



REPUBLIC OF KENYA



KENYA LAW
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**Fort Properties Limited v Kenya Revenue Authority & another (Petition
E025 of 2023) [2023] KEHC 21946 (KLR) (22 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21946 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION E025 OF 2023
OA SEWE, J
AUGUST 22, 2023**

BETWEEN

FORT PROPERTIES LIMITED PETITIONER

AND

KENYA REVENUE AUTHORITY 1ST RESPONDENT

COMMISSIONER OF DOMESTIC TAXES 2ND RESPONDENT

RULING

1. Before Court for determination is the Notice of Motion dated 26th April 2023. It was filed by the petitioner under Articles 2, 3, 10, 12, 20, 22, 27, 40, 46, 47, 48, 238 of the *Constitution of Kenya*, 2010; Orders 40 and 51 of the *Civil Procedure Rules*, and the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013, for orders that:
 - (a) Spent
 - (b) Spent
 - (c) Spent
 - (d) Pending the hearing and determination of the Petition a conservatory order be issued restraining the respondents, their agents including KCB and NCBA Bank of Kenya from taking any enforcement action including forceful removal of the petitioner's funds and payment for the penalties and interest liabilities regarding its Agency Notice dated 10th February 2023.
 - (e) The costs of the application be provided for.
2. The application was supported by the affidavit sworn on 26th April 2023 by a director of the petitioner, Mr. Ketan Patel, in which it was averred that, on the 8th February 2021, the respondents



issued the petitioner with a demand notice for the payment of a cumulative sum of Kshs. 16,789,825/= as tax for the period January 2014 to December 2018. Mr. Patel averred that, out of that sum, the principal amount was Kshs. 8,510,689.80, which amount has since been paid; and therefore that the rest of the sum demanded was in respect of penalties and interest.

3. The affiant further stated that, although the petitioner wrote to the respondents on the 1st March 2022 appealing for waiver of the penalties and interest as well as the lifting of the Bank Agency Notice, no response was made to that request by the respondents. Instead the respondents issued another Agency Notice calling for the payment of Kshs. 9,389,338/= in respect of penalties, interest and VAT; which sum has also been paid. In proof thereof, Mr. Patel annexed the documents marked “KP 3A”, “KP 3B” and “KP 3C”.
4. At paragraphs 8, 9 and 10 of the Supporting Affidavit, Mr. Patel deposed that the petitioner formalized its request for waiver vide the document marked Annexure “KP 4” but again no response was forthcoming. Accordingly, the petitioner filed an application before the Tax Appeals Tribunal, being Miscellaneous Appeal No. 13 of 2023, which was later dismissed for lack of jurisdiction. A copy of the ruling was annexed to the Supporting Affidavit as Annexure KP-5B. The petitioner is now apprehensive that unless the orders sought are granted, enforcement of the Agency Notice will ensue, thereby occasioning it irreparable damage as it risks depleting the working capital it requires to stay afloat.
5. The 1st respondent opposed the application vide its Replying Affidavit sworn on 26th May 2023 by Joseph Kamanga, in which it was averred that the petitioner was liable to pay corporate income tax under the Income Tax Act, Chapter 470 of the Laws of Kenya; and that the demand notice dated 8th February 2021 was issued in that regard pursuant to Section 32 of the Tax Procedures Act, 2015. He further stated that this particular demand notice was for tax that ought to have been paid by the petitioner for the period between January 2014 and December 2018; which had crystallized into a debt for purposes of Section 32(1) of the Tax Procedures Act.
6. At paragraphs 14 and 15 of the Replying Affidavit, Mr. Kamanga deposed that the respondents granted the petitioner an opportunity to pay the tax due in instalments pursuant to Section 33(2) of the Tax Procedures Act, but that, when the petitioner defaulted in the payment, the whole balance of the tax outstanding at the time became immediately payable together with attendant penalties and interest pursuant to Section 33(4) of the Tax Procedures Act. He acknowledged, at paragraph 18 of the Replying Affidavit that the petitioner thereafter paid the principal taxes, leaving an outstanding sum of Kshs. 9,394,233.61 which consisted of penalties and interest.
7. With regard to the petitioner’s application for waiver, Mr. Kamanga deposed that its application was rejected on 10th December 2021. He added that the petitioner was engaged multiple times with a view of coming up with a payment plan for the penalty and interest due but the petitioner was reluctant to sign one. Consequently, the 1st respondent issued the Agency Notices dated 31st January 2022 and 10th February 2023 after the petitioner defaulted in paying its outstanding taxes. He added that, under Section 89(6) of the Tax Procedures Act, waivers are granted at the discretion of the 2nd respondent on the basis of the reasons given by an applicant.
8. Thus, the respondents opposed the petitioner’s application and prayed for its dismissal with costs, contending that it is premised on an illegality; granted that the petitioner had twice defaulted in payment of taxes when given the opportunity to do so in instalments.
9. Upon consideration of the application ex parte, the Court granted interim orders on 28th April 2023 and thereafter gave directions that the application be canvassed by way of written submissions. Thus,



on behalf of the petitioner, Mr. Matheka relied on his written submissions dated 22nd June 2023. He reiterated the factual basis of the application at paragraphs 3 to 9 thereof and proposed the following issues for determination:

