IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

MISC CIVIL APPLICATION NO. 15 OF 2021

(C/F from Civil Case No. 04 of 2021)

URBE TRADERS COMPANY LIMITED.....APPLICANT

VERSUS

NEL LINES INTEGRATED SERVICES.....RESPONDENT

RULING

04/05 & 17/05/2021

MZUNA, J.:

This is an application for attachment before judgment of the respondent's properties pending hearing and judgment of the pending suit. The second prayer is for an order for disposal of 447 tonnes of beans stored in the warehouse at Esso house No. 29.

The application is preferred under Order XXXVI Rule 6 and Section 95 of the Civil Procedure Code, Cap 33 RE 2002 and is supported by an affidavit sworn by Vedasto John Kalela the Director of the applicant. The applicant is represented by Mr. Michael Lugaiya, the learned counsel whereas the respondent is represented by Mr. Fidel Peter and Mr. K. Mapima, the learned counsels. There is also a counter affidavit sworn by Mr. Charles Omongot opposing the application.

There are two main issues subject for determination; The first issue emanates from the raised preliminary objection as to whether the application is tenable in law? The second issue is whether the application should be allowed?

Let me start with the first issue on the raised preliminary objections. Two points have been raised, First the allegation that there is wrong citation and or non citation of the applicable law. Second that the application has been brought prematurely. Submitting on the said points of preliminary objection, Mr. Fidel Peter, the learned counsel, argues that there is wrong or non citation of the applicable law. He said that the application is preferred under Order XXXVI Rule 6 of the Civil Procedure Code while Rule 6 has 3 sub rules. That, in sub rule 1 there is 1(a) and (b) followed by sub rule (2) and sub rule (3). That, failure to cite the sub rules by the learned counsel suggest that this Court is wrongly moved because the court cannot assume the applicant's sub rules in order to grant the prayers sought In the chamber summons because each sub rule has its own purpose.

The second point is that the application has been brought in defiance of the agreed terms that in case of any dispute, the matter should be filed in the arbitration. He referred this court to a document Urbe 1, 2, and 3. For instance, Urbe 1, Article 5 says any dispute has to be referred to the Arbitrator. That has not been complied with, because there is no Arbitration which has been conducted. So the application is premature, he argued.

The third point is that the agreed date upon which the applicant could institute the suit in case of failure to honor agreement had not been reached. According to the learned counsel, it was therefore prematurely filed to the detriment of the respondent. He referred to Annexture Urbe 2 which shows that a contract of debt settlement was

signed on January 7th, 2021. Article 3 page 2, there was a promise to pay USD 368,000 by three installments. A suit would commence after default. That this case was filed on 15th February, 2021. The current application was filed on 16th February, 2021. That was 12 days before the date of first installment. This, he further said, contravenes Art 4 of Urbe 2 because it (suit and application) were brought prematurely. On this account, he prayed for the court to dismiss the application.

Responding to the raised preliminary points of objection, Mr. Lugaiya submitted on the issue of wrong citation, that he cited even Section 95 of the Civil Procedure Code on the inherent powers of the High Court, which cures the raised anomaly. On the issue of attachment before the agreed date and filing the matter in court before Arbitration he said that Art 3 of Urbe was about payment within 7 days after delivery. That is how the subcontract agreement was reviewed by the parties by signing Urbe 2. Paragraph 5 of Urbe 2 parties agreed that in case of default to honour the agreement the applicant will file the suit. This according to him, allows them to institute the suit before the agreed dates due to the conduct because the respondent is not a Tanzanian National and was about to avoid the jurisdiction of the Court. That they took away all the money from the Bank after payment.

This court has the following to say. First, the application of section 95 of the CPC would apply where there is no specific provision governing the matter at hand. I am fortified to this view by the decision of the Court of Appeal in the case of **Aero Helicopter (T) Ltd v. F.N. Jansen** [1990] TLR 142 at page 145 (CA). The court held that:-

"The inherent power of the High Court under section 95 of the Civil Procedure Code is exercisable where the law has made no provision governing the particular matter at hand."

