



Kenya Revenue Authority v ECO Bank Kenya Ltd & 3 others; Kanyago (Interested party) (Miscellaneous Application E015 of 2022) [2022] KEHC 41 (KLR) (Commercial and Tax) (31 January 2022) (Ruling)

Neutral citation number: [2022] KEHC 41 (KLR)

Republic of Kenya

In the High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)

Miscellaneous Application E015 of 2022

A Mabeya, J

January 31, 2022

IN THE MATTER OF: THE TAX PROCEDURES ACT NO. 29 OF 2015 AND IN THE MATTER OF: AN APPLICATION BY KENYA REVENUE AUTHORITY FOR AN ORDER UNDER SECTION 43 (3) OF TAX PROCEDURES ACT, 2015

Between

Kenya Revenue Authority

Applicant

and

ECO Bank Kenya Ltd

1st Respondent

NCBA Bank Limited

2nd Respondent

Family Bank Ltd

3rd Respondent

Standard Chartered Bank (K) Ltd

4th Respondent

and

Peter Tiras Kanyago

Interested party

Ruling

1. Before Court is an application dated 10/1/2022. It was brought under section 43 (3) of the Tax Procedures Act, 2015 and section 3 and 3A of the [Civil Procedure Act](#), and order 51 rule 1 of the Civil Procedure Rules.

2.The application sought orders for the preservation of funds and prohibiting the release or dealing with a sum of Kshs. 80,395,299/= held by the respondents on behalf of the interested party in 7 different bank accounts pending the issuance of a tax assessment and recovery of taxes, or until further orders of the court. There was an alternative prayer for security for the taxes.

3.The application was supported by the affidavit of Jesse Kamau sworn on 10/1/2022. The grounds were that in 2021, the applicant conducted investigations on the interested party. It discovered that he had failed to fully disclose his income for the period 2016-2020. According to the findings, the interested party had income of Kshs. 357,504,497/= but had only declared income of Kshs 89,520,166/= leading to loss of Kshs. 80,395,299/= in revenue.

4.For those reasons, the applicant had reason to believe that the interested party had engaged in tax evasion. It served the interested party with its findings on 11/11/2021. For that reason, on 29/12/2021, the applicant issued the respondents with preservation of funds notices pursuant to section 43 (2) of the Tax Procedures Act, 2015 ("the Act") in respect of the accounts held by the interested party.

5.It was the applicant's case therefore that, in the circumstances, and owing to the amount of taxes involved, it was likely that the interested party may frustrate the recovery of the taxes if funds held by the respondents were not preserved. It was also contended that the interested party had no other known assets other than the funds in the respondent's accounts. That unless the preservation order was granted, the applicant would suffer prejudice.

6.The interested party opposed the application vide his replying affidavits sworn on 20/1/2022 and 21/1/2022 respectively. His case was that; the applicant served him with a notice of investigation dated 7/10/2021 in accordance with section 59 of the Act. He appeared before the applicant on 10/11/2021.

7.The respondent also instructed his advocates who wrote to the applicant on 10/11/2021 and inquired on the status of the investigation. The applicant responded on 29/11/2021 confirming that investigations were still ongoing and it would share the findings and allow the interested party time to respond. The alleged findings of 11/11/2021 have never been served upon him.

8.On 29/12/2021, the applicant served notices of preservation of funds to all his bank accounts. He protested vide a letter dated 18/1/2022 stating that he had never been served with the alleged findings. That the applicant had never served him with any tax assessment and hence there was no tax due. That the investigations had not been completed and no tax was therefore recoverable from him.

9.He therefore contended that the preservation notices were issued in bad faith and in breach of his right to fair administrative action. That he was a compliant taxpayer throughout the period complained of by the applicant as evidenced by the certificates of compliance issued to him which, had not been revoked or recalled.

10.He concluded that he was unable to carry out his day to day businesses including paying school fees, paying employees and maintaining his family. That he had always shown good faith, was cooperative and tax compliant.

11.The parties filed their respective submissions which were hi-lighted on 24/1/2022. It was the applicant's submission that it had met the threshold provided for under section 43(1) of the Act. That the applicant could invoke that section if it reasonably believed that a tax payer had made taxable supplies or had derived an income in respect of which tax had not been charged and that the taxpayer was likely to frustrate the recovery of the tax.

