REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 689 OF 2021

BIDCORO AFRICA LIMITED... APPLICANT

-VERSUS-

COMMISIONER OF CUSTOMS & BORDER CONTROL.....RESPONDENT

RULING

1. The Applicant is a limited liability company incorporated in Kenya and is involved in the manufacturing of beverage juices from concentrate compounds.

2. The Respondent is a principal officer of the Kenya Revenue Authority appointed under the Kenya Revenue Authority Act. Kenya Revenue Authority is an agency established for the collection of Government revenue and related functions.

3. Following a desk audit, the Respondent served the Applicant with a demand of Kshs 104,562,636.00 being additional import duty, VAT and penalties arising out of HS classification of the Applicants imports.

4. Being aggrieved with the Respondent's decision, the Applicant filed an Appeal before the Tribunal on 27th October 2021. The Appeal was filed together with an application brought by way of Notice of

Motion dated 12th October 2021 supported by an Affidavit of Judy Momanyi the Appellant's Group Head of Legal Department, sworn and filed on the same date.

5. The application sought for the following Orders being that;

   (i) For reasons to be recorded the application herein be certified as urgent and be heard ex parte in the first instance in respect of prayers herein.

   (ii) A stay be issued in respect to the decision by the Commissioner of Customs and Border Control Department delivered on 4th October 2021 directing the Appellant to pay One hundred and four million five hundred sixty-two thousand, six hundred and thirty-six Kenya Shillings (Kshs 104,562,636) within 30 days of the decision pending hearing and determination of this application inter parties and or until further orders of the Honourable Tribunal.

   (iii) The Honourable Tribunal be pleased to grant a stay of the decision by the Commissioner of Customs and Border Control Department delivered on 4th October 2021.

(iv) The Honourable Tribunal stay the Respondent's application of tariff Number EAC/CET HS Code 2009 and instead EAC/CET HS Code 2106 90 20 continue to apply to all 24 compounds under Sunquick and Suntop products imported by the Applicant pending the hearing and determination of the Appeal challenging the decision by the Commissioner, Customs and Border Control department delivered on 4th October 2021.

(v) The costs of this application be provided for.

6. The Appellant in support of the application filed written submissions dated and filed on the 18th November, 2021. The Applicant substantively addressed the material issues of whether the Applicant has demonstrated the presence of an arguable appeal, whether the appeal will be rendered nugatory if the stay is not granted and whether security ought to be provided for prior to the issuance of any orders of stay. The Applicant made reference to various statutory and judicial authorities in its written submissions.

7. The Respondent in opposition to the application filed a Replying Affidavit sworn by Lydia Njagi, a Supervisor of the Respondent sworn on the 9th November 2021 and filed on 11th November 2021. The

Respondent subsequently filed written submissions dated 16th October 2021 and filed on 15th November 2021.

8. The Respondent opposed the assertion by the Applicant that, the Sunquick and Suntop compounds contained high levels of juice concentrates, flavours, oils, and colors, making it unfit for direct sale to consumers or direct consumption.

9. The Respondent also opposed the assertion that the Respondent has not availed any laboratory analysis to the Applicant in respect of any of the twenty-four (24) compounds. The Respondent submitted that its Ruling was objectively informed by several laboratory tests that revealed substances contained in the fruit juices were of a negligible percentage did not affect the natural characteristics of the product.

10. On the issue of staying of orders, the Respondent directed this Tribunal to the **Subru Motors Limited v Commissioner of Domestic Taxes [2020] eKLR**. According to the Respondent, Justice D.S Majanja reiterated his assertions in **Africa Oil BV v Commissioner of Domestic Taxes COMM ITA No. E024 of 2020 [2020] eKLR** and **Choppies Enterprises Limited v Commissioner of Domestic Taxes [2020] eKLR.** The court can be quoted as follows:

"The duty of the court in such circumstances, is to balance the interests of both parties. On the one hand, to ensure that a business which is a going concern with the ability to pay taxes in the future does not collapse and in fact, continues to pay taxes as and when they fall due. On the other hand, the court must not unnecessarily impede the Respondent's statutory duty to collect taxes in accordance with the law."

11. The Respondent argued that whereas the grant for an order of stay is an exercise of judicial discretion based on facts presented by the parties, in order for the Tribunal to exercise this discretion the Applicant must make full disclosure of all circumstances including its financial position necessary for the court to make an appropriate decision. It is the Respondent's submission that the Applicant is a going concern as asserted in their Application and supporting Affidavit.

12. The Respondent further added that it is the Honourable Tribunal's power to order security in order to secure the taxes claimed by the Commissioner. The Applicant, the Respondent stated, had not tabled any evidence as proof of its inability to pay the assessed taxes or security.

13. Considering the amount of tax claimed is from 2017 to date, the Respondent proposed that the Honourable Tribunal grants conditional stay for prayer (iii) and (iv) subject to cash security of 50% on the tax claimed, that is Kshs 52,281,318.00 pending the hearing and determination of the Appeal.

Analysis and Determination

14. The Tribunal having considered the contents and purport of the facts separately deponed in the Affidavit in Support of the application and the Replying Affidavit and being appropriately guided by the elaborate written submissions filed by the parties proceeds to determine the application as hereafter.

