IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM
MISC. COMMERCIAL APPLICATION NO.164 OF 2023

PRESTIGE INVESTMENT SA.....APPLICANT

VERSUS

LAMAR COMMODITY TRADING DMCCC..... 1ST RESPONDENT
NOMURA TRADING PTE LIMITED.....2ND RESPONDENT
KCB BANK KENYA LIMITED.....3RD RESPONDENT
LAKE OIL LIMITED .....4TH RESPPONDENT

Last Order: 09/11/2023
Date of Ruling: 08/12/2023

RULING

NANGELA, J.,:

This application arises from a dispute over Burundi petroleum products supplies transaction. The Applicant is aggrieved by the conduct of the 1st and 2nd Respondents which led to the withholding of imported petrol fuel product destined to the Republic of Burundi under a contract of supply between the Applicant and the 1st Respondent. It is alleged as well that, the consignment was sold to the 4th Respondent while the Applicant had discharged her payments obligations under a Letter of Credit which was issued by the 3rd Respondent in favour of the 2nd Respondent.

The applicant preferred her application to this court by way of chamber summons preferred under Section 68 (e), Order XXXVII Rule 2 (1) of the Civil Procedure Code, Cap.33 R.E 2019;

Section 2(3) of the Judicature and Application of Laws Act, Cap.358 R.E 2019, Rules 10 (b) and 11 of the High Court (Commercial Division) Procedure Rules, GN.No.250 of 2012 (as amended).

The chamber summons contains the following prayers:

1. That, this Honourable Court be pleased to issue an order for the 1st, 2nd, and 3rd Respondents to stop their continuing breach of the Supply Contract dated 24th June 2023 and Standby Letter of Credit dated 19/9/2022 and the 1st and 2nd Respondents release the cargo of 20685.61 MT gasoline now under the storage of the 4th Respondent, to the Applicant.
2. Costs of this Application be paid by the 1st Respondent.
3. Any other reliefs the Honourable Court shall deem just and equitable to grant.

This chamber summons was supported by an affidavit of **Nimfura Lee Cewis,** a resident of Bujumbura Burundi and a Principal Officer of the Applicant. The Applicant also filed a certificate of extreme urgency on the 23rd of October 2023 advancing five solid grounds regarding why this court should urgently hear and determine this application. Noting the urgency involved in the matter at hand, this court scheduled its hearing and invited the parties on the 31st of October 2023. However, this court had to deal with a few preliminary matters

and prayers, after which a unanimous position was agreed upon, and the parties were ordered to appear for an oral hearing of the matter on the 3rd day of November 2023. Even so, the matter could not take off on that date but did take off on the 8th day of November 2023.

On the material date, Mr. Seni Malimi, a learned advocate appeared for the Applicant. Mr. Godwin Nyaisa and Stephen Axwesso also learned advocates appeared for the 1st Respondent while Mr. Nuhu Mkumbukwa, a learned advocate, appeared for the 2nd Respondent. The 3rd Respondent enjoyed the services of Mr. Gaspar Nyika, a learned advocate, while Mr. Thobias Laizer and Eliolotu Boniface, learned advocates appeared for the 4th Respondent.

Submitting in support of the prayers contained in the chamber summons, Mr. Malimi adopted the contents of the supporting affidavit and the affidavit filed in reply to the Respondents' counter affidavits as forming part of his submission in chief. Mr. Malima argued that this application should be granted as prayed having been premised under section 68 (e), Order XXXVII Rule 2 (1) of the Civil Procedure Code, Cap.33 R.E 2019, section 2 (2) of Judicature and Application of Laws Act, Cap.533 R.E 2019 and Rules 10 (b) and 11 of the High Court (Commercial Division) Rules, 2012 (as amended).

Mr. Malimi submitted that; this application was filed as an effort to mitigate the losses which the Applicant continues to incur due to failure on the part of the 1st Respondent to supply

the cargo which the Applicant has already fully paid for. He claimed that the losses would be too huge if the Applicant is to await until the main suit which is pending before this same court is heard and determined as there is presently a continuing breach.

It was Mr. Malimi's submission that, although the third and the fourth Respondents were initially joined in this application as necessary parties, that status does not apply to the fourth Respondent anymore based on the facts disclosed in the counter affidavit filed by the 1st Respondent which is to the effect that the larger portion of the consignment was sold to the 4th Respondent. He submitted that, as per the **Annexure PISA-3**, the Applicant and the 1st Respondent concluded a Supply Agreement for the supply of petroleum products.

Mr. Malimi told this court that, as security for the supply, the Applicant applied for an Irrevocable Letter of Credit (LC), in favour of the 2nd Defendant. The same was attached as **Annexure PISA-4** to the supporting affidavit. According to him, the LC was issued by the Bank of Burundi (as the "**Issuing Bank**") and confirmed by the 3rd Respondent (as the "**Confirming Bank**"). He told the court that the terms and conditions of the LC were clear, and the most relevant term and condition is the one captured under **Field 40A** – indicating that the LC was "**Irrevocable**". He submitted that under **Field 49** it is clearly indicated that the LC was "Confirmed", and the 3rd Respondent is shown under **Field 53A** to be the "**Reimbursing Bank**".

He submitted that, under field **47A- 3**, the total amount to be drawn under the LC arrangements is US$ 60 million. He contended that under the arrangements, the LC was to be reinstated based on a new request upon final settlement. He argued that as per **Field 47-A-3**, the LC was revolving and cumulative. He submitted that **Field 47A-3** of the LC should be read with **Field 43-B** which allowed "Partial Shipment". According to Mr. Malimi, the shipment of the consignment was not meant to be for all US$ 60 million but allowed a partial shipment to the maximum of US$ 60 million, and the LC was issued and confirmed. He argued that from the moment of its issuance, the 1st and 2nd Respondents were secured for their shipment to the Applicant.

Mr. Malimi submitted that, as shown in the Applicant's supporting affidavit, no payment was made outside the LC arrangements and, hence, the reasons stated in the 1st and 2nd Respondents' counter affidavit as their basis for withholding the release of the cargo are unfounded considering that the LC is "*Irrevocable*" and "*Confirmed*". He argued that they have never been a lack of reinstatement of the LC to meet the payment requirements as contended in paragraphs 7(a), (b), (c), and (d) of the 1st Respondent counter affidavit or paragraph 16,17, 18, up to 29 of the 2nd Respondent's counter affidavit.

He submitted further that, since the LC was irrevocable and confirmed, the issue that there was no reinstatement of the LC to provide cover to the consignment cannot arise and full payments were made. To back up his submission reference was

made to various SWIFT Payment Advice attached to as **Annexures PISA-6D, C, D,** and **E,** showing how payments were made to the confirming bank. According to Mr. Malimi further to that is the confirmation from the Managing Director of the confirming bank KBC Burundi, attached as **Annexure PISA -7** which are emails confirming that the LC was fully paid to the tune of UD$ 60 million. He told this court that the KCB-Burundi is the originator of the LC and as **Annexure PISA-7** which is the email dated **04/10/2023** indicates, the US$ 60 million for the entire LC has been paid and so the supplier's bankers have been paid.

Mr. Malimi submitted that if the originator of the LC does confirm to be paid who else can question? He argued that the duty to follow up on the money with their respective bankers is of the 1st and 2nd Respondents. It was his submission that the 3rd Respondent is only a "conforming bank" but has a robust role because it added up its guarantee and that, as a reimbursing bank it also must pay. He argued that the Applicant has no squabbles with the 3rd Respondent as such, but the 1st and 2nd Respondents have to follow up the matters with their bankers properly. He submitted that, in the reply to the 1st and 2nd Respondents' counter affidavit, there is attached thereto as annexed as **Annexure PISA -R-4,** a SWIFT Payment Advice dated 27/09/2023, from the Bank of Burundi to the 3rd Respondent.

Expounding further on **Annex.PISA-R-4,** he maintained that this annexure summarizes all payments made

to the tune of US$ 60 million. He argued that the same asks for confirmation and the reference thereto is a reference to the LC under consideration as the US$60 Million was for the entire LC. Mr. Malimi pointed out the payments made on 22/08/2023 and 15/09/2023 noting that these payments sum up to a total of US$ 35 million as the last batch of payments made by the Applicant. He contended that, in the meeting whose minutes are attached to the 1st Respondent's counter affidavit as **Annexure LCT-12**, the Applicant was not a party thereto, but the meeting involved the 1st Respondent, the 3rd Respondent, Burundi Oil Product Commission, the Bank of Burundi and M/s Nisk Capital Ltd.

Relying on **Annexure LCT-12**, he argued that, though the Applicant was not a party to the meeting, it can be clearly shown that the payments were received. He submitted that, under pages 3 of 8 of the minutes, there is an acknowledgement of the two payments made on 22/08/2023 and 15/09/2023 all of which were received by the 3rd Respondent (KCB). He submitted that; such payments corroborate the SWIFT Payment Advice of 22/9/2023.

