



**Coast Bus (Mombasa) Limited v Kenya Revenue Authority & another (Civil Suit 79 of 2021) [2023] KEHC 155 (KLR) (20 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 155 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL SUIT 79 OF 2021  
OA SEWE, J  
JANUARY 20, 2023**

**BETWEEN**

**COAST BUS (MOMBASA) LIMITED ..... PLAINTIFF**

**AND**

**KENYA REVENUE AUTHORITY ..... 1<sup>ST</sup> DEFENDANT**

**PHILLIPS INTERNATIONAL AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

- [1] The notice of motion dated 23<sup>rd</sup> august 2021 was filed by the plaintiff pursuant to sections 1A, 1B, 3, 3A and 63(c) & (e) of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, as well as order 40 rules 1(a), 2 and 4 and order 51 rules 1 and 3 of the *Civil Procedure Rules, 2010*, for the following orders:
- [a] Spent
  - [b] Spent
  - [c] That the court be pleased to stay execution of the notice of distress and proclamation notice issued on the August 16, 2021 and all other consequential actions in relation thereto pending the hearing and determination of the application and subsequent suit;
  - [d] That the court be pleased to issue a mandatory order compelling the 1<sup>st</sup> defendant to lift/ revoke its notice of distress dated August 16, 2021 as against the plaintiff;
  - [e] That the defendants herein be restrained from interfering with and/or selling any property belonging to the plaintiff pending the hearing and determination of the application and the subsequent suit;



- [f] That the defendants be compelled to furnish the plaintiff with audited statements of account of the plaintiff's outstanding arrears/alleged tax arrears and the criteria used to compute the said alleged tax arrears;
- [g] That the defendants be restrained from harassing, intimidating or threatening to attach and auction off the plaintiff's proclaimed goods listed in the proclamation notices dated August 16, 2021 or any other assets whatsoever;
- [h] That the costs of the application be awarded to the plaintiff.
- [2] The application was premised on the grounds that, on the August 16, 2021, the 1<sup>st</sup> defendant arbitrarily issued a notice of distress and instructed the 2<sup>nd</sup> defendant to distrain for the unsubstantiated amount of Kshs 28,170,464.88 purporting the same to be tax arrears due from the plaintiff. The plaintiff therefore averred that unless restrained, the defendants will proceed and alienate and/or interfere with its financial and business operations by carting away its goods on account of unsubstantiated tax arrears, thereby grinding its operations to a halt. The plaintiff also averred that it is ready and willing to be subjected to a proper in-depth forensic audit to determine whether or not alleged tax arrears are in fact due from it. It added that it is only seeking an opportunity to prepare, present and ventilate its objection against the decision of the commissioner of domestic taxes before the tax appeals tribunal.
- [3] The application was supported by the affidavit sworn on August 23, 2021 by one of the plaintiff's directors, Mr. Mohamed Ajaz Mirza, in which the plaintiff set out the genesis of the dispute. Mr. Mirza averred that the plaintiff raised an objection to the tax assessment by the 1<sup>st</sup> defendant in respect of which the commissioner for domestic taxes rendered its decision on July 7, 2020, dismissing the objection. He explained that, at the time, he was in London for spinal injury treatment and was therefore not able to follow up the matter and give proper directions on the way forward; and that when he was able to resume duty, he wrote to the tax appeals tribunal vide an email dated July 26, 2021 attaching evidence of payment of appeal fees as well as a letter explaining, *inter alia*, the reason for the delay in filing the appeal.
- [4] At paragraph 7 of his replying affidavit, Mr. Mirza averred that he was shocked when, on August 16, 2021, the 1<sup>st</sup> defendant arbitrarily issued a notice of distress and instructed the 2<sup>nd</sup> defendant to levy distress for alleged tax arrears to the tune of Kshs 28,170,464.88. He consequently posited that, unless restrained, the defendants will proceed and alienate and/or interfere with the plaintiff's business operations by carting away the applicant's goods, thereby grinding the operations of the plaintiff to a halt.
- [5] Mr. Mirza further deposed that the plaintiff has, at all material times, been willing to offset and settle the rightful amounts/taxes due to the 1<sup>st</sup> defendant; and that it is ready and willing to be subjected to an in-depth forensic audit to determine the tax arrears, if any. He added that it is only fair and in the interest of justice that the orders sought are granted to enable the court to fairly adjudicate on the dispute; and that no prejudice will be suffered by the defendants that cannot be adequately compensated by an award of damages. Mr. Mirza annexed several documents to his affidavit (collectively marked Annexure "MMA-1") in support of his averments.
- [6] In response to the plaintiff's application, a replying affidavit sworn by Francis Kabubi Gitonga, an employee of the 1<sup>st</sup> defendant in its domestic taxes department, was filed herein on September 22, 2021. Mr. Gitonga set out the chronology of the pertinent events at paragraphs 8 to 28 of his affidavit and supported those averments by the documents marked Annexures Kra 1, Kra 2, Kra 3 and Kra 4. He asserted that the taxes claimed by the 1<sup>st</sup> defendant are justly due and payable by the plaintiff and therefore were properly distrained for. Mr. Gitonga further deposed that the plaintiff ignored the



