



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
CORAM: D. S. MAJANJA J.
CIVIL CASE NO. 469 OF 2013
CONSOLIDATED WITH
CIVIL SUIT NO. 471 OF 2013

BETWEEN

PANKAJ VRAJLAL SOMAIA 1ST PLAINTIFF

METRO PETROLEUM LIMITED..... 2ND PLAINTIFF

AND

KENYA REVENUE AUTHORITY 1ST DEFENDANT

LEAKEY AUCTIONEERS.....2ND DEFENDANT

BILL KIPSANG ROTICHINTERESTED PARTY

RULING

1. These two suits have been consolidated because they deal with the same subject matter. In **HCCC No. 461 of 2013**, the 1st plaintiff and the interested parties are the directors of the 2nd plaintiff (“Metro Petroleum”). As the name suggests, Metro Petroleum was involved in selling petroleum. In due course, both directors disagreed and the 1st plaintiff filed suit to protect and safeguard the interests of Metro Petroleum.

2. The 1st plaintiff learnt that the 1st defendant (“KRA”) had issued warrants of distress under the provisions of **section 102** of the *Income Tax Act*, **section 24** of the *Value Added Tax Act* and **section 228** of the *Customs and Excise Act* to recover taxes by selling petroleum products held at the Kenya Pipeline Depot in Nairobi estimated to be worth Kshs. 118 million.

3. In the amended plaint dated 5th November 2013, the plaintiffs contended that they were not aware of the unpaid taxes and were apprehensive that KRA would sell the petroleum below market value. The

plaintiffs prayed for the following:

a. A permanent injunction be issued restraining the 1st and 2nd Defendants by themselves, their servants, agents or otherwise howsoever from proceeding with the threatened distress over the 2nd plaintiff's property, distraining, advertising for sale, offering for sale or selling by public auction or otherwise interfering with, alienating, disposing or in any way dealing with the 2nd Plaintiff's moveable property held at the premises of Kenya Pipeline situated along Sekondi road, off Nanyuki Road – Industrial Area;

aa. A declaration that the 1st Defendant is not entitled to summarily distress on the 2nd Plaintiff's property without full and proper notice to the Plaintiffs herein.

ab. A declaration that the Plaintiffs are entitled to dispose of their fuel product held by Kenya Pipeline Company Ltd at market value under supervision of the Court provided the 1st Defendant has first claim on any and owing tax assessment.

ac. An order that the 1st Defendant herein do render proper accounts and provide full information to the Plaintiffs of the purported unpaid taxes, any assessment thereof and basis thereto.

b. Costs and interest of the suit;

c. Any other relief that the Honourable Court may deem fit to grant.

4. At the same time Metro Petroleum filed **HCCC No. 417 of 2013** at the instigation of the interested parties. It claimed that KRA had issued a Notice and Warrant of Distress against its Petroleum Line Fill Stock at the Kenya Pipeline Limited premises in Nairobi on account of unpaid PAYE. It contended that it had made substantial payments, entered into negotiations to settle the balance and undertaken to liquidate the outstanding amount. It claimed that although KRA lifted the warrants, it threatened to sell the stock which it alleged was valued at Kshs. 170 million. It was apprehensive that KRA would sell the stock at an undervalue. It sought the following reliefs:

a) Temporary injunction restraining the Respondent by themselves, their servants, agents and/or assigns from selling by Auction or otherwise, the Applicant's Petroleum Line Fill Stock at Kenya Pipeline Company Limited Premises situated along Sekondi Road off Nanyuki Road, Industrial Area, pending the hearing and determination of this Application and suit.

b) Permanent injunction restraining the Respondent by themselves, their servants, agents and/or assigns from selling by Auction or otherwise, the Applicant's Petroleum Line Fill Stock at Kenya Pipeline Company Limited Premises situated along Sekondi Road off Nanyuki Road, Industrial Area, pending the hearing and determination of this Application and suit.

c) Order that Accounts be taken to determine the rightful outstanding Debt.

d) An Order that the parties herein jointly sell the said Petroleum Line Fill Stock at prevailing Market Rates, with the proceeds directly being applied to liquidate the Defendant's rightful demand.

e) Costs of this suit.

f) Any other remedies that this Honourable Court may deem fit to grant.

5. On 26th November 2013, the suits were consolidated by consent since they dealt with the same subject matter. The parties also recorded a consent where parties agreed that both directors of Metro Petroleum would be allowed access to the petroleum stock in order to sell an equivalent of Kshs. 20 million worth of stock and the amount would be deposited in a joint account pending the determination of the suit.

6. The parties were not able to agree on the way forward and the matter found itself back before Gikonyo J., who heard the applications for injunction filed by the parties and dismissed them in a ruling dated 15th June 2015.

7. When the matter came up in court on 10th July 2015, the issue of the petroleum stocks was still live. The parties then recorded the following consent:

1. THAT the 629,002 litres of diesel subject matter herein shall be sold by KRA through either public auction or private treaty as by law required in satisfaction of the claim by KRA.

