IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

MISC. CIVIL APPLICATION No. 94 of 2022

(*C/F Civil Case No. 13 of 2022*)

RUWAICHI JOHN KERETH.....APPLICANT

VERSUS

M'RINGA ESTATES LIMITED.....1ST RESPONDENT

DONOUGH JOHN MAHON.....2ND RESPONDENT

DIANA JULIUS MAVIS BANISTER.....3RD RESPONDENT

SALLY JUNE MANN.....4TH RESPONDENT

CHRISTOPHER JOHN BANNISTER.....5TH RESPONDENT

DAWN FRANCES BUNTING.....6TH RESPONDENT

ROWENA MARGRET GRIFFITHS.....7TH RESPONDENT

CATHRYN ELIZABETH HOWARD.....8TH RESPONDENT

AMANDA LOUISE FRISBY.....9TH RESPONDENT

SARA GAYE BANNISTER.....10TH RESPONDENT

DENISE LUCINDA BANNISTER.....11TH RESPONDENT

STEPHEN PATRICK MANN.....12TH RESPONDENT

LIZA JOY MANN.....13TH RESPONDENT

RULING

03rd & 28th October 2022

TIGANGA, J

This application is basically for attachment before judgment. It is preferred under Order XXXVI Rules 1(a), (b) 6 (1), (a) and (b) and section 68 (e) and 95 of the Civil Procedure Code [Cap 33 R.E 2019]. It is originating from Civil Case No. 13 of 2022 in which the applicant herein is the plaintiff and the respondents herein are the defendants. The application at hand was filed under certificate of urgency certified by Mr. Boniphace Joseph, learned counsel, one of the advocates forming a team of counsel who are representing the applicant.

In the chamber summons, the applicant seeks two sets of orders; **one** being sought ex-parte while the other being sought inter- partes. Ex-parte, the applicant was seeking in the first instance the Court to dispense with the requirement of issuing notice of appearance to all the respondents and further proceed to hear the application ex-parte and issue interim orders pending the inter parties hearing and determination of this application.

Under that Limb of this application, the Court is asked to issue a warrant of arrest against the four respondents namely Mr. Christopher John Bennister, Ms. Denise Lucinda Bannister, Ms. Amanda Frisby and Mr. Donough John Mahon, as well as any other respondent who may be in Tanzania at the time when this application is placed before the trial Judge.

The applicant also urged the Court to call upon the cited respondents and require them to show cause why they should not furnish security for their appearance when the application is being heard and until it is finally determined.

In the inter-partes application, the Court is urged to order attachment before judgment in Civil Case No. 13 of 2022 the following items or properties which are the subject matter of the suit or which belong to the respondents (the defendants in the suit):

i. Respective shares in the names of the 3rd, 5th, 9th, 10th respondents (with their corresponding positions as defendants in the suit) in a limited liability company called Kimemo Holdings Limited.
ii. A bank payment guarantees No. CRDB 22 –IGT0816 for the sum of USD 4,000,000. issued to the 2nd to 13th respondents by the CRDB Bank PLC for the transfer of their shares in the 1st respondent Company to Bajuta International (Tanzania) Limited.
iii. Funds amounting to USD 4,000,000. in an Escrow account for the benefit of the 2nd to 13th respondent's payment of their transfer of shares in the 1st respondent Company to Bajuta International (Tanzania) Limited, details of which account appears as hereunder.

The name of escrow Agent: PKF Advisory Limited

Names of the Bank maintaining the Escrow amount: Diamond Trust Bank Limited

Account Number: USD 0411217007

Branch Name: Dar Main Mosque Street

Bank Code: DTKE

Location/Country Code: TZ

iv. Costs of this application to follow the outcome of the final judgment in the main suit

v. Any other items or reliefs that this Honourable Court will deem fit and just to grant.

The application is affidavit of **Ruwaichi John Kereth,** the applicant.

