IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC.COMMERCIAL APPLICATION NO.189 OF 2023

(ARISING FROM COMMERCIAL CASE NO. 144 OF 2023)

FLIPOS GEBREMEDHIN ..... APPLICANT

VERSUS

ASMARA TRANSPORT COMPANY LIMITED .....RESPONDENT

RULING

Date of last Order: 15/12/2023

Date of Ruling: 31/01/ 2024

GONZI, J

The Applicant brought the present application by way of chamber summons and affidavit seeking for the following orders against the Respondent:

(1) That this honourable Court be pleased to grant an order for attachment of the Motor Vehicles with Registration Numbers T665 DZA; T621 DZE; T644 DUH; T438 ECC and T653 DZA and or furnish security equivalent to US Dollars 89,285.00 and UK Pound Sterling 4,100.00 before judgment.

(2) Costs of this application be provided for;

(3) Any other and further relief the Court may deem fit and just to grant.

From the affidavit in support of the application which was deponed by the Applicant, the facts that come out are that the Applicant has filed in this Court Commercial Case No.144/2023 against the Respondent wherein the Applicant is claiming for a refund of US Dollars 89,285 and Pound Sterling 4,100 which is the equivalent of Tshs. 253,709,246.00 (Tanzanian Shillings Two hundred fifty three million, seven hundred and nine thousand, two hundred forty six) as well as interests on the stated sum at court rate and costs of the suit.

The Applicant in his affidavit stated that that while the main suit is pending in this court, he has discovered that the Respondent has no immovable assets in Tanzania. The applicant stated further that his relationship with the majority shareholder of the Respondent Company, one Tesfelam Desale, is deteriorating and has learned that the Respondent is about to dispose of by sale all its properties including the motor vehicles listed in the Chamber Summons, something which is likely to obstruct and or delay execution of the decree against the Respondent. The Applicant attached to the counter affidavit a copy of the plaint forming the main suit as annexture FG 1. He also attached, once again as annexture FG 1, a letter from Asmara Transport Co. Limited to the Applicant dated 27th August 2023. The letter essentially

informs the Applicant about problems faced by the Respondent at the Port and TRA to clear some imported cargo and the efforts being done by the Respondent. The letter concludes by the following paragraph reproduced verbatim:

> *"Finally, the amount of money given to Semon Abraham was 56,500 UK Pounds,4100 UK Pounds to Milkias, where 6500 USD and 37,840,000/= Tshs cash to Tesfalem Desaile or (on 1/9/2022, 40,000 USD, 24/11/2022 14625 USD, 11/1/2023 12,160 USD; 30/01/2023 6500 USD;05/02/2023 16.00 USD (37,840,000/= Tsh) so total is 89,285 USD and 4100 UK Pounds)."*

The Applicant concluded his testimony in the affidavit by stating that the directors and shareholders of the Respondent Company namely Tesfelam Desale and Semon Abraham Okbameckael are not citizens of Tanzania and hence execution against them will be unfruitful.

In the counter affidavit deponed by one Kaites Aloyce Laurent - the Respondent's General Manager, the application is resisted. The Respondent denied to be the owner of a Motor vehicle with registration No. T438 ECC and further alleged that the Motor vehicles with registration Numbers T665 DZA, T621 DZE and T644 DUH are already attached by the High Court of Zambia at Lusaka vide Commercial Case No.2023/HP/0738 involving Polytra Zambia Ltd against Link Transport Limited and Asmara Transport Company

Limited. She attached to her counter affidavit annexture A1 being an Interpartes Summons for an order for interim attachment of property issued by the High Court of Zambia on 10th November 2023. In that Summons, the Respondent is impleaded as the 2nd Respondent.

The respondent further stated that the financial transaction in respect of which refund is sought by the Applicant in the main suit, was a personal arrangement between the applicant in one hand and three individual persons on the other hand namely Desale, Milkias and Semon Abraham which transaction was entered into in Dubai and London, not in Tanzania. The respondent alleged that the said money did not come into the bank account of the Respondent Company nor does it feature in the Respondent company's revenues and that there is no company resolution in respect of the claimed money.

