



**Zohari Credit Limited v Kenya Revenue Authority; Vinepack Limited (Interested Party)
(Constitutional Petition E005 of 2022) [2023] KEHC 1238 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1238 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CONSTITUTIONAL PETITION E005 OF 2022**

RB NGETICH, J

FEBRUARY 23, 2023

**IN THE MATTER OF ARTICLES 2(6), 10,19,20(1), (2), (3), & (4),
21 (1) & (2), 22(1), 23 (1), (2) & (3) (A)(C) & (E), 40 (1) AND 47
(1) & (2) OF THE CONSTITUTION**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE
FUNDAMENTAL RIGHTS AND FREEDOM UNDER ARTICLES 40(1)
AND 47 (1) & (2) OF THE CONSTITUTION**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF
SECTION 4(1) & (2) AND 12 OF THE FAIR ADMINISTRATIVE
ACTION NO.4 OF 2015**

AND

**IN THE MATTER OF RULES 3, 4, 11 AND 13 OF THE
CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE**

RULES

BETWEEN

BETWEEN

ZOHARI CREDIT LIMITED PETITIONER

AND

KENYA REVENUE AUTHORITY RESPONDENT



AND

VINEPACK LIMITED INTERESTED PARTY

RULING

1. The application before the court is dated March 7, 2022, seeking conservatory orders against the Respondent, its servants, agents, officers, employees, assigns and staff to allow, facilitate and enable the petitioner immediate inspection of the fully automatic 7500-8000 BPH bottling line on 750ml bottle with Ropp cap front and back sticker label for liquor filing application and the Automatic rotary 10 Head Crown Capping machine, Model Capmatic (together the equipment) located at the interested party's Premises Thika pending the hearing and determination of the application and of the suit.
2. The grounds on the application are that the applicant leased the equipment to the interested party; the equipment was self-funded and partially through bank loan facility from Sidian Bank. The interested party defaulted in the payment of taxes and the Respondent confiscated the equipment which is the property of the Applicant; that the Respondent is in contempt of a court order of August 12, 2018 to release the equipment to the applicant. The continued detention poses imminent prejudice to the Applicant under Article 40 of the *constitution* and the right to fair administrative action; that the Respondent is punishing a non-defaulting taxpayer.
3. The application is supported by affidavit sworn March 7, 2022 by Irene Wanjiru Karuga the Chief Executive Officer of the applicant. She reiterated the grounds of the application and stated that the Respondent lacks the justification to arbitrary confiscate its equipment's; and the continued unlawful and illegal detention of the equipment has occasioned economic loss to the applicant.
4. In response, the Respondent filed Replying Affidavit sworn on May 12, 2022 by Dennis Kibara. He averred that on October 6, 2020, a Multi-Agency Team intercepted, seized and detained a lorry Registration No KCM 939 along Garissa Road which was suspected of ferrying illicit alcoholic drinks, a team was sent to verify the consignment and it found 700 casks of fiesta ICE brand with counterfeit excise stamps which was manufactured by Vinepark Limited. When a search was conducted at the premises, several crates of the Fiesta ICE brand were recovered with genuine and counterfeit stamps affixed on them and they were seized together with the machinery inside the building.
5. That subsequently the Director of the Vinepark Limited and his employees were arrested and criminal charges preferred and criminal case having been filed, it was paramount to preserve the premises pending a site visit hearing; after a court visit by consent of the parties, it was agreed that the premises to remain closed at all times; the Directors were allowed to access the store adjacent to the area of interested party to remove materials; that the Respondent is not a party to the Consent.
6. He further stated that any loss incurred by the petitioner should be borne by the Interested party as the Respondent cannot be faulted for enforcing the law and continued seizure and detention of the machinery is pursuant to the court's directions of November 27, 2020.
7. He further stated that the court order directing the release of the seized machinery has not been attached. He denied the detention was unlawful and stated that the machinery which is subject to the criminal case proceedings cannot be released pending the hearing and determination of the criminal case.
8. The application was heard by way of written submissions.



