

IN THE HIGH COURT OF KIRIBATI 2019

CIVIL CASE NO. 10 OF 2019

	[NICHOLAS JONG T/A I-MART	APPLICANT
	[
BETWEEN	[AND	
	[
	[ATTORNEY-GENERAL IN RESPECT OF	
	[INTERNAL REVENUE BOARD	RESPONDENT

Before: The Hon Chief Justice Sir John Muria

22 November 2019

Ms Kiata Kabure for Applicant

Ms Tumai Timeon for Respondent

JUDGMENT

Muria, CJ: By his Originating Summons dated 6 May 2019 and filed herein, the applicant, Nicholas Jong T/A I-MART, seeks the following orders:

1. A declaration declaring that the Respondent has unlawfully issued Garnishee Order against the Applicant without justifying the amount being owed before the competent Court;
2. That the Garnishee Order is legal mechanism to enforce judgment;
3. General Damages;

4. Such further order or orders as this Honourable Court thinks fit.

2. The Originating Summons is supported by the affidavit evidence of the applicant sworn to on 14 February 2019 and filed with the Originating Summons. Both the Originating Summons and the affidavit in support were served on the respondent.

3. The respondent entered an Appearance to the Originating Summons and filed affidavit in response to the applicant's affidavit. The respondent's affidavit in response was served on the applicant.

Brief background

4. The dispute between the parties arose out of a claim by the respondent that the applicant has owed the Government Income Tax in the sum of \$624,666.41 for the years 2012 to 2017. A number of correspondence exchanges took place between the applicant and respondent on the matter.

5. On 1 June 2018, the respondent sent a letter of demand to the applicant for provisional tax to be paid by the applicant. The applicant replied on 8 June 2018 seeking reassessment of his 2018 provisional tax bill on the basis that the amounts claimed to be due was beyond the applicant's means as well as not reflecting the applicant's current financial position.

6. Further letters were sent by the applicant to the respondent on 21 December 2018 and 31 January 2019 according to the affidavit of the applicant. However on 25 January 2019, the respondent sent their Tax Arrears Reassessment to the applicant, showing that the applicant owed the respondent Income Tax in the sum of \$624,666.41.

7. On the same date 25 January 2019, the respondent issued a "Garnishee Notice" on the Accountant General in respect of the applicant. The Notice advised the Accountant General to "**withhold and pay to the Internal Revenue Board any payment due**" to the applicant's business until the total outstanding tax arrears, including penalties and interests, are fully settled. The Garnishee Notice was effective immediately and was said to have been issued under section 114 of the *Income Tax Act 1990*.

Garnishee Notice

8. As the legality of the Garnishee Notice is the main issue in this application, I set out the Notice here which states:

"TO: Accountant General
FROM: Commissioner of Taxes
FILE REF: TIN 1000883
DATE: 25/01/2019

RE: Garnishee Notice for I-Mart

1. Pursuant to Section 114 of the Income Tax Act 1990, you are hereby advised to withhold and pay to the Internal Revenue Board any payment due to the above mentioned business.
2. This notice is effective as of today's date (25/01/2019) until total outstanding tax arrears (including penalties/interests) of the business is fully settled. You would be advised by the Board to cease the withholding of these payments.
3. For more information, please call the tax office on extension 209 or 210.

E rarabwa.

(Sgd) Iaokiri Koreaua
Commissioner of Taxes
For Internal Revenue Board

Cc: *Managing Director at I-Mart*

9. It would also be helpful that I set out here section 114(1) of the Act which states as follows:

"114(1) Any –

- (a) agent, trustee, attorney, factor, receiver, liquidator, partner or manager who has the receipt, control or disposal of any money belonging to a person deriving or having derived chargeable income; or**
- (b) bank or any other financial institution, or any other person owing any money to a person deriving or having derived chargeable income,**

on receipt of notice in writing from the Board, shall, to the extent specified in the notice, pay to the Board any money held on behalf of or owing to the person deriving or having derived chargeable income in respect of tax due and owing by that person". (Underlining added).

