IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 169 OF 2015

KILIMANJARO TRUCK COMPANY LIMITED .....APPLICANT

VERSUS

TATA AFRICA HOLDINGS TANZANIA LIMITED.....1ST RESPONDENT

HARVEST TANZANIA LIMITED.....2ND RESPONDENT

RULING

Mansoor, J:

Date of Ruling- 29TH APRIL 2016

The facts of the case, briefly stated, are as follows: as alleged by the Plaintiff who is also the Applicant in this Application, the Applicant and the 1st Respondent entered into an oral agreement for sale and purchase of 10 motor vehicles worth

THz 1,200,000,000 at a cost of THz 120,000,000 per truck. So far as contended by the Applicant, he paid THz 716,571,000 leaving the balance of THz 516,428,680 as at June 2015. The Applicant contended that it experienced financial difficulties, and could not finalise payment of the balance in time, and proposed for a rescheduling, and the applicant was willing to pay THz 51,000,000 monthly until the entire loan is liquidated. The Applicant contends that the 1st respondent using the services of the 2nd respondent has highhandedly seized his 2 vehicles bearing Reg No's T 293 CPS and T 290 CPS and have threatened to sell the vehicles in public auction without further notice, and have threatened to impound more vehicles.

In the Counter affidavit of Mr Prashant Shukla, the Head of Auto and Allied Business of the 1st respondent in which the respondent denied the existence of the oral agreement but stated that the Applicant and the 1st respondent entered into a written agreement for sale of the 10 vehicles, and the total costs of the 10 lorries is THz 1,336,763,000 at the cost of THz

133,676,300, and that the outstanding debt is THz 661,335,849, and the amount was to be paid 10 months after the delivery of the vehicles. It is in the written Agreement that the 10 vehicles were hypothecated to the 1st Respondent as the Vehicles were registered in the joint names of the 1st respondent and the Applicant and the name of the 1st respondent would have been removed only when the Applicant had finished paying the entire amount. (Clause 4 of the written agreement, Annexure TATA-1 to the Counter Affidavit).

Along with the suit, which is still pending the applicant filed an application for temporary relief of injunction restraining the respondents from selling the two seized motor vehicles, and restraining the respondents from impounding the remaining 8 vehicles.

I shall say at the outset that in this application the principle of injunction set in the famous case of Attilio vs Mbowe cited by the parties herein shall not be considered as this is a special case of the laws of hypothecation under the laws of Contract

Ordinance, and the parties have to demonstrate their rights of exercising the rights created under the charge or mortgage or pledge or pawn in order to be given an order or injunction or of refusal of the order of temporary injunction.

In order to determine the merits of this application, first I have to determine the question whether the right of seizure and sale of the vehicles can be exercised without the intervention of the Court when the hypothecation creates only a charge. Going through the Agreement I have observed that, the agreement in question did not create a mortgage or pledge, it merely created a charge or a pawn.

It follows therefore that if the hypothecation constitutes pledge, or pawn, the said right is specifically given under Section 124 to 128 of the Law of Contract of Tanzania, Cap 345 R: E 2002, which provides:

> 124. The bailment of goods as security for payment of a debt or performance of a promise is called "pledge";

and the bailor is in this case called the "pawnor" while the bailee is called the "pawnee".

Pawnee's right of retainer

125. The pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise, but for the interest of the debt, and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged.

Pawnee not to retain for debt or promise other than that for which goods pledged

126. The pawnee shall not, in the absence of a contract to that effect, retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged; but such contract, in the absence of anything to the contrary, shall be presumed in regard to subsequent advances made by the pawnee.

Presumption in Case of Subsequent Advances Pawnee's right as to extraordinary expenses incurred

127. The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged.

Pawnee's right where pawnor makes default

128. - (1) If the pawnor makes default in payment of the debt or performance, at the stipulated time of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.

(2) If the proceeds of such sale are less than the amount due in respect of the debt or promise,

the pawnor is still liable to pay the balance but if the proceeds of the sale are greater than the amount so due, the Pawnee shall pay over the surplus to the pawnor.

