



Sparetech Trading Co Limited v East African Portland Cement PLC (Civil Case E672 of 2021) [2023] KEHC 1352 (KLR) (Commercial and Tax) (10 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1352 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E672 OF 2021
A MSHILA, J
FEBRUARY 10, 2023**

BETWEEN

SPARETECH TRADING CO LIMITED PLAINTIFF

AND

EAST AFRICAN PORTLAND CEMENT PLC DEFENDANT

RULING

1. The Notice of Motion dated June 11, 2021 was brought under Order 40 Rules 1 and 2 of the [Civil Procedure Rules 2010](#), and Sections 1A and of the [Civil Procedure Act](#) for the following orders;
 - a. Pending the hearing and determination of this suit, the Court grants an interim injunction compelling the Defendant/Respondent to issue the Plaintiff/Applicant with all the withholding tax certificates for the payments made on diverse dates between February 7, 2015 and February 4, 2019 amounting to Kshs 8,099,755.34,
 - b. Pending the hearing and determination of this suit, the Court grants an interim injunction compelling the Defendant/Respondent to pay the Plaintiff/Applicant Kshs 8,099,755.34 in the event the Defendant/Respondent does not issue the Plaintiff/Applicant with the withholding tax certificates amounting to Kshs 8,099,755.34 the payments made on diverse dates between February 7, 2015 and February 4, 2019.
 - c. Costs of this Application be provided for.
2. The Application was supported by the sworn Affidavit of Shomit Ghai who stated that the Plaintiff/Applicant on diverse dates between January 1, 2014 and December 1, 2019 supplied the Defendant/Respondent with various services including transportation and supply of raw materials (Pozzolana) used in the manufacture of cement. The Plaintiff/Applicant sent the invoices for the supplies made



during that period which invoices have only been partially settled, leaving an outstanding balance of Kshs 48,395, 129.67.

3. In the Defendant's/Respondent's duty as a withholding tax agent, the Defendant/ Respondent was required to issue the Plaintiff/Applicant with withholding tax certificates for the payments made to the Plaintiff/Applicant for purposes of reconciling its tax obligations with the Kenya Revenue Authority.
4. Unless the instant Application is heard expeditiously and an interim injunction granted compelling the Defendant/Respondent to issue the Plaintiff/Applicant with the withholding tax certificates amounting to Kshs 8,099, 755.34, the Plaintiff/Applicant stands to suffer irreparable loss and damages. The Defendant/ Respondent will not suffer any prejudice if the orders sought in this Application are granted.

Applicant's Case

5. It was the Applicant's submission that, the goods were supplied in the period between January 1, 2014 and December 1, 2019. Therefore, the Respondent cannot purport to still be verifying the goods to date. Further, the Respondent acknowledges that the Applicant issued it with invoices which the Respondent partially settled.
6. The goods supplied by the Applicant attracted Withholding VAT necessitating the Respondent to withhold tax upon making payment to the Applicant. The Respondent has since failed and neglected to issue the Applicant with the VAT Withholding Tax Certificates for the partial payments made between January 1, 2014 and December 1, 2019. Further, the Respondent has not provided any justification for not doing so.
7. The Respondent's failure to issue the Applicant with the said withholding tax certificates has led to accrual of tax arrears with Kenya Revenue Authority putting the Applicant's business in jeopardy. The Respondent's neglect of its statutory obligation has frustrated the Applicant's attempt to reconcile its tax obligations with the Kenya Revenue Authority.
8. The Applicant submitted that failure to be issued with the interim injunction compelling the Respondent to remit the VAT Withholding Tax Certificates will interfere with the Applicant's business causing irreversible loss.
9. It was the Applicant's argument that it has not only established a prima facie case, but this is also a clear case that warrants this court to issue a mandatory injunction.

Respondent's Case

10. In response, the Respondent stated that the Defendant has always had a policy with the Plaintiff that the goods and/or services supplied will be paid upon proper verification by the Defendant's procurement officers that the same have indeed been supplied and have met the requirements of the Defendant. Some of the invoices raised by the Plaintiff from February 7, 2015 to February 4, 2019 were never paid due to non-verification and as such the Defendant had no obligation to withhold any amount as withholding tax and submit to the Plaintiff withholding tax certificates.
11. Further, it was the Defendant's position that the goods and services claimed by the Plaintiff to have been supplied have not yet been verified and paid and as such the Defendant is under no obligation to withhold any amount to the Commissioner or issue the Plaintiff with any VAT withholding certificates.
12. The Respondent was of the opinion that the Plaintiff ought to have applied to the Commissioner of the Kenya Revenue Authority for the refund of Kshs 8,099,755.34 being the amount claimed as



withholding tax as the Defendant cannot be put in a position to issue withholding certificates for invoices which were in the first place not paid due to non-verification.

