Kenya Revenue Authority v Standard Chartered Bank (K) Ltd & 2 others; Tiampati (Interested Party) (Miscellaneous Application E009 of 2022) [2022] KEHC 30 (KLR) (Commercial and Tax) (31 January 2022) (Ruling)

Neutral citation: [2022] KEHC 30 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E009 OF 2022

A MABEYA, J

JANUARY 31, 2022

IN THE MATTER OF: THE TAX PROCEDURES ACT NO. 29 OF 2015

AND

IN THE MATTER OF: AN APPLICATION BY KENYA REVENUE AUTHORITY FOR AN ORDER UNDER SECTION 43 (3) OF TAX PROCEDURES ACT, 2015

BETWEEN

KENYA REVENUE AUTHORITY ..... APPLICANT

AND

STANDARD CHARTERED BANK (K) LTD ..... 1ST RESPONDENT

FAMILY BANK LIMITED ..... 2ND RESPONDENT

ABSA BANK KENYA PLC ..... 3RD RESPONDENT

AND

SAMUEL LERIONKA TIAMPATI ..... INTERESTED PARTY

RULING

1. Before Court is an application dated 10/1/2022. It was brought under section 43 (3) of the *Tax Procedures Act*, 2015 and section 3 and 3A of the *Civil Procedure Act*, and order 51 rule 1 of the *Civil Procedure Rules*.

2. The application sought orders for the preservation of funds and prohibiting the release or dealing with a sum of Kshs. 28,910,687/= held by the respondents on behalf of the interested party in 6 different

bank accounts pending the issuance of a tax assessment and recovery of taxes, or until further orders of the court. There was an alternative prayer for security for the taxes.

3. The application was supported by the affidavit of Eric Riungu sworn on 10/1/2022. The grounds were that in or about March 2021, the applicant conducted investigations on the interested party. It discovered that he had failed to fully disclose his income for the period 2016-2020. According to the findings, the interested party had income of Kshs. 96,368,956 which was undeclared. leading to loss of Kshs. 28,910,687/= in revenue.

4. For those reasons, the applicant had reason to believe that the interested party had engaged in tax evasion. For that reason, on 29/12/2021, the applicant issued the respondents with preservation of funds notices pursuant to section 43 (2) of the *Tax Procedures Act*, 2015 ("the Act") in respect of the accounts held by the interested party.

5. It was the applicant's case therefore that, in the circumstances, and owing to the amount of taxes involved, it was likely that the interested party may frustrate the recovery of the taxes if funds held by the respondents were not preserved. It was also contended that the interested party had no other known assets other than the funds in the respondent's accounts. That unless the preservation order was granted, the applicant would suffer prejudice.

6. The interested party opposed the application vide his replying affidavit sworn on 14/1/2022 and supplementary affidavits sworn on 19/1/2022 and 21/1/2022, respectively. His case was that; the applicant served him with a notice of investigation dated 6/9/2021 in accordance with section 59 of the Act. He appeared before the applicant on 10/9/2021 having written to the applicant on 9/9/2021 requesting for information relating to; the preliminary analysis report forming the basis of the investigation; the form of taxes alleged to have been evaded; and the specific transactions that were alleged to be unremitted.

7. The respondent also instructed his advocates who wrote to the applicant on 29/11/2021 and inquired on the status of the investigation. The applicant responded on 29/11/2021 confirming that investigations were still ongoing and it would share the findings and allow the interested party time to respond. The findings were shared on 7/12/2021 and the applicant was allowed 14 days to respond. The interested party responded to the findings on 20/12/2021 but as at the time the application came up for hearing, the applicant had not responded to him.

8. However, vide a letter dated 19/1/2022, the applicant requested for further documents to enable it define what unremitted taxes were due.

9. On 29/12/2021, the applicant served notices of preservation of funds to all his bank accounts. He protested vide a letter dated 3/1/2022. That the applicant had never served him with any tax assessment and hence there was no tax due. That the investigations had not been completed and no tax was therefore recoverable from him.

10. He therefore contended that the preservation notices were issued in bad faith and in breach of his right to fair administrative action. That he was a compliant taxpayer throughout the period complained of by the applicant as evidenced by the certificates of compliance issued to him which, had not been revoked or recalled.

11. He concluded that he was unable to carry out his day to day businesses including paying school fees, paying employees and maintaining his family. That he had always shown good faith, was cooperative and tax compliant.

12. The parties filed their respective submissions which were hi-lighted on 24/1/2022. It was the applicant's submission that it had met the threshold provided for under section 43(1) of the Act. That the applicant could invoke that section if it reasonably believed that a tax payer had made taxable supplies or had derived an income in respect of which tax had not been charged and that the taxpayer was likely to frustrate the recovery of the tax.

13. That its investigations had revealed that despite the interested party having had taxable deposits of Kshs. 295,040,446/= for the period 2016 - 2020, he only declared Kshs. 198,671,490/= which amounted to under declaration of income. That these findings were communicated to the interested party on 7/12/2021. In the circumstances, the applicant was justified to invoke section 43 of the Act.