The respondent disputed the allegation of having an intention to dispose of the motor vehicles by way of sale by stating that since the motor vehicles are subject to attachment in the High Court of Zambia, it is not possible for the Respondent to sell them and that the Applicant has brought no proof of such intention. The Respondent stated that the Applicant has not brought in court a professional valuation report on the real value of the motor vehicles

which are all trucks. Upon being served with the counter affidavit, the Applicant did not request for leave to file a reply to counter affidavit. He opted to proceed to hearing.

During the hearing of the application, the Applicant enjoyed the services of Mr. Desdery Ndibalema, learned Advocate while the Respondent appeared through Ms Kaites Aloyce, the General Manager thereof.

Mr. Ndibalema adopted the applicant's affidavit and submitted that the application is brought under Order XXXVI Rule (6), (1)(a) and (b) as well as Rules (2), (3) and (7)(i) and (ii) of the Civil Procedure Code. He argued that the application seeks for orders for attachment before judgment of the Motor Vehicles Nos.T665DZA; T621 DZE; T644 DUH; T438ECC and T653 DZA which are all the property of the Respondent. He submitted that alternatively the Respondent be ordered to furnish security amounting to USD 89,285 and Sterling Pounds 4,100 which money was paid by the Applicant to the Respondent as the purchase price for those vehicles. He argued that the application was prompted by the Respondent's advertisement through social media to sell the said vehicles while there is an ongoing case in this court against the Respondent that is Commercial Case No.144/2023 between the same parties. The learned advocate submitted that the Applicant entered

into an arrangement with directors of the Respondent, who are all foreigners hailing from Eritrea, for purchase of the motor vehicles from the Respondent and paid them the purchase price which was actually used to buy the motor vehicles but that the motor vehicles were never delivered to the Applicant. He submitted further that as the company has no other assets in Tanzania except the said motor vehicles, there is fear on the part of the Applicant that if the motor vehicles are sold off, it will be detrimental to the Applicant as the Directors of the company may at any time leave if the country as they are foreigners. If that happens, the applicant's counsel submitted, there will be no property of the Respondent for the Applicant to attach in satisfaction of the decree in the main case, should judgment and decree be eventually entered in favour of the Applicant against the Respondent.

The learned counsel for the Applicant concluded by submitting that as order XXXVI of the Civil Procedure Code allows attachment before Judgment, the Court be pleased to invoke it and grant the order for attachment before judgment. Alternatively, the applicant's counsel submitted, the court can order the Respondent to furnish security in the amounts mentioned earlier herein to safeguard the interest of the Applicant.

In reply, Ms Kaites Aloyce the General Manager of the Respondent Company adopted her affidavit and submitted that that the trucks sought to be attached are company's trucks and cannot be attached for personal arrangement done between the Applicant on one hand and Tesfelam Desale, Milkias and Semeon Abraham. The Respondent was not involved and there was no board resolution sanctioning the transaction as required by section 147(1)(a),(b) as well as section 4 both of the Companies Act which require a Board Resolution to be passed before making any decision involving the company.

In the second place Ms Kaites submitted that the Respondent Company is also being sued in Zambia vide Commercial Case No.2023/HP/0736 in which the same trucks of the company have been attached. Therefore, she concluded that there are no more trucks for attachment in Tanzania.

Further, the Respondent submitted that the Applicant is also a foreigner in Tanzania yet he filed this case without furnishing any security in court in contravention of Order XXV Rule 1 and 2 of the Civil Procedure Code. It was therefore argued that if the Applicant loses this case, he can leave Tanzania and cannot be traced to pay costs of the suit.

In her further submissions Ms Kaites argued that the contract subject of the main case was entered into in Dubai and London. Hence, she argued that this court has no jurisdiction as the cause of action occurred outside Tanzania.

Another argument by Ms Kaites is that the Applicant has produced no contract for exchange of money. She argued that the letter attached to the Affidavit as Annexture FG 1 indicated as emanating from the Respondent, and which makes reference to the sums, is not a contract and therefore cannot be enforced in Tanzania.