On 16th August 2022, the first date when the case file was placed before me after assignment, after assessing the nature of the application and the orders sought in the inter-parties application, I made the following orders: That, given the nature of the application and the orders sought by the applicants against the respondents, I found it to be in the interest of justice, to order service to the respondents for them to appear, either to concede to the prayers made in the application or object by filing counter affidavits.

That order did away with an ex parte application, consequent of which, I ordered immediate service to the respondents. I also proceeded to make a schedule for filing counter affidavits and reply thereto, if any. I further realized to parties should appear on 19th August 2022 at 14:30 hours for hearing.

When the application was called for hearing on 19th August 2022, parties were represented. While the applicant was represented by Senior Counsel Mr. Eric Sikujua Ng'maryo assisted by Mr. Boniphace Joseph, and Mr. Jafari Suleiman, all learned advocates. Mr. Deusidedith Mayomba Duncan assisted by Mr. Henry Katunzi learned counsel, appeared representing the 1st, 2nd, 5th and 11th respondents, while Mr. Peresi Seneto Parpay appeared holding brief of Mr. Gaspar Nyika, for the 4th, 6th, 7th, 8th, 9th, 10th, 12th, and 13th respondents. The 3rd respondent was reported to be deceased.

When the matter was called for hearing, Mr. Deusdedit Mayomba Duncan who stood as the leading counsel for the respondents, acknowledged that the respondents were served with the application and the order of this Court dated 16th August 2022, but for the reasons he gave on 19th August 2022, the respondents were not ready for hearing consequent of which they asked for adjournment. That prayer was strongly objected by

counsel for the applicant also for the reasons given in the proceedings of that day. It is on that basis; this Court gave its ruling on 24th day of August 2022 which was giving effect to the prayers in the ex parte application. It was directed that all the mentioned respondents were to submit their travelling passports which shall be held by the Court until on the date the application at hand will be determined.

On that very date, that is 24th August 2022, the parties asked for leave to argue the application by way of written submissions. The Court granted the prayers and proceeded to make a filing schedule, which the counsel complied with.

In the submission in chief filed by the counsel for the applicant, they informed the Court that the applicant prayed among other things, this Court to order for the arrest of some of the respondents. In lieu thereof, by the order of the Court, the two respondents who are currently residing in Tanzania appeared in Court on the 29th August 2022 and submitted their passports to ensure that they do not leave Tanzania and obstruct or delay the execution of any pertinent order of the Court.

It was further stated that, the applicant also prayed for attachment of the respondents' property before judgment so that at the end of the suit and

if it is decided in his favour, the applicant (Plaintiff in the suit) is not left empty handed and the judgment given in his favour is not reduced to a nullity.

They further stated that for maintenance maintaining of status quo that was preserved by the interim injunctive order given by the Honourable Court on the 5th May 2022 in Miscellaneous Civil Application No. 47 of 2022 was to prevent the shares in Mringa Estates Limited (the 1st respondent) owned by the rest of the respondents from being transferred to Bajuta International (Tanzania) Limited. According to the applicant's counsel, the transfer of the said shares have been processed but the payment by Bajuta has not been accomplished, hence the said payment (as a deposit in an escrow account and as a bank guarantee) that is now part of the subject of the application for attachment before judgment.

He further submitted that, para 5 to 7 and part of para 12 of the affidavit of Ms. Denise Lucinda reveals that the transfer of the shares worth US$ 8,000,000 is on process and whenever they will be transferred they will irreversibly have expatriated from Tanzania by all the natural respondents who are non-citizen and many (ten out of the twelve) are non – resident. The Counsel for the applicant further submitted that, they have established

all the required ingredients for the attachment before judgment, the situation at hand whereby the defendants intends to obstruct or delay the execution of any decree that may be passed against them is determined by two factors under clauses (a) and (b) of that sub rule.

