IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 518 OF 2023

(Arising from Civil Case No. 229 of 2013)

STANDARD CHARTERED BANK (HONG KONG) LIMITED ..... 1st APPLICANT

STANDARD CHARTERED BANK PLC ..... 2ND APPLICANT

STANDARD CHARTERED BANK (TANZANIA) LIMITED ..... 3RD APPLICANT

VERSUS

VIP ENGINEERING & MARKETING LIMITED ..... RESPONDENT

RULING

S.M. MAGHIMBI, J:

The application beforehand is lodged under the provisions of Section 10, 11 and 95 of the Civil Procedure Code, [Cap. 33 R.E 2019] ("the CPC"). The applicant is moving the court to dismiss Civil Case No. 229/2013 ("the suit") between VIP Engineering (the respondent herein) who sued Standard Chartered Bank Plc (2nd applicant herein), Standard Chartered Bank (Hongkong) Limited (1st applicant herein), Standard Chartered Bank (Tanzania) Limited (3rd applicant herein), the Joint Liquidators of Mechmar Corporation (Malaysia) Berhad ("Mechmar"), Wartsila Nederland B.V and

Wartsila Tanzania Limited. However, the last two defendants in the main suit are not parties to this application.

Brief background that led to this application is that in the suit, the respondent herein sued the defendants outlined above seeking for judgment and decree of this court against the defendants jointly and severally as follows:

a. A declaration that by their conducts complained of, the Defendants committed fraud, corporate waste, oppression, diversion of funds, money laundering, and conversion of Independent Power Tanzania Limited (**IPTL**), and Plaintiff's (in the Suit) assets in the ICSID Proceedings and thus acted and continue acting wrongfully, illegally, and maliciously vis-à-vis Plaintiff (in the Suit) and IPTL, in deliberate breach of their duty of care they owed to the Plaintiff (in the Suit) and to IPTL.

b. A declaration that the Plaintiff (in the Suit) and IPTL have suffered substantial loss and damage as a result of the Defendants' actions and conduct complained of.

c. A declaration that neither SCB nor its agent SCBHK has been or is a creditor of IPTL and none of them ever obtained any valid, legally secured interest in any IPTL property including the PPA.

d. A declaration that, consequently, neither SCB nor its agent SCBHK is entitled to appoint any Administrative Receiver of IPTL or initiate or maintain any legal proceeding, whether in Tanzania or abroad, claiming, stating or suggesting that SCB or its agent SCBHK or any entity controlled by SCB has any claim against or any right or interest in IPTL, in the Plaintiff (in the Suit) or in IPTL's or the Plaintiff's (in the Suit) property rights.

e. An order directing Wartsila to carry out dual gas and heavy fuel oil conversion of the IPTL 100MW Power Plant at a cost of not more than **USD 11.5 million**.

f. An order declaring that all the Defendants shall pay the Debts and other liabilities of IPTL as of **12 November 2013** and in case they continue with their conduct of abuse of Court process as at the date of the order.

g. Payment of damages in an amount of not less than **USD 490,900,000.00** (Say Not less than United States Dollars Four Hundred and Ninety Million Nine Hundred Thousand) or its equivalent in Tanzania Shillings or as may be assessed by the Honourable Court.

h. Costs of this suit.

As per the records, during the pendency of the suit, the 1st Applicant herein filed a claim in the High Court of Justice Queens Bench Division ("the **English Court")** against a company trading as Independent Power Tanzania Limited ("IPTL"), the Respondent and Pan African Power Solutions (Tanzania) Limited ("PAP"). In the claim, the applicant was claiming for payment of sums due under the Facility Agreement dated 28th June, 1997 ("the **Facility Agreement"**) which was later novated to the 1st Applicant by the Danaharta Managers (**Managers**). The Managers had taken over the loan by novation from the original lending banks.

It is the applicants' claim in this application that the said Facility Agreement and the novation subject of the proceedings in the English Court are also the subject of the Respondent's Suit before this Honourable Court against the Applicants herein. Their argument is that in particular,

the suit seeks for this Court to impeach the novation agreement entered between the Managers and the 1st Applicant and ultimately find that the 1st Applicant is not a creditor of IPTL.