Finally, Ms Kaites submitted that there is no proof of payment of the claimed amount as the same has not be shown to have been received into the Respondent's account. She submitted that the Applicant has failed to satisfy the requirements of section 110 and 111 of the Evidence Act, Cap 6 of the Laws of Tanzania which impose the burden of proof upon he who alleges something.

By way of rejoinder, Mr.Ndibalema submitted that the Respondent has not submitted any proof of attachment order from Zambia. He added that what the Respondent has submitted in Court is a court summons from Zambia. He

submitted further that if in fact the trucks are already attached in Zambia, then the Respondent should be alternatively ordered to furnish security equivalent to the money claimed by the Applicant in the main suit. On absence of the Respondent's board resolution, Mr.Ndibalema submitted that not every business of the company requires a Board Resolution. He argued that as long as the Respondent Company through the Managing Director admitted vide the letter Annexture FG 1 dated 27th August 2023 to possess a waiver from TRA to import the vehicles from the United Kingdom, the Respondent cannot now deny to have been given the money in question.

On the argument that the contract was made in Dubai and London hence denying the court jurisdiction, Mr.Ndibalema argued that this is a mere allegation without any proof thereon as the General Manager, Ms Kaites, is neither a shareholder nor a Director of the Respondent Company. Hence, she cannot testify over what actually happened. He argued that the Respondent has a place of business in Tanzania and the business transaction resulting to the dispute was done in Tanzania. The argument of the applicant not having furnished security for costs, Mr.Ndibalema argued that this argument ought to have been raised in the main suit and that at any rate the Applicant is a foreigner but resident of Tanzania hence not covered by

Order XXV Rule 1 of the Civil Procedure Code. Mr.Ndibalema concluded by insisting that the Respondent has not denied the fact that the respondent company has no fixed assets in Tanzania to sustain execution of the decree in the event the Applicant wins the main case. He prayed that the application be granted as prayed.

After hearing the rival submissions, I now proceed to determine it in line with the applicable law. I have noted that some of the facts and arguments advanced by the parties are not relevant to the present application as they go to the merits of the main case or are irrelevant for determination of applications like the present one. I will only deal with the relevant facts for the purpose of the present application only. It is apposite at this time to reproduce the relevant portions of the provision of the law under which the application is made:

> *Order XXXVI Rule 6(1): "Where, at any stage of a suit the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him – (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court, the court may direct the defendant ..... to appear and show cause why he should not furnish security.*
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> *7(1) where the defendant fails to show cause why he should not furnish security ..... the court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached."*

The provision has been widely interpreted by the courts within Tanzania and elsewhere in the common law jurisdictions. In the case of **Sea Saigon Shipping Limited vs Mohamed Enterprises (T)Limited** (Civil Appeal No.37/2005, [2005] TZCA 36 (11 August 2005) we can gather the following excerpts from the decision of the Court of Appeal of Tanzania about applicability of Order XXXVI rules 6 and 7 of the Civil Procedure Code:

> *one important element to be established before an order for attachment before judgment is granted, is the defendant's intention to obstruct or delay the execution of any decree that may be passed against him.....The general powers for attachment of property before judgment are under Section 68(b). The procedure for attachment before judgment is prescribed under Order XXXVI Rule 6. The powers for arresting a human being, that is, a defendant who is attempting to defeat the ends of justice are provided for under Section 68(a). The procedure for arresting such a defendant is prescribed under Order XXXVI Rule 1(b)..... Generally speaking, these grounds are applicable to applications for attachment before judgment under Order XXXVI Rule 6 and 7 although the defendant has first to show cause why he should not furnish security before his property is attached....*

Again, in the case of **Geipam Group Limited Versus Bondeni Seeds Limited,** Misc. Civil Application No. 82 of 2022 decided by the High Court of Tanzania at Arusha by Hon. Kamuzora,J., this court held that:

The above provision prescribes the pre-requisite conditions upon which an application for attachment before judgment can be granted. The applicant will have to prove by affidavit that the defendant/respondent one, is about to dispose of the whole or any part of his property or is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court. Two, the defendant/respondent is doing so with intention to obstruct or delay execution of the decree which may be passed against him. It must be noted that, an order for attachment before judgment usually affects the rights of the owner of the property to deal with the same before any decision is made against him. Such an order should not be granted on mere assertions and speculations without cogent and tangible evidence.

