



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D.S. MAJANJA J.

TAX APPEAL NO. E118 OF 2021

BETWEEN

MWALIMU NATIONAL SAVINGS AND CREDIT

CO-OPERATIVE SOCIETY LIMITED.....APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

(Being an appeal against the judgment of the Tax Appeals Tribunal

at Nairobi dated 13th May 2021 in Tax Appeal No. 344 of 2018)

RULING

1. The Appellant has filed an application by way of the Notice of Motion dated 7th July 2021 made under **Articles 47, 50** of the **Constitution of Kenya, Section 3A** of the **Civil Procedure Act** where it seeks, inter alia, that the decision of the Tax Appeals Tribunal (“the Tribunal”) made on 13th May 2021 upholding the Respondent’s (“the Commissioner”) assessments on the Pay As You Earn (PAYE) and Corporation Tax obligations, and the Agency Notices issued to the Appellant’s banks be lifted and stayed from execution until the hearing and determination of the Appellant’s Appeal against the said Agency Notices and Tribunal’s decision. The application is supported by the affidavits of Esther Waitara, the Appellant’s Chief Manager, Treasury & Investment sworn on 7th July 2021 and that of the Appellant’s Advocate, Maurice Muma Manani sworn on 16th July 2021.
2. The application is opposed by the Commissioner through the Grounds of Opposition dated 13th July 2021 and the parties have also filed written submissions in respect of their various positions.
3. The facts giving rise to the instant appeal are largely common cause and are as follows. The Commissioner carried out a tax compliance audit of the Appellant’s records with regards to Value Added Tax (VAT), PAYE, Withholding Tax (WHT), Corporation Tax and Excise Duty covering the period 2013 to 2016. The Commissioner issued its findings through a letter dated 29th March 2018 and requested the Appellant to provide any clarification necessary on the issues raised. The Appellant responded through a letter dated 11th April 2018 and gave its position on the issues raised and conceded to tax amounting to KES. 12,101,100.00 for Capital Gains Tax, KES. 6,722,410.00 for PAYE, KES. 5,816,181.00 for WHT, KES. 17,254,668.00 for Corporation Tax and KES 4,198,719.00 for Excise Duty respectively.
4. The Commissioner then issued the Appellant with an assessment through a letter dated 20th June 2018 and demanded outstanding taxes amounting to KES 1,325,342,838.00. The Appellant through a letter dated 12th July 2018 requested for a meeting to give more clarity to the issues raised in the assessment letter and sought to close the matter. The Commissioner, through a letter dated 20th July 2018 informed the Appellant that its letter did not meet the threshold of an objection letter as laid out in **section 51(3)** of the **Tax Procedures Act** (“TPA”) and therefore the total taxes demanded amounting to Kshs 1,325,342,838.00 was still due and payable. The Appellant then requested for more time in order to file a valid objection, which was by the Notice of Objection letter dated 16th August 2018 disputing amount demanded.
5. The Commissioner issued its Objection Decision contained in the letter dated 17th September 2018 demanding partially amended taxes

amounting to KES. 1,194,719,342.00. The Appellant was dissatisfied with this decision and appealed the same at the Tribunal, which after hearing the appeal, delivered its judgment on 13th May 2021 where it upheld the Commissioner's assessments on PAYE and Corporation Tax obligations being the principal tax of KES. 20,549,583.00 and KES. 24,436,660.00 respectively.

6. The Appellant has lodged an appeal with the court against these findings by the Tribunal. The Commissioner has since issued agency notices to the Appellant's Bankers in a bid to recover the assessed amounts. Thus, the Appellant seeks a stay of execution of the Tribunal's judgment and a lifting of the said agency notices.

7. I have considered the parties' arguments and I have no doubt that this court has the jurisdiction to preserve the subject matter of the appeal as part of its power to hear and determine the appeal. It is common ground that an application for stay of execution pending an appeal from the decision of the Court is governed by **Order 42 Rule 6 (2)** of the **Civil Procedure Rules**. In order to succeed, the applicant must demonstrate substantial loss may result unless the order of stay is made. It must also demonstrate that the application has been brought without undue delay and lastly, the applicant must give such security as the court may order for the due performance of the decree or order as the case may be. It is also recognized that the power to order stay is discretionary and must be exercised in such a way that the appeal is not rendered nugatory. This discretion, I would add, is based on the facts and circumstances of each case (see **Halai & Another v. Thornton & Turpin (1963) Ltd [1990] KLR 365** and **Butt v Rent Restriction Tribunal [1982] KLR 417**). The court must weigh the Appellant's entitlement to exercise its statutory right of appeal on the one hand and the Commissioner's entitlement to the fruits of its judgment in this case to collect the taxes to be paid by the Appellant on the other hand.

8. In this case, the Commissioner has since issued Agency Notices to the Appellant's Bankers in a bid to recover the assessed taxes. The Court issued interim orders on 9th July 2021 which orders appear to be interpreted differently by the parties. Order No. 5 of the said order was that; *"Pending hearing and determination of the application, the Respondent is restrained from executing the Judgment of the Tax Appeal Tribunal or in any way enforcing collection of taxes"*. It is not in doubt that the Agency Notices predated the Order and that there was no order staying execution of the Tribunal's judgment. I do not find any fault in the Commissioner issuing the said Agency Notices in the absence of an order stopping it from recovery of taxes. I am in agreement with the Commissioner that the court's order above did not in any way lift the said Agency Notices but rather stayed their execution meaning that the Commissioner could not appropriate the funds attached.

9. Be as it may, the Appellant has now sought for the Agency Notices to be lifted. It is a well-known co-operative society who business has been paralysed by the freezing of its account. If the Agency Notices remain in place and the Appellant's accounts are frozen it will disrupt its operations. This is an appropriate case to lift the Agency Notices on terms that will satisfy the position of both parties pending the hearing of the appeal.

10. For the reasons I have set out above, I allow the Notice of Motion dated 7th July 2021 following terms:

a. An order of stay be and is hereby issued staying execution of the Judgment of the Tax Appeal Tribunal dated 13th May 2021 in Tribunal Appeal No. 344 of 2018 and any further enforcement action thereon pending the hearing and determination of this appeal or until further orders of the court.

b. In consideration of the stay in (a) above, the Appellant shall pay the Respondent the sum of KES 10,000,000.00 and provide a Bank Guarantee for KES. 10,000,000.00 from a reputable bank in favour of the Respondent within fourteen (14) days from the date hereof whereupon the Agency Notice issued by the Respondent shall be lifted unconditionally.

c. In default of compliance with the terms aforesaid, the order of stay shall stand discharged.

d. The costs of this application shall be in the appeal.

e. The court shall adjourn to issue directions for the hearing and determination of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JULY 2021

D. S. MAJANJA

JUDGE

Mr Manani instructed by Coulson Harney LLP Advocates for the Appellant.

Mr Marigi, Advocate instructed by Kenya Revenue Authority for the Commissioner of Domestic Taxes.