

REPUBLIC OF KENYA
HIGH COURT OF KENYA AT NAIROBI
PETITION NO 87 OF 2012

KENYA DATA NETWORK LIMITED.....PETITIONER

VERSUS

THE KENYA REVEUE AUTHORITY..... RESPONDENT

RULING

Introduction

1. In my judgment in this matter dated 28th January 2013, I declined to issue certain orders sought by the petitioner, Kenya Data Networks Limited, as this would have the effect of interfering with the respondent's lawful exercise of its statutory authority. I also made a finding that the respondent was within the law in demanding the amounts paid to the petitioner erroneously as VAT refunds, that it is also entitled to demand tax that is in arrears, and that the petitioner is liable for the acts of its agent, Bax Logistics.
2. I, however, found in favour of the petitioner with regard to payment of VAT refunds and issued the following declarations and orders:

i. A declaration that the petitioner's fundamental rights to fair and expeditious administrative action under Article 47 has been violated by the respondent.

ii. An order of Mandamus directed to the respondent compelling it to expeditiously and in any case within a period of not more than sixty (60) days from the date of this judgment to consider, process and pay out in accordance with the law all outstanding VAT refund claims by the petitioner.

3. The petitioner was dissatisfied with the first limb of my judgment with regard to the authority of the respondent to demand tax arrears and the amounts erroneously paid as refunds to it. It indicates that it has lodged a notice of appeal on this aspect of the said decision. In addition, the petitioner filed an application by way of Notice of Motion dated 11th February 2013 in which it sought the following orders:

- 1. This application be certified urgent and be heard ex-parte in the first instance.***
- 2. Pending the hearing and determination of this application, an order of injunction do issue restraining the respondent whether by itself, its officers, employees and/or agents, from commencing, instituting or proceeding with any enforcement or prosecution actions against the applicant or its directors and/or officers in relation to or on account of the disputed taxes in the sum of Kshs283,257,024/- and Ksh112.483,506/- and the interest and penalties claimed thereon.***
- 3. Pending the hearing and determination of the intended appeal against the judgment or 28th***

January 2013, an order of injunction do issue restraining the respondent whether by itself, its officers, employees and/ or agents, from commencing, instituting or proceeding with any enforcement or prosecution actions against the Applicant or its directors and/or officers in relation to or on account of the disputed taxes in the sum of Kshs283,257,024/- and Kshs112,483,506/ and the interest and penalties claimed thereon.

- 4. There be a stay of the decision contained in the Respondent's letter dated 27th February 2012 and/or any enforcement relating to the demands contained therein pending the hearing and determination of this application. In particular and for the avoidance of doubt the Respondent and the Investigation and Enforcement department or any other department of the Respondent be stopped from taking any steps including issuance of agency notices or commencement if any proceedings against the Petitioner and/or its directors and officers with a view to collecting any moneys on account of the disputed taxes pending the hearing and determination of this application.*
- 5. There be a stay of the decision contained in the Respondent's letter dated 27th February 2012 and/or any enforcement relating to the demands contained therein pending the hearing and determination of the intended appeal against the judgment of 28th January 2013.*

6. Any further order or relief that this court deems fit to make to meet the ends of justice.

7. In the alternative, the judgment of 28th January 2013 be varied, set aside or be substituted with an order that there be a set off as between the VAT refunds claims by applicant and taxes due from it to KRA

8. Costs of this application be provided for

4. The petitioner was, however, satisfied with the orders issued against the respondents with regard to the processing and payment to it of the VAT refunds within 60 days from the date of the judgment. Consequently, upon the expiry of the 60 day period, the petitioner sought, in its application dated 24th April 2013, leave to institute contempt proceedings against the respondent. It thereafter filed an application by way of Originating Notice of Motion dated 29th April 2013 in which it sought to commit the Commissioner General of the respondent to prison for contempt of court. The said application sought the following orders:

1. The commissioner General of the Kenya Revenue Authority be committed to prison for contempt of court for refusing to comply with the orders of 28th January 2013.