A more extensive judicial interpretation of the law on attachment before judgment is seen in the case of **Raman Tech. & Process Eng.Co., v. Solanki Traders** (5 ALL MR 44 (SC). In this case, the Supreme Court of India was interpreting Order XXXVIII Rule 5 of the Indian Code of Civil Procedure which is similar to the Order XXXVI Rule 6 of the Tanzania Civil Procedure Code. With a view to expounding the law in this area so as to discern it and its applicability to the facts at hand, I would like to quote in extenso what the Supreme Court of India had to say on attachment before Judgment:

The object of supplemental proceedings (applications for arrest or attachment before judgment, grant of temporary injunctions and

appointment of receivers) is to prevent the ends of justice being defeated. The object of Order 38 Rule 5 CPC in particular, is to prevent any defendant from defeating the realisation of the decree that may ultimately be passed in favour of the plaintiff, either by attempting to dispose of, or remove from the jurisdiction of the court, his movables. The Scheme of Order 38 and the use of the words to obstruct or delay the execution of any decree that may be passed against him in Rule 5 make it clear that before exercising the power under the said Rule, the court should be satisfied that there is a reasonable chance of a decree being passed in the suit against the defendant. This would mean that the court should be satisfied that the plaintiff has a prima facie case. It is well-settled that merely having a just or valid claim or a prima facie case, will not entitle the plaintiff to an order of attachment before judgment, unless he also establishes that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that may be passed. Equally well settled is the position that even where the defendant is removing or disposing his assets, an attachment before judgment will not be issued, if the plaintiff is not able to satisfy that he has a prima facie case. A defendant is not debarred from dealing with his property merely because a suit is filed or about to be filed against him.

The Indian Code of civil Procedure is a statute in parimateria to the Civil Procedure Code of Tanzania hence the judicial interpretation thereof forms a useful external aid of interpretation of the relevant Tanzanian legal provision. As a rule of statutory interpretation, similar language in statutes with common purpose is interpreted in the same way.

The key cumulative and inseparable take-aways from the above analysis of the case laws interpreting the provision on attachment before judgment in terms of Order XXXVI Rules 6 and 7 of the Civil Procedure Code are that:

(i) There must be reasonable chance of a decree being passed in the suit against the defendant. That is to say that the court should be satisfied that the plaintiff has a prima facie case.

(ii) The Plaintiff should also establish that the defendant is attempting to remove or dispose of his assets.

(iii) The Plaintiff must establish that the removal or disposal of the assets by the defendant is being done with the intention of defeating the decree that may be passed against the defendant by obstructing or delaying its execution.

(iv) The order should not be granted on mere assertions and speculations without cogent and tangible evidence.

(v) That the Respondent has first to be given an opportunity to show cause why he should not furnish security before an order for attachment of his property before judgment can be eventually made.

I can add that, in terms of Rule 6(2) of Order XXXVI of the CPC, the Applicant is also required to specify the property required to be attached and the estimated value thereof, unless the court otherwise directs.

I have taken time to consider whether the Applicant in the present application has a prima fascie case as against the Respondent? A prima facie case for the purpose of the present application, is essentially a bona fide contention between the parties or a serious question to be tried. Annexture FG-1 a copy of the plaint alleges that the Respondent had an arrangement with the Applicant for the purchase and importation of two trucks to Tanzania and that the Respondent has breached the terms of their agreement by failing to deliver the said trucks. The letter from the Respondent to the Applicant which is also annexed as FG-1 is indicative, though not conclusive, of existence of the financial arrangement between the parties herein. Although the Respondent has argued that the said arrangement was a personal contract between the Directors and shareholders of the Respondent on one hand and the Applicant on the other hand, I find that by this argument the Respondent actually does, in effect, supply the proof of existence of a bona fide contention between the parties or a serious question to be tried. Hence it establishes the prima fascie case

that is needed as one among the pre-conditions for issuance of an order for attachment before judgment.

