REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. E322 OF 2019

ZAKHEM INTERNATIONAL

CONSTRUCTION LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

KENYA PIPELINE

COMPANY LIMITED.....DEFENDANT/APPLICANT

THE ATTORNEY GENERAL.....INTERESTED PARTY/RESPONDENT

RULING

1. On 5th February, 2021, the Defendant filed an Application of even date seeking the following main orders:

a) THAT this Honourable court be pleased to issue an order recalling, canceling, lifting and/or setting aside the Warrants of Sale of Property and the Warrants of Attachment dated 27th January 2021 issued to Moran Auctioneers for having being erroneous and unlawful.

b) *THAT this Honourable Court be pleased to make an order quashing the unlawful Proclamation of the Defendant's movable properties and restitute the same to the Defendant.*

c) THAT the Honourable court be pleased to issue an order that the Auctioneers costs if any and any other associated costs be borne by the Plaintiff.

d) THAT the Defendant be at liberty to apply for further orders and /or directions as this Honourable court may deem fit and just to grant.

e) THAT costs of this Application be provided in favour of the Defendant

2. The Application was brought under **Article 159(2) (d)** of the **Constitution, Sections 1A, 1B & 3A** of the **Civil Procedure Act, Order 9 Rule 9, Order 22 Rule 22** and **Order 51 Rule 1** of the **Civil Procedure Rules** and any other enabling provisions of the law. It is predicated on the grounds on the face of it and supported by the Affidavit of **FLORA OKOTH**, the Defendant's Company Secretary sworn on even date.

3. In the said Affidavit, it is deposed that on 16th June, 2020, a partial summary judgment was entered by the Honourable Court upon which the Defendant was ordered to pay the Plaintiff a decretal sum of USD 44,019,024.64. Being dissatisfied with the partial summary judgment, the Defendant filed *Civil Appeal No. E208 of 2020* against it which is yet to be determined. The Plaintiff also filed a Cross-Appeal in the same matter.

4. It is averred that upon entry of the partial summary judgment, Kenya Revenue Authority (KRA) issued an Agency Notice dated 3rd September, 2020 on the Defendant and its Bankers, Standard Chartered Bank (K) Limited, on account of tax due and payable by the Plaintiff in the sum of Kshs. 6,199,943,077/=. Subsequently, the Defendant's Advocates filed an application dated 4th September, 2020 seeking, *inter alia*, the suspension of the said Agency Notice and a determination of what proportion of the partial decretal sum would be paid to the

Plaintiff and what would be paid to KRA.

5. A Ruling on the said application was delivered on 6th January, 2021. Immediately thereafter, KRA issued another Agency Notice dated 7th January, 2021 on the Defendant and its bankers, NCBA Bank Limited, on account of tax due and payable by the Plaintiff in the sum of Kshs. 1,350,316,830/=.

6. It was averred that the Defendant's banks have so far released Kshs 4,450,288,369/= in two tranches of Kshs 3,099,971,539/= and Kshs 1,350,316,830/= in October 2020 and January 2021 respectively to KRA pursuant to the two Agency Notices and on account of this court's Ruling. She contended that the Agency Notices and money demanded by KRA was based on the USD 44,019,014.64 which amounts to Kshs 4,450,288,360/= after applying the applicable exchange rate which is Kshs 101.0992 against the United States dollar.

7. As such, it is contended that the intended attachment is unlawful due to the following reasons:

a) KRA, in its letter dated 7th January, 2021, is categorical that once the exchange rate issue is resolved between the parties there would still be more money payable by the Plaintiff on account of unpaid taxes.

b) KRA vide its Agency Notice recovered the total partial judgement amount from the Defendant.

c) KRA vide its letter dated 7th January, 2021 declined the waiver of interest and penalties.

d) The Defendant wrote to the Plaintiff's advocates clearly explaining that KRA recovered the entire decretal sum as there was no waiver of interest/penalties.

e) The Plaintiff's advocates replied to the said letter insisting that the Plaintiff is still owed USD 7,157,824/-.

8. It was further deposed that the applicable exchange rate was provided for in the contract between the Defendant and the Plaintiff which ought to be the Central Bank selling rate on the working day of the month in which an invoice is issued. That the applicable exchange rate would be the operating rate as at the date when the USD 44,019,014.64 was determined by the Expert Scheduler.

