REPUBLIC OF KENYA

IN THE HIGH COURT AT

NAIROBI MILIMANI COMMERCIAL COURTS

CIVIL CASE 351 OF 2010

AFRICAN SAFARI CLUB LIMITED .....PLAINTIFF

VERSUS

KENYA REVENUE AUTHORITY..... DEFENDANT

RULING

The plaintiff in this suit has filed a notice of motion application dated 24th May, 2010 under the provisions of Section 102 of the Income Tax Act and Section 18 of the Value Added Tax Act and Section 3A of the Civil Procedure Act. The said application seeks the following orders.

1. THAT this application be certified as urgent and heard ex-parte in the first instance.

2.THAT there be a stay of the Agency Notices dated 26th April, 2010 imposed on the Plaintiff\'s Bank accounts at Barclays Bank of Kenya, Equity Bank, Standard Chartered Bank, Kenya Commercial Bank, Commercial Bank of Africa and National Bank of Kenya pending the hearing and final determination of this application and/or further orders of this Honourable Court.

3. THAT there be a stay of any intended distress and/or sale of the Plaintiff\'s assets by way of public auction pending the hearing and final determination of this application and/or further orders of this Honourable Court.

4. THAT the costs of this application be provided for.

The second application is a notice of motion filed by the defendant on 24th September, 2010 under Section 2A, of the Civil Procedure Act, Order VI Rule 9 and order XII Rule 6, Order XXXV and Order VI Rule 13 of the Civil Procedure Rules and all enabling provisions of the law. The same seeks the following orders:

1. THAT judgment on admission be entered in favour of the defendant as prayed in the Counter claim on account of the plaintiff\'s admission contained in the pleadings herein.

2. THAT the plaintiff\'s plaint be struck out.

3. THAT the costs of this application be provided for.

During the hearing of the applications, the plaintiff\'s counsel submitted that she is relying on the annexed affidavit of Frank Neugebaur and on the grounds that the defendant has declared the defendants\' banks as agents to collect Kshs. 56,630,890 being taxes allegedly due and owing in the plaintiff\'s accounts. According to the plaintiff\'s counsel, her client has proposed to pay the taxes lawfully within 24 months and he has also expressed willingness to dispose off some immovable properties. These properties are clearly shown in paragraph 5 of the supporting affidavit of the plaintiff. It is the contention of the plaintiff\'s counsel that the defendant has unreasonably declined to accept their proposal. She further explained that most of the said properties are in the North Coast. she also submitted that the same prime properties valued at more than Kshs. 50 million. She conceded that though valuations have already been carried out the reports are not available. Further to the above, she also submitted that the properties are within knowledge of the defendant who has not queried the valuation. Apart from the above, she also submitted that the plaintiff finds that the agency notices, intended distress and sale of his property by public auction are unreasonable, harsh and oppressive in view of the settlement put forward. She also contended that the defendant\'s action shall adversely affect the plaintiff\'s business and one thousand employees. The plaintiff\'s counsel also submitted that the defendant\'s action shall ground the plaintiff\'s business despite the proposals to allow the defendant get its money. The learned counsel conceded that some Pay As You Earn (PAYE) and Value Added Tax (VAT) monies are in dispute. She acknowledged the fact that they know that they have to pay some money though she wants the plaintiff to sit down with the defendant and agree on some final figures before they can give proposals to pay. In addition to the above, the plaintiff\'s counsel has referred this court to paragraph 8 and 9 of their supporting affidavit which gives the reasons for the financial difficulties of the plaintiff and the resultant tax arrears. She was of the view that the factors are political and hence beyond the control of the plaintiff. She has also referred this court to the annexed correspondence between the parties. As far as the defendant\'s application dated 24th September 2010 is concerned, the plaintiff\'s counsel has opted to adopt the written submissions that they have filed. In addition to the above, the plaintiff has also relied on his own affidavit dated 8th November 2010. In that affidavit, the plaintiff has admitted that there was a previous suit which was filed but was not based on the same subject matter. She further submitted that the suit was later settled by consent of both parties. Besides the above, the plaintiff\'s counsel has also contended that her client had been filing its returns and that they are ready to produce evidence proving the filing of the monthly returns. In conclusion, the plaintiff\'s counsel submitted that this court has powers to exercise its discretion, to interfere and intervene in the defendants\' statutory right of action on the basis that the said right is being exercised oppressively.

