



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

CIVIL CASE NO. 60 OF 2016

1. ABDALLA BREK SAID T/A AL AMRY DISTRIBUTORS

2. FAUD ABDALLA BREK SAID

3. FAHMY ABDALLA BREK SAID

4. FARID ABDALLA BREK SAID

5. FAHID ABDALLA BREK SAID.....PLAINTIFFS/APPLICANTS

VERSUS

KENYA REVENUE AUTHORITY.....DEFENDANT/RESPONDENT

RULING

1. The application by way of Notice of Motion dated 8th June, 2016 seeks orders that:-

i. Spent;

ii. Spent;

iii. Pending the hearing and determination of this suit interpartes an injunction or conservatory order be issued restraining the defendant, its servants or agents from proceeding with the recovery of tax in the sum of Kshs. 1,159,928,615/= against the plaintiffs as captured in the notices dated 26th May, 2016; and

iv. That costs of the application be provided for.

The application has been brought under section 84 of the Income Tax Act, sections 1A, 1B and 3A of the Civil Procedure Rules, 2010, Articles 22, 23 and 159 of the Constitution of Kenya, 2010 and all other enabling provisions of the law and the inherent jurisdiction of the court.

2. The application is supported by the grounds on its face and the supporting affidavit of Abdalla Brek Said, the 1st plaintiff. The respondent filed a replying affidavit on 1st July, 2016 in opposition to the application.

APPLICANTS' SUBMISSIONS

3. Mr. Gikandi, Learned Counsel for the plaintiffs/applicants informed the court that he was seeking conservatory orders restraining the respondent from recovering tax amounting to Kshs. 1,159,928,615.00 which now stands at about Kshs. 2.5 Billion because of interest. He submitted that the applicants are not liable to pay the respondent taxes in the manner they have been assessed. He relied on the supporting affidavit filed on 9th June, 2016 and the further affidavit filed on 18th July, 2016. He added that it was not correct for Counsel for the respondent to argue that the present application is *res judicata* by virtue of the ruling in Judicial Review application No. 57 of 2010 where the court declined to look at whether the amount indicated as owing from the applicants was the right amount of tax arrears. He submitted that Judge Emukule dealt with the decision making process in the Judicial Review application. Counsel submitted that the question now is how much tax is due to the respondent from the applicants and that there is no Judgment of any court which has said that the applicants are liable to pay the tax demanded.

4. It was submitted that the applicants are now in court under the provisions of article 165(3)(a) of the Constitution which provides that the High Court has unlimited original jurisdiction in criminal and civil matters. This court was requested to exercise its original civil jurisdiction and look into the matter of the tax due, if any, to the respondent. Mr. Gikandi referred to a letter dated 21st July, 2014 written by the respondent to the applicants and marked as EK 5(i) in the replying affidavit whereby some discrepancies were highlighted in the demand notices. These were to the effect that all the deposits in the applicants bank accounts were treated as business income and cash payments to suppliers were treated as sales not deposited in the said accounts hence treated as business income, among others.

5. Counsel submitted that Mr. Asige Advocate wrote to the respondent on 20th August, 2014 on the issue and also advised Mr. Aboo, a tax consultant to meet with the respondent and agree on the items that were taxable. The meeting never took place. In his view, the respondent has the onus to show that a meeting was arranged and that the applicants failed to attend.

6. He relied on articles 10 and 47 of the Constitution on the duty of all state organs to be transparent, accountable and to uphold corporate governance. He further stated that the respondent is vested with too much power and if the courts do not control it, the respondent can destroy rights of business operators. It was submitted that a strong prima facie case had been presented before this court and that damages would not be an adequate remedy and if the process is not controlled the respondent will force the applicants to close down their businesses which cannot be compensated. He added that if there is any doubt in the court's mind, it can award the prayer sought on a balance of convenience. The court was informed that the applicants are Kenyans sustaining their families and have employees to take care of. Further, the respondent is holding the 1st applicant's Kshs. 8,342,880.00 as of 15th April, 2014. It was indicated that the tax being demanded was for the years 2008 to 2012 and that it was not logical for the respondent to hold a credit for 8 Million and demand for Kshs. 1.5 Billion.

7. The court's attention was drawn to the cases of **Commissioner of Lands vs Kunste Hotel Limited** [1997] eKLR to show that Judicial Review is a special jurisdiction and **Benjoh Algamated Limited & Another vs KCB Ltd** [2014] eKLR, where the court held that it is possible to reopen proceedings in a matter that has been heard.

