



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW NO. 153 OF 2015**

**IN THE MATTER OF AN APPLICATION BY KSC INTERNATIONAL LIMITED (IN RECEIVERSHIP) FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF THE INCOME TAX CHAPTER 470 LAWS OF KENYA, THE VALUE ADDED TAX ACT 2013 AND THE CUSTOMS & EXCISE AT CHAPTER 472 LAWS OF KENYA AND THE COMPANIES ACT CHAPTER 486 LAWS OF KENYA AND ARTICLE 47 OF THE CONSTITUTION OF KENYA**

**KSC INTERNATIONAL LTD (IN RECEIVERSHIP)..... APPLICANT**

**VERSUS**

**KENYA REVENUE AUTHORITY.....RESPONDENT**

**AND**

**KENYA COMMERCIAL BANK LTD.....1<sup>ST</sup> INTERESTED PARTY**

**I & M BANK LTD.....2<sup>ND</sup> INTERESTED PARTY**

**BANK OF AFRICA KENYA LTD.....3<sup>RD</sup> INTERESTED PARTY**

**RULING**

1. By a Chamber Summons dated 1<sup>st</sup> May, 2015, the applicant herein, **KSC International Ltd (In Receivership)**, sought leave to apply for the following orders:

i. an Order of *Certiorari* removing to this honourable court for the purpose of the same being quashed the letter dated 7/5/2015 and the notices dated 5<sup>th</sup> May 2015 and 11<sup>th</sup> May 2015 issued by the Respondent as well as the proclamation letters dated 8/5/2015 and 14/5/2015 issued by the Respondent's agents Leakey's Auctioneers, and directed at the Applicant.

ii. An order of prohibition to prohibit the Respondent, its officers, servants, agents including Leakey's Auctioneers from attaching, taking away, disposing, alienating or interfering with the Applicant's possession of the items referred to in the proclamation letters dated 8/5/2015 and 14/5/2015.

**3. That the grant of leave to operate as a stay against the distress of the goods and chattels of the Applicant by the Respondent, its officers, servants or agents including Leakey's Auctioneers, pending the final hearing and determination of these proceedings.**

**4. That costs be awarded to the Applicant.**

2. According to the applicant, on the 18<sup>th</sup> February, 2015, the Applicant company was placed under Receivership by the 3<sup>rd</sup> Interested Party and **Kolluri Venkata Subbaraya Kamassastry** appointed Receiver and manager of the whole of the property of the company pursuant to powers conferred upon the 3<sup>rd</sup> Interested Party by the Debenture dated 5<sup>th</sup> May, 2011. On 13<sup>th</sup> March, 2015, **Samuel Okech Onyango** and **Harveen Gadhoke** were appointed as Joint Receivers and managers of the Applicant company by the 3<sup>rd</sup> Interested Party, and by the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties on 20<sup>th</sup> March, 2015, to act long with **Kolluri Venkata Subbaaraya Kamasasstry**.

3. By way of a demand letter dated 7<sup>th</sup> May, 2015 and served upon the Applicant on 8<sup>th</sup> May, 2015 at the close of business at 4.45pm, the Respondent demanded immediate payment to it of a total sum of Kenya Shillings 226,780,998/= being Corporation Tax, Value Added Tax and Pay As You Earn tax all inclusive, that was purportedly owing. The said demand was issued following an alleged assessment over the period 2010 to 2015. However, no demand for payment had been issued by the Respondent to the Applicant prior to 8<sup>th</sup> May, 2015. On the same date and time of 8<sup>th</sup> May, 2015 at the close of business at 4.45pm, the Applicant was simultaneously served at its Head Office, with a proclamation Notice by the Respondent's agents Leakey's Auctioneers, purporting to have attached and left in the custody of the Applicant, various items whose value was not disclosed or indicated on the proclamation document. The authority for distress was stipulated to be based on Section 102 of the **Income Tax Act**, Section 18 of the **Value Added Tax Act** and Section 225 of the **Excise Act**.

