



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D.S. MAJANJA J.

TAX APPEAL NO. E024 OF 2020

BETWEEN

AFRICA OIL KENYA BV APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES..... RESPONDENT

(Being an appeal against the judgment of the Tax Appeals Tribunal made on 27th March 2020 in Nairobi Tax Appeal No. 347 of 2018)

RULING

Introduction

1. The application for consideration by the court is the appellant's Notice of Motion dated 8th April 2020. It seeks orders in the nature of stay arising from the decision of the Tax Appeal Tribunal made in favour of the respondent ("the Commissioner") to the extent that the Tribunal ordered that, "Demand for Kshs. 2,293,334,065.44 being VAT on farm-out transactions for 2011, 2012 and 2016 be reviewed to exclude assessment in respect of the 2011 and 2012." [Emphasis mine]

2. As a result of the decision, the Commissioner issued an agency notice under **section 42** of the **Tax Procedures Act** to Citi Bank Kenya demanding Kshs. 2,293,334,065.44 on account of VAT owed by the appellant. It is this action that has precipitated the Notice of Motion which seeks the following orders:

[1] This application be certified urgent and heard ex parte in the first instance for the purposes of prayers 2, 4 and 6.

[2] There be a stay of execution of the judgment and decree of the Tax Appeals Tribunal at Nairobi delivered on 27th March 2020, pending the hearing and determination of this application.

[3] There be a stay of execution of the judgment and decree of the Tax Appeals Tribunal at Nairobi delivered on 27th March 2020, pending the hearing and determination of this appeal.

[4] A temporary injunction do issue restraining the Respondent whether by itself, its officers, employees, servants and/or agents, from enforcing the Agency Notice dated 7th April 2020 served on Citi Bank Kenya Limited by the Respondent, for the sum of Ksh.2,293,334,065 on account of alleged Value Added Tax due to the Respondent from the Appellant, pending the hearing and determination of this application.

[5] A temporary injunction do issue restraining the Respondent whether by itself, its officers, employees, servants and/or agents, from enforcing the Respondent's Agency Notice dated 7th April 2020 served on Citi Bank Kenya Limited by the Respondent, for the sum of Ksh.2,293,334,065 on account of alleged Value Added Tax due to the Respondent from the Appellant, pending the hearing and determination of this appeal.

[6] In the alternative to prayer 4 above, there be a stay of the Respondent's Agency Notice dated 7th April 2020 served on Citi Bank Kenya Limited by the Respondent, for the sum of Ksh.2,293,334,065 on account of alleged Value Added Tax due to the Respondent from the Appellant, pending hearing and determination of this application.

[7] In the alternative to prayer 5 above, there be a stay of the Respondent's Agency Notice dated 7th April 2020 served on Citi Bank Kenya Limited by the Respondent, for the sum of Ksh.2,293,334,065 on account of alleged Value Added Tax due to the Respondent from the Appellant, pending hearing and determination of this appeal.

[8] The costs of this application be provided for.

3. The application is based on the supporting and further affidavit of Mark Dingley, a director of the appellant, sworn on 8th and 15th April 2020 respectively. The Commissioner opposed the application through the replying affidavit of Geoffrey Njuguna, the respondent's Chief Manager of the International Tax Office, sworn on 14th April 2020.

Principles for grant of stay

4. Counsel for both parties; Ms Mwangi for the appellant and Mr Ochieng for the Commissioner made brief oral submissions in support of their respective positions. Before I consider the factual basis for my decision, let me recap the principles that guide the exercise of the court's discretion in deciding whether or not to grant an order of stay. **Order 42 Rule 6 (2)** of the **Civil Procedure Rules** provides the starting point by setting out the conditions which an applicant must meet before the court can grant an order of stay. First, the appellant must demonstrate substantial loss may result unless the order of stay is made. Second, the application must have been made without undue delay and third, the appellant must give such security as the court order for the due performance of the decree or order as the case may be. Our courts have held in several cases that the power to order stay is discretionary and must be exercised in such a way that the appeal is not rendered nugatory or academic. In addition, the court ought to consider the facts and circumstances of each case (see **Halai & Another v. Thornton & Turpin (1963) Ltd [1990] KLR 365** and **Butt v Rent Restriction Tribunal [1982] KLR 417**).

5. It is agreed by both sides that the court has jurisdiction to order stay of execution pending the hearing and determination of the appeal. Further there is no dispute regarding the fact that the application has been brought promptly.

Appellant's Case

6. The appellant has stated that it is ready and willing to offer security but submitted that the court should consider several factors in making the order. Mr Dingley deponed that the appellant does not generate revenue as it is in the oil exploration and appraisal stage as evidenced by its audited financial statements for 2018 which show that it had a current working capital deficit of USD 218,393,171 and a current cash balance of USD 2,605,319. That its financial position had deteriorated to a current working capital deficit of USD 226,822,164 and a cash deficit of USD 2,871,657 as per the draft financial statements for December 2019. He further deponed that the appellant's current monthly running costs average about USD 200,000 hence an order for security for any sum above USD 100,000 would jeopardise the appellant's operation including office running costs and payment of employees' salaries. The appellant urged the court to take into account the state of the international oil industry evidenced by decline in international oil prices as a result of the COVID-19 pandemic which has affected its ability to raise funds.

