

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

MISC.COMMERCIAL APPLICATION NO. 01 OF 2023

(Arising from Commercial Case No.136 of 2022)

**YAPI MERKEZI INSAAT VE SANAYI ANONIM SIKETI ... APPLICANT
VERSUS
SVT TANZANIA LIMITED1ST RESPONDENT
MID TRANSPORTATION COMPANY LIMITED 2ND RESPONDENT**

RULING

A.A. MBAGWA J.

This ruling is in respect of application for interim orders pending hearing and determination of the main suit namely, Commercial Case No. 136 of 2022.

The applicant YAPI MERKEZI INSAAT VE SANAYI ANONIM SIKETI herein after to be referred to as YAPI MERKEZ, brought this application under certificate of urgency praying for the following interlocutory orders;

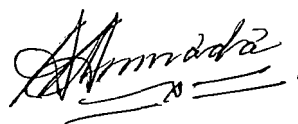
1. Immediate release of two containers with number HLBU 3349109 and TCNU 8376176 by the 2nd respondent and delivery of the same to the applicant pending determination of the main suit.
2. Costs of this application to follow the event



3. Any other relief this Honourable Court shall deem fit to grant.

The application is by way of chamber summons made under Sections 68(e), 95 and Order XXXVII, rule 10 of the Civil Procedure Code. The prayers are supported by an affidavit affirmed by Ethem Ozgur Dogu, the applicant's Purchasing and Logistics Manager.

The applicant is a legal entity contracted by Tanzania Railways Corporation (TRC) to design and construct Standard Gauge Railway from Dar es Salaam to Isaka. The applicant contends that she entered in to an agreement with the 1st respondent, SVT TANZANIA LIMITED to transport its consignments from Dar es Salaam port to various places where the applicant is running its operations. The agreement deed was annexed to the affidavit and marked YM1. According to the deponent, the agreement was that upon delivery and offloading of the consignments, the 1st respondent would return the empty container to the shipping line namely, Hapag Lloyds Company in time. However, things did not go the way it was contracted. It is the applicant's contention that the 1st respondent delivered all the consignments as per the agreement but did not return all six empty containers to the shipping line. Instead, it only returned four containers while withholding the two containers to wit; HLBU 3349109 and TCNU 8376176. The delay to return the two



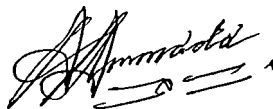
containers caused and still is causing loss to the applicant as the shipping line is charging the applicant demurrage fees in the sum of US\$ 70 per day. That due to failure to return the said containers, until the date of filing this application the demurrage charges had accrued to Tanzanian shillings 52,000,000/=. The applicant further contends that upon being issued with the invoice for demurrage charges, she made a follow up only to learn that the two containers are illegally held by the 2nd respondent, **MID TRANSPORTATION COMPANY LIMITED**. The applicant further avers that in the course of pursuing the issue she discovered that the 1st respondent sub contracted the 2nd respondent to transport the applicant's consignments without the applicant's knowledge and in the course the 1st respondent breached the agreement. As such, the 2nd respondent withheld the containers to compel the 1st respondent perform the terms of agreement. The applicant contacted the 2nd respondent but she refused to release the same on the ground that the 1st respondent owes her money. As such, the applicant decided to institute a suit namely, Commercial Case No.136 of 2023 claiming for compensation and release of the said containers. The applicant further states that as the time goes the demurrage charges continue to

A handwritten signature in black ink, appearing to be 'A. Amundala', with a horizontal line underneath it.

accrue hence she prays the court to order immediate release of the containers pending determination of the main suit.

In rebuttal, the 2nd respondent filed a counter affidavit sworn by Mohamed Gharib Faraji, the Managing Director of the 2nd respondent. In essence, the 2nd respondent admits retention of the said two containers following the 1st respondent's breach of their contract. 2nd respondent states that she entered into a transportation contract whose copy was attached to the counter affidavit and marked MD2. The deponent continued that the 1st respondent breached the terms of contract as such, the 2nd respondent decided to retain the two containers as a means to compel the 1st respondent perform her contractual obligations. Further, 2nd respondent claims that the applicant is stranger to the agreement between 1st and 2nd respondent and therefore she has no colour of rights to bring claims against her.

