

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[LABOUR DIVISION]

AT ARUSHA

MISCELLANEOUS LABOUR APPLICATION NO. 68 OF 2020

(C/F Execution Number 84 of 2019 before J.F. Nkwabi, DR)

NATIONAL BANK OF COMMERCE LIMITED APPLICANT

VERSUS

IMPALA HOTEL LIMITED 1ST RESPONDENT

LABOUR OFFICER 2ND RESPONDENT

**BONIFACE KAMUGISHA BUBERWA T/A NUTMEG
AUCTIONEERS AND PROPERTIES LIMITED 3RD RESPONDENT**

RULING

20th October, 2020 & 10th November, 2020

Masara, J.

This Application was filed by the Applicant under a certificate of extreme urgency. According to the affidavit in support of this Application sworn by Mr. Wilbard John Massawe, learned Advocate for the Applicant, the Court is asked to investigate on the claim of the Applicant in order to establish the rights of the Applicant to the property subject to attachment in Execution Number 84 of 2019 in the High Court of Tanzania at Arusha, a Generator Make Caterpillar with Serial Number CAT00000PSES05445, the property of the first Respondent and to postpone the attachment and sale of the property pending the investigation.

The Applicant prays that the said property be lifted or postponed from the attachment as they have rights over the same on the grounds that:

- a) There exists a fixed and floating debenture dated 27th April, 2001 to secure unspecified amount over all the assets of the 1st Respondent in favour of the Applicant which initially covered the sum of US \$2000.00;
- b) There exists corporate guarantee for US \$4,000,000.00 entered by the 1st Respondent to secure loan facility extended to Ngurdoto Mountain Lodge Limited ... under the Facility Letter dated 19th September, 2011 after consolidating the same with term loan facility dated 3rd September,2008 into the Term Loan Facility; and
- c) That, by extension, the property form part of the proceedings in Civil Case No. 13 of 2019 for recovery of the aforementioned outstanding sum.

The 2nd Respondent opposed the Application. They filed a counter affidavit to that effect sworn and attested by Ms. Flaviana Chacha, Labour Officer. Ms. Chacha also filed a notice of preliminary objections containing two points; namely,

- a) That, the Verification Clause is bad in law, and
- b) That, the attestation clause is bad in law.

When the Application was called for hearing, the Court directed that hearing of the Preliminary Objections proceeds in tandem with that of the main application. At the hearing, the Applicant was represented by Mr. Wilbard John Massawe, learned Advocate. The first Respondent was represented by Mr. Gospel Sanava, learned Advocate, the 2nd Respondent was represented by Ms. Flaviana Chacha, Labour Officer, while the 3rd Respondent appeared in person.

Ms. Chacha opted to drop the second point of objection and submitted on the first point. She contended that considering the facts deponed by Mr. Massawe in the affidavit supporting the Application, it was not possible for all those facts to be within the knowledge of the deponent. That facts deponed from paragraph 6 onwards are facts supplied to him by other persons but he does not acknowledge the source of such information. She cited the decision in **Anatol Peter Rwebangira Vs. Permanent Secretary, Ministry of Defence & the Attorney General**, Civil Application No. 548/04 of 2018 (CAT-Unreported) where an application was held incompetent for similar defects. She therefore prayed that the Application be dismissed.

Replying to the objections, Mr. Massawe was of the view that the objection was an oversight as the same is covered by Order XXI Rule 57 (1) of the Civil Procedure Code, Cap. 33 and that the issue is not about the competence of the Application but is on the Court's power to investigate the claim. He cited the decision in **Doris A. Minja Vs. Diamond Trust Bank and 4 Others**, Misc. Commercial Application No. 398 of 2017 (Unreported). In the alternative, the learned counsel asked the Court to ignore the alleged errors in the verification or order amendments for substantive justice. He cited the Court of Appeal decision in **Sanyou Service Station LTD Vs BP (T) LTD**, Civil Application No. 185/17 of 2018 and the High Court decision in **Alliance One Tobacco (T) Ltd Vs. Mwajuma Khamis (as Administratrix of the Estate of Philemon Kirenyi) & Another**, Misc. Civil Application No. 803 of 2018 (unreported) to back up his position.

After a careful consideration of the submissions made both for and against the preliminary objection, the issue is whether the affidavit in support of the Application is defective and thus the application ought to be dismissed.

At the outset, the law is well settled that affidavits should contain nothing but factual matters constating evidence, as provided under Order XIX of the Civil Procedure Code, Cap 33 [R.E 2002]. A person swearing an affidavit or counter affidavit has to state facts in his personal knowledge or disclose the source of such knowledge/information which he believes to be true. This is provided under Order XIX Rule 3(1) of the CPC.

The impact of swearing facts which are not in the deponent's own knowledge in an affidavit was stated in the case of ***Lalago Cotton Ginnery and Oil Mills Company Ltd Vs. The Loans and Advance Realization Trust (LART)***, Civil Application No. 80 of 2002 (unreported), where the Court held:

"It is obvious, therefore, that an affidavit or a counter affidavit which contains hearsay statements or arguments instead of facts is incurably defective."

