

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR-ES-SALAAM.

MISC. APPLICATION CASE NO. 61 OF 2016

(Original Commercial Case No. 42 of 2016)

EAST AFRICAN CABLES (T) LIMITED APPLICANT

VERSUS

SPENCON SERVICES LIMITED RESPONDENT

RULING

Mruma, J.

This is an application for attachment before judgment. The applicant East African Cables Limited have instituted commercial Case No. 42 of 2016 against the Defendants Spencon Service Limited claiming for sum of Tshs. 1,351,854,816.00 being the unpaid price for electric cables ordered, supplied and acknowledged by the defendants on REA-LOT 9 Kilimanjaro Service Line. The plaintiffs are also claiming for costs and interest. In their written statement of defence, the defendants have denied the claims laid against them and they have put the plaintiffs in strict proof of their claim.

Subsequent to the filing of the plaint, the plaintiffs have brought this application praying for the following interim orders:-

(a) That this honourable court be pleased to attach before judgment the sum of Tshs. 1,351,816/= receivable from Rural Electricity

Authority (REA), due to the Respondent as security towards satisfaction of a decree.

(b) That this honourable court orders the Chief Executive Officer of Rural Electrical Authority (REA), to deposit in the court the amount of Tshs. 1,351,854,816/= due to the Rural Electricity Authority (REA) or any receivable due to the Respondent.

The application is brought under the provisions of Order XXXVI Rule 6 (1) (b) (2) and (3) of the Civil Procedure Code and it is supported by the affidavit of Joseph Hunja who introduced himself as the Managing Director of the Applicant's company.

The Respondents through Lilian Musa who introduced herself as a principal officer of the Respondent's company has vigorously opposed the application. Apart from putting the Applicant to strict proof of every prayer, Ms Lillian stated in her counter affidavit that the Respondent executed various loan facility agreements with the Standard Chartered Bank Uganda Limited of P. O. Box 7111 Kampala Uganda to finance projects being undertaken by the Respondent (See paragraph 6.1 of Ms Lilian Masawe's counter affidavit). In paragraph 6.3 Ms Lilian asserts that the Respondents also executed a project Account Agreement with Standard Chartered Bank Uganda under which it was agreed that all receivables payable to the Respondents be directed to the Standard Chartered Bank Uganda.

Submitting in support of the Application, Mr. Ringia counsel for the Applicant contended that what is stated in paragraphs 3,6,7,8 and 9 of the affidavit of Joseph Hunja which amounts to evidence warranting this court

to grant the reliefs sought in the chamber summons are not controverted by the counter affidavit of Lilian Masawe but to the contrary they are supplemented. The counsel said that the fact that Lilian Masawe sworn in her counter affidavit that receivable from REA are being taken outside the jurisdiction of this court brings this case squarely under the ambit of the provisions of Rule 6 (1) (b) of Order XXXVI of the Civil Procedure Code [Cap 33 RE 2002] .

Responding to Mr. Ringia's submission Mr. Hussein Mlinga, counsel of the Respondent contended that what is contained in the affidavit of Joseph Hunja are mere apprehensions than real. He cited the Kenyan case of **Savings and Loans Kenya Limited versus Erastas Mwangi Mungai – Nairobi High Court Civil Case No. 775 of 2000 (Ringa J)** in which the Kenyan court held that mere apprehension without evidence that the Respondent/defendant is intending to do what is feared is not sufficient ground for granting the application for attachment before Judgment.

The learned advocate stated that the Kenyan Court was dealing with **Order XXXVII of the Kenyan Civil Procedure Code** which is in paramateria with our own **Order XXXVI of the Civil Procedure Code**. He also referred this court to an Indian case of **Vikay Nataraja Gounder Vs. S.A. Bangau Reddiar**.

The learned counsel submitted further that the receivable that the applicants want to attach constitute interest of a third party the **Standard Chartered Bank of Uganda**. He said that **Order XXXVI Rule 11 of the Civil Procedure Code** bars attachment before judgment which has

an effect to the interest of a third party. He said that there is an arrangement between the Respondent and the Standard Chartered Bank of Uganda. On this point the learned counsel cited the decision in an Indian case of **Jagroop Singh and others vs. Boria Khan (Punjab Haryana High Court)**. He said that the essence of that decision is that attachment before Judgment should not affect the rights of a third party. It is the learned counsel's view that therefore attachment of money in the hands of a third party cannot be validly done in absence of a decree. He said that the attachment of money payable to the defendant will be akin to a garnishee order which order can validly be given during execution only.

On the point that the allegations raised by Joseph Hunja have not been denied with particulars, the learned counsel contended that it will be unfair to compel the Respondent to provide particulars to counter an affidavit which itself lacks particulars.

With regards to documents which are executed by Spenco International Limited or Spenco Uganda Limited, the counsel submitted that the three Companies are sister Companies. He said that Spenco Service Limited and Spenco Uganda Limited are subsidiaries of Spenco International Limited.

On the documents with title "**Notice of Account for Project Receivables**" he conceded that the documents are blank, have no dates and they are not stamped. He said that was an oversight.

