

TANZANIA / JUDGMENT

dial quotaquot cab tanzania limited vs rashid s kinkoro others 2018 tzhcld 5 16 january 2018

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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT PAR ES SALAAM MISCELLANEOUS
APPLICATION NO. 313 OF 2017 DIAL "A" CAB TANZANIA LIMITED..... APPLICANT
VERSUS RASHID S. KINKORO..... ..1st RESPONDENT DIAL A
CAB..... ..2nd RESPONDENT TAMBAZA AUCTION MART AND GENERAL
BROKER..... 3rd RESPONDENT

RULING

Date of Last Order: 28/12/2017 Date of Ruling: 16/01/2018. L.L.Mashaka. J. This is a ruling in respect of an application filed by the applicant under certificate of urgency, objecting the execution order and attachment thereto of her property on the reason that she was not party to the Labour dispute no. CMA/DSM/KIN/R.352 of 2017 at the Commission for Mediation and Arbitration [herein after referred to as CM A]. The application is made by way of Notice of application and Chamber Summons under Rules 24(1),24(2)(a)(b)(c)(d)(e),(f),3(a)(bXc)(d),24(11),55(1) and (2) of the Labour Court Rules, GN 106 of 2007 and Order XXI, Rule 57(1) &(2) and Section 95 of the Civil Procedure Code Cap 33 supported by affidavit deposed by Rahim Suleiman Msaki. During hearing the applicant was represented by Mr. Issaya Peter, Advocate, Mr. Timothy Alvin Kahoho, Personal Representative appeared for the first respondent while Mr. Ramadhani Chaurembo, Advocate who represented the third respondent and the second respondent failed to enter appearance on the date the matter was heard. This is according to the Court proceedings. Learned Counsel for the applicant submitted to the Court that they have filed an application supported by a certificate of urgency and affidavit of the applicant praying for among other things, that the applicant is about to suffer grievous loss for the 1st respondent is in the final stage of execution of the case Execution No. 294 of 2017. That at the time they filed the application, the 1st respondent was at the final stage of execution but as of now the 1st respondent has already attached the motor vehicle registration T. 436 DFQ make Toyota Noah. Learned Counsel argued that the said property attached by the 1st respondent has been wrongly attached because the applicant was not party to the case which was instituted by the 1st respondent in labour dispute no. CMA/DSM/KIN/R.352 of 2017. Learned Counsel contended that

unless this Court intervenes and grants necessary orders sought in Chamber Summons in which among other things the applicant prays for the Hon. Court to release and declare that the applicant's warrant for attachment of movable property in execution of a decree for money in the Execution Application No. 294 of 2017 is not subject to execution for an order in which the applicant is not party to the application. That as affirmed by the applicant's Principal Officer deponed that the applicant was incorporated under the Laws of Tanzania on the 28th November 2011 to undertake business in Tanzania Mainland. The Certificate of Incorporation issued by the Assistant Registrar of Companies is attached as Annexure AFF - 1 of which the applicant craves to make reference to. That on the 25th August, 2017 the applicant was served with warrant of attachment of a movable property from the 1st & 2nd respondents, demanding the applicant to pay a debt of Tshs.8,028,800/= which emanates from Execution Application No. 294 of 2017. A copy for execution and payment of the debt is attached and marked as Annexure AFF- 2. The applicant prayed to the Court to make reference to the same. That the applicant was not a party to the dispute which was filed before the CMA in the labour dispute no. CMA/DSM/KIN/R.352/17, which awarded the 1 respondent and he executed the order. That there has never been any matter filed against the applicant before the CMA Dar-Es-Salaam Zone or before this Hon. Court or any other judicial body between the applicant and the 1st respondent to warrant the execution at issue. That the applicant has never been served any summons by the 1st respondent or his agent requiring the applicant to appear before the CMA or this Hon. Court or any judicial body between the applicant and the 1st respondent. Learned Counsel for the applicant submitted further that the execution against the applicant's property was incorrectly entered since the applicant was not a party thereto. As per chamber summons, the applicant prays to the Court to be pleased to issue an order directing that the property motor vehicle make Toyota Noah with registration number T 436 DFQ be released from attachment as the judgement debtor was not party to the said suit or application for execution in which the decree holder has executed. The applicant prays for any other relief the Court may deem fit to grant and the costs for this application be borne by the respondents. In response Mr. Kahoho, Personal Representative for the first respondent submitted that there was ample evidence in establishing similarities of both the applicant and the 2nd respondent. That the first one being the employment package involving the applicant and the 2nd respondent on one hand and the 1st respondent collectively and prayed to refer document marked as Annexure K-3. That the said document K-3 collectively, at the top of the document it bears the name of the second respondent and at the same time the applicant appearing to have employed the 1st respondent as a Senior driver with effect from 1st March

