



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E095 OF 2020

BETWEEN

CHOPPIES ENTERPRISES LIMITED...PLAINTIFF

AND

COMMISSIONER OF DOMESTIC TAXES/KENYA

REVENUE AUTHORITY..... DEFENDANT

RULING NO. 2

1. The plaintiff seeks the following orders in the Notice of Motion dated 4th May 2020:

[1] This application be certified as urgent, service thereof be disposed with and be heard exparte in the first instance.

[2] Pending the hearing and determination of this application, a temporary order be issued in the first instance, restraining the defendant/respondent by himself servants, agents or agents from enforcing agency notices dated:-

i. 28th February 2020 in the sum of Kenya shillings one hundred and seventy three million three hundred and eighty eight thousand four hundred and sixteen (Kshs. 173,288,416) issued to M/S Standard Chartered Bank in respect of plaintiff account number 10000007354 compelling them to remit the said amount to the defendant/respondent: and

ii. 13th March 2020, in the sum of Kenya shillings one hundred and twenty five million two hundred and twenty five thousand five hundred and sixty eight and fifty eight cents (Kshs. 125,225,568.58) issued to M/s Quick Mart limited compelling them to remit the said funds to the defendant and not into the plaintiff's bank account.

[3] Pending the hearing and determination of this suit, an order be issued restraining the defendant/respondents by themselves, or their servant, agents or otherwise howsoever from enforcing agency notices dated:-

i. 28th February 2020 in the sum of Kenya shillings one hundred and seventythree million three hundred and eighty eight thousand four hundred and sixteen (Kshs. 173,388,416) issued to M/S Standard Chartered Bank in respect of plaintiff account number 10000007354 compelling them to remit the said amount to the defendant/respondent: and

ii. 13th March 2020, in the sum of Kenya shillings one hundred and twenty five million two hundred and twenty five thousand five hundred and sixty eight and fifty eight cents (Kshs. 125,225,568.58) issued to M/s Quick Mart limited compelling them to remit the said funds to the defendant and not into the plaintiff's bank account.

[4] Pending the hearing and determination of this suit an order be issued setting aside agency notice dated 28th February 2020 for being premature, irregularly issued and therefore illegal and duplicitous.

[5] Pending the hearing and determination of this application, and order be issued directing the applicant's bankers to allow the

applicant to access funds as shall be sufficient to enable applicant obey court orders dated 31st January 2020 and 24th March 2020 in:-

a. Nairobi Milimani ELRC No. 861 of 2019 – Kenya Union of Commercial, Food and Allied Workers Union Vs Choppies Enterprises (K) Limited & 3 others and

b. Milimani CMCC No. 22 of 2020 – Sameer Agriculture and Livestock Limited Vs Choppies Enterprises Kenya Limited.

[6] Pending the hearing and determination of this suit, order be issued directing the applicant's bankers to allow the applicant to access funds as shall be sufficient to enable applicant pay its financiers and suppliers.

[7] Costs of this application be borne by the respondent.

2. This is the second application in this matter as the plaintiff had filed an earlier application seeking similar orders and which I dismissed on 22nd April 2020. The gravamen of the plaintiff's suit was that the defendant ("the Commissioner") has issued Agency Notices under **section 42** of the **Tax Procedure Act, 2015** ("the **TPA**") yet the taxes due had not been ascertained. I held that under the aforesaid provision, "*where a taxpayer may become liable to pay tax and the Commissioner has reasonable grounds to believe that the person will not pay tax by the due date for payment, it may proceed to issue an agency notice. It is thus not necessary under that provision, for the tax liability to be ascertained.*" I came to the conclusion that the Commissioner had reasonable belief to issue the Agency Notices because there was sufficient evidence that the plaintiff was disposing of its business undertaking in Kenya.

3. I thereafter proceeded to determine whether I ought to give the plaintiff relief from the Agency Notices by directing it to furnish security as a condition for staying the Agency Notices. On this issue I held as follows:

[14] There is no dispute that the court has the power to order security in the circumstances of this case in order to secure the taxes claimed by the Commissioner. This power is discretionary and is intended to do justice. On the one hand, it is to ensure that the plaintiff or taxpayer is not subjected to undue hardship as it is not the intention of the court to lead to a situation where a going concern collapses with all attendant consequences. On the other hand, the court must ensure that taxes are secured as it is the obligation of the taxpayer to ultimately pay taxes found due. In order for the court to exercise this discretion, the applicant must make full disclosure of all circumstances including its financial position necessary for the court to make an appropriate decision.

[15] In this case, there is no basis upon which I can order the plaintiff to provide security of Kshs. 15,000,000.00 when the expected tax liability is over Kshs. 100,000,000.00. There is undisputed evidence that the plaintiff is disposing of some of its assets. It has already laid off some of its employees hence the liability of about Kshs. 60,000,000.00. The plaintiff has not disclosed how much it expects to receive from sale of its assets and stock. It has not stated how much is held in its accounts. As I have stated, the plaintiff has not shown that it is a going concern and how it intends to provide the security for taxes.