When the matter came for mention on 24th November, 2023, this court ordered the disposal of the application to be by way of written submissions. All parties filed their submissions accordingly. The applicants' submissions were drawn and filed by Mr. Gasper Nyika, learned Counsel and the respondent's submissions were drawn and filed by Ms. Dosca Mutabuzi, learned Senior Counsel.

In his submissions to support the application, Mr. Nyika submitted that the English proceedings were heard and determined by the English Court on 16th November, 2016 in favour of the 1st Applicant. That in the English Judgment, the English Court declared inter alia that the 1st Applicant was a secured creditor in IPTL (annex SCB-1 to the affidavit, paragraphs 52 and 56 on pages 11 and 12 respectively). His argument was that there is no room for the Respondent to set the English Judgment aside and therefore, as it is final and conclusive. That the effect of the judgment has been to finally and conclusively determine any matters which were dealt in the said English Judgment and raised in the

Respondent's Suit which include the question of whether the 1st Applicant is a secured creditor of IPTL.

Mr. Nyika went on submitting that the Respondent's Suit against the Applicants herein is premised on the claims that the novation agreement is invalid and illegal and therefore did not give the 1st Applicant any secured creditor status in relation to IPTL. Pointing to the decision of the English Court, he argued that the decision therein conclusively ruled that the novation agreement was valid and therefore the 1st Applicant was a secured creditor of IPTL. He then concluded that based on this finding by the English Court, the Respondent's claim in the Suit before this Honourable Court is not maintainable, praying for the dismissal of the suit.

In their reply, Ms. Mutabuzi, learned Senior Counsel representing the respondent, submitted that the entire submissions of the advocates for the Applicant to justify grant of the prayers in the application are based on the existence of the Foreign Judgment referred. Her argument was that as deponed in the Counter Affidavit, the Judgment in issue, that is, the Judgment in Case N0. CL-2013-000411 (Formerly 2013 Folio 1697) in the High Court of Justice Queen's Bench Division Commercial Court [2016] EWHC 2908 (Comm), 2016 WL06696933 was obtained illegally and it is a

Judgment unenforceable in Tanzania. She argued that for this reason, its registration was set aside by the High Court Commercial Division (Hon. B.K. Phillip, J.) on 26th August 2020 in Consolidated Misc. Commercial Causes No. 67 & 75 of 2017.

She went on submitting that it is a fact that the English proceedings were commenced after the matter before this Court was already initiated by the Respondent and after the Applicants had applied in the United State District Court Southern District of New York (Hon. Victor Marrero, United States District Judge) in Case 1:13-cv-04754-VM VIP Engineering and Marketing Ltd against Standard Chartered Bank that the proper forum for resolution of the present dispute is Tanzanian Courts. She concluded that the Applicant also made undertakings that they agreed to be bound by the decisions of Tanzanian Courts.

On the authority of the Court of Appeal of Tanzania (Hon. Othman, C.J., Hon. Msoffe, J.A., And Hon. Rutakangwa, J.A.) in **Civil Revision No. 1 of 2012** between **Standard Chartered Bank (Hong Kong) Ltd Versus (1) Mechmar Corporation (Malaysia) Behard & 7 Others**, she submitted that the authority clearly directs at pg 18 that where the language of the statutory provisions such as quoted in para (B) 1 to para

(B) 21 above is plain and admits only one meaning, the tasks of interpretation can hardly be said to arise.

Ms. Mutabuzi questioned the applicant's failure to rely on the English Judgment dated 16th November 2016 as their defence and Counter claim in Civil Case No. 229 of 2013 and the applicants' prayer that Civil Case No. 229 of 2013 be dismissed against **Wartsila Netherlands BV and Wartsila Tanzania Limited**. She further questioned the applicant's failure to rely on the English Judgment dated 16th November 2016 in arguing their Consolidated Civil Application Nos. 70 & 90 of 2016 at the Court of Appeal of Tanzania? She further questioned whether this court should follow the orders of the Court of Appeal of Tanzania dated 7th March 2022 in Consolidated Civil Application Nos. 70 & 90 of 2016 or the English Judgment delivered on 16th November 2016 in Claim No CI-2013-000411 (Formerly 2013 Folio 1697)?

