



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 126 OF 2016

ELSEK & ELSEK (K) LTD.PLAINTIFF

VERSUS

1. KENYA REVENUE AUTHORITY

2. GEORGE N. MUIRURIT/A LEAKEY'S

AUCTIONEERS.....DEFENDANTS

RULING

1. Through an application dated 14th December, 2016 premised on the provisions of Order 40 rules 1 and 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, the applicant seeks the following orders:-

(i) Spent;

(ii) Spent;

(iii) That the court be pleased to restrain the defendants by themselves, their agents and employees from removing to the 2nd defendant's premises or selling by public auction or private treaty or in any manner whatsoever disposing of properties belonging to the plaintiff but attached by the 2nd defendant pursuant to a notice of distress dated 6th December, 2016 addressed to Elsek & Elsek Construction Ltd and a proclamation of attachment dated 6th December, 2016 addressed to Elsek & Elsek Construction Ltd and a proclamation of attachment dated 6th December, 2016 wherein Elsek & Elsek Construction Ltd is named as the debtor pending the hearing of this suit; and

(iv) That costs of this application be provided for.

2. The application is supported by the affidavit of Osman Erding Elsek sworn on 14th December, 2016 and the grounds on the face of the application. Mr. Wameyo Advocate swore a supplementary affidavit on 9th June, 2017 in support of the application. The 1st defendant/1st respondent through Asha K. Salim swore an affidavit on 4th January, 2017 to oppose the application. The respondent filed a further affidavit on 3rd May, 2017. The said affidavit was sworn by George Mbaye Advocate on 28th April, 2017.

3. Counsel for the 1st respondent filed his written submissions on 1st March, 2017. The applicant's Counsel filed his on 4th April, 2017. Mr. Wameyo, Learned Counsel for the applicant highlighted his submissions by stating that the issue in this matter is whether the applicant is the same person to whom statutory notices were issued by the 1st respondent in respect to debts owed to it.

4. Counsel stated that Elsek & Elsek Construction Ltd and the applicant herein are different entities. He submitted that the 1st respondent instructed the 2nd respondent to issue statutory notices to Elsek & Elsek Construction Ltd. He argued that the notices issued to the said company bore the PIN number for the said company but the 1st respondent attempted to attach goods for the applicant herein. Counsel contended that the instructions given by the 1st respondent to the 2nd respondent were for it to pursue Elsek & Elsek Construction Ltd.

5. In reference to the 1st respondent's written submissions that it cannot be enjoined, Mr. Wameyo stated that the mistake in attachment of the applicant's goods was done by the 2nd respondent which can be enjoined. It was submitted that the applicant has in its supplementary affidavit denied owing the 1st respondent any money. It was further stated that the applicant herein was approached by Elsek Construction

Ltd to pay the debt on its behalf. Mr. Wameyo stated that was a proposal to pay the 1st respondent but it was not an admission of liability on the part of the applicant.

6. Mr. Mbaye, Learned Counsel for the 1st respondent stated that Counsel for the applicant had admitted that the order being sought cannot issue against the 1st respondent in accordance with Sections 3(2) and (5) of the Kenya Revenue Authority Act and Section 16 of the Government Proceedings Act. It was submitted that the 1st respondent was trying to distress for money owing, and the goods that were to be distrained were for Elsek & Elsek Construction Ltd in offices and godowns. He stated that both companies are situate in the same premises and godowns.

7. To emphasize his point, Counsel referred to annexure AKS2 attached to the 1st respondent's affidavit from Elsek & Elsek Construction Ltd dated 26th June, 2016 signed by Mr. Osman. He stated that the notice of distress issued by the 1st respondent was against the said company.

8. It was submitted for the 1st respondent that the provisions of Section 46 of the Tax Procedures Act, are clear that where there is a tax liability in respect to a business carried out by a Taxpayer and the assets have been transferred to another business owned by the same taxpayer, then the liability is payable. He stated that the tax assessed has not been disputed.

9. Mr. Mbaye referred to annexure GM1 attached to the 1st respondent's further affidavit, which is a letter from the applicant's Advocate that contains an admission that the companies are one and the same. He expounded that the letter states that money owed to the applicant by the Elsek & Elsek Construction Ltd be recovered from Presbyterian University. He further submitted that the chairman of Elsek & Elsek Construction Ltd in a Board resolution informed members that tax issues needed to be finalized.

10. Counsel argued that the 1st respondent acted within its mandate. He cited the case of **Muigua T/a Kariuki Muigua and Co. Advocates vs Commissioner of VAT and 2 Others** [2012] eKLR to support the foregoing assertion. He also cited the case of **Okiya Omtatah Okoiti vs Kenya Revenue Authority and 2 Others** [2016] eKLR to show that the applicant had not shown the type of irreparable damage it will suffer.

11. In his rejoinder, Mr. Wameyo, submitted that under Section 47 of the Tax Procedures Act, it must be demonstrated that upon issuance of distress notices, the applicant transferred its assets to another company with the aim of defeating the cause of justice. He stated that the dates of the documents showing ownership of the goods by the applicant precede the date when the notices for distress were issued.

12. He stated that there is no averment in the applicant's affidavit that Elsek & Elsek Construction Ltd is one and the same with Elsek & Elsek (K) Ltd. Counsel concluded by stating that where it is clear that there is an illegality, the breach cannot be sanitized by an agreement for compensation for irreparable damage.