2013. He prayed the document marked as Annexure K-3 be admitted in Learned Counsel for the applicant did object to the admittance of Annexure K - 3 as exhibit and argued that the emblem at the top of the document was not carrying the name of the applicant but insisted that he was not objecting the genuineness of the documents hence be admitted by the Court. The Court overruled the objection as Learned Counsel for the applicant did not doubt the genuineness of the document hence document with the mark Annexure K-3 which is offer of employment admitted in evidence and marked as Exhibit D1. Personal Representative for the 1st respondent further submitted that according to the Exhibit D 1

clearly proves that the 2nd respondent was a short name of the applicant. That in fact it is addressed to the 1st respondent and express pleasure to employ the 1st respondent for Tshs. 400,000/=per month. Another document is the Drivers Code of Conduct, that it bears a letter head in the name of the 2nd respondent and also requires the 1st respondent to comply with the terms offered by the applicant which is Dial "A" Cab Tanzania Ltd. He further argued that there is one letter written to the 1st respondent by the applicant, which is Annexure K-4. That the letter which was addressed to the 1st respondent and bears the letter head of the 2nd respondent concerns salary increment as informed by management of Dial 'A' Cab Tanzania Ltd signed by Mr. Rahim Msaki. That there is an official stamp of the applicant and prayed the Annexure K-4 be admitted as exhibit. Learned Counsel for the applicant did not object on the same, and the Court admitted document Annexure K-4 and marked as Exhibit D2. In that regard therefore Mr. Kahoho argued that the documentary evidence also confirm the applicant having assimilated the name of the 2nd respondent and the same is affirmed by the pleadings of one Rahim Msaki who is the Principal Officer of the applicant at paragraph 2 of his affidavit. That it is further proved by furnishing a copy of Certificate of Incorporation No. 87482 issued by Assistant Registrar of Companies on the 28th November, 2011. That it is affirmed by the 1st respondent at paragraph 2 of counter affidavit, by furnishing the copy of termination letter signed by one Halima Tesha referred letter marked Annexure K-1 and prayed the same to be admitted as exhibit. Learned Counsel for the applicant had no objection on the same and the Court admitted Annexure K-1 and was marked as Exhibit D3. Personal Representative further argued that the Exhibit D3 bears the letter head in the name of the 2nd respondent, it is signed by Ag. Managing Director Halima Tesha and there is an official stamp of the applicant. That this establishes cohesion of the applicant with the 2nd respondent. That the applicant starts with Dial "A" Cab which also reads as the letter head Dial 'A' Cab on the letters tendered as exhibits. Therefore the 1st respondent was right to sue the 2nd respondent as it has been used by the management as a synonym of the applicant. ^ He submitted that though the 2nd respondent is not represented here but the applicant was seeking for this Court for an order to release the motor vehicle and that Learned Counsel was appearing to represent the applicant and at the same time seeking an order to the 2nd respondent. Following such submission by the Personal Representative for the first respondent Learned Counsel for the applicant raised an objection that he was representing the applicant and not the 2nd respondent. The Court took note on the same that Learned Counsel was representing the applicant and not the 2nd respondent thus the objection was sustained. Mr. Kahoho submitted further that both the applicant and the 2nd respondent were the same company. That it was the fault of the applicant to have exercised reluctance to appear before the CMA after receiving the suit documents and it is undisputed that the 1st respondent filed on the 04th April, 2017 a Labour dispute no. CMA/DSM/ILA/R.352/17 against the 2 respondent. In that same suit the 1st respondent was claiming inappropriate payment of salaries, annual leave, overtime and other allowances and certificate of service. He elaborated that, the 1st respondent served the dispute documents through CUM of the Tanzania Posts Corporation under CUM service receipt no. 99384 dated 24th March, 2017 and prayed to tendered the

