



**REPUBLIC OF KENYA**

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

**COMMERCIAL & TAX DIVISION**

**INCOME TAX APPEAL 151 OF 2020**

**SWEDISH SCHOOLS**

**ASSOCIATION OF KENYA.....APPELLANT**

**VERSUS**

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

**RULING**

The Appellant approached the Court vide Certificate of Urgency Notice of Motion filed on 24<sup>th</sup> February 2021 and sought stay of execution of Tax Appeals Tribunal judgment & decree of 23<sup>rd</sup> September 2020 pending hearing and determination of the instant application and/or appeal.

A temporary injunction to issue restraining the Respondent whether by itself, its officers, employees, servants/agents, from enforcing the Agency notice dated 17<sup>th</sup> February 2020 served on NCBA bank, Standard Chartered Bank (K) Ltd, National Bank of Kenya, I& M Bank Ltd, Diamond Trust Bank Ltd, CFC Stanbic Bank Ltd, Bank of Africa Kenya Ltd, Absa Bank Kenya Ltd PLC, Citi Bank Kenya Ltd by the Respondent for the sum of Ksh 124,046,017 on account of alleged PAYE due to the Respondent from the Appellant, pending hearing and determination of this application and the Appellant be at liberty to access and operate the Account.

Annexed to the application is Notice of Appeal and Memorandum of Appeal filed on the same date.

**ORAL SUBMISSIONS**

Mr Kashindi for the Appellant stated that the Appellant runs Swedish schools in Kenya offering special curriculum to the Scandinavian students/Learners.

Through bilateral cooperation agreements between Sweden & Kenya Governments, the Appellant ran the schools on behalf of Sweden and as well as the right to exemption from personal income tax paid to the Schools staff /teachers. In 2016, the Respondent sought to impose PAYE on expatriate teachers of the Appellant.

This is the subject of the appeal arising out of the decision of the Tax Appeals Tribunal.

Pursuant to the Tribunal's judgment of 23<sup>rd</sup> September 2020, on 17<sup>th</sup> February 2021, the Respondent through Agency Notices sent the same to the Appellant on 23<sup>rd</sup> February 2021. The Appellant's operations are now completely paralyzed.

The special circumstances that pertain to support the application for stay of execution and lifting of the Agency Notices are;

- a) The Appellant serves Scandinavian Children for workers in the region and these children cannot obtain alternative special curriculum in Kenya to continue pursuing their studies.
- b) The Appellant owns properties and include buildings and therefore is not a flight risk.
- c) The teachers at the School are Swedish nationals operating in a foreign country and living with their families. The Respondent's Agency Notice freezing the Appellant's Accounts means that they will not receive salaries and this will cause them undue hardship, anxiety, difficulty and pecuniary embarrassment. It will be hard to obtain alternative means of support.

d) The Appellant caters for children going to school. In view of the Corvid 19 pandemic situation and the Kenya Government's directive to ensure that All schools remain open, then if the Appellant's schools are shut down it will cause substantial loss.

Ms Mwangela h/b Ms Almadi for Respondent stated that she was instructed that there was no problem with the grant of stay of execution but the Appellant ought to furnish security.

They agree that grant of stay of execution with or without security is discretionary. However, the security ought to be 50% cash of the decretal amount in this Case Ksh 124,000,000/-

Payment of tax is a statutory obligation and the Respondent is mandated by law to collect taxes.

Mr. Kashindi replied the actual amount due as tax is Ksh 80 million the balance are penalties and proposed a bank guarantee of Ksh 10 million to be provided within 14 days and if not the stay of execution lapses.

He reiterated that the Appellant is not a going concern a business making profit but runs schools to provide education to children. A bank guarantee would be reasonable in the circumstances as the Appellant has to collect School Fees as its source of income.

### **DETERMINATION**

Pending hearing and determination of the appeal lodged by Appellant, the Respondent issued Agency Notice under **Section 42 of Tax Procedures Act** pursuant to the Tax Appeals Tribunal's judgment and decree of 23<sup>rd</sup> September 2020.

The Appellant cited special circumstances to the Court on why the grant of Stay of Execution order should be granted pending hearing of the application/appeal.

It is not contested that the Appellant is not a business entity but one that engages in provision of education to and for Scandinavian children residing in the region with their families as expatriates. In a sense it deals in specialized education and curriculum.

The Agency Notices issued by the Respondent have adversely impacted on the expatriate children, families and employees. Some of them are on foreign land to eke a living and cannot do so as the Appellants' Accounts are frozen to satisfy the decretal amount of Ksh 124,000,000/- which is by no means meagre but colossal amount and would shut down the Appellant's operations and possibly make it extinct.

It is not disputed that there is a pending appeal as of right and it should not be rendered nugatory and on the other hand there is a valid, regular and legal judgment and decree until it is successfully appealed against set aside or varied.

The Respondent referred this Court to caselaw;

**a) Mass Logistics vs Commissioner of Domestic Taxes No 6 of 2021**

**b) Farah International vs Income Tax No 122 of 2020**

that mandate 50% of the decretal amount in cash ought to be considered as sufficient security for stay of execution pending appeal.

The Appellant relied on the following case-law;

**a) Highlands Mineral Water Ltd vs Commissioner of Domestic Taxes [2020] e KLR**

**b) Bella Vista Restaurant Mombasa Ltd vs KRA [2010] e KLR**

**c) Vitrociset S.P.A. Kenya vs Commissioner of Domestic Taxes [2010] eKLR**

**d) Awal Limited vs Commissioner of Investigations & Enforcement [2020] eKLR**; the court relied on the Court of Appeal case **Butt vs Rent Restriction Tribunal [1982] KLR 417**, which gave guidance on how a court should exercise discretion and held that;

***“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.***

***2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.***

***3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.***

***4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large***

amount of rent in dispute and the appellant had an undoubted right of appeal.

**5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”**

In light of the above caselaw and submissions, this Court finds that

**Order 42 Rule 6 CPR 2010** mandates that conditions for stay of execution are complied with as follows;

**a) Substantial loss may occur to the Appellant unless the order for stay of execution is granted;**

In the instant case, there are special and unique circumstances to consider;

The Appellant runs Swedish Schools that have young learners who are not aware of, were not involved in any way or manner in the matter in dispute; the non- withholding and non- remittance of tax by the Appellant. Yet, from the Agency Notices issued that have resulted in freezing the Appellant’s accounts, these children will be deprived of education due to no fault of their own but from circumstances beyond them. This is contrary to **Article 53 (2) COK 2010**, which provides;

**“(2) A child’s best interests are of paramount importance in every matter concerning the child”**

The Appellant and Respondent are all entitled to Fair Administrative Action **Article 47 COK 2010**, Access to Justice **Article 48 of COK 2010** and Fair Hearing **Article 50 COK 2010** and thus there is a pending appeal as of right. Since the appeal has not been heard and determined it is incumbent upon parties to ensure it is not rendered nugatory and at the same time the Respondent is not prejudiced.

Even though the Appellant has not provided documentation of its financial status, the tax in issue as per the judgment and decree is a colossal amount that would significantly adversely affect the Appellant’s operations to facilitate education programs to Swedish schools that have a unique curriculum.

As submitted by the Appellant’s Counsel, the Appellant is not a business run on or for profit and its sole source of revenue is collection of School Fees. If the Agency Notices take effect and the Appellant’s accounts remain frozen, then the Appellant shall grind to a halt and fold up.

This shut down will be contrary to Kenya Government’s policy that the schools remain open and children should learn during the Corvid 19 pandemic period.

The children shall be deprived of education through no fault of their own, the teachers in employment at the moment shall be unemployed and destitute as they will lack means of survival in foreign land without payment of salaries and emoluments, yet it has not been shown they failed or refused to pay tax, those who did may have left the jurisdiction of the Court. The Kenyan staff will suffer unemployment too as the establishment will shut down.

The parents who are Scandinavian in the region will abandon their places of work and relocate back to their countries as their children who learn from a special curriculum will lack education.

In times of Corvid 19 pandemic globally, exodus to and from countries is hampered by strict conditions employed to restrict entry, exit or transit in a bid to control and manage the pandemic. The children, teachers and parents may end up stranded.

Finally, if the Appellant shuts down operations, the appeal shall be rendered nugatory, the substance of the appeal will change and/or cease.

From these circumstances, if the Agency Notices remain place and the Appellant’s accounts are frozen it will occasion substantial loss including to innocent parties.

The Application was filed without delay as the Agency Notice was served on 23<sup>rd</sup> February 2021 and the instant application was filed under certificate of urgency on 24<sup>th</sup> February 2021.

With regard to furnishing security, the Respondent’s view is that it should be a cash deposit of 50% of the decretal amount, the Appellant proposed Ksh 10 million bank guarantee.

This Court considers the decretal amount colossal amount of money that would paralyze the operations of the Appellant to provide education to children. The justice of the case makes it reasonable to grant the Bank guarantee to ensure innocent parties are not affected by the drastic consequences of halting operations of the Appellant and allows the appeal to be heard on its merits.

## **DISPOSITION**

**1) An order for stay be and is hereby issued staying execution of the judgment and decree of the Tax Appeal tribunal of 23<sup>rd</sup> September 2020 and lifting forthwith the Agency Notices of 17<sup>th</sup> February 2021 served on the Appellant on 23<sup>rd</sup> February 2021 and ALL banks listed in paragraph 4 of Notice of Motion of 24<sup>th</sup> February 2021 for the sum of Ksh 124,000,000**

pending hearing and determination of the appeal or further orders of the Court.

2) In consideration of the order above, the Appellant shall provide Bank guarantee from a reputable bank for Ksh 10,000,000/- within 14 days from today to the Respondent and shall provide a copy to Court through DR Commercial & Tax Division.

3) In default of compliance the stay of execution shall abate/lapse forthwith after 14 days.

DELIVERED SIGNED & DATED IN OPEN COURT ON 4<sup>TH</sup> MARCH 2021 (VIDEO CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MR. KASHINDI FOR THE APPELLANT

MR ALMADI FOR THE RESPONDENT

COURT ASSISTANT: TUPET