

TANZANIA / JUDGMENT

20140828 TZHC Dar es Salaam

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IN THE HIGH COURT OF TANZANIA '' (DAR ES SALAAM DISTRICT REGISTRY) AT DAR ES SALAAM MISC. CIVIL APPLICATION NO. 364 OF 2013 (Arising from Civil Case no. 202 of 2013 and Misc. Application no. 370 of 2013) ABG AFRICAN LINK TRADERS LIMITED
APPLICANT VERSUS JAN INTERNATIONAL LIMITED 1ST RESPONDENT JAN AFRICA INVESTIMETS LIMITED 2ND RESPONDENT .!-.../ JAN JAPAN TANZANIA LIMITED 3RD RESPONDENT DIN MUHAMMAD
4TH RESPONDENT

RULING

MURUKE,J. On 4/4/2014, this court ruled that there was a question of wrongful attachment of 31 motor vehicles belonging to the 1st respondent (then the 1st applicant) and 3 folk lifts the property of the 2 nd respondent (then the 2nd applicant). It was observed that while the decree in Civil Case no. 202 of 2013 was issued against the 3rd respondent herein, the warrant of attachment was on Jan Japan International Limited. The court ordered the warrant of attachment to be lifted to avoid further sufferings by the 1st and the 2nd respondents. ., The applicant, who is the decree holder in Civil Case no. 202 of 2013, was unhappy with the lifting of the warrant of attachment and therefore filed this application four days later, i.e. on 8/4/2014, requesting for the following orders:

- (1) That this honorable court may be pleased to review and set aside its order dated 4/4/2012. 1
- (2) Costs of this application be provided for; and
- (3) Any other or further orders as the honorable court may deem necessary to grant. The grounds for bringing forward the instant application are stated in the affidavit and supplementary affidavit affirmed by Batul Nassoro Seif, the principal officer of the applicant, in support of the chamber application. Batul Nassoro Seif deposed in her affidavit that on 12/11/2013, this court made an order that the motor vehicles belonging to the 3rd respondent be attached until such time when the main suit is determined. The order was executed by a court broker on 14/11/2013. Batul Nassoro Seif stated further that on 4/4/2014 at around 10 hrs, the applicant was served with summons and affidavits requiring her to appear in court on the same day at 14 hrs in relation to Misc. Application no. 3 70 of 2013 which was filed by the 1st applicant and one Din Mohamed against the applicant herein.

