



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**  
**JR MISC. CASE NO. 87 OF 2013**

**REPUBLIC .....APPLICANT**

**VERSUS**

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

**BARCLAYS BANK OF KENYA LTD .....1<sup>ST</sup> INTERESTED PARTY**

**SOITA & SAENDE ADVOCATES .....2<sup>ND</sup> INTERESTED PARTY**

**KENYA COMMERCIAL BANK LTD .....3<sup>RD</sup> INTERESTED PARTY**

**EX-PARTE**

**ERAD SUPPLIERS & GENERAL CONTRACTS LTD**

**RULING**

The subject of this ruling is the notice of motion application dated 19<sup>th</sup> March, 2013 brought under sections 1A, 1B and 3A of the Civil Procedure Act and Orders 51 and 53 of the Civil Procedure Rules, 2010. Through the said application Kenya Revenue Authority seeks orders as follows:-

1. **That this application be certified as urgent and service be dispensed with in the first instance.**
2. **That the order of stay granted by this Honourable Court on 7<sup>th</sup> March, 2013 be vacated and/or varied with conditions.**
3. **That an order be issued directing the Ex-parte Applicant to furnish security for tax in the sum of Kshs.156,600,000/= from the moneys held at the 3<sup>rd</sup> Interested Party pursuant to a Garnishee Order in its favour pending hearing of the substantive Notice of Motion.**
4. **Costs of the Application be provided for.**

The application is supported by grounds on its face, a supporting affidavit sworn by Peter Kibogoro Wanjohi on 19<sup>th</sup> March, 2013 and annexures thereto.

Before delving into the Applicant's case, I will first introduce the parties. The Applicant in respect of this application is Kenya Revenue Authority (KRA). KRA is the Respondent in the substantive notice of motion seeking the grant of judicial review remedies. Erad Suppliers and General Contracts Ltd (Erad) is the Ex-parte Applicant in the substantive application but is the Respondent in this application. Barclays Bank of Kenya Ltd, Soita Saende Advocates and Kenya Commercial Bank Ltd are the 1<sup>st</sup> to 3<sup>rd</sup> interested parties in the main proceedings. The outcome of this application will not directly affect the interests of the two banks and they have not participated in this application. Soita Saende Advocates are on record for Erad but the said firm of advocates did not file any papers in opposition to the application. To avoid confusion I will simply refer to the Applicant as KRA and the Respondent as Erad.

This matter requires some background information. Through a chamber summons application dated 7<sup>th</sup> March, 2013 Erad moved the Court and obtained leave to commence proceedings for the issuance of judicial review orders against KRA. This was after KRA issued agency notices to the 1<sup>st</sup> and 3<sup>rd</sup> interested parties appointing them as agents for purposes of collecting the sum of Kshs.156,600,000/= being taxes allegedly due to KRA from Erad. When granting leave, Odunga, J also directed that the said leave was to operate as stay in terms of prayer 2(d) of the chamber summons application. The said prayer was couched in the following words:-

**“The grant of leave herein do operate as a stay against the Respondent, its officers, agents, servants, body or authority appointed for that purpose from demanding any payment or sum relating to the Garnishee Order issued by this Honourable Court on 27<sup>th</sup> March 2013 or any other sum relating to the decree issued in HC Misc. 639 of 2009 ordered to be paid to the applicant by the Honourable Court from Kenya Commercial Bank Limited from the accounts of National Cereals and Produce Board through the Applicant's lawyers accounts with Barclays Bank of Kenya Limited and communicated by the Respondent through its letter dated 28<sup>th</sup> February, 2013 or any other date.”**

In this application, KRA has invoked the provisions of Order 53 Rule 1(3) of the Civil Procedure Rules (CPR), 2010 and seeks security in respect of the tax in question.

It is very difficult to consider this application without crossing into the province of the substantive notice of motion. I will, nevertheless, try to avoid veering off into the province of the substantive notice of motion. The grounds in support of KRA's application are:-

- a. The Ex parte Applicant is a registered taxpayer pursuant to Section 132 of the Income Tax Act chapter 470 of the laws of Kenya and assigned personal identification number (PIN) P051151024 and has continued filing Nil Tax Returns from the year of income 2004.**
- b. The Ex-parte Applicant was expected to be making installment tax repayments to the Respondent over the years to 2011 which was not the case.**
- c. The Ex-parte Applicant is also registered for Value Added Tax Act chapter 476 of the laws of Kenya and its effective date of registration under VAT registration number 012970D.**
- d. The Ex-parte Applicant filed VAT Returns July 2003 to January, 2004 when it was on a credit balance of kshs.1,006,812.00. Thereafter the Ex-parte applicant continued filing NIL returns on this tax head until January 2007.**
- e. From then on the Ex-parte Applicant failed to make VAT returns leading to default penalty being applied by the automated system which has accumulated additional tax of Kshs. 600,000.00.**
- f. The Ex-parte Applicant was assessed upon information received that it was in business and since the records submitted were showing Nil Income it was necessary to safeguard the revenue as per Section 75A Income Tax Act chapter 470 Laws of Kenya**
- g. Agency Notices were on 28<sup>th</sup> February 2013 issued under Section 96 of the Income Tax Act chapter 470 Laws of Kenya as a result of information received that the funds due to the Ex-**

