

**IN THE HIGH COURT OF UNITED REPUBLIC OF  
TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR-ES-SALAAM**

**MISC.COMMERCIAL CAUSE NO.28 OF 2020**

**IN THE MATTER OF ADJUDICATION AND ARBITRATION  
ACT (CAP.15 R.E.2020)  
AND**

**IN THE MATTER OF TEMPORARY INJUNCTION PENDING  
FINALIZATION OF ADJUDICATION AND ARBITRATION  
PROCEEDINGS IN DISPUTE BETWEEN TANCHI  
BROTHERS CONSTRUCTION COMPANY LTD AND  
ARUSHA URBAN WATER AND SANITATION AUTHORITY**

**BETWEEN**

**TANCHI BROTHERS CONST. COMPANY LTD..PETITIONER**

**VERSUS**

**AMANA BANK LIMITED.....RESPONDENT**

**RULING**

Date of Last Order: 16/6/2020  
Date of this Ruling: 24/8/2020

**NANGELA, J.;**

This ruling is in respect of a petition filed in this Court under a certificate of urgency. The urgency of the matter ensued from an express intention of the Respondent's to honour a demand for payment of an advance payment guarantee valued at **TZS 1,106,450,788.00** and a performance guarantee valued at **TZS 737,633,859.00**. The Respondent

issued the two guarantees in favour of Arusha Urban Water and Sanitation Authority (**AUWSA**), following the signing of a construction contract between the Petitioner and **AUWSA**.

The Petitioner is seeking to restrain the Respondent from proceeding with its intention to honour AUWSA's demands for payment of the guarantees whilst there are pending adjudication and possible subsequent arbitration proceedings between the Petitioner and **AUWSA**. As a matter of practice, advance payment and performance guarantees are issued for the purposes of insulating a client or employer, in the event the contractor fails to fulfil his contractual obligations, and act as an assurance that the contractor will complete that particular project.

The petition at hand was brought under section 2 (3) of *the Judicature and Application of Laws Act (Cap.358 R.E.2002)*, section 3 and section 21 (d) of the *Arbitration Act, Cap.15 [R.E.2002]* and Rule 5 of the *Arbitration Rules, GN No.427 of 1957*, and other enabling provisions of the Law. It was supported by an affidavit of one, *Zhang Hong Quan*.

The Petitioner seeks for the following orders of the Court:

**A: EX PARTE**

- (i) That, this honourable court be pleased to grant temporary injunction restraining the Respondent from effecting payment in relation to advance payment guarantee valued at TZS 1,106,450,788.00 and performance guarantee valued at TZS 737,633,859.00, which were issued to Arusha Urban Water and Sanitation Authority (**AUWSA**) for and on behalf of the Petitioner which guarantees were issued in relation to Construction of **AUWSA Main Office Contract No. AUWSA/AFDB/005/2017** or any other matters in relation

to the recall of the bank guarantees by AUWSA, until the determination of adjudication and subsequent arbitration dispute in relation to the construction of the same building currently pending at the Tanzania Institute of Arbitrators between the Petitioner herein and the Arusha Urban Water and Sanitation Authority is determined to its finality.

**INTER-PARTES**

- (ii) That, this honourable court be pleased to grant temporary injunction restraining the Respondent from effecting payment in relation to advance payment guarantee valued at TZS 1,106,450,788.00 and performance guarantee valued at TZS 737,633,859.00, which were issued to Arusha Urban Water and Sanitation Authority (**AUWSA**) for and on behalf of the Petitioner which guarantees were issued in relation to Construction of **AUWSA Main Office Contract No. AUWSA/AFDB/005/2017** or any other matters in relation to the recall of the bank guarantees by AUWSA, until the determination of adjudication and subsequent arbitration dispute in relation to the construction of the same building currently pending at the Tanzania Institute of Arbitrators between the Petitioner herein and the Arusha Urban Water and Sanitation Authority is determined to its finality.
- (iii) Costs of this Application be provided for.
- (iv) Any other reliefs this honourable court may deem fit and just to grant.

