

TANZANIA / JUDGMENT

EFFICIENT FREIGHTERS T LTD VS OMAX FERRO ALLOYS ZAMBIA LTD MISC

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TANZLIIDECIDED
1 January 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA COMMERCIAL DIVISION AT
PAR ES SALAAM MISC. CIVIL APPLICATION NO. 10382 OF 2024 (Arising from Commercial Case
no. 9541 of 2024) BETWEEN EFFICIENT FREIGHTERS (T) LIMITED..... APPLICANT
VERSUS OMAX FERRO ALLOYS ZAMBIA LIMITED..... RESPONDENT EXPARTE
RULING Date of Last Order: 03/06/2024 Date of Ruling: 04/06/2024 GONZI, J. Under Certificate of
Urgency, the Applicant filed this application seeking for orders that Exparte:

1. Sufficient conditions exist to warrant the court to dispense the requirement to serve notice to the respondent before hearing of the application inter partes for interim orders.
2. That this Honourable Court be pleased to give an order for attachment of the Respondent's cargo (Furnace Equipment and Machinery in CKD Form) estimated to be worthy approximately USD 50,000.000 which is currently located in Dar es Salaam for transit purposes under Sea Way Bill No. MEDUJ6337698 and having Delivery Order No. DO026362024DAR pending the final determination of the main suit.
3. Any order that this Honourable Court deems fit and just to grant. Inter partes:
 1. That this Honourable Court be pleased to give an order for attachment of the Respondent's cargo (Furnace Equipment and Machinery in CKD Form) estimated to be worthy approximately USD 50,000.000 and carried in Containers No. MEDU7575078 AND DRYU9401917 which are currently located in Dar es Salaam for transit purposes under Sea Way Bill No. MEDUJ6337698 2 and having Delivery Order NO.D0026362024DAR pending the final determination of the main suit.
 2. Any order that this Honourable Court deems fit and just to grant. The application was made under Order XXXVI Rules 6(a), (b), 6(2) and 7(1) and (2), Section 68(c) and (e) and 95 of the Civil Procedure Code Cap 33 R.E 2019. It was taken at the instance of Godwin Attorneys and supported by an affidavit of Benjamin S. Makoy. On 31st May 2024, the case was called for necessary Orders and Mr. Moses Mwitete, learned advocate appeared for the Applicant whereas the Respondent was absent. Mr. Mwitete addressed the Court that the applicant had effected service to the Respondent by way of DHL as the Respondent's offices are in Zambia. He produced in Court proof of service by DHL effected on 30th May 2024. He prayed to be

heard exparte as the application was extremely urgent. The Court was not impressed by the service done in the last 24 hours before the case came in court despite the summons being issued to the Applicant 4 days earlier. Therefore, the Court directed Mr. Mwitete to immediately serve the respondent electronically by 3 way of email to the official e-mail addresses of the Respondent and the court adjourned the matter to 3rd June 2024 at 2:00pm so as to afford a chance for the Respondent to be served and take part in the proceedings against the respondent. On 3rd June 2024, Mr. Moses Mwitete, learned advocate appeared in Court and addressed the Court that, the Applicant had effected service to the Respondent by sending Email to the known official email addresses of the Respondent and that the e-mails were sent to the Respondent on 31st May 2024 at 5pm. He produced proof of service by e-mail to the Respondent. The Court being satisfied that the Respondent had been reasonably duly served, passed an order for the exparte hearing to proceed in this application. Mr. Mwitete, learned advocate for the Applicant adopted the affidavit of the Principal Officer of the Applicant Company and submitted that the Applicant has filed Commercial Case No. 9541/2024 against the Respondent and which is still pending in this Court claiming from the Respondent US Dollars 97,611.22 from an agreement of provision of transportation services to the respondent who is their customer and that the respondent has been using the services of the Applicant frequently for 4 clearance and transportation of its cargo at the Dar es salaam port. He submitted that the Respondent is a Zambian-based Company. Mr. Mwitete submitted that the Respondent has no properties in Tanzania except the cargo described in the chamber summons and which is in containers for transportation to Zambia. He argued that there is evidence that the Respondent intends to dispose of the properties by transferring the same to Zambia and that in the event the Applicant wins in the pending Commercial Case No. 9541/2024 against the Respondent, execution of the decree will be delayed or prevented due to the Respondent lacking properties in Tanzania. Therefore, he prayed that the orders in the Chamber summons be granted pending determination of the application inter partes. The Court ordered the Applicant to send to the Respondent by email a notice issued by the Court, notifying the Respondent of the date of delivery of exparte Ruling and to bring that proof of service in court before the Ruling could be delivered. Reading the affidavit in support of the application, the Applicant and the Respondent in January 2022, entered into an agreement for the Applicant to transport and handle Respondent's cargo from Serenje, Zambia to Dar es salaam Tanzania as well to clear the Respondent's cargo at the Dar es salaam port to various destinations in Zambia. The applicant alleged that in July 2022 the parties entered into an updated contract to formalize their ongoing business relationship and clarify the terms of their agreement. The applicant attached a copy of the Updated Contract with the Respondent as annexure EFL1. It was stated that after the Applicant performed her obligations under the contract, the Applicant sent invoices to the Respondent informing the respondent the outstanding debt and claiming to be paid and that the Respondent from time-to-time effected payments to the Applicant as evidenced by annexure EFL 2 being the Respondent's account statement from January 2023 to March 2024. However, there remains unpaid balance of USD 97,611.22 that remains unpaid by the Respondent. It is this balance payment outstanding which has made