Janet Maduhu, the applicant's counsel, appeared in court as summoned and she was referred to this application which was filed by Jan International Limited and Jan Africa Investments Limited. The advocate informed the court that the applicant had never been served with this application and that she appeared commensurate with chamber summonses in Misc. Application no. 370 of 2013. The deponent affirmed that, on the same day and despite lack of service of Misc. Application no. 364 to the applicant, the court proceeded to decide that there was a serious issue of wrongful attachment of the 1st respondent's vehicles because, according to the registration cards annexed to the application, the cars belonged to the 1st respondent while the attachment order was issued against the 3rd respondent. Batul Nassoro Seif maintained that since there was no counter affidavit filed by the applicant due to lack of service of the chamber summons, the court did not have room to see and appreciate at the time it made the order new and important evidence indicating that the attached vehicle belonged to the 3rd respondent and not the 1st respondent herein. The affidavit in support of the 2nd application is attached with the bond declaration forms IM4 and IM7 showing that the owner of the attached vehicles is the 3rd respondent and not the 1st respondent. It is pertinent to note at this point that despite being served, the respondents did not file their counter affidavits to contradict the contents of the affidavit of Batul Nassoro Seif. On 23/6/2014, the applicant filed a supplementary affidavit of Batul Nassoro Seif. The supplementary affidavit is attached with the affidavit of Sadiq Mugendi Kumbata, the director of the 3rd respondent company, who affirmed that the motor vehicles the subject of this application belong to the 3rd respondent and not the 1st or the 2nd respondents. Mr. Kumbata affirmed further that the 3rd respondent never sold her motor vehicles to the 1st respondent and that the alleged sale of the said motor vehicles by the 3rd respondent to the 1st respondent is void ab initio because the sale was made without the board resolution; the 4th respondent is not a director as shown in the sale agreement; the sale did not comply with the TRA procedure on sale of motor vehicles; and that the sale agreement is not stamped. Din Muhamad, the 4th respondent and the director of the 1st and the 3rd respondents, affirmed a counter affidavit to oppose the supplementary affidavit of Batul Nassoro Seif. He stated that not every transaction of a company needs a board resolution and that sale of the motor vehicles between the 1st and the 3rd respondents was done in the normal course of the daily business of the 3rd respondent company. He contended that the Mr. Sadiq Mugendi Kumbata is a non executive director of the 3rd respondent and therefore knows nothing about the daily operations of the 3rd respondent company. Mr. Din Muhamad maintained that all TRA procedures were followed, the 1st respondent paid for the purchased motor vehicles and she was accordingly registered as the owner of the motor vehicles. He insisted that nature of the transaction between the 1st and 3rd respondent did not require payment of stamp duty and at any rate it can be paid at any time. The application was argued orally by Mr. Kitururu who represented the applicant, Mr. Tarimo for the 1st and 2nd respondents and Mr. Nyangaruri who appeared for the 3rd and 4th respondents. Mr. Kitururu submitted that, according to the provisions of section 78(b) and Order 42 rule 1(b) of the Civil Procedure Code, Cap. 33 R.E. 2002, for a party to succeed in an application for review, he must show that there is discovery of a new and

important matter of evidence which after exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order was made or when there is mistake or an error apparent on the face of the record or any other sufficient reason. The applicant's counsel argued that, consonant to the affidavit and supplementary affidavit of Batul Nassoro Seif, there is important evidence showing that the motor vehicles attached pursuant to this court's order dated 12/11/2013 and which was duly executed on 14/11/2013 belonged to the 3rd respondent. He argued further that the attachment order was lifted by this court basing on the affidavit in support of Misc. Application no. 364 of 2013 which, on the face of it, portrayed that there was a serious issue of wrongful attachment of the 1st and 2nd respondents' motor vehicles. Mr. Kitururu submitted that the applicant could not produce the said evidence indicating that the motor vehicles attached belonged to the 3rd st respondent and not the 1 and 3rd respondents because she had not been served with the chamber summons and affidavit in support of the 1st and 2nd respondents' Misc. Application no. 364 of 2013 and had not yet filed her counter affidavit. The counsel maintained that, in fact, on the date when the attachment order was lifted in Misc. Application no. 364 of 4 2013, Janeth Maduhu advocate had appeared in court for the applicant herein in relation to Misc. Application no. 370 of 2013 on setting aside of the ex parte judgment and not in relation to Misc. Application no. 364 of 2013 of which no service had been effected on the applicant. Mr. Kitururu submitted that all documents annexed to the affidavit of Batul Nassoro Seif and marked ABG-3 prove that the 3 rd respondent was the importer or consignee of all the motor vehicles which were attached pursuant to the ex parte decision of this court against the 3rd respondent. He contended that the 1st and 2nd respondents' claim that the 3 rd respondent transferred ownership of the motor vehicles to the 1st and 2nd respondents is a lie because the 4th respondent who posed as the Managing Director of the 3rd respondent in execution of the said sale is not one of the directors of the 3rd respondent company according to the official search report from BRELA dated 23/4/2014 attached to the supplementary affidavit of Batul Nassoro Seif. Mr. Kitururu submitted further that the said sale did not comply with the TRA procedures regarding transfer of bonds, there was no consideration and the sale agreement lacks evidential value as it is not stamped in terms of section 5 of the Stamp Duty Act. On the strength of the above submissions and grounds, Mr. Kitururu urged the court to grant the prayers in the chamber summons. He reminded the court that the respondents did not file their counter affidavit against the affidavit of Batul Nassoro Seif in support of the application for review. The applicant's counsel asked that, in the circumstances, the facts in the said affidavit should be taken to have been admitted by the respondents. To strengthen his contention, Mr. Kitururu cited the Court of Appeal's decision in TANZANIA REVENUE AUTHORITY v TANGO TRANSPORT CO. LTD, Consolidated Civil Applications nos. 4 of 2009 and 9 of 2008 (DSM, unreported). In reply to Mr. Kitururu's arguments, Mr. Tarimo, counsel for the 1st and th 2nd respondents, submitted that the share certificate issued to the 4 5 respondent, the extra ordinary board resolution dated 25/12/2012, the resolution in respect of opening the bank account of the 3 rd respondent, pleadings in Civil Case no. 202 of 2013 and the ruling in Misc. Application no. 370 of 2013 indicate that the 4th respondent is the share holder and

