



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

MISC. CIVIL APPLICATION NO. E1215 OF 2020

BETWEEN

PEPCO KENYA LIMITED.....1ST APPLICANT

JAMES CHOMBA WAMWANGI..... 2ND APPLICANT

FRANCIS WAMBUGU MWANGI.....3RD APPLICANT

ZOLA EAST AFRICA LIMITED.....4TH APPLICANT

DANKI VENTURES LIMITED.....5TH APPLICANT

WARDA HOLDINGS LIMITED.....6TH APPLICANT

ABDISAMAT NOOR ABDI.....7TH APPLICANT

AND

KENYA REVENUE AUTHORITYRESPONDENT

AND

ZAKHEM INTERNATIONAL CONSTRUCTION LIMITED.....1ST INTERESTED PARTY

QUALITY INSPECTORS LIMITED2ND INTERESTED PARTY

RULING

Introduction and background

1. The Applicants have moved the court by the Notice of Motion dated 12th November 2020 seeking the following reliefs:

[1] THAT the sale of Motor Vehicle Registration Numbers KCC 950J, KCC 9510J, KCC 788W, ZE 9823, KCC 790W, ZF 65222, KCD 464K, KCD 463K, KCD 571S, ZF 3248, KCG 352P, KCC

784W, ZE 9827, KCC 794W, ZE 9824, KCC 785W, ZE 9828, KCC 787W, KCC 949J and ZE 9825 by way of private treaty sale be confirmed in favour of the Applicants herein.

[2] THAT the Honourable Court be pleased to declare the caveats placed by the Respondent as unlawful for lack of statutory underpinning.

[3] THAT a Mandatory Injunction do issue against Kenya Revenue Authority to remove the unlawful and or arbitrary caveats placed on Motor Vehicle Registration Numbers KCC 950J, KCC 9510J, KCC 788W, ZE 9823, KCC 790W, ZF 65222, KCD 464K, KCD 463K, KCD 571S, ZF 3248, KCG 352P, KCC 784W, ZE 9827, KCC 794W, ZE 9824, KCC 785W, ZE 9828, KCC 787W, KCC 949J and ZE 9825.

[4] THAT this Honourable Court be pleased to issue an order directing the Registrar of Motor Vehicle, Mombasa/Nairobi to transfer and issue the logbooks of Motor Vehicle Registration Numbers KCC 950J, KCC 9510J, KCC 788W, ZE 9823, KCC 790W, ZF 65222, KCD 464K, KCD 463K, KCD 571S, ZF 3248, KCG 352P, KCC 784W, ZE 9827, KCC 794W, ZE 9824, KCC 785W, ZE 9828, KCC 787W, KCC 949J and ZE 9825 to the purchasers being the Applicants herein.

[6] THAT the costs of this Application be provided for.

2. The application is supported by the Applicants' affidavits. The application is supported by the 2nd Interested Party ("Quality") through the replying affidavit of Peter Kinyua Muthendu, the proprietor of Kinyua Auctioneers ("the Auctioneer"), sworn on 2nd December 2020. The 1st Interested Party ("Zakhem") also supports the application through the affidavit of Ibrahim Anmous Admam, its Logistics Manager, sworn on 25th January 2021. The Respondent ("KRA") opposed the application by the replying affidavit of Victor Mino, an officer in its Debt Enforcement Department, sworn on 22nd January 2021.

3. The facts leading to the application are fairly straightforward and are not disputed. Zakhem and Quality were embroiled in a dispute that resulted in a decree in favour of Quality in **Milimani Miscellaneous Application No. E112 of 2018 Zakhem International Construction Limited and Quality Inspectors Limited**. The Auctioneer was instructed to execute the decree on behalf Quality. He placed advertisements in the Star Newspaper on 1st February 2020 and in the Daily Nation Newspaper on 1st and 8th February 2020 inviting bids for the sale of the suit motor vehicles. The Applicants submitted their bids. The auction did not proceed as Quality and Zakhem agreed to sale of the suit motor vehicles by private treaty. The Applicants and the Zakhem voluntarily executed sale agreements for the suit motor vehicles in order to partially settle the decree in favour of Quality. The Applicants paid the full consideration and took possession of the suit motor vehicles.

