



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. E018 OF 2021

ENNIO LIMITED.....PLAINTIFF/APPLICANT

VERSUS

1. KENYA REVENUE AUTHORITY

2. GN MUIRURI T/A PHILIPS INTERNATIONAL AUCTIONEERS.....DEFENDANTS/RESPONDENTS

RULING

On 6th September 2021, the Plaintiff/applicant filed a Plaint seeking judgment be entered against the Respondents/defendants for a permanent injunction restraining the latter from interfering with the properties of the Plaintiff/applicant on account of tax arrears of a company identified as Beechlane Holdings Limited. Alongside that Plaint was a Notice of Motion filed under a certificate of urgency and Rules 16 and 17 of the High Court (Organisation and Administration) (General) Rules, 2016, Order 40 Rules 1 and 2 of the Civil Procedure Rules and Section 1A & 1B, 3,3A of the Civil Procedure Act, and Section 1 of the Tax Procedures Act,2015.

The Notice of Motion seeks the following orders:

- 1. *This matter be certified urgent and be heard during the Court vacation/recess due to the extreme urgency as demonstrated in paragraphs 4,5,6,7,8 and 9 of the Supporting Affidavit herein.(spent).***
- 2. *That pending the inter-parties hearing and determination of this application, the Honourable court be pleased to issue an order of temporary injunction restraining the Respondents, whether by themselves, their agents, employees, servants or any person acting at their behest from seizing, removing, selling, disposing off, alienating, or in any other manner interfering with the goods of the Applicant/Plaintiff on account of tax arrears allegedly owed or claimed as against Beechlane Holdings Limited.***
- 3. *That pending the hearing and determination of this suit, the Honourable court be pleased to issue an order of temporary injunction restraining the Respondents, whether by themselves, their agents, employees, servants or any person acting at their behest from seizing, removing, selling, disposing off, alienating, or in any other manner interfering with the goods of the Applicant/Plaintiff on account of tax arrears allegedly owed or claimed as against Beechlane Holdings Limited.***
- 4. *In the alternative, in the event that the Applicant/Plaintiff's goods have been seized, or removed from the Plaintiff's premises, a mandatory injunction be issued compelling the Respondents to return the goods to the Plaintiff's premises within 3 days of the order.***
- 5. *The Auctioneer's fee in any event to be paid by the 1st Respondent.***
- 6. *Costs.***

The motion is based on the grounds on the face of the application and supported by the affidavit of Guiseppe Bonasera, a director of the Plaintiff/applicant Company, sworn on 6th September 2021. According to Mr. Guiseppe, the 1st Defendant/respondents served the Plaintiff/applicant with a tax distress notice dated 26th August 2021. According to that notice, a company referred to as Beechlane Holdings Limited owed the 1st Defendant/respondent tax arrears of Kshs. 23,514,335/-. On that same date, the Defendants/respondents trespassed into the Plaintiff/applicant's premises Plot No. 20 Watamu and proceeded to proclaim and attach the Plaintiff/applicant's property for the recovery of the tax arrears and auctioneer fees of Kshs. 975,573.40/-.

Mr. Guiseppe explained that the properties seized belong to the Plaintiff/applicant in the sense that one of the structures within the Plot No. 20 Watamu is a hotel partly leased to Beechlane Holdings Limited. That within the said hotel structure are moveables which belong to the

Plaintiff/applicant. According to an exhibited lease agreement between the two companies dated 1st May 2015, the said Beechlane was only to utilize the moveables on a contractual basis.

In response, the 1st Defendant/respondent filed a Replying Affidavit sworn by Godfrey Wagai on 29th September 2021. Mr. Godfrey deponed that the Plaintiff/applicant and the said Beechlane Holdings Limited are one and the same entity as they have the same directorship. He added that upon the issuance of notices to the tax debtor, Beechlane, they agreed to pay the arrears in installments as per the annexed debt payment agreement.