ANALYSIS AND DETERMINATION

The issue for determination is if the applicant has made out a case for grant of orders of an injunction.

13. The principles for grant of an injunction were well settled in **Giella vs Cassman Brown** [1973] EA 358 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."

14. The Board resolution of Elsek & Elsek Construction Ltd dated 19th December, 2016 attached to the supplementary affidavit as annexure A, is testament to the fact that it is indebted to the 1st respondent and a notice of distress was issued on 6th December, 2016 with a view of trying to recover unpaid taxes.

15. The further affidavit of George Mbaye contains a copy of a letter sent by the applicant's Counsel to the 1st respondent through email. Although Mr. Wameyo submitted that the said letter does not amount to an admission of the debt owing to the 1st respondent, a careful reading of the said letter shows that both the applicant and Elsek & Elsek Construction Ltd, acknowledged owing outstanding taxes to the 1st respondent proposals were made in the said letter on how the taxes could be recovered. The letter dated 20th January, 2017 was not written on a **"without prejudice"** basis and therefore this court is not estopped from relying on the contents thereon.

16. The bone of contention is the proclamation of goods belonging to Elsek & Elsek (K) Ltd, to satisfy taxes due from Elsek and Elsek construction Ltd. The applicant's deponent attached copies of log books to his affidavit to show that motor vehicle registration No. KBY 659D is owned jointly by TransAfrica Motors and Elsek & Elsek (K) Ltd, motor vehicle registration No. KBP 342F is owned by S. Abdulla Motors, motor vehicle registration No. KBS 152J is owned by Elsek & Elsek (K) Ltd, motor vehicle registration No. KBK 508V is owned by Kenya Commercial Bank Ltd and Elsek & Elsek (K) Ltd, motor vehicle registration No. KBH 539T is owned by Shem Gichumu Kiama and a fork lift registration No KHMA 543C is owned by Elsek & Elsek (K) Ltd and TransAfrica Motors Limited. Other assorted items were proclaimed for attachment alongside the said motor vehicles. It is not however clear to whom the assorted goods belong, between the applicant herein and Elsek & Elsek Construction Ltd.

17. The annexure attached to the applicant's affidavit and marked as exhibit F(2) is a bill of lading issued on 6th May, 2013 for 28 galvanized steel strips in coils that were imported by the applicant. It is not clear from the applicant's affidavit which items among the ones proclaimed correspond to the items listed on exhibit F(2). The court cannot make the presumption that galvanized steel that was imported by a construction company 3 years ago remains unutilized to date.

18. I have considered the submissions of the parties hereto and the authorities cited. I do agree with the submission by Mr. Wameyo that the applicant herein and Elsek & Elsek (K) Ltd, are distinct and separate legal entities registered under the Companies Act. The PIN for the applicant herein as per exhibit C attached to the applicant's affidavit is P051221605G and the PIN No. for Elsek & Elsek Construction Ltd, is given as P051321609M in the notice of distress marked as exhibit D to the applicant's affidavit.

19. When dealing with a different case, namely, **Oakpark Apartments Mombasa Limited & others vs Kenya Revenue Authority & another**, Mombasa High Court Civil Case No. 56 of 2016, it was brought to this court's attention through a list released by the Auctioneers Licensing Board for Class "B" Licensed Auctioneers as at 20th April, 2016, that Leakey's Auctioneers was in the year 2016 not licensed to proclaim goods for attachment in Mombasa County and its environs. In a ruling delivered on 9th February, 2018 this court found that the said Auctioneer lacked jurisdiction to proclaim goods for attachment in Mombasa during the said period. The holding in the said case is applicable in this case as the proclamation for attachment herein was issued in Mombasa County, which is not within Nairobi, Thika, Kiambu and Kajiado where Leakey's Auctioneers was licensed to operate.

20. Mr. Mbaye in his written submissions indicates that the 1st respondent acted within the provisions of Section 41 in issuing the notice of distress and proceeding with enforcement as it has powers to issue an order in writing for the recovery of unpaid tax by distressing on movable property.

21. There is no doubt that the 1st respondent has immense powers provided under the law to recover tax due and owing but the fact remains that some of the goods that were distrained by the 2nd respondent belong to the applicant and other parties and not Elsek & Elsek Construction Limited alone.

22. Having considered the circumstances of this case, I decline to grant an interim injunction. This court will give an equitable remedy that will go to the benefit of both parties. I hereby invoke the provisions of Section 3A of the Civil Procedure Act which provides as follows:-

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process.”

23. I therefore make the following orders:-

- (i) That the proclamation notice dated 6th December, 2016 issued by Leakey's Auctioneers against the applicant herein is hereby declared null, void, invalid and is hereby set aside;
- (ii) That all goods listed in the schedule of movable property in the proclamation notice issued on 6th December, 2016 by the 2nd respondent shall be released forthwith;
- (iii) The 1st respondent will be at liberty to enforce its rights to recover outstanding taxes through a properly executed legal process; and
- (iv) The applicant is awarded costs of the application.

DELIVERED, DATED and SIGNED at MOMBASA on this 16th day of February, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Nabwana holding brief for Mr. Wameyo for the applicants

Ms. Sanga holding brief for Mr. Mbaye for the 1st respondent

No appearance for the 2nd respondent

Mr. Oliver Musundi - Court Assistant