



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D.S. MAJANJA J.

TAX APPEAL NO. E026 OF 2020

BETWEEN

HIGHLANDS MINERAL WATER LIMITED.....APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

(Being an appeal against the judgment of the Tax Appeals Tribunal made on 30th March 2020

in Nairobi Tax Appeal No. 30 of 2018)

RULING

Introduction

1. On 30th March 2020, the Tax Appeals Tribunal (“the Tribunal”) dismissed the appellant’s appeal against the respondent’s (“the Commissioner”) decision disallowing its objection and demanding Kshs. 155,402,525 inclusive of penalties and interest. The appellant has now appealed and moves the court by Notice of Motion dated 14th April 2020 inter alia under **Order 42 rule 6** of the **Civil Procedure Rules** seeking, inter alia, the following orders:

[2] THAT there be a stay of the enforcement and/or execution of the Agency Notices dated 7 April 2020 imposed on the Applicant’s accounts with Ecobank Kenya Limited and Equity Bank Limited pending hearing and determination of the Appeal.

[3] THAT the Honourable Court be pleased to grant a stay of execution of the Respondent’s demand dated 1 February 2018 pending the hearing and determination of the appeal.

[4] THAT the Respondent’s, their agents, employees, assigns be refrained from demanding or issuing further agency notices in relation to the amounts in issue in Tax Appeal No. 30 of 2018 pending the hearing and determination of the Appeal.

2. The application is grounded on the supporting and further supporting affidavit of Partrick Mwai Kariuki, the appellant’s Finance Officer, sworn on 14th and 16th April 2020 respectively. There is also the supplementary affidavit of its managing director, Joachim Westerveld, sworn on 23rd April 2020.

3. The application is opposed by the Commissioner through the replying affidavit of Susan Wali, an officer of the Commissioner in the Medium Taxpayers Office, sworn on 22nd April 2020.

4. At the hearing, counsel for both parties made brief oral submissions in support of their respective cases.

Principles for grant of stay

5. As this is an application for stay of execution pending an appeal from the decision of the Tribunal, it is governed by **Order 42 Rule 6 (2)**

of the **Civil Procedure Rules** which sets out the conditions an applicant must meet before the court can grant an order of stay. First, the appellant must demonstrate substantial loss may result unless the order of stay is made. Second, the application must have been made without undue delay and third, the appellant must give such security as the court may order for the due performance of the decree or order as the case may be. Our courts have recognised that the power to order stay is discretionary and must be exercised in such a way that the appeal is not rendered nugatory. I would add that this discretion 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**).

6. Neither of the parties dispute the fact that this court has jurisdiction to grant an order of stay. I am also satisfied that the application, having been filed within 14 days of the judgment, was filed timeously and without delay. After hearing the parties and considering their depositions, I think the only issue for determination is the extent of security the appellant should be ordered to provide and it is to this issue I turn.

Appellant's Case

7. As I understand, the appellant's position is that its status as a going concern is threatened as it is unable to conduct its business including payment of its regular taxes. It stated that it is involved in production of water, a necessary and essential good especially now that the country is going through the COVID-19 epidemic. It further stated that despite the pandemic, it has continued with its operations. It has over 200 employees who are still working and earning a living hence the agency notices and enforcement of taxes by the Commissioner will lead its business to collapse.

8. Mr Westerveld gave a financial status of the appellant. He produced the Annual Report and audited Financial Statements for the year ending December 2018. He explained that the company had been loss making and had been affected by the COVID-19 as its business decreased by 35%. He stated that the appellant was ready and willing to offer a bank guarantee of Kshs. 10,000,000.00 as security.

Commissioner's Case

9. The Commissioner opposed the application. It argued that since the Tribunal has rendered a decision in its favour, it was entitled to proceed with collection of the tax determined by the decision by issuing agency notices since there is no provision for standing over the tax pending appeal to High Court. It urged the court to consider the fact that taxes have been outstanding since 2017 and that the Commissioner should now enjoy the fruits of the judgment.

10. The Commissioner urged that should the court be minded to order security, the same should be in the form of payment to the Commissioner's account as the money would be available to meet the country's financial needs. Moreover, the appellant would not suffer any prejudice since the money would be refunded if the appellant is ultimately successful.

