IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

MISC. CIVIL APPLICATION NO. 22 OF 2020

YUKO'S ENTERPRISES (EA) LIMITED ..... APPLICANT

VERSUS

KTMI COMPANY LIMITED ..... RESPONDENT

RULING

16th April, & 4th May, 2020

ISMAIL, J.

This ruling is in respect of an application, filed in this Court by the Applicant, substantively for an order compelling the respondent to show cause as to why it should not furnish security for its appearance in Court. Alternatively, the Court should order the respondent to deposit a sum that will constitute the value of the subject matter, or properties whose value will sufficiently settle the claim.

The application is made by way of a Chamber Summons, preferred under the provisions of Order XXXVI Rule 1 of the Civil Procedure Code,

Cap. 33 R.E. 2002 (CPC). It is supported by the affidavit of **Magira Magoma Masegesa**, the applicant's Managing Director, and it sets out grounds on which the application is based.

For a quick appreciation of the matter that bred the present application, it is apt that a brief background of the matter, as gathered from the pleadings, be stated. The parties hereto entered into two joint venture agreements that bid a tender for rehabilitation of two vessels known as MV. Victoria and MV. Butiama. The rehabilitation work was to be performed in Mwanza. Under these agreements, the applicant was designated as a partner while the respondent was to become a lead partner. Subsequent thereto, the parties hereto were awarded the tender for rehabilitation of the vessels and signed contracts in respect thereof. Value of the contracts were TZS.22, 712,098,200/= exclusive of VAT, and TZS. 4,897,640,000/= for MV. Victoria and MV. Butiama, respectively. To effectuate what was agreed, the parties entered into a Memorandum of Understanding (MoU), executed on 9th of August, 2017. Under the MoU, the applicant was entitled to a commission, to the tune of US$ 500,000.00, whose disbursement was staggered in two instalments with each of them payable within seven days from the date of release of the contract price

payments. The commission constituted the applicant's consideration for facilitating bidding and eventual award of the tender. Midway through the implementation of the project, a misunderstanding between the parties arose. The applicant alleged that the respondent had reneged on the terms of the JVA and the MoU by, *inter alia*, sub-letting, to third parties, some of the assignments meant for the applicant. The respondent denied this allegation, claiming that only one sub-contractor had been engaged, and this is an international manufacturer of engines for inland waterway ships. The latter had been contracted to manufacture, install, test and commission the engines. Efforts to have the differences resolved amicably failed. This failure culminated into the applicant's decision to institute proceedings which are pending in this Court and on which this application hinges. The applicant's claim is to the tune of US$ 857,606.00 which is equivalent to TZS. 1,956,199,286/=, constituting loss of income and profit.

In the pendency of the suit and, under a certificate of urgency, the applicant has moved the Court to grant orders stated above. The basis for the application is what is averred in paragraphs 11, 12 and 13 of the supporting affidavit. These paragraphs state as follows:

"11. THAT, upon filing the civil suit referred herein above in paragraph 10, it has come into our knowledge that the project in dispute has been completed for over 95 percent; and upon its completion in fullest, the Respondent will handed (sic) over the project to the employer. Copy of the monthly progress report of 23rd January, 2020 for rehabilitation of the vessel is attached herewith and marked as Annexure YUKO'S-7.

12. THAT, upon our further follows (sic) ups to the relevant authority, we have noted that, this is the only project that the Respondent is executing here in Tanzania and has no any immovable property in the country, thus, there is probability that she will leave the country soon after completion of the project and handing over the same to the Employer.

13. THAT, in the circumstances it will be just and equitable that this Honourable Court grant this application otherwise there is a danger that our company will suffer irreparably as will be obstructed and/or delayed in the execution of any decree that may be passed against the Respondent."

