



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**(MILIMANI COMMERCIAL COURTS)**

**CIVIL SUIT NO 469 OF 2013**

**Consolidated with Civil Suit No. 471 of 2013**

**PANKAJ VRAJLAL SOMAIA.....1<sup>ST</sup> PLAINTIFF**

**METRO PETROLEUM LIMITED.....2<sup>ND</sup> PLAINTIFF**

**Versus**

**KENYA REVENUE AUTHORITY.....1<sup>ST</sup> DEFENDANT**

**LEAKEY AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**BILL KIPSANG ROTICH.....INTERESTED PARTY**

**RULING**

**Injunction against distress,**

[1] The two suits, i.e. NBI HCCC NO 469 of 2013 and NBI HCCC NO 471 of 2013 were consolidated on 26th November 2013. This ruling, therefore, relate to both suits. But it is noteworthy that both applications were made by two directors and shareholders of Metro Petroleum Limited, the 2nd Plaintiff herein, that is, the 1<sup>st</sup> Plaintiff and the Interested Party herein.. The applications are dated 30<sup>th</sup> October 2013 and 31<sup>st</sup> October 2013, respectively. The aggregate orders sought are:-

- a. **An injunction against the 1st and 2nd Defendant from proceeding with the threatened distress over the 2nd Plaintiff's property, distraining, advertising for sale, offering for sale or selling by public auction or otherwise interfering with, alienating, disposing or in any way dealing with the 2nd Plaintiff's moveable property held at the premises of Kenya Pipeline Limited situated along Sekondi road, off Nanyuki Road-Industrial Area.**
- b. A stay of the intended auction of Metro Petroleum Limited's fuel products held by Kenya Pipeline Company Limited in its line fills.

[2] The applications are supported by the Supporting Affidavit of the respective applicant. The 1st Plaintiff also filed a further affidavit dated 20th August 2014 in response to the 1st Defendant's Replying Affidavit dated 22nd November 2013 as well as the Affidavit of Bill K. Rotich in support of the Application by the Interested Party dated 31st October 2013. The major bone of contention is the advertisement carried in the newspaper to the effect that the 2<sup>nd</sup> Defendant acting as agents of the 1<sup>st</sup> Defendant intended to sell the suit property by public

auction that was scheduled for the 1st November 2013. The application was subsequently amended on the 5th of November 2013 pursuant to a court order. The Applicants argued that the court had ordered that under the direction and control of Kenya Revenue Authority, the directors of Metro Petroleum Limited be allowed to access the Petroleum products under the custody of Kenya Pipeline Company Limited and dispose by selling the quantity thereof to the value of Kshs. 20,000,000.00 which was to be deposited in an interest bearing account in the joint names of counsels for the respective parties at KCB High Court Branch Nairobi. The said court order has never been complied with to date, due to lack of co-operation by the Interested Party despite the 1st Plaintiff's attempts which includes writing to the Managing Director of Kenya Pipeline Company Limited. The letter dated 7th July 2014 requested that the 1st Plaintiff and Interested Party to be allowed to transfer approximately 294,800 litres of Diesel for sale to a willing purchaser. The said letter was also copied to the interested party.

[3] According to the 1<sup>st</sup> Plaintiff's written submissions, the following are the issues for determination by the Court:-

- a) **Whether the tax assessment is a valid claim against the 2<sup>nd</sup> Plaintiff Company?**
- b) **Whether the purported proclamation and intended sale of the 2<sup>nd</sup> Plaintiff Company fuel products in the line fills held by Kenya Pipeline Company Limited by the 1st Defendant and the 2<sup>nd</sup> Defendants by themselves or their agents was done in good faith?**
- c) **Whether the Plaintiffs have fulfilled and met the required threshold to be granted an injunction restraining the 1st Defendant and the 2<sup>nd</sup> Defendants by themselves, their servants, agents or otherwise from proceeding with the threatened distress over the 2nd Plaintiff's property?**
- d) **Whether the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants stand to suffer any loss and/ or prejudice if the orders sought by the Plaintiffs are issued?**

### **Is Tax Assessment a Valid Claim?**

[4] The 1<sup>st</sup> Plaintiff asserted that, when he learnt of the alleged owing and unpaid taxes to the 1st Defendant, purportedly amounting to about Kshs. 16 Million, he promptly asked the 1<sup>st</sup> Defendant to render true and proper accounts and provide full information to the Plaintiffs on the purported unpaid taxes and the assessment thereof, but in vain. The 1<sup>st</sup> Plaintiff contended that the representations made by the Interested Party to the 1<sup>st</sup> Defendant that he would pay the taxes with proceeds of the 2<sup>nd</sup> Plaintiff's stock is a fraudulent attempt to defraud the 2<sup>nd</sup> Plaintiff's assets, because the Interested Party had full knowledge that the 2<sup>nd</sup> Plaintiff had ceased trading and conducting its ordinary business. Whereas it is not in dispute that the 1<sup>st</sup> Defendant is entitled to recover unpaid taxes either through court process or through levying distress, the taxes sought ought to be based on an assessment which the debtor is entitled to be informed of. The 1<sup>st</sup> Defendant has never supplied the 1<sup>st</sup> Plaintiff with the tax assessments despite several requests to date. Therefore, they concluded that the action of the 1<sup>st</sup> Defendant goes against the rules of natural justice and the right to fair hearing as enshrined in the constitution.

