THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR-ES-SALAAM

MISC. COMMERCIAL APPL. NO. 52 OF 2023

EAST AFRICAN DEVELOPMENT BANK .....APPLICANT

VERSUS

HOOD TRANSPORT COMPANY LIMITED.....1ST RESPONDENT
MOHAMED HOOD ALJABRY LIMITED .....2ND RESPONDENT/ NECESSARY PARTY
SAID MOHAMED ALJABRY.....3RD RESPONDENT/ NECESSARY PARTY

Last order: 10th AUGUST 2023
Ruling: 21ST SEPT. 2023

RULING

NANGELA, J:.,

This ruling is in respect of a preliminary object filed against an application which was brought to the attention of this court by way of a chamber summons filed under section 12 (7), 13 (2)(b) and 13 (4) (b) of Financial Leasing Act, No.5 of 2008, Chapter 417, Revised Edition 2002. The objection is to the effect that:

1. The Application is bad in law for improperly joining the 2nd and 3rd Respondents.

2. The Application is incompetent for being preferred under section 12 (7) and 13 (4) (b) of the Financial Leasing Act.
3. That, the application is, in itself, untenable.

When the parties appeared before me, all along the Applicant enjoyed the legal services of Mr. Gabriel Simon Mnyele, learned counsel while Mr. Majura Magafu, Mr. Hosea Chamba, and Mr. Elias Kiatua learned counsel, appeared for the Respondents. This court directed the parties to dispose of the preliminary objection by way of written submissions and issued a schedule of filing. The parties adhered to the schedule and duly filed their written submissions.

Submitting in support of the objections, Mr. Magafu submitted that as regards the first limb of the points of objection so far raised by the Applicant, this court's attention needs to be drawn to the fact that the Applicant's act is about to circumvent the principle of natural justice and put the 2nd and 3rd Respondents in a danger of being condemned unheard.

Mr. Magafu reasoned that since this application emanated from a decision of this Court in Commercial Case No.132 of 2016 between the Applicant and the 1st Respondent, it is logically inappropriate at this stage (especially where the decision and appeal have been determined) to add the 2nd and 3rd Respondents to the matter as at hand. He contended that such an act needs to be halted by this court.

He submitted further that, what the Applicant seems to aver in paragraphs 4 and 5 of her affidavit filed in support of the application is novel and only known to the Applicant as the 2nd and 3rd Respondents are not parties to the Financial Lease Agreement, were never served any notice of default, and neither were they parties to the commercial Case No.32 of 2016. He surmised, therefore, that, it is unjust to issue adverse orders against the 2nd and 3rd Respondents in the application at hand while they were not parties to any of the founding reasons for the institution of this application.

To further lend support to his submissions, Mr. Magafu relied on the case of **Mbeya-Rukwa Autoparts and Transport Limited vs. Jestina George Mwakyoma** [2003] TLR 251 and argued that, even under Article 13(6) (a) of the

Constitution of the United Republic of Tanzania (1977) as amended from time to time, there will be a breach of the right to be heard if this court will proceed to deal with the matter before it.

As regards the second limb of objection, it was Mr. Magufu's submission that, in its entirety, the Financial Leasing Act does not mandate this court to grant the orders sought in the chamber summons. He contended that, the reason is because the Act is used for financial leasing and not financial loans and, therefore, that, the orders sought in the chamber summons to repossess the vehicles mentioned therein is untenable given that, the vehicles are co-owned by the Applicant and the 1st Respondent as shown by Annex.EADB-2.

Mr. Magafu argued that, since the Financial Leasing Act No.5 of 2008 deals with leasing, the ownership of the leased equipment rests only on the lessor and that is the gist of section 3 and section 4 of the Act. He contended that, annexure EADB 2 is contrary to what the provisions cited provide. He contended that, the attached ownership cards of the mentioned vehicles (Annex. EADB -2) do not relate at all with the financial lease in question. He submitted that, based

on that aspect, invoking the provisions of the Financial Leasing Act to co-owned property is, in itself, bad in law and makes the application incompetent as the Act deals with lease and use only and the annexed equipment are not subject of the Finance Leasing Agreement.