9. It was argued that from the records, the Report was issued on 3rd April, 2018 hence that ought to be the date for determination of the applicable exchange rate. Further, it is argued that if the applicable exchange rate as at the date aforesaid being KES 100.9944/USD is applied, then the Kenya Shillings equivalent of USD 44,019,014.64 would be the sum of KES 4,445,673,972.

10. In circumstances, it was argued that there is no money due and owing to the Plaintiff and thus the actions by the Plaintiff are in bad faith and constitute an attempt to extort from the Defendant an amount in excess of what is due to them.

11. In addition, it was deposed that notwithstanding the foregoing, in February 2021, Jovan H. Kariuki t/a Moran Auctioneers, acting on the instructions of the Plaintiff's Advocates, proclaimed the Defendant's movable property pursuant to Warrants of Attachment issued on 27th January, 2021 for the sum of USD 7,157,824.77 and Kshs. 4,300/=. It is contended that the said Warrants of Attachment were issued erroneously and are an outright illegality for the reasons that:

a) The amount claimed had already been paid to KRA on account of tax due by the Plaintiff.

b) Should the Plaintiff attach the Defendant's goods then the effect would be a double payment to the Plaintiff as the said amounts were recovered by KRA in exercise of its statutory obligation to collect taxes due and owing to it by the Plaintiff.

c) That a Proclamation that is based on an erroneous Warrant of Attachment is unjustified.

d) That if the Plaintiff has any dispute with the amount recovered by KRA vide the Agency Notice then the Plaintiff ought to have sought redress from another forum but not proclaim the Defendant's goods.

12. Finally, it was averred that the Plaintiff will not suffer any prejudice by the Court granting the orders sought as the entire decretal sum has been paid in full.

13. In response to the said application, the Plaintiff raised a Preliminary Objection dated 5th February, 2021 on the following grounds:

a) THAT the Defendant's Application is Res judicata as the Orders sought in the aforesaid Application and issues raised therein have already been determined by a court of competent jurisdiction vide a ruling dated and delivered by the Honourable Justice Ngenye on 6th January 2021 in which this Court made conclusive findings on the sums due and payable to the Plaintiff/Respondent and the Kenya Revenue Authority.

b) THAT the current Application is a gross abuse of the process of the court and ought to be struck out in limine under the court's inherent jurisdiction as preserved under section 3A of the Civil Procedure Act.

c) THAT the Application is a disguised appeal against the Ruling of this Honourable court delivered on 6th January 2021.

d) <u>THAT</u> the Application ought to be dismissed with costs to the Plaintiff/Respondent.

<u>Submissions</u>

14. The preliminary objection and the application were canvassed together through both written and oral submissions.

15. In its written submissions dated 14th February, 2021, the Defendant argued that the difference between its present application and the previous application dated 4th September, 2020 is glaringly clear from the different orders sought.

16. First, it was noted that the initial application sought to stay execution of US$ 44,019,024.64 (approximately Kshs. 4.4 billion) whereas the instant application seeks to stay execution of warrants of attachment in the sum of USD 7,157,824.77 (approximately Kshs. 787,360,725/-) which is a totally distinct figure since circumstances have changed. Secondly, the Defendant contended that the earlier application sought to stay KRA Agency Notices but that is not the case in the instant application since the said Agency Notices were realised and the sum due to KRA was recovered from the Defendant's bank accounts. Thirdly, the Defendant submitted that the first application sought a stay of the Agency Notices so that the court could give directions in the matter whilst in the instant application the Plaintiff seeks stay because the decretal sum has been paid in full.

17. Further, the Defendant submitted that the general principles of *res judicata* contemplated by **Section 7** of the **Civil Procedure Act** do not apply to the present application. It was contended that this application falls within the exception of "special case" **referred to in the case of <u>Henderson vs. Henderson (1843-60) ALL ER 378</u>** where the court held that *except in a special case,* a litigant is not to re-open an issue which ought to have been brought in a previous matter or application, had reasonable diligence been employed.

18. According to the Defendant, the second Agency Notice dated 7th January, 2021 issued by KRA upon declining the waiver of interest and penalties constituted a new event that occurred after the delivery of the Ruling of 6th January, 2021 thus bringing its current application within the exception of the "special case" referred to in **<u>Henderson vs. Henderson (supra).</u>** The Defendant reiterated that KRA have since recovered the total partial judgment amount being the sum of USD 44,019,014.64 from the Defendant's Bankers. It was also its submission that it has no control over the dispute between the Plaintiff and KRA as to the amounts due from the latter.