The respondent's opposition to the application was formidable. Through a counter-affidavit sworn by Chang Hwan Lee, the Country Manager, the respondent took a serious exception to the applicant's averments. Denying the allegation of sub-contracting part of their functions to local sub-contractors, the respondent contended that the only sub-contracting done was in respect of manufacturing, installation, testing and commissioning of engines for the vessels, and that such function was sub-let to sTX Engine of South Korea which is an international sub-contractor. The respondent averred further that applicant is still free to execute the

sub-contracted works and employ any local expert or hire a dry dock or yard from the applicant. The respondent's further averment is that, whilst an opportunity was granted for the applicant to provide local experts, only one expert was offered and serves the respondent. With respect to payments allegedly due, the respondent stated in paragraphs 6 through to 9 as follows:

> *"6. That the contents of paragraph 9 of the affidavit are denied and the applicant is put to strict proof thereof. The stated sum of USD 500,000 is the remuneration of the Applicant as provided for in paragraph V of the Memorandum of Understanding upon executing its obligations thereat.*
>
> *I further state that despite doing nothing, as it lacks capacity, knowledge and manpower, the respondent paid USD 200,000 to the applicant being 40% and further USD 85,000 thus a total of USD 285,000 of the commission as provided for under paragraph vi of the Memorandum of Understanding. That for the paid amount the Applicant has refused and/or neglected to issue an EFD receipt. The applicant will pay the remaining amount as provided for in paragraphs Vii of the Memorandum of Understanding and upon furnished EFD receipt for the advanced payment.*
>
> *Correspondence on the above and proof of payment of the above mentioned USD 200,000 are annexed hereto collectively marked "KTMI-1" and forms part of this affidavit.*
>
> *7. That the contents of paragraph 10 of the affidavit are denied and the applicant is put to strict proof thereof, save for dependency of Civil Case No. 03 of 2020. The Applicant is not entitled to the claimed amount of USD 857,606 equivalent to TZS. 1,956,199,286 as alleged or at all. That in*

the absence of any contractual provision for the alleged sum, the allegation remains baseless. Any pending amount per memorandum of understanding shall be honoured as per the said document and upon receipt of EFD for prior payments.

8. *That the contents of paragraph 12 of the affidavit are denied and the applicant is put to strict proof thereof. That apart from the unpaid substantial contractual amount from the employer including 10% bank performance guarantee bond.*

   Further for any payment to be made a certificate must be executed by Eng. Tumaini Mugasa, the representative of the Applicant, who is at the site. Further there is in place a Bank performance guarantee bond amounting to 10% of the project amount. Thus the foregoing there is sufficient security contrary to what is stated in the said affidavit.

9. *That the contents of paragraph 13 of the affidavit are denied and the applicants are put to strict proof thereof. Further granting the said order will amount to locking in project finance which will have a negative impact on this strategic Government project based on baseless an un-contractual claims. The foregoing is more so considering existence of a Bank performance guarantee bond amounting to 10% of the project amount that will continue to be in place during the 2 year defect liability period.*

   Public interest on the part of the vessel owner, the Government of Tanzania demand otherwise. That more so is the fact that the remuneration provided for under the Memorandum of Understanding has been honoured and shall be honoured as stated hereinabove.

When the matter came up for orders, Mr. Franco Mahena, learned advocate represented the applicant, while the respondent enlisted the services of Mr. Deogratias Ringia, learned counsel. To expedite disposal of

the matter, the Court acceded to the counsel's prayer for disposing of this matter by way of written submissions. Accordingly, a schedule was drawn for filing of the submissions and the same was duly complied with.

Submitting in support of the application, Mr. Mahena revisited the applicant's deposition, insisting that the respondent owes the applicant the sum of US$ 857,606. He contended that the respondent's presence in Tanzania is nearing the end, with no fixed assets to fall on, should the applicant win the claim that is pending in this Court. The applicant submitted that there is a reasonable suspicion that the plaintiff may be obstructed or delayed in execution a decree that may be passed against the defendant (respondent), unless an order is issued to call upon it to show cause as to why it should not furnish security, in cash or property. As averred in the affidavit, the basis for the contention is that the work for which the respondent is contracted is complete by 95%, meaning that upon completion of this contractual obligation, the respondent will leave the country, leaving behind nothing to fall on. The learned counsel argued that since the contract period was 12 months, counting from 3rd September, 2018, it is clear that that term came to an end in August, 2019. He contended that even if it is assumed that an extension thereto was

granted, such extension would not exceed half of the contract period. Mr. Mahena invited the Court to be persuaded by the Ugandan case of ***Makubuya Enock Willy t/a Pollaplast v. Songdoh Films (U) and Another***, Misc. Application No. 321 of 2018, in which belief of reasonable or probable cause was deemed to be sufficient to move the court to grant orders sought by the applicant.

