



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D.S. MAJANJA J.

TAX APPEAL NO. E012 OF 2020

BETWEEN

KEROCHE BREWERIES LIMITED.....APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

(Being an appeal against the judgment of the Tax Appeals Tribunal at Nairobi made on 9th March 2020 in Tax Appeals Tribunal Appeal No.137 of 2017 consolidated with No. 138 of 2017 and No. 139 of 2017)

RULING NO. 2

Introduction

1. The appellant has filed a Notice of Motion dated 7th April 2020 under the inherent power of the court seeking, inter alia, the following orders:

[1]

[2]

[3]

[4] *The condition for granting stay, pending appeal, made by this court on 16th March 2020 requiring the appellant to pay the respondent Kshs. 500,000,000/- be varied and substituted with an order granting the appellant unconditional order of stay pending appeal.*

[5] *In the alternative to prayer 4 above, the order of stay pending appeal be issued on condition that the appellant deposits the sum of Kshs. 10,000,000/- in an interest bearing account opened in the joint names of the appellant's advocates and respondent.*

[6] *The court do make any other order that it deems just and fit in the circumstances.*

[7] *The costs of this application be provided for.*

2. The application is supported by the affidavits of Tabitha Mukami Karanja, the appellant's Chief Executive and John Nyongesa, Head of Corporate Affairs, sworn on 7th and 8th April 2020 respectively. In addition, Ms Karanja has sworn a supplementary affidavit on 19th April 2020. The application is opposed by the respondent ("the Commissioner") through grounds of opposition dated 16th April 2020 and the replying affidavit of Francis Muiruri, Chief Manager of the respondent's Large Taxpayers Office, sworn on 17th April 2020.

3. Both parties supported their respective position by written submissions and oral arguments which I shall consider shortly.

4. The appellant seeks to vary the orders issued by this court on 16th March 2020 on the following terms:

1. THAT there shall be a stay of further enforcement of any collection of taxes arising from the decision of the Tax Appeal Tribunal in Tax Appeal Tribunal No. 137 of 2012 as consolidated with TAT No. 138 & 139 of 2017 and Tax Appeal No. 214 of 2015 as consolidated with TAT No. 38 of 2017 & 97 of 2017;

2. THAT the stay shall be on condition that the Appellant pays Kshs. 500,000,000/- within the next thirty (30) days in default of which the order of stay shall lapse with any further order.

3. THAT the Tax Appeal Tribunal is directed to furnish typed copies of the judgment to all the parties within 48 hours and typed proceedings within 7 days from the date hereof;

4. THAT the Appellant shall file and serve its record of Appeal within 30 days from the date hereof;

5. THAT mention on 23rd April, 2020 for directions;

6. THAT this Order shall apply to Tax Appeal No. E013 of 2020; and

7. THAT Costs in the cause.

5. Before I deal with the substantive grounds of the application, I propose to settle the issue of jurisdiction of this court to vary its own orders under its inherent jurisdiction. I do not think that jurisdiction of the court to vary its own orders under its inherent jurisdiction can be gainsaid. Both parties cited the case of **Okiya Omtatah Okiiti v Commissioner General, Kenya Revenue Authority and 2 Others NRB HC Petition No. 532 of 2017 [2017] eKLR** where the court held as follows:

[25] The High Court has inherent jurisdiction to vacate or vary its own orders in cases where there would otherwise be an irreparable injustice, but this power will only be exercised in exceptional circumstances, where justice requires the Court to act, or where a mistake has occurred which, if unrepaired, would cause a serious injustice. Examples though not exhaustive include:-

(a) Varying an order to give effect to the meaning the court intended the order to have or to resolve an ambiguity.

(b) Reviewing an order made ex parte, the basis of which has been said to be natural justice. Under this category can also be included denial of procedural fairness through no fault of a party. The court may set aside an order at any time if the order was made in the absence of a party if service was not proper or for sufficient reason.

(c) The occurrence of circumstances after the order which warrant varying the order.

(d) Entertaining an application for extension of time for appealing against the order after the time for compliance with that order has expired.

[26] For an application of this nature to succeed, the court is required to first consider and satisfy itself that the applicant has a strong case likely to succeed on the merits. Secondly, the court must be satisfied that the applicant will be irreparably injured, if stay is refused. Thirdly, the court must consider whether the issuance of a stay order will substantially injure the other parties interested in proceedings. Lastly, the court is bound to consider where the public interest lies.

6. Without belabouring the point further, I agree with the principles set out above and I am satisfied that this court has jurisdiction to vary or review its own orders under its inherent jurisdiction. The question then for consideration is whether the appellant has put before the court sufficient material to enable the court exercise its discretion in its favour.

7. The appellant's reasons and grounds for seeking the orders to vary the orders of 16th March 2020 are set out in the face its application and in the depositions filed on its behalf. The appellant's case is founded on the fact that the COVID-19 pandemic has brought unprecedented challenges to its business which involves sale of alcoholic beverages through hotels, bars and restaurants. As these businesses have closed in an effort to contain the spread of the virus, its sales have dwindled to the extent that it does not have the capacity to pay the sum of Kshs. 500,000,000/- ordered by the court.

