CIVIL

- ***Can an injunction issue against the government?***
- ***Principles of granting injunction.***
- ***Disputes on assessments of VAT should be filed before a Tribunal and not the High Court.***

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVIL CASE NO. 58 OF 2010

MAUA METHODIST HOSPITAL SACCO ……. PLAINTIFF

VERSUS

COMMISSIONER, KENYA REVENUE AUTHORITY …….. DEFENDANT

RULING

The plaintiff has sued the commissioner Kenya Revenue Authority by its plaint filed on 29th April 2010. The plaintiff by that plaint has alleged that the defendant illegally wrote letters to its bankers namely Barclays Bank, Consolidated Bank Co-operative Bank and Equity Bank authorizing them to suspend the operations of the plaintiffs in respect of the plaintiff's accounts in those banks. It is further alleged that in seeking to suspend those accounts, the defendant had alleged that the plaintiff owes it a debt dating back to the year 2007. By its plaint, the plaintiff seeks an injunction against the defendant to stop the defendant interfering with its bank account in the aforestated banks. The plaintiff filed an interlocutory application by way of Chamber Summons dated 29th April 2010. The plaintiff by that application seeks temporary injunction to stop the defendant from interfering with its bank accounts in the aforestated banks. The plaintiff in its supporting affidavit acknowledges that it was appointed an agent through the letter dated 19th September 2006 whereby the Kenya Revenue Authority (KRA) appointed the plaintiff as an agent of withholding Value added tax (VAT) for the KRA. The plaintiffs also by their said affidavit admit that the Company Ramen Enterprises were working for them although they allege that Ramen Enterprises worked for them in a period prior to their appointment as agents for colleting VAT. The plaintiff further deponed that the defendant had made a demand from them and as a result of that demand they made a payment which they stated concluded their dispute with the defendant. They were therefore of the view that the defendants were wrong to seek to attach their accounts in respect of the assessment of VAT payable by Ramen Enterprises. In a further supporting affidavit filed on behalf of the plaintiff on 4th July 2011, the plaintiff alleges that it had no obligation to collect tax on behalf of the defendant before it was appointed as an agent on 30th May 2007. That the contractors amongst whom is Ramen Enterprises who it is alleged the plaintiff should have collected their tax worked for the plaintiff in the year 2005 and early 2006. This according to the plaintiff, was a period prior to its appointment as an agent by KRA. Further, that the contractors had themselves complied with the tax requirement and that information was supplied to the defendant. The plaintiffs deponed that they had requested that the dispute in respect of the present tax demand be subjected to a tribunal hearing as required by the law but the defendant had failed to carry out their request. The application was opposed by the defendant. In opposition, it was stated that by that replying affidavit, the defendant confirms that the plaintiff was registered as withholding tax agent for the defendant. That registration was as per section 19 A of the Value Added Tax Act Cap 476. That by virtue of that registration, the plaintiff was required to deduct tax from a tax paying supplier AND was also required to keep records of such form or manner of deduction as may be directed by the commissioner of KRA. The plaintiff was further required to furnish the supplier with acknowledgement of payment as the commissioner may direct. The deponent of the replying affidavit stated that the plaintiff had the legal obligation of withholding VAT on all taxable purchases and supplies regardless of whether or not the supplier is a registered VAT tax. That the dispute which is the subject of this case relates to a contractor Ramen Enterprises who the plaintiff retained to carry out work on the plaintiff's SACCO plaza. That the defendant carried out preliminary audit to check or to confirm the plaintiff's self declared assessment. This was carried out at the defendant's offices on the the 7th and 8th August 2007. At that audit, it was found that the plaintiff owed the defendant tax amounting to Kshs. 7,868,918/=. That audit information was relied to the plaintiff by letter

dated 14th August 2007. Thereafter, a meeting was held between the plaintiff and the defendant whereby it was agreed that the plaintiff pay Kshs. 2,000,000/= pending confirmation that Ramen Enterprises had paid the balance to the defendant of Kshs. 5,868,891/= to the defendant. The indepth tax audit was carried out on the plaintiff's company following it's deregistration as a VAT withholding agent on 1st October 2007. That audit established that the plaintiff did not withhold VAT from its major suppliers, namely Ramen enterprises and Paradigm. The total amount owed by the plaintiff was found to be Kshs. 5,033,647/=. The penalty payable on that total was Kshs. 503,365/=. It was deponed in that affidavit that the onus was on the plaintiff to show that the suppliers had paid the VAT as required by the law. The deponent stated that the plaintiff in filing the present action had failed to follow the law specifically section 33 (1) (ii) of the VAT Act Cap 476. That section requires anyone who disputes the decision of the commissioner on matters arising on that Act to give the commissioner 30 days notice that such a person wishes to file an appeal to the tribunal established under that Act.

