



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kenya Revenue Authority v Equity Bank Limited Kenya & another; Troy Limited & another (Interested Parties) (Commercial Case E553 of 2022) [2023] KEHC 21548 (KLR) (Commercial and Tax) (21 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21548 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**COMMERCIAL AND TAX**  
**COMMERCIAL CASE E553 OF 2022**

**DO CHEPKWONY, J**

**JULY 21, 2023**

**IN THE MATTER OF: THE TAX PROCEDURES ACT NO. 29 OF 2015**

**AND**

**IN THE MATTER OF: AN APPLICATION BY KENYA REVENUE AUTHORITY FOR AN ORDER UNDER SECTION 43(3) OF TAX PROCEDURES ACT, 2015**

**BETWEEN**

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

**AND**

**EQUITY BANK LIMITED KENYA ..... 1<sup>ST</sup> RESPONDENT**

**ECO BANK KENYA LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**TROY LIMITED ..... INTERESTED PARTY**

**ABDIRIZAK SHUKRI ELMI ..... INTERESTED PARTY**

**RULING**

1. Before this court for determination is a Notice of Motion Application dated July 13, 2022 filed pursuant to Section 43(3) of the *Tax Procedures Act, 2015* “The TPA”, Section 3 and 3A both of the *Civil Procedure Act*, Cap 21 Laws of Kenya and order 51 rule 1 of the *Civil Procedure Rules, 2010*. The Application seeks the following orders;

a. Spent;



- b. An Order be and is hereby issued to preserve funds and prohibit the release, transfer, payment or other dealing involving the sum of up to Kshs.679,786,199 held by the Respondents on behalf of and/or in the name of the 1<sup>st</sup> Interested Party in the following accounts pending hearing and determination of this Application:

<i>Account Name</i>	<i>Bank</i>	<i>Account No's</i>
<i>Troy Limited</i>	<i>Equity Bank Ltd</i>	<i>USD-0150272528542</i>
<i>Troy Limited</i>	<i>Eco Bank Kenya Limited</i>	<i>USD-0011015027482801</i>
		<i>EURO-0011015027482802</i>
		<i>KSHS-0010015027482801</i>

- c. The amounts held by the Respondents in the bank accounts stated in prayer No.(2) above be and is hereby preserved pending the issuance of a tax assessment(s) and recovery of taxes or until further orders of the Court.
- d. In the alternative and without prejudice to the foregoing,  
an Order be and is hereby issued against Interested Parties to provide security for the payment of taxes that shall be found due and owing to the Applicant.
- The Application is based on the grounds on its face and the Supporting Affidavit of Hassan Mwinyi sworn on 13<sup>th</sup> July, 2022. The Applicant holds that it was conducting investigations relating to tax evasion by the Interested Parties herein in its capacity as an Agency of the Government in-charge of the collection and receipt of all revenue. The Applicant holds that it received intelligence report in August, 2020 that the Company is suspected to be engaged in acts of tax evasion and money laundering which involves colossal amounts of money. The Applicant contends that upon investigations, it established that the Company is a registered corporate entity with KRA Personal Identification Number (PIN) P05XXXX9M for corporation tax as its sole tax obligation and the 2<sup>nd</sup> Interested Party is its Director.
  - The Applicant states that from the information obtained from the bank, the Company received bank deposits into the accounts held by the Respondents amounting to Kshs.1,477,796,084.00 for the period between 2017 and 2019 but for that period, the Company filed nil income tax which amounts to concealing income and tax evasion.
  - The Applicant holds that the Company has also not registered for Value Added Tax and as a result, the Applicant has lost revenue of Kshs.679,786,199.00 comprising of Kshs.443,338,825.00 on account of corporation tax and a further Kshs.236,447,373.00 on account of value added tax which is a criminal conduct pursuant to the provisions of Section 97 of the *Tax Procedures Act*(TPA).
  - According to the Applicant, holds that it sent the Tax Investigation Findings to the Company on 17<sup>th</sup> May, 2021 and requested for further information to aid the investigations but the Company failed to cooperate with them in providing necessary documentation. That instead, through a letter dated 17<sup>th</sup> June, 2021, the Company wrote to the Applicant refuting the tax amount as the Company's agents sought time within which to respond but failed to comply despite numerous reminders.



6. The Applicant avers that it issued a preservation Notice through a letter dated 28<sup>th</sup> June, 2022 for the preservation of accounts for ten (10) working days pursuant to Section 43(2) of the [Tax Procedures Act](#). It seeks for court orders for the preservation of the accounts as it is apprehensive that the Company may withdraw the funds and jeopardize the Applicant's efforts to recover tax especially since they do not have any other known assets. The Applicant holds that the orders be granted to ensure that all tax payers pay their fair share of tax, in the interest of the public and justice.
7. The application is opposed by the affidavit of Eva Kariuki sworn on 30<sup>th</sup> August, 2022. The 2<sup>nd</sup> Respondent and Interested Parties "the Company" did not file any responses to the application despite service having been effected on them as evidenced in the Affidavit of Service of Ngetich Abedaego Kipngéno sworn on 9<sup>th</sup> September, 2022.
8. The 1<sup>st</sup> Respondent confirmed service of the Preservation Notice dated 28<sup>th</sup> June, 2022 and states that it complied with the notice and preserved the bank account of the Company from 28<sup>th</sup> June, 2022 until 8<sup>th</sup> July, 2022. However, it states that the account has only a credit of USD 6.84 and hence cannot satisfy the tax arrears demanded by the Applicant.
9. Pursuant to the court's directions issued on 11<sup>th</sup> August, 2022, the Application was disposed of by way of written submissions. In the submissions dated 12<sup>th</sup> September, 2022, the Applicant reiterated its position in the application and stated that it has complied with Section 43 of the [Tax Procedures Act](#) and the conditions set out therein being:-
  - a. The taxpayer has made taxable supplies or has derived an income in respect of which tax has not been charged; and,
  - b. The taxpayer is likely to frustrate the recovery of the tax. The Applicant seeks the application to be allowed as prayed.
10. The 1<sup>st</sup> Respondent through the submissions dated 13<sup>th</sup> March 2023 reiterates that the court orders cannot be enforced since the bank account has insufficient funds and cannot pay the tax arrears and tax liabilities demanded by the Applicant. It holds that the court orders will be issued in vain and therefore the application ought to be dismissed with costs.

### **Analysis And Determination.**

11. This Court has considered the grounds upon which the orders sought are premised vis-à-vis the grounds in opposition thereof in line with the legal provisions and case law and finds the issue for determination being whether the application has merit?
12. The Application is premised under Section 43 of [Tax Procedures Act](#) which provides as follows:-

“ 43. Preservation of funds

(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) An order made under this section shall be valid for a period of thirty days but the Commissioner may apply to the Court for an extension of the period beyond the initial thirty days.
- (6) The Commissioner shall serve the order under this section on the taxpayer as soon as is practicable and upon service, the taxpayer may, within fifteen days, apply to the Court to discharge or vary the order.
- (7) If the order made under this section is not discharged or varied, the Commissioner shall, within thirty days of serving the taxpayer with the order, assess the tax due and payable by the taxpayer, notify the taxpayer of the assessment and commence proceedings for the recovery of the tax.



- (8) An order issued under this section shall expire on the service of a notice of assessment under subsection (7) unless the Court extends the order.
- (9) Despite the provisions of any written law, contract or agreement, a person who complies with an order made by the High Court under this section shall be indemnified in respect of the actions taken in connection with the order against all proceedings or processes.
- (10) A person who, without reasonable cause, fails to comply with an order of the High Court under this section shall be personally liable for the amount specified in the order.

13. It is trite that Section 43 of the [Tax Procedures Act](#) gives a comprehensive procedure of obtaining a court order of this nature. Under Section 43(3) of the [Tax Procedures Act](#), the Applicant’s Commissioner is mandated to apply to this 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. The High Court can only grant the order under Section 43 (4) of the [Tax Procedures Act](#) if the conditions set out under Section 43 (1) of the [Tax Procedures Act](#) are fulfilled. These conditions are as follows:-

“ [43]. (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.”

14. Therefore, purpose of Section 43 of the [Tax Procedures Act](#) is for the preservation of tax payer’s money that is in the hands of a third party.

15. The Court in the case of [Kenya Revenue Authority –vs- Jane Wangui Wanjiru & 2 Others](#) [2018]eKLR, held that:-

“ The purpose of Section 43 of the [Tax Procedures Act](#) 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”.

16. In the instant case, it is evident that the Company filed nil income tax returns for the period from 2017-2019. This then compelled the Applicant to initiate investigations of the Company and through the letter dated 17<sup>th</sup> May, 2021, issued a preliminary investigations finding for the periods of 2017-2019



based on the Company's Bank statements held with the Respondents which showed huge sums of computed taxes totaling to Kshs.679,786,199/=.

17. In the response dated 17<sup>th</sup> June, 2021, the Company refuted the sums and held that the bank statements only comprised of deposits and the amount of tax was calculated without factoring in expenses. It also stated that it has not registered for VAT since the same was not payable under Section 34 of the VAT Act, 2013. Through a letter dated 17<sup>th</sup> June, 2021, the Firm of M/S Nyanchoga & Associates CPA, acting as agents of the Company and other mentioned Companies, informed the Applicant that the Company had complied with the *Income Tax Act* and it had filed the required tax returns.
18. In response, the Applicant requested for documents such as agency agreements, schedule of funds, evidence of delivery of goods, source of funds of the huge sums of money which it holds that the Applicant did not respond to.
19. In this Court's view, the failure by the Company or its agents to avail the said documents amounts to concealing of information thereby hindering the Applicants efforts to recover the tax. In view of this finding, this Court is inclined to grant the preservation orders sought by the Applicant.
20. The Respondent has stated that as at the time of swearing the Replying Affidavit, the bank account only had USD 6.84 as at 30<sup>th</sup> August, 2022 which is insufficient to pay the tax liability, if any. At the time of rendering this ruling, it is more than Ten (10) months and thus, the current status of the bank account is unknown. It is worth-noting that the 2<sup>nd</sup> Respondent has also not filed any response to the application so as to give the status of the bank accounts.
21. In that regard, this Court is inclined to allow the application dated 13<sup>th</sup> July, 2022 and the following orders issue:-
  - a. An Order be and is hereby issued to preserve funds and prohibit the release, transfer, payment or other dealing involving the sum of up to Kshs.679,786,199.00 held by the Respondents on behalf of and/or in the name of 1<sup>st</sup> Interested Party in the following accounts pending hearing and determination of this Application: Equity Bank Ltd USD-015XXXX42 and Eco Bank Kenya Limited USD-001XXXX01 EURO-001XXXX02 Kshs-001XXXX01.
  - b. The amounts held by the Respondents in the bank accounts stated in prayer 2 above be and is hereby preserved for a period of 30 days pending the issuance of a tax assessment(s).
  - c. In the event all the Respondent's bank accounts have insufficient funds, it is hereby directed that the Company deposits security of the taxes that shall be due and owing upon tax assessment being issued.
  - d. Costs of the application are awarded to the Applicant.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 21<sup>ST</sup> DAY OF JULY, 2023.**

**D. O. CHEPKWONY**

**JUDGE**

**In the presence of:**

Mr. Biwott holding brief for Mr. Busaidy for 1<sup>st</sup> respondent

No appearance for the Applicant