[5] The 1<sup>st</sup> Plaintiff averred that there is non-disclosure of information in this case, and so the action by the 1<sup>st</sup> Defendant infringes upon the right of the Plaintiffs. Disclosure of information entails the right to have a fair and proper notice of the issues intended to be raised against the plaintiff's and in this case, it was the tax assessment against the 2<sup>nd</sup> Plaintiff Company. Full material disclosure makes it possible for the affected person to appreciate the allegations against it

to prepare its own case. Natural justice is infringed if a body decides a matter on the basis of confidential enquiries and information. The right to know the materials on which the authority is to rely is part and parcel of the right to defend and prepare for one's case. The position of the courts in Kenya on the need for disclosure of material information and fair administrative action has been expressed in the case of **Geothermal Development Company Ltd v Kenya Revenue Authority & Others**, where the High Court held that

**“...the company's right to fair administrative action accorded by the constitution were violated issuing the Tax Demand dated 20th June 2011 and acting upon it to enforce the collection of taxes. Consequently, any action cannot lie and as such the Agency Notices dated 6th August 2012 are hereby quashed. I find and hold that Notice of Assessment dated 16th August 2012 is proper notice issued under the VAT act therefore proceedings concurrent upon it including the objection lodged by the Company through its appointed agent shall proceed in accordance with the law. Although a notice of assessment was issued in respect of Value Added Tax (VAT), no such notice was issued in respect of the amount due under the Income Tax Act. The Defendants are therefore restrained from enforcing collection of Withholding tax and PAYE set out in the Tax Demand until such time as proper notice of assessments is issued to the company”.**

[6] The 1<sup>st</sup> Plaintiff was, however, aware that, the Commissioner of the 1<sup>st</sup> Defendant may in writing, require a person carrying on business to furnish him with a reasonable time, not being less than thirty days from the date of service of the notice, with a return of all payments made by that person of any kind specified in that notice. The 1<sup>st</sup> Defendant did not serve the said notice on the Plaintiffs, thus, it infringed on the Plaintiff's right and is in direct contravention of the Income Tax Act, Laws of Kenya. The Plaintiffs have never been served with notice despite the 1<sup>st</sup> Defendant being aware of the 2<sup>nd</sup> Plaintiff's Company postal address and having the knowledge that there was a dispute between the 1<sup>st</sup> Plaintiff and the Interested Party vide Civil Suit Number 542 of 2007 filed by the 1<sup>st</sup> Plaintiff in the Commercial Division of the High Court of Kenya, Nairobi. All these things put together deny the Plaintiffs the right to have the dispute herein in a fair and public hearing before a court or if appropriate, another independent impartial body or tribunal.

### **Purported Proclamation and Intended Sale not in Good Faith**

[7] The 1<sup>st</sup> Plaintiff averred that, in the year 2003, the Interested Party's wife resigned as a Director and also withdrew as a shareholder. Subsequently, the 1<sup>st</sup> Plaintiff was appointed as a Director/Shareholder of the 2<sup>nd</sup> Plaintiff. The 1<sup>st</sup> Plaintiff and the Interested Party are the only lawfully appointed Directors of the 2<sup>nd</sup> Plaintiff Company, with the 1<sup>st</sup> Plaintiff as the Chairman and the Interested Party as the other Director. They urged that, the Interested Party's action of purporting to run and manage the affairs of the 2<sup>nd</sup> Plaintiff single handed without the knowledge and consent of the 1<sup>st</sup> Plaintiff is null and void. The Interested Party misappropriated the Company's assets worth 200 Million and failure to remit income tax chargeable and payable to the 1<sup>st</sup> Defendant together with purportedly accrued interest in the sum of Kshs. 16 Millions also fraudulent act done without the 1<sup>st</sup> Plaintiff's knowledge and consent. The 1<sup>st</sup> Plaintiff also contended that he learnt that the Interested Party had made representations to the 1<sup>st</sup> Defendant that he would pay the purported taxes with the proceeds from the sale of the 2<sup>nd</sup> Plaintiff Company stock, but has to date never come good. The law relating to companies is the Companies Act and requires that every company shall have at least two directors or one director and a secretary. The law prohibits a company having the secretary as the sole director of the company, or a sole director being the secretary to the company or a corporation being the sole director of the company or as sole director of which is secretary to the company. A provision requiring or authorizing a thing to be done by or to a director and the secretary shall not be satisfied by its being done by or to the same person acting as director and as, or in place of, the secretary.