It follows that the Plaintiff/applicant responded to the Replying Affidavit by filing a supplementary affidavit sworn by the same Giuseppe on 6th October 2021. He deposed that as per the copies of CR-12 exhibited by the 1st Respondent, the two companies were incorporated on different dates and that the only common directors out of the 11 named directors for both companies, are himself and one Margherita Olivieri.

The application was canvassed by way of written submissions which I have summarized as hereunder.

In the Plaintiff/applicant's submissions filed on 7th October 2021, it was submitted that the application ought to be measured against the 3 principles of granting a temporary injunction as was set out in ***Giella v Cassman Brown Co. Ltd [1973] E.A 358***. Those three principles were identified therein as the issues for determination.

The first issue is whether the Plaintiff/Applicant has established a prima facie case with probability of success. It was submitted that a prima facie case as defined in ***Mrao Limited v First American Bank of Kenya Ltd & 2 others and Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR*** has been established. It was argued that the tax decision was against Beechlane Holdings and not the Plaintiff/Applicant which has a guaranteed right to property under Article 40 of the Constitution of Kenya, 2010. To buttress this point, counsel cited the case of ***Five Forty Aviation Limited v George N. Muiruri t/a Leakey's Auctioneers & another [2021] eKLR***.

Further, so it was submitted, that the legal consequences of incorporation of a company is to make it a separate and independent legal entity from its shareholders and directors. Consequently, the tax liabilities of Beechlane cannot be transferred to the Plaintiff/applicant by the mere fact of common directorship. They relied on the cases of ***Style Industries Ltd v KRA & another [2019] eKLR; Five Forty Aviation Limited v George N. Muiruri t/a Leakey's Auctioneers & another (supra); James Kipchirchir Sambu v Patriotic Guards Ltd [2017] eKLR; Kenyairi & Associates v Hans Jurgen Langer [2016] eKLR and Hezekiah Ogao Abuya v Thrust & Engulf Ltd [2006] eKLR***.

Further citing the case of ***Samura Engineering Ltd and others v KRA, Nairobi Petition No. 54 of 2011 [2012] eKLR***, it was submitted that the 1st Defendant/respondent failed to adhere to the legal requirement that demands it not to infringe on the bill of rights in the exercise of its mandate.

In relation to the 2nd Defendant/respondent, it was their argument that the former failed to conduct any due diligence as to ownership of the proclaimed goods and as such should be held personally liable for wrongful attachment. Similarly, they relied on the cases of ***Kuronya Auctioneers v Maurice O. Odhoch & another [2003] eKLR and Five Forty Aviation Limited v George N Muiruri (supra)***.

The second issue was whether the Plaintiff/applicant will suffer irreparable injury if the injunction is not granted. It was submitted that the Plaintiff/applicant is being forced to bear the tax burden of another entity; it stands to lose its property if the same is sold by way of auction or private treaty to third parties. Further, the removal of the said properties will disrupt the Plaintiff/applicant's business operations causing loss of clientele since it is in the real estate business. According to them, no amount of compensation will revive the distracted business.

Finally, on whether the balance of convenience lies with the Applicant, it was argued that the purpose of an interlocutory injunction is to preserve the substratum of the case. The Plaintiff/applicant having established a prima facie case, the only way to preserve the property is to issue a temporary injunction to avoid rendering the suit useless.

On its part, the 1st Defendant/respondent filed submissions on 3rd November 2021 submitting that the Plaintiff/applicant has failed to satisfy the threshold for granting an interlocutory injunction. It was submitted that one of the mandates of the 1st Defendant/respondent is to assess and collect taxes on behalf of the government. In the exercise of that mandate, it proceeded to attach the Plaintiff/applicant's properties for reasons that the two companies share the same directorship.

According to the 1st Defendant/respondent, the Plaintiff/applicant had not shown that it will suffer irreparable loss which cannot be compensated by damages since the amount in question is a liquidated amount and that the 1st Defendant/respondent has in place sufficient mechanisms for refund. On the balance of convenience, it was submitted that the court should lean towards denying the orders sought since Kenyans stand to be prejudiced on account of lack of sufficient funding for government services. They relied on the case of ***Robert N Gakuru v County Government of Kiambu & another [2013] eKLR***.

