

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)**

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 664 OF 2021

GLENRICH TRANSPORTATION COMPANY LIMITED.....APPLICANT

VERSUS

DIFOPAS INTERNATIONAL LIMITED.....1ST RESPONDENT

SAID MASOUD AMRY.....2ND RESPONDENT

ZAINUL MUSTAPHA KHALID.....3RD RESPONDENT

RULING

Date of last order: 30/06/2022

Date of ruling: 05/08/2022

E.E. KAKOLAKI J.

Under certificate of urgency and Order XXXVI Rule 6 (1) (b), (2), 7(1), 8 and section 95 of the Civil Procedure Code, [Cap 33 R.E 2019] (the CPC), and any other enabling provisions, the applicant has preferred this application against the respondents for the grant of an order that, the respondents deposit in this court USD 151,060.00/= as security for the performance of any decree that may be passed against them in Civil Case No. 215 of 2021. Upon failure of the respondents to deposit the said amount, an order for attachment before judgment be issued against the third respondent's

immovable property situated at Muongozo Malimbika Kigamboni Dar Es Salaam, measuring 23,000 square meters pending hearing and final determination of the main suit. And in addition to that, costs of the application be provided for and any other reliefs this court may deem just and fit to grant. The application is supported by the affidavit of one Mohamed A. Rashid, principal officer of the Applicant. The same is strenuously resisted by the 3rd respondents who filed his counter affidavit disclaiming applicant's claims and prayers while putting her under strict proof. The 1st and 2nd respondents could not file their counter affidavits the conduct which connotes their concession to the application.

Briefly as gathered from the affidavit, the applicant herein being a transporter entered into an oral agreement with the 1st respondent for transportation services of goods at various destinations on conditions that, the 1st respondent shall pay to the plaintiff the total cost of services rendered immediately upon demand. Undisputedly, relying on the said agreement the applicant offered transportation services to the 1st respondent on different dates, totaling USD 157,606, in which only USD 6,000 was paid on 31/12/2019, thus, the amount due is USD 151,060. On 02/05/2020, the 2nd respondent signed a personal guarantee, guaranteeing the 1st respondent

on the payment of the outstanding balance and assuring the applicant that, if the 1st respondent fails to pay the same, then he will pay it immediately. Further to that, on 11/05/2020, the 3rd respondent via email communication to the applicant, guaranteed payment of the outstanding balance of USD 151,060, by the 1st respondent by pledging his personal property measuring 23,000 square meters located at Muongozo, Mlimbika-Kigamboni, Dar es Salaam as security. It appears that, despite all that guarantees, and several demands by the applicant for repayment of the debt, the 1st respondent failed/refused or neglected to pay the outstanding balance the result of which applicant filed a civil case which is pending before this court, hence the present application. The reason as to why the application is preferred is that, the respondent may sell, dispose or alienate the listed immovable property and that, the applicant is unaware of other property owned by the respondents which can satisfy the decree to be passed in a pending main case, hence rendering the decree impossible to execute.

On the date fixed for hearing of this application, Ms. Neema Mahunga learned counsel for the applicant appeared together with Mr. Hamisi Katundu, learned counsel for all Respondents. Parties were heard viva voce.

Supporting the application, Ms. Mahumba with leave of the court adopted the affidavit of Mr. Mohamed A. Rashid to form part of her submission. She then reiterated the contents of the affidavit as stated in the brief facts of the matter and added that, though the respondents are the residents and have their businesses dealings in Dar es Salaam, they reside in Zambia where they also conduct business. And that the applicant is unaware of any property owned by the respondents except the one mentioned above which was introduced to her by the 3rd defendant being one of the shareholders in 1st respondent company. She contended that, the said outstanding amount of USD 151,060 is long standing despite of applicant efforts to recover it, the efforts which proved futile. She said, the applicant is seeking an order for attachment of the property belonging to the 3rd respondent measuring 23,000 acres located at Malindika Mwongozo in Kigamboni District, pending hearing and determination of the main suit as she knows no any other property belonging to the respondents to satisfy the decree if issued against them.