When the petition was called on for orders before me on 16<sup>th</sup> June 2020, the Petitioner was represented by Ms. Mercy Chimtau, learned advocate. The Respondent Bank did not show up in court despite there being evidence that it was properly served with the court documents. I had intended to issue a ruling *ex-parte* but I found it necessary to hear both parties, taking into account a counter affidavit of the Respondent.

Since the Respondent had filed a counter affidavit, when the parties appeared before me on 23<sup>rd</sup> July 2020, the Petitioner prayed for time to file a reply to the counter affidavit. The Court vacated its earlier orders and the submissions by Ms Chimtau and ordered that the application be argued by way of written submissions.

The Petitioner was supposed to file his submission on or before 30<sup>th</sup> July 2020 while the Respondent Bank was required to file its submission on or before 6<sup>th</sup> August 2020. Rejoinder submission (if any) was to be filed on or before 11<sup>th</sup> August 2020. The parties duly filed their written submissions. For her part, Ms. Chimtau submitted that, the application was filed following the Respondent Bank's intention to proceed with payment of an advance payment guarantee valued at **TZS 1,106,450,788.00** and a performance guarantee valued at **TZS 737,633,859.00** which were issued by the Respondent **AUWSA**.

Adopting the affidavit in support of the application, Ms Chimtau submitted that, the construction contract between the Petitioner and AUWSA had required the former to provide guarantees to secure the advance payment which amounted to 10% of the contract price. Similarly, the Petitioner was to secure performance of the contract by issuing a bank guarantee equivalent to 10% of the total value of the contract sum. It is submitted that, the condition was satisfied and the Respondent Bank issued the guarantees after the Petitioner had furnished security equivalent to the sums secured through a separate and independent contract.

Subsequent to the issuance of the guarantees, the Petitioner and AUWSA signed the construction contract and its performance commenced. However, afterwards, the parties' relations went sour and

AUWSA terminated the contract. Upon termination, the Applicant commenced an adjudication proceedings which are still pending before the Tanzania Institute of Arbitrators (**TiArb**). It was at this juncture, however, the Respondent informed the Petitioner about the former's intention to call on the two guarantees following AUWSA's demand thereto.

Ms. Chimtau contended that, the two guarantees were issued subject to the ICC Uniform Rules for Demand Guarantees No.758 (URDG) and the URDG specifically requires any demand under a guarantee to be supported by document clearly documenting the breach of obligations that has been encountered in the related contract. It was argued that, when the Petitioner demanded the Respondent to call upon AUWSA to present such documentations, none were made available. She submitted that, by paying the total sums of the two guarantees to AUWSA, the Petitioner will be required to repay them in full despite the fact that the reason why the contract went sour was AWUSA's failure to meet the contractual terms. She stated that, such a fact was known to the Respondent.

Ms. Chimtau further submitted that, the Petitioner would be indebted to the Respondent for a full amount, as the full effect of the Respondent's act, while the performance of the project had been done commensurate to the performance bond. Ms Chimtau contended that, a court granting injunctive relief will always review the principles for the granting of such a relief which are:

- (i) The existence of a *prima facie* case,
- (ii) Imminent irreparable loss, incapable of being atoned for by way of damages, and

(iii) Balance of convenience.

Expounding on the above principles, Ms. Chimtau submitted that, a *prima facie* case does exist between AUWSA and the Petitioner. She submitted that, the construction contract was prematurely determined by AUWSA without considering relevant factors that caused the delay of the project, which delay was primarily attributed by AUWSA. She argued further that, the Respondent was well aware of the construction contract progress and was also aware of the reasons as to why the project was delayed.

Ms. Chimtau submitted that, sometime in October 2019, the Respondent was in communication with AUWSA. The gist of such communication was a request that AUWSA should extend the time of the construction project to allow the Respondent to extend the guarantees which were then to expire on 22<sup>nd</sup> October 2019. She argued, therefore, that, the Respondent is also aware of the dispute resolution process that is pending to date as AUWSA is trying to run around to avoid it, pushing the Respondent to call upon the guarantees in order for them to avoid the dispute which is largely in the Petitioner's favour.

