



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS APPLICATION NO. 178 OF 2019

KENYA REVENUE AUTHORITY.....APPLICANT

VERSUS

WOW BEVERAGES LIMITED.....1ST RESPONDENT

WINES OF THE WORLD LIMITED.....2ND RESPONDENT

HUMPHREY KARIUKI NDEGWA.....PROPOSED 3RD RESPONDENT

RULING

INTRODUCTION

1. Through an application dated 21st February 2019 brought under Section 43 of the Tax Procedures Section 43 (hereinafter “**the Act**”), the applicant herein, Kenya Revenue Authority, sought and obtained ex parte orders to preserve the 1st respondents bank accounts. The 1st respondent reacted to the said ex parte orders by filing 2 applications dated 1st March 2019 and 22nd March 2019 which application are the subject of this ruling.

1st respondents applications

2. In the application dated 1st March 2019, (hereinafter “the 1st application”) the 1st respondent seeks the following orders:

1. The Honourable court be pleased to and hereby stays, sets aside or varies its order issued on 22nd February, 2019 preserving funds and prohibiting transfer, withdrawal or disposal or dealings in the respondent’s account Nos. 1175732230, 1178020762, 1107143330, 1166883965 held at KCB Bank Limited.

2. The honourable court be pleased to and hereby orders the Kenya Revenue Authority, its officers, agencies, associates, partners and those acting through it, directing them to re-open the respondent’s factory and premises forthwith, which they have illegally, unfairly and unjustly closed from 31st January, 2019 to date, subject to any conditions the court may impose.

3. The honourable court be pleased to and hereby issues orders restraining the Kenya Revenue Authority its officers, agencies, associates, partners and those acting through it from closing, interfering with, disrupting the business of WOW Beverages Limited or issuing any demand assessment or notice on the false account of WOW Beverages Limited being involved in manufacturing of alcoholic drinks.

4. The honourable court be pleased to and hereby issues an order directing the Kenya Revenue Authority to provide the list of authorized officers who conducted the raid, search and seizure in the respondent’s premises and to further provide the originals and/or copies of all documents, data, records, books of accounts and inventory of all documents seized within seven days of the grant of these orders on such further terms and conditions as the court may impose.

5. The honourable court be pleased to and hereby issues orders restraining the Kenya Revenue Authority, its officers, agencies, associates, partners and those acting through it from associating the respondent with any other person, company or entity or person which they have no relationship with.

The costs of this application be provided for:

3. In the 2nd application dated 22nd March 2019, the 1st respondent prays that:

1. The honourable court be pleased to and hereby unconditionally sets aside and/or discharges its order issued on 22nd February, 2019 preserving funds and prohibiting transfer, withdrawal or disposal or dealings in the respondent's accounts 1175732230, 1178020762, 1107143330, 1166883965 held at Kenya Commercial Bank Limited.

2. The honourable court be pleased to and hereby orders that before the Kenya Revenue Authority takes adverse action against a Chief Executive, director, general manager, company secretary, or other senior office or controlling member of company for the company's tax liability or tax offence, it has statutory obligation to satisfy itself that such actions against Chief Executive, director, general manager, company secretary, or other senior office or controlling member of company in compliance with Sections 18(2) and 103(3) of the Tax Procedures Act.

3. The honourable court be pleased to and hereby finds and orders that the orders issued on 22nd February, 2019 were obtained through non-disclosure and misrepresentation.

4. The honourable court be pleased to and hereby finds and orders that on the basis of the Tax Compliance Certificates Nos. KRALTO966202218 and KRAMTO1134185418 issued to the 1st and 3rd respondent's respectively by the applicant, there is prima facie evidence that the 1st and 3rd respondents declares, files the relevant tax returns and pay all taxes due that can only be rebutted by contrary evidence.

5. The honourable court be pleased to and hereby finds and orders that a person who had no role in the executive management of the company and who was not aware of any activities or the company cannot be legally culpable.

6. The honourable court be pleased to and hereby finds and orders that no orders were issued on 22nd February 2019 or any other date freezing the bank accounts of the 3rd respondent or directed at him restraining him from accessing the bank accounts of the 1st respondent.