8. Counsel cited the case of **Nyongesa & 4 Others vs Egerton University College**, Nairobi Court of Appeal Civil Appeal No. 90 of 1989, where the court emphasized on the right to a hearing. Mr. Gikandi submitted that in the instant case, the applicants have not been heard. In the cases of **Kenafriic Industries vs Commissioner of Domestic Taxes & 4 Others** [2012] eKLR and **Commissioner of Domestic Taxes Large Tax Payers Office Exparte Barclays Bank of Kenya Ltd.** [2014] eKLR, it was held that Kenya Revenue Authority has a duty to identify payments that attract tax liability.

9. Mr. Gikandi conceded to the fact that section 84 of the Income Tax Act was repealed and Judge Emukule found that there was non-compliance with section 84 of the said Act. Counsel was of the view that there are issues that need to be determined in the present case. He prayed for his application to be allowed.

RESPONDENT'S SUBMISSIONS

10. On his part Mr. Kirugi, Learned Counsel for the respondent submitted that sections 84 and 86 of the Income Tax Act were repealed by the Tax Procedures Act, No. 29 of 2015 that came into force on 18th December, 2015. He stated that the applicants in paragraph 15 of the plaint state that they are before this court on an appeal on an objection to a tax decision under section 85(3) of the Income Tax Act.

11. He contended that a taxpayer could appeal a tax decision under the old Act but the law now provides for a party to go to the Appeals Tribunal. Previously, section 84 of the Income Tax Act required an objector to file an objection before a local committee of a tax area. If a party was dissatisfied with the decision of a local committee, one would then approach the court under section 84(2) of the said Act. He added that section 2 of the Income Tax Act defines a local committee as a committee established under section 82 of the said Act. It was submitted that the High Court is not a local committee as a party can only approach a High Court through an appeal, and as such this court has no jurisdiction to hear this matter.

12. Mr. Kirugi informed the court that Judge Emukule's decision was delivered on 19th May, 2016 and the applicants are now objecting to the tax assessment which was done in the year 2014 and that they have approached the court after their objection was declined. He further submitted that the applicants ought to appeal to the Tax Tribunal under Section 52 of the Tax Procedures Act as the letters dated 26th May, 2016 were not tax decisions. The onus was on the Taxpayer to show that duty as assessed was erroneous.

13. On *res judicata*, Counsel submitted that the present suit is an abuse of the court process with the applicants trying to have a second bite on the cherry. He referred the court to section 7 of the Civil Procedure Act which provides that no court shall try a matter which has been substantially dealt with by another court and determined. He cited the decision of the Supreme Court in Motion No. 42 and 43 of 2014, **Kenya Commercial Bank Limited vs Muiri Coffee Estate Limited & Another**, where it was held that in establishing if a case is *res judicata*, the court has to ascertain if the issues are the same, the parties are the same, the concurrence of jurisdiction and the finality of the decision. It was submitted that the parties in the Judicial Review application No. 57 of 2010 are the same as in the present suit, the only difference being the interest accruing, but there was finality in Judge Emukule's orders.

14. Counsel for the respondent referred the court to the 1st prayer in the plaint for declaration that the tax of Kshs. 1,159,928,615/= is illegal and not payable in submitting that the request in the Judicial Review application was for the quashing of the decision demanding the taxes by the respondent. In his view, the two prayers are similar, as this court is being requested to find the tax demand a nullity. Mr. Kirugi informed this court that Judge Emukule stated that the court will not seek to establish if the amounts demanded are the correct as section 73(1) of the Income Tax Act provides that the Commissioner of Income Tax shall assess the tax of every person after delivery of the income. The said Judge cited section 73(2)(b) of the said Act which states that the Commissioner of Domestic Taxes can in his judgment assess tax accordingly. The said Commissioner can also assess more tax from documents submitted to the respondent (KRA) and Judge Emukule found that the respondent was right in demanding taxes. Mr. Kirugi submitted that this court is being asked to consider what Emukule Judge dealt with.