advice given by the officers of the tax appeals tribunal and opted to file this suit instead; thereby failing to exhaust the laid down procedure for resolving the dispute. In his assertion, the taxes have crystallized for recovery by the defendants.

- [7] Upon directions being given herein that the application be canvassed by way of written submissions, Mr. Mutugi for the applicant filed his written submissions on July 7, 2022, thereby proposing the following issues for determination:
- [a] Whether the plaintiff has established a prima facie case with a probability of success;
  - [b] Whether the plaintiff will otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages;
  - [c] Which party will suffer greater harm from granting or refusing the remedy pending a decision on the merits?
- [8] On what amounts to a prima facie case, counsel relied on the viewpoint expressed by the Court of Appeal in *Moses C. Mubia Njoroge & 2 others v Jane W. Lesaloi & 5 others* [2014] eKLR and submitted that the plaintiff has presented evidence explaining why it was not in a position to file its appeal against the decision of the commissioner in time, and demonstrated that as soon as he was in a position to, the plaintiff took action by invoking the laid down procedure for appeal. Counsel also urged the court to note that the plaintiff is willing to pay what is rightfully due as tax arrears.
- [9] On whether the plaintiff will otherwise suffer irreparable injury which would not adequately be compensated by an award of damages, Mr. Mutugi submitted that the attached buses are the sole source of the plaintiff's income, and are in essence its tools of trade. He added that to allow the defendants to attach and auction those buses would in effect halt the plaintiff's business. He further submitted that it would amount to irreparable harm if the defendant were to take away the plaintiff's tools of trade before the court can ascertain the actual amount of tax arrears and allow the plaintiff a chance to repay what is duly owed.
- [10] As to which party would suffer the greater harm from granting or refusing the remedy sought pending a decision on the merits, Mr. Mutugi urged the court to find in favour of the plaintiff for the reason that the attached buses form the plaintiff's tools of trade. He made reference to the case of *Paul Gitonga Wanjau v Gathuthis Tea Factory Company Ltd & 2 others* [2016] eKLR and urged the court to find that the balance of convenience is in favour of the plaintiff. He accordingly prayed that the plaintiff's application be allowed with costs.
- [11] On her part, Ms. Almadi reiterated the genesis of the dispute at paragraphs 3 to 22 of her written submissions filed on June 6, 2022. She thereafter proposed the following issues for determination:
- [a] Whether the application is properly before this court;
  - [b] Whether the plaintiff has met the threshold for issuance of the interlocutory orders sought;
  - [c] Whether the court should grant the prayers sought in the application dated August 23, 2021.
- [12] It was the submission of Ms. Almadi that the plaintiff does not have the *locus standi* to present this dispute before the court, granted that it is challenging the 1<sup>st</sup> defendant's statutory duty to collect taxes that are in arrears. She urged the court to note that the plaintiff has annexed correspondence with the tax appeals tribunal; an indication that it is aware of the correct forum and procedure for challenging the decision dated September 7, 2020. Thus, counsel urged the court to strike out the suit as well as the application for having been prematurely filed. She relied on sections 51(1) of the *Tax Procedures Act*



and section 12(1) of the [Tax Appeals Tribunal Act](#), as well as the cases of [Republic v Commissioner of Domestic Taxes, Ex-Parte I&M Bank Limited](#) [2017] eKLR to buttress her submissions in this regard.