According to Mr. Malimi, during the meeting to which the Applicant was not a party, it is shown that the 1st Respondent raised the issue of reinstatement but there was a disagreement as to what really that meant. He argued that the only issue that the 1st and 2nd Respondents are clinging to even now is that the LC has not been reinstated to allow payments. He maintained,

however, that, since the payments have been effected there is no need for reinstatement.

Mr. Malimi submitted further that, in any case, **Field 47A** of the LC had provided that, reinstatement could be done upon final settlement, meaning that, one must have supplied and now convenes for a final settlement of the accounts and the reinstatement was upon a new request by the Applicant. He argued that, under the LC and UPC-600 literature, reinstatement is about a "renewal" and where the LC is revolving and cumulative, it means that one does not need to go for a new LC whenever he/she goes for a new shipment. He maintained that it is only upon final settlement as per **Field 47A-2** of the LC.

Mr. Malimi submitted further that, the allegation that there is no security provided for by the Applicant to cover the supplies is purely a non-starter. He noted that there have also been raised concerns that the LC has expired since under **Field 31D** of the LC, the same was to expire on the 3rd of September 2023. He submitted that what that fact entails is that the LC was to come to an end by the time there was paid the US$ 20 million and that, on the 15th day of December 2023 more monies went in.

Mr. Malimi submitted that the expiration of an LC does not prevent payments of suppliers who have supplied within the validity dates of the LC. He maintained that; in any case, the beneficiary is at liberty to apply for an extension to enable payments to be processed. He argued further that, the payment

of US$ 35 million was made to meet the obligations but the Applicant has not received the fuel consignment, and the monies paid have not been refunded. He argued that the expiry of the LC cannot hinder the release of the consignment.

Mr. Malimi submitted further that, the other issue for consideration is the unfortunate allegation made in paragraph 9 of the 2nd Respondent's counter affidavit and **Annex.N-6**, to the effect that, the consignment is no longer available as it was sold to other buyers to mitigate alleged damages and costs. He submitted that the facts present an unfortunate situation since the endorsement of the Bill of Lading (BL) (**Annex.N-6**) shows that the consignment was delivered to the 4th Respondent on the 7th of July 2023, a date when the BL was endorsed. According to Mr. Malimi, that is the reason why the 4th Respondent has not said anything in respect of that matter.

Mr. Malimi submitted that the information that the cargo was sold came to the Applicant's attention after he was served the counter affidavits but nowhere was it divulged to the Applicant earlier even though from July 2023 to September 2023 there were several ongoing communications between the Applicant and the Respondent. He averred that neither the 1st nor the 2nd Respondents ever disclosed such facts, although paragraph 8 of the 1st Respondent bears similar information, this being an indication that, the two were in communication.

Mr. Malima submitted that, in line with **Annexure PISA-R -1** annexed to the Affidavit in reply to the 1st Respondent's counter affidavit, the Vessel discharged its cargo twice at the

port of Dar-es-Salaam, first on 1st of July 2023 and second on 31st of July 2023. He stated, however, that, if the alleged sale of the cargo is anything to go by, then it would mean that the sale was done before the discharge of the cargo at the port. He submitted, however, that, in between there were communications which spanned between the months of July to August 2023 and if the 1st Respondent knew of the sale, why did she remain silent without sharing the information with the Applicant?

Mr. Malimi submitted further that, instead, as it may be noted from **Annexure LCT-9**, the 1st Respondent purported to cancel the supply contract, and nothing was disclosed regarding the sale of the consignment to the 4th Respondent. He stated, however, that, there is a commercial invoice setting out the payment for the entire consignment but no indication that any part thereof was sold. He submitted further that, as **Annexure PISA-8** indicates, on the 2nd of August 2023, the Applicant invited the 1st Respondent immediately after the Vessel had discharged the cargo. He observed that the 1st Respondent replied to **Annexure PISA -8** on the 03rd of August as **Annexure LCT-11** to the 1st Respondent's counter affidavit would show.

Mr. Malimi submitted that; the letter does not show anywhere that the cargo had been sold. He further stated that on the 06th of July 2023/ 07th of July 2023, the confirming bank (the 3rd Respondent) did receive money to the tune of US$ 15 million for this last consignment as per **Annexure PISA-6B** of

the supporting affidavit, meaning that the consignment was allegedly sold to the 4th Respondent the same day, a fact which clearly reveals that the alleged sale borders a fraudulent conduct if at all that happens to be true.

Mr. Malimi submitted that, as per the law there is no Oil Marketing Company (OMC) permitted to import fuel outside the Petroleum Bulk Procurement Agency (PBPA). He referred to this court Regulation 14 of the *Government Notice* No. 193 of 2017. He argued that nowhere in the 2nd Respondent's counter affidavit is it indicated that there was any approval from the PBPA allowing the 4th Respondent to purchase the said consignment. He noted that as per Reg. 17 of the GN.No.193 of 2017, no person is allowed to procure bulk petroleum consignment outside the PBPA framework. He argued that the procurement of the 28,000 MT of gasoline exceeded the PBPA's allowable amount, and, for that matter, such purported sale was illegal and cannot be blessed by this court. He further argued that it is worth noting that the consignment was an on-transit consignment destined for the Republic of Burundi.

From that fact Mr. Malimi argued that one of the following two things must have happened: one, either the consignment was localized or two, that it was sold to another country. He argued, however, that, nothing has been disclosed in the 2nd or 4th Respondents' counter affidavit or supplementary affidavit and, if the consignment was localized there is a procedure which should have been followed.

Referring to Reg. 15 of GN.193 of 2017, he argued that, if a consignment was a transit-cargo there are requirements and specifications which ought to be complied with. He submitted that if the sale happened, it was illegal and that accounts for the reasons why the 4th Respondent never commented it. Mr. Malimi argued that such conduct of short-changing a cargo destined for a neighboring country that uses the Dar-port should not be condoned by this court as it not only tarnishes the reputation and image of the Dar-es-Salaam Port, but also has disastrous effects on the Port's functions.

He further submitted that the monies used to purchase the consignment were Burundian taxpayers who now have neither the fuel nor the money. As regards the 4th Respondent's alleged lien over the consignment which is under the 4th Respondent's custody, he submitted that the 4th Respondent seems to be mixing up issues as before this court no application/suit has been filed alleging adverse interest. He argued that what the court has before it is a mere allegation raised by way of an affidavit, while in fact, this court ought to have been given the opportunity to hear the parties comprehensively and not by way of passing. He contended, however, that, the claims raised by the 4th Respondent are unprocedural as they have come to the light through a back door and should not be allowed.

Mr. Malimi argued that be that as it may, in any case, the Applicant and the 4th Respondent are still doing business and there is no indication that the arrangements they have are being

or have been terminated. He argued that, if the 4th Respondent is interested in raising a claim, then he should have come up with a counterclaim since, currently, there are no sufficient materials before this court for it to determine the alleged claims by the 4th Respondent. He submitted that the claims by the 4th Respondent are to the tune of US$ 14.5 million while there is already paid US$ 35 million.

Concerning the tenability of this application, it was Mr. Malimi's submission that the orders sought are discretionary in nature and the court's discretion is to be exercised judiciously. He submitted that the case of **Atilio vs. Mbowe** (1969) HCD 284, should therefore be followed as the trappings of this application are almost along the same lines of an injunction. He contended that the requirements which were laid down under that case are fully met in this application. He contended that the application does reveal a serious triable issue, the applicant is in an apparent danger of suffering as her monies were paid but no fuel was availed. Further, he contended that the loss being irreparable the Applicant has brought up this application to mitigate such loss as she still stands to suffer.

Mr. Malimi contended further that, even if the loss can be quantified in monetary terms since the applicant has failed to deliver to the Burundians that is a serious issue of concern to them as they stand highly inconvenienced. He argued that the balance of convenience favours the Applicant more than any of the Respondents. He thus argued this court to grant the Applicant's prayers with costs.

Responding to Mr. Malimi's lengthy submissions, Mr. Godwin Nyaisa, the learned counsel appearing for the 1st Respondent, addressed this court by focusing on the remedy sought for payer (a) to the chamber summons. He contended that the orders sought are silent as to what will be pending if this court decides to grant them. Will the court grant such orders pending the hearing and determination of the main case? Mr. Nyaisa asked. He submitted that the prayers sought are not temporary but seem to be having a permanent effect and could only be granted after hearing and determining the main suit. He argued that a look at the Plaint attached as **Annexure PISA-1** shows that the 2nd prayer in the chamber summons is akin to prayer (d) of the relief sought under the Plaint.