12. That its investigations had revealed that despite the interested party having had taxable income of Kshs. 357,504,497/= for the period 2016 - 2020, he only declared Kshs. 89,520,166/= which amounted to under declaration of income. That these findings were communicated to the interested party on 11/11/2021. In the circumstances, the applicant was justified to invoke section 43 of the Act.

13. Counsel further submitted that the interested party had no other known assets but for the bank accounts held by respondents. He referred the Court to the cases of Pili Management Consultants Ltd vs Commissioner of Income tax KRA [2016] eKLR and KRA vs Jimmy Mutuku Kiamba [2015] Eklr, in support of his submissions.

14. On the part of the interested party, it was submitted that the applicant had not met the threshold set up in section 43 of the Act. That the tax liabilities in question had not been well defined, had not fallen due and were not unpaid. Hence, it could not be said that the applicant had reason to believe that the interested party had derived income in respect of which tax had not been charged.

15. It was further submitted that investigation was still ongoing and no tax assessment had been made against the interested party. In the premises, the applicant had not met the first condition under section 43 of the Act.

16. That he had at all times cooperated with the applicant. He had appeared before the applicant and responded to all correspondence. That the applicant was guilty of material non-disclosure at the ex parte stage. It failed to disclose that the interested party had honoured every summon issued by the applicant and had provided responses to the findings by the applicant.

17. On the alternative prayer for security, Counsel submitted that the applicant had un-procedurally issued the notice of preservation of funds and was undeserving of that order. That security ought not be given as the taxes due were still unascertained.

18. I have considered the affidavits on record, the written and oral submissions of Learned Counsel. I have also considered the authorities relied on.

19. This is an application by the tax authority for funds preservation under section 43(2) of the Act. They were issued to Standard Chartered Bank (K) Ltd, Absa Bank Kenya PLC and Family Bank Limited, respectively.

20. It is the duty of every citizen to pay tax. In Pili Management Case (supra), it was held that every taxpayer has a duty to file tax returns and pay taxes. Article 210 of the Constitution provides for the duty to pay tax by every citizen. It is for that reason that there are elaborate provisions on imposition and collection of taxes. While payment of taxes is a civil duty, if its imposition and collection is not undertaken in accordance with the law it might result in wrongful deprivation of property. It is for that reason that tax statutes are to be interpreted strictly.

21. In Mount Kenya Bottlers Ltd & 3 others v Attorney General & 3 Others NRB CA Civil Appeal No. 164 of 2013 [2019] Eklr, the Court of Appeal observed: -[...], when it comes to interpretation of tax legislation, the statute must be looked at using slightly different lenses. With regard to tax legislation, the language imposing the tax must receive a strict construction. Judge Rowlett in his decision in Cape Brandy Syndicate v I.R. Commissioners [1921] 1KB (cited by the appellants), expressed the common law position in this area when he stated '...in a taxing Act one has to look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used'.

22. The dispute before Court touches on section 43(1) of the Act. It provides: -(1) This section applies if the Commissioner reasonably believes: -(a) That a tax payer-(i) Has made taxable supplies, has removed excisable goods, or has derived an income, in respect of which tax has not been charged; or (ii) Has collected a tax, including withholding tax, that has not been accounted for; and (iii) That the taxpayer is likely to frustrate the recovery of the tax”.

23. In *Kenya Revenue Authority v Jane Wangui Wanjiru & 2 others* [2018] eKLR, it was held that; “The purpose of section 43 of the TPA is to allow KRA to preserve a taxpayer’s money in the hands of a third party without notice to the taxpayer for a limited period before moving the court for formal orders of preservation. Since the exercise of the power to collect taxes, in the manner outlined by the statute, is a justifiable limitation on the right to privacy protected by Article 31 of the Constitution, it must be construed strictly. This approach is buttressed by and is consistent with the principle that tax statutes must be interpreted strictly”.

24. This provision applies where no assessment of tax has been undertaken. It is based on the Commissioner’s reasonable belief of the twin matters set out therein, viz that there is tax due which has not been unremitted and that the tax payer is likely to frustrate the collection of that tax. It is only when such reasonable belief exists that the draconian procedure set out in that section is to be resorted to.

25. In *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance Ltd* [2014] AC 366, Lord Kerr observed: -“... in demonstrating an absence of reasonable or proper cause ‘requires the proof of a negative proposition, normally among the most difficult of evidential requirements.’ The test for establishing whether there is an absence of reasonable and proper cause requires both a subjective and objective assessment. The subjective test requires an assessment as to whether the claimant honestly believed the defendant was liable in respect of the claims brought. If the Court is convinced as to the subjective state of mind, it should then consider whether, based on the information available to the claimant at the time it initiated proceedings, it was reasonable for the claimant to have reached the conclusion it did in respect of the defendant”.

