



**REPUBLIC OF KENYA**

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

**COMMERCIAL & TAX DIVISION**

**INCOME TAX APPEAL NO. 34 OF 2017**

**KENYA POSTEL DIRECTORIES LIMITED.....APPELLANT**

**VS.**

**THE COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT**

**RULING**

1. The Judgment of Hon. Justice Chemitei delivered in this matter on 13<sup>th</sup> July 2017 leaves Kenya Postel Directories Limited (Kenya Postel) with a tax liability in excess Kshs.220,885,605. That Judgment aggrieves Kenya Postel which has filed a Notice of Appeal signifying its intention to appeal against the whole of the said decision to the Court of Appeal.

2. In the meantime Kenya Postel seeks to stay enforcement action in respect to the assessed tax pending the hearing and determination of the intended appeal. The application, a Notice of Motion dated 28<sup>th</sup> November 2019 is sought under the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010.

3. Order 42 Rule 6 reads:-

“6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have

been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with”.

4. The conditions to be met before stay is granted under Order 42 Rule 6 have been restated by the Court of Appeal in Halai & another v Thornton & Turpin (1963) Ltd [1990] eKLR to be:-

“Thus, the Superior Court’s discretion is fettered by three conditions. Firstly the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must, of course, be made without unreasonable delay.”

5. It may well be that there are only three conditions, to wit: the application is brought without delay, the Court is satisfied that substantial loss may result to the suitor unless stay is granted and that such security as the Court orders for the due performance of such decree or order as may ultimately be binding in him has been given by the Applicant. Once these three conditions are satisfied then sufficient cause for the grant of the order is established. In this regard I agree with the observation of Hon. Gikonyo J in Antoine Ndiaye v African Virtual University [2015] eKLR. Secondly in regard to the conditions, all three must be met. None is less worthy than the other.

6. Does the current application meet the treble threshold? The application was brought on 29<sup>th</sup> November 2019 to stay the effects of a decision delivered on 31<sup>st</sup> October 2019. There is no undue delay.

7. In respect to whether the applicant risks substantial loss if the stay is not granted, the Applicant in an affidavit of Rehema Bahati, sworn on 29<sup>th</sup> November 2019, avers:-

“7. The principal tax in dispute for which the Appellant’s Appeal was dismissed amounts to Kshs.220,885,605 which is a substantial amount. If the stay of execution pending appeal is not granted the Appellant will suffer loss”.

8. In the submissions made in support of the application, counsel for Kenya Postel adds that if stay is not granted then the Revenue Authority will attach its assets and the issuance of agency notices to its banks will ground the business operations to a halt. I think counsel is out of order when he makes a statement of this kind from the bar. Whether or not Kenya Postel is unable to pay this amount is a matter of fact. It is also a factual issue whether or not an agency notice will cripple its operations. Such matters ought to be demonstrated by affidavit evidence which is overtly missing from the affidavit of Rehema Bahati. In this regard the Court readily agrees with counsel for the Revenue Authority when he states the Applicant has not placed any or sufficient evidence before Court to prove substantial loss.

9. Ordinarily that would have been the end of the road in the matter but the Court chooses a slight variation to the route suggested by counsel for the Revenue Authority as an alternative if the Court were to grant stay. Counsel had stated that such grant be conditional upon the Respondent paying half the decretal amount of taxes and the other half be deposited in an interest earning account.

10. Instead the Court orders stay of execution pending the hearing and determination of the Appeal on condition that the Appellant pays half of the demanded Value Added Tax of Kshs.225,333,836 within 90 days hereof and in the same period provides a bank guarantee from a reputable Bank for the other half. Each party to bear its own costs for the application.

**Dated, Signed and Delivered in Court at Nairobi this 15<sup>th</sup> Day of June 2020**

**F. TUIYOTT**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17<sup>th</sup> April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

**JUDGE**

**PRESENT:**

Tugee for Applicant.

Chabla for Respondent