IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

(APPELLATE JURISDICTION)

MISC. CIVIL APPLICATION NO. 19 OF 2021

(Originating from Civil Case No. 3/2021 of the High Court – Kigoma)

MOHAMMED ENTERPRISES (TANZANIA) LIMITED ..... 1ST APPLICANT

TANZANIA COMMODITIES TRADING COMPANY ..... 2ND APPLICANT

VERSUS

SHISHIR SHYAMSINGH ..... RESPONDENT

RULING

12/8/2021 & 23/8/2021

L.M. MLACHA, J.

The applicants, MOHAMED ENTERPROSES (TANZANIA) LIMITED and TANZANIA COMMODITIES TRADING COMPANY, filed this application against the respondent, SHISHIR SHYAMSINGH, under certificate of urgency seeking the following orders.

1. *That this Honourable Court be pleased to make an order that a notice be issued to respondent to show cause why he should not furnish security in the sum Tsh. 256,609,958 (say Tanzania*

Shillings Two Hundred Fifty-Six Million six Hundred and Nine Thousand Nine Hundred and Fifty-Eight) for satisfaction of any decree that may be passed against the Respondent in the suit;

2. *Upon their failure to show cause, this Honourable Court may be pleased to order that the Respondent should deposit his passport into Court as security for the performance of any decree that may be passed against the respondent in the main suit;*
3. *That upon failure to deposit his passport, this Honourable Court may be pleased to commit the Respondent, now in Kigoma, Tanzania as a Civil Prisoner until such time as he deposits in Court the security above stated or until full and final determination of the suit and execution of the Decree thereon in full;*
4. *An order restraining Indian High Commission from issuing travelling documents to the Respondent pending determination of Civil Cas No. 03 of 2021;*
5. *Costs of this Application be provider for;*
6. *Any other relief the Honourable Court shall deem fit and equitable to grant.*

The application was made under Order XXXVI Rules 1(b), 3(1), 5, section 68(b) and (e) and section 95 of the Civil Procedure Code Act, Cap 33 R.E. 2019 (the CPC) and any other enabling provision of the law. It was supported by the affidavit of Abbas Rashid, a principle officer of the first applicant. The respondent was duly served and filed a counter affidavit in opposition. He

also lodged a Notice of Preliminary Objection with three points. Counsel for the respondent abandoned the third point in the course of submission leaving two points which read thus;

1. *The application is bad in law and incurably defective for being supported by a defective affidavit which bears a defective verification clause which does not disclose the source of the information verified by the deponent.*
2. *The application is incurably defective for being affirmed by only the 1st respondent and the second respondent is not reflected* anywhere.

Ms. Neema Mahunga appeared for the applicants while the respondent had the services of Mr. Daniel Rumenyela. With leave of court, counsel submitted on the preliminary points of objection and the application together. Hearing was done by oral submissions.

It was the submission of Mr. Daniel that, the affidavit made in support of the application has a verification clause which was not made in line with order XIX rule 13 (1) and order VI rule 15 (2) of the Civil Procedure Code Act (the CPC). That, the verification clause states that what is contained in the affidavit is true to the best of the knowledge of the deponent something which is not true because paragraph 3, 4, 5 and 6 have information from

undisclosed source. That, the deponent being an employee of the first applicant could not know what is contained in these paragraphs. He went on to say that paragraph 5 talks of the audit report but he never disclosed where he got it. He said that paragraph 4 has statements which did not originate from him. It also takes us to the audit report, annexture A1. He referred the court to the case of **Rashid Ally Kadegereka v. Jumanne Masinde**, High Court Miscellaneous Land Application No. 323 of 2019 a case which talked about defects in the verification clause. He also referred the court to **Anatory Peter Rwebangira v. The Principle Secretary Ministry of Defence and Attorney General**, Civil Application No. 548/04/2018 on the same subject.

Submitting on ground two, counsel for the respondent said that the application has two applicants but we have just one affidavit which is of the Principle Officer of the first applicant. The deponent spoke of two applicants in paragraph two but did not say that he is a Principle Officer of the two applicants, he said. Counsel proceeded to say that the relationship between the deponent and the second applicant is not disclosed. He wondered the one who gave him the mandate to speak for them.