2. THAT any notice required shall be accordingly given.

3. THAT matter be mentioned on 13/10/2015.

8. It is not in dispute that KRA sold the entire stock fuel for Kshs. 35,853,114.00 leaving a shortfall of **Kshs. 9,946,680/-** net of necessary charges and expenses which KRA states it is entitled to recover. Thereafter the matter was fixed for hearing. When it came up for hearing on 4th November 2019 and after hearing the parties, I issued the following directions;

1. After hearing the parties, I direct that the following issue be determined as a preliminary issue:

(1) Did the court order of 13th July 2015 extinguish the tax liability of Metro Petroleum Limited.

(2) If not, what relief is the Company entitled.

2. The parties shall file and exchange written submissions. Submissions should not exceed 5 pages.

3. Highlighting on 29.11.2019 at 8.30am.

9. When the matter came up for hearing as scheduled, the plaintiff filed written submissions while both parties made oral arguments to support their respective positions.

10. The plaintiffs' position is that the consent order was a valid consent reached and recorded by the court and that its effect was that the sale of the petroleum stock was in complete satisfaction of the amount claimed by the KRA from the Metro Petroleum on account of taxes. The plaintiffs submitted that the consent was entered into voluntarily, was binding and no grounds had been advanced to set it aside. Counsel pointed out that KRA did not establish any fraud, mistake or representation to warrant the court varying or setting it aside. Counsel cited the cases of **Brooke Bond Liebig v Mallya [1975] EA 266** and **Flora N. Wasike v Destimo Wamboko [1988] eKLR** to support its position. Counsel submitted that KRA's claim was fully settled when it was allowed to sell the 629,002 litres of fuel and that after doing so, it should now be barred from making any further claim.

11. KRA's stance is that Metro Petroleum has not settled taxes. It pointed out that the issue for determination was the proper construction of the consent order and in interpreting it, the court must have regard to the ruling of Gikonyo J as it provides the context of the consent. KRA submitted that Metro Petroleum had already admitted that it owed taxes and made several promises to make payment. Since it failed to make payment, KRA was entitled to sell the fuel by public auction to the highest bidder. KRA asserts that the circumstances of the sale have been explained and that it is now clear that the sale was intended to recover taxes and that any shortfall ought to be paid as KRA cannot waive taxes to be paid by Metro Petroleum.

12. I am constrained to agree with counsel for KRA, that the meaning of the consent must be seen in the context of the case and in particular the ruling of Gikonyo J., in respect of the injunctive relief sought by the plaintiffs. Regarding the issue of taxes owed by Metro Petroleum, the learned judge stated as follows;

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

13. The learned judge then dealt with the notice of distress which he held that it was on account of outstanding taxes and the issue of wrangles between the 1st plaintiff and the interested parties as follows:

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

14. The following uncontested findings of fact emerge from the decision of the learned judge. First, Metro Petroleum had admitted owing taxes. Second, it had proposed to make payment but had defaulted. Third, the KRA exercised its power under the **Income Tax Act** to levy distress following default. It is not in doubt that the purpose of the distress was to secure payment of all taxes that were due and owing by Metro Petroleum.

15. According to the affidavit of Asha Salim sworn on 22nd March 2016, the petroleum was advertised for sale by the 2nd defendant on 7th December 2015. Due to price fluctuations, KRA received an offer to

sell 629,002 litres at Kshs. 60/-. The bidder was unable to secure financing, so the product was sold to the second highest bidder at Kshs. 57.00per litre. Having sold the entire product, KRA was unable to recover the full tax debt.

16. The purpose of the sale was to recover outstanding taxes. In other words, to satisfy the tax debt. The sale was not in full and final settlement of the debt. It was only to recover such sum as would be recovered in the sale. Further, under the applicable law, KRA was entitled to hold an auction sale. The sale at an auction reflects the market value unless of course the party contesting the sale proves collusion or fraud. There is no guarantee the sale would yield a sum that would cover the tax debt or even guarantee recovery of a specific sum.

17. I therefore find and hold that the sale of the petroleum and the proceeds thereof were not intended to be the full and final settlement of Metro Petroleum's tax debt. Given the context of the matter as I have outlined above, I hold that word "*satisfaction*" in the consent order did not imply full satisfaction nor did it relieve Metro Petroleum of the statutory duty to settle the tax debt which it had admitted but also made an effort to settle albeit with cheques that were dishonoured. It merely referred to the fact that proceeds of sale would be used to offset part of the tax debt to the extent of the proceeds of sale.

18. In view of the finding that the Metro Petroleum is still indebted to KRA, I now invite the parties to take further directions on the hearing of the case bearing in mind the findings of Gikonyo J., in the ruling dated 15th June 2015.

DATED and DELIVERED at NAIROBI this 20th day of JANUARY 2020.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Kanjama instructed by Muma and Kanjama Advocates for the plaintiffs in HCCC No. 469 of 2013.

Mr Manoti instructed by Kenya Revenue Authority for the 1st and 2nd defendants.