



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

INCOME TAX APPEAL NO.E 031 OF 2020

COMMISSIONER OF CUSTOMS

& BORDER CONTROL.....APPELLANT/APPLICANT

- VERSUS -

TETRA PAK LIMITED.....RESPONDENT

RULING

1. **THE COMMISSIONER CUSTOMS & BORDER CONTROL** (hereinafter the Commissioner) has filed a Notice of Motion application dated 27th May 2020. By that application the commissioner seeks stay of execution of the judgment of the Tax Appeals Tribunal (hereinafter the Tribunal) dated 26th February 2020, pending appeal before this court. The application is opposed by **TETRA PAK LIMITED** (hereinafter Tetra Pak) the respondent in this appeal.

2. This dispute arose when the Commissioner issued a demand for under paid taxes by Tetra Pak. That demand was based on the Tariff Ruling of 15th September 2016 which Ruling classified Tetra Pak's imported goods as suitably prepared adhesives under H.S Code 3506.91.00 as opposed to what Tetra Pak's agent had declared and which attracted import duty and additional Value Added Tax (VAT). Tetra Pak therefore was required to pay additional sum of Ksh 919,175, being the under paid taxes. Tetra Pak appealed against the Tariff Ruling before the Tribunal. The Tribunal overruled the Tariff Ruling and by its judgment of 26th February 2020 the Tribunal inter alia ordered the commissioner to refund to Tetra Pak Ksh 919,175 being the additional taxes paid to the Commissioner. It is that judgment which is appealed in this matter and by the application before court the commissioner seeks stay of that judgment.

3. The application is supported by the affidavit of Judith Jewa who works in The Commissioner's Customs Border Control Department. In her affidavit dated 27th May 2020 she stated that Tetra Pak, through its agent, had demanded a refund of Ksh 16,184,943.00 from the commissioner. The deponent further deponed:

“That as such there is imminent threat of execution against the Applicant (the commissioner) necessitating the filing of this Application.

That it should be taken into consideration that the Applicant is not an ordinary citizen but a public body charged with the solemn duty of collection taxes on behalf of the Republic, Monies that are deposited into the consolidated fund and administered by the Treasury in close supervision of the National Assembly. That as such a claim for refund is constructively a claim against the Government of Kenya with the Applicant only playing the role of being a facilitator between the tax payer and the Central Government. The Applicant does not have funds to meet a decree of “immediate payment” for instance.”

4. By its replying affidavit sworn by Daniel Njenga Mbugua Tetra Pak's Finance Director, Tetra Pak stated that after the Tariff Ruling it was agreed between the parties that Tetra Pak would pay, under protest, custom duty payment based on that Tariff Ruling but that however such payment was on the understanding that if Tetra Pak did succeed in its appeal before the Tribunal the amount paid under protest would be refunded. That Tetra Pak having succeeded in its appeal before the Tribunal it was entitled to be refunded those payments. That the commissioner is under statutory duty to refund the amount. That the commissioner had failed to show Tetra Pak was not in a position to refund the amount if this appeal does succeed.

ANALYSIS AND DETERMINATION

5. Stay pending appeal is considered as stipulated in Order 42 Rule 6 (2) of the Civil Procedure Rules (hereafter the Rules). That Rule provides:

(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.

6. The court's discretion must be considered in the confines of that Rule.

7. In considering the application before me it is important to state clearly that any order of stay that would be granted would be limited to the amount paid in respect to the appeal before the Tribunal. In other words the stay sought can only relate to the amount of Ksh 919,175 which was the subject of the appeal before the Tribunal. Any other agreement between the parties that payments for additional tax would be paid under protest has no relation to this appeal, because as far as I could decipher that agreement between the parties was not made part of the appeal before the Tribunal and therefore it cannot be made subject to this appeal.

8. The commissioner contended, in support of the application, that it is a public body and a claim for a refund is a claim against the government. Whereas the Kenya Revenue Authority (KRA) is a parastatal it is not the government, as it seeks to argue. It also must have been in its contemplation that if the appeal filed by Tetra Pak did succeed the commissioner would have to refund the additional tax it levied against Tetra Pak. In considering an application for stay the first port of call is to determine if the party seeking stay has established that it will suffer substantial loss. Loss can only be substantial if the party seeking stay argues that it will not recover the amount of the judgment from the respondent because the said respondent is impecunious. The commissioner has not stated that Tetra Pak is impecunious. Indeed the Tribunal in its judgment described Tetra Pak as "an international company which is also registered in Kenya and principally manufactures material for long life packaging of different kinds of liquids including but not limited to milk and fruit juice." There is no suggestion by the commissioner that Tetra Pak would be unable to refund the amount of Ksh 919,175 if this appeal does succeed. It is useful here to consider the case **RICHARD MUTHUSI V PATRICK GITUMA NGOMO & ANOTHER (2017) eKLR** thus:

*"...by the ruling of Court of Appeal at Nairobi in **METEINE OLE KILELU & 10 OTHERS –VS- MOSES K. NAILOLE, CIVIL APPEAL NO. 340 OF 2008**, wherein the court opined that where the decree appealed against is a monetary decree, the applicant has to show that either once the execution is done, after refusal of the application, the applicant may never get back that money even if his appeal succeeds or that the decretal sum is so large vis a vis his status, or business that the execution would in itself ruin his business or threaten his very existence"*

9. I am also of the view that the court, in considering whether a party will suffer substantial loss is called upon to balance the interests of the parties. This is what was stated in the case **ANTOINE NDIAYE V AFRICAN VIRTUAL UNIVERSITY (2015) eKLR**:

*"But what was stated in the case of **Absalom Dova vs. Tarbo Transporters [2013] eKLR** is relevant, that:*

"The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination"

10. In balancing those interests I find that the amount due to be refunded to Tetra Pak is money which would be put in its business to generate further income. Tetra Pak stands more to be disadvantaged if stay is granted because it will be denied money that could be used to advance its business.

11. Because I have reached a conclusion that stay will not be granted I will not proceed to consider whether security for due performance of the decree ought to be ordered.

12. Finally I find and I hold that the application by Notice of Motion dated 27.5.2020 is not merited and is hereby dismissed with costs.

FURTHER ORDERS

13. At the reading of this Ruling directions will be given on the hearing of this appeal.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of SEPTEMBER 2020.

MARY KASANGO

JUDGE

Before Justice Mary Kasango

C/A Sophie

For the Applicant

For the Respondent

ORDER

This decision is hereby virtually delivered this 30th day of September 2020.

MARY KASANGO

JUDGE