

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

MISC. CIVIL APPLICATIONS NO. 237 & 238 OF 2022

**MOHAMED ENTERPRISES (TANZANIA) LTD.... APPLICANT
VERSUS**

SAKUMA EXPORTS LIMITED1ST RESPONDENT

MV VISSAI VCT 052ND RESPONDENT

Date of the Order: 10/08/2022

Date of the Ruling: 26/08/2022

RULING

MGONYA, J.

Before this court are consolidated **Applications No. 237** and **No. 238** made under **Sections 68(e) and 95 and Order XXXVI Rule 6(1), (b), (2), (3), 7(1), (2) of the Civil Procedure Code, Cap. 33 [R. E. 2019] and Sections 2 (3) and 3 of the Judicature and Application of Laws Act, Cap. 358 [R. E. 2019]**. In these Applications, the Applicant is inviting the court to call upon the 1st and 2nd Respondents to show cause in respect of the 2nd Respondent deposit security for the amount mentioned for **Application No. 237** amount is **344.435.00**

USD equivalent to **TSHS 796,546,207.35** and for **Application No. 238**, the amount is **USD 378,969.63** equivalent to **TSHS 876,408,956.03/**. Further, the Applicant prayed in both Applications that the 2nd Respondent VISSAI berthed at Dar es salaam port be attached before Judgment and placed before the Chief Port Master custody.

While the 1st Respondent's case has been ordered to proceed Exparte, the Applicant herein enjoyed the services of Mr. Elisa Abel Msuya and Mr. Zacharia Daudi, the learned Counsel Represented the 2nd Respondent herein. Both Applications are supported by the affidavits. **Mr. RAFIQ ABBAS ALLY** in duly affirmed the Affidavit No. 237 while the Application No. 238 is duly affirmed by **Mr. IMRAN PATEL**; both being Application Principal Officers of the Applicant. During his submission Mr. Msuya prayed that the said Affidavits be adopted and form part of the Applicant's submissions.

Submitting for the Applications, the Applicant's counsel stated that the principles which guide the applications before the Court for attachment were discussed by **MULLA, in the Code of Civil Procedure** in page **3664 and 3665**. He said the Learned Author basically discussed the applicability of **Order XXVIII Rule 1 of India Code of Civil Procedure** which is *parimateria*

with our **Order XXXVI Rule 1** in particular **sub-rule 1 and 3 of the Civil Procedure Code, Cap. 33 [R. E. 2019]** which deals with subject in issue before the court, which states that:

"The Applicant must establish a prima facie case and the Applicant must establish that there is all reasonable capability that if execution of that Decree will be obstructed or delayed.

The Counsel said, the principle was also discussed in the case of ***TANZANIA INDUSTRIAL SERVICES LTD Vs SAE POWER LINES, Misc. Land Application NO. 525 of 2020.*** From the said principle, it is the Applicant's Counsel concern that the Applicant had adequately established the conditions sufficient to enable this court to order attachment of the vessel in event the Respondent has failed to furnish the security in the Main Suit and Application.

Further, the Applicant referring the literature by Mulla, the prominent learned Author, submitted that this court is vested with jurisdiction to call upon Respondent to deposit security where the court is satisfied that the Respondent is **foreigner**, where Mr. Msuya, the learned Counsel said:

"a ship touching temporarily at an Indian Port, here Dar es salaam stands the same position of the foreign personnel who is about to leave the jurisdiction.

From the Above, it is the Applicant's Counsel view that the affidavits in both Applications have reasonably established that, there are all reasonable probability that the said vessel will leave the port unless the 2nd Respondent is ordered to deposit security for costs. In this regard, the Applicant's Counsel pointed out the paragraphs which supports the said establishment; to be paragraphs **4,5 (i)-(iv), 6,7,8,9,10,11 and 12**; cumulatively of which all establishes a *prima facie* case against the Respondents. Further, it is the Applicant's Counsel concern that the cause of action pleaded in all the paragraphs above focus to **Negligence, Misrepresentation and lack of duty of care**. Hence, caused loss to the Applicant.

