



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
MISCELLANEOUS CIVIL APPLICATION NO. 285 OF 2015

KENYA REVENUE AUTHORITY.....APPLICANT

- VERSUS -

JIMMY MUTUKU KIAMBA.....RESPONDENT

RULING NO. 2

1. The applicant, **JIMMY MUTUKU KIAMBA**, had sought the following orders;

1. *Access to Kshs. 10 million in Account No. 0100002572677 at CFC Stanbic Bank Limited, pending the hearing and determination of the application dated 27th January 2016.*
2. *The Review, Variation or setting aside of the orders made on 20th January 2016.*
3. *The discharge of the preservatory orders issued on 18th June 2015.*
4. *In the alternative, pending the referral and determination of the dispute, through the Alternative Dispute Resolution framework, permitting the Applicant to access Kshs. 50 million from Account No. MM1428009380 at CFC Stanbic Bank Limited.*

2. In his supporting affidavit the applicant pointed out that he was unable to meet his financial obligations because he had been kept off his funds.

3. He therefore asked for Kshs. 10 million to enable him settle accrued debts and also to enable him meet his usual and normal financial needs.

4. The applicant also expressed concern that it was difficult for him to ascertain when the dispute would be resolved. The uncertainty was blamed on the conduct of the Kenya Revenue Authority, which, allegedly, lacked commitment and interest in finding a quick solution.

5. The reason for the applicant blaming the Kenya Revenue Authority was that the said Authority had expressly rejected the court's order which had required the parties to submit themselves to arbitration.

6. The attitude displayed by the **KRA** persuaded the applicant that even if the matter proceeded to arbitration, the **KRA** would not co-operate, but would frustrate the whole process.

7. The applicant believes that the **KRA** was encouraged to continue delaying the resolution of the dispute because there was a preservatory order currently in place, which was to the advantage of **KRA**.

8. Meanwhile, as the process of assessment of tax had been concluded, the applicant believes that the preservative orders which had been issued under Section 96A of the Income Tax Act, had automatically lapsed. Nonetheless, the applicant urged the court to discharge the said preservative orders.
9. In answer to the applicant's affidavit, **KRA** filed an affidavit sworn by **CYRELL WAGUNDA**, who is one of its duly appointed officers.
10. The respondent informed the court that the applicant's Tax liability had been assessed in the sum of 262,774,327/-. Following the computation of that Tax liability, the applicant had lodged Tax Appeal No. 183 of 2015, to challenge it.
11. According to the respondent, the assets belonging to the applicant had been used as securities to secure borrowings from banks. Therefore, the respondent did not know of any properties belonging to the applicant, which were not tied up as securities.
12. In those circumstances, the respondent believed that if the funds held in the bank accounts which are currently frozen, were to be released to the applicant, the outstanding tax would not be recovered from the applicant.
13. The respondent's position was that the accounts of the applicant should remain frozen until after the Tax Appeals Tribunal had determined the applicant's appeal.
14. The respondent also submitted that they had not obstructed the Alternative Dispute Resolution mechanism.
15. The respondent's explanation was that it is the applicant who had made it difficult for the process of Alternative Dispute Resolution to be undertaken.
16. The respondent blames the applicant for failing to provide documents to demonstrate the sources of his income. The applicant's auditors had written the **KRA** to say that the applicant did not have any documents.
17. As the **KRA** requires documentation which it would give consideration when called upon to re-evaluate the tax liability of any tax-payer, it was the contention of **KRA** that the proposed arbitration was frustrated by the failure of the applicant, to provide documents to support his position.
18. Secondly, the **KRA** did explain, through the affidavit of **JULIET KAMANDE**, (*the Officer In-charge of the Tax Dispute Resolution Department*) that the **ADR** Framework specified certain kinds of disputes as being inappropriate for **ADR**. One such category of disputes is that of disputes relating to or tainted with tax evasion or fraud.
19. In this case, there were allegations that the applicant had been involved in tax evasion. Therefore, there was a proposal that the Investigations and Enforcement Department of the Kenya Revenue Authority should explore the possibility of prosecuting the applicant for tax evasion.
20. In the circumstances, I am satisfied that the **KRA** did not deliberately set out to frustrate or to scuttle the process of Alternative Dispute Resolution, which the parties had been directed to participate in, by the court. The **KRA** found itself in a position which was tricky, because if it proceeded to arbitration, that may have constituted a violation of the **ADR** Framework which has been in force from July 2015.
21. On the other hand, by not proceeding with **ADR**, the **KRA** would have violated the express orders of the court.
22. The **KRA** appears to have chosen to go along with the provisions of the **ADR** Framework.
23. Much as that action could be understandable, this court wishes to make it clear that no party has the

luxury of choosing whether or not to give effect to the orders of the court.

24. If a party is unable to give effect to orders of the court, the party is obliged to return to the court for review, or, in the alternative the party could seek a stay of execution of such order, or the party could lodge an appeal to challenge the order.

25. The respondent did not take any of those steps. Therefore, there was a real risk that the court could have punished the respondent, if the applicant had filed an appropriate application.

26. Instead, it is the applicant who asked the court to review or to set aside the order. By so doing, the applicant may have, unwittingly, let off the respondent.

27. The respondent did not oppose the application for the review or the setting aside of the orders made on 20th January 2016. Therefore, there is no reason why it should not be granted.

28. Accordingly, I now set aside the orders which directed the parties to resolve the dispute through Arbitration.

29. The second reason for setting aside the said order is that the **KRA** has already assessed the applicant's tax liability; and the applicant has challenged that decision through an appeal.

30. Although there is no legal bar to parties resolving disputes which were pending before an appellate court or tribunal, it would be wrong for a court to direct the parties to resolve the appeal through arbitration.

31. On 8th February 2016 the court allowed the applicant to get Kshs. 4,000,000/-, in order to enable him have means to pay for his bills and utilities.

32. Therefore, the court has been mindful of the welfare of the applicant.

33. The applicant has not proved the contention that the respondent was being vindictive. Indeed, the applicant has not made available any evidence to demonstrate why he considers the respondent to have been driven by vendetta.

34. Finally, I find myself unable to appreciate the logic which demands that the money which is currently being held in the respondent's accounts be released now, so that the applicant may thereafter seek to recover it in the normal manner. My sense of justice tells me that provided the appeal is determined expeditiously, the funds should continue to be preserved. I therefore reject the application to discharge the conservatory order.

35. However, each party will bear his own costs of the application dated 27th January 2016.

DATED, SIGNED and DELIVERED at NAIROBI this 4th day of April 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of:

Mrs. Nganga for Okello for the Applicant

No appearance for the Respondent

Collins Odhiambo – Court clerk.