



**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D.S. MAJANJA J.**

**TAX APPEAL NO. E124 OF 2020**

**BETWEEN**

**FORESIGHT INFRASTRUCTURE INC.....APPELLANT**

**AND**

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

**RULING**

1. The Tax Appeal Tribunal (“the Tribunal”) dismissed the Appellant’s appeal by a judgment dated 18<sup>th</sup> September 2020 thus precipitating this appeal. The Tribunal upheld the Respondent’s objection decision requiring the Appellant to pay Kshs. 21,176,283.00.
2. The Appellant has filed the Notice of Motion dated 14<sup>th</sup> December 2020 supported by the affidavit of its director, Vishal Agarwal, sworn on the same date. The Respondent did not file any response to the Application. At the plenary hearing of the application, counsel for the parties made brief oral submissions and agreed that the only issue for determination is the terms upon which the court should order stay pending appeal.
3. The duty of the court in such circumstances, is to balance the interests of both parties. 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 in fact, continues to pay taxes as and when they fall due. On the other hand, the court must not unnecessarily impede the Respondent’s statutory duty to collect taxes in accordance with the law bearing in mind that it has succeeded before the Tribunal (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*).
4. The grant of an order of stay is an exercise of judicial discretion based on facts presented by the parties. The Appellant states that it will comply with any orders that the court may order as conditions for the grant of stay pending appeal. I have considered that the Appellant is a going concern. It owns commercial rental properties. Considering the circumstances of the economy, which I am entitled to take judicial notice vis-a- vis the amount of tax claimed, I find that an order for security in the sum of Kshs. 4 million would be appropriate in the circumstances.
5. I allow the Notice of Motion dated 14<sup>th</sup> December on the following terms:
  - a. An order of stay be and is hereby issued staying execution of the judgment of the Tax Appeal Tribunal dated 18<sup>th</sup> September 2020 in Tax Appeal Tribunal Appeal No. 257 of 2018 pending hearing and determination of this appeal or until further orders of this court.
  - b. In consideration of the stay in (a) above, the Appellant shall provide a Bank Guarantee in favour of the Respondent pending the hearing and determination of the appeal from a reputable bank for **Kshs. 4,000,000.00** within **twenty-one (21) days** from the date hereof. In default, stay shall stand discharged.
  - c. The costs of this application shall be in the appeal.

**DATED and DELIVERED at NAIROBI this 22<sup>nd</sup> day DECEMBER of 2020.**

**D. S. MAJANJA**

**JUDGE**

Mr Muhindi instructed by Anjarwalla and Khanna LLP Advocates for the Appellant.

Ms Kithinji, Advocate instructed by Kenya Revenue Authority for the Commissioner of Domestic Taxes.