

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

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 197 OF 2023

(Arising from Civil Case No. 74 of 2023)

BZM LOGISTICS COMPANY LIMITED APPLICANT

VERSUS

TRANSYS GLOBAL FORWARDING PRIVATE LIMITED 1ST RESPONDENT

VISTAS INVESTMENTS PRIVATE LIMITED 2ND RESPONDENT

CHAMPION INDUSTRIES LIMITED 3RD RESPONDENT

GREENWAY INVESTMENT LIMITED 4TH RESPONDENT

RULING

9th & 14th June, 2023

MWANGA, J.

This is an application for attachment before judgement. It was brought under Order XXXVI, Rule 6(1) (b (, (2) & (3), 7(1) & (2), Sections 68 (c) & (e) and 95 of the Civil Code, Cap. 33 R.E 2019. It was brought by chamber summons supported by affidavit sworn by Vijayakumar PG,

The applicant, BZM Logistics Company Limited has instituted a Civil Case No. 74 of 2023 against the respondents claiming a total sum of USD 234.000.00. The applicant is also claiming for costs and interest. In their Written Statement of defence, the 2nd, 3rd and 4th respondents have denied the claims levelled against them and they have put the applicant in strict proof of her claims. The 1st respondent is absent.

The application was brought by the applicant under certificate of urgency asking the court to be heard on two stages. That is, ex-parte as well as inter-parte hearing.

On 9th day of May, 2023 this court granted the ex-parte order restraining the respondents, their agent (s) or servant (s) or any person, natural or artificial, acting under the respondents' instruction from removing the twenty (20) properties/containers of the respondents from the local limits of jurisdiction of this court pending hearing and determination of the application inter- parties, which was done on 6th June, 2023.

Relevant facts for appreciating the arguments of the parties on this application on merits, briefly stated are that in the affidavit filed by the principal officer of the applicant Mr. Vijayakumar PG, the applicant is dealing with the business of clearing and forwarding services. Sometimes in January, 2022 the applicant entered into business

agreement with the 1st respondent for clearing and forwarding services in favour of 2nd, 3rd, and 4th respondents. According to the deposition at paragraph 7 of the applicant's affidavit, the 1st respondent engaged the applicant as her agent to clear goods shipped and transported from India by the 2nd respondent in the assistance of the 1st respondent who cleared and forwarded them to Zambia via Dar es salaam Port as the 1st respondent did not have office in Dar es salaam. It is deposed at paragraph 8 of the affidavit that, the agreement obliged the 1st respondent to clear the goods in India, the 2nd respondent to ship and transport the same from India to Zambia via Dar es salaam and the applicant was obliged to clear the same in favour of the 3rd and 4th respondents in Zambia. At times, the applicant was requested by the 2nd, 3rd and 4th respondents to hold containers in the Dar es salaam Port for a while since April, 2022 until June 2022 because the import licence and exemption letter from the Zambia Revenue Authority were not readily available at the time. On the 1st week of June, 2022 when the import licence and exemption letter were ready, the 2nd, 3rd and 4th respondents sent the documents to the applicant and asked her to start loading the containers from Dar es salaam Port.

The applicant contended further at paragraph 11 of the affidavit that, the holding of 56 containers encouraged charges of shipping line

container detention, storage charges, warehouse rent charges and transport additional costs amounting to USD 131, 000.00. Also, the applicant claimed the outstanding previous invoices and costs of four containers which were not returned back by 2nd and 3rd respondents which made the unpaid sum to the tune of USD 234,000.00.

What has been troubling to the applicant is that, the 1st respondent has ignored the payments of the stated sum and, the other respondents have terminated the service agreement and appointed a new clearing and forwarding agent as an effort to evade the payments of outstanding amount to the applicant. As a result, the shipping lines and transporters has reported the applicant to the regulator (TASAC) seeking them to retain the applicant's license.