Commissioner's Case

7. The Commissioner opposed the application. It argued that since the Tribunal has rendered a decision in its favour, it has no option but to enforce collection of the tax determined by the decision since there is no provision for standing over the tax pending appeal to High Court. It urged the court to take judicial notice of the fact that the taxes claimed relate to the period between 2012 and 2016 and that the respondent should now enjoy the fruits of the judgment by being allowed to enforce the decision of the Tribunal. It also urged the court to consider the fact that the appellant has enjoyed a stay of execution for a period of over 3 years since the objection was lodged in 2017 hence there is no reason to extend the period of uncertainty which exposes to the Commissioner the risk of not recovering the tax.

8. In relation to the appellant's offer to provide security, the Commissioner submitted that it expected the appellant to have put in place contingency measures to address the negative outcome from the Tribunal such as making provision for payment of whatever amount. It urged the court to consider that the government is in dire need of money and the security should only be issued in form of actual payments as this will ensure that the money is made available to meet the current national needs.

Determination

9. The appellant has offered to provide security to the extent of Kshs. 10,000,000.00 on account of its financial difficulties. Apart from submitting that the security offered was too little in relation to the amount of tax demanded, the Commissioner referred to my recent decision in **Keroche Breweries Limited v Commissioner of Domestic Taxes HC Comm ITA No. E021 of 2020 (UR)** where I ordered payment of Kshs. 500 million as security and submitted that I should order the same amount.

10. Counsel for the petitioner submitted that given the circumstances of this case, the court should not order security in light of the decision in **Bella Vista Restaurant Mombasa Limited v Kenya Revenue Authority MSA Pet. No. 44 of 2014 [2016] eKLR** where the court recognised the financial difficulties of the petitioner and refused to order for security on the ground that security must be backed by financial arrangements which would have led to closure of the petitioner's business in view of the huge tax assessment. Counsel also relied on **Awal Limited v Commissioner of Investigations and Enforcement HC COMM. ITA No. 26 of 2017 [2020] eKLR** and **Victrociset S.P.A. Kenya v Commissioner of Domestic Taxes NRB HC JR No. 28 of 2018 [2018] eKLR** where the court granted an unconditional stay of execution after taking into consideration the financial difficulties the companies faced.

11. The duty of the court is to balance the interests of the appellant and to ensure that the appeal is not rendered nugatory or that its financial position is imperilled on the one hand by enforcement of the Tribunal's decision. On the other hand, this court recognises that the Tribunal has not made a decision that the Commissioner is entitled to enforce absent an appeal and an order of stay. The Commissioner does not dispute the factual circumstances regarding the appellant's nature of business and which I am entitled to take judicial notice particularly

given that the National Government has declared COVID-19 a national pandemic.

12. What has caused me some anxiety is the nature of the order the Commissioner seeks to enforce. This brings to fore the nature and effect of a stay order. A stay order can only stop or restrain a positive order or action resulting from the judgment or order (see ***Western College of Arts and Applied Sciences v Oranga and Others [1976 – 80] 1 KLR 63***). The judgment in favour of the Commissioner was that the demand for VAT be reviewed to exclude certain assessments for the year 2011 and 2012. There is no evidence that the Commissioner has complied with the judgment and reviewed the amount of Kshs. 2,293,334,065.44 it initially demanded from the appellant and which has for all intents and purposes has been set aside by the Tribunal subject to the review. It is the same amount that the Tribunal ordered to be reviewed that the Commissioner has now sought to enforce by issuing an agency notice.

13. The effect of the agency notice is that the Commissioner has ignored the decision of the Tribunal. Since the initial assessment and demand has been varied in accordance with the Judgment, it is incapable of enforcement until the Commissioner complies with the Judgment. I therefore find that the Commissioner lacked a legal basis to issue an agency notice on the basis of the Tribunal Judgment. It therefore follows that I cannot order the appellant to provide security where the tax liability has not been determined as directed by the Tribunal.

Disposition

14. For the reasons I have set out above, I allow the Notice of Motion dated 8th April 2020 on the following terms:

a. An order of stay be and is hereby issued staying execution of the judgment of the Tax Appeal Tribunal dated 27th March 2020 in Tax Appeal Tribunal Appeal No. 347 of 2018 together with the Agency Notice dated 7th April 2020 served on Citi Bank Kenya Limited for the sum of Kshs. 2,293,334,065 pending the hearing and determination of this appeal or until further orders of the court.

b. The costs of this application shall be in the appeal.

c. The court shall adjourn to issue directions for the hearing and determination of the appeal.

DATED and DELIVERED at NAIROBI this 21st day of APRIL 2020.

D. S. MAJANJA

JUDGE

Ms Mwangi with her Ms Omondi instructed by Coulson Harney LLP Advocates for the appellant.

Mr Ochieng, Advocate with him Ms Mburugu, Advocate and Ms Mwangera, Advocate instructed by Kenya Revenue Authority for the Commissioner of Domestic Taxes.