

TANZANIA / JUDGMENT

TIB DEVELOPMENT BANK VS WAJA CATA MINING

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (MWANZA SUB REGISTRY) AT MWANZA MISC. CIVIL APPLICATION NO. 10274 OF 2024 (Arising from Execution No. 3192 of 2024 and Civil Case No. 47 of 2022 of the High court of the United Republic of Tanzania at Mwanza Hon. Morris, J. dated 14th of June 2023) BETWEEN TIB DEVELOPMENT BANK LIMITED..... 1st APPLICANT ATTORNEY GENERAL..... 2nd APPLICANT VERSUS WAJA GENERAL COMPANY LIMITED..... 1st RESPONDENT CATA MINING COMPANY LIMITED..... 2nd RESPONDENT KASANGA H. KASANGA t/a ROCK CITY TAKERS LTD..... 3RD RESPONDENT

RULING

20th & 21th June, 2024 A. MATUMA, J. In this matter the 1st Respondent obtained a consent judgment against the 2nd Respondent for payment of Tshs. 1,223,264,256.56 vide civil case no. 47 of 2022. The decretal sum was agreed to be paid in full before 30th June, 2023. The 2nd defendant defaulted the agreed payment period which necessitated the 1st Respondent to institute execution proceedings vide Execution case no 3192 of 2024 in which a warrant of attachment against the 2nd Respondent's properties was issued. The properties listed in the warrant of attachment are; Mobile crane with Registrations No. T 561 DCG, Toyota Alphard (T 110 DVP), Truck make FAW (T 461 DQP), Nissan Pickup (T 921 DGP), Volvo (T 901 DCC), Bell Dumper (T 405 DLS), Bell Dumper (T 414 DLS), Bell Dumper (T 417 DLS), Toyota Hillux (T 344 DNK), Toyota Hillux (T 343 DNK), Toyota Hillux (T 345 DNP), Toyota Hillux (T 380 AFJ), Howo Truck (T 671 DHD), and Howo Truck (T 668 DHD). The 3rd Respondent was appointed to execute the Decree and in execution of such duty attached such properties which are currently under her hands ready for sale in execution of the Decree. The 1st Applicant claiming interests in the said properties brought this application claiming that such properties are not liable for attachment and sale because they are floating charges to the debenture duly entered and registered between her and the 2nd Respondent. This court is therefore moved to investigate the claim and order the release of such properties. At the hearing of this application Mr. Felician Daniel learned state Attorney represented both Applicants, Mr. Ferdrick Binamungu Kakurwa and Mr. Miyasi Mashauri learned advocates represented the 1st and 3rd Respondents while Mr. Godchile Chirare Castory learned

advocate represented the 2nd Respondent. 2 Arguing for this application the learned state attorney submitted that on 14th April, 2014 the loan facility agreement was executed between the 1st Applicant TIB Development Bank Limited and the 2nd Respondent CATA Mining company Limited in which the 1st Applicant released to the 2nd Respondent USD 7,500,000 which were secured by both fixed and floating charges which were dully registered. In the instant matter the fixed charges are not at issue. The learned state attorney further argued that the debenture between the 1st Applicant and 2nd Respondent was registered on 25/04/2014 covering the then current and future assets of the CATA Mining company. In that respect the learned state attorney was of the view that so long as the list of attached properties supra formed part of the floating charges in the debenture which was dully registered, they are not liable for attachment and sale by any third party because they stand as security to the loan facility agreement between that 1st Applicant and the said company. He thus prayed for this court to investigate such a claim and release the properties from attachment and sale by the 1st and 3rd Respondents. On their part, Mr. Fredric Binamungu and Miyasi Mashauri argued that the floating charges do not automatically act as-security to the debenture even if registered unless some event occurs crystallising the floating charges. They referred this court to the Book titled Company Law by John Joseph Ogola, second edition published by Focus Books in which at page 167 the learned author explained that floating charges bears three characteristics namely;