The argument by Mr. Lugaiya, the learned counsel that section 95 of the CPC allows this court to apply inherent powers in the present case while there is "specific provision governing the particular matter at hand", with due respect is misplaced. By the same stroke of a pen, the raised issue of wrong and non citation of the applicable law, by Mr. Fidel Peter is also unassailable. I say so because with the advent of principle of overriding objective introduced in the CPC under Section 3 (A) and (B) by the written Laws Amendment Act No. 3/2018 courts are guided with just resolution of disputes with undue regard to technicalities. Issue of wrong citation and non citation cannot deny the court to do the act asked for. Courts do sometimes allow parties to amend the Chamber summons and allow parties to insert the proper provision where necessary so that the merits of the case can be determined. I am fortified to this view by the decision of the Court of Appeal in the case of **Amani Girls Home vs. Isack Charles Kanela,** Civil Application No. 325/08 of 2019 (unreported). The court (at page 7) held that:-

"...although the applicant herein was supposed to cite Rule 10 of the rules in his application which he did not, the Court's jurisdiction to entertain this application has not been ousted by such failure..."

The court was interpreting proviso to Rule 48 (1) of the Court of Appeal Rules, 2009 which reads:-

"... Provided that where an application omits to cite any specific provision of the law or cites a wrong provision, but the jurisdiction to grant the order sought

exists, the irregularity or omission can be ignored and the court may order that the correct law be inserted."

Although the Court was interpreting the said rules still the principle enunciated therein applies even in this court. It is therefore amended to suit the application even after there is a raised preliminary point of objection. This argument equally fails.

On the point that parties had agreed to refer the matter for Arbitration, Mr. Lugaiya is correct in my view when he said that there was waiver of the said condition. He said that upon signing a subcontract agreement in which paragraph 5 of Urbe 2, parties agreed that in case of default to honour the agreement the applicant will file the suit. The instituted suit Civil Case No. Civil Case No. 04 of 2021 conforms to that condition.

The question is, was it preferred prematurely before the date agreed to honour the first instalment of the agreement? It is true, this application was filed on 16th February, 2021 just 12 days before the date of first installment. That contravenes Art 4 of Urbe 2 because both the suit and application were brought prematurely. By thie argument the learned counsel seems to say the suit would be properly filed if it was after the default. In other words, impliedly, issue of Arbitration as the first resort seems to have been abandoned.

The argument by Mr. Lugaiya, and this takes me to the merits of the application as the second major issue, is that the respondent had the contract with the World Food Programme. The applicant was subcontracted by the respondent. The said respondent was paid the money by WFP but never paid the applicant. That, there a was reconciliation for the money due to be paid to the applicant to the Tune of U$ 368,000 which is

equivalent to Tanzania Shs 853,000,000/-. They signed the agreement. The respondent promised to settle the debt annexed as Urbe 2. That the respondent continues to receive cash from WFP but does not pay the applicant. As a result, the Bank has issued a demand Notice to the applicant marked as (Urbe 3).

That this application should be allowed in view of what was held in the case of **Tanzania Industrial Services Ltd Vs SAE Power Lines s.r.1,** Misc Land Application No. 525 of 2020, High court Dar-es-Salaam, Land Division (unreported) page 4 which gives conditions under which the court can order attachment before judgment. It includes, if the party is about to dispose of the whole or any part of his property; And or the disposal is with intention of obstructing or delaying the execution of any decree that may be passed against him.

Mr. Fidel Peter has argued that no proof of intention to evade the jurisdiction of the court in the filed affidavit and that Urbe 3 which is on confirmation of loans/overdraft balance by the Bank has no connection with the respondent herein. The borrowing of money from the Bank to finance the business does not feature in the agreement. For the above reasons, according to him, Urbe 1, 2,3 does not establish any prima facie case against the respondent.

He gave an example of Sub rule 1 which provides that there must be a prima facie case and enough evidence of the defendant intention to obstruct the execution of any decree. That, prima facie case, according to **Black's Law Dictionary** 10th Edition P. 1382, is defined to mean the production of enough evidence to enable the Court to infer

the said fact at issue and rule in the parties favour. That, the second requirement under 1 (b) refers to the attachment.

He touched as well on the applicant's affidavit and said that there is no proof that the respondent is about to remove the properties outside the jurisdiction of this Court because there is nothing attached to prove any likely disposal or removing same. That, the court should not infer and rule in the applicant's favour.

