

TANZANIA / JUDGMENT

db shapriya co ltd vs regional manager 2011 tzhccomd 2079 1 march 2011

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TZHCCOMDDECIDED
1 March 2011

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT DAR ES SALAAM
MISCELLANEOUS COMMERCIAL CASE NO.6 OF 2010 DB SHAPRIYA &COMPANY
LTD..... APPLICANT VERSUS REGIONAL
MANAGER.....RESPONDENT Date of hearing of an application: 29/10/2010
Date of the last Order: 17/02/2011 Date of Ruling: 01/03/2011

RULING

MAKARAMBA J; On the 6th day of October 2010, the Applicant filed in this Court a Chamber Summons under Order XXI Rule 57 and 59 and section 95 of the Civil Procedure Code, Cap.33 R.E 2002 and any other enabling provisions of the law. The Application is supported by the affidavit of JUSTINIAN BYABATO, stating the ground upon which the prayers are to be granted and other facts adduced at the hearing. In the application, the Applicant is praying for among 1 others prayers that this Court be pleased to order that Account No. 01J1042981800 at CRDB Bank Tower Branch attached through the Garnishee Order dated 30th September 2010 signed by the Registrar of Commercial Court is not liable to such attachment for not belonging to the Judgment debtor. On the date set for the hearing of the application, the petitioner's Counsel chose to add two more grounds, namely, that the Garnishee Order was wrongly issued without being preceded with Garnishee Order nisi, and that the judgment debtor was condemned unheard. Mr. Kilindu, Learned Counsel for the Respondent in his reply submissions objected to the manner in which the Learned Counsel for the Petitioner raised these two other grounds arguing that parties are bound by their pleadings. Mr. Kilindu submitted further that the application before this court was to the effect that the amount attached does not belong to the judgment debtor and therefore all the submissions not related to that ground are not sustainable in law since they are not raised in the application and indeed the affidavit intended to support the application does not support these other grounds. Mr. Kilindu prayed that the Court should not consider all issues other than the account number not belonging to the judgment debtor since they are completely outside the ambit of the present application. I have carefully considered the other grounds raised by the 2 Petitioner's/Applicant's Counsel and the submissions of Learned Counsel for the Respondent in objection to them. In my view, much as the additional grounds raised by Counsel for the Petitioner in the course of making his submissions are not supported by the pleadings, they have

not caused a miscarriage of justice as the Respondent has not been caught by surprise. Furthermore, the additional grounds raise some pertinent issues relating to the procedure of execution. In the circumstances I shall consider them. However, I shall first consider the submissions of Counsel on the main ground in the application that the account number attached by the garnishee order does not belong to the judgment debtor. The gist of the Petitioner's Counsel argument is that the account attached belong to TANROADS and not to the Regional Manager Lindi who is the Judgment Debtor. It was the further argument of petitioner Counsel that the mere fact that the account attached was named in the contract, the subject of the proceedings that resulted to the contested decree does not make the Regional Manager Lindi its owner and therefore if the Decree holder wished to attach would have attached the account belonging to the Judgment debtor. The Petitioner's Counsel submitted further that the Regional Manager TANROADS Lindi in the contract signed on behalf of the CEO TANROADS and therefore it is the latter who was to be sued in respect of any dispute arising from that matter so that the Respondent could benefit from that account. Mr. Kilindu in reply 3 submitted that as per para 1 to 4 of the affidavit of the Applicant, the Applicant make admission that he was involved in dispute with Respondent and therefore the Applicant cannot object to the attachment of the Bank Account while aware of being a party to those proceedings. Mr. Kilindu submitted further that the contract "Annexure A" to the counter affidavit was signed on behalf of CEO TANROADS by Regional Manager Lindi for the project for rehabilitation of the regional roads in Lindi, that is why the Regional Manager Lindi had to supervise it. Mr. Kilindu submitted further that the account number on which this application is based was provided by TANROADS when demanding from the respondent's Bank, Exim Bank, the account of Tshs. 113,266,400/= when the Applicant wrote to the respondent Bank demanding the money because the respondent had not performed. Mr. Kilindu submitted further that the amount of Tshs. 113,266,400/= which was subsequently paid and credited to the account of TAN ROADS, which is the account the subject of those proceedings, is part of the sum this court has decreed should be paid by TANROADS. The issue before the court is whether the account attached belongs to the Judgment Debtor. In trying to answer this question we have to trace the basis of the proceedings which gave rise to the order which is now being challenged by the Applicant. The Applicant, Regional Manager Lindi TANROARDS as the Applicant's Counsel rightly submitted signed the contract the subject of the proceedings 4 that resulted to the decree being challenged, on behalf of the CEO TANROADS. The contract was for the rehabilitation of regional roads in Lindi which works were supervised by Regional Manager Lindi. The account, the subject of the attachment order was provided by TANROADS. This goes to show that in so far as consideration for the contract as concerned it was CEO TAN ROADS who was to provide on one part. The Applicant's Counsel did not tell this Court anything on the fact of the account number on which the Application is based was provided by TANROADS when demanding from the Respondent's Bank, Exim Bank the account of Tshs. 133,266,400/= which sum is part of the amount this court has decreed should be paid by TAN ROADS. With due respect to the Applicant's Counsel the issue before this court is not who is the owner of the account or who should have been sued. The issue is whether there was consideration for the contract. The Applicant's Counsel did not tell this court if the Regional Manager Lindi has his own finds or whether he operates a separate account apart from the one

provided by TAN ROADS for retaining funds for disbursement towards the road rehabilitation project he was undertaking in Lindi. In any event the Regional Manager does not dispute the fact that he signed the contract on behalf of CEO TANROADS. The issue at this stage is not whether CEO TANROADS should have been sued or whether the Regional Manager Lindi is the owner of the account 5 attached. The main issue for consideration is the fact that the Regional Manager Lindi signed a contract on behalf of CEO TANROADS who provided the account wherein money was credited. The argument by the Applicant's Counsel that the Regional Manager Lindi is not the owner of the account attached and that if the Respondent wanted to benefit from that account should have sued the CEO TANROADS and not the Regional Manager flies in the face of the Principal-Agency relationship. The Regional Manager Lindi was responsible for supervising the project on behalf of CEO TANROADS and therefore was perfectly a party to the contract. The doctrine tracing comes into play also. In these proceedings since the account, the subject of this proceeding was provided by CEO TANROADS. In this proceeding the main issue is not owner of the account but the tracing of the money deposited in an account, which the Applicant is now trying strenuously to deny so as to prevent the Respondent from benefiting from the fruits of its hard earned labour. The Applicant cannot accept having the Respondents funds deposited in an account provided by CEO TANROADS by coming up with arguments absent ownership of the account or who was a party to the proceedings, in my view, the account was cumbrously provided by CEO TANROADS; money demanded by the Applicant was deposited in that account, and which now is part of what the Respondent is demanding from the Applicant. With due respect the Applicant's Counsel is trying to question at this 6 With due respect to the Applicant's Counsel trying to question at this stage whether it was wrong for the Regional Manager to have been sued is trying to assist the obvious. In any case this should have been raised with the Arbitrators. Furthermore, in my view the issue of ownership of the account attached is misplaced since it is TANROADS which provided it to the Respondents when demanding from them for sums of money towards non-performance. In the event and for the foregoing reasons I dismiss the objection by the Applicant. I shall now turn to consider albeit very briefly the argument of Counsel on the additional grounds raised by the Applicant's Counsel in the course of his submissions. The Applicants Counsel argued that the Garnishee Order absolute was wrongly issued without being pleaded with a garnishee order and further that it was issued by the Registrar contrary to the requirement of the law. Mr. Kilindu in reply submitted at length on the procedure of issuing Garnishee Order nisi/absolute which he says do not exist in our Civil Procedure code, as the procedure for hearing application for execution is contained in Order XXI Rule 9 to 15 of the Civil Procedure Code. Mr. Kilindu submitted that in the Rules nowhere it is stated that the decree will be decree nisi or absolute. Furthermore, the only exception when application for execution is made one year after the date of decree, the Judgment Debtor can be called to show cause as per order XXI Rule 20(1)(a) of the Civil Procedure Code, otherwise where 7 application is before this Court in less than one year, the presence of Judgment Debtor is not required. Mr. Kilindu submitted further, in this case of money decree, immediate execution can be issued. Mr. Kilindu surmised that the argument by Applicants Counsel that the Judgment Debtor was condemned unheard is not material as it is not governed by our law. I am at one with Mr. Kilindu's submissions. That is the position of the law. The procedure for garnishee nisi or