It furhter stated that under the circumstances they will apply only what has been stated in clause (a). The counsel continued to submit that, the respondents are not only about to dispose the whole or any part of their property, namely the shares in the 1st respondent's company, but they have already disposed those shares and they admit so in the affidavit sworn and filed by Ms. Denise Lucinda Bannister. They further stated that they are fully aware that even if the sale of the particular shares has taken place, the proceeds of the sale must be in Tanzania in which this Court has jurisdiction to order an attachment. In that regard the counsel prayed for the application to be granted as prayed.

In reply submission, the respondent's that the applicant's affidavit is full of assumptions and speculations with no any substantive evidence. They submitted further that the applicant's pleadings contains lies with regard to the values of the shares in M'ringa Estates Limited (M'ringa) and in Kimemo as stated in paragraph 23(i) and 23(ii) of the affidavit. The counsel continued

to submit that since the affidavit is full of assumptions, it is as good as the application has not been supported, hence needs to be dismissed with costs, as it does not comply with the provisions of Order XIX, Rule 3(1) of the CPC.

Counsel further submitted that the respondents through the counter affidavits of both, Ms. Denise and Mr. Bannister have confirmed of having other assets in Tanzania. For instance, in paragraph 11 of the counter affidavit, Mr. Bannister has stated that he came to Tanzania in the year 1960 and has been a resident in Tanzania for an uninterrupted period of 62 years. Mr. Bannister has no intention of leaving the country except for medical reasons. Counsel for the respondents further stated that Mr. Bannister's Counter affidavit is highly corroborated by the counter affidavit of Ms. Denise.

Counsel according to the respondent for an order of arrest of the respondents to be issued by the Honourable Court, it is necessary on the part of the applicant to prove that the respondents have intention to delay the plaintiff or to avoid any Court's process, to obstruct or delay the execution of any decree that may be passed against them. The applicant has not even proved that, the respondents have absconded or left the local limits of this Court's jurisdiction in which also their properties are found. Counsel

continued to submit that there is no proof of any shares acquisition contract as alleged by the applicant.

With regard to attachment before judgment, the learned counsel for the respondents submitted that for the applicant to establish the right of attachment before judgment, it is important for him to satisfy the Court by an affidavit that the defendants are about to dispose the whole or part of their properties or are about to remove the whole or part of their properties from the local limits of jurisdiction of this Court with intention to obstruct or delay the execution of any decree that may be passed. The learned counsel further submitted that the applicant has failed to demonstrate such facts as to warrant the Honourable Court to issue such drastic orders.

It was further submitted that in the main suit which he filed via plaint, the applicant prayed for six orders, **the first one,** is orders of specific performance of the alleged share acquisition contract, **the second** being, the declaratory orders against the sale of the 2nd to the 13th respondents' shares from the 1st respondent to any third party, the **third one** is an order for injunction, the **fourth one** being the payment of general and punitive damages to be assessed by the Court, the **fifth one** being the costs of the suit and the **last one** is any other relief the Court deems fit to grant.

It is the learned Counsel's argument that, due to the nature of the reliefs sought in the main case, the respondents failed to understand how attachment of the respondents' properties attributes to any decree that may be passed in favour of the applicant. According to counsel for the respondents basing on the relief sought there will be no any monetary decree which will be passed so as to entitle the applicant to seek for attachment and sale of the respondents' assets and properties before the judgment. They added that there is no monetary value attached to the applicant's claims in the suit, he only claims for the declaratory orders, orders for injunction and specific performance of a non-existing share acquisition contract. It was further submitted that there is no risk of obstruction or delay of execution of the decree which may be passed subsequently.

In his view, for the applicant to be granted the orders of arrest and attachment before judgment, the applicant is required to prove by an affidavit or otherwise that, the conduct of the defendants is with intent to obstruct or delay the execution of any decree that may be passed against them. The Counsel further stated that, the Court must be guided by the specific provisions of the law and indeed satisfy itself on the exact purpose of such provisions. The learned counsel further submitted that the

jurisdiction of this Court to grant orders of arrest and attachment before judgment is exceptional and must be sparingly exercised with utmost caution so as to avoid oppression due to the fact that such orders interferes with personal right and liberty and the right to own and utilize the respondents' properties.

