



REPUBLIC OF KENYA



Kenya Revenue Authority v Stanbic Bank Ltd & 10 others; Chai Trading Company (Interested Party) (Miscellaneous Application E017 of 2022) [2022] KEHC 35 (KLR) (Commercial and Tax) (31 January 2022) (Ruling)

Neutral citation: [2022] KEHC 35 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E017 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

STANBIC BANK LTD 1ST RESPONDENT
STANDARD CHARTERED BANK LTD 2ND RESPONDENT
FAMILY BANK LTD 3RD RESPONDENT
CO-OPERATIVE BANK LTD 4TH RESPONDENT
SBM BANK LIMITED 5TH RESPONDENT
ABSA BANK KENYA PLC 6TH RESPONDENT
DIAMOND TRUST BANK LTD 7TH RESPONDENT
BANK OF AFRICA KENYA LTD 8TH RESPONDENT
CITIBANK N.A 9TH RESPONDENT
ECOBANK LIMITED 10TH RESPONDENT
NCBA BANK KENYA PLC 11TH RESPONDENT



AND

CHAI TRADING COMPANY INTERESTED PARTY

RULING

1. Vide a letter dated 8/12/2021, the applicant communicated to the Interested Party that it had carried out investigations and discovered that the interested party had under-declared its income. The applicant therefore demanded Kshs. 95,834,896/- as taxes that were due failure to which the taxes would be assessed.
2. A Notice of Preservation of Funds was subsequently issued by the applicant on 29/12/2021 against the interested party's bank accounts held with the respondent banks.
3. By a Motion on Notice dated 14/1/2022, the applicant applied for the preservation of the funds in 45 accounts held in the respondent banks. There was also an alternative prayer for security for the said taxes. The application was brought, inter-alia, under section 43 of the *Tax Procedures Act*, 2015 ("the Act").
4. The application was premised on the grounds that the applicant had reasons to believe that the interested party was engaged in tax evasion. This was because of failure to declare the correct amount of income and/or sales for purposes of both Corporation Tax and Value Added Tax for the tax periods between 2015 -2020.
5. It was further contended that preliminary findings indicated that the interested party was engaged in tax evasion by failing to declare the correct income resulting in revenue loss of Kshs. 2,521,337,950/=.
6. The application was opposed vide the replying affidavit of Michael Kimeli Cherituch sworn on the 19/1/2022 and a Motion on Notice dated 17/1/2022 seeking to set aside the ex parte orders made on 14/1/2022. It was averred that the interested party was tax compliant. It had fulfilled all its tax obligations in the past and had availed to the applicant all its financial statements for the period under investigation.
7. That the interested party gave the applicants demand dated 11/11/2021 an elaborate response to the investigations on 16/11/2021. Nevertheless, the applicant proceeded to issue the investigations findings on 8/12/2021 and further a preservation order on 29/12/2021 without any basis. That the applicant ought to have gone through the ordinary audit process and then make an assessment once satisfied that there were any taxes due and owing.
8. It was further contended that the applicant had not met the preconditions laid out under section 43(1) of the Act. That the preservation order fell of the *Fair Administrative Action Act* (hereinafter 'FAAA'). That the ex parte order of 14/1/2022 was obtained through concealment of material facts.
9. The Court has carefully considered the parties' respective cases and submissions. It has also reviewed the authorities relied on.
10. It is the duty of every citizen to pay tax. In *Pili Management Consultants Ltd vs Commissioner of Income Tax* [2016], eKLR, 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 of every citizen to pay tax. 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.

11. 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’.

12. 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”.

13. 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”.

14. 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 therein is to be resorted to.

15. In *Crawford Adjusters (Cayman) Ltd v Sagikor 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”.

16. 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”.

17. Reasonable belief is the cornerstone of any action under section 43 of the Act. To this Court’s mind, reasonable belief means a belief that would be held by an ordinary and prudent person 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.

18. In this regard, therefore, 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.

19. In the present case, the applicant submitted that it had carried out investigations which had revealed that the interested party had derived income for which tax had not been charged and/or made supplies in respect of which VAT had not been charged. That this allowed it to invoke section 43 of the Act.

20. Further, it was the applicant’s case that the interested party was likely to frustrate the recovery of the tax due. The applicant held this belief due to the gross under declaration of tax and the huge amount of taxes claimed.

21. On its part, the interested party submitted that a reasonable belief that a taxpayer has accrued a tax liability can only be demonstrated by the issuance of a tax assessment that expressly states the nature of the tax demanded, the legal provision underpinning the tax demand, the amount demanded, and the remedies available to an aggrieved party including the right to object or appeal the tax assessment.

22. It was contended that the applicant had only carried out investigations which were still ongoing but an assessment had not been done. That pending the finalization of the investigation, the taxpayer is entitled to be heard through a reconciliation meeting for the parties to peruse the investigation reports and address any errors or omissions. That it was not likely to frustrate the collection of taxes as it had shown cooperation with the applicant during its investigations.

23. As already stated, the applicant had to demonstrate and prove the twin conditions in section 43 of the Act. On first condition, the letter dated 8/12/2021 from the applicant to the Interested party indicated the results of its tax investigations for the years 2015/16 to 2019/2020. It concluded that taxes in excess of Kshs.2,521,337,950/= was due.

24. The Court notes that the said letter may not have been conclusive on the tax due. Indeed, it called for additional documents from the interested party. However, the fact that the conclusions therein were arrived at after a thorough investigation, that in my view can be said to be a basis for a reasonable belief that there was tax due that was unremitted.



25. In my view therefore, although there had been no tax assessment, there having been investigations, in which the interested party was informed of, which revealed some taxes to be due, the first condition under section 43 of the Act had been met.
26. In my view, under section 43 of the Act, it is not necessary that there be an assessment of tax before reasonable belief can be inferred that there is tax due. Where there is an investigation whose findings are revealed to the tax payer and which reveal that there is tax due, that will be sufficient for purposes of the first condition in section 43 of the Act.
27. The second condition to be met under sub-section 1 is that the Commissioner should have reasonable belief that the tax payer would frustrate the collection of such tax.
28. It was submitted that the Court has to look at the circumstances surrounding the claim by the applicant. That the gross-undervaluation constituted reasonable belief that the interested party will frustrate the recovery of the tax. It was submitted otherwise for the interested party.
29. I agree with Mr. Ado, Learned Counsel for the applicant that, in order to ascertain whether the tax payer will frustrate the recovery of tax, the Court has to examine the circumstances surrounding each case. Indeed, it is the conduct of the tax payer that would determine whether there is belief that he would frustrate the recovery of tax.
30. In the present case, it is not in dispute that the interested party has hitherto been paying tax. It is only being accused of under-declaration during the period in question. The applicant called the interested party into a meeting and informed it of the pending/ongoing investigations. The interested party not only attended the said meeting(s) but also gave to the applicant all information and documents requested.
31. However, the court notes that the interested party did not respond to the findings by the applicant. It only responded in January, 2022.
32. The applicant may not therefore be faulted for invoking the drastic powers donated to it by law under section 43 of the Act vide its Notice of Preservation of funds. The information and documents sought by the applicant were being provided on 10/1/2022.
33. In the circumstances, I am of the view that the applicant may not be faulted for holding that it believed that the interested party would frustrate the recovery of tax. Due to the delay in responding and the large amount demanded, the applicant's act cannot be faulted.
34. Be that as it may due to the cooperation the interested party had shown; further due to the compliance certificates it holds, it would be highly prejudicial to allow the prayer for preservation of funds.
35. As regards security, this would be a proper prayer where the applicant has followed the due process. I have noted that the interested party has indicated an ability to give security. The amount involved is huge. The amount sequestered has been revealed to total in excess of Kshs. 113.4 b against alleged taxes of approximately Kshs. 2.5 b. I am inclined to order that security of Kshs. 1 b be given forthwith the discharge of the preservation orders now in force.
36. The upshot is that the Court allows the alternative prayer in the motion dated 10/1/2022. Each party to bear own costs.

It is so ordered.

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

A. MABEYA, FCI Arb



JUDGE