[8] The purported proclamation and intended sale of the 2<sup>nd</sup> Plaintiff Company fuel products in the line fills held by Kenya Pipeline Company limited by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants or their agents was thus in bad faith as no notice was served upon the Plaintiffs.

### **Threshold for injunction**

[9] Order 40 Rule 1 of the Civil Procedure Rules, 2010 provide that:

**“Where in any suit it is provided by affidavit or otherwise –**

- a. **that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or**
- b. **that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”**

Rule 2 provides that:

**“In any suit for restraining the Defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or relating the same property or right.**

**(2) The Court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise as the court deems fit.”**

[10] The 1<sup>st</sup> Plaintiff submitted that, by virtue of **Order 40**, the court has the power to grant an injunction against the Defendant. However, the power is held discretionary. See **Nyutu & 3 others v Gatheru & 2 others [1990] KLR** on principles of granting a temporary injunction, i.e., firstly show prima facie case with a probability of success: Secondly, that unless granted an injunction he is likely to suffer injury incapable of adequate redress by an award of damages: and, Thirdly, that in the event of doubt, the Court should decide the case on the balance of convenience. See also the case of **Olympic Sports House Limited V School Equipment Centre Limited** as well as **Giella v Cassman Brown**. The Court of Appeal defined what prima facie case is in **Mrao v First American Bank (K) Limited**. The 1<sup>st</sup> Plaintiff stated that it has shown that his right will be infringed and so has established a prima facie case.

[11] They also submitted that, as long as a party has shown that its rights have been infringed or the defendant has breached an express provision of the law, an injunction should issue to aid the law. In the case of **Loldiaga Hills Ltd & 2 Others v James Wells and 3 others** it was held that:

**“Be that as it may, I hold the view that it is not always mandatory that where damages are an adequate remedy an injunction should not issue. In HCCC No. 33 of 2011 Payless Car Hire and Tours Ltd V Imperial Bank Ltd, I held that:-**

**“On the second limb of Giella v Cassman Brown, the Defendant has asserted that as a financial institution, it is capable of compensating the plaintiff and therefore damages are an adequate remedy. As already stated above, I have never understood the law**

that a wronged party cannot obtain an injunction because the wrongdoer is capable of compensating such party with damages. More so, when the act complained of is an illegal act that blatantly flouts the law a court of equity cannot fold its hands and condone the flouting of the law on the basis that damages are an adequate remedy. Whilst I am alive to the fact that the 2<sup>nd</sup> limb of *Giella V Cassman Brown* is to the effect that an injunction will normally not be issued where damages are an adequate remedy, I venture to suggest that principle is not couched in mandatory terms. The East African Court of Appeal in laying down the test in *Giella v Cassman Brown* put the 2<sup>nd</sup> limb in a permissive form as opposed to the 1st limb.

Then in *Waithaka v Industrial and Commercial Development Corporation [2001] KLR 374* Ringera J (as he then was) once again delivered himself thus at page 381:

As regards damages, I must say that in my understanding of the law, it is not an inexorable rule that where damages maybe an appropriate remedy, an interlocutory injunction should never issue. If that were the rule, the law would unduly lean in favour of those rich enough to pay damages for all manner of trespasses. That would not only be unjust. I think that is why the East African Court of Appeal couched the second condition in very careful terms by stating that normally an injunction would not issue if damages would be an adequate remedy.....if the adversary has been shown to be highhanded or oppressive in its dealings with the applicant this may move the court of equity to say: ‘money is not everything at all times and in all circumstances and don’t you think you can violate another citizen’s rights only at the pain of damages.’ In the instant case, although I have found myself in doubt as to the existence of prima facie case, I have said enough to show that the Plaintiff has an arguable case and that the Defendant’s conduct may be regarded as high handed and probably unfounded in law”...

[12] The plaintiffs were convinced that they have established a prima facie case in the sense of the definition in *Mrao v First American Bank (K) Ltd* in that the 1st Defendant failed to serve on the Plaintiff the notice as required by law and as such, a legal right was infringed, Therefore, the 1<sup>st</sup> Defendant’s action and its conduct was tantamount to illegality. See the case of *Gurdoba Enterprises Ltd V Kenya Revenue Authority [1998]* where Mboghli J. found that the Plaintiff had established a very strong prima facie case with a probability of success and it was not necessary for him to consider the other two principles in granting the injunction order. The learned judge issued injunction orders as against Kenya Revenue Authority as prayed.