The 1st Defendant/respondent further contested that the grant of the orders sought will determine the matter at a preliminary stage since it will be unable to recover the taxes due and in turn determining the dispute without considering the 1st Defendant/respondent's claim/defence.

This would interfere with the 1st Defendant/respondent's powers to obtain security for payment of taxes and distress property for recovery of taxes envisaged under section 36 and 41 of the Tax Procedures Act.

Relying on the case of ***Pankaj Vrajlal Somaia & another v KRA & 2 others [2015] eKLR***, it was further submitted that the Plaintiff/applicant was not entitled to the orders sought for reasons that it is guilty of misrepresentation of facts to wit that the two companies are unrelated.

It was added that the Tax Procedure Act, 2015 provides for a mechanism for resolution of such disputes which the Plaintiff/applicant has failed to pursue before approaching the court. In the circumstances, so it was argued, this Court is not the proper forum to determine the present suit.

Analysis and determination

Having looked at the application, replying affidavit and submission by the parties herein, I find that the issues for determination are:

- i) Whether this court is the proper forum to file the present suit.***
- ii) Whether the Plaintiff/applicant has satisfied the conditions upon which a temporary injunction may be granted.***
- iii) Appropriate orders to be granted.***

i) ***Whether this court is the proper forum to file the present suit.***

The 1st Defendant/respondent's challenged the jurisdiction of this court. It argued that the Plaintiff/applicant ought to have followed the mechanism provided for under the Tax Procedure Act, 2015 to challenge the tax decision before coming to this court. A tax decision is defined under section 2 of the Tax Procedure Act, 2015 as follows:

“tax decision” means—

- (a) an assessment;***
- (b) a determination under section 17(2) of the amount of tax payable or that will become payable by a taxpayer;***
- (c) a determination of the amount that a tax representative, appointed person, director or controlling member is liable for under section 15, section 17 and section 18***
- (d) a decision on an application by a self-assessment taxpayer under section 31(2);***
- (e) a refund decision;***
- (f) a decision under section 48 requiring repayment of a refund; or***
- (g) a demand for a penalty;***

Further, Section 51(1) and (2) of the same Act provide for the procedure to be followed when one needs to challenge a tax decision. That section provides:

- (1) A taxpayer who wishes to dispute a tax decision shall first lodge an objection against that tax decision under this section before proceeding under any other written law. (Underlining mine for emphasis)***
- (2) A taxpayer who disputes a tax decision may lodge a notice of objection to the decision, in writing, with the Commissioner within thirty days of being notified of the decision.***

If still dissatisfied with the decision of the Commissioner referred to under section 51 above, a party is still availed a window to appeal under Sections 52, 53 and 54 as follows:

52. Appeal of appealable decision to the Tribunal

- (1) A person who is dissatisfied with an appealable decision may appeal the decision to the Tribunal in accordance with the provisions of the Tax Appeals Tribunal Act, 2013 (No. 40 of 2013).***
- (2) A notice of appeal to the Tribunal relating to an assessment shall be valid if the taxpayer has paid the tax not in dispute or entered into an arrangement with the Commissioner to pay the tax not in dispute under the assessment at the time of lodging the notice.***

53. Appeals to High Court

A party to proceedings before the Tribunal who is dissatisfied with the decision of the Tribunal in relation to an appealable decision may, within thirty days of being notified of the decision or within such further period as the High Court may allow, appeal the decision to the High Court in accordance with the provisions of the Tax Appeals Tribunal Act, 2013 (No. 40 of 2013).

54. Appeals to Court of Appeal

A party to proceedings before the High Court who is dissatisfied with the decision of the High Court in relation to an appealable decision may, within thirty days of being notified of the decision or within such further period as the Court of Appeal may allow, appeal the decision to the Court of Appeal.

