



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI  
COMMERCIAL AND TAX DIVISION  
CIVIL CASE NO. E322 OF 2019

**ZHAKEEM INTERNATIONAL CONSTRUCTION LIMITED...PLAINTIFF/RESPONDENT**

**VERSUS**

**KENYA PIPELINE COMPANY.....DEFENDANT/RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....INTENDED INTERESTED PARTY**

**RULING**

**Introduction**

1. The application for determination is dated 4<sup>th</sup> September, 2020. The orders sought are that:

**a. That** interim conservatory orders be issued, *ex parte* at the first instance, to suspend the Agency Notices dated 25<sup>th</sup> August, 2020 and 3<sup>rd</sup> September, 2020 issued to the Defendant and the Defendant's Bankers, Standard Chartered Bank (K) Ltd by Kenya Revenue Authority on account of the tax due and payable by the Plaintiff in the sum of Kshs. 6,219,348,389/= and Kshs. 6,199,943,077/= respectively pending the hearing and determination of this application.

**b. That** interim conservatory orders be issued, *ex parte* at the first instance, to stay execution of the Warrant of Attachment of moveable property issued to Moran Auctioneers in execution of the decree dated 16<sup>th</sup> June, 2020, the attendant Proclamation Notices Nos. 5228, 5229, 5230, 5231, 5232, 5233, 5234, 5235, 5236, 5237 dated 2<sup>nd</sup> September, 2020 seeking payment of US\$ 44,019,024.64 and Kshs. 4,300/= and the Auctioneers fees and charges of Kshs. 186,537,421/= pending the hearing and determination of this application.

**c. That** the Honourable Court be pleased to make determination regarding the competing demands made against the Defendant arising from the sum awarded herein by the undernoted;

- i. The plaintiff who has commenced execution proceedings seeking payment of US\$ 44,019,024.64 (approximately Kshs. 4.4 billion).
- ii. Kenya Revenue Authority who has issued Agency Notices dated 25<sup>th</sup> August 2020 and 3<sup>rd</sup> September, 2020 seeking immediate payment of Kshs. 6,219,348,389/= and Kshs. 6,199,943,077/= respectively.
- iii. Court orders issued in **H.C.C.C. 292 of 2018, Ecobank Nigeria Limited & Another –vs- Zakhem International Construction Limited (Nigeria) & others** directing that any payment due to the Plaintiff arising from the contract which is the subject matter of this suit should be paid to Zakhem International Construction Nigeria Limited and Zakhem Construction Nigeria Limited.

**d. That** as the demands set out in (b) above are in respect of the sum awarded herein, the orders made by this Honourable Court be awarded herein, the orders made by this Honourable court be a discharge of any liability that may otherwise accrued upon the Defendant to any party adjudged as not entitled to the sum.

**e. That** the Honourable court do direct service of this application be effected upon Kenya Revenue Authority and Zakhem International Construction Nigeria Limited and Zakhem Construction Nigeria Limited being parties who will be affected by the

orders sought in this application.

**f. That** costs of this application be provided for.

2. The application is supported by the grounds on the face of it which I shall summarize hereunder by way of the background to the application. It is further supported by the affidavit of Flora Okoth, the Company Secretary of the Defendant Company sworn on 4<sup>th</sup> September, 2020. The crux of the same is an emphasis of the grounds on which the application is premised.

3. In brief the application arises from orders issued by Hon. G. Nzioka, J in a ruling delivered on 16<sup>th</sup> June, 2020. The Ruling was pursuant to an application filed by the Plaintiff on 20<sup>th</sup> January, 2020 which essentially sought summary judgment against the Defendant in the sums prayed for in the Plaintiff.

4. Under paragraph 63 of the afore stated Ruling, the Court found that the sum of USD 44,019,024.64 was undisputed and accordingly entered partial judgment for the Plaintiff in the said sum. Meanwhile, other claims were to be canvassed in the main suit as well as the interest accruing on the sum awarded.

5. Upon the entry of the judgment, Kenya Revenue Authority issued an Agency Notices dated 25<sup>th</sup> August, 2020 and 3<sup>rd</sup> September, 2020 on the Defendant and the Defendant's Bankers, Standard Chartered Bank for payment of taxes in the sums of Kshs. 6,219,348,389/= and Kshs. 6,199,943,077/= respectively owing from the Plaintiff which Agency Notices precipitated this application.