As regards the imminent irreparable loss which the Petitioner is likely to suffer, and, which is incapable of being atoned for by way of damages, Ms Chimtau contended that, such is of no dispute should the guarantees be recalled. She argued that, the Petitioner will have constructed the project by use of its own funds as AUWSA will have its money fully recovered and will still remain with the building of which its construction had been commenced.

Ms. Chimtau further submitted that, AUWSA will have gained an additional amount of the value of performance guarantee which would

have been payable commensurate to the area of non-performance if any and not the whole amount. She claimed, therefore, that, the Petitioner will be left with an irreparable loss of **TZS 1,106,450,788.00** and **TZS 737,633,859.00**. It was her contention that, AUWSA will not attend the adjudication process should they be able to recover the funds in full and remain with the building which would mean 100% gain for them and a total loss to the Petitioner .

As regards the issue of balance of convenience, it was Ms. Chimtau's submission that, the Petitioner still believes that the same is parallel and tilts to the favour of all parties involved. She submitted that, should the injunctive orders be granted, the Petitioner will not suffer loss, but AUWSA will be forced to settle the on-going dispute through adjudication. Furthermore, she submitted that, the Respondent being the holder of the guarantees, will be able to issue them rightfully on determination of the adjudication dispute between both the Petitioner and AUWSA without aiding loss to the Petitioner or assisting AUWSA to simply get a refund on their money without determination of the rights of both the parties.

Ms Chimtau submitted that, in granting temporary injunction Courts exercise their discretionary powers but the same must be exercised judiciously, looking at the balance of convenience in favour of the party who will suffer the greater inconvenience if the orders sought will be denied. At the instant application, she argued, the Petitioner stands to suffer should the Court refuse to grant the Application. She referred to this Court the Court of Appeal decision, in the Case of **Abdi Ally Salehe v Asca Care Unit Ltd, Ayoub Salehe**

**Chamshama and Kenya Commercial Bank, Civil App. No.3 of 2012, (unreported).**

Ms. Chimtau argued that, in that case, the Court of Appeal of Tanzania granted an order for temporary injunction having stated as hereunder, that:

“From the lengthy and well researched ruling, it is apparent to us that the learned judge went far beyond the scope necessary for the determination of an application for an interim injunction pending the determination of the suit....(It) is elementary that the purpose of an interlocutory injunction is to maintain the status quo until the main suit is finally determined....In deciding application for interim injunction the Court is to see only prima facie case, and not to record finding on the main controversy involved in the suit prejudging issue in the main suit ; in the latter event the order is liable to be set aside. .... In view of the above, we are satisfied that, by prejudging the issue of fraud in the application for temporary injunction, which is also the main contention in the main suit, the High Court improperly exercised its discretion and resulting order refusing to grant a temporary injunction was erroneous and calls for intervention. The High Court had refused to grant temporary injunctive orders based on the fact that the alleged fraud was not proved by the Petitioner whilst the same was in dispute in the main suit.”

To further buttress her submission, Ms Chimtau referred yet to another decision of this Court in the case of **Irene Energy Ltd v Mohamed Said Nkanga, Misc. Comm.Cause No.35 of 2019 (Unreported)**. She contended that, in that case, the Court granted the application on balance of convenience and that the case was similar to the one at hand as the pending adjudication will be subject to determining the rights of the parties.



Ms Chimtau contended that, the issues to be determined is whether AUWSA was right in terminating the contract. Further to that, it was argued that, should AUWSA be allowed to recall the guarantees, then AUWSA will be in a position to proceed with construction while the Petitioner will be left with a huge debt to the point of going bankrupt, and, the adjudication and subsequent arbitration proceedings will be rendered nugatory.

