

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 113 OF 2022

[Originating from Commercial Case No. 47 of 2022]

BETWEEN

MOBIKEY TRUCK AND BUS LIMITED.....PETITIONER

VERSUS

JUNIOR CONSTRUCTION COMPANY LIMITED.....RESPONDENT

RULING

Date of last order: 24/11/2022

Date of Ruling: 14/12/2022

AGATHO, J.:

The Applicant armed with a certificate of urgency moved the court under the provisions of Sections 68(e), 95 and Order XXXVI Rule 6(1)(a), (b)(2) and (3) of the Civil Procedure Code, Cap. 33 R.E. 2019 applying for:

- (1) an order of attachment of the Defendant's heavy load Motor Vehicles make MAN with registration Numbers T613 DWD, T578 DWD, T579 DWD and T580DWD pending hearing and determination of the main suit.
- (2) Cost of the application to be provided for the Respondent;

(3) And any other and further reliefs as this Honourable Court shall deem fit and appropriate to grant.

The application was brought by way of chamber summons and it was supported by an affidavit sworn by Godfrey M. Belege, the principal officer of the Applicant. The Respondent protested the application by filing a counter affidavit sworn by Suleiman Masoud Suleiman, the Managing Director of the Respondent.

Both parties were represented by the learned counsel. Whereas advocate Emmanuel Ndanu represented the Applicant, advocate Juventus Katikero represented the Respondent. It was agreed that the hearing of the application be conducted by way of written submissions.

But to appreciate the crux of the matter a brief description of its background suffices. On 18/05/2021 the Applicant and the Respondent entered into sale and purchase agreement. It was agreed that the Applicant shall sell and the Respondent shall buy 10 new trucks (vehicles) at a consideration of Twenty-nine thousand eight hundred and fifty Euros (29,850 €) each. And the total amount/price for the 10 vehicles were Two hundred and eighty-eight thousand five hundred Euros (298,500€). They also agreed in their contract that out of 10 trucks purchased on credit the Respondent shall take four (4) new

vehicles and she will deposit Fifty seven thousand Euros (57,000€) equivalent to 70,000 USD. The Applicant alleges that out of 57,000€ the Respondent deposited Fifty Thousand United States Dollar (50,000USD) only. After payment of the aforesaid initial deposit the Applicant handed over the four (4) motor vehicles to the Respondent. The Motor vehicles came to be registered as T 613 DWD, T 578 DWD, T 579 DWD and T 580 DWD. The Applicant claims that since the initial deposit of 50,000€ and delivery of the four (4) motor vehicles the Respondent had neglected payment of the sum due per schedule stipulated in the agreement. By the end of October 2021, the sum due and which the Respondent ought to have paid stood at United States Dollar Sixty-seven thousand eight hundred and ninety-six and seven cents (USD 67,898.70). In a bid to ensure the money is paid, the Applicant's lawyers sent demand note to the Respondent. But it was unheeded.

The Applicant also stated in the affidavit that the Respondent has removed tracking system in the vehicles. The Respondent has also changed her physical address where initially the address was Temeke, TAZARA near Mchicha area. Her physical address or location is now unknown. The Applicant was thus unable to track the vehicles and cannot locate the Respondent. That situation alarmed the Applicant who

decided to seek Court intervention as the Respondent shows signs that she is attempting to move the vehicles away from the local limits of the jurisdiction of this Court. The Applicant also stated that the four trucks were seized and detained in Sumbawanga but latter they were released by the police. And she does not know their where about as tracking system has been disabled.

The Respondent in the counter affidavit does not dispute existence of the sale and purchase agreement. What she disputes is that the agreement was for the sale and purchase of 10 and not 4 vehicles. She claimed that she had paid for the 4 vehicles that were delivered. The counter affidavit states further that the vehicles are used for different purposes. As for allegation that the Respondent has changed her physical address the managing director of Respondent denies that allegation. He avers that the Respondent is operating its business from her registered office without any changes of location, and she uses the trucks as per the agreement without any alteration. The latter response means that the car tracking system has not been altered or disabled. Further, on paragraph 6 of the counter affidavit the Respondent's managing director avers that the Respondent is continuing making payment to the Applicant for purchased and supplied four vehicles.

As for detention of the vehicles in Sumbawanga and their whereabouts being unknown, the Respondent responded on paragraph 7 of the counter affidavit that the attempt by the Applicant's agent to seize and detain the vehicles in Sumbawanga failed as the police intervened. And according to paragraph 7 of the counter affidavit, the vehicles are still detained at the Sumbawanga Central Police Station. The Respondent added in paragraphs 7 and 8 that the attempt by the Applicant to seize and detain the vehicles was illegal and caused serious financial loss and difficulties to the Respondent. And that the Respondent paid 70% of the consideration and yet she is still making payment. She is also using the vehicles in her projects to generate income that will facilitate the payment of the outstanding balance.