In view of that, he argued that granting such an order would be tantamount to prejudging the main suit whose hearing is yet to commence. He contended that the 1st Respondent as a Defendant in the main suit will not be availed an opportunity to present respective documentary evidence and will be condemned unheard.

To support his submission, he referred to this court the cases of **Isaya Mwakilasa @ Wakuvanga & 6 Others vs. East Africa Television Ltd & 2Others**, Commercial Case 46 of 2008 (unreported) and **Shaheeza Moezali Karmali & 3Others vs. North Mara Gold Mine Limited & 2Others**, Misc. Civil Application No.203 of 2023 (unreported). He submitted, therefore, that the application before this court is

not one for a temporary but a final order and should not be granted at this time.

Mr. Nyaisa submitted as well that, to a larger extent, the application at hand has been overtaken by events. Referring to paragraph 7 (f) of the 1st Respondent's counter affidavit, he contended that, to the extent of the amount paid, the discharge was made to the Applicant as proved by **Annexure LCT-6.** He submitted that, regarding the portion of the cargo yet to be paid for, the 1st Respondent has made it clear in her counter affidavit that the same was sold to off-takers to release the Vessel which had anchored for 81 days waiting for confirmation of payments from the Applicant. He referred to this court **Annexures LCT-7** and **LCT-8** as proof of the alleged sale. He contended that the only cargo remaining is MT.4.3.

Mr. Nyaisa surmised therefore that, apart from the remaining MT.4.3, the rest of the cargo is no more, and this court should not be enticed to grant orders which cannot be enforced. He contended that, whether the sale was lawful or not is not an issue that can be determined at this stage. He argued that the Applicant is at liberty to challenge the sale and that will be an assignment for another day.

As to the merits of the application, Mr. Nyaisa adopted the counter affidavit filed by the 1st Respondent as forming part of his submission. He argued that, as regards the three tests, the first being that there should be a *prima facie* case against the 1st Respondent, looking at paragraph 6 of the Applicant's affidavit and **Annexure PISA-3**, there is no doubt that the

product ordered by the Applicant was secured by LC. He submitted that in line with clause 7 of the Supply Contract, paragraph 2 of the Applicant Affidavit also states that delivery was conditioned upon full payment security. He submitted, however, that the question to be asked is whether at the time when the Vessels arrived, there was such full payment security.

Referring to paragraph 10 of the Applicant's Affidavit, he argued that the same speaks of "assurance of payments" which is a completely different thing from Security Payment in favour of the LC. He concluded that what it meant was that there was none of such security at the time. He argued that Clause 7 of the supply contract provides for "full payment security" and not "assurance security". He argued that paragraph 10 of that Affidavit goes contrary to what Mr. Malimi stated since what was available was "assurance security" and not "full payment security".

Referring to **Annexure PISA-5A** of the Applicant's Affidavit, Mr. Nyaisa submitted that, this letter, dated 17th June 2023 states that the Applicant was referring to "commitment for undertaking to pay" meaning that the same signified lack of a full payment security. He further relied on **Annexure LCT-2** attached to the 1st Respondent's counter affidavit. He noted that, with it is a letter dated 19th of June 2023 in which paragraph says that 'full security payment' was to be there sometime in May 2023. He contended that, since Mr. Malimi had submitted that by the 15th of September 2023, the Applicant had delayed paying for a full four months.

Mr. Nyaisa contended further that; paragraph 4 of the said **Annexure LCT-2** was clear that there was to be discharge only when the full payment security was made. He argued that paragraph 5 of the letter had advised that despite the paying US$ 10 million, there was a need to pay US$ 25 million a payment which the letter had advised that should be hastened.

Mr. Nyaisa referred to this court a Notice of Claim dated 28th of May 2023 (attached to the 1st Respondent's counter affidavit as **Annexure LCT-1**). He argued that the same reminded the Applicant of the outstanding payment obligations yet to be fulfilled. He contended that the same and its accompanying email and statement of account were in respect of the three shipments. He submitted that the 1st statement in column 6 was a full security equal to US$ 60 million. He argued that the 2nd statement also indicated a full security of US$ 60 million and this was the time when the LC in question was raised.

He submitted further that looking at the 3rd statement of account in column 6, there is no full payment security to the tune of US$ 60 million, meaning that there was no full payment security back in May 2023 and the Applicant never responded that there was full payment security. He queried as to why the Applicant did not state so when the claims were issued.

Mr. Nyaisa referred the court to **Annexure LTC-5** attached to the 1st Respondent's counter affidavit and argued that, with it is an email from the 2nd Respondent and a letter from the Shipping Line addressed to the Applicant advising the

Vessel to remain adrift due to financial hold while advising hastening of payments so that the Vessel could berth and discharge her cargo. Mr. Nyaisa argued that, as per **Annexure LCT-10** of the 1st Respondent's counter affidavit, this was an email from the KCB-Burundi advising the Applicant that initially the LC was drawn for US$ 60 million and has been paid, i.e., has been utilized to the limit.

He submitted, however, that, part of it was reinstated to the tune of US$ 25 million. He submitted that the full LC that was utilized during the 2nd shipment but not the 3rd shipment was partially reinstated and for that matter, the cargo was partially released. Mr. Nyaisa referred to yet another **Annexure LCT-12** arguing that it was a meeting between Burundi Oil Products Commission which was convinced after the earlier court case was withdrawn from the court.

It was Mr. Nyaisa's submission, therefore, that, one of the agenda was payments so far made and Nisk Capital, the Applicant's financial advisor attended the meeting. He argued that, on page 3 of 8, the partial payment received on 22/05/2023 was US$10 Million which the 1st Respondent is not disputing, and the 2nd partial payment was made on the 06th of July 2023 for US$ 15 million.

He argued that the disputed payments made in August and September have no description as they did not reinstate the LC and, therefore, there was no way payments could have been made to the supplier without there being reinstatement. He argued that the instructions to reinstate must come from the

issuing bank and the 1st Respondent cannot respond as to why it did not happen. He contended that towards the end of **Annexure LCT -12,** there is a payment breakdown for the 3rd shipment and the last row indicates what is remaining as the available consignment which is 4350.18 MT. He argued that the Applicant was advised since 22/09/2023 to avail names of the clients for the release of the BL.

Mr. Nyaisa submitted that, with all those documents it is the Applicant who is in breach and should not be allowed to benefit from its wrongs. He contended that the documents do not support the view that there was full security payment. He argued that the LC Fields which the Applicant's counsel relied on are inapplicable to the 1st Respondent as she is not the beneficiary of the LC. He argued that as per what the 1st Respondent stated under paragraph 6 (g) of her counter-affidavit, as long as the 2nd Respondent was not paid, the 1st Respondent had nothing to deliver. Commenting on Field 47A of the LC, Mr. Nyaisa was of the view that, the 1st Respondent's understanding of the LC is that full settlement would mean that the LC was fully utilized.

As regards the August 2023 SWIFT Advice, Mr. Nyaisa submitted that, the same never reinstated the LC and it is the Applicant who should find out with the Bank of Burundi regarding why the LC was not reinstated. He contended further that, even if it were to be assumed that there was such reinstatement, still the same would be after 4 months since the arrival of the Vessels and the 1st Respondent was not sure if the

Applicant was still committed to the LC, hence one would have expected the 1st Respondent as any reasonable supplier would do, to mitigate its losses.

He submitted that the mitigations are in the sense that, the ship has arrived, the supplier has not been paid for all four months, there would be interests and demurrages which per day is US$ 50,000 as well as other incidental costs all accruing as well. He contended further regarding the role of KCB-Burundi that she was not the conforming bank and so had no mandate as the real confirming bank was KCB Kenya.

Mr. Nyaisa argued that a look at **Annexure LCT-10** (the email form KCB-Burundi) does clarify better, and the two emails defeat each other. He further argued that the LC was between the issuing and the confirming bank and if it expired it is the Applicant's bank that should seek for its renewal and not the Supplier's duty. He contended that although it has been argued that the Bank of Burundi has paid, it is for the Applicant to follow the money as the monies have never been received by the 1st Respondent.

Mr. Nyaisa also responded to the issue of sale of the consignment stating that the 1st Respondent had no cargo to sell as she would only have gotten the cargo had the 2nd Respondent been paid. He contended that what the 2nd Respondent chose to do with her cargo having not been paid, was purely her own decision which was not necessarily supposed to be revealed to the 1st Respondent who equally came to know about it in court. He argued that the legality of

the same and whether taxes were paid or not cannot be matters to determine in this application.

From his submission, Mr. Nyaisa contended that no *prima facie* case has been made out worth of success because it is the Applicant who is in breach. To support his submission, he relied on the case of **Mohamed Iqbal Haji and 3Others vs. ZEDEM Investment Ltd & 2 Others**, Misc, Land Appl. No.05 of 2020 (unreported) where it was held, inter alia that, the court's jurisdiction to interfere where a contract subsists by granting an interlocutory injunction is limited to cases where it is clear that a breach must result from the acts of the Defendant.

