IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 14 OF 2023

(Originating from Civil Case No. 10 of 2023)

UNIVERSAL G & G CO. LTD..... APPLICANT

VERSUS

IMR METALLURGICAL RESOURCES AG.....RESPONDENT

JITEGEMEE HOLDINGS COMPANY LIMITED.....INTERESTED PARTY

RULING

Date of last Order: 27/1/2023.

Date of Ruling: 31/01/2023.

E.E. KAKOLAKI, J

The applicant herein under certificate of urgency and in terms of the provisions of Order XXXVI Rule 6(1)(b),(2) and (3) and section 68 of the Civil Procedure Code, [Cap. 33 R.E 2019] hereinto referred as CPC, preferred this application praying for ex-parte hearing for an order of attachment before judgment of 55,000 (+/1 10 PCT) metric tons of Tanzanian steam coal in bulk or part thereof loaded on board the ship namely **MV El Matador**

currently docked at Mtwara Port, Tanzania, the property of the respondent, pending hearing of the application inter-parties and inter-parte hearing for the same order pending determination of the main suit now pending before this Court.

Upon hearing the counsel for the applicant Mr. Deagratias Lyimo Kirita ex-parte and having considered his submissions and the nature of this application and having satisfied myself that, the **MV El Matador** docked at Mtwara Ports loaded with the consignment of 55,000 (+/1 10 PCT) metric tons of Tanzanian steam coal, subject of this application was about to sail outside this Court's jurisdiction, on 17/01/2023, I issued an interim order for attachment of the above mentioned consignment of steam coal, pending hearing and determination of the application inter-parties. Further to that, the applicant was ordered to serve the respondent, while the matter set for mention on 24/01/2023 in line with the main suit Civil Case No. 10 of 2023. The application is supported by the affidavit of Mr. Gilbert Zebedayo Mrema, applicant's principal officer.

Briefly as gathered from the affidavit, before this Court in Civil Case No. 10 of 2023, the applicant herein has sued the respondent for breach of confidentiality agreement which was executed between her, the respondent,

a company registered and incorporated under the laws of Switzerland as business partner together with one Mr. Sanjay Shah, for securing mining products in Tanzania for export to international market, as it is the applicant who was to pay for the purchase price and cover all local costs while the respondent's obligation was to open a letter of credit on behalf of the applicant and pay for the export transportation costs to the port of destination in Europe and sale the cargo, as the profit garnered was to be shared amongst parties. Since under their agreement, the applicant under took to supply all necessary information to the respondent of the availability and market price of various minerals in Tanzania, it was the respondent's obligation under their terms of agreement not to purchase the undersigned minerals and related products directly or indirectly from other sources within Tanzania. The applicant contends however that, the respondent breached that term of agreement by purchasing the said 55,000 metric tons of steam coal from **ARAL International Limited** the company that used **URAL International Limited** to outsource **Jitegemee Holdings Co. Limited**, which finally supplied the said coal to the respondent/defendant, Jitegemee Holding Co. Ltd being the company allegedly introduced to the respondent by the applicant. It is further alleged that, in execution of that purchase of

coal consignment under contest, the respondent opened a letter of credit in favour of ARAL International Ltd, to order and export the said coal to Antwerp Port Belgium and or Santander Spain. Upon demand of reasons by the applicant for the breach of the said confidentiality agreement, the Respondent though admitting to have purchased the cargo of steam coal in bulk in Tanzania as per the letter of credit, denied to have breached the contract with the applicant, hence the institution of Civil Case No. 10 of 2023, the suit that gave birth to the present application.

When served with the chamber summons the respondent vehemently resisted the application by filing her counter affidavit to that effect. As for the Interested Party who was formerly not party to this matter, sought leave of the Court to be joined in both main suit as well as this application, the prayer which was cordially granted in terms of Order I Rule 10(2) and section 68(e) of the CPC, before she was allowed to file her counter affidavit too, resisting the application. Both parties were heard viva voce on the merit of the application. The applicant enjoyed the services of Mr. Deogratius Lyimo Kirita and Mr. Alfred Lyimo Kirita, learned advocates while the respondent had representation of the team of advocates led by Mr. Senen Mponda accompanied by Mr. Daniel Welwel, Mr. Jacob Kaisi and Steven Cyprian and

the interested party advocated by Mr. Mulamuzi Patrick Byabusha, learned advocate. Both parties submitted at length on the merit and demerits of the application.