In its submissions, the Respondent Bank adopted its counter affidavit and submitted that, the root cause of the matter was the Advance Payment Guarantee **No.000GUMBI82950001**, and the Performance Guarantee **No.000GUMBI82950002**. Both guarantees were awarded to the Petitioner on 22<sup>nd</sup> October 2018. It was argued that, the guarantees were issued as a condition to the contract being entered by the Petitioner and AUWSA. It was further submitted that, performance of the contract had gone well until when it was terminated sometime on 11<sup>th</sup> December 2019. In its paragraph 9 of the counter affidavit and the written submissions, the Respondent maintained that the Bank is duty bound to honour the guarantees in accordance with the terms and conditions of the said guarantees.

Although in paragraph 7 of the counter affidavit the Respondent conceded to be aware of the Petitioner's request for extension of the guarantee, it was submitted that the Respondent could not proceed to reissue due to a letter issued by AUWSA (**Annexure ABL-1**), **Ref. No.AUWSA/P 10/80/VOLII/48**, demanding payment of the same. It was the Respondent's submission, that efforts to seek for extension was unfruitful because, on 14<sup>th</sup> February 2020, AUWSA issued Demand Notice on the same matter, and yet another was issued on 30<sup>th</sup> March

2020 with intent to sue. The Respondent submitted that, the Petitioner was made aware of the demands hence this application. The Respondent contended, however, that, since AUWSA proceeded with the demand, it is the Respondent's duty to honour the guarantees in accordance with the terms and conditions given.

To strengthen its submission, the Respondent relied on the case of **Edward Owen Engineering Ltd v Barclays Bank International Ltd [1978]QB 159**. In that case , the court held that:

“a bank which gives a performance guarantee **must honor that guarantee according to its terms**. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions. The only exception is when there is a clear fraud which the bank has notice.”

In a brief rejoinder, the Petitioner adopted its reply affidavit to the counter affidavit of the Respondent and restated its submission in chief, that, the guarantees were issued subject to the ICC Uniform Rules for Demand Guarantees No.758. It was contended, therefore, that, no demand without support of documents clearly documenting the breach of obligations encountered by AUWSA as a beneficiary. This, it was contended, is a prerequisite that has never been complied with to enable the bank to issue payments under the guarantees.

It was argued further that, the Respondent can only pay the said sums if the Petitioner had not fulfilled conditions of the Contract which is now a matter in dispute before adjudication following AUWSA's termination of the contract. The Petitioner rejoined further, that, since the matter is pending, the beneficiary should not be allowed to call upon

the guarantee without proof that the Petitioner was in default of the contract entered between the parties.

The Petitioner rejoined further, that, much as it can be viewed that a bank guarantee is a tripartite agreement between the banker, the beneficiary and the customer, the same is a totally different and independent contract from the underlying contract between the Petitioner and AUWSA. The Petitioner contended, however, that, the underlying contract between the Petitioner and AUWSA is extremely important in determining the instance when a default has occurred in order for a bank to be liable to pay such amount.

Ms. Chimtau rejoined that, this has not been done at any instance neither by the Petitioner nor by the AUWSA as the only way to determine the default is by way of adjudication process which is pending. However, as I shall demonstrate later on, a dispute between the Applicant and AUWSA may not necessarily affect the contract of guarantee.

Ms Chimtau distinguished the case of **Edward Owen Engineering Ltd v Barclays Bank International Ltd (supra)**, cited by the Respondent. She argued that, Courts in this jurisdiction have issued injunctive orders as against banks calling upon guarantees. Although she did not support her view with such court decisions, it suffices to note, indeed, that Courts in this jurisdiction have dealt with applications for injunctive orders.

Ms. Chimtau contended further that, in this petition there are two exceptions to the norm where injunction on invocation of unconditional bank guarantee can be granted, i.e., if there is:

- (i) Fraud of egregious nature as to vitiate the entire underlying transaction, of which the bank has noticed;
- (ii) Special equities in the form of preventing irretrievable injustice between parties.

