



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
COMMERCIAL CASE NO. 4 OF 2017

BIN ABDULRAHIM & SONS.....PLAINTIFF/APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....DEFENDANT/RESPONDENT

RULING

[Notice of Motion dated 16th February, 2017]

1. At the time of filing his claim on 16th February, 2017, the Plaintiff, Bin Abdulrahim & Sons Ltd also filed the instant Notice of Motion application seeking orders against the Defendant/Respondent, Kenya Revenue Authority (KRA) as follows: -

“a) This matter be certified urgent and heard ex-parte in the first instance.

b. The Honourable Court do make preservative order for the funds held by FIRST COMMUNITY BANK LTD, MALINDI in A/C No. [particulars withheld] in the name of BIN ABDULRAHIM AND SONS LTD and release the account to operate in a normal manner pending the hearing of this Application inter-partes.

c. The Honourable Court do issue an injunction restraining the Defendant from continuing to attach, take away and/or in any manner freeze and/or close down the Plaintiff’s business pending the hearing and determination of this Application.

d. The Honourable Court do issue an order restraining the Defendant from claiming the amount of Kshs.119,000,000/= pending filing and determination of an objection to be filed within 30 days before the Disputes Tribunal.

e. Alternatively in the meantime the freeze order placed on A/C No. [particulars withheld] in the name of ABDULRAHIM AND SONS LTD in FIRST COMMUNITY BANK LTD, MALINDI BRANCH, be lifted.

f. Costs of this Application be provided for and paid by the Defendant.”

2. The application is supported by the grounds on its face as follows: -

“1. The Plaintiff is not in tax arrears as shown by his current iTax statement to date.

2. The amount claimed is not supported by any facts or at all as all the correspondences regarding the dispute have not been answered by the Defendant.

3. The Defendant has without reason or at all frozen the Plaintiff's account held at FIRST COMMUNITY BANK LTD and has instructed the bank to release money to it.

4. The dispute has not been resolved and therefore unless the orders sought are granted the plaintiff stands to be prejudiced as his business can close as it is already suffering.

5. The Plaintiff is ready to furnish security equal to the amount in the said account.

6. The ends of justice leans towards granting the orders.”

3. The application is also supported by an affidavit sworn by Abubakar Mohamed Ahmed, a director of the Applicant company.

4. It is averred in the affidavit that following a compliance check conducted on the Applicant's business by the Respondent, the Applicant was notified through a letter dated 17th July, 2016 that it had outstanding VAT, corporation tax and withholding tax amounting to Kshs. 119,326,030.53. The Applicant responded to the said claim on 2nd August, 2016. It is the Applicant's case that its response has never been addressed. On 31st January, 2017 it was notified by its bankers that the Respondent had ordered the freezing of its account. The Applicant once again wrote to the Respondent on 3rd February, 2017 seeking answers to the issues it had raised. It subsequently moved to this court through the instant application.

5. It is the Applicant's position that the attachment of its account was illegal as no notice had been issued as required. Further, that the attachment had paralysed its business.

6. The Respondent opposed the application through a replying affidavit sworn on 10th March, 2017 by Christine Macharia, a Compliance Programme Officer in its Malindi Domestic Taxes Department. In the affidavit the Respondent highlights the process leading to the demand for the tax arrears. It is the Respondent's position that the tax is due and the procedure provided by the law was followed in demanding the same from the Applicant. The Respondent does not therefore see any merit in the Applicant's application and prays for its dismissal.

7. The parties also filed submissions in support of their positions. The Applicant contends that it has invoked the inherent jurisdiction of this court by referring to Article 165 (3) of the Constitution and asking the court to do justice to the parties. The Applicant asserts that it is only seeking a preservation of the subject matter before the parties can proceed to prove their cases before the Tax Appeals Tribunal (the Tribunal) established by Section 3 of the Tax Appeals Tribunal Act, 2013.

8. According to the Applicant, there is a dispute as the Respondent's iTax system shows that the Respondent owes it (the Applicant) over Kshs.5 million.

9. It is the Applicant's position that the merits of the case should be reserved for the Tribunal. The Applicant asserts that its case is strong as the tax claimed by the Respondent has not been backed by any evidence.

10. In the Applicant's view, the Respondent's ability to pay damages does not count as failure to stop the Respondent's action would result in the closure of its business.

11. The Respondent's position is that the Applicant is before the wrong forum. Reliance is placed on Section 51 of the Tax Procedures Act, 2015 which provides that a taxpayer who wishes to dispute a tax decision shall first lodge an objection against the tax decision in accordance with the Section before proceeding under any other written law. The Respondent contends that the Applicant has not lodged a

notice of objection with the Commissioner in respect of the tax decision which is the subject of this case. Further, that any objection which the Applicant may have had has now been overtaken by time as an objection to a tax decision ought to be lodged within thirty days.

