



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D.S. MAJANJA J.

TAX APPEAL NO. E029 OF 2020

BETWEEN

ERNEST MBURU MUINAMU

T/A KIKUYU PIPES AND FITTINGS CENTRE...APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

RULING

1. The Tax Appeal Tribunal (“the Tribunal”) dismissed the Appellant’s appeal by a judgment dated 27th March 2020 thus precipitating this appeal. The Tribunal upheld the Respondent’s assessment of Kshs. 8,028,842.00. Following the dismissal of the appeal, the Respondent moved to enforce collection of taxes by issuing a Notice of Distress and proceeded to proclaim the Appellant’s assets. The Respondent also sent an Agency Notice to the Kenya Commercial Bank seeking to be paid Kshs. 8,028,842.00 from the Appellant’s accounts.

2. On 9th September 2020, the Appellant has filed the Chamber Summons seeking to stay the orders of attachment. It was supported by the Appellant’s affidavit sworn on the same date. He deponed that the attachment of his accounts has occasioned hardship as he has been unable to meet his obligations to about 150 employees, the landlord and suppliers. He stated that continued attachment of his property exposes him to double jeopardy as his accounts have also been attached. The Appellant further deponed that on 6th September 2020, his business premises suffered a devastating fire which razed the warehouse where the stock is kept and which loss amounts to about Kshs. 150,000,000.00. The Appellant therefore seeks interim relief to enable him engage with the Respondent and protect his business otherwise he will suffer irreparable loss.

3. The application is opposed by the affidavit of Victor Mimo, an officer of the Respondent, sworn on 21st September 2020. In respect of the application for stay of the enforcement, the Respondent states that the Appellant has not demonstrated by way of evidence that it will suffer prejudice and or substantial loss if the stay is not granted. The appellant stated that if the order of stay is granted there is a risk that the Respondent may not be able to recover the outstanding taxes.

4. As this is an application in the nature of stay of execution pending an appeal from the decision of the Tribunal, the issue is whether and on what terms I should grant the orders of stay. As I have previously stated, the duty of the court in such circumstances, is to balance the interests of either party. On the one hand, to ensure that a business which is a going concern with the ability to pay taxes in the future does not collapse and on the other, to ensure that the statutory duty imposed on the Respondent to collect in accordance with the law is observed. (see *Africa Oil BV v Commissioner of Domestic Taxes* COMM ITA No. E024 of 2020 [2020] eKLR).

5. I had prior to reserving this ruling suggested to the parties to attempt an out of court resolution of the matter and if not, to agree on some form of security pending the hearing of the application. Unfortunately, this was not done hence I am now called upon to determine the application at hand. The only new issue that emerged during the period after the application was filed, is that the Appellant suffered a devastating loss to its business through a fire. It is not clear to what extent that it may remain in business and whether it would be able to settle its tax liabilities in the future.

6. As I had indicated, the only issue I intended to deal with is the nature and terms of security to be ordered pending the hearing and determination of the appeal. In this regard, the Appellant has not made sufficient disclosure on how much is held in its accounts and how

much is due to the employees, landlord and suppliers in order for the court to exercise its discretion.

7. Having considered all the facts, I direct that the status quo regarding the accounts and attachment be maintained pending the hearing and determination of the appeal or until further orders.

DATED and DELIVERED at NAIROBI this 23rd day of OCTOBER 2020.

D. S. MAJANJA

JUDGE

Mr Njoroge instructed by J. M. Njoroge and Company Advocates for the Appellant.

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