



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
JUDICIAL REVIEW DIVISION
JR CASE NO. 22 OF 2012

REPUBLIC.....APPLICANT

VERSUS

COMMISSIONER GENERAL KENYA REVENUE AUTHORITY.....RESPONDENT

EXPARTE

INVESCO ASSURANCE CO. LIMITED

JUDGEMENT

The ex-parte Applicant, Invesco Assurance Co. Limited (Invesco) is a company licensed to carry out insurance business in Kenya. The Respondent is the Commissioner General of Kenya Revenue Authority. Kenya Revenue Authority is a statutory body established to, among other things, collect revenue in the Republic of Kenya.

By way of a notice of motion application dated 30th January, 2012 the Applicant prays for orders as follows:

- 1. That this application be certified urgent and be heard and determined forthwith.**
- 2. That the Applicant Messrs Invesco Assurance Company Limited be granted leave to apply for an order of:-**
 - i. Prohibition prohibiting the Commissioner General from enforcing the Agency Notices issued on the 13th January 2012 against the Applicant's accounts with M/s Standard Chartered Bank Kenya Limited and NIC Bank Limited.**
 - ii. Prohibition prohibiting the Commissioner General from issuing further Agency Notices in respect of the accounts below and any other accounts pending the hearing and determination of this matter:-**
 - a. Interface Printers**
 - b. Mandnan Freight**

- c. Ericko Hauliers**
- d. Georine Agencies**
- e. Benpa Freight Agencies**
- f. Cranes Hut Agencies**
- g. Ahero Freight Forwarders**
- h. Africargo Limited**
- i. Kemnet Agencies**
- j. Maalox Agencies**
- k. Meclif Clearing and Forwarders**
- l. Matsingbery Limited**
- m. Super Freight**
- n. Six Continent Freight**

3. An Order of Certiorari to quash the Agency Notices issued by the Commissioner General on the 13th January 2012 which arbitrarily demands the sum of Kshs.14,313,405/- or any other further demands in respect of the following accounts and any other accounts pending the hearing and determination of the issues herein:-

- a. Interface Printers**
- b. Mandnan Freight**
- c. Ericko Hauliers**
- d. Georine Agencies**
- e. Benpa Freight Agencies**
- f. Cranes Hut Agencies**
- g. Ahero Freight Forwarders**
- h. Africargo Limited**
- i. Kemnet Agencies**
- j. Maalox Agencies**
- k. Meclif Clearing and Forwarders**
- l. Matsingbery Limited**
- m. Super Freight**
- n. Six Continent Freight**

4. Costs of this application be provided for.

The notice of motion which is a replica of the chamber summons application for leave is supported by a statutory statement and the verifying affidavit of the Applicant's Claims Manager, Paul Gichuhi all dated 20th January, 2012. The application is also supported by the further affidavit of Paul Gichuhi sworn on 20th March, 2012.

The Respondent opposed the application through a replying affidavit sworn on 2nd March, 2012 by Doris Gitonga a Senior Assistant Commissioner serving in the Debt Management Unit, Customs Services.

The Applicant filed this matter as a result of agency notices issued by the Respondent to the Applicant's bankers. The notices dated 13th January, 2012 appointed Standard Chartered Bank Kenya Ltd and NIC Bank as agents of the Applicant for the purpose of collecting the sum of Kshs. 14,313,495/= being enforcement of security bonds guaranteed by the Applicant.

According to the statutory statement the Respondent's action is arbitrary and against the rules of natural justice for the reasons that:

“a) The amount claimed by Messrs Kenya Revenue Authority is based on fraudulently obtained and/or forged bonds and unauthorized bonds.

b) The bonds were purportedly issued and accepted by Messrs Kenya Revenue Authority during the period the applicant was under statutory management and when a legal moratorium had been issued.

c) The agency notices as issued and threatened to be issued will totally cripple the applicant who is reconstructing itself from near collapse and will ruin lives of several Kenyans who have insured and invested with it.

d) There is clear and damning evidence presented by the applicant to show that the said bonds are not valid and as such not worth anything.

e) Kenya Revenue Authority has refused and/or neglected to respond to the applicant's objections and evidence showing that the bonds are invalid.

f) No other remedy lies in law to prevent the respondent from abusing the powers and thus adversely affecting the applicant's rights.”

The Applicant's case is that between January 2010 and July 2011 it received numerous varying demands from the Respondent for unpaid bonds it allegedly guaranteed. The Applicant contends that upon receiving the demands it informed the Respondent that some of the bonds were fraudulently obtained or forged. It even sought from the Respondent copies of the bonds for purposes of verification but the Respondent was unresponsive. Further, the Applicant argues that during the period the bonds were presented, the Applicant was under statutory management and the statutory manager had declared a moratorium and as such no bonds could have been approved and/or signed during that period.

The Applicant states that it instituted private investigations through Messrs Epic Marine and General Assessors Limited and even though the Respondent did not co-operate, the investigator found out that:

i. The bonds presented to the Respondent were falsified by deletion to read different figures other than the ones issued.

ii. Some bonds were exaggerated to improbable figures of Kshs. 200,000,000/= which could not have been issued by the Applicant.

- iii. Bonds would be issued with a serial number and a limit but the same bonds would be extended severally with different limits being given.
- iv. The Respondent continued to honour the Applicant's bonds despite advertisements in the press that the Applicant had ceased to operate.
- v. Several motor vehicles were cleared using the fraudulent bonds but the Respondent had not impounded the vehicles despite the particulars of the vehicles being given by the Applicant.
- vi. The Respondent had failed to follow up the clearing agents who had obtained the bonds from the Applicant.