Although Ms. Chimtau tries to distinguish the case of **Edward Owen Engineering Ltd v Barclays Bank International Ltd (supra)** which has been relied upon by the Respondent Bank, in her submission she also concedes that the issue of fraud does not exist in this case. However, in support of the ground (ii) of the exceptions cited above, Ms. Chimtau referred to this Court and relied on the case of **U.P State Sugar Corporation v Sumac International Ltd (1997) 1 SCC 568**. This case has pointed out the two exceptional grounds above in (i) and (ii) as relevant to the granting of an injunction where a bank guarantee is involved.

Ms. Chimtau contended that, the circumstances of this instant case are of a very exceptional nature as the Petitioner will have utilized the advance payment for construction of part of the building and the bank in paying the guarantees and will have given the beneficiary an amount more so equivalent to the value of the building, a fact which should not be allowed. Ms Chimtau argued that, the beneficiaries will stand to gain because they can call upon the guarantees and the Respondent is required to pay on demand. She rejoined further that, this would be proper had the Petitioner completely failed to perform the project. In view of that, she submitted that, the problem is not failure to complete but rather failure to accomplish the project within the agreed period due to AUWSA's change of site.

In a further rejoinder, Ms Chimtau submitted that, this Court should make a finding that there are exceptional circumstances in this case which should be differentiated from other matters which will obviously result in the irretrievable harm or injustice to the Petitioner. She further submitted that, both securities had expired as of 22<sup>nd</sup> day of October 2019 and were issued conditionally upon any demand for payment under the guarantees which must have been received before the expiry date. It was also her contention that the demand for payment was received after the expiry of the guarantees which were not extended making the same to be of no value upon their expiry and hence cannot be recalled. She therefore called upon this Court to make a determination in favour of the Petitioner.

Having summarised the submissions from both parties, the issue which I am confronted with is ***whether it is appropriate, in the circumstances of this case, to grant the injunctive reliefs sought by the Petitioner.*** Before I address this issue I find it pertinent to state my views regarding the submission, that, since the guarantees were issued subject to the ICC URDG rules, supporting documents should have been availed to the Petitioner.

In my view, the demand letter attached in the Respondent's counter affidavit as **Annexure ABL-I**, was a sufficient document which discharges the obligations under the ICC Uniform Rules for Demand Guarantees No.758 (URDG) requirements. This is due to the fact that the demand letters by AUWSA discloses the grounds upon which the demand was being made by AUWSA.

Turning back to the issue whether it is appropriate to grant the prayers sought in this petition, let me, albeit briefly, restate the legal

principles governing applications for interim reliefs. It is a settled law that an injunction is an equitable and discretionary remedy. Any decision to grant or refuse to grant such a relief involves exercise of the Court's discretion. In that regard, the law calls for judicious exercise of the Court's power.

As regards the rationale for granting such an equitable relief, it is agreeable, as it was authoritatively stated in **Abdi Ally Salehe v Asca Care Unit Ltd, Ayoub Salehe Chamshama and Kenya Commercial Bank** (supra), that, an interlocutory injunction is meant to preserve the subject in controversy or maintain the *status quo* until the questions of rights involved in another suit (main suit) is finally determined. Since the court is governed by the principles of equity, it will, among others things, look at the conduct of the Petitioner seeking the injunctive relief. The Petitioner must establish that he/she has a legal right and there is invasion to it or will suffer irreparable detriments if the Court will not intervene.

To authoritatively expound on the above views, this Court, Mapigano, J., (as he then was) stated in the case of **T.A. Kaare v General Manager Mara Cooperative Union (1984) Ltd [1987] TLR 17 (HC)**, that, there are certain conditions which must be fulfilled when a court is called upon to grant an injunctive relief. The Court had the following to say, that:

“the power to grant such an application has always been discretionary, to be exercised judicially by the application of certain well - settled principles. The first such governing principle, as indicated supra, is that the court should consider whether there is a bona fide contest in between the parties. Secondly, it should consider on which side, in the event of the plaintiff's

success, will be the balance of inconvenience if the injunction does not issue, ..... Thirdly, the court should consider whether there is an occasion to protect either of the parties from the species of injury known as "irreparable" before his right can be established, keeping it in mind that by "irreparable injury" it is not meant that there must be no physical possibility of repairing the injury but merely that the injury would be material, i.e., one that could not be adequately remedied by damages..”