I have heard counsel for the parties submissions. I have also read the affidavit and counter-affidavit filed in this matter and I am of the

opinion that the only issue before me is whether there is evidence that the defendant is about to wind up its business in Tanzania and that it has no immovable assets which are free from any embraces within the jurisdiction of this court. Which the plaintiffs/Applicants can resort to in the event they obtain a decree against the defendants/Applicants.

Rule 6 (a) of Order XXXVI of the Civil Procedure provides that:

"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 or any decree that may be passed against him –

- (a) is about to dispose of the whole or any part of this property*
- (b) is about to remove the whole or any part of his property from the local limit or 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, or 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 the should not furnish security".*

Under paragraph 6 of the affidavit of Joseph Hunja, he stated that the Respondent had promised to direct REA to make some payments directly to the Applicant as part of settlement of the debt.

In paragraph 7, Joseph Hunja is asserting that the Respondent is about to wind up business in Tanzania and that she has no immovable property which are free from any incumbrances within the jurisdiction of this court.

In her counter affidavit, Lilian Masawe disputed the facts stated in paragraph Six of the affidavit of Joseph Hunja and stated that the Respondent had executed various loan facilities with the standard Chartered Bank of Uganda and that in the said facilities all receivables payable to them are now payable to Standard Chartered Bank of Uganda, (see paras 6.1 and 6.2 of Lilian Masawe's counter affidavit).

As correctly submitted by Mr. Ringia for the Applicant, the counter affidavit of Lilian Masawe didn't controvert the assertions made in the affidavit of Joseph Hunja. Whereas paragraph 6 of the affidavit of Joseph Hunja raises a question of there being a promise by the Respondent to direct REA to make some payment to the Applicant, the counter affidavit of Lilian Masawe evasively answered that question. She didn't actually address the issue but instead she raised an issue of there being loan facility arrangements between the Respondent and Standard Chartered Bank of Uganda.

Regarding the allegation that the respondent is about to wind up its business in Tanzania, the counter affidavit simply put the Applicant to a strict proof of what is asserted in paragraph 7 of the affidavit of Joseph Hunja.

In law affidavit and/or counter – affidavit (as the case may be) is evidence. It is a voluntary declaration of the facts written down and/or sworn to by the declarant before an officer authorized to administer oaths. Unlike pleadings (plaint and written statement of defence and other pleadings), affidavit and counter affidavit are prima facie evidence of the facts stated therein. When a fact is stated on oath, it has to be controverted on oath and this gives the court an opportunity to weigh which fact is probably true than the other. When the fact sworn to or affirmed is not controverted then it is deemed to be admitted. When a person swears or makes a sworn declaration of a fact, the best way to challenge him/her is to swear a fact which tends to show that what he sworn to was false. Putting him to strict proof of the fact without giving your side of the story which you want to be believed, amounts to admission of the fact. A requirement of strict proof of the facts applies to pleadings in the suit (ie. Plaint, written statement of defence reply etc) and not to affidavit and counter-affidavit which are as said earlier evidence.

Thus, because paragraphs 6, 7, 8, 9 and 10 of the affidavit (ie evidence) of Joseph Hunja are not controverted but instead he was put to “strict proof thereof” as if the facts stated therein were allegations in the plaint, I find that there is a prima facie evidence that;

- (i) There were promises by the Respondent to direct REA to make some payments direct to the Applicant.
- (ii) The Respondent is about to wind up his business in Tanzania.
- (iii) The Respondent has no any immovable properties/assets free from any encumbrances within the jurisdiction of this court.

Further to that there is evidence from the Respondent through paragraphs 6.1, 6.2 6.3, 6.4 and 6.5 of the counter affidavit of Lilian Masawe to the effect that the Respondent is disposing the whole of their property (which is the money receivable from REA) to Uganda which is beyond the local limits of the jurisdiction of this court. In the circumstances, I think this is a fit case to direct and Order that:

- (1) Tshs 1,351,854,816.00 due to the Respondent from Rural Electricity Authority (REA) or any other receivable to the Respondent not exceeding that amount be attached before judgment unless the Respondent furnishes as security a sum equal to the amount claimed, within a period of two weeks from the date of this order.

It has been submitted that in terms of **Rule 11 of Order XXXVI of the CPC**, attachment before judgment should not affect rights of a stranger. In law those rights of a stranger has to be established. In the present case the loan facility agreement which is annexed to Ms Lilian Masawe's counter affidavit as Annexure SSLZ is between Spencon Services Limited of P. O. Box 926 Kampala Uganda (a company incorporated under the laws of Uganda) and Standard Chartered Bank Uganda Limited; In the present application parties are East African Cables (T) Limited and Spencon Services Limited – a Limited liability company incorporated under the Laws of Tanzania. Though the two Spencon Companies may be sister companies as alleged by the counsel for the Respondent but yet in law they are distinct legal personalities each with its own legal rights and liabilities. Moreover, as correctly submitted by the Applicant's counsel, R.E.A is not a

party to the agreement therefore she cannot be bound by the terms thereof. It is for those reasons that I have allowed this application to the extent explained above.

Order accordingly.

A handwritten signature in black ink, appearing to read 'A. R. Mruma', is positioned above the printed name.

A. R. Mruma

JUDGE

1/7/2016