On the respondent's averment that there is still a claim of Performance Guarantee Bond which constitutes 10%, the learned counsel fervently urged the Court to decline the temptation, holding the view that the sum constituting the Bond cannot be recalled and serve for any other purpose than that of ensuring that performance of the contract is consistent with terms and conditions of the contract. The learned counsel held the view, as well, that the Performance Bond is a retention amount which would also take care of the Defects Liability Period, in case the respondent fails to make good the defects which would be detected during the first 18 months succeeding the handing over. On the impact that the prayer will have on the public interest, Mr. Mahena held the view that none will be felt by the public, taking into account that the level of performance achieved meant that the project was substantially complete and due for

handing over. The counsel wound up by contending that the applicant would stand to suffer an irreparable loss if the prayers sought are not granted.

Submitting in rebuttal of the applicant's contention, Mr. Ringia began by picking fault from the applicant's application and its supporting submission. He contended that the application is nothing but a misconception, since the provisions under which the application is preferred only apply in applications for injunction and interlocutory orders, or where there is a property owned by the respondent and there is proof that the latter intends to remove it from the court's jurisdiction with the intention of defrauding its creditors. Mr. Ringia submitted that none of such property is in existence. With respect to cash deposit, the learned counsel held the view that the same is yet to fall into the respondent's hands from the government of the United Republic of Tanzania. As such, it cannot be held that the respondent is the applicant's creditor to qualify for orders sought under the cited provisions of the law. With respect to propriety of the citation, the learned counsel asserted that the applicant ought to have applied section 68 (a) and (b) of the CPC, as the appropriate enabling provision, in line with the holding in the case of ***Sea Saigon Shipping***

Limited v. Mohamed Enterprises (T) Limited, CAT (DSM)-Civil Appeal No. 37 of 2005 (unreported).

With respect to the respondent's residence status, Mr. Ringia contended that the respondent had complied with the provisions of the Companies Act, Cap. 2002 R.E. 2002, and is a registered tax payer. This means, in his view, that the respondent's ship rehabilitation activities are local operations with its registered branch office in Mwanza. He holds the view that the fear of not honouring its legal obligations is imaginary. On the quantum sought to be deposited, Mr. Ringia ferociously contented that the same is suspect since the applicant has not given, on oath, the basis on which it was arrived. Furthermore, no workings have been provided to demonstrate, with mathematical precision, which of the sums constitute the alleged profit and which of those are on the income side. The respondent would want me hear that there is a performance bond worth 10% of the contract price, translating to TZS. 2,760,974,320/=, that was to be retained by the employer for 18 months, and he was of the view that this sum far exceeds the subject matter value. It was the counsel's assertion that the defects liability period is in excess of the longevity of the order sought to be granted whose maximum lifespan is 12 months. He

finds nothing to suggest that the applicant will be exposed to any risk. The learned counsel took the view that payments effected to the respondent are done with full involvement of a Mr. Mugasa who serves as the applicant's representative in the respondent's activities. The respondent relied on the ***Makubuya Enock Willy*** and ***Chandrika Prasad Singh*** (supra) to underscore his contention. The respondent did not spare the applicant from blemishes. Applying the principle of equity, the respondent's counsel contended that the applicant had committed acts of misrepresentation and non-disclosure on a number of areas. These were: failure to exhibit two payments aggregating US$ 285,000.00, paid consistent with the MoU. It is contended that these payments were not reflected in the supporting affidavit. The respondent alleges failure to receipt the said sum of US$ 285,000.00, contrary to the provisions of the Income Tax (Electronic Fiscal Devices) Regulations, 2012, which obligate that receipts be issued against every daily transaction conducted. The respondent read a mischief on the applicant's conduct. The respondent further imputed acts of misrepresentation with respect to the applicant's capacity and ability to undertake obligations that it committed under the MoU and the JVA, including provision of local materials, local experts and

casual labourers, and non-possession of dry port dock and shipbuilding yard. This necessitated the respondent's decision to engage international sub-contractors. The respondent further contended that, in the absence of local capacity, resort to international sub-contractors is an inescapable norm in ship building industry as was the case here. The respondent shifted the blemish to the applicant, alleging that failure to demonstrate ability meant that it had to resort to sub-contracting and hiring of some of the functions and facilities.

