IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CASE NO. 148 OF 2019

PRECISE SYSTEMS LTD.....APPLICANT

VERSUS

TP SERVICES LTD.....1st RESPONDENT

TRAVELPORT INTERNATIONAL LTD.....2nd RESPONDENT

Last Order: 27th Apr, 2020

Date of Ruling: 18th June, 2020

RULING

FIKIRINI, J.

This application sprouted from the Commercial Case No. 165 of 2017, whereby the present applicant, Precise Systems Ltd, sued the 1st respondent, TP Services Ltd and the 2nd respondent Travelport International Ltd, who in the main suit are the 1st and 2nd defendants respectively, for, specific damages to the tune of USD. 1, 235,341; Tzs. 171,350,000, general damages, interest, costs of this suit and any other relief deemed fit and just by this Court.

Disputing the claim, apart from filing written statement of defence, the 2nd respondent/defendant filed a counter-claim claiming for, payment of USD 360,070. with interest, damages to the tune of USD. 70,000, costs of the suit by way of

counter-claim, and other reliefs to be ordered by the Court. As the matter was still pending before the Court, the plaintiff/applicant through Mr. Roman Masumbuko learned counsel, in this application, moved this Court under Order XXXVI Rule 1 (a) (i) & (b) and Rule 3 (1), section 68 (b) and 95 of the Civil Procedure Code, Cap 33 R.E. 2002 (the CPC), and any other enabling provision seeking the 2nd respondent be arrested before judgment or ordered to deposit security for the amount claimed in Court. The application is supported by an affidavit deponed by Mr. Migire Migire, Principal Officer of the applicant's company, averring on the existing agreement between the applicant and the 2nd respondent, who is based in Berkshire (United Kingdom). And that, this agreement terminated in November, 2015 when the 2nd respondent introduced the 1st respondent as its representative, even though the representation was later denied by the 1st respondent.

The deponent further averred that the applicant's claim, aside from the outstanding commission fees, she is also claiming for the unreturned equipment, which were converted into use for the respondents' benefit, after contesting its repossession that unless there was an agreed arrangement. Also deponed was the fact that the 2nd respondent has left Tanzania with no intention of returning to the country, which connotes an intention to avoid any decree in the event the applicant/plaintiff is successful in the main suit, which she has so far managed to delay for two (2)

years, claiming to prefer an arbitration process rather than submitting itself to the jurisdiction of this Honourable Court. Urging the Court the affidavit deponed stated that the 2nd respondent had nothing to lose if the security is deposited pending determination of the Commercial Case No. 165 of 2017.

A number of documents were annexed to the affidavit in support.

The 2nd respondent filed counter-affidavit deponed by Mr. Wilbert B. Kapinga, learned counsel entrusted with power's of attorney, contesting the application.

At the hearing Mr. Roman Masumbuko and Mr. Audax Kameja learned counsels appeared for their respective parties. Both counsels adopted their affidavits and skeleton arguments filed on 11th March, 2020 and 22nd April, 2020, as part of their oral submissions made in Court on 27th April, 2020. Submitting in support of the application and assigning reasons, it was Mr. Masumbuko's submission that the 2nd respondent operates outside the jurisdiction and has no physical presence in Tanzania as pointed out in paragraphs 14 and 15 of the deponed affidavit in support and has no intentions of coming back. In the event the Court decides in favour of the plaintiff, the decree will not be met, as the 2nd respondent has no tangible assets in Tanzania. And so far she has been acting through the lawyer to get all the filings done. All these facts have not been disputed.

The 2nd respondent's action and conduct according to Mr. Masumbuko was that she was avoiding the jurisdiction of this Court. It started with insisting on arbitration proceedings out of this jurisdiction. All these prove that the 2nd respondent was avoiding, delaying and obstructing any decree to be passed by the Court. Reinforcing his submission, he referred this Court to the case of **Fernades v CBA Ltd & Another [1969] EALR Vol. 1 482.**

On the strength of his submission he thus prayed for the 2nd respondent's Managing director to be summoned to furnish security. Or else give reason why he should not, deposit the amount not less than 3% of the contested sum, prior to issuance of an order for arrest before judgment.

Responding, Mr. Kameja submitted that at no material time the 2nd respondent had been present in the jurisdiction. This was even when the suit was filed. Canvassing on the provision of Order XXXVI Rule 1 (a) (i) of the CPC, it was his submission that the provision envisaged the situation where the defendant has absconded or left the local limits of the jurisdiction of the Court with intention to delay, avoid or obstruct the execution of the decree. That was however, not the case in the present situation, submitted Mr. Kameja.