- i. It is a charge on a class of assets of the company, present and future; ii. The class is one which changes from time to time in the ordinary course of the company's business; and Hi. It is contemplated by the charge that, until some event occurs which causes the charge to crystallise, the company may use the assets charged in the ordinary Couse of its business. With the three characteristics of the floating charges, the two learned advocates submitted that the attached properties are in full control of the 2nd Respondent and may be disposed of, by her even without consultation to the 1st Applicant because there is no any alleged event crystalizing such properties to make them fixed charges. On his part Mr. Godchire Chirare for the 2nd Respondent argued briefly that the 2nd Respondent's company used to acquire and dispose her properties from time to time as some vehicles becomes old which necessitates them to dispose such vehicles and buy some knew others. In his rejoinder the learned state Attorney Mr. Felician Daniel maintained that the 1st Applicant has interests in the attached properties and their role is just to establish such interests as he has already done. Having heard the parties for and against this application, I first agree with the learned state attorney that TIB Development Bank (1st Applicant) has interest in the attached properties which acted as floating charges to the registered debenture. I however find that such interests did not and does not operate as a bar against the borrower CATA Mining to use such properties and even to dispose them in the ordinary course of its business. This is because one of the characteristics of a floating charges as written supra from the Company law book by John Joseph Ogola is that; the company may use the property in the ordinary course of the company's business. This includes disposal of such properties the fact which has been conceded by Mr. Godchile Chirare learned advocate for the 2nd Respondent who explained that her client used to acquire and dispose the properties (floating charges) from

time to time. 5 In the circumstances, I agree with the two learned advocates for the 1st and 3rd Respondents that floating charges does not automatically stand as security to the loan facility agreement even if the debenture is registered until and unless some event has occurred to crystallise the property. At the same page 167 of John Joseph Ogola's book supra the events which may crystallise the floating charges are;

- when the company defaults the payment of the loan and the debenture holders take steps to enforce their security, either by appointing a receiver or applying to the court to do so,
- when the company is put into liquidation,
- when the company ceases to carry on business. I agree with the learned advocates for the 1st and 3rd Respondents that none of the three events supra has been pleaded or alleged by the applicants against the 2nd Respondent and as such the 2nd Respondent's floating charges are not crystalized to the debenture by the 1st Applicant. They are free properties of the Company which may be disposed of, at any time including sale by the company in its ordinary course of business. If that is the case, the company may even use the properties to its other transactions and this includes the right of third parties to realise its dues to the company from such properties because they are not crystalized. It is my firm finding that the reserved powers of the company to dispose of the floating charges from time to time in its ordinary course of business is the same thing when a third party attaches the property and sale in execution of the decree because payment of debt by the company is one of the ordinary course of its business be it that the company by itself sales the floating charges to pay the debt or the floating charges are attached and sold in execution of the decree. Even reading the advantages and disadvantages of floating charges at page 168 of the company law Book supra, it is clearly elaborated that the company is free to deal with the assets charged as if they had not been charged. This is advantage from the company's point of view which on the other hand is the disadvantage to the lender because the floating charges are free properties unless crystalized as stated supra. In that regard a floating charge is useless to the lender unless some event occurs as stated supra to crystalise the assets. In the instant matter the 2nd Respondent's company is operative, no allegations of defaults of its obligations to the loan facility agreement between her and the 1st Applicant. In that respect therefore, the 1st Applicant cannot be allowed charges of its borrower which have not been crystalized as herein above stated while at the same time she do not stand as an obstacle to the company itself to sale and utilise the proceeds of such sales in its ordinary course of business. In any case, if the 1st Applicant is fearful that the 2nd Respondent may fail to discharge its obligations in the loan facility agreement and thinks that the floating charges of the company may save the purpose, should take steps to crystalize them but not the already attached properties. I therefore, having investigated the claim and for the reasons stated above, find that this application has been brought without any sufficient cause. It is hereby dismissed in its entirety with costs. Whoever aggrieved with this decision should seek further remedy in accordance to the relevant law. 8

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