



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. 128 OF 2019

THE CO-OPERATIVE BANK OF KENYA LIMITED.....APPELLANT/APPLICANT

VERSUS

HENRY NYABUTO ONDIEKI.....1ST RESPONDENT

CHEMELIL SUGAR COMPANY.....2ND RESPONDENT

KENYA COMMERCIAL BANK.....3RD RESPONDENT

RULING

1. By a notice of motion dated 13th November, 2019 brought under Section 1A, 1B, 3A and 5 of the Civil Procedure Act; Order 10 Rule 11; Order 22 Rule 22 and Order 51 rule 1 and 3 of the Civil; Procedure rules and Section 34 (3) (c) of the Tax Procedure Act No. 29 of 2015, the Appellant/ Applicant prays for orders that

a. **This Honourable Court be pleased to grant a stay of execution of the ruling and order dated 31st October, 2019 against the Applicant pending the hearing and determination of this appeal**

b. **Costs of this application be provided for**

2. The application is based on the grounds among others that the Appellant/ Applicant being an agent of Kenya Revenue Authority was issued with an Agency Notice way before the Honourable Court issued the order dated 31st October, 2019.

3. The application is supported by an affidavit sworn on 13th November, 2019 by Stephen Oyucho, advocate for the appellant who reiterates the grounds on the face of the application. Annexed to the affidavit is the impugned order issued on 31st October, 2019 and an Agency Notice dated 05th September, 2019 issued by Kenya Revenue Authority (**KRA**) to the Applicant to collect a total of Kshs. 2,032,584.495/- from the 2nd Respondent.

4. The application is opposed by way of a replying affidavit sworn by the 1st Respondent on 18th November, 2019 in which he blames the **KRA** for being indolent in collecting tax from the 2nd Respondent. He avers that Section 34(3), 42(1) and 52 of the Tax Procedure Act contravene Articles 3, 10 and 27 of the Constitution and further that the orders sought will deny him the fruits of his judgment which will greatly prejudice him. He urges the court to order the Applicant to deposit the decretal sum in an interest earning account between it and himself as a pre-condition for granting the orders sought.

Analysis and Determination

5. I have considered the application in the light of the supporting affidavit, the replying affidavit and written submissions filed on behalf of both parties.

6. An order for stay of execution is a discretionary order. The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** held that discretion ought to be exercised in a manner that would not prevent an appeal. The Applicant submitted that this application seeks to stay the violation of Section 34 (3) (c) of the Tax Procedure Act No. 29 of 2015. Section 34 of that Act which deals with priority of tax provides as follows:

(1) The following amounts shall be held in trust for the Government by the person receiving or withholding the amount—

(a) the value added tax payable on taxable supplies made by the person (net of any deduction for input tax allowed) when the person is a registered person under the Value Added Tax Act, 2013 (No. 35 of 2013);

(b) the excise duty payable on the removal of excisable goods from the person's factory or the supply of excisable services by the person when the person is a licensed person under the Excise Duty Act (No. 23 of 2015);

(c) withholding tax; and

(d) an amount that a payer is required to pay under a notice issued under section 41(2).

(2) If the person referred to in subsection (1) is liquidated or is declared bankrupt, the amount referred to in subsection (1) shall not form part of the estate of the person in liquidation or bankruptcy and shall be paid to the Commissioner before any distribution of property is made.

(3) Despite the provision of any other written law, the withholding tax deducted by a person—

(a) shall not be subject to attachment in respect of any debt or liability of that person;

(b) shall be a first charge on the payment or amount from which the tax is withheld or deducted; and

(c) shall be deducted prior to any other deduction that the person may be required to make from the payment or amount under an order of any court.

7. It has been demonstrated that Agency Notice dated 05th September, 2019 issued by Kenya Revenue Authority (**KRA**) to the Applicant to collect a total of Kshs. 2,032,584.495/- from the 2nd Respondent was issued way before the impugned order was issued.

8. From the affidavit evidence, I am persuaded that the Applicant has demonstrated a *prima facie* case that ought to go for trial on appeal. As a result, the interest of justice demands that this court exercises its discretion in favor of the Applicant to prevent the appeal from being rendered nugatory.

Disposition

9. Consequently and for the reasons stated hereinabove, the notice of motion dated 13th November, 2019 is considered and allowed in the following terms:

a. **This Honourable Court be and is hereby pleased to grant a stay of execution of the ruling and order dated 31st October, 2019 against the Applicant pending the hearing and determination of this appeal**

b. **HCCC NO. 21 OF 2019 by which the 1st Respondent seeks to cite the Applicant's officers for contempt of the impugned order is similarly stayed pending the hearing and determination of this appeal**

c. **The Applicant is directed to file and serve its record of appeal within 30 days from today's date**

d. **Costs shall abide the outcome of the appeal**

DELIVERED AND SIGNED IN KISUMU THIS 13th DAY OF *February* 2020

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Amondi/Okodoi

Appellant/Applicant -N/A

1st Respondent -Present in person

2nd Respondent - N/A

3rd Respondent - N/A