Mr. Nyaisa submitted further that it is the 1st Defendant who stands to suffer irreparable loss if they have not been paid and could not have released the consignment without being paid first, as no LC was reinstated, and no payment security was available. He argued that, once there is a release, the obvious would be that the cargo would be distributed to the outlets in Burundi. He contended that the Applicant is a resident of Bujumbura with no assets in Tanzania. As such, the irreparable loss would have befallen on the 1st and 2nd Respondent had they released the cargo. He similarly submitted, concerning the third element (i.e., balance of convenience) that, once the cargo is sold, it will be difficult on the part of the 1st Respondent to get anything out of it. He thus urged this court to dismiss this application with costs.

The third submission was from Mr. Nuhu Mkumbukwa, a learned advocate for the 2nd Respondent. For him, having adopted the 2nd Respondent's counter affidavit, he chose to be associated with the 1st Respondent's counsel submission to the extent such applies to the 2nd Respondent's case. He maintained that the contract between the 1st and 2nd Respondent obliges the 2nd Respondent to deliver the cargo only when there is full payment security. Reliance was placed on paragraph 4 of **Annexure N-3** of the 2nd Respondent's counter affidavit. He contended that in this case there were three Vessels whereby the 1st and 2nd Vessels discharged without problem, but it is the third Vessel that had issues as there was no full payment security made in respect of it because the LC was not reinstated.

He contended that such a fact is stated not just by the 1st but also by the 3rd Respondent (the KCB-Bank). He argued that even the Applicant's **Annexure PISA-7** contains an email supporting the view that only partial reinstatement of US$ 25 million was done but no full payment security. He submitted therefore that the 2nd Respondent could not to have released the fuel consignment.

He further submitted that although the payment issue was a bank-to-bank transaction, there is no documentary evidence from the issuing bank (Bank of Burundi), conforming bank (KCB-Kenya), or the beneficiary bank (ABSA) showing that there was still a valid LC for the disputed consignment. He argued that the 2nd Respondent relied on confirmation from the

Bank and no such confirmation, then paragraphs 7 and 10 of the 3rd Respondent's counter affidavit apply.

He maintained that the confirming bank is on a stance of denying that the relevant security has been reinstated meaning that there was no assurance communicated to the 2nd Respondent for her to be able to release the cargo to the 1st Respondent. He submitted that the duty was to release the cargo upon a show of full payment security and not to release it to the Applicant.

He contended, therefore, that even the Applicant's prayer to release is misconceived as the 2nd Respondent being a beneficiary will release it to the 1st Respondent, but that will only happen if the Applicant compels the 3rd Respondent to confirm to the 2nd Respondent that there is full payment security. But Mr. Mkumbuka was quick to submit, however, that, even if the Bank of Burundi and the KCB-(K) are not agreeing as to whether there is full payment security or not, paragraphs 9, 10, 11, and 19 of the 2nd Respondent's counter affidavit do show that the cargo has been sold to other off-takers as **Annexure N-6** to the respective counter affidavit reveals.

He contended that such a route was taken to mitigate the losses and damages since the 2nd Respondent purchases from other suppliers. He argued that the Applicant was notified on the 25th of May 2023 of the arrival of the Vessel and was obligated to avail the full payment security on receipt of that information. He submitted that, instead, the reinstatement was done in piecemeal and so the 2nd Respondent sold the

consignment and now there is no cargo to supply except MT 4350.38 released to the 1st Respondent.

He submitted that an order to release the goods would not be contractually sound and could not be executed as there is no more such cargo to release. He urged this court to restrain itself from issuing such an order since it has the potential to create more harm and confusion than good. To back up his submission reliance was placed on C. K. Takwani, **Civil Procedure**, 6th ed, Eastern Book Company, on page 331, para.9 regarding the power of this court to grant injunctions and why it should be exercised with circumspection.

As regards the maintainability of this application, Mr. Mkumbukwa joined hands with Mr. Nyaisa that, the prayers made are final and not temporary, and if granted then they will do away with the relief in numbers (b), (d), and (e) in the Plaint. To support his submission, he relied on the case of **Gulf Bard Group (Tanzania) Ltd vs. Swalehe Said Mohamedi**, Civil Revision No.10 of 2019 (unreported).

He contended further that the orders sought are granted by the court at its discretion. He argued that the Vessel arrived in May 2023 but there was a delay of 81 days. So, if indeed the cargo was badly needed, the Applicant ought to have expedited the matter and paid the LC promptly. As regards the issue of irreparable loss on the part of the Applicant, Mr. Mkumbukwa was of the view that the loss was atonable with an award of financial damages.

As regards injury to reputation, he argued that reputation is earned and there being evidence that the security was not reinstated failure to do so has consequences that follow naturally. Moreover, he argued that throughout the Applicant's affidavit, nowhere is it stated that the Applicant is the sole imported of fuel in Burundi. As such, he contended that no loss cannot be atoned financially.

Mr. Mkumbukwa argued further that even by assuming that the cargo is still available, if the orders are to be granted it is the 2nd Respondent who will suffer because the cargo would be unsecured, and the LC has long expired since the 3rd of September 2023. He argued that the current application was filed after the LC had expired and, the expiry is a fact admitted by the Applicant in her affidavit in reply.

On the issue of disclosure of information, he argued that, as **Annexure N-7** indicates, the 2nd Respondent was constantly reminding the 1st Respondent and the Applicant and so the consequences of failure to supply full payment security were known to all parties, themselves being business-minded persons. With all that, he urged this court to decline to grant the prayers sought by the Applicant.

The fourth submission was from Mr. Gasper Nyika, for the 3rd Respondent. His submission was very brief. Having adopted the counter affidavit of Mr. Damas Mwangwage which was filed in this court, Mr. Nyika submitted that, the most relevant parts of the said affidavit include paragraphs 7, 8, 9, and 10 as they set out the status of the 3rd LC which, had it

been funded in full it would have secured the delivery or shipment of the cargo, the subject of this application. He submitted that, as paragraph 10 of the said counter affidavit shows, the LC was not fully reinstated.

Mr. Nyika submitted further that as the chamber summons is seeking the release of goods that are the subject of contract, it has been pointed out under paragraph 9 of the counter affidavit of the 3rd Respondent that, as a confirming bank, the 3rd Respondent has no obligation to verify or be involved with issues of performance of such an underlying contract. Rather, her obligation is to deal with the documents as per the terms of the LC and will not engage herself as to whether the cargo is there or not. He prayed that the application be dismissed with costs.

The final submission came from Mr. Laizer, the learned advocate for the 4th Respondent. Mr. Laizer submitted that as a matter of principle, courts do care about the sanctity of contracts. To that extent, he referred to this court Clause 10 of the Supply Contract between the Applicant and the 1st Respondent where the two had agreed to the effect that, in case of any dispute between them, the same should be settled in London Court of International Arbitration.

He contended that under paragraph 25 of the 1st Respondent counter affidavit pleaded that under the agreement it is the London Court of International Arbitration which will adjudicate the two and them being foreigners, then this court is not clothed with requisite jurisdiction to hear and determine

this matter. Aside from that preliminary concern of his, Mr. Laizer proceeded to adopt the counter affidavit filed by the 4th Respondent and the supplementary affidavit thereto as forming part of his submission.

He further adopted the submissions made by the counsel for the 1st and 2nd Respondents to the extent they serve the interests of the 4th Respondents and more regarding the orders sought by the Applicant.

In his submission, Mr. Laizer submitted that as far as the applicable principle of injunctive relief is concerned, the orders sought are untenable. He argued that, since the two main orders are predicated on the supply contract and the LC, they cannot be granted because the two instruments have expired. Similarly, the prayer for the second order is untenable because it goes contrary to the real import and purpose of Order XXXVII Rule 2 (1) of the Civil Procedure Code, Cap.33 R.E 2019 through which temporary injunctive orders are given.

Mr. Laizer argued that, primarily such orders are meant to maintain the *status quo* pending determination of a substantive matter or suit. To that extent, he associated himself with the various decisions which this court was referred to earlier arguing that granting this application will render the main suit superfluous.

Mr. Laizer submitted further that the orders sought are untenable as well because the cargo itself has not been secured by the LC. He argued that the available correspondences, including Annexure N-4 to the 2nd Respondent's counter

affidavit written just two days after the Vessel had arrived, prove that the third shipment was not secured by LC. He averred that the letter (Annexure N-4) originates from the Applicant's agent urging the Applicant to expedite the payment process as the cargo was on a funding hold as payments were still pending. He argued, therefore, that, the Vessel delayed for 81 days.