The law relating to injunctions and bank guarantees is also well settled. This was correctly stated in the case the case of **Edward Owen Engineering Ltd v Barclays Bank International Ltd (supra)** cited by the Respondent herein. In the case, the Court made it clear that, where an injunctive relief involves a bank guarantee, the applicable principle is that, there cannot be an injunction against a bank from paying the amounts covered under an unconditional bank guarantee unless it has been established that there has been fraud. In other words, the bank which gives a performance guarantee must honor that guarantee according to its terms. It must pay according to its guarantee, on demand if so stipulated, without proof or conditions.

In the case of **U.P. Co-Operative Federation Ltd vs Singh Consultants & Engineers (P), [1988] AIR 2239**, the Supreme Court of India was of the same view as above, adding a further exception based on the ground of irretrievable injustice. This is the same as the ‘irreparable injury’ stated by Mapigano, J., (as he then was) in the above cited case of **T.A. Kaare v General Manager Mara Cooperative Union (1984) Ltd (supra)**.

In that case of **U.P. Co-Operative Federation Ltd (supra)**, the Appellant entered into a contract with the Respondent for the supply and installation of a manufacturing plant. The contract bond had contemplated

guaranteed performance of the work at various stages in accordance with the time schedule prescribed and a date for completion and commissioning of the plant after trial run.

According to the appellant, time factor was essentially and indisputably the essence of the contract. The Respondent was to furnish a performance bank guarantee and another bank guarantee as security for the monies advanced by the appellant to the respondent for undertaking the work. The two guarantees, as well as the contract bond, entitled the appellant to invoke them and call for their realisation and encashment on the failure of the respondent to perform the obligations.

It happened that the Respondent defaulted at various stages and finally failed to complete the work within the stipulated time. The appellant invoked the two guarantees one after the other, and thereafter proceeded to have the plant completed. The Respondent filed an application for an injunction, restraining the appellant from realising and encashing the bank guarantees. The matter went up to the Spreme Court which had the following to say:

“...[T]he learned Judge has proceeded on the basis that this was not an injunction sought against the bank but this was the injunction sought against the appellant. But the net effect of the injunction is to restrain the bank from performing the bank guarantee. That cannot be done. One cannot do indirectly what one is not free to do directly. But a maltreated man in such circumstances is not remediless. The respondent was not to suffer any injustice which was irretrievable. The respondent can sue the appellant for damages. In this case there cannot be any basis for apprehension that irretrievable damages would be caused if any. I am of the opinion that this is not a case in which injunction should be granted. An irrevocable commitment either



in the form of confirmed bank guarantee or irrevocable letter of credit cannot be interfered with except in case of fraud or in case of question of apprehension of irretrievable injustice has been made out. This is the well-settled principle of the law ....”

Reverting to the case at hand, the Petitioner has implored this honourable court to grant a temporary injunction restraining the Respondent Bank from effecting payment in relation to the two guarantees valued at **TZS 1,106,450,788.00** and **TZS 737,633,859.00**. The two guarantees were issued to AUWSA for and on behalf of the Petitioner , in relation to AUWSA Main Office Contract **No. AUWSA/AFDB/005/2017**. The contract was terminated and AUWSA has issued a demand to the Respondent bank that issued an intention to call for the realisation and encashment of the two guarantees.

In both affidavits (main and in reply) and the submissions filed by the Petitioner, it has been contended that it will be unjust for the Respondent to proceed with the repayment of the guarantees to AUWSA while the issues pertaining to the contract which gave rise to the issuance of the two guarantees, are yet to be determined by the **TiArb**. The Petitioner contends that, if the guarantees payments are honoured, the Petitioner will suffer irreparable loss because AUWSA will have no reason to pursue the adjudication route and subsequent arbitration. However, I have a different position. As it was correctly stated in the case of **U.P. Co-Operative Federation Ltd vs Singh Consultants & Engineers (P) (supra)**, a “*maltreated man in such circumstances is not remedyless.*”

In this instant case, I hold a similar view that, the Petitioner can still sue AUWSA for damages on the basis of their contractual relations. In line with the existing authorities, which I have referred to herein above,

therefore, I find that it will be inappropriate to restrain the bank from performing its obligations under the bank guarantees.