15. It was clarified that the letters of 26th May, 2016 were not new assessment for tax but were pursuant to demand notices served on 31st October, 2014. The applicants then proceeded to file Judicial Review application No. 57 of 2010 where they were granted orders for stay. After dismissal of the Judicial Review application, the respondent issued the demand notices. He added that the annexure marked EK8 attached to the replying affidavit dated 1st July, 2016 are minutes of a meeting held between representatives of the applicants and those of the respondent. The meeting did not exonerate the applicants from the operation of section 84 of the Income Tax Act. It was submitted that after the appointment of Mr. Aboo as a tax agent for the applicants, he has not called a meeting to date. In Mr. Kirugi's view, it was upon the Tax Payer to show that tax should not have been assessed as it was. Counsel further submitted that the tax letter marked as EK 5(iv) attached to the respondent's replying affidavit shows that the tax demanded was not whimsical. The applicants were requested to supply further documentation which they did not.

16. In winding up his submissions, Mr. Kirugi stated that no prima facie case has been established for grant of the orders sought and that this court is not the proper forum for determining fair tax owing to the respondent. He added that the balance of convenience tilts in favour of the respondent and not the applicants. Counsel cited the cases of Nairobi High Court Petition No. 422 of 2013, **Madison Insurance Company Limited vs The Commissioner of Domestic Taxes & Kenya Revenue Authority**, Nairobi High Court Petition No. 203 of 2012 and **Kapa Oil Refineries Limited vs Kenya Revenue Authority & 2 Others** and Nairobi High court petition No. 370 of 2012, **Kapa Oil Refineries Ltd vs Kenya Revenue Authority & 2 others**, where courts found that they were not the proper bodies to deal with issues of tax assessment and downed their tools for lack of jurisdiction.

APPLICANTS' REJOINDER

17. Mr. Gikandi stated that the respondent had not filed an application for striking out of the plaint for want of jurisdiction and no preliminary objection was filed. He urged the court to look at the provisions of articles 164 and 165 of the Constitution of Kenya when taking into consideration that although another organ may have jurisdiction, that does not take away the jurisdiction of this court as the court will look at the efficacy of this matter being determined elsewhere. He further submitted that dismissal of the Judicial Review Application that had been filed earlier on does not make the respondent's demand legitimate. He informed this court that the Judge Emukule declined to deal with the legality of the amount.

18. Counsel for the applicant in reference to the case of **Kapa Oil Refineries Limited vs Kenya Revenue Authority & 2 Others** stated that Judge Lenaola granted interim orders to enable the applicant to go to the Appeals Tribunal. Mr. Gikandi urged the court to come up with a win-win situation. He added that no meeting was ever set between the parties after the first meeting of 14th April, 2014 although it was agreed in minute 3/14, that a further meeting would be held.

ANALYSIS AND DETERMINATION

The issues that call for determination are:-

- i. If the application dated 8th June, 2016 is *res judicata*; and
- ii. If the court can grant the orders sought.

RES JUDICATA

19. Mombasa Judicial Review application No. 57 of 2010 was heard and determined by Justice Emukule. It sought an order of certiorari to issue to remove into the Honourable court for the purpose of quashing the decision contained in the respondent's additional assessment computations dated 31st October, 2014 against all the exparte applicants. The application also sought an order of prohibition to issue to prohibit the respondent from implementing and/or issuing any collection agency notices in respect to the collection of the payments in the demand notices and from continuing to wrongfully, unlawfully and un-procedurally demand from the applicants any monies on account of alleged tax due from the applicant for the tax years as specified in the additional assessments dated 11th September, 2014 and demand notices dated 31st October, 2014.

20. On the other hand, in the plaint filed in court on 9th June, 2016, the plaintiffs seek orders for:-

- i. A declaration that the demand by the plaintiff pays taxes to the tune of Kshs. 1,1559,928,615/= is illegal and that the said taxes are not payable;
- ii. An injunction order to restrain the defendant from enforcing recovery of taxes in the tune of Kshs. 1,1559,928,615/= against the plaintiffs as captured in the notices dated 26th May, 2016;
- iii. Any other relief or other order that this court will allow in the circumstances of the case; and

iv. Costs in the cause.

21. On *res judicata*, section 7 of the Civil Procedure Act provides that:-

“No court shall try any suit or any issue in which the matter directly or substantially in issue has been directly and substantially in issue in a former suit between the same parties, or, or between parties under whom they claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

22. In the case of **E.T. vs Attorney General & Another** [2012] eKLR the court said thus on *res judicata*;

“The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action that which has been resolved by a court of competent jurisdiction. In the case of Omondi vs National Bank of Kenya Ltd. and Others [2001] EA 177, the court held that “Parties cannot evade the doctrine of res judicata by adding other parties or causes of action in a subsequent suit.”