director of the 3rd respondent company. Mr. Tarimo argued that the sworn statements of Mr. Sadiq Mugendi Kumbata are contradictory in that in Civil Case no. 202 of 2013, there exists a decree subject to execution against the 4th respondent as the director of the 3rd respondent while in this application, he has sworn an affidavit that the 4th respondent is not the director of the 3rd respondent. Mr. Tarimo contended that the 3rd respondent's business is to sell motor vehicles and it is not expected that every time a customer comes to purchase a motor vehicle a board resolution should be in place. He maintained that the selling of the motor vehicles to the 1st respondent was done in the normal course of business of the 3rd respondent. The counsel insisted that receipts issued by the 3rd respondent acknowledging receipt of Tshs. 327,600,000/- and the tax invoice both attached to the counter affidavit and marked annexure LL-2, indicate that there was consideration in the sale of the motor vehicles to the 1st respondent. On the issue of nonpayment of stamp duty contrary to the provisions of section 5 of the Stamp Duty Act, Mr. Tarimo submitted that this court is mandated to order payment of stamp duty either before or after the agreement is admitted. The counsel added that, even if the sale agreement is not admitted, it is not the only document proving that the 3rd respondent sold the motor vehicles to the 1st respondent as there are registration cards showing that the 3rd respondent is the owner of the motor vehicles and there are receipts issued by the 3rd respondent. He argued that the search report dated 23/4/2014 is not a new discovery rather, it is a new evidence which cannot be acted upon. The counsel's argument is that for the court to review its own order, the fact discovered must have been of assistance during making of the decision. In the present case, the decision to be reviewed was made on 4/4/2014 while the search was conducted on 23/4/2014 and therefore it is a fact which was not known before. In the end, Mr. Tarimo asked the court to refuse the application. Mr. Nyangaruri who represented the 3rd and 4th respondents supported what was submitted by Mr. Tarimo advocate and added that the applicant is neither the director nor shareholder of the 3rd respondent thus has no locus to question the business affairs of the 3rd respondent. He submitted in relation to the search report from BRELA which was referred by the applicant that the registrar didn't make an entry in the register regarding changes of members and directors of the 3rd respondent through which, in December 2012, the 4th respondent became the share holder and director of the 3rd respondent. He referred the court to the share certificate, Board resolution on allotment of shares and resolution on opening a bank account -collectively annexure LL-1. Mr. Nyangaruri submitted further that pursuant to article 8 of the articles of association of the 3rd respondent, a resolution is valid if it is in writing and is signed by all the directors who are in Tanzania. He argued that pursuant to the referred article, it cannot be said that there was no resolution of the board or that there is discovery of new evidence. As regards the argument that the sale agreement is not stamped, the 3rd and 4th respondents' counsel emphasized that, for the interest of justice, the court has powers to order the instrument to be presented for adjudication and if necessary order for the document to be stamped within a particular period of time as provided under section 59(1)(b) of the Stamp Duty Act. The counsel requested that the application at hand be dismissed for failure to meet the requirements under Order 42 rule 1(b) of the Civil Procedure Code. In his rejoinder

