



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 422 OF 2014

TYREWORLD & ACCESSORIES (K) LIMITED..... PLAINTIFF

V E R S U S –

PETER G. WAHOME..... 1ST DEFENDANT

WAHOME NJUGUNA CONSULTING LTD 2ND DEFENDANT

RULING

1. Tyreworld & Accessories (K) Ltd, the plaintiff/applicant herein took out the motion dated 3rd December 2014 whereof it sought for the following orders against **Peter G. Wahome and Wahome Njuguna Consulting Ltd**, the 1st and 2nd defendants/ respondents herein *inter alia*:

1. The respondents be and are hereby compelled whether by themselves, their employees, officers, agents or any other person to appear before the Commissioner of Investigations and Enforcement, Kenya Revenue Authority or any other officer of the Kenya Revenue Authority and do/comply with such other/further requests as may be made to him by the applicant for purposes of resolving a tax dispute between the applicant and the Kenya Revenue Authority of kssh.53,793,340.00 pending the hearing of this application inter partes.

2. That the respondents be and are hereby compelled whether by themselves, their employees, officers, agents of any other person to appear before the Commissioner of Investigations and Enforcement or any other officer of the Kenya Revenue Authority and do comply with such other/further requests as may be made to him by the applicant for purposes of resolving a tax dispute between the applicant and the Kenya Revenue Authority for kshs.53,793,340.00 pending the hearing of and determination of this suit.

3. That costs in the application be costs in the cause.

2. The motion is supported by the affidavit of Agnes Njambi Mbugua. When served, the defendant filed the replying affidavit of Peter Githiri Wahome to oppose the motion. Learned counsels appearing in this matter recorded a consent order to have the motion disposed of by written submissions.

3. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavit filed in support and against the motion. I have further considered the rival written submissions. It is the submission of the plaintiff/applicant that it engaged the services of the defendants/respondents as its auditors for the period up and until 2013 during which period the respondents handled all the applicant's tax matters.

4. It is further averred that the respondents represented the applicant in a dispute pitting the applicant and the Kenya Revenue Authority involving a total sum of kshs.53,793,340/= which culminated in an appeal before the Value Added Tax Tribunal vide Appeal no. 8 of 2013. It is argued that the respondents handled the applicant's defence in a manner that was incompetent, negligent and unprofessional thus breaching the duty of care owed to the applicants, leading to the loss of the appeal that led to the applicant being ordered to pay Kenya Revenue Authority a sum of ksh.53,793,340/=. The applicant further pointed out that the respondents failed to turn up for the ruling despite having notice of delivery thus obtaining the same after the period to appeal had lapsed.

5. It is also argued that the respondents refused to attend meetings between the applicant and the representatives of Kenya Revenue Authority to resolve the dispute. The applicant further argued that the respondents have no lawful justification to refuse to cooperate in the discussions having been fully paid. On the basis of the above reasons, the applicant urged this court to issue an order compelling the respondent to appear before the Kenya Revenue Authority and fully cooperate in that respect to facilitate the negotiations. I have already stated that the respondents heavily relied on the replying affidavit to oppose the motion.

6. It is the respondents' submission that it would be unconscionable to compel the respondents to appear on behalf of the applicant to offer professional services which in any case is voluntary in nature. The respondents aver that the applicant has refused to follow their professional advice and has even refused to pay their professional fees in this matter and other related assignments thus causing their contractual relationship to strain. It was also pointed out that the applicant has already appointed another auditing firm to represent it before the tax authorities hence their presence is not necessary. The respondents also accused the applicant of withholding certain files relevant to the tax dispute thus impairing their ability to respond to some audit queries. The respondents stated that since their relationship with the applicant is strained they are unwilling to continue to act for it in this matter in any way.

7. After a careful consideration of the material placed before me, it is clear to me that the parties to this dispute had a contractual relationship. It is not in dispute that the applicant engaged the services of the respondents to represent it in a tax dispute between it and the Kenya Revenue Authority. It is also not in dispute that the relationship has now gone sour. The parties have accused each other for failing to adhere to the terms of the professional agreement. The applicant has accused the respondents for acting in an unprofessional manner making them lose the dispute before the Value Added Tax Tribunal. The respondents on the other hand have accused the applicant for failing to pay their professional fees and for failing to hand over to them certain files which could have assisted the respondents competently and ably represent the applicant before the tax authority. The question is whether or not it is appropriate in the circumstances to issue an order of injunction to compel the respondents to continue appearing for the applicant. There is no doubt that the relationship between the applicant and the respondents is a contractual one which is personal and voluntary in nature. The relationship is terminable by either party. A court of law cannot therefore compel a party like the respondents to continue offering professional services where such a relationship is so strained like in this case. In the treatise of Cheshire and Fifoot's, Law of Contract 9th edition, M. P. Furmston at page 615 it is expressly stated *inter alia* as follows:

“In accordance with the general principle that equity does nothing in vain, there are two particular types of contract of which specific performance will not be granted. These are contracts for personal service, and those in which the performance cannot be ensured without the constant superintendence of the court.”

8. With respect, I agree with the respondents that it is unconscionable to compel the respondents to represent the applicant.

9. In the end, I find no merit in the motion. The same is dismissed with costs to the respondents.

Dated, Signed and Delivered in open court this 11th day of November, 2016.

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant