REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

COMMERCIAL CASE NO. E359 OF 2019

FIVE FORTY AVIATION LIMITED.....APPLICANT

VERSUS

GEORGE N. MUIRURI T/A LEAKEY'S AUCTIONEERS..... 1ST RESPONDENT

KENYA REVENUE AUTHORITY..... 2ND RESPONDENT

RULING

1. The Applicant herein filed suit against the Respondents seeking certain declarations and general damages for unlawful attachment of its 4 motor vehicles and 3 aircraft leased by the Applicant from a third party. The Applicant alleged that the 1st Respondent attached the goods on instructions from the 2nd Respondent over taxes owed by East African Safari Air Express Limited (EASAEL), an entity unrelated to the Applicant, yet the goods did not belong to that entity. As a result, the Applicant suffered losses.

2. By a notice of motion dated 14.10.19 and amended on 5.10.19, the Applicant seeks an injunction restraining the Respondents from proceeding with the attachment, taking possession of, or carting away the said goods, namely Motor vehicles registration numbers KAZ 749L, KBP 224A, KCB 673E and KCD 951Z and Aircraft registration numbers CRJ 200, CRJ 100 and CRJ 100ER listed in the Proclamation of Attachment dated 2.10.19 pending the hearing and determination of the suit.

3. The grounds contained in the Application and in the affidavit of Donald Earle Smith on 14.10.19 are that the 2nd Respondent did on 2.10.19 issue a Notice of Distress to EASAEL and attached the said vehicles and aircraft. The vehicles and aircraft are used for the Applicant's business. To the Applicant, the attachment is illegal as the Respondents did not seek to establish the ownership of the vehicles and aircraft. Had the Respondents done a search, they would have established that the vehicles and aircraft do not belong to EASAEL.

4. The Applicant contends that it has a good case with a high probability of success and that the balance of convenience tilts in its favour; that if the orders sought are not granted, the suit would be rendered a mere academic exercise and that the Applicant would suffer irreparable damage incapable of compensation.

5. In his defense, the 1st Respondent averred in his replying affidavit sworn on 19.12.19 that the vehicles and aircraft were pointed out to him by the 2nd Respondent; that the Applicant owed the 2nd Respondent the sum of Kshs. 324,026,325/= as at 2.10.19; that the certificate of registration of aircraft No. 2640 dated 4.5.15 exhibited by the Applicant shows that the Applicant and EASAEL are one and the same; that the aircraft are under operations by the Applicant; that the Applicant has manipulated documents and has been economical with the truth.

6. The 2nd Respondent opposed the Application vide a replying affidavit sworn by Lemmy Mgao, an officer in its Debt Enforcement Accounts Management and Refunds Division. He contended that the Applicant ought to have moved to the Tax Appeals Tribunal to ventilate its claim and not this Court; that EASAEL was audited in 2019 and was found to be owing tax amounting to Kshs. 324,026,325/=; that in spite of demand being made EASAEL failed to object to the same thus rendering the amount uncontested and thus payable; that EASAEL is a subsidiary of the Applicant and both are engaged in the same business; that the 2 companies also share a director, Don E. Smith, as well as offices at the Watermark Business Park, Karen; that pursuant to Section 41 of the Tax Procedure Act, distress was levied on 2.10.19 on EASAEL for recovery on the amount owed; that according to EASAEL's website, the assets proclaimed are part of its fleet and under the *itax* platform, some of the vehicles proclaimed are owned by EASAEL. The 2nd Respondent prayed that the Application be dismissed with costs.

7. In his further affidavit sworn on 19.5.2020, Donald Earle Smith denied that EASAEL is a subsidiary of the Applicant and averred that the Applicant does not hold shares in EASAEL, that EASAEL is an independent company with its own air operation licenses and pays its own

taxes; that the suit and application herein do not concern a tax dispute but attachment of the applicant's property to recover tax owed by a different entity; that the Tax Appeals Tribunal has no jurisdiction over the matter;

8. Parties filed their respective submissions which I have duly considered. The 2nd Respondent claims that EASAEL owes it taxes amounting to Kshs. Kshs. 324,026,325/= and proceeded to levy distress for the recovery of the amount owed. The Applicant on the other hand maintains that the goods proclaimed by the 1st Respondent belong to the Applicant and 3rd parties and not to EASAEL. To the Applicant therefore, this is a case of wrongful attachment of goods. The position adopted by the 1st Respondent is that the Applicant and EASAEL are one and the same vide certificate of registration of Aircraft No. 2640 exhibited by the Applicant. It was submitted that the Applicant's indebtedness was demonstrated by the 2nd Respondent to warrant the attachment. For the 2nd Respondent, it was argued that the Applicant and EASAEL are sister companies with common shareholding. The business of the 2 companies is intertwined in a way that makes it difficult for proclamation and attachment of goods.

