

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

MISC. CIVIL APPLICATION NO. 12 OF 2022

(Arising from Civil Case No. 06 of 2022)

CIWASA (T) LTD.....APPLICANT

VERSUS

EQUITY FOR TANZANIA ("EFTA") LTD.....RESPONDENT

RULING.

11/05/2022& 06/07/2022

E. L. NGIGWANA, J.

The applicant, CIWASA (T) LTD through the legal services of Mr. Amyimike Mwamsiku, learned advocate, has brought this application by way of chamber summons made under Order XXXVI rule 6 (1) (a), (b), 7 (1) and section 95 of the Civil Procedure Code Cap. 33 R: E 2019, seeking for an order to attach before judgment the respondent's property to wit; one used Caterpillar Moter Grader 140 G. The application is supported by an affidavit sworn by the Applicant's advocate, Mr. Mwamsiku.

The respondent was served with the chamber summons on 17/03/2022 but neither filed a counter affidavit nor entered appearance on the hearing date. Therefore, the hearing proceeded in the absence of the respondent. The reasons why this application should be granted were stated in paragraph 2, 3, 4, 5, 6, 7, 8 & 9 which were coached as follows:-

2. *That, on the 14 day of November 2018, the applicant 'CIWASA (T) LTD' entered into a lease agreement with the respondent for leasing a used Caterpillar Motor Grader 140G with registration number T321 DPF. (A copy of the lease agreement is herewith attached and mark as annexure AB-1 leave of the Court will be craved forming part of this affidavit).*
3. *That, in the said agreement, it was mutually agreed that, the Applicant leasing the said machine for the period of three years starting from 14 days of November 2018 up to 14 days of November 2021.*
4. *That, it was agreed that, the applicant shall pay the Respondent a sum of Tshs. 375,590,002/= within the said time in the breakdown of investment capital and rate amount.*
5. *That, the Applicant performed his contractual duties by effecting payment to the Respondent as it was agreed, as such he paid the Respondent a sum Tanzania Shillings Three Hundred thirty Six Million and five hundred thousand shillings only. [Tshs. 336,700,000/=] and a sum of Tshs. Thirty nine Million was to be paid before the completion of the agreed time. (A copy of the Efta equipment loan description breakdown is herewith attached and mark as annexure AB-2 LEAVE OF THE Court will be craved forming part of this affidavit).*
6. *That, before the expiration of the contract between the Applicant and the Respondent, the latter took the said machine from the Applicant's client and repossessed it an act which caused loss of Tshs. Eight Six Million and four Hundred thousand Shillings 86,400,000/= only.*

7. *That, the Applicant has found that, the respondent handled the same machine to another person to the detriment of the Applicant.*
8. *That, despite of numerous follow up, to the Respondent to settle the matter amicably the Respondent has refused the same efforts are in futile.*
9. *That, in the circumstance, it will be in the interest of justice if this Hon. Court interferes and grants the orders as sought in the chamber summons as I have assigned sufficient cause for the same.*

At the hearing, Mr. Anyimike Mwamsiku, learned advocate represented the applicant. Submitting in support of the application, Mr. Mwamsiku adopted his affidavit and further stated that on 14/11/2018 the applicant entered into a lease agreement with the respondent for leasing a used caterpillar Motor Grader 140G with Registration No. T321 DPF. He added that the contract commenced from 14/11/2018 to 14/11/2021.

He added that the value of the agreement was **Tshs. 264,500,000/=** plus the interest of 30% to wit; **Tshs. 111,090,000.2/=** making a total of Tshs. **375,590,000/.** The learned counsel further submitted that on 03/11/2021, the respondent repossessed the said caterpillar which was still in the hands of the Applicant on allegation that the Applicant had breached the contract. He added that, at the time of repossession, the Applicant had already paid Tshs. **336,700,000/=**, therefore, the outstanding balance was Tshs. **39,520,000.02/=**. The learned counsel went on submitting that, on 9/11/2021, the Applicant was given a 14 days' notice to pay the outstanding balance to the respondent otherwise he would take back the caterpillar.