2. All necessary and consequential orders be given.

3. The costs of and occasioned by this application be paid by the Kenya Revenue Authority.

5. When the application dated 11th February 2013 came up before Odunga, J on 12th February 2013, he granted orders in terms of prayers 2 and 4 thereof. On 27th February 2013, by consent of the parties, the interim orders were extended till the hearing and determination of the application. Both the application for an injunction pending appeal and the application seeking to commit the Commissioner General of the respondent for contempt of court were canvassed before me on 29th July 2013.

Application for an Injunction Pending Appeal

6. In the application dated 11th February 2013 and supported by the affidavit of **Mr. Shahab Meski** sworn on the same date, the petitioner seeks injunctive orders restraining the respondent from proceeding with any enforcement action against it pending the hearing of its intended appeal against the judgment of the court made on 28th January 2013 to the extent that it found that the petitioner was liable for the acts of its agent, Bax Logistics, and permitted the respondent to demand tax in arrears of Kshs 283,257,024 from the petitioner as a result of the acts of the said agent; and also to recover the sum of Kshs112,483,506, erroneously refunded to the petitioner by the respondent.

7. The petitioner's application is based on several grounds set out in the said application and expounded upon in the affidavit in support and its written submissions. It contended that it had exercised its right of appeal and the Court should as far as possible make orders that preserve the appeal so that the appeal is not made an academic exercise. Mr. Kiragu Kimani submitted that the respondent had been found to have breached the constitutional rights of the applicant and had not, six months after the judgment, complied with the order of the court. It had therefore shown that it was going to collect any money or retain any money shown to be due and payable to the applicant, including money the subject matter of the judgment of 28th January 2013. Mr. Kimani pointed out in this regard, in reference to the affidavit of Ms. Irene Kaibe filed on 29th April 2013, that the respondent had admitted that it retained certain monies in February and May 2013.
8. According to the applicant, because of the retention of the money by the respondent, its business had almost been destroyed; yet, because of the nature of its business, it would always be in credit with the respondent as it will always have money held by the respondent. Mr. Kimani submitted therefore that there was no risk, should its appeal be unsuccessful, that the respondent will not be able to recover the monies due from the applicant, and there was therefore a just and proper case for stopping any enforcement of the order for the tax arrears or the over-payment of refunds. Mr. Kimani relied in support on, among other authorities, the decision of the

Court of Appeal in **Madhupaper International –vs-Kerr (1985)KLR 840** and **Erinford Properties Limited-vs Cheshire County Council (1974) 2 All ER 443**.

9. The applicant also sought a stay of execution in reliance on the decision of the court in **Ujagar Singh –vs- Runda Coffee Estates (1966) EA 263**. It submitted that it was willing to grant security as it had already furnished a bank guarantee which was due to expire on 12th of April 2013, and that it was willing to extend the said guarantee.
10. To the respondent's argument, in reliance on the provisions of section 16 of the Government Proceedings Act, that the Court cannot issue an injunction against the respondent as the provisions of the Act had been extended to it, the applicant took the view that Article 159 2(d) enjoins the court not to be bound by technicalities. Consequently, the court had power to issue an injunction and order of stay; that further, under Article 23(3)(b), the Constitution confers on the Court jurisdiction to issue an injunction where the action is brought under Article 22 for enforcement of the Bill of Rights.
11. With regard to the respondent's contention that the Court could not issue an injunction under the Civil Procedure Act to stop the operation of a statute, the applicant took the view that the Court was not being asked to stop the operation of any statutory provision but to preserve the applicant's right of appeal by suspending any

attempts to collect disputed taxes.

The Response

12. In response to the application for injunctive orders and stay of execution, the respondent has filed an affidavit sworn by Mr. **Sylvester Okello Ogello**, a Senior Assistant Commissioner in the Investigation and Enforcement Department of KRA, on 26th February 2013. In the said affidavit, the respondent reiterates its arguments with regard to the tax demand and the erroneous VAT refunds and therefore contends that the petitioner's intended appeal does not have reasonable prospects of success; and further, that the petitioner cannot demonstrate that it has a prima facie case with a probability of success to warrant an injunction.
13. The respondent submits that it is not in the habit of disobeying court orders and contends that the petitioner wants to "have their cake and eat it" by injunctioning the respondent from collecting a refund erroneously paid on the basis of presentation by the petitioner of forged documents and obtaining VAT refunds; that what the applicant is seeking is a reversal of the judgment of the Court of 28th January 2013, a function and jurisdiction of the Court of Appeal; that orders of injunction are interim orders granted by the Court to preserve a status quo pending the hearing and determination of a matter and as the matter had been heard and a finding made, for the court to issue an injunction would be for it to sit on appeal. To the

respondent, the Court is now *functus officio* as it has already made a final determination in the matter.

