THE REPUBLIC OF UGANDA

IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA

MISC. APPL. NO. 091 OF 2020

[ARISING FROM LDR NO. 229/2019]

BETWEEN

GIORGIO ZENAGALIA……..……..APPLICANT

VERSUS

1. **SARI CONSULTING LTD**
2. **Studio Galling Gengneria Ari (SGI)**
3. **Uganda National Roads Authority (UNRA)…….……RESPONDENT**

BEFORE

1. Hon. Chief Judge Ruhinda Asaph Ntengye
2. Hon. Lady Justice Linda Tumusiime Mugisha

PANELISTS

1. Ms. Adrine Namara
2. Mr. Matovu Michael
3. Ms. Susan Nabirye

RULING

This is an application brought under **Order 40 rule 1(1)(a), (ii)(b), and (2) and rules 2 and 12 of the CPR, as well as Sections 64(e)** and **98 of the Civil procedure Act.**

The application seeks orders of this court that the respondent pays into court 1,500,000,000/= as security for satisfaction of a decree that may be passed against it in **LDR No. 229/2019**. The application in the alternative seeks an order of court to attach 1,851,296,462/= owing to the respondent from a joint venture involving 2nd and 3rd respondent.

Lastly the application seeks for costs.

The application is supported by an affidavit sworn by the applicant himself to the effect that the respondent is a foreign company without any known assets or property within the jurisdiction of court and yet he is a claimant in **LDR 229/2019** where the 1st respondent is also the respondent. According to the affidavit the only known business of the respondent in Uganda is an ongoing contract of a joint venture for consultancy on upgrading of Bumbobi – Lwakhakha road which is in advanced stages of completion and once completed and the respondent is fully paid, the respondent will leave the jurisdiction of court thus obstructing payment against a decree which may be extracted against the respondent in the above Labour Reference case. An affidavit in rebuttal was sworn by one David Okello, the 1st Respondent's country Manager to the effect that the respondent has running contracts with UNRA and with Ministry of Water and that it is registered in Uganda with offices in Kampala.

The affidavit in reply further states that the amount allegedly owed to the claimant in the Head suit is far less than the amount alleged in the instant application. The

affidavit is also to the effect that this court having overruled the respondent on a preliminary objection, the respondent filed an appeal to the Court of Appeal, which is pending hearing and that therefore the intention of the instant application is to curtail the 1st respondent's right of appeal.

Briefly the background of this application is as follows:

The applicant filed **LDR No. 229/2019** claiming salary arrears amounting to 104,134USD and other reliefs. When the suit came up before this court, the applicant raised a preliminary objection concerning the jurisdiction of the court. It was argued that because the contract had a provision to the effect that in case of conflict the matter would be arbitrated in Rome in accordance with the laws and regulations of Italy, this court had no jurisdiction. This court held that since the Arbitration Act did not apply to this court, it was not obligated to refer the matter for arbitration and that even if it were, referring it to Rome would be tantamount to denying justice to the parties. This ruling relied on other authorities where the High court had handled similar cases and overruled the objection and sat down the case for hearing on its merits.

The applicant applied to this court for an order of leave to appeal against its decision on a preliminary objection. By the time of submissions of both counsel in this application, the above ruling for leave to appeal was not yet pronounced in court.

It is pertinent to say at this point, that even though the applicant filed an appeal in the court of Appeal against the decision of this court, no right of appeal exists as a matter of right against a ruling on a preliminary objection. This is the reason the applicant filed an application for leave of this court to file an appeal against its

decision. Consequently, it cannot be true that there exists an appeal in the court of appeal against the decision of this court before this court grants leave or before a higher court grants such leave. The instant application therefore cannot be capable of frustrating or curtailing an appeal which does not exist.

Order 40 r 1 of the CPR provides for situations where a defendant (or claimant) is tasked to show ability to satisfy a judgment debt before it is pronounced by court. It is meant to cover an extra ordinary situation where a defendant is likely to be fraudulent so as to avoid payment of the decretal sum. Therefore, in deciding whether to grant the application under **O40 r 1,** the court has to balance the need to preserve the interest of the applicant before the determination of the suit thus protecting the integrity of court orders and judgment, and the need to protect the rights of innocent third parties who may be caught up in the business of the respondent as a result of the court's order.