Mr. Ringia was strenuously of the view that grant of the orders sought is not dependent on the pendency of the suit alone. Rather, it is grantable on demonstration of a reasonable probability that execution of the decree that may be passed is likely to be delayed or obstructed. He held the view that not every case in which the respondent is a foreign company with no property in the country should be subjected to this kind of a process. He sought to distinguish the Ugandan case with the instant case as none of the conditions in that case is prevalent in the present application.

On the orders sought, the respondent contends that the respondent is still contracted to perform its work for 24 more months, and that the

maximum a case can last in court is 24 months. By his reckoning, the learned counsel held the view that this case is one which can be disposed of within ten months, meaning that the respondent will still be around. The respondent reiterated what it has averred in the counter-affidavit by contending that the pending application is intended to stifle the respondent's effort and has adverse impact on the public at large.

The learned counsel fortified his contention that the discretionary powers of the Court to grant the orders are only invoked where it is clear that the conduct of the defendant is *malafides*. In this respect, he cited the case of ***Hamali Co-operative Labour Contract Society Ltd v. Venkatiah LQ*** (1981) HC 1208. He held the view that no evidence has been adduced by the applicant to that effect. The learned counsel further contended that grant of the orders of attachment before judgment is fraught with serious dangers as it places the defendant in a disadvantageous position before the suit is heard. He buttressed his contention by citing an Indian case of ***V.K. Nataraja Gounder v. S.A. Bangaru Reddiar AIR*** (1965) Madd 212.

He prayed that the application be dismissed with costs.

The applicant's rejoinder was swift and equally powerful. With respect to the citation of the enabling provisions of the law, it contended that insofar as security of appearance is concerned, the provisions cited are the enabling provisions and they have nothing to do with temporary injunction. The applicant argued that in applications like this, the requirement is existence of the suit and demonstration that the respondent is intending to leave in circumstances which afford a reasonable probability that such departure will obstruct or delay execution of a decree that may be passed against the respondent. He cited the Court's holding in ***Alliance One Tobacco Tanzania Limited & Another v. Mwajuma Hamisi & Another***, HC-Civil Application No. 803 of 2018 (unreported), in which it was held that where a wrong citation is made but the court is vested with jurisdiction to grant the prayer then the omission can be ignored by inserting the appropriate provision.

On lack of accounts and computation of the claim, the applicant is of the view that the argument is premature at this stage, and with no bearing on the application. Regarding performance guarantee and defects liability period, the applicant maintained its stance that money under the performance bond isn't available for any other use serve for contractual

purposes, while the period of defects liability is 18 months and it does not require that the respondent should be physically around. The applicant held the view that the defects liability period cannot be used as a security for appearance. The applicant contended that the rehabilitation of the vessels was, by December, 2019, 95% complete. With respect to misrepresentation, the applicant viciously denied that there was any such representation in the JVA or the MoU. It was the applicant's assertion that the respondent breached the terms of the agreements when the respondent sub-let some of the functions. In winding up, the applicant implored the Court to grant the application.

From these voluminous, powerful and resourceful submissions by the counsel, the profound issue for resolution is whether the applicant has laid to this Court, adequate materials to make it believe that circumstances of the case are such that the respondent/defendant is about to remove himself from the jurisdiction of the Court. In attempting to resolve this, I will choose to avoid most of the counsel's submissions which I believe are the subject for another day, in the sense that they do not have relevance to the issue in contention. Such issues include those that touch on breach

of contract, computation of the sum allegedly owing, and allegations of concealment and misrepresentation.