Mr. Laizer submitted as well that, regarding whether the LC was replenished or not, that is a question to be responded to by the Bank of Burundi as the sender of the LC to the KCB who act as its receiver, on behalf of the 1st Respondent. He contended that unfortunately, the Applicant has chosen not to bring the Bank of Burundi in these proceedings hence putting this court in a precarious position. He submitted that when such issues arise, they invite the application of the UCP600 and the URR-Rules.

Referring to Article 14 (a) and (b) of the UCP600 he argued that the same imposes a legal duty to both the sender and the receiver to confirm receipt and, in this case, reimbursement of the LC amount sufficient to cover the cargo on board the Vessel. He submitted that being a legal duty, the absence of the Bank of Burundi puts the court in a difficult position to ascertain whether the payments were done to the KCB (K) or not.

He contended, however, that the Applicant is to blame for not bringing on board the Bank of Burundi into these

proceedings. He urged this court to draw a negative inference against the Applicant based on such a failure.

Concerning the Swift Messages claimed under paragraph 11 (c) of the Applicant's Reply to the 3rd Respondent's counter affidavit, it was Mr. Laizer's submission that, the amount alleged to have been sent was not the full payment security required. He contended that in any case the same was sent after the LC had expired contrary to **Field 47A (3)** of the LC which requires the presentation to be made within the validity of the contract. As regards the 4th Respondent's interests, Mr. Laizer relied on **Annexure LO-2** to the 4th Respondent's counter affidavit which are copies of hospitality agreements between the Applicant and the 4th Respondent.

He argued that attached to **Annexure LO-2** are invoices for a sum of US$ 1,623,321.89 plus 181361 being the value of dead stock for the leaded Depot. He submitted that through the agreements, the 4th Respondent had rendered services to the Applicant without being paid. Besides, he contended that some of the claims by the 4th Respondent relate to services rendered as far back as March 2023 and all efforts to demand payments have not been fruitful.

Mr. Laizer submitted the Applicant has been proposing a settlement of the debts using the amount of her stock of petroleum products being kept by the 4th Respondent in its storage facility on a hospitality basis. He submitted that on the 7th of July 2023, the 2nd Respondent availed to the 4th Respondent a list of off-takers of the 1st discharge of MT-

22/660/711 as nominated by the Applicant and raised a commercial invoice which is attached as **Annexure N-6** to the 2nd Respondent's counter-affidavit for the MT-20,000 of Gasoline sold to the 4th Respondent and that, on the 2nd of November 2023, the 4th Respondent issued a final release order confirming that a balance of 4350.18 m^3 could be released to the Applicant.

He submitted that, in paragraph 8 of the Applicant's Reply to the 4th Respondent's supplementary affidavit, the Applicant does not deny there being agreements for the provision of services and being indebted to the 4th Respondent but that the claims require reconciliation. He invited this court to consider such admission and make an order that the 4th Respondent order seeking the release of the fuel which is in the custody of the 4th Respondent before the statements of account are reconciled will prejudice the interests of the 4th Respondent and its intended counterclaims in the main suit.

He contended that the Applicant's position to have the 4th Respondent's claims reconciled before the release of the 4350.18 m^3 which the 4th Respondent has, does confirm the 4th Respondent can release upon submission of the names of the Applicant's clients to the 2nd Respondent for preparation of the BL, is indeed a welcome by the 4th Respondent who undertakes to participate in full.

He noted that, as **Annexure LO-2** to the 4th Respondent's counter affidavit shows, all agreements have expired and have not been renewed. He argued that the only

way the 4th Applicant can get paid is by using the Applicant's fuel, the 4350.18 M^3 to offset its claim after the proposed reconciliation is done. Mr. Laizer submitted further that, going by the principle stated in **Attilio vs. Mbowe** (supra), it is the 4th Respondent who will be a plaintiff in the counterclaim that has established the existence of triable issues.

He urged this court to strike a balance in a manner that the fuel belonging to the Applicant is not released until such time a substantive suit in the form of a written statement of defence and counterclaim to be filed by the 4th Respondent is filed, heard, and determined.

Mr. Laizer submitted, in the alternative, that, if this court is to hold that the available 4350.18 M^3 of fuel or any such quantity be released, then the court's order should direct deduction of the volumes sufficient to liquidate the 4th Respondent's claims as pleaded here. Mr. Laizer submitted that the Applicant has raised claims of fraud and has cited GN.193 of 2017 arguing that it prohibits the sale of transit fuel to several off takers including the 4th Respondent. He maintained, however, that, the learned counsel for the Applicant has not told this court that under Regulation 15 (1), (2), (3), and (4) of GN. 193 of 2017 parties are allowed to procure transit volumes through the BPS System except for local volumes. He noted, however, that the only condition attached to that is to ensure that the cargo strictly complies with the quality requirements.

Mr. Laizer argued that even so, the 4th Respondent does oil transit business as usual and has companies operating in

Rwanda, Burundi, Malawi, and Congo DRC, meaning that she is allowed under the law to acquire such volumes without being accused of breaching the law.

He submitted that the 4th Respondent's purchase of the cargo aboard the Vessel from the 2nd Respondent was no secret but allowed under the existing law. Referring to **Annexure PISA 5-D** attached to the Applicant's affidavit, he submitted that on the 26th of July 2023, the 2nd Respondent wrote to the Executive Directors of the PBPA and TPA informing them of the 2nd Respondent's readiness to off-load the volumes of the said fuel to the 4th Respondent. He submitted that; the 4th Respondent has been cited as a notifying party because it was so agreed that the cargo would be discharged to the 4th Respondent as a notifying party. He contended that the volumes are not subject to payment of taxes in this country unless such volumes are localized. He contended that there is no evidence to show that the 4th Respondent localized the volumes to argue that taxes were evaded.

Mr. Laizer contended further that evidence has been shown of the existence of an agreement between the 4th and the 2nd Respondent which necessitated the communication between the two about the sale of the cargo which was not paid for by the Applicant. He argued that, after the Applicant's failure, there was nothing wrong for the 2nd Respondent to seek other buyers to mitigate her losses.

Relying on **Field 47A (3)** of the LC, he argued that the LC provides that reinstatement of the LC crystalizes when the

maximum amount is drawn down, the maximum amount being US$ 60 million. He submitted that what was paid by the Applicant was not sufficient to constitute the maximum security required under Clause 4 of the Supply Agreement (**Annexure PISA-3**) to cover the costs. He argued that the Applicant is not the sole importer of fuel in Burundi. He thus urged this court to dismiss the Applicant's application.

In his rejoinder submission Mr. Malimi rejoined that, the Applicant wish to maintain her submission in chief. He rejoined that, as far as the tenability of this application is concerned, the same was made a part of mitigating measure on the part of the Applicant as there is currently a continuing breach and the Applicant cannot sit idly.

Second, he argued that the provisions upon which the application is premised are section 68 (e) and Order 37(2) (1) of the CPC, Cap. 33 R.E 2019 and section 2 (3) of the Judicature and Application of Laws Act, Cap.358 R.E 2019, making this an application that comes closer to an injunction. He argued that the injury cannot continue to be sustained till the final suit is determined as argued and that this court has the power to intervene.

Mr. Malima rejoined that, under section 68(e) of the CPC, the court can make any interlocutory order as it sees fit to prevent ends of justice from being infringed. He argued that the Applicant has paid and there is US$ 35 million lying with the 3rd Respondent on account of the third consignment, the subject of this application and, that, none of the Respondents has denied

that fact. He contended that the only issue disputed is that of reinstatement of the LC.

He submitted that under section 68 (e) of the CPC, where the essential fact is not defeated, the controversy becomes narrow, and the court should not allow the injury to continue. He argued that, read with Order XXXVII Rule 2 (1) of the CPC and section 2 (3) of the JALA, the court is at liberty to grant the prayers especially where there is no clear-cut position regarding how the injury should be contained, this being a court of justice which must come to the aid of the complainant.

Mr. Malimi distinguished the cases of **Isaya Mwakilasa** (supra) and that of **Shaheeza** (supra) arguing that these were cases for pure temporary injunctions considering the prayers sought therein. He submitted that those cases were premised on section 95 and Order XXXVII Rule 1 (a) and (2) of the Civil Procedure Code, Cap.33 R.E 2019, hence, they were clear cases of seeking injunctive relief as no remedy was sought under section 2(3) of JALA, Cap.358.

Concerning a possible infringement of the right to be heard if this application is granted, Mr. Malimi submitted that the parties have already been afforded time to put clear their positions and the fact that stands out is that there was LC and the payments were made for the release of the consignment, which is what the Applicant stands for. He submitted, therefore, allegations that the Respondents will go unheard of are misplaced since the suit has other prayers that do not

necessarily depend on this application, reliance being placed on Annexure 4 to the Affidavit filed in support of the application.