For his part Mr. Mnyele, the learned counsel for the Applicant, submitted that the two preliminary objections ought not to have been raised at all. He contended that, at the end of the day, the Respondents seem to have argued the main application by resorting to the averments in the counter affidavit regarding why the vehicles should not be re-possessed. Mr. Mnyele was of the view that, on the first objection, the Respondent has erroneously argued that the basis of this application is Commercial Case No. 132/2016. On the contrary, Mr. Mnyele argued that the matter is a stand-alone application, based on the Financial Leasing Act, 5 of 2008 where the Lessor of the Equipment is given two alternatives to repossess the leasing equipment.

According to Mr. Mnyele, the lessor has a right, under section 13 (2) (b) of the Act, to repossess the leased equipment upon expiry of the lease period if the lessee has not

purchased the leased property in terms of section 12 (7) of the Act. He contended that, re-possession is both a contractual and a legal right.

Mr. Mnyele told this court that, under section 13(4) of the Act, the lessor has two options if he wants to re-possess: (a) direct repossession without recourse to court or (b) applying to the court for orders of repossession. He argued, therefore, that, the Applicant has opted for the second option and, the mere fact that there is a Decree of the Court is not a bar to an application for repossession as repossession is a remedy allowed under section 13 (5) of the Act without prejudice to all others.

Mr. Mnyele contended that, under the normal circumstances, the Applicant could have attached the buses, but she has explained why she cannot attach the buses as she still has title over them as per Annex. EADB -1.

Mr. Mnyele submitted that, the argument fronted by the Respondents to the effect that, the 2nd and 3rd Respondents were not parties in the Commercial Case No. 132 of 2016 and so cannot be condemned unheard is of no substance. He contended that the reason is because the suit and the current

application are stand alone proceedings with different objectives. He noted that, while it is indeed proper and good practice to join the directors of the lessee so that they may be directly heard and show cause as to why the buses should not be re-possessed, that fact, without prejudice, cannot happen since they are not parties to the EADB-1 (the Lease Agreement).

As regards the second objection, it was Mr. Mnyele's submissions that the enabling provisions cited by the Applicant were properly cited. He contended that, when the leasing agreement (Annexure EADB-1) took effect, the Act was not there as it became law on the 06th day of June 2008. He however contended that the documentation was by then following the practice in other countries.

He submitted further that, although the buses are registered in joint names, which does not make the attached lease agreement not a financial agreement in terms of the Act, the definition of financial leasing agreement applies equally to the lease agreement in question as it has all basic tenets of lease transaction and the Respondents have not shown any different law applicable to the transaction.

Mr. Mnyele submitted that, though the leasing agreement was executed before the Act came into effect, in essence, it complied with the legal requirements in regard to the title by virtue of Clause 10 (a) of Annexure EADB -1 in which it was agreed that the leased equipment will remain the property of the lessor until the conclusion of the lease agreement.

Mr. Mnyele submitted in the alternative that, the preliminary objections should be dismissed as they do not, looking at the way they have been argued, fit the test provided for in the **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd** [1969] EA 696 as cited in the case of **Selcom Gaming Ltd vs. Gaming Management (T) Ltd and Another**, Civil Application No.175 of 2009 (unreported).

The learned counsel for the Respondents filed a rejoinder submission rejoining that, the so-called "good practices" by the Applicant to join the 2nd and 3rd Respondents in this application ought to have been relied upon when Commercial Case No.132 of 2016 was filed. He rejoined further that, considering that the 2nd and 3rd Respondents are neither

parties to the financial leasing agreement nor to the Commercial Case No.132 of 2016, joining them at this stage of repossession is a serious irregularity.

Rejoining further regarding the second limb of the objection, Mr. Magafu maintained that the financial lease gives exclusive right of ownership to the lessor. He contended that the attachment marked as Annexture EADB-2 are not subject covered under the Financial Leasing Act, as the Act does not deal with co-ownership of leased property while this application is preferred using a law of exclusive right of ownership to assets which are co-owned by the Applicant and the 1st Respondent.

Mr. Magafu refuted as misconceived the assertions made by Mr. Mnyele that the preliminary points of law he raised do not meet the test for preliminary objections. He argued that, joining a Respondent who is not a party to the agreement and to the previous proceedings in an inter-related application is fatal and need not be overlooked by the court.

He rejoined, likewise, that, invoking a law which confers exclusive ownership to properties which are co-owned also need not be overlooked by the court. He submitted therefore

that the two points were pure points of law. Having summarised their rival submissions, the issue which I am to address shortly hereafter is whether the two preliminary points of law raised and argued by the Respondents are of any merit.