8. The appellant's managing director depones that that following the measures to contain the spread of the Corona virus, the appellant has been starved of revenue and its productivity is at an all-time low. She also depones that the appellant's bankers had declines to provide any financial accommodation on account of the uncertain business environment and it has had to downscale its business to the extent of sending its staff home. It urges the court to take judicial notice of these circumstances and find that from the totality of circumstances including evidence from its cash flow, it has demonstrated that there is a good basis for this court to vary the conditions imposed for the orders of stay.

9. The appellant also urges that if the orders are not varied, the appellant will suffer irreparable injury as enforcement action will lead to automatic collapse of the company with attendant consequences to employees and other businesses that depend on the appellant as a going concern. On the other hand, the appellant contends that even if the orders varies, the respondent will not suffer any prejudice as the appellant would remain a going concern which would continue paying taxes which it does to the tune of Kshs. 950 million a year. The appellant also urges that it is in public interest that the business of the appellant should be preserved as it is the only indigenous player in the alcoholic beverage market and its collapse would lead to a monopoly thereby undermining consumer interests.

10. On the substance of the issue, the respondent's position is that the appellant has not presented any new facts to enable this court exercise discretion in its favour. It contends that all the financial documents including its loan agreement and extracts of its cash flow showing that it

is unable to comply with the court order were all available to it when it filed its initial application for stay. It further submits the issues raised are clearly *res-judicata* as the court has already exercised its inherent jurisdiction and granted a conditional order of stay.

11. While the respondent admits that the National government has taken certain measures to deal with the COVID 19 pandemic, it submits that the appellant has not exercised due diligence in this matter. It points out that this has been a longstanding tax dispute that has been ongoing since 2006 and the matters before the Tax Appeal Tribunal date back to 2015 and 2017 respectively hence the appellant knew that it had a contingent liability before the COVID 19 pandemic for which it ought to have made provision under the application accounting standards.

12. The respondent has also emphasised that the COVID 19 pandemic is not a reason for the court to review the terms under which it imposed the conditions for stay as these conditions obtained at the time the court issued the initial order. It also urged the court to consider that it would be unreasonable to deny the respondent money for the same reason that the money is required to fight the same COVID 19.

13. At this stage it is important to recall that the application before the court on 16th March 2020 was for stay pending appeal invoking the court's jurisdiction under **Order 42** of the **Civil Procedure Rules**. Since the application had been brought timeously, I was largely influenced by the deposition of Tabitha Mukami Karanja sworn on 13th March 2020 that, "*the appellant was ready and willing to abide with any condition that this court may issue in allowing the application.*"

14. For the sake of completeness, I will set out what I stated in the ruling dated 16th March 2020:

[4] I have heard the submission from counsel on sides and I take the following view of the matter. First, the appellant is entitled to exercise its statutory right of appeal. Second, the respondent is entitled to the fruits of its judgment in this case to collect what the Tribunal has adjudged to be the taxes to be paid by the appellant. Third, the court should ensure that the appeal is not rendered nugatory by imposing substantial loss on the appellant rendering the appeal itself otiose.

[5] I have considered these factors and I find that the appellant is a going concern and the action by the respondent may cripple its operations. However, it must secure some of the taxes which have been long outstanding.

15. The result of my consideration of the interests of the appellant and those of the respondent resulted in the condition I imposed for the stay. I have considered the facts set out by the appellant and I find that nothing new has arisen in regard to the nature of the appellant's business in relation to its tax liability hence I decline to vary the order and grant the appellant an unconditional order of stay pending appeal.

16. As regard the offer by the appellant to deposit the sum of Kshs. 10,000,000/- in an interest bearing account opened in the joint names of the appellant's advocates and respondent, I am also unable to accede to this request. The result of the previous order was to balance the respective positions of the parties. The sum of Kshs. 10,000,000/- bears little in relation to the adjudicated tax liability and the circumstances of this case. As recently as 24th April 2020, during the COVID-19 pandemic, the Court of Appeal in **CMA CGM (K) Limited v Commissioner of Domestic Taxes NRB CA Civil Appl. No. 83 of 2020 [2020] eKLR**, 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.

17. For the reasons I have stated, I dismiss the Notice of Motion dated 7th April 2020 with costs.

18. This ruling shall apply to the similar application in Tax Appeal No. E013 of 2020.

DATED and DELIVERED at NAIROBI this 11th day of MAY 2020.

D. S. MAJANJA

JUDGE

Mr Kiragu Kimani with him Mr Ruto instructed by Hamilton Harrison and Mathews Advocates for the appellant.

Mr Ontweka with Mr Ochieng, Advocates instructed by Kenya Revenue Authority for the Commissioner of Domestic Taxes.