

TANZANIA / JUDGMENT

agro processing and allied products ltd others vs asia ally zahoro 2003 tzhccomd 8 12 december 2003

COURT
TZHCCOMDDECIDED
12 December 2003

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT DAR ES SALAAM
COMMERCIAL CASE NO. 107 OF 2001 AGRO PROCESSING AND ALLIED PRODUCTS
LTD..... 1st RESPONDENT/DECREE HOLDER SAID ZAHOR t/a ESSAM BAKERY.....
2nd RESPONDENT/JUDGMENT DEBTOR UNYANGALA AUCTION MART & COURT
BROKER..... 3rd RESPONDENT/COURT BROKER VERSUS ASIA ALLY
ZAHORO APPLICANT/OBJECTOR Counsel: Mr. Tibaijuka for the Objector/
Applicant. Dr. Lamwai for 1st Respondent/Decree holder.

RULING

BWANA, J: It is not controverted that the Applicant/Objector and the 2nd Respondent/Judgement debtor are wife and husband. A suit was filed against the second respondent by the first respondent claiming a sum of shs. 26,514,025/48. That was in May 2001. On 10 July 2001 the parties entered a settlement wherein the second respondent admitted liability and agreed to pay the sum claimed. A schedule of payment was agreed upon and recorded in court. The deed of settlement contained a default clause. The second respondent/judgment debtor defaulted. The 1 first respondent was left with no alternative except to apply for execution. He obtained one. However before execution, the Applicant/Objector came up with an application which is the subject matter of this Ruling. Invoking the provisions of Order XXI Rules 57 and Section 95 of the Civil Procedure Code, 1966, the Objector states the following in her affidavit in support of the application Para 2: That in 1996 the Applicant/Objector stated to run business of producing bread for sale in the name of Essam Bakery as was approved by appropriate authorities and registered as a sole proprietor (copy of registration attached as A). Para 3: ... that in 1999 the applicant applied and was granted a loan of shs. 26,925,000/- from Finance and Enterprises Development Association Ltd. in order to increase and expand the business (a copy of the loan agreement attached as B). Para 4: The applicant having received the loan, constructed a factory at Ubungo area on plot No. 396 Block C, Dar es Salaam. Para 5: The said loan has not been fully paid by the applicant hence the Bakery factory is still under mortgage to the creditor. Para 6: Having personal problems, the applicant could not run the business smoothly hence in November 1999 decided to lease out the whole business, including business name and factory to... the judgment

debtor (a copy of the lease agreement attached as C). 2 Para 7: Since then the factory has been under the control of the judgment debtor under lease basis and not ownership... Para 8: That the applicant on 28 September 2003, was sent a notice of attachment of Essam Bakery as being a result of the judgment debtor failure to pay sh. 26,514,025/48 to the decree holder in Commercial Case No. 107 of 2001. Para 9: That the applicant has never transacted along side with the judgment debtor in connection with the demanded sum nor has ever been a party to Commercial Case No. 107 of 2001. Para 10: That the applicant is still the sole proprietor of Essam Bakery and the judgment debtor is operating it on lease basis. The foregoing averments attracted vehement opposition from one Gulama bass Husseinali Fazal Dewji, the Chairman of the Decree holder Company. He states in his counter affidavit inter alia, the following:- Para 2 (a): As to para 2 of the affidavit, I state that it is Said Zahor (the judgment debtor) who took the goods for Essam Bakery and purported to be the proprietor of the said Bakery.

- (b) ... the applicant and judgment debtor are husband and wife and the husband had authority to act for the bakery.
- (c) ... the applicant admits that the business known as Essam Bakery existed before she supposedly took it over. 3
- (d) ... Annexure B is inadmissible since it has not been duly stamped.
- (g) The loan is irrelevant in the present proceedings and that in fact the factory has not been mortgaged to anybody.
- (i) ...Annexure C is inadmissible since it is not duly stamped.
- (j) That as to para 7 of the Affidavit, I state that all the machinery and movable assets in the factory belong to Said Zahor ... I further state that this application is a conspiracy between a husband and wife to defeat the ends of justice.
- (l) Further to what is stated in (j) herein, I state that the properties are liable for the payment of the goods supplied to Essam Bakery and Said Zahor had ostensible authority to offer them as security as admitted by the applicant in para 6 of the affidavit when she swears that she lease the whole business including the business name and factory...
- (m) ... I state that the applicant is not the owner of the firm and that even if she was the owner, she allowed it to be used to incur debts thus the properties are liable for attachment. There was no reply filed to counter the strong averments as presented by way of a counter affidavit. Nor did the applicant file a submission as per schedule of events agreed upon by the parties by order of this court dated 20 October 2003. 4 The applicant seems to rely on annexures A, B and C to support her averments as contained in her affidavit. Annex. A is a purported extract from a register of business names. However the said extract is uncertified. Being a public document, it required certification. Failure to comply with that fundamental requirement makes that extract inadmissible. As such, there is no document deemed to support what the applicant avers in para 2 of her affidavit. Likewise Annexure B. The document does not fulfil the requirements of the law, in that it is not stamped in accordance

with the requirements of the Stamp Duty Act, 1972. Further, it is an uncertified copy of a purported original. For those reasons, that annexure B is in admissible. Annexure C - the Lease Agreement - contains another fundamental error which leaves me with no option other than not to do admit it. The said document is purportedly drawn and attested by M/S Kifunda & Co. Advocates. However, that is contrary to the provisions of the Notaries Public and Commissioners for Oaths Ordinance which prohibits a Notary Public who has drawn a document from attesting it. I must note at this stage that apart from the inadmissible annexure A, the applicant has not produced any proof of title ownership to the bakery machinery and equipment, the subject matter of the attachment. Under rule 57 of Order XXI of the Civil Procedure Code, 1966 the applicant is required to show that at the time of attachment of the property in question, she was vested with the title to the said property. Failure to do so is a fatal omission. The fact that she could have registered the name which was admittedly leased to the judgment debtor, that per se - it is my considered opinion - does not indicate that whatever is found in the premises belongs to her, applicant. Lastly, it is important to restate that the applicant and the judgment debtor are wife and husband. That fact has not been controverted. Essam Bakery does exist. According to para 6 of the affidavit and if one were to believe its contents, it is the applicant who passed over to the judgment debtor all the affairs of Essam Bakery. Therefore he cannot be said to be an impositor. He has, therefore under the law, the authority to use the name and property registered there under. There was no way the decree holder could be made aware of the internal arrangements between husband and wife who now claims one to be owner of the proper and the other a mere lessee. Be that as it may, still properties belonging to the same, Essam Bakery, were used as security in realising the loan from the decree holder. Having defaulted the judgment debtor cannot succeed to avoid liability. Likewise this application - it cannot succeed. It is therefore dismissed with costs. 1,331 words 6

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