



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

MISCELLANEOUS APPLICATION NO 37 OF 2018

IN THE MATTER OF: THE TAX PROCEDURES ACT NO 29 OF 2015

AND

IN THE MATTER OF: AN APPLICATION BY KENYA REVENUE AUTHORITY

UNDER SECTION 43 OF THE TAX PROCEDURES ACT

KENYA REVENUE AUTHORITY.....APPLICANT

VS

JANE WANGUI WANJIRU.....1ST RESPONDENT

JOSEPH WANJOHI.....2ND RESPONDENT

SIDJOE MANUFACTURERS AND SUPPLIERS.....3RD RESPONDENT

RULING

1. Before me are two applications dated 6th September 2018 filed by the Applicant and another dated 25th September 2018 filed by the Respondents. They have been argued simultaneously as the issues in both are intertwined.

2. The Applicant in the application dated 6th September 2018 seeks the following orders.

(2) That this Honourable Court do issue orders preserving funds and prohibiting the release, transfer, payment or other dealing involving the sum of Kshs 260,759,016 held by Barclays Bank of Kenya, Equity bank and Cooperative bank on behalf of the Respondents.

(3) That the amounts held by the said Banks be preserved pending the issuance of a tax assessments and recovery of taxes or until further orders of the court.

(4) That in the alternative and without prejudice to the foregoing this Honourable court be pleased to impose such terms as to giving security for the taxes that shall be found due and owing to the applicant.

3. The application is supported by the grounds on the face of the application plus an affidavit sworn by Weldon Ngeno an officer at Kenya Revenue Authority (KRA) who is involved in investigations. He has deponed that their investigations reveal that the Respondents have transacted business in excess of Kshs 167,074,687/- attracting a tax of Kshs 49,627,228/- (W.N.4). That the Respondents have evaded payment of the said tax.

4. This tax is for the period January 2013-August 2018. That the Respondents have never filed Value Added Tax (VAT) returns while income tax returns are grossly under declared. It is therefore feared that the Respondents may frustrate the recovery process for the outstanding sum hence the need for the orders sought.

5. On 28th and 29th August 2018, the Applicant issued notices under section 43(2) of the Tax Procedures Act to Barclays Bank of Kenya, Equity Bank and Cooperative Bank where the Respondent's money is held. (W.N.5-7). The total sum held in the said banks is Kshs 260,759,016/-.

6. The Applicant seeks to have the funds in the said accounts preserved as it prepares to raise and issue tax assessments to the Respondents.

7. In his submissions Mr Okello for the Applicant argued that the Applicant has complied with the requirements of section 43(3) of the Tax Procedures Act. That through annexure JW4 the Applicant has shown that the Respondents are in receipt of income and are doing business.

8. Further that the likelihood of frustration in recovery has been expressed in para 9 of the supporting affidavit of Weldon Ng'eno.

9. He further stated that the applicant is not aware of the Respondents other assets besides the funds in the said accounts. He referred the court to two cases namely.

(i) Pili Management consultants Ltd vs Commissioner of Income tax KRA (2016) eKLR

(ii) KRA vs Jimmy Mutuku Kiamba [2015] eKLR.

10. In respect to the Respondent's application dated 25th September 2018 Mr Okello in opposing the application referred to section 44(1) VAT Act arguing that the taxes due have not been paid, and the Applicant had good reasons for having the funds preserved. He asked the court to order for security to be provided in the event it deemed it fit to vary the orders.

11. The Respondents in their application dated 25th September 2018 sought to have the following orders:

(2) That this Honourable court be pleased to discharge or vary the orders issued by this court on 11th September 2018.

(3) That this application be heard together or in priority to the Respondent's Notice of Motion dated 6th September 2018.

12. The application is supported by the grounds on its face plus the supporting affidavit of the 2nd Respondent Joseph Wanjohi. He avers that upon being served with the Notice for tax assessment and while preparing to submit their documents they were shocked to be served with a court order freezing all their bank accounts (annexture JW3).

13. He questions the contradictory figures stated in the certificate of urgency and the Notice of Motion application. He depones that the 3rd Respondent started operations in 2018 and wonders how the taxes due would be so huge in less than a year (JWa50). He denied any attempts to avoid paying taxes and/or frustrating the recovery.

14. Mr Mutembei for the Respondents submitted and prayed for variation of the Orders issued by the court on 11th September 2018. He said the orders were obtained on the basis of misrepresentation and non- disclosure. He said the figures in the filed papers was not reflected in the documents annexed. He further submitted that there was communication between the parties as shown in JW2. This he said showed that the Respondents were co-operative, and they even visited the applicant's Offices.

15. He urged that the Respondents had been issued with compliance certificates by the Applicant yet this was not disclosed by the Applicant. He contended that the Applicant had not complied with the provision of section 43(1) of the Tax Procedures Act by failing to demonstrate that the Respondents would frustrate any recovery by the Applicant.

16. He said there was no reason to make the Applicant believe that the respondents would not pay the assessed taxes. He finally submitted that the Respondents were in a financial crisis since the preserved money was for the business and salaries. He asked the court to allow the application.

