



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**CIVIL CASE NO. E095 OF 2020**

**BETWEEN**

**CHOPPIES ENTERPRISES LIMITED.....PLAINTIFF**

**AND**

**COMMISSIONER OF DOMESTIC TAXES/**

**KENYA REVENUE AUTHORITY.....DEFENDANT**

**RULING**

1. The defendant (“the Commissioner”) issued two agency notices dated 28<sup>th</sup> February 2020 to Standard Chartered Bank for Kshs. 173,388,416.00 and to Quick Mart Limited for Kshs. 125,255,568.50 on account of the plaintiff tax liability. Following the notices, the plaintiff filed suit seeking declarations that the agency notices are contrary to the ***Tax Procedures Act, 2015*** (“the ***TPA***”) and consequential orders seeking to set aside those agency notices. It also filed a Notice of Motion dated 8<sup>th</sup> April 2020 seeking mandatory orders suspending, cancelling and or setting aside the agency notices. In the application, the plaintiff also seeks orders permitting it to access money sufficient to meet existing liabilities.

2. The application is grounded on the affidavit and further affidavit of the plaintiff’s managing director, Parin Patel, sworn on 8<sup>th</sup> April and 15<sup>th</sup> April 2020 respectively. The application is opposed by the Commissioner through the replying affidavit of Peter Iraki, an officer of the defendant, sworn on 15<sup>th</sup> April 2020. In addition to the deposition, counsel for the plaintiff, Mr Juma and counsel for the respondent, Mr Ochieng’, made brief oral submissions in support of their respective positions.

3. It is not disputed by the parties that the Commissioner issued assessments to which the plaintiff raised objections. The Commissioner’s has not made any decision on the objections. The gravamen of the plaintiff’s case is that despite the fact that the Commissioner has not made a determination on its objections, it has now issued the agency notices complained of. The plaintiff contends that the Commissioner has not established a basis for issuing the notices while the Commissioner takes the position that it was entitled to issue the agency notices in the circumstances.

4. Resolution of the dispute between the parties revolves around **section 42** of the ***TPA*** which the Commissioner invoked to issue the agency notices which empowers it to collect tax from a person owing money to a taxpayer. The pertinent part, **section 42(1)** thereof, provides as follows:

*42. (1) This section applies when a taxpayer is, or will become liable to pay a tax and—*

*(a) the tax is unpaid tax; or*

*(b) the Commissioner has reasonable grounds to believe that the taxpayer will not pay the tax by the due date for the payment of the tax. [Emphasis mine]*

5. The reason why I have set out the aforesaid provision is to show that where a taxpayer may become liable to pay tax and the Commissioner has reasonable grounds to believe that the person will not pay tax by the due date for payment, it may proceed to issue an

agency notice. It is thus not necessary under that provision, for the tax liability to be ascertained. I am aware that at this stage where the plaintiff seeks interim relief, I am not required to make any definitive findings of fact or law but I am satisfied that there is a legal basis for the Commissioner to act in the manner it did even where it has not determined the plaintiff's objections its assessments.

6. The plaintiff admits that the Commissioner issued assessments and that it has lodged objections hence the first limb of **section 42(1)** of the **TPA** is satisfied because tax may become due once the objection is determined. On the second limb, it is the burden of the Commissioner to establish that there are reasonable grounds to believe that the taxpayer will not pay taxes if it is found due. **Section 42(1)** aforesaid provides the Commissioner with a *quia timet* remedy where there a likelihood that tax may not be recovered at some in the future.

7. On the issue whether there was reasonable belief, Mr Iraki deponed that the Commissioner is aware that the plaintiff, a supermarket chain, is winding up its business in Kenya and is in the process of disposing of its branches, assets and stock without informing the Commissioner. He states that the plaintiff is now in the process of selling 5 of its branches to Quickmart Supermarkets Limited and that it has received an advance payment of Kshs. 25,000,000.00. He deponed that he believes that by the time objection proceedings are completed, the plaintiff would have sold all its assets in Kenya, closed its bank accounts and the Commissioner will be unable to recover any money once the tax liability is ascertained.

8. The plaintiff denies the Commissioner's allegations and states that it has not met the threshold required under **section 42(1)** of the **TPA**. In response to the specific allegation that the plaintiff is closing down business, Mr Patel deponed in his further affidavit as follows:

*[17] THAT in reply to paragraph 17, closing its branches in Kenya is a business decision as long as it is done procedurally and lawfully.*

*[18] THAT in reply to paragraph 18, the Defendant/Respondent does not demonstrate that even though the closure is taking place the Defendant (sic) shall remove itself from the jurisdiction of the Laws of the Republic of Kenya. The Plaintiff/Applicant is a business enterprise whose directors are Kenyan Citizens with many other business interests within the Republic of Kenya. Annexed to herein and marked as "FPP4" is a copy CR12.*

9. Mr Patel further deponed that after the interim order was issued by this court, the parties held a meeting to discuss the matter and the Commissioner demanded a bank guarantee for the amount claimed in the agency notices. The plaintiff found the demand untenable and was only willing to give a security for Kshs. 15,000,000.00.