19. It was thus the Defendant's submission that the current application therefore does not raise the same issues which were 'directly' and 'substantially' in contention in the previous application because the matters complained of in the current application were not in existence when the previous application was determined. The Defendant relied on the Court of Appeal's decision in the case of **<u>Housing Finance Company of Kenya v J. N. Wafubwa [2014]e KLR</u>** to the extent that it affirmed the view that developments which occur subsequent to the institution and determination of a suit constitute special circumstances where general principles of *res judicata* do not apply.

20. Reliance was also placed on the case of **Nathaniel Ngure Kihiu v Housing Finance [2018] eKLR** and the case of **Saifudeen Abdulla Bhai & Hussein Abdulla Bhai v Zainabu Mwinyi [2014] eKLR** where the concerned Courts dismissed Preliminary Objections that were raised in matters that fell within the category of special circumstances.

21. In totality, the Defendant urged that the Plaintiff's Preliminary Objection be dismissed. It urged that the stay of execution sought be granted especially in view of the fact that the Plaintiff is a foreign company and that should execution proceed, the Defendant may suffer irreparable loss.

22. In his oral submissions, learned counsel for the Defendant, Mr. Kihara further reiterated the position that the Defendant has since settled the entire decretal sum pursuant to the agency notices issued by KRA. He submitted that the dispute is now between the Plaintiff and KRA and as such, if the Plaintiff wishes to have the tax dispute deliberated upon, the Tax Appeals Dispute Tribunal can deal with the issue. Mr. Kihara further stated that there is no proof of the Plaintiff's claim that its request for waiver is yet to be approved by treasury as alleged. It was also his submission that if the Plaintiff were to proceed with the attachment, that would amount to punishing the Defendant twice as the Defendant will be forced to pay an amount in excess of the decree sum.

23. Finally, Mr. Kihara dismissed the Preliminary Objection and reiterated the Defendant's written submissions that its current application is by no means *res judicata.*

24. On the other hand, in its written submissions dated 5th March, 2021, the Plaintiff commenced by faulting this court for allegedly sitting on appeal of the partial judgment of 16th June, 2020 by awarding 90% of the Judgment to KRA which is not a party to the proceedings. The Plaintiff argued that in a Ruling delivered on 6th January, 2021, it was to receive roughly Kshs. 900million. However, the Defendant and KRA have set out on a conspiracy to deny it the fruits of its judgment by refusing to remit the money to it as ordered by the court.

25. The Plaintiff submitted that despite this court's orders of 6th January, 2021 on how the Defendant was to disburse the decretal sum between KRA and the Plaintiff, the Defendant only released the money to KRA but refused to release any amount to it. As such, the Plaintiff rightfully proceeded with the execution process only for the Defendant to come up with a second application to stay execution of the partial decree. Further, the Plaintiff took issue with the Defendant's current position that it no longer owes the Plaintiff any money under the partial decree contrary to its position in the earlier application that both the Plaintiff and KRA were demanding the decretal sum from it.

26. It was the Plaintiff's further contention that it is evident that the Defendant applied an exchange rate of Kshs 102 per USD, which was the exchange as at 3rd April, 2018, to come up with the sum of Kshs 4,450,288,369 allegedly disbursed to KRA in two tranches of Kshs 3,099,971,539 and Kshs 1,350,316,830. The Plaintiff argued that the partial decree was for the sum of USD 44,019,024.64 and thus if the exchange rate of Kshs 110 to the dollar is applied, the result will be the sum of Kshs 4,842,092,710. In the Plaintiff's view therefore, if the Defendant was to comply with the court order of 6th January, 2021, it ought to have remitted to the Plaintiff the balance in the sum of Kshs 826,804,341.

27. The Plaintiff submitted that according to exhibit *FO4b*, payment was made on 8th January, 2021 from a number of Kenya Shillings accounts and no exchange rate was applied. As such, the Defendant's claim that a particular exchange rate was applied does not hold true and is only meant to mislead the court. The Plaintiff argued that if the Defendant was honest, the applicable exchange rate should have been the one as at 8th January, 2021. In its view therefore, it was clear in the circumstances that the Defendant has willfully refused to obey the Court order of 6th January, 2021 in as far as it relates to payments due to the Plaintiff; the Defendant has paid all the principal taxes due to KRA from the Plaintiff; and, the sum of Kshs 826,804,341 is still owing and yet to be paid to the Plaintiff.