As stated earlier on, the applicant's quest is to have this Court grant an order for furnishing security for the respondent's appearance in respect of the pending suit or, as an alternative, an order for deposit of a sum constituting the value of the subject matter of the suit. The applicant is convinced that circumstances of this case warrant issuance of the prayers made.

Before I dwell onto the substance of the application, there is this small matter of the propriety or otherwise of the provisions under which this application is preferred. This argument was raised by the counsel for the respondent. The contention is that this provision caters for grant of temporary injunctions and other interlocutory orders. The counsel has been unduly economical with particulars relating to the latter. If the counsel's intention is to exclude the orders prayed in the present application from the list of interlocutory orders, then the whole of that contention is profoundly misconceived. Temporary injunctions and other interlocutory orders are reliefs which are sought under the provisions of Order XXXVII of the CPC and not Order XXXVI of the CPC, as erroneously contended by the

learned counsel. On the applicant's failure or omission to cite the provisions of section 68 of the CPC as one of the enabling provisions, I am of the considered view that the Court of Appeal's decision in the ***Sea Saigon Shipping Limited*** (supra) resolves this matter with an admirable ease. At page 27 the superior Bench held as hereunder:

> *"Since Section 68 merely summaries the general powers of the court in regard to interlocutory proceedings, whoever applies for a specific order must cite the order under which he is applying for. For example, if he is applying for attachment before judgment he must cite Order XXXVI and the appropriate rule. If he is applying for an injunction order or for any such other interlocutory orders, he must cite the order applicable to injunction or other interlocutory orders, that is, Order XXXVII, and appropriate rule."*

What is discernible from this excerpt is that, while section 68 is a supplemental proceeding that provides high level details, it is the provisions of Order XXXVI, and rules that fall under it, which drive the procedure for realization of the remedy provided thereunder. In this case, section 68 only plays second fiddle by serving as an 'icing on a cake' to the nitty-gritty details provided by Order XXXVI. It follows, therefore, that non-citation of section 68 as one of the enabling provisions would not be of a devastating effect as it would, if Order XXXVI was not brought into equation. I find the omission tolerable and of less effect. It does not have

the effect of rendering the application incompetent. In the result, I choose to disregard this contention.

Having disposed of this matter, I revert back to the main battleground area in this application. It is trite law that in an application preferred by way of chamber application merit or lack of it is gauged by glancing through its accompanying affidavit. The rationale is not hard to find. It is mainly because affidavits are evidence, unlike submissions from the bar which serve as narrations and legal arguments that complement the sworn depositions [See: ***The Registered Trustees of the Archdiocese of Dar es Salaam v. The Chairman Bunju Village and 11 Others***, Civil Appeal No. 147 of 2006 (unreported)].

As I alluded to earlier on, the applicant's prayers are predicated on the assertions made in paragraphs 11 through to 13, the contents of which have been reproduced above. The main reason cited as the basis is that work for which the respondent was contracted and keeps it in the country is nearly complete, and that completion of this work will effectively signal the end of the respondent's stay in the country. This contention is fiercely opposed by the respondent who argues that, even if the contract is at the tail end of implementation, there is still a timeframe under which the

respondent will have to hang around and remedy defects that there may be. This is called defects liability period. The respondent contends that this will take about 24 months from the date the project is commissioned. The applicant has poured cold water on this assertion, holding that such period does not require the respondent's physical presence in the country. While these two versions remain contentious, what is important here is whether evidence has been adduced to afford a reasonable probability that the applicant may be obstructed or delayed in the execution of the decree.

Let me preface my analysis by stating that the law, as it currently obtains, is to the effect that orders for furnishing security for appearance to be held in deposit by the Court is essentially an attachment before judgment. Grant of this order is discretionary upon the plaintiff's proof, by affidavit, that the defendant is about to abscond or leave this jurisdiction or has disposed of or removed his property. It is upon reading the affidavit and counter affidavit, that the court's discretion is called into action to decide this or that way. Mightily important, as well, is the fact that an application for these orders may be made at any stage of the suit, meaning that the Court is not under any mandatory obligation to decide on the application at the earliest stage of the proceedings. Hearing of the main

suit can still proceed and decide the application on a subsequent date or at a later stage of the trial proceedings. As such, the application doesn't have to stand in the way of the main case, at the beginning, unless the fear of abscondment is imminent. Worth of a note, as well, is the fact that this is a remedy which should be resorted to and granted sparingly and only when the plaintiff is likely to win the case.