Petitioner's written submissions

9. Counsel for the Applicant filed written submissions dated June 21, 2022 and submitted that the petitioner should be allowed to inspect and maintain the equipment as the equipment is the property of the petitioner, and the same leased to the interested party. The Machinery should not be seized due to the interested party's alleged default of their tax obligation.
10. Counsel submitted that criminal and tax liability is not transferable and the petitioner cannot be punished for the interested party's alleged fault. Counsel's argument is that the Respondent cannot impose a criminal sanction on the Petitioner for the wrong doings of the interested party and cited the case of *John Mbaabu and John Mutembei Murathi v Kenya Revenue authority* (2020) where the court allowed the release of motor vehicles belonging to third parties upon proof of ownership.
11. Counsel further submitted that due to the delicate nature of the Machinery and the uncertain conditions in which the equipment is being stored, they may deteriorate resulting to significant loss in the substantial investment made.
12. That the petitioner has met the threshold of issuing conservatory orders as he has demonstrated it will suffer prejudice if not allowed to inspect the machinery; that the law does not require the Respondent to seize property belonging to a 3rd party or innocent tax payers and the Respondent is acting ultra vires and in reckless disregard to constitution right to protect the applicants right to property.
13. That the petitioner having demonstrated it is the rightful owner of the machinery, it should be allowed to access, inspect and maintain the equipment.
14. In conclusion counsel submitted that it is in the public interest for the Respondent to adhere by the rule of law and protect Constitutional Rights and the Obligations under Article 3(1) of the Constitution to defend and uphold the Constitution; and urged the court to allow the prayers in the application.

Respondent's submissions

15. Counsel for the Respondent submitted that this application ought to be made before the Criminal Court which seized the equipment and under Section 44 of the Tax Procedure Act, the Respondent has the right to seize property belonging to a taxpayer for purposes of recovering tax liability.
16. Counsel further submitted that conservatory orders should be declined and prayer to access the premises on daily basis is unreasonable and will greatly cause inconvenience to the Respondent as well as cause interference of the potential exhibits in the criminal court.
17. Counsel submitted that the applicant/petitioner has not demonstrated the prejudice to be suffered if the orders are not granted, and urged the court to dismiss the application.

Analysis and determination

18. I have considered ground of the application, averments in affidavits and submissions filed. Before a court grants conservatory orders, it must establish that the applicant has demonstrated that there is prima facie case has been established and that prejudice shall be suffered if the orders are not granted.



19. In the case of *Mrao Ltd v First American Bank of Kenya Ltd and 2 Others* (2003) KLR 125 defines what amount to a prima facie case as follows: -

“I would say that in civil cases it is a case in which the material presented to the court a tribunal property 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.”

20. Further the Supreme Court of Kenya defined conservatory orders in the case of *Gatirau Peter Munya vs Dickson Kithinji & 2 Others* eKLR SC. Application No 5 of 2014as follows: -

“Conservatory orders bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as ‘the prospects of irreparable harm’ occurring during the pendency of a case; or ‘high probability of success’ in the applicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes and priority levels attributed to the relevant causes.”

21. The applicant urged the court to allow it to access the machinery seized for purposes of routine maintenance. On the other hand, the Respondent in the Replying affidavit sworn by Dennis Kibara acknowledges that the machine has been seized as an exhibit of the court and that the site visit has already been conducted by the criminal Court.

22. It is not disputed that the petitioner is the owner of the machine and the petitioner has no role to play in the reason for confiscation of machinery by the Respondent. It is the applicant’s argument that if it is not allowed to access the machinery, it will suffer prejudice as it will wear and tear.

23. The Respondent has not demonstrated any prejudice that it is likely to suffer if applicant is allowed to access the machine for routine maintenance.

24. Final orders:-

1. Conservatory interim order do issue directing the Respondent, its servants, agents, officers, employees, assigns and staff to allow, facilitate and enable the petitioner to undertake access, inspection and maintenance of fully automatic 7500-8000 BPH bottling line on 750ml bottle with Ropp cap front and back sticker label for liquor filing application and the Automatic rotary 10 Head Crown Capping machine, Model Capmatic (together the equipment) located at the interested party’s Premises Thika pending the hearing and determination of this suit.
2. Access as per order 1 above to be every 2 weeks.
3. Costs in the cause.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU THIS 23RD DAY OF FEBRUARY, 2023

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RACHEL NGETICH

JUDGE

In the presence of:



Martin – Court Assistant

No appearance by Parties

