TANZANIA / JUDGMENT

baretto hauliers t limited vs africarriers limited another 2015 tzhccomd 2106 30 october 2015

COURT
TZHCCOMD

DECIDED
30 October 2015

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT PAR ES SALAAM MISC. COMMERCIAL APPLICATION NO. 164 OF 2015 BARETTO HAULIERS (T) LIMITED.....APPLICANT VERSUS AFRICARRIERS LIMITED.....1st RESPONDENT TRANS AFRICA LOGISTICS LIMITED.....2nd RESPONDENT

RULING

Mansoor, J: Date o f Ruling- 30™ OCTOBER 2015 A Compromise Decree was passed on 14th May 2015, in Commercial Case No. 49 of 2015, whereby the Plaintiff in that suit was Africarriers Limited and the Defendant was Trans Africa Logistic Limited, the l sl and 2nd Respondents, respectively, in these proceedings. In the said Compromise Decree it was agreed that the 1st Respondent would hand over to the 1st Respondent the Seven Eicher Tippers with Registration Nos T312CQJ, T290CQJ, TT305 CQJ, T264 CQJ, T902 CQR; T380 DBX and T376 DBX , herein referred to as "the Seven Vehicles". It was also the Consent/Compromise Decree that the 2nd Respondent would pay the 1st Respondent USD 60,000 for the dishonored cheques, and also it was the Compromise Decree that the 2nd Respondent would compensate the 2nd Respondent with the said USD 60,000 by offering to the 2nd Respondent the three motor vehicles and trailers with Registration no's T512 (TRUCK), T298 AVX (TRAILER), T518 TRUCK, T436 ATD TRAILER, and T479 AMD, TRUCK, T 287 AVX TRAILER, herein referred to as "the Three Vehicles and Trailers". The Applicant is submitting that the said Compromise Decree was fraudulent in that the Seven Vehicles namely, Eicher Tippers with Registration Nos T312CQJ, T290CQJ, TT305 CQJ, T264 CQJ, T902 CQR, T380 DBX and T376 DBX do not 2 belong to the 2nd Respondent but the Applicant herein. The Applicant claims that it had entered with the 1st Respondent, Africarriers Limited into a Hire Purchase Agreement for the purchase of the Seven Eicher Motor Vehicles and one Richard Baretto the Managing Director of the Applicant's Company had signed the Hire Purchase Agreement. That the said Seven Motor Vehicles were delivered to the Applicant and it is the Applicant who was repaying the Loan/ the Hire Purchase instalments. The Applicant claims that it was paying the l s^ respondent through cheques and bank transfers, and Africarriers Limited used to issue receipts acknowledging the payments, and these receipts were issued in the name