In this case, the Plaintiff/applicant is not contesting any tax decision as defined under section 51. The contention is wrongful proclamation of goods or property belonging to a different entity other than the tax debtor. In the circumstances, there is no any other proper forum to determine such issues except this court. The 1st Defendant/Respondent's argument that this court lacks jurisdiction to entertain the present suit has no legal basis.

ii) ***Whether the Plaintiff/applicant has satisfied the conditions upon which a temporary injunction may be granted.***

To adequately determine this issue it is pertinent that I state the law and principles on granting temporary injunctions. The law on granting of a temporary injunction is set out under order 40(1) (a) and (b) of the Civil Procedure Rules, 2010 as follows:

Cases in which temporary injunction may be granted [Order 40, rule 1.]

Where in any suit it is proved 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.

The conditions for consideration in granting an injunction are also well settled in the case of *Giella vs Cassman Brown & Company Limited (supra)*, where the court expressed itself thus: -

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

In *Kenleb Cons Ltd vs New Gatitu Service Station Ltd & another, (1990) eKLR* the court held as follows on what a party seeking an injunction must demonstrate:

"To succeed in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction."

The circumstances for consideration before granting a temporary injunction under order 40 Rule 1 above require proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property. The Court is in such situation enjoined to grant a temporary injunction to restrain such acts.

In the instant case, there is no doubt that the proclaimed goods are in danger of being seized and alienated as the 1st Defendant/respondent do not deny that, but contends that it has a legal right to recover tax arrears from tax debtors; whereas the Plaintiff/applicant challenges such a right contending that the proclaimed and attached goods do not belong to the said Beechlane Holdings Limited but the Plaintiff/applicant herein.

That notwithstanding, this court must be satisfied that the Plaintiff/applicant has met the threshold for granting a temporary injunction as established in the *Giella case* (supra) above.

1. Whether the Plaintiff/applicant has established a prima facie case with a probability of success.

On what amounts a *prima facie* case was defined by the Court of Appeal in *Moses C. Muhia Njoroge & 2 others vs Jane W Lesaloi and 5 others, (2014) eKLR* citing with approval the case of *Mrao Ltd vs Ltd vs First American Bank of Kenya and 2 others (supra)* correctly relied upon by the Plaintiff/applicant, where it was defined as follows:

"A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later".

It was not in dispute that the tax arrears are owed by the said Beechlane Holdings Limited. The 1st Defendant/respondent's argument was that it proclaimed the goods or properties in question because the directors of Beechlane Holdings Limited are the same as those in the Plaintiff/applicant Company. On its part, the Plaintiff/applicant argued that the Defendants/respondents' actions were wrong since a company is a legal entity on its own and the directors or shareholders cannot be held liable for the liability of a company.

It is evident from the two certificates of incorporation produced by the 1st Defendant/respondent's, that the two companies are separate. The Plaintiff/applicant was incorporated in 1985 and Beechlane Holdings Limited in 2014 with company numbers C. 29190 and CPR/2014/138154 respectively.

The named directors and shareholders of the Plaintiff/applicant are namely **Giuseppe Bonasera, Daniela Delfino, Margherita Olivieri, Verona Real Estate Limited** and **Riccardo Concetti**. Whilst those in Beechlane Holdings Limited are **Giuseppe Bonasera, Margherita Olivieri, Dorothy Mayar**, and **Grace Mayar**.

In company law, once registration of a company has been successfully completed a legal person separate from its Members is created. With the formation of the company the new entity acquires a veil of incorporation that completely separates the members from being held responsible for the liabilities of a company which they have subscribed to. This veil of incorporation blocks the members from being held liable for acts of the company. This principle was set out in the old English case of **Salmon and Salmon & Co. Ltd (1897) AC 22**.

In the present case, the tax demand and distress notices were addressed and issued to Beechlane Holdings Limited. There is also a copy of a lease agreement evidencing that the Plaintiff/applicant leased the hotel (Barracuda Inn Resort) to Beechlane Holdings Limited together with the proclaimed moveables. Clause 2.2 of the lease states as much. The 2nd Defendant/respondent proceeded to proclaim and make an inventory of the property within the said hotel as evidenced by the annexure marked "EL-5".