14. Counsel for the respondent, Ms Lavuna, pointed out that in the application for an injunction and stay of execution, the petitioner had offered to set off the amount due from it against the amount due from the respondent as an alternative to the injunction. She submitted that the respondent was willing to accept a set-off as it is expeditious and makes more business sense; and that there was no need for the petitioner to furnish security as it had undertaken to do as this can be met by the set-off.
15. Ms. Lavuna also took the position that an injunction could not issue against the respondent as it falls under section 16 of the Government Proceedings Act; that the making of refunds to tax payers as it had been directed to do was a statutory function; and that the respondent would be able to process the refund so long as the petitioner was co-operating with the process. She relied on the decision of the Court in **Nyaga -vs- Housing Finance Co. Ltd of Kenya C.A No 134 of 1987** in which the Court held that

"it is correct in law where a party has a statutory right of action, the court will not usually prevent that right being exercised."

16. The respondent asked the Court to consider the balance of convenience and not to exercise discretion to grant either a stay or an injunction as it was in the interests of the applicant if a set-off is ordered as taxes due attract penalties which would be against the petitioner's interests; that the petitioner's appeal would not be rendered nugatory if a stay or injunction was not granted as the parties are in a constant relationship and the respondent would have no problem repaying the money paid to it by the petitioner should its appeal succeed.

Application to Commit for Contempt

17. In its second application dated 29th April 2013, the applicant sought orders to punish the Commissioner General of the respondent for the failure by the respondent to comply with the Court's orders issued on 28th January 2013. Mr. Kimani submitted that every forum to which a court order is directed is obliged to obey the Court order and he relied on the decision in the English case of **Hadkinson –vs- Hadkinson (1952) 2 All ER 567** and the decisions of the High Court in **Wildlife Lodges Ltd –vs- County Council of Narok (2005) 2 EA** and **Gatimu Farmers Compnay-vs-Geoffrey Kagiri Kimari 2005 eKLR**. He also relied on the **Supreme Court Practice 1999, para 52/1/7 and 52/1/12-13** with regard to situations where a judgment has directed payment of money within a specified time.

18. Mr. Kimani submitted further that service of the order, which was made on 28th January 2013 in the presence of Counsel for the respondent and served together with a Penal Notice on 12th March 2013, was not disputed; that the respondent has admitted that it has not complied with the judgment of the Court which had a timeline of 60 days within which to consider, process and pay out the VAT refunds; that the period ended on 28th March 2013; that the respondent had admitted payment of some Kshs 84.3 million in May 2013; disallowed certain sums and paid itself Ksh299m; that the order was for payment of funds, not for set-off; that there was no application made for review of the judgment to allow for a set off or stay of the judgment; and neither was an appeal filed against the said decision.
19. Mr. Kimani discounted the explanation given by the respondent for its conduct to the effect that there was a delay by the petitioner in submitting documents. He contended that the applicant had not failed to provide documents as alleged as the claims for refund were as old as four years; that if there was a problem with documentation, this could have been raised earlier.
20. The applicant asked the court, in reliance on **Halsbury's Laws of England, Vol 9, Paragraph 52**, to find that to neglect to do what has been directed by a judgment or order of the Court within the time specified is contempt and to either make an order of committal

or fine the contemnor. Mr. Kimani urged the Court, should it agree with the applicant, to direct that the sum of Kshs 299 million which the respondent had withheld be paid to the petitioner.