The learned counsel added that, as per agreement, the caterpillar was to be repossessed on 13/11/2021 but for reasons better known to the respondent, the

same was re-possessed on 03/11/2021 and the respondent having done so, issued a 14 days' notice.

The learned counsel added that the applicant has a **sub-contract with ECIA COMPANY LTD**, and up to the time of filing this application, the applicant has suffered a loss of **Tshs. 86,400,000/=** because payment agreed to be paid per day in the sub-contract is **Tshs. 800,000/=**.

The learned counsel added that the respondent made follow-ups but the respondent had already handed over the said caterpillar to another person. He added that the applicant has attempted to settle the matter amicably but in vein, hence this application. He further said, looking at the trend of payments, the applicant would have settled the outstanding balance if the caterpillar would not have been taken by the Respondent.

I have gone through the submission made by the learned counsel and the affidavit supporting the application, sworn by the learned counsel therefore, the major issue for determination is whether this application is meritorious. Order XXXVI Rule 6 (1) (a), (b), & (1) provides for attachment before judgment and states;

"6(1) Where, at any stage of a suit, the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him:-

(a) is about to dispose of the whole or any part of his property;

or

(b) is about to remove the whole or any part of his property from the local limits of the Jurisdiction of the court, the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to

satisfy the decree, or to appear and show cause why he should not furnish security.

7(1) Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the court, the court may order that the property specified or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached."

The provisions above depicts that the court has the power to grant orders for attachment before judgment provided that it is proved that;

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

It is apparent that the power under Order XXXVI rule 6 of the Civil Procedure Code Cap 33 R: 2019 is drastic and extra ordinary power, therefore, such power should never be exercised mechanically or merely for the asking. It must be used sparingly and strictly in accordance with the rule, because it substantially interferes with the defendant's property rights before the final resolution of the overall dispute. Any attempt by a plaintiff to utilize the provisions the herein above named order as leverage for coercing the defendant to settle the suit claim should be discouraged.

It is well-settled that merely having a just or valid claim or a prima facie case, will not entitle the plaintiff/applicant to an order of attachment before judgment, unless he also establishes that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that may be passed.

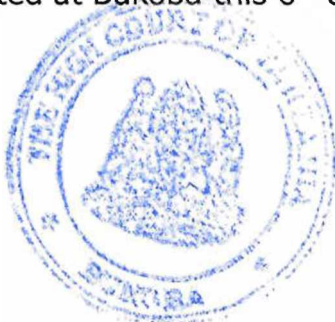
In the Indian case; Chandrika **Prashad Singh v. Hira Lal Air** (1924) Dawson Miller, C. J observed as follows;

"The power given to the court to attach the defendant's property before judgment is never meant to be exercised lightly or without clear proof of the existence of the mischief aimed at in the rule. To attach the defendant's property before the defendant's liability is established by a decree, may have the effect of seriously embarrassing him in the conduct of the defence, as the properties could not be alienated even for putting him in funds for defending the suit, which may eventually prove to have been entirely devoid of merit".

In the instant case, having read the law under which this application was made, the affidavit in support of the applications as well as submissions by the learned counsel, I am at all convinced that this is not one of the proper cases to issue an order to attach the respondent's property before judgment. The applicant has not shown to the satisfaction of this court that the respondent had the intention to defeat the decree that may be passed. The applicant alleged that the 14 days' notice was issued to the applicant after the property had been re-possessioned by the respondent. However, for reasons better known to the applicant, the copy of the said notice was not attached to form part of the plaint. Indeed, fear has never been sufficient ground for granting the application for attachment before judgment.

In the event, I find this application devoid of merits; therefore, it is hereby dismissed accordingly.

Dated at Bukoba this 6th day of July 2022.



E.L. NGIGWANA

JUDGE

06/07/2022

Ruling delivered this 6th day of July 2022 in the presence of the Mr. Anyimike Mwamsiku, learned advocate for the Applicant, Mr. Lameck Erasto, learned advocate for the respondent and Ms. Tumain Hamidu, B/C.




E.L. NGIGWANA

JUDGE.

06/07/2022