7. The honourable court be pleased to and hereby grant other orders and reliefs it deems fit.

8. Costs to and incidental to this application.

4. Both applications are supported by the affidavit of the 1st respondent's non-executive director, **Mr. Humphrey Kariuki Ndegwa**. The gist of the respondent's prayer in both applications, for the setting aside the impugned exparte orders issued on 22nd February 2019 is that the said orders were obtained through deliberate non-disclosure and misrepresentation, that the statutory grounds for granting the orders were not met and that in view of the fact that the assessment of tax due has not been done or issued, the said orders should automatically expire by operation of the law.

5. On prayers No. 4 and 6 of the 1st application and prayers 2 and 5 of the 2nd application, the 1st and 3rd respondents challenge the Departure Prohibition order issued against the 3rd respondent on account of the claim that he was involved in the production of the alcoholic products using ethanol and counterfeit stamps. The 1st and 3rd respondent's case is that the applicant was aware that the 3rd respondent does not manufacture or produce any alcoholic products as all the importation and distribution was done by the 1st respondent.

6. On the prayer for the re-opening and hand-over of the 1st respondent's premises the 1st respondent maintained that it is the applicant who under Section 60(4) of the Tax Procedure Act placed seals to close its premises and cannot therefore claim that the said lock up was done by the Director of Criminal Investigation.

7. On the prayer to be provided with the list of the authorized officers who conducted the raid, search and seizure of the 1st respondent spaces and storage facilities, the 1st respondent cited the provisions of Section 4(4) and 60(5) of the Act in support of the claim that the applicant was under an obligation to provide it with the list of its authorized officers.

8. At the hearing of the two applications, Mr. Ouma, learned counsel for the respondents reiterated the grounds set out in the applications and submitted that the applicant obtained the impugned orders of 22nd February 2019 through misrepresentation of facts and claims that the 1st respondent was a manufacturer of alcohol when it was all along aware of the fact that the 1st respondent only distributes finished product of well known brands.

9. Counsel submitted that the 1st respondent has no association whatsoever with the alleged counterfeit stamps and that it has a valid Tax Compliance Certificate that is still in force.

10. On the departure prohibition order against the 3rd respondent, counsel submitted that a non executive director of company is not liable for any taxes. Counsel further submitted that no notice of seizure of any goods/stamps were effected on the 1st respondent and neither has any tax demand or notice of assessment been served on the respondent within 30 days as is required under Section 43(7) of the Act. It was therefore 1st respondents case that there is no justification for the issuance of the impugned orders

11. The applicant opposed the 1st and 3rd respondents application through the replying affidavit of one **Dominic Kengara** dated 11th March 2019. The applicant/now respondent also filed Grounds of Opposition dated 11th March 2019 in which it set out the following grounds:

1. That the orders sought vide the said application are misconceived and misplace.

2. That the subject matter of the Miscellaneous Application is very specific in nature, brought under the provisions of Section 43(3) of the Tax Procedures Act, being that of preservation of funds in the accounts belonging to Wines of The World Limited and WOW Beverages Limited.

3. That no orders have been sought for preservation of funds in the accounts of the said Humphrey Kariuki Ndegwa.

4. That the said Humphrey Kariuki Ndegwa is thus not an important party to these proceedings.

5. That Section 43(6) of the Tax Procedures Act provides clearly on how to reply to an application brought under the provisions of Section 43(3) of the said Act.

6. That at all times the said Humphrey Kariuki Ndegwa is free to institute a suit and prosecute his claim against the applicant/now respondent but to seek to do so, within the instant Miscellaneous Application, is a misconception of the law and would amount to convoluting issues.

12. The applicant's case is that it was made a party to a Multi Agency Task Force formed to curb illicit trade in alcohol and alcoholic products, and that on 31st January 2019, the said Task Force pursued a truck suspected to be conveying uncustomed goods upto certain premises in Thika, Kiambu County. He states that the applicant then moved to court to obtain search warrants to inspect the premises where they discovered over 100 drums of ethanol with the labels of both the 1st respondent herein and one Africa Spirits Ltd.

13. He further avers that they also recovered a *cache* of counterfeit excise stamps in the said premises thereby prompting them to arrive at the conclusion that there was tax evasion by the 1st respondent after which they sought departure prohibition orders against the 1st respondent directors and the impugned preservation orders.

14. At the hearing of the application, Mr. Kirugi, learned counsel for the applicant submitted that applicant duly obtained the impugned orders under Section 43 of the Act, upon meeting all the conditions and/or threshold set for obtaining such orders. According to Mr Kirugi from the background of the case, the applicant had reasonable belief that there was tax evasion or that tax recovery will be frustrated thereby necessitating the filing of the application dated 21st February 2019 that gave rise to the impugned orders.