Countering the assertion on, the manner in which it showed that the 2nd respondent intended to avoid any decree passed against him submission, he refuted that to be

the intention, arguing that had the 2nd respondent envisioned that, the fact the 2nd respondent was based in the United Kingdom (UK), she could have easily walk away without even making any appearance or taking part in the proceedings, when she had opportunity to avoid them. This was an indication that the 2nd respondent had no such intention, submitted the counsel. Furthering his submission, he submitted that in the event the judgment is in favour of the plaintiff, she can still execute the decree as there were recognized procedures to execute decrees in the jurisdiction where a party resides, since this country has reciprocal arrangement with the UK.

On security deposit, it was the counsel's submission that this will be prejudicial to the 2nd respondent as it will involve tying down a huge sum of money, which will impact the 2nd respondent's business. Stressing on the position, he urged that a party should not be made to make any payment to the Court or otherwise before judgment is entered against that party, simply because that party happened to be a foreigner. This was more so when such party has shown readiness to honour the proceedings of this Court and its outcome.

On the submission he thus prayed for the application to be dismissed.

In rejoinder submission, Mr. Masumbuko, addressing on the aspect of the 2nd respondent's presence within the jurisdiction when the suit was instituted, it was

his submission that the provision did not look at when a party left the country, but the intentions. Those intention being to (a) delay, (b) avoid, and (c) obstruct any process of this Court. The conduct which is exhibited by the 2nd respondent since institution of the suit and the fact they were not subject to this jurisdiction. Underscoring on the grant of the application, it was his submission that the application can be granted at any stage whether the party was in the country or left afterwards. The 2nd respondent opted to instruct their lawyer to enter and file documents on its behalf, which showed that the 2nd respondent was avoiding coming to this jurisdiction ever since to-date.

Contrasting the submission that there was procedure in place of enforcing the judgment, he contended that the submission was misplaced as this was not a foreign judgment and reciprocal provision cannot be invoked when a party is before the Court through their lawyer. The proper provision or law applicable was thus the CPC, upon which the application for security was based. The assertion that depositing security will tie down a lot of money and will impact the 2nd respondent's business, that was the reason why, her appearance and post security be it bank bond or assets, was being sought. He stressed that the risk was bigger if the 2nd respondent was not called to furnish security. Not doing so will impact the applicant as she will not be able to enforce the decree, only because one of the

party was a foreigner or has absconded the jurisdiction rather than furnishing security at this point in the proceedings.

Reiterating his earlier submission, he urged the Court to grant the application and order the 2nd respondent to furnish security.

In determination of the merits and demerits of this application, which its main objective is to see the 2nd respondent arrested before judgment or ordered to deposit security for the amount claimed in Court. Embarking on the exercise the Court will thus consider the three elements spelt out under Order XXXVI Rules 1 (a) (i) and 3(1) of the CPC and sections 68 (e) and 95 of the CPC, to find out if have been answered in affirmative or all of them to warrant grant or not grant the application.

Order XXXVI Rule 1 (a) (i) which is reproduced below for ease of reference states:

> *"Where at any stage of a suit, other than a suit of nature referred to in paragraphs (a) to (d) of section 14, the court is satisfied, by affidavit or otherwise-*

(a) *That the defendant, with* ***intent to delay*** *the plaintiff, or to* ***avoid any process*** *of the court* ***or to obstruct*** *or* ***delay the execution*** *of any decree that may be passed against him-*

(i) ***Has absconded or left the local limits of the jurisdiction of the court;*** *or*

(b) That the ***defendant is about to leave Tanzania under circumstances affording reasonable probability*** *that the plaintiff will or* ***may thereby be obstructed*** *or* ***delayed in the execution of any decree that may be passed against the defendant in the suit****, the court may issue a warrant to arrest the defendant and bring him before the court to show cause why he should not furnish security for his appearance."*[Emphasis mine]

Reading from paragraph 2 of the applicant's affidavit it is evident that the 2nd respondent is based in Berkshire, the United Kingdom, the fact not controverted by the 2nd respondent's counsel. The applicant, aside from that, has also pointed out in paragraphs 14 and 15, that, the 2nd respondent has no intention of returning to Tanzania and has no tangible assets for the purposes of execution, in the event the applicant is successfully with the suit. More to this, it is the applicant's assertion

that the 2nd respondent after failing to refer the matter to arbitration, filed written statement of defence, a clear proof that the 2nd respondent's Managing Director will never return to Tanzania as has opted to conduct its business from other countries especially Kenya, United Arab Emirates and United Kingdom. The affidavit as well portrayed under paragraph 16 that the 2nd respondent,s acts and conduct leave no doubt that she intends to avoid any decree to be passed by this honourable Court in the event the applicant/plaintiff is successful in the main suit.

It was the applicant's further averment that the 2nd respondent has delayed the matter for two (2) years claiming to prefer arbitration but failed to do so when leave was granted. This according to Mr. Masumbuko was the 2nd respondent's efforts not wanting to submit itself to the jurisdiction of this honourable Court.