On the other hand, the application has been opposed by the defendant, who has relied on the replying affidavit that was sworn on 25th June, 2010. In the said replying affidavit the deponent has stated that an in-depth audit h Ad been carried out on the plaintiff from November 2008 up to 18th March 2010. According to that audit it was discovered that the plaintiff has been collecting VAT and PAYE and has not been remitting the same to the defendant. The breakdown of the amount collected has been clearly shown in paragraph 5 of the replying affidavit as totaling Kshs. 56,630,890.00. The above amount includes the penalties and interest. The defendant\'s counsel further submitted that PAYE and VAT are agency taxes, which means that traders collect the taxes over and above the goods that they are selling. He further contended that it is unlawful for any trader to plough back that amount of money into his business as if it is part of his profit. The learned counsel also submitted that PAYE is also a mandatory tax deduction which is deducted monthly from the employees salaries and hence should be reflected in the payslips. It is his contention that it is inconceivable for any trader collecting the taxes to retain that amount on reasons of post election violence and hard economic times. It is his view that so long as a business is operating they can make profit and collect taxes that they should send to KRA. The defendant\'s counsel observed that the plaintiff has stated that they have one thousand employees and hence they must be collecting taxes that they are not remitting. Apart. form the above, she also submitted that it is not reasonable for the plaintiff to expect the defendant to accept their payment plan for taxes that have been collected for over 2 years. As far as she is concerned, those taxes become due as soon as they are collected. She also emphasized that those taxes are usually paid at the end of the month and hence should not be accumulated. She further submitted that the plaintiff has not been filing their annual returns since the year 2008 and that the case that they had earlier filed was also in connection to none payment of taxes. Despite the fact that a consent was filed in that matter, the defendant failed to honour the same. Consequently, several meetings have been held between the parties but what has been due has never been

the issue till now. She also informed the court that even the current taxes are not being remitted by the plaintiff. The defendant\'s counsel referred this court to section 96 of the Income Tax Act and section 19 of the Value Added Tax Cap 476 which gives the Kenya Revenue Authority powers to impose taxes by issuing agency notices. According to the defendant\'s counsel, this is a last resort after the audits have been conducted and the tax payer has been granted a chance to object. However, the plaintiff has not exercised those options and is now seeking the court\'s intervention to impose a payment plan that is unreasonable to the defendant. Besides the above, the defendant\'s counsel also reminded the court that they have filed a defence and counterclaim on 9th August 2010. She was of the considered opinion that the plaintiff has not established any prima facie case in compliance with the principles of **Giella vs. Cassman Brown.** As far as she is concerned, there is no *bona fide* dispute between the parties and that as a matter of fact it is the defendant who is trying to enforce the law. Secondly, she submitted that the plaintiff will not suffer any irreparable injury because they will only be paying their contractual obligations. According to the defendant\'s counsel substantial mischief will be caused if the court grants a stay since the plaintiff is investing in other ventures instead of paying tax. Apart from the above, she also referred this court to the defendant\'s application dated 24th September 2010 and explained that they were relying on Order XII rule 6 Order XXXV and Order VI Rule 13. In support of her submissions, she quoted the case of **Choitram vs. Nazari F1984 KLR.** In the above case, the Court of Appeal determined that where there are no denials, then a court may determine a matter based on admissions. It is the defendant’s counsel contention that they are claiming the taxes that have been admitted. In conclusion she submitted that the court\'s role is not to enforce payment plans. On the basis of the above submissions, the learned counsel urged this court to enter judgment on admission and that the plaint be struck out for not displaying any reasonable cause of action. In addition to the above, she also urged this court to enter judgment as prayed in the defendant\'s counterclaim. She was of the view that the defendant has acted reasonably and that all tax payers should be treated equally. She took issue with the fact that the plaintiff has offered some properties as security in lieu of taxes.