The Respondent added in paragraph 8 of the counter affidavit that it is the Applicant who has led to the mess as she failed to release the 10 vehicles after the payment of initial deposit, and instead only four (4) vehicles were delivered contrary to the terms of the agreement.

In response to paragraph 8 of the affidavit, the Respondent's managing director in paragraph 9 of the counter affidavit prayed that the application for attachment of four vehicles before judgment be rejected and instead the court issue an order to release all four (4) vehicles that

are detained at Sumbawanga Central Police Station. Before examining the parties' submissions, I should comment on the practice of including prayers in the affidavits. To say the least that is against the law. Paragraph 9 of the counter affidavit include prayers as stated hereinabove.

To be precise it offends the rules on affidavits as contained in O.XIX. R. 3(1) of the Civil Procedure Code Act [Cap 33 R.E. 2019]. The content of an affidavit has been prescribed by the law. In **Mustapha Raphael v East African Gold Mines Limited/ Civil Application No. 40 of 1998 (HC-DSM)** (unreported) it was stated:

"An affidavit... is simply a written statement on oath. It has to be factual and free from extraneous matter such as hearsay, legal arguments, objections, prayers and conclusions."

In the case of **Uganda v Commissioner of Prisons, Ex-parte Matovu (1966) EA 514** the High Court of Uganda stated as follows:

"...as a general rule of practice and procedure, an affidavit for use in court, being a substitute for oral evidence, should only contain elements of facts and circumstances to which the witness deposes either of his own personal, knowledge or from information which he believes to be true. Such an

affidavit must not contain an extraneous matter by way of objection or prayer or legal arguments or conclusion"

Omari Ally Omary v Idd Mohamed and Others, Civil Revision No. 90 of 2003 (HC-DSM) (unreported) Hon. Massati, J. (as he then was) held at page 7 that:

"As a general rule a defective affidavit should not be acted upon by a court of law, but in appropriate cases; where the defects are minor, the courts can order an amendment by way of filing fresh affidavit or by striking out the affidavit. But if the defects are of a substantial or substantive nature, no amendment should be allowed as they are a nullity, and there can be no amendment to nothing. I have no doubt in my mind that those paragraphs contain legal arguments, conclusions and prayer."

Defects in the affidavits may be fatal. In **Khalid Simba v L.H. Maleko, Misc. Land Application No. 502 of 2020, High Court – Land Division at Dar es Salaam** (unreported), the application collapsed because the Court was satisfied that the Affidavit in support of the application was defective. In the present case, the defect on the

counter affidavit could have disposed the application, but I had thought that it is prudent to examine it on merit.

In this application, I have read the parties written submissions. The Respondent has belaboured on the Applicant's failure to supply the remaining six (6) trucks and to her that was a breach of contract. In my view the Respondent has forgotten that before we talk about the six remaining vehicles, she has failed to complete the initial payment for the four trucks which was a term in the agreement. I will thus distinguish the case at hand and that of **Joyce Mboyi Sabini v CRDB Bank Plc, Land Appeal No. 85 of 2018 HCT Mwanza District Registry** which held that *the Court of law (not of parties) does not have powers to interfere with the parties on terms legally agreed and executed by them. After all it is cardinal law that parties to contract are by the terms and conditions executed by them as per section 37 (1) of the Law of Contract Act [Cap 345 R.E. 2002].*

A question of a party benefiting from her own fault is unmatched with the present case. Therefore, the case of **Flora Celestine Kaimukilwa v ECO Bank Tanzania and 3 Others, Land Case No. 9 of 2021 HCT Land Division at Dar es salaam** is distinguished from the case at hand. All that the Applicant did was an attempt to ensure the

payment of four vehicles is completed. Therefore, the engagement of Yono Auction Mart and Court Brokers as per para 7 of the affidavit and which was blocked by the Police in Sumbawanga cannot be said a fault that has to operate as bar to the Applicant to seek redress in this court.

To determine the merit of the application at hand we will be guided by a key issue whether the application for attachment of the four (4) vehicles before judgment should be granted? But to answer that question the court raised the following issues:

1. Whether the Respondent has changed her physical address/location and cannot be traced.
2. Whether the car tracking system has been altered or disabled and hence the four vehicles cannot be tracked by the Applicant.
3. Whether the four vehicles are still being detained at Sumbawanga Central Police Station.
4. Whether the Respondent is still making payment of the outstanding initial amount as price for the four (4) vehicles.

Looking at the averments in the affidavit and counter affidavit, neither party brought evidence to show that the Respondent's physical address has changed or not. The Respondent simply said the registered physical address has not changed. The Applicant has not brought any evidence

from BRELA to show that the address has changed. Section 110 of the Evidence Act [Cap 6 R.E. 2019] requires that he who alleges to prove. The Applicant failed to do so. I am thus inclined to hold that the physical address has not changed. Hence issue (1) is answered in the negative.

As for issue (2) regarding alteration or disabling of the vehicles tracking system, the Respondent has not brought any evidence that the tracking system is working properly. Therefore, the issue 2 is answered in the affirmative.

