



**Kenya Revenue Authority v Sbi International Holdings AG  
Kenya & another (Miscellaneous Civil Application E457 of 2022)  
[2024] KEHC 4610 (KLR) (Commercial and Tax) (15 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4610 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS CIVIL APPLICATION E457 OF 2022  
JWW MONG'ARE, J  
APRIL 15, 2024**

**BETWEEN**

**KENYA REVENUE AUTHORITY ..... APPLICANT**

**AND**

**SBI INTERNATIONAL HOLDINGS AG KENYA ..... 1<sup>ST</sup> RESPONDENT**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Brief Background**

1. The brief background to this ruling is that SBI International was contracted by Kenya National Highways Authority (KENHA) to construct several roads namely; Kisumu Boys Mamboleo Road for Kshs.4,531,261,407.52/=, Ahero Interchange for Kshs.853,435,616.22/= and Kericho Interchange for Kshs.783,8983,767.82/= with an undertaking that the same would be paid.
2. Subsequently Kenya Revenue Authority (KRA) conducted a Tax audit on the 1<sup>st</sup> Respondent and established a tax liability and issued a tax assessment of Kshs.3,286,434,991/= on 23<sup>rd</sup> December 2022. Simultaneously with the Tax assessment, the Applicant issued an Agency notice to KENHA for the amount of Kshs. 3,286,434,991/=.
3. The 1<sup>st</sup> Respondent moved the court and the Agency Notices were quashed. The Applicant moved this court under Section 43(2) of the Tax Procedure Act seeking the preservation of the Funds of the 1<sup>st</sup> Respondent held by the 2<sup>nd</sup> Respondent. An interim preservation order was granted on 9<sup>th</sup> June, 2022.
4. There are two applications for determination in this ruling before the court. The first application was filed on 17<sup>th</sup> June, 2022 by KRA which seeks to extend the orders of 9<sup>th</sup> June, 2022 preserving the funds



- under Section 43(2) of the Tax Procedure Act in respect to the 1<sup>st</sup> Respondent on all accounts in all banks of the 2<sup>nd</sup> Respondent. The Applicant also seeks costs of the application.
5. The application is premised on the grounds set on the face of the Application and the Applicant's main ground is that SBI, the 1<sup>st</sup> Respondent, has no known assets in Kenya and that all its directors are foreign nationals residing outside the country and the jurisdiction of this court. That SBI requested to be paid its dues by KENHA into a foreign bank account and KRA argues that this was in order to evade payment of taxes and therefore there is eminent danger to be suffered by the Applicant if KENHA is allowed to pay SBI directly into the foreign bank account as there are no other known assets belonging to SBI to attach and the collection of tax revenue will be frustrated.
  6. The Application is supported by the annexed affidavit of Dorcas Matoke sworn on 7<sup>th</sup> June, 2022 wherein she reiterates the grounds of the application.
  7. The 1<sup>st</sup> Respondent opposed the application and also filed its own application.
  8. The second application was filed on 6<sup>th</sup> July 2022 brought by the 1<sup>st</sup> Respondent and it seeks to set aside the extended preservation orders on the funds held by KENHA. The application is premised on the grounds set on the face of the application and supported by the annexed affidavit of Gilad Mishini sworn on 6<sup>th</sup> July, 2022.
  9. By the directions of the court the two applications were canvassed by way of written submissions.
  10. The Applicant (KRA) submits that it is mandated under Section 43(2) of the *Tax Procedures Act* to issue preservation notices to banks and other third parties while undertaking investigations where it is evident that the taxpayer may dissipate the funds and frustrate the collection and recovery of the lost taxes. That the 1<sup>st</sup> Respondent is a foreign company contracted by KENHA to undertake major road constructions and thus receives its income from Kenya and ought to remit taxes which it has failed to do so. Reliance was placed in the case of *Commissioner for the South African Revenue Service vs Tradex (PTY) Ltd & 2 Others*.
  11. The Applicant urges the court that in the event it fails to extend the preservation orders that the 1<sup>st</sup> Respondent be ordered to raise confirmed taxes as security as provided under the law. The court was urged that for the sake of public interest and good governance, the preservation orders remain in force, and urged the court to balance the rights of the Applicant with that of the 1<sup>st</sup> Respondent to secure the colossal sum due and owing from the 2<sup>nd</sup> Respondent.
  12. On the other hand, the 1<sup>st</sup> Respondent opposed the application and submitted that the Applicant is obligated under Section 43(7) of the *Tax Procedure Act* to have within 30 days as of 20<sup>th</sup> June 2022 assessed the taxes due and payable by the 1<sup>st</sup> Respondent, notified the 1<sup>st</sup> Respondent and commenced proceedings for the recovery of the tax and the failure to do so the jurisdiction of this court to issue preservation orders under Section 43 of the *Tax Procedure Act* ought not to be invoked. It was argued that a preservation Order under Section 43(2) and (3) is only applicable in circumstances where assessment and demand have not been issued and recovery proceedings from the said assessment and demand have not commenced whereas in the instant case the recovery proceedings have commenced.
  13. Further, the Respondent contended that the court lacks the jurisdiction to grant the reliefs sought in the application dated 17<sup>th</sup> June, 2022 and conversely should allow the application dated 6<sup>th</sup> July, 2022 seeking to set aside the preservatory orders. The court was urged that in the absence of jurisdiction it ought to down its tools emphasis was drawn from the celebrated case of *Owners of the Motor Vessel "Lilian S" vs Caltex Oil Kenya Limited* (1989) eKLR, Justice Madan(as he then was) opined that



