



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 243 of 2012

KARIUKI MUIGUA T/A KARIUKI MUIGAI & CO ADVOCATES.....APPLICANT

- VERSUS -

COMMISSIONER OF VAT.....1ST RESPONDENT

COMMISSIONER OF INCOME TAX.....2ND RESPONDENT

THE KENYA REVENUE AUTHORITY.....3RD RESPONDENT

R U L I N G

1. The **Notice of Motion** application before the court is dated **19th April 2012**. It is filed under **Order 40 Rule 2, Order 1 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, 3 and 3A of the Civil Procedure Act**. The application seeks the following orders:-

- 1)** That this application be certified urgent and be heard *ex-parte* in the first instance.
- 2)** That an injunction do issue restraining the Defendants/Respondents, their servants and/or agents, anybody or authority from executing, pursuing, considering or in any manner howsoever from re-assessing, effecting recovery or enforcement of Value Added Tax for the years 2000 to 2003 and Income Tax for the years 1995 to 2009 against the Plaintiff/Applicant pending the *inter-parte* hearing and determination of this application.
- 3)** That an injunction do issue restraining the Defendants/Respondents, their servants and/or agents, anybody or authority from executing, pursuing, considering or in any manner howsoever from re-assessing, effecting recovery or enforcement of Value Added Tax for the years 2000 to 2003 and Income Tax for the years 1995 to 2009 against the Plaintiff/Applicant pending the hearing and determination of this suit.
- 4)** Such other orders the honourable court may deem fit and just to grant.
- 5)** Costs of the application.

2. The application is premised on grounds set out therein namely:-

- a)** That the Applicant has diligently been paying Income Tax and VAT since it registered for taxation.

- b) That the demand for additional taxes from the Applicant is unwarranted, capricious and manifestly unjust.
- c) That the amounts demanded are so excessive and the Applicant is apprehensive that Respondents actions shall occasion it irreparable loss and damage.
- d) That the Applicant has a prima-facie case with a probability of success.
- e) That the balance of convenience favours the Applicant owing to the prejudice that will be occasioned to the Applicant if the said arbitrary, illegal and absurd VAT and Income Tax are executed.

3. The application is supported by affidavit of **KARIUKI MUIGUA** dated **19th April 2012** with its annextures and a further affidavit dated **20th June 2012**. These affidavits mainly magnifies the above grounds.

4. The application is opposed by a **Notice of Preliminary Objection** dated **22nd May 2012** but which refers to a completely different application dated **22nd December 2009** which is not before the court. I take this to be an error and that the Preliminary Objection is for the current application. The application is also opposed vide the Replying affidavit of **LOYFORD KUBAI** dated **11th June 2012** with its annextures. By the leave of this court the parties filed written submissions. The parties highlighted their submissions before the court on **1st November 2012**.

5. The brief history of the application is that the Applicant applied for registration with the Value Added Tax department in **June 2003** and by a letter dated **30th June 2003**, the 1st Respondent informed the Applicant that it had been registered under the VAT Act but it backdated the effective date of registration to **1st January 2000**.

By a demand letter dated **7th March 2012**, the 1st Respondent sought to recover from the Applicant the sum of Kenya shillings Five Million, Two Hundred and Twenty Six Thousand, Four Hundred and Seventy Five (**Kshs.5,226,475/=**) purported to be Value Added Tax in arrears for the years **2000 to June 2003**. By a further demand letter dated **7th March 2012**, the 2nd Respondent sought to recover from the Applicant the sum of Kenya Shillings Five Hundred and Eighty One Thousand, One Hundred and Ten (**Kshs.581,110/=**) purported to be Income Tax in arrears for the years **1995 to 2009**. The Applicant was required to pay the demanded taxes in arrears within 14 days from the date of the letters failing which the Respondent stated that they would institute the normal cause of recovery without any further reference to the Applicant.

Previously the 1st Respondent had made a demand for tax in arrears to which the Applicant objected and moved to court in Miscellaneous Civil Application No. 116 of 2004 to have that decision quashed but the Applicant's suit was dismissed for want of prosecution and without being heard on its merits, on **17th February 2012**.

The Applicant being aggrieved by the Ruling of Justice Ngugi Mumbi has lodged an appeal which the Applicant submits raises substantial issues of law, has overwhelming chances of success, and hence this application for injunction.

6. I have carefully considered the application herein in light of the Preliminary Objection raised. I consider the grounds raised in the Preliminary Objection relevant to the application before the court, and so I will consider those grounds one after another.

The Defendants opposes the Plaintiff/Applicant's application dated **19th April 2012** for the following reasons:-

1. The Application is bad in law, misconceived, incompetent and fatally defective, as the reliefs sought

cannot issue against the Defendant, as they would contravene **Section (2) (a)** of the **Kenya Revenue Authority Act, Cap 469** as read together with **Section 16** of the **Government Proceedings Act, Cap 40**.

Section 3 (2) (a) of the **KRA Act** states as follows:-

“(2) The Authority shall be a body corporate with perpetual succession and a common seal and shall, subject to this Act, be capable in its corporate name of:-

(a) Suing and being sued:-

provided that any legal proceedings against the Authority arising from the performance of the functions or the exercise of the powers of the Authority under Section 5 shall be deemed to be legal proceedings against the Government within the meaning of the Government Proceedings Act.”

