



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. E414 OF 2018

KEY CORP REAL ADVISORY LIMITED1ST PLAINTIFF/APPLICANT

PETER KIGUTA WERU T/A CENTRICA INVESTMENTS ...2ND PLAINTIFF/APPLICANT

-VERSUS-

KENYA REVENUE AUTHORITYDEFENDANT/RESPONDENT

RULING

Background

1. Through an application dated 5th December 2018 (hereinafter “**the Earlier Application**”), the plaintiff/applicants herein sought, inter alia, orders of injunction to restrain the respondent from enforcing the agency notices issued on 9th November 2018 and to be allowed to withdraw the sum of Kshs 15 million to cater for bills salaries and cheques which had been issued by the plaintiffs.

2. In a ruling delivered on 25th July 2019, tis court dismissed the application on the basis that the suit is *sub judice* and offends the doctrine of exhaustion.

Application dated 30th January 2020

3. Following the dismissal of the earlier application, the applicants/plaintiffs filed the present application on 31st January 2020 seeking the following orders.

1. Spent

2. That the orders of 25th July, 2019 together with any other consequential orders be set aside, varied, vacated and/or reviewed pending the hearing and determination of this suit.

3. That this Honourable court be pleased to lift agency notices issued by the defendant on 9th November, 2018 to Spire Bank Limited and Commercial Bank of Africa.

4. That this court be pleased to make any further orders that it may deem fit to grant in the circumstances; and

5. That costs of this application be provided for.

4. The application is brought under Articles 50 and 159 of the Constitution, Order 45 Rules 1, 2 of the Civil Procedure Rules among other provisions. The application is supported by the affidavit of the 1st plaintiff’s Director and Proprietor of the 2nd plaintiff, **Mr. Peter Kiguta Weru**, and is premised on the grounds that:

1. That there are new facts and documents which were not within the plaintiff’s possession and now have been obtained.

2. That it has come to the knowledge of the plaintiffs/applicants that the tax in question is being remitted to the

defendant/respondent as required by the law by the tax payer who is not the plaintiffs.

3. That the plaintiffs are not tax payers in relation to the dispute herein hence are not a subject to tax appeal tribunal since there dispute herein has nothing to do with assessment of taxes.
4. That the agency notices subject of this dispute have been issued to the applicants as third parties and not as taxpayers.
5. That the defendant/respondent cannot be allowed by this honourable court to effect the urgency notices and preservation notices issued on 9th November, 2018 and 13th November, 2018 respectively yet the taxes in question are being remitted and which taxes they are not liable to.
6. That the respondent has failed to disclose to this court that they have an agreement with taxpayer and with the agreement in place the defendant cannot have any claim on the plaintiff's funds.
7. That the plaintiffs/applicants are not party to the tax disputes arising between the defendant/respondent and third parties hence cannot be held at ransom and instead should be allowed to continue with their business freely.
8. That due to the fact that the plaintiffs/applicants are not party to the tax disputes arising, the Tax Appeals Tribunal is not the appropriate forum to issue the orders being sought in the plaintiffs' application of 5th December, 2018.
9. That other than this suit, there is no pending suit between the parties herein either at the tribunal or any court of competent jurisdiction.
10. That it is therefore in the interest of justice and fairness that the honourable court set aside, varies, vacates and reviews the orders of 25th July, 2019 to allow the parties proceed for hearing of the application of 5th December, 2018.
11. That the plaintiffs'/applicants are bound to continue suffering great prejudice and loss unless the orders being sought herein are granted.
12. No prejudice shall be occasioned to the defendant/respondent.

5. At the hearing of the application, **Mr. Were**, learned counsel for the applicants reiterated the grounds cited on the face of the application and expounded on the averments made by the applicant's deponent. Counsel submitted that new issue was that that had been discovered was that the taxes in dispute were being paid by the tax payer, **Oxygen 8**, and that there was therefore no need to continue holding the sums of money held in the applicants' bank accounts. He argued that the applicants are not the taxpayers in these proceedings and that no assessment of taxes had been done against the applicants.

Respondent's case.

6. The respondent opposed the application through the replying affidavit of its officer **Mr. Dominic Keng'ara** who reiterates the averments he made on 29th November and 19th December 2018 in response to the earlier application. He avers that the agency notices that are the subjects of this dispute are clear in their content and that sums due are "**Tax due to Kenya Revenue Authority which was diverted to this account**".

7. He states that there are no new facts as alleged by the applicants as the notices formed part of the plaintiffs' earlier application. He faults the applicants for misleading the court on the existence of an agreement between the respondent and **Oxygen 8** and maintains that there is no such agreement over the payment of taxes and that Oxygen 8 still owes the respondent a substantial amount of money arising from tax payments that they channeled through the applicants who ended up diverting the same to their own accounts thus leading to the issuing of the agency notices.

8. He states that while **Oxygen 8** has been paying the taxes due and owing to the respondent, it has not settled the tax arrears that were diverted to the plaintiffs' accounts that are the subject of the Agency Notices. He further states that the ledger report attached to the applicants' affidavit as annexure "**PKW2**" only shows **Oxygen 8's** self assessment and payment of taxes but does not address the taxes that were diverted to the plaintiffs' accounts.

