



**Maya EA Limited v Lulu Logistics Limited & 3 others (Civil Case E610 of 2021)
[2024] KEHC 3036 (KLR) (Commercial and Tax) (1 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3036 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E610 OF 2021
MN MWANGI, J
MARCH 1, 2024**

BETWEEN

MAYA EA LIMITED PLAINTIFF

AND

LULU LOGISTICS LIMITED 1ST DEFENDANT

WAWERU NJOGU 2ND DEFENDANT

BENJOE LOGISTICS LIMITED 3RD DEFENDANT

KENYA REVENUE AUTHORITY 4TH DEFENDANT

RULING

1. On 2nd June, 2021 the plaintiff/applicant filed suit seeking judgment against the defendants/respondents for a declaration that the plaintiff paid all dues and assessed customs duty presented to it by the 1st to 3rd defendants for imported goods for the period between the years 2018 and 2020. The plaintiff also seeks a declaration that the 1st to 3rd defendants be held liable to pay all the tax demands of Kshs 189,158,264.81 from the plaintiff by the 4th defendant.
2. Filed contemporaneously with the plaint was a Notice of Motion application brought under Sections 1A, 1B and 3A and Section 63(e) of the *Civil Procedure Act*, Order 40 Rules 1, 2, 3, 4 and 8, Order 51 Rules 1, 4, 10, 12 & 13 of the *Civil Procedure Rules, 2010* and any other enabling provisions of the law.
3. The applicant seeks the following orders:
 - i. Spent;
 - ii. Spent;



- iii. That pending the hearing of the main suit filed herein, the 4th defendant whether acting on its own, its agent, employee, servants and or any other person acting on its authority and/or institutions are hereby restrained by an order of temporary injunction from demanding from the plaintiff payments of the sum of Kshs.189,158,264.81 and or enforcing any recovery measures referred to and embodied in its letters dated 6th May, 2021 and 27th May, 2021 and/or any other communication seeking to recover the above sum from the plaintiff/applicant;
 - iv. That pending the hearing of the main suit herein, the 4th defendant/respondent be and is hereby compelled to provide its report to the Court on investigations carried out by its investigation and enforcement department against the 1st to 3rd defendants on all taxes assessed and paid by the plaintiff as well as provide a report on how the plaintiff's imported goods were released to the 1st to 3rd defendants by the 4th defendant's Officers; and
 - v. That the costs of the application be provided for.
4. The application is premised on the grounds on the face of it and is supported by the affidavit of Abdirahaman Musa Noor, a director of the plaintiff/applicant sworn on 2nd June, 2021.
 5. According to Mr Abdirahaman, on 16th October, 2017, the plaintiff contracted the services of the 1st defendant to collect, clear and forward the plaintiff's imported goods. That on 8th August, 2019, the 2nd defendant as a director of the 1st defendant introduced the 3rd defendant as the agent to conduct clearing and forwarding business. Mr. Abirahaman averred that the 1st to 3rd defendants generated assessed tax invoices as Customs Agent and forwarded the same to the plaintiff for payment, and the plaintiff paid the same and the goods were cleared and forwarded to it.
 6. He deposed that the goods were however detained at the Port of entry in November 2020 by the 4th defendant for alleged non-payment of taxes but were released upon proof through a bank statement that money had been deposited to the 1st defendant's account as payment of the assessed taxes.
 7. Mr. Abdirahaman argued that in a new turn of events, the 4th defendant issued a tax demand and penalties of Kshs.189,158,264.81 without any sufficient justification. He contended that the demand of taxes and penalties by the 4th defendant is a clear indication that the Officers of the 4th defendant acted negligently and were involved in corruption.
 8. In response to the application herein, the 4th defendant filed a replying affidavit sworn on 13th September, 2021 by Davis Nyamache, an Officer of the 4th defendant. He deposed that the 4th defendant conducted a customs post clearance audit on the plaintiff and the audit established that the actual payments for the imported goods were not reflected in the 4th defendant's bank accounts, and proceeded to issue a tax demand to the plaintiff. He argued that no proof had been adduced to support the payment despite the allegation by Benjoe Logistics Limited (3rd defendant) to have cleared the tax assessment.
 9. Mr. Nyamache contended that the bank statements attached to the plaintiff's affidavit are evidence that the plaintiff transferred money to Lulu Logistics Limited's (1st defendant's) bank account but it does not support payments made to KRA, and that there is no evidence adduced to demonstrate that taxes were paid for and/or on behalf of the plaintiff.
 10. He contended that the amount remitted by the 1st defendant as taxes for the period in issue were monies paid by different companies and not the plaintiff. He stated that the Simba System revealed alteration made by the 1st defendant. He argued that the plaintiff ought to provide security as the unpaid taxes remain a debt to the Government and every taxpayer is obligated to remit taxes.