The respondent further questioned the non-involvement of the Attorney General to protect what they termed as Public Policy. On the cited **Kenyan Case of Graham Rioba & 2 Others Vs. Fina Bank Limited & 5 Others [2017] e KLR,** it was Ms. Mutabuzi's reply that a case if only persuasive and is a very clear abuse of court process. The respondent also

submitted on the issue of admission of non-payment of Stamp Duty on a document admitted before Hon. Phillip, J. in Consolidated Misc. Commercial Cause No. 67 of 2017 and No. 75 of 2017 on the IPTL Loan Facility Documents and erroneously submitted that non-payment of Stamp Duty only makes the IPTL Loan Facility Documents inadmissible in evidence while Section 47(1)(d) of CAP 189 cited at para (B) 3 above directs that evidence of non-payment of Stamp Duty is admissible in proving criminal offences. She argued that Hon. B.K. Phillip, J. was statutorily obliged to set aside the exparte order of Hon. B.M.A. Sehel, J. (as she then was) in Misc. Commercial Cause No. 2 of 2017 delivered on 09th February 2017 because by Registering the Foreign Judgment Exparte, Hon. B.M.A. Sehel, J. sustained a claim founded on a breach of Sections 45(1), 47(1)(d) and 73(2)(a) of the United Republic of Tanzania Stamp Duty Act [CAP. 189 R.E. 2019] for the admitted non-payment of the 4% Stamp Duty on the USD 105.0million 28th June 1997 IPTL Loan Facility Documents and consequently the Ex-parte Registration contravened Sections 11(c) and 11(f) of the Civil Procedure Code [CAP. 33 R.E. 2019] which direct that a Foreign Judgment shall not be conclusive to a matter directly adjudicated upon between the parties or between parties under

whom they or any of them claim litigating where it fails to recognize any relevant law in Tanzania and/or sustains a claim founded on a breach of any law in force in Tanzania.

I need not to be detained much by this line of argument because what the respondent is asking cannot be granted by this court. Since the Commercial Division of the High Court is within the same rank with this court, I am in no position to fault the proceedings that have already been concluded by a fellow judge of this court because by doing that, I will be usurping powers that I do not have. So, stating that a judgment is not res judicata because the court had no jurisdiction of the subject matter of the action or that it was illegally obtained, is simply another way of stating that there is no judgment. However, in this application, the applicant is challenging the jurisdiction of the court in terms of the substantive law, which is merely describing the jurisdictional concept in another language, and not the validity of what was decided in that judgment. The issue will therefore not form part of my determination and analysis of this application. There are also issues and prayers raised which shall better be addressed in the main Civil Case should this application be dismissed.

Back to the submissions in relations to the application at hand, in her conclusive submissions, the respondent had the following prayers:

1. An order under Section 95 of the Civil Procedure Code [CAP 33 R.E. 2019] that Miscellaneous Civil Application No. 518 of 2023 be dismissed with costs to prevent the unprecedented abuse of court process by the Applicants.
2. An order directing that the Professional Expert Evidence and the documents attached to paras (C) 2.1, (C) 2.2, (C) 2.3, (C) 2.4, (C) 2.5, (C) 2.7, (C) 2.8 and (C) 2.9 above as TAB-11, TAB-12, TAB-13, TAB-14, TAB-15, TAB-16, TAB-17 and TAB-18 respectively be placed in Civil Case No. 229 of 2013 to be relied upon by the Plaintiff at the resumed hearing of Civil Case No. 229 of 2013 as allowed by the provisions of the United Republic of Tanzania Civil Procedure Code [CAP 33 R.E. 2019] quoted at paras (B) 14, (B) 15, (B) 16, (B) 17, (B) 18, (B) 19 and (B) 20 above,
3. Any other orders that the Hon. Court may deem necessary and justified.