10. It will be observed that section 114 empowers the Inland Revenue Board to issue a Notice to any person or bank or any other financial institutions to pay to the Board any money held on behalf of or owing to a tax debtor. This is what is sometimes called a "**Garnishee Notice**" which is a legal means incorporated into the tax administration to enforce payment of taxes owed by a tax debtor. It is not a Garnishee Order which is issued by the Court, but a Notice issued under the hands of the Commissioner of Tax on behalf of the Revenue Board. In the present case, the Internal Revenue Board issued a Garnishee Notice to the Accountant General to "**withhold and to pay to the Inland Revenue Board any payment or money due to the applicant**".

11. Section 114 of the *Income Tax Act* empowers the Board, instead of going to Court, to issue Garnishee Notice and have it served on a third party who holds, controls or has custody or disposal of any money belonging to a person deriving or having derived chargeable income (tax payer). In this regard, the Notice issued

by the Commissioner of Taxes on 25 January 2019 to the Accountant General was a "Garnishee Notice" or more properly called a **Garnishment Notice** and not a Garnishee Order as complained of by the applicant. The only issue is whether the Garnishee Notice was lawfully issued. However, before I deal with that issue, there is something that I need to address first in this judgment.

Omission by Counsel

12. Both Counsel for the applicant and the respondent have made section 114 of the *Income Tax Act 1990* fallen into oblivion. Yet it is that section 114 which propelled the applicant to drag the respondent and the Court to be present here in this Court Chamber in this case. Section 114 of the *Income Tax Act 1990* was the very basis of the respondent's action in issuing the Garnishee Notice and the applicant's complaint.

13. In their respective affidavit evidence, both the Commissioner of Tax and the applicant referred to section 114 of the *Income Tax Act*. The Commissioner of Tax confirmed that the Garnishee Notice he signed was made under section 114 and the applicant confirmed receiving that Garnishee Notice from the respondent, although the applicant called it a "**Garnishee Order**". The evidence and legal issues, the subject of contention in the case are clearly centred on section 114 of the *Income Tax Act 1990* and Garnishee Notice issued under it.

14. Now turning to the written submissions by both Counsel for the applicant and respondent, there is absolutely no reference made in both submissions of section 114 of the *Income Tax Act 1990*. No explanation can be gleaned from the submissions for the omissions. In any case, neither Counsel can convincingly say that the provision slipped from their minds. In the present case in particular, there can be no acceptable explanation for failing to address the very legal

provision that both Counsel know had kick-started the dispute between their clients.

15. Instead of addressing section 114 of the *Income Tax Act 1990*, both Counsel dwelled on sections 30, 35 and 36 of the *Revenue Administration Act 2013*, and section 100 of the *Income Tax Act 1990*. There is no evidence at all in this case that sections 30, 35 and 36 of the *Revenue Administration Act 2013* or section 100 of the *Income Tax Act* were in issue nor is there any evidence that the Garnishee Notice dated 25 January 2019 the subject of complaint in this case, was issued pursuant to those provisions. There can be no argument in this case that sections 30, 35 and 36 of the *Revenue Administration Act* and section 100 of the *Income Tax Act 1990* confer powers on the Revenue Board to take the necessary actions to ensure that a person who derives or has derived chargeable income pays taxes that are due and owing by that person. That has never been an issue in this case. The only issue is whether, in the circumstances of the present case, the Garnishee Notice issued under section 114 of the *Income Tax Act 1990* was lawfully made.

16. The neglect by Counsel to address section 114 of the *Income Tax Act* is not only an omission, but it is also a failure by Counsel in their duty of candour to the Court. Under this duty, a lawyer ought not to employ strategies that would lead to misleading the Court on the evidence and legal issues which the Court is required to determine.