The account on the 2nd respondent's presence in Tanzania was contested by the 2nd respondent's counsel who swore counter-affidavit on behalf. Particularly in paragraphs 4, it has been clearly stated that even when the agreement was being entered between the applicant and the 2nd respondent in 2012, the latter was not in Tanzania.

I have carefully and thoroughly read the affidavit, counter-affidavit, skeleton arguments filed and listened to the oral submissions in respect of each parties' stance. I have however, failed to be persuaded that the application is meritorious.

First and foremost, it is an undisputed fact that the 2nd respondent, who is based in Berkshire, United Kingdom, has never been present in Tanzania even during the time parties were entering into the agreement in 2012. The assertion that the 2nd respondent has absconded or left the jurisdiction is therefore not there.

Secondly, the claim that the 2nd respondent had an intention to delay the matter and that has been exhibited by her acts and conduct by insisting to go for arbitration, when a suit had already been filed, is in my view, exaggerated. *One*, the 2nd respondent was not barred by any provision of law to exercise her right to go for arbitration if that is what parties agree when contracting. The applicant has not disputed existence of that option in the parties' contract. The applicant cannot therefore consider the choice as a delaying tactic, unless there is specific evidence to that effect. Short of which the assertion will be mere statement. *Two,* had the Court find the right not existing it would not have granted the petition and stay the proceedings as exhibited by WBK-5 annexed to the counter-affidavit. *Three,* the intent alleged by the applicant has neither been shown nor proved. After the counter- affidavit has been filed, the applicant had a room for filing reply, which she did, but nothing in the reply to the counter-affidavit has countered the averment, except for general statements.

Intent being a mental attitude it can only be interpreted from the acts done or omitted, which from the affidavit, reply to the counter-affidavit or even submission has so far not been exhibited.

Thirdly, the account that the 2nd respondent was avoiding or obstructing any Court process is equally not supported. Because by failing to go for arbitration after the leave has been granted, while it could be a correct assertion that she was avoiding the Court process but since there is no proof of that, this Court cannot bank on apprehension which the applicant harbour's. There was no single piece of evidence put forward to show that the 2nd respondent was indeed avoiding or obstructing Court process. In actual fact, there is more evidence that the 2nd respondent was cooperating. Which is, besides filing a written statement of defence, which she could opt not to file if she was avoiding Court process, and considering the fact that she is outside the jurisdiction, indicates to me that the 2nd respondent is ready and willing to abide by the law and has nothing to the contrary in subjecting herself to the jurisdiction of this Court. The case of **Fernandes** (supra), is relevant but distinguished. While I agree that 2nd respondent's permanent absence outside the jurisdiction of this Court creates concerns, but it has to be remembered even during entering into the contract the 2nd respondent was not in Tanzania or jurisdiction of this Court. This fact cannot be brought forward now while it has been known all

along. The situation in this application is totally different from that observed in **Fernandes** case.

In the **Fernandes** case, the defendant, who was leaving in Kenya wanted to travel to India without notifying the other party while there was a deadline in between for something to occur. There's nothing like that in the present application, unlike in the **Fernandes** where the plaintiff's acts could have been easily interpreted as intending to leave the jurisdiction. The plaintiff's intention of leaving without notifying the other party, could be interpreted as absconding or leaving local limits of the jurisdiction of the Court, with the intent to delay or avoid any process of the Court or obstruct or even delay the execution of any decree that might come out of the Court decision.

The powers to arrest before judgment or order deposit for security should, in my opinion not to be exercised lightly and without clear evidence of any misbehavior in the party's acts and conduct, the Court should refrain from acting as prayed.

The provisions of sections 68 (e) and 95 of the CPC, though applicable but I, do not find any valid reason to bring them into application. The provision of Order XXXVI Rule 1 (a) (i) & 3 (1) of the CPC, were sufficient, to argue the application on merits or not. As clearly pointed out in the **Bunda District Council v. Virian**

Tanzania Ltd [2000] T.L.R 385, as to when the provision of section 95 can be brought into play, the Court stated that:

> *"Inherent jurisdiction must be exercised subject to the rule that if the Code does contain specific provisions which will meet the necessities of the case in question, such provisions should be followed and the inherent jurisdiction should not be invoked; it is only when there is no clear provision in the Civil Procedure Code that inherent jurisdiction can be invoked."*

Other cases along the same line are: **Shaku Haji Osman Juma v. Attorney General and Two Others [2000] T.L.R 49 Tanzania Electric Supply Company (TANESCO) v. Independent Power Tanzania Ltd (IPTL) and Others [2000] T.L.R 324.** As intimated earlier I, find the application devoid of merits and could not find any valid reason to resort to the application of section 68 (e) and 95 of the CPC.

For the foregoing, I, proceed to dismiss the application with costs. It is so ordered.

P.S. FIKIRINI

JUDGE

18th JUNE, 2020