

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 109 of 2016

SUBRU MOTORS LIMITED.....APPELLANT

VERSUS

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

RULING

- 1) This Tribunal delivered its judgment on 10th July 2020 dismissing the Appellant's appeal. The Appellant being dissatisfied with the result filed a Notice of Appeal in exercise of its right of appeal.
- 2) By an application dated 21st August 2020 supported by the affidavit of JOSEPH GITERE NYAMU of even date and filed on 24th August 2020, the Appellant has moved the Tribunal under Certificate of Urgency seeking an order of stay of execution of the Respondent's Objection Decision dated 19th July 2016 pending the hearing and determination of an appeal to be lodged in the High Court.
- 3) It does appear that no appeal had been filed at the time of filing of the Appellant's Notice of Motion but the Supporting Affidavit of JOSEPH GITERE KOMU exhibits a Memorandum of Appeal at annexure JGN3 thereof.

- 4) The Respondent in resisting the Appellant's application filed Grounds of Opposition dated 27th August 2020.
- 5) The Appellant's principal ground of seeking an order of stay of execution is that its intended appeal will be rendered nugatory in the event an order of stay is not granted. On the other hand, the Respondent opposes the application on grounds that this Tribunal lacks jurisdiction to hear and determine the Appellant's application. So to speak, the Tribunal is *functus officio* on matters which an appeal has been proffered to the High Court against its decision.
- 6) When the application came up for *inter-partes* hearing on 15th September 2020, The Appellant relied on the Notice of Motion, Supporting Affidavit and Written Submissions while the Respondent relied on the Grounds of Opposition and Written Submissions and the authorities attached thereto.
- 7) The Appellant has based his application on sections 18 and 32 of the Tax Appeals Tribunal Act (TAT).
- 8) The Tribunal considers that the two sections of the TPA are irrelevant for the purposes of this application.
- 9) For the Appellant's application to be determined on its merits, this Tribunal must be satisfied that it is clothed with the legal mandate to grant an order of stay of execution pending the hearing and determination of the Appellant's appeal to the High Court.
- 10) In the circumstances where this Tribunal has been confronted with an application for stay of execution pending appeal, the balance has always

tilted towards refusing to make such orders. There is no express provision of the law that permits the Tribunal to stay its orders.

- 11) The Tribunal considers itself *functus officio* upon delivery of its judgment or ruling except where it is moved to exercise its powers to review its decision to correct an error or a mistake.
- 12) The mistake should not be one that requires great reasoning in deciding but would be what is known as a “**slip of the pen**”, in judicial circles.
- 13) Section 18 of the TPA which the Appellant sought to rely on states as follows:-

“Where an appeal against a tax decision has been filed under this Act, the Tribunal may make an order staying or otherwise effecting the operation or implementation of the decision under review as it considers appropriate for the purposes of securing the effectiveness of the proceeding and determination of the appeal”.
- 14) The Appellant’s reliance on this section of the law is with respect erroneous. The stay envisaged thereunder relates to a decision by the Commissioner against which an Appellant appeals to this Tribunal under Section 52(1) of the Tax Procedures Act.
- 15) The stay envisaged thereunder relates to the Tribunal staying the operation of the Respondent’s decision where an appellant elects to file an appeal to this Tribunal in exercise of the right donated by Section 52(1) of the Tax Procedures Act. If so, the Tribunal may stay implementation of any action by the Respondent until the appeal before the Tribunal is heard and determined.

- 16) The law does not leave the Appellant without any avenue for recourse. The Appellant is expected to approach the High Court under the Civil Procedure Act and the rules promulgated thereunder as provided under Rule 20 of the Tax Appeals Tribunal (Appeals To The High Court) Rules for any reprieve.
- 17) The Tribunal having rendered its final verdict and the Appellant has appealed to the High Court, under Section 54 of the TPA, the Tribunal lacks jurisdiction to entertain the application or grant the orders sought.
- 18) In the final analysis, the Appellant's application is dismissed with no order as to costs.

DATED and DELIVERED at NAIROBI this 18th day of September, 2020

**PATRICK LUTTA
CHAIRPERSON**

**HELEN BILA
MEMBER**

**MWAI MBUTHIA
MEMBER**

**ELISHAH NJERU
MEMBER**

**HABON FARAH (MRS)
MEMBER**