Determination

11. In resolving this matter, the court is called upon to balance competing interests. In the **Africa Oil Kenya BV v Commissioner of Domestic Taxes ML HC TA No. E024 of 2020 [2020] eKLR**, I stated as follows:

[11] The duty of the court is to balance the interests of the appellant and to ensure that the appeal is not rendered nugatory or that its financial position is imperilled on the one hand by enforcement of the Tribunal's decision. On the other hand, this court recognises that the Tribunal has not made a decision that the Commissioner is entitled to enforce absent an appeal and an order of stay.

12. The appellant has offered to provide a bank guarantee of Kshs. 10,000,000.00 as security. The respondent countered by demanding security for the entire sum as or a large proportion thereof. Counsel for the Commissioner referred to my decision in **Keroche Breweries Limited v Commissioner of Domestic Taxes HC Comm ITA No. E021 of 2020 (UR)** where I ordered payment of Kshs. 500 million as security where the amount of outstanding tax was Kshs. 9 billion.

13. The nature and extent of the security to be ordered by the court is dependent on the facts and circumstances of the case. In **Bella Vista Restaurant Mombasa Limited v Kenya Revenue Authority MSA Pet. No. 44 of 2014 [2016] eKLR**, the court recognised the financial difficulties of the petitioner and refused to order security on the ground that security must be backed by financial arrangements which would have led to closure of the petitioner's business in view of the huge tax assessment. In **Victrociset S.P.A. Kenya v Commissioner of Domestic Taxes NRB HC JR No. 28 of 2018 [2018] eKLR** the court also granted an unconditional stay of execution after taking into consideration the financial difficulties the company faced. More recently in **CMA CGM (K) Limited v Commissioner of Domestic Taxes NRB CA Civil Appl. No. 83 of 2020 [2020] eKLR**, the Court of Appeal ordered the appellant to deposit Kshs. 50,000,000.00 in a joint account pending the appeal where the sum demanded as taxes was Kshs. 299,130,352.00.

14. The appellant has placed facts before the court which show that it is a going concern. Mr Westerveld deponed that even as at 31st March 2020, it had applied for a Kshs. 150 million loan facility for working capital from its Bankers. From the letter to the Bank, the appellant stated that it also intended to prioritize tax payments in light of Tribunal's decision. The appellant's audited accounts show that it made losses over the last two years but its revenue has continued to grow. According to the report, its revenue grew by 11% from 1,253 million to Kshs. 1,396 million in 2017. The totality of the evidence shows that the appellant is a company on a growth trajectory.

15. Both parties have referred to the COVID-19 pandemic in support of their respective cases. The appellant business has obviously been affected and the respondent requires to collect taxes to support the Government initiatives to deal with the pandemic. Both arguments are valid and must be balanced. At the end of the day, it is not in the national interest for a company to shut down in order to provide security for the outstanding taxes.

16. The factual circumstances relating to the appellant's business are not contested. Taking all the facts into account, I find the appellant's

offer for security is appropriate in the circumstances. From the facts placed before the court, any higher amount would lead to closure of the company which would also be inimical to the State interests.

Disposition

17. For the reasons I have set out above, I allow the Notice of Motion dated 14th April 2020 on the following terms:

(a) An order of stay be and is hereby issued staying execution of the judgment of the Tax Appeal Tribunal dated 14th April 2020 in Tax Appeal Tribunal Appeal No. 30 of 2018 together with the Agency Notices dated 7th April 2020 served on Ecobank Kenya Limited and Equity Bank Limited for the sum of Kshs. 155,402,525.00 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 provide a Bank Guarantee pending the hearing and determination of the appeal from a reputable bank for Kshs. 10,000,000.00 within fourteen (14) days from the date hereof. In default, stay shall stand discharged.

(c) The costs of this application shall be in the appeal.

(d) The court shall adjourn to issue directions for the hearing and determination of the appeal.

DATED and DELIVERED at NAIROBI this 29th day of APRIL 2020.

D. S. MAJANJA

JUDGE

Mr Muriuki with him Mr Mutai instructed by MEMA Advocates LLP for the appellant.

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