REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 420 OF 2011 (O.S)

IN THE MATTER OF THE FOREIGN JUDGMENTS (RECEPROCAL ENFORCEMENT) ACT CHAPTER 43 OF THE LAWS OF KENYA

AND

IN THE MATTER OF REGISTRATION OF JUDGEMENT OF THE HIGH COURT OF ZANZIBAR IN CIVIL SUIT NO. 13 OF 1994 DELIVERED ON 31ST JANUARY 2000

AND

IN THE MATTER OF THE GOVERNMENT OF THE UNITED REPUBLIC OF TANZANIA AS THE INTERESTED PARTY/APPLICANT.

BETWEEN

LAMSHORE LIMITED.....DECREE HOLDER/APPLICANT

J.S. KINYANJUI..... 2ND PLAINTIFF

S.T. MUGASHA T/A GALAXY AUCTIONEERS ….....….....INTERESTED PARTY/APPLICANT

AND

BIZANJE K. U.D.K.....DEFENDANT/JUDGMENT DEBTOR

THE HONOURABLE ATTORNEY GENERAL…..….....…….…… AMICUS CURIAE

THE GOVERNMENT OF THE UNITED REPUBLIC OF TANZANIA.....INTERESTED PARTY/APPLICANT

RULING

The application before this Court is a Notice of Motion dated 14th November 2013 it is brought Under Order 1, 22, and 51 of the Civil Procedure Rules, 2010, and section 10 (2) of the Foreign Judgments (Reciprocal Enforcement) Act, Chapter 43 of the Laws of Kenya and Rule 6 of the Foreign Judgments

(Reciprocal Enforcement) Rules, Section 4 of the privileges and Immunities Act Chapter 179 of the Laws of Kenya, Article 21 and 22 of Vienna Convention on Diplomatic Relations, section 3A, 63E of the Civil Procedure Act Chapter 21 Laws of Kenya and All Enabling Provision of the Law

The applicant seeks the following orders;

1. The Government of the United Republic of Tanzania be enjoined as an Interested Party in these proceedings.

2. There be a stay of the execution of the Ex-parte order for attachment of subject matter L.R. 209/13678 at Nairobi issued by the Honourable Court and all consequential orders thereto pending the hearing and determination of this application inter-parties.

3. There be a stay of execution of the ex-parte prohibitory order issued by this Honourable Court on 3rd May, 2012 and all consequential orders thereto pending hearing and determination of this Application inter-parties.

4. The Ex-parte Order issued by this Honourable Court on 4th November, 2011 be and is hereby vacated and/or set aside.

5. The Ex-parte order for attachment of the subject matter L.R. 209/13678 at Nairobi issued by this Honourable Court be and is hereby set aside.

6. That the Ex-parte Prohibitory order issued by this Honourable Court on 3rd May, 2012 be and is hereby set aside.

7. The cost of this application be provided for

This application is premised on the following grounds**:**

1. That the land parcel LR 209/13678 situate within Nairobi in Kenya, the subject of these proceedings is the property of the Tanzania High Commission of the Government of the United Republic of Tanzania, in Kenya hence the Government of the United Republic of Tanzania is an interested party.

2. That hitherto the proceedings have proceeded without due notice to the Government of the United Republic of Tanzania, the rightful owner of the said property.

3. That it is necessary and paramount to enjoin the Government of the United Republic of Tanzania as an Interested Party of these proceeding in order to enable the court effectively and completely to adjudicate upon and settle all questions involved in this application/suit.

4. That the Government of the United Republic of Tanzania ought to be enjoined as an Interested Party as any order emanating therefrom relating to the said land parcel will adversely affect its existing rights and interests without re-course.

5. That the Honourable Court issued an order ex-parte on 4th November, 2011 registering a foreign judgment delivered on 31st January, 2000 in Civil Suit No. 13 of 1994 in High Court for Zanzibar.

6. That consequential upon the said registration of a foreign judgments the Honourable Court gave Ex-parte orders of Attachment and Prohibitory for attaching the said land parcel L.R. No. 209/13678 at Nairobi and Prohibiting and restraining the Government of the United Republic of Tanzania from interfering or charging with it.

7. That the decree holder contravened domestic procedures for execution of a decree against the Government as provided for in the Civil Procedure (Principal Legislation) Chapter 8 Laws of Zanzibar as read with the provisions of Foreign Judgment (Reciprocal Enforcement) Act and Rules chapter 43 Laws of Kenya.

8. That the foreign judgment delivered on 31st January, 2000 in Civil Suit No. 13 of 1994 in the High Court for Zanzibar is not enforceable as against the Government of the United Republic of Tanzania.

9. That in any event the said order contravenes the principle of inviolability of diplomatic premises as envisaged by provision of the Privileges and Immunities Act, Chapter 176 of the Laws of Kenya and the Vienna Convention on Diplomatic and Consular Relations of 1961.

10. That the Revolutionary Government of Zanzibar and the Government of the United Republic of Tanzania are two separate legal entities in terms of civil liability depending on the nature of the commercial transaction and the party to that particular transaction.