11. In response to the application, Mr. Waweru Njogu, the 2nd defendant, who is a director of the 1st defendant and the Sales, Operations & Logistics Manager of the 3rd defendant filed a replying affidavit sworn on 28th June, 2021. He agreed that he entered into a contractual relationship with the 3rd defendant for the clearing and forwarding of imported goods, where the 1st defendant outsourced the services of the 3rd defendant and that the business has been running seamlessly. He stated that the issue of sub-contractor agency was well known by the plaintiff even at the time of engagement, and the plaintiff did not question the same.
12. He stated that the 1st and 3rd defendants collected, cleared and forwarded goods to the plaintiff in good condition having paid the tax assessment duties amounting to Kshs.118,135,572.00. He averred that the demand for tax due and penalties by the 4th defendant is attributed to an error, gaps or discrepancies with the records of the 4th defendant. He stated that the Simba System password is only known to the 3rd defendant who interacts with the 4th defendant. He averred that the 3rd defendant duly executed its mandate as a Customs Agent in strict compliance with the relevant laws and regulations in collecting, clearing and forwarding the plaintiff's goods. He stated that the demand letter dated 6th May, 2023 by the 4th defendant is premature as it states investigations are still ongoing.
13. The application was canvassed by way of written and oral submissions. The 1st, 2nd and 3rd defendants did not file written or make oral submissions.
14. Mr Dondo, learned Counsel for the applicant filed submissions on 25th July, 2023. He informed this Court that prayer Nos. 2 and 3 of the application seek to have the 4th defendant restrained from demanding Kshs. 189,158,264.81 from the plaintiff as tax demands and penalties for imported goods between the years 2018 and 2020. He submitted that the plaintiff contracted the 1st defendant to collect, clear and forward imported goods, and in return, the 1st defendant contracted the 3rd defendant to do clearance of the said goods. He submitted that the tax invoices sent by the 1st defendant were settled and the plaintiff deposited the said amounts in the 1st defendant's bank account for onward transmissions to the 4th defendant. He indicated that in support of the said fact, bank statements had been attached to the plaintiff's affidavit.
15. Counsel argued that the issue in contention is whether the 1st defendant and 2nd defendant remitted the money to the 4th defendant. He contended that the plaintiff is not indebted to the 4th defendant as confirmed by the 3rd defendant who cleared the goods, and in instances where there are tax demands, they ought to be met by the 1st defendant. He submitted that the plaintiff has established a prima facie case for grant of injunctive orders. He contended that the plaintiff will suffer irreparable harm if an injunction is not issued restraining the 4th defendant from demanding the taxes in issue, as the 4th defendant is notorious for failing to refund taxes. He stated that the 4th defendant will not suffer any prejudice if the orders being sought are granted.
16. Mr. Dondo cited the case of *Nairobi Kiru Line Services Ltd v County Government of Nyeri & 2 Others* [2016] eKLR, to demonstrate that irreparable harm cannot be quantified in monetary terms or cannot be cured. He urged this Court to find that the balance of convenience tilts in favour of the plaintiff as sufficient evidence has been presented to prove that the plaintiff had remitted the taxes due and owing to the 3rd defendant for payment to the 4th defendant.
17. On his part, Mr. Chabala, learned Counsel for the 4th defendant submitted that the contract between the 1st defendant and 3rd defendant was void ab initio as the 1st defendant was not a licensed agent of the 4th defendant. He stated that this Court is being asked to grant an injunction on a void a contract. He argued that no *prima facie* case had been established as no evidence was adduced to prove that tax



payments were made for the 42 entries in issue by the 3rd defendant to the 4th defendant on behalf of the plaintiff.

18. He submitted that the contract adduced by the plaintiff wherein it contracted the 1st defendant and the bank statement evidencing money deposited to the 1st defendant's bank account are not sufficient to establish a prima facie case that the taxes demanded, were paid to the 4th defendant. Counsel cited the provisions of Section 107 of the Evidence Act that he who alleges must prove. He also cited Section 56 of the Tax Procedures Act which places the onus on a taxpayer to show that a demand by KRA is not proper.
19. Mr. Chabala relied on the case of Njenga v Njenga [1991] eKLR, where the Court observed that an injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles.
20. Counsel submitted that the amount that is being demanded by the 4th defendant is substantial and that the plaintiff has failed to adduce its bank statement. He contended that the allegation of non-refund of taxes by the 4th defendant is hearsay.
21. He stated the plaintiff has failed to demonstrate the irreparable harm to be suffered as the 4th defendant is only carrying out its responsibilities by safeguarding public interest in enhancing revenue collection and combating tax evasion. He submitted that if an injunction is not granted, the plaintiff has the option of recovering its money from the 1st to 3rd defendants.
22. Mr. Chabala submitted that the balance of convenience cannot tilt in favour of the plaintiff when no proof of payment of the tax due has been adduced. He stated that it would be discriminatory if the plaintiff failed to pay the tax due and owing to the 4th defendant. In his view, the balance of convenience tilts in favour of the 4th defendant.
23. He submitted that Section 148 of the EACCMA holds the principal liable for the actions of its agents, or servants, and the 4th defendant is therefore justified in claiming the tax demand and penalties from the plaintiff.
24. He urged that the plaintiff had failed to discharge its burden of proof and is undeserving of the orders of injunction sought

Analysis And Determination.