Elaborating further on paragraph 13 of both Applications, the Counsel is of the view that, it is not disputed by 2nd Respondent that the same is a **FOREIGN ENTITY** which is neither registered in Tanzania nor have any assets in this jurisdiction with the fact that is a moving vessel.

Lastly, the Applicant's Counsel Mr. Msuya submitted that the *prima facie* case is normally considered from the Affidavit with all attachment with spillage of sugar from the ship, emails in respect of this matter and which are inadequately responses by the Respondent, diverting way bridge at Mumbai which was bitterly protested by the 2nd Respondent inclusive the destroyed bags. Hence, the Applicant prayed the court to issue the reliefs.

Submitting against the Application the learned Counsel Mr. Zacharia for the 2nd Respondent adopted affidavit deponed by one **NGUYEN HUANG LONG**, and prayed to form part of the 2nd Respondent's submission. Further, the 2nd Respondent's Counsel prayed that, if this Honorable Court made finding and issue an Order to furnish security; to take into consideration that the total sum be shared equally with the 1st Respondent because as clearly stated in the Affidavits, the said negligence is allegedly to have been caused in different occasion by the 1st Respondent at another level. It is further the 2nd Respondent's Counsel that, if at all there will be liability, the same be split equally to both Respondents.

Further, the 2nd Respondent's Counsel averred that the 2nd issue to be considered by this court is the amount stated presuppose the full claim by the Applicant. It is further the 2nd

Respondent's counsel concern that if the court would order to file security; the said security should be taken into account that the amount be not in full as claimed, reasoned that the evidence attached to both Affidavits, do not itemize the specific loss incurred. Finally, the 2nd Respondent prayed the court to exercise its discretionary power which could be reasonably considered the pleaded facts and evidence given in both affidavits.

In rejoinder, the Applicant denied the request to split the liability into two as prayed by the 2nd Respondent's Counsel as referring paragraph 4 of the Plaintiff in both suits, the claims have been made jointly and severally. Further, the Applicant reiterated that the essence of the instant Application is securing the Applicant by ordering the Respondent to file security for costs to ensure that any claim/deed be secured in full. So the Respondent's prayer would defeat the purpose of **Order XXXVI Rule 1(vii) of the Civil Procedure Code.**

Lastly, the Applicant's Counsel prayed the court to exercise its jurisdiction, to consider the full particularized facts in the Applications and proceed to grant the reliefs prayed.

I have carefully read both Counsel respective submissions as well as the affidavits to the instant Applications which have been

consolidated. Further, before I proceed in determining this Application, I have decided to reproduce some of the paragraphs from the Applicant's Affidavits for ease reference as herein below:

"5.0 *It is strictly contended herein that during loading of the cargo at the port of loading, (Mumbai India) Intertek India noted/observed apparent discrepancies on the cargo being loaded as follows:*

- i) Many bags contained in the cargo to be shipped were damaged, cut, torn out and were hand stitched.*
- ii) Trucks hired by the 1st Respondent to load the subject cargo were avoiding to weighing the cargo and went directly to the wharf for loading on the ship.*
- iii) Despite protests lodged on both para (i) and (ii) above, the 1st Respondent blatantly and in disrespect thereof, allowed and continued to load the cargo on board in the vessel's holds.*
- iv) The Applicant also through various e-mail and WhatsApp communication complained about his concerns to the 1st Respondent on constant basis.*

" Email communications, WhatsApp communication between the Applicant and the 1st Respondent together with the Letters of Protests prepared by the

Surveyor- Intertek India attesting the facts herein stated are attached and Marked as annexure "TMA-3" collectively"

13.0 *I am aware that the Respondents above are **foreign entities (persons)**; the only available property present within the jurisdiction of the Court that can be attached is the said Vessel – MV VISSAI VCT 05 (the vessel) which is currently anchored at Dar es salaam port offloading Indian Brown Sugar; the consignee being the Applicant.*