Per contra, Mr. Shehzada Walli who appeared on behalf of the 2nd, 3rd and 4th respondents seriously contest the application requiring the applicant to strict proof the allegations against his clients. Paragraph 4 of the counter affidavit sworn by Mr. Nishith Vyas provides that, the 2nd, 3rd and 4th respondents have never entered in an agreement or arrangement with the applicant and the 1st respondent for clearing and forwarding services. It was averred that, the 2nd respondent engaged the 1st respondent to deliver goods from India to Zambia and, any communication between the applicant and the 2nd, 3rd and 4th

respondents was out of goodwill and not contractual liability. And further that, the holding of containers by the applicant at the port was done at her discretion with ill intention. As it was stated in paragraph 9 and 10 of the counter affidavit, the instruction was to delay and not to hold and it was done in favour of Southern Bioenergy Ltd.

The averment at paragraph 11 of the counter affidavit is that, the applicant was paid in excess of what he was claiming and the said payments of USD 642,250.00 was paid on account as per the request and assurance of the 1st respondent and, further that the reconciliation and justification of the same is still pending. As to paragraph 23 of the counter affidavit, the 2nd respondents state that some of the containers contain industrial paints along with project specific engineered components, composed of chemicals such as pentaerythritol, sodium formate and formaldehyde which makes the paint decay after 30 days. And that will cause business loss to the 2nd respondent and applicant will not be able to compensate or refund the monies lost and damage incurred if the injunction remains.

When the matter came for hearing, the applicant was represented by Advocate Stephan Mosha assisted by Fredrick and Nafikile Mwamboma, the learned counsels. The 2nd, 3rd, 4th respondents were

represented by Mr. Shehzada Walli, also the learned counsel. The 1st respondent was marked absent.

Mr. Stephen Mosha submitted that, the respondents are foreigners and do not have office or any immovable properties in Tanzania and they are on the verge of removing movable properties from the local jurisdiction of the court. And its removal would destruct the execution of any decree that would be obtained in the civil case.

According to the counsel, all the tests for granting attachment before judgement are met; **One**, that there is an intention of the respondents to remove the properties from the local jurisdiction of this court. **Two**, the said removal is intended to delay or obstruct the execution of the decree. The counsel cited a number of cases in support of the application including; **Fabec Investment Ltd Versus Mes International Financial Services PTY Ltd and Another** (HCT)., Miscellaneous Commercial Application No. 2 of 2023; **East African Cables Tanzania Ltd Versus Spencon Services Ltd**, (HCT) Miscellaneous Civil application No. 61 of 2016; **FA Jessa Versus Jumanne Ramadhani**, Miscellaneous Civil Appeal No. 11 of 1993(HCT).

All the above cases discussed the tests established for granting attachment before judgement pursuant to Order XXXVI, Rule 6(1) (b),

(2) & (3), 7(1) & (2), Sections 68 (c) & (e) and 95 of the Civil Code, Cap. 33 R.E 2019.

On the other hand, Mr. Shehzada contended that, the applicant had filed the suit at this court without the knowledge of the 1st respondent while in actual fact there has been ongoing negotiations between the applicant and 1st respondent regarding such claims.

Responding on the cited cases, the learned counsel Mr. Shezada distinguished them all stating that; **one**, the properties that were attached in those cases are equipment's and cars as opposed to applicant's prayer for attachment of the containers belonging to different company but in the possession of the ship lines and port authorities. **Two**, the attachment shall continue attracting storage charges, detention charges and damage charges. **Three**, the goods carried on the containers are chemicals subject to decay after 30 days. **Four**, the agreement between the 1st respondent and the applicant has nothing to do with the 2nd, 3rd and 4th respondents. The learned counsel supported his position with the cases of **Glory Shifwaya Samson Versus Raphael James Mwinuka**, Civil Application No. 506/17 of 2019; **Kombe Versus Kombe**, 1951 ALLELR 767, **Kanyinda Abdalla Versus Obocha Credit**, DC Civil Appel No. 5 of 2022.

The counsel added that, the applicant must show that the respondents want to dispose the property to delay execution. It was his view that, in case the applicant wins this case, the judgement and decree can as well be executed in India. The counsel supported his contention with the Indian cases of; **Transasia Private Capital Limited Versus Gaurav Dhawan**, EX.APPL.(OS) 11291/2021 and **Bank of Baroda Versus Kotak Mahindra Bank Limited**, (2020) 17 Supreme Court Cases 798. Referring also the case of **Fabec Investment Ltd Versus Mes International Financial Services PTY Ltd and Another (supra)**, the learned counsel argued that, the costs incurred as charges for the attached 20 containers at the port is almost USD 4000 per day and the applicant has not shown how he is going to compensate for the expenses incurred. It was the counsel view that, the cases cited provided that each case should be decided on its own facts.

