



**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D.S. MAJANJA J.**

**TAX APPEAL NO. E122 OF 2021**

**BETWEEN**

**JIPSY CIVIL & BUILDING**

**CONTRACTORS LIMITED.....APPELLANT**

**AND**

**COMMISSIONER OF INVESTIGATIONS AND**

**ENFORCEMENT.....RESPONDENT**

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

***Tribunal at Nairobi dated 11<sup>th</sup> June 2021 in Tax Appeal No. 281 of 2020)***

**RULING**

1. On 11<sup>th</sup> June 2021, the Tax Appeals Tribunal (“the Tribunal”) delivered a judgment dismissing the Appellant’s appeal on technical grounds that its Notice of Objection to the Respondent (“the Commissioner”) and the subsequent appeal to the Tribunal were invalid for non-conformance with the provisions of **sections 51(3) and 52(2)** of the **Tax Procedures Act**. In doing so, the Tribunal entered judgment in respect of a partial consent filed by the parties before the Tribunal and subject to the said partial consent, upheld the Commissioner’s Objection Decision dated 27<sup>th</sup> December 2019.

2. This meant that the Commissioner’s tax assessments inclusive of interest issued to the Appellant for the years of income 2013-2019 and amounting to KES 452,003,944.00 became due and payable to the Commissioner by the Appellant. The Appellant is aggrieved by the Tribunal’s decision and has lodged an appeal to this court and by the Notice of Motion dated 8<sup>th</sup> July 2021, now seeks a stay of execution of the Tribunal’s judgment pending hearing and determination of the said appeal. The application is supported by the grounds set out on its face and the affidavit of Joseph Kimani Ngacha, a director of the Appellant, sworn on 8<sup>th</sup> July 2021.

3. The Commissioner, who has since issued Agency Notices to the Appellant’s bankers under **section 42** of the **Tax Procedures Act** and pursuant to the Tribunal’s judgment, has opposed the application through the Replying Affidavit of its officer, Eric Wachira, sworn on dated 27<sup>th</sup> July 2021.

4. The Appellant avers that unless stay is granted, its appeal will be rendered meaningless, useless and nugatory and that its assets and bank accounts are at an eminent risk of execution by the Commissioner in furtherance of the Tribunal judgment. The Appellant further deposes that due to the said Agency Notices being issued to its banks and the current depressed business environment, the Appellant has found it difficult to even fulfil the payment conditions for the aforesaid Partial Consent with the Commissioner in respect of other taxes, thus, the execution of the demand for KES 259, 319, 773.47 will force the Appellant to shut down its business.

5. The Appellant urges that it has given the Commissioner security by entering into the said Partial Consent dated 27<sup>th</sup> May 2021 and is willing to abide by any other conditions that may be imposed by the Court. Further, the Appellant contends that its business is at risk of grinding to a halt if the Commissioner commences the execution of the Tribunal’s Judgment against the Appellant before the hearing and determination of its meritorious appeal and that the Commissioner shall not suffer any prejudice if this application is allowed.

6. On its part, the Commissioner states that there is no demonstration of any substantial loss that cannot be compensated nor has the Appellant provided security for the taxes which were found to be due and payable and that contrary to the Applicant's assertion that it has provided security through a partial consent, the Commissioner affirms that the consent is not in regards to the taxes in dispute nor do the payments therein amount to security for the disputed amounts. The Commissioner adds that the consent was reached following an appeal on various tax heads which the Appellant was found liable to pay at the time and which have since been settled and that the Appellant's assertion that the Commissioner's actions of issuing Agency Notices to its bankers with an eventual purpose of execution will expose it to financial troubles and eventual closure remain to be mere allegations. The Commissioner avers that the Appellant has failed and/or neglected to furnish the Court with certified bank statements or audited accounts to show that it will suffer substantial loss or have its operations crippled if stay of execution is not granted.

7. Although the Commissioner states that no grounds have been furnished to grant an order of stay, it submits that should the Court be inclined to grant stay, it prays for security of taxes through cash of equivalent value of 50% the tax demanded or a bank guarantee of the full amount. Further, that the failure to issue the orders herein will not render the appeal nugatory as the Appellant is a going concern and will be able to offset the sums against future taxes or apply for a refund of the taxes

8. After weighing the arguments on both sides and taking into account the circumstances of the case including the fact that the Appellant has been paying taxes agreed upon by consent during the proceedings before the Tribunal and that it is a going concern, I allow the Notice of Motion dated 8<sup>th</sup> July 2021 on the following terms:

**(a) An order of stay be and is hereby issued staying execution of the Tribunal's judgment and taxes including the Agency Notices issued to the Appellant's bankers on condition that the Appellant furnishes security in favour of the Respondent for KES 1,000,000.00 in the form of Bank Guarantee from a reputable bank within Forty-five (45) days from the date hereof**

**(b) In the default of compliance of the terms set out hereinabove, the order of stay shall stand discharged forthwith.**

**(c) Costs of the application shall be in the appeal.**

**(d) The matter is no adjourned for directions on the appeal.**

**DATED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF AUGUST 2021.**

**D. S. MAJANJA**

**JUDGE**

Mr Munyeri instructed by Kimani, Kiarie and Associates Advocates for the Appellant.

Ms Muruka, Advocate instructed by Kenya Revenue Authority for the Commissioner of Investigations and Enforcement.