



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL SUIT NO. 237 OF 2014

MASINDE MULIRO UNIVERSITY OF

SCIENCE AND TECHNOLOGY.....CLAIMANT

VERSUS

ECH CONTRACTORS LIMITED.....RESPONDENT

KENYA COMMERCIALBANK LIMITED.....1ST GARNISHEE

NATIONAL BANK OF KENYA OF KENYA LIMITED.....2ND GARNISHEE

RULING

1. I am tasked with simultaneously determining two applications, a Motion dated 18th December 2018 and another dated 21st January 2019. Both are brought at the instance of the claimant.

2. The Motion dated 18th December 2018 seeks deferral of a ruling on a Motion dated 6th December 2018 pending the tendering of additional evidence by the claimant in support of that Motion. The affidavit sworn in support of the application, by Josephine Osiro, on 18th December 2018, advances the position that the claimant had lost its documents relating to taxes that it had paid to the Kenya Revenue Authority, totaling Kshs. 585, 572.50, and that it had since recovered the documents. It would like to place those documents before the court as evidence that it had paid all the outstanding taxes amounting to Kshs. 585, 572.50, and if it was compelled to pay that amount to the respondent, as withholding taxes, plus penalties, that would amount to unjustly enriching the respondent.

3. There is a response to that Motion by the respondent, vide an affidavit sworn on 26th March 2019, by Gichira Maina. He avers that the claimant had sufficient time to file its reply to the application dated 6th November 2018, which was to come up for hearing on 26th November 2018. He took the view that the claimant was just seeking to patch up holes in its case. He averred that the additional material sought to be introduced was of no evidentiary value as it did not attach the income tax certificate generated upon payment of Kshs. 585, 572.50 as taxes to the Kenya Revenue Authority, and, therefore, there was no evidence that the claimant had remitted that amount of tax to the Kenya Revenue Authority. He submitted that the application was nothing more than a maneuver to delay finalization of the matter.

4. The Motion dated 21st January 2019 seeks joinder of the Kenya Revenue Authority as a party to the proceedings and, upon the joinder, to confirm that it had received taxes from the claimant to the tune of Kshs. 585, 572.50. In the affidavit sworn in support of the application, it is averred that the claimant had paid taxes to the Kenya Revenue Authority. It is pleaded that the Kenya Revenue Authority would be a necessary party in the proceedings, to confirm that the claimant had paid taxes.

5. I have closely perused through the file of papers before me, and I have not come across an affidavit which purports to be a reply to the application dated 21st January 2019. I believe, though, that the affidavit of Gichira Maina sworn on 26th March 2019, and purporting to respond to the claimant's application dated 6th March 2019, is intended to reply to the application of 21st January 2019, as there is no application on record dated 6th March 2019. The contents of the said affidavit appear to address the matters raised in the application dated 21st January 2019. The deponent principally argues that the claimant has not demonstrated that it had made any effort to procure evidence that it had paid the taxes to the Kenya Revenue Authority. He asserts that that evidence should have been obtained from the tax authority. He also avers that the claimant can still call officers from the tax authority to avail such evidence. He submits that there is no need to drag the Kenya Revenue Authority into the suit.

6. The two applications were argued orally before me on 25th September 2019. Both sides breathed life to the averments made in the affidavits placed on record by the parties, that they represent in the cause, and I do not think that I need to reproduce the same herein.

7. In the application dated 18th December 2018, the issue is about the claimant filing a further affidavit to provide additional evidence. The

additional evidence appears to be that it had paid taxes to the tax authority amounting to Kshs. 585, 572.50. The further affidavit that is proposed to be placed on record is attached. I see nothing, in the annexures to it, that evidences that Kshs. 585, 572.50 was paid to the tax authorities as alleged. There is no official receipt from the tax authority as evidence of payment of that amount, nor a letter from the authority acknowledging receipt of the money, nor a tax clearance certificate as evidence that the taxes had been cleared. There is equally no letter from the claimant to the tax authority asking them to acknowledge payment. I believe that there is credence in the argument, by the respondent, that this is just a scheme by the claimant to delay finalization of the matter.

8. The second application seeks joinder of the Kenya Revenue Authority as an interested party in the proceedings. The only interest that has been brought forth is that the tax authority would provide evidence that the claimant had paid Kshs. 585, 572.50. With respect, that cannot be a good reason to have a party enjoined in the proceedings. The tax authority is, no doubt, not a party interested in the outcome of these proceedings. If it was so interested then it ought to move the court itself for such joinder and state its interest. It cannot be joined merely to come and provide evidence of a payment by the claimant to itself. That is evidence that the claimant ought to get from the tax authority without having to make the tax authority a party. I agree with the respondent that it is even open to the claimant to have tax officers summoned to come to court and provide any evidence that the claimant feels the tax authority has in its possession. It would be abuse of court process to join Kenya Revenue Authority as a party to these proceedings.

9. The final orders that I shall make in the circumstances are as follows:

(a) That the Motion dated 21st January 2019 is hereby dismissed with costs to the respondent;

(b) That the application dated 18th December 2018 is allowed, for whatever it is worth, to the extent of admitting the affidavit attached to that application titled further supporting evidence and sworn on 18th December 2018; and

(c) That thereafter the matter shall be mentioned, on a date to be given at the delivery of the ruling, for directions on the disposal of the application dated 6th November 2018.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 7th DAY OF February, 2020

W MUSYOKA

JUDGE