17. This neglect by Counsel is a serious omission which can have adverse consequences on the case and the parties to it. I think it is unfair to both parties, that their cases should be presented in such manner. The neglect is not by the parties, but by their respective Counsel. The parties have put their cases to the Court, supported by their respective affidavit evidence, with legitimate expectations that they should be placed before the Court and for the Court to

determine them justly. However, despite Counsel's omission, the Court will proceed to consider and determine the application now before the Court.

Whether Garnishee Notice lawfully issued

18. The power to issue Garnishee Notice, as I have already stated, is provided under section 114 of the *Income Tax Act 1990* and section 36(2) of the *Revenue Administration Act 2013*. The respondent does not need a Court order to issue the garnishment notice under section 114. That principle is also stated in *Eti -v- Inspector of Taxes* [1995] KIHC 3; HCC 14/95 (26 May 1995). However, before the power under section 114 can be exercised, there are certain pre-conditions that must be satisfied before the garnishment process issued by the respondent can be done lawfully. This is because having the power to do something is one thing and lawfully exercising it is another matter.

19. The first of these pre-conditions is that the tax payer (tax debtor) owes taxes and has not paid them. The language used in section 114 is "tax due and owing" by the taxpayer (the applicant in the present case). In this case, there is evidence that the Applicant owes some income taxes to the respondent. See Exhibits A, B and C attached to the affidavit of the Commissioner of Income Tax sworn-to on 5 June 2019. However, the actual amount of the tax "due and owing" is very much yet to be resolved.

20. Secondly, there is the difficulty in collecting the tax due and owing from the tax payer (the tax debtor) despite attempts have been made to have the tax debtor paid. The third-party notice can only be issued after attempts have been made and the Board is unable to obtain any payment from the tax debtor or the Board is unable to secure any satisfactory arrangement with the tax debtor for the payment of his taxes that are due and owing. The language used in section 36(1)(b) is "the Board has reasonable grounds to believe that the taxpayer will

not pay the tax by the due date". The Board will only have "reasonable grounds" to believe that the applicant in this case will not pay the tax due after attempts have been made and arrangements have been attempted to have the applicant pay but the Board was unable to get the applicant to pay the tax due.

21. Thirdly, as the process of garnishment is directed at a third party, the Commissioner must show that the third party holds, controls or has custody of the tax debtor's money. Not only that the third party holds, controls or has custody of tax debtor's money, but the Commissioner must establish also that the third party is liable to pay to the tax debtor his money and has an obligation to do so.

22. Garnishment is a common law process of enforcing tax payment. It is incorporated into Kiribati's tax administration and is given statutory force under section 114 of the *Income Tax Act 1990* and section 36 of the *Revenue Administration Act 2013*. The procedure to be followed in enforcing tax payment by way of garnishment remains in similar fashion as that obtained in "attachment of debts" procedure under the *Civil Procedure Rules* of the High Court in Kiribati. It is directed at a third party who has or holds money belonging to or owing to the debtor and that third party is liable or obliged to pay over such money to the debtor. Next, the creditor must show that despite attempts, he is unable or unlikely to get the debtor to pay the debt owing to the creditor and so resort has to be made by way of a garnishment process.

23. The principle described here, equally applies to garnishment process under section 114 of the *Income Tax Act*. Generally, garnishee action or process can only be resorted to after recovery attempts or payment arrangements have failed or repayment arrangement had been reached but the taxpayer has failed to abide by it. This necessary entails that after all the recovery attempts have failed, a reasonable notice must be given to the tax debtor that the Revenue

Board will exercise its power under section 114 of the *Income Tax Act*. That gives the tax debtor the opportunity to be heard before the Garnishment Notice is issued.