of Bareto Hauliers (T) Limited, and that some receipts were being issued in the name of Trans Africa Logistics Limited by mistakes. The Applicant submits that up to 16th July 2015, the Applicant made the payments of THz 10,000,000. The Applicant, however did not state as to' what was the total purchase price for the Seven Vehicles, and how much was the instalments and the instalments were to be paid at which intervals. The Applicant states in its submissions that the seven vehicles were purchased in the name of the 2nd Respondent based on good faith, trust and friendship. The Applicant submits that the Hire Purchase Agreement is valid for Two years and expires on 5th October 2016, and that Commercial Case No. 49 of 2015 for which a Compromise Decree was entered was filed prematurely and fraudulently with the intention of depriving the Applicant of the Motor Vehicles which are still in its possession. The Applicant submits that even after the Commercial Case No. 49 of 2015 was filed, the 1st Respondent continued to receive payments for the Seven Vehicles from the Applicant. The Applicant claims that it purchased the three Motor Vehicles and Trailers with Registration no's T512 (TRUCK), T298 AVX (TRAILER), T518 TRUCK, T436 ATD TRAILER, and T479 AMD, TRUCK, T 287 AVX TRAILER from the 2nd Respondent', and has already paid the full •amount of the 4 purchase price, and all the original Registration Cards have been handed over to the Applicant by the 2nd Respondent. The Applicant submits further that the dishonored cheques of USD 60,000 were also issued by it, and contends that it had already substituted the dishonored cheques by cash payments and the 1st respondent had acknowledged receipt. The Applicant have therefore moved this Court to investigate into the claims of ownership of the 10 motor vehicles subject of the Compromise Decree entered into between the 1st Respondent and the 2nd Respondent into settling Commercial Case No. 49 of 2015. The Respondents filed a joint written submissions. I shall disregard the objections raised in the submissions with regards to late service of the submissions in chief by the Applicant to the Respondents, and also the font size of the submissions, as these objections ought to have been raised formally and not in the submissions. It should also be noted that all the annexures annexed to the submissions shall also not be considered as the Respondents ought to have annexed their evidence in support of their case in the counter affidavit. The Respondents submits that the Hire Purchase Agreement was entered between the 1st Respondent and the 2nd Respondent as shown in Annexure GFL2 of the Affidavit of one Jude Baretto in support of the application. The Agreement was for the purchase of the Seven Brand New Vehicles. The 1st Respondent submits that it received the payments of THz 10,000,000 from the Applicant, but these payments were being effected by the Applicant on behalf of the 2nd Respondent, and not on the account of the Applicant. The Respondent submits that the signature of Mr. Richard Bareto in Annexure GFL 2 to the affidavit of Jude Bareto in support of the Application, that Mr. Richard Bareto was signing as the representative of Trans Africa Logistic Limited and not as the Managing Director of the Applicant's Company. The Respondents submits, it is not true that the Compromise Decree entered between the 1st Respondent and the 2nd 6 Respondent was arrived at by collusion or fraud, and there is no truth whatsoever regarding the allegations of fraud and collusion. The 2nd Respondent submits that the Applicant wanted to purchase one of the Vehicle and Trailer but failed to pay the entire purchase price for the Vehicle. The Vehicles and Trailer are still registered in the name of the 2nd Respondent, and that the Applicant had also hired the other two Trucks and Trailers and the Applicant was paying rental charges to the 2nd

Respondent. The 2nd Respondent submits that there is no Sale Agreement between Trans Africa Logistics Limited and Baretto Haulers. The Trucks and Trailers are still registered in the name of Trans Africa Logistics Limited. No Sale Agreement or Transfer of ownership of the Seven Trucks were made in the name of Bareto Hauliers Limited, and the Hire Purchase Agreement for the purchase of the Seven Motor Vehicles were between Africarriers Limited and Trans Africa Logistic Limited. 7 The 1st Respondent applied for execution of the Decree requesting for attachment and sale of the 10 motor vehicles registered in the name of the 2nd Respondent herein referred to as “the Vehicles” , the Court through the Court Broker issued a warrant of attachment of the Vehicles., the Applicant herein, “Bareto Hauliers” filed an objection, under Order 21, Rule 57 of the Civil Procedure Code, Cap 33 R: E 2002. Bareto Hauliers claimed that they have an interest in the Vehicles attached since they claim to have purchased the three vehicles from Trans Africa Logistic Limited and have been paying the hire purchase instalments in its own name for the seven vehicles hence they are the owners of the 10 vehicles. The Applicant also contends that it has paid the USD 60,000 in replacing the cheques which were dishonored by the Bank. The Respondents have objected the claims by Baretto Hauliers saying that Baretto Hauliers has failed to satisfy the Court that it has interest in the Vehicles as required by Order XXI Rule 58 of the C.P.C which requires the claimant or objector to 8 adduce evidence to show that at the date of the attachment he had some interest, or was possessed of, the property attached. The counsel for the respondents argued that the Applicant did not annex to his affidavit the Certificate of Title of the Vehicles, proving that the vehicles were indeed registered in the Applicant’s name at the time of attachment. He said, the Certificate of Title of the Vehicles attached to the submissions of the respondents have all shown that all the 10 vehicles and the three trailers are registered in the name of the 2nd respondent. The Counsel submitted further that payments of THz 10,000,000 towards settlement of the hire purchase agreement between the 1st and the 2nd respondents and issuing the cheques in its name, attached to the affidavit of the Applicant is not a conclusive proof of registration of the vehicles in the name of Baretto Hauliers, I have carefully considered the submissions of both Counsels for the Parties, and I would say that the provisions of Order 21 Rules 57 to 62 of the CPC entitled the executing court to make 9 a summary enquiry so that the execution proceedings may not be unnecessarily delayed it being left to the parties concerned to have their rights determined by way of a regular suit. If a property is sought to be attached and a person claims to be in possession of it under a 'bona fide' claim of title, the court has to be satisfied that he has such a 'bona fide1claim. The language of Order 21, Rule 58 indicates that both the question of interest claimed as also the question of possession of the property can be raised and can be investigated by the executing court. Rule 58 provides that: "The claimant or objector must adduce evidence to show that at the date o f the attachment he had some interest in, or was possessed of, the property attached." The claim or objection to be investigated under Rule 59 is set out in Rule 57 as* follows: ....any property attached in execution o f a decree..... is not liable to such attachment...." 10 And the property will not be liable to attachment if the judgment-debtor has no saleable interest in it. Whether a judgment-debtor is or is not in possession of the property, if he has a saleable interest therein, such interest can be sold, then the property can be attached. Proceedings under Rules 59, 60 and 61 being more or less of a summary nature, they deal mainly with possession but a claim of an objector on the basis of