6. Subsequently, KRA wrote to the advocates for the Plaintiff and the Defendant Company on 8<sup>th</sup> October, 2020 and 11<sup>th</sup> November, 2020 respectively demanding payment of Ksh.6,199,943,073/-, of which Ksh. 4,015,288,368.00 is the principal and the balance the interests and penalties.

7. In response to the application, the Defendant filed an Affidavit sworn by Ermanno Rabbiosi, its Chief Quantity Surveyor and Contract Manager on 13<sup>th</sup> November, 2020. I need not reiterate its contents because majorly, it comprises undisputed facts which I shall make reference to in the determination.

8. It suffices to mention that both the Plaintiff and the Defendant conceded to the participation of KRA in the application without a formal application, for purposes of ventilating the Authority's tax interest. Miss Mburugu represented the Authority.

### **Submissions**

9. According to learned Senior Counsel, Mr. Ngatia for the Applicant, the demand by KRA of Ksh. 6,199,943,078 is unreasonable because KRA ought only to have demanded an amount not in excess of the partial decree. Counsel applied an exchange rate of Ksh. 110/- which implies that the partial decretal sum would translate to approximately a sum of Ksh. 4.9 Billion and not the Ksh 6.1 Billion plus demanded by KRA.

10. Mr. Ngatia, SC also took issue with the proclamation process commenced by the Plaintiff on 22<sup>nd</sup> September, 2020 as it made a demand for the entire partial decretal sum. He added that Hon. Nzioka, J on 9<sup>th</sup> September, 2020 gave interim measures by ordering that the Defendant pays to KRA the admitted tax. That hence, a demand for a sum in excess of the decretal sum was unreasonable and unwarranted.

11. Counsel took issue with the letter dated 8<sup>th</sup> October, 2020 by KRA to the Plaintiff's counsel and copied to him demanding a tax liability of Ksh. 4 Billion (Ksh. 4,015,288,368.00) with any amount above this being interests and penalties. He also referred to the Plaintiff counsel's letter dated 3<sup>rd</sup> September, 2020 which made reference to the tax. Counsel underscored the fact that the dispute would be finalized if the principal sum is paid as parties had no dispute on it.

12. Counsel however lamented that by a letter dated 6<sup>th</sup> November, 2020, KRA demanded a tax of Ksh. 6.1 Billion whilst Ksh. 3 billion has already been paid. Respectively, counsel asked the court to adjudicate on what proportion of the partial decretal sum would go to the Plaintiff and KRA respectively. Flowing from this request, the court was urged to find that the demand by KRA is absurd as the Defendant cannot pay beyond the decretal sum. For this reason, Mr. Ngatia, SC prayed that the court directs that none of the parties take adverse action against the Defendant. He further urged for a determination on which party pays the costs of the application to the Defendant.

13. Miss Mburugu submitted that the Plaintiff owed KRA taxes of Ksh. 6,999,943,073/- of which 50% in the sum of Ksh. 3,099,971,539/- has already been paid. Further, of the balance of the unpaid tax, the principal sum is Ksh. 915,316,830/- and the balance is interests and penalties.

14. She conceded that the Plaintiff had applied for a waiver of interests and penalties but was quick to add that the same can only be considered by the National Treasury under the parent Ministry after the principal sum is paid. The waiver is however discretionary. For this reason, KRA had to make a demand of the payment of both the principal and the penalties and interests as per its letter dated 11<sup>th</sup> November, 2020.

15. Miss Mburugu added that KRA would not result to adverse action if the principal sum was paid as it awaits the directions on the waiver of penalties and interests. She added that the issue of payment of penalties and interests would only apply after the waiver is declined.

16. On costs, counsel submitted that KRA should not be dragged into it or condemned to pay as it has severally demanded the remittance of the taxes from the Defendant. That instead of complying with the demand, it filed the instant application which was unnecessary. She urged

that the Defendant be condemned to pay the costs.

17. Learned SC, Mr. Ahmed Nassir for the Plaintiff blamed the Defendant for dragging the matter into court. He underscored the fact there was no dispute that the undisputed tax was for the sum of Ksh. 4,041,288,368/ and that Ksh. 3,099,971,000/- had been settled. As such, the Plaintiff had consented to pay the balance of Ksh. 915,316,830/-. He submitted that KRA would exit the scene if the remaining principal sum is paid as the Plaintiff awaits the consideration of waiver of both the interests and penalties.