The contention before us is whether the respondent, being a foreign company, has reasonably on going works within this country that may compel it to continue operations in the country until the decision in **LDR No. 229/2019** is disposed and/ or whether the respondent has sufficient property in this country that may be held in execution once the decision is in favor of the claimant.

We have carefully perused the submissions of both counsel. What comes out of both is that although Sari Consulting Ltd. (the respondent) is a foreign country, it caused registration of Sari Consulting (Uganda) Ltd to cater for its interests in Uganda, no evidence was adduced to suggest that the Directors of the respondent are either resident in Uganda or that they own property in Uganda or that either Sari Consulting Ltd or Sari consulting (Uganda) Ltd owns property in Uganda.

Our attention was drawn to **annexures "A" and "B"** to the respondent's affidavit in reply. On perusal of the same, they do not disclose the duration of the contracts or the value involved so as for this court to assess whether they would possibly suffice to satisfy the decree, or to show that the respondent was not about to close shop and return to home country. Yet the same contracts were attached in an attempt by the respondent to rebut the assertion of the applicant that the respondent had no capacity to satisfy a decree claimed by the applicant in the main claim.

Under paragraph 7 of the affidavit in reply, the respondent asserts that it has accounts in "**Orient Bank among others"**. We think this is too shallow an attempt to show that the respondent has capacity to satisfy a decree or that it will not close shop immediately the on-going contract is ended. Nothing in the affidavit in reply opposed the contention in the affidavit in support of the application **under paragraph iii and vi** that the consultancy and supervision works for upgrading of Bumbobi—Lwakhakha road was the only known business of the 1st respondent and that it was in advanced stages of completion after which the respondent would be paid and thereafter withdraw from the jurisdiction of this country, except the about assertions which are not satisfactory as pointed out.

Much of the affidavit in reply contained assertions relating to the appeal in the court of Appeal against the decision of this court on a preliminary ruling instead of providing evidence that the respondent will in the first place not withdraw from the jurisdiction of this court after completion of the works and secondly that it has capacity to satisfy a decree of this court once the main claim is determined in favor of the applicant.

Just like in the case of **Welt Machines Engineering Ltd. Vs china Road and Bridge Corporation & two others** in **Misc. Appln. No. 51/2015 (Soroti),** the 1st respondent has failed to show capacity to satisfy any decree that may be passed and the applicant will be prejudiced if the payment is made before the disposal of the main claim.

As pointed out in the case of Makubuya **Enock Willy T/A Polla Plast Vs Songdoh films (U) Ltd & Another Misc. Appln. 321/2018**

"The purpose of an interlocutory application for attachment before judgment has been summed up in Halsbury's Laws of England 4th Edition Volume 37 para 326 as follows:

"to enable the court to grant such interim relief or remedy as may be just or convenient. Such relief may be designed to achieve one or more of several objectives. For purposes of this application for attachment before judgment such objective may be to preserve a fair balance between the parties and give them due protection while awaiting the final outcome of the proceedings."

In the circumstances, we are satisfied that the applicant has made out a case for allowing the application. It is therefore ordered that the applicant deposits into court within 3 weeks from the date of this ruling a bank guarantee of 500,000,000/= (Five hundred million) as security for the respondent to appear and satisfy any decree that may arise from **LDR 229/2019**. Given the delays associated with completion of matters in courts of law the applicant is required to follow up this case and fix it for hearing so that it is completed by 28th February 2022 failure of which, unless otherwise ordered by this court, this order shall lapse.

No order as to costs.

Delivered & signed by:

1. Hon. Chief Judge Ruhinda Asaph Ntengye …….
2. Hon. Lady Justice Linda Tumusiime Mugisha …….
3. **PANELISTS**

1. Ms. Adrine Namara …….
2. Mr. Matovu Michael …….
3. Ms. Susan Nabirye …….

Dated: 05/03/2021