28. Further, it was the Plaintiff's position that the three grounds advanced by the Defendant to demonstrate that its current application is not *res judicata* are merely quibbling excuses for failing to comply with the court order of 6th January, 2021.

29. The Plaintiff also raised issues with the Defendant's contention that KRA refused to give waiver for the penalties and interests without providing any evidence for the same. It was submitted that it is not KRA that has the powers to waive penalties and interest on the principal tax but the Cabinet Secretary in charge of Treasury as provided under Section 89 of the Tax Procedure Act and, that the said Cabinet Secretary has not made a decision on the Plaintiff's application for waiver of penalties and interest.

30. In addition, the Plaintiff submitted that the Defendant's refusal to pay the Plaintiff the money due to it pursuant to the decision of this court is inexcusable, unjustified and a flagrant breach of the law. The Plaintiff averred that the decision of 6th January, 2021 creates a cause of action estoppel. It relied on the case of **Thoday v Thoday (1964)1 ALL ER 341** where Lord Diplock stated as follows:

> ***"The particular type of estoppel relied on by the husband is estoppel per rem judicatam. This is a generic term which in modern law includes two species. The first species, which I will call "cause of action estoppel" is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, i.e., judgment was given on it, it is said to be merged in the judgment…if it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does, he is estopped per rem judicatam"***

31. The Plaintiff submitted that the doctrine of *res judicata* has six components which are that: (i) The decision, whether domestic or foreign, was judicial in the relevant sense; (ii) it was in fact pronounced; (iii) the tribunal has jurisdiction over the parties and the subject matter; (iv) the decision was (a) final, (b) on the merits; (v) it determined a question raised in the later litigation; and (vi) the parties are the same, or the earlier decision was in rem.

32. The Plaintiff stated that the judicial policy behind *res judicata* is to bring finality to litigation and afford parties closure as aptly captured by the Court of Appeal in **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR**. Reliance was also placed on the said court's sentiments when determining whether the matter before it was *res judicata.* The court expressed itself in the following words:

> *"To our mind, there is no better case in which the Court ought to invoke the doctrine of constructive res judicata than in the present appeal. Constructive res judicata is broader and encompasses all the issues in dispute which, a party employing due diligence ought to have raised for consideration. To allow Benjoh to relitigate, re-agitate and re-canvass any issues, no matter how crafted or the legal ingenuity and sophistry employed and in spite of the plethora of cases already conclusively determined by competent courts on the question of accounts, would be tantamount to throwing mud on the doctrine of res judicata and allow a travesty of justice to be committed to a party. The specific issue the respondent raises of rendering true and proper accounts to a customer's accounts, has been or could have been raised before the High Court in the previous suits".*

33. It was argued that the "exception for special circumstances" which the Defendant raises do not qualify as special circumstances to deviate from the doctrine of *res judicata* or dilute the potency of the same. The Plaintiff submitted that the "exception for special circumstances" arises only in relation to ***issue estoppel*** and not in cause of action estoppel which is the case in the matter before the court. The Plaintiff contended that cause of action estoppel arises only in instances where a plea for *res judicata* could not be established because the causes of action are not the same whereas issue estoppel arises in fluid and evolving set of facts that materially change over a period of time.

34. It was the Plaintiff's further contention that *res judicata* is distinct as it determines the issues before court once and for all whereas in issue estoppel the court can relook at the matter because of the fluid dynamics of a given situation which can either be on the law or the facts of the case between the parties. Reliance was placed on the case of **Arnold and Others v National Westminster Bank Plc (1990) 1 All ER, 529** in which the court quoted Lord Diplock's definition of estoppel in **Mills v Cooper (1967) 2 All ER 100 at 104**, as follows:

> *"The doctrine of issue estoppel in civil proceedings is of fairly recent and sporadic development, though none the worse for that… This doctrine, so far as it affects civil proceedings, may be stated thus: a party to civil proceedings is not entitled to make, as against the other party, an assertion, whether of fact or of the legal consequences of facts, the correctness of which is an essential element in his cause of action or defence, if the same assertion was an essential element in his previous cause of action or defence in previous civil proceedings between the same parties or their predecessors in title and was found by a court of competent jurisdiction in such previous civil proceedings to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion and could not by reasonable diligence have been adduced by that party in the previous proceedings has since become available to him".*