- (a) Whether the respondents have a mandatory duty to respond to an application or not;
 - (b) Whether the respondents acted *ultra vires* in failing to exercise their mandate under statute; and whether they thereby infringed the petitioner's rights as a taxpayer.
10. Mr. Matheka submitted that, under Article 47 of the Constitution, every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair; and that, in this instance that right has been violated and is still being violated by the respondents. He pointed out that the Tax Appeals Tribunal having delivered its ruling and demonstrated the limits of its jurisdiction by the ruling dated 20th April 2023, the petitioner has no other recourse than to this Court for relief. He cited Articles 23, 165(2) and 258 of the Constitution and Section 11 of the Fair Administrative Action Act in this regard and pointed out that to date there has been no decision on the applicant's waiver requests dated 1st March 2022 and 16th February 2023.
 11. Mr. Matheka placed reliance on *Republic v Commissioner of Domestic Taxes Ex Parte I&M Bank Limited* [2017] eKLR and *R v Commissioner for Co-operatives, Ex Parte Kirinyaga Tea Growers Co-operatives Savings and Credit Society Ltd* [1999] 1 EA 245, 249, among other authorities, to buttress his submissions. He urged the Court to grant the prayers sought so as to put the parties on equal footing pending the hearing and determination of the Petition.
 12. On behalf of the respondents, Ms. Chepsiror filed written submissions dated 16th June 2023. She reiterated the averments set out in the respondents' Replying Affidavit and confirmed that the respondents issued a demand notice dated 8th February 2021 for tax arrears of Kshs. 16,789,825 for the period January 2014 to December 2018; and that the petitioner later paid the tax in instalments with the concurrence of the respondents. She further confirmed that as of 16th January 2023, the petitioner had a balance of Kshs. 9,394,233.61 to clear in terms of penalties and interest, for which a demand notice dated 16th January 2023 was issued. Thus, Ms. Chepsiror proposed a single issue for determination by the Court, namely, whether there was any valid application for waiver of penalty and interest.
 13. Counsel made reference to the applicable provisions of the law, including Article 47(1) of the Constitution, Section 4(6) of the Fair Administrative Action Act as well as Sections 33, 38 42 and 89 of the Tax Procedures Act to underscore her submission that the petitioner was liable to pay penalties and interest to the 1st respondent but has failed to do so to date. In her submission, the respondents having adhered to the provisions of Article 47 of the Constitution, there can be no merit in the Petition. She accordingly prayed that the Notice of Motion and the Petition dated 26th April 2023 be dismissed with costs.
 14. I have given due consideration to the application. It is worth stating at the outset that, at this stage, the Court need not examine the merits of the case closely and therefore the issues proposed by learned counsel appear premature in the circumstances. In this regard, I bear in mind the caution expressed by Hon. Ibrahim, J. (as he then was) in the Muslim for Human Rights & 2 Others v Attorney General & 2 Others [2011] eKLR that:

“The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no



conclusivity or finality arising that will or may operate adversely vis-à-vis the case of either party. The principle is similar to that in temporary or interlocutory injunctions in civil matters...”

15. Similarly, in Nairobi High Court Petition No. 16 of 2011: [*Centre for Rights Education & Awareness \(CREAW\) & 7 Others v Attorney General*](#), it was held:

“At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”

16. The guiding principles in determining whether or not to grant conservatory orders are now settled. The Supreme Court, in the case of [*Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*](#) [2014] eKLR, held: -

“Conservatory orders bear a more decided public-law connotation; for these are orders to facilitate ordered functioning within the 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 order 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 attributable to the relevant cases.”

17. Hence, an applicant for conservatory orders for purposes of Articles 22 and 23(3)(c) of the [*Constitution*](#) must satisfy the Court as to the following three elements:

- (a) A prima facie case with a high likelihood of success;
- (b) That the Petition will be rendered nugatory;
- (c) That public interest weighs in the applicant’s favour.

18. What amounts to a prima facie case was aptly stated in [*Mrao Ltd v First American Bank of Kenya Ltd & 2 Others*](#) [2003] KLR 123 thus:

“A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case in 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. Similarly, in [*Kevin K Mwiti & Others v Kenya School of Law & others*](#) (supra), it was held that:

“A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words the Petitioner has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success. Accordingly in



determining this application, the Court is not required- indeed it is forbidden- from making definite and conclusive findings on either fact or law.

20. A perusal of the Supporting Affidavit and the documents annexed thereto, including the written submissions filed on behalf of the petitioner shows that his complaint is hinged on Article 47 of the Constitution and the failure by the respondents to respond to his application for waiver. While the respondents contend that the application was declined and a response to that effect made, the petitioner is adamant that its application for waiver is yet to be responded to and that it is entitled to conclude, in the circumstances, that the application was granted.
21. Thus, the petitioner has raised issues around Article 47 of the Constitution, Section 4(2) of the *Fair Administrative Action Act* and Sections 51 of the *Tax Procedures Act* for the proposition that once a taxpayer lodges an application for review, a decision thereon ought to be taken within 30 days and communicated to the taxpayer in writing, failing which the respondent shall be deemed to have allowed the application. In this regard, the applicant relied on *Republic v Commissioner of Customs Services, Ex Parte Unilever Kenya Limited* [2012] eKLR.
22. I note too that not a single document was annexed to the respondents' Replying Affidavit to buttress their assertion that it communicated its decision on the petitioner's waiver application. I am therefore satisfied a prima facie case has been made out by the petitioner, judging by the material presented by the petitioner vide its application and the response thereto by the respondents. I am further satisfied that the Petition will be rendered nugatory unless the conservatory orders sought are granted; and that public policy and the interest of justice demand that parties be given a hearing on the merits.
23. In the premises, I find merit in the petitioner's application dated 26th April 2023. The same is hereby allowed and orders granted as hereunder:
 - (a) That pending the hearing and determination of the Petition a conservatory order be and is hereby issued restraining the respondents, their agents including KCB and NCBA Bank of Kenya from taking any enforcement action including forceful removal of the petitioner's funds and payment of the penalties and interest liabilities regarding its Agency Notice dated 10th February 2023.
 - (b) The costs of the application be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 22ND DAY OF AUGUST 2023

OLGA SEWE

JUDGE

