



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 121 OF 2017

ICEA LION LIFE ASSURANCE COMPANY LIMITED.....PLAINTIFF

VERSUS

JOMO KENYATTA UNIVERSITY OF

AGRICULTURE AND TECHNOLOGY.....DEFENDANT

JUDGMENT

1. This suit is commenced by way of Originating Summons dated 21st March 2017 and filed on the same day for the following orders:-

1. Spent

2. THAT the Respondents do honour the terms of the Agreement for Sale for L.R. No 209/8287, ICEA Building, Kenyatta Avenue, dated 14th July 2015 and forthwith pay to the Applicant Kshs.296,000,000/- being VAT due pursuant to the terms of the Agreement for Sale dated 14th July 2017.

3. THAT, further the Respondents do account for and pay to the Applicant Kshs.115,440,000/= being penalties and interest on the sum of Kshs.296,000,000/= from 1st October 2015 to 30th March 2017 and thereafter any additional penalties or interest that may accrue until payment in full.

4. THAT the costs of this Application be borne by the Respondent.

2. The facts forming the background to this matter are by and large undisputed. ICEA Lion Life Assurance Company Ltd (ICEA) is the past owner of LR No.209/8287 (the suit property) on which stands a Building then known as ICEA Building. Through an Agreement for sale dated 4th July 2015, ICEA sold the suit property to Jomo Kenyatta University of Agriculture and Technology (JKUAT) for a sum of Kshs.1,850,000,000/=. A highlight of the Sale Agreement was that JKUAT as purchaser would pay Value Added Tax (VAT) on the transaction of Kshs.296,000,000 in addition to stamp duty and registration fees on transfer. The completion date for the transaction would be on or before 20th December 2015.

3. There is no contest that in terms of the Sale Agreement, the obligation to pay VAT fell on JKUAT. It is also common ground that VAT has not been paid to date. Prior to the presentation of this matter to Court, JKUAT had through a letter dated 29th September 2015 requested the Cabinet Secretary, Treasury for waiver of the VAT. Neither the waiver nor payment had come through by the time this matter came to Court.

4. In an affidavit in reply to the Summons sworn by Prof. Benard Otoki Moirongo on 18th October 2018, JKUAT outlines the effort it has made over time to resolve the matter. The details are unnecessary but the climax is said to be the letter of 4th September, 2017 in which the Kenya Revenue Authority (KRA) is said to have confirmed that the transaction qualifies for Zero Rate VAT status.

5. Because of the centrality of the letter to the matter at hand it is reproduced in its entirety:-

H.O Ref: 3002/1

The Vice Chancellor

Jomo Kenyatta University of Agriculture & Technology

P.O. Box 62000-00200

NAIROBI

Dear Madam

JKUAT APPLICATION UNDER SECTION 65 –TPA 2015 PIN: P051104833Z.

I refer to the above matter and your letter of appeal dated 11th April, 2017.

The tax issue for which this appeal relates in on VAT treatment for the purchase of ICEA Building which we had earlier issued advisory vide our letter dated 17th March, 2016.

KRA and JKUAT met with your Tax Consultants on 16th May 2017 and we have made the following observations:-

- (i) The Vendor and Purchaser of the said property are both registered for VAT under Section 34 of the VAT Act 2013 and TPA 2015.
- (ii) The property under consideration is a commercial building and therefore qualifies as a taxable supply under Section 2 of the VAT Act 2013.
- (iii) The Tenants who occupied the entire area of 165,501 square feet at the date of sale were all retained by yourselves and continued with their lease entitlements, with the latest expiry date being 31st December 2022. Contracts of service providers were also retained by yourselves after the acquisition of the property.
- (iv) “Going concern” is an accounting concept and a mandatory requirement for International Financing Reporting Standard purposes. It also has relevance in the interpretation of paragraph 7 of Second Schedule to VAT Act.

