



**Kenya Revenue Authority v Equity Bank Limited & 4 others; Purma Holdings Limited & 2 others (Interested Parties) (Miscellaneous Civil Application E721 of 2021) [2022] KEHC 178 (KLR) (Commercial and Tax) (25 February 2022) (Ruling)**

Neutral citation: [2022] KEHC 178 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS CIVIL APPLICATION E721 OF 2021**

**A MABEYA, J**

**FEBRUARY 25, 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**

**EQUITY BANK LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**CREDIT BANK LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**CFC STANBIC BANK KENYA LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**FAMILY BANK LIMITED ..... 4<sup>TH</sup> RESPONDENT**

**KENYA COMMERCIAL BANK LIMITED ..... 5<sup>TH</sup> RESPONDENT**

**AND**

**PURMA HOLDINGS LIMITED ..... INTERESTED PARTY**

**MARY WAMBUI MUNGAI ..... INTERESTED PARTY**

**PURITY NJOKI MUNGAI ..... INTERESTED PARTY**



## RULING

1. Before Court is an application dated 17/12/2022. When the parties appeared before Court on 10/01/2022, they informed Court that there were other related matters which had been filed being Misc. Appln. Nos. E926/2021, E927/2021, E929/2021, E930/2021, and E933/2021.
2. Mr. Moses Ado and Nelson Havi, Learned Counsels for the applicant and the interested parties in all these matters requested that they address the Court in this matter and the findings herein be applied to all those other matters. Accordingly, the replying affidavit filed herein and the submissions were to apply to those other matters and the ruling accordingly.
3. The application was brought under section 43 (3) of the [Tax Procedures Act](#), 2015 and sections 3 and 3A of the [Civil Procedure Act](#), and order 51 rule 1 of the [Civil Procedure Rules](#).
4. It sought orders for the preservation of funds and prohibiting the release or dealing with a sum of Kshs. 2,535,410,527/= held by the respondents on behalf of and in the name of the interested party in 13 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.
5. The application was supported by the affidavit of James Wainaina sworn on 17/01/2021. The grounds were that; sometimes in March 2021, the applicant conducted investigations on the interested parties. The investigations revealed that the interested parties had failed to fully disclose their income for the period 2014-2019.
6. According to the findings, the interested parties had income of Kshs. 7,666,374,020/= which was undeclared leading to loss of Kshs. 1,937,529,876/= in income tax and Kshs. 597,880,651/= in VAT totaling to a loss of Kshs. 2,535,410,527/= in revenue.
7. For those reasons, the applicant had reason to believe that the interested parties had engaged in tax evasion. In that regard, on 8/12/2021, 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 parties.
8. It was the applicant’s case that, in the circumstances, and owing to the amount of taxes involved, it was likely that the interested parties may frustrate the recovery of the taxes if funds held by the respondents were not preserved. That unless the preservation order was granted, the applicant would suffer prejudice.
9. The interested parties opposed the application vide the replying affidavit of Mary Wambui Mungai, a director of the 1<sup>st</sup> interested party, sworn on 4/1/2022. She swore that the applicant had carried out tax investigations on the 1<sup>st</sup> interested party until 6/12/2021 and had computed Kshs. 44,606,651/= as taxes due. That the 1<sup>st</sup> interested party had paid a sum of Kshs. 10,000,000/= and proposed to settle the balance in instalments.
10. That the interested parties had since been charged in the Anti-corruption Case No. E028 of 2021, Rep. vs Purma Holdings Limited & 2 others (“the Criminal Case”), with 8 offences of failure to pay the alleged taxes. That the purpose of the various preservation notices to the respondents was to prevent the interested parties from raising the cash bail of Kshs. 50,000,000/= in the criminal case.
11. It was the interested parties’ case that the alleged taxes of Kshs. 2,535,410,527/= was the subject matter of the criminal case which was still under investigation. That the preservation notices were issued



