



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

PETITION NO. E421 OF 2018

PEVANS EAST AFRICA LTD.....PETITIONER

VERSUS

KENYA REVENUE AUTHORITY (KRA).....RESPONDENT

RULING

1. This petition was filed by **Pevans East Africa Limited** against the **Kenya Revenue Authority (KRA)** the Respondent. KRA is the statutory body charged with responsibility of assessing and collecting tax. The Petitioner is engaged in the business of organizing bets which entails receiving money in the form of bets from punters (players) and paying the winnings to the players who placed successful bets.
2. By its Petition, the Petitioner admits that **Section 35** of the income Tax Act obligates it to withhold taxes from the winning bets and remit the taxes to the Respondent.
3. The Petitioner however states that an order was issued by the Nairobi Chief Magistrate's Court in case number **CMCC No. 1662 of 2014**, whereby the said Court issued an interim injunction restraining the Petitioner from deducting the winning of any person winning in a bet or game of chances.
4. That as a consequence of that Court order being issued the Respondent demanded the Petitioner to remit withholding tax. The Petitioner, by this petition, seeks for an order, *inter alia*, quashing the Respondent's said demand.
5. The petition is still pending for hearing.
6. An application has been filed by the **Attorney General (A.G)** whereby the A.G seeks to be joined in this matter as an Interested Party. The A.G has presented various grounds in support of the application some of which are; that the A.G has a Constitutional duty to represent the National & Government in any legal proceedings and to which the National Government is a party; that the A.G. has a duty to promote, protect and uphold the rule of law and defend public interest; that the A.G has a right of audience by virtue of **Section 7** of the office of the **Attorney General Act (Act No. 49 of 2012)** in proceedings which involve public interest or involve public money; that the case involves interpretation of the Bill of rights, and Chapter 12 of The Constitution; and that the orders sought by this Petition have a direct bearing on the National Governments Fiscal Policy and Development Programs.
7. The Respondent (**or KRA**) did not oppose the application.
8. The Petitioner opposed the application and presented the following grounds:
 - a) ***The Application is bad in law, misconceived and an abuse of the Court process;***
 - b) ***The Application has not established that it has met the threshold set out in Section 7 of the Office of the Attorney General Act No. 49 of 2012;***
 - c) ***The Applicant has not met the requirements for joinder as an interested Party as stipulated by the Supreme Court in Trusted Society of Human Rights Alliance –vs- Mumo Matemu [2014] eKLR and Francis Kariuki Muruatetu & Another –vs- Republic & 5 Others [2016] eKLR to warrant the exercise of discretion in its favour;***
 - d) ***The Applicant has not demonstrated that it has a distinct and separate legal interest or argument from the Respondent which it wishes to advance and which cannot be sufficiently articulated by the Respondent in these proceedings;***

- e) *The Application for joinder has been made on a false premise and based on misapprehension of the issue arising in the Petition and is in the circumstances fatally defective;*
- f) *The petition seeks to resolve issue of compliance and enforcement of Court orders and whether the Respondent can compel the Petitioner to act in defiance of the Court orders issued in Nairobi CMCC No. 1622 of 2014;*
- g) *The final orders sought do not have a bearing on the interpretation of Chapter 12 of the Constitution, the Government's power to impose taxes or the principles of public finance;*
- h) *The Applicant is not a necessary party and its joinder in these proceedings will only serve to muddle up the issues as opposed to assisting in determining the real issue in controversy;*
- i) *Other than making general allegations, the Applicant has not identified the purported prejudice it will suffer in the peculiar circumstances of this case and the actual issue in controversy.*

ANALYSIS AND DETERMINATION

9. The Petitioner in opposing the application relied on the grounds stated above, a Replying Affidavit and authorities.

10. The Petitioner relied on the case of **ATTORNEY GENERAL –VS- KENYA BUREAU OF STANDARDS & ANOTHER [2018] eKLR** where the Court of Appeal considered an application by A.G to be joined to an Appeal. The genesis of that claim, before the Court of Appeal was an Arbitration Award which was adopted as a Judgment of the Court, by the High Court. The matter was appealed and it was at that stage the A.G sought to be joined, as an interested party because the case involved public interest. The Court of Appeal stated that although it had wide powers to permit such a joinder it found the A.G had failed to demonstrate public interest.