11. That pursuant to the application before this court for setting terms and condition for sale of the land property L.R. 209/13678, the said land parcel is now under imminent danger of disposal to the detriment of the Government of the United Republic of Tanzania.

12. That it is equitable that an order of stay be granted in the circumstances of this case.

The application is supported by the affidavit of, INNOCENT EUGENE SHIYO dated 14th November 2013, a further affidavit by Mr. I. E Shiyo dated 3rd December sworn in response to the replying affidavit of Mr. E. T Mugacha the 1st interested party and a further affidavit of Mr. I. E. Shiyo dated 19th December 2013 in response to the affidavit of Lamshore Limited the decree holder /applicant. The application was opposed. The 1st interested party filed a replying affidavit dated 22nd November 2013. The plaintiff/ respondent filed an affidavit dated 6th December 2013 sworn by Mr. James Kinyanjui, the 2nd plaintiff who is a director of the 1st plaintiff/ Decree Holder.

SUMMARY OF AFFIDAVITS

I have read all the said affidavits and this is what I gather. The 1st plaintiff the decree holder together with the 2nd plaintiff filed this suit against the defendant Bizanje K.U.D.K **.** The suit was heard and on the 31st January 2000 judgment was entered for the 1st plaintiff against the defendant. The 1st plaintiff on the 28th September 2011 filed an application in this suit seeking exparte registration of the judgment that had been delivered on the 31st January 2000 by the High Court of Zanzibar. On the 4th of November 2011 the said judgment was registered as a foreign judgment by this Court. The1st plaintiff thereafter began the execution process and applied for an exparte order of judgment on Land Parcel number L.R. 209/13678, which application was granted by this Court and the said parcel of land was attached and subsequently an exparte prohibitory order issued against the Government of the United Republic of Tanzania.

The Applicant avers that on diverses dates between the end of May, 2013 and early June 2013, the Office of the Attorney General of the Republic of Kenya convened a consultative meeting with delegation of the High Commission of the United Republic of Tanzania. The meeting was held in the offices of the Honourable Attorney General of the Republic of Kenya. Discussions at the said meeting led to the appearance of the Honourable Attorney General of the Republic of Kenya in this Court on 13th June 2013 and subsequently the Attorney General was enjoined as the Amicus Curiae. On the 28th October 2013 the Amicus Curiae informed the Court that it was necessary and in the interest of justice that the Government of the United Republic of Tanzania be enjoined as an interested party. The applicant /the United Republic of Tanzania now seek to be enjoined as a party in these proceedings. The applicant argues that the High Commission of the United Republic of Tanzania is the registered owner of the land parcel L.R. 209/13678 is a representation of the Government of the United Republic of Tanzania in the Republic of

Kenya and subsequently the Government of the United Republic of Tanzania is a necessary and interested Party to be joined in these proceedings.

It is the applicant's argument that neither the High Commission of the United Republic of Tanzania in Kenya nor its Advocate, the Attorney General's Chambers in Dar es Salaam, Tanzania were served with the Summons and application for attachment and prohibitory order in relation to this Misc. Civil Application No. 420/2011 (O.S); that the Address of service of the Advocate of the Government of the Republic of Tanzania is the Attorney General's Chambers, Kivukoni Front, P.O. Box 9050, Dar es Salaam, Tanzania or c/o The High Commission of the United Republic of Tanzania, 9th Floor, Re-insurance Plaza, Taifa Road, Nairobi; that Lamshore Limited the Decree Holder is not a subject of the Republic of Kenya and is not registered as a company anywhere in East Africa and that the Drawn Order issued on 21st May 2004 by the High Court for Zanzibar was improper and un-procedural as it was against the decision of the Court of Appeal of the United Republic of Tanzania delivered on 20th November 2003; that the land parcel which is the subject matter of this proceedings is a consular premises which the National flag of the Government of the United Republic of Tanzania has been flying over and a residential premises of one the Members of the Service Staff of the Mission; that he has been advised by the Principal State Attorney that the drawn Order of the High Court of Zanzibar dated 21st May 2004 which lifted the corporate veil from Bizanje K.U.D.K to the Government of Zanzibar, neither extended to the Government of the United Republic of Tanzania nor can be executed against the Government of the United Republic of Tanzania under the law of the country of the original Court and further that the said Order dated 21st May 2004 by the High Court for Zanzibar and the registered foreign Judgment did not waive the immunity of the Mission of the Government of Tanzania in the Republic of Kenya, including the premises of the Mission the subject of this case; that the Government of the United Republic of Tanzania should be enjoined to this application to enable the Court effectively and completely adjudicate upon and settle all questions involved in this application.

The applicant argues further that if the exparte order of attachment and prohibition of this Court is not set aside, the Government of the United Republic of Tanzania and/or the High Commission of the United Republic of Tanzania in Kenya will suffer irreparable loss following the same land being obtained on reciprocity basis with the Republic of Kenya.

