



**Kenya Revenue Authority v Family Bank Limited; Pennant Trading Company Ltd (Interested Party) (Miscellaneous Application E021 of 2022) [2022] KEHC 92 (KLR) (Commercial and Tax) (4 February 2022) (Ruling)**

Neutral citation: [2022] KEHC 92 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E021 OF 2022**

**A MABEYA, J**

**FEBRUARY 4, 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 THE TAX PROCEDURES ACT, 2015**

**BETWEEN**

**KENYA REVENUE AUTHORITY ..... APPLICANT**

**AND**

**FAMILY BANK LIMITED ..... RESPONDENT**

**AND**

**PENNANT TRADING COMPANY LTD ..... INTERESTED PARTY**

**RULING**

1. Before Court is a Notice of Motion dated 10/1/2022 brought by Kenya Revenue Authority (KRA) under Section 43 (3) of The *Tax Procedures Act*, 2015, Section 3 and 34 of The *Civil Procedure Act* and Order 51 Rule 1 of The *Civil Procedure Rules, 2010*.
2. The Motion seeks orders for the preservation of a sum of up to Kshs. 65,106,526/= in the interested party's account held in the Respondent bank pending the issuance of tax assessments and recovery of taxes. In the alternative, KRA prays for security from the interested party for the taxes that shall ultimately be found to be due and owing.



3. The application is supported by the Affidavit of Eric Riungu, an officer of KRA. The Applicant avers that preliminary investigations into the interested party's tax affairs for the period 2016 – 2021 established that the interested party was engaged in tax evasion. That the findings reveal that the interested party had under declared its income and/or sales resulting in tax liability of Kshs. 65,106,526/= comprising Kshs. 38,313,890/= on account of corporation tax, Kshs. 25,193,848/= on account of value added tax and Kshs. 1,598,788/= on withholding tax.
4. For this reason, on 29/12/2021 KRA issued the Respondent with a Preservation of Funds Notice pursuant to section 43(2) of the Act, 2015 ("the Act"). Further, KRA believes that owing to the amount of taxes involved, there is a high likelihood of the interested party frustrating the recovery of the taxes if the funds in the account held by the Respondent are not preserved. It is also KRA's contention that other than the said funds, there are no other known assets belonging to the interested party that can satisfy the taxes that will be found due and payable.
5. In response, the interested party filed Grounds of Opposition dated 14/1/2022 and a Replying Affidavit sworn by its Managing Director Nicholas Munyi Kaigua. He contended that section 43 of the Act violates due process requirements under Articles 10, 47 and 50 of the Constitution to the extent that it condemns a tax payer unheard.
6. That this Court lacks jurisdiction to grant the orders sought since the High Court can only entertain a tax dispute between a tax payer and the KRA in the form of an appeal against a decision of the Tax Appeals Tribunal. Further, it was contended that unless and until KRA issues a notice of assessment of the taxes due and owing from the interested party, if any, it has no basis for applying for any orders that may adversely affect operations of the interested party's bank accounts and/or business.
7. The interested party contends that KRA has not stated the quantum of the unremitted taxes with precision and clarity. That the interested party has and still intends to fully cooperate with KRA in the investigation process so as to determine if at all there are any taxes due and owing by it. It is on this basis that the interested party's representative has held meetings with the applicant. Lastly, the interested party faulted the applicant for taking adverse action against it without first responding to the issues it had raised in its letter of response to the investigation findings.
8. The Court has carefully considered the affidavits on record, the written and oral submissions of Learned Counsel as well as the authorities cited.
9. There is a preliminary issue that I need to dispose off before delving to the application. The Interested Party contended that without a tax assessment being done, KRA has no power to act as it did. Secondly, that this Court has no jurisdiction as its jurisdiction is only to deal with appeals from the Tax Appeals Tribunal.
10. As regards tax assessment that is not a requirement before KRA can invoke its powers under section 43 of the Act. The procedure for assessment is clearly set out in sections 49 to 54 of the Act. All that is required under section 43 of the Act is the Commissioner to have a reasonable belief of the existence of unremitted tax and the likelihood of the tax payer frustrating the recovery thereof.
11. As regards jurisdiction, the submission is without basis. The jurisdiction of the High Court under section 43 of the Act is original and not appellate. I reject both objections. Now to the main matter.
12. It is the duty of every citizen to pay tax. In *Pili Management Consultants Ltd vs Commissioner of Income Tax* [2016], eKLR, it was held that every taxpayer has a duty to file tax returns and pay taxes as Article 210 of the Constitution provides for the duty of every citizen to pay tax. 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.