14. Counsel further submitted that the interested party had no other known assets but for the bank accounts held by respondents. He referred the Court to the cases of *Pili Management Consultants Ltd vs Commissioner of Income tax KRA [2016] eKLR* and *KRA vs Jimmy Mutuku Kiamba [2015] Eklr*, in support of his submissions.

15. On the part of the interested party, it was submitted that the applicant had not met the threshold set up in section 43 of the Act. That the tax liabilities in question had not been well defined, had not fallen due and were not unpaid. Hence, it could not be said that the applicant had reason to believe that the interested party had derived income in respect of which tax had not been charged.

16. It was further submitted that investigation was still ongoing and no tax assessment had been made against the interested party. In the premises, the applicant had not met the first condition under section 43 of the Act.

17. That he had at all times cooperated with the applicant. He had appeared before the applicant and responded to all correspondence. That the applicant was guilty of material non-disclosure at the ex parte stage. It failed to disclose that the interested party had honoured every summon issued by the applicant and had provided responses to the findings by the applicant.

18. On the alternative prayer for security, Counsel submitted that the applicant had un-procedurally issued the notice of preservation of funds and was undeserving of that order. That security ought not be given as the taxes due were still unascertained.

19. I have considered the affidavits on record, the written and oral submissions of Learned Counsel. I have also considered the authorities relied on.

20. This is an application by the tax authority for funds preservation under section 43(2) of the Act. They were issued to Standard Chartered Bank (K) Ltd, Absa Bank Kenya PLC and Family Bank Limited, respectively.

21. It is the duty of every citizen to pay tax. In Pili Management Case (supra), it was held that every taxpayer has a duty to file tax returns and pay taxes. Article 210 of the *Constitution* provides for the duty to pay tax by every citizen. It is for that reason that there are elaborate provisions on imposition and collection of taxes. While payment of taxes is a civil duty, if its imposition and collection is not undertaken in accordance with the law it might result in wrongful deprivation of property. It is for that reason that tax statutes are to be interpreted strictly.

22. In *Mount Kenya Bottlers Ltd & 3 others v Attorney General & 3 Others NRB CA Civil Appeal No. 164 of 2013 [2019] Eklr*, the Court of Appeal observed: -

> [...], when it comes to interpretation of tax legislation, the statute must be looked at using slightly different lenses. With regard to tax legislation, the language imposing the tax must

receive a strict construction. Judge Rowlett in his decision in Cape Brandy Syndicate v I.R. Commissioners [1921] 1KB (cited by the appellants), expressed the common law position in this area when he stated '...in a taxing Act one has to look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used'".

23. The dispute before Court touches on section 43(1) of the Act. It 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
>
> (iii) That the taxpayer is likely to frustrate the recovery of the tax".

24. In *Kenya Revenue Authority v Jane Wangui Wanjiru & 2 others [2018] eKLR*, it was held that;

> " The purpose of section 43 of the TPA is to allow KRA to preserve a taxpayer's money in the hands of a third party without notice to the taxpayer 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 is consistent with the principle that tax statutes must be interpreted strictly".

25. This provision applies where no assessment of tax has been undertaken. It is based on the Commissioner's reasonable belief of the twin matters set out therein, viz that there is tax due which has not been unremitted 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 in that section is to be resorted to.

26. *In Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance Ltd [2014] AC 366*, Lord Kerr observed: -

> " ... in demonstrating an absence of reasonable or proper cause 'requires the proof of a negative proposition, normally among the most difficult of evidential requirements.' The test for establishing whether there is an absence of reasonable and proper cause requires both a subjective and objective assessment. The subjective test requires an assessment as to whether the claimant honestly believed the defendant was liable in respect of the claims brought. If the Court is convinced as to the subjective state of mind, it should then consider whether, based on the information available to the claimant at the time it initiated proceedings, it was reasonable for the claimant to have reached the conclusion it did in respect of the defendant".

27. In *Hicks v Faulkner {1878} 8Q.B.D. 167, 171,* Hawkins J observed: -

> " I should define reasonable and probable cause to be an honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds of the existence of a state of circumstances which, assuming to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accused to the conclusion that the person charged was probably guilty of the same imputed".

28. Reasonable belief is the cornerstone of section 43 of the Act to this Court's mind, reasonable belief means a belief that would be held by an ordinary and prudent man in the same circumstances as the actor. The belief is to be based on reasonable grounds. It is not necessarily that the belief should be correct, but it must pass the test of reasonableness.

29. In this regard, the applicant was under a duty to satisfy the Court that the twin conditions set out in section 43(1) of the Act had been complied with. These are; that the Commissioner was under a reasonable belief that there was tax due and unremitted and that the interested party was likely to frustrate the recovery thereof.

30. It is not in dispute that the interested party had filed returns and paid some money in respect of taxes. He also held a Tax Compliance Certificate. However, it is the applicant's contention that the interested party had failed to account for all the tax due. That he had under-declared his income for the period in question.

31. To satisfy the first condition, the applicant contended that it had carried out investigations which revealed that despite the interested party having had taxable deposits of Kshs. 295,040,446/= for the period in question, he had only declared Kshs. 198,671,490/=. That amounted to under-declaration that had led to loss of Kshs. 28,910,687/= in taxes. The interested party submitted otherwise.

