



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. E414 OF 2018

KEY CORP REAL ADVISORY LIMITED.....1ST PLAINTIFF/APPLICANT

PETER KIGUTA WERU T/A

CENTRICA INVESTMENTS.....2ND PLAINTIFF/APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....DEFENDANT/RESPONDENT

RULING

1. Through an application dated 5th December 2018 brought under Order 40 Rules 1(a),(b), 2(1) (2) and 3 of the Civil Procedure Rules, the plaintiffs applicants seek the following orders:

a) Spent

b) Spent

c) That orders of injunction do issue restraining the defendant either by itself, its servants, proxies, agents or through any other person from acting on or enforcing the agency notices issued on 9th November, 2018 and notice to preserve issued on 13th November, 2018 pending the hearing and determination of this application.

d) That the 2nd plaintiff be allowed to withdraw a sum of kshs 15,000,000/- to cater for the bills salaries and the cheques which were issued by the plaintiffs.

e) That an order of injunction do issue restraining the defendant either by itself, its servants, proxies agents or through any other person from acting on or enforcing the agency notices issued on 9th November, 2018 and notice to preserve issued on 13th November, 2018 pending the hearing and determination of this application.

f) That cost of this application be awarded to the plaintiffs/applicants.

2. The application is supported by the affidavit of the 2nd plaintiff and is premised on the following grounds;

a) That the defendant has never issued the plaintiffs with any notice of any sums if any which is due to them.

b) That the defendant is giving contradicting figures and in any event has not shown where they are getting the figures from.

c) That no mode of calculation has been shown by the defendant on how they have reached at the figures they demand from the plaintiffs.

d) That the notices are causing hardship to the plaintiffs' business and the plaintiffs cannot manage their obligations such as paying salaries and their supplies.

e) That by issuing the notices to the defendant amounts to pure harassment in the circumstances.

f) That justice requires that every person should be accorded a fair hearing and the plaintiffs have not been accorded a hearing.

g) That it is only reasonable and fair to grant the orders being sought herein by the plaintiffs.

h) That freezing the plaintiffs' accounts is causing unnecessary loss and damage to the plaintiffs which loss and damages can be mitigated if the orders sought herein are granted.

i) The defendant shall not suffer any prejudice if orders sought herein are granted hence it is in the interest of justice to allow this application.

j) On other grounds and reasons to be adduced at the time of hearing hereof.

3. The 2nd plaintiff avers that on 24th October 2018, he received a letter from the defendant requesting him to attend a meeting on 31st October, 2018 as shown in annexure "PKW1" and that he attended the meeting after which he was informed to attend another meeting on 2nd November, 2018 however, on the date slated for the said 2nd meeting the defendant's agents re-arrested him without any justifiable cause and without any explanation before he was released on a Kshs. 100,000 cash bail as shown in the receipt marked annexure "PW2".

4. He states that he was thereafter arraigned in court where he was jointly charged with the 1st plaintiff. He avers that it was after his court appearance that the defendant issued agency and preservation notices, to their account thereby curtailing their financial operations.

5. He further avers that the defendant did not serve them with any notices or explain to them how the sums of money demanded in the agency notices were arrived at. He also states that the plaintiffs are unable to attend to their financial obligations due to the freezing of their accounts thereby negatively impacting in their business.

6. At the hearing of the petition, Mr. Were, learned counsel for the applicants submitted that the applicants ought to be allowed to withdraw a portion of the amount being held through the agency notice so as to enable the company operate as the defendant had as at the date of the hearing not made any assessment of the taxes due to them. It was the applicants' case that the respondent had not exhibited any documents to show the level of their indebtedness.

Respondent's case

7. The respondent opposed the application through the replying affidavit of its appointed, officer, one **Dominic Kengara** who avers that the 2nd applicant is a co-director of the 1st plaintiff and a principal suspect in investigations and on-going prosecution before Makadara Chief Magistrate's Court in Makadara CMCCR Case No. 2092 of 2018 wherein he has been charged with the offence of tax evasion among other offences.

