



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**COMMERCIAL & TAX DIVISION**

**INCOME TAX APPEAL NO. 3 OF 2017**

**GULF BADR GROUP (KENYA) LIMITED.....APPELLANT**

**VERSUS**

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

**RULING**

1. Gulf Badr Group Kenya Limited (Gulf Badr or the Appellant), a tax payer seeks to stay the Judgment of this Court of 7<sup>th</sup> February 2020. In that Judgment the Court upheld the decision of the Tax Appeals Tribunal delivered in 5<sup>th</sup> December 2016. The effect being that the tax payer would be liable to pay withholding tax on demurrage charges in the sum of Kshs.47,328,768/=.
2. The tax payer has filed a Notice of Appeal against the decision of this Court.
3. On the part of the tax payer, and germane to the application before Court, is that should stay not be granted then the Commissioner will recover the sum of Kshs.47,328,768/= from it .This is said to be a substantial amount. In an affidavit in support of the application Hannah Mtekele, a legal manager of Badr Gulf, stated that should the sum be recovered then its operations are likely to ground to a halt. Further, that payment of the sum will put it to significant and unreasonable expense which may force it out of business, to breach contractual agreements with third parties and face multiple suits.
4. The Tax Payer states that it is prepared to comply with any conditions that the Court may impose for purposes of granting the stay.
5. On his part, the Commissioner states that the tax relates to a period between 2010 to 2012 and that it should be allowed to enjoy the fruits of the Judgment. That technically the Applicant has enjoyed stay since the objection in 2011, a period of over 9 years.
6. The Court is also told that the country is currently in dire need of money and if stay is granted then security should be in form of actual payments to the accounts of the Respondent as this will ensure that the money is made available to meet the needs facing the country.
7. In addition, it is asserted that the Tax Procedures Act has robust provisions for refund of the tax erroneously paid should the Court of Appeal find in favour of the Appellant and that it has provisions that allow an offset of any future tax liability against sums paid.
8. It is also argued that the Tax payer has not demonstrated that substantial loss may result unless the order is made.
9. This is an application for stay of this Court's own Judgment pending an intended appeal from it. The application has to be considered within the parameters set out in Order 42 Rule 6 which provides:-

“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.”

10. In addition, the application ought to have been brought without undue delay.

11. This Court has considered the arguments made in support and in opposition to the application.

12. As a starting point it is common ground that at the time of delivering the Judgment on 7<sup>th</sup> February 2020, the Court granted the applicant a temporary order of stay stopping enforcement for 45 days. An argument of the Commissioner, raised in its replying affidavit, that the early order makes the current application res judicata was not pressed in submissions. I do not consider it to have been a serious argument and I leave it at that.

13. The Judgment of this Court was delivered on 7<sup>th</sup> February 2020. The stay of 45 days granted on that day would lapse on or about 23<sup>rd</sup> March 2020. This application brought on 16<sup>th</sup> March 2020, about one week before the lapse of that order, is therefore brought without undue delay. The applicant successfully gets past the first hurdle.

14. In respect to substantial loss this Court is told that enforcement of a sum of Kshs.47,328,768/= will cripple its operations, force it out of business and into breach of contractual agreement with third parties.

15. The Respondent argues that the Applicant has not laid any proof in support of those assertions.

16. In specific response to these assertions by the Tax Payer, the Respondent had replied as follows:-

“(9) THAT I am informed by the Respondent’s counsel on record that having perused the Appellant’s Application herein there is no demonstration of any substantial loss that cannot be compensated nor has the appellant provided security for the taxes which were to be found to be due and payable.”

17. What the Respondent does not challenge is that the tax liability of Kshs. 47,328,768/= is not insubstantial and further that it could cripple the operations of the Applicant if paid. I have to find that the Applicant has proved that it would suffer substantial loss unless stay is granted. On this I would be aligned to the decision of the Court of Appeal CMA CGM (K) Limited -vs- Commissioner of Domestic Taxes [2020] eKLR in which it stated:-

“On whether the appeal would be rendered nugatory, even though what is involved is a sum of money, the same is by no means small. Indeed, the applicant has sworn that unless the stay is granted, it stands a real risk of being forced to close down its operations, breaching contractual obligations, staring at bankruptcy and laying off hundreds of its workers which would amount to injustice and irreparable harm to it.”

Irreparable harm amounts to substantial loss and stay is deserved.

18. What is left is for this Court to impose a condition or conditions for grant of stay. The Applicant urges this Court to take a cue from the Court of Appeal decision in CGM where it ordered deposit of 10% of the amount claimed in a joint account between counsels for the parties as condition for stay. At the heart of the Applicant’s plea is that payment of a sum of Kshs. 47,328,768/= will bring its operations to its knees as the amount is substantial. Balancing this concern and the tax collectors insistence on sufficient security, I order that 20% of the sum to be paid be deposited in a joint interest earning account in the names of the lawyers for the Parties within 60 days hereof. In default, the stay shall automatically lapse.

**Dated, Signed and Delivered in Court at Nairobi this 24<sup>th</sup> Day of August 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:**

**Mr Ruto for the Applicant.**

**Miss Miruka for the Respondent.**