It was in her further submission that, since the said property is already in the applicant's hands following the pending guarantee, the only remedy sought by the applicant is court's intervention to attach it as security for

satisfaction of the decree if passed against the respondents in the main suit. She rested her submission by praying the court to order the respondents to either furnish the security amounting to USD151,060.00 by depositing the amount in court's account or in the alternative order the property mentioned above to be attached pending hearing and final determination of the suit.

In response Mr. Katundu prefaced his submission by adopting the contents of the counters affidavit by the 3rd respondent to form party of his submission. He contended that, the application is misplaced as under the provisions of Order XXXVI Rule (1) (b) of the CPC, the prayed order of attachment covers movable properties, particularly where the property is intended to be disposed of or removed from the country wholly or in part. In his view the immovable property subject of this application cannot be removed from the local limits of this court.

Mr. Katundu went on submitting that, Order XXXVI Rule 6 (2) of the CPC, cited by the applicant requires the applicant by way of affidavit to state the estimated value of the property sought to be attached which she has failed to do. And further that, the applicant ought to satisfy the court that the respondents are intending to obstruct or delay execution of the decree once declared as required by law, the duty which she also failed to discharge. He

added apart from the applicant's assertion that he pursued the respondents for recovery of her debts but had failed to establish to the court's satisfaction that she so attempted be it by email, demand letter or any form of communication. And added that, even the email communication attached to the applicant's affidavit was not communicated to the applicant as it was between the 3rd respondent and the applicant for being directed to Mr. Gullam who is not a party to this application.

Concerning the applicant's prayer that, the respondents should deposit security of the USD 151,060, so as to guarantee satisfaction of the intended decree, it was Mr. Katundu's submission that, the prayer improperly placed before the court as all the respondents are Tanzanians despite the fact that, they are doing business in Zambia, and they have never intended to obstruct or delay execution of the decree if the same is issued in favour of the applicant. He concluded by requesting the court to dismiss the application with costs.

In a short rejoinder, Ms. Mahunga submitted on the issues raised by the respondents. Firstly, on the ground that, Order XXXVI 6 (1) (b) of the CPC refers only to movable properties she contended that, Mr. Kitundu has failed to provide any authority leading to that interpretation as the same covers

both movable and immovable. Concerning the allegations that, the applicant failed to show the effort done by her in the recovery of the outstanding debt Ms. Mahunga countered that, paragraphs 7 and 8 of the affidavit and paragraphs 5 and 6 showed and explained that, throughout the applicant has been in communication with the respondent to ensure that, the outstanding debt is settled but the efforts bore no fruits. She added that, annexure P1 to the affidavit shows that, the applicant had a running account with the respondents from January 2018, thus the two were communicating, hence the respondents were aware of the outstanding debt.

Concerning the submission of failure by the applicant to estimate the value of the property sought to be attached as per the requirements of Order XXXVI Rule 6 (2) of the CPC, it was Ms. Mahunga's submission that, the email found in annexure P3 of the affidavit exhibits that the respondent himself pledged the property in question as security to the applicant's debt. She added that, since it is the respondent who offered the said property to the applicant as security, then it was proper for the applicant to request this court not to direct her to furnish the estimated value of the property. On the assertions that annexure P3 was not directed to the applicants, she argued that was not the case as the applicant in paragraph 6 of the affidavit testified

that the email was sent to the applicant. She contended that, there is nowhere in the counter affidavit that the 3rd respondent contested that fact. It was her submission that, since the respondents have failed to show why the attachment order of the property should not be entered against them and since there is ample evidence that, the 3rd respondent submitted his property as security for the applicant's debt, then this court be pleased to grant the applicant's prayers as the applicant stands to suffer more if the property is not attached or security is not furnished.

I have taken time to exhaustively examine and consider the affidavit, counter affidavit and submissions for and against this Application. This Court under Order XXXVI Rule 6 (1) (b), (2), 7(1), 8 and section 95 of the CPC, has unfettered discretionary powers to grant the sought orders upon the applicant meeting the conditions set therein. Now the issue that this court is called to determine is whether the application is meritorious or in other words whether the applicant has met the set conditions for grant of the prayed orders. To start with the requirement under Order XXXVI Rule 6 (1) (b), (2) of the CPC, the cited provision by the applicant provides that:

6. (1) 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-

(a) NA

(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, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to 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 he should not furnish security.

(2) The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.

The wording of the above provisions are very clear and well informing that, the applicant who wants the court to issue such orders in his favour has to prove by affidavit before the court **firstly** that, the defendant/respondent's *conduct* irresistibly depicts his intent to remove whole or partly the property intended to be attached to satisfy the decree if issued against her from the local limits of the jurisdiction of the court, for the purposes of obstructing or delaying execution of the to be issued decree, and **secondly**, should state and specify the said property and its estimated value. This court in a plethora of authorities has settled this position. See Court observation in the case of

Tanzania Industrial Services Ltd Vs. Sea Power Lines Srj, Misc. Land

Application No 525 of 2020 (HC), the observation which I subscribe to.

Going by the evidence in the instant application, I am unable to find any piece of evidence in the applicant's affidavit depicting the 3rd respondent's intention of removing in whole or any part of the property subject of this application from the jurisdiction of this court with intent to obstruct or delay execution of the intended decree, leave alone the fact that land cannot be removed rather disposed of. It is therefore my settled view that, in absence of such evidence or averments in the applicant's affidavit, the two conditions remain unproved as the applicant's averment in paragraph 9 of the affidavit that, the respondent may sell, dispose or alienate the listed immovable property, in my firm view is a mere speculation which in law does not amount to evidence to be relied on by this Court to exercise its discretion whether to grant the application or not.

Next for determination is the requirement under Rule 6 sub rule 2 of Order XXXVI of the CPC, as cited by Ms. Mahunga, in which the applicant had to specify not only the property in the sought order for attachment but also its estimated value. Both description of the property and its value must be disclosed to enable the Court satisfy itself whether the same will meet the

purpose of satisfying the decree if issued in favour of the applicant in the main suit. In the present application, the applicant partly specified the property to be attached as measuring 23,000 acres located at Malindika Mwongozo in Kigamboni District without specifying its value. In absence of specified value of the property, I hold the applicant has failed to satisfy the requirement of the law, as it is unknown to the Court whether the property sought to be attached as security has correspondence value to the claimed amount USD 151,060.00 in which also an order for the respondents to deposit it in the Court's account is sought. The two conditions have not been met by the applicant to warrant this court grant the two prayers for deposit of the specified amount of money or attachment of the 3rd respondent's landed property.

The above notwithstanding, I have also considered the uncontroverted fact as submitted by Mr. Katundu that, the pledged security by the 3rd respondent for the due amount of USD151,060.00 is already in the hands of the applicant as exhibited in the 3rd respondent's purchase agreement of 23,000 square meters of land and email communication to the applicant annexures P3. Since the security pledged is already in possession of the applicant, I wonder as to how this Court could grant the sought orders in absence of proof that

the same is in the danger of being disposed of by the respondent so as to obstruct or delay execution of the decree that may be passed, as to grant them is tantamount to determination of the main suit which is still pending before this Court. With those facts under consideration am satisfied that, the 3rd respondent has shown sufficient grounds as to why security should not be furnished in favour of the applicant.

In the event, the present application is devoid of merits and the same is hereby dismissed with costs.

It is so ordered.

DATED at DAR ES SALAAM this 5th August, 2022.



E. E. KAKOLAKI

JUDGE

05/08/2022.

The Ruling has been delivered at Dar es Salaam today 05th day of August, 2022 in the presence of Mr. Hamis Katundu advocate for the Respondents who is also holding brief Ms. Neema Mahunga, advocate for the applicant and Mr. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI
JUDGE
05/08/2022.