### **Will 1<sup>st</sup> and 2<sup>nd</sup> Defendants suffer any loss or prejudice?**

[13] The Plaintiffs asserted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants will not suffer any loss and/or prejudice if the orders sought for injunction are granted as there are interim orders of injunction in place and the said orders have been extended from time to time by the Honourable Court. In case, any damage suffered could be compensated in damages. For those reasons, the Plaintiffs prayed for a temporary injunction to issue against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants restraining them from levying distress over, advertising for sale, offering for sale or selling in by public auction or otherwise interfering with, alienating, disposing or in any way dealing with the 2<sup>nd</sup> Plaintiff’s moveable property held at the premises of Kenya Pipeline Limited situated along Sekondi road, off Nanyuki Road- Industrial Area.

### **1<sup>ST</sup> Defendant’s submissions**

[14] The 1<sup>st</sup> Defendant filed its submissions. It urged that these matters relate to distress for taxes owed by Ms. Metro Petroleum Limited, a Taxpayer in the registers with the 1<sup>st</sup> Defendant herein. The said Metro Petroleum Limited is a private company that was incorporated on or about April 6<sup>th</sup>

2003. The taxpayer's principal business is distribution of petroleum products. In support of its action the 1<sup>st</sup> Defendant gave brief facts of the case to be that;

- a. A compliance check was conducted on the taxpayer's records in the year 2011. PAYE arrears amounting to **Kshs.19,518,085.53** were established and demanded on July 15, 2011 (*see replying affidavit*). There being no payment received, the case was forwarded to Debt Unit for enforcement and a demand notice issued subsequently date July 22, 2011 (*see affidavit*).
- b. The taxpayer's reply dated July 29<sup>th</sup>, 2011 did not dispute the arrears, and gave a proposal to settle the principal tax of **KShs.11,483,839.45** in eight (8) equal installments over a period of 2 years, and expressed intention to apply for waiver of interest and penalty. The proposal was not accepted, guided by procedures in Debt Manual.
- c. A meeting was held on August 12, 2011 between 1<sup>st</sup> Defendant and Metro Petroleum Ltd. To discuss an amicable way to settle the arrears. The taxpayer agreed to offer an acceptable payment plan and the taxpayer pledged to communicate the same to KRA by August 17 2011. However, the taxpayer reneged on the commitment and a 7 day demand notice for the full amount of **Kshs.19,518,085.53** issued dated August 19, 2011. No reply was received, leading to issuance of immediate demand letters dated September 5, 2011 and September 29, 2011.
- d. Another meeting was held on February 29, 2012, after which the taxpayer then presented two (2) post-dated cheques numbers 100561 and 100562 of **Kshs.500,000** each, dated March 6th,2012 and April 4th, 2012 respectively. The covering letter indicated that the taxpayer was not yet trading and was having difficulties in settling the arrears.
- e. The taxpayer requested 1<sup>st</sup> defendant not to attach their bank Accounts because they had a facility to finance their oil imports amounting to over **KShs.1 billion**. They indicated that if 1<sup>st</sup> Defendant attached their bank accounts, the bank would withdraw the facility because of the clauses in the agreement which informed granting of the facility. They further said that it had taken them over two (2) years to negotiate the facility and that it would be unfair if the facility was withdrawn. Save for the loan facility, the firm was in financial distress and there was no likelihood that it would honour any agreement to settle the debt. Based on this, the Department considered recovery through warrant of distress.
- f. On April 19, 2013, 1<sup>st</sup> Defendant wrote to Kenya Pipeline Company Limited (KPC) based on the provisions of Section 56 of the Income Tax Act, requesting for fuel stock details of held on behalf of Metro Petroleum Limited. KPC confirmed existence of the fuel stock valued at **KShs.119,755,277**. Based on the provisions of Section 102 of the Income Tax Act, distress warrants for the amount of **Kshs.16,518,085.53** were served on June 19, 2013.
- g. The taxpayer wrote to KRA on June 19, 2013, committing to settle the principal taxes by June 27, 2013. This directed the suspension of the notice and warrant of distress on June 26, 2013. However, no payment was received leading to reinstatement of the warrants on September 30, 2013. *On October 16, 2013, the taxpayer was issued with Notification of Sale form*. The same was also posted to the taxpayer through registered mail. The sale was advertised in the local dailies on October 22, 2013.

[15] Was the Plaintiff served with a proper notice under the provisions of Section 52 of the Income Tax Act? The Defendant submitted that the following claims by the Plaintiff are insincere:-

- a. That the proclamation and intended sale has not been done in good faith and that the Defendants have acted capriciously, recklessly and have treated and Applicants oppressively.
- b. That the distress levied was an unlawful exercise of the Defendant's statutory power.
- c. That the 1<sup>st</sup> Plaintiff came to learn of the unpaid taxes, as well as the arrangements to settle the arrears, recently.
- d. That no notice was served upon the 1<sup>st</sup> Plaintiff, despite being aware of the dispute between the company's directors. That neither was a notice served on the company's postal address, its physical address having ceased to be operational.
- e. That the taxes to be recovered ought to be based on an assessment which the debtor is entitled to be informed of. That the 1<sup>st</sup> Defendant failed or neglected to inform the Plaintiffs of the

- assessment despite repeated requests. That the intended sale is meant to recover the taxes from the sale of the entire line fill that is valued at KShs.118 million.
- f. That KRA has refused to divulge the reserve price of the intended auction.
  - g. That the intended sale is not in good faith, and that KRA has acted capriciously, recklessly and treated the Applicants oppressively.