4. According to the Applicant, the demand for payment and the distress of the Applicant's Assets was illegal under the three Acts since according to it, VAT does not fall under the **Income Tax Act**; there is no provision for distress under Section 18 of the **VAT Act** relied upon by the Respondent; and indeed, none of Corporation Tax, VAT or PAYE fall under the **Customs & Excise Act**.

5. It was contended that in any event, a distress under Section 225 of the **Customs & Excise Act** relied upon by the Respondent demands that the items distrained must be kept for a period of fourteen (14) days, and not the ten (10) days issued by the Respondent and its agents Leakey's Auctioneers. Further, the Respondent's demand and distress were in breach of the **Companies Act** Chapter 486 Laws of Kenya since Section 95(1) of the **Companies Act** demands that any payments (including preferential payments) be made out of the assets coming into the hands of the Receiver.

6. It was contended that the said Receivers and managers, fully seized of the Receivership of the Applicant company would process them in accordance with the provisions of the Companies Act, once in receipt of full details of the Respondent's claim.

7. It was disclosed that the proclaimed assets were charged to the Interested Parties, by way of a fixed charge and that assets comprised in fixed charges (including the charge over immovable property of the company) are not available to pay preferential debts until the creditors secured by those charges have been paid in full, by virtue of Section 95 (4) of the **Companies Act**. To the applicant, the preferential payment of any outstanding taxes in priority would only cover a period of the twelve months leading to receivership (rather than the 5 years period assessed by the Respondent), and would only apply to assets comprised in floating charges as opposed to the fixed charges now held by the Interested Parties.

8. It was therefore averred that the demand for payment by the Respondent was clearly unlawful. However, the Applicant was willing to provide a suitable security, should the court deem it fit, pending the hearing and determination of this matter.

9. It was asserted that the Respondent had deliberately violated the principles of natural justice by

demanding payment from the Applicant of the large sum of Kshs 226,780,998/- without giving it the opportunity to be heard. Further, the Respondent had deliberately irrationally violated the principles of natural justice by instructing Leakey's Auctioneers to proclaim and attach the Applicant's assets on 5<sup>th</sup> May, 2015, before giving the Applicant an opportunity to be heard.

10. The demand for payment and distress procedures initiated by the Respondent, it was the applicant's case are in bad faith, unconscionable and illegal and would be injurious and most prejudicial not only to the Applicant, but also to the interested parties who are secured creditors. Further, the demand for payment and distress procedures initiated by the Respondent were malicious, arbitrarily oppressive and a violation of the rights of the Applicants to a fair hearing, natural justice and fair play yet the Applicant is entitled to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair, which has not been afforded to the Applicant.

11. It was averred that the demand letter dated 7<sup>th</sup> May, 2015 had been purportedly issued on the basis of a "conceded amount" when in fact the Applicant had not made any concessions on any purported tax and none had been exhibited. The said actions, it was its case had thwarted the applicant's legitimate expectation that it would address any lawful demand issued by the Respondent because the Respondent had already issued instructions to Leakey's Auctioneers. It was therefore contended that the demand by the Respondent and the proclamation action taken by the Respondent's agents Leakey's Auctioneers, is *ultra vires* the provisions of Section 95 of the **Companies Act** and that the Respondent had abused its powers because it has clearly not taken into account the fact that the Applicant is in Receivership and that the interests of the Interested Parties who were owed sum of Kshs 476,429,887.95 would be harmed by any attachment of the goods proclaimed by the Respondent's appointed agents Leakey's Auctioneers.

12. Further to the foregoing, the applicant contended that Applicant is an insolvent company and does not have any funds in its Bank accounts. Since the provisions of Section 311(1)(a) of the **Companies Act** applies, the Respondent's claim is subject to the said provisos and acceptance by the Receivers of the Applicant and that the Receivers have no power to deal with unsecured creditors.