This court has carefully considered the opposing submissions by the learned counsels in relation to both applications. It is apparent that the plaintiff who operates his business under the name of African Safari Club Limited is one of the large tax payers in this country. It is obvious that on the 26th April 2010, the defendant acting through its agents and pursuant to the provisions of section 96 of the Income Tax

Act Cap 470 Laws of Kenya, and section 19 of the Value Added Tax Act, Cap 476 Laws of Kenya declared the plaintiff\'s bankers namely Barclays Bank of Kenya, Equity Bank, Standard Chartered Bank, Kenya Commercial. Bank, of Africa and National Bank of Kenya to be its agents for purposes of recovering a total of Kshs. 56,630,890/- being taxes allegedly due and owing from the plaintiff\'s account with the said bankers. In addition to the above, by a letter dated 6th May 2010, the defendant has given the plaintiff notice under the provisions of section 103 of the Income Tax Act and section 20 of the Value Added Tax Act to pay the said sum of Kshs. 56,630,890/- within 30 days failing which it would apply to the Registrar of Lands for the plaintiff\'s property being LR. No. 1066/1/MN, LR. No. 1067/1/MN, LR. No. 5905/1/MN and LR. No. 3622/1/MN to be charged as security for the payment of the alleged tax arrears. From the submissions which have been made by the plaintiff\'s counsel, it is apparent that following the above demands the plaintiff has proposed to pay the taxes which are lawfully due within 24 months. In addition to the above, the plaintiff has also expressed willingness to dispose off some of the immovable properties which are actually based in the North Coast. It is common knowledge in this country that properties within that area are rather prime and usually attract a high market value. The impression that the plaintiff\'s counsel is giving is that they are in tax arrears but the parties have not agreed specifically as to the amount which is due however, the . plaintiff\'s counsel has stated that if the amount is properly assessed, then they are willing to pay the amount within a period that they have proposed. On the other hand, the defendants have stated very clearly that they had already conducted what they described as **"compliance check audits"** with the participation of the plaintiff and it was found that there were arrears amounting to Kshs. 56,630,890/-. In addition to the above, the defendant has gone ahead and given a breakdown on how the taxes were arrived at in paragraph 5 of their defence. The relevant paragraph indicates as follows:

Tax Head Principal Tax Penalties Interest Total

PAYE	16,597,380	3,319,476	4,077,316	23,994,172
VAT	25,926,773	1,296,339	5,413,606	32,636,890
Total	**42,524,153**	**4,615,815**	**9,490,922**	**56,630,890**

From the above analysis it is very clear that the parties had already verified the amounts which were due from the plaintiff in terms of taxes. The impression that the plaintiff is trying to create that a proper audit has not been done of what is due is therefore not correct. It is economical on the truth. In addition to the above, it is also crystal clear to this court that in a VAT transaction. the same is borne by the consumer and paid by the service provider, who in this case is the plaintiff. Simply put, the duty of the service provider is actually to remit the money to the KRA and is actually not supposed to use the said amount of money because the same does not belong to him. Apart from the above, it is also correct to state that PAYE is the amount of money which is collected from the employees direct from the payroll. That also means that the money collected from the employees does not actually belong to the service provider who in this case is the plaintiff. In both instances the plaintiff is merely acting as an agent once he has collected VAT and PAYE. It also means that the plaintiff cannot turn around, use the amount of money collected to do his business, and then claim he does not have money to pay in terms of those two taxes. This court entirely agrees with the defendant\'s counsel that it is utterly unreasonable for the plaintiff to request to be allowed to pay back the money which does not belong to him within a period of 24 months. That is akin to getting a loan from the defendant without any interest. Section 96 of the Income Tax Act states as follows:

96.(1) In this section -

"agent" means a person* appointed *as* such under *subsection (2);

"appointment notice" means a notice issued by the Commissioner under that subsection appointing an agent;

"moneys" include salary, wages and pension payments and any other remuneration whatever;

\'principal" means the person in respect of whom an agent is appointed.