“where a court or tribunal finds it has no jurisdiction, it can only do one thing, and that is down its tools.”

14. The 1<sup>st</sup> Respondent avers that Orders issued under Section 43(2) and extended under Section 43(3) of the [Tax Procedures Act](#) are self-executing in nature in that Section 43(8) stipulates the order expires on the service of a notice of assessment under subsection (7) unless the court extends the orders.
15. I have carefully perused and considered the Notice of Motion Applications, counsel's rival written and oral submissions made before the court.
16. It is my belief that every citizen, whether individual or corporate, is tasked with the civil obligation to file returns and pay taxes and any business whether foreign or local bears a responsibility to file tax returns for income earned within and from Kenya unless there are special circumstances exempting the said business or citizen from so doing. Indeed, [the Constitution](#) of Kenya under article 210 requires its citizens, whether corporate or individual to remit their taxes in a timely fashion, as and when called upon to do so. In my view, the provisions of Section 43 of the [Tax Procedures Act](#) should be used sparingly and in clear cases where taxpayer is a serial defaulter of tax payment or where it becomes imperative to the Tax Collector that it is unlikely to collect the taxes without undue hardship or impediments. This position was reinforced by the court in the case of [Kenya Revenue authority vs Family Bank Ltd: Tea Machinery Engineering Ltd \(Interested Party\)](#) Miscellaneous application E010 of 2022 (2022) KEHC 32 KLR Commercial and Tax 31<sup>st</sup> January 2022.
17. In addition, the law as set out at Section 43 of the [Tax Procedure Act](#) provides for the Preservation of funds in following circumstances:-
  1. This section applies if the Commissioner reasonably believes—
    - a. that a taxpayer—
      - i. has made taxable supplies, has removed excisable goods, or has derived an income, in respect of which tax has not been charged; or
      - ii. has collected a tax, including withholding tax, that has not been accounted for; and
    - (b) that the taxpayer is likely to frustrate the recovery of the tax.
  2. The Commissioner may by notice in writing, in respect of a taxpayer to whom this section applies, require a person—
    - a. who owes or may subsequently owe money to the taxpayer;
    - b. who holds or may subsequently hold money for or on account of the taxpayer;
    - c. who holds or may subsequently hold money for on account of another person for payment to the taxpayer; or
    - d. who has the authority from some other person to pay money to the taxpayer, to preserve such money, and that person shall not transfer, withdraw, dispose of or otherwise deal with that money except as provided for in the notice for a period of ten working days or until the application by the Commissioner made in accordance with subsection (3) is heard and determined by the High Court.