possession can be allowed only if he is in possession under a 'bona fide' claim of title. If the objector is in possession of the property, 'prima facie' it would be assumed that he has a right to such possession but if it is established that the objector is not in possession under a 'bona fide' claim of title and the judgment-debtor has a saleable interest in the property then there appears to be no good reason why that saleable interest should not be attached and sold. I am inclined, therefore, to agree with the argument of learned counsel for the Respondents that under Rule 62 the decision must be confined to the question of who was in possession of 11 the title on the date of the attachment. Rule 59 does require that the Objector or the Applicant must prove to the Court that at the time of attachment the properties attached were registered in its name, and that the judgement debtor did not have a selable interest in the properties. In objection proceedings the claimant has to assert if he wants to save the property >that the judgment-debtor has no saleable interest in the property and though the proceedings under Order 21, Rules 57 to 62 being summary proceedings the court may not enter into an elaborate enquiry into the question of title the court will have to be 'prima facie' satisfied that the person objecting to the attachment and sale was in possession under a 'bona fide' claim. The claim of the decree- holder to proceed against the property and have it sold in satisfaction of his decree is valid herein as 1st and 2nd respondents managed to establish that the judgment-debtor i.e. Trans Africa Logistics Limited had a saleable interest in the vehicles at the time of attachment, in that the Hire Purchase Agreement was entered between the 1st and the 2nd 12 Respondents, all the vehicles were registered and are still registered in the name of the 2nd Respondents. The Applicant has not shown any proof as to why it was making payments in its name paying for the vehicles which were purchased by the 2nd Respondent from the 1st Respondent. The Applicant did not produce any Sale Agreement or any other proof evidencing that the 10 Motor Vehicles were sold to it by the 2nd Respondent before the date of attachment. There were no prima facie evidence adduced by Baretto Haulierin in satisfaction of Rule 58 of Order 21 of the Code that it was in possession of title to the vehicles on the date of the attachment, and failed to establish that the judgment-debtor i.e. Trans Africa Logistic Limited had no saleable interest in the vehicles at the time of attachment. No proof has been adduced by the Applicant to show that the Consent Decree entered between the 1st and 2nd Respondent in Commercial Case No. 49 Of 2015 was fictitious and fraudulent and that the Consent Decree was entered in order to defraud the Applicant of the possession of the 10 vehicles and the 13 three trailers. In any case a Consent Decree cannot be set aside by an Order under Order 21 Rule 58 of the CPC. In the circumstances, the Application is dismissed with cpsts. DATED at DAR ES SALAAM this 30th day of OCTOBER, 2015 MANSOOR JUDGE 30™ OCTOBER 2015 14

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