35. The Plaintiff further relied on the following statement by Dillon LJ in the case:

> *"If therefore, the binding nature of an issue estoppel, where a point has been litigated in earlier proceedings, may be qualified of new facts of cogency being brought forward in a second action, why as a matter of common sense should it not equally be qualified*

as a result of a new development in law? It is not enough for a litigant who has argued a point of law and lost, to say, in order to avoid issue estoppel, merely that it is arguable in the light of other decisions at first instance that the previous decision at the first instance might have been wrong. He must go further"

36. It was further submitted that this court cannot endlessly re-litigate the issues that divide the Plaintiff and the Defendant. The Plaintiff argued that the dispute between the parties was conclusively determined by the Ruling of 6th January, 2021 which has not been stayed or set aside. The Plaintiff insisted that the said Ruling was in essence an appeal from the decision of 16th June, 2020 as 90% of the decretal sum was awarded to KRA which is not a party to the proceedings. It was argued that the procedure for tax collection is clear and if KRA has tax claims against the Plaintiff it must follow the right process and procedure but cannot constantly meddle in this suit and create endless confusion by using the Court as the forum that helps it to collect tax.

37. In view of its foregoing submissions, the Plaintiff urged the Court to uphold its Preliminary Objection and strike out the Defendants Notice of Motion dated 5th February, 2021.

38. Learned Senior Counsel, Mr. Ahmed Nassir for the Plaintiff reiterated the foregoing in his oral arguments before this court. He added that if the partial decretal sum money is not paid as ordered in the decision of 6th January, 2021, then the said decree remains unsatisfied.

39. On the part of KRA, learned counsel, Ms. Mburugu submitted that the Plaintiff's waiver application was declined. She referred the court to the letter dated 8th January, 2021 regarding directions for payment of interests and penalties. Counsel also confirmed that the outstanding interests and penalties still remain unpaid.

40. In rebuttal, Mr. Kihara submitted that the Plaintiff's advocate should have limited himself to matters law only since there is no Replying Affidavit on record.

Analysis and Determination

41. I have carefully considered the application by the Defendant, the Plaintiff's Preliminary Objection and parties' rival submissions as well as the authorities cited. It is a well settled legal principle and practice that where a Preliminary Objection is raised then it must be determined first since such determination may have the effect of disposing the matter at hand preliminarily without the court having to go into **its merits.**

Whether the Notice of Preliminary Objection is merited.

42. A Preliminary Objection (hereafter PO) was described in the case of **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696** to mean:-

"So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

43. Sir. **Charles Newbold, JA** in the case stated that:-

"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop."

44. In the case of ***Oraro v Mbaja [2005] eKLR***, the court stated that:

"Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence".

45. In the instant **PO**, the Plaintiff argues that the Defendant's application herein is *res judicata* as the Orders sought and issues raised therein were determined in the ruling delivered by this court on 6th January, 2021 regarding the sums due and payable to the Plaintiff and KRA. The issue for determination therefore, is whether the application is *res judicata* by virtue of the Ruling of 6th January, 2021.

46. The doctrine of *res judicata* bars re-litigation of matters that have already been determined. It is premised on the principle that litigation on a particular matter must come to an end. It is provided for under **Section 7** of the **Civil Procedure Act** as follows:

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

47. At this point, I find it necessary to reproduce the relevant part of the Ruling of 6th January, 2021 which the Plaintiff has alluded to:

a. That the Defendant within 10 days releases to KRA the principal balance in the sum of Ksh. 915,316,830/.

b. That the balance from Ksh. 4,041,288,368/- of about Ksh. 485,000,000/ (after deducting both Ksh. 3,099,971,539/- and Ksh. 915,316,830/ being principal tax) shall be released to the Plaintiff.

c. That if the waiver of interests and penalties is not granted then KRA shall be at liberty to demand the same.

d. That the disbursements of any monies shall be in US Dollars unless the parties otherwise agree. Parties are at liberty to confirm currency exchange rates from Central Bank if a dispute on the same arises.

e. Each party shall bear its own costs of the application."