17. In response to the application dated 5th September 2018, the Respondents filed a replying affidavit and a further replying affidavit by the 2nd Respondent. The deponent raised issue with the figures stated by the Applicant. He averred that the Respondents have always filed their returns (JW-2) and also made payments (JW4).

18. Mr Mutembei in opposing the said application submitted that under section 43(7) of the Tax Procedure Act the assessment ought to have been done within 30 days. In this case he said the interim orders were issued over 30 days ago but there was no tax assessment.

19. He argued that the **Jimmy Mutuku** case could be distinguished from this one in that there is no frustration in this one whereas there was frustration in the **Jimmy Mutuku** one. He also submitted that tax is not paid on deposits but income. That they had annexed an income statement which had not been annexed by the Applicant.

20. He further submitted that the Respondents and Applicant had equal protection under the Constitution. On this he referred to the case of **EACC Vs CO- OP Bank & Anor Nrb ACEC Misc Application No 23/17**. Submitting that it would be in public interest for the court to protect honest business people from harassment through applications of this nature.

Determination

21. I have considered both applications, affidavits, submissions by both counsel and the authorities cited. What has clearly come out is that there is a tax dispute between the Applicant and the 3 Respondents which dispute must be resolved.

22. The Applicant issued Notices for tax assessment as provided for under section 43(2) of the Tax Procedure Act, to three banks namely; Equity Bank; Barclays bank and Cooperative bank. These notices are dated 28th August 2018(Annexure W.N. 5-7).

23. The Applicant then moved to court vide an application dated 6th September 2018. It was placed before the court on 10th September 2018 and interim orders were issued in terms of prayer No 2 of the application which were to the effect that the funds belonging to all the Respondents held in various bank accounts in Barclays Bank of Kenya and Equity bank be preserved.

24. It is these preservation orders sought that are the borne of contention. The said application has been brought under section 43(3) of the Tax Procedure Act provides.

“The Commissioner shall apply, in the absence of the taxpayer to the High Court for an order against any person holding funds belonging to the tax payer, prohibiting that person from transferring, withdrawing, disposing of or otherwise dealing with such funds.”

25. By coming to court exparte the Applicant was quite in order since that is what the Law provides. Section 43(4) of the said Act provides:

“The Court may issue an order under subsection (3) if the court is satisfied that the conditions specified under subsection (1) have been met.”

26. What then are the conditions under Section 43(1) of the Act? The said section provides:

(1) This section applies if the Commission reasonably believes:-

(a) That a tax payer-

(i) Has made taxable supplies, has removed excisable goods, or has derived an income, in respect of which tax has not been charged; or

(ii) Has collected a tax, including withholding tax, that has not been accounted for; and

(b) That the taxpayer is likely to frustrate the recovery of the tax.

27. It was the duty of the Applicant to satisfy the Court that the conditions set out in section 43(1) of the Tax Procedure Act have been complied with before the issuance of the orders sought. As was held in the case of **Pili Management** (supra) every taxpayer has a duty to file tax returns and pay taxes. In the present case the Respondents have filed returns and paid some money in respect of taxes but the Applicant contends that they have not accounted for all the tax they owe, hence the dispute, between them.

28. The 2nd condition is for the Applicant to show that the taxpayer is likely to frustrate the recovery of the tax. The Applicant herein says it has fear that the Respondents may frustrate the tax recovery. The reason for saying so is because of the filing of Nil returns when they ought not to have done so.

29. Besides that, there is no evidence that the Respondents have been un co-operative or have deliberately caused the delay of any process or refused to pay any declared taxes. (see **KRA vs Jimmy Mutuku Kiamba**).

30. The pleadings and documents filed herein by the Applicant (KRA) appear not consistent on how much is in the Respondents accounts in the stated banks though its indicated that what could be owing in terms of taxes is Kshs 49,627,228/-.

31. All these figures need to be harmonized. This can only be done through a proper assessment of the taxes, payable by the Respondents.

32. The Respondents have an obligation to pay taxes when due and it now behoves the Applicant to do a proper assessment of the Respondents taxes. Counsel for the Applicant has confirmed that they have now been served with the necessary documents for the said exercise.

33. The order that was issued on 10th September 2018 was an interim order which would either be confirmed or discharged after the interpartes hearing. I do find that since the condition in section 43(1)(b) has not been satisfied the order issued on 10th September 2018 cannot be confirmed. It automatically lapses.

34. I hereby make the following orders.

i. An order to issue in terms of prayer no. 4 of the application dated 6th September 2018 to the effect that the Respondents deposit with the Applicant a security or securities of immoveable property with a total value of Kshs 50 million pending the assessment and payment of the taxes that may be found due.

ii. Once the deposit of such security is made the Applicant should with immediate effect write to the banks (i.e Barclays, Equity and Co-operative) withdrawing their notices dated 28th August 2018.

iii. The Applicant to undertake the tax assessment and serve it on the Respondents within 14 days. The necessary procedure to follow thereafter.

35. There being no winner or loser in this matter I direct that each party bears his/her own costs.

Orders accordingly.

Signed, dated, and delivered on this 24th day of October 2018 in open court at Nairobi.

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HEDWIG I. ONG'UDI

JUDGE