### **Relevant provisions of the statute**

[16] The 1<sup>st</sup> Defendant submitted that the relevant law is Income Tax Act and the specific sections thereto are:

- a) Section 77: Additional assessment;
- b) Section 78: Service of notice of assessments;
- c) Section 84: Notice of objection to assessment; and
- d) Section 102: Collection of tax by distraint.

[17] The 1<sup>st</sup> Defendant argued that, contrary to the assertions by the Plaintiffs:

1. The debt is not “alleged” as it is a result of a compliance check on the company’s records and governed by the Provisions of Section 77 Income Tax Act. No objection was received against the tax and in fact the taxpayer made attempts to settle the debt and paid a total of **Kshs.3,000,000** towards it.
2. Section 52 could not apply in this case as the section governs furnishing of returns which was not the subject of the assessment in question. The Notice of Assessment was correctly served under Section 78 of the same Act.
3. Section 102 allows for collection of arrears through distraint. Given the time frame the case has taken (from years 2011 to 2013), and the taxpayer’s renegeing on commitments to settle the taxes, the actions were well within the law and was done in good faith to recover the taxes.
4. The debt is being demanded from Metro Petroleum Limited and not the company’s directors. The internal wrangles between the directors should therefore not affect the taxpayer’s obligation to being tax compliant.
5. All correspondences were sent via post to the taxpayer as a body corporate; therefore the Department was not required to furnish individual directors or their lawyers with copies of the correspondences. Further, the replies and payments made confirm that the correspondences were received by the taxpayer.
6. The intended auction is expected to recover the outstanding arrears amounting to **Kshs.16,518,085.53**, and cover the auctioneer’s fees. There is no intention to sell the entire fuel as alleged.
7. The Defendant is not under any obligation to divulge the reserve price.

[18] The 1<sup>st</sup> Defendant cited case law. First, the Case of **Prime Bank vs Kenya Revenue Authority H.C.C.C No. 116 of 2009**, this Court held that an injunction cannot issue against the 1<sup>st</sup> Defendant by dint of the Government Proceedings Act Cap 40. Justice M. Koome states

**“On the first issue this suit is against the Commissioner of Customs and the orders sought in prayer Nos. 2 and 4 are injunctive relieves. Counsel for the Plaintiff argued that under the EACCMA particularly Section 221 proceedings may be brought against the Commissioner in their name. However, this act as the preamble suggest is an act of the community to make provisions for the management under administration of customs and for related matters. Further under Section 5 it is provided as follows:**

**“There shall be appointed, in accordance with partner States’ legislation, a Commissioner responsible for the management of Customs by each of the Partner States and such other staff as may be necessary for the administration of this Act and the efficient working of the Customs”.**

**By dint of the above provisions, the Commissioner of Customs is appointed according to the Kenya Revenue Authority Act which is a body corporate. Under Section 3(2), any suit against the KRA arising from the performance of the functions or the exercise of any of the powers of the authority shall be deemed as legal proceedings against the Government within the Government Proceedings Act. Under the Government Proceedings Act, any party desiring to institute proceedings against the Government under Section 13(1) is supposed to issue a notice which should be for a period of 30 days.**

**Although it was not necessary for the Plaintiff to issue a notice in this case because the orders sought are declaratory, there is a further problem which is compounded by the provisions of Section 16 of the Government Proceedings Act. It is provided that a Court cannot make an order of injunction against the Government but merely declare the rights of the parties. The Plaintiff’s application seeks for injunctive relieves at this stage pending the hearing and determination of the suit. According to Section 16 of the Government Proceedings Act, an injunctive order sought cannot issue. I am aware this Court is vested with the discretion to grant an order declaring the rights of the parties. It is also trite that discretion must always be exercised judiciously based on evidence and the law. Before such an order is made, the Court has to be satisfied that the Plaintiff has a prima facie case with a probability of success at the end”.**

[19] The 1<sup>st</sup> Defendant was, therefore, of the view that the registered taxpayer in this matter is the one running the business. The same have been admitted as payable for failure deduct and remit PAYE. Similarly, they urged that this matter be dismissed in its entirety for both do not disclose any cause of action. Consider:-