13. While it is not in dispute that the Defendant is a registered and/or appointed withholding tax agent pursuant to the provisions of the *Value Added Tax Act* and the *Finance Act* of 2015, it was the Defendant's submission that the said withholding tax has never become due as payment has never been made in respect to the goods supplied by the Plaintiff.
14. On whether the Plaintiff will suffer an irreparable injury which cannot be compensated by way of damages on account of not being supplied with withholding tax certificates; the Respondent submitted that already the sum has been identified by the Plaintiff as being Kshs 8,099,755.34 being the purported tax liability demanded from the Defendant. As such the same cannot be classified as irreparable injury not capable of being compensated by way of damages.
15. The balance of convenience firmly lies with the Respondent. It would be highly prejudicial and/ or inconvenient for the defendant to be put in a position of issuing withholding tax certificates for goods which have not been paid for.
16. Further, the Plaintiff has not established any special circumstance to warrant the issuance of the mandatory injunctive reliefs. This is a case of supplier-customer relationship where there is not only a dispute as to whether payment was made to give rise to withholding tax certificates but also a dispute as to whether the Defendant owes the alleged sum as stated in the Plaint. These issues can only be substantively determined at the hearing of the main suit after all parties have put forth evidence in support of their case.

Issues For Determination

17. After considering the Application, the response and the written submissions the Court has framed the following issue for determination;
 - a. Whether the Applicant should be granted an order of interim injunction compelling the Respondent to issue withholding tax certificates?

Analysis

18. The germane principles on interlocutory injunctions were stated by the Court of Appeal in East Africa in the case of *Giella v Cassman Brown & Co Ltd* [1973] EA as follows:
 - a) The applicant must first establish a prima facie case with a probability of success.
 - b) The applicant must then demonstrate that he, she or it stands to suffer irreparable loss that cannot be adequately compensated through damages.
 - c) Where there is doubt on the above, then the balance of convenience should tilt in favor of the applicant.
19. Similarly, in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court of Appeal held that:

“In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to; establish his case only at a *prima facie* level, demonstrate irreparable injury if a temporary injunction is not granted, and ally any doubts as to (b) by showing that the balance of convenience is in his favour.



These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the Applicant is expected to surmount sequentially.”

20. On whether the Applicant has established a prima facie case; it is not disputed that the Applicant herein has sued the Respondent for the recovery of the money owed to it from the supply of the raw materials. The Respondent affirmed this by stating that some of the invoices raised by the Plaintiff from February 7, 2015 to February 4, 2019 were never paid due to non-verification and as such the Defendant had no obligation to withhold any amount as withholding tax and submit to the Plaintiff withholding tax certificates. The Applicant therefore has established a *prima facie* case as against the Respondent.
21. On whether the applicant will suffer irreparable injury which cannot be compensated by damages unless interlocutory injunction is granted, this Court is not convinced of the same. The amount sought by the Applicant is quantifiable and therefore the same can be compensated by damages.
22. On whose side then does the balance of convenience tilt? The Respondent herein argued that it could not issue withholding tax certificates for unconfirmed amounts as it would be against its policy. The Applicant on the other hand has furnished the Court with copies of statements of Accounts proving that the Respondent already made part payment hence the demand for the withholding tax certificates.
23. After perusing the said attached statements of accounts, on the face of it the statement is not self-explanatory and given that only part payment was made; which is equally disputed by the Respondent. More information is needed to determine the amount paid so far and the amount of tax that was withheld ought to be properly calculated. In the circumstances, the balance of convenience tilts in favour of the Respondent.
24. Further to the above, it is the Court’s understanding that the Applicant is seeking a mandatory interlocutory injunction. In a mandatory injunction the Applicant must, in addition to the three requirements for a temporary injunction, establish the existence of special circumstances. An applicant for mandatory injunction must prove his case on a standard higher than the standard in prohibitory injunctions.
25. In the case of *Kenya Breweries Limited v Washington Okeyo* [2002] eKLR cited in the case of *Paul Mwaniki Gachoka & another v Nation Media Group Limited & another* [2019] eKLR the court reasoned that:

“A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but, in the absence of special circumstances it will not normally be granted. However, if the case is clear, and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied or if the defendant attempted to steal a match on the plaintiff. A mandatory injunction will be granted on an interlocutory application.” ...From my analysis of the respective positions presented above, I have not come across any compelling factors that would warrant the granting of a mandatory injunction at this stage.”
26. This is not a clear case that ought to be decided at once and it is this Court’s finding that the Applicant has not demonstrated to the satisfaction of this court, that there are special and exceptional circumstances that warrant the granting of the orders of mandatory injunction sought.



Findings and Determination

27. For the foregoing reasons this court makes the following findings and determinations

- (i) This court finds the application devoid of merit and it is hereby dismissed;
- (ii) Each party to bear its own costs.
- (iii) Mention on March 9, 2023 before the Deputy Registrar for case management.

Orders Accordingly.

DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 10TH DAY OF FEBRUARY, 2023.

HON. A. MSHILA

JUDGE

In the presence of;

Imali for the Plaintiff/Applicant

Muchiri for the Defendant/Respondent

Lucy-----Court Assistant