In rejoinder, Mr. Nyika submitted that the Respondent's submissions are misconceived. In relation to the non-payment of stamp duty for the

Facility Agreement, his rejoinder submission was that there was no admission from Gaspar Nyika in his affidavits in support of this application or any other court proceedings pertaining to the failure to pay stamp duty of the Facility Agreement if any. Rather, he argued, the Applicants' submission which was made from the bar is that the failure by IPTL to register the charge or pay stamp duty for the documents pertaining to the loan facility cannot invalidate the Facility Agreement. He concluded that the Facility Agreement is perfectly valid under Tanzanian law notwithstanding that there is no evidence that IPTL or the 1st Applicant paid the requisite stamp duty.

He went on submitting that in relation to the abuse of court process, the application is not an abuse of court process as the applicants are entitled to lodge this application under Sections 10, 11 and 95 of the CPC. On the cited decisions of the Court of Appeal in Consolidated Civil Applications Nos. 76 & 90 of 2016, and the United States District Court Southern District of New York, Mr. Nyika argued that the decisions do not preclude the Applicants from filing this application to dismiss the Respondent's Suit and thus there is no abuse of court process or contempt of court orders by the Applicants as alleged by the Respondent. That the

directive by the Court of Appeal that the suit should proceed from where it ended includes determination of any matter which may arise in the cause of proceeding with the Suit. An application to dismiss the suit is therefore within the orders of the Court of Appeal because it is intended to progress the proceedings if it succeeds.

He further faulted the respondent for failure to demonstrate in their submissions that any of the exceptions provided by Section 11 (a) to (f) of the CPC apply in the present case for the English Judgment not to be conclusive and binding against the Respondent in all matters which were dealt with in the said judgment and raised in Civil Case No 229 of 2013, including the question of whether the 1st Applicant is a secured creditor of IPTL. He argued that the English Judgment was decided by a court of competent jurisdiction after earlier jurisdictional challenges by the Respondent and the other defendants had been dismissed as indicated at paragraph 4 of the English Judgment. That the judgment was given on merit in the sense that the English Court considered the Respondent's likely defences and there is no suggestion nor has the Respondent demonstrated that the English Courts' decision was based on an incorrect

view of international law and no applicable Tanzanian law was refused to be recognized.

He went on submitting that there is no breach of natural justice because the Respondent was given an opportunity to be heard prior to the issuance of the English Judgment but chose not to do so, and the decision is not obtained by fraud and is not founded or sustains a claim founded on a breach of any law in force in Tanzania.

Mr. Nyika further pointed that the Respondent's submission in reply failed to show that it still has a *stratum* or cause of action against the Applicants in the Suit as per its pleadings following the issuance of the English Judgment declaring inter alia that the 1st Applicant is a secured creditor of IPTL, meaning that the 1st Applicant has an interest in the Power Purchasing Agreement (**PPA**) between IPTL and TANESCO as it is one of the assets belonging to IPTL. Consequently, he argued, the Respondent's Suit against the Applicants is not maintainable in law for lack of cause of action.

Further that the Respondent has also failed to demonstrate that this Court is not *functus officio* to determine the Suit following issuance of the

English Judgment which inter alia held that the 1st Applicant is a secured creditor of IPTL. That in her counter affidavit deponed by James Burchard Rugemalira and its submissions in reply did not make any suggestion that the English Judgement has been set aside by an English Court on jurisdiction grounds. She just challenged the Applicants' position that the English Judgment need not be registered in Tanzania under the Foreign Judgment Act for the judgment to be conclusive and binding against it. In addition, he submitted, the Respondent's submissions have also failed to show that it is not abusing the court process in its continued pursuit of its claims against the Applicants in the Suit alleging that the Applicants, or its agents, have never been or are a creditor of IPTL and that none of them have ever obtained any valid, legally secured interest in any IPTL property including the PPA.

He concluded that the respondent's continued act to pursue its claims against the Applicants in the Suit before this Court and seek the same reliefs i.e., declaratory orders that neither the Applicants or its agents have been or is a creditor of IPTL when it is evident that such claims and reliefs sought against the Applicants have been determined by the English Court

is an abuse of court process. He reiterated his prayer that the suit be dismissed with costs.

Having gone through the Chamber Summons, the affidavit in support thereof and the respondent's counter affidavit in opposing the application, and having further considered the submissions of the parties for and against the grant of this application, I find that the question for my determination in this application is whether the judgment of the English Court dated that involved the parties herein finally and conclusively determined the matters in controversy in this suit. In order to achieve that, I have to determine whether the judgment of the English Court is binding making this court functus officio.