absolute is a matter of practice. It is not a legal requirement. In that event this ground fails and I shall dismiss it accordingly. The Applicant's Counsel submitted further that the manner of execution was not proper way of executing orders against the court or government Debt such as TANROADS which is a Government Agency which does not own money of its own but get funds from the Government. The Applicant's Counsel submitted further that for that matter the procedure used to execute decree against the government could have been followed in terms of the Government Proceedings Act 1967. Mr. Kilindu in reply submitted that TANROADS is a creature of statute capable of suing and being sued on contract and to that extent it is a separate institution from Government. It was the further submission of Mr. Kilindu that the Account Number attached decree not belong to the Government but to TANROARDS which operates it as it deems fit and does not need 8 account and operates it, stated that when TANROADS applied to open an account with CRDB it filed an application form (Annexure B in the Counter Affidavit) which resulted from the resolution of TANROARDS Board and nowhere it says it has to seek government authority. Mr. Kilindu hinted that it is common knowledge that Government money is banked at Central Bank and if it were the case then if the attachment order was government account it would have been opened with the Central Bank where government money is barked and not normal banks. The arguments that TANROADS is a government institution which get funds from the government flies with face of the fact that it operates its own account under terms into binding contracts with other organizations and is capable of being sued or suing in its own name. As correctly submitted by Mr. Kilindu, TANROADS is a statutory creature. No amount of arguments in my view will convert TANROARDS into government institution merely by the fact that it gets financial disbursement from the government. The fact of independence of action and being responsible for its own action distance TANROADS, the Applicant Counsel is arguing that it gets funds from Government. In that respect if TANROADS were a government institution in the sense in which Government is reflected in the Government Proceedings Act, then it would have been the attorney general and the Ministry of Infrastructure Development which should have concluded the contract for project of rehabilitation of Lindi road and not TANROADS. With due respect 9 reflected in the Government Proceedings Act, then it would have been the attorney general and the Ministry of Infrastructure Development which should have concluded the contract for project of rehabilitation of Lindi road and not TANROADS with due respect to the Applicant's Counsel, one can not submit that it is the TAN ROADS which was apply to the contract which gave rise to the proceedings leading to the challenged order and at the same time deny liability on the ground that it is a government institution and therefore not liable to normal procedure of execution as other private organs. In the event and for the foregoing reasons, the grounds that TANROADS is a government Agency and that for not amenable to the procedure of execution by garnishee order fails and stands dismiss. In the upshot the application fails and is hereby dismissed with costs. Order accordingly. ' R.V. MAKARAMBA JUDGE 01/03/2011 10 Ruling read in chamber this 1st day of March 2011 in the presence of Mr. Abubakar, Advocate for the Petitioner and Mr. Kilindu, Advocate for the Respondent. R.V. MAKARAMBA JUDGE 01/03/2011 Words count: 2,277 11

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CASE PAGE	https://chat.esheria.ai/case-law/tanzania/db-shapriya-company-ltd-v-regional-manager-garnisheeproceedings-tzhccomd-2011

Prepared on 14 October 2026 · Esheria