



**Commissioner Customs & Border Control v Hemwil Investment Limited (Income Tax Appeal E467 of 2023) [2023] KEHC 20638 (KLR) (Commercial and Tax) (5 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20638 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INCOME TAX APPEAL E467 OF 2023**

**A MABEYA, J**

**JULY 5, 2023**

**BETWEEN**

**COMMISSIONER CUSTOMS & BORDER CONTROL ..... APPELLANT**

**AND**

**HEMWILL INVESTMENT LIMITED ..... RESPONDENT**

*(Being an Appeal against the Ruling of the Tax Appeals Tribunal delivered on 26th May, 2023)*

**RULING**

1. The motion dated June 9, 2023 by the appellant/applicant seeks stay of execution of the order of the Tax Appeals Tribunal (“the tribunal”) dated May 30, 2023. It also seeks to stay the proceedings in TAT E 208 of 2023. It is brought, inter alia, under section 32 of the *Tax Appeals Tribunal Act* and order 42 rule 6 of the *Civil Procedure Rules*.
2. The grounds are that the impugned ruling of the tribunal stayed the applicant’s decision of classifying the respondent’s imported vehicles under tariff code 8703.33.90. That the tribunal ordered the classification of Toyota Hiace Vans under HS code 8702.10.20 which attracts duty of 20% unlike HS code 8703.33.90 which attracts duty of 35%.
3. It was further contended that the effect of the impugned order is the likely loss of Kshs 18,672,921/= in excise duty as the 20 vans would be released to the respondent if a stay in not granted. That the tribunal issued a substantive order in the interim stage before the tribunal.
4. I have considered the record and submissions of learned counsel. A stay order will be made where an applicant demonstrates that he will suffer substantial loss, give security for the performance of the order or decree appealed against and the application must be made timeously.



5. In the present case, the application was made timeously. As regards substantial loss, the tax sought to be recovered is said not to relate to the vehicles detained but for past importations.
6. I am alive to the fact that the order appealed against was interim in nature. The main appeal is still pending before the tribunal. To stay that appeal, in my view, would not be in the interest of justice. It will lead to backlog for no reason. Let the parties prosecute the appeal so that the substantive rights of the parties can be determined.
7. As regards the stay of the order, I do not see how the applicant will suffer substantial loss. As already stated, the claim for Kshs 18,672,921/= is said to be for previous importations. The court has to lean towards that which will cause minimum injustice. To continue detaining the respondent's motor vehicles would cause more losses. They are said to have been imported for specific customers. Continued detention would lead to additional warehouse rent, deterioration/depreciation amongst other losses.
8. I note that it was submitted that for the current importation, the difference of the duty between that contended by the respondent and the one by the applicant is Kshs 1,292,253/=.
9. Accordingly, I find that the application is without merit and is dismissed. The order of stay granted herein shall however lapse upon the respondent depositing with the applicant as security, the sum of Kshs 1,292,253/=. The costs to be in the appeal.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF JULY, 2023.**

**A. MABEYA, FCI Arb**

**JUDGE**