- a. **The Government Proceedings Act Cap 40 Laws of Kenya**
- b. **The Civil Procedure Act Cap 21 Laws of Kenya**
- c. **The Kenya Revenue Authority Act Cap 469 Laws of Kenya**
- d. **The Income Tax Act Cap 470 Laws of Kenya**
- e. **Mombasa H.C.C.C No. 170 of 2000: Marc Cargo Ltd vs Kenya Revenue Authority**
- f. **Nairobi H.C.C.C No. 363 of 2000: Jaffer Shariff Omar vs Kenya Revenue Authority**
- g. **Nairobi H.C.C.C No. 588 of 2007: Swift Commercial Establishment Ltd vs Kenya Revenue Authority**
- h. **Nairobi H.C.C.C No. 576 of 1999: Southern Credit Banking Corporation Ltd vs Kingsway Tyres&Automart Ltd & 2 Others**

## **DETERMINATION**

[20] A quick resolution of an issue which I think is important. Contrary to the arguments by the 1<sup>st</sup> Defendant, an injunction can issue against the 1<sup>st</sup> Defendant despite the provisions of the Government Proceedings Act Cap 40. I will proceed on that basis. This is an application for injunction. I do not wish to reinvent the wheel except to say that the law on injunctive relief, just as any other limb of law, has grown to great refinement in order to provide for situations which were not exactly foreseen before. Therefore, the court has to consider the entire and peculiar circumstances of each case in order to determine whether an injunction is deserved or not. And in doing so, the Court should be minded to take a path with less risk of injustice should it turn out that the court was wrong in issuing the injunction. Nonetheless, the Court must be guided by the traditional thresholds set out in the case of **Giella vs. Cassman Brownby** asking:

- a) **Has the Applicant established a prima facie case with a probability of success?**
- b) **Will the Applicant suffer irreparable damages not compensable in damages unless an injunction is granted? And**
- c) **Where does the balance of convenience lie?**

[21] The 2<sup>nd</sup> Plaintiff is a limited liability company. It has its own existence as a company separate from the people who compose it. That is what is called separate corporate entity-the greatest legal innovation in the ever great case of **Salomon vs. Salomon**. There seems to be internal wrangles between the directors of Metro Petroleum Limited. Those differences seem to be deep-seated and are also a source of disobedience with court orders which were issued on 26<sup>th</sup> November 2013. The company has not complied with the court orders because of the differences between the two directors of the company. I wish to state that the orders are issued against the company and are to be adhered to as such. The human persons through whom the company operates are the two directors. These are not winding-up or liquidation proceedings or a derivative suit or proceedings under section 164, 165 and 166 of the Companies Act. These are matters of tax between KRA and the Company. The injunction will, therefore, be considered within that framework. It should be noted, however, that the court should not be seen to be powerless in the face of flagrant disobedience with its orders made on 26<sup>th</sup> November 2013. It will see to it that its orders are complied with. It will, nonetheless, see to it that justice prevails at the end of the day.

[22] The tempo and the law have been set. I will proceed with the case as I have pointed out. The first point which is clear is that the company is a tax payer in the record of KRA. I see the following two major issues for determination:-

- a) **Were notice of assessment and proclamation for distress served on the company as by law required?**
- b) **Was there non-disclosure of material information on the assessment of tax herein?**

These two issues are inextricable and are the basis of the application as well as the case. I will, therefore, consider them only on prima facie basis and on the material before me.

[23] The 1<sup>st</sup> Plaintiff has stated that the following three major complaints entitle him to an injunction:

- 1) **That Commissioner for KRA did not in writing, require the company as a person carrying on business to furnish him within a reasonable time, not being less than thirty days from the date of service of the notice, with a return of all payments made by that person of any kind specified in that notice. The 1<sup>st</sup> Defendant did not serve the said notice on the Plaintiffs, which is a contravention of Sections 52 and 58 of the Income Tax Act Chapter 470 of the Laws of Kenya, and thus, an infringement on the Plaintiff's right. They argued that the 1<sup>st</sup> Defendant was aware of the 2<sup>nd</sup> Plaintiff's Company postal address and had the knowledge that there was a dispute between the 1<sup>st</sup> Plaintiff and the Interested Party in Civil Suit Number 542 of 2007 filed by the 1<sup>st</sup> Plaintiff in the Commercial Division of the High Court of Kenya, Nairobi.**
- 2) **That, in the year 2003, the Interested Party's wife resigned as a Director and also withdrew as a shareholder. Subsequently, the 1st Plaintiff was appointed as a Director/Shareholder of the 2<sup>nd</sup> Plaintiff. The 1<sup>st</sup> Plaintiff**

and the Interested Party are the only lawfully appointed Directors of the 2<sup>nd</sup> Plaintiff Company, with the 1<sup>st</sup> Plaintiff as the Chairman and the Interested Party as the other Director. Therefore, he urged that, the Interested Party's action of purporting to run and manage the affairs of the 2<sup>nd</sup> Plaintiff single handed without the knowledge and consent of the 1<sup>st</sup> Plaintiff is null and void. The Interested Party misappropriated the Company's assets worth Millions of shillings and one of his fraudulent acts was failure to remit income tax chargeable and payable to the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Plaintiff also contended that he learnt that the Interested Party had made representations to the 1<sup>st</sup> Defendant that he would pay the purported taxes with the proceeds from the sale of the 2<sup>nd</sup> Plaintiff Company stock. Basing his arguments on sections 177, 178, 179 and 180 of the Companies Act, a company cannot run with one director or one person doubling up as a director and secretary. Such person cannot authorize any act by the company.