Submitting on the merits of the application, counsel for the respondent said that the application does not have any urgency because Civil Case No. 3 of 2021 is yet to be heard. It is coming for mention on 30/8/2021. He called the case malicious aiming at restricting the movement of his client. He proceeded to say that if the respondent has no property as is contained in paragraph 7 of the affidavit, there is no logic for him to be required to deposit security. He proceeded to say that the allegation that he can run away and make the decree in the case useless has no base because the decree is yet to be released. He proceeded to say that the respondent has no plan to process a temporary passport from the Indian High Commission as alleged. He added that the court cannot issue orders against something that has not happened.

Counsel proceeded to submit that the applicants are aware that the respondent is an accused person in Criminal Case 149/2021 at the District Court of Kigoma which is coming for hearing on 25/8/2021 and that the passport in question has been deposited in court as a condition for bail. He questioned the reason as to why it is needed in this court. He said that the move aims at suppressing his client for no legal base. He prayed for the application to be dismissed.

Submitting in reply, Ms. Neema, counsel for the applicants prayed to adopt the contents of the affidavit made in support of the application as part of his submission. She submitted that the preliminary points of objection raised lack the characteristics of a preliminary objection as established in the case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd** [1969] E.A 696s and adopted by our courts in **Karata Ernest and others v. Attorney General**, CAT Civil Revision No. 10 of 2010 and **OTTU on behalf of P.L. Asenga and 106 others v. AMI (Tanzania) Ltd**, CAT Civil Application No. 35 of 2011. She said that, a preliminary objection must be based on a pure point of law and must not call for any evidence to substantiate it.

Submitting on accusations directed to paragraph 3, 4, 5 and 6 of the affidavits in support of the application, counsel for the applicants invited the court to hold that order VI rule 15 (1) and (2) do not include affidavits as alleged by counsel for the respondent. She said that a pleading described in order VI is a plaint or written statement of defence and such other pleadings as may be presented in accordance with rule 13 of order VIII, meaning a Counter Claim a and Reply to counter claim. An affidavit has no room in order VI, she said.

While correcting that order XIX does not have rule 13 (1) it having only 3 rules, and suggesting that the counsel for the respondent must have in mind rule 3 (1), and not 13(1) which is not existing, she said that the deponent had knowledge of facts contained in the challenged paragraphs in his capacity as a Principal Officer of the first applicant company. Referring to paragraph 2, he said that the applicants have filed a civil suit against the respondent which is a fact known to him as a Principal Officer of the first applicant. She went on to say that in paragraph 3 the deponent said that the respondent was an employee of the second applicant sent to Kigoma to work in godowns of the first applicant. He knew this as a Principal Officer of the first applicant. She stresses that paragraph 2 and 3 are in line with order XIX rule 3 (1) because he has knowledge of the facts. She added that the cases of Rashid Ally (supra) and Anatoli Peter (supra) are distinguishable on the facts and issues of this case.

Giving details, she said that in Rashid Ally, the court at page 6 acknowledged that, the applicant ought to have stated the source of information at paragraph 6 as an information received from his legal officer. In Anatoli Peter the court had dismissed the application by the applicant on the ground that it had a defective verification clause because it did not state the source of

information contained in paragraph 5 and 6 of the affidavits and included matters of law not facts. She said that all these circumstances are not present in the present application. He went on to say that the deponent in his capacity as a Principal Officer had knowledge of all what was going on in the first applicant warehouse at Kigoma where the respondent worked. In that reasoning, she submitted, all what is stated in paragraph 2 and 3 of the affidavits are true to the best of his knowledge.

Counsel submitted that the counsel for the respondent challenged annexture A2 saying that they contain information from third parties but failed to show on whose behalf the reports were prepared for. She said that the reports were prepared on behalf of the first applicant where the deponent is a Principal Officer. She declined to go to the contents of the report saying that could amount to revealing evidence which is restricted in preliminary objections as reflected in the cases cited.

Counsel proceeded to say that taking annexture A1 and A2 as information received from another defeats the purpose of a preliminary objection because it calls for evidence to prove those facts. She argued the court to disregard that point.

Submitting on ground two, counsel for the applicants said that the law does not require all parties to testify for or against the case. She proceeded to say that, paragraph 3 of the affidavit shows that the respondent was an employee of the second applicant who was sent to work at the first applicant's go-down at Kigoma. That, there was no need for the second applicant to swear an affidavit to prove this fact because the first applicant had knowledge of it and could testify. He proceeded to submit making reference to **Msanii Africa Newspaper vs Zakaria Kabengwe**, CAT Civil Application No. 2 of 2009 where it was said that failure to file an affidavit does not bar a party to address the court on matters of law. He stressed that, a party who did no file an affidavit which is the substitute of oral evidence, can still submit on matters of law. Counsel went ahead and said that in he absence of any law which requires all parties to file affidavits, the affidavits of the first applicant satisfies the requirements of order XLIII Rule 2 of the CPC. She added that the counsel for the respondent has failed to show how the interests of the second applicant have been defeated for its failure to file an affidavit. Counsel argued the court to dismiss the preliminary objections.

Submitting on the application, Ms. Neema said that the applicants are arguing the court to order the respondent to deposit Tshs. 2566,609,958/= which is the sum claimed in Civil suit No. 3/2021 as security under order XXX VI Rule 1 (b) of the CPC because he is an Indian national who has nothing in the country except Criminal Case No. 148/2021 pending before the District Court of Kigoma where he has deposited his passport as security for bail.

That, if he will be acquitted in the criminal case or given a sentence other than a custodial sentence, he is likely to escape making the decree which may be issued useless. She went on to submit that the fact that the applicant is facing a criminal case did not prevent them to file a Civil suit because the facts can be a basis of a Civil case also. In the Civil Case he is accused of negligence in the course of performing his duty.

Referring to order XXXVI Rule 1 (b) of the CPC, the counsel of the applicants said that the court can order an arrest before judgment to bring the defendant to show course why the court should not make an order for deposit for an amount equal to what is in the plaint pending determination of the suit.

Counsel proceeded to say that the defendant does not have any property in Tanzania or any family ties which will force him to remain in the country. She went on to say that the applicants stand to suffer more if the respondent leaves Tanzania as they don't have any knowledge of his whereabouts in India, neither do they have any operations in India. She proceeded to submit that the counter claim contains allegations which are yet to be proved. She said that so long as they are not aware of what is happening in the Indian High Commission and its people, it is safe to issue the order as a safeguard. She argued the court to grant the application as prayed.

Mr. Daniel Rumenyela made a rejoinder and joined issues with counsel for the applicant.

I plan to start with the preliminary objections. I will start with defects on the verification clause. I start with problems of the Law – order VI rule 15 (2). The issue is whether the affidavit is defective and whether order VI rule 1 cover affidavits. Counsel for the respondent had the view that, affidavits are covered under order VI rule 15 (2). Counsel for the applicants has the view that, pleadings described in order VI rule 1 is limited to a Plaint or a Written Statement of Defence and a Counter Claim and a Reply to counter claim.

They don't extend to affidavits. She also challenged the citation to order XIX rule 13 (1) saying that the order has only 3 rules.

Reading through rule 1 of order VI, I have come to agree with counsel for the applicants that rule 15 (2) was wrongly cited by counsel for the respondent for order VI has nothing to do with affidavits. The verification mentioned in rule 15 (2) is therefore restricted to Plaints, Written Statements of Defence, Counter Claim and Reply. In the like manner, order XIX does not have rule 13 (1). It is limited to 3 rules. This can dispose of the first objection but I think I should proceed ahead.

The deponent said that all what is contained in paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 are true to the best of his knowledge. Counsel for the respondent say that what is contained in paragraphs 3, 4, 5 and 6 show that the deponent was not in a position to know them because they have a source from a third party who could not be disclosed. The counsel for the applicants does not agree. She said that given the position of the deponent who is a principal officer of the first applicant who has a go-down in Kigoma, used by the second applicant, where the respondent worked, he knew everything making the objection baseless. She adds that, the objections show that they

are not pure points of law. They call for evidence and therefore not maintainable.

I think, we should go to the paragraphs themselves, one by one, to see if it can be said that they contain information which could not be readily available to the deponent.

In paragraph 3 the deponent says that the respondent was the employee of the second applicant who was sent to work in the first applicant's Kigoma Branch from December 2018 until February 2020. Earlier, in paragraph 1, the deponent said that he is a principle officer of the first applicant. In paragraph 2 he said that the applicants have filed a case against the respondent where they claim the money being loss occasioned by the respondent.

I think, so long as it is not disputed that the parties in this case are the same as parties in Civil suit No. 3 of 2021, the deponent being the principal officer of the first applicant, who is a party in the Civil suit, must have personally know knowledge of issues involved in the case which touch the parties including the second respondent. It is not correct therefore, to say that, he

is not aware of issues involving the second applicant who was the employer of the respondent.

In paragraph 4 it is stated that, before handling over of duties to another person, the first applicant conducted an audit aiming at finding the closing and opening stock for goods in the first applicant's godown at Kigoma, outstanding balance from the first applicant's credit customers, sales of products and; opening and closing balance of money in the applicant's accounts. A copy of the auditor's report, annexture A2 was attached.

