

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL REVISION NO. 22/02

TRAMICO INVESTMENTS COMPANY LTD ..... APPLICANT

Versus

KAHIZILEGE BAHIGANA & ANOTHER ..... RESPONDENT

R U L I N G

KIMARO, J:

This is a revision in which this court is being asked to nullify a warrant of attachment issued against a vessel named M/V BANUSSO II on the ground that the vessel is the property of the applicant who is not a party to the proceedings which led to the attachment order.

The applicant is TRAMICO INVESTMENT COMPANY LIMITED. One Kahizilege Bahigana filed a chamber application under Section 12 (2) of the Merchant Shipping Act and Section 133 of the Employment Ordinance Cap 366 and Section 95 of the Civil Procedure Code 1966 praying for payment of wages. The Managing Director DEN-TAXI RESOURCES LTD in the chamber application is the respondent. The application was filed in court on 19/12/92. Mr. Kahizilege Bahigane is the respondent in this revisional proceedings.

This application in the subordinate court was heard ex parte. Attempts to have this ex parte decree set aside was not successful. It was in the execution of the decree that the vessel which forms the subject matter of these proceedings was attached. Objection proceedings were filed in the subordinate court to challenge the attachment but were dismissed. The dismissal of the objection proceedings is what has led to the filing of this revision.

The revision has been filed under Sections 44 (1) of the Magistrates Courts Act 1984 as well as Section 77 (1) and Section 95 of the Civil Procedure Code 1966 as well as Order XXI rule 24 (2) and Rule 57 of the Civil Procedure Code, 1966.

The applicant is being represented by Mr. Duncan, learned Advocate. The respondent is not represented. The respondent raised several preliminary points of objection.

The parties filed written submission for and against the application under the direction of this court. The same with the preliminary objection. Apparently, the respondent has not filed a reply to the preliminary objection nor a reply to the main application. Although he has filed a

chamber application seeking for extension of <sup>/time</sup> to file the same, it is not worthy allowing the application to proceed to full hearing of the chamber application because at the end of the day it might not alter the outcome of the revision. This view is being expressed after a thorough study of the proceedings in the trial court as well as the present application and the submissions filed.

It is important for me to mention that the research done by the parties is appreciated. I thank them for their efforts. Their submission is of assistance in the disposal of this application.

The first point of preliminary objection is that the application is time barred. Having inspected the record of the trial court and the time when the revision was filed, I will say that this objection has no merit. The ruling in which this revision is being preferred was delivered on 13 February 2002. This revision was filed on 19th February 2002. While I appreciate the submission made by the respondent on this point, the truth of the matter is that he is mistaken. Mr. Duncan submitted correctly that the application was filed on the sixth day after delivery of the ruling. It was filed within time.

Regarding the second point of objection, the respondent seems to be concerned why Mr. Duncan cited both Section 79 (1) of the Civil Procedure Code 1966 and Section 44 (1) of the Magistrates Courts Act. His opinion is that Mr. Duncan should have been specific on which provision of the law he is relying upon rather than quoting both of them. In other words the applicant ought to say whether she is relying on Section 79 (1) of the Civil Procedure Code 1966 or Section 44 (1) of the Magistrates Courts Act. Mr. Duncan's response is detailed. However the point raised by the respondent has substance given the distinction existing in the circumstances of the application of the two provisions. The provision of Section 79 (1) of the Civil Procedure Code 1966 are restrictive. They are limited to jurisdiction that is acting without jurisdiction or exercising jurisdiction unlawfully. Section 44 (1) is broader, covering all circumstances reflecting error material to the circumstances of the case involving injustice. Given the distinction it is important the applicant to point out specifically the provision which is being relied upon rather than doing a guess work. All the same, the citing of the provisions is not a fatal mistake warranting the dismissal of the application.

Regarding the citing of Orders XXI Rule 24 (2) and Rule 57 I must say they were quoted out of context. As far as these provisions are concerned, they have no relationship at all with these proceedings while

- appreciate the submission made by Mr. Dunsan on this aspect my feelings are that they are totally irrelevant to these revisional proceedings. They add nothing to the application which is before this court apart from reflecting some doubts on the advocate on which provisions of the law are applicable under the circumstances which led to the filing of the application. All the same, citing them does not make the application fatal particularly where the enabling provisions for filing a revision have been cited.