21. In her response, Ms. Lavuna attacked the application for contempt on four main grounds. She contended that it was necessary for the alleged contemnor to be served in person, which she submitted had not been done in this case; that if the alleged contemnor was not served, he cannot be accused of disobeying the court order. She submitted, further, that the Attorney General should have notice of the contempt proceedings but the petitioner had not shown that the Attorney General was served yet the KRA Act at section 53A states that proceedings against it are proceedings against the government.
22. Ms. Lavuna contended that as late as the week preceding the hearing of the petitioner's applications, the parties were still working on the processing of the petitioner's claim. She referred in this regard to the affidavits sworn by Ms. Irene Kaibe on 30th May 2013 and 29th July 2013 and asserted that the respondent had finalized the processing of the applicant's claim, and what had emerged is that the applicant owes more than is due to it in respect of the VAT claim.
23. Ms. Lavuna submitted further that as was evident in the affidavit sworn by Ms. Irene Kaibe on 30th May 2013, certain refunds demanded by the applicant had no supporting documents; that the

samples requested for by the respondent had only been supplied by the applicant on 3rd May 2013; that the respondent had not been able to complete the process in 60 days as the respondent could not carry out the processing of the VAT refund alone; that it was the petitioner which had caused the delay in processing as it had not provided the documents requested for in time; that the delay in processing the refunds as ordered was caused by the fact that the respondent was indulging the applicant as it did not want to disallow the entire amount claimed; that the applicant had admitted in the affidavit of Shahab Merski that certain documents requested for by the respondent had not been produced; and that the delay that took the matter past the time required in the judgment was thus caused by the petitioner.

24. Ms. Lavuna argued that contempt proceedings are of a very serious nature and would cause great embarrassment; that the respondent has taken the matter very seriously and would not wish to suffer the embarrassment and that it has tried to comply with the 60 days' period but has been unable to due to the petitioner's delay.
25. Like the applicant, the respondent relied on the provisions of the Supreme Court Practice, para 52/1/13, for the proposition that the petitioner must establish wilful, deliberate disobedience. Ms. Lavuna submitted that there had been no wilful desire by the respondent not to comply with the orders of the court, and the delay in complying with the orders of the court was caused by the delay on the part of

the applicant to supply the documents required by the respondent.

26. In his reply to the respondent's submissions, Mr. Kimani argued that even if there had not been wilful refusal to obey the Court order, there had been, as demonstrated in the affidavit of Irene Kaibe, at least negligence in obeying. He contended that the respondent had paid itself Ksh299 million and was asserting that it is at liberty to issue agency notices upon receipt of approval from the Commissioner; and that internal document such as an agency notice from one department to another could not overturn an order of the Court.
27. With regard to the respondent's contention that the applicant had delayed the processing of the refund claim, Mr. Kimani submitted that even where the processing had been done, the respondent elected to pay itself first, and no application was made to extend the period of 60 days.
28. On the respondent's arguments with regard to the process for filing an application for contempt and service on the alleged contemnor, it was the applicant's case that section 5 of the Judicature Act required that the procedure to be followed was the same as in England; that the Court has inherent power to punish for contempt; that the mischief aimed at by the requirement for personal service is to bring to the attention of the person the existence of the order and give them an opportunity to obey or purge the contempt; that the

respondent was aware of the order and it was again served on 12th March 2013; and no affidavit was filed by the person sought to be punished for contempt offering an explanation for non-compliance.

Determination

29. While the two applications before me seek very disparate orders and relate to different amounts, I believe, even from the submissions of the parties that they are inextricably intertwined and I will therefore deal with them as one.
30. The first observation that I must make with regard to the applications is that the petitioner/applicant, as an entity carrying on business in Kenya, and the respondent, the state entity charged with the responsibility of collecting taxes in Kenya, are in an on-going relationship, a fact that both the applicant and the respondent concede in their respective submissions: the argument by the petitioner is that it will always be in credit with the respondent as it will always have money held by the respondent, and there is therefore no risk of its being unable to repay the amount due as tax arrears or erroneous tax refunds should its appeal not be successful.
31. That being the case, it seems to me that the petitioner has provided an answer to its own arguments with regard to the application for an injunction or stay of execution in so far as the judgment of the Court allows the respondent to collect the tax arrears and erroneous