10. On the basis of the evidence before me, I find that there is sufficient evidence that the plaintiff is disposing off its business. In his deposition, Mr Iraki annexed copies of documents showing that the plaintiff has sold some of its branches to Chandarana Supermarket Limited, Tusker Mattress Limited and Appmatt Limited. In light of this evidence, the plaintiff bore the burden of showing otherwise particularly because the nature of its business was a matter peculiarly within its knowledge (see **section 112** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** and **ABN Amro Bank Limited v Le Monde Foods Limited CA Civil Appl. No NAI 15 of 2002 (UR)**).

11. As a matter of fact, from the extract of Mr Patel's deposition which I have set out above, the plaintiff does not deny that it is disposing off its branches or part of its business, it stated that it was doing so lawfully. While Mr Patel states that the directors are Kenyan citizens and are involved in other commercial business, the tax liability is for the plaintiff and not its directors and it matters not that the directors are within the court's jurisdictions. The issue is whether the plaintiff has the capacity to pay the tax that may ultimately be found due. Nothing would have been easier than for the plaintiff to show that it has other businesses it is involved in or that it is a going concern or has substantial assets.

12. The nature of orders sought by the plaintiff in the application are mandatory in nature. Should the orders be granted, they would dispose of the suit by dissolving the Commissioner's statutory powers which have been exercised on basis of the facts that I have set out above. It is trite law that the court ought not issue mandatory orders of injunction unless there are exceptional circumstances and then only in the clearest of circumstances (see **Kenya Breweries Limited & Another v Washington O. Okeyo NBI CA Civil Appeal No. 332 of 2000 [2002] eKLR**).

13. The final issue is about release of funds to meet certain liabilities. This is related to the provision of security by the plaintiff so that the agency notices are lifted. The plaintiff has indicated that it is ready and willing to provide security for the amount claimed by the Commissioner to the extent of Kshs. 15,000,000.00. The plaintiff also prayed that the court should make an order that it should access sufficient funds in order to meet two court orders against it. The first is an order in **NRB ELRC No. 861 of 2019, Kenya Union of Commercial, Food and Allied Workers v Choppies Enterprises (K) Ltd and 3 Others** where it is required to pay about Kshs. 60,023,031.00 to employees it has declared redundant. The second one is an order in **ML CMCC No. 22 of 2020 – Sameer Agriculture and Livestock Limited v Choppies Enterprises Kenya Limited** in which it is required to pay Kshs. 14,204,771.00. The plaintiff also adverts to payment of Kshs. 911,356.87 owed to NCBA Bank and Kshs. 224,317,697.76 owed to more than 400 suppliers.

14. There is no dispute that the court has the power to order security in the circumstances of this case in order to secure the taxes claimed by the Commissioner. This power is discretionary and is intended to do justice. On the one hand, it is to ensure that the plaintiff or taxpayer is not subjected to undue hardship as it is not the intention of the court to lead to a situation where a going concern collapses with all attendant consequences. On the other hand, the court must ensure that taxes are secured as it is the obligation of the taxpayer to ultimately pay taxes found due. In order for the court to exercise this discretion, the applicant must make full disclosure of all circumstances including its financial position necessary for the court to make an appropriate decision.

15. In this case, there is no basis upon which I can order the plaintiff to provide security of Kshs. 15,000,000.00 when the expected tax liability is over Kshs. 100,000,000.00. There is undisputed evidence that the plaintiff is disposing of some of its assets. It has already laid off some of its employees hence the liability of about Kshs. 60,000,000.00. The plaintiff has not disclosed how much it expects to receive from sale of its assets and stock. It has not stated how much is held in its accounts. As I have stated, the plaintiff has not shown that it is a going concern and how it intends to provide the security for taxes.

16. Notwithstanding the conclusion I have reached on the issue of provision of security and allowing the plaintiff to access funds to meet certain liabilities, I am aware and indeed take judicial notice of the COVID-19 pandemic which the National government has declared as an emergency. I therefore grant the plaintiff leave to apply for any further orders in line with what I have stated. Further, the parties should explore the opportunity to resolve the matter amicably to the extent possible.

17. For the reasons I have given, I dismiss the Notice of Motion dated 8<sup>th</sup> April 2020 with costs to the defendant. The plaintiff is at liberty to apply for any further or other orders. In the meantime, the status quo regarding the agency notices shall remain in force for **fourteen (14) days** to enable the parties explore amicable settlement or for the plaintiff to move the court appropriately.

**DATED and DELIVERED at NAIROBI this 21<sup>st</sup> day of APRIL 2020.**

**D. S. MAJANJA**

**JUDGE**

Mr Juma instructed by Musa Juma and Company Advocates for the plaintiff.

Mr Ochieng, Advocates with him Ms Mburugu, Advocate and Ms Mwongera, Advocate instructed by Kenya Revenue Authority for the defendant.