13. 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’.

14. 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”.

15. 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”.

16. 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 remitted 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 therein is to be resorted to.

17. In *Crawford Adjusters (Cayman) Ltd v Sagikor 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”.

18. 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”.

19. Reasonable belief is the cornerstone of any action under Section 43 of the Act. To this Court’s mind, reasonable belief means a belief that would be held by an ordinary and prudent person 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.
20. In this regard, therefore, KRA was under a duty to satisfy the Court that the twin conditions set out in section 43(1) of the Act had been met. 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.
21. On the first condition, KRA clarified that the investigations revealed that despite the Interested Party having taxable income and/or deposits of Kshs. 157,541,278/= for the tax period 2016 to 2020, it only declared a gross turnover of Kshs. 29,828,311/= for the entire period. According to KRA, that was a gross under declaration of income which resulted in a total tax liability of Kshs. 65,106,526/= on account of corporation tax, VAT and Withholding tax. It submitted that the findings were communicated to the interested party vide KRA’s letter of 8/12/2021.
22. In KRA’s view therefore, it is manifestly clear that the interested party derived income for which tax has not been charged and therefore the Commissioner rightfully invoked Section 43 of the Act. Mr. Ado, learned counsel for KRA has urged that the monies be preserved to facilitate efficient and effective collection of taxes.
23. On the part of the interested party, Learned Counsel Mr. Gikandi submitted that no basis exists for making the orders prayed for under section 43 of the Act. He holds the view that the correct procedure would have been to invoke the provisions of sections 49 to 54 of the Act relating to assessment of taxes.
24. In my view, the Commissioner had a basis for reasonably believing that there was tax due and unremitted by the interested party. That belief arose out of the investigations that had been undertaken. The first condition has therefore been met.
25. Further, I hold the view there is no requirement under section 43 of the Act that an assessment of tax be undertaken before reasonable belief can be inferred that there is tax due from a tax payer. Where the Tax Authority has conducted thorough investigations which reveal that there is tax due, that will be sufficient for purposes of the first condition in section 43(1) of the Act.
26. On the second condition, KRA reiterated that the gross under declaration of taxes and the colossal amount of revenue and taxes involved creates a reasonable belief that the Interested Party is likely to



frustrate recovery of tax. It is KRA's view therefore, that it is in the wider public interest that the assessment of the taxes and recovery thereof must be secured. Mr. Ado fortified these submissions by arguing that the monies must be preserved in view of the need for efficient and effective collection of taxes.

27. Mr. Gikandi on the other hand submitted that KRA has not established a basis for such belief since the interested party fully cooperated with it. Counsel urged that the tax payer should not be made to suffer through arbitrary freezing of its account. That the Interested Party is being punished for resisting government's attempts to change how tea is to be dealt with.
28. The record shows that since serving the interested party with the investigation notice of 2/9/2021, there was correspondence between the parties that culminated in KRA's findings of 8/12/2021. In that letter, KRA wrote: -

“If you wish to engage the Commissioner in resolving the above issues, kindly respond to the above findings and make payment of the uncontested taxes or provide a settlement plan within 14 days from the date of receipt of this letter, failure to which the taxes will be assessed”.

29. The interested party claims to have duly responded to that letter but there is nothing on record to prove that effect. It was imperative for the interested party to show that not only did it respond to the issues raised but that the Notice of 29/12/2021 was irrational and unwarranted in the circumstances.
30. This court has to consider the likely peril that may be suffered in the event that KRA is ultimately found to be right. The tax alleged to be due is hefty. The interested party is also a running corporation. Weighing the interests of both parties and in the scales of justice, I grant the alternative prayer. Let security amounting to Kshs. 20 million be given to KRA for the discharge of the interim orders in force.
31. Each party to bear own costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**A. MABEYA, FCI Arb**

**JUDGE**

