



**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

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

**TAX APPEAL NO. E009 OF 2021**

**BETWEEN**

**PALAEH LIMITED.....APPELLANT**

**AND**

**COMMISSIONER OF INVESTIGATIONS AND ENFORCEMENT.....RESPONDENT**

***(Being an appeal against the judgment of the Tax Appeals Tribunal***

***at Nairobi dated 22<sup>nd</sup> January 2021 in Income Tax Appeal No. 81 of 2017)***

**RULING**

**Introduction**

1. On 22<sup>nd</sup> January 2021, the Tax Appeals Tribunal (“the Tribunal”) dismissed the Appellant’s appeal against the Respondent’s (“the Commissioner”) decision disallowing its objection. The Tribunal confirmed the Commissioner’s assessment of KES 1,361,746,295.00 and KES 7,891,387,842.00 being corporation tax and VAT respectively. The Appellant has now appealed against the Judgment. It has also moved the court by Notice of Motion dated 27<sup>th</sup> January 2021, inter alia, under **Order 42 rule 6** of the **Civil Procedure Rules** seeking orders staying execution and enforcement of the judgment.
2. The application is grounded on the supporting and further affidavit of its director, Patrick Njiru, sworn on 27<sup>th</sup> January 2021 and 16<sup>th</sup> February 2021 respectively. In opposition to the application, the Commissioner has filed Grounds of Opposition dated 29<sup>th</sup> January 2021 and the replying affidavit of its officer, Dominic Kengara, sworn on 2<sup>nd</sup> February 2021.
3. At the hearing, counsel for both parties made brief oral submissions in support of their respective cases.
4. An application for stay of execution pending an appeal from the decision of the Tribunal is governed by **Order 42 Rule 6 (2)** of the **Civil Procedure Rules**. In order to succeed, the appellant must demonstrate substantial loss may result unless the order of stay is made. It must also demonstrate that the application has been brought without undue delay and lastly, the appellant must give such security as the court may order for the due performance of the decree or order as the case may be. Our courts have recognised that the power to order stay is discretionary and must be exercised in such a way that the appeal is not rendered nugatory. This discretion, I would add, is based on the facts and circumstances of each case (see **Halai & Another v. Thornton & Turpin (1963) Ltd [1990] KLR 365** and **Butt v Rent Restriction Tribunal [1982] KLR 417**).
5. Neither party disputes the fact that this court has jurisdiction to grant an order of stay. I am also satisfied that the application has been filed timeously and without delay. The issue in contention is the nature and extent of security the Appellant should be ordered to provide.
6. In resolving this matter, the court is called upon to balance competing interests. In the **Africa Oil Kenya BV v Commissioner of Domestic Taxes ML HC TA No. E024 of 2020 [2020] eKLR**, I stated as follows:

*[11] The duty of the court is to balance the interests of the appellant and to ensure that the appeal is not rendered nugatory or that its financial position is imperilled on the one hand by enforcement of the Tribunal’s decision. On the other hand, this court recognises that the Tribunal has not made a decision that the Commissioner is entitled to enforce absent an appeal and an order of*

stay.

7. The Appellant has offered to provide a bank guarantee of KES. 10,000,000.00 as security. It contends that it has paid KES 17,500,000.00 on account of the disputed taxes. The Commissioner countered by demanding security for a proportion of the tax demanded. Counsel for the Commissioner referred to my decision in **Keroche Breweries Limited v Commissioner of Domestic Taxes HC Comm ITA No. E021 of 2020 (UR)** where I ordered payment of Kshs. 500 million as security where the amount of outstanding tax was Kshs. 9 billion.

8. The nature and extent of the security to be ordered by the court is dependent on the facts and circumstances of the case. In **Bella Vista Restaurant Mombasa Limited v Kenya Revenue Authority MSA Pet. No. 44 of 2014 [2016] eKLR**, the court recognised the financial difficulties of the petitioner and refused to order security on the ground that security must be backed by financial arrangements which would have led to closure of the petitioner's business in view of the huge tax assessment. In **Victrociset S.P.A. Kenya v Commissioner of Domestic Taxes NRB HC JR No. 28 of 2018 [2018] eKLR** the court also granted an unconditional stay of execution after taking into consideration the financial difficulties the company faced. In **CMA CGM (K) Limited v Commissioner of Domestic Taxes NRB CA Civil Appl. No. 83 of 2020 [2020] eKLR**, the Court of Appeal ordered the appellant to deposit Kshs. 50,000,000.00 in a joint account pending the appeal where the sum demanded as taxes was Kshs. 299,130,352.00.

9. In this case, the total tax demanded by the Commissioner is about KES 8 billion. It is not in doubt that if this amount is enforced at once, the Appellant will close down with all the attendant consequences. The Commissioner has not disputed the fact that the Appellant is a trading company and a going concern. It has produced its annual report and financial statement for the year dated 31<sup>st</sup> December 2018, showing a profit of KES 28,775,270 from the total sales for the year 2018. I have also considered that the Appellant has made a payment of KES 17,500,000.00 on account of outstanding taxes. It has also offered to give security of KES 10,000,000.00.

10. Since the factual circumstances relating to the Appellant's business are not in doubt and taking all the facts into account, an order for payment of a reasonable amount would be appropriate in the circumstances. An order for payment of a substantial proportion of the tax demanded by the Commissioner would lead to closure of the company which would also be inimical to the State's interests. It must also not be lost to the parties that the appeal may be wholly or partially successful.

#### **Disposition**

11. For the reasons I have set out above, I allow the Notice of Motion dated 27<sup>th</sup> April 2020 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 22<sup>nd</sup> January 2021 in Tax Appeal Tribunal Appeal No. 81 of 2017 and any further enforcement action thereon pending the hearing and determination of this appeal or until further orders of the court.

(b) In consideration of the stay in (a) above, the Appellant shall pay the Respondent KES 10,000,000.00 within fourteen (14) days from the date hereof. In default, stay shall stand discharged.

(c) The costs of this application shall be in the appeal.

(d) The court shall adjourn to issue directions for the hearing and determination of the appeal.

**DATED and DELIVERED at NAIROBI this 9<sup>TH</sup> day of FEBRUARY 2021.**

**D. S. MAJANJA**

#### **JUDGE**

Mr Mbaye with instructed by Humphrey & Company LLP for the Appellant.

Mr Said, Advocate instructed by Kenya Revenue Authority for the Commissioner of Investigations and Enforcement.