We would therefore wish to confirm that the said transaction qualifies for Zero Rate VAT accounting status in accordance with Second Schedule, paragraph 7 of the VAT Act 2013 and as a going concern in lien with the precedence set in the case law quoted in your letter.

By a copy of this letter, the Head of Public Sector Division (PSD) is advised to appoint you as a withholding Agent under Section 42A of the TPA -2015.

Please note and be advised accordingly.

Yours faithfully,

Signed

J.M Ojee

Deputy Commissioner – Policy Co-ordination

For: Commissioner of Domestic Taxes

Cc. Public Sector Division

Attn: Charity Giteru

Clarity Biztech Advisory

Certified Public Accountants

P.O. Box 39545-00623

Nairobi

6. It is because of that letter that JKUAT takes the position that there is nothing more to the matter. ICEA does not share this position. Mr. James Gitau Singh appearing for ICEA is concerned that although the letter is an assurance to JKUAT, it does not unequivocally absolve his client from future demands. For that reason his client would have been happier if KRA had written to them directly. Second is the fear about any penalty that may arise because of the delay in resolving the matter.

7. Mr. Lutta for the JKUAT on the other hand does not apprehend the fears of ICEA. He makes the point that KRA which bears the responsibility of collecting taxes has ruled that the transaction qualifies for zero rating and that no demand has been made for payment of the tax. He thinks that all that ICEA needs to do is to attach the letter of 4th September 2017 to its Tax Returns.

8. The obligation to pay for VAT on the transaction is spelt out in clause 14.1 of the Sale Agreement as follows:-

“Each party shall bear their own Advocates legal costs in respect of the Sale transaction, but the Purchaser shall pay the VAT, Stamp Duty and Registration fees on the Transfer and Charge of the property”.

As it turned out, JKUAT is entitled to a waiver of that VAT and this has been confirmed by KRA.

9. As I understand it, the apprehension by ICEA is that unless the assurance given to JKUAT by KRA is given to ICEA, it is insufficient. This Court does not think that the apprehension is misplaced because the parties agreed on whom the VAT liability would fall and ICEA is entitled to insist that it is unequivocally absolved from any future demand. The intention of clause 14.1 being to insulate ICEA from payment of VAT then JKUAT was under obligation to show that it had paid the VAT or if waived then that it would neither be demanded from it or ICEA. JKUAT seems to have appreciated that ICEA had a legitimate interest in getting that assurance when its Tax Consultant signed off its Appeal of 11th April 2017 as follows:-

“We look forward to your revised interpretation on this transaction which we intend to share with the transferor to enable them vacate their demand of VAT on the premises that the transaction is one of a going concern pursuant to the provisions of the VAT Act 2013 and thus zero rated”.

10. It is now known that when the positive response to this letter was written on 4th September 2017 it was not copied to ICEA. This Court cannot direct KRA to give that assurance to ICEA not on the least because KRA is not party to these proceedings. However under the terms of the Contract entered between ICEA and JKUAT, JKUAT is obliged to ensure that on the question of VAT on the transaction, ICEA is free from any demand (past, present or future). For this reason this Court does give an opportunity to JKUAT to obtain a letter from KRA which sufficiently assures ICEA that it shall not suffer any demand (past, present or future) for VAT or any penalty arising or associated thereto in respect to the transaction captured in the Sale Agreement of 14th July 2015.

11. The letter referred to in the preceding paragraph shall be obtained and furnished to ICEA within 60 days hereof failing which JKUAT shall within 14 days of the expiry of that period give ICEA an unequivocal undertaking to indemnify it of any demand, penalties or interest that KRA may levy in respect to VAT on the transaction in the Agreement for Sale of 14th July 2015. A copy of that undertaking to be filed in Court.

12. As the suit was necessary at the time it was filed, then the Plaintiffs shall have costs thereof.

Dated, Signed and Delivered in Court at Nairobi this 2nd day of May, 2019.

F. TUIYOTT

JUDGE

PRESENT:

Mr. Thatcher Singh for Plaintiff

Mr. Lutta for Defendant

Nixon – Court Assistant