



Kenya Revenue Authority v Sportybet Limited (Miscellaneous Civil Application E597 of 2023) [2023] KEHC 21933 (KLR) (Commercial and Tax) (18 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21933 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION E597 OF 2023**

A MABEYA, J

AUGUST 18, 2023

**IN THE MATTER OF AN APPLICATION BY KENYA REVENUE AUTHORITY
FOR AN ORDER UNDER SECTION 43 OF TAX PROCEDURES ACT**

BETWEEN

KENYA REVENUE AUTHORITY APPLICANT

AND

SPORTYBET LIMITED RESPONDENT

RULING

1. Before me is a Motion on Notice dated July 13, 2023 by the tax authority. It is brought under section 43 of the *Tax Procedures Act* ('the Act').
2. The application seeks an order for the preservation of funds held in various banks by the respondent upto Kshs 5,022,774, 709/=.
3. The grounds for the application were set out in the body of the Motion and in the supporting affidavit of Rhoda Onyango. These were that; the applicant had carried out an audit on the respondent and issued an estimated assessment of Kshs 5,022,774,709/=.
4. That pursuant thereto, the applicant issued a preservation order on July 4, 2023 and wished the same to be re-issued by this Court in accordance with the law. That the respondent had no known assets in Kenya save for the amounts held in those accounts sought to be sequestered. That if the orders sought were not granted, there was risk of the respondent frustrating the collection of the revenue.
5. The application was opposed vide the replying and supplementary affidavits of Clyde Atsango Musotso sworn on July 28, 2023 and August 8, 2023, respectively.



6. The respondent denied that there had been any assessment of tax at all. That the letter relied on was a preliminary finding to which the respondent had been given 14 days to respond to. That the parties were still discussing but the applicant rushed to Court and obtained preservative orders.
7. It was denied that the respondent was a foreign entity and that it had operated in Kenya for 8 years. That there are two ongoing tax disputes between the parties, to wit, HCJR Misc Appl No E 560 of 2023 and Tax Appeal No 344 of 2023. That the Tribunal had allowed the parties to resolve the matter through ADR within 30 days of July 27, 2023. That the respondent had employed 20 Kenyans and it was not a flight risk.
8. The applicant filed a further Affidavit of Joseph Miano dated August 4, 2023. It was contended that the tax audit for the years 2018-2021 of the respondent had led to the issuance of the preliminary findings on July 3, 2023 for Kshs 5,022,774,709/=. That an assessment has since been issued for Kshs 5,727,840,685/=. That the issuance of a preservation order was out of caution as the respondents' director is a foreigner who could transfer the available funds out of jurisdiction.
9. That the dispute that has been referred to ADR by the Tax Appeals Tribunal is on withholding tax while the current assessment is on taxation of variances from the paybill deposits data for 2018-2022.
10. In the supplementary affidavit, the respondent contended that it was not about to wind up its operations in Kenya. That it held valid current Tax Compliance Certificates. That the respondent's systems were fully integrated with the applicants I-tax System Integration Data Transmission Report. That its actions were not consistent with a difficult tax payer or one who was capable of frustrating the collection of taxes.
11. The application was argued orally which submissions the court has noted.
12. Section 43(1) of the Act provides:-
 - ' 1) This section applies if the commissioner reasonably believes:-
 - a. That a tax payer-
 - i. Has made taxable supplies, has removed excisable goods, or has derived an income in respect of which tax has not been charged; or
 - ii. Has collected a tax including withholding tax, that has not been accounted for; and
 - b. That the tax payer is likely to frustrate the recovery of the tax.'
13. After issuing a preservation order under sub-section 2 of that section, the tax authority is required to apply to this court for appropriate orders. The order has a life of 30 days unless the Court orders otherwise.
14. In [Kenya Revenue Authority vs Jane Wangui Wanjiru & 2 Others \[2018\] eKLR](#), it was held:-
 - ' The purpose of section 43 of the TPA is to allow KRA to preserve a tax payers money in the hands of a 3rd party without notice to the tax payer for a limited period before moving the court for formal orders of preservation. Since the exercise of the power to collect taxes, in the manner outlined by the statute, is a justifiable limitation on the right to privacy protected



by Article 31 of the Constitution, it must be construed strictly. This approach is buttressed by and consistent with the principle that tax statutes must be interpreted strictly.'

15. In Kenya Revenue Authority vs Family Bank Ltd & Anor [2022] KEHC 32 (KLR), the court held:-

' This provision applies where no assessment of tax has been undertaken. It is based on the commissioners reasonable belief of the twin matters set out therein, viz that there is tax due which has not been unremitted (sic) and that the tax payer is likely to frustrate the collection of that tax. It is only when such reasonable belief exists that the draconian procedure set out therein is to be resorted to.'

16. In the present case, the applicant contended that the respondent had been under declaring tax in the period 2018-2022. That an audit had been undertaken and a sum of Kshs 5,022,774,709/= had been raised as a preliminary tax due. An assessment for Kshs 5,727,840,684/= had been raised whilst these proceedings were pending.

17. The respondent contended that it had been paying taxes and it had valid compliance certificates over the years including one for 2023. That the applicant came to court while correspondence was still ongoing.

18. The court has considered the contestations. It is not disputed that the respondent has tax compliance certificates over the years. However, it is noted that the same are usually issued to facilitate trade. That notwithstanding, it would be in good order for the tax authority to withdraw such certificates immediately it discovers that there is tax due and is about to commence recovery vide any other mode permitted under the tax statutes. It seems untidy for a tax payer to be holding such valid tax compliance certificates on the one hand and at the same time the same tax authority allege that there is tax due on the other hand.

19. The foregoing notwithstanding, the Court notes that there was an investigation and an audit undertaken on the respondent's tax matters. That a preliminary finding was made to the effect that there was taxes due in the sum of Kshs 5,027,774,709/=. In the premises, the Court is satisfied that there was reasonable believe that an income had been made in Kenya in respect of which there was tax due. The first element or requirement of section 43(3) of the Act was met.

20. The second limb is that the tax payer is likely to frustrate the recovery of the tax. The contention by KRA is that the respondent is foreign owned. That its only director is a foreigner and he may transfer the funds in the respective accounts beyond the jurisdiction of this Court. On the other hand, it was contended by the respondent that it is a corporate citizen of Kenya which has been religiously paying taxes for the last 8 years it has been in existence. That it has throughout cooperated with the applicant and has integrated its data system with KRA the latter. That its conduct was not recalcitrant or that of a difficult tax payer capable of frustrating the collection of taxes.

21. In the KRA va Family Bank Case (supra), the Court held: _

' As I have already stated, section 43 of the Act should be sparingly used. Only in clear cases where the taxpayer is a serial defaulter of tax payment and is one I have described as recalcitrant, un-cooperative and imprudent. One whose response to tax investigation is movement of funds from his/her accounts or one who resorts to disposing off his assets.'

22. In the present case, it is not in dispute that the respondent is a corporate citizen of this country. That it has hitherto been paying taxes, albeit being accused of under declaration.



23. However, there were two allegations that were not denied. These are that the respondent has no other known assets in Kenya and that its only director is a foreigner who might transfer the funds in the subject accounts beyond the reach of this Court.
24. The Court notes that whilst the said two serious allegations were not denied, the person swearing the affidavit was at all times the respondent's tax agent. There was no denial that the only director of the respondent was a foreigner and that he was likely to transfer the funds in those accounts abroad.
25. In this regard, the Court is satisfied that in the circumstances of this case, the applicant has succeeded to demonstrate the likelihood of the respondent frustrating the collection of taxes. The other issue is that the amount involved is astronomical. The twin conditions under section 43(3) of the Act have been proved and/or demonstrated.
26. Mr Kenyatta for the respondent submitted that since an assessment notice had been issued on August 2, 2023, the provisions of section 43 (8) should take effect.
27. Section 43 (8) of the Act provides:-

' An order issued under the section shall expire on the service of a notice of assessment under subsection (7) unless the Court extends the order.'
28. It is noted that the preservation order was first made on July 14, 2023. It had to be in force for 30 days. However, it is admitted that an assessment notice has been issued on August 2, 2023. It was issued immediately before the present application came up for hearing.
29. I have already found that the serious allegations that the respondent has no other known assets in Kenya and that there is reasonable apprehension that the only director of the respondent who is a foreigner may transfer the only available funds out of jurisdiction. These have not been denied. For the other reason that the amount involved is huge, there may be a motivation to move those funds.
30. Accordingly, notwithstanding that the assessment notice was issued on August 2, 2023, I allow the application as prayed. The order shall be in force until September 11, 2023 by which time the provisions of sections 45 to 48 of the Act may be resorted to.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF AUGUST, 2023.

A. MABEYA, FCIArb

JUDGE

