IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

MISC. LABOUR APPLICATION NO. 11 OF 2021

SAM MATHEW KAMPAMBE ..... APPLLICANT

VERSUS

KABUHU MBEKA & 5 OTHERS ..... 1ST RESPONDENT

NOBLE BRIDGE PRE & PRIMARY SCHOOL ..... 2ND RESPONDENT

RULING

28th July, & 25th August, 2021

ISMAIL, J.

In this application, I am called upon to grant an application for lifting of attachment of allegedly erroneously attached in satisfaction of an award of the Commission for Mediation and Arbitration (CMA), in Labour Dispute No. CMA/GTA/24/2020. The property penciled for attachment is a motor vehicle, make Toyota Coaster, with registration No. T114 ARC. The alleged registered owner and title holder is Sam Mathew Kampambe, the applicant. The applicant's averment in the supporting affidavit is that he was not a party to the proceedings which bred the award whose execution was to be done through attachment and sale of the said vehicle.

In the counter-affidavit sworn in opposition to the said application, the 1st respondent aver that there is no proof that the second respondent, against whom the award was passed, is a separate legal person that owns its own properties distinct from the applicant's properties.

Hearing of the applicant took the form of written submissions, preferred by the parties in adherence to the schedule. In his laconic submission, Mr. Ernest Mhagama, counsel for the applicant, submitted that at no point was the applicant a party to the CMA proceedings. As such, execution of the CMA award cannot be effected against his property. He, therefore, urged the Court to investigate the applicant's interest in the said vehicle, and refuse to grant an order of attachment of the said property and such other orders as the Court may deem appropriate.

In an equally concise reply submission Mr. Steven Mhoja, the 1st respondent's counsel admitted that the said vehicle was listed for attachment following the 2nd respondent's failure to honour the decision of the CMA. With respect to ownership, the counsel held the view that the applicant has not attached a certificate of incorporation to his attachment. Such certificate would demonstrate that the 2nd respondent is a distinct registered entity whose liabilities are separate from those of the applicant. It was the counsel's

contention that the attachment was in order, making the application lacking in plausibility. He prayed that the application be dismissed with costs.

From these brief submissions, the singular issue for determination is whether the application is meritorious. Looking at the application, it is clear that the same is made under Order XXI Rule 57 (1 of the Civil Procedure Code, Cap. 33 R.E. 2019 (CPC). This provision empowers the Court to investigate an objector's claim of interest or possession in the property that penciled for attachment in execution of a decree, with a view to assessing eligibility or otherwise of effecting the attachment. Inevitably, this process entails calling upon the objector to adduce a testimony to prove that, at the time of the intended execution, the objector was possessed of the property subjected to the opposed attachment. For ease of reference, the said provision is quoted as hereunder:

> *"(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.

To give a complete sense of what the foregoing provision is intended to convey, it behooves me to reproduce the substance of rule 59 which is to the effect that:

59. Where upon the said investigation the court is satisfied that for the reason stated in the claim or objection such property was not, when attached, in the possession of the judgment debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment."

The message that is gathered from the provisions 59 is that, where the Court is satisfied that the property, the subject matter of the attachment, is found to be in the ownership and possession of some other person, or it

is in the possession of the judgement debtor but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, then the Court is obliged to make an order releasing the property from the attachment. As stated earlier on, the 1st respondent does not dispute the fact that the said vehicle belongs to the applicant. His contention, however, is that there is no proof that the applicant and the 2nd respondent are distinct legal personalities. In the 1st respondent's view, such duty is cast upon the applicant. This is not only stranger than fiction, but it defies the conventional and long-established canon of evidence, enshrined in sections 110, 111, 113 and 115 of the Evidence Act, Cap. 6 R.E. 2019. In particular, section 110 (1) states:

> *"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."*

Evidently, the duty to prove existence of the singleness of the personality between the applicant and the 2nd respondent rests or lies on the 1st respondent. This is even critical in the circumstances where the applicant has adduced evidence through annexure SK1, proving that the vehicle set for attachment is registered in the applicant's name in the exclusion of anybody else. This position is consistent with the legendary commentaries made by Sarkar on Sarkar's Laws of Evidence, 18th Edn., ***M.C. Sarkar, S.C.***

Sarkar and P.C. Sarkar, published by *Lexis Nexis, in which it was opined* at page 1896 as follows:

> ***"... the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof****. It is ancient rule founded on consideration of good sense and should not be departed from without strong reason .... Until such burden is discharged the other party is not required to be called upon to prove his case.* ***The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party..."*** [Emphasis added].

See also: ***Paulina Samson Ndawavya v. Theresia Thomas Madaha***, CAT-Civil Appeal No. 45 of 2017 (unreported).

In my humble view, whilst the 1st respondent has failed to prove that the vehicle earmarked for attachment is liable to attachment because of the alleged link between the applicant and the 2nd respondent, the applicant has complied with the provisions of rule 58 of Order XXI of the CPC, by adducing evidence to establish that the objector holds interest in or is possessed of the property in question.

Consequently, I take the view and hold that the application is meritorious. Accordingly, I release the said vehicle from the attachment and order that the same should not be subjected to any form of attachment in execution of the award passed against the 2nd respondent.

Order accordingly.

DATED at **MWANZA** this 25th of August, 2021.

M.K. ISMAIL

JUDGE