8. He avers the said prosecution is a culmination of investigations into a tax evasion racket involving the plaintiffs and another company known as Oxygen 8 East Africa from which taxes due to the respondent were diverted to the plaintiff with a view to evading payment of the said taxes. He adds that one **Brian Nasinde Waluchio**, a Managing Director of the Kenyan Chapter of Oxygen 8 East Africa also faces charges of collusion with the plaintiffs to avoid payment of taxes. He attached a copy of the charge sheet to the replying affidavit as annexure "KRA3".

9. He states that the respondent was able to obtain statements from witnesses that resulted in the prosecution of the plaintiffs for failing to remit taxes paid to them by Oxygen 8 East Africa Ltd for onward transmission to the respondent and for being a conduit for stolen taxes. He further states that the monies held in the plaintiffs' bank account that are the subject of the Agency and Preservation Notices should be safeguarded because the funds are required in evidence in the said criminal proceedings instituted against the plaintiffs and that the respondent is under the provisions of Section 43(1) (b) of the Tax Procedures Act (hereinafter "**the Act**") entitled to seek the preservation of funds where the commissioner reasonably believes that the tax payer is likely to frustrate the recovery of taxes.

10. It is the respondent's case that the Agency Notices were issued by the respondent in exercise of the Commissioner's powers and Section 42 of the Act. He further avers that the plaintiff applicant has filed 2 similar applications before the Judicial Review Division of this court being **Nairobi High Court Misc Judicial Review No. 447 of 2018; Republic Versus Kenya Revenue Authority Exparte Centrica Investment**, and **Nairobi High Court Misc Judicial Review Application No. 448 of 2018; Republic Versus Kenya Revenue Authority Exparte Keycorp Real Advisory Limited** and that the instant application is therefore an abuse of the court process. Copies of the pleadings in the said Judicial Review matters are attached to the replying affidavit as annexure "KRA8".

11. At the hearing of the application, Mr. Wairire, learned counsel for the respondent submitted that the case filed by Oxygen 8 East Africa Limited against the plaintiffs was an indication that the plaintiffs diverted the taxes that they were supposed to pay to the respondent.

12. Counsel submitted that Section 51 of the Act identifies the action taken by the commissioner against the plaintiffs as a tax decision which ought to be pursued at the Tax Appeals Tribunal. It was therefore the respondent's argument that the applicant failed to exhaust all the procedures provided for under the Act before filing the case before this court.

13. Counsel argued that the respondent has, in the replying affidavit explained, at great length, how the taxes received by the plaintiffs from Oxygen 8 East Africa Limited for onward transmission to the respondent were diverted by the plaintiff and that it was therefore the respondent's duty to pursue the plaintiff for the said taxes.

Analysis and Determination

14. I have considered the pleadings filed herein, the submissions of the parties' counsel and the applicable law. The issues that fall for determination are:-

a) Whether the instant application is subjudice.

b) Whether the doctrine of exhaustion is applicable in this case, and depending on the answer to (a) and (b) above.

c) Whether the applicant is entitled to the orders sought herein.

15. On the issue of sub judice, the respondent submitted that in view of the existence of 2 similar applications before the Judicial Review Division of this court, the instant application amounts to an abuse of the court's process. The sub judice rule is stated under Section 6 of the Civil Procedure Act which provides that:

No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceedings in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

16. In instances where the test of res sub judice is established or met, the explanatory notes to the Section 6 of the Civil Procedure Act stipulates that the latter suit would be stayed until the earlier suit is heard or determined. In practice, however, the two similar suits could be consolidated for hearing and determination.

17. When dealing with the doctrine of sub judice in the case of **Republic v Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 Others [2017] eKLR** the court held that:

“...Therefore for the principle to apply certain conditions precedent must be shown to exist: First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title; and such suit or proceeding must pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed...”

18. The rationale for this principle was restated in ***Kampala High Court Civil Suit No. 450 Of 1993*** -

(1) A taxpayer who wishes to dispute a tax decision shall first lodge an objection against that tax decision under this section before proceeding under any other written law.

