IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 171 OF 2021

(ARISING FROM COMMERCIAL CASE NO. 132 OF 2021)

BURAQ LOGISTICTS LIMITED—APPLICANT

VERSUS

PRIME CEMENT LIMITED—RESPONDENT

Date of Last Order: 14/02/2022

Date of Ruling: 04/03/2022

RULING

MAGOIGA, J.

The applicant, BURAD LOGISTICS LIMITED under certificate of urgency and by chamber summons preferred under the provisions of sections 68 (e), 95 and ORDER XXXVI Rule 6(a) (b) and (2) and (3) all of the Civil Procedure Code, [Cap 33 R.E. 2019] and any other enabling provision of the law moved this court for grant of ex-parte and inter parties orders against the respondent for an order of attachment before judgement of the respondent's properties, a list of which attached to the chambers summons or in the alternative this court be pleased to order the respondent to deposit in this court, security in the extent of USD.526,425.00 or its equivalent in Tshs.1,200,249,000/=, interest at mercantile rate and 7% Court's rate,

costs abide the result of the main suit and any other relief the court may deem just and fit to grant.

The chambers summons was accompanied by affidavit sworn by Mr. QAISS ANWAR KARIM stating the reasons why this application should be granted.

On 16.11.2021 having satisfied that the instant application was against the respondent who was outside the country as per the facts stated in the affidavit, I entertained ex-parte orders/prayers because this was an exception in that it was not easy to serve the respondent without delaying justice to triumph as the respondent was outside the jurisdiction of this court. Then, I ordered the motor vehicles as listed to be attached before judgement pending hearing of the main application inter parties. In the course of executing my order, it was discovered that the intended trucks were outside this court's jurisdiction. Therefore on 25/11/2021, when this matter was called on for orders, Mr. Msuya, learned advocate for the applicant moved this court to vary my order to substitute with a new list of trucks now in Tanzania to be attached as opposed to the former list which was not possible. Considering the nature of the trucks involved, I granted the order as prayed. The matter was adjourned to 08/12/2021, whereby Mr. Alex Mgongolwa, learned advocate appeared for the respondent and

parties intimated to settle their dispute and sought a short adjournment and fixed the matter on 10/12/2021

On 10/12/2021 when the application was called on for orders, Mr. Mgongolwa, learned advocate for the respondent informed the court that, they have filed counter affidavit and supplementary counter affidavit. And Mr. Msuya, learned advocate for the applicant told the court they don't intend to file a reply and has noted the value of the trucks to be USD.73,309.00 and not USD.40,000.00 and admission of USD.170,000.00 as principal claim. In the circumstances, Mr. Msuya prayed that some trucks already under attachment be released. According to Mr. Msuya, six trucks were enough to cover the disputed amount. The amounted admitted was to be paid in installments and I gave the order varying the number of trucks to be attached to 5 in number and scheduled the matter on 16/12/2021 for parties to file a deed of settlement.

On 16/12/2021, no settlement was filed but parties' advocates prayed for more time to file one and same be recorded before Deputy Registrar and the matter was fixed on 06.01.2022 but no settlement was filed and the matter was set for hearing.

For better understanding the nature of this dispute, I find it imperative to state the facts of this application which are not complicated. On 20th May, 2021 parties herein entered into contract of carriage by applicant casted with obligations to transport by road 10,000 metric tonnes of clinker materials from Tanga, Tanzania to Musanze in Rwanda at price of USD.1,040,000.00 to be paid by installments of USD.208,000.00, 208,000.00, 104,000.00 and 520,000.

The applicant in the course of doing her obligation managed to transport only 5,565 metric tonnes worthy USD.578,760.00 and has been paid so far USD.480,000 leaving unpaid balance of USD.170,760 subject of this suit and other payments done to third parties. The other consignment was not transported because the respondent frustrated the exercise, hence, this ruling for attachment before judgement.

The applicant is enjoying the legal services of Mr. Elisa Abel Msuya, learned advocate and the respondent is equally enjoying the legal services of Mr. Alex Mgongolwa, learned advocate.

Mr. Msuya arguing the application reiterated the provisions under which the application is pegged and prayed to adopt the contents of the affidavit.

According to Mr. Msuya, the application of this nature to be granted the applicant must prove two conditions, namely: one, the defendant is disposing all or part of the properties which would be subject of judgement in the event the judgement is entered and is intended to render execution impossible, two, the lack of property or office in Tanzania. In support of his arguments, the learned advocate cited the cases of TIS LTD vs. SAE POWER LINES srl, MISC. LAND APPLICATION NO.525 OF 2020, HC (DSM) (UNREPORTED) and SEA SAIGON SHIPPING COMPANY LIMITED vs. MOHAMED ENTERPRISES LIMITED, CIVIL APPEAL NO. 37 OF 2005 CAT (DSM) (UNREPORTED)

According to Mr. Msuya, the two conditions have been met and urged this court to grant the order as prayed in the chambers summons.

Mr. Mgongolwa in rebuttal argued that are seriously opposing this application and prayed to adopt the contents of the counter affidavit and supplementary counter affidavit. Brief to the point, Mr. Mgongolwa argued that the contract was to transport 10,000 metric tones of clinker materials but the applicant manages to transport only 5,565 metric tones worthy USD.578,760 and by the time he filed this case the unpaid balance was

USD.170,760 which has been paid to through this case as admitted and not disputed.