48. Having rendered myself as above, it is clear that the money payable to the Plaintiff from the partial decree was conclusively adjudicated upon and a determination in respect thereof made. But I pose the question; can the present application be said to be *res judicata* in view of that? My answer to this is no. Why? This is because, as rightfully submitted by the Defendant, there are special circumstances under which the doctrine of *res judicata* will not apply. The Court in the English case of *Henderson v Henderson (Supra)*, observed thus:

"…where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

49. I have perused the agency notice dated 7th January, 2021 issued by KRA a day after the Ruling demanding payment of Kshs. 1,350,316,830/= from the Defendant on account of tax owed to it by the Plaintiff. The Defendant has stated that it paid the entire amount demanded by KRA which was inclusive of the sum that was supposed to be paid to the Plaintiff as per the Ruling of 6th January, 2021. The Plaintiff has not denied that it owed that much in taxes due to KRA. Its only complaint is that the Defendant ought to have complied with the orders of this court as this is not the proper forum that KRA should have used to collect its taxes. Further, counsel for KRA has confirmed that an amount equivalent to the partial decretal sum has since been paid to the Authority on account of taxes owed by the Plaintiff and that all that remains are the interests and penalties.

50. Whereas I appreciate that the doctrine of *res judicata* may rightfully be invoked in instances where a party raises issues in a subsequent application, which he ought to have raised in a previous application as between the same parties, I find that the developments alluded to hereinabove arose subsequent to the Ruling of 6th January, 2021. The Agency Notice dated 7th January, 2021 is not an issue *which the Defendant, exercising reasonable diligence, might have brought forward as part of the subject of the previous application as it was not aware of the same.*

51. I therefore hold that the Defendant's present application qualifies to be in the "special case" exception referred to in **the Henderson v Henderson Case**. This means that I do not hold the *Defendant's present* application to be *res judicata.* I decline to uphold the PO and the same is dismissed with no orders of costs.

Whether the Defendant's Notice of Motion is merited.

52. The issue for consideration herein is whether the issuance of the Warrants of Attachment and Sale against the Defendant and the subsequent proclamation of the Defendant's movable property are proper. The Defendant is emphatic that it has settled the partial decretal sum in full in view of the sum of Kshs. 4,450,288,369/= paid to KRA on account of taxes due to the Authority from the Plaintiff. Counsel on record for KRA has confirmed receipt of the said amount. On its part however, the Plaintiff contends that the Warrants of attachment and sale were proper on two accounts. Firstly, is that the partial decree remains unsatisfied because the money was not paid in the manner ordered in the Ruling of 6th January, 2021. Secondly, it (Plaintiff) is relying on a different exchange rate of Kshs. 110 to the American Dollar in the computation of the partial decretal sum which was in USD which rate was not applied by the Defendant.

53. At this juncture, it is worthy to note that the Plaintiff having not filed a Replying Affidavit could not submit on points facts. Although a determination of this limb of the Ruling is majorly on factual matters, for record purposes, any submission made in this respect by the Plaintiff is hereby expunged from the record.

54. On the part of this court, I do not think that issue is about the disbursement of the monies to KRA. What would be in issue is whether the disbursement was as ordered by the court. Back to the Ruling of 6th January, 2021, the court was emphatic that if parries did not agree on the exchange rate, they had to resort to Central Bank which would give them the prevailing exchange rate to enable them convert the decretal sum into Kenya Shilling at prevailing market rates. Prevailing market rates imply rates as at the time the monies leave the bank.

55. It is clear that the Defendant merely transmitted an amount of money equivalent to what it thought was properly tabulated at its convenient exchange rate without consulting the Plaintiff. Consequently, it has turned around to state that it has no money to disburse to the Plaintiff. This is of course erroneous, improper and a circumvention of the Court order of 6th January, 2021. My view is that, until the decretal sum is first converted into KSH at an agreed rate or at the rate given by Central Bank, then the Defendant cannot claim to have discharged its obligation to the Plaintiff.

56. What this means is that the Defendant ought to have furnished the Plaintiff with proof of conversion of the monies at the prevailing

exchange rate as ordered before assuming to take action. I thus fault the Defendant for assuming to have paid all the decretal sum to KRA yet there is no proof of the basis on which all the sum became payable to it. Furthermore, the court is not aware of any successful review or appeal of its Ruling as regards the manner in which the decretal sum was to be distributed.