- parte Applicant was about to be disbursed and the Ex-parte Applicant was likely not to disclose the income.**
- h. The Ex-parte Applicant was served with Tax assessments by Registered Post Office through its address after efforts to contract its officials from data on telephone contracts given at recruitment failed to trace any of its officers.**
  - i. The Ex-parte Applicant has had an opportunity to reflect on the tax assessment after seeking protection of this Honourable Court on 7<sup>th</sup> March 2013 but it has done nothing to file formal objections and making payments for the undisputed tax or providing evidence that it is not liable to tax.**
  - j. It is for this reason that the Respondent is making this application to secure kshs.156,600,000.00 the Respondent's tax debt pending hearing and determination of the application by the Ex-parte Applicant.**

A perusal of the supporting affidavit and the grounds in support of the application reveals that KRA got wind that Erad was to be paid Kshs 297 million out of Kshs. 522 million, pursuant to a judgment in its favour, in **Milimani High Court Misc. Civil Application No. 639 of 2009**. KRA perused Erad's tax records and assessed that the sum of 156,600,000/= was due to it as tax from the company. It then issued agency notices dated 28<sup>th</sup> February, 2013. That is when Erad moved to Court and obtained, among other orders, an order staying the agency notices. It is KRA's case that Erad had previously declared Nil Tax Returns and there is a risk that it will evade tax. It has therefore used Section 75A of the Income Tax Act, Cap 470 to protect the tax on the income received by Erad. KRA wants this Court to order Erad to provide security for the sum of Kshs.156,600,000/= or in the alternative the Court should lift the stay orders so that the agency notices can take effect.

Erad vehemently opposed the application through the replying affidavit of its Managing Director Ms. Grace Sarapay Wakhungu sworn on 30<sup>th</sup> March, 2013. In summary Erad opposes the application on the grounds that:-

1. It does not owe any tax to KRA and KRA had no basis for issuing the agency notices;
2. The actions of KRA are driven by bad faith and it is an attempt to deny Erad the enjoyment of the fruits of the judgment in **Milimani High Court Misc. Application 639 of 2009**.
3. The matter is *res judicata* since the issue of the agency notices was addressed by Mabeya, J in a ruling delivered on 15<sup>th</sup> March, 2013 in **Milimani H.C. Misc. Application No. 639 of 2009**.
4. Any income earned by Erad this year will be declared next year and income tax paid on it.

Advocates for the parties filed written submissions and highlighted the same on 11<sup>th</sup> June, 2013. They also cited authorities in support of their positions. KRA cited the following authorities:-

1. **JUDICIAL REVIEW HANDBOOK by Michael Fordham;**
2. **NAIROBI HIGH COURT CONSTITUTIONAL PETITION NO. 177 OF 2012 BIDCO OIL REFINERIES LIMITED v THE ATTORNEY GENERAL AND THREE OTHERS;**
3. **PILI MANAGEMENT CONSULTANTS LTD v COMMISSIONER OF INCOME TAX KENYA REVENUE AUTHORITY [2010] eKLR; and**
4. **NAIROBI HIGH COURT CONSTITUTIONAL PETITION NO. 13 OF 2011**

**KENYA HOTEL PROPERTIES LIMITED V THE ATTORNEY GENERAL  
AND 6<sup>TH</sup> OTHERS.**

The following cases were cited in support of Erad's position:-

1. **GEOTHEMAL DEVELOPMENT COMPANY LIMITED v ATTORNEY GENERAL AND 3 OTHERS [2013] eKLR; and**
2. **REPUBLIC v COMMISSIONER OF INCOME TAX EX-PARTE SDV TRANSAMI (KENYA) LIMITED [2005] eKLR.**

I have carefully gone through the above cited authorities and I will bear them in mind when reaching my decision. I must, however, state that almost all the cited decisions are not relevant to this application.

Mr. Ahmednasir for Erad submitted that Order 53 Rule 1(3) CPR, 2010 under which the application is brought deals only with security for costs and matters related to costs. He argued that judicial review is about challenging administrative action and the question of providing security does not arise. He further submitted that the issue of provision of security can only be addressed at the point of grant of leave and once that opportunity is lost, the issue cannot be revisited. He asserted that it is only the judge who grants leave who can address the issue of provision of security and in this matter this application should have been heard by Odunga, J.