In rejoinder, Mr. Stephan submitted that any loss incurred as a result of the attachment is quantifiable. So, his client will be responsible and he has been advised accordingly for that matter.

I have deeply gone through the depositions and submission of the learned counsels. The question now arises is whether the exparte interim injunction order, which was granted to the applicant at the initial stage, should be confirmed or vacated.

The applicant has deposed that, he had an agreement with the 1st respondent in the clearing and forwarding goods as its agent in Dar es salaam because the 1st respondent has no clearing office in Dar es salaam. The goods were shipped and transported from India by the 2nd respondent who cleared and forwarded them to Zambia. The 1st respondent was obliged to pay the applicant upon presentation of the invoice, the act which ran smooth between the two. The goods were cleared in favour of the 2nd, 3rd and 4th respondents. As the import license and exemption letter from the Zambia Revenue Authority were not readily at the time, the aforesaid respondents engaged service of the applicant to delay the 56 containers up until that was done. The applicant acted on their instructions.

However, such move led to various port charges of; shipping line container detention, storage, warehouse rent charges and transport additional costs, which the applicant incurred. The payments were done to the tune of 624,000.00 but according to the applicant the amount did not settle the whole sum. As a result, the applicant instituted suit in Civil Case No. 74 of 2023 claiming, among other things, the sum of USD 234.000.00. As it was put right by the counsel the respondent there was negotiation which was ongoing but has not worked out.

The contentions which should weigh with the court in deciding the application for grant of interim injunction are well settled. There are, **one**, whether the plaintiff has made out a prima facies case meaning thereby that there is a bonafide contention between the parties or a serious question to be tried. **Two**, whether the balance of conveniences in favour of the plaintiff, that is to say, whether it would cause greater inconvenience to the applicant if the injunction is not granted than the inconvenience to which the respondents will be subjected if it is granted. **Three**, whether the plaintiff would suffer irreparable loss and injury if the prayer for grant of temporary injunction is refused. All these three considerations must be conjointly satisfied before the order is granted by the court.

It should be noted that, the grant of temporary injunction is a discretionary relief; therefore, it must be based on facts produced by the applicant, circumstances, and available documentary evidence to prima facies establish that he may have rights in the subject matter of the suit.

Upon satisfaction of the above conditions, the court will invoke Order XXXV1, Rule 6 (a) and (b) of the CPC which stipulates that: -

"(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.

As I have endeavored to go through the affidavit of the applicant and the counter affidavit of the respondents, so to say, the conditions set forth in granting interim orders sought are satisfied.

For those reasons, I hereby order attachment of the 20 containers at the Port of Dar es salaam which is the subject matter of Misc. Civil Application No. 197 of 2023 unless the respondents furnish as security a sum equal to the amount claimed, that is USD 234.000.000 within the period of two weeks from the date of this order. The containers subject to attachment before judgment are as follows: -

- a) Containers No. BEAY ST 88794, GESU 5941380, HASU 4502723. MRKU 3691933, MRSU 3815425, MSKU 0893676, SEGU 4121735, all under the bill of lading/booking No. 225875910;
- b) Container No. PONU 8177580 under a bill of lading/booking No. 226323182;
- c) Containers No. BSIU 9730183, HASU 4660919, MAGU 5118618 SUDU 6513709, SUDU 8788120, TCLU 8923086, TCNU 7039397 all under bill of lading No. 226632307; and
- d) Containers number MRKU 2068699, MSKU 0793276, MSKU 8875771, MSKU 9640215, SUDU 6754558, all with bill of lading No. 226628602.

This order is issued to the defendants because of the presence of clear link between the claim of the plaintiff in relation to the service rendered to the defendants.

It is so ordered.



H. R. MWANGA

JUDGE

14/06/2023

COURT: Ruling delivered in the presence of Advocate Stephen Masha for the applicant and Advocate Shehzada Walli for the 2nd, 3rd, and 4th Respondents.



H. R. MWANGA

JUDGE

14/06/2023