Mr. Mgongolwa posed, and asked a question, what is the dispute now that this court can determine while other claims are outside the contractual time which expired after 30 days? Legal claims, if any, must arise from the contractual period and not outside, insist Mr. Mgongolwa. In this application, Mr. Mgongolwa pointed out that the applicant avoided to say he did not accomplished his assignment in time.

On argument that he subcontracted the work, it was the reply by Mr. Mgongolwa that the applicant failed to tell the court where she derived that authority from. The learned advocate for the respondent argued that looking at the authorities cited and the law one has to prove by affidavit that the defendant is about to dispose off the whole or any part of his property and that the disposal must be with intent to obstruct the execution of any decree, meaning the defendant must be charged by his conduct, which is not the case here as no single paragraph in affidavit stated so. According to Mr. Mgongolwa, if so argued it was submission from the bar and are not in the affidavit, hence, cannot be basis for granting this application.

Of non availability office in Tanzania, it was the reply of Mr. Mgongolwa that the respondent has office in Kahama as exhibited in annexure PC- 4 and the trucks under attachment was done at Kahama where there is permanent office.

On that note, the learned advocate prayed and urged this court to dismiss this application with costs.

In rejoinder, Mr. Msuya was of the arguments that the applicant subcontracted 141 trucks and paid for them. According to Mr. Msuya, the act of the respondent bringing his own trucks frustrated the contract. On the availability of the office in Kahama, Mr. Msuya argued that a mere presence of the office by itself without attachable property is not enough.

And as such insisted the application to be granted as prayed. This marked the end of hearing of this application.

The task of this court now is to determine the merits or otherwise of this application. Having heard and considered the rivaling submissions by learned advocates for parties, the affidavit and counter affidavit together with supplementary affidavit and revisited the law on attachment before judgement, I find it apposite to start with what the law requires of the

applicant to prove before the grant of the order in dispute. And in so doing, I find it imperative the provisions of Order XXXVI Rule 6 to assist me in resolving this issue. The said Rule provides as follows:

Rule 6(1) Where, at any stage of the 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 of or any part of his property from the local limits of the jurisdiction of the court, the court may direct the defendant, within the time to be fixed by it, either to furnish security, in such sum as may be specified in the order, or 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. (Emphasis mine)

(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 directs the conditional attachment of the whole or any portion of the property so specified.

Going by the wording of the above rule which is clear and not ambiguous, it my considered view that, the applicant who wants the court to order attachment before judgement or furnish security is enjoined to prove by affidavit that the conduct of the defendant/respondent is with intent to obstruct or delay execution of any decree that may be passed against him by disposing of the whole or any part of the his property or is about to remove his whole property or any part of his property from the local limits of the jurisdiction of the court.

In this application as right argued by Mr. Mgongolwa, and rightly so in my own view, no single paragraph in the affidavit stated in respect of the conduct of the applicant of disposing or removing his whole property or any part thereof form the jurisdiction of this court. What is gathered in

paragraph 15 the applicant stated that the respondent is a foreign company with no office in Tanzania, having trucks temporarily in Tanzania and are the only properties in Tanzania and that the court dispense with notice of hearing inter parties because the respondent shall remove the trucks outside the jurisdiction of this court. Having read the law and having equally read the contents of the affidavit in paragraph 15 that is not what the parliament intended when enacting the provisions of Rule 6 to Order XXXVI.

In my considered view, in the absence of such statement or averments in the affidavit of the applicant, it cannot be said the applicant proved by affidavit the bad conduct of the applicant. More worse, going by the wording of paragraph 15, the learned advocate created his own conditions which this court cannot take because had the parliament intended these be the consideration, it would have stated so in clear and unambiguous terms in the law.

Even going by his own created conditions, still they will not help the applicant because, the respondent by affidavit stated to have a permanent office in Kahama, a fact which was not controverted by reply to counter affidavit. Mr. Msuya by telling the court that they had nothing to reply were admitting that the respondent has permanent office in Tanzania at kahama.

Much as the respondent has permanent office in Tanzania and as rightly argued by Mr. Mgongolwa, the respondent statement that has a certificate of compliance which was not controverted by affidavit remains to be admission on the part of the applicant and makes the whole paragraph 15 of no help in granting attachment before judgment or ordering the respondent to put security. The effect of certificate of compliance is to make the company a local company and no way this company, can be treated as foreign company.

That said and done, I find the arguments by Mr. Msuya and affidavit of the applicant devoid of any useful conditions for attachment before judgement or for ordering the respondent to give security and more worse fall short of calling the respondent to give security given that he has a local advocate who is representing him and he is available and can be traced from Kahama where is within the jurisdiction of this court. Even the cases cited by Mr. Msuya are in favour of the respondent as correctly argued by Mr. Mgongolwa.

In the vein the instant application is hereby and must be dismissed with costs. Consequently, the order of this court attaching the five trucks is lifted

and should be set free and put at the disposal of the respondent to go on using them until directed otherwise.

It is so ordered.

Dated at Dar es Salaam this 04th day of March 2022.

S. M. MAGOIGA

JUDDE

04/03/2022