Section 5 of the **KRA Act** relates to functions of the Authority. It empowers the Authority to administer and enforce collection of revenue under the various laws in the schedules to the Act.

Section 16 of the **Government Proceedings Act** states as follows:-

“(1) In any civil proceedings by or against the Government the Court may, subject to the provision of this Act, make any order that it may make in proceedings between subjects, and otherwise give such appropriate relief as the case may require:-

Provided that –

Where in any proceedings against the Government any relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; . . .”

This position has also been taken in a long line of Judicial Authorities in the following cases:-

In **Jaffer Shariff Omar – Vs – The Commissioner of Customs & Excise**, where Justice Onyango stated as follows at page 5 of the Ruling.

“It is clear that the Commissioner of Customs & Excise when working as an agent or appointee of the Kenya Revenue Authority is covered by this Act and any suits against the same Commissioner of Customs & Excise on his duties to Kenya Revenue Authority must be treated as suits against the servants, against or appointees of the Revenue Authority and such suits must be treated as suits against the Government and so under Section 16 of the Government Proceedings Act no injunction can issue against the Commissioner of Customs & Excise.”

This was also reiterated in the following cases:-

Rwigara Assinapol – Vs – Commissioner of Customs & Excise, Civil Case No. 2786 of 1992 at page 4 of the Ruling.

Southern Credit Banking Corporation Limited – Vs – Kingsway Tyres & Automart Limited & 2 others Civil Case No. 567 of 1999 at pages 9 to 12.

David Kiprotich Kosgei – Vs – Kenya Revenue Authority Civil Suit No. 37 of 2003 at page 3.

The Defendants have also submitted that the applicant is not entitled to an injunction. In my view, the power to grant an interlocutory injunction should be exercised reasonably, judiciously and on sound legal principles. Generally before granting an injunction the court must be satisfied that there is “*a prima facie case*”, and “*balance of convenience*.”

An application shows a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. See **Giella Vs Cassman Brown & Co. (C.A. 1973) E.A.** Page 59 of the Respondent's bundle.

In Ringera J. in **Morris and Company Limited – Vs Kenya Commercial Bank (2003) 2EA** at page 610, the court held that (page 44 of Respondent's Bundle of Authorities)

“Where a party has a statutory right of action, the court will not usually prevent that right from being exercised except that the court may interfere if there was no basis on which the right could be exercised or it was being exercised oppressively.”

The Defendants have also raised the issue of lack of statutory notice to sue, and that there has been no demand or a statutory notice of intention to sue issued against the Respondent herein and the Plaintiff will be put to strict proof thereof.

Section 13 A of the Government Proceedings Act Cap 40 of the Laws of Kenya provides that:-

(1) No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing has been served on the Government in relation to those proceedings.

The Plaintiff has conceded in its submissions at paragraph 1 that the Respondents are entitled to a 30 days' notice of intention to sue. They however submitted that it is not mandatory when only declaratory orders are being sought.

In this matter, the Plaintiff is not only seeking declaratory orders, but the primary prayer in the Plaint is for a permanent injunction. The statutory and mandatory notice of intention to sue was therefore required in this matter.

The Plaintiff is seeking orders to stop KRA from executing, pursuing, considering or in any manner however from re-assessing, effecting recovery or enforcement of VAT for the years 2000 to 2003.

The Plaintiff has already assessed for the years in question, and a demand letter dated **9th October 2003** was issued within that year.

Lastly, the Defendant raised the issue of *Res-judicata*, that this suit emanates from a previous suit that was filed in **J.R. No. 116 of 2004; Kariuki Muigua, T/a Muigua & co. Advocates – Vs – commissioner VAT & KRA**, which was dismissed on **15th February 2012**.

The Plaintiff already challenged the assessment and demand by filing a Judicial Review to challenge the taxes on **3rd February 2004** by way of a Judicial Review Application **Nairobi H.C. Misc. Civil Application No. 116 of 2004: R – Vs – The Commissioner of VAT and KRA Ex-parte; Kariuki Muigua & Co. Advocates**.

KRA filed a replying affidavit of Charity Wakarima Giteru, who was then serving as an Assistant Commissioner.

In the Replying affidavit of Charity Wakarima Giteru. KRA responded to all the issues raised by the Plaintiff, which have been reiterated exactly in this matter.

The Defendant also raised the issue of *subjudice*, and that the suit is statutory barred.

6. In my view, the Defendants only need one valid objection to this application. I have considered these objections in light of the law and facts of this matter. The objects are valid. Further in my view, quite apart from those objections, I do not think that this court can issue orders whose effects would be to stop the Respondents from carrying out their statutory obligations. The Defendants must continue with their obligations. This court cannot stop the Defendants from assessing tax levies due. However, the court may issue orders declaring how such levies may be paid by the Applicant. However, that is not the prayer before the court.

7. I am satisfied that the Preliminary Objection raised to this application carries the day and I herewith dismiss the Notice of Motion application dated **19th April 2012** with costs to the Respondents.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 7TH DAY OF DECEMBER 2012

E. K. O. OGOLA

JUDGE

PRESENT:

Kiaire Mugambi H/B for Omwanza for the Applicant

M/s Ngugi H/B for Lavune for the Respondents

Teresia – Court Clerk