13. By way of clarification, it was contended that the applicant is heavily indebted to each of the three Interested Parties in the sum of Kshs 2,094,000,000, Kshs 1,288,000,000 and Kshs 476,000,000 respectively, who have securities registered against the assets of the Applicant.

14. The applicant averred that as a matter of fact, the Applicant had been certified by the Respondent over the last five years to have complied with all tax requirements and there really should not be question of the Respondent turning around and demanding any security before this matter can be determined. However, should the court in its wisdom determine that the Applicant should present some security, the Applicant can only realistically issue an undertaking that it shall set apart the sale proceeds net of costs arising from the sale of assets not specifically charged. The applicant cannot however procure a Bank Guarantee because it would be required to deposit cash of an equivalent amount with the issuing Bank, which cash is not available owing to the insolvent nature of the Applicant company.

15. The applicant therefore urged the Court to take note of the peculiar financial situation of the Applicant as well as the Respondent's earlier confirmation of tax compliance by the Applicant, over the past five years, when determining the question of security raised by the Respondent.

## **2<sup>nd</sup> Interested Party's Case**

16. The 2<sup>nd</sup> Interested Party on its part while supporting the applicant's position on security averred that the fact of the applicant being under receivership places the *ex parte* Applicant's receivers in a precarious position as they seek to protect and balance the conflicting interests of secured creditors such as the 2<sup>nd</sup> Interested Party and the unsecured creditors. It was disclosed that this is the category the Respondent's claims fall save for the limited amounts yet to be determined under the provisions of Sections 95 and 311 of the **Companies Act**.

17. According to the Interested Party the copies of the tax clearance certificates issued by the Respondent to the *Ex parte* Applicant are a strong pointer that the claims made by the Respondent may not be sustainable.

18. It was therefore contended that leave having been granted to challenge the distress of the goods and chattels of the *ex parte* Applicant and in light of the new facts now placed before this honourable court, it would only be just and equitable that the court waives the requirement of security and or considers the proposal made by the *Ex parte* Applicant as reasonable in the circumstances of the case.

### **Respondent's Case**

19. In response to the application, the Respondent averred that the demand of taxes was pursuant to an audit and the audit findings were communicated to the Applicant through a letter dated 10<sup>th</sup> July, 2014. In that letter, audit findings were compiled and classified into five tax heads covered by the audit namely Income Tax, VAT, PAYE, Withholding Tax and Standards Levy and that the tax due at this time was Kshs 748,359,178.

20. It was disclosed that the Applicant replied to the above audit findings on 14<sup>th</sup> July, 2014 where they sought to clarify some audit issues and at the same time conceded to Kshs 226,780,998 of the taxes assessed which concession is the subject of this suit and the entire proceedings.

21. Accordingly, the Respondent wrote to the Applicant on 4<sup>th</sup> March, 2015 and asked that the Applicant pay the tax it had conceded and on becoming aware that the Applicant was under receivership wrote to the receiver manager of the Applicant on 3<sup>rd</sup> March, 2015 to register the interest of the Respondent for the outstanding VAT, PAYE and Corporation taxes owing. The Agency Notices to the Applicant's agents were however issued on 31<sup>st</sup> March, 2015 in exercise of powers conferred to the Commissioner of Domestic Taxes by Section 19 of the **VAT Act** and Section 96 of the **Income Tax Act**. The said agents, it was disclosed, included I&M Bank, Bank of Baroda, Kenya National Highways Authority, Standard Chartered Bank, UBA Kenya Limited, Kenya Commercial Bank, NIC Bank.

22. It was further averred that on 1<sup>st</sup> April, 2015 the Applicant wrote to the Respondent undertaking to pay the undisputed conceded principal tax of Kshs 226,780,998 and asked for a grace period of 12 months within which to pay. The same day, the Applicant again wrote two letters to the Respondent; one registering its intention to appeal to the local committee and the other asking that the agency notices be suspended. However the agents of the Applicant i.e. Bank of Baroda, Standard Chartered Bank, I&M Bank and Kenya National Highways Authority wrote back and informed the Respondent that they could not comply with the requirements of the agency notices as they had no accounts with credit balances belonging to the Applicant and that further the Applicant was indebted to the banks.