The counsel for the respondents further argued that since the applicant has failed to demonstrate the value of the decree that may be passed against the defendants in the suit, he is not justified to claim for attachment of the property worth US$ 8,000,000 in respect of the proceeds of sale of M'ringa Estates Limited and TZS 23,000,000,000 with regards to the value of Kimemo.

They contended that the rules set by the Civil Procedure Code for attachment before judgment have not been fulfilled. The Counsel continued to argue that, as deposed by Ms. Denise in her affidavit, the estimation of the value of the shares in Kimemo and M'ringa given by the applicant are erroneous and inaccurate, since the actual value is more than US$ 8,000,000 in exclusion of the taxes and duties as paid by Bajuta International (T) Limited in respect of M'ringa. The total estimated value of Kimemo is TZS 23,000,000,000.00 as shown in the approved valuation report referred in

para 27 of Denise affidavit. The counsel prayed in the end the Court to dismiss the application for want of merits.

In rejoinder submission, the applicant did, save to the few issues which were argued in countering the new arguments raised by the counsel for the respondent, to the great extent reiterated what he submitted in chief.

The issue for determination before this court is whether this application is meritorious

In the course of this Court's parties deliberation upon the Parties' submissions, the Court found it prudent to refer the provisions upon which the application was preferred as the guidance to the discussion and determination of the issue in dispute. With regards to the arrest before judgment this court referred **Order XXXVI Rule 1(a) (i), (ii) and (iii) and rule 1(b)** of the Civil Procedure Code, cap 33[R: E 2022] which provides that;

> *1.Where at any stage of a suit,* ***other than a suit of the nature referred to in paragraphs (a) to (d) of section 14****, the court is satisfied, by affidavit or otherwise;*
>
> > *(a) That the defendant, with intent to delay the plaintiff, or to avoid any process of the court or to obstruct or delay*

the execution of any decree that may be passed against him;

(i) has absconded or left the local limits of the jurisdiction of the court; or

(ii) is about to abscond or leave the local limits of the jurisdiction of the court; or

(iii) Has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof or

(b) that the defendant is about to leave Tanzania under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may issue a warrant to arrest the defendant and bring him before the court to show cause why he should not furnish security for his appearance."

In fact, what the law provides is what the applicant is invoke must prove to the satisfaction of the Court. That proof must be through evidence, Since the matter is an application then the type of evidence expected to be presented is the proof through affidavit.

Now the affidavit filed by the applicant in proof of the allegations is to the effect that since the respondents except Mr. Christopher, Ms. Denise,

Ms. Amanda, Mr. Donough are Non -Tanzanian Citizens, there is a likelihood of leaving this country an act which indeed will deprive the plaintiff in case the decree is passed in favour of the plaintiff. It is the position of the law under sections 110, 111 and 112 of the Evidence Act, [Cap 6 R.E 2022] that,he who alleges must prove. It is therefore the duty of the applicant to prove to the satisfaction of the Court that those prerequisite conditions provided for in the provision cited herein above exists.

In effort to prove, the applicant is expected to prove by evidence that there was an attempt or effort to leave the country as alleged by demonstrating the arrangements for the respondents' travel not otherwise. Mere words that the respondents are likely to flee the country is, in my considered view, an assumption without tangible evidence.They remain to be assumptions without evidential value which cannot be acted upon to issue serious order such as the one sought in this application which is in fact going to curtail the constitutional right of the respondents.

With regards to the transfer of the shares to Bajuta International (Tanzania) Limited, this is the center of the dispute in the main case, there is no dispute from the affidavit sworn by both parties that the shares were sold to Bajuta International (Tanzania) Limited. Since this is the nexus upon

which the claim in the main case has been centered, then it cannot be said that the respondents are selling their property or removing them from the jurisdiction of the Court to entitle the applicant the order for arrest before Judgment.