At this point, I wish to remind myself the correct principles that should guide this court as it considers the interlocutory Chamber Summons. Those principles were set out in the case **Mbuthia vs. Njimba Credit finance co. and Ano. KLR** 1988 page 1.

"The correct approach in dealing with an application for an interlocutory injunction is not to decide the issue of fact, but rather to weigh up the relevant strength of each side's propositions. The lower court judge in this case had gone far beyond his proper duties and made final findings of fact on disputed affidavits."

Bearing that principle in mind, I will also be guided by the principles of granting an injunction which were set out in the case **Gielle vs. Cassman Brown & Co. Ltd [1973] E.A.**

Those principles are:-

i. An applicant must show a prima facie case with a probability of success.
ii. An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.
iii. When the court is in doubt it will decide the application on a balance of convenience.

There is no doubt that the plaintiff was appointed as tax withholding agent by the commissioner of income tax as per section 19A of the VAT Act Cap 476. Once the defendant carried out the indepth audit as stated above, if the plaintiff was dissatisfied with that audit it should have moved as provided under section 33 of the VAT Act. That section provides as follows:-

"33 (1) A persons who disputes the decision of the commissioner of any matter arising under the provisions of this Act may, upon giving notice to the Commissioner in writing, within thirty days of being notified of the decision, appeal to the Tribunal:

i) in the case of a dispute arising from an assessment of tax by the Commissioner under paragraph 9 of the Seventh Schedule the person shall, before filing the appeal, deposit with the Commissioner fifty per cent of the tax assessed; or

ii) In the case of any other dispute, such person shall, before filing the appeal, make all returns of tax where applicable as required and shall pay the amount of tax shown thereon as being due and payable."

As can be seen, the plaintiff did not follow the provisions of that section. Having failed to do so, it is my finding that the plaintiff has not shown a prima facie case with probability of success. It is only after the hearing by that tribunal that the plaintiff could have approached the High Court to appeal against its decision. Such an appeal should have been filed within 14 days. In my view, the plaintiff also failed to show a prima facie case because it sued the wrong party. Section 3 of the Kenya Revenue Authority Act Cap 469 provides that the Kenya Revenue Authority had power to sue and to be sued. It therefore means that the correct party that should have been sued by the plaintiff should have been the Kenya Revenue Authority. It follows that the plaintiff having sued the wrong party fails to show a *prima facie* case with probability of success. This court by a ruling dated 17th March 2011 in this matter made a finding that the plaintiff had not served the defendant with the summons of this case. In other words, the plaintiff had only served the defendant with the plaint and the Chamber summons. Order 5 of the Civil procedure Rules 2010 rule 1 (1) provides as follows:-

"When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein."

That rule provides that the defendant would file an appearance after being served with the summons. The summons having not been filed the defendant had no obligation to file an appearance and a defence as required by the rules. Summons are valid for 12 months. The plaintiff filed this action on 29th April 2010 under order 5 of the Civil Procedure Rules the plaintiff was required to prepare the summons for signature by the judge. I am unable to find evidence that the plaintiff did file the summons for signature by a judge. It is because of that that I additionally find that the plaintiff failed to show a *prima facie* case with probability of success. Finally, section 3 (2) (a) of the Kenya Revenue Authority Act provides that proceedings against the Kenya Revenue Authority in relation to the performance of functions and exercise of its powers shall be deemed to be legal proceedings against the government. The Government Proceedings Act Cap 40, specifically section 16, provides the reliefs

which one can get from the government. That section provides that the courts shall not in any civil proceedings grant an injunction against the government. That being so, the prayers sought in the chamber Summons by the plaintiff are unattainable. It is because of the aforestated reasons that I hereby dismiss the plaintiff's Chamber Summons dated 29th April 2010. The costs of that Chamber Summons are awarded to the defendant. The orders made by this court on 29th April 2010 injuncting the defendant against tampering with the plaintiff's account at Barclays Bank Meru Branch Co-operative Bank Meru and Maua Branch and Consolidated Bank are hereby discharged.

Dated, signed and delivered at Meru this 10th day of August 2011.

MARY KASANGO
JUDGE