



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

COMMERCIAL DIVISION

CIVIL CASE NO. 98 OF 2017

DEEMAN BUILDERS LIMITED.....PLAINTIFF

VERSUS

KENYA REVENUE AUTHORITY.....1ST DEFENDANT

GEORGE N. MUIRURIT/A LEAKEY'S

AUCTIONEERS.....2ND DEFENDANT

RULING

The Application

1. What is before this Court for determination is Notice of Motion dated 18.10.2017 and sought the following orders: -

1. Spent

2. spent

3. THAT the Court be pleased to restrain the 2nd Defendant by itself, its agents and employees from removing to the 2nd Defendant premises or selling by public auction or private treaty or in any manner whatsoever disposing of properties belonging to the Plaintiff but attached by the 2nd Defendant pursuant to a Notice of Distress dated 11th October 2017 and a Proclamation of Attachment dated 11th October 2017 wherein DEMAN CONSTRUCTION LTD is named as the debtor pending hearing of this suit.

2. The Notice of Motion is premised upon ten(10) grounds appearing on the face of it and supported by the Affidavit of **Arvind Narsani** sworn on 18.2.2019. The deponent states that he is the Applicants Director and that the Applicant is a limited liability company duly incorporated on the 15.6.2012 and is registered with the Defendant and has been issued with a Personal Identification Number P0xxxxxxxD and has always discharged all its tax obligations. Consequently the 1st Defendant has certified it as tax compliant.

3. He avers the Plaintiff is a different entity separate and distinct from Deman Construction Limited, it has no any tax arrears and no demand has ever been made against it by the 1st Defendant. Therefore, there was no basis for the 2nd Defendant to serve upon the Plaintiff a Notice of Distress dated 11.10 2017 addressed to **Deman Construction Limited** demanding the sum of Kshs.53,195,895.52.

4. The deponent avers that all the proclaimed goods belong to the Plaintiff and it is yet to be engaged by the Defendant on the alleged unpaid taxes and being a separate and distinct entity, it is not liable for taxes payable by DEMAN CONSTRUCTION LIMITED.

5. In response to the Application, the Respondent filed a Replying Affidavit sworn by **Asha K. Salim** who is described as a Debt Enforcement Manager to the 1st Defendant. She deponed that the Court orders obtained by the Plaintiff herein were obtained without full disclosure of material facts as the Plaintiff/Applicant is related to and shares directorship with Deman Construction limited.

6. She avers that Deman Construction Limited failed to pay taxes as per the Assessment and Demand issued to it on the 6.6.2012, a reminder via letters dated 19.11.2015, 8.12.2015 and 27.1.2016 were ignored prompting the 1st Defendant to issue an immediate demand notice on the 4.10.2017 followed by Agency Notices on the 5.10.2017 to the Tax payer's Bankers but the same did not achieve anything.

7. The deponent avers that on the 11.10.2017 its officers visited the premises of the Tax Payer to serve the Notice of Distress only to find that the business was still going on and nothing much had changed except it was going on in a new name of the Applicant herein and preliminary investigations had established the name change was due to the tax liabilities which had been accumulated by Deman Construction Limited and the Applicant had been incorporated in 2012 to camouflage the former.

8. The deponent also deponed that in the course of enforcing the Tax debt ,the investigations established that both DEMAN Construction Limited and the Plaintiff both have a **Mr. Arvind Manji Varsani** PIN No. A00xxxxxxxS as a common director and that Deeman Construction Limited had transferred some of its assets and that the Plaintiff had taken over the running of the business of the former.i.e there was a transfer of Motor Vehicle registration no.KBP 486H,Mitsubishi Lorry from Deman Construction Limited to the Plaintiff.Since there is proof of transfer of assets,the Tax Procedure Act empowers the Respondent to recover from the Plaintiff the Tax Liability incurred by Deman Construction Limited.

9. The deponent also avers that the Applicant herein did not issue the Notice of taking over the business (Deman Construction limited) as required under Section 3 of the Transfer of Business Act CAP 500 and as provided under the Value Added Tax Act CAP 476 so that the Respondent could raise the issue of tax liability. Therefore, the transfer was a ploy to evade the tax liabilities. Consequently, the Respondent were well within their legal mandate to issue a Distress Notice and further proclaim the Applicant items.

10. The 1st Defendant avers that it is a reputable government Agency which if need be can pay damages should the Court finally rule against it hence the Applicant should not be granted the interim orders.

12. Vide an affidavit sworn on the 14.11.2018,by Mr. William O. Wameyo who is the Plaintiff's Advocate, the Plaintiff alleged that the 2nd Defendant held a class C certificate hence it did not have jurisdiction in Mombasa and that as at the time of swearing the affidavit the 2nd defendant held a Class B licence.

13. In response to the Plaintiff's supporting affidavit, the 1st Defendant filed a Further Affidavit sworn on the 3.4.2019 by **Antony Opondo** who is described as an officer appointed under Section 13 of the Kenya Revenue Authority Act. He deponed that the allegations by the Plaintiff's Counsel remain as mere allegations as no documentary evidence has been adduced to support the said allegations. Further, the impugned Notice of Distress was made in October 2017 and not 2018 and as such, the annexed list of licensed Auctioneers as at 21.9.2018 has no relevance in these proceedings and the same is of questionable authenticity as it is not signed by the alleged marker.

