



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CONSTITUTIONAL PETITION NO. 14 OF 2019

BETWEEN

MAYA ENTERPRISES LIMITED.....PETITIONER

AND

KENYA REVENUE AUTHORITY.....RESPONDENT

AND

BANK OF BARODA (K) LTD.....1ST INTERESTED PARTY

JKADS COMPANY LTD.....2ND INTERESTED PARTY

RULING

Introduction

1. The petitioner is a limited liability company carrying on transport, haulage, and logistic business within the Republic of Kenya. On or about the 12/9/2018 the Respondent proclaimed the Petitioner's motor vehicles in exercise of its recovery of taxes due and owing from the 2nd Interested Party. This led to the filing of this Petition on the 19/2/2019.

The Application

2. Together with the Petition, the Petitioner filed a Notice of Motion of even date under certificate of urgency, and sought the following orders: -

1. Spent

2. THAT pending the hearing and determination of this Application the Respondent be restrained from attaching, physical removal and/or selling by public auction or otherwise in any manner disposing of or interfering with the Petitioner's use of the suit properties namely the motor vehicles registration numbers:

a. KBY 623U and Trailer ZF 4285

b. KBV 448Z and Trailer ZF 4286

c. KBV449Z and Trailer ZF 2104

d. KBY 624U and Trailer ZF 2105

e. KCJ 281X and Trailer ZF 2105

f. KBN 891Z and Trailer ZF 2107

g. Trailers: ZD 3399 and ZD 6587

3. THAT pending the hearing and determination of the Application the Respondent be restrained from attaching, physical removal and/or selling by public auction or otherwise in any manner disposing of or interfering with the Petitioner's use of the suit properties namely the motor vehicles registration numbers:

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f. KBN 891Z and Trailer ZF 2107

g. Trailers: ZD 3399 and ZD 6587

4. THAT this Honourable Court do grant such other facilitative orders and directions as may be necessary to give effect to the foregoing orders and meet the ends of Justice on this case;

5. THAT the costs of this Application be provided for;

3. The Notice of Motion is premised upon five (5) grounds appearing on the face of it and supported by the Affidavit of **Philip Omukuva Madera** sworn on 18/2/2019. The deponent states that he is the Applicant's Operations Manager. He avers that the motor vehicles proclaimed were purchased from the 2nd Interested Party on the 23/11/2017 through a refinancing arrangement with the 1st Interested Party and as a result, it acquired possession of the said motor vehicles and they are being used in the Petitioner's business and the Petitioner does not owe the Respondent the sum of Kshs. 10,363,554 on account of pending taxes.

4. The deponent further states that the Petitioner had sought and obtained restraining orders in the lower Court on the 20/9/2018 in CMCC No. 1929 (Msa) which orders lapsed on the 13/2/2019 upon the lower Court ruling that it lacked jurisdiction to hear the dispute.

5. In response to the application, the Respondent filed a Replying Affidavit sworn by **Wilson Mwangi** on 11/03/2019. The deponent states that he is an officer of the Respondent.

6. He avers that he is aware that a demand was issued against the 2nd Interested Party on the 18/3/2016 for Kshs. 3,095,538.00 VAT and Kshs. 16,767,238.00 Corporation tax and the 2nd Interested Party was given 30 days to object. A 1st reminder was sent on the 24/6/2016; the 2nd reminder was sent on the 14/7/2016, and the final reminder on the 20/9/2017.

7. The 2nd Interested party proceeded to the Tax Appeals tribunal via Tax Appeal Tribunal Appeal No. 98 of 2016 and by consent the tax obligation was reviewed downwards to Kshs. 2,788,077.00 VAT and Kshs. 7,575,477.00 Corporation Tax respectively and the 2nd Interested party was ordered to pay the same via six installments. Still, it failed to honour the consent prompting the Respondent to issue an agency notice to the 2nd Interested Party's bankers, (the 1st Interested Party herein) which also did not yield any fruit.

8. The Respondent then instructed Leakey auctioneers to effect distress for unpaid taxes. The auctioneer issued a proclamation for the attachment of taxpayer's motor vehicles after investigation directed the Respondent's officers to the Petitioner's yard. The Respondent avers that it was not a coincidence that the Petitioner only took over the business previously owned by the 2nd Interested party on the 23.11.2017 just a few days after the Respondent issued a demand and agency notice to the Bank of Baroda (1st Interested Party).

9. Parties agreed to dispense with the application vide written submissions, which were filed.

The Determination

10. I have considered the affidavit evidence, the annexures thereto and submissions by both parties' advocates on record and the relevant applicable law and authorities cited.

11. The issue for determination is whether on the evidence and material placed before this Court, the Petitioner has satisfied the conditions upon which a temporary injunction can be granted.

12. The Petitioner is seeking a temporary injunction to restrain the Respondents from attaching, physical removal, and/or selling by public auction the suit properties pending the hearing and determination of this petition. The established legal principles for grant of a temporary injunction in Kenya is set out in the cases of **East African Industries vs. Trufoods [1972] EA 420** and **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358**. In **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR** the Court restated the law as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a *prima facie* level,**
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and**
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.”**

13. A successful applicant for orders of temporary conservative injunction must show that a *prima facie* case has been established. A *prima facie* case is a case which has the likelihood to succeed upon trial. From the record herein, it is not a coincidence that the Petitioner only took over the business/purchased the motor vehicles previously owned by the 2nd Interested Party on the 23/11/2017 just a few days after the Respondent had issued a demand notice and Agency notices to Bank of Baroda (K) Ltd (the 1st Interested Party), which is the 2nd Interested Party's banker.

14. There appears to be evidence of collusion between the Petitioner and the 1st and 2nd Interested Parties herein to defraud the Respondent of taxes due and owing from the Interested Party by hatching a scheme to defeat the Respondent's execution process through a sale, which even at this stage appears to be fraudulent.

15. Section 46 of the Tax Procedures Act states as follows:

“(1) When a taxpayer (referred to as the "transferor") has a tax liability in relation to a business carried on by the taxpayer and the taxpayer has transferred all or some of the assets of the business to a related person (referred to as the "transferee"), the transferee shall be liable for the tax liability (referred to as the "transferred liability") of the transferor.

(2) Despite subsection (1), the Commissioner may recover the whole or part of the transferred liability from the transferor.”

16. It would appear therefore that the Petitioner is liable for the 2nd Interested Party's tax liabilities in relation to the business, having taken over all or some of the assets of that business, apparently with the sole aim of aiding the 2nd Interested Party evade payment of tax and without the mandatory Notice under Section 9 of the Tax procedures Act, and Section 3 of the Transfer of Business Act CAP 500. **Section 3(1) of the Transfer of Business Act** provides as follows:

“(1) Whenever any business or any portion of any business is transferred, with or without the goodwill or any portion thereof, the transferee shall, notwithstanding any agreement to the contrary, become liable for all the liabilities incurred in the business by the transferor, unless due notice in accordance with this Act has been given and has become complete.”

17. At this preliminary stage this Court is satisfied that the Petitioner has not established a *prima facie* case for the grant of the orders sought. The Petitioner may still have a case in the trial, but it has failed to satisfy this court that it is entitled to the temporary reliefs sought. The upshot is that the motion herein is dismissed for lack of merit.

18. Costs shall be for the Respondent.

Dated, Signed and Delivered at Mombasa this 13th day of February, 2020.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Wairire for Respondent

Ms. Nduku for Petitioner

Mr. Kaunda Court Assistant