15. The Tribunal is clothed with the necessary discretionary powers under Section 18 of the Tax Appeals Tribunal Act to make any appropriate orders of stay or against the implementation of the tax decision forming the substrum of the Appeal in such a manner that is calculated to afford the parties an opportunity to have the dispute determined in fair, just and proportionate proceedings that preserves the substrum of the appeal and does not render the adjudication process nugatory. The Section provides as follows:-

"Where an appeal against a tax decision has been filed under this Act, the Tribunal may make an order staying or otherwise affecting the operation or implementation of the decision under review as it considers appropriate for the purposes of securing the effectiveness of the proceedings and determination of the Appeal."

16. In **Multimedia University & Another –Vs- Professor Gitile N. Naituli (2014) eKLR** the Court of Appeal stated that when an applicant prays for orders of stay of execution the applicant must satisfy the court on the twin principles: First, the applicant must present an arguable appeal and second, the intended appeal would be rendered nugatory if the interim orders sought were denied.

17. The court in **Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2103[eKLR** stated that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous. On whether the appeal is arguable, it was held in **Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004** that it is sufficient if a single bona fide arguable ground of appeal is raised.

18. Justice Bosire JA (as he then was) in **Mrao Limited –vs- First American Bank Limited (2003) KLR 125**, observed that:

> *"...it is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."* He reiterated that the Applicant must have a prima facie case with a probability of success. He added that:
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> *"A prima facie case in a civil application includes but is not confined to a genuine and arguable case and that it is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."*

19. Madan, Law and Potter JJA in the case of **Habib Bank AG Zurich vs. Eugene Marion Yakub Civil Application Number Nairobi 43 of 1982**, held that probability of success means the court is only to gauge the strength of the plaintiff's case and not to adjudge the main suit at the stage since proof is only required at the hearing stage.

20. The Tribunal observed from the Memorandum of Appeal filed together with the Application that the Applicant had raised fourteen

grounds of appeal. While it was not necessary to consider more than one ground, the Tribunal was of the view that the Applicant had a prima facie case that called for rebuttal by the Respondent. In line with the holding in **Habib case (Supra),** the Tribunal could only examine proof of arguments by both parties during the hearing of the substantive appeal.

21. The Court in **Damji Pragji (supra)** observed that in considering an application the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal. In **Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227** the Court stated that:

> "*The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile, or invalid, but also means trifling. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.*"

22. The Tribunal considered the amount claimed by the Respondent to be so substantial that even if the amount was to be refunded in the event

that the Appellant was to succeed in its case, the injury caused to the business by withdrawal of the amount would be irreparable as to render the Appeal nugatory.

23. In **Industrial Cause No. 7715 of 2011, Elena Doudoladova Korir vs Kenyatta University [2014] KLR at (Nairobi)** the Court of Appeal held that;

> *"The High Court's discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly, the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay."*

24. In **County Executive of Kisumu vs County Government of Kisumu and 8 others Civil Application No. 3 of 2016** the Supreme Court held that: *"Each case has to be determined on its own merit and all relevant circumstances considered."* Similarly, in **Butt v Rent Restriction Tribunal [1982] KLR 417** the Court of Appeal while giving guidance on how a court should exercise discretion in an application of stay of execution and held that:

"The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

...

The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the exceptional circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal."

25. The Tribunal noted that in the present dispute, the Applicant is a going concern and no evidence had been shown of its inability to settle the amount claimed should it fail in its appeal. Furthermore, the Applicant is a resident company and it had not been shown that it was a flight risk. Moreover, the Tribunal did not see any prejudice to be suffered by the Respondent if a temporary stay was granted pending full hearing of the Appeal.

Disposition

26. In view of the foregoing, the Tribunal finds that the application has merit and that for the purposes of preserving the substrum of the Appeal the Orders that recommend themselves are as follows; -

    (i) Temporary Orders of stay of execution of the decision by the Commissioner Customs and Border Control Department delivered on 4th October 2021 be and are hereby granted pending hearing and determination of the Appeal.

    (ii) Temporary Orders of stay of execution of the Respondent's Application of tariff Number EAC/CET HS Code 2009 and instead EAC/CET HS Code 2106 90 20 continue to apply to all 24 compounds under Sunquick and Suntop products imported by the Applicant pending the hearing and determination of the Appeal challenging the decision by the Commissioner, Customs and Border Control Department delivered on 4th October 2021.

    (iii) Temporary stay of execution the Respondent's Application of tariff Number EAC/CET HS Code 2009 and instead EAC/CET HS Code 2106 90 20 continue to apply to all 24 compounds under Sunquick and

Suntop products imported by the Applicant pending the hearing and determination of the Appeal challenging the decision by the Commissioner of Customs and Border Control Department delivered on 4th October 2021.

(iv) The Appeal shall be heard on priority with a prior notice of hearing served upon the parties.

(v) No orders as to costs.

27. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **23rd** day of **December, 2021.**

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ERIC N. WAFULA
CHAIRMAN

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CATHERINE N. MUTAVA
MEMBER

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ABRAHAM K. KIPROTICH
MEMBER

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ELISHA NJERU
MEMBER

....
GABRIEL M. KITENGA
MEMBER