In ***Tanzania Breweries Ltd Vs. Herman Minja***, Civil Application No. 11/18 of 2019 (unreported) the court stated that:

*"...an advocate can swear and file an affidavit in proceedings in which he appears for his client **but on matters which are within his personal knowledge**. These are the only limits which an advocate can make an affidavit in proceedings on behalf of his client."* (Emphasis supplied)

I have gone through the paragraphs that Ms. Chacha contends to be not within the personal knowledge of the deponent. I have taken note that Mr.

Massawe disclosed how he became aware of the facts which he deposed. I agree with Ms. Chacha that Mr. Massawe should have probably stated in the verification clause the source of his information and whether he believes such facts to be true. I have in mind those facts that Mr. Massawe gathered from Court records. Court records are authorities and represent what happened, and it is not contested that the court has to take judicial notice of such court records. However, the mere fact that court records are authorities, and the fact that they ought to be known by whoever has read them, does not confer an automatic right to any person who has come across such records powers to depone on those records despite as if that person has personal knowledge. It is different, however, where an advocate participated in the proceedings constituting such records.

The contested part of Mr. Massawe's affidavit is the verification clause. The relevancy of the verification in affidavits and counter affidavits was discussed in the Court of Appeal decision in ***Sanyou Service Station Ltd Vs. BP Tanzania Ltd (Now Puma Energy (T) Ltd)***, Civil Application No. 185/17 of 2018 (Unreported) which cited with authority its previous decision in ***Lisa E. Peter Vs. AI - Hushoom Investment***, Civil Application No. 147 of 2016 (unreported), where it held:

"The reasons for verification of affidavits are to enable the Court to find out which facts can be said to be proved on the affidavit evidence of rival parties. Allegations may be true to information received from persons or allegation may be based on records. The importance of verification is to test the genuiness and authenticity of allegations and also to make the deponent responsible for allegations. In essence verification is required to enable the Court to find out as to whether it

will be safe to act on such affidavit evidence. In the absence of proper verification, affidavits cannot be admitted in evidence."

That said however, in the context of this Application, the Court has three options, one is to reject the affidavit and direct the Applicant to file a proper affidavit; two, identify the offensive paragraphs and expunge them from the impugned affidavit; or, three, ignore them for the interest of justice. I chose the latter. As rightly submitted by Mr. Massawe, this Court is asked to do an investigation into the property that was attached through its own order in with a view to establish whether such property is of the judgment debtor or of the Applicant. Considering the current judicial trend which militates against undue regard to technicalities at the expense of substantive justice, I find it appropriate to ignore the offensive paragraphs in the affidavit and proceed to determine the application on merits. The preliminary objection is accordingly overruled.

I now turn to the submissions made for and against the merits of the Application.

Submitting on the main application, Mr. Massawe prayed to adopt the contents of his affidavit to form part of the submissions. He submitted that according to Clause 3 of the Debenture dated 27/04/2001 fixed and floating charges over all assets of the first Respondent was created. The 1st Respondent is a judgment debtor in Miscellaneous Labour Application No. 68 of 2020. The learned counsel submitted that according to Clause 9 of the debenture Agreement charges crystallise upon distress levied upon the property and failure to make payment on demand, instances of which have

both occurred. That Notice of default were issued as per the annexes and that no payments were made to date, that there is an order of attachment issued by this Court and the Applicant has initiated recovery by way of counter claim in Civil Case Number 13 of 2019.

Mr. Massawe argued further that the attachment ordered against the debentured property will affect the Applicant's equitable interest over the property in the following manner:

- a) That the property is a subject of Civil Case No. 13 of 2019, if disposed off, the decree in that case may be rendered nugatory should the Court decide in favour of the Applicant;
- b) The conduct of the 1st Respondent is a deliberate attempt to avoid consequences of the debenture by allowing the execution to proceed in their absence.

The learned counsel also argued that the Applicant's claims have priority over those of the Labour Officer. He cited *Paget's Law of Banking*, 13th Edition at page 745 where it is stated that secured creditors rank ahead of unsecured creditors and that in this case the 2nd Respondent's interest over the property is that of unsecured creditor. On whether the Debenture has crystallised, the learned counsel cited decisions from other Commonwealth countries to back up his assertions. The cited cases are ***Mackenzie (Kenya) Ltd Vs. Pharmico Ltd***, Civil Case No. 2688 of 1975 (HC), ***James Job Kihori Kahagi Vs. Kencity Clothing Ltd***, Civil Case No. 583 of 1974 (HC) and ***Professional Inspection Services Ltd. Vs. Jokhan General Contractors Ltd & 3 Others***, Claim No. CV2014-01858, High Court of Justice, Trinidad and Tobago, all of which are to the effect that a Debenture

usually creates a floating charge over the company's assets and that once the debenture crystallises it takes precedent over an executing creditor.

