



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

Petition 352 of 2012

**GEOHERMAL DEVELOPMENT COMPANY
LIMITED.....PETITIONER**

AND

**THE HON ATTORNEY
GENERAL.....1ST RESPONDENT**

**THE KENYA REVENUE
AUTHORITY.....2ND RESPONDENT**

**THE COMMISSIONER GENERAL KENYA REVENUE
AUTHORITY.....3RD RESPONDENT**

**THE COMMISSIONER OF DOMESTIC TAXES LARGE TAX PAYERS
OFFICE.....4TH RESPONDENT**

RULING

1. The petitioner has moved this court for conservatory orders in terms of the Chambers Summons dated 15th August 2012 which seeks the following reliefs;

(1) *That for reasons to be recorded, the application herein be certified urgent and be heard ex-parte in the first instance in respect of prayer 2 and or 4 thereof.*

(2) *That this Honourable Court be pleased to grant the petitioner/applicant a conservatory order by way of an order restraining the 2nd, 3rd and 4th respondents herein whether by themselves, their offices, servants, agents or otherwise howsoever from purporting to levy distress or levying distress against the property the petitioner/applicant including their bank accounts or any of them and staying the operation of the agency notices dated 6th August 2012 and issued as against the petitioner/applicant to the Chief Executive Officer – Cooperative Bank of Kenya and the Managing Director of the Petitioner transmitted to the petitioner by email on 8th August 2012 claiming Kshs.468,790,216/= and Kshs.34,073,488/= and or any other sum arising from a tax audit undertaken by the 2nd, 3rd and 4th respondent in 2011 pending the hearing and determination of this application.*

(3) *That this Honourable Court be pleased to grant a conservatory the petitioner/applicant a conservatory order by way of an order restraining the 2nd, 3rd and 4th respondents herein whether by themselves, their officers, servants, agents or otherwise howsoever from purporting to levy distress or levying distress against the property of the petitioner/applicant including their bank accounts or any of*

them and staying the operation of the Agency Notices issued against the Petitioner/Applicant to the Chief Executive Officer-Cooperative Bank of Kenya and the Managing Director of the Petitioner transmitted to the petitioner by email on 8th August 2012 claiming Kshs.468,790,216/= and Kshs.34,073,488/= and or any other sum arising from a tax audit undertaken by the 2nd, 3rd and 4th respondent in 2011 pending the hearing and determination of this petition.

(4) That a conservatory order do issue, ex-parte in the first instance and upto the hearing and determination the application, freezing, immobilizing the Agency Notices dated 6th August 2012 issued by the 2nd, 3rd and 4th respondents on 8th August 2012 directed to the Chief Executive Officer of Co-operative Bank of Kenya Ltd and the Managing Director of the petitioner pending the hearing and determination of the petition.

(5) That this Honourable Court be pleased to give such further or other conservatory orders and or directions as will preserve the set of circumstances in such a way that the constitutional petition is not rendered nugatory.

(6) That the Honourable Court be pleased to give such further or other orders and or directions as to the hearing hereof and the petition filed herein as it may deem just in the light of all circumstances.

(7) The petitioner be at liberty to apply for such other or further orders and or directions as this honourable Court may deem fit and just to grant.

(8) That costs of this application be provided for.

2. The application matter came up for hearing ex-parte during the High Court vacation whereupon Hon. Lady Justice Achode granted interim relief in terms of prayer 2 of the summons pending inter-parties hearing.

3. The matter is now before me today for determination the issue whether the petitioner is entitled to conservatory orders. All the parties concede that for the purposes of the application, the petitioner has a prima facie case with a probability of success and as such it is not necessary for me to consider this limb as one of the factors to be considered when granting a conservatory order.

4. Both parties also concede that in light of my decision in ***Bidco Oil Refineries Ltd v Attorney General, Kenya Revenue Authority and Others Nairobi Petition No. 1177 of 2012 (Unreported)*** that this Court has jurisdiction to grant conservatory orders on such terms as it deems fit and just in the circumstances.

5. Before weighing the respective arguments by the parties, it would be important to set out a brief outline of the petitioner's case. The petitioner is a limited liability company incorporated under the ***Companies Act (Chapter 496 of the Laws of Kenya)***. Its principal shareholders are the Permanent Secretary to the Treasury and the Permanent Secretary to the Ministry of Energy. Its key objective, as its name suggests, is to develop geothermal energy in Kenya.

6. As part of its work, it entered into a contract with Great Wall Drilling Company Ltd to provide drilling services for ten geothermal wells in the Olkaria area. The total value of the contract was USD 39,615,890.88. The petitioner states that it made substantial Value Added Tax (VAT) payments on this contract.

7. After an audit carried out in 2011, the Kenya Revenue Authority demanded VAT, withholding tax and PAYE. The subsequent demand and enforcement is what has precipitated these proceedings. The petitioner's contention in the petition is that the demand and enforcement of the tax demanded is being carried out contrary to the provisions of **Article 47** of the Constitution which protects the rights to fair administrative action.

8. Mr Wekesa, counsel for the petitioner, urges the court to take into account the fact that the company is a government owned corporation with a mandate to develop geothermal energy. He submitted that an order of security may paralyse the operations of the company. In any case, according to the petitioner, some of the sums have been paid which the court should consider as security.

9. Ms Odindo, on behalf of the KRA, opposed the application on the basis that taxes are due and the demand was proper and within the statutory authority of KRA to collect revenue. Counsel contended that part of the sum paid by the petitioner was on account of the tax and this constitutes an admission that taxes were due. Counsel submitted that it is in the public interest that taxes be secured for public benefit.

10. As I stated in the *Bidco case (Supra)*, “I am required to balance the right of the petitioner to be heard on the one hand and the public interest in securing the collection taxes on the other.” In this case I am alive to the fact that the petitioner is a wholly owned government corporation which is a special vehicle for developing geothermal energy. This fact alone, does not entitle it to any special consideration, but I have taken into account the fact that it is fully government funded and an order of security may be onerous to the extent that its work may be affected to the detriment of the public.

11. Unlike in the *Bidco Case (Supra)*, where the petitioner had filed a multiplicity of suits, I think this case presents different circumstances and therefore taking all factors into account and balancing the right of the petitioner to agitate these proceedings and the obligations of the respondent to secure taxes, I make the following order;

(1) That pending the hearing and determination of the petition, a conservatory order be and is hereby issued restraining the 2nd, 3rd and 4th respondents by themselves or their authorised agents from levying distress against the property of the petitioner including their bank accounts and staying the operation of the Agency Notices issued to the Cooperative Bank claiming or enforcing all or any taxes due arising from the tax audit undertaken by the 2nd, 3rd and 4th respondent in 2011.

(2) Order (1) is granted on the condition that the petitioner shall furnish an irrevocable banker’s guarantee from a reputable bank for the sum of Kshs.50,000,000/= within fourteen (14) days from the date hereof and in default the order currently in force shall stand discharged.

(3) The costs of this application shall abide by the judgment.

DATED and DELIVERED at NAIROBI this 1st day of October 2012

D.S. MAJANJA

JUDGE

Mr C. Wekesa instructed by Wekesa and Simiyu Advocates for the petitioner.

Mr Moimbo, Litigation Counsel, instructed by the State Law Office for the 1st respondent.

Ms Odundo, Advocate, instructed by the Kenya Revenue Authority for the 3rd and 4th respondents.