26. In *Hicks v Faulkner* {1878} 8Q.B.D. 167, 171, Hawkins J observed: -“I should define reasonable and probable cause to be an honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds of the existence of a state of circumstances which, assuming to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accused to the conclusion that the person charged was probably guilty of the same imputed”.

27. Reasonable belief is the cornerstone of section 43 of the Act to this Court’s mind, reasonable belief means a belief that would be held by an ordinary and prudent man in the same circumstances as the actor. The belief is to be based on reasonable grounds. It is not necessarily that the belief should be correct, but it must pass the test of reasonableness.

28. In this regard, the applicant was under a duty to satisfy the Court that the twin conditions set out in section 43(1) of the Act had been complied with. These are; that the Commissioner was under a reasonable belief that there was tax due and unremitted and that the interested party was likely to frustrate the recovery thereof.

29. It is not in dispute that the interested party had filed returns and paid some money in respect of taxes. He also held a Tax Compliance Certificate. However, it is the applicant’s contention that the interested party had failed to account for all the tax due. That he had under-declared his income for the period in question.

30.To satisfy the first condition, the applicant contended that it had carried out investigations which revealed that despite the interested party having had taxable income of Kshs. 357,504,497/= for the period in question, he had only declared Kshs. 89,520,166/=. That amounted to under-declaration that had led to loss of Kshs. 80,395,299/= in taxes. The interested party submitted otherwise.

31.I have considered the record. The letter that communicated the findings of the investigations set out in detail the basis of the Commissioner's belief as to the alleged unremitted taxes. In my view, since this was not an erratic one-time act, but one based on investigations that spanned over 9 months, the applicant cannot be said not to have had a reasonable belief that there was tax due from the interested party.

32.In this regard, I reject the interested party's contention that without an assessment, the applicant had no reasonable belief that there was tax due. I hold that, a thorough investigation that reveals that there is tax due is sufficient for the purposes of the first condition under section 43 of the Act. The first condition was met.

33.On the second condition, it was the applicant's case that owing to the interested party's under declaration of income and evasion of tax and owing to the amount of taxes involved, it was likely that he would frustrate the recovery of the taxes if funds held by the respondents were not preserved. It was also contended that the interested party had no other known assets other than the funds in the respondent's accounts. That this formed the basis for a reasonable belief that the interested party would frustrate the recovery thereof. The interested party contested otherwise.

34.The record shows that since serving the interested party with the investigation notice of 6/9/2021, there was correspondence between the parties. Although the applicant contended that it had communicated the findings on 11/11/2021 the interested party denied that fact. There was nothing on record to show that the letter had been delivered and received by the Interested party.

35.Since there was no rebuttal to the Interested party's denials and letter dated 14/1/2022; I believe that those findings were never communicated to him.

36.The said letter of 14/1/2022 was neither acknowledged nor responded to by the applicant. By that time the preservation notice of 29/12/2021 had been issued and the present application made.

37.From the foregoing, it is clear that no firm conclusion can be said to have been arrived at that there was tax due which had been unremitted. If there was, the same had not been communicated to the interested party.

38.In this regard, I hold that it was imperative on the part of the applicant to have first communicated to the interested party on its findings of the investigation before taking any precipitate.

39.From what I have set out above, I am doubtful that the findings of the investigations which only remained on the records and possession of the applicant can be said to entitle the applicant to form a reasonable belief that the interested party had unremitted taxes. The first condition had not been met.

40.Further, I hold that in order to satisfy the second condition in section 43 of the Act, the applicant should have demonstrated that the interested party knew of the taxes due and from his conduct, the applicant had reasonable belief that he would frustrate the recovery thereof.

41.This Court is bound to strictly construe and interpret section 43(1) of the Act. That the applicant must

demonstrate it had a reasonable belief that the interested party would frustrate the collection of revenue taxes it had communicated to him.

42. The upshot is that this Court finds that the applicant did not demonstrate that the interested party was likely to frustrate it had satisfied the twin conditions under section 43 of the Act. The application is therefore untenable and is dismissed with costs. The interim orders of 14/1/2022 are hereby discharged.

It is so ordered. **DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY, 2022.A.
MABEYA, FCI ArbJUDGE**



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