- after the institution of the criminal case whereby the court in that case had ordered that any new investigations were to be sanctioned by that court.
12. They contended that the orders of 24/12/2021 were obtained on concealment and non-disclosure of material facts by the applicant. That the interested parties had filed their audited accounts for the claimed period and received various tax compliance certificates.
  13. They further contended that the applicant had not demonstrated a reasonable belief that they were likely to frustrate the recovery of tax. That the preservation notices had been issued maliciously.
  14. The applicant filed a further supporting affidavit of Rael Ivayo sworn on 9/1/2022. It contended that the investigations begun in 2019 culminating in the applicant's letter of 28/5/2021 where the tax liability of Kshs. 2,535,410,527/= was imposed, inclusive of the admitted sum of Kshs. 44,606,651/= which had not been cleared.
  15. That the ruling in the criminal case did not extend to civil proceedings and had been delivered after the investigations had began. It denied any malice in the issuance of the preservation notices. That they were issued in order to prevent any frustration in tax collection considering the colossal amounts involved.
  16. The applicant further contended that the issuance of tax compliance certificates to the interested parties was not conclusive proof of the holder having fully complied with tax obligations. That the present proceedings were purely civil and were not barred by any criminal proceedings against the interested parties.
  17. The 4<sup>th</sup> respondent responded to the application vide the replying affidavit dated 31/1/2022 sworn by Samuel Kahuhu. It was deponed that the preservation notice was received by the defendant bank and the 2<sup>nd</sup> interested party's account was subsequently frozen.
  18. The parties filed their respective submissions which were hi-lighted on 10/1/2022. 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.
  19. Counsel submitted that the interested party was likely to frustrate the recovery of tax based on the gross under declarations, and on the fact that the admitted taxes of Kshs. 44,606,651/= had not been settled. That the colossal amounts involved was also a factor for consideration.
  20. On the part of the interested parties, it was submitted that the order of 24/12/2021 had been obtained by concealment and non-disclosure of material facts. That the pendency of the criminal case and the court's ruling directing that new investigations should first be sanctioned by that court ought to have been disclosed.
  21. Counsel relied on *Shirinkhanu Amirali Shariff v. Alibhai Sharrif & 7 others* [2005] eKLR where an ex-parte order was set aside due to concealment and non-disclosure of material facts. Further reliance was placed on *Aberdare Freight Service Ltd V Kenya Revenue Authority* [2006] eKLR where it was held that factual and legal misrepresentations were an unfair use of the court process.
  22. Counsel submitted that the various tax compliance certificates were evidence of no tax debts or liability hence the first condition under section 43 of the Act had not been met. On the issue of frustration of tax recovery, counsel submitted that the burden of proof was with the applicant and the same had not



been discharged. The case of *Geo Chem Middle East Ltd v Kenya Revenue Authority & 2 others* [2021] eKLR was relied on in support of those submissions.

23. It was also submitted that the interested parties had already paid a cash bail of Kshs. 50,000,000/= to secure their attendance in court, hence it would be unfair to deny them access to their money.
24. It was submitted that the sum of Kshs. 2,535,410,527/= was claimed from the 1<sup>st</sup> interested party which was a limited liability company. That the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties were its directors and shareholders and had separate legal entities and tax payers. The case of *George WM Omondi & Another v National Bank of Kenya Ltd & 2 others* [2001] eKLR was relied upon on the law on the liability of directors and shareholders from the actions of a company. That no demand for that amount had been made against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents and their accounts ought not to have been attached for the claimed tax liability of the 1<sup>st</sup> interested party.
25. I have considered the affidavits on record, all the files for the respective matters, the written and oral submissions of Learned Counsel. I have also considered the authorities relied on.
26. This is an application by the tax authority for funds preservation under section 43(2) of the Act. The notices were issued to the 1<sup>st</sup>- 5<sup>th</sup> respondent.
27. It is the duty of every citizen to pay tax. In *Pili Management Consultants Ltd vs Commissioner of Income tax KRA* [2016] eKLR and *KRA vs Jimmy Mutuku Kiamba* [2015] 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 to pay tax by every citizen.
28. 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.
29. 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’.

30. 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”.

31. 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”.

#### **A. ON REASONABLE BELIEF**

32. 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 remitted 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.

33. 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”.

34. 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”.

35. 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.

36. 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 parties were likely to frustrate the recovery thereof.