17.0 *I am advised further, by Elisa Abel Msuya, Advocate and whose advice I verily believe to be true that this Court has powers to order the Respondents to furnish security to secure the Applicant for any decree that shall be passed against them. Under the circumstances it is justifiable that the requested orders for attachment be issued.*

18.0 *On the contrary if the attachment order is refused and the Respondents manage to level the jurisdiction of the Court the Applicant shall have no means of executing any decree to be issued by the Court thereby suffer irreparably. On the contrary the Respondents can issue*

securities securing the Applicant. Balance of convenience therefore tilts in favour of granting the prayers than refusing them."

Further, I prefer to quote the law **[Order XXXVI Rule 6 (1) (b)] of the Civil Procedure Code Cap. 33 [R. E. 2019]** that brought this Application so as to have the guidance in determining this matter:

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)...

(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."

From the above provision, the court shall also have regard to observe the guiding principles in granting the security for costs as well narrated by the learned Counsel Msuya when quoting the prominent learned Author Mulla, that the major factors to be considered in this kind of Application includes:

- 1. The likelihood of the Plaintiff succeeding or rather the establishment of the prima facie case;***
- 2. The financial status of the Plaintiff /Defendant ; and***
- 3. Whether the Plaintiff/ Defendant has substantial assets within the jurisdiction.***

In our case, there is no dispute at all that the Respondents / the Defendants herein are the Foreign Companies/entities. To be specific, the 2nd Respondent is registered in Vietnam and carrying her business all round the World as it is a moving vessel. While the 1st Respondent is registered and operating in Mumbai India. Further, the Respondents are neither residing nor have offices in Tanzania. For the 2nd Respondent particularly, the owners are residing in Korea. On the other hand, the Respondents have no property in Tanzania whether movable or immovable. The fact which prompted the Applicant to file this application as it is provided for under **Order XXXVI Rule 6 (1) (b) of the Civil**

Procedure Code, Cap; 33, [R. E. 2019]. The reason behind this Rule is not far to seek as the purpose is to protect the Applicant who is not likely to recover his costs in the event he succeeds in the main case before this honorable Court. However, the word “**may**” gives this Court discretion. And I am aware that the said discretion must be exercised judiciously.

From the affidavit and the submissions of both learned Counsel, there is no rational dispute that the Respondents are non-resident without property in Tanzania. On satisfying the above conditions referring to the above quoted few paragraphs from the Applicant’s Affidavits, I have to declare that I am satisfied that indeed there is an established *prima facie* case. Further, taking into consideration of the 2nd Respondent’s business, it is my view that the same has a stable financial status and that as this matter has a unique circumstances where by the nature of the 2nd Respondent, of which is the Vessel, the same has to continue operating and move from this jurisdiction while the main case is still pending determination.

Therefore, in my considered view, **the Applicant is eligible for the grant of security for costs, and is hereby granted as prayed.**

In the event therefore, the 2nd Respondent is ordered to deposit the total sum of **USD 723,404.66** which is equivalent to **Tshs. 1,672,555,163.37** to the **1st Class International Bank** within **14 days** from the date of this ruling, or in the earliest possible time so as to enable the vessel to be released for further business; **failure of which the Vessel MV Vissai VCT 05 be attached before judgment and be placed under the custody of the Chief Harbor Master of the Tanzania Ports Authority until the finality of the Suits before the court.**

Costs in due cause.

Order accordingly.



L. E. MGONYA

JUDGE

26/8/2022

Court:

- Ruling delivered in chamber in the presence of Ms Irene Mchau and Ndehurio Ndesamburo, Advocates for the Applicant, Harrison Lukosi Advocate for the 2nd Respondent and Mr. Richard RMA in this 26th day of August 2022.



L. E. MGONYA
JUDGE
26/8/2022