This position was succinctly illustrated in the Indian case of *J. Balaji v. RC Subramanyam* C.R.P. No. 4571 of 2008 dt. 19-12-2008, from which the following excerpt has been extracted:

> *"An order of attachment before judgment affects the right of the owner of the property to deal with the same even before any verdict is available against him as regards the claim of the plaintiff.* ***Such an order is not to be passed merely for the asking or in the routine manner. There must be cogent, prima facie materials to lead the Court to the conclusion that there have been attempts by the defendant to dispose of the property with a view to defeat the decree. Mere satisfaction that there has been an attempt to dispose of the property is in itself not sufficient and there must be further conclusion, again prima facie, that the attempt to alienate is to delay or defeat the decree. For reaching such satisfaction, there has to be before the Court some tangible material than the mere statement without giving any particulars and without disclosing the source of the information*** *of no third party affidavit as the second affidavit was*

only of the Clerk of the respondent-firm who was under its control as an employee. The affidavits in themselves do not disclose as to when an attempt was made to alienate, what type of alienation was intended to be made and to whom the alienation was being desired to be made and who gave such information."

Illustrating the scope and application of Order XXXVIII of the Indian Code of Civil Procedure, 1908, which is *imparimateria* with Order XXXVI Rule 1 of the CPC, Sarkar's Law of Civil Procedure, 8th ed., Vol. 2, 1992 (Reprint), narrowed down the key pre-conditions for grant of this discretionary order through the following remarks, at p. 1403:

"The court has to see whether the suit is bona fide [Probodh v. Dowey, 14C 695, 702]. It should be satisfied that (1) plaintiff's cause of action is prima facie unimpeachable and (2) ***that there are adequate materials to believe that unless the power is exercised the defendant will remove himself from the jurisdiction*** *[Seth v. Purushottam, 50 M 27: A 1926 M 584]..."*

What is incontrovertible is the fact that the respondent is a foreign company whose singular undertaking and basis for its presence in the country is execution of the contract for construction of ships. This means that, its presence in the country is activity based, and dependent upon the subsistence of the activity it was contracted to undertake. The question that arises at this point is, can it be said that its departure is imminent and intended to obstruct or delay execution of a decree that may be passed?

My unfleeting review of the affidavit reveals that the imminence in leaving the country is real and not imaginary. By providing what appears to be a status of the project implementation which, by the applicant's reckoning, it ought to be complete by May, 2020, the applicant has shown that the respondent's departure would be ripe the moment the project is handedover. This, though, is a fact that is not independently verified at least by the employer of the project, the ultimate consumer of the services. As it were, this contention has been flatly denied by the respondent. This being a contractual obligation that has a definite start and end date, including some room for flexibility by way of extension, it is fair to conclude that the durations stated in the contracts i.e. 12 and 11 months, respectively, plus extensions, if any, are the guiding tool in assessing the longevity of the respondent's stay in the country. Thus, since the contracts were executed on the 3rd of September, 2018, and were to run for 12 and 11 months, respectively and, if the applicant's contention is anything to go by, the May, 2020 hand over date represents an extension to the durations set out in the contracts. So far, nothing has been submitted to support the contention that there was an extension. The respondent's only contention is that there is still a defects liability period to factor in. I find the

respondent's contention flawed, since the defects liability period is what it is. It is simply *"a period of time following practical completion during which a contractor remains liable under the building contract for the dealing with any defects which become apparent."* It is also known as a rectification period or defects correction period. (See: Article by Iwan Jenkins: ***hughjames.com***). Thus, while the respondent will be liable to remedy any defects that may become apparent post implementation of the contract, it is not correct, as rightly contended by the applicant, to argue that such period constitutes part of the contractual period. The respondent will only be liable if there are defects to remedy. That would not require that the respondent hangs around for all that period. The respondent may, as well, sublet activities falling under the defects liability period to whomsoever it may choose, and remedy the defects without necessarily having to send any of its personnel to the country. This leaves the remainder of the contract period as the only duration on which to gauge the imminence of the respondent's departure. It, quite realistically, indicates that not much is left, in terms of time, before the respondent winds down and leaves the country. What stands between the respondent and departure is the completion of the remainder of the works, quantified

to constitute 5% of the total work as at January, 2020. This convinces me to hold that the respondent's departure is imminently due and looming.