Regarding issue 3 whether the four vehicles are still detained at Sumbawanga Central Police Station. In my view it cannot be true that the vehicles are still detained in Sumbawanga that is because the Respondent has given inconsistent responses. She appreciated the police intervention to block the attempt by the Applicant's agent to seize and detain the vehicles. She also controversially said the vehicles are in use. It means they are no longer detained or under the police watch in Sumbawanga. Again, if they were at the police station at least a police report should have been attached to confirm that the motor vehicles are still at the police station. Consequently, issue 3 is answered in the negative, that there are no vehicles still detained at Sumbawanga Central Police Station.

Finally, whether the Respondent is continuing to make payments to clear the outstanding amount for the price of the four vehicles. This is answered in the negative as there is not any evidence given to support the assertion by the Respondent's managing director that the Respondent is continuing making payment. The same contravenes the law under Section 110 of the Evidence Act [Cap 6 R.E. 2019] requiring any allegation to have proof.

Now, turning to whether the order for attachment of the four vehicles before judgment should be granted the answer is drawn from the requirement of the law and evidence that there must be an attempt to move the property from the local limits of the jurisdiction of the court. In **Tanzania Industrial Services Limited v Sae Power Lines S.R. Misc. Land Application No. 525 of 2020** (unreported) at page 5 the court held that:

"..if an order for attachment is not granted, the judgment if issued in favour of the applicant/plaintiff would be rendered meaningless as they would have nothing to execute."

At this juncture, I should state that acts constituting evidence of removing property from the jurisdiction has not been exhaustively stated in the law. In the case of **Buraq Logistics Limited v Prime Cement**

Limited, Misc. Commercial Application No. 171 of 2021 HCT Commercial Division at Dar es salaam the court was confronted with the quest for an order of attachment of property before judgment. And at pages 8-9 it examined the phraseology "is about to dispose of the whole or any part of his property; or (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 concluded that in the affidavit there was not any single paragraph that stated in respect of the party's conduct to dispose or removing the property in wholly or part of it from the jurisdiction of the Court. In my opinion **the Buraq Logistics case** did not enlist the situations that constitute removing the property from the local limits of jurisdiction of the Court. What will prove removing a property from the local limits of jurisdiction of the court depends on the circumstance of the case. And that may mean many things. But in the end, there must be evidence direct or circumstantial indicating that the property is being removed or there are efforts to remove it from local limits of the jurisdiction of the court. In my view even an attempt to conceal whereabouts of the property may be considered as strategy to removing the property from local limits of the jurisdiction of the court. What I have gathered in the present case is that there are attempts to do so. The fact that the four vehicles tracking system has been disabled is

undisputed. That may be construed as an attempt to conceal the whereabouts of the vehicles and ultimately remove them from the local limits of the jurisdiction of the court. Further, the Respondent has given an incredible averment that she is still making payment towards the outstanding initial payment of the four vehicles. To aggravate the matter, there is no evidence that the four vehicles are detained at Sumbawanga Central Police Station. On the importance of evidence to prove allegation see the case of **Hemedi Saidi v Mohamed Mbilu [1984] TLR 113.**

For the foregoing reasons and as per provisions of Sections 68(e), 95 and Order XXXVI Rule 6(1)(a), (b)(2) and (3) of the Civil Procedure Code[Cap. 33 R.E. 2019]the application for the order of attachment of four vehicles with registration numbers T 613 DWD, T 578 DWD, T 579 DWD and T 580 DWD before judgment is granted. The Respondent is warned that to give false averments in the sworn statement such as counter affidavit is tantamount to lying on oath before the court of law.

This being miscellaneous application, costs shall be in the main cause.

It is so ordered.

DATED at DAR ES SALAAM this 14th Day of December 2022.



U. J. AGATHO

JUDGE

14/12/2022

Date: 14/12/2022

Coram: Hon. U.J. Agatho J.

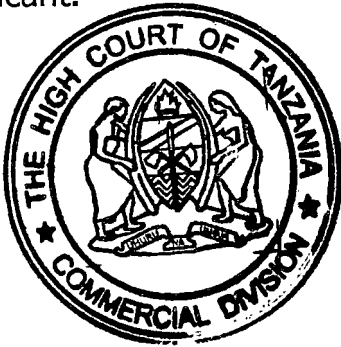
For Applicant: Juventus Katikiro, Advocate, holding brief of Emmanuel Ndanu, Advocate for, and Godfrey Belege – Finance Manager of the Applicant.

For Defendant: Juventus Katikiro, Advocate.

C/Clerk: Beatrice

JLA: Opportuna

Court: Ruling delivered today this 14th December 2022 in the presence of Juventus Katikiro, Advocate for the Respondent also holding brief of Emmanuel Ndanu counsel for the Applicant, and in the presence of Godfrey Belege, the finance manager of the Applicant.



U. J. AGATHO

JUDGE

14/12/2022