In this ruling before considering the submissions by the parties on the merits or otherwise of this matter, I wish to revisit the law governing the applications of this nature. It is the law that, under Order XXXVI Rule 6(1)(a),(b), (2) and (3) of the CPC, this Court is crowned with jurisdiction to grant the application for attachment before judgment upon the applicant satisfying by affidavit or otherwise that, two conditions dictated by the law do exist. **One**, that the defendant/respondent is about to dispose of or remove the property subject of attachment from the local limits of the jurisdiction of this Court and **second**, that such disposal or removal is with the intention of obstructing or delaying the execution of any decree that may be passed against him. The said provisions of Order XXXVI Rule 6(1)(a),(b), (2) and (3) of the CPC reads thus:

> *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. (Emphasis supplied)

See also the decision of this Court in the cases of **M.M. Intergrated Steel Mills Ltd Vs. Auto Mech Limited and 2 Others**, Misc. Civil Application No. 67 of 2020, **CIWASA (T) Ltd Vs. Equity For Tanzania (''EFTA'') Ltd**, Misc. Civil Application No. 12 of 2022 and **Ruwaichi John Kereth Vs. M'ringa Estates Limited and 12 Others**, Misc. Civil Application No. 94 of 2022 (All HC-unreported), in which establishment of the two above

conditions by the applicant were discussed and overemphasized, before the sought order for attachment before judgment is granted in his/her favour. The law under Order XXXVI Rule 6(1)(b) of the CPC presupposes that, such order shall be issued after the applicant has failed to furnish security of the corresponding value to the property or portion thereof sought to be attached, that may be sufficient to satisfy the decree.

It is worth noting also that, in an application of this nature mere assertion by the applicant that, there exists a just or valid claim or prima facie case in the main suit, is not sufficient ground warranting this Court grant him the sought order for attachment before judgment, unless the two conditions alluded to above are established. See also the case of **CIWASA (T)** (supra). That legal stance is premised on the fact that, it is not this Court's duty to establish at this stage whether the claims by the applicant/plaintiff are genuine or justifiable or that a prima facie case has been established against the defendant/respondent as to so do in my considered view is tantamount to predetermination of the main suit.

With the understanding of that settled law on determination of the application of this nature and having thoroughly perused the pleadings and considered the rivalry submissions by the parties, I find the issue which this

Court is confronted with for determination to be *whether the applicant has sufficiently provided materials proving existence of the two conditions, warranting grant of the sought order*.

To start with the first condition whether the defendant/respondent is about to dispose of or remove from the jurisdiction of this Court the property sought to be attached Mr. Kirita contended with force argument that, under the confidentiality agreement the applicant was duty bound to introduce the respondent with information and necessary data of marketable coal in Tanzania, who subsequent to that would purchase the said coal and sale it to the international market and in that course of purchasing issue the bill of lading in the name of the applicant. He submitted that, it was agreed further that, upon generation of profit out of that business parties would share the profit. He said, contrary to the terms of their agreement the coal consignment subject of attachment was supplied to the Respondent by the Interested Party (Jitegemee Holding Co. Ltd) through ARAL International Ltd and that, as per the emails correspondences annexure ''C" to the affidavit and the ones in the reply to the respondent's counter affidavit, the interested party is covered by the confidentiality agreement as the applicant was inquiring about availability of coal from her (Jitegemee Holding Co. Ltd).

According to him, with such business relationship between the applicant and interested party, the respondent's act of purchasing 55,000 metric ton of coal consignment subject of this application and main suit, indirectly from Jitegemee Holding Co. Ltd through ARAL International Ltd as exhibited by the letter of credit annexure 'B' to the affidavit which he termed as bill of lading, circumvented the applicant in purchasing the said coal, hence breach of the confidentiality agreement. MR. Kirita lamented, due to that breach of terms of agreement, the applicant has suffered damages including loss of profit. He said that, the said breach and circumvention is also one of the contested issue in the main suit.