[16] Notwithstanding the conclusion I have reached on the issue of provision of security and allowing the plaintiff to access funds to meet certain liabilities, I am aware and indeed take judicial notice of the COVID-19 pandemic which the National government has declared as an emergency. I therefore grant the plaintiff leave to apply for any further orders in line with what I have stated. Further, the parties should explore the opportunity to resolve the matter amicably to the extent possible.

[17] For the reasons I have given, I dismiss the Notice of Motion dated 8th April 2020 with costs to the defendant. The plaintiff is at liberty to apply for any further or other orders. In the meantime, the status quo regarding the agency notices shall remain in force for **fourteen (14) days** to enable the parties explore amicable settlement or for the plaintiff to move the court appropriately.

4. The context of my first ruling was to enable the court determine the terms upon which it should order security if the parties were unable to agree on suitable terms of such security. The plaintiff's case is set out in the supporting and supplementary affidavit of Parin Patel, it's managing director, sworn on 4th May 2020 and 27th May 2020 respectively. It is opposed by the replying affidavit of Mr Peter Iraki, an officer of the defendant, sworn on 20th May 2020. Both parties filed written submissions and highlighted the same orally.

5. In its depositions and submissions, the plaintiff has dwelt on the legality, reasonableness or otherwise of the Commissioner demand. As I stated in the earlier, the Commissioner has power issue an Agency Notice even where the tax is unascertained. At this stage I cannot make a final determination as this is matter that will be determined at the trial of this suit. Besides, the plaintiff has objected to the Commissioner's decisions and the matters are under review hence any comments or findings in that regard may prejudice the process.

6. The issue for the court's consideration is the terms of the security, which both parties, agree is within the discretion of the court and as I had stated in my earlier ruling, the court has to balance the position of both parties.

7. As a starting point it is not disputed that the Commissioner issued Agency Notices in respect of a tax liability of Kshs. 125,225,568.58. Since this amount is subject to the objection process, it or part thereof may be found due and owing after the audit. The plaintiff has offered Kshs. 30,000,000.00 as security but the Commissioner has rejected this proposal.

8. In the earlier ruling I emphasized the need for the plaintiff to make full disclosure in order to assist the court exercise discretion in its favour. In the supporting affidavit, the plaintiff has shown that it had 16 branches. Out of these, it has sold 11 and received payment in full, closed one branch and one is still on the market as a buyer is being sought. The 3 remaining branches, including a sale to Quick Mart which is subject of the Agency Notice, is the subject of ongoing negotiations. It has also shown that it holds Kshs. 36,000,000/= in the Standard Chartered Bank Account which is the subject of the Agency Notice.

9. In response, counsel for the Commissioner, pointed out the sale of the branch to Quick Mart is complete and the plaintiff has not disclosed how much was realized and how it was applied. She further submitted that the plaintiff realized a total of Kshs. 384,600,000.00 from the sale of its branches and has not disclosed how this money was utilized. The Commissioner urged that in light of the circumstances, the plaintiff should be ordered to provide security in the form of a cash deposit for the sum of Kshs. 125, 225,568.58 or the amount be deposited in a joint account of the parties' Advocates.

10. From the evidence, the only money expected by the plaintiff is the purchase price from its three branches that are up for sale. Once all the branches are disposed of, the plaintiff has not shown that it has any other sources of income. The deposition by Mr Iraki that the plaintiff has sold other assets including motor vehicles and that its offices and warehouse have been taken over by an associated company was not controverted in the further affidavit.

11. The courts have in many cases given an unconditional stay but in those cases it has been satisfied that the business is a going concern and likely to pay taxes in the future (see *Victrociset S.P.A. Kenya v Commissioner of Domestic Taxes NRB HC JR No. 28 of 2018 [2018] eKLR*). In other cases, the courts have ordered provision of security where it is satisfied the conditions demand such an order. For example, in *CMA CGM (K) Limited v Commissioner of Domestic Taxes NRB CA Civil Appl. No. 83 of 2020 [2020] eKLR*, the Court of Appeal ordered the appellant to deposit Kshs. 50,000,000.00 in a joint account pending the appeal where the sum demanded as taxes was Kshs. 299,130.352.00.

12. The evidence shows that if the plaintiff completes winding up its business, there is a likelihood that the Commissioner will not be in a position to recover any taxes if the same are found due in future. It is for this reason that I decline to lift the agency notices unconditionally. In imposing the conditions, I haven taken into account that the liability may reduce after a comprehensive audit.

13. For the reasons I have set out above, I order as follows:

a. The plaintiff shall furnish an irrevocable guarantee from a reputable bank for the Kshs. 100,000,000.00 or deposit the same amount in a joint interest earning account within 30 days from the date hereof. In default, the Commissioner shall be at liberty to enforce the Agency Notices.

b. In the event of compliance with (a) above, the order shall remain in force for a period of 60 days only whereupon the Agency Notices shall lapse unless extended by this court.

c. The plaintiff shall bear the costs of the application.

DATED and DELIVERED at NAIROBI this 24th day of JUNE 2020.

D. S. MAJANJA

JUDGE

Mr Juma instructed by Musa Juma and Company Advocates for the plaintiff.

Ms Mwangera, Advocate instructed by Kenya Revenue Authority for the defendant.