The 1st interested party argued that; before the filing of this case there was Misc. Appl. No. 655 of 2009 between the same parties where just as in this case the Foreign judgment by the High Court of Zanzibar of 31st January, 2000 was registered and was appointed to execute the same on the 25th May 2010 and he issued with Notification of Sale to sell NAIROBI L.R. NO. 209/13678 measuring approx. 0.8099 on 26th July 2010 upon the warrant of the decree holder. He prepared to sell and proceeded to advertise NAIROBI L.R. NO. 209/13678 and incurred costs but before he could sell, on the morning of 26th July 2010 when the sale was due he was served with an Order staying the same. On 4th November, 2011 he was enjoined to these proceedings as a third party as he had offered his services in Misc. Application No. 655 of 2009 where his fees are yet to be settled; that he was once again retained to execute the foreign judgment and were it not for the 2nd third party/ applicant application dated 14th November, 2013 the Court would have issued direction on the sale of the attached property; that to his knowledge before the filing of the 2nd interested party's application dated 14th November, 2013 that Attorney General who appeared as Amicus Curiae in High court Misc. Case No. 655 of 2009 represented the judgment debtor in those proceedings at the instance of the United Republic of Tanzania and just as it was then the Attorney General has since been enjoined to these proceedings and has since the 25th June 2013 been appearing Amicus Curiae for the decree holder at the instance of the United Republic of Tanzania.

He argues further that it follows that the United Republic of Tanzania has all along been a party to this suit and its interests have in the past been secured by the Hon Attorney General and as such these proceedings have not proceeded exparte as alleged and the United Republic of Tanzania has admitted having sat on this matter between May and June 2013 and that Mr. Innocent Eugene Shiyo did depone the affidavit in respect of the application by the Hon Attorney General seeking to be admitted Amicus Curiae; that nowhere in High Court Misc. Case No. 655 of 2009 and in these proceedings have there been

distinction or attempts made to distinguish between the defendant and the 2nd interested party the United Republic of Tanzania; that the Attorney General acting at the instance of the decree holder who produced the title to this property which is attached to the Attorney General's application dated 29th July 2013 seeking to be admitted to these proceedings which Title deed now forms part of the Court record; that the belated attempts to distinguish between the Revolutionary Government of Zanzibar and the United Government of the United Republic of Tanzania is a distinction without a difference as the United Government of Tanzania is formed by the Union between Zanzibar and Tanganyika and the United Republic of Tanzania cannot be said to be united without Tanganyika or Zanzibar; that had the attached property belonged to the Government of Tanganyika it's only the Government of Tanganyika that would have successfully moved the Court.

The first Interested Party's affidavit was not complete paragraphs 17 to 21 are missing.

In a further affidavit of Mr. I. E Shiyo in response to the replying affidavit by Mr. S. T. Mugacha he depones that; the registration of the foreign judgment and all the consequential orders were made exparte against the Government of the United Republic of Tanzania in Misc. Application No. 655 of 2009 in respect of Nairobi L. R No. 209/13678, save that, the Government of the United Republic of Tanzania was later on enjoined, and ultimately the same proceedings were quashed and the Court Orders were set aside; that the alleged incurred costs in Misc. Application No. 655/2009 may not be borne by the party that successfully challenged such application; that the defendant/or Revolutionary Government of Zanzibar and the government of the Untied Republic of Tanzania in terms of civil liability depends on the nature of the commercial transaction and the party to that particular transaction, that the same is founded on the Constitution of the United Republic of Tanzania; that the Title Deed which forms part of the Court record is in respect of the Diplomatic property which enjoys both Diplomatic privileges and immunities as per the Vienna Convention on the Diplomatic and Consular Relations of 1961; that the distinction between the Revolutionary Government of Zanzibar and the Government of the United Republic of Tanzania is founded on the Constitution of the United Republic of Tanzania of 1977 as amended, further that the Government of the United Republic of Tanzania is honestly defending her interests in these proceedings and in accordance with Vienna Convention on Consular Relations of 1961 and 1963 on which Kenya is a signatory and the same are applicable in Kenya; that the Government of the United Republic of Tanzania was not a party to these proceedings before but was only enjoined to these proceedings by the court order dated 20th November 2013 as an Interested Party/Applicant and that it is was neither a defendant nor is a judgment debtor and that it follows that any service to the defendant/judgment debtor through or to the High Commission of the United Republic of Tanzania at Nairobi was to be by way of Diplomatic channel, which service was never received by the Tanzania High Commission in Nairobi. I note that this affidavit too had paragraphs 5 to 11 missing.

James Kinyanjui a director of the decree holder who is also the 2nd plaintiff depones as follows; that the application does not lie at this stage of proceedings; that the judgment debtor had been served with these proceedings since the year 2009 and it even appointed an advocate to represent it in Nairobi High Court Misc. Application No 655 of 2009; that in the said proceedings the judgment debtor was represented by the Attorney General and the Company's advocates on record raised an objection on the capacity of the Attorney General to represent a foreign government in proceedings before a Kenyan Court; that thereafter the judgment debtor hired the firm of Masara & Company advocate; that the prayer for setting aside registration