23. It was this turn of events that led to the issuance of warrants of distress on 8<sup>th</sup> May, 2015 being a further enforcement tool after the agents replied that no funds were available which measure was taken to ensure that the conceded tax debt was secured and/or recovered. On 11<sup>th</sup> May, 2015, however, the Applicant wrote to the Respondent again conceding to tax arrears of Kshs 226,780,998/- and sought to clear the balance of the taxes owing over 12 instalments with the first payment starting 30 days after the receivership was lifted.

24. The Respondent reiterated that the distress was done in respect of the conceded principal amount only despite the fact that the assessment of tax owing was much more. As at 30<sup>th</sup> March, 2015 when the final demand for taxes was sent to the Applicant the total tax owing from the Applicant was Kshs 1,341,532,642 i.e. over One Billion Kenya Shillings.

25. To the Respondent, it's actions are proper and within the law the sole aim of ensuring that the government revenue is secured and/or recovered and that this court can order for provision of security for the taxes in dispute as provided under order 53 Rule 3 of the **Civil Procedure Rules** 2010 whose purpose is to ensure that litigation is not in vain and in order to protect the interest of a Respondent or Interested

Party.

26. The Court was therefore urged that in granting the Applicant a stay in this matter, it should balance the rights of both parties and ensure that the proper security is given by the Applicant and the Interested Parties in order to secure the government revenue pending hearing and determination of this suit. Since the applicant has expressed its willingness to offer security, it was contended that any other contrary assertions are in bad faith and meant to defeat the Respondents tax demands.

27. Since the applicant is under receivership as opposed to winding up, it was it was the Respondent's case that the provisions of Section 311(1)(a) of the **Companies Act** are express and do not apply here as the Applicant company is not being wound up and that even if Section 311 of the **Companies Act** were to apply tax assessment is preferential debt that must be considered even before the secured creditors. As the amount demanded of Kshs 226,780,998/- is a conceded tax assessment debt, it was asserted it ought not to be subject to further challenge before this court.

28. To the Respondent, the list of uncharged assets exhibited the Applicants affidavit is a list that is of no value to the Respondent until and unless the said assets are valued by a certified valuer, their values provided as well as their costs so as to make a reasonable estimate as to whether these values net of costs can cover the Respondents demand of Kshs 226,780,998/=

29. It was the Respondent's belief that the Respondents are empowered under Section 103 of the **Income Tax Act** to direct the Register of Lands to register a charge over the Applicant's Land and buildings to secure the taxes and this honourable can make an order directing the Registrar of Lands to make such registration and that Applicant and the Interested Parties be compelled to provide a list of all the land and buildings belonging to the company for that purposes. The Court was further urged to order that the goods already distrained upon by the Respondent be preserved as security for the taxes and that the same should not be sold or interfered with in any manner whatsoever pending the hearing and determination of the suit.

30. In the Respondent's view, a tax Compliance Certificate:

- a. Is an acknowledgement that the Applicant has complied with the requirement to file its tax returns as part of the Country's self-assessment system and that the self-assessment is subject to further audit.
- b. Does not prohibit the Respondent from carrying out audits on the tax affairs of a company and raising any taxes that are proved to be unpaid.
- c. Is subjected to the caveat that the Respondent may withdraw the certificate "if new evidence materially alters the tax compliance status of the recipient".
- d. Is futuristic and is meant to facilitate business.

31. In the premises this Court was urged to grant the Respondent security for the taxes.

### **Determinations**

32. I have considered the application, the affidavits filed herein and the submissions made by the parties and this is the view I form of the issues raised.

33. Leave having been granted to commence judicial review proceedings proper, this ruling is limited to the direction whether that leave ought to operate as a stay of the decision in question.