12. It is the Respondent's case that in deciding whether to grant an injunction, the court is guided by the principles in **Giella v Cassman Brown [1973] E.A. 358**, namely, whether the applicant has shown a *prima facie* case with a probability of success; whether the applicant will suffer irreparable injury which would not adequately be compensated by an award of damages; and where the court is in doubt it decides the application on the balance of convenience.

13. Relying on **Mrao v First American Bank of Kenya Limited & 2 others [2003] eKLR**, the Respondent asserts that the Applicant has not established a case which can make this court conclude that there exists a right which has been infringed thus requiring the Respondent to offer an explanation or make a rebuttal. It is the Respondent's case that the Applicant has not rebutted its assertion that there was no objection lodged against the tax decision.

14. As to whether the Applicant cannot be compensated by an award of damages, the Respondent asserts that if the Applicant eventually succeeds in its case, then the money collected can always be refunded. The Respondent states that it is a reputable government agency with the ability to refund the taxes.

15. Finally, the Respondent contends that looking at the circumstances of this case and in particular the fact that it is a reputable government agency, the balance of convenience should tilt in its favour.

16. A perusal of the application before court shows that the Applicant is seeking an order to preserve its bank account and release it from the clutches of the Respondent. The application also seeks an injunction restraining the Respondent from claiming the tax arrears pending the filing and determination of an objection before the Tribunal

17. The orders the Applicant seeks are in the nature of injunction. The **Giella** principles on injunctions are thus applicable.

18. In **Mrao Ltd** (supra), the Court of Appeal (Bosire, JA) posed the question as to what a *prima facie* case is and answered the question thus: -

“I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

19. In order to determine whether an applicant has an arguable case, the court will consider the pleadings before it. The court is not expected to extensively comment on the case before it since that would result in a determination of the same without a proper hearing.

20. In the case before me the Applicant alleges that the Respondent's demand for tax arrears is not backed by any evidence. The Respondent's reply seems to take issue with the mandate of this court to deal with the matter.

21. The Respondent's case cannot be said to be without merit. Establishing that a court or tribunal before which a case is filed has jurisdiction is one of the ways of demonstrating an arguable case. A party with a strong case taken before the wrong forum cannot be said to have a *prima facie* case.

22. The Tax Appeals Tribunal Act, 2013 establishes the Tribunal for the management and administration of tax appeals. The core business of the Tribunal is to hear appeals filed against any tax decision made by a commissioner appointed under Section 13 (1) of the Kenya Revenue Authority Act, 1995.

23. Under Section 12 of the Tax Appeals Tribunal Act, a person who disputes the decision of the commissioner on any matter arising under the provisions of any tax law may, upon giving notice in

writing to the commissioner, appeal to the Tribunal.

24. Section 18 of the same Act provides that where an appeal has been filed the Tribunal may stay the implementation of the decision under review pending the determination of the appeal.

25. Counsel for the Respondent also referred this court to the Tax Procedures Act, 2015 which seeks to consolidate the procedural rules for the administration of tax laws in Kenya. Section 51 of the Act provides the procedure for objecting to a tax decision. Sections 52 to 54 provides that an appeal from the decision of the commissioner can be appealed to the Tribunal. The appellate channel is open all the way to the Court of Appeal.

26. The application before this court is in the nature of an application for a preservatory order. That kind of order as already demonstrated is available before the Tribunal. The Applicant had no reason for approaching this court before exhausting the procedure provided by statute. For the above stated reason, I would hold that the Applicant has not established a *prima facie* case.

27. There is a second reason why there is no *prima facie* case before this court. The Applicant has not demonstrated before this court that it has lodged a valid objection before the Commissioner. One of the prayers in the application for a restraining order is to allow the Applicant to file an objection “**within 30 days before the Disputes Tribunal.**” Nothing stopped the Applicant from filing a matter before the Tribunal. Seven months down the line, the Applicant is yet to file any case before the Commissioner or the Tribunal. It seems the Applicant is only attempting to delay its eventual appointment with the Respondent. A stay will not rescue the Applicant as it agrees that only the Tribunal can help it.

28. The Applicant having failed to demonstrate a *prima facie* case, its application dated 16th February, 2017 collapses. The same is therefore dismissed with costs to the Respondent.

Dated, signed and delivered at Malindi this 28th day of September, 2017.

W. KORIR,

JUDGE OF THE HIGH COURT