4. The Applicants now contend that after the sale but before the transfer of the suit motor vehicles, KRA arbitrarily and unprocedurally placed caveats over the suit motor vehicles without any lawful or justifiable cause and thus denying the Applicants' the right to have the motor vehicles registered in their names.

5. KRA states that Zakhem owed it substantial taxes to the tune of KES. 7,331,132,411.00 and in order to secure the taxes, KRA invoked **section 36** of the **Tax Procedure Act** ("the **TPA**"). In line with the aforesaid provision, KRA issued instructions, by letters dated 8th September 2020, to the National Transport and Safety Authority (NTSA) to place caveats to prevent transfer of ownership of the suit motor vehicles from Zakhem to the Applicants. According to KRA, the sale agreements dated 16th, 17th, 21st and 24th September 2020 and the sale agreement dated 6th October 2020 were executed after the caveats were placed on 8th September 2020 hence the caveats are valid. KRA states that it lifted the caveats in respect of KCC 787W, KCC 949J and ZE9825 since the sale agreements in respect thereof were executed before the caveat.

Applicants' Case

6. The Applicants case is that at the time of sale, there was no caveat or encumbrance impeding the sale and purchase but after the sale and before the transfer of the suit motor vehicles to them, KRA arbitrarily and unprocedurally placed caveats over the suit motor vehicles without any lawful or justifiable cause. They contend that KRA has not challenged the proceedings and/or the decree in **Miscellaneous Application No. E112 of 2018** and it therefore cannot interfere or frustrate the execution proceedings and consequent transfer of the suit motor vehicles to them.

1st Interested Party's Case

7. Zakhem contends that KRA placed the caveats arbitrarily and unprocedurally thus offending the dictates of fair administrative action and have no basis in law therefore unlawful. It submits that KRA ought to have notified it within a reasonable time of the intended adverse action against its proprietary interest and accorded it an opportunity to defend itself against such action. It asserts that no notice of adverse action nor opportunity to defend itself was availed by KRA and that in absence of a statutory underpinning conferring the right to place a caveat, KRA ought to have adhered to a lawful procedure that culminates to an order of the court conferring such a right to empower it to place a caveat.

2nd Interested Party's Case

8. Quality contends that there were no caveats or encumbrance placed on any of the suit motor vehicles during the proclamation, attachment and sale and that upon proclamation, Zakhem's interest in the suit motor vehicles ceased. It submits that the caveats placed by KRA are unenforceable as against the Applicants and that having sold off the suit motor vehicles to the Applicants in execution of a Decree of this Court, the same are not Zakhem's property but are now owned by the Applicants. It adds that the Applicants are innocent purchasers of the suit motor vehicles in execution of a Decree issued by the Court and should not therefore be punished for actions or omissions of 3rd Parties.

Respondent's Case

9. KRA submits that since Zakhem owes it KES 7,331,132,311.00 following an Alternative Dispute Resolution Agreement dated 22nd November 2019. It submits that where a tax liability has crystallized against a taxpayer and for some reason the taxpayer is unable to liquidate the tax liability, it can invoke and issue conservatory caveats to 3rd parties who hold any taxpayer's moveable property. In this instance, the KRA invoked **section 36** of the **TPA** and issued instructions to the NTSA to place caveats to prevent any transfer of ownership from Zakhem to third parties.

10. KRA states that the Applicants are not innocent purchasers as they ought to have exercised due diligence in dealing with the suit motor vehicles by conducting searches on the NTSA portal to determine not only the true ownership of the suit motor vehicles but also whether there were any registrable interests. KRA further states that since Zakhem was aware of the crystallized debt, it ought to have been forthcoming to its other creditors as to the actual status of the interests on the suit motor vehicles. KRA adds that the law is clear that a tax debt takes priority over any other interests and the Respondent can require security for taxes in a manner that the Commissioner may prescribe as stated in **Section 36** of the **TPA** as was done in this case.

Determination

11. There is no dispute that Zakhem has a substantial tax liability which KRA is entitled to collect. The issue in this case is not whether or not KRA has power to collect taxes but whether the procedure adopted in this case is lawful. This is not an idle issue as the cornerstone of the legal system is the rule of law which, under our Constitution, is cast as a national value in **Article 10(2)(a)**. Rule of law underpins the doctrine or principle of legality which means that every action by a public body must be underpinned by law. In **AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another [2006] ZACC 9**, the court expressed the following view:

[T]he doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised Public power can validly exercised only if it is clearly sourced in law.