the applicant file Commercial Case No.9541 in this court against the Respondent. The Applicant stated in the affidavit that under instructions from the Respondent, the Applicant is now in possession of containers described in the Chamber summons for the purpose of clearing them at the port and transporting them to the Respondent's plant at Serenje, Zambia. The applicant attached annexure EFL 4 being Email correspondences with the Respondent, Delivery Order NO.D00263620024DAR, Proforma Invoice 6 and TRA release order for the said containers with all the relevant transit details. The applicant is asking for the court to allow her to attach before judgment the Respondent's cargo in possession of the Applicant. It is apposite at this time to reproduce the relevant portions of the law under which the application is made: Order XXXVI Rule 6(1): "Where, at any stage of a 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 - (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 to appear and show cause why he should not furnish security. 7(1) where the defendant fails to show cause why he should not furnish security the court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached." 7 The provision has been widely interpreted by the courts within Tanzania and elsewhere in the common law jurisdictions. In the case of Sea Saigon Shipping Limited vs Mohamed Enterprises (T) Limited (Civil Appeal No.37/2005, [2005] TZCA 36 (11 August 2005) we can gather the following excerpts from the decision of the Court of Appeal of Tanzania about applicability of Order XXXVI rules 6 and 7 of the Civil Procedure Code: "one important element to be established before an order for attachment before judgment is granted, is the defendant's intention to obstruct or delay the execution of any decree that may be passed against him..... The general powers for attachment of property before judgment are under Section 68(b). The procedure for attachment before judgment is prescribed under Order XXXVI Rule 6. The powers for arresting a human being, that is, a defendant who is attempting to defeat the ends of justice are provided for under Section 68(a). The procedure for arresting such a defendant is prescribed under Order XXXVI Rule 1(b)..... Generally speaking, these grounds are applicable to applications for attachment before judgment under Order XXXVI Rule 6 and 7 although the defendant has first to show cause why he should not furnish security before his property is attached...." Again, in the case of Geipam Group Limited Versus Bondeni Seeds Limited, Misc. Civil Application No. 82 of 2022 decided by the High Court of Tanzania at Arusha by Hon. Kamuzora, J., this court held that: "The above provision prescribes the pre-requisite conditions upon which an application for attachment before judgment can be granted. The applicant will have to prove by affidavit that the defendant/respondent one, is about to dispose of the whole or any part of his property or is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court. Two, the defendant/respondent is doing so with intention to obstruct or delay execution of the decree which may be passed against him. It must be noted that, an order for attachment before judgment usually affects the rights of the owner of the property to deal with the same before any decision is made against him. Such an order

should not be granted on mere assertions and speculations without cogent and tangible evidence." 9 A more extensive judicial interpretation of the law on attachment before judgment is seen in the case of Raman Tech. & Process Eng. Co., v. Solanki Traders (5 ALL MR 44 (SC)). In this case, the Supreme Court of India was interpreting Order XXXVIII Rule 5 of the Indian Code of Civil Procedure which is similar to the Order XXXVI Rule 6 of the Tanzania Civil Procedure Code. With a view to expounding the law in this area so as to discern it and its applicability to the facts at hand, I would like to quote in extenso what the Supreme Court of India had to say on attachment before

Judgment:

"The object of supplemental proceedings (applications for arrest or attachment before judgment, grant of temporary injunctions and appointment of receivers) is to prevent the ends of justice being defeated. The object of Order 38 Rule 5 CPC in particular, is to prevent any defendant from defeating the realisation of the decree that may ultimately be passed in favour of the plaintiff, either by attempting to dispose of, or remove from the jurisdiction of the court, his movables. The Scheme of Order 38 and the use of the words to obstruct or delay the execution of any decree that may be passed against him in Rule 5 make it dear 10 that before exercising the power under the said Rule, the court should be satisfied that there is a reasonable chance of a decree being passed in the suit against the defendant. This would mean that the court should be satisfied that the plaintiff has a prima facie case. It is well-settled that merely having a just or valid claim or a prima facie case, will not entitle the plaintiff to an order of attachment before judgment, unless he also establishes that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that may be passed. Equally well settled is the position that even where the defendant is removing or disposing his assets, an attachment before judgment will not be issued, if the plaintiff is not able to satisfy that he has a prima facie case. A defendant is not debarred from dealing with his property merely because a suit is filed or about to be filed against him." The Indian Code of civil Procedure is a statute in parimateria to the Civil Procedure Code of Tanzania hence the judicial interpretation thereof forms a useful external aid of interpretation of the relevant Tanzanian legal provision since as a rule of statutory interpretation similar language in statutes with common purpose is interpreted in the same way. 11 The key take-aways from the above analysis of the case laws interpreting the provision on attachment before judgment in terms of Order XXXVI Rules 6 and 7 of the Civil Procedure Code are that:

- (i) There must be reasonable chance of a decree being passed in the suit against the defendant. That is to say that the court should be satisfied that the plaintiff has a prima facie case. (ii) The Plaintiff should also establish that the defendant is attempting to remove or dispose of his assets. (iii) The Plaintiff must establish that the removal or disposal of the assets by the defendant is being done with the intention of defeating the decree that may be passed against the defendant by obstructing or delaying its execution. (iv) The order should not be granted on mere assertions and speculations without cogent and tangible evidence.

- (v) That the Respondent has first to be given an opportunity to show cause why he should not furnish security before an order for attachment of his property before judgment can be eventually made. 12 I can add that, in terms of Rule 6(2) of Order XXXVI of the CPC, the Applicant is also required to specify the property required to be attached and the estimated value thereof, unless the court otherwise directs. I have taken time to consider whether the Applicant in the present application has a prima facie case as against the Respondent? I answer this in the affirmative. The Applicant has attached to the affidavit a copy of the agreement with the Respondent as EFL 1. Also, she has attached the statement of accounts as EFL 2 showing the way the Respondent was obliging by paying the Applicant for the debts under the agreement. The invoices claiming to be paid for services rendered all prove there is a prima facie case. At any rate as the Respondent has not filed counter affidavit nor appeared for hearing despite being served, the allegations by the Applicant are not opposed. The other requirement or consideration is that the defendant should be attempting to remove or dispose of his assets. In the case at hand the applicant has attached annexures EFL 3 and EFL 4 which show that the two containers and the cargo therein belong to the Respondent and that the same is for transit to Serenje, Zambia. Thus, the Respondent is about 13 to remove the property from Tanzania to Zambia, hence outside the jurisdiction of the Court. The other requirement is that there must be proof that the removal or disposal of the assets by the defendant is being done with the intention of defeating the decree that may be passed against the defendant by obstructing or delaying its execution. Now, this is a bit difficult to prove in the present case as the Respondent has not filed a counter affidavit despite being served. In absence of any counter affidavit, the statements in the affidavit stand undisputed. Hence this element is also proved. The other consideration is that the order should not be granted on mere assertions and speculations without cogent and tangible evidence. In the case at hand, the Applicant has attached cogent and tangible evidence to support her application. Annexures EFL1 and EFL2 show the prima facie case whereas annexures EFL 3 and EFL4 show the likelihood of the property being moved outside Tanzania thereby posing danger as to execution of the decree that may be eventually passed in the main case between the same parties. Without counter affidavit controverting the facts in the affidavit, there is sufficient evidence. 14 The other requirement is that the Respondent has firstly to be given an opportunity to show cause why he should not furnish security before an order for attachment of his property before judgment can be eventually made. That is the essence of this Court twice ordering the respondent to be summoned before hearing could proceed despite the application being brought under certificate of urgency. The Respondent failed to utilize the opportunity to show cause why he should not file security instead of order for attachment. In that regard, the uncontested application succeeds. In fine, I allow the application at hand.

- a) I do hereby order the attachment of the Respondent's cargo (Furnace Equipment and Machinery in CKD Form) estimated to be worthy approximately USD 50,000.000 which is currently located in Dar es Salaam for transit purposes under Sea Way Bill No. MEDUJ6337698 and having Delivery Order No.DO026362024DAR pending the final determination of Commercial Case No.9541/2024 filed by the Applicant against the Respondent and which is still pending in this Court.
- b) I make no order as to costs as the application proceeded exparte the respondent. 15 It is so ordered. Ruling is delivered in Court this 4th day of June 2024 in the presence of Mr. Moses Mwitete, learned advocate for the Applicant and in absence of the Respondent who was served with Notice of date of delivery of the Ruling. JUDGE 04/06/2024 16

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