- [13] On the merits of the application, counsel made reference to the principles enunciated in [Giella v Cassman Brown & Co. Ltd](#) [1973] EA 358 at p. 360 and reiterated in [Ace Engineering & Building Contractors Limited v National Bank of Kenya Limited](#) [2019] eKLR and urged the court to find that the plaintiff has utterly failed to satisfy any of those conditions. In her submission, from the material placed before the court, the overall impression given is that it is the plaintiff who is at fault; granted the provisions of sections 32(1) and 41 of the [Tax Procedure Act](#) which provides for distress orders as a tax collection mechanism available to the 1<sup>st</sup> defendant. In the premises, Ms. Almadi prayed for the dismissal of the plaintiff's application. She however proposed that, should the court be inclined to allow the application then it should consider making an order for security for the payment of the taxes due from the plaintiff pursuant to section 36 of the [Tax Procedures Act](#).
- [14] I have given due consideration to the application, the averments in the parties' respective affidavits as well as the written submissions filed herein by learned counsel. By way of summary, it is common ground that a tax assessment was done by the defendant of the plaintiff's income for the period 2015-2018 based on the returns made by the plaintiff (see annexure Kra1). The tax due was accordingly assessed at Kshs 188,326,943.40, which the plaintiff objected to per the document marked annexure Kra 3. Thereupon a re-assessment was done by the commissioner for domestic taxes that formed the basis of the notice of distress dated August 16, 2021 for Kshs 28,170,464.88 (at page 2 of the plaintiff's application). Apparently the plaintiff did not act on the notice with promptness and hence, the 1<sup>st</sup> defendant issued instructions to the 2<sup>nd</sup> defendant to levy distress in terms of the notice aforementioned.
- [15] In the premises, the main issue for consideration is the question whether the plaintiff has made out a good case for the issuance of the interlocutory orders prayed for in its application dated August 23, 2021. However, before delving into the merits of the application, it is imperative for the court to consider the preliminary point raised by counsel for the 1<sup>st</sup> defendant, namely whether the application, and by extension the suit, is premature.
- [16] Section 52 of the [Tax Procedures Act](#) provides that:
- “A person who is dissatisfied with an appealable decision may appeal the decision to the Tribunal in accordance with the provisions of the [Tax Appeals Tribunal Act](#), 2013.”
- [17] In the same vein, section 12(1) of the [Tax Appeals Tribunal Act](#) provides that:
- “A person who disputes the decision of the commissioner on any matter arising under the provisions of any tax law may, subject to the provisions of the relevant tax law, upon giving notice in writing to the commissioner, appeal to the Tribunal...”
- [18] Hence, while it is the case that an attempt was made by the plaintiff to appeal the decision of the commissioner to the tax appeals tribunal as by law provided, that appeal was belated and therefore a non-starter. The plaintiff's own annexures show that the tribunal advised the plaintiff accordingly, and in particular thus:
- “...kindly approach the tribunal with the relevant documents, i.e. certificate of urgency and a supporting affidavit...”



[19] This was presumably to enable the plaintiff seek leave to appeal out of time and show why the appeal could not be filed in time. Instead of pursuing the recommended course of action, the plaintiff opted to file this suit; which in my considered view was ill-advised in the light of the doctrine of exhaustion. In *Speaker of National Assembly v Karume* [1992] KLR 21 the Court of Appeal held that:

“Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”

[20] Likewise, in *Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR, the Court of Appeal restated its position thus:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The ex parte applicants argue that this accords with article 159 of the Constitution which commands courts to encourage alternative means of dispute resolution.”

21.

(21) In the circumstances, it is plain that the plaintiff’s application is premature; and therefore need not be subjected to a merit analysis. The same is hereby struck out with no order as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20<sup>TH</sup> DAY OF JANUARY 2023.**

.....

**OLGA SEWE**

**JUDGE**

