IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 92 OF 2019

BETWEEN

BUKOBA MUNCIPAL COUNCIL.....APPLICANT

Versus

MANTRAC TANZANIA LIMITED.....1st RESPONDENT

INTERCOUNTRY ROAD

CONSTRUCTION CO. LTD.....2nd RESPONDENT

CHRISTMAS MAHUZA MUMANGI.....3rd RESPONDENT

S.L ISANGI AUCTION MART AND

COURT BROKERS.....4th RESPONDENT

Last Order: 22nd April, 2020

Date of Ruling: 23rd June, 2020

RULING

FIKIRINI, J.

This is a ruling on objection proceedings brought by the applicant, Bukoba Municipal Council through her advocates Mr. Bahati Wape and Mjahidi Bilal Kamugisha. The application was preferred by a way of chamber summons under the provisions of Order XXI Rule 57 and section 95 of the Civil Procedure Code, Cap 33 R.E 2002 (the CPC) against the, 1st, 2nd, 3rd and 4th respondents. The gist of the application is about the attachment of motor grader 140K with registration

Number T687 CDN, which is not liable for attachment subject to the execution of the decree in Commercial Case No.141 of 2017.

During the hearing, the 2nd and 3rd respondents neither filed counter-affidavits nor did enter appearance. As intimated earlier, Mr. Wape and Kamugisha, Municipal Solicitor appeared for the applicant while 1st and 4th respondents enjoyed the legal service of Mr. Roman Masumbuko learned counsel. This Court ordered the matter to be argued by a way of written submissions under the following filing schedule: the applicant to file written submission by or on 6th May 2020, reply by the respondents by or on 20th May 2020, and rejoinder if any by or on 27th May 2020. This was to be followed by ruling scheduled for 23rd June, 2020.

The background to this application rests on Commercial Case No. 141 of 2017 in which the 1st respondent, Mantrac Tanzania Limited sued the 2nd and 3rd respondents jointly and severally for the payment of USD. 300,192, being the value of one unreturned machine of Motor Grader 140k and other damages, which was alleged due to the expiration of the lease agreement, was in possession of the 2nd and 3rd respondents illegally.

The suit was settled and deed of settlement signed by the parties on 27th June 2018, and then was filed in Court and registered as the decree of this Court. As per the deed of settlement, the 2nd and 3rd respondents agreed to pay the 1st respondent, the

outstanding rentals amounting to USD 363,874.94, the payment agreement which was however not complied with. The 1st respondent was thus left with no option but to proceed with the execution by a way of attachment of the equipment possessed by the applicant. This prompted the applicant to file these objection proceedings against execution in Commercial Case No. 141 of 2017, as she was never a party to the deed of settlement arising in the above mentioned case and hence this ruling.

The essence of Mr. Kamugisha's, submission was that the Motor Grader 140k with registration No T687 CDN, with Chassis No. SZL 010224, was not liable to attachment as intended by the 1st respondent because the applicant was not a party to the suit. Extending his submission, he submitted that subject to Order XXI Rule 57(1) of the CPC, this Court was empowered to investigate an objection to the attachment of property in execution of decree if the objector was not party to the suit. To strengthen his position, he cited the case of **Katibu Mkuu Amani Fresh Sports Club v Dodo Umbwa Mamboya and Another (2004) TLR 326,** where it was held that:

> *"where a claim is preferred or objection made to attachment of any property, the court is duty bound to investigate the claim or objection."*

Admitting receiving a letter from 4th respondent, one S.L. Isangi Auction Mart and Court broker, who was appointed by Commercial Court to execute the decree in Commercial Case No. 141 of 2017, by attachment of motor grader model No. 687 CDN, Chassis No. SZL 010224, after the 2nd and 3rd respondents failed to pay the outstanding amount of USD 363,874, to the 1st respondent, but the attachment was opposed by the applicant for not being a party to the Commercial Case No. 141 of 2017. Submitting on the said motor grader, he submitted that the applicant has critical interest over the motor grader in dispute and currently is in her possession in her yard at Bukoba Municipality since 2018. This was after the applicant attached the motor grader pending the determination of Civil Case No. of 2019 between the applicant and NCL International Limited and Stanbic Bank. He referred to paragraph 7 and annexure BMC4 of the affidavit in support.

Further in his submission, giving background to the applicant's involvement with the 2nd respondent, that the applicant entered into a contract with the 2nd respondent on 29th May 2018, for construction of Bukoba Municipal roads (5km) to Bitumen Standard phase 1 for the amount of Tzs. 7,030,086,046/= (Tanzanian Shillings Seven Billion Thirty Million Eighty Six Thousand and Forty Six Only). The project was for the period of ten (10) months. This was verified under paragraph 6 and annexure BMC3 of the affidavit in support. The 2nd respondent breached the contract, which compelled the applicant to terminate the contract on 2nd November,

2018. The termination of the contract as exhibited by annexture BMC-5, constrained the applicant to take possession and place under her custody all plants and equipment on site including the motor grader subject of this objection proceedings application. To strengthen his position, he made reference to clause 63.1 of the General Conditions of the said contract which clearly stated that:

> *"all material on the site, plant, equipment, temporary works and works shall be deemed to be deemed to be the property of the Employer if the contract is terminated because of the contractor 's default".*

The above referred clause of the contract gave power to the applicant to take control of the motor grader up to this moment. The applicant's interest on the motor grader was therefore obtained from the contract entered between the parties. The clause gave the applicant powers to hold the plants machinery and materials regardless of ownership, provided that they were brought by the contractor for the purpose of execution of the existing contract between the parties.

On top of that it was the counsel's submission that, upon the breach of the contract, the applicant filed a Civil Case No. 3 of 2019 in the High Court of Tanzania, Bukoba District Registry at Bukoba seeking the declaration that the applicant be declared the lawful owner of the plants and equipment she seized on the site which

were in possession of the contract which included the motor grader. The case was still pending in Court, as deponed in paragraph 29(i) of the affidavit as to the applicant's rights and interest.

Canvasing on whether the applicant has adduced evidence to show interest on the attached property, the counsel made reference to Order XX1 Rule 58 of the CPC and cited the case of **Kwiga Masa v Samwel Mtubatwa (1989) T.L.R 103**, where it was held that:

> *"He who seeks a remedy must prove the grounds thereof, in which case it is the duty of objector to adduce evidence to show that at the date of attachment he had some interests in the property attached."*

Concluding his submission, he submitted that these objection proceedings for the attachment of the said motor grader has complied with Order XXI Rule 58 of the CPC and the application was not necessarily to delay the execution of the Court decree rather protecting the applicant's contractual rights. Therefore, prayed this application to be allowed and the property attached be released from attachment.

Mr. Masumbuko, counsel for the 1st and 4th respondents opposed the objection by making reference to Rule 58 of Order XX1 of the CPC, which provided the pre-condition, that for the Court to allow the application for objection the applicant

must give evidence that at the date of attachment, he had interest or was in possession of the attached property. Submitting on whether the applicant had some interest in the property attached, he submitted that the registered motor grader was registered in the name of the 1st respondent, as the legal owner and was only rented to the 2nd and 3rd respondents. Therefore, not the legal owners of the motor grader and that legal interest superseded any other interest.

Mr. Masumbuko, defined interest according to the Black Law Dictionary, that it meant:

> "a *legal share in something or all part of legal or equitable claim to or right in proper.*"

He went on submitting that interest has to be legal ownership of the attached property, unlike the applicant herein who did not have legal ownership of the attached property as the affidavit in support failed to lead evidence proving or showing any documents of ownership that the equipment belonged to her. Likewise, the 2nd respondent also did not have legal ownership over it. He further submitted that the fact the disputed property was taken by the third party and placed under the party's yard did not warrant legal ownership over the motor grader.

Reacting on the Civil Case No. 3 of 2019, in the High Court between the applicant, NCL and Stanbic Bank, he submitted that, it did not change the ownership status of the disputed motor grader, which was rented to the 2nd respondent, who was not party to Civil Case No. 3 of 2019. It was thus wrong assumption because there was no way clause 63.1 of the alleged contract could have changed the ownership of the motor grader from the 1st respondent. Besides, the rights and liabilities of the said agreement could not have affected a third party, he stressed. Supporting his position, he cited the case of **Dorice Keneth Rwakatare v Nurdin Abdallah Mushi & 5 Others. Miscellaneous Application No. 300 of 2019,** in which it was held that in any objection proceedings the executing Court has an obligation of investigating the claim to see that the objector has proved to have possession or interest in the attached property. He also cited the case of **Katibu Mkuu Amani Fresh Sports Club v Dodo Umbwa Mamboya & Another [2004] T. L.R 326,** where the Court of Appeal.

"The High Court should have investigated proof of ownership of the claimant. "

Discussing on the issue of whether the applicant possessed the property he submitted that the 4th respondent was the one exposed the applicant for holding the subject matter without any lawful order. Despite the order of this Honourable Court, the applicant refused to hand over the property which amounted to contempt of Court, andcontinued unlawful possession of the property liable to attachment.

According to Mr. Masumbuko, the application was just designed attempt to delay the execution process.

Finalizing his submission Mr. Masumbuko, submitted that the contract between applicant, the 2nd respondent and the Stanbic Bank, was useless as the respondents were not parties to the contract or to the Civil Case No. 3 of 2019. There was no order issued by the High Court, ordering the change of ownership of the disputed property and it remained with the 1st respondent. This Honourable Court cannot go against its decree unless it was set aside. This was based on the fact that a thief cannot claim a good title than the owner of the machine. To that end he prayed for the application to be dismissed with costs.

In rejoining the applicant learned advocates submitted that the 1st and 4th respondents' submission to a large extent was a deliberate misrepresentation of the issues at hand, vindictive and attacking the applicant's personality by naming her thief who cannot claim a good title. This was unethical in legal fraternity.

Otherwise responding to the counsel's submission; he submitted that Mr. Masumbuko has failed to cure the issue of applicant's interest or possession over the motor grader raised in the submission in chief. He went on submitting that the issue of ownership was not disputed by the applicant and the core issue in this application was not vested on ownership as wrongly asserted. What was at issue

was the applicant's interest or possession of the motor grade and not legal ownership. Submitting on the definition of the term interest it was the counsel's submission that the definition was in favour of the applicant as it included the phrase equitable claim of which the applicant has claim of right against the motor grader as per clause 63.1 of the contract. The 1st and 4th respondents counsel has failed to address the issue of possession of which the applicant has already proved. To support his position, he cited the case of **CRDB Bank v Mwamba Entreprises Ltd & Charles Mtokozi, Commercial Case No. 50 of 2000,** which was cited with approval in the case of **Dorice Keneth** (supra) when the Court held that:

> *"Where it was stated that actual possession is enough to prove that a person has got interest over the property which is subject to objection proceeding."*

As per the counsel's account the motor grader was in the applicant's possession even before the 4th respondent has issued a letter of attachment to the applicant on 29th July, 2019. The accusation that applicant committed contempt of Court was not water tight and must fail, urged the applicant's counsel.

Discussing the case of **Katibu Mkuu** (supra) cited by the 1st and 4th respondents, the applicant's counsel wondered as to why the respondents learned counsel

changed the wording of the holding and put his own words which favored his wrong position on ownership. In the cited case what the Court held was that:

"*the court is bound to investigate the claim or objection.*"

Submitting on the validity of the decree to be executed, he submitted that decree issued by this Court clearly provided that, the defendants to pay USD. 363,874.94/= to the 1st respondent, but nowhere there was an order for attachment of the motor grader. The allegation that this Court cannot go against its decree wastherefore not true, because the purported attachment was not found in the decree of this Honourable Court.

The counsel as well pointed out 2nd and 3rd respondents had neither filed the counter affidavit nor appeared in Court to contest this application simply because they have conceded to this application and support it, he emphasized.

Concluding his submission, he submitted that the applicant has interest over the motor grader and she possessed it in her yard at Bukoba Municipal Council before the attachment order. If this application will be dismissed the applicants' rights shall be prejudiced and the equilibrium of the pending Civil Case No. 3 of 2019 in the High Court at Bukoba will be disturbed.

After a careful read through and examination of the chamber summons and relief sought, affidavit in support and against and the submissions filed by the parties

through their counsels, which I consider is vital in determining the merits of the objection raised, I shall now proceed to address on only one issue: whether the applicant has been able to adduce evidence as required under Order XXI Rule 58 of the CPC. For ease of reference the rule is provided below:

> *"**The claimant or objector must adduce evidence to show that at the date of attachment he had some interest in, or was possessed of, the property attached.**"*[Emphasis mine]

The only requirement as per the provision is for the applicant to show: (i) that at the date of attachment he had some interest, or (ii) was possessed of, the property attached. From the affidavit and submissions there is no dispute at all that the equipment belongs to the 1st respondent but rented out to the 2nd and 3rd respondents. This fact is acknowledged by the applicant as well in paragraph 11 of the affidavit in support which made reference to the 1st respondent's written statement of defence annexed as BMC-7.

Ordinarily, the property to be attached must belong to the judgment debtor as stated in the case of **Ally Issa Musa v Mwidadi Ally Mawila & 2 Others, Commercial Case No. 91 of 2009,** which held that:

> *"The property to be attached should belong to the judgment debtor"*

But there are circumstances whereby a third party can take possession of the property to be attached so long as they have some interest or in possession of the property before being subjected to attachment. Like in the present application the applicant has shown her interest in the would be property to be attached and in actual fact the equipment is under her possession as reflected in paragraph 10 of the affidavit which states as follows:

> *"That, the said motor grader in view of Clause 63.1 of the Contract, is now under the possession of the Applicant claiming a right as herein stated."*

The averment is backed by list of plants and equipment annexed to the affidavit as BMC-6.

The submission by Mr. Masumbuko in this regard is, I would say, misplaced. The provision of Order XXI Rules 57 and 58 of the CPC, has stated nothing related to ownership. After all that was not what, the applicant contended or her application is all about. What the applicant wanted is the Court to intervene, as the applicant reaction was propelled by terminated contract between the applicant, 2nd respondent and Stanbic Bank, after the breach by the 2nd respondent. This prompted the applicant to file Civil Case No. 3 of 2019, before the High Court at Bukoba. Meanwhile the applicant proceeded to attach the motor-grader and other

equipment which were in use by the 2nd respondent in course of performance of the contract. The motor grader is certainly in the applicant's possession. The possession which took place even before the issuance of execution order in Commercial Case No. 141 of 2017, the fact which has never been contested by the 1st and 4th respondents. It true that the 1st and 4th respondents are not party to the Civil Case No. 3 of 2019 but the applicant's action are equally bona fide as illustrated above. In the case of **Harilal & Co v Buganda Industries Ltd (1960) EA 318**, faced with the question the Court held that:

> *"**The court should investigate the question of possession of the attached property and if satisfies that the property** was **in the possession of the objector** it must be found whether he **held on his own account** or trust for the judgment debtor"*[Emphasis mine]

Mr. Masumbuko's submission has therefore no any legal basis, not only that but also the fact that the 1st respondent is not part to the contract between the applicant and the 2nd & 3rd respondents had no merits because the important question to be asked is whether on the date of attachment who was in possession of that property and not ownership. And from the affidavit and submissions it was evident the applicant was in possession on her own account. That is another issue the Court is required to find out.

In the case of **G.R Bhande v B.R Ihadav AIR 1974 Bom 155,** answering that the Court held that:

> *"The question to be decided is* ***whether on the date of attachment it was the judgment debtor who was in possession*** *and further when the court comes to a finding that the property was in the possession of the* ***objector****, then the court* ***must proceed further to find whether that possession of the objector was on his own account for himself or as a trustee or*** **on account of the judgment debtor".** [Emphasized mine]

Since the motor grader subject to the attachment in execution of the Court decree is under dispute which is yet unresolved, sensibly the said equipment should be released from attachment. This has been provided under Order XXI Rule 59, which states:

> *"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 the same person in trust for him*** *or in occupancy for tenant or other person paying rent to him or that being in possession of the judgment debtor at such time, it was so in*

possession, not in his own account or at his own property, but on account of or in trust for some other person or partly on his own account of the same other person, ***the court shall make an order releasing the property*** *wholly or to such extent as it thinks fit, from attachment.*"[Emphasis mine]

The applicant has in actual fact been able to satisfy and prove the requirements stipulated under Order XXI Rule 57, 58 and 59 of the CPC.

In the alternative the 1st respondent may proceed to sue the applicant for the release of the motor grader and not by a way of attachment, or finding other attachment that belongs to the 2nd and 3rd respondents, to compensate her loss. This Court can in no way proceed to allow the attachment of the motor grader to satisfy the execution of the Court decree in Commercial Case No. 141 of 2017, as applied in the execution proceedings for the reasons stated above.

The application is thus granted and the motor grader 140K with registration Number T687 CDN, is not liable for attachment subject to the execution of the decree in Commercial Case No.141 of 2017, and has to be released. It is so ordered.

P.S FIKIRINI

JUDGE

23th JUNE, 2020