CUM receipt of acceptance as exhibit. Learned Counsel for the applicant objected that the receipt of acceptance was not directed to the applicant and did not bear the name of the applicant and that there was a name of accepting officer called Doto. From that he argued that there was no such officer at the applicant's office. The Court overruled the objection because Learned Counsel did not doubt the genuineness of the receipt of acceptance, only that it was not directed to the applicant hence the CUM receipt of acceptance was admitted and marked as Exhibit D4. Personal Representative for the first respondent submitted further that, later the 1st respondent delivered the suit document by delivery note number 122118 dated 28th March, 2017 by the Tanzania Posts Corporation and prayed the same delivery note be admitted in evidence. Learned Counsel for the applicant objected the same that, the said document was not part of his counter affidavit and did not have the copy of the delivery note. The Court therefore sustained the objection that there was no such document attached to the pleadings counter affidavit of 1st respondent and also the Court record has no such delivery note hence the delivery note was not admitted as exhibit. Mr. Kahoho further argued that after the service of the suit to the MD who is Mr. Msaki, he never replied or appeared before the CMA. That the CMA decided to hear the dispute ex-parte and delivered the award on the 16/06/2017. That the 1st respondent struggled to serve the applicant the CMA award by CUM receipt No. 102329 dated 16/06/2017 and refused to accept the CMA award. They prayed the CUM receipt no. 102329 be admitted as exhibit. Learned Counsel for the applicant had no objection on the same admission of the said document. The Court admitted the CUM receipt no. 102329 dated 16/06/2017 and marked as Exhibit D5. Mr. Kahoho argued further that the refusal by the applicant to accept the CMA award, led to the filing of execution application by the 1st respondent which led to the Court appointing the 3rd respondent towards execution of the CMA award. That the 3rd respondent fulfilled the duty to attach the motor vehicle which bears the name of the 2nd respondent. That it was surprising on the part of the first respondent on the claim by the applicant that they were not party to the labour dispute at the CMA and Execution Case No. 294 of 2017 while it was their fault for non- appearance. In law and fact, Mr. Kahoho argued that the applicant cannot escape liability in complying with the CMA award nor deny being a party to the 8 Execution Case No. 294 of 2017, notwithstanding the fact that the applicant was not party to the ex-parte at the CMA, then why was he praying for release of the motor vehicle. That the application was bad as it intended to deprive the 1st respondent his award by the CMA of Tshs. 8,028,800/=. The first respondent therefore strongly prayed to this Hon. Court to consider that the applicant and the 2nd respondent are one company and that they have to comply with the CMA award and pay the money due to the 1st respondent. In rejoinder Learned Counsel for the applicant argued that the applicant was a body corporate duly registered under the Laws of Tanzania under the Companies Act Cap 211 of RE 2002. As a registered company it becomes a separate legal person in law capable of being sued and to sue. Section 15(2) of Cap 211 RE 2002 provides for the legal personality of the Company after its incorporation. He further submitted that as a duly registered Company, referring to Exhibit D1, clearly shows that the 1st respondent was employed by the applicant who is duly incorporated under the Laws of Tanzania and not otherwise. Exhibit