I agree with the 1st Defendant/respondent, that it has a statutory mandate to collect taxes on behalf of the government, however that duty must be done within confines of the law. In the circumstances I am convinced that the Plaintiff/applicant has established a prima facie case with the probability of success.

2. Whether the applicant will otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages

On the one side, the 1st respondent contested that the Plaintiff/applicant has not shown that it will suffer irreparable harm which cannot be compensated by damages if the orders sought are not granted. On the other end, it was the Plaintiff/Applicant's submission that the properties proclaimed are its tools of trade which if seized and auctioned by the 1st Defendant/respondent, it would lead to loss of clientele on the Plaintiff/applicant's part who are, in the current pandemic times, irreplaceable.

This in my view amounts to a loss that cannot be compensated by an award of damages and more so putting into consideration that the tax arrears are indeed owed by a different entity from the Applicant/plaintiff herein.

3. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits?

In the case of **Paul Gitonga Wanjau vs. Gathuthis Tea Factory Company Ltd & 2 others (2016) eKLR**, the court dealing with the issue on balance of convenience expressed itself thus: -

"Where any doubt exists as to the applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance on convenience lies. "

The 1st Defendant/respondent urged this court to look at the greater harm that will be occasioned to the Kenyan citizen if it is unable to recover the tax arrears. However, it is not in dispute that the tax arrears are owed by the said Beechlane Holdings Limited. The Plaintiff/applicant therefore stands to suffer a greater loss if it will be forced to pay for the mistakes of another entity. The result is that the balance of convenience favours the Plaintiff/applicant in this case.

iii) Appropriate orders to be granted.

In the foregoing I do find that Plaintiff/applicant has met the threshold to grant a temporary injunction. Prayer no. 2 and 3 are therefore merited.

Notably, the Plaintiff/applicant prays in the alternative that a mandatory injunction be issued compelling the Respondents to return the goods, in the event that the same have been seized. As at the time parties were submitting on the present application, it was clear that the property/goods had not been removed from the Plaintiff/applicant's premises. It was submitted as much by the Plaintiff/applicant. There is therefore no basis for granting prayer no. 4.

The Plaintiff/applicant urged that the auctioneer's fees be paid by the 1st Respondent. In my view, this court cannot grant this order at an interlocutory stage but until the full consideration of all the facts and the law that will be presented by all parties. I say so because, in order to determine who should pay the auctioneer fees, this court would need to analyse the merits of the case, which is not possible at this stage when the Defendants/respondents are yet to file their defences.

Granting such an order at this stage would mean that the Plaintiff/applicant's case is successful even before granting an audience to the Defendants/respondents. The court in **East African Portland Cement Company Limited v Attorney General and Another NRB IC No. 9 of**

2012 [2013] eKLR observed as follows:

“Interim orders are granted where the Court, in exercising its discretion is satisfied that they are necessary due to the urgency and nature of the circumstances. They are mostly injunctive in nature, putting on hold an action, maintaining the status quo, until the substantive dispute can be investigated and resolved. The applicant must establish genuine urgency. Interim orders are not suitable if by their grant, they finally determine the substantive dispute. The Courts must be wary of prejudgment of the substantive merits.”

It follows then that prayer no. 5 is not merited.

On costs, the principle is settled that costs follow the event. (See *East African Portland Cement Company Limited v Attorney General and Another NRB IC No. 9 of 2012 [2013] eKLR*). In the foregoing, the Plaintiff/applicant is entitled to costs of the application.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 14TH DAY OF FEBRUARY, 2022.

.....

S.M. GITHINJI

JUDGE

IN THE PRESENCE OF; -

1. MR KITONY FOR THE PLAINTIFF/APPLICANT

2. MRS WAMBUI FOR THE 2ND RESPONDENT