Next for my consideration are three requirements which I have clubbed together as they swing around common facts in this application. These are the need for the Applicant to establish that the defendant is attempting to remove or dispose of his assets; the need for plaintiff to establish that the removal or disposal of the assets by the defendant is being done with the intention of defeating the decree that may be passed against the defendant (by obstructing or delaying its execution); and the requirement that the order should not be granted on mere assertions and speculations without cogent and tangible evidence. The Applicant has stated in his affidavit that the applicant has seen social media advertisement made by the Respondent for sale of its motor vehicles. It was submitted for the applicant that the Respondent company does not have other assets in Tanzania except the motor vehicles and that all the directors of the Respondent company are foreigners who might run away from Tanzania hence making it difficult to enforce the decree against them and that the Respondent has shown an intention of selling its assets so as to make the resulting decree un enforciable. The Respondent has denied those allegations in her counter

affidavit and has stated that the trucks have been attached in Zambia by order of the High Court of Zambia and has annexed a summons of the Court. She has not however attached the court order for attachment of the said trucks. The truth of the matter hangs in suspension and remains unsubstantiated. The Applicant on the other hand has not however, supplied the court with any proof of the alleged social media page of the Respondent advertising sale of the alleged motor vehicles. In one hand the Applicant has failed to prove his allegation of advertisement of sale and on the other hand the Respondent has failed to prove her argument that there is already an attachment order issued by the High Court of Zambia in respect of the same vehicles. I asked myself whose burden was it to prove the allegation of intention to sell or dispose of the stated motor vehicles with an intention of defeating the decree which may be entered against the respondent? Under section 110 of the Evidence Act the burden of proof is on he who alleges. It is the Applicant in this case who alleges that the Respondent has shown an intention to dispose of its assets namely the 5 listed motor vehicles by way of advertisements in social media. The Respondent has denied that allegation in her counter affidavit. The Applicant was duty bound to prove his allegation on the balance of probabilities. Copy of the alleged social media

not annexed to the Applicant's Affidavit to substantiate the allegation of intention by the Respondent to dispose of her assets as alleged. There is no evidence brought by the Applicant to substantiate the intention of the Respondent disposing of the assets so as to defeat the decree that might be entered against the Respondent in the main suit. Motor vehicles are by their very nature mobile and hence can move from one place to another. The motor vehicles in the present case are trucks. It is not strange if the same are moved across the borders between Tanzania and Zambia or elsewhere. It is part of the ordinary transportation business. Furthermore, attaching all 5 trucks of the Respondent, without ascertaining or estimating their value, before any claim is established in court against the Respondent, would inevitably stifle the business operations of the Respondent company and result into far-reaching trickle-down financial consequences. That will not be in line with sound commercial best practices and justice. I must hasten to point out that the Applicant has not shown the estimated value of each of the 5 trucks of the Respondent which the Applicant is trying to move this court to attach before judgment in relation to the Applicant's claim of Tshs 253,709,246.00. Order XXXVI Rule 6(2) provides that the plaintiff shall, unless the court otherwise directs, specify the property required to be

attached and the estimated value thereof. In the case at hand, the Applicant who is also the plaintiff in the main suit, has not specified the value of each of the trucks sought to be attached. This is a clear violation of the legal requirement. The need to specify the details of the property and disclose the value thereof is essential in my view as this will help to guide the court in the exercise of its power fairly and proportionately to the extent necessary in the prevailing circumstances of the particular case. Without specifying the properties and their estimated value, there is a danger of the Court issuing a blanket order that may result into an unnecessary curtailment of the respondent's property rights than it is necessary in the case. What if the value of one truck only would exceed the claimed amount? The Applicant has not brought any evidence to prove that the Respondent is indeed the registered owner of each of the 5 trucks sought to be attached. The Respondent has denied ownership of some of the trucks. The Applicant has not brought any evidence to prove that the 5 trucks are actually within the local limits of the jurisdiction of this Court. The Respondent has testified in the affidavit and argued that the trucks are actually attached in Zambia. With all this shaky evidence on record, I am not inclined to accept that the Applicant has convinced the court to rule in his favor.