12. Further in reference to the rule of law, the court in ***Samura Engineering Ltd and Others v Kenya Revenue Authority NRB Pet. No. 54 of 2011 [2012] eKLR***, the court observed that:

[77] By placing the values of rule of law, good governance, transparency and accountability at the centre of the Constitution, we must now embrace the culture of justification which requires that every official act must find its locus in the law and under pinning the Constitution.

13. In order to justify its actions, KRA invokes **section 36** of the **TPA** which states as follows:

36. Security for payment of taxes

The Commissioner may, for purposes of securing payment of any tax due require a person to furnish a security in such manner and in such amount as the Commissioner may prescribe.

14. A reading of the provision shows that it only requires the Commissioner to require a person to furnish security. I fail to find any nexus between **section 36** of the **TPA** and the instructions issued by KRA to NTSA. If the Commissioner sought security for payment of the taxes due and owing by Zakhem, nothing would have been easier and direct than for the Commissioner write to and demand such security in such manner and in such amount as it deemed fit. **Section 36** of the **TPA** does not empower the Commissioner to seek security from a third party or to direct a third party such as NTSA to provide the security on behalf of a defaulting taxpayer.

15. KRA has not established any legal basis upon which it can issue instructions to NTSA to place caveats on the suit motor vehicles without any reference to Zakhem. KRA's action is not only arbitrary but offends **Article 47** of the Constitution which requires administrative action to be lawful, reasonable and procedurally fair. **Part II, section 5** of the **Traffic Act**, requires the NTSA to keep a register of all vehicles and trailers registered in Kenya. Under **section 8** of the **Traffic Act**, "*The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.*" Where any action, which is prejudicial to the owner's proprietary interest is taken by either NTSA or any other public authority then the owner must at least be notified within a reasonable time of the adverse action (see ***Adasim Agencies Limited v Kenya Revenue Authority NRB Pet. No. 349 of 2012 [2013] eKLR***).

16. I therefore find that the caveats placed against the suit motor vehicles by KRA are not lawful as they are not based on any law or regulation, they therefore violate **Article 47** of the Constitution are therefore null and void and of no effect. That is not to say that KRA cannot recover the taxes due from Zakhem, it can only do so within the confines of the Constitution and the relevant tax laws.

Disposition

17. For the reasons I have set out I now grant the following reliefs:

(a) THAT the caveats placed by Kenya Revenue Authority by the Letters dated 8th September 2020 addressed to the National Transport Safety Authority restraining or preventing the transfer, registration or any other dealing of Motor Vehicle Registration Numbers KCC 950J, KCC 9510J, KCC 788W, ZE 9823, KCC 790W, ZF 65222, KCD 464K, KCD 463K, KCD 571S, ZF 3248, KCG 352P, KCC 784W, ZE 9827, KCC 794W, ZE 9824, KCC 785W, ZE 9828, KCC 787W, KCC 949J and ZE 9825 be and are hereby declared illegal null and void.

(b) The Registrar of Motor Vehicles be and is hereby directed to transfer and issue the logbooks of Motor Vehicle Registration Numbers KCC 950J, KCC 9510J, KCC 788W, ZE 9823, KCC 790W, ZF 65222, KCD 464K, KCD 463K, KCD 571S, ZF 3248, KCG 352P, KCC 784W, ZE 9827, KCC

794W, ZE 9824, KCC 785W, ZE 9828, KCC 787W, KCC 949J and ZE 9825 to the Applicants.

(c) *The Respondent shall bear the costs of the application.*

DATED and DELIVERED at NAIROBI this 24th day of FEBRUARY 2021.

D. S. MAJANJA

JUDGE

Mr Mburu instructed by J. M. Waiganjo and Company Advocates for the Applicants.

Ms Ng'ang'a instructed by Kenya Revenue Authority.

Mr Oluoch-Olunya instructed by Oluoch Olunya and Associates Advocates for the 1st Interested Party.

Mr Muturi instructed by Mwaniki Gachoka and Company Advocates for the 2nd Interested Party.