



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**MISCELLANEOUS CIVIL APPLICATION NO. 179 OF 2019**

**IN THE MATTER OF TAX PROCEDURES ACT, 2015**

**ACT NO. 29 OF 2015**

**IN THE MATTER OF AN APPLICATION BY KENYA REVENUE AUTHORITY**

**FOR AN ORDER UNDER SECTION 43 OF TAX PROCEDURES ACT**

**KENYA REVENUE AUTHORITY.....APPLICANT**

**VERSUS**

**AFRICA SPIRITS LIMITED.....DEFENDANT**

**RULING**

1. The subject of this ruling is the notice of motion application dated 1<sup>st</sup> March 2019, supported by the grounds on the face of it and an affidavit sworn by Robert Thinji Muriithi, a director of the Applicant's company. I have taken note of the prayers therein and the provisions of the law cited in support thereof.
2. In a nutshell, the Applicants are seeking for an order that, the accounts; Nos. 117573\*\*\*\*, 117802\*\*\*\*, 110714\*\*\*\*, 117802\*\*\*\*, 1107143\*\*\* and 1166883\*\*\* held by them at Kenya Commercial Bank Limited be unfrozen. The said accounts were apparently frozen following an agency notice served on the Bank by the Kenya Revenue Authority (KRA), the Respondent to this application.
3. Following the filing of a notice of motion dated 21<sup>st</sup> February 2017, by Kenya Revenue Authority, the court issued an order on 22<sup>nd</sup> February 2019 preserving funds and prohibiting the transfer, withdrawal or disposal of or other dealings involving the funds in the said accounts hence the orders sought for by the Applicant herein. The Applicants aver that, the Respondent has also shut down their business premises and carted away several documents, books of accounts and data.
4. However, the application was opposed vide a replying affidavit of Dominic Keng'ara, an officer of Kenya Revenue Authority (KRA). He deposed that, Kenya Revenue Authority (KRA) together with the DCI officers on 31<sup>st</sup> January 2019 were in pursuit of a truck Registration No. KCD 672Y ZF 3996, suspected to be conveying un-customed ethanol.
5. The truck was tracked to the Applicant's premises situated in Thika Kiambu County. Subsequently the security agencies obtained warrants of search and seizure, 100 drums of un-customed ethanol and a cache of approximately 894 reels of counterfeit exercise stamps in the premises.
6. The Respondent then concluded the Applicant were liable to pay Kenya Shilling Ninety-Three Million (Kshs. 93,000,000), although it is believed that, after full assessment, the tax liability will be way over Kenya shilling Three Billion (Kshs. 3,000,000,000). However, as the exercise of ascertaining tax evasion is extensive, it is important that, the accounts that contain Kenya Shillings Fifty Eight Million (Kshs.58,000,000), which is a small fraction of the sum sought, be preserved under Section 43 of the Tax Procedure Act.
7. The court heard the parties orally in this subject application, and in my considered opinion, the only issue that is urgent relates to the prohibition and/or access to the Applicant's accounts.
8. The provisions of Section 43 of the Tax Procedures Act, (herein "the Act") entitles Kenya Revenue Authority, to preserve money and prohibits the owner not to transfer, withdraw, dispose or otherwise deal with the funds, within the period of ten (10) days' notice. However,

the commissioner can apply to the High court for extension of the ten (10) days' notice, for a period of thirty (30) days, and this period may be extended by the court, beyond the initial thirty (30) days.

9. However, the tax payer can apply within fifteen (15) days of service of the court order to have it discharged. If the order is not discharged, the Commissioner shall within thirty (30) days, assess the tax due and payable and notify the tax payer. It is therefore clear from the provisions of Section 43, that, there are strict timelines set.

10. In the instant matter, Kenya Revenue Authority sent a notice to the head of Legal Kenya Commercial Bank Limited on 8<sup>th</sup> February 2019, in terms of the provisions of the law; this notice should have lapsed on or before 18<sup>th</sup> February 2019. The application to extend this period was filed in court on 22<sup>nd</sup> February 2019. As can be seen clearly, it was outside the period of ten (10) days, but there was no serious contention therefore by the Applicants.

11. The application to set aside the preservation of funds was filed court on 1<sup>st</sup> March 2019. It suffices to note that, the thirty (30) days given to Kenya Revenue Authority should have expired by 22<sup>nd</sup> March 2019. By 3<sup>rd</sup> April 2019, Kenya Revenue Authority had not sought for extension of those orders, but sought for an extension of seven (7) days on the 4<sup>th</sup> of April 2019 on the ground that, it needed more time to go through the documents seized from the Applicants to fully ascertain the tax liability.

12. However, it is noteworthy that, the Applicants offered to deposit the initial assessed sum of Kenya Shillings Ninety Three Million (Kshs. 93,000,000) for Kenya Revenue Authority to allow them access the funds. However, that offer was turned down on the ground that, the same was based on different assessment of domestic tax. It is clear that, Kenya Revenue Authority will require a lot of time to assess the tax due and payable, that the Applicants cannot be shut out of funds without an indication of as to how soon Kenya Revenue Authority will be done with the exercise.

13. In that regard, to address the urgency of this matter and at the same time to allow Kenya Revenue Authority an opportunity to conclude the assessment, I shall grant Kenya Revenue Authority the seven (7) days of this order extension period to ascertained tax liability and serve it upon the tax payer. In default thereof, any orders and/or notice issued preserving the funds shall automatically lapse. In the meantime, as per the request of the Applicants on 9<sup>th</sup> April 2019, the accounts may be opened purely for the purposes of receiving credits and no debits shall be paid out. The rest of the issues in the application will go to full hearing.

14. Those then are the orders of the court.

**Dated, delivered and signed in an open court this 24<sup>th</sup> day of April 2019.**

**G.L. NZIOKA**

**JUDGE**

**In the presence**

**Mr. Kirugi for the Applicant**

**Mr. Ouma for the Respondents**

**Dennis .....court Assistant**