(2) A taxpayer who disputes a tax decision may lodge a notice of objection to the decision, in writing, with the Commissioner within thirty days of being notified of the decision.

(3) A notice of objection shall be treated as validly lodged by a taxpayer under subsection (2) if—

(a) the notice of objection states precisely the grounds of objection, the amendments required to be made to correct the decision, and the reasons for the amendments;

(b) in relation to an objection to an assessment, the taxpayer has paid the entire amount of tax due under the assessment that is not in dispute or has applied for an extension of time to pay the tax not in dispute under (1); and

(c) all the relevant documents relating to the objection have been submitted.

(4) Where the Commissioner has determined that a notice of objection lodged by a taxpayer has not been validly lodged, the Commissioner shall immediately notify the taxpayer in writing that the objection has not been validly lodged.

(5) Where the tax decision to which a notice of objection relates is an amended assessment, the taxpayer may only object to the alterations and additions made to the original assessment.

(6) A taxpayer may apply in writing to the Commissioner for an extension of time to lodge a notice of objection.

(7) The Commissioner may allow an application for the extension of time to file a notice of objection if—

(a) the taxpayer was prevented from lodging the notice of objection within the period specified in subsection (2) because of an absence from Kenya, sickness or other reasonable cause; and

(b) the taxpayer did not unreasonably delay in lodging the notice of objection.

(8) Where a notice of objection has been validly lodged within time, the Commissioner shall consider the objection and decide either to allow the objection in whole or in part, or disallow it, and Commissioner's decision shall be referred to as an "objection decision".

(9) The Commissioner shall notify in writing the taxpayer of the objection decision and shall take all necessary steps to give effect to the decision, including, in the case of an objection to an assessment, making an amended assessment.

(10) An objection decision shall include a statement of findings on the material facts and the reasons for the decision.

(11) Where the Commissioner has not made an objection decision within sixty days from the date that the taxpayer lodged a notice of the objection, the objection shall be allowed.

52. Appeal of appealable decision to the Tribunal

(1) A person who is dissatisfied with an appealable decision may appeal the decision to the Tribunal in accordance with the provisions of the Tax Appeals Tribunal Act, 2013

(2) A notice of appeal to the Tribunal relating to an assessment shall be valid if the taxpayer has paid the tax not in dispute or entered into an arrangement with the Commissioner to pay the tax not in dispute under the assessment at the time of lodging the notice.

53. Appeals to High Court

A party to proceedings before the Tribunal who is dissatisfied with the decision of the Tribunal in relation to an appealable decision may, within thirty days of being notified of the decision or within such further period as the High Court may allow, appeal the decision to the High Court in accordance with the provisions of the Tax Appeals Tribunal Act, 2013.

21. The respondent relied on the "Doctrine of Exhaustion" which requires that a party exhausts all available dispute resolution mechanisms provided by the law before filing a dispute in court. The doctrine was aptly captured by the Court of Appeal case of Geoffrey Muthinja Kabiru & 2 Others Vs Samuel Munga Henry & 1756 Others [2015] eKLR where the court held:-

"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be for a last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for

resolution outside the courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute.”

22. The plaintiffs’ argument was that as at the time they filed this suit, the Tax Appeals Tribunal was not sitting and that since justice cannot be suspended, Makau J. was able to grant the applicants interim orders. My finding is that having regard to the clear provisions of the sections 51, 52 and 53 of the Act that I have already highlighted in this judgment, it is clear that there is clear path that any party aggrieved by a tax decision should follow and that the first port of call should have been the Tax Appeals Tribunal before the matter can be filed in court.

23. Having regard to my findings on the two issues of res sub judice and the doctrine of exhaustion, I decline to grant the orders sought in the application dated 5th December 2018 which I hereby dismiss with no orders as to costs.

Dated, signed and delivered in open court at Nairobi this 25th day of July 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Were for the plaintiff /applicant

Mr Wairire for the respondent

Court Assistant - Ali