Mr. Massawe argued further that since the attachment was made on 15/9/2020, way after the Applicant had taken steps to enforce the security, the Applicant's interest supersedes that of the Labour Officer. He cited Order XXI Rule 61 of the CPC to that effect. He urged the Court, if it is satisfied that a debenture exists, to take one of the two options: one, detach the property from execution or, two, order continuation subject to the charge. He contended that Order XXI Tule 61 is couched in mandatory terms.

Contesting the Application, Mr. Sanava stated that although it is true that the Applicant, in response to a suit filed against them, did file a counter claim in Civil Case No. 13 of 2019 citing a debenture, the existence of the debenture over the assets of the 1st Respondent is highly contested and that as the said case is yet to be determined, this application should not be granted.

Ms. Chacha, likewise opposed the Application in the same line as that of Mr. Sanava. She added that the intended execution is not likely to prejudice the Applicant as the 1st Respondent has other properties. She thus urged the Court to dismiss the application for lack of merits.

The third Respondent prayed to submit and when allowed he challenged the Applicant's application. However, in line of what was held in ***M/s Backreef Gold Co. Ltd Vs. Tax Planner Associate Ltd & First World Investment***

Court Broker, Misc. Commercial Reference No. 3 of 2017, being an agent of the Court, his submission was unnecessary.

After a careful consideration of the submissions and counter submissions of the parties herein, the pertinent issue to determine is whether the property ordered to be sold in Execution No. 84 of 2019 should be detached from execution.

The answer to that issue depends on a proper scrutiny of the documents submitted by the Applicant as evidence substantiating the claim. The Respondents vehemently oppose the Application on the basis that the existence of the charge (debenture) is disputed and even if it exists, it has not crystallised as alleged by the Applicant. On the other hand, the Applicant urges the Court to decide that given the evidence available on record, there exists fixed and floating debenture over all the assets of the 1st Respondent, the property subject of execution included. On whether the debenture has crystallised, it is Mr. Massawe's view that according to Clause 9 of the Debenture Agreement between the Applicant and the 1st Respondent, incidents of crystallisation have since occurred, and thus the Applicant's interests supersede those of the employees represented by the Labour Officer.

The Applicant urged this Court to investigate their potential interest in the property attached for execution. Such powers are bestowed to the Court under Order XXI, Rule 57 of the CPC which states:

"-(1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the

*ground that such property is not liable to such attachment, **the court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector and in all other respects, as if he was a party to the suit:***

Provided that, no such investigation shall be made where the court considers that the claim or objection was designedly or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the court ordering the sale may postpone it pending the investigation of the claim or objection.”(Emphasis added)

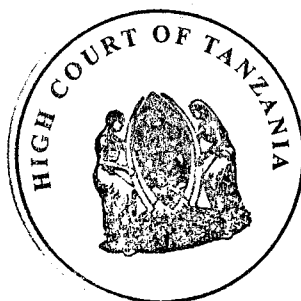
For the Court to conduct an investigation and properly determine the claim, it needs to take evidence and be satisfied that the property in question is indeed the property of the Applicant and not otherwise and that the charge over the property has indeed crystallised. Although the Applicant submitted documents to support the Application, no oral evidence was given in order to test the veracity and authenticity of the evidence submitted. It is on record that there exists a dispute between the Applicant and the 1st Respondent regarding the alleged debenture. This is Civil Case No. 13 of 2019 before the High Court of Tanzania, Arusha. In my considered opinion, proper investigation of the Applicant's claims over the attached property will be done in that case. Such investigation cannot be conclusively determined with the scanty evidence at my disposal. That said, however, it is my view that the Applicant has made a prima facie case that calls for further investigation in line with Order XXI, Rule 57 of the CPC, Cap. 33. I say so based on the prevailing circumstances of this application. The Court expected the Applicant to either oppose or support the Application. However, the 1st Applicant did not file a counter affidavit for or against the Application but

conceded in their oral submissions in Court that the issue of the debenture is subject of litigation between them and the Applicant, by way of a counter claim. For obvious reasons, I will not discuss the authorities tendered to support the issues raised in this Application. Such discussion may be relevant when the alleged counter claim will be determined.

That said, in the absence of cogent evidence to prove ownership, I refrain from giving the orders requested; that is, to detach the Generator Make Caterpillar with Serial Number CAT00000PSES05445 from execution or order continuation subject to the charge. In lieu thereof, in exercise of the powers given to me under Rule 57(2) of Order XXI, I order postponement of the sale of the said Generator pending the investigation of the Applicant's claim, currently pending before this Court in Civil Case No. 13 of 2019.

Consequently, in light of what I have endeavoured to explain herein above, the Application is partly allowed. The 2nd and 3rd Respondents are directed not to sell the Generator Make Caterpillar with Serial Number CAT00000PSES05445 pending the investigation of the Applicant's claim as explain hitherto. Each party to bear its own costs.

It is so ordered.




Y. B. Masara
JUDGE

10th November, 2020