On the legal requirement that the defendant has first to show cause why he should not furnish security before his property is attached, I find that this requirement was introduced as a buffer zone for the Respondents against the impacts of a more serious order of attachment before judgment. The imposition of this alternative remedy underscores the fact that an order of attachment before judgment is a serious one that should not be granted lightly. The Applicant has prayed for an order that the Respondent be required to furnish security amounting to the claim in the suit which the applicant has approximated at Tshs 253,709,246.00. In my Ruling this alternative prayer faces the same fate like the prayer for order of attachment before judgment. It suffers from factual deficiency to support its grant. In the same way like the Applicant has failed to substantiate the requirements for the order of attachment before judgment, he has also failed to substantiate factually that he is entitled to the order requiring the Respondent to furnish security. The legal prerequisites for the two orders are the same although the orders are grantable in a hierarchical alternative manner.

As I conclude, I would like to reiterate, for the sake of emphasis, and again by making reliance on the Raman Tech case (supra) that:

> *"The power (to order attachment before Judgment) is drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It Should be used sparingly and strictly in accordance with the Rule. The purpose (of the Order) is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilize the provisions of the Order as a leverage for coercing the defendant to settle the suit claim should be discouraged."*

In this case, it appears from the submissions by Mr. Ndibalema that the Applicant might be an unsecured creditor with the Respondent. Actually, the Respondent is disputing the very existence and validity of the alleged contractual arrangement as claimed by the Applicant. The Applicant might end up as an unsecured creditor in the main suit and the Applicant is worried that the very assets of the Respondent company are subject to attachment proceedings in Zambia. The Applicant in this application is in effect attempting to turn the alleged financial arrangement with the Respondent into secured credit by abusing the provisions of Order XXXVI Rules 6 and 7 of the CPC. The Court cannot help him in that course. One may pause and ask: if the financial arrangement was done between the Applicant and the Respondent Company which is a Tanzanian resident Company having been incorporated in Tanzania, why would the Applicant be concerned with personal presence or absence of the Respondent's Directors in Tanzania

while he allegedly contracted with the company as a legal entity? Do directors of the company automatically bear the financial burdens of their company? An unsecured creditor is, in my view, entitled to rely on the share capital and assets of the company, not on the individual persons who serve as its directors or shareholders. A prior due diligence in company's liquidity and share capital ought to have been made before entering into the financial arrangements with the company. If the Applicant is concerned with the Directors and shareholders of the company individually because he advanced the money to them, then one wonders why he has sued only the company as a corporate legal entity without joining any of the individual persons with whom he allegedly transacted business and who happen to be directors or shareholders of the respondent? While those questions are lingering matters for the main case, which were prematurely argued in the present application, those legal conundrums inevitably manifest themselves on the face of the present application which is neither here nor there. Order XXXVI of the CPC cannot be resorted to in an attempt to convert an unsecured disputed debt into a secured debt. I warn myself of the danger of exercising the court's power in favour of the applicant in the present application. I heed and subscribe to the words of my sister Judge Hon. D.C.Kamuzora,J., in the case

of **Geipam Group Limited Versus Bondeni Seeds Limited,** (supra) who reasoned that an order for attachment before judgment usually affects the rights of the owner of the property to deal with the same before any decision is made against him. Such an order should not be granted on mere assertions and speculations without cogent and tangible evidence. I would add that a defendant is not debarred from dealing with his property merely because a suit is filed or about to be filed against him.

In the upshot, I find that the Applicant has failed to prove in this application the necessary circumstances as to warrant the invocation of the court's powers under Order XXXVI Rules 6 and 7 of the Civil Procedure Code.

Accordingly, the application is hereby dismissed with costs.

It is so ordered.

A. H. GONZI
JUDGE
31/01/2024

Ruling is delivered in Court this 31st day of January 2024 in the presence of Mr.Ndibalema, Advocate for the Applicant and Ms Kaites the General Manager of the Respondent.

A. H. GONZI
JUDGE
31/01/2024