I think it is open that, the deponent being a principal officer of the first applicant had personal knowledge of all what is stated in paragraph 4. They are all issues of the first applicant company. Going further to dig the details of the report, annexture A1 to see who prepared it, when, how and what it contains takes us to calling evidence which as hinted above, will take us far from the coverage of a preliminary objection.

Paragraph 5 states that as a result of the audit done at the first applicant's Kigoma Branch, the first applicant found that the respondent had occasioned losses as itemized from (a) to (i) total Tshs. 256,609,958. Copies of documents were annexed as A2 collectively. Like in paragraph 4, the

deponent as a principal officer of the first applicant, in my view, must have had personal knowledge of the losses which has been occasioned at Kigoma Branch. The documents must have come to him in the usual way as a principle officer. Seeking for who prepared them and who gave them to him, will amount to looking for evidence, which is outside the parameters of a preliminary objection.

In paragraph 6 it is stated that the respondent admitted to have occasioned loss to the first applicant at Tshs 256,609,957, but to date he has not done anything to reimburse the same to the first applicant. Again here, the deponent being a principal officer of the first applicant, who is aware of the audit and report by virtue of his position, must have been aware of the amount of loss. This in my view, is something which was in his personal knowledge.

That said, the objection based ground one is dismissed.

In ground two, the problem his on the fact that the application is not supported by two affidavits as is usually the case. It is supported by the affidavit of the first applicant only. Counsel for the respondent say that the omission is fatal and made the application incurably defective. Counsel for

the applicant has the view that so long as the deponent spoke of issues of the two applicants it was not fatal. I have tried to weigh and think carefully. I have noted that the practice of having one affidavit to cover two applicants is not in our jurisdiction.

According to order XLIII rule 2, all applications must be made by presentation of a chamber summons supported by an affidavit. The affidavit is evidence to back the orders sought in the application. If there are more that one applicant or respondent, each of them must file an affidavit in support of his case. It is thus not correct, with respect to the views counsel for the applicants, that, the affidavit of the first applicant can act for both applicants. Much as the two can be represented by one counsel, but each was supposed to have his affidavit.

Now can we say that the affidavit of the first applicant can support the orders sought in the absence of the affidavit of the second applicant? I have taken time to consider this aspect. I have gone through the affidavit and tried to relate it to the orders sought. Having done so, I have realized that the orders sought rely mainly on facts deponed in the affidavit. There is little touching the second applicant who appear as a subsidiary company of the first applicant. It is therefore clear that the absence of the affidavit of the second

applicant cannot prevent the court to make the orders, if it is found necessary to do so.

That said, what are the merits of the application? We are told that the respondent has a criminal case in the District Court of Kigoma. We are also told that the parties in this case are parties in the pending Civil case. Both the Criminal and Civil cases relate to the same subject matter but based on different legal basis. The applicants have the view that the criminal case may end up in an acquittal or a sentence which is not custodial. The respondent who is an Indian may escape leading the decree in this case to be a mere paper. They are now seeking the deposit of the amount as security failure of which he should show course or deposit his passport. The court is also requested to order the Indian High Commission not to issue a temporary passport for the same purpose.

I have considered the rival submission on the subject matter. I agree with counsel for the respondent that, if the applicant say that the respondent has no any tangible asset in Tanzania, ordering him to deposit cast Tshs. 256,609,958 under any circumstance may be a useless exercise. That prayer is therefore refused. But, I agree that, the first applicant has managed to demonstrate in its affidavit and counsel submission that, there is a danger

that if the respondent is acquitted or the proceedings of the case are otherwise terminated in his favour, he can move out of the jurisdiction of this court and made the decree, if any, useless. With that in mind, I order his passport to be deposited in this court pending hearing and final determination of the Civil Case, soon after the termination of the criminal case.

I cannot issue any order to the Indian High Commission because they were not parties in this case. I can only say that, if the Indian High Commission happens to be approached by the respondent for a temporary pass, they are adviced to take note of the existance of Civil Case No. 3 of 2021 and the deposit of the passport in the course of exercising their discretion to issue or refuse.

The application is partly granted. It is ordered so.

No order for costs.

L.M. Mlacha

Judge

23/8/2021

Court: Ruling delivered in chamber in the presence Ms. Neema Mahunga, Counsel for the applicant and in presence of the respondent in person who also represented by Mr. Daniel Rumenyela, advocate.

L.M. Mlacha

Judge

23/8/2021