While the departure is a real possibility in not too distant a future, what is still to be resolved is whether such departure is intended to obstruct or delay the applicant's efforts to execute the decree should the Court grant the prayers in the pending suit. I hasten to answer this question in the negative. Nothing has been laid to the fore to convince this Court that, other than the respondent's inevitable and expected removal from the Court's jurisdiction, arising out of completion of the contracted duties, a connection exists between such removal and the pending court proceedings. As such, nothing has been adduced by the applicant to create any semblance of cogency that the respondent desires that execution of the decree which may be passed be stifled or delayed. It is merely the applicant's own apprehension and speculation which lacks credence worth believing in. I would hold, as I hereby do, that circumstances falling under the provisions of Rule 1 (b) of Order XXXVI of the CPC are not apparent in the present application.

While the applicant's bid to convince the Court that the respondent harbours an ill intent of removing itself from the Court's jurisdiction has

failed to resonate, I am not oblivious to the fact that the respondent's unblemished but imminent departure will pose some difficulties in having the respondent enter appearance or even honour the decree that may be passed in the applicant's favour. This view has also taken into account the fact that, whilst the law allows execution of this Court's decrees in foreign countries, realization of this is dependent on the legal regime that exists in the particular country, and it is often riddled with profound challenges, some of which may be insurmountable. This is informed by the fact that some regimes have cumbersome procedural requirements that may render the execution illusory. This is not intended to mean that the legal regime in the respondent's place of domicile is ladden with any of these challenges, but the uncertainty arising from the differences in regimes convinces me that a justification arises for this Court to exercise its discretion to make an order that will meet ends of justice to both parties. This is to the effect that the respondent should deposit into the Court, the sum of money that will serve as security for appearance while the suit is pending and until satisfaction of the decree that may be passed. The sum ordered to be deposited into the Court's account will be the equivalent of US$ 215,000.00 which is the balance of the uncontested sum of US$ 500,000.00 that was

to be paid to the applicant and in respect of which the respondent has expressed willingness to pay, but no yet settled. Such payment should be deposited into the Court within thirty (30) days from the date hereof. Details of the account into which the sum will be deposited shall be made available by the District Registrar of the Court. This ruling takes into account the fact that the sum deposited by the respondent as performance bond is not money that is available for any purpose other than that for which it was deposited. In any case, the same is in the hands of a third party who is not a party to these proceedings.

Consequently, this application succeeds but only to the extent and for reasons stated herein above. Costs to be in the cause.

It is ordered accordingly.

DATED **at MWANZA** this 4th day of May, 2020.

M. K. ISMAIL
JUDGE

Date: 04/05/2020

Coram: Hon. M. K. Ismail, J

Applicant: Present/absent online (Mobile No. 0712 959685

Respondent: Present/absent online (Mobile No. 0769 560460

B/C: B. France

Court: Now that following the global outbreak of the pandemic. COVID 19, and pursuant to the order of - (if any) parties are present online, the application is, by way of Audio Teleconference heard.

M. K. Ismail
JUDGE
04.05.2020

Mr. Geofrey Lugomo, Advocate:

I represent the Applicant. The matter is for ruling and we are ready.

Sgd: M. K. Ismail
JUDGE
04.05.2020

Mr. Ludovick Ringia, Advocate:

I hold brief of Mr. Deogratias Ringia, Advocate for the respondent and we are ready.

Sgd: M. K. Ismail
JUDGE
04.05.2020

Court:

Ruling delivered in chamber in the presence of Counsel for both parties, in the presence of Ms. Beatrice B/C this 04th May, 2020.

M. K. Ismail
JUDGE

At Mwanza
04th May, 2020