

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. E074 OF 2020

BETWEEN

SUBRU MOTORS LIMITED.....APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES..... RESPONDENT

RULING

1. The Tax Appeal Tribunal (“the Tribunal”) dismissed the Appellant’s appeal by a judgment dated 17th August 2020 thus precipitating this appeal. The Tribunal upheld the Respondent’s assessment. Following the dismissal of the appeal, the Respondent moved to issue an Agency Notice to the Appellant’s banker’s seeking to be paid Kshs. 181,406,247.00 from the Appellant’s accounts.

2. The Appellant has filed the Notice of Motion dated 18th September 2020 supported by the affidavit of Joseph Gitere Nyamu, the Appellant’s tax agent, sworn on the same date. He deponed that the appeal raises triable issues with high chances of success and that the amounts involved are substantial enough to cripple the appellant’s business and if an order of stay is not granted, the appeal will be rendered nugatory.

3. The application is opposed by the replying affidavit of Felistus Sabiri Nyagwoka, 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 Respondent stated that if the order of stay is granted, there is a risk that it may not be able to recover the outstanding taxes.

4. As this is an application for 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 hand, it must not unnecessarily impede the Respondent’s statutory duty to collect taxes in accordance with the law (see *Africa Oil BV v Commissioner of Domestic Taxes* COMM ITA No. E024 of 2020 [2020] eKLR and *Choppies Enterprises Limited v Commissioner of Domestic Taxes* [2020] eKLR).

5. Prior to reserving this matter for ruling, I requested the parties to agree on the nature and amount of security to be provided by the Appellant in order to secure the appeal but they failed to agree leaving the decision to the court. The determination of this issue is a matter for the court’s discretion. Such discretion, being judicial discretion, is based on facts presented by the parties. In this case, the Appellant did not disclose the nature of its business as a going concern, it does not state how much money is in its accounts or its assets and liabilities. It did not even offer any security, its nature or even suggest a reasonable amount. In such circumstances, it would be difficult to fashion an appropriate order. In summary, the Appellant’s affidavit is threadbare and insufficient to sustain the application.

6. Having considered all the facts, I am constrained to dismiss the Notice of Motion dated 18th September 2020 with costs to the Respondent.

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

D. S. MAJANJA

JUDGE

Mr Mwara instructed by Komu and Kamenju Advocates for the Appellant.

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