9. He further avers that the letter marked "**PKW3**" annexed to the plaintiff supporting affidavit does not state the total tax arrears owed by the said **Oxygen 8** but is specific to tax arrears of Kshs 19,938,956 tabulated as PAYE for the year 2019 and adds that the said taxes have nothing to do with taxes that were diverted to the plaintiffs' accounts.

10. He avers that as a result of withholding and/or diverting taxes due from the said **Oxygen 8** to the respondent, the plaintiffs directors were arrested and charged in Milimani Law Courts in criminal, case Nos 2091/2018 and 20192/2018. He further avers that the instant application is an attempt by the applicants to reopen their earlier application which was dismissed instead of filing an appeal.

11. He accuses the applicants of abusing the due process of court by filing this application even after the ruling in the earlier application had made it clear that the applicant was required to exhaust the mechanisms provided under Sections 51, 52 and 53 of the Tax Procedures Act.

12. At the hearing of the application **Miss Almadi**, learned counsel for the respondent reiterated the averments contained in the replying affidavit and submitted that no new facts had been presented before this court to warrant the issuance of the orders of review sought in the

application.

Analysis and determination.

13. I have carefully considered the application dated 30th January 2020, the respondent's response and the submissions by counsel for the parties.

14. The main issue for determination is whether the applicants have made out a case for the granting of the orders to lift the agency notices issued on 9th November 2018 and set aside, vary, vacate or review the orders of 25th July 2019.

15. Order 45 Rules 1 and 2 of the Civil Procedure Rules stipulates as follows:

Application for review of decree or order.

1. (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

[Order 45, rule 2.] To whom applications for review may be made.

2. (1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.

(2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.

(3) If the judge who passed the decree or made the order is still attached to the court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other judge as the Chief Justice may designate.

16. In the present case, the applicants seek review on the basis that there are new facts and documents which were not within their possession at the time the ruling was made in the earlier application. The applicants referred to their annexure "PKW 1" and "PKW 2" to demonstrate that the respondent had entered into an agreement with **Oxygen 8** to settle the tax arrears due and added that the actual amount of tax arrears due from **Oxygen 8** was Kshs 19 million which is lower than the amount stated in the agency notices.

17. On its part, the respondent denied having reached any agreement with the said **Oxygen 8** on the amount of tax arrears due and stated that annexure "PKW1" was merely a commitment by **Oxygen 8** on how it wished to pay the taxes due while "PKW2" is in respect to their self assessment.

18. I note that the instant application seeks more or less the same orders that were sought in the earlier application. The earlier application was not determined on the basis of the facts of the case and whether or not the respondents were justified in issuing the agency notices, but on the law and the two doctrines of *sub judice* and exhaustion.

19. In the ruling delivered on 25th July 2019, this court held as follows on *sub judice*:-

"In the present case, the applicants did not deny the claim that it had filed 2 similar matters before the judicial review division of this court. I have perused the pleadings in the Judicial Review matters (being JR Nos. 447 and 448 of 2018) that were attached to the respondent's replying affidavit and I note that the same were filed on 13th and 27th November 2018 respectively. Both suits challenge the Agency Notices issued to the plaintiff by the respondent herein which is the subject matter in this case. It was not disputed that the said suits have not been heard and/or determined. The claims are the same, and the parties are also the same.

Accordingly, I have no hesitation in finding that the matter is sub judice as the issues in this suit are directly and substantially in issue in the Judicial Review matters and the appropriate order that commends itself to me at

this stage is to order that this suit shall forthwith be stayed pending hearing and determination of JR 147 and 148 of 2018. I hasten to add that the applicants are at liberty to consolidate this suit with the JR matters for purposes of expeditious disposal of all the suits”

20. Besides the finding that the suit herein is sub judice, this court also found that having been issued with agency and preservation notices a tax decision within the meaning of Section 52 of the Tax Procedures Act had been taken against the applicants and the correct cause of action to be taken by them, if aggrieved by the notices, was to refer the dispute to the Tax Appeals Tribunal before the matter can be filed in court.

21. In the present case, I note that the applicants have not only not informed the court of the position regarding the proceedings pending before the Judicial Review Division of this court over the same subject matter, but have also not indicated if they lodged any claim before the Tax Appeals Tribunal.

22. My finding is that having dismissed the earlier application on grounds that this matter is subjudice and offends the doctrine of exhaustion, this court cannot be called upon to review its earlier orders on the basis of discovery of new material/facts that was not in the knowledge of the applicants regarding the alleged payments of the taxes.

23. My take is that the alleged discovery of new material does not take away the fact that this court had already stayed this suit pending the hearing and determination of JR 147 and 148 of 2018 besides the finding on the doctrine of exhaustion.

24. I find that to revisit the earlier application, in the face of the findings on the doctrine of subjudice and exhaustion will be tantamount to this court sitting on appeal in its own decision.

25. For the above reasons, I do not find any merit in the application dated 30th January 2020 and I therefore dismiss it with costs to the respondent.

Dated, signed and delivered via skype at Nairobi this 23rd day of April 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Miss Okweto for Were for plaintiff/applicant

C/A & DR – Hon. Tanui