Mr. Malimi argued that, apart from the order of specific performance the rest will not be cancelled out by the order sought in the application. Concerning the argument that the Application has been overtaken by events and the reference made to **Annexure LCT-6,** he rejoined that the allegation is an afterthought and that is the position held by the Applicant even in her main submission. He maintained that there is no sale as such given the surrounding facts, in particular, that, while the alleged sale took place on the 7th of July 2023, the vessel, by this date the Vessel for which the LC applied had only discharged its part of the cargo on the 05th of July 2023 as **Annexure PISA-R-2** to the Reply Affidavit to the 3rd Respondent's counter affidavit shows.

He rejoined that, the discharge by the Vessel was expected by the Applicant and the 1st, and 2nd Respondents. That being the case, the Applicant hade invited the 1st Respondent for a final calculation and pricing as shown in **Annexure PISA-8** to the main affidavit supporting the application. He contended that the invitation was a fact that took place on the 2nd of August 2023 and the 1st Respondent replied by a letter dated the 3rd of August 2023, annexed as **Annexure LCT-12** to the 1st Respondent's counter affidavit, stating that they were yet to receive the final costs for them to issue an invoice.

He rejoined that, there was nothing like a sale of the cargo to a third party was ever mentioned. For him, the alleged endorsement was moot. Mr. Malimi rejoined further that the granting of the application will not prejudice the said purchaser since all parties, including the purchaser of the cargo, are herein court and had the opportunity to counter the allegations at least for the 16,778 MT as per the BL. He rejoined further that, if the sale took place, it would be unlawful because the 1st Respondent had a contractual obligation to supply the cargo. He castigated alleged the lack of payment security as an excuse, for not releasing the cargo reiterating his submission that there was full security, first because the LC was irrevocable and confirmed by the 3rd Respondent.

Mr. Malimi rejoined as well that the Terms of Reference (ToRs) of the LC do not have a requirement of there being reinstatement as contended by the Respondents except what **Field 47A (2)** of the LC provides, which reinstatement comes after a "final settlement" meaning that the supply was now concluded and the parties were to sit down and sort out the final settlement as **Annexure -LCT-11 & 12** of the 1st Respondent would show.

He rejoined further that, since the payments were coming from the confirming bank and the 1st Respondent has the security of the LC, which was irrevocable and confirmed, he ought to have proceeded to deliver the cargo and discharge the Vessel and that happened on the 31st of July 2023. He rejoined that all payments were by way of LC and the 1st and 2nd

Respondents were no strangers to the Applicant, hence the assurances given in paragraph 10 of the Applicant's affidavit should not be taken out of context under which they were given.

Mr. Malimi rejoined that nowhere was it shown that the LC terms ever got changed or amended and that the concerns under **Annexure PISA-5** were about when the Vessel was to anchor and discharge, that being the context and nothing else. He submitted further in his rejoinder that, the argument that by 15th of September 2023, there was already a four-month delay which justified the selling of the cargo if at all so, the fact is that by 7th of July 2023, the cargo was long sold, and if that is the case, then all complaints beyond the 07/07/2023 by the 1st and 2nd Respondent were mere afterthoughts. He rejoined that, if so, does it mean the payments done on the 22nd of August and 15th of September 2023 involving the LC were done while there was no cargo and the 1st and 2nd Respondents kept quiet?

He argued that the sale issue is just a mere manipulation between the 1st, 2nd, and the 4th Respondents as facts do not tally. He maintained that if there was any such sale, it was therefore a fraudulent sale as it was done when the LC was still valid. Further, concerning the 25th of May 2023 Notice of Claim and other Statements of Account referred to in respect of the 1st and 2nd shipments, Mr. Malimi rejoined that, all communications were being done before the discharge of the Vessel, on the 5th of July 2023 and 31st of July 2023. He stated that the Notice was followed by a letter dated 09/06/2023 and 17/06/2023, all of which were in respect of the Vessel, which

was going to discharge, and their reading will prove that the LC was nowhere altered or varied but remained intact.

As regards the fact that the KCB-Burundi confirmed payments or not, Mr. Malimi drew the attention of this court to **Annexure LTC -10** to the affidavit of the 1st Respondent and **Annexure PISA -7** to the Applicant's main affidavit all showing that there was such confirmation that the whole of US$ 60 million was paid. As regards **Annexure LCT-12**, it was Mr. Malimi's rejoinder submission that, the 1st Respondent has conceded that the Applicant was not privy to the meeting as was not a part of it and denied that Nisk Capital ever represented the Applicant and whatever outcomes reached in that meeting cannot be associated with the Applicant.

He told this court the **Annexure LCT-12** and the payments are resting with the 3rd Respondent as the SWIFT Messages (**Annexure PISA-6**) indicate. Responding to the second Respondent's submission, Mr. Malimi reiterated his submission that the Applicant's prayers are fully maintainable in this court, and this is a right application brought to the attention of the court as it constitutes a unique situation demanding the court to look at it. He submitted that; the case of **Gulf Bar (Tanzania) Ltd** (supra) cited by the 2nd Respondent, is distinguishable and not binding on this court.

Mr. Malimi submitted that; it will not be the first time for this court to grant an application as the one at hand as this court has once done so in the case of **Synergy Logistics Company Ltd & Another vs. Equity Bank Tanzania Ltd &**

Another, Misc. Land Application No.51 of 2020. As regards the argument that the 2nd Respondent relied on confirmation from the 3rd Respondent, it was Mr. Malimi's rejoinder submission that, the relationship between the 2nd Respondent and the Applicant was governed by the LC and it was the Applicant who applied for the LC.

Concerning the submission that the 2nd Respondent had no duty to inform the Applicant about the sale, Mr. Malimi rejoined that, there was both direct and implied duty otherwise had it been known the Bank of Burundi would not have paid the monies she paid on the 22nd of August 2023 and 15th of September 2023. He argued that the non-disclosure has thus made the Applicant suffer and continues to suffer. As regards the 4th Respondent's submissions, Mr. Malimi rejoined that, the jurisdictional issue raised by the 4th Respondent ought to have been raised by the 1st Respondent and this goes further to prove that the 1st, 2nd, and 4th Respondents are before the court to defeat the rights of the Applicant.

He submitted that the 4th Respondent has no *locus standi* to speak for the 1st Respondent or raise the issue of arbitration as the counsel for the 1st Respondent was the appropriate person to have raised it. Even so, he rejoined that this court has jurisdiction over the matters before it. He admitted that indeed clause 10 to the **Annexure PISA-3** has an arbitration clause requiring matters between the Applicant and the 1st Respondent to be referred to the London Court of International Arbitration (LCIA). He argued, however, that the 1st Respondent had not

intimated to enforce this clause and it was not the duty of the 4th Respondent to have raised such an issue.

Mr. Malimi submitted that, under section 15 of the Arbitration Act, a person who wants to enforce an arbitration clause must follow the procedures laid down by the law which include seeking to stay the matter and resort to arbitration. Section 15 (4) of that Act does not provide what the court should do and so, the court is given a margin of discretion to exercise. He maintained that since the procedure has not been invoked this court has jurisdiction.

To support his rejoinder submission, he relied on the decision of the Court of Appeal in the case **of Scova Engineering S.p.a & Another vs. Mtibwa Sugar Estates Limited & 3Others**, Civil Appeal No.133 of 2017 (unreported), on page 18 of the Court's decision. As regards the 4th Respondent's submission that the Applicant admitted under oath to be indebted to the 4th Respondent, Mr. Malimi rejoined that, that is an erroneous position to hold as paragraphs 7, 8, and 9 of the Applicant's Reply affidavit to the 4th Respondent's Supplementary affidavit contain a very clear denial by the Applicant.

He submitted that the 4th Respondent has not filed a counter application in which the court could make the set-off orders or the like as the 4th Respondent seems to insinuate and all that remains matters from the bar. He reiterated his submission that this application has met the requisite threshold applicable to a grant for an interlocutory application as it is not

disputed that money has been paid for the release of the consignment since August and September 2023, but no supply was released to the Applicant to date.

Finally, it was Mr. Malimi's rejoinder submission that, the fact that the Applicant is not the only importer or supplier of fuel in Burundi is a side issue not raised by the Applicant but what was said it that the Applicant is one of the major suppliers of fuel in Burundi and the volumes involved in the dispute are serious volumes which can negatively impact on the Burundian economy. He reiterated that the SWIFT Advice received (**Annexures PISA-6D, C, D,** and **E**) and **Annexure -LTC-12** all show that payments for the consignment were received in line with the LC arrangement, and, for that matter, the prayers sought need to be granted with costs as the principles applied in the **Atilio vs. Mbowe** (supra) have been established and do apply to this application.

With such long submissions made by the parties, the main concern for this court is whether the prayers sought by the Applicant should be granted by this court. It should be noted, however, that the Respondents have raised some issues which they ought to have raised then as preliminary objections, but they have rather raised them in their submissions as concerns worth looking at. I will first address such issues since they present questions of legal significance.