57. The other facet of the Defendant's argument is that it disbursed all decretal sum because KRA issued a further Agency Notice dated 7th January, 2021. It is however worthy to note that, despite KRA having issued the Agency Notice, Miss Mburugu for the Authority submitted that interests and penalties demanded remained unpaid. Therefore, the Defendant cannot hide under the guise of a dismissive statement that it disbursed all monies to KRA, reasons wherefore it had nothing owing to the Plaintiff. Such an assertion can only hold upon demonstrating that, even if the money was disbursed in USD as ordered by the court, the proper prevailing exchange rate was applied.

58. I note that the Defendant relied on an expert report by M/s Nyara Consultants dated 10th April, 2018 to assert that a proper conversion rate was applied. However, the court was emphatic in its Ruling that parties had to agree on the exchange rate failing which they seek assistance from Central Bank. To the contrary, the Defendant decided to operate under its own terms and conditions, to its own disaster. For this reason, clearly the monies disbursed to KRA were in excess of the apportionment to it as ordered on 6th January, 2021. (emphasis added).

59. Further and in any event, even if an Agency Notice was issued by KRA, the amount of the tax demanded must be subject to proof. As far as this court is aware and borne by the record, KRA pronounced itself to demanding no more than was consented to and recorded in the aforesaid Ruling of January 6th. I add that, the assertion that no waiver of interests and penalties was given, reasons why all the decretal sum was disbursed to KRA was a submission from the bar and not supported by evidence. I say so because, clearly the court was not shown any such documentation containing a refusal of the waiver by the Cabinet Secretary despite alleging so.

60. To support this finding, reliance is had to Section 89(7)(b)(i) of the Tax Procedures Act, 2015 which is clear that the approval for waiver of penalty and interest must be given by the Cabinet Secretary in charge of finance (In this case Treasury) where the same exceeds ***one million five hundred thousand shillings.***

61. What is intriguing to note is that the tax in the Agency Notice of 7th January, 2021 does not comprise interests and penalties as would be the position as at the date of the Ruling but of a Principal Tax. The Court having distributed the Partial Decretal Sum as per its Ruling means that any monies paid to KRA in excess of the order was so paid at the peril of the Defendant and its bankers. In fact, it is in blatant disregard of the court orders which have neither been set aside nor reviewed, or better still, appealed. What I am simply saying is that such transmission was on the Bank's own volition and the court cannot come to its aid.

62. That said, the Plaintiff too ought not to have commenced the execution proceedings without providing proof that it was executing for the monies due to it as per the court's Ruling of 6th January, 2021, which amount is supported by an exchange rate issued by Central Bank.

63. I also fault the Plaintiff's counsel for submitting that KRA is using the court to collect its taxes. When I took over this matter, both the Plaintiff and the Defendant had consented to KRA's participation in the proceedings without filing any formal pleadings for purposes of ventilating the Authority's case in so far as the amount of taxes owed to it by the Plaintiff and which amount, by virtue of Agency Notice(s), could not be transmitted to the Plaintiff. Thus, the Authority's case was ventilated pursuant to the Tax Procedures Act, 2015 and at the expediency of fast tracking the proceedings.

64. Having regard to the foregoing, I emphasize that the Plaintiff is only entitled to such sum as per the court's Ruling of 6th January, 2021. The Warrant of Attachment is no doubt in excess of the amount pronounced and even if it equated the sum pronounced by the court, the Plaintiff has not demonstrated that it relied on an agreed exchange rate or an exchange rate given by the Central Bank. Unequivocally, the Plaintiff should only execute for the sum it is entitled to out of the partial decree.

65. In the circumstances, the Notice of Motion dated 5th February, 2021 partially succeeds with the orders that I recall the Warrants of Attachment of Moveable Property drawn by the Plaintiff in execution of a decree for a sum of USD 7,157,824.77 and Ksh. 4,300/ dated 27th January, 2021 and the proclamation of the Defendant's movable property. I order that the Plaintiff should draw up fresh Warrants of Attachment and execute for a sum as ordered in the court's Ruling of 6th January, 2021 and upon fulfilling the conditions set out by the court in the said Ruling, of tabulating the decree for money at an exchange rate issued by the Central Bank of Kenya or agreed by both the Defendant and Plaintiff.

66. Each party shall bear its own costs of the application.

DATED AND DELIVERED AT NAIROBI THIS 8TH APRIL, 2021.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Mr. Kihara for the Defendant/Applicant.*

2. *Mr. Ahmed Nasir, SC for the Plaintiff/ Respondent.*

3. *Ms. Mburugu KRA.*