To begin with, as rightly noted by Mr. Mnyele, the Lease Agreement between the Applicant and the 1st Respondent was executed on the 22nd of October 2007 at the time when the Act under which the application is premised was yet to be enacted. In other words, at the time the parties were not governed by the provisions of the Act since the Act came into effect in the 06th day of June 2008.

In his submission, however, Mr. Magafu has contended that, the Act and the provisions of the Act upon which the application is premised do not apply. He contended that the Act does not deal with financial loans, but financial leasing and the vehicles sought to be repossessed are co-owned. In my view, I do not find this argument to a befitting argument that supports a preliminary objection. It is more befitting if the parties were arguing the merits of the application.

On the other hand, I do agree with Mr. Mnyele that, the application is filed as a separate matter under the Financial

Leasing Act, Cap. 417. R.E. 2002. However, much as I agree with him on that point, I do find merit in the argument that, the 2nd and 3rd Respondents being not parties to the Lease Agreement (Annexure EADB-1) cannot be made parties to the dispute between the Applicant and the 1st Respondent unless it is clearly shown how they are involved in the transaction. By merely stating that they are necessary parties does not suffice.

For the reason above, I will uphold the 1st objection and hereby proceed, as I do, to struck out the application. Having upheld the first objection, I see no need to address the second objection. The application is, thus, struck with no orders as to costs.

It is so ordered.

DATED AT DAR-ES-SALAAM ON THIS 21ST DAY OF SEPTEMBER 2023

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA COMMERCIAL DIVISION

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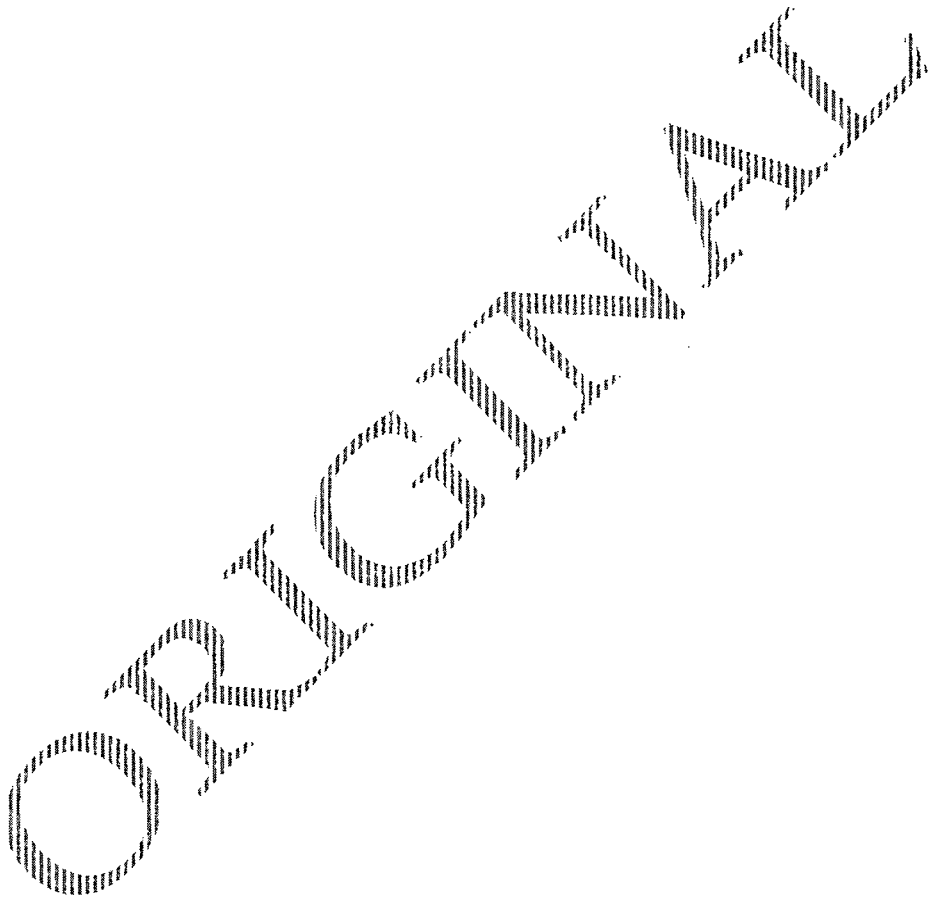
DEO JOHN NANGELA

JUDGE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