(2) The Commissioner may by written notice addressed to any person –

(a) appoint him to be the agent of another person for the purposes of the collection and recovery of tax due from that other person; and

(b) specify the amount of tax to be collected and recovered.

(3) An agent shall pay the tax specified in his appointment notice out of any moneys which may, at any time during the twelve months following the date of the notice, be held by him for, or due from him to, his principal.

(4) Where an agent claims to be, or to have become, unable to comply* with *subsection (3) by reason of the lack of moneys held by, or due from, him he shall, within seven working days, notify the Commissioner accordingly in writing setting out fully the reasons for his inability so to ***comply, and the Commissioner may –***

(a) accept the notification and cancel or amend the appointment notice accordingly; or

(b) if he is not ***satisfied with*** those reasons, ***reject the notification in writing.***

(5) Unless and until a notification is given by an agent under subsection (4) –

(a) sufficient moneys for the payment of tax specified in his appointment notice shall be presumed to be held by him for, or due from him to, his principal; and

(b) in any proceedings for the collection or recovery of that tax he shall be stopped from asserting the lack of those moneys.

(6) For the purposes of this section, the Commissioner may, by notice in writing, at any time require any person to furnish him within a reasonable time, not being less than thirty days from the date of service of the notice, with a return showing any moneys which may be held by that person for, or due by him to, another person from whom tax is due.

(7)Where an agent fails to pay an amount of tax specified in his appointment notice within thirty days –

(a) of the date of service of the notice on him; or

(b) of the date on which any moneys come into his hands for, or become due by him to, his principal, whichever is later, and –

(1) he has not given a notification under subsection (4); or

(ii) he has given a notification which has been rejected by the Commissioner, the provisions of this Act relating to the collection and recovery of tax shall apply to the collection and recovery of that amount as if ***it were tax due and payable by the agent, the due date for the payment of which was the date upon which that amount should have been paid to the Commissioner under this subsection.***

(8) An agent who has made a payment of tax under this section shall for all purposes be deemed to have acted therein with the authority of his principal and of all other persons concerned, and shall be indemnified in respect of that payment against all proceedings, civil or criminal, and all process, judicial or extrajudicial, notwithstanding any provisions to the contrary in any written law, contract or agreement.

(9) A person who, in giving a notification under subsection (4), willfully makes any false or misleading statement, or wilfully conceals any material fact, shall be guilty of an offence.

(10) For the purposes of this section, cases where moneys are held by an agent for, or due by him to, his principal, shall include cases where the agent

(a) owes or is about to pay money to the principal; or

(b) holds money for or on account of the principal; or

(c) holds money on account of some other person for payment to the principal; or

(d) has authority from some other person to pay money to the principal."

Section 19 of the Value Added Tax Act states as follows:

19. ***(1) Where any sum by way of tax is due and payable by a taxable person, the Commissioner may, by notice in writing, require -***

(a) any person from whom any money is due or accruing or may become due to a taxable person; or

(b) any person who holds or may subsequently hold money for or on account of the taxable person; or

(c) any person who holds or may subsequently hold money on account of some other person for

payment to the taxable person; or

(d) any person having authority from some other person to pay money to the taxable person, to pay to the Commissioner that money or so much thereof as is sufficient to pay the tax so due and payable.

(2) Where a person required under subsection (1) to pay money to the Commissioner claims to be or to have become unable to do so by reason of lack of moneys held by, or due from him, he shall within seven working days notify the Commissioner accordingly in writing stating the reason for his inability to do so.