24. In the present case, the reality of what had happened was that the Commissioner of Tax, on behalf of the Revenue Board, instructed the Accountant General simply to withhold payments due to the applicant for services it provided to the Government. The Board relied on section 114 of the *Income Tax Act 1990* which empowers the Board to issue a garnishment notice or colloquially called "**Garnishee Notice**". The same power is also available to the Board under section 36 of the *Revenue Administration Act 2003*. But it must be said that this power, no doubt, is a very powerful tax collection tool given to the Board which must exercise it within reasonableness. That includes traversing the contours of requirements or pre-conditions for the application of the coercive tax enforcement measures such as a Garnishment process against a tax debtor. Having said that, I shall now turn to the factual evidence in this case, in order to ascertain if the issue of the Garnishee Notice in this case was lawful or not.

25. The applicant has not disputed the fact that he owes the respondent some income tax. The only dispute is as to the amount. As noted in the background facts set out at the beginning of this judgment, correspondence exchanges took place between the applicant and the respondent, over the quantum of Income Tax said to be outstanding and unpaid by the applicant.

26. It is not without significance that the Demand Letter dated 18 December 2018 sent by the respondent to the applicant and showing the total sum of \$742,770.10 as Tax arrears, gave the applicant the Ultimatum, "**You have till Wednesday (5 December 2018) to make payment or contact with this Office**". The respondent's letter is reproduced here as follows:

Tin: 100883

Date: 18/12/2018

Nicholas Jong
I-Mart
Bikenibeu

Dear Sir/Madam

Re: Final Demand Letter for Outstanding Tax Arrears

According to our records, you now have a total outstanding tax arrears of \$742,770.10 with breakdown appended hereunder:

Type of Tax	Amount
VAT	\$117,023.78
Income Tax	\$624,666.41
PAYE	\$579.91
PAYE Reconciliation	\$500.00
TOTAL	\$742,770.10

Please arrange payment of the above as soon as you receive this letter to avoid further running of interests and penalties.

Should you wish to clear it through instalments, our office would be happy to discuss a fitting payment plan with you in person.

It is important to note also that should you fail to comply with the above, this office shall be forced to look into other ways of recovering your tax debts and that one of them is through a *Garnishee action* (Sec 35 of the RAA 2013 refers).

You have till Wednesday (5/12/2018) to make payment or make contact with this office.

For further information required on this matter, please contact the undersigned during working hours.

Yours faithfully

(Sgd) Tinana Tekiaa
pp Commissioner of Taxes
for Internal Revenue Board"

27. Obviously, the ultimate date for payment preceded the date of the Demand Letter. Whether that was a deliberate or a mistake we do not know. However, it demonstrates the first pitfall in the process taken by the respondent in the garnishment procedure against the applicant in this case. It is inconceivable to make a demand for something to be done at a date that had already gone passed.

28. Apart from the Letter of Demand, and more importantly, are the pre-conditions to be satisfied before the garnishment process can be pursued. Those pre-conditions have been adverted to earlier in this judgment in paragraphs 20 to 23. Only after recovery attempts or payment arrangements have failed or repayment arrangements have been reached but the taxpayer has failed to abide by it, can the power under section 114 of the *Income Tax Act 1990* or section 36 of the *Revenue Administration Act 2013* be exercised and not before. This is consistent with the manner in which tax laws are to be interpreted and applied.

29. Taxing statutes must be construed strictly since there is no equity in tax. This principle was enunciated in *Cape Brandy syndicate -v- IRC* [1921] 1 KB 64; 12 Tax Case 358 where Rowlatt stated at page 71:

"..... in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used".

30. In the present case, as I have already stated, garnishment process is a very powerful tool available to the respondent to use against a taxpayer who defaulted in paying taxes. It is therefore incumbent on the respondent to strictly follow all the steps required to enforce the provisions of a tax law against a taxpayer, such as the applicant. That includes adhering to the requirements of a garnishment procedure to enforce tax payment.

31. In this case, all that had happened were the initial letter of demand made on 1 June 2018 for provisional tax to be paid followed by a series of exchanges of correspondence between the parties. The respondent sent a Re-assessment of the Tax Bill on 25 January 2019 with the re-assessed tax due in the sum of \$624,666.41. On the same date, the respondent issued the Garnishee Notice under section 114 of the *Income Tax Act*.

