

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 67 OF 2020

[Original Civil Case No. 15 of 2020]

M.M. INTERGRATED STEEL MILLS LIMITED APPLICANT

VERSUS

AUTO MECH LIMITED 1st RESPONDENT

HEENA PATEL 2nd RESPONDENT

RAMESH PATEL 3rd RESPONDENT

RULING

28rd May & 26th June, 2020.

E. E. KAKOLAKI J

In this application the applicant is seeking an order for attachment before Judgment of the 1st Respondent property situated at Tabata Relini Area along Mandela Road, Ilala Municipality, Dar es salaam on plot No. 31/2, CT No. 47866, LO No. 68278, plot size 2,171 hectares estimated at value of over USD 1,500,000 alleging that the respondent is in the process of obstructing and delay the execution of decree that may be passed against the said Respondent, the 2nd and 3rd Respondents being it Directors. The application has been preferred at the instance of the **DAVOS ATTORNEYS**, for the applicant under Order XXXVI Rule 6(1)(a) and 6(2) of the Civil Procedure Code, [Cap. 33 R.E 2002], together with any other enabling provisions of the law. It is supported by affidavit of **Mussa**

Rashid Lilombo, Company Secretary of the Applicant's company. It has been opposed by the respondents who filed their counter affidavits sworn by Ramesh Patel for the 1st and 3rd respondent and Heena Patel on her behalf. As the application was brought under certificate of urgency when the matter was called for hearing on the 19/03/2020 both parties agreed and sought court's leave to argue the same by way of written submission. The filling schedule order was issued and complied with, except for the applicant who waived his right to file a rejoinder submission. The applicant in this application is represented by Mr. Jerome Msemwa learned advocate whereas the three respondents are represented by Ms. Dainess Simkoko learned advocate.

Briefly it is contended by the applicant in his affidavit that he entered into agreement with 1st respondent to supply her with different structural materials which were to be sold on credit basis and supplied to TANESCO by the applicant. On diverse dates he supplied the material to the applicant worth USD 861,268,587 with the commitment to pay from the 2nd and 3rd respondents. Despite of that commitment the 1st respondent has refused to pay back the sum claimed as a result the applicant instituted suit against the respondents in Civil Case No. 15 of 2019 claiming among other reliefs payment of the claimed USD 861,268,587 and general damages to be assessed by court. It is also asserted that the 1st respondent wilfully failed to pay TIB Development Bank Limited loan, thus its property sought to be attached by the applicant is put under threat of being sold by the said TIB bank, the move which will obstruct or delay the execution of the decree which may be passed against the respondents. It is from that background the applicant has brought this application seeking orders of this court to attach the said property before judgment.

Submitting in support of the application Mr. Msemwa argued that the purpose of this application is to prevent the decree that may be passed against the Respondent from being rendered infructuous. And that in issuing an order for attachment before judgment, the court must be satisfied not only that the Defendant is really about to dispose of his property or to remove it from jurisdiction but also that his object is to obstruct or delay the execution of a decree that may pass. He had it that the applicant has so proved in his affidavit in particular paragraph 5 of the affidavit in support of the chamber summons that property sought to be attached by the applicant is at threat of being sold by TIB Development Bank Limited. And that the assertion is supported by the contents of paragraph 6 of the 1st and 3rd Respondents' counter affidavit stating that the said property is already sold under auction since 4th February, 2020. However, that claim of the property being sold by the respondent is contradicted by her annexed copy of *"Handing over of property for security purpose"* the document which negates the fact that the property is sold thus proof of the respondents' process of obstructing and delaying the execution of the decree that may be passed against her. He added that there is no any evidence to prove that the same has been transferred to the buyer as transfer must be shown in the certificate of title. Mr. Msemwa therefore prayed for the grant of the prayers.

Ms. Dainess Simkoko for the 1st and 3rd respondents resisted the application by stating that the applicant has failed to establish how the sum of USD 861,268,587 came into existence and that there was an agreement to pay within 30 days. That the applicant's claims are seeking justification on the printed copies of ledgers which only the applicant knows its origin and authenticity as well as the delivery notes which do not prove the sum claimed. On the agreement between the respondents

and TIB Development Bank Limited which attracted sale of the impugned property she submitted, that has nothing to do with the applicant and further that the alleged sale was effected on 14/02/2020. And that since this application was filed on 20/02/2020 the same is overtaken by event. In addition to that Ms. Simkoko argued that what is stated by the applicant in his affidavit as ground for the grant of this application is not sufficient enough as fear of the property being sold cannot be justifiable ground to base the grant of this application.

Ms. Simkoko went on to submit that the 1st respondent being a company conducting business in Tanzania, own assets in Tanzania. That the applicant has failed to prove to the court as to whether the 1st and 3rd Respondent are not capable of paying her for the materials supplied to entitle her to apply for the attachment of property. She was therefore of the view that his application is untenable for being overtaken by event as the 1st and 3rd respondents had no bad intention of obstructing nor delaying the payment for material supplied but they have not received payments from TANESCO to date. And that the agreement between the respondent and the applicant was that payment be done as soon as the third party (TANESCO) pays the Respondent. She prayed the court to dismiss the application with costs.

