



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

INCOME TAX APPEAL NO E075 OF 2020

RAYMOND OLENDO T/A OGEJO, OLENDO

& COMPANY ADVOCATES.....APPLICANT

-VERSUS-

COMMISSIONER OF INVESTIGATIONS

& ENFORCEMENT.....RESPONDENT

R U L I N G

1. Before Court is a Chamber Summons dated 26/08/2020 brought under **Rule 17, 18 and 19(1) of the High Court of Kenya (Organization and Administration) Rules 2016, Rule 17(1) and 20 of the Tax Appeals Tribunal (Appeals to the High Court) Rules 2015, Order 42 Rule 6 and Order 51 rule 1 of the Civil Procedure Rules, section 53 of the Tax Procedure Act and section 3A of the Civil Procedure Act.**
2. In the Summons, the applicant seeks a stay of execution of the Tax Appeal Tribunal Ruling made on 14/08/2020 in **Misc Application No 28 of 2020** pending the hearing and determination his appeal to this Court.
3. The grounds on which the application is predicated upon are set out in the body of the Summons and the supporting affidavit of **Raymond Olendo**, sworn on 26/08/2020. These include: that an appeal has been preferred to this Court from the aforementioned ruling with good chances of success, that the appeal will be rendered nugatory if the stay sought is not granted as the respondent may use his statutory powers to enforce collection of taxes.
4. Further, that the respondent will not suffer any prejudice if the application is allowed as the applicant has already paid Kshs. 6,300,000/- through agency notices issued by the respondent despite the dispute herein. That the said sum could be held as security pending appeal. Further, that the applicant is an Advocate of the High Court of Kenya and of good standing with a reputation to protect thus there is no risk of default in the event the appeal does not succeed.
5. The respondent opposed the application through a replying affidavit by **Ouru Nyamori**, sworn on 2/9/2020. He contended that after the Tribunal had heard the applicant's case, it lifted the Commissioner's agency notices for Ksh.24,270,171/- and held that, an amount of Ksh.19,198,181/- in undisputed taxes was recoverable from the applicant.
6. That the applicant had vide a letter of 22/11/2019, admitted taxes amounting to Kshs. 11,412,265/50 to be divided between its partners **Raymond Olendo** and **Stanley Ogejo**. That between 15/11/2019 and 17/11/2019, the applicant filed their own returns and self-assessed tax amounting to Kshs. 9,047,758/-. That this showed that the taxes are undeniably due and the application is an attempt to forestall collection of due taxes.
7. That the applicant has not illustrated the substantial loss it would suffer if the orders sought are not granted. On the other hand, the respondent stands to suffer real prejudice if the stay is granted as he has a great responsibility to collect taxes on time to enable the payment of salaries to government employees and for the smooth running of the country. In any event, the respondent is capable of reimbursing the applicant or apply the amount found to have been levied for future taxes.
8. I have carefully considered the parties' depositions and the submissions on record. A brief background of this matter is that vide a **Miscellaneous Application No.28 of 2020 before the Tax Appeal Tribunal**, the applicant sought the stay of the enforcement of Agency Notices issued by the respondent on 7/05/2020 and 26/05/2020 demanding the payment by the applicant's agents an amount totaling Kshs. 24,270,172/-.

9. By a ruling dated 14/8/2021, the Tribunal lifted the said notices but held that there was due from the applicant taxes amounting to Kshs. 19,198,181/- which should be paid. That is the order the applicant seeks to stay.

10. This is an application for stay of execution pending appeal. The principles applicable are well known as set out under **Order 42 Rule 6(1) of the Civil Procedure Rules, 2010**. These are that; the application must be made timeously, the applicant must demonstrate that he will suffer substantial loss and finally, he must offer security for the performance of the decree that will ultimately be found to be binding on him.

11. On the first principle, the impugned ruling was made on 14/8/2020 while the current application was filed on 26/8/2020. The application was filed timeously.

12. On the second principle, the applicant submitted that they would suffer substantial loss if the stay is not granted and the appeal would be rendered nugatory because, the respondent may use its power to enforce the collection of the amount decreed. That the enforcement will extend to issuance of agency notices to the applicant's clients thereby affecting his standing as an advocate.

13. In **Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another [2015] Eklr**, the Court of Appeal held: -

“In seeking to balance the interests of the respective parties, the approach we have always taken in determining whether or not to grant a stay of execution is to ensure that applicants are not denied their opportunity to ventilate their legal cases as afforded under the laws through the appeal process, with the possibility of success, while at the same time, respondents are not denied the fruit of judgment in their favour and their rights are safeguarded.”

14. The applicant is an advocate of this Court. He asserts that he is of good standing. The amount sought to be recovered from him is a whopping Kshs.19 million which is said to have been incurred or to have accrued when he was in partnership with another advocate. That sum cannot be said not to be substantial by an individual whose practice has been beaten by the effects of the Covid – 19 pandemic.

15. If he is called upon to forthwith pay the said sum, he may close shop and if the appeal is successful, his firm may be beyond recovery. I am satisfied that the applicant has demonstrated that he will suffer substantial loss.

16. It was submitted that the respondent is able to refund the money. That may be the case. However, by the time the respondent refunds the amount, with the long bureaucratic procedures appurtenant thereto, there may be no firm in existence.

17. On security, the applicant stated that he had already paid a sum in excess of Kshs. 6 million which was recovered by the respondent through the aforesaid agency notices. He proposed that the same be used as security.

18. I do not think that may be correct, the security has to be on the taxes now found to be due by the tribunal. It was alleged by the respondent and not denied by the applicant that he had admitted taxes in excess of Kshs. 11 million. That the said sum was due jointly with another advocate he was in partnership with. In this regard, he has to give a fresh independent security.

19. I have considered the amount ordered by the Tribunal. I have also considered the position of the applicant. Payment of taxes is a civil duty and the responsibility of each and every citizen regardless of his position in society. I consider it fair and just that the applicant do pay to the respondent Kshs. 3,000,000/- as security for the stay.

20. Accordingly, the application dated 26/08/2020 is hereby allowed on condition that the applicant deposits with the respondent the sum of Kshs. 3,000,000/- within 30 days of delivery of this ruling. Further, the applicant is ordered to lodge and pursue this appeal within 120 days of today's date in default the stay to lapse.

It is so ordered.

DATED and DELIVERED at Nairobi this 4th day of March, 2021.

A. MABEYA, FCI Arb

JUDGE