In this case, it has been conceded that there is no issue of fraud, and, the only ground which the Petitioner is relying on is that of irretrievable (irreparable) loss. In my view, since the Petitioner's doors for remedy to any losses that might have been suffered under its contract with AUWSA has not been closed, there cannot be any basis for apprehension that irretrievable damages would be caused if this application is refused.

Ordinarily, when it comes to restraining banks from performing their obligations in relation to banking guarantees, courts have largely been reluctant to encumber the enforcement of unconditional and irrevocable bank guarantees. The rationale for that reluctance is that, such guarantees are divorced from the underlying contract between its customer and the third-party beneficiary. They constitute, as rightly conceded by the Petitioner, a totally different and independent contract from the underlying contract between the Petitioner and AUWSA.

Consequently, as the Court in the English case of **Hamzeh Melas & Sons v British Imex Industries Ltd.**, [1958] 2 Q.B .D. 127, emphasized, the encashment of bank guarantees “*must be allowed to be honoured free from interference by the courts*”, failing which, as it was stated in **State of Maharashtra v National Construction Co.**, (1996) 1 SCC 735, “*trust in internal and international commerce would be irreparably damaged.*”

It is on the basis of the above reasoning, this Court makes a finding that, since the current application is intending to restrain the Respondent Bank from performing its obligations under the contract of guarantee,

which is separate from the underlying contract between the Petitioner and AUWSA, the current application cannot be granted. This is the position even if there may be a *prima facie* underlying case between the Petitioner and AUWSA.

Besides, it also my views that the balance of convenience does not as well indicate that the Petitioner will be gravely inconvenienced because there is no evidence that the petitioner is remedyless. I find it be a futile and an unsubstantiated view to hold that, if this petition is granted AUWSA will be forced to settle the on-going dispute through adjudication.

In my view, since the underlying contract between the Petitioner and AUWSA has provided for the means through which the parties are to settle their disputes, the principles governing contractual relations and choice of forum, in case of a dispute between parties to a contract, will have to apply. No where has it been stated that such principles are barred from their application. If AUWSA breached the the underlying contract, a remedy for such will definitely be available from the appropriate forums.

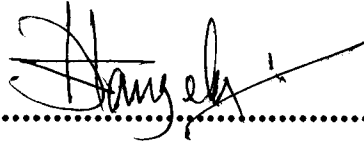
It is also my finding that, this Court has not been convinced that there has been a demonstration on the part of the Petitioner, of the sufficient basis for the apprehension that irretrievable damages would ensue if this application is refused. As I stated earlier herein, the Petitioner can still sue AUWSA for damages under their underlying contract.

In the upshot, the Court settles for the following orders:

**I. THAT**, the prayers sought by the Petitioner are hereby denied.

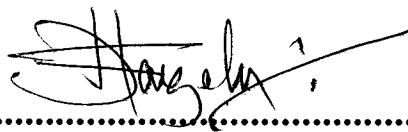
2. **THAT**, the petition is hereby dismissed.
3. **THAT**, costs should follow the event.

*It is so ordered.*



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**DEO JOHN NANGELA**  
**JUDGE,**  
**High Court of the United Republic of Tanzania (Commercial**  
**Division)**  
**24 / 08 /2020**

Ruling delivered on this 24<sup>th</sup> day of August 2020, in the presence of Ms. Levina Muro, Advocate for the Petitioner and Mr. Fahad Hafif, Advocate for the Respondent.



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**DEO JOHN NANGELA**  
**JUDGE**  
**High Court of the United Republic of Tanzania (Commercial**  
**Division)**  
**24 / 08 /2020**