3) That KRA concealed information contrary to section the taxes to be recovered ought to be based on an assessment which the debtor is entitled to be informed of. The 1<sup>st</sup> Defendant failed or neglected to inform the Plaintiffs of the assessment despite repeated requests. KRA has also refused to divulge the reserve price of the intended auction. This was non-disclosure of information and coupled with lack of assessment notice amounts to infringement of a right to natural justice and fair administrative action. Therefore, the entire process of assessment of tax, the proclamation and the intended sale of the entire line fills that is valued at KShs.118 million were done in vain and in bad faith. KRA has acted capriciously, recklessly and treated the Applicants oppressively.

[24] What does the law say on the matters raised by the 1<sup>st</sup> Plaintiff? Let me deal with the capacity of the company to operate. The 1<sup>st</sup> Plaintiff alleges that the Interested Party was running the company single-handed to the exclusion of the 1<sup>st</sup> Plaintiff. He argued that, in such circumstances, all the decisions the Interested Party made alone including proposals to pay the tax demanded through the petrol in the line company's line fills are in contravention of the law; are null and void. He also alleged misappropriations of company's assets worth millions of shillings by the Interested Party. To say the least, the 1<sup>st</sup> Plaintiff has admitted that both the 1<sup>st</sup> Plaintiff and the Interested Party are still the directors of the company. The documents filed in court also reveal that position. The only complaint is that decisions were made by Interested Party alone in the absence of 1<sup>st</sup> Plaintiff. The said allegation will need full proof through record of the resolutions of the company. None was produced to support the allegations. But in any event, the said arguments on fraud and misappropriation of company's assets may not affect taxes which are found to be due from the company. In so far as injunction against recovery of taxes by KRA is concerned, the wrangles between the directors or shareholders will not be formidable arguments or basis for injunction. Those arguments by the 1<sup>st</sup> Plaintiff cannot be used as a shield not to pay taxes or as a basis for injunction on matters of tax. Taxes are paid on earnings or income from any business. I reject the argument put forth as a basis for injunction. Perhaps the other arguments are potent grounds. Let me examine them carefully.

#### **Assessment notice**

[25] Again, arguments that the 1<sup>st</sup> Plaintiff was not served with assessment notice despite the 1<sup>st</sup> Defendant being aware of the wrangles between the directors will not hold any water. The taxpayer is the company, and any notice should be served on the company not the individual directors. To this end, I need not remind what was said a long time ago in the case of **Salomon vs. Salomon** that, a company is a corporate legal entity separate from those who compose it. Before I consider whether a notice served on the company, let me first confirm the nature of assessment in this case. From the facts of the case and especially the letter dated 14<sup>th</sup> July 2011 which was

received by the company, it merges that the company had filed PAYE Returns and spread sheets with KRA. The Returns were examined and KRA reached a decision that the company had not fully complied with tax regulations under the Income Tax Act. There were irregularities in the Returns. Therefore, KRA made additional assessment as follows:

Principal tax.....	Kshs. 11,483,839.45
Penalty.....	Kshs. 2,296,767.89
Interest.....	Kshs. 5,737,478.19
Total due and payable.....	Kshs. 19,518,085.53

[26] The applicable sections are, therefore, 77, 78 and 84 of the Income Tax Act which provide as follows:

**77. Where the Commissioner considers that a person has been assessed at a less amount, either in relation to the income assessed or to the amount of tax payable than that at which he ought to be assessed, the Commissioner may, by an additional assessment, assess that person at such additional amount as, according to the best of his judgement, that person ought to be assessed.**

**78. The Commissioner shall cause a notice of an assessment, provisional assessment or instalment assessment to be served on the person assessed, and the notice shall state the amount of income assessed and the amount of tax payable and shall inform the person assessed of his rights under section 84; but no notice need be served in the case of a person deemed to have been assessed under section 74(2) or 74A(2).**

**84(1) A person who disputes an assessment made upon him under this Act may, by notice in writing to the Commissioner, object to the assessment.**

**(2) A notice given under subsection (1) shall not be a valid notice of Objection unless it states precisely the grounds of objection to the assessment and is received by the Commissioner within sixty days after the date of service of the notice of assessment; but if the Commissioner is satisfied that owing to the absence from Kenya, sickness or other reasonable cause, the person objecting to the assessment was prevented from giving the notice within that period and there has been no unreasonable delay on his part, the Commissioner may, upon application by the person objecting, and after deposit by him with the Commissioner of so much of the tax as is due under the assessment under section 92, or such part thereof as the Commissioner may require, and the payment of any interest due under section 94, admit the notice after the expiry of that period and the admitted notice shall be a valid notice of objection:**