32. I have considered the record. The letter that communicated the findings of the investigations set out in detail the basis of the Commissioner's belief as to the alleged unremitted taxes. In my view, since this was not an erratic one-time act, but one based on investigations that spanned over 9 months, the applicant cannot be said not to have had a reasonable belief that there was tax due from the interested party.

33. In this regard, I hold and reject the interested partys contention that without an assessment, the applicant had no reasonable belief that there was tax due. I hold that, a thorough investigation that reveals that there is tax due is sufficient for the purposes of the first condition under section 43 of the Act. The first condition was met.

34. On the second condition, it was the applicant's case that owing to the interested party's under declaration of income and evasion of tax and owing to the amount of taxes involved, it was likely that he would frustrate the recovery of the taxes if funds held by the respondents were not preserved. It was also contended that the interested party had no other known assets other than the funds in the respondent's accounts. That this formed the basis for a reasonable belief that the interested party would frustrate the recovery thereof. The interested party contested otherwise.

35. The record shows that since serving the interested party with the investigation notice of 6/9/2021, there was correspondence between the parties that culminated in the applicant's findings of 7/12/2021. In that letter, the applicant wrote: -

> " In view of the above we would appreciate your response within 14days failure to which the commissioner will proceed to take further action as provided by the law.

Further, you are advised to avail any other information or documents that you would wish to disclose to the commissioner".

36. In response, the interested party wrote through his advocates on 20/12/2021, well within the time given. In the letter, he raised various issues including a request for information that formed the basis of the applicant's conclusions and findings. To buttress his position, he gave a detailed explanation for the bank credits for each year of income. He urged the applicant to get in touch if it required any clarification and information.

37. The said letter of 20/12/2021 was neither acknowledged nor responded to by the applicant. What followed was the notice to preserve funds of 29/12/2021.

38. From the foregoing, it is clear that no firm conclusion can be said to have been arrived at that there was tax due which had been unremitted. I say so because, in its findings of 7/12/2021, the applicant itself requested for an explanation within 14 days which was given by the interested party.

39. In this regard, I hold that it was imperative on the part of the applicant to have first responded to the issues raised in the letter of 20/12/2021 before taking any precipitate action as clearly indicated in its letter of 7/12/2021. If the applicant was not satisfied with the response of 20/12/2021, nothing would have been easier than to advise the interested as such before taking the action of 29/12/2021.

40. From what I have set out above, I am doubtful that the findings of the investigations per se, to which the applicant itself had asked the interested party to respond to which he did, could form a reasonable belief that the interested party would frustrate the recovery thereof. The investigations themselves cannot be said to have been concluded.

41. Accordingly, I hold that in order to satisfy the second condition in section 43 of the Act, it must be demonstrated that the belief was based on a set of irresistible facts that the tax payer is likely to frustrate recovery of the taxes. The belief should not be based on mere speculations or conjecture but on the conduct of the tax payer and not other extraneous considerations.

42. In the present case the conduct of the interested party was not of one who had the intention of frustrating the recovery of taxes. He was cooperative throughout the exercise.

43. As regards the allegation that the claimed tax was colossal, that may be a consideration but there must be something more than suspicion of a tax payer being unable or failing all together to pay the same before he can be arbitrarily deprived of his property.

44. This Court is bound to strictly construe and interpret section 43(1) of the Act. That the applicant must demonstrate it had a reasonable belief that the interested party would frustrate the collection of revenue if his funds are not preserved. There must be evidence to show that the taxpayer will refuse to pay or will frustrate the collection either through delay, un-cooperative behavior, or any other conduct which would prejudice the applicant's collection efforts. For example, hasty and unexplained huge withdrawals or transfer of funds to 3rd parties or sale of other assets can be a basis for such belief.

45. I agree with the submission by Counsel for the interested party that by virtue of Article 210, 10 and 47 of the Constitution, there is no room for arbitral deprivation of property or arbitral infringement of the right to property. It was not enough for the applicant to act on a mere apprehension that the interested may frustrate revenue collection, there ought to have been reasonable grounds to support such apprehension.

46. The upshot is that this Court finds that the applicant did not demonstrate that the interested party was likely to frustrate the recovery of tax. The second condition under section 43 of the Act was therefore not met by the applicant.

47. On the alternative prayer for security for taxes, I do not think the same ought to issue at this stage. The unexplained hurry in which the applicant acted imputes bad faith on its part. I don't think the Court should aid a perpetuation of bad faith. There is no evidence of depletion of the interested party's wealth. He is a citizen who lives within jurisdiction and there is no evidence of his likelihood of leaving the jurisdiction. Let the applicant follow the procedures set out in sections 49 to 54 of the Act and recover the tax due.

48. In the end, I find that the application has failed to meet the required threshold and the same is dismissed with costs to the interested party. The interim orders of preservation issued on 14/1/2022 are hereby forthwith discharged.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY, 2022.

A. MABEYA, FCI Arb

JUDGE