It is important that I make it clear at this point that what I have to determine is the binding nature of the English Judgment as opposed to the legality of it, which is what the respondent seems to have moved the court to do. Such is the position because while I am obliged by the nature of this application to determine the binding effect of the English judgment, I am not in any position by law to determine the legality of the said judgment because at this point, I would have no jurisdiction to do so. This is coupled with the fact that the claim in the suit filed is not on the legality

of that judgment but rather a claim against the defendants which on their part, the defendants/applicants herein claim the said cause of action had already been determined in the English Court between the same parties herein.

However, before I go into the determination of the application, I must make clarity on a point that was raised by the respondent in her submissions. There was raised an argument that when the Court of Appeal remitted the suit back to this court, there was a directive by the Court of Appeal that the suit should proceed from where it ended. It was Ms. Mutabuzi's concern on whether this court should follow the English Judgment or the Orders of the Court of Appeal in **Standard Chartered Bank & Others vs VIP Engineering & Marketing Limited & Others (Consolidated Civil Application 76 of 2016) [2022] TZCA 302 (7 March 2022)** or the English Judgment. In his reply Mr. Nyika argued that the directives of the Court of Appeal includes determination of any matter which may arise in the cause of proceeding with the Suit. I must admit that there is indeed a decision of the Court of Appeal with a directive that the matter should proceed where it ended before the two applications were filed before The Court. However, this directive was only in so far as

the pendency of this suit before this court is concerned, that it should proceed. The Court of Appeal did not determine the legality of the proceedings before me or the illegality of the English Judgment, neither did the order remitting the records of this suit back to this court to proceed on merits did preclude the defendants therein/applicants herein from raising any concern on the legality or competence of this suit.

Having cleared that concern, I will now proceed to determine the binding nature of the English Judgment. In the so determining, the relevant laws will be visited and supported with the precedents set by our court. The applicant's argument is mainly that the matters in issue in the suit including the cause of action therein had already been determined by the English Court. On the other hand, the respondent claims that the judgment was illegal and had already been set aside by the Commercial Division of this same High Court.

I will start with Section 11 of the CPC relied upon by Mr. Nyika. The Section provides:

> *A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or*

between parties under whom they or any of them claim litigating under the same title except-

(a) where it has not been pronounced by a court of competent jurisdiction;

(b) where it has not been given on the merits of the case;

(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of Tanzania in cases in which such law is applicable;

(d) where the proceedings in which the judgment was obtained are opposed to natural justice;

(e) where it has been obtained by fraud;

(f) where it sustains a claim founded on a breach of any law in force in Tanzania.

The general rule under the cited Section is that a foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties. As far as the proceedings herein are, there is no dispute that the English Judgment in question determine the issues in controversy between the same parties as in this suit save for Wartsila

Nederland B.V and Wartsila Tanzania Limited who are not a party to this application but are parties in the main suit. It is further undisputed that the English Judgment finally determined the controversy between the parties.

The respondent's argument, as pointed out earlier is in so far as the legality of the judgment is concerned which, as I held, is not an issue to be determined by this court at this stage. The exception to such registration is on the reasons outlined under item (a) to (f) of the Section 11. The issue is how the registration of the judgment can be challenged on the exceptions under Section 11(a)-(f). This is answered under Section 6 of the Reciprocal Enforcement of Foreign Judgements Act, [Cap. 8 R.E 2019] ("the REFJA"). In the Section, it is clearly provided that a registered judgment may be set aside on an application in that behalf by any party against whom a registered judgement may be enforced. The registration of the judgement shall be set aside if the registering court is satisfied that the conditions outlined under Section 6 (1)(a)(i)-(vi) of the REFJA exists. A registering court on the other hand is defined as the court to which an application to register the judgement is made.

Why I have taken time to explain the provisions of the REJFA is because it is only the registering court that has powers to determine the legality or otherwise of the Foreign Judgment and from the outlined definition, I am not the registering court hence any issue pertaining the legality of the judgment of the Foreign Court cannot be entertained at this stage. The case would have been different had the judgment been refused admission or set aside in any manner by a court in this country. That being the case, the Foreign judgment is binding to the parties as if it were a judgment of a court within the United Republic of Tanzania. The only issue remaining is to determine is whether the cause of action in the suit had already been determined by the English Court.