**Provided that the objection made within the sixty days shall not be valid unless it is accompanied by a return of income together with all the supporting documents, where applicable.**

**(3) A person aggrieved by the refusal of the Commissioner to admit a notice of objection under subsection (2) may, on depositing with the Commissioner if he so requires, the whole or such part as the Commissioner may require of the amount of tax assessed under the assessment to which objection is made and on paying any interest due under section 94, appeal against the refusal to a local committee, whose decision shall be final.**

**(4) All the provisions of this Act relating to appeals against assessments shall, so far as they are applicable and subject to the finality of the decision of the local committee, have effect with respect to an appeal under subsection (3), and the local committee hearing the appeal may confirm the decision of the Commissioner or may direct that the notice concerned shall be a valid notice of objection.**

[27] I will proceed on that basis. The Kenya Revenue Authority wrote to the company on 14<sup>th</sup> July 2011 informing them of additional assessment of tax due and payable. The letter was addressed to the company and was received by the company on 15<sup>th</sup> July 2011. There is a rubber stamp of the company affixed on the letter. The company has not denied receipt of the said letter. The letter stated the amount of income assessed and the amount of tax payable. The company was also provided with the spread sheet detailing the assessment of the tax due and payable and called upon the company to seek for any clarification from the writer of, through a designated number specified in the letter. Although the letter did not specifically inform the company of its rights under section 84, it is sufficient notice of assessment. No objection was raised by the company. Instead the company engaged the Kenya Revenue Authority on how it intended to pay of the tax due and made several proposals on payment thereof, but in vain. The company even issued two cheques which were dishonoured upon presentation. Further reminders were issued on 22<sup>nd</sup> July 2011 to which the company replied that they will pay the tax due over a period of two years in eight equal instalments. They, however, requested for waiver of penalty and interest charged. See the letter dated 29<sup>th</sup> July 2011. The company and KRA held other subsequent meetings on this matter where the company gave certain commitments to pay the tax but reneged on the promises. These events made KRA to write the letter dated 19<sup>th</sup> August 2011 calling for payment of the tax due of the sum of Kshs. 19,518,085.53 within 7 days thereof. Other demands letters were issued on 5<sup>th</sup> and 29<sup>th</sup> September 2011. The company only replied on 29<sup>th</sup> February 2012 and send two post-dated cheques of Kshs. 500,000 each. These cheques were dishonoured on presentation. There is no doubt the tax was not disputed by the company as by law required. The company was given notice of the assessment and all details in the spreadsheet and therefore, they cannot say now that they were not provided with details of the assessment. The company acknowledged the debt and did not file any objection thereto. There is no right of the company which was infringed. As I stated earlier, the distinction between the company and the directors is crucial in this decision. Accordingly, the arguments on infringement of right of the company fail.

[28] It is after the prolonged default by the company that KRA issued a Notice of Distress under Distraint Rules to attach goods and chattels belonging to the company. They also issued Warrant of Distress under section 102 of the Income Tax Act. The goods to be attached are the stocks held on behalf of the company by Kenya Pipeline Company Limited (KPC). Looking at all the circumstances of this case, the distress was not made capriciously or mala fides as alleged. The distress was made in accordance with the law and after persistent default by the company to pay the taxes due and payable to KRA. here is also nothing unlawful about the Notification of Sale issued by the auctioneer. The 1<sup>st</sup> plaintiff seems to lay too much emphasis on the wrangles between the two directors to fault the assessment by KRA and the process adopted to recover the taxes due and payable from the company. As I stated, those arguments around the internal wrangles of directors cannot afford a formidable ground for an injunction against a third party who in any case should not be affected by internal processes or conflicts of members of a company. They can only serve useful purposes on matter between the directors themselves or with the company or in a winding-up cause of the company or in proceedings under section 164, 165 and 166 of the Companies Act.

[29] It is worth of note that the court made a consent order that the products in issue to be sold and the funds be deposited in an interest earning account. But due to the wrangles between the directors the order was not obeyed at all. The Applicants have come to court for equitable relief and they should pass the test of good faith. The law is that, where the conduct of the Applicant does not meet the approval of equity, the court will deny him the injunctive relief regardless of all

other matters. The conduct of the Applicants does not excite any tenderness from equity. Similarly, the applications herein do not meet the threshold of law. When put on scale, the circumstances of the case tilt the balance of convenience in favour of denying the injunction as well as the stay orders sought. On the reasons I have stated, I refuse to issue any injunction against or stay the recovery action by KRA. The upshot is that I dismiss the applications dated 30<sup>th</sup> October 2013 and 31<sup>st</sup> October 2013 with costs to the Respondents. It is so ordered.

**Dated, signed and delivered in court at Nairobi this 15<sup>th</sup> day of June 2015.**

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**F. GIKONYO**

**JUDGE**

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