The 2nd respondent on her side is totally denying any responsibility with regard to the claims between the applicant and the 1st and 3rd respondent. That apart from being 3rd respondent's daughter of the 3rd she is neither the director nor a shareholder of the 1st respondent hence has no capacity to conduct any transaction on behalf of the 1st and 3rd respondent herein. Otherwise she called upon the applicant to prove her alleged commitment to pay the applicant as required under section 110(2) of the Evidence Act,

[Cap. 6 R.E 2019]. She therefore prayed for dismissal of the application with costs.

I have paid due consideration to the both parties submissions. This court has powers to grant orders for attachment before judgment provided that the two main condition for so doing have been advanced to the satisfaction of the court. These are well stated in the book by **C.K. Thakker (Takwani), Civil Procedure with Limitation Act, 1963**, 8th Edition at page 332:

"Before an order of attachment can be made, the court must be satisfied about the following two conditions:

- (i) That the defendant is about to dispose of the whole or any part of his property; and*
- (ii) That the disposal is with intention of obstructing or delaying the execution of any decree that may be passed against him."*

Applying the said conditions or principles in this matter, on the first condition the applicant is claiming that TIB Development Bank Limited is about to dispose of the impugned property as the 1st and 3rd respondent defaulted to repay its loan. The 1st and 3rd respondents are submitting that the same has been disposed of already and thus the application is overtaken by event, the submission which is challenged by the applicant in that there is no proof of that fact as the only provided evidence is that of the copy of *"Handing over of property for security purpose"* and not for sale. Whether the property has been sold or not is not an issue at the moment. It behoves the applicant to prove that the respondents are the ones who either sold or are about to sell the said property. In deed there is no such evidence. The only evidence advanced by the applicant is that

it is TIB Development Bank Limited and not the respondents which is intending to dispose of the property as per Annex A after the respondents' failure to repay back the loan. Hence the first condition has not been met.

The applicant having failed to meet the first condition it is obvious the second condition cannot be met as well. Since it is not the respondents who are intending to dispose of the property but rather the TIB Development Bank Limited then the respondents' intention of obstructing or delaying the execution of the intended decree cannot be said to have been proved. Thus the second condition has not been proved as well to the court's satisfaction.

Apart from failure by the applicant to satisfy the two conditions Ms. Simkoko submitted that the applicant also failed to prove to the court that the 1st and 3rd respondent have failed to pay him and further that the 1st respondent being a company conducting business in Tanzania have no any other properties to attach apart from the impugned property. No response was made by the applicant to challenge these facts. I am convinced and therefore agree with Ms. Simkoko's contention that there was a need for the applicant to prove to the satisfaction of the court that she fruitlessly made some efforts to demand payments of the claimed sum from the respondents. The applicant was expected to adduce evidence through the affidavit to prove non-payment of the claimed money by attaching the demand notices instead of plain allegation. Further to that I also share her contention that it was important for the applicant to show and prove to the satisfaction of the court that the respondents have no any other property that could be attached if decree is to be executed in her favour something which she failed to do.

With regard to the assertion by the 1st and 3rd respondents that the impugned property is already sold that fact also has not been proved as there is no evidence to prove it. As rightly submitted by Mr. Msemwa the same could have been proved by showing the transfer in the certificate of Title or payment receipt by the buyer. However, I wish to add that failure of the respondents to so prove cannot be taken as a proof of respondents' intention to obstruct or delay the execution as the applicant would like this court to believe. The reason is that there is no proof that it is the respondents who were disposing or about to dispose the said impugned property.

And lastly is on the 2nd respondent's denial of any responsibility with regard to the commitment to pay the claimed money. The applicant was called to prove the said claim but failed to do so as required under section 110(2) of the Evidence Act, [Cap. 6 R.E 2019].

In the premises and for the foregoing reasons, I am inclined to hold that this application lacks merit and is hereby dismissed with costs.

It is so ordered.

DATED at DAR ES SALAAM this 26th day of June, 2020.



E. E. KAKOLAKI

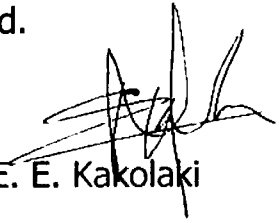
JUDGE

26/06/2020

Delivered Dar es Salaam today on 26/06/2020 in the presence of **Ms. Sara Kilonde**, holding brief for advocate Ms. Agnes Simkoko for the

1st and 2nd respondent and advocate Robin Mafuru for the 2nd respondent and **Ms. Lulu Masasi** Court clerk and in the absence of the Applicant.

Right of Appeal Explained.



E. E. Kakolaki

JUDGE

26/06/2020