D2 the same which has been quoted by the 1st respondent it bears the name of the applicant as Dial 'A' Cab Tanzania Ltd as per the official stamp of the Company. Going through Exhibit D3 the applicant is known as Dial 'A' Cab Tanzania Ltd and no other name. Learned Counsel for the applicant did plead that he recognize the applicant as Dial 'A' Cab Tanzania Ltd and there is no way if the applicant 9 could have been served summons addressed by his name would have hesitated to appear before any Court if the summons were duly addressed. He insisted that the applicant had never been sued by the 1st respondent. Learned Counsel argued going through the exhibit D1, the 1st respondent was employed by the applicant and all the documents suffice that the 1st respondent knows who his employer was. For such reason, the applicant countered that, he was not served summons to appear before any Court or the CMA. He insisted that all what the 1st respondent contended that the summons were served to the applicant did not hold any water for Exhibit D5 shows that it was served to another person and not the applicant. Learned Counsel for the applicant concluded that the prayers sought under the chamber summons and affirmed by the deponent in affidavit be granted. Having gone through the submissions by both parties and Court records, the issue for determination by this Court is whether or not the applicant was party to the CMA proceedings thus be held responsible to pay the decretal sum of the CMA award at Tshs 8,028,800/= accelerated by the execution process by this Court hence the attachment order. At the outset this Court makes it clear that, what is seen in the applicant's pleadings first is Annexure "AFF-2" execution Form issued by this Court on 24/08/2017, directed to the second respondent. The execution is cited as Execution No.294 of 2017 between Rashid S. Kinkoro Vs. Dial 'A' Cab. It is from the Execution Case the applicant's property was 10 attached. There is no where the applicant Dial 'A' Cab Tanzania Ltd appears as a party to the proceedings, and the 1st respondent has not proved throughout their submissions or by the documents admitted in evidence that at the CMA the applicant was a party to the labour dispute, there is no CMA Form No. 1, no CMA award attached thereto or tendered during the hearing before this Court nor pleaded in the Counter affidavit of the 1st respondent. There is no evidence on the same hence improper to attach the property of the applicant. According to Exhibit D1 which is a letter to offer employment with Dial 'A' Cab Tanzania Ltd (DCTL) the applicant to Mr. Rashid Sekiondo Kinkoro the 1st respondent. This is proof that the applicant was the employer of the 1st respondent as per the letter to offer employment. Also the other document Exhibit D2 shows the document is signed by one Rahim Msaki on behalf of Dial 'A' Cab Tanzania Ltd and there is an official Stamp carrying the same name. The applicant is a registered Company incorporated under the Law of Tanzania with Certificate of Incorporation No. 87482 dated the 28th November, 2011. Also refer the letter of notice of termination dated 11/04/2017 addressed to the 1st respondent and signed by Ag. Managing Director, Exhibit D3 and letter for salary increment signed by Rahim Msaki on behalf of Dial 'A' Cab Tanzania Ltd Exhibit D2. The first respondent's exhibits tendered and admitted as exhibits bear the emblem of "Dial A-Cab" at the top of the letter and a rubber stamp of Dial 'A' CAB TANZANIA LTD at the bottom of the same. This means the proper name of the applicant is as reflected on the official rubber stamp and on the space for signature below. The emblem

on top of the letter is a letter head and not the proper name of the applicant. The proper legal name of the applicant is as seen on Exhibit D1 the letter to offer employment. A company has a legal personality under the law to sue and be sued. The applicant is legally known as Dial 'A' Cab Tanzania Ltd which is a different legal person with the 2nd respondent Dial A Cab under the law. Therefore the proper legal entity who was the employer of the 1st respondent is the applicant and not the 2nd respondent. On the issue that the applicant rejected the summons, the exhibits by the first respondent on summons were addressed to the second respondent and there is no proof of service thereto. In Exhibits D4 and D5 the first respondent claims that they were rejected, but what is seen is that the same was addressed to the second respondent not the applicant and there is no proof that the applicant was properly served. The 2nd respondent who was party to the labour dispute at the CMA and Execution Case No. 294 of 2017 is a non-existing legal entity. It has been the decision of this Court on executing awards against a party not to the labour dispute from the very beginning or not sued from the very early stage that the same nullifies the attachment or execution process. In the case of The Registered Trustees of Umoja wa Wazazi Vs. Uswege Msika and 2 Others, Misc Application No 19 of 2017, HCLD at Mbeya[unreported] the Court held that " it is the responsibility of the one who prosecutes his case to ensure he prosecutes the proper party and not otherwise. Due to this omission, now the 1st respondent is left with an unexecuted award in possession". The Court finds the first respondent wrongly prosecuted the attachment of the applicant's property, motor vehicle make Toyota Noah with registration No. T436 DFQ in Execution No.294/2017 between Rashid S Kinkoro Vs. Dial A. Cab whereas the applicant in this case was not a party thereto. The Court doth order the release of the attachment of motor vehicle make Toyota Noah with registration No. T436 DFQ owned by the applicant Dial 'A' Cab Tanzania Ltd forthwith. For meeting good ends of justice between the parties, using powers vested in this Court under Rule 55C1) and (2) of the Labour Court Rules GN 106 of 2007, this Court grants the first respondent leave to file a fresh labour dispute against the proper legal entity to the CMA within thirty days from the delivery of this ruling if he still intends to pursue the dispute, by suing the proper legal entity his employer. Therefore, the present application is merited and granted. No order to costs. So ordered according1"

L.L.Mashalca • JUDGE 16/01/2018 13

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