23. In the previous proceedings the applicants approached the court under the special jurisdiction of the court by way of Judicial Review whereby the court could only grant prerogative orders. Although the parties in the present suit are similar to those in Mombasa Judicial Review application No. 57 of 2010, the parties have invoked Constitutional provisions and are seeking orders of declaration that the demand by the respondent is illegal and that the taxes are not payable. It also seeks an order of injunction to restrain the defendant from enforcing recovery of taxes against the applicants. This court notes that among the demand notices on record is a tax demand addressed to Al Amry Abdalla Brek Said dated 26th May, 2016 that bears PIN No. A000182412R and there is another tax demand dated 26th May, 2016 in the name of Abdalla Brek Said T/A Al Amry Distributors with PIN No. A000182412R. The similarity of the PIN numbers brings uncertainty as to whether the tax being demanded from the 1st plaintiff is being demanded from him as an individual or as a Trader or on the two fronts. A perusal of the documents attached to the respondent's replying affidavit does not reveal that a similar demand notice by the name Al Amry Abdalla Brek Said was issued to the 1st plaintiff in the year 2014. In my view, the pleadings in the present case bring a different dimension to the case and introduce triable issues that the court needs to hear and determine. It is therefore my finding that the present suit is not *res judicata*.

THE DEMAND FOR TAX PAYMENTS

24. The affidavit of Abdalla Brek Said, at paragraph 14 states that the respondent issued demand notices on 26th May, 2016 which were received on 2nd July, 2016 by the applicants. The said notices demanded payment of additional tax by the applicants in their personal capacity. In paragraph 15 of the said affidavit, the deponent states that the applicants sent letters of objection to the decision in writing to the Commissioner within thirty days of being notified of the said decision. The Commissioner is required to communicate an objection decision to a Tax payer within 60 days from the date that the Tax payer lodged a notice of objection in accordance to section 51(11) of the said Act. The respondent submitted that the said objection was declined by the Commissioner General.

25. Section 52 of the said Act provides that:-

“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.”

Section 53 provides for appeals to the High Court in the following terms:-

“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 of 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 Tribunal Act, 2013”.

26. Counsel for the respondent was of the view that the applicants had failed to follow the right procedures as articulated above and for the said reason, the interim orders being sought should not be granted. A reading of section 55 of the Tax procedures Act do give the applicants a life line and a window of opportunity to resolve the present dispute out of court. The said section provides:-

“1. Where a court or the Tribunal permits the parties to settle a dispute out of court or the tribunal, as the case may be the settlement shall be made within ninety days from the date the court or tribunal permits the settlement.

2. Where parties fail to settle the dispute within the period specified in sub section (1), the dispute shall be referred back to the court or the Tribunal that permitted the settlement”.

27. In the present case none of the parties has approached this court seeking to settle the present dispute out of court. However, after perusing the pleadings relied upon by both parties to argue the present application, this court is of the firm view that this is a suitable case for an out of court settlement. This court takes cognizance of the fact that the amount being demanded in form of tax is very high, and the accuracy of the same can be properly determined by giving parties herein an opportunity to go back to the drawing board to thrash out the issues that have brought about the present suit.

28. In arriving at the above decision, I am guided by the case of **Equity Bank Limited vs West Link MBO Limited**, [2013] eKLR where Musinga JA held that:-

“Courts of law exist to administer justice and in so doing they must of necessity balance between competing rights and interests of different parties but within the confines of the law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a court implicitly without it being derived from the constitution or statute. Such power enables the Judiciary to deliver on their constitutional mandate”.

29. I therefore make the following orders:-

i. That a conservatory order do issue restraining the defendant, its servants or agents from proceeding with the recovery of tax in the sum of Kshs.1,159,928,615/= against the plaintiffs/applicants as captured in the notices dated 26th May, 2016, pending the hearing of this suit interpartes;

ii. That parties are granted ninety (90) days to engage in negotiations and consider an out of court settlement in this case; and

iii. Costs in the cause.

DELIVERED, DATED and SIGNED at MOMBASA on this 27th day of September, 2016.

NJOKI MWANGI

JUDGE

Delivered in the presence of:-

Mr. Gikandi for the plaintiffs/applicants

Mr. Nyaga holding brief for Mr. kirugi for the defendant/respondent

Mr. Oliver Musundi Court Assistant