

TANZANIA / JUDGMENT

said salim bhakhresa co ltd vs master of mv denler premier dsm port another 2004 tzhccomd 68 24 september 2004

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TZHCCOMDDECIDED
24 September 2004

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT DAR ES SALAAM SAID SALIM BAKHRESA & CO. LIMITED PLAINTIFFS/ APPLICANTS VERSUS

1. MASTER OF MV DENLER PREMIER, DAR ES SALAAM PORT
2. DENLER TRADE LIMITED, LONDON DEFENDANTS/RESPONDENTS C/O MR. DENLER PREMIER, DAR ES SALAAM The Plaintiff/Applicant's Chamber Summons filed on 14/9/2004 simultaneously with the main suit, prayed for orders:- The Honourable Court be pleased to issue an interim order restraining the Respondents/Defendant whether acting by their Directors, Officers, Servants or Agents, or any of them or otherwise, ji'om taking any measures to sail the Vessel MV DenIer Premier pending the hearing of the Application for injunction interparties. The Honourable Court be pleaded to dispense with the requirement of notice.
 - (a) The Respondents/Defendants whether acting by their Directors, Officers, Servants or agents, or any of them or otherwise, be restrained from taking any measures to sail the vessel MV. Denier Premier pending the determination of the main suit.
 - (b) Costs of this Application be provided for
 - (c) Any further reliefs the Court may deem just and equitable to grant. " The application is supported by an affidavit of Ramisetty Venkata Sreenivasulu and prosecuted by Mr. Kihwelo, Advocate. It is resisted by Respondents/Defendants represented by Mr. Chip eta, Advocate. The said resistance is with the support of Allan Sutton's Counter - affidavit. On same date the application was filed, the exparte injunctive order sought was issued, and, although hearing inter - partes was accommodated just the following day, the procedural requirements of filing a Counter - affidavit and reply, and also a further filing of a Chamber Summons by Plaintiffs/Applicants to bar Chipeta and Associates from representing Respondents, which application naturally had to be heard first and disposed of, the same could not proceed earlier than today (22/9/2004). The application was filed under s. 68 (e) and O. XXXVII, Rule 1 and 2 of the Civil Procedure Code. The Plaintiff/Applicant, in the main suit, claims "against

the Defendants jointly and severally ...payment of us \$72,232.855 being compensation for short landed cargo and damaged consignment of Indian Milling Wheat Grain ... " For clarity, let salient paragraphs of Ramisetty's affidavit in support of the application paint the basis of the application: - "2. The Applicant is the Owner of 7,302.882 metric tones of Indian milling Wheat Grain purchased from Noble Grain Pte Limited and Shipped by the Defendants per MV Denier Premier.

3. The Plaintiff negotiated and entered into agreement with Noble Grain Pte Limited for purchase of 7,302.882 metric tones of Indian Milling Wheat Grain, as per Commercial Invoices, which are annexed herewith, jointly marked Annexure "SSB 1" to which the Applicant prays for leave to refer to them as forming part of this Application.
4. The said consignment of Indian Milling Wheat Grain was purchased on "Cost and Freight" basis with ownership and risk passing to the Applicant upon loading of the Cargo.
5. Sometimes in July, 2004 the Supplier engaged the Denier Trade Limited, London through their agent Liladhar Hasog Forwarder PVT Limited to ship the purchased Cargo from the Port of Kandla India, to the port of Dar es Salaam and to deliver the same to the Applicant .
6. That MIS Denier Trade Limited, London (2nd Defendant) assigned and used a Marine Vessel Christened MV DENLER PREMIER under the mastership of one Capt. Zinurov Anatolij (ist Defendant) to transport the Cargo to the Port of destination Dar es Salaam Port.
7. It was an implied term of the carriage, implied in order to give business efficacy to the agreement, that the Defendants shall ensure safe transportation and delivery of the consignment and shall at all material times use due care and skill, to protect the goods from defect, and in case of damages shall indemnify the Applicant in full.
10. The Defendants did receive the whole consignment of Indian Milling Wheat Grain, in clean, good order, condition and in quantity as per relevant shipping documents.
11. On the 18th July 2004 the damaged consignments was observed by officers from the Ministry of Health and the Applicant whereupon notice of the damage was duly brought to the attention and knowledge of the Defendants and Seaforth General Agencies Limited who are the agents of the Vessel's underwriter and/or Owners. The parties have duly witnessed the damage and the loss "" .
12. The Defendants undertook to provide security in form of cash deposit and/or Bank Guarantee for the loss immediately upon discovery of the damage but to date no guarantee or security has been deposited as undertaken or at all.
13. As consequence of the Defendant's failure to ensure safe transportation and delivery of the consignment the Applicant has suffered damage and loss of profit calculated at the tune of us \$.72,232.855.