The Applicant contends that it tried to amicably resolve the matter with the Respondent but the Respondent had continued demanding the unreasonable amounts of money.

In reply to the application, the Respondent asserts that it was performing its statutory duties when it issued the agency notices to the Applicant's bankers. The Respondent contends that it is allowed by law to collect taxes from any surety. The Respondent also submitted that the agency notices were issued as authorized by Section 131 of the East African Community Customs Management Act, 2004 (EACCMA).

After going through the papers filed by the parties in this matter, it is apparent the parties are in agreement that the issuance of the agency notices by the Respondent is within the law. They also agree that where a principal fails to pay taxes, the surety to a bond is liable for payment of such taxes.

The only issues for the determination of the Court are:

1. Whether the Respondent failed to afford the Applicant an opportunity to be heard and thus breached the rules of natural justice;
2. Are guarantees issued when a company is under statutory management valid?
3. Does the Applicant's notice of motion comply with Order 53 of the Civil Procedure Rules 2010 (CPR)?
4. Who should meet the cost of these proceedings?

The first issue to address is whether the notice of motion is in compliance with Order 53 Rule 4(1) of the CPR. The said sub-rule states:

“4. (1) Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.

2.....”

The Respondent contends that one of the prayers in the substantive notice of motion is an order of certiorari and yet no such relief is sought in the statutory statement. The Respondent's counsel submitted that the prayer for an order of certiorari offends Order 53 Rule 4 CPR.

The Applicant replied that this is a matter of technicality and the Court should do substantive justice.

I am of the opinion that failure to comply with the above cited rule goes to the root of the application. It cannot be brushed aside on the ground of technicality. The purpose of the statutory statement and verifying affidavit is to give notice to the opposite party of the particulars of the application that has been

presented to the court by an applicant. The respondent and interested party is made aware of the relief the applicant is seeking from the court.

In the statutory statement it is clear that the Applicant is only seeking an order of prohibition. It is indeed correct that the only relief sought according to the statutory statement is an order of prohibition. The Respondent was, however, informed through the chamber summons application for leave that the Applicant would also be seeking an order of certiorari. Indeed the Court order indicates that the Applicant was also allowed to seek an order of certiorari. The Respondent cannot say that the Applicant had not issued notice that it would be asking for an order of certiorari. In the circumstances of this case, it would be giving too much leeway to the rules, at the expense of substantive justice, were this Court to find that failure to strictly comply with Order 53 Rule 4(1) CPR is fatal to the Applicant's prayer for an order of certiorari. The Respondent's objection to the application on this ground is therefore rejected.

The next question to consider is the fate of the bonds issued when the Applicant was placed under statutory management. It is noted that the Insurance Regulatory Authority placed the Applicant under statutory management for one year with effect from 29th February, 2008. Through a notice in the press the Insurance Regulatory Authority informed the public that **“the insurer is not authorized to transact any new insurance business with effect from the same date.”**

On the date the Applicant was placed under statutory management Mr. Geoffrey Njenga the statutory manager declared a moratorium on the payment of the Applicant's policyholders and other creditors for a period of twelve (12) months with effect from the date the Applicant was placed under statutory management.

The notice from the Insurance Regulatory Authority was clear that the Applicant was not to undertake new insurance business. Any bonds issued during the moratorium were therefore not valid. The Applicant was at that time incapable of being a surety to anybody and that fact was in the public domain. In such circumstances, any bonds presented to the Respondent ought to have been rejected. The only option available to the Respondent in respect of the bonds issued during the moratorium is to go after the principals. The Respondent has no legitimate claim against the Applicant in respect of the bonds issued during the period that the Applicant was under statutory management.

I have carefully looked at the correspondences exchanged between the Applicant and the Respondent over the bonds. I have also perused the investigation report and the documents presented to Court by the Applicant. The Applicant raised serious issues which ought to have been addressed by the Respondent before the agency notices could be issued.

The Respondent is mandated by the law to collect taxes but it should do so in a reasonable and fair manner. Where a taxpayer seeks the assistance of the Respondent, as the Applicant did in this case, the Respondent should be ready to listen and assist where possible. It must be noted that the Applicant had just emerged from the verge of collapse and it is possible that its records were in disarray. The Respondent ought to have given it copies of the bonds to enable it carry out investigations. The only reasonable conclusion is that the Applicant was not taken through a fair administrative process by the Respondent. There is also need to separate the bonds issued when the Applicant was under statutory management from those issued when the Applicant was in active business.

In order to give the Respondent an opportunity to do the right thing, this application succeeds. The agency notices issued on 13th January, 2012 to the Applicant's bankers (Standard Chartered Bank Kenya Ltd and NIC Bank Ltd) in respect of the following accounts: Interface Printers, Mandnan Freight, Ericko Hauliers, Georine Agencies, Benpa Freight Agencies, Cranes Hut Agencies, Ahero Freight Forwarders, Africargo Limited, Kemnet Agencies, Maalox Agencies, Meclif Clearing and Forwarders, Matsingbery Limited, Super Freight and Six Continent Freight are hereby removed into this Court and quashed. An order of prohibition will also issue prohibiting the Respondent from making claims in respect of these particular accounts or any other accounts for the period when the Applicant was under statutory management.

As for the bonds allegedly issued by the Applicant before it was placed under statutory management and those issued after it emerged from statutory management, I remit the matter to the Respondent with a recommendation that a joint task force be appointed to audit all the bonds and agree on what is payable by the Applicant. At the conclusion of the exercise, the Respondent will be at liberty to demand any amount due from the Applicant.

Considering the outcome of the application, there will be order as to costs.

Dated, signed and delivered at Nairobi this 30th day of April, 2014

W. KORIR,

JUDGE OF THE HIGH COURT