9. The principles for grant of an interlocutory injunction were well settled in the case of Giella vs Cassman Brown [1973] EA 358 where at page 360, Spry VP held that:

> **The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.**

10. I have looked at the exhibited ownership documents relating to the proclaimed motor vehicles and aircraft. The logbooks for the motor vehicles KAZ 749L, KBP 224A, KCB 673E and KCD 951Z show that they all belong to the Applicant and not to EASAEL. The attached aircraft are registered to different owners. Aircraft CRJ 200 is owned by Raph Trade Corporation and leased to EASAEL. There is a notice of change in ownership indicating that the aircraft was transferred to the Applicant with effect from 24.11.26. Aircraft CRJ 100 is owned by Avmax Aircraft Leasing Inc., and leased to Avmax Spares East Africa Limited. It is not clear to the Court what interest the Applicant has in this aircraft. Aircraft CRJ 100ER is owned by Avmax Aircraft Leasing Inc. and leased to the Applicant.

11. The Applicant has maintained that it is a distinct legal entity separate from EASAEL. The Respondents' argument however is that the Applicant and EASAEL and one and the same and that their business is so intertwined that it was difficult to recover tax due by means of attachment of goods owned by EASAEL. The 2nd Respondent has sought to support its contention by exhibiting printouts of the Applicant's and EASAEL's websites showing that they share a director and office premises and that they engage in the same business. This in my view is evidence that is shaky and riddled with assumptions and is insufficient to persuade the Court that the 2 companies are one and the same. The tax demands are addressed to EASAEL and not to the Applicant. If indeed the 2nd Respondent was of the view that the Applicant and EASAEL were one and the same, why was the tax demand not sent to both companies to justify the proclamation of the goods attached.

12. In the case of Catherine Kinyany v Mcl Saatchi & Saatchi & another [2014] eKLR, cited by the 2nd Respondent, Onyango, J. stated:

> **I find that the Respondent and Objector are essentially the same person operating under different registered company names. As stated in the affidavit of Nathaniel Mbugua Kangethe, the Respondent and the Objector have common directorship. It has transpired from the proceedings that they share the same office, the same address and most probably the same office furniture and equipment. Some of the invoices produced as evidence of purchase of the proclaimed goods bear the name MCL & Marketing Communications Ltd meaning that they do not belong to the Objector alone but also to MCL which is part of the name of the Respondent… I therefore find that although the objector alleges it is the owner of the proclaimed property, it has not proved that the said property are not at the same time owned by the Respondent. The difference between the Objector and the Respondent appears to be on paper only.**

13. In the cited case, the objector therein did not prove that the proclaimed property was owned by both the objector and the respondent. In the present case however, the Applicant has shown on a balance of probabilities that the motor vehicles and 1 aircraft belong to it and 2 aircraft belong to 3rd parties. No evidence was placed before the Court to demonstrate that the proclaimed property belongs to EASAEL.

14. The 1st Respondent contended that it was acting on the instructions of the 2nd Respondent which pointed out the goods to proclaim. He urged the Court to allow the distress and attachment to proceed. It is the Applicant's contention however that the 1st Respondent ought to have ascertained ownership of the property before proclamation. It is trite law that an auctioneer is under an obligation to ascertain ownership of property to be proclaimed to avoid personal liability for wrongful attachment. This was the holding in the case of Kuronya Auctioneers v Maurice O. Odhoch & another [2003] eKLR where the Court of Appeal stated:

> **The question that falls for our consideration in this aspect of the appeal is this: "If an auctioneer attaches the goods of a wrong party when he is armed with a warrant to attach the goods of a specified party can he claim the immunity given to him by section 6 of the Judicature Act?"**
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> **That issue was decided in the case of Simiyu vs. Sinino [1982-88] IKAR 630. That case decided that a party who sets in motions the process of execution against a wrong person, even though not maliciously, becomes liable at common law for damages for trespass and wrongful execution.**

15. It is common ground that the 2nd Respondent has powers to issue a distress order for recovery of unpaid tax by means of distress and sale of the movable property of a taxpayer Section 41 of the Tax Procedures Act. of the Act authorizes the levying of distress for recovery of unpaid tax as follows:

> **1. The Commissioner or an authorised officer may issue an order (referred to as a "distress order"), in writing, for the**

recovery of an unpaid tax by distress and sale of the movable property of a taxpayer.

16. The 2nd Respondent argued that the Applicant ought to have filed an objection to the distress order with the Commissioner as provided for in the Act. The law has made provision for a tax payer who wishes to dispute a tax decision to lodge an objection with the Commissioner within the stipulated time. Section 51 of the Act provides:

> **1. A taxpayer who wishes to dispute a tax decision shall first lodge an objection against that tax decision under this section before proceeding under any other written law.**
>
> **2. A taxpayer who disputes a tax decision may lodge a notice of objection to the decision, in writing, with the Commissioner within thirty days of being notified of the decision.**

17. The record shows, the tax decision was made against EASAEL. As has been stated by the 2nd Respondent, the tax payer is EASAEL. It has not been demonstrated that any such tax decision has been made against the Applicant, to warrant attachment of its goods. For the reasons stated, I am satisfied that the Applicant has demonstrated a prima facie case with a probability of success and the balance of convenience clearly tilts in favour of the Applicant.

18. In the end, I do allow the application dated 14.10.19 but in relation to the motor vehicles registration numbers KAZ 749L, KBP 224A, KCB 673E and KCD 951Z and aircraft registration numbers CRJ 200 and CRJ 100ER. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 16TH DAY OF APRIL, 2021

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M. THANDE

JUDGE

In the presence of: -

…… for the Applicant

…… for the 1st Respondent

…… for the 2nd Respondent

…….…… Court Assistant