(3) Unless the Commissioner is satisfied with the reasons given by such person under subsection (2) –

(a) sufficient moneys for the payment of the tax specified in the notice shall be presumed to be held by such person for, or due from him to, the taxable person in respect of whom the notice is given under subsection (1); and

(b) in any proceedings for the collection or recovery of that tax such person shall be stopped from asserting the lack of those moneys.

(4)The Commissioner may, by notice in writing, at any time require any person to furnish him within a reasonable time, not being less than thirty days from the date of service of the notice, with a return showing any moneys which may be held by that person for, or due by him to, the taxable person from whom the tax is due.

(5) All payments made in accordance with a notice under this section shall be deemed to be made on behalf of the taxable person and of all other persons concerned, and shall constitute a good and sufficient discharge of the liability of such persons to the taxable person, or any other person.

(6) Any person who, without lawful authority or excuse-

(a) fails to comply with the requirement of any notice given to him under subsection (1) or (4); or

(b) discharges any liability to a taxable person in disregard of such notice;

shall be guilty of an offence and liable to a fine not exceeding fifteen thousand shillings or to imprisonment for a term not exceeding six months or to both, and shall also be personally liable to pay to the Commissioner the amount of any liability so discharged."

This court has carefully considered the above clear provisions of the law. The said sections clearly outline the powers that have been conferred on the defendant to implement the Income Tax Act and Value Added Tax. In this particular case, nothing has been availed to show that the KRA has violated any of the provisions of law. As far as the first application dated 24th May, 2010 is concerned, it is apparent that the defendant has acted within the law to issue the agency notices dated 26th April 2010 to the banks that have been mentioned in the application. Secondly, there are no sufficient grounds to enable this court to grant an order of stay of any intended distress and/or sale of the plaintiff\'s assets by way of public auction pending the hearing and final determination of this case. As far as the second application dated 24th September 2010 is concerned, it is abundantly clear that paragraphs 6, 7 and 8 of the plaint actually admits liability as far as the tax arrears are concerned. As earlier stated, the plaintiff has not given any good reason why he should collect taxes from other people and then fail to remit the same to the defendant. The money that he has collected as Pay As You Earn is basically derived from the salaries of the employees. That money does not actually belong to the plaintiff. As far as the issue of VAT is concerned, it is apparent that this is money that the plaintiff has been collecting out of the services that it has rendered to its customers. That money cannot be considered to be part of the profits for the plaintiff. Simply put, that money does not belong to the plaintiff. This court is very sensitive and alive to the political upheavals that took place a couple of years back. These upheavals include ethnic clashes, Kikambala terrorist bombing and the American and European travel warnings to their citizens. That issue

has been raised in paragraph 8 of the plaint by the plaintiff. With due respect to the plaintiff he just wants to confuse issues. Those difficulties have nothing to do with services which have already been rendered. The taxes being demanded arise out of services which have already been rendered. The defendant is not demanding for money which has not yet accrued. The defendant is demanding for money which has already accrued by way of services having been rendered.

The upshot is that I hereby dismiss the application dated 24th May, 2010 since the same does not have any merits. Lastly, I hereby concede to the application by the defendant dated 24th September 2010. I concede to the same in terms of prayer No. 1 and 2. That means the plaintiff must pay taxes which have accrued to the tune of Kshs.56,630,890/= for VAT and PAYE arrears. He must also pay Kshs. 9,369,751/= on interest from previous arrears by which a consent was entered on 14th July 2009 in HCCC No. 456 of 2009 where the matter was settled in terms that the plaintiff would pay the principle debt together with penalties, interest and costs. In conclusion, I hereby direct that the plaintiff must pay the costs of these two applications together with the suit.

Those are orders of this court.

MUGA APONDI

JUDGE

Ruling read, signed and delivered in open court in the presence of:

Ms. Lavuna for Mrs. Sijeny - Plaintiff\'s Counsel

Ms. Lavuna - Defendant\'s Counsel

MUGA APONDI

JUDGE

15TH MARCH 2011