37. It is not in dispute that the 1<sup>st</sup> interested party had filed returns and paid some money in respect of taxes. The interested parties also held various Tax Compliance Certificates. However, it is the applicant’s



contention that the 1<sup>st</sup> interested party had failed to account for all the tax due. That it had under-declared its income for the period in question.

38. To satisfy the first condition, the applicant contended that it had carried out investigations which revealed that the 1<sup>st</sup> interested party had income of Kshs. 7,666,374,020/= which was undeclared leading to alleged loss of Kshs. 1,937,529,876/= in income tax and Kshs. 597,880,651/= in VAT totaling to a loss of Kshs. 2,535,410,527/= in revenue. The interested parties submitted otherwise.
39. 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 allegedly from 2019. The applicant cannot be said not to have had a reasonable belief that there was tax due from the interested parties.
40. In this regard, I hold and reject the interested parties' contention that their tax compliance certificates ought to have been conclusive evidence of non-liability. I say this because the Tax Compliance Certificates are issued based on the self-assessment done by the tax payer.
41. The issuance of the compliance certificate does not bar the applicant from investigating the self assessment. The various certificates relied upon were issued based on the 1<sup>st</sup> interested party's self - assessment which was investigated and revealed possible under-declaration of income. Such realization justified the applicant's reasonable belief under section 43 of the Act that there may be some 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. In this regard, I hold that the first condition was met.

## **B. LIKELY TO FRUSTRATE RECOVERY**

42. On the second condition, it was the applicant's case that owing to the interested parties' under declaration of income and evasion of tax and owing to the amount of taxes involved, it was likely that they would frustrate the recovery of the taxes if funds held by the respondents were not preserved. It was also contended that the 1<sup>st</sup> interested party had admitted to owing Kshs. 44,606,651/= in taxes and the same had not been fully settled. That this formed the basis for a reasonable belief that the interested parties would frustrate the recovery thereof. The interested parties contended otherwise.
43. The interested parties contended that the whole process was malicious. That the applicant had instituted the criminal case on 6/12/2021 before lodging this application on 17/12/2021. That the court in the criminal case had directed that any new investigations on the interested parties were first to be sanctioned by that court. That the interim orders were obtained by material non-disclosure.
44. In *Signature Tours & Travel Limited V National Bank of Kenya Limited* [2017] eKLR, the court cited with approval the case of *Bahadurali Ebrahim Shamji V. Al Noor Jamal & 2 others* Civil Appeal No. 210 of 1997 wherein the court had observed: -

“It is perfectly well-settled that a person who makes an ex parte application to the court — that is to say, in the absence of the person who will be affected by that which the court is asked to do — is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make the fullest possible disclosure then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained. It has been for many years the rule of court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts — facts, not law. He must not misstate the law if he can help it — the court



is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement ...”

45. In the instant case, the non-disclosure complained of was the existence of a criminal case concerning the applicant and interested parties over the same subject matter. There was also a ruling in that case directing that new investigations were to be first sanctioned by the criminal court.
46. Applying the test in *Bahadurali Shamji vs Al Noor Jamal (1997) Supra*, this court finds that there was concealment and material non-disclosure. It was incumbent upon the applicant to disclose the existence of the criminal case and the direction of the criminal court. It does not matter that the existence of the criminal case was not a bar to civil proceedings. Once the criminal case existed with the directions therein, it behooved the applicant to disclose the same to the court at the ex-parte stage.
47. On the likelihood of frustrating the recovery of the taxes, while the huge amount of taxes involved is a consideration, the same is not per se the determinant factor. There must be additional factors to justify a reasonable belief.
48. The interested parties were arraigned in court in the criminal court for the same taxes as alleged herein. They paid cash bail of Kshs. 50,000,000/= to secure their attendance. They had also demonstrated that they were making payments of the admitted taxes in installments and had so far paid Kshs. 10,000,000/=.
49. While past failure or inability to pay taxes can be a good ground for reasonable belief of the likelihood to frustrate recovery of taxes, that is not the case here. The interested parties had not paid the admitted taxes of about Kshs.34 million. However, they contended that the failure was occasioned by the applicant’s action of suspending the 1<sup>st</sup> interested party’s i-Tax Portal a fact that was not denied.
50. Something interesting happened on the issue of the none payment of these admitted taxes. On 26/1/2022, the interested parties wrote to the applicant to open the 1<sup>st</sup> interested party’s i-Tax Portal to allow for the payment of the outstanding tax. The applicant failed to respond.
51. The interested parties then filed a Motion on 27/1/2022, under a certificate of urgency to compel the applicant to open or re-activate the said i-Tax Portal. The order was granted on 4/2/2022 by consent of the parties. Still the applicant failed to activate the said i-Tax portal to allow the payment of the said taxes.
52. Frustrated by the applicant’s non-responsiveness or allowing them to pay the admitted taxes, the interested parties lodged an application dated 14/2/2022 seeking to cite the applicant’s Commissioner General for contempt. That application came up for hearing on 24/2/2022 but the applicant was not ready. It is pending hearing.
53. What the foregoing shows is; the applicant is alleging that there are huge taxes due from the interested parties; it has neither assessed the same nor ascertained them. On the other hand, there are ascertained and admitted taxes amounting to over Kshs. 34 million which the interested parties have been begging the applicant to allow them pay but the applicant has looked the other way. Can it then be said, in the circumstances, that there is a likelihood of a tax payer who is begging to be allowed to pay taxes of frustrating the recovery of such taxes? I don’t think so.
54. In order to satisfy the second condition in section 43 of the Act, it must be demonstrated that the applicant’s 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 speculation or conjecture but on the conduct of