18. Counsel was emphatic that since the decretal sum was in USD, the Defendant ought to satisfy the decree in the same currency. Further, that the current exchange rate was Ksh. 115/- and not Ksh.110/- as alluded by Mr. Ngatia, SC. His view consequently was that the Principal sum of Ksh. 915,316,830/ be remitted to KRA and the balance to the Plaintiff. Counsel did not submit on costs.

19. In rejoinder, Mr. Ngatia, SC submitted that KRA had demonstrated a state of changing goals posts attested by varied demands; at some point for payment of both the principal and interests and penalties and at other point of only the principal. For this reason, he urged the court to absorb the Defendant entirely from liability as the only amount available was about Ksh. 4 Billion, premised on the partial decree.

20. As regards the currency in which disbursement should be made, he submitted that the legal tender in Kenya was in Kenya Shillings. As such, a conversion should be made at prevailing exchange rate.

21. Whilst insisting that the demand by KRA of Ksh. 6.1 Billion was unreasonable, he urged the court to adjudicate on how the sum of USD 44 Million should be apportioned.

### **Determination.**

22. The task of this court in my view is very simple; as rightly submitted is to first pronounce on the undisputed facts and figures. These are that principal tax owed by the Plaintiff to KRA is KSH. 4,015,288,368.00/. If the interests and penalties are added the total sum would be Ksh. 6,199,943,077/-. Of this amount Ksh. 3, 099,971,539/- as part of the Principal has been settled. A Principal balance of Ksh. 915,316,830/ remains undisbursed.

23. An Agency notice having been issued implies that the Defendant could not release the decretal sum until and after accruing taxes are settled. The fact is that the decretal sum is USD. 44,019,025/ (approximately Ksh. 4.4 Billion). It follows that the Defendant can only remit to KRA on behalf of the Plaintiff an amount only within what it is holding.

24. As rightly agreed by all parties, only the Principal sum for now, can be disbursed to KRA as the Plaintiff awaits the direction on its request for waver of interests and penalties by the National Treasury. If the waiver is declined, KRA can resort to lawful means to recover it. For this reason, the Defendant should forthwith release to KRA the principal balance in the sum of Ksh. 915,316,830/.

25. The court has been urged to determination the currency in which the money should be disbursed. I concur with Mr. Ahmed Nassir, SC that since the decree was in USD, prudence demands that any payments be made in the same currency. So far, the two main parties appear not to agree on the exchange rate. The court too, is not an expert with money markets. Hence, on this, my view is that if the parties cannot agree on the exchange rate at which tabulation should be done, the Defendant is at liberty to write to Central Bank for a confirmation of the prevailing exchange rate as at the time of disbursement. I add that, for ease of reference in this ruling, the court has made reference to figures in the currencies that parties have used.

26. As regards costs, the same follows the event. However, the court may vary this position depending on the circumstances of the case having regard that award of costs is discretionary. My candid view is that this is not a matter that ought to have dragged to court as parties have had a meeting of the mind on almost all issues. But at the same time, I agree with learned S. counsel, Mr. Ngatia that the court needed to intervene as regards the apportionment of the decretal sum if a disagreement arose. The court in this case has agreed almost on all issued canvassed. It has also pronounced how the Defendant shall disburse the decretal sum. This serves the interests of all parties. For this reason, I would not wish to condemn any party to costs.

27. In view of the foregoing observations, I am unable to find, as urged by the Defendant that the demand for Ksh 6.1 Billion is absurd. KRA is mandated to collect the taxes inclusive of interests and penalties unless otherwise the latter are waived. The Plaintiff has been accorded the window to request for the waiver. I cannot add more on this issue.

28. In sum, I give the following orders:

**a. That the Defendant within 10 days releases to KRA the principal balance in the sum of Ksh. 915,316,830/.**

**b. That the balance from Ksh. 4,041,288,368/- of about Ksh. 485,000,000/ (after deducting both Ksh. 3,099,971,539/- and Ksh. 915,316,830/ being principal tax) shall be released to the Plaintiff.**

**c. That if the waiver of interests and penalties is not granted then KRA shall be at liberty to demand the same.**

**d. That the disbursements of any monies shall be in US Dollars unless the parties otherwise agree. Parties are at liberty to confirm currency exchange rates from Central Bank if a dispute on the same arises.**

**e. Each party shall bear its own costs of the application.**

**DATED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF JANUARY, 2021**

**G.W.NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. Mr. Ngatia, SC for the Defendant/ Applicant.
2. Mr. Ahmed Nassir, SC for the Plaintiff/ Respondent.
3. Miss Mburugu Kenya Revenue Authority.