submissions, Mr. Kitururu maintained that there is no counter affidavit to counter the grounds for review in the affidavit of Batul 7 Nassoro Seif. He again cited TANZANIA REVENUE AUTHORITY v TANGO TRANSPORT CO. LTD supra and insisted that, so far, all the grounds of review stated in the affidavit in support of the application for review remain uncontroverted by the respondents hence admitted. The applicant's counsel submitted that a supplementary affidavit by itself cannot support an application, and in the same analogy, a counter affidavit to the supplementary affidavit cannot be used to defeat an application. Mr. Kitururu argued further that the respondents' challenge of the application on the legal grounds has no merit because any legal objection has to be presented in court by filing a notice of preliminary objection in advance. The counsel submitted that although the respondents' argument is based on the decision in the case of PAULO LEMA v WILSON CHUMA, the instant case is distinguishable. He submitted that in PAULO LEMA's case, the court considered the legal grounds before making its decision while in present case, the applicant had no room to present in court the legal points contained in the supplementary affidavit of Batul Nassoro Seif and therefore the court did not have an opportunity to consider those points before making its decision. In that situation, Mr. Kitururu argued, legal matters stated in the supplementary affidavit of Batul Nassoro Seif are new matters which the court has to consider before reaching a decision to alter or not to alter its earlier decision. On factual matters, Mr. Kitururu disputed that the 4th respondent is the director of the 3rd respondent. He submitted that the 4th respondent's share certificate, pleadings in Civil Case no. 202 of 2013 and any resolution signed by the 4th respondent cannot be conclusive evidence that the 4th respondent is the director of the 3rd respondent. The applicant's counsel maintained that there is a legal procedure for appointing one a director of a company and it is conclusive when the relevant forms are filed with BRELA. He contended that, in law, the only entity vested with powers to verify directors of any registered company is BRELA, and according to it, 8

the 4th respondent is not the director of the 3rd respondent. Mr. Kitururu submitted that the search report attached to the supplementary affidavit was obtained on behalf of the 3rd respondent and there is yet no any other search report filed in court by the respondents to counter the said search report. The counsel added that at the time of filing Civil Case no. 202 of 2013 and Misc. Application no. 370 of 2013 the search report annexed to the supplementary affidavit had not been obtained. Mr. Kitururu submitted also that the articles of association referred by Mr. Nyangaruri were file in Misc. Application no. 370 of 2013 and not in the instant application. He argued that if the counsel thought that the articles were important in this matter he ought to have filed them according to the procedure. He argued further that even if one makes reference to article 8 referred by Mr. Nyangaruri the same cannot rescue the respondents because no one challenges the validity of the resolution, rather, the applicant contends that the 4th respondent is not a director of the 3rd respondent. The counsel insisted that sale of the motor vehicles required resolution of the board and that the sale agreement has no evidential value as it is not stamped. First of all, and with great respect to what was submitted by both respondents'