- the tax payer and not any other extraneous consideration. Here, it is the interested parties who were begging the applicant to allow them pay the ascertained taxes, yet the applicant decided to look the other way.
55. As regards the allegation that the claimed tax is 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. If the applicant has been unwilling to accept payment the admitted sum of Kshs. 34 million, why is it hell bent on freezing the interested parties' accounts for unascertained taxes. Taxes it has not yet assessed in accordance with the law?
  56. 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 parties would frustrate the collection of revenue if the 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. Nothing of the sort here. Here is a case of a willing tax payer whose effort to pay ascertained taxes are being thwarted by the tax authorities.
  57. By virtue of Article 210, 10 and 47 of *the Constitution*, there is no room for arbitrary deprivation of property or infringement of the right to property. It was not enough for the applicant to act on a mere apprehension that the interested parties may frustrate revenue collection, there ought to have been reasonable grounds to support such apprehension.
  58. The upshot is that this Court finds that the applicant did not demonstrate that the interested parties are likely to frustrate the recovery of tax. The second condition under section 43 of the Act was therefore not met by the applicant.
  59. On the alternative prayer for security for taxes, I do not think the same would be merited. The unexplained hurry in which the applicant acted imputes bad faith on its part. The continued refusal to accept the payment of the admitted sum of Kshs. 34 million imputes extreme bad faith on the part of the applicant. The applicant has shown that it is prepared to entertain its Commissioner General to be cited for contempt rather than allow the interested parties comply with their civil duty of paying taxes!
  60. I don't think the Court should aid a perpetuation of bad faith. Further and more importantly, the interested parties have already paid Kshs. 50,000,000/= as cash bail in the criminal matter to secure their attendance.
  61. Be that as it may, considering the amounts allegedly involved, I would order a security of Kshs.50 million preserved. For the avoidance of any doubt, this single security is applicable in respect of all the preserved accounts and not on each and singular one of them. Recovery from any one of the accounts shall be sufficient to discharge all the other accounts in this case and in all the other cases, to wit, Misc. Appln. Nos. E926/2021, E927/2021, E929/2021, 930/2021 and E933/2021.
  62. In the meantime, let the applicant follow the procedures set out in sections 49 to 54 of the Act and recover the tax due. The criminal case is also ongoing and the applicant has an opportunity to achieve its objectives in that matter.
  63. 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 parties. The interim orders of preservation issued on 24/12/2021 are hereby forthwith discharged. These orders apply to Misc. Appln. Nos. E926/2021, E927/2021, E929/2021, 930/2021 and E933/2021, respectively. The security ordered herein is in addition to the security ordered in Misc. Appln. No.926/2021.

It is so ordered.



**DATED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF FEBRUARY 2022.**

**A. MABEYA, FCIArb**

**JUDGE**