3. The Commissioner shall apply, in the absence of the taxpayer, to the High Court for an order against any person holding funds belonging to the taxpayer, prohibiting that person from transferring, withdrawing, disposing of or otherwise dealing with such funds.
4. The Court may issue an order under subsection (3) if the Court is satisfied that the conditions specified under subsection (1) have been met.
5. ....
6. ....
7. ....
18. The purpose of the above provision is to preserve the funds of the taxpayer held by a third party in order not to frustrate the collection of taxes. The application ought to be done ex-parte.
19. In *Kenya Revenue Authority v Jane Wangui Wanjiru & 2 others* [2018] eKLR, as cited with approval by the 1<sup>st</sup> Respondent it was held that:-

“The purpose of section 43 of the *TPA* is to allow KRA to preserve a taxpayer’s money in the hands of a third party without notice to the taxpayer for a limited period before moving the court for formal orders of preservation. Since the exercise of the power to collect taxes, in the manner outlined by the statute, is a justifiable limitation on the right to privacy protected by Article 31 of the *Constitution*, it must be construed strictly. This approach is buttressed by and is consistent with the principle that tax statutes must be interpreted strictly”.
20. In order for the court to grant the orders of preservation the Applicant must demonstrate that the conditions set out in Section 43 of the *Tax Procedures Act* have been complied with.
21. Further, the Applicant must demonstrate that the taxpayer is likely to frustrate the recovery of the tax. The Applicant has established that the 1<sup>st</sup> Respondent company though established in Kenya all its directors are foreign nationals and the payment of money due and owing to them by the 2<sup>nd</sup> Respondent is to be paid to a foreign bank account owned by the 1<sup>st</sup> Respondent as directed. The 1<sup>st</sup> Respondent despite undertaking various projects in Kenya failed to pay taxes when they ought to do so.
22. I have perused the documents and note that after the Applicant issued the 1<sup>st</sup> Respondent with a tax assessment the same was reviewed to Ksh1.7 Billion, though the taxes have been disputed by the 1<sup>st</sup> Respondent, it is apparent that the tax due and payable be harmonized in order to ascertain the correct amount due and owing to the Applicant.
23. The orders issued on 9<sup>th</sup> June, 2022 and extended on 20<sup>th</sup> June 2022 were temporary orders that the court has the jurisdiction to either confirm or discharge after hearing the parties.
24. In the circumstances I find that the Applicant has established the requisite conditions as set out under Section 43 (1) (b) of the *Tax Procedure Act* have been satisfied. I am therefore satisfied that the Application by KRA has merit and I will allow the same. The upshot of the above finding is that the orders issued on 9<sup>th</sup> June, 2022 and extended on 20<sup>th</sup> June, 2022 are hereby extended to await the outcome of the tax dispute between KRA and SBI International(the 1<sup>st</sup> Respondent). Conversely, the Application by the 1<sup>st</sup> Respondent seeking to vacate the said orders is defeated. The same is therefore dismissed with no orders as to costs.
25. The resultant effect is that I make the following orders:-



- i. An order do hereby issue to extend the orders of 9<sup>th</sup> June, 2022 preserving the funds under Section 43(2) of the *Tax Procedure Act* in respect to the 1<sup>st</sup> Respondent to the tune of Kshs 2 Billion only as security.
- ii. The costs of the application be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15<sup>TH</sup> DAY OF APRIL, 2024.**

.....  
**J.W.W. MONG'ARE**

**JUDGE**

In the presence of:-

1. Ms. Nganga holding brief for Ms. Chelangat for the Applicant.
2. Mr. Oduor holding brief for Mr. Bwire for the 1<sup>st</sup> Respondent.
3. Amos - Court Assistant