The respondent has also raised an argument to the effect that under Section 112 (1) of the Merchant Shipping Act 1967, the sea mens lien over a vessel does not change with the change of ownership of the vessel. The answer to the argument is simple. It all depends how the ownership passes. In any event this is not a matter which can be argued by preliminary objection because evidence will be required to show who is the owner and how the ownership was acquired.

Having analysed the arguments given in respect of the preliminary objection, I must conclude by saying that the preliminary objection has no merit. It is dismissed.

The next step is to look at the application for revision. Mr. Duncan submitted that by the time employment Cause No. 264 of 1997 was determined, the vessel BANUSSO II was no longer the property of the judgment debtor (DEN - TAN RESOURCES). The reason given is that DEN - TAN RESOURCES was involved in High Court Civil Case No. 106 of 1996 which led the ownership of the vessel to pass to Industrialization Fund for Developing Countries. Thereafter, the vessel was put under the Receiver/Manager (Mr. Nimrod Mkono). The vessel was sold to Tangol Fishing Company and ownership was transferred to it on 24th February, 1997. At a later stage, on 20th December, 2000 the applicant bought the vessel from Tangol Fishing Company Limited.

Mr. Duncan's submission which is correct is that the sequence of events show that at the time the case was filed in the trial court on 19th December, 1997 DEN-TAN RESOURCES LIMITED was no longer the owner of the vessel BANUSSO II. There was no justification for the trial court dismissing the objection proceedings. The sequence of the events clearly show that the vessel was sold even before the filing of the application by the decree holder. The dismissal occasioned injustice to the applicant because her property was being attached while she was not a party to the proceedings and she had not even been given the opportunity to be heard.

In addition, Mr. Duncan said that since the vessel was initially sold by an order of the court, then the trial court had no jurisdiction to entertain the case. He cited Section 121 (b) of the Merchant Act 1967, arguing that exclusive jurisdiction is conferred to the High Court where a seaman or apprentice claims for recovery of wages where the ship is sold under the authority of the court.

This court takes judicial notice of the consent order made in the High Court Civil Case No. 106 of 1996, between DEN - TAN RESOURCES LTD VS THE INDUSTRIALIZATION FUND FOR DEVELOPING COUNTRIES. There was a Memorandum of settlement by the parties. Under Para 5, the IFU was given an automatic right of possession of the vessel (BANUSSO II) without recourse to court or any other legal action if the DEN - TAN RESOURCES defaulted to honour the repayment schedule. It appears that DEN - TAN RESOURCES defaulted and so IFU took possession of the vessel. Subsequently DEN - TAN RESOURCES was put under receivership and the vessel (BANUSSO II) was sold to Tangol Fishing Company.

Given the circumstances under which the ownership of the vessel passed from DEN - TAN RESOURCES LTD to Tangol Fishing Company and then to the applicant, there was no justification at all for the trial magistrate holding that the sale was intended to prevent execution. The history of the vessel shows that at the time the decree holder filed the case in the trial court, the vessel was no longer the property of the judgment debtor.

The other irregularity pointed out by Mr. Duncan is that the trial court lacked jurisdiction to entertain the case which was filed by the decree holder <sup>in</sup> the trial court because the judgment debtor was under receivership of Mkonzo and Company Advocates.

Mr. Duncan submitted correctly that the Receiver and Manager was not joined into the proceedings and the suit was filed without first obtaining the leave of the High Court as required by Section 9 of the Bankruptcy Ordinance - Cap 25. The defects given above is an illustration of the injustice which was done by the trial court. The trial court had no jurisdiction to entertain the case which was filed by the decree holder. This is a matter which falls squarely under the provisions of Section 44 (1) of the Civil Procedure Code 1966. Since it is only the objection proceedings which were challenged, this court will suo moto revise the whole proceedings in the trial court under Section 44 (1) of the Magistrate Courts Act, 1984 because they are a nullity.

I quash and set aside the entire proceedings in Employment Cause No. 264 of 1997. No order of costs.

  
N.P. Kimaro

JUDGE

30/08/2002