Mr. Kirita went on submitting that, as averred by the applicant in paragraphs 12 and 13 of the affidavit and undisputed by the respondent in paragraph 21 of her counter affidavit, the ship loaded with coal consignment is about to sail outside the jurisdiction of this Court. And that, the said coal consignment under contest is the only respondent's property in the country as she has no bank account nor any known office in the country, hence withholding grant of this application amounts to rendering the expected decree by the applicant in the main suit not executable. He lastly argued that, the profit which the applicant is or would be entitled to, had it not for

the breach of contract is a total of USD 950,000, in which he submitted and prayed in alternative that, this Court order the respondent to furnish the same or its equivalent value in Court as security, failure of which the said coal consignment be attached as the law so allows.

As regard to the interested party's purported interest of having title of the coal consignment under dispute as deposed in her counter affidavit Mr. Kirita submitted that, the claim goes against the evidence provided by the applicant in paragraphs 4, 5 and 9 of the reply to counter affidavit of the interested party as the annexed sale agreement of coal by her is between her and ARAL International Ltd, who is not a party to this matter. And further that, there is no any deposed evidence in her counter affidavit proving that, the said ARAL International Ltd has not paid her the purchase price for her to claim and exhibit to this Court that, the title has not passed from her to ARAL International Ltd. He added that, even the bill of lading purporting to show that the interested party was the shipper of the coal consignment differs materially on the weight of the contested coal consignment as the weight disclosed in the letter of credit issued by the respondent as applicant in favour of ARAL International Ltd refers to 55,000 metric tons of coal, while the ones annexed to the interested party's counter affidavit speak of

53,352.495 metric tons. And that, there is no possibility that the said title had not passed from interested party to ARAL International as if so then ARAL International Ltd would not have sold the consignment to the respondent without the title to pass. With that submission he implored the Court to find the applicant has established existence of the first condition, hence the application be granted.

In reply Mr. Welwel staged in submitting for the respondent. Having invited the Court to consider the two requisite conditions for the grant of this application as deliberated herein above, he added that, this Court is also enjoined to pay due regard to and make sure that interference with the respondent's right to property is avoided.

In response to the contention that the ship loaded with coal consignment was about sail outside this Court's jurisdiction, Mr. Welwel made no response thereto, instead he concentrated much on the rest of the submissions by negating the applicant's contention that, it is the Jitegemee Holding Co. Ltd who sold the contested coal consignment to the respondent through ARAL International Ltd. He said, there is no adduced evidence by the applicant to that effect as the submission by Mr. Kirita on that assertion is based on the evidence from the bar and that, to the contrary applicant's evidence which

the respondent agrees with is to the effect that, the seller of coal consignment is ARAL International Ltd, though the applicant provided no evidence indicating that the title had passed to the respondent. Mr. Welwel was of the view that, since there is a sale and purchase agreement annexure JT1 to the Interested party's counter affidavit, exhibiting existence of sale agreement between her (interested party) and ARAL International Ltd and not with the respondent then, this Court cannot conclude that, interested party is the seller of the alleged coal consignment to the respondent as submitted by Mr. Kirita, since the letter of credit annexure 'B' in the said affidavit relied on by the applicant merely mentions the respondent as applicant of credit in favour of the respondent and not Jitegemee Holding Co. Ltd as the seller of coal to the respondent. In addition he argued that, there is no evidence from the confidentiality agreement exhibiting that Jitegemee Holding Co. Ltd is covered by the same, since there is no any annexed list of companies allegedly introduced to the respondent by the applicant so as to restrict her from dealing with them directly or in anyway. He had it that, since there was prior communication between the respondent and Jitegemee Holding Co. Ltd even before the signing of confidentiality agreement and since interested party claims title over the contested coal

cargo then, this Court should find that the applicant has failed to substantiate her assertion that, the coal consignment belongs to the respondent, hence this application is bound to fail.

On the interested party's side Mr. Byabusha resisted the application contending that, the interested party had no business relations with the applicant but rather with ARAL International Ltd whom she was to sell her coal as exhibited by their Sale and Purchase Agreement annexure JT1 to the counter affidavit by the interested party. It was his argument that, according to the two separate copies of bill of lading annexure JT2 and JT3 to the counter affidavit respectively, the interested party had sold a total of 53,352.495 metric tons of coal to ARAL International Ltd and not the applicant as claimed by Mr. Kirita and that, since the purchase price was not yet paid then, the title had not passed from her to the said ARAL International Ltd, thus the coal cargo under contest is hers. He was therefore of the view that, any claim between the applicant and respondent covered under confidentiality agreement has nothing to do with the interested party.