11. The Petitioner also relied on the case **FRANCIS KARIUKI MURUATETU & ANOTHER –VS- REPUBLIC & 5 OTHERS [2016] eKLR** where the Supreme Court of Kenya set out the parameters of joining an interested party as follows:

“From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party:

One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:

- i) The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.***
- ii) The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.***
- iii) Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of these submissions are not merely a replication of what the other parties will be making before the Court.”***

The Supreme Court in the case **TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE –VS- MUMO MATEMO & 5 OTHERS [2014] eKLR** stated;

“Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. On the other hand, an amicus is only interested in the Court Making a decision of professional integrity. An amicus has no interest in the decision being made either way, but seeks that it be legal, well informed, and in the interest of justice and the public expectation. As a ‘friend’ of the Court, his cause is to ensure that a legal and legitimate decision is achieved.”

12. I have considered those authorities and their application to the matter at hand.

13. The Court order of the **Chief Magistrate’s Court** which the Petitioner has pleaded was the basis of not remitting the withholding tax to the Respondent has been attacked by the Respondent – in its affidavit of **Tomkys Kigen**, of **4th February 2019**. By that affidavit the Respondent amongst other depositions alleged that the **Chief Magistrate’s Court** did not have jurisdiction to grant the order, and that the said order was void *ab initio*.

14. There is no doubt in mind that the validity or otherwise of that order will be central in the determination of this petition. Corollary to that determination, may be, will be what obligation the Petitioner had to obey that Court order vis-a-vis the statutory obligation of remittance of tax.

15. In consideration of the above there is an aspect of public interest involved, that is the rule of law. It is a fundamental rule of law that Court orders be obeyed. When can a party fail to obey a Court order? That is an issue for determination after full hearing.

16. The A.G. also relied on the provisions of **Section 7 Act 49 of 2012. Section 7 (3) and (4)** of that Act provides:

“(3) Where a suit, inquiry or any other proceedings is pending before a Court, tribunal or any other administrative body to which the Attorney-General does not have a right of audience, it shall be sufficient for the Attorney General to file a certificate of the intention of the Attorney General to be joined in the proceeding;

(4) The Court, tribunal or any such administrative body shall, upon receipt of a certificate under subsection (3), enjoin the Attorney General in the proceedings.”

17. This is a pending suit before a Court as stated in **sub-Section (3)** there above. That sub-Section requires where A.G has no right of audience, if he wishes to be joined in such proceedings he must file a certificate of intention to join the proceedings.

18. I believe without relying on procedural technicalities (contrary to **Article 159 (2) (d)** of the Constitution) it can be considered that the application by A.G is a certificate which is required under **Sub-Section (3) of Section 7, Act 49 of 2012**. No party in this matter can allege prejudice to consideration of the application as such certificate, since all parties were aware of the application and submitted on it.

19. On the whole I am of the view that the A.G in the position he holds as the Government adviser, he has a stake in the outcome that will touch, on not just taxation, but also the rule of law. It is for that reason the application succeeds. The costs of the application however will be in the cause because the A.G moved the Court in view of public interest matters involved herein.

20. In the end the Attorney General is granted leave to join this matter as an interested party. The costs of the **Notice of Motion** application dated **7th February 2019** shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 9TH day of MAY, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie..... **COURT ASSISTANT**

..... **FOR THE PETITIONER**

..... **FOR THE RESPONDENT**

..... **FOR THE ATTORNEY GENERAL (INTERESTED PARTY)**