IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[IN THE DISTRICT REGISTRY]

AT ARUSHA

CIVIL CASE . NO. 23 OF 2014

BIMEL ENTERPRISES COMPANY LTD........................PLAINTIFF

VERSUS

TANZANIA NATIONAL ROADS AGENCY ....1ST DEFENDANT

THE ATTORNEY GENERAL..................................2ND DEFENDANT

STRADA INTERNATIONAL B.C.E LTD...................3RD DEFENDANT

JUDGMENT

02/06 & 14/08/2020

MZUNA, J.:

In this case, the plaintiff claims against the 1st defendant for the immediate release of its illegally impounded properties to wit, Nissan Water Bowser No. T. 357 AKV, Chingling Roller Vibrator, Fiat Water Tanker 682, Water Bowser No. T. 175 AJW and Fiat Wheel Loader No. T. 146 AUK all valued more than 300,000,000/=. The plaintiff further prayed for default judgment against the 3rd defendant who was duly served by substituted service but never entered appearance. By order of the court, the hearing proceeded by way of written submissions whereby the parties filed their submissions in order of their schedule.

Apparently, the first defendant, an Executive Agency of the Government of the United Republic of Tanzania founded under section 3 (1) of the Executive Agencies Act, Cap 245 R.E 2002, entered into contract with the third defendant (Contractor) for the upgrading of KIA-Mererani road to a Bitumen Standard. The said agreement, executed on 27Th March, 2013 was to be implemented within seventeen (17) months whereas the commencement was expected to kick off after thirty (30) days from signing the contract. The contractor defaulted the terms of their agreement leading to the termination of same by the first defendant. All materials, equipment, plant, and works thereof as per their contact, were deemed to be the property of the employer (first defendant herein). Consequently, the project client impounded the equipment and trucks aforementioned. They were shifted from the site to their yard for security reasons.

Upon acknowledgement of the impoundment of the equipment aforesaid by the project employer, the plaintiff unsuccessfully demanded for their release that prompted the institution of a suit before this court. This court (Hon. Dr. Opiyo, J.), found that the plaintiff being not privy to the contract with the contractor failed to prove her case, hence declared the 1st

defendant a lawful owner of the impounded equipment thereby dismissing the suit with costs.

The matter went on appeal vides Civil Appeal No. 301 of 2017 challenging the finding and decision of this court. The Court of Appeal found that the order of the High Court declaring the first defendant as a lawful owner of some equipment in absence of a counter-claim was illegal and set the same aside. Further that the issue of non-joinder of the contractor which was raised and determined by this court in the judgment stage denied parties right to be heard. The record was remitted back for hearing of the parties on non-joinder issue and, depending on the finding, determine the case on merit.

Mr. Mosses Mahuna, learned counsel appeared for the plaintiff. He amended the plaint for the purpose of impleading the 3rd defendant who was previously not impleaded as a co-defendant. Mr. H. Chang'a learned Senior State Attorney and Mr. G. Mwanga, State Attorney appeared for the 1st and 2nd defendant. They amended their written statement of defence as well without incorporating a counter claim. This judgment is based on the record as agreed by both parties. I do so mindful of the fact that the first assigned Hon Judge Dr. Opiyo is now on transfer.

As per the record, four issues were agreed namely: **One,** whether the plaintiff is the legitimate owner of the equipment impounded by the 1st defendant; **Two,** whether the 1st defendant was a party to the contract signed between the plaintiff and the 3rd defendant; **Three,** whether the act of the 1st defendant impounding the construction equipment was lawful, and; **Four,** to what reliefs are the parties entitled.

Let me start with the first issue as to whether the plaintiff is a lawful owner of the impounded equipment. The plaintiff paraded two witnesses, namely BILLY GRAHAM MATHEW (PW1) and AIKANDE B. LEMA (PW2) likewise the defence summoned MGENI JUMBE (DW1) and AGREY GASPER SOMI (DW2). Case for the plaintiff is that the 3rd defendant had a construction contract with the 1st defendant regarding the upgrading of KIA-Mererani road (*exhibit D1)* measuring 26 Km in consideration for the payment of a sum of Tshs 21,965,398,370.51 (say Tanzanian Shillings Twenty-one Billion Nine Hundred sixty five, three ninety-eight, three seventy and Fifty One Cents Only). In that regard, there were three hire purchase agreements for the construction equipment between the plaintiff and the 3rd defendant (*Exhibit P1)*. It is also on record that the contract between the plaintiff and 3rd defendant was supposed to terminate on 13th April, 2014.

For the defence is that the 1st defendant had a construction agreement with the 3rd defendant (*exhibit D1*) in which the 3rd defendant defaulted the terms thereof and later on absconded from the site. As a result, there was termination of contract that followed with impoundment of the site equipment by the 1st defendant part of which belonged to the plaintiff.