refunds. While it is true that the petitioner may well be able to repay the arrears and refunds should its appeal fail, conversely, there is no reason to suppose that the respondent will be unable to pay back the arrears and refunds should the petitioner's appeal succeed. Bearing in mind that the collection of taxes by the respondent is critical to the running of the state and provision of services to citizens, I am not inclined to accept the argument by the petitioner that I should stay execution of the demand for the tax arrears or grant an injunction with regard thereto. The best I can do, as the petitioner has prayed in its application, is direct that there be a set-off of the total amount due from it to the respondent against any monies found to be due to the applicant from the respondent. Should its appeal against my decision be successful, I have no reason to believe that the respondent will be unable to pay to it such amount as the Court of Appeal may find due and payable.

32. In its second application, the petitioner seeks orders to commit the Commissioner General of the respondent to jail for contempt of Court, and has relied on various authorities in support of its contentions. On its part, the respondent argues that as there has been no personal service of the order on the Commissioner General, and the Attorney General has not been served with the application, the alleged contemnor cannot be found liable in contempt.

33. I believe that we can no longer hide behind the technicalities related to personal service of Court orders so as to escape liability where there has been disobedience. See in this regard the decision of the court in **R -vs- The Minister Ministry of Medical Services and Another High Court Misc. Civil Appl. No. JR 316 of 2010; Gatimu Farmers Company -vs- Geoffrey Kagiri Kimari & Others Nakuru High Court Civil Suit No. 245 of 2001 and Mitubell Welfare Association -vs- Attorney General High Court Petition No. 164 of 2011**. Nor can the fact that committal of the Commissioner General of the respondent for contempt would be embarrassing be a factor for consideration by the Court in determining whether or not to commit for contempt.

34. As rightly argued by the petitioner in reliance on the Supreme Court Practice, Paragraph 53/1/11, disobedience of a court order for payment of money within a specified period of time is contempt of Court. However, as the Supreme Court Practice notes at paragraph 52/1/13,

'Casual or unintentional disobedience to an order will not usually justify an order of committal; it must be contumacious.....Thus, an applicant who seeks to commit a person for breach of an injunction must establish a deliberate or wilful breach of a Court order beyond reasonable doubt'.

35. In the case before me, has there been wilful, deliberate and contumacious disobedience of the orders of the Court, which the petitioner has established *'beyond reasonable doubt'*? In determining this issue, I must take into consideration the facts that have led to non-compliance with the orders of the Court. It has been averred by the respondent, and this has not been disputed by the petitioner, that the parties have been engaged in working out the amount of refunds due to the petitioner, and the petitioner did not provide some of the documents required by the respondent until 3rd May 2013. I have also noted the correspondence between the petitioner's officers and officers of the respondent with regard to the VAT refunds, and that meetings have been held between the petitioner and the respondent with regard to the refunds. Further, from the averments by the respondent which are again not disputed, it appears that the petitioner may owe the respondent more than is due to it in the form of refunds.

36. The orders of this court were for the respondent ***'expeditiously and in any case within a period of not more than sixty (60) days from the date of this judgment to consider, process and pay out in accordance with the law all outstanding VAT refund claims by the petitioner'***. In a situation where the parties are engaged in working out the outstanding VAT claims by the petitioner, and in which the petitioner had not supplied such documents as were required to enable the respondent process the VAT refund claim, it

would be unjust to then turn around and allege contempt of the orders of the court where the applicant has itself been partially responsible for the failure by the respondent to comply with the orders of the court.

37. That being the case, I am unable to find a deliberate and wilful disobedience of the Court's orders by the respondent, and in the circumstances, both applications are hereby dismissed with costs to the respondent.
38. I am grateful to the parties for their extensive submissions and authorities in support of their respective cases. If I did not make reference to them in this ruling, it is not because they were not useful to the Court.

Dated Delivered and Signed at Nairobi this 24th day of September 2013



MUMBI NGUGI

JUDGE

Mr. Kiragu Kimani instructed by the firm of Hamilton, Harrison & Mathews Advocates for the Petitioner

Ms. J.K Lavuna instructed by the Respondent