



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO. 436 OF 2014

MARGARET W. KAMAU.....PLAINTIFF

VERSUS

JOPA VILLAS LLC & ANOTHER.....DEFENDNT

R U L I N G

1. The parties in this matter appeared before the Honourable Court on the 11th day of August 2016. They invited the Court to consider the Ruling delivered by the DR, Honourable Caroline Wattimah on the 5th August 2016. That ruling was in accordance with the order of the Honourable Court given by the Honourable Justice E. K. Ogola on the 13th May 2016 to the effect that the DR take accounts herein.

2. The DR in her ruling dealt with most of the claims in dispute, save for three thereof namely:

(i) KRA Capital Gains Tax

(ii) KRA Withholding Tax and

(iii) Vartus Company claim

3. I have read through the said ruling delivered by the DR. I find that the main reasons advanced by her, for reference of the said matters back to the Honourable Court are mainly:

(i) Failure by the claiming parties to provide accurate and / or supporting evidence to sustain that claim and explain how they arrived at the sum claimed, and

(ii) The inability to determine who is liable to pay the respective claims once the same are proved.

I also note that the DR was unable to specifically deal with the disputed claim in favour of Vartus Company because, a there was a dispute as to who was liable to pay the same.

4. The submission made by the parties were basically inviting the Honourable Court to make it's finding on the outstanding and referred claims. In particular, Mr. Murugara for Vartus Company invited the Court to uphold the finding of the DR and determine who is liable to pay off the company's claim. He submitted that the claim is not in dispute. That, the amount payable is Kenya Shillings Twenty Nine Million, Eight Hundred Thousand (29,800,000). He argued that the same be paid from the proceeds of sale.

5. Mr. Nyachoti for the Plaintiff submitted that the DR made an error by finding and holding that, the claim by the Vartus Company was consented to by the parties following the consent order made in Court on 6th June 2016. That, the consent referred to, only admitted Vartus Company as an Interested/Third party to the suit for the purposes of taking accounts. He told the Court that, the claim by Vartus Company is vehemently opposed. He invited the Court to give directions on the accounts taken by the DR, and the resultant ruling. He further submitted that the sums due to the 1st Defendant are as per the findings of the DR on items 1 – 9, 13 and 14 and should be released to the 1st Defendant forthwith and the sum in favour of KRA be released to the Plaintiff and 2nd Defendant. That the sum Kenya Shillings Forty One, Four Hundred and Fifty Thousand, Two Hundred and Twenty Three, Forty Two Cents (41,450,223.42) to be released to the firm of Kaplan and Straton and Associates and that Kenya Shillings Twenty Nine Million, Eight Hundred Thousand (29,8000,000) be held until the Court determines and or gives directions and Similarly the sum of Kenya Shillings Eighteen Million, Six Hundred and Sixty Thousand, Sixty Seven, Twelve Cents (18 660 067.12) also be held until the Court gives directions. That the sum to be released to the Plaintiff is Kenya Shillings One Hundred and Eighteen Million, Eight Hundred and Eighty Nine Thousand, One Hundred and Fifty Six, Thirty Cents, (118 889 156.30) which includes the withholding sum Kenya Shillings Forty Five Thousand.

6. Ms Kimani holding brief for Mrs Opiyo for the 1st Defendant supported the submission by Mr Nyachoti that there was no consent admitting the sum claimed by Vartus Company. She however told the Court that the 1st Defendant has filed a notice of Appeal against the DR's ruling and therefore the disbursement of the finds should await the determination of the Appeal.

7. Mr. Makori learned Counsel for the 2nd Defendant associated himself fully with the submission made by the learned Counsel Mr. Nyachoti. He further submitted that, there is no order for stay pending the hearing of the Appeal and that the purported Appeal is a mere delaying tactic.

8. Mr. Nyangweso, the learned Counsel submitted that the sum owing to KRA is Kenya Shillings Eighteen Million, Six Hundred and Sixty Thousand, Sixty Seven (Kshs.18,660,067) as the Capital Gains Tax plus penalty and interest of Kenya Shillings Twenty Two Million, Seven Hundred and Sixty Five Thousand, Two Hundred and Eight One (Kshs.22,765,281.00) and the other amount of withholding tax is Kenya Shillings Thirty Nine Million, Eight Hundred and Ninety Seven Thousand, Five Hundred and Thirty Seven, Eighty Cents (Kshs.39,897,537.80) and inclusive of penalty and interest, totals Kenya Shillings Forty Five Million, Seven Hundred and Seventy Nine Thousand, Three Hundred and Fourteen (Kshs.45,779,314).

9. Finally the learned Counsel Mr. Murungara reiterated that when the parties conceded to the matter to be referred to the DR, it was also implied that, they conceded to the DR making the orders that she made, therefore the claim by Vartus Company is admitted and the only issue remaining is where the money will come from. That the only challenge to the DR's finding is through an Appeal as the matter is Res Judicata. However, if there be further deliberation, the money should be retained in the manner already ordered.

10. I have fully examined the issues canvassed; however I wish to hear the parties views on the following issues.

- Whether there is any objection to the release of the sums relating to items numbers 1 – 9, 13 and 14 as per the DR'S ruling.
- Whether the sum claimed by Kenya Revenue Authority is disputed and if not, can the Court order for its release.
- Whether the parties have any other objection to the release of any other sums claimed, if so, which sums, and why?
- How do they propose to deal with the outstanding and or disputed claims?

11. Before I deal with these issues I wish to deal with the issue as to whether, the claim of Vartus Company was conceded to by consent of the parties. I have gone through the Court record and I find that,

the Vartus Company was only allowed to be enjoined in the suit as an Interested Party for the purposes of taking of accounts, and not in relation to the admission of its claim. In that case, there is definitely an error on the face of the record in particular, the Ruling by the DR. I find that claim is contested. All in all I await to hear from the parties on the issues raised herein.

It is so held.

Dated and Delivered in an open Court at Nairobi, on this 31st Day of August, 2016.

G. L. NZIOKA

JUDGE

31st August 2016

Coram

Judge-----Hon Justice G.L. Nzioka

Court clerk-----Teresia

Mr makori for Mr Nyachoti-----Plaintiff

Miss Kimani for mrs opiyo-----1ST Defendant

Mr Makori for-----2nd Defendant

N/A for-----1st Interested Party

N/A for-----2nd Interested Party

Mwiti for Mr Murugara-----3rd Interested Party

COURT

I have called the Parties to clarify certain issues, (issues in the Ruling above) are read out to the parties and they respond as follows) and they respond as follows;

Mr. Makori – We have no objection to the release of the sums agreed on, and as ordered by the DR.

Miss Kimani: We only concede on the claims under items 1, 3, 5, 6, 7 and 9. We dispute all other claims.

Court: By consent of the parties the sums awarded vide the DR’s ruling dated 5th August 2016, in relation to the following claims are to be paid forthwith:

1. Security expenses Kenya Shillings Five Million, Two Hundred and Three Thousand, Six Hundred and Twenty Seven, Twenty Cents (Kshs.5,203,627.20).
2. Electricity Bills Kenya Shillings Eighty One Thousand, One Hundred and One, Thirty Eight Cents (Kshs.81,101.38)

3. Advertising Expenses Kenya Shillings Three Hundred and Sixty One Thousand, Three Hundred and Twelve (Kshs.361,312.00)

4. Land and Rent Expenses Kenya Shillings Eight Hundred and Seventy Seven Thousand, Five Hundred and Fifty (Kshs.877,550.00).

5. Valuation Expenses Kenya Shillings Three Hundred and Sixty Four Thousand, Five Hundred (Kshs.364,500).

6. OPIC Disbursements USD One Hundred and Fifteen Thousand, Six Hundred and Twenty Six, Eight Six (115 626 .86)

Orders accordingly

G. L. NZIOKA

JUDGE

COURT:

It's further, ordered that, as regards the other claims which are still in dispute, the parties will file and serve written submissions on the same (that is claims under items 8, 10, 11, 12, 13 and 14). The said submissions shall be filed within 30 days of today's date. The parties must annex and/or provide proof of their claim through supporting documents, and or suggest the amount they find acceptable as due (if any) and owing, and inform who should pay the same once they are determined. That will assist the Court determine the outstanding claims. The matter will then come for highlighting on 3rd November 2016.

Orders accordingly.

G. L. NZIOKA

JUDGE