In the plaint the plaintiff admits under paragraph 7, that she became aware that the 3rd defendant abandoned the site and her whereabouts is unknown to date. The basis upon which the plaintiff says (according to the plaint) is the lawful owner of the said construction equipment is based on the registration cards tendered during the hearing. PW1 is recorded to have said the following at page 18 of the typed proceedings, that:-

> *"Bimel Enterprises had no any contract with the 1st respondent (sic). I made a follow-up but they said the law is that when they terminate the contract all the equipment at the site are impounded believed to be belonging to the contractor..."*

I should make the record clear that it is only a Registration card for Changling Compact Roller with Registration No. T334 AKZ which is in the

name of the plaintiff. There is a Memorandum of Understanding (MoU) between the Principal Officer of the plaintiff and other companies showing that the trucks and water bowsers were granted to the plaintiff.

The question lingers on the construction agreement between the 3rd defendant and 1st defendant (Exhibit D1) vis a vis the three hire purchase agreements for the construction equipment between the plaintiff and the 3rd defendant (Exhibit P1). On account of the above, is it proper to hold the plaintiff lawful owner of those equipment.

In the submissions, the counsel for the plaintiff insisted on the plaintiff's ownership of the impounded equipment. He relied on Exhibit P5 (two letters) which according to him even the defendant admitted about such ownership. For the defence it was submitted that the said letters never acknowledge ownership but that they were hired. That the plaintiff was given an option to settle the outstanding debt but never complied. That is also stated under paragraph 4 of the amended written statement of defence of the 1st and 2nd defendants. In their view, exhibit D1 supersedes exhibit P1 in that the impounding of the equipment by the 1st defendant was premised on three arguments. First, that the contract was breached by the contractor. Second, the equipment impounded were found on the site handled to the 3rd

defendant. Lastly, they were impounded upon the 3rd defendant absconding the site.

I would agree with the defendants No.1 and 2. I have examined the contents of exhibit D1 particularly clause 63.1 at page 44 which reads as follows:-

"All materials on the Site, Plant, Equipment, Temporary Works, and Works shall be deemed to be the property of the Employer if the Contract is terminated because of the Contractor's default."

In view of the above transcript, the 1st defendant is deemed to be the owner of any property on the site at the moment the contract is terminated based on the default by the contractor. DW2 was more elaborative on this when interpreting clause 63 (see page 36 of the typed record). He said that:-

"Upon termination of contract all equipment and materials at construction site becomes property of the client-TANROADS."

Reading the evidence as well as the pleadings the plaintiff does not deny the fact that the construction agreement was defaulted by the 3rd defendant. In this, I refer to paragraph 7 of the amended plaint which reads thus:-

"**THAT,** as for recently the plaintiff came to learn that, the 3rd Defendant had abandoned the whole KIA-Mererani project (*left the*

said equipments at the project site); and his whereabouts are still unknown."

The first defendant herein was neither involved nor informed of the existence of such contract. It is even on the record that the third defendant was paid sums of money for equipment mobilization. Since the impounded equipment were found on the site which was abandoned by the third defendant, the first defendant was right to claim ownership as per their contractual terms and conditions.

The alleged MoU between the plaintiff and 3rd defendant in my view, does not take away the rights and liabilities created by the construction agreement, that is to say exhibit D1. Above all, such transfer between legal persons without Board resolutions cannot be legal. The said MoU cannot be acted upon. The plaintiff cannot be said to be lawful owner of the impounded equipment. So it remains with the plaintiff to look for the whereabouts of third defendant and proceed on their hire purchase agreement. This is because the doctrine of privity of contract bars the plaintiff from suing the 1st and 2nd defendants. I refer to the famous celebrated English case of **Tweddle v. Atkinson** [1861] EWHC QB J 57 which insisted that only parties to the contract can sue and be sued. The same position was advanced by

the Court of Appeal in the case of **Chesano Cotton Ginnery v. Jielong Holding Tanzania Ltd,** Civil Appeal No. 187 of 2017 CAT at Dar es Salaam (unreported). In that case, there was agreement between the appellant and respondent regarding the supply of cotton. The appellant engaged another company (third party) to supply cotton without approval of the respondent.

The High Court rejected the argument that the third party was liable. The respondent won a claim for breach of contract. On appeal, the appellant claimed that it assigned the third company to supply cotton on its behalf. The Court of Appeal dismissed the appeal and stated that the respondent was never involved in the subcontracting agreement, hence not privy to it.

Similarly, as in our case, the plaintiff not being privy to the contract cannot claim against the 1st and 2nd defendants. It remains as uncontroverted fact that upon termination of contract by default of the contractor everything on the site vests to the 1st defendant. In this regard, therefore, the first issue is resolved against the plaintiff.

On the second issue whether the 1st defendant was a party to the contract signed between the plaintiff and the 3rd defendant. Reading from the submissions by the counsel for both sides and evidence, it is quite clear

that the 1st defendant was not privy to the agreement between the plaintiff and 3rd defendant. Therefore, in the circumstance, the second issue is resolved against the plaintiff.

I turn to the third issue on lawfulness of impounding the said equipment. The plaintiff's counsel argued that the 1st defendant acted unjustifiably in impounding the equipment which were leased to the 3rd defendant. The gist of this argument is that since the 1st defendant was not privy to the hire purchase agreement, he could not impose any liability against the plaintiff. He relied on section 132 of the Law of Contract Act, Cap 345 RE 2002 which according to him the plaintiff is allowed to sue a third party for deprivation of property/equipment which were unlawfully seized.

On their part, the learned counsels for the 1st defendant argued that the contract (exhibit D1) gave them right to impound anything left on the site in any event the contract is terminated by default of the contractor. They consider the seized properties/equipment like a lien which upon default reverts to the employer.

Looking at the contract, it does not mention that the employer has to search for the title of the contractor to the said equipment. Hire purchase

agreement between the contractor and the third party is tantamount to subcontracting of the project while the contract (exhibit D1) prohibits any kind of subcontract without prior approval from the employer. This was not done in this case, which is why I hold that the 1st defendant was not privy to the hire purchase agreement.

Mr. Mahuna, the learned counsel says there was no subcontracting but a hiring of equipment. That no transfer upon the 3rd defendant signing of exhibit D1. I do not agree with him entirely. The said agreement (exhibit P1) was void in view of the decision in the case of **Chandrakant Vinubhai Patel vs Frank Lionel Marealle and Another** [1984] TLR 231 (CA). The court observed at page 235 that:-

> *"We are of the view that the agreement is void and since the trial judge has based his decision entirely on a void agreement, his judgment is vitiated as it is based on a fundamental flaw."*

As above noted, the agreement (subcontracting) was void and one can say there was fraud calculated to deny the 1st and 2nd defendant the right to claim such equipment upon disappearance by the 3rd defendant. I find and hold the third issue against the plaintiff too.

Last issue was on the reliefs. From the plaint the plaintiff claimed a number of remedies ranging from the order for release of the impounded equipment, compensation for loss of use, specific damages and general damages plus interests thereof. Having found and held the other three issues against the plaintiff as intimated above, it is quite clear that the plaintiff cannot be awarded any remedy so claimed against the first and second defendant notwithstanding (in my view and without fear of being contradicted) that they never filed counter claim. Their claim is based on Exhibit D1 which I find is self explanatory. What this court can do is just to make an order that the impounded equipment(s) are hereby vested to the 1st defendant as her lawful properties.

I say so because what was agreed between them was just like a pledge (or as the defence put it lien) which in view of what was held in the case of **Jacob Tibifukula vs. Daud Justinian** (1968) HCD No. 134,

> *"Where money is loaned upon a pledge of property, on condition that the property becomes the property of the pledge if the loan is not repaid on time, the property does not pass unless there is a court order to that effect..."*

I would extend the principle thus, the equipment (property) passes from the contractor to the employer and the latter acquires title after court order to that effect upon default of the agreed contractual terms. This is particulary so because the third defendant was paid mobilization costs including costs to hire the said equipment.

There is a prayer by the plaintiff's counsel that the court enters default judgment against the 3rd defendant. This prayer has also some reservations. It is true, the third defendant failed to file defence after the plaintiff had issued notice of this case by publication in the newspaper of wide coverage. This however, does not mean that this court can pass a decree through a back door. As noted above, a transfer was between legal persons without Board resolutions which I consider as illegal. The said MoU (exhibit P4) and agreement with the third defendant (exhibit P1) which is the basis of the plaintiff's claim cannot be acted upon. DW1 was more articulate. When he/she was cross examined (at page 31 of the record), said that:-

> *"...TANROADS never blessed such agreement between the two. It is only Strada (i.e 3rd defendant) that can prove that some of the equipment were not his but Bimels..."*

Similarly, this court cannot say they were equipment of the plaintiff. The alleged section 132 of the Law of Contract Act, Cap 345 RE 2002, which *is imparimateria* with section 180 of the Indian Contract Act, 1872 reads:-

> *"If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury."*

The term bailment is defined under Blacks Law Dictionary, 8th Ed to mean:-

> *"A delivery of personal property by one person (the bailor) to another (the bailee) who holds the property for certain purpose under the express or implied-in-fact contract."*

One can say, it is sort of "a rental or lease" which I dare say would entitle the third defendant who steps into the shoes of the owner (plaintiff) to claim it against the 1st defendant if she has any cause of action not the plaintiff to claim for it. That said and done, the plaintiff's suit is dismissed even against the 3rd defendant. Suit stands dismissed with costs.

M. G. MZUNA,
JUDGE.
14. 08. 2020