Mr. Byabusha went on submitting that, since the applicant failed to establish that the coal consignment under contest belongs to the respondent, this

Court will be setting a bad precedent to attempt to grant the application. As such he added, continued holding of the said coal consignment which he claimed to belong to the interested party, will have negative effect to her for discontinuing her business with ARAL International Ltd as well as affecting national and international coal market. On the assertion of circumvention of the applicant by the respondent in dealing in coal business directly with the interested party, he resisted the contention submitting that, there is no any evidence to substantiate such assertion as the only proved existing business relations is between the interested party and ARAL International Ltd and not with the respondent as claimed. Before resting his submission Mr. Byabusha notified the Court that, the interested party's coal consignment under contest is still loaded in the ship which cannot move without having this application determined, and that for the purposes of maintaining stability of coal business in the country it is in the interest of justice that, this application should not be granted. He thus implored the Court to dismiss it with costs.

In a brief rejoinder Mr. Kirita responded that, the applicant has given enough evidence establishing ownership of the contested cargo to belong to the respondent and that, that is the only property she has within the jurisdiction to satisfy the decree should it be issued in favour of the applicant. And that,

the essence of attachment before judgment is to protect the plaintiff/applicant from rendering her decree redundant once the respondent's property is moved outside the jurisdiction of this Court. With regard to the submission that, the claims of circumvention of the applicant by the respondent is not supported by the confidentiality agreement, he countered that, the submission is a total misdirection as paragraph 9(1) of the agreement covers and binds the respondent in not dealing with all coal transactions in the country without applicant's notification and/or authorization. Hence a justification of the contention that, the dealing indirect with interested party through ARAL International Ltd by the respondent without her involvement amounted to circumvention. He said, the transaction between interested party and ARAL International Ltd as exhibited by the sale and purchase agreement (annexure JT1) has nothing to do with coal sale made by ARAL International Ltd to the respondent as the provision of payment in the sale and purchase agreement does not bind them but rather the intended parties. With regard to the ownership issue, he insisted the coal consignment was sold to the respondent by ARAL International Ltd as exhibited in the letter of credit annexure 'B' to the affidavit, showing it was issued by the respondent as applicant in favour of

the respondent for purchase of 55,000 metric tons of coal and not 53,352.495 metric tons which is a different transaction between the interested party and ARAL International Ltd as exhibited by two copies of bill of lading annexure JT2 and JT3, respectively. And on the contention of suffering loss should the sought order be granted he countered, the coal consignment under contest is the only respondent's property which the applicant can fall into to satisfy her decree in Tanzania regardless of the value of her claim which is USD 950,000. Lastly on the interested party's contention that, the coal consignment belongs to her as the title was yet to pass due to none payment of purchase price, Mr. Kirita said the assertion is devoid of merit as there is no evidence to that effect apart from the sale and purchase agreement since the letter by Bank of Africa annexed to the Counter Affidavit does not provide credit apart from introducing ARAL International Ltd to the interested party, hence no proof that there was guaranteed payment which is yet to be paid todate. He thus prayed the Court to grant the application after being satisfied that the two conditions have been met.

Having considered the above contending submissions there emerges three issues to be addressed by this Court when considering existence of the first

condition as raised by the parties. **One**, existence of just claims or prima facie case by the applicant, **second**, ownership of the coal consignment subject of attachment and **third**, whether there is a proof that the sought to be attached coal consignment is about to be disposed of or removed from this Court's jurisdiction. To start with the first issue as recapitulated above, it is a well settled principle of law that, mere having just or valid claim or prima facie case does not entitle the applicant to an order for attachment before judgment. It is from that legal stance, I do not see the importance of dwelling much on this point since the issue as to whether there was breach of the confidentiality agreement by circumvention of the applicant due to the alleged respondent's act of dealing or transacting directly or indirectly with the interested party, in my considered view is one of the subject matter in controversy for determination by this Court in the main suit as rightly submitted on by Mr. Kirita. Any attempt to determine the same at this stage in my opinion is tantamount to determination of the main suit which exercise this Court is unprepared to indulge on in this application. It suffices to say that, the applicant's claims in the main suit are based on breach of confidentiality agreement, the agreement which its existence seem not to be

contested by the respondent save for its breach, hence existence of triable issue.