The next question is on what was determined in the foreign judgment and whether determination of the issues therein makes this court functus officio in determining the same issue again. To ascertain the issues in controversy in the suit as opposed to those determined in the English Judgment, I had to go through the judgment of the English Court and see what the claim was about and thereafter see whether what was determined in that case is the same as what was claimed by the applicant in the suit. Should the claim be the same and hence finally determined,

the suit that is pending before this court would have no legs to stand on, and the vise versa is therefore obvious. Since the nature of the application beforehand is on objection on point of law, my determination of the issue will be solely plunged on the pleadings that are before me, I will not go into determination of any issue that will require evidence to be ascertained (see the celebrated case **of Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd., 1959 E.A 696**).

A thorough perusal of the claim blends well with what Mr. Nyika has submitted in both his affidavit in support of the application and the submissions thereto. The cited paragraphs 26, 27, 28, 29, 30, 31, 32, and 33 of the plaint in the Suit are clear that plaintiff/respondent is moving the court to determine that neither the 1st Applicant nor the 2nd Applicant have ever been secured creditors or are a secured creditor of IPTL. Further determination that neither the 1st Applicant nor the 2nd Applicant have ever obtained any valid, legally secured interest in any of IPTL's property including any interest under the Power Purchasing Agreement (**PPA**) between IPTL and the Tanzania Electric Supply Company Limited (**TANESCO**).

In this claim, it is on record that at page pages 11 and 12, particularly paragraphs 52 and 56 respectively, the English Court, in its judgment, dealt with the question of whether the 1st Applicant is a secured creditor of IPTL, a question which was determined in favour of the 1st Applicant declaring that the 1st Applicant is a secured creditor of IPTL.

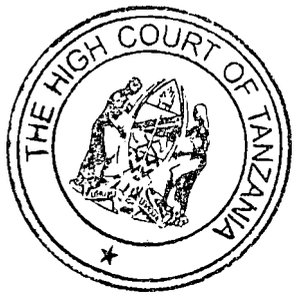
Now looking at the claim in the suit, one of the issues which is sought to be determined in the Suit before this Honourable Court is whether the 1st Applicant is a creditor of IPTL by virtue of the novation agreement signed between the Managers and the 1st Applicant. The parties in the English Court were the 1st Applicant herein as one of the claimants and the Respondent herein as one of the defendants. That being the case, I am in agreement with the applicants that the matter in issue in this case involves issues which have already been settled by the English Court and cannot be entertained any further by this court. Before I pen down, I must echo at this point, the law of jurisdiction of the courts is neither procedural law nor substantive law and has nothing to do with either the creation or recognition of substantive rights. The issue of jurisdiction is simply a limitation on the power of a court to act as a court having finally determined the same issue in a previous litigation. Jurisdiction in general

is such that once the legal rights of parties have been judicially or impartially recognized by a competent court/tribunal, such recognition is subsequently conclusive in so far as those rights or an issue is concerned. In conclusion therefore, much as the respondent strongly argues that the registration of the English Court Judgment is still in question and pending before the Court of Appeal, that should be the proper route that the rights of parties herein shall be determined, patience should be on the outcome of what is pending at the court of appeal. The resolution of the same dispute cannot be done by deploying yet another enforcement mechanism that may at time point collude with the already determined same issues and leave parties at a juncture which, the ends of justice may hinder the execution of one form of determination of the controversy over the other legally so determined rights of parties. Hence in as far as my jurisdiction to determine the issues in controversy is barred by the existence of the English Judgment, that route pending at the Court of Appeal is the route proper fit for the parties until that time the litigation in relation to the existence of the English Judgment is concluded and the same is set aside.

To wrap all matters in one conclusive verdict, the application before me is hereby allowed. Under the circumstances that the issues in the suit

have already been determined by the English Court, the suit is bound to be struck out.

Dated at Dar es Salaam this 12th Day of March, 2024.



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S. M. MAGIMBI

JUDGE