The 1st respondent on her part, did not file counter affidavit nor did she appear in court despite being duly served by the applicant. According to the affidavit of the process server and copy of the application documents, the 1st respondent was duly served through its staff one Imran Ashur on 13th January, 2023 at 11:44hrs.



When the matter was called on for hearing, I order the hearing to proceed *ex parte* against the 1st respondent considering that the matter was filed under certificate of urgency and there was proof of service to the 1st respondent.

The applicant enjoyed the services of Humphley Aloyce, learned advocate whilst the 1st respondent was duly represented by Nehemia Gabo, learned advocate.

Submitting in support of the application, Mr. Humphley Aloyce told the court that the applicant brought the present application praying the court to order release the two containers which are being held by the 2nd respondent on the following reasons;

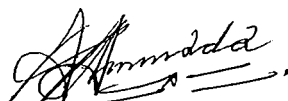
One, to avoid the costs (demurrage charges) of US\$ 70 per day which are increasing on daily basis. He said that the costs are neither beneficial to the applicant nor to the respondents. The counsel continued that the applicant is compelled to pay costs in order to maintain good business relationship with the shipping line as the applicant has already ordered other consignments which are to be shipped by Hapag Lloyd Company. The applicant's counsel further submitted that continual retention of the



containers ruins the applicant's reputation considering that she is among the giant construction companies all over the world.

Mr. Humphey said that at paragraph 7 of the counter affidavit, the 2nd respondent is claiming for money (monetary value) hence by releasing the containers, she would not be prejudiced given that there is already the main suit i.e., Commercial Case No. 136 of 2022 in which the 2nd respondent may raise a counter claim against the 1st respondent. The counsel insisted that if the court grants the application, that would not amount to final determination of the rights of the parties. In conclusion, he prayed the court to grant the applicant's prayers.

In rebuttal, Mr. Nehemia Gabo, learned counsel for the 2nd respondent contested the application on mainly two grounds. He said that there is agreement between the 1st and 2nd respondents which set the terms and conditions for transportation of the said containers. He clarified that the said agreement clearly provided that the 2nd respondent would have the right to withhold the containers in case the 1st respondent failed to pay. The counsel concluded that by withholding the containers, the 2nd respondent is exercising contractual rights. In addition, Mr. Gabo submitted that the containers are security for payments against the 1st respondent. He was thus



opined that should the court grant the orders, the case against the 2nd respondent would have been determined to its finality. To support his argument, the counsel cited the case of **Commissioner General Tanzania Revenue Authority and another vs Milambo Limited**, Civil Appeal No. 62 of 20222, CAT at Dar es Salaam. Finally, the counsel submitted that the orders sought by the applicant are not interlocutory as such, he implored the court to dismiss the application with costs.

I have carefully heard the rival submissions by the learned counsel. I have also strenuously scanned the record available in this application as well as court file of the main suit to wit, Commercial Case No.136 of 2022 which is pending before Hon. Aghato J.

The applicant was very clear that continual retention of the two containers not only increases demurrage charges but also erodes business relationship between the applicant and the shipping line namely, Hapag Lloyds Company whereas the applicant still needs Hapag Lloyds Company for shipment of its consignments in the ongoing construction of Standard Gauge Railways Project (SGR).

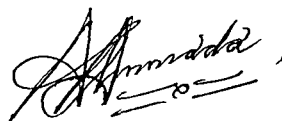
A handwritten signature in black ink, appearing to read 'Aghato J.', with a horizontal line underneath it.

Order XXXVII rule 10 of the Civil Procedure Code under which this application is brought provides;

'Where the subject matter of a suit is money or some other thing capable of delivery, and any party thereto admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another party, the court may order the same to be deposited in court or delivered to such last-named party, with or without security subject to the further direction of the court'

The above provision enjoins the court with discretionary powers to order delivery of any property pending determination of the main suit. Nonetheless, it does not set the factors to consider in granting the orders as such, it remains open for the court to exercise the discretion judiciously.