Having so found, I now move to the next issue as to who is the owner of the coal consignment loaded in ship and subject of this application. The law under section 110(1) and 112 of the Evidence Act, [Cap. 6 R.E 2022] provides that, he who alleges must prove and the burden of so proving lies on the party would fail if no evidence at all is given on either side. See also the cases of **Abdul Karim Haji Vs. Raymond Nchimbi Alois and Another**, Civil Appeal No. 99 of 2004, **Berelia Karangirangi Vs. Asteria Nyalwambwa,** Civil Appeal No. 237 of 2017 and **Paulina Samson Ndawavya Vs. Theresia Thomasi Madaha**, Civil Appeal No. 53 of 2017 (All CAT-unreported). In **Abdul Karim Haji** (supra) on the burden of proof the Court of Appeal on the burden of proof had this to say:

> *"…it is an elementary principle that he who alleges is the one responsible to prove his allegations."*

Guided with the settled rules of law in proving cases in courts, it is noted that, the applicant herein is relying on the letter of credit annexure 'B' to the affidavit to prove that the contested coal cargo belongs to the respondent while both respondent and interested party are banking on the two copies

of bill of lading annexed as JT2 and JT3 to the interested party's counter affidavit to claim ownership of the coal cargo to belong to the interested party. Having thoroughly perused the said documents, I embrace Mr. Kirita's contention and submission and therefore arrive to the findings that, ownership of the said coal consignment loaded in the ship MV El Matador, currently docked at Mtwara Port, Tanzania, is the respondent's property. The reasons I am so holding is not far-fetched. **One**, the letter of credit annexure 'B' to the affidavit discloses abundantly the respondent as the applicant of credit and ARAL International Ltd as beneficiary (seller) and not the interested party. Meaning that, it is ARAL International Ltd who is the seller of coal to the respondent, the fact which was also conceded by Mr. Welwel in his submission as well as in paragraph 21 of her Counter Affidavit when contended the respondent that, the continued holding of such cargo loaded in the ship will suffer the respondent irreparable and immensely inconvenience her. With that concession one would query that, if at all she is not the owner of the said coal consignment in the ship why claiming and how would she suffer irreparably from the alleged loss. The answer is obvious that, its because she has interest therein. **Second**, the issued letter of credit annexure 'B' to the affidavit is for the purchase of 55,000 metric

tons of coal by the respondent (applicant) from the beneficiary ARAL International Ltd and not 53,352.495 metric tons from the interested party as exhibited by the two bills of lading, which I hold to be a different transaction between the interested party and ARAL International Ltd. **Third**, the assertion of none payment of the purchase price in the coal business of 53,352,495 metric tons of coal as submitted by Mr. Byabusha between the interested party and ARAL International Ltd has nothing to do with the business between the respondent and ARAL International Ltd as even if the purchase price was not paid the claims of unpaid cargo by the interested party against ARAL International Ltd which I find not proved, could not have affected ownership of the consignment sold to the respondent, as there is no evidence from the seller ARAL International who is not a party to this matter to the effect that she had no title to pass. Any claim of non-payment of purchase price if any I hold cannot be raised in this matter by the interested party without bringing in the said ARAL International Ltd, the remedy which she had an avenue to exhaust but failed to do.

Having so found the respondent is the owner of the disputed coal cargo loaded in the ship, the last issue for consideration is on the assertion that, the coal consignment subject of this application is about to be removed from

the jurisdiction of this Court. I think this issue need not detain much this Court as Mr. Welwel does not dispute the fact that, the said ship is about to sail outside this Court's jurisdiction carrying the said cargo. He only justifies the movement in that, it is in the normal course of business for the ship to sail outside this Court's jurisdiction after loading the cargo such as coal. Since it is undisputedly established by the applicant that, the coal consignment subject of applicant's order is the only property belonging to the respondent and since there is no dispute that, the ship in which the consignment is loaded is about to sail hence its removal from the jurisdiction of this Court, I am of the findings that the first condition is established by the applicant.

