



**REPUBLIC OF KENYA**

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

**JR –MISC APPLICATION NO. 9 OF 2018**

**IN THE MATTER OF APPLICATION BY BHARAT VINOD BHUTA**

**T/A USHA MERCHANDISE FOR LEAVE TO APPLY FOR ORDERS OF**

**CERTIORARI AND PROBATION**

**(UNDER ORDER 53, RULES 1, 2 & 3 OF THE CIVIL PROCEDURE RULES**

**CAP. 21 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE SECTIONS 7, 8, 9, 10 & 11) OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015**

**IN THE MATTER OF THE PROVISIONS OF THE CRIMINAL PROCEDURE CODE CAP. 75 OF THE LAWS OF KENYA,**

**THE EVIDENCE ACT CAP. 80 OF THE LAWS OF KENYA TOGETHER WITH ALL OTHER ENABLING PROVISIONS OF**

**THE LAW**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE KENYA REVENUE AUTHORITY.....RESPONDENT**

**AND**

**BHARAT VINOD T/A USHA MERCHANDISE.....EX-PARTE-APPLICANT**

**RULING**

1. The Ex-parte Applicant, **BHARAT VINOD T/A USHA MERCHANDISE**, sought leave of the Court to apply for Orders of Certiorari.
2. One of the other orders sought by the Ex-parte Applicant was that the leave, if granted, should operate as an order for the stay of all enforcement procedures against it, by the Kenya Revenue Authority.
3. The Court initially heard the application ex-parte and granted leave to the Applicant to commence the substantive process. However, the Court did not make a determination on the question as to whether or not the leave granted ought to operate as an order for the stay of the enforcement procedures.
4. The Court expressly directed the Applicant to serve the Respondent with the application, so that thereafter the Court would hear both parties before determining if the leave should operate as an order for stay of the enforcement procedures.
5. It is common ground that the Kenya Revenue Authority, (hereinafter “**KRA**” had issued four Agency Notices to the following companies;

**a. I & M Bank Limited;**

**b. Bank of Baroda;**

**c. Muhoroni Sugar Company Limited; and**

**d. Chemelil Sugar Company Limited**

6. Through the said Agency Notices, **KRA** was seeking to recover the sum of Kshs.39,185,172/=.

7. The Applicants hold the view that **KRA** was not entitled to claim those monies, as **KRA** had acted unilaterally when it purported to determine the dispute between it and the Applicant.

8. As far as the Applicant was concerned, the conduct of **KRA** was extremely draconian and oppressive. The Applicant deemed the actions of **KRA** as calculated to unjustifiably clamp down its financial muscle.

9. It was the understanding of the Applicant that its accounts would be frozen, pursuant to the Agency Notices.

10. In the circumstances, as the Applicant was not granted an opportunity to be heard before **KRA** served the Agency Notices, the Applicant feared that unless the enforcement procedures were put on hold, the Applicant would be compelled to shut down its business and lay-off all its employees.

11. If the Applicant were forced to shut down before its substantive application was heard and determined, the Applicant submits that the whole substantive application would have been rendered academic.

12. In answer to the application, **KRA** submitted that the Agency Notices were based upon the assessment on unpaid taxes for the period 2012 – 2017.

13. In the event that the Applicant had any objections to the said assessments, it is the position of **KRA** that the Applicant could have invoked its rights under **Section 51** of the **Income Tax Act**.

14. In effect, the Applicant could have lodged an Objection to the assessment.

15. In this case, the Applicant did not lodge any objection pursuant to the Act. The Applicant had also not sought an extension of time within which he could lodge an objection.

16. Consequently, the **KRA** submitted that Applicant was now under an obligation to pay the tax, in line with the assessment, as the law deems the Applicant to have admitted the accuracy of the assessment.

17. In the light of the understanding by **KRA**, that the Applicant is deemed to have admitted the tax, **KRA** submitted that the substantive application was now an academic exercise.

18. But even if the **KRA** were allowed to recover the taxes, it reasons that the Applicant could always invoke provisions of the law, which enable any person who had overpaid taxes, to reclaim the over-payment.

**19. KRA** pointed out that the Applicant was an Indian national, and that the Applicant had been understating his taxes.

20. As the Applicant did not have any known assets in Kenya, the Respondent asked the Court to allow it to collect the taxes.

21. In the case of **KENYA REVENUE AUTHORITY V. JIMMY MUTUKU KIAMBA, MISC. CASE NO. 285 OF 2015** (at the Commercial of Admiralty Division, Nairobi); the Court expressed the view that;

**“..... even though the Respondent says that he has enough assets which can be used to pay his taxes, his conduct casts serious doubt about his willingness to pay tax.”**

22. Based upon that assessment of the Respondent, the Court prohibited the Respondent from transferring, withdrawing, disposing of, or in any other way dealing with the money in his 10 Bank Accounts.

23. In this case the Applicant did not dispute the fact that he is an Indian national. However, he said that there was no evidence that he was a flight risk. If anything, he pointed out that his passport had already been impounded in the Criminal Case which had been instituted against him, arising from the alleged failure to pay the taxes in issue in this case.

24. The fact that the Applicant’s passport had already been impounded makes it a little bit difficult for him to abscond from the jurisdiction of the Court.

25. However, the very fact that it had been deemed necessary to impound the Applicant’s passport, is an indication that there was a fear that the Applicant could flee from the country.

26. Having given due consideration to the competing legal rights and interests, I have come to the conclusion that a blanket freeze on the enforcement procedures, if unconditional, would defeat the course of justice.
27. On the other hand if the Applicant were also given an unrestricted access to the funds due from the four companies which are his debtors, that could prejudice the Respondent.
28. In the circumstances justice demands that there be a conditional freeze of the Agency Notices. Accordingly, the Agency Notices will, in the first instance, remain frozen for the next 21 days.
29. The said 21 days are to enable the Applicant procure appropriate Securities, which he will provide to **KRA**, to cover the tax liability which may be ultimately found against the Applicant.
30. For the avoidance of any doubt, such security should cover not less than Kshs. 39 Million.
31. If the security is provided, the leave granted herein shall operate as a stay of the enforcement procedures until the substantive application is determined.
32. If the parties are making progress that is reasonable, towards the attainment of an acceptable security, it is open to them or either of them to seek an extension of time for compliance.
33. In the event that the Applicant fails to procure requisite securities within the specified period, the Respondent may proceed to give effect to its enforcement procedures, unless the period were extended.
34. The costs of this application shall abide the determination of the substantive application. If the said substantive action succeeds, the Applicant will also be awarded the costs of this application. But if the substantive application fails, the costs of this application shall stand awarded to the Respondent.

**FRED A. OCHIENG**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 30<sup>TH</sup> DAY OF JULY 2018**

**T.W. CHERERE**

**JUDGE**