In my considered view, reading the phraseology of Order XXXVI Rule 1 (a)(i)(ii)(iii) and 2 and considering the same in light of the circumstances of this case, it goes without saying that, the philosophy in the provision did not intend to catter for the circumstances of this case where the complained transfer or disposition was done way back before the institution of the case. In my view, it was intended to provide for the subsequent action done by the respondent after the case has been instituted, and with intent to either delay the plaintiff, or to avoid any process of the Court or to obstruct or delay the execution of any decree that may be passed against, the attributes which are missing in the case and application at hand. That said I find the application in the fist limb has failed for the reasons given.

Turning on the part of attachment before judgment, this Court made reference on **Rule 6(1)(a) and (b) Order XXXVI** of the Civil procedure Code, Cap 33 [R: E 2019] which 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) **is about to dispose of the whole or any part of his property; or***

*(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.

(3) The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified."

The provision is very clear, that the court can only be moved to give an order under **Order XXXVI, Rule 6(1)(a) and (b)** of the Civil Procedure Code, [Cap 33 R.E 2019] after it has been satisfied by evidence, which may be given through affidavit or otherwise that the conditions provided under that provision exists. Short of that, the Court will have no mandate to issue the orders sought.

That means, proof of the intent of the defendant that he is **about to** dispose or remove the property from the local limits of jurisdiction must be proved by an overt act or arrangements. I hold so because the plain meaning of the word about to dispose or remove means *close to do some thing with the preliminary arrangement already completed.*

Now the issue is whether, the applicant in this case has managed to prove the conditions provided under the above provisions?

I have passed through the applicant's affidavit and noted that most of the facts he adduced as evidence for the disposal of the whole or part of the respondents' properties do not exhibit the meaning of the word "about to dispose or remove". This finding is justified by the phraseology of para 2 at

page 12 of the affidavit by the applicant where for purpose of clarity, I wish to reproduce the said paragraph as follows;

> *"That, shareholder Respondents have unjustly transferred or are in the process of unjustly transferring all their shares to Bajuta, after which they will no longer have any meaningfully valuable assets in Tanzania, except for their respective shares in the said Kimemo Holdings Limited, which shares they have been touting, through their agent, the late Edward Mwachinga, as being up for the sale. I believe that Mr. Mwachinga who was at all times a trusted agent of the respondents, was telling me the truth."*

This peace of the applicant's pleading evidences the fact as to whether there is whole or partial disposal of the respondents' properties. The applicant has relied upon the hearsay evidence of the late Edward Mwachinga, who if could be alive was supposed to make an affidavit to substantiate this fact he adduced to the applicant. It should also be noted that this is information obtained long ago, when Mr. Edward Mwachinga was still alive and worse still they are not disclosing the evidence showing that the applicant is "**about to transfer or remove the property.**" It is also as observed herein before, that the complaint does not seem to have arose after the institution of the main case, if it so arose then there is no evidence

presented to prove that and substantiate the same for the Court to be better placed to grant the application for attachment before judgement.

That being the case, it is my considered view that this application does not prove the conditions provided under both, **Order XXXVI, Rule 1(a) (i), (ii) and (iii) and rule 1(b)** as well as **Order XXXVI Rule 6 (1)(a) and (b) Order XXXVI** of the Civil Procedure Code, [Cap 33 [R.E 2019]. It is those for the reasons given and consequently the two prayers are refused.

Before I pen down, I find it in the interest of justice to say o word on the order given by this Court on 24th August 2022, which required the defendants to submit their travelling documents. That order was to end today, however, given the nature of the case, and for similar purpose for which the order was granted, the same is now extended till the determination of the main suit. The already submitted documents will remain in the custody of the Court till determination of the main suit.

It is accordingly ordered.

DATED at **ARUSHA** on this 28th day of October 2022.

J.C. TIGANGA

JUDGE.