Next for consideration is the second condition as to whether removal of the said property is intended to obstruct or delay execution of the potential decree should it be issued in favour of the applicant. Mr. Kirita submission on this condition is to the effect that, the said coal consignment being the only property belonging to the applicant, any attempt to remove it from the jurisdiction of this Court infers respondent's intention to obstruct execution of the decree if issued in the applicant's favour as the aim of attachment is to protect the plaintiff from rendering her decree redundant. According to him the condition has been met, hence this application be granted. On his

side Mr. Welwel contested the submission arguing that, the applicant has not contended in her affidavit such fact leave alone proving that, the respondent is operating under intention of obstructing any potential decree. According to him, the consignment in question is for trade purposes since it is in the normal transaction of selling and buying coal which is natural, hence no proof of any intention to obstruct execution of the decree by the applicant. Thus the contention by the applicant in paragraph 12 of the affidavit that, the ship carrying the said consignment is about to sail outside the country with intent to obstruct execution of the decree is unfounded and unjustifiable and does not establish existence of this condition. He added, the sought to be attached cargo worth 10 million USD while the applicant's unjustifiable claim is USD 950,000 only, so to grant the application for such small amount is onerous and economically inexplicable. He therefore prayed the Court to find the condition is not established. As for the interested party Mr. Byabusha like what is submitted by the respondent, stressed on the point that, grant of this application will suffer his client irreparable loss and prayed the Court to dismiss the application.

In his rejoinder Mr. Kirita almost reiterated his submission in chief as narrated herein above when discussing the first condition. He added that,

the mere fact that the claimed amount is USD 950,000 does not entitle this Court to deny grant of the application as that coal consignment is the only respondent's property here in Tanzania.

I have taken time to internalise the fighting submissions by the parties regarding the intention of the respondent to obstruct execution of the decree, if any issued in favour of the applicant. It is not in dispute that, the consignment of steam coal of 55,000 metric tons loaded in ship MV El Matador is the only property owned by the respondent here in Tanzania capable of satisfying the decree issued in favour of the applicant. It is also uncontroverted fact that, the said ship is about to sail outside this Court's jurisdiction. Nevertheless, that is not enough to prove existence of the second condition as it behoves the applicant to adduce evidence proving that, the respondent's act of removal of the said coal cargo outside this Court's jurisdiction is so done with intent to obstruct execution of potential decree by the applicant. The law demand under Order XXXVI Rule 6(1) of the CPC that, such evidence to be adduced by affidavit or otherwise. The term otherwise in my considered view is used in that provision to mean procuring a witness in Court to testify in lieu of affidavit as affidavit is a

substitute of oral evidence. See the case of **Uganda Vs. Commissioner for Prisons, Ex-parte Matovu** (1966) E.A 514 where the Court held thus:

> *"Again, as a general rule of practice and procedure,* ***as affidavit for use in court, being a substitute for oral evidence****, should contain statements of facts and circumstances to which the witness deposes either of his own personal knowledge or from information which he believes to be true…" (Emphasis supplied)*

In this matter Mr. Kirita tried to impress upon the Court that, the applicant proved the respondent's intent to obstruct execution of the expected decree by the applicant through the averment in paragraph 12 of the affidavit in that, since the respondent was about to remove from the jurisdiction of this Court the said coal consignment loaded in MV El Matador, then an inference be drawn that she intended to obstruct execution of the decree. For the sake of comprehending the gist of Mr. Kirita's argument, I find it apposite to quote the said paragraph 12 of the affidavit which reads:

> *12. That, the Respondent has already loaded the cargo to the ship and according to the letter of credit, the ship was supposed to said from Tanzania any time form 10th January, 2023 but the same is still docked at Mtwara port and can sail any time.*

With the contents of the above cited paragraph and I agree with Mr. Welwel's submission that, no any averment was made by the applicant exhibiting her contention that, sailing of the ship loaded with cargo outside this Court's jurisdiction is with intent of obstructing the decree when issued in favour of the applicant. The applicant ought to have stated specifically in the affidavit the facts showing or proving respondent's intention of obstructing execution of the decree if any is issued in her favour but failed to do so. Since affidavit is an evidence, and since no evidence has been adduced to that effect, I decline respondent's invitation to imply such fact that sailing of the ship loaded with coal consignment outside this Court's jurisdiction intended to obstruct execution of the decree. In view of that, I am convinced and therefore forced to hold that, the second condition has not been established by the applicant.

Since the two conditions as set out above must all be established for the order of attachment before judgment to be issued under Order XXXVI Rule 6(1) of the CPC, and since the applicant has failed to establish existence of the second condition, it is the findings of this Court that, the application is destitute of merit. The same is therefore dismissed with costs.

It is so ordered.

Dated at Dar es Salaam this 31st day of January, 2023.

E. E. KAKOLAKI

JUDGE

31/01/2023.