32. On any view of the evidence before the Court, other pre-conditions for the exercise of the power under section 114 have not yet been satisfied. The applicant, as indicated, did not dispute owing some tax to the respondent but the amount \$624,666.41 is disputed. There was still on-going exchanges of correspondences between the parties as shown by the letter from the applicant to the respondent on 4 February 2019 formally requesting re-assessment of tax following the applicant's disagreement with the tax arrears contained in the letter of 25 January 2019 and the garnishee notice. Thus the actual amount of the tax "**due and owing**" is yet to be settled.

33. The next step in the process is that after the issue of the actual amount of tax due and owing is resolved, the question of payment then arises. Payment can be either in lump sum or by agreement in instalments. Once the question of the amount of tax is resolved, demand for payment of the amount "**due and owing**" is not made or the arrangements for payment have been made and the tax debtor fails or unable to meet, then and only then, that the power under section 114 of the *Income Tax Act* can be exercised, to kick in the garnishment process. By then the Board (respondent) will have sufficient basis to determine if it has "**reasonable grounds**" to believe that the tax debtor (applicant) will not pay or is unable to pay the tax due. If Counsel dissect s.114, Counsel would have seen all the requirements needed before the power under s.114 can be exercised.

34. I need also to mention that the tax debtor has a right of appeal against an assessment of tax to the Board under section 101 of the *Income Tax Act*. There is also a further right of appeal to the Tax Tribunal under section 104. There is also a further right of appeal to the High Court against the Tribunal's decision under section 105 of the Act. No argument has been addressed as to the effect of section 114 on these appeals provisions. I shall therefore not deal with them. Suffice to say that the said provisions do show that tax enforcement is a complex matter and tax authorities have onerous obligations to meet when it comes to enforcement of tax against a subject. This is particularly so, since the liability imposed on a subject to pay tax, is for the purpose of raising general revenue of the State.

Conclusion

35. On the evidence before the Court, I find that the exercise by the respondent of his power under section 114 of the *Income Tax Act 1990* to issue a garnishment notice on 25 January 2019 to the Accountant General against the applicant's money held by the Accountant General was unreasonable and therefore unlawful. Any payment withheld by the Accountant General pursuant to the garnishment notice issued on 25 January 2019 are therefore not lawfully withheld. The applicant is still lawfully entitled to such payments and they must be paid over to the applicant immediately.

36. The applicant has also sought general damages in this case. The principles applicable to an award of general damages in cases of this nature involving economic losses, are firmly established by the Courts in Kiribati and are applicable in this case. General damages are applicable to compensate a party for inconvenience caused by the unlawful action of the defendant. See the cases of *Tebetanga -v- Betio Town Council* [2014] KHC 43; Civil Case 192/2010

(17 October 2014); *Koru –v- Tabiteuea Meang Island Council* [2020] KIH 30; Civil Case 53 of 2017 (20 October 2020); *Jong –v- Kiribati Ports Authority* [2020] KIH 33; Civil Case 107 of 2014 (24 October 2020). See also *Baraniko –v- Solar Energy Co.* [2014] KICA 2; Civil Appeal 3 of 2014 (13 August 2014).

37. Applying the principles set out in the cases decided by the Courts in Kiribati, I award general damages to the applicant in the sum of \$5,000.00 to be paid by the respondent.

38. The applicant is also entitled to costs to be paid by the respondent at a sum to be agreed or to be taxed if not agreed.

- ORDER:**
1. Application granted.
 2. Garnishment Notice issued by the respondent on 29 January 2019 is unreasonable and, therefore, unlawful.
 3. The applicant's money withheld by the Accountant General pursuant to the said Garnishment Notice shall be released to the applicant forthwith.
 4. The applicant is granted general damages in the sum of \$5,000.00.
 5. Costs to the applicant to be taxed if not agreed.

Dated the 11th day of December 2020



SIR JOHN MURIA
Chief Justice