On his part, Mr. Ontweka for KRA submitted that Order 53 Rule 1 (3) CPR, 2010 covers situations like the one before this Court. He argued that under the said Rule, this Court can direct Erad to provide security for the taxes being claimed by KRA. He cited the decision of Majanja, J in the **BIDCO OIL REFINERIES LIMITED** case to demonstrate that security for taxes has been ordered in the past. In his view, the fact that the Court did not order for provision of security at the leave stage does not preclude a respondent or interested party from bringing an application for the provision of security. As to whether a judge can deal with the issue of provision of security in a matter where the leave to commence judicial review proceedings was granted by a different judge, he submitted that this is possible depending on the circumstances of the case.

Order 53 Rule 1(3) CPR, 2010 provides that:-

**“The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.”**

The above cited rule does not only deal with costs and matters related to costs as submitted by Mr. Ahmednasir. The said rule extends to the provision of security in respect of the subject matter in dispute. I therefore agree with Mr. Ontweka that this Court can order for provision of security for the taxes in dispute. The purpose of the rule is to ensure that litigation is not in vain. The judge may deem it fit to direct an applicant to provide security so as to protect the interests of a respondent or interested party.

Ideally, the issue of imposition of an order as to costs and provision of security should be addressed at the time the leave is granted. However, I do not see any harm in a respondent or interested party bringing an application for imposition of terms as to costs and security. There could be matters which may have escaped the attention of the judge at the time of granting leave. Such an application should, however, be brought with a lot of circumspection, the reason being that the judge granting leave must have considered the matter and found it not necessary to impose terms as to the giving of security. Secondly, such an application, if opposed like in the case before me, it will lead to delay in the hearing of the substantive notice of motion. That would defeat the basic principle behind judicial review proceedings to wit speedy resolution of disputes that fall under the purview of judicial review. I therefore find that the application before me is not misplaced.

I agree with Mr. Ahmednasir that the judge who grants leave should ordinarily hear an application such as the one before me. However, some circumstances may call for the hearing of the application by a different judge. Where the judge who granted leave is for one reason or another not available to hear the application then I see no harm in a judge from the same division or station hearing the application. I would compare this kind of application to an application for review of a decree or order under Order 45 of the Civil Procedure Rules, 2010. Although Odunga, J granted leave in these proceedings, I have dealt with this application since Odunga, J is currently hearing election petitions in Mombasa. He is the one who directed the parties to appear before me. This is an application which has to be dispensed with speedily. It cannot wait for Odunga, J to report back to the Division. I therefore hold that I am properly seized of this matter.

Mr. Ahmednasir submitted that this matter is *res judicata* as the issue of the agency notices was addressed by Mabeya, J in his ruling of 15<sup>th</sup> March, 2013 in **Nairobi H.C. Misc. Application No. 639 of 2009**. He

submitted that what KRA is doing amounts to collateral attack on the decision of Mabeya, J. It is his view that the only avenue open to KRA is to appeal the decision of Mabeya, J. Mr. Ontweka for the KRA argued that the agency notices referred to in the decision of Mabeya, J were issued in respect of taxes owing to KRA from the National Cereals and Produce Board (NCPB) the judgment debtor in that matter. Mr. Ontweka submitted that what is before this Court are agency notices in relation to taxes owing from Erad which is a different entity from NCPB. I have gone through the ruling of Mabeya, J and it is clear that the question before the learned Judge was whether Erad was entitled to monies in NCPB's bank account in priority to KRA which had issued agency notices claiming taxes from NCPB. That is quite a different issue from the one before this Court. I agree with Mr. Ontweka that the issue of the agency notices in this matter was never the subject of Justice Mabeya's ruling. Should Erad be ordered to provide security in this matter? Erad argues that it does not owe any taxes to KRA. KRA on its part argues that under Section 75A of the Income Tax Act it can call in taxes that are not due. If I proceed to consider these arguments by the parties, I will end up determining the substantive application at this preliminary stage. The way to go is to consider whether Erad should be ordered to provide security in the circumstances of this case.

Why is it necessary to order for the provision of security in the first place? It is meant to take care of the interests of the respondent and or interested party should the substantive application be dismissed. In ordering the provision of security, the Court will consider several factors like the financial health of the parties, the nature of the orders sought, the impact of stay of proceedings on the parties and the application's chances of success. The Court will also consider the fact that judicial review is meant to check on exercise of administrative powers and access to the courts should not be limited by imposing unnecessary conditions.

In this matter, leave to commence these proceedings was granted by Odunga, J who did not find it fit to order for the provision of security. For the application to succeed there is need to prove that some material information was concealed from the Court at the time leave was granted. An applicant is required to place before the Court information which may have been overlooked at the time leave was granted. Such an application can also succeed where it is demonstrated that there are new developments which would make it necessary to order for the provision of security.

In this case, KRA has not established any grounds to warrant the imposition of new conditions on the leave and stay granted by Justice Odunga on 7<sup>th</sup> March, 2013. This application fails and is dismissed for lack of merit. Costs will be in the cause.

Dated, signed and delivered at Nairobi this 26<sup>th</sup> day of June , 2013

**W. K. KORIR,**

**JUDGE**