15. Counsel conceded that under Section 43(6) of the Act, the impugned orders ought to be in force for only 30 days within which time, the applicant ought to have issued the 1st respondent with an assessment of the taxes due but argued that the intrinsic nature of the investigations being carried out by a third party necessitated an extension of the 30 days. For this argument counsel cited the provisions of Section 43(8) of the Act. Counsel urged the court to continue preserving the funds in the 1st respondents account so as to forestall the carting away of the same. In the alternative, counsel prayed for an order for reasonable security for recovery of the taxes due.

Analysis and determination

16. I have considered the two applications filed by the 1st and 3rd respondents, the applicant's response and the parties' submissions together with the provisions of the Act that they relied upon.

17. From the very outset I wish to note that considering the sequence of events that led to the filing of the instant applications the main issue for determination by this court ought to be whether the impugned orders issued on 22nd February 2019 should be set aside.

18. This court notes that apart from the prayer to set aside the impugned orders, the 1st and 3rd respondents also sought a raft of other prayers including orders directing the applicant to re-open the 1st respondent's factory, to restrain the applicant officers from disrupting of closing the 1st respondents business, to provide the list of its authorized officers among other prayers. My take is that apart from the prayer to set aside the impugned orders, the rest of the prayers do not fall within the purview of this court, at least at this point in time, when the respondents have not filed any substantive suit against the applicant and are only riding on the Miscellaneous Application filed by the applicant pursuant to Section 43(3) of the Act. I will therefore confine this ruling only to the finding on the issue of whether or not the impugned orders should be set aside.

19. It was not in dispute that on 22nd February 2019, the applicant sought and obtained orders preserving and restraining the transfer, withdrawal or disposal of funds in the 1st respondents various accounts. Section 43(2) and (3) of the Act under which the impugned order were issued stipulate as follows.

Section 43(2) and (3) of the Tax Procedures Act

(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.

20. According to the respondents the applicant obtained the impugned orders through deliberate misrepresentation of facts while the applicant argued that it had reasonable belief of that the 1st respondent was engaged in tax evasion and this need to preserve their accounts.

21. To my mind, the question of whether or not the applicant had justifiable reasons to obtain the impugned orders is now water under the bridge as the fact still remains that the said orders were issued by this court, differently constituted and presided over by Onyiego J. of the Anti-Corruption and Economic Crimes Division of this court before the matter was transferred to this court. I therefore reiterate that this court will now concern itself with the issue of whether the impugned orders should be set aside.

22. In determining this matter this court will be guided by the relevant provisions of the Act governing the issuance and lapse of the impugned considering that preservation orders are not intended to exist in perpetuity or for an indefinite period of time. Section 43(6), (7) and (8) of the Act stipulates as follows:

(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.

23. In the instant case, it was not in dispute the applicant has not issued the 1st respondent with an assessment of the taxes due of any. As at the time of hearing this application on 11th April 2019, up to the time of delivering this ruling, the applicant did not make give indications to the court that an assessment was in the pipeline or had been issued to the 1st respondent so as to necessitate the continued preservation of the funds in the 1st respondent's account. Indeed, all that the applicant stated is that the investigations on the 1st respondent's accounts/affairs is intrinsic and involves a third party whose identity was not disclosed.

24. My finding is that Section 43(7), the particulars of which I have highlighted this judgment, is couched in mandatory terms and provides that the applicant shall notify the tax payer of an assessment within 30 days.

25. Needless to say, 30 days from the date of the issuance of the impugned orders lapsed way back on 24th March 2019 and todate, the applicant has been riding in the magnanimity of this court which invoked its inherent jurisdiction to extend the said orders pending the hearing and determination of the applications. As matters stand now, I find that the applicant has not placed any material before this court to satisfy me that an extension or continued existence of the impugned order is merited.

26. For the above reasons, I allow prayer (1) only of the two applications dated 1st and 22nd March 2019. The 1st respondent is also awarded the costs of this application.

Dated, signed and delivered in open court at Nairobi this 7th day of May 2019

W. A. OKWANY

JUDGE

In the presence of:

Mr Ouma for Musyoki for the respondents

Miss Almadi for Kirugi for the applicant

Court Assistant - Ali