



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION- MILIMANI

INCOME TAX APPEAL NO. 1 OF 2019

ZAKHEM INTERNATIONAL CONSTRUCTION LTD.....APPELLANT

VS

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

RULING

BACKGROUND OF APPLICATION

The Appellant approached the court through an application dated the 12th of July 2019 for the orders;

- a. The order made on 2nd July 2019 by the Tax Appeal Tribunal be stayed pending hearing and determination of the Appeal
- b. The three agency notices dated 29th May 2019 that had been issued by the Respondent under section 42 of the Tax Procedures Act, be suspended pending the hearing and determination of the Appeal

The Application was based on the following grounds;

- a. That the sum of kshs 17,912,262,818 was the aggregate of the alleged unpaid tax as particularized in Respondent's assessments dated 18th September 2018, 11th September 2018 and 26th February 2019
- b. That the Appellant had applied to the Tax Appeal Tribunal for the agency notices to be lifted as they were not only ultra vires against section 42 of Tax Procedure Act, but were also offended the dignity of the Tribunal, through and application made on 6th June 2019.
- c. The said agency notices have caused the Appellant heavy losses as its principal bank accounts have been frozen and can therefore not service various loans.

The Application was supported by the affidavit of an authorized representative of the Appellant. The Appellant stated that the assessed unpaid tax involved; kshs 4,528,306,856 inclusive of penalties and interest, withholding tax of kshs 501,881,051, PAYE of kshs 559,912,916 and corporate tax of kshs 3,466,512,889 to which the Appellant objected to on 17th October 2018.

The assessment dated 11th December 2018 included kshs 3,006,049,446 inclusive of penalties and interest, comprising of the alleged VAT on materials acquired outside Kenya exempted by the National Treasury to which the Appellant objected to on 19th December 2018. The assessment dated 26th February 2019 included kshs 5,635,860,989 comprising of alleged corporate tax on equipment imported from outside Kenya to which the Appellant objected on 28th March 2019.

RESPONDENT'S REPLYING AFFIDAVIT

The Respondent replied through an affidavit dated 26th July 2019 to the Appellants application. The Respondent stated that they had had challenges with meeting revenue targets due to tax evasions and non-compliance with tax legislations.

The Appellant is a Kenyan branch of foreign company incorporated under the laws of Cyprus who had won the contract to procure,

construct, test and commission the new Mombasa Nairobi Oil Pipeline for the Kenya Pipeline Company costing 484,502,886.40 USD.

The Respondent also stated that an audit was carried out by them and an assessment of kshs 17,912,262,818 was made under various tax heads, penalties and interest against the Appellant. The Respondent also averred that the Appellant had since been paid by Kenya Pipeline Company Ltd a large part of the said contract sum and the outstanding balance being USD 76,191,811.38, approximately 40% of the assessed tax.

The Respondent stated that there was a high likelihood from that the tax of kshs 17,912,262,818 may not be fully recovered and that by setting aside the orders of the Tribunal the Appeal herein would be rendered nugatory. The Appellant had also completed the subject contract and had no further operations in Kenya and hence would not be found once paid the balance of the contract sum. Furthermore, the Respondent stated that there were no good grounds advanced to interfere with the discretion the Tribunal as held in the case of Mbogo vs Shah.

The Respondent also stated that the Appellant had reputation of not honoring its financial obligations and has had its bank accounts frozen as the Appellant has been unable to pay even the conceded taxes despite several commitments to the Respondent since 2017.

APPELLANTS SUPPLEMENTARY AFFIDAVIT

The Appellants filed an affidavit dated 30th July 2019 in support of the Appellants Notice Motion. The Appellants stated that pursuant to the courts directions on 25th July 2019, the parties were to furnish it with copies of the Certificate of Compliance issued by the Registrar of Companies on 24th July 2014, details of the Company's registered addresses, performance guarantee in favour of the Appellant and advance VAT payment slips for 2017-2018.

DETERMINATION

On 29th May 2019, the Respondent issued three Agency Notices to Eco Bank Kenya Limited, Stanbic Bank Ltd and Kenya Pipeline Company, in exercise of powers conferred upon him by Section 42 of the Tax Procedures Act, demanding payment of the sum of Kshs. 17,912,262,818.00 for recovery of taxes so assessed in the aforementioned assessments. **Section 42 of the Tax Procedures Act No.29 of 2015 provides for:-**

Power to collect tax from person owing money to a taxpayer

1. This section applies when a taxpayer is, or will become liable to pay a tax and —

a. the tax is unpaid tax; or

b. the Commissioner has reasonable grounds to believe that the taxpayer will not pay the tax by the due date for the payment of the tax.

2. The Commissioner may, in respect of the taxpayer and by notice in writing, require a person (referred to as the "an agent")—

a. who owes or may subsequently owe money to the taxpayer;

b. who holds or may subsequently hold money, for or on account of, the taxpayer;

c. who holds or may subsequently hold money on account of some other person for payment to the taxpayer; or

d. who has authority from some other person to pay money to the taxpayer, to pay the amount specified in the notice to the Commissioner, being an amount that shall not exceed the amount of the unpaid tax or the amount of tax that the Commissioner believes will not be paid by the taxpayer by the due date.

This Court has to consider the circumstances of the matter at this stage on whether a prima facie case is made out to warrant staying the orders of the Tax Tribunal pending hearing and determination of appeal. The facts pleaded by parties as filed disclose a dispute as to tax remittance to the Respondent by the Appellant. The Respondent deponed that the whereabouts and status of the Appellant in the country are not confirmed and if funds are not held then there is likelihood of loss of revenue as tax collected from the Appellant.

On the other hand the Appellant provided certificate of Compliance to establish its residence in the Country. However its residence and conduct of business is not confirmed. The issue of the Appellant's status and operations in the country was considered by Lady Justice Kasango in **Ecobank Nigeria Limited & Ecobank Kenya Limited vs Zakhem International Construction Nigeria Limited & Zakhem International Construction Cyprus Limited, Zakhem Construction Kenya Limited & Kenya Pipeline Company Limited [2018]eKLR**, Ruling delivered on 29th November 2018 where the Court held;

“By this application the 5th defendant seeks to be struck out of this suit. I have considered the submissions of the parties and by parity of the above findings I find and hold that the 5th defendant's presence in this suit is of utmost importance because the proceeds, subject of this suit, are of the contract between Zakhem Cyprus and the 5th defendant. It follows that the 5th defendant's application fails.

In the end, I grant the following orders:

a. A temporary mareva (freezing) injunction is hereby granted restraining and/or barring the 1st, 2nd, 3rd and 4th Respondents either by each one of them or jointly, or whether by themselves, their employees, servant, agents or nominees or any other person claiming through them from disposing, assigning, diminishing, transferring, alienating or otherwise dealing in any manner whatsoever with any of their bank accounts or assets in Kenya; and

b. A temporary injunction is hereby granted restraining and/or barring the Respondents either by each one of them or jointly whether by themselves, their employees, servant, agents, or nominees or any other person claiming through them from paying, transferring, remitting, alienating and/or otherwise disposing any proceeds or monies due under the Agreement dated 1st July 2014 between the 3rd and 5th Respondents other than to the applicants.”

This decision involving same parties i.e. the Defendants, remains a lawful and legal order of the Court with regard to the bank accounts and assets in Kenya, as it has not been varied, appealed against or reviewed.

Of importance since the dispute entails tax remittance and there is possibility of funds transfer pending the hearing and determination of the appeal the balance of convenience tilts to withholding the secured sum until hearing and determination of the appeal.

DISPOSITION

- 1. The application to grant orders sought at this stage is denied.**
- 2. Parties should seek an early hearing date from the Tax Tribunal.**
- 3. The matter to await hearing and determination of the appeal.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 31ST JULY 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

MS OGONJO H/B FOR MR KEMBOI FOR APPELLANT

MR NYAGA H/B FOR MS MBURUGU FOR RESPONDENT

COURT ASSISTANT- ISAIAH OTIENO