The first point is whether this court is clothed with jurisdiction to hear and determine this application while clause 10 of Annexure PISA-3 (the contract between the Applicant and

the 1st Respondent) contains an arbitration clause which direct the parties' dispute resolution to the London Court of International Arbitration (LCIA). In his submission, Mr. Laizer, the learned counsel for the 4th Respondent (being the counsel who raised the matter), argued that the court lacks such jurisdiction. However, Mr. Malimi has argued to the contrary that adding that, the 4th Respondent does not even have the locus to raise the matter which ought to have been raised by the 1st Respondent.

Indeed, this was a point that ought to have been raised by the 1st Respondent's counsel and the 4th Respondent being not a party to the arbitration clause, lacks the mandate to raise it. But since it has been raised as an issue of legal significance, does this court lack the mandate to hear and determine these applications? I think this court's jurisdiction is not fettered but in so holding the issue therefore should not be whether this court has jurisdiction or not but whether such jurisdiction can be exercised. In my view, the right approach is to approach the matter from the point of exercise of this court's jurisdiction and not that it has jurisdiction or not.

Secondly, the above position also finds strength from what the Court of Appeal stated in the case of **Scova Engineering S.p.A** (supra). In the decision, the court was of the settled view that by choosing another forum parties do not oust the jurisdiction of the court since the two courts will equally have jurisdiction. The Court pointed out, however, that:

> "When the attention of the court, in which the suit is instituted, is drawn

> to a contractual stipulation to seek relief in a particular (foreign) forum, the court may, in the exercise of its discretion, stay to try the suit...."

However, the third point to note is the fact that a stay must, as section 15 (1) of the Arbitration Act, Cap.15 R.E 2020, have been sought by the party against whom the legal proceedings whether by way of a claim or a counterclaim are brought (and here the 1st Respondent, since she is the party to the arbitration agreement). Nothing of that was brought before this court by the 1st Respondent, and as correctly submitted by Mr. Malimi, the 4th Respondent's counsel has no locus to raise the issue he has raised. From that position, I find that the issue brought by Mr. Laizer is a non-starter.

The second point to note is whether the application if granted will preempt the main suit. In other words, is the application tenable? In their submissions, the 1st, 2nd, and 4th Respondents have insisted that this court should decline the prayers sought by the Applicant, in particular, prayer (b), (d), and (e) in the chamber summons. However, Mr. Malimi has countered those arguments himself arguing that the application can be granted notwithstanding the Respondents' submission and the case they have relied on which he distinguished from the application at hand.

It is worth noting the court's jurisdiction to issue injunctions or interlocutory orders is indeed wide, arising historically as an incident of its inherent jurisdiction. In this application, as Mr. Malimi rightly stated, the Applicant has

premised under section 68 (e) and Order XXXVII Rule 2 (1) of the Civil Procedure Code, (CPC) Cap.33 R.E 2019, section 2 (1) of the Judicature and Application of the Laws Act (JALA), Cap.358 R.E 2019, and Rules 10(b) and 11 of the Hugh Court (Commercial Division) Rules of Procedure, 2012 (as amended).

Essentially, under section 68 (e) of the CPC, the law has given such wide powers that the court can exercise to prevent the ends of justice from being defeated. In so doing the court may, subject to any rules in that behalf **make such other interlocutory orders** as may appear to the court to **be just** and **convenient**. Under that provision the Legislature never left any situation, likely to arise, without a legal remedy. Instead, the court was given the jurisdiction to pass any **'interlocutory order' if** it appears to be **'just'** and **'convenient'**.

Besides, the exercise of such jurisdiction by the court is not dependent upon the filing of an application by a party but rather it can competently be exercised where an order is required to **prevent the ends of justice from being defeated.**

In his submission, Mr. Nyaisa, but more so Mr. Laizer submitted that, in principle that, the purpose of injunctive relief must be to maintain a status quo. With due respect, that is not necessarily the case although it may be one of the effects of an interim injunction, but one must be able to distinguish between interim injunctions and interlocutory injunctions. In essence, an interim injunction I made to preserve the *status quo* until a named date or until further order or the hearing and

determination of the motion on notice while an 'interlocutory' injunction lasts till the determination of the substantive action i.e., till judgment is delivered.

As it was stated in the case of **Sea Saigon Shipping Limited vs. Mohamed Enterprises (T) Ltd,** Civil Appeal No.37 of 2005 (unreported), while the powers for ordering interim injunction are provided for under section 68(c) of the CPC and the procedure for obtaining a temporary injunction is prescribed under Order XXXVII, the powers for making such other interlocutory orders as may appear to the court to be just and convenient are provided for under Section 68(e) and the procedure for making any such other interlocutory orders is prescribed under Order XXXVII. An interlocutory order sought is, however, based on a pending suit and so cannot be considered in complete isolation from the pleadings if filed or to be filed.

All such are equitable reliefs meant to **prevent the ends of justice from being defeated** and being of the nature, such are granted at the discretion of the court which discretion must be exercised judiciously and judicially. It is also worth noting that, for the interlocutory order to be granted the Applicant must have or demonstrate that he has a legal right that is threatened and ought to be protected. Once the acts complained of will lead to an infringement of the applicant's rights, it is proper for the court to intervene by the grant of an injunction. Therefore, where an applicant has no legal right or

fails to show that he has one, the court has no power to grant an injunction.

Moreover, there must also exist a substantial issue to be tried. In principle, an applicant for an order of interlocutory order does not have to make out a case as he would do on the merits, it being sufficient for him to establish that there is a substantial issue to be tried at the hearing. See **Attilio vs. Mbowe** (supra). See also the English case **American Cynamid vs. Ethicon Ltd.** (1975) AC. 396 AT 407.

A court must also decide where the balance of convenience tilts in considering whether to grant an application for an interlocutory order sought by the Applicant or not. In this regard, the court must ask itself the questions – who will suffer more inconvenience if the application is granted, and who will suffer more inconvenience if the application is refused? If available evidence shows that the applicant will suffer more hardship if the application is refused, then the balance of convenience is in his favour.

Now, reverting to the issue of whether the granting of the orders sought will defeat the main suit rendering it superfluous, Malimi has argued that the application has been brought to prevent a continuing breach and hence the Applicant's effort to mitigate the harms that flow from it. Essentially, I do understand, as this court once stated in the of **Fabec Investment Limited vs. MES International Financial Services (PTY) Ltd & Another**, Commercial Case No.07 of

2022 (unreported), that, a party who is about to suffer losses which he can clearly foresee, has a duty to mitigate.

But looking at the current application and the order number (a) which appears in the chamber summons and compares the same with relief number (d) in the plaint, I find that the two are indeed similar or have the same effect. But will granting the application render the entire suit superfluous? In his submission, Mr. Malima has argued that the Plaint does not have only one relief which the Plaintiff (Applicant herein) is seeking but what the Applicant is doing is to mitigate the losses and avoid the continuing breach which breach he has pleaded in the Plaint.

Indeed, as I look at the affidavits, the annexures thereto and the submissions in their entirety, I do find that the plaint annexed to the application as **Annexure PISA-1** has about 8 reliefs sought by the Applicant and not just one relief. Had it been just one relief which is similar to the relief prayed for in this application, I would have been convinced by the wisdom stated in the Nigerian Court in the case of **Eyo vs. Ricketts** (2005) All FWLR (PT. 241) 387 at 393 Paras D-E to the effect that where the relief prayed for in an interlocutory application is the same as that claimed in the main suit, it is advised that rather than grant such relief, an Order for accelerated hearing of the main suit be made by the Court.

But as I stated, the reliefs in the Plaint are not just one and the court when satisfied that there is a need to prevent the ends of justice from being defeated, can, if it appears to

be **'just'** and **'convenient'**, grant the orders sought. Having heard the submissions from the parties, and looked at the pleadings, and the annexures attached thereto, I find that, the question to address is therefore whether it is just and convenient to grant the orders (specifically order number (a)) sought in the chamber summon.

That prayer seeks the release of the consignment of fuel destined for the Republic of Burundi whose payments, as per the Applicant's claims, were duly settled by the Applicant but disputed by all Respondents. In their submissions, however, the learned counsel for the 1st, 2nd, and 4th Respondents have argued that even if the order number (a) is to be granted, it will be a waste of time and energy since the subject matter, i.e., the fuel consignment sought to be released has been sold to other off-takers. The learned counsel for the 2nd Respondent submitted for instance that, if the order is granted that will not be contractually sound as there is no cargo to release.

As per the attached documents (**Annexures N-6** to the counter affidavit of the 2nd Respondent shows, however, the endorsement of the Bill of Lading (BL) signifies that the consignment was delivered to the 4th Respondent on the 7th of July 2023, a date when the BL was endorsed. But Mr. Malimi, the counsel for the Applicant, has argued that such an assertion and evidence is only a fabrication to blind the eyes of the observers, including this court.

