



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION 413 OF 2009

IN THE MATTER OF AN APPLICATION BY THE APPLICANT BEIRERSDORF EAST AFRICA LIMITED FOR LEAVE TO APPLY FOR

JUDICIAL REVIEW BY WAY OF ORDERS OF CERTIORARI AND PROHIBITION DIRECTED TO THE KENYA REVENUE AUTHORITY

AND

IN THE MATTER OF THE CUSTOMS AND EXCISE ACT, CHAPTER 472 OF THE LAWS OF KENYA, THE VALUD ADDED TAX ACT

CHAPTER 476 OF THE LAWS OF KENYA AND THE EA ST AFRICAN COMMUNITY CUSTOMS MANAGEMENT ACT, 2004

BEIRSDORF EAST AFRICA

LIMITED.....APPLICANT

VERSUS

THE KENYA REVENUE

AUTHORITY.....RESPONDENT

RULING

What has fallen for my determination is the Notice of Motion dated 6th July 2011 seeking a stay of execution of the order made on 23rd June 2011 pending the hearing and determination of the intended appeal against the said ruling. It is the position of the applicant that there be a stay of any enforcement, actions that may be taken by the respondent in relation to and/or on account of disputed taxes in the sum of Kshs.22,898,505/= pending the hearing and determination of the intended appeal against the ruling delivered on 23rd June 2011 by **Musinga J.**

By an application for judicial review the applicant had sought to quash a decision by the respondent to collect and demand disputed taxes in the amount of Kshs.22,898,505/= and an order of prohibition to stop the respondent from collecting the said taxes. On 23rd June 2011 the application was dismissed and the applicant was granted a 14 days stay of execution. The applicant thereafter filed an appeal against the said decision to the Court of Appeal. It is the contention of the applicant that it has at all times complied with the law and paid substantial amounts of taxes lawfully due from it. The applicant disputes the sum of Kshs.22,898,505/= is payable by it by the law.

It was submitted by **Mr. Ojiambo** learned counsel for the applicant that the applicant is apprehensive that

it will not in the foreseeable future recover the said sum from the respondent in the event that it succeeds in the intended appeal due to difficulties faced by tax payers in obtaining refunds. It was also submitted by **Mr. Ojiambo** that the sum is substantial and that the applicant will suffer substantial loss for it will be kept from its money used in operations. And that the respondents will not pay any interests on the money in the event the appeal succeeds.

The application was opposed by **Miss Lavuna** for the respondent who contended that this court has no jurisdiction to grant an order of stay in judicial review matters. She contended that there is no precedence where the court granted a stay when it has determined the substantive matter, therefore the application is unprecedented. In the 2nd issue she contended that in judicial review matters there is no order to execute and that there is nothing special in the application by the applicant.

I have considered the application and the arguments by **Mr. Ojiambo** and **Miss Lavuna** tendered on behalf of their clients. The first issue is whether this court has jurisdiction to grant stay of execution in matters relating to judicial review. It is my position that this court has jurisdiction to grant stay where it deems fit to do so in the interest of the parties and in order to protect the due process of the law. The rule that a stay cannot be granted in judicial review matters as contended by **Miss Lavuna** is not an automatic rule. The question whether an order of stay should be granted is a matter for the court to determine. The issue of fairness and to respect and protect the rights of the parties is a fundamental principle in granting a stay or not. In my understanding a stay of execution is meant to ensure that the intended appeal is not rendered nugatory or that a party is not exposed to undue hardship as a result of the execution of the order or decree obtained by the opposite party.

The question in this matter is whether the applicant has established grounds for granting the orders sought. The applicant is one of the largest manufacturer and distributor of consumer products in Kenya and has existed and traded in Kenya for over 28 years since its incorporation in 1982. It is on oath by the applicant that in the past five years it has paid taxes to the respondent in excess of Kshs.1.5 billion. It is also contended by the applicant that it has at all times complied with the law and paid substantial taxes lawfully due and demanded by the respondent. It is also clear that the initial demand was in excess of Kshs.66 million but was revised to the current sum.

The question is whether a party who is as prominent as applicant and who has been paying substantial and colossal sums of monies in taxes, would suffer substantial loss if the order is not granted. In my view the applicant will not suffer in any manner whatsoever in failing to get an order of stay against the respondent. The applicant is a going concern reputed to have been paying substantial sums in taxes. It is the case of the applicant that if a stay is not granted and in the event of its appeal succeeding, it will not in unforeseeable future recover the sum in dispute from the respondent.

Miss Lavuna for the respondent submitted that the granting of stay to the applicant until the determination of intended appeal is likely to cause greater hardship to the applicant because it would mean that the amount of taxes demanded would continue to accrue interests and penalties until payment in full. **Miss Lavuna** invited this court to save the applicant from financial destabilization by denying the stay because if they fail in intended appeal, the interests and penalties on principal sum must be collected as mandated by law will be much heavier a financial burden for them to bear,. In short, it is the position of the respondent that early payment of taxes due will arrest the penalties and interests to be loaded on the principal sum.

Having addressed my mind to the issues raised by **Mr. Ojiambo** and **Miss Lavuna**, it is clear that the applicant will not suffer any hardship in the event the appeal succeeds. There are two options available to the applicants in the event the appeal succeeds which is to seek for a refund and/or use the amount to offset present or future taxes which may have accrued. The respondent would be in a position to comply with any of the options and the court will be in a position to order strict compliance in order to protect the rights and interests of the applicant. It is therefore my position an order of stay is not just unfair in the circumstances and the disclosures made by the parties herein. There is no evidence to show that the intended appeal will be rendered nugatory if a stay is not granted. Consequently, the application by the applicant is dismissed with costs.

Dated, signed and delivered at Nairobi this 7th day of February, 2012.

M. WARSAME

JUDGE