25. Having considered the application, the replying affidavits and the submissions made by the parties' Advocates, the issue for determination is if the plaintiff has satisfied the conditions upon which a temporary injunction may be granted.
26. The law on temporary injunctions is set out in Order 40 Rules 1(a) and (b) of the Civil Procedure Rules, 2010. It stipulates as follows:

“Where in any suit it is proved by affidavit or otherwise—

- a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and



preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

27. Courts have through precedents set out conditions to be considered before orders for temporary injunction can be granted. The said conditions were well articulated in the case of *Giella v Cassman Brown Co. Ltd* [1973] E.A 358, where the Court expressed itself thus:

“First, an applicant must show 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.”

28. On the issue of what constitutes a prima facie case, the Court of Appeal in the case of *Mrao Limited v First American Bank of Kenya Ltd & 2 others* [2003] eKLR, defined a prima facie as follows:

“A Prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

29. In the instant application, the plaintiff submitted that the 4th defendant’s tax assessment, tax demand and penalties in the sum of Kshs 189,158,264.81, will cripple its business as the same amounts to double taxation. The 4th defendant on its part averred that no evidence had been adduced by the plaintiff and/or its agent the 1st to 3rd defendants in support of its assertion that it had paid for the tax assessment that is being demanded for the 42 entries for imported goods for the period between the years 2018 and 2020.
30. Having considered the documents relied on by the plaintiff, it is evident that it remitted money to the 1st defendant for payment of taxes, but no evidence has been presented before this Court to demonstrate that the said amount was remitted to the 4th defendant for the payment of the tax assessed, as claimed in the replying affidavit sworn by Waweru.
31. If the payment was done, nothing would have been easier than for the 1st to 3rd defendants to furnish this Court with evidence to demonstrate the payment made to the 4th defendant on behalf of the plaintiff herein. I do agree with the 4th defendant that it has a mandate to collect taxes on behalf of the Government. The said mandate should however be exercised within the confines of the law. It is also clear that there are set guidelines on how imported goods are cleared from the Port before being dispatched to their owners.
32. The goods that form the subject of the tax in issue, were discharged to the plaintiff. That is a clear indication that they were approved for clearance by the Officers of the 4th defendant at the Port. This Court is in doubt as to how the imported goods were dispatched to the plaintiff in the absence of duty being paid. The allegation by the 4th defendant that duty was not paid for some goods that were cleared from the Port requires evidence to be called so that each party can support its position with evidence.
33. In the circumstances, it is my finding that the plaintiff has demonstrated at this interim stage, that its rights have been infringed by the 4th defendant. As a result, a prima facie case has been established.



34. The second issue is whether the plaintiff will suffer irreparable harm. The 4th defendant submitted that the plaintiff failed to demonstrate the loss it will suffer, if the injunction is not granted, while on the other hand, the plaintiff stated that the amount demanded is colossal and will have a crippling effect on its business since it had paid tax to the 4th defendant through its Customs Agent.
35. In my considered view, if the 4th defendant is allowed to recover the amount being demanded, the plaintiff's business will be greatly jeopardized as it had remitted the money for tax to the 1st defendant. It then follows that the plaintiff will be made to shoulder the responsibility of another entity (1st defendant) and may not be compensated by an award of damages.
36. In the circumstances, this Court finds that the balance of convenience tilts in favour of the plaintiff by allowing a temporary injunction.
37. The plaintiff also seeks an order for the 4th defendant to be compelled to provide its report to the Court on the investigations carried out by its Investigation and Enforcement Department against the 1st to 3rd defendants on all taxes assessed and paid by the plaintiff, as well as to provide a report on how the plaintiff's imported goods were released to the 1st to 3rd defendants by the 4th defendant's Officers. I believe such a report would aid this Court to effectually determine the dispute between the parties and arrive at a just conclusion.
38. In the result, the applicant has met the threshold for being granted a temporary injunction. The application dated 2nd June, 2023 is merited. It is hereby allowed in the following terms-
- i. That pending the hearing of the main suit filed herein, the 4th defendant whether acting on its own, its agent, employee, servants and or any other person acting on its authority and/or institutions are hereby restrained by an order of temporary injunction from demanding from the plaintiff payments of the sum of Kshs.189,158,264.81 and or enforcing any recovery measures referred to and embodied in its letters dated 6th May, 2021 and 27th May, 2021 and/or any other communication seeking to recover the above sum from the plaintiff/applicant;
 - ii. That pending the hearing of the main suit herein, the 4th defendant/respondent be and is hereby compelled to provide its report to the Court within sixty (60) days on investigations carried out by its investigation and enforcement department against the 1st to 3rd defendants on all taxes assessed and paid by the plaintiff as well as provide a report on how the plaintiff's imported goods were released to the 1st to 3rd defendants by the 4th defendant's officers; and
 - iii. That the costs of the application are granted to the plaintiff.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 1ST DAY OF MARCH, 2024.

RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Mulanya for the plaintiff/applicant

No appearance for the defendants

Ms B. Wokabi – Court Assistant.