Indeed, looking at **Annexure PISA-5D** which shows that the Vessel MT Khasab Silver was ready to discharge by the

26th of July 2023 and, further, looking at **Annexure PISA-8** to the Applicant supporting affidavit which is also **Annexure N-9** (annexed to the Respondent's counter affidavit) dated 2nd of August 2023 and its reply by the 1st Respondent on 03rd of August 2023, (**Annexure -N-9**), there is no indication whatsoever the cargo had been sold.

Annexure PISA-8 which is a letter addressed to the 1st Respondent asking for a meeting wherein the parties were to agree on final calculations and pricing, was responded to by **Annexure N-9** to the 2nd Respondent's counter-affidavit which reads as follows:

> "We refer to your letter dated 02 August 2023, and hereby advise you that we have not yet received the final claim from our suppliers with regards to demurrage and other costs incurred .... We are therefore obliged to postpone this meeting until we have received details of all costs and have issued the final invoice."

As it may be noted hereabove, the response was given on the 03rd day of August 2023 while the BL (**Annexure N-6** to the 2nd Respondent's counter affidavit) one will note that the endorsement was done on the 07th of July 2023. If that happened it means, therefore, and as Mr. Malimi argues, that, the cargo was sold before even the vessel discharged her cargo something which does not add up to the narratives of the 1st Respondent as evinced in **Annexure N-9** cited hereabove. I

will therefore agree with Mr. Malimi that, if the sale took place, then it would constitute a fraudulent act that cannot be sanctioned by this court. Under such a circumstance the court must not hesitate to act to protect the innocent party.

I hold it to be so because, in line with **Annexure PISA-R -1** annexed to the Affidavit in reply to the 1st Respondent's counter affidavit, the Vessel discharged its cargo twice at the port of Dar-es-Salaam, first on 1st of July 2023 and second on 31st of July 2023 while the endorsement on **Annexure N-6** shows that it was done on the 07th of July 2023 weeks before the Vessel discharged her laden cargo and at the time when the LC, (**Annexure PISA -4** attached to the supporting Affidavit of the Applicant) was still valid. Moreover, as submitted by Mr, Malima, between July up to September 2023 (as **Annexure LCT-9** shows) the parties were still in communication but nothing in their communication had anything to do with the alleged sale of the consignment.

In my view, such non-disclosure of facts would raise alarms, and more so when the cargo is said to have been sold to the 4th Respondent who alleges to have a claim over the cargo. Was there a scheme to divert the cargo to the 4th Respondent or was it a mere manipulation between the 1st, 2nd, and the 4th Respondents as argued by Mr. Malimi? While I need not go to any such details in this application since those are matters that could be looked at in the main suit, it suffices to note from the affidavits and annexed documents that the consignment alleged to be sold was sold to the 4th Respondent.

I do understand, however, that the alleged fraud if any will need to be looked at more in detail in the main case as this court cannot go to its details in this present application. But as Denning LJ's statement in **Lazarus Estates Ltd vs. Beasley** [1956] 1 QB 702 at 712, reveals:

> "... No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order ..., can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts, and all transactions whatsoever ..."

In his submissions, Mr. Malimi argued that, on the 06th of July 2023/ 07th of July 2023 the confirming bank (the 3rd Respondent) did receive money to the tune of US$ 15 million for this last consignment as per **Annexure PISA-6B** of the supporting affidavit. As it may be noted, if on the 07th of July 2023 such was the situation and on the same date the consignment was allegedly sold to the 4th Respondent what does such fact portray? Does it not suggest that the sale borders fraudulent conduct if at all that happens to be true?

I do not think that I will respond to the above question as of now, but as I stated earlier, more facts will be needed to unravel what really took place. Even so, that does not mean

after looking into the facts and circumstances of the case and all that has been laid bare to the court, this court will be prevented from exercising its discretion and protecting the ends of justice from being defeated. In my view, any action or behavior that undermines the pursuit of justice and the legal process has the potential to defeat the ends of justice.

Essentially, two rules will apply when there is an issue relating to the need to protect ends of justice: (a) that, it is the ends of justice that injury should be avoided, prevented, remedied, or mitigated as soon as practicable and needless expenses and inconvenience to parties be avoided and (b) it will not be in the ends of justice to exercise inherent powers if it would interfere with the interest of third party or cause mischief or injustice.

In this application, the Applicant seeks to prevent or mitigate greater inconvenience considering that, as **Annexures PISA 6 (a) to (e)** and **Annexure PISA 7** indicate, the Applicant has paid monies in respect of the consignment which nevertheless has not been released when it should have been released. The Respondents' counsel have contended that it was the Applicant to blame for her delayed payments. But as I look at the **annexures PISA 5(a), (b), (c)** and **(d)** attached to the supporting affidavit, the facts tend to tell me a different story as it is the 1st Respondent who could not allow the Vessel to berth and discharge the cargo timely despite being assured of payments.

It is also worth noting, as correctly argued by Mr. Malimi, that, the parties were no strangers in business to the extent of there being such a level of mistrust. Being guided by those principles earlier stated hereabove and, considering the facts and all submissions and materials laid before me, I do not find it proper that the 1st and 2nd Respondents should have withheld the release of the cargo. That was an uncalled-for act that exerts not only irreparable harm to the Applicant but also to the economy of the people of Burundi who are the end users of the fuel which the 1st and 2nd Respondents have refused to discharge to the Applicant while the parties had all along been operating under an atmosphere secured by the LC which was irrevocable and confirmed.

As it may be noted from the submissions, the 1st and 2nd Respondents contended that there was no reinstatement of the LC to provide cover to the consignment and issue of releasing the cargo cannot arise given that no full payments were made. However, as correctly argued by Mr. Malimi, since the LC was irrevocable and confirmed, the issue that there was no reinstatement of the LC to provide cover to the consignment cannot arise as there are all indications that full payments were made. The LC was a revolving one, meaning that it was opened for the stated amount and the drawings under it were reinstated as soon as the documents were paid upon final settlement. This further explains why I held that the withholding of the discharge was uncalled for.

Notable also and adding to that reasoning is the fact that, being irrevocable and confirmed it means it was not subject to any unilateral modification or revocation during its validity and the beneficiary had a firm undertaking of not only the bank issuing the credit, but also of the confirming bank. Now, firstly, as submitted by Mr. Malima, there is no indication that the LC was amended meaning that its terms remained throughout its validity period. Secondly, as a matter of principle, each document must be construed according to its terms. As correctly argued by Mr. Malimi, a look at **Field 47A (2)** of the LC does confirm that reinstatement was allowed upon final settlement.

Turning to the submissions made by Mr. Laizer, regarding the interest of the 4th Respondents, I will only make limited comments regarding such submissions. In his submission, Mr. Laizer has argued that the 4th Respondent has an unsettled claim against the Applicant as evinced by **Annexure LO-2** which are invoices for a sum of US$ 1,623,321.89 plus 181,361 being the value of dead stock for the leaded Depot. He submitted that, the 4th Respondent had rendered services to the Applicant without being paid and that all efforts to demand payments have not been fruitful.

However, as correctly submitted by Mr. Malima, since the 4th Respondent is a party to the main suit, which is pending, such matters can be addressed therein. To urge this court to grant the 4th Respondent set-off orders while the 4th Respondent has not filed a counter application in which the court could make orders as Mr. Laizer seems to urge this court

to do would be inappropriate since, as a matter of principle, this being a court of law, it works based on the materials laid before it. Likewise, it cannot act in anticipation that a particular party will file a claim in the future.

From all that I have stated and discussed here, I find that the Application has merits and meets the thresholds for the grant of an interlocutory order under section 68(e) and Order XXXVII Rule 2(1) of the CPC, Section 2(3) of the Judicature and Application of Laws Act, Cap.358 R.E 2019, Rules 10 (b) and 11 of the High Court (Commercial Division) Procedure Rules, GN.No.250 of 2012 (as amended).

Because of all that I stated here above, and there being a necessity to prevent the ends of justice from being defeated this court finds it just and convenient to grant the prayers sought and settles for the following orders:

1. the 1st, 2nd, and 3rd Respondents are hereby ordered to stop their continuing breach of the Supply Contract dated 24th June 2023 and Standby Letter of Credit dated 19/9/2022 and the 1st and 2nd Respondents should forthwith release the cargo of 20685.61 MT gasoline which is under the storage of the 4th Respondent, to the Applicant.
2. That, since the parties are engaged in Commercial Case No.130 of 2023 which is pending before this court,

costs of this application shall be in cause.

It is so ordered.

ITED AT DAR-ES-SALAAM ON THIS 08TH DAY OF DECEMBER 2023

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DEO JOHN NANGELA
JUDGE