In this application, it is undisputed that the applicant is the main contractor in the major national project of Standard Gauge Railways. It is also common cause that given the nature of the applicant's operation, it frequently imports major consignments from abroad. The applicant has further sufficiently demonstrated the costs it is incurring by the 2nd respondent's continual

A handwritten signature in black ink, appearing to read 'Aminda', with a horizontal line underneath it.

retention of the two containers. On the other hand, the 2nd respondent gains nothing commercially by withholding the two containers apart from believing that the act would compel the 1st respondent pay her money.

I have glanced at the court file in Case No.136 of 2022 and noted that the 1st and 2nd respondents who are the 1st and 2nd defendants respectively are yet to file their written statement of defence. It is also common cause that there is no dispute over ownership of the said containers. The 2nd respondent's argument is that the 1st respondent owes her money and therefore the containers stand as security for the debt. Moreso, neither of the party in this application or the main suit claims ownership of the said two containers nor does the 2nd respondent intends to dispose them for purposes of recovering its money. In the result, I decline to agree with the 2nd respondent's counsel that releasing the containers would have effects of finally determining the rights of parties in the main suit. Instead, it is my considered view that the 2nd respondent would still have legal remedies to pursue her claims against the 1st respondent including filing a fresh suit or counter claim in Commercial Case No. 136 of 2022 subject to the legal requirements.

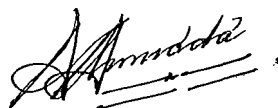
A handwritten signature in black ink, appearing to be 'A. Amadi', with a horizontal line underneath.

On account of the circumstances obtaining in this matter, I am opined that continual retention of the two containers by the 2nd respondent is more prejudicial to the applicant not only financially but also in terms of business relationship with the shipping line which is of utmost significance to the applicant.

In fine, on the balance of convenience test, I find it in the interest of justice and in line with international trade to grant the orders sought. Admittedly, the applicant stands to suffer more if the retention of two containers continues than the respondent would suffer if the interim orders sought are granted.

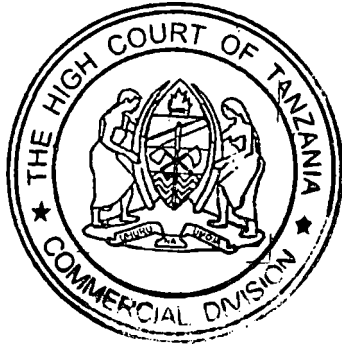
On all this account, I find the application meritorious and consequently allow it with the following orders.

1. The 2nd respondent **MID TRANSPORTATION COMPANY LIMITED** to immediately release the said two containers namely, HLBU 3349109 and TCNU 8376176 and deliver/ hand over the same to the applicant, YAPI MERKEZI INSAAT VE SANAYI ANONIM SIKETI or its agents pending determination of the main suit namely, Commercial Case No. 136 of 2022.

A handwritten signature in black ink, appearing to be 'Aminda', written over a horizontal line.

2. Costs of this application to follow the event in the main suit to wit,
Commercial Case No. 136 of 2022.

It is so ordered.



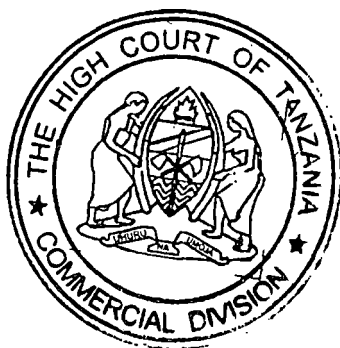
A handwritten signature in black ink, appearing to read "A. A. Mbagwa".

A. A. Mbagwa

JUDGE

19/01/2023

Court: Ruling has been delivered in the presence of Humphley Aloyce, learned advocate for the applicant and Nehemia Gabo, learned advocate for 2nd respondent this 19th day of January, 2023.



A handwritten signature in black ink, appearing to read "A. A. Mbagwa".

A. A. Mbagwa

JUDGE

19/01/2023