14. The Applicant has filed a suit for the claim of the said money being damages for the water damaged cargo, loss of profit and short landed cargo.
15. Under the circumstances the Applicant is fearful that the Respondents are in the process of taking certain measures to sail the vessel without settlement of the Applicants legitimate claims and/or posting any security for damaged cargo and short landed cargo .
16. Sailing of the Vessel without settlement of the Applicant's legitimate claims and/or posting any security for the damaged cargo now stored in Tanzania Harbours Authority and short landed cargo, which is a sizeable quantity indicates irreparable loss on the part of the Applicant if the Respondents are not restrained immediately by granting the prayers in the Chamber Summons. " On the other hand, Allan's Counter - affidavit, in substance, urges that the bills of lading exhibited by Applicants total to 5,302.882 MT although they have so far taken delivery of 6,960 MT and that there is no any more cargo they deserve to receive as there is no evidence of title to 7,302.882 MT. Adopting Ramisetty's affidavit, Mr. Kihwelo submitted that grounds upon which an injunction can issue have been established in terms of Attilio Mbowe [1969] HCn 284; Giella vs Casman [1973] EA 358; CC 5 of 99, Tanzania Tea Packers Ltd vs Commissioner of Income Tax & Another and CC 73 of 2002, Glaxo Group Ltd vs Aggregate Ltd. Mr. Kihwelo insisted that they have no objection if an alternative security is found, short of which the Respondents will not honour their obligation. In response, Mr. Chipeta, adopting Allan's counter - affidavit charged that the application should have been filed under O. 36, Rule 6 and not 0.37 CPC; that even if the latter was the proper Order, requisite conditions have not been established; that para.16 - 19 of Ramisetty's affidavit in reply should be expunged as they were not verified; that the bills and invoices referred to do not establish title of more than 4500 MT of grains; and that in any case, the Court should direct its mind to 0.36 and not 0.37 CPC. In rejoinder, Mr. Kihwelo conceded the inapplicability of O. 37 CPC but urges that s. 68 suffices; agrees that indeed the challenged para. 16 - 19 of Ramisetty's affidavit were not verified; that the title to the cargo is fully established as 2760 MT were sold when the ship was already on high seas hence difference in dates, and that in any case, the question of title is for trial in the main suit. I should outrightly state that indeed the application was brought under the wrong provision of the law. O. 37 epe applies in different situations clearly spelt out under Rule 1 thereof and which provides: "Where in any suit it is proved by affidavit or otherwise -
 - (a) that any property in dispute in a suit is in danger of being waste, damaged, or alienated by any party to the suit or suffer loss of value by reason of its continued use by any party to the suit, or wrongly sold in execution of a decree, or

- (b) that the defendant threatens, or intends, to remove or dispose of his property with a view to defraud his creditors. the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, loss in value, removal or disposition of the property as the court thinks fit, until the disposal of the suit or until further orders. " Here, the ship is not the subject matter of the suit nor can sub - rule
- (b) be invoked as there is no threat to defraud creditors. The relevant provision of the law is O. 36 epe under a sub - title "Attachment before judgment" which in part provides: - "6. 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, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.
2. The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof
3. The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified. Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the court, 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.
- (2) Where the defendant shows such cause or furnishes the required security and the defendant shows such cause or furnishes the required security and the property specified or any portion of it has been attached, the court shall order the attachment to be withdrawn, or make such other order as it thinks fit. " The above said, I regret to say that this application is doomed to fail from two aspects. One is technical and this is as regards the citation of the wrong law, and two, for lack of prerequisite conditions for the applicability of O. 36 Rule 6 CPC. The old stand that wrong citation of the law is not fatal has now been reversed by the Court of Appeal and the current legal position of the law is that, in applications, the applicant has to cite the relevant provision from which the Court derives the power to hear and determine the application failure of which the Court will not have properly been moved hence the incompetency of the application (see: (CAT) Civil Appeal No. 45 of 2000, Mbeya - Rukwa Autoparts & Transport Ltd vs Jesteng George Mwakyoma; Civil Application No. 64 of 2003, Citibank Tanzania Ltd and Tanzania Telecommunications Co. Ltd and four others in which the following were cited, Abdul Aziz Seleman v Nyaki Farmers Cooperative Ltd [1966] EA 409, Civil Application No. 20 of 1997, NBC and Sadrudin, Civil Application No. 88 of 1998, Almas Iddie Mwinyi versus NBC and Ngeme Mbita; ZBZ Civil Application No.3 of 2003

between Naibu Katibu Mkuu (CCM) and Mohamed Ibrahim Versi & Sons; ZNZ Civil Application No.2 of 2003, between Hamish Ambaram Jina by his Attorney Ajar Patel and Abdulrazak Jussa Suleiman; Civil Application No. 4/2004, Abdulhamid Ramadhan Mnjomo & 2 others versus Ali Salim Ali & 2 others). Thus, having cited o. 37 instead of O. 36, the Applicant is taken to have not moved the Court to decide anything. S. 68 is just a supplemental provision which has to be read together with a substantive provision upon which the application is pegged. On this ground alone, the application fails. And, I should confess that for similar reason, merits in the application between same parties, seeking disqualification of Mr. Chip eta & Associates from representing Respondents, were inadvertently considered as the application should have been thrown out on similar grounds. Although the above disposes the matter I think an observation should be made on the other leg. Just for sake of completeness, even if the right provision had been cited yet still the application would have failed. Why? O. 36, Rule 6 CPC above cited would only apply where the Respondents are about to dispose of their whole property or part thereof or remove the same from the jurisdiction of the Court "with intent to obstruct or delay execution of any decree that may be passed against" them (Respondents) . Here, there is no question of "disposal" or "removal" within the meaning of the provision stated. As already observed, the ship in question is in its normal course of business, plying between one port and another, loading and off loading cargos of different kinds and its preparation to depart from Dar es Salaam port is not out of normality and therefore the intent element to obstruct justice is lacking. It would have been different if the argument was that the Respondents are incapable of meeting their obligations in the event of a decree being passed against them. And this cannot be assumed but should be established by Applicants. Applicants did not so establish. For reasons stated, the application is incompetent and is hereby struck out with costs. The interim injunctive order against Mv Denler Premier issued on 14/9/2004 is hereby raised. L.B. KALEGEY A JUDGE L.B. KALEGEYA JUDGE 24/9/2004 I Certify that this is a true and correct ~~~ the Orig~in3}Crder).~dgem.ent Rulling Sign . r. , ----.: ... ~ Registra~ CO," lrfi~i)l-c;~;t-6~n~"

Date __. __. ~. ~l~Yi. __. __

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