



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL SUIT NO 14. OF 2018

HANNAH NJERI GITUKIA.....APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....1ST RESPONDENT

LEAKEYS AUCTIONEERS.....2ND RESPONDENT

RULING

Background

By plaint dated 19th September 2018 Hannah Njeri Gitukia sued the defendant Kenya Revenue Authority (1st Defendant) and Leakey Auctioneers (2nd Defendant) seeking the following orders;

- i. A declaration that the 1st defendant instructions to the 2nd defendants to distress for tax and the latter's levying of properties pursuant to the instructions was irregular, procedural and unlawful.*
- ii. A permanent injunction restraining the defendants from seizing and selling the plaintiff's properties hereinabove listed and/or any of her properties located within her depot at plot 33D Kimilili.*
- iii. Costs of this suit.*

The plaintiff in her plaint avers that she is a registered tax payer and carries out her business on Plot number 33D Kimilili which business includes distribution of Coca Cola products. She avers that on 11.9.2018 on instruction of 1st Defendant the 2nd defendant distressed the plaintiff movable property. The documents of distress of the property shows the tax payer was Emiliana Muthoni King'ori and yet her name is Hannah Njeri Gatukia and that Emiliana Muthoni King'ori has no interest in the property distressed.

She avers in paragraph 11 of the plaint that the particulars of want of procedure, irregularities and illegality are as follows;

- i. Affronting the plaintiff's right to fair administrative action.*
- ii. Distraint of the plaintiff's properties whilst there is not any unpaid tax owing from her*
- iii. Deliberately distraint of the properties of the plaintiff whilst aware when they ought to have been that the property belongs not to Emiliana Muthoni King'ori*
- iv. Engaging a summary procedure for recovery of tax in circumstances that do not support such a procedure*
- v. Offending the provisions of section 41 of the Tax Procedure Act, 2015.*

The defendants filed statement of defence dated 15th January 2019. The defendant avers that the plaintiff is a tax payer. In paragraph 4 and 5 respectively of the defence the defendant avers;

- 4. That the aforesaid Emiliana Muthoni Muraya a.k.a Emiliana Muthoni King'ori of national identification card No. 93608879 postal address number 707-50204 and cell phone No. 07055768559 was at all material times the bonafide proprietor of the said business "Emiliana Distributors" registered under certificate number 25636 mainly dealing in among others, soda distribution business within Kimilili town of Bungoma County.*

5. That the aforesaid taxpayer in her obligation to pay tax to the tune of kshs.29,507,246/= inclusive of penalties and interest thereby necessitating issuance of a demand and subsequently a notice of distress from the Defendant.

The plaintiff filed a notice of motion dated 19.9.2018 seeking the following orders;

i. Spent

ii. Pending of this application interparties the defendants/respondents be restrained by themselves, their agents and/or servants or whoever from selling those properties they proclaimed and impounded on the 13th September 2018.

iii. Pending the hearing and determination of the suit herein, the Defendants/Respondents their agents or servants or whoever be restrained by way of temporary injunction restraining the defendants/respondents from levying distress for tax over the plaintiff's/Applicant's business goods and/or in any manner interfering with the plaintiff's/Applicant's business.

iv. Costs of this application be provided for.

The grounds of the application is that the distress document relate to Emiliana Muthoni King'ori and not to the plaintiff/applicant who is the proprietor of the goods proclaimed.

The 1st defendant filed a replying affidavit sworn on 3.10.2018 by Eric Owiyo the debt manager of 1st Defendant. He deponed in paragraph 5

“That I am aware from records in our possession one tax payer Emiliana Muthoni Muraya also known as Emiliana Muthoni King'ori of National Identity Card No.9360879 and postal address No.707-50204 does among other economic activities, carry on a soda distribution business within Kimilili town of Bungoma County.(Annexed hereto and marked AKS 1 and 2 are true copies of the said taxpayer's KRA Pin and I tax screen shot confirming the foregoing)”.

Paragraph 7;

“That from records in our possession, the aforesaid taxpayer has not been fulfilling her obligations of paying taxes, thus arrears of Kshs.29,507,246/= comprising of taxes, penalties and interest”.

By consent the application herein was canvassed argued by way of written submissions. Both parties filed their respective submissions, the respondent in their submissions raised the issue whether this court has jurisdiction to determine this matter in view of the provisions of section 51 of Tax Procedure Act.

I have considered the pleadings and submissions. The main issue in the suit and application is whether the plaintiff/applicant whose property has been proclaimed is the tax payer- Emiliana Muthoni King'ori. The applicant contention is that she is not Emiliana Muthoni to whom there is a tax obligation. This is an issue in my view that can be canvassed. If indeed the plaintiff is the tax payer then section 51 of Tax Procedure Act will come into play.

If she, as she submitted is not the taxpayer intended then distressing property belonging to her will be unlawful and she is properly before this court seeking the prayers. Section 51 of the Tax Procedure Act applies where there is a dispute in relation to a tax decision which has been made in respect of the tax payer. The applicant avers this such decision has been made in respect to her. For this reason, I find that as the dispute is whether the applicant is the tax payer intended by the respondents which is a good ground for granting the orders of restraining the defendant from selling the proclaimed goods has been established.

I allow the application in terms of prayer(C) for 45 days.

In view of the orders issued this suit to be heard on **11.2.2020 at 2.30p.m.**

It is so decided.

Dated and Delivered at BUNGOMA this 29th day of Nov, 2019.

S.N. RIECHI

JUDGE.