The Determination.

14. 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.

15. The issue for determination is whether on the evidence and material placed before this Court, the Applicant has satisfied the conditions upon which a temporary injunction can be granted. 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) ally any doubts as to (b) by showing that the balance of convenience is in his favour.

16. A successful applicant for orders of temporary injunction must show that a prima facie case has been established. A prima facie case is a case is which has the likelihood to succeed upon trial.

17. The first issue that the court would like to address is if the Auctioneer who issued the proclamation notice acted without jurisdiction by proclaiming goods that were in Mombasa County. The proclamation notices were issued by Leakey's Auctioneers on 11.10.2017. Counsel for the applicants produced an unsigned list of Licensed Auctioneers and their areas of jurisdiction as at 21.9.2018 . The said list shows that George Njoroge Muiruri T/A Leakey's Auctioneers was licensed to operate in **Nairobi, Kiambu,Thika and Kajiado only**.

18. **The 1st Defendant in rejoinder produced its auctioneer licence which was indicated on its face that it was “Class B”, it was issued on the 23.1.2017, has an expiry date of 31.12.2017 and districts it is allowed to operate in are listed as Thika ,Nairobi,Kiambu & Kajiado.**

19. Rule 3(1) of the Auctioneers Rules, 1997 states as follows:-

“The Board shall issue two kinds of licenses –

(a) A class “A” licence which shall be a general auctioneering licensee limited to specific districts;

(b) Class “B” license which shall be a general auctioneering license which shall enable the holder to realize charged

securities, repossess and sell any property throughout Kenya, execute court orders, and to levy distress within specific districts.” (emphasis added).

20. It is thus evident that the said Auctioneer’s license was restricted to certain districts within which **it could levy distress**. Going the 2nd defendants licence issued on the 23.1.2017 Leakey’s Auctioneers area of jurisdiction in so far as levying of distress was concerned, was limited to Nairobi, Thika, Kiambu and Kajiado. This Court finds and holds that operating outside the purview of the licence would render such execution null and void. In the case of **Jeska Taaka Wanyonyi v Esther Opondo NKU HCCC No. 126 of 2006 [2007] eKLR**, the court held thus:

The said auctioneers repossessed the said motor vehicles from the possession of the respondent at Nakuru. It is apparent that the said Madume Auctioneers repossessed the said motor vehicles from Nakuru when they clearly did not have the territorial jurisdiction to do so. There is no evidence to suggest that the said Madume Auctioneers had obtained an order of the court to enable them execute a repossession order out of their area of operation. The said Madume Auctioneers therefore repossessed the said motor vehicle contrary to the provisions of the Auctioneers Act and the licence issued to them by the Auctioneers Licensing Board.

21. From the foregoing, it is the finding of this Court that a prima facie case has been established following the finding that the Auctioneer who issued the proclamation notice was acting outside the purview of his jurisdiction. Hence, the proclamation issued on the 11.10.2017 is void.

22. From the record herein, it is not a coincidence that the Applicant only took over the business belonging to Deman Construction limited, had some property transferred to it which were previously owned by Deman Construction limited and one **Mr. Arvind Manji Varsani** is both a director of the Plaintiff and Deman Construction Limited.

23. This Court verily believes that the Applicant, **Mr. Arvind Manji Varsani** and Deman Construction Limited acted in concert to defraud the 1st Respondent of taxes due and owing from the Deman Construction by hatching a scheme to defeat the 1st Respondent’s execution process through a fraudulent transfer and/or sale. Furthermore, the facts illustrated above clearly and unequivocally show that there is an explicit plan between the Applicant, **Mr. Arvind Manji Varsani** and Deman Construction Limited to circumvent the law and evade payment of taxes by way of business arrangements.

24. Under Section 46 of the Tax Procedures Act, it is stated 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.

25. **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.

26. There is no doubt that the 1st respondent has immense powers provided under the law to recover tax due and owing but the fact remains that some of the goods that were distrained by the 2nd respondent belong to the applicant and other parties and not Deman Construction Limited alone.

27. Having considered the circumstances of this case, I decline to grant an interim injunction. This court will give an equitable remedy that will go to the benefit of both parties. I hereby invoke the provisions of Section 3A of the Civil Procedure Act which provides as follows:-

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process.”

28. I therefore make the following orders:-

(i) That the proclamation notice dated 11.10.2017 issued by Leakey’s Auctioneers against the Applicant herein is hereby declared null, void, invalid and is hereby set aside;

(ii) That all goods listed in the schedule of movable property in the proclamation notice issued on 11.10.2017 by the 2nd respondent shall be released forthwith;

(iii) The 1st respondent will be at liberty to enforce its rights to recover outstanding taxes through a properly executed legal process; and

(iv) The applicant is awarded costs of the Application to be shouldered by the 2nd Respondent.

DATED and DELIVERED at Nairobi this 14th day of May, 2020.

D.O. CHEPKWONY

JUDGE

In view of the declaration of measures restricting court operations due to the COVID-19 pandemics, and in light of the directions issued by His Lordship, the Chief Justice, on 15th March 2020. This ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious proportionate and affordable resolution of civil disputes.