Of interest in this case is section 128 of the Law of Contract Act regarding the Pawnee's right where pawnor makes default. In this case the Applicant is the pawnor in the Agreement and has admittedly defaulted in payment of the debt, or performance; at the stipulated time or the promise, in respect of which the goods were pledged, the Pawnee, in this case the 1st Respondent had options of bringing a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or sell the thing pledged, on giving the pawnor reasonable notice of the sale. If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the Pawnee shall pay over the surplus to the pawnor.

Thus, the law of the land cited hereinabove has recognized the right of the Pawnee in possession of the title and the property pledged to sell the property without the intervention of the Court. . In this case however, the Pawnee is not in possession of the vehicles and such a covenant in the contract can only be enforced through Court. The reason being that in the absence of the actual possession of the property/vehicles, a person cannot take the law into his own hands and take possession of the goods forcibly when the debtor obstructs taking of possession.

In this case also, there is no Clause in the agreement providing for the right seizure and sale to the Pawnee, and the existing provisions in the Agreement only enables the creditor to enforce through a Court of law as it operates an equitable charge in favor of the creditor.

In this case the agreement in question did not empower the 1st respondent to take possession and sell the vehicle if there was any default. Also under the said Agreement, 1st respondent was not given any right as an "Attorney" for the co-owner of

the vehicles i.e. the Applicant to take possession of the vehicles and sell them without the intervention of the Court.

I don't agree with the arguments of the learned counsel for respondents that the 1st respondent had a special right to recover its dues in the event of default by the borrower, if needed by the sale of the vehicles and that the said right can be exercised without intervention of the Court. I must say that the agreement has given a right to the 1st respondent to realize the amount by enforcing the security through Court.

Since there is no clause in the Agreement empowering the 1st respondent to take possession and sell the vehicles, and since the actual possession of the vehicles is not with the 1st respondent, the 1st respondent cannot exercise the rights given under Section 128 of the Law of Contract Act without the intervention of the Court. .

In the Agreement, if there existed the following kind of clause, then the 1st respondent would have been right in seizing and

selling the vehicles pledged as security for the loan, without the intervention of the Court. :

"The Creditor and its Agents and Nominees shall be entitled at all times without notice to the borrower but at the borrower's risk and expense and if so required as attorney for and in the name of the borrower to enter any place where the said vehicle may be and inspect value insure superintendent disposal and/or take particulars of all or any part of the said vehicle and check any statements accounts reports and information and also on any default of the borrower in payment of any money hereby secured or the performance of any obligation of the borrower to the Creditor or if any statement representation or warranty made by the borrower in its, their or his loan application or in any support in financial statement shall be found to be false or in-accurate in any material respect or on the occurrence of any circumstances in the opinion of the Creditor endangering this security to take possession or recover receive appoint receivers or remove and/or sell by public auction or private contract dispatch for realization or otherwise dispose of

or deal with all or any part of the said vehicle and to enforce realize settle compromise and deal with any rights or claims relating thereto without being bound to exercise any of these powers or being liable for any loss in the exercise thereof and without prejudice to the creditor's rights and remedies of suit or otherwise and notwithstanding there may be any pending suit or other proceedings the borrower undertaking to give immediate possession to the creditor on demand of the said vehicles ....."

A perusal of the clauses of the Agreement, no such right was given to the 1st respondent, and this kinds of clauses are normally incorporated in a Chattel Mortgage between the Parties. I have not seen any Charttel Mortgage created between the parties for enforcement of the Creditor right of seizure and sell of the vehicles placed as security for the debt.

Based on the above, therefore the application for injunction is granted and the respondents, their agents or anybody or authority acting under them are hereby restrained from disposing the two vehicles with Registration No. T290 CPS and

T 293 CPS, impounded by the respondents pending the hearing and determination of the main suit. Further, the respondents are restrained from impounding the other vehicles pending the hearing and determination of the main suit.

I shall, however, make no order as to costs.

Application allowed.

DATED at DAR ES SALAAM this 29TH day of APRIL, 2016

MANSOOR
JUDGE
29TH APRIL 2016

THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION