

TANZANIA / JUDGMENT

20070830 TZHC Dar es Salaam

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TZHCDECIDED
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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT DAR ES SALAAM
COMMERCIAL CASE NO. 18 OF 2007 I JEREMY WOODS 1st PLAINTIFF/APPLICANT
CAMERON WOODS 2ND PLAINTIFF/APPLICANT VERSUS I I ROBERT
CHOUDURY. 1st DEFENDANT/RESPONDENT r CULLINAN CUT & I POLISH LTD 2ND
DEFENDANT/RESPONDENT RULING, G I Date of final submission June 5, 2007. Date of ruling:
August 6, 2007. MJASIRI, J. The Applicants/Plaintiffs have filed an application against the
Respondents/Defendants asking for an order of attachment before judgment of the Defendants'
factory situated at Mikocheni, Dar es Salaam and all other equipment therein. The application
was supported by the affidavit of Maria Malingumu Kashonda, Advocate for the Applicants. 1 On
the date of hearing of the application Counsels for both parties advised the court that they had
reached a consensus that the Defendants should not sell or make any attempt to sell the factory
located on Plot No. 96 Industrial site Mikocheni Dar es Salaam, and the status quo should be
maintained until the final outcome of the case. However on May 28, 2007 Counsel for Applicant
applied to the court to have the application for attachment heard as the Defendants were not
abiding by the agreement reached. This move was not objected to by the Counsel for the
Defendants /Respondents. Counsel for the Applicants /Plaintiffs cited the student Manual by
Chipeta J at page 265 in support of the application which is reproduced as under: "If at any stage
of a suit, the court is satisfied, by affidavit or otherwise, that the Defendant with intent to delay or
obstruct the execution of any decree that may be passed against him in the suit, is about to
dispose of 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 value of it or such portion of it as may be sufficient to
satisfy the decree, or to appear to show cause why he should not furnish security (Order 36 r6(1),
CPC. Unless the court should direct otherwise, the Plaintiff must specify the property to be
attached and its estimated value, and the court may also order the conditional attachment of the
whole or any portion of such specified property (Order 36 rule 6(2) and (3)), CPC." Counsel also
made reference to the following cases which were cited in the above student manual: Raphael
Dibago V Prablamus Wambura 1975 LRT No.42 and Mtale V January Kapembwa 1976 LRT no.7 in
support of the application. Mr. Hyera learned Counsel for the Defendants asked the court to
adopt the affidavit of one Abuyd Nsanya (an employee of the second Respondent) as part of the
Defendants' submissions. Counsel further argued that the Applicant advanced the Respondent

money and the . Respondent transferred 37.5 shares of the company to the Applicants. The said transaction has not been revoked. The Applicants cannot therefore retain the shares of the company as well as their money. Counsel for the Defendants/Applicants further submitted that the Respondents have not sold any item of the factory. There is no documentary evidence showing any sales of the items from the factory. There is also no evidence that the Respondents intend to delay the conclusion of the suit or planning anything which would result in the applicants having an empty decree. This court should not be moved by the Plaintiffs/Applicants' worries that the Defendants intend to sell the factory, concrete evidence should be presented. The Applicants have a stake in the factory and the orders sought by the Plaintiff's/Applicants are not warranted and should not be granted. In reply Counsel for the applicants stated that the 37.5 shares have not been transferred to the Applicants, the ' shares belonged to Mr. Hyera learned Counsel. The first Respondent/Defendant is not a Tanzanian citizen and may leave the country anytime. The first Respondent is using delaying tactic to deny the applicant the return of his money. 4 What is the criteria for granting attachment before judgment by the court. In considering an application for attachment of property before judgment under Order 36 r 5 and 6 of the Civil Procedure Rules, the court is required to follow the following steps: Ndirangu V Abdalla 1984 KLR 746

- a) Before the court can take any action, it must be "satisfied" that the Defendant is about to dispose of his property or to remove it from the jurisdiction of the court with intent to obstruct or delay the execution of any decree that may be passed against him.
 - b) If the court is so satisfied, it then proceeds to direct the defendant, within a time fixed by it, either to furnish security or to appear and show cause why he should not furnish security.
 - c) The final step is that where the defendant fails to show cause why he should not furnish security, 5 required, the court may order the attachment of such property as is sufficient to satisfy the decree. Order XXXVI Rule 6 and 7 of the Civil Procedure Act Cap.33 [R.E.2002] provides as under: "6(1) where, at any stage of the 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. 6
- 2) The Plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof

- 3) The court may also in the order direct the conditional attachment of the whole or any portion of the property. 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 the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit be attached. I
- 2) Where the Defendant shows such cause or furnishes the required security and the property specified or any portion of it has been attached, the court shall order attachment to be withdrawn or make such other order as it thinks fit." In *Mtale V January Kapembwa* 1976 LRT No.7 Sisy AG J as then was held as under: 7
- (1) Before invoking the provisions of Order 36 Rule 6 of the Civil Procedure Code a court must be satisfied that the Defendant with intent to obstruct or delay the execution of any decree that may be passed against him is about to commit the mischief about which the complaint is made. I I I
- (2) Power to attach property under the said rule should not be exercised lightly and without clear proof of the mischief aimed at. I The main object of the rule is to enable the Plaintiff to realize the amount of the decree, if one is eventually passed, from the Defendant's property. However before invoking the provisions of this rule the court must be "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" is about to commit the mischief about which the complaint is made. In *Raphael Dibogo V Prablanus Wambura* 1975 LRT No.42 Lugakingira J as then was held as under: I I 8 I "Before an order of attachment of property prior to judgment is made, the court must be satisfied that the property is in danger of being destroyed, hidden wasted, damaged, alienated or otherwise injuriously dealt with." In *Ndirangu V Abdalla* 1986 KLR 746. The court of Appeal of Kenya laid down clearly the steps to be followed in considering an application for attachment of property before judgment under Order XXXVIII Rule 5 and 6 of the Civil Procedures Rules Kenya which is similar to Order XXXVI Rule 6 and 7 of the Civil Procedure Act Cap 33 [R.E:2002]. I I On the strength of the affidavit of Mrs. Rutashobya learned Counsel for the Applicant/Plaintiff and in view of the fact that the involvement of Counsel for the Defendant raised in the said affidavit was not addressed at all in the counter affidavit filed by the Defendant/respondent, I am of the view that sufficient cause has been shown. I the refore hereby order that the Defendant/Applicant appear in court to show cause why he should not furnish security within two weeks from the date of this order, i.e on August 21, 2007. Mr.Hyera I to be notified. 9 . _ Sauda Mjasiri Judge August 6, 2007 Delivered in Chambers this 6th day of August, 2007 in the presence of the Advocate for the Applicants/Plaintiffs and in the absence of Mr. Hyera, Advocate for the Defendants/Respondents this 6th day of august 2007. Sauda Mjasiri Judge, August 6, 2007 1,974 words jd 0

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