Mr. Fidel Peter, the learned counsel, argued further that the applicant did not disclose the mode of disposing it (beans) and whether it belongs to the respondent as the owner. Further that beans are agricultural procedure which under Order XXXVI Rule 13 is prohibited to be attached. That the cited case of **Tanzania Industrial Services Ltd Vs SAE Power Lines s.r.1** (supra) is distinguishable. It attached Land and there was proper citation unlike this application. He therefore prayed for this application to be dismissed with costs. The order of maintaining status quo be revised.

In his rejoinder submission, Mr. Lugaiya, insisted that there is a prima facie case which has been established based on the definition in **Black's Law Dictionary.** Urbe 1, 2, 3 shows there is inference of a prima facie case. He touched as well on Order XXXVI Rule 13 of the Civil Procedure Code and said that it is differentiated because beans are used for trading not for consumption at this level. They are not from the farmers but from Traders. He insisted that the application is still relevant and is in line with this application.

Having considered the rival submissions from the learned counsels, I agree on one aspect that although issue of borrowing from the bank was raised by the applicant

but the respondent was not a guarantor thereof. However, there is a prima facie case that there is a dealership agreement and that the respondent is indebted to the applicant and the amount due has not been fully or partly paid.

Reading the affidavit of the applicant, paragraph 16 the applicant said that:-

"The director of the respondent is the only person to be held accountable but the applicant fears that he is likely to run away since he is not a Tanzanian National."

Copy of passport was attached. That fact has not been controverted by the respondent in his counter affidavit.

As a matter of fact, there is a pending Civil case No. 4/2021 filed by the applicant and according to the filed affidavit, the only property available in the hands of the respondent is 447 Tonnes of beans of the respondent stored in the warehouse. I agree as well submitted by Mr. Fildel Peter that, prayer one in the chamber summons, which touched on the attachment of properties/goods/ vehicles/and bank accounts is verge for lack of specific particulars of the listed properties showing owners as well. I consider to have abandoned it. There is therefore no order made in that respect. That notwithstanding, the beans are mentioned in paragraph 11 of the applicant's affidavit and part (ii) of the Chamber summons. It was agreed to be part payment of the debt. This I would say is the security. The applicant says, if the same is removed the applicant stands to lose. It is for that reason, he prayed for this Court to issue the orders as prayed so that he can have something to be recovered.

Order XXXVI Rule 6(1) of the Civil Procedure Code, Cap 33 RE 2019 reads:-

"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 of any decree that may be passed against him –

(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 may direct the defendant..... to appear and show cause why he should not furnish security.

7(1) where the defendant fails to show cause why he should not furnish security..... the court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached."

The above provisions suggest that there must be proof that *with intent to obstruct or delay the execution of any decree that may be passed against him –the respondent is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court...*

The affidavit of the applicant has shown existence of such fact as per the requirement of the law, not as alleged by Mr. Fidel Peter, the learned counsel for the respondent that there must be proof by a document. What follows is for the respondent to show security before the said attachment. In this respect, I would say he has to deposit ½ of the claimed sum (about Tshs 400,000,000/- say Tshs four hundred thousand only) in court within 14 days, failure of which the said beans mentioned in paragraph 9 of the affidavit (447 tons of beans stored in the warehouse at Esso Warehouse No. 29 Arusha Arusha) will be attached pending finalization of the suit.

The mere fact that the application was preferred before the agreed date of effecting first instalment, is cured by the fact that up to the date of this ruling the same

has not been paid while the time had already lapsed. The application is therefore properly before the court.

In conclusion therefore, I find and hold that there is *a prima facie case* which has been established because there is intention by the respondent to obstruct or delay the execution of decree that may be passed against her and that she is "about to remove the whole or any part of his property from the local limits of the jurisdiction of the court."

For the above stated reasons, the respondent has to deposit Tshs 400,000,000/- (say Tshs four hundred thousand only) in court within 14 days. Failure of which the said 447 tons of beans stored in the warehouse at Esso Warehouse No. 29 Arusha Arusha, will be attached for six months' (unless otherwise extended) pending finalization of the suit. The order for its disposal is refused.

This application for attachment before judgment is granted subject to the above condition. Status quo should be maintained during the said 14 days. Costs to be in the cause.

By order.

M. G. MZUNA,
JUDGE.
17/05/2021