



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**IN NAIROBI**  
**CORAM: MURGOR J.A. (IN CHAMBERS)**  
**CIVIL APPLICATION NO. 88 OF 2014**

**BETWEEN**

**MJENGO LIMITED.....APPLICANT**

**AND**

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

*(An application for temporary stay of execution from the Judgment and decree of the High Court of Kenya at Nairobi (Musinga, J) dated 25<sup>th</sup> January 2013*

in

***H.C. Income Tax Appeal No. 1 of 2011)***

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**RULING**

On the 30th April 2014, I declined to certify this matter as urgent having been unable ascertain the necessity of a certificate of urgency.

The matter before me relates to a judgment and decree of *Musinga J*, (as he then was) delivered on 25<sup>th</sup> January 2013, wherein the High Court upheld the finding of the Local Committee.

Briefly the respondent carried out an audit of the applicant's business where it established that the applicant was engaged in the business of importing and packaging rice for sale. During the audit it was found that the applicant had claimed an industrial building allowance for which it was not entitled as the applicant was not carrying on the business of a manufacturer.

Subsequently, the respondent raised Tax Assessment No. 0305200600073 in respect of financial year 2006 of an amount of Kshs.2,761,932/-. The applicant being dissatisfied with the assessment filed a memorandum of appeal to the Local Committee claimed that it (the applicant) had erred in claiming industrial building allowance, but should instead have claimed an Investment Deduction. The Local Committee was required to determine whether the applicant was a manufacturer within the meaning of the Act, and therefore entitled to benefit from the Investment Deduction, of which only manufacturing

companies were eligible. The applicant submitted that it was a manufacturing firm registered by the Kenya Bureau of Standards as such, and had paid the relevant levies as required by manufacturers. Upon consideration of the evidence and the submissions, the Local Committee made a finding that the applicant was not a manufacturer as defined within the Income Tax Act, and further, that cleaning and repackaging of rice was not a manufacturing process since, the appellant's processes commenced with the rice product and ended up with the rice product, albeit in smaller packages for the convenience of consumers.

The applicant was aggrieved with the decision of the Local Committee, and filed an appeal to the High Court, which appeal was subsequently dismissed.

Being dissatisfied with the decision of the High Court the applicant filed a Notice of Appeal to this Court on 7<sup>th</sup> February 2014, and on 9<sup>th</sup> April 2014 filed a Certificate of Urgency dated 9<sup>th</sup> April 2014, and supported by an affidavit sworn by *Bonface Munyao Mumbi* of the same date, expressing an apprehension on the part of the applicant that unless restrained by this Court, the respondent would rush to enforce collection of the disputed taxes which would greatly jeopardize the applicant's appeal. It was this Certificate of Urgency that I was requested to certify as urgent, but declined to do so.

The application was referred back to me under **rule 55** of this Court's rules for hearing inter partes, and when the parties appeared before me on 5<sup>th</sup> June 2014 learned counsel for the applicant, *Mr. Omari* holding brief for *Mr. Bonface Muumbi* submitted that the Certificate of Urgency was in respect of the Notice of Motion dated 9<sup>th</sup> April 2014, seeking an order of stay of execution pending the hearing and determination of an intended appeal. Counsel submitted that as a result of the ruling the respondent was demanding a sum of Kshs. 3,559,466/- in respect of alleged unpaid taxes, interest and penalties for the tax year 2006; that the amount is disputed, and unless this Court grants an order of stay of execution, there is nothing to prevent the respondent from executing against the applicant to recover the disputed taxes. Counsel continued, that the applicant had received several letters of demand from the respondent. It was the applicant's contention that, the grant of orders would not occasion any prejudice to the respondent and that applicant has an arguable appeal, which has a very high chance of success.

On his part *Mr. Matuku*, learned counsel for the respondent opposed the application and submitted that the application was not urgent. Counsel confirmed that the letters were from the respondent, but that, the letters were mere requests for the payment of taxes, which the applicant was advised to pay to avoid the further accrual of interest and penalties, with a further request that the applicant contact the respondent's officers, should it have any queries; that the applicant had not responded to any of the letters, nor had it made any effort to explain the reasons for failure to payment. Counsel explained that the requests for payment were in respect of different tax years; that the letter of 16<sup>th</sup> May 2013 was for tax year 2006, where the amount claimed was Kshs. 2,761,932/-, while another was for tax year 2007 where the amount claimed was Kshs. 9,232,704/- and therefore it did not relate to the claim in question. Counsel concluded that it was in the applicant's interest to make payment, and in the event the appeal was successful, the sums could always be refunded under section 105 of the Income Tax Act.

I have again considered this matter, and after considering the pleadings and having heard the rival submissions of counsel, I am still not persuaded that this matter should be imposed on the full court by way of an urgency certificate.

I am unable to establish from whence the urgency arises. The letters from KRA that counsel for the applicant has referred me to, are routine letters of request for payment of the tax amount owed for the two tax years of 2006 and 2007. Counsel for the respondent has submitted that these are routine letters, which merely notify and request the applicant to make the payments to avoid accrual of interest and penalties, or to contact the respondent officials should it have any concerns or queries. There are no letters on the record from the applicant to show that it has taken up this offer, or explained the reason for non-payment. Consequently, I see no threat upon which to base a Certificate of Urgency.

In the circumstances, I again decline to grant a certificate of urgency and will therefore uphold the decision made on 30<sup>th</sup> April 2014. The costs of the application for urgency to be in the main application.

***DATED and DELIVERED at NAIROBI this 27<sup>th</sup> day of JUNE, 2014.***

**A.K. MURGOR**

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**JUDGE OF APPEAL**

I certify that this is a  
true copy of the original.

**DEPUTY REGISTRAR**