counsels, I concede to Mr. Kitururu's exposition of the law as regards applications for review under Order 42 rule 1(b) of the Civil Procedure Code. In the case of *MUYODI v INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION AND ANOTHER* [2006] 1 EA 243, the Court of Appeal of Kenya held at page 246: "It was incumbent upon the applicant if his application for review . . . were to succeed to show that there has been discovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason." 9 The same court held again in *NATIONAL BANK OF KENYA v NJAU* [1995-1998] 2 EA 249 at page 253 that: "A review may be granted wherever the court considers that it is necessary to correct an error apparent or omission on the part of the court. The error or the omission must be self evident and should not require an elaborate argument to be established." From the submissions and the grounds set forth in the applicant's supporting affidavit and supplementary affidavit, it is obvious that the applicant's grievance is divided in two: Firstly, there was evidence indicating that the 3rd respondent, as consignee of the motor vehicles ordered to be attached, was the owner of the attached vehicles; the applicant could not produce this evidence at the time the attachment order was lifted because she was not served and so could not file her counter affidavit against Misc. Application no. 364 of 2013 through which the attachment order was vacated. Secondly, transfer of ownership of the vehicles from the 3rd respondent to the 1st respondent was unlawful for the reasons that the 4th respondent who executed the sale documents for the 3rd respondent was not the director of the 3rd respondent; To the applicant, the stated legal contentions couldn't be brought before the court because the applicant had no chance to reply to the affidavit accompanying the 1st and 2nd applicant's application the application itself having not been served on the applicant herein. Regarding the first limb of the applicant's grounds for review, it is true that on 4/4/2014 when the attachment order was lifted, the applicant had not been served with the 1 and 2nd respondents' Misc. Application no. 364 of 2013. I am also satisfied that on that date, the applicant's counsel appeared in relation to Misc. Application no. 370 of 2013 and not Misc. Application no. 364 of 2013. Since the applicant had not been served with the 1st and 2nd respondents' application there was no way the applicant could counter the affidavit supporting the 1st and 2nd respondents' application and in a way produce this so important evidence showing that 10 • the 3rd respondent was the owner of the attached vehicles. This is new evidence which this court had no opportunity to consider when lifting the attachment order and its absence might have caused injustice to the applicant. I should add here that the respondents' failure to counter the first ground of review tacitly shows that they are in agreement with the said reason for bringing the present application for review. In the case of *TANZANIA REVENUE AUTHORITY v TANGO TRANSPORT CO. LTD* cited above, the Court of Appeal made the same observations and held: " ... the applicant's reasons for the delay ... were not controverted by any counter affidavit from the respondent. So, on the authority of Kerenge's case [*John D. Kerenge v Joel Mabiba*, Civil Application no. 19 of 1998 (unreported)], the respondent must be deemed to have admitted the same." On the strength of the above authority, the respondents are deemed to have admitted the first ground of review as set forth in paragraphs 3, 4, 5, 6 and 7 of the affidavit of Batul Nassoro Seif supporting the application. For the reasons explained, the application succeeds as regards

the first limb of the grounds of review. As it is the case with the first limb of the grounds of review, it is evident that the applicant had no room to present his legal points to counter the 1st and 2nd respondents' application. The fact that the attachment order was lifted without the application being served on the applicant and affording the applicant herein a chance to present her defense before making the decision is an apparent error on record and is a sufficient ground for review. Sarkar's Law of Civil Procedure, 8th edition, 1992, Part II reads at page 1595: "... when a judgment is delivered without notice to the parties ... A judgment proceeding on an erroneous assumption as to material facts amounts to a mistake apparent on the face of the record ... So also a judgment against law and established practice." It is stated further at page 1594 that: 11 "Whether the error crept through court's oversight or counsel's mistake, if it is apparent on the face of the record, it should be corrected without driving a party to appeal ... " In our jurisdiction, it is law and an established practice that a party must know the case against her and should be given an opportunity to present her defense. In lifting the attachment order, the applicant was not afforded both opportunities which is an obvious error sufficient to grant a review. With all the above in mind, the application succeeds on the second ground of review as well. In the end, the application is granted; the order dated 4/4/2014 lifting the attachment is vacated; the attachment order dated 12/11/2013 in Civil Case no. 202 of 2013 is reinstated. Costs to be in the course during determination of the 1st and 2nd respondents' application (Misc. Application no. 364 of 2013) G. JUDGE 28/08/2014 Ruling delivered in the presence of Mr. Tarimo for the 1st and 2nd respondents and also holding brief of Mr. Nyamgururi for 3rd and 4th respondent, and Sophia Stanly for the applicant. Z. G. MURUKE JUDGE 28/08/2014 12

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