



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D.S. MAJANJA J.

TAX APPEAL NO. E086 OF 2021

BETWEEN

SUNDAY PUBLISHERS LIMITED.....APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES..... RESPONDENT

(Being an appeal against the judgment of the Tax Appeals Tribunal at Nairobi dated 11th June 2021 in Income Tax Appeal No. 271 of 2018)

RULING

1. On 11th June 2021, the Tax Appeals Tribunal (“the Tribunal”) delivered a judgment partly allowing the Appellant’s appeal challenging the Respondent’s objection decision dated 31st October 2018 where the Respondent (“Commissioner”) had demanded taxes including interest and penalties amounting to KES. 473,892,194.00 in respect of Corporation Tax and Value Added Tax for the years 2013-2017. The Tribunal held that the Commissioner’s objection decision ought to be varied to take into account a loan of KES. 44,000,000.00 as a deductible expense from the gross taxable income determined from the Appellant’s bank deposits.
2. The Appellant has lodged an appeal with the court against this decision by the Tribunal and has now approached the court by the Notice of Motion dated 15th June 2021 seeking inter alia a stay of execution of the aforesaid Tribunal decision pending the hearing and determination of the appeal. The application is supported by the affidavit of Ayub Savula Angatia, a director of the Appellant, sworn on 15th June 2021. The Commissioner has opposed the application through the Grounds of Opposition dated 17th June 2021.
3. It is common ground that an application for stay of execution pending an appeal from the decision of the Court is governed by **Order 42 Rule 6 (2)** of the **Civil Procedure Rules**. In order to succeed, the applicant 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 applicant must give such security as the court may order for the due performance of the decree or order as the case may be. At the end of the day, the court is called upon to do justice in light of the circumstances of the case bearing in mind that the Commissioner is entitled to the fruits of its judgment in this case to collect the taxes to be paid by the Appellant and; the court should ensure that the appeal is not rendered nugatory by imposing substantial loss on the Appellant rendering the appeal itself otiose (see *Keroche Breweries Limited v Commissioner of Domestic Taxes ML HC ITA E012 of 2020 [2020] eKLR*, and *Superior Homes (Kenya) Limited v Musango Kithome MKS HC Civil Appeal No. 91 of 2017 [2018] eKLR*).
4. In this case, the Appellant states that unless execution of the Tribunal’s judgment is stayed, the appeal, which has appreciable chances of success, would be rendered nugatory and would thereby occasion substantial loss to it. Further, considering the colossal amounts at stake, the Appellant is apprehensive that the Commissioner is at liberty and may proceed to execute and recover the alleged amounts demanded at any time and that this will greatly prejudice the Appellant.
5. The Appellant avers that it is only fair and just that the court order a stay of execution as it is, on a without prejudice basis, having already paid KES. 3,000,000.00. It therefore proposes to furnish an additional security of KES. 3,000,000.00 payable in equal monthly installments of KES. 200,000.00. The Appellant asserts that due to the unprecedented confiscation of all crucial documents and the subsequent legal suits against it, its business was forcefully closed down as it became very expensive and unsustainable to operate, thus the business does not have any liquidity to enable it furnish security in one installment.

6. On its part, the Commissioner contends that it should be allowed to enjoy the fruits of the judgment in its favour since the Appellant has been enjoying a stay of execution since the matter was filed at the Tribunal. The Commissioner adds that should the Appellant succeed on appeal, the Commissioner had the ability to refund the taxes in dispute and that it is in the interest of the Appellant to pay the said assessed taxes as the said sum continues to accumulate penalties and interests. The Commissioner accuses the Appellant of failing to demonstrate good faith by offering to place a security of KES. 3,000,000.00 whereas the Commissioner's assessment that has been upheld by the Tribunal is KES. 473,982,194.00.

7. I am satisfied that this application has been brought without undue delay and also cognizant of the fact that the tax amount being demanded is relatively colossal as deponed by the Appellant. The Appellant contention that it has closed its business and that it lacks liquidity to keep it as a going concern has not been established by any evidence. As the Court of Appeal held in **Coastal Bottlers Limited V Commissioner Of Domestic Taxes NRB CA Civil Application No. 91 of 2008 [2009] eKLR**, it is not enough to claim that the business faces foreclosure if security is ordered and that it is necessary to place before the court material such as financial and accounting reports, notices of closure, insolvency notices and such like evidence to demonstrate the financial health of the entity.

8. In any case, I find that the security of KES. 3,000,000.00 being proposed by the Appellant insufficient and too low considering the tax liability at stake. A security of KES. 10,000,000.00 in the form of a Bank Guarantee from a reputable Bank would be most appropriate taking into account the circumstances of the case.

9. For the reasons I have set out above, I allow the Notice of Motion dated 15th June 2021 following terms:

(a) An order of stay be and is hereby issued staying execution of the Judgment of the Tax Appeal Tribunal dated 11th June 2021 in Tax Appeal Tribunal Appeal No. 271 of 2018 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 provide a Guarantee of KES 10,000,000.00 from a reputable bank in favour of the Respondent within forty-five (45) 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 5TH DAY OF JULY 2021.

D. S. MAJANJA

JUDGE

Mr Owano instructed by Humphrey & Company LLP for the Appellant.

Mr Ng'ang'a, Advocate instructed by Kenya Revenue Authority for the Commissioner of Domestic Taxes.