34. The decision whether or not to grant a stay pursuant to leave is no doubt an exercise of judicial discretion and that discretion like any other judicial discretion must be exercised judiciously.

35. As was held in **Jared Benson Kangwana vs. Attorney General Nairobi HCCC No. 446 of 1995**, in considering whether the said leave ought to operate as a stay of proceedings the Court has to be careful in what it states lest it touches on the merits of the main application for judicial review.

36. The mere fact, however, that the application discloses a *prima facie* case does not necessarily qualify the matter to a grant of stay. In my view, it is only where the imminent outcome of the decision challenged is likely to render the success of the judicial review nugatory or an academic exercise that the Court would stay the said proceedings the strength or otherwise of the applicant's case notwithstanding.

37. Therefore it is not in every case that there are chances of the High Court reaching a decision contrary to the one in the proceedings sought to be stayed that the High Court will stay those proceedings. It must be shown that the probability of a determination being made in the challenged proceedings, are high and such probability cannot be said to have been achieved on mere conjecture and speculation.

38. That the applicant is in receivership is not in question. Whether or not it will slide into liquidation cannot be determined at this stage. However that route cannot be ruled out. In granting a direction that the leave granted herein does operate as a stay the Court ought to balance the interests of all the parties involved in order to ensure that the conditions for stay do not amount to a denial of the stay granted. On the other hand the Court ought not to grant conditions which will expose the Respondent to the risk that at the end of the day if the application does not succeed, it will be left baby-sitting a barren decision. In such matters as these the Court, in considering the nature of the orders to grant ought to take into account the principle of proportionality and see where the scales of justice lie. The law is now that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate ends of justice. In so deciding the Court, in exercising its discretion, should always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589**.

39. I would with respect borrow the reasoning of the Court of Appeal in **Nduhiu Gitahi vs. Warugongo [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100** to the effect that:

**“The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial...The court is concerned with preserving the rights of both parties...It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the [hearing]...For that purpose, it matters not whether the plaintiffs are secured in one way rather than another.”**

40. In this case since the applicant is not being wound up as yet, section 311 of the ***Companies Act*** has not yet come into play. From the evidence on record, it would seem that the Respondent issued to the Applicant some tax compliance certificates. The *prima facie* effect of such certificates was determined by this Court in **Republic vs. Kenya Revenue Authority & Another ex parte Tradewise Agencies Limited [2013] eKLR**. This Court is not aware that the said decision has been reversed on appeal. However, there is evidence on record that as late as 11<sup>th</sup> May, 2015, the applicant acknowledged that its tax arrears were to the tune of Kshs 226,780,998/-.

41. It has however been contended that the applicant is not in a position to furnish a banker's bond. Since the applicant is just under receivership, only its management may change but its status would remain intact. It may well successfully come out of the receivership. It is in fact in the interest of all the parties concerned that it does so. Therefore any conditions that this Court gives must be with a viewing to keeping the applicant afloat rather than drowning it. If it does go into liquidation, the Respondent's rights by law rank in priority to those of the interested parties as long as they have “become due and payable within twelve months next before that date not exceeding in the whole one year's assessment”.

42. Having considered the issues raised herein, the order which commends itself to me and which I hereby grant is that the grant of leave herein shall operate as a stay on condition that the applicant provides a suitable security worth Kshs 100,000,000.00 within the next 15 days. If the said property is in form of movable or immovable property, the applicant and the Respondent will appoint a joint valuer to determine the value of the said property.

43. Liberty to apply granted to the parties.

44. The costs of the application will be in the cause.

**Dated at Nairobi this day 21<sup>st</sup> day of July, 2015**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Gachuhi for 2<sup>nd</sup> Interested Party and holding brief for Mr Karungo for the Applicant and 3<sup>rd</sup> Interested Party***

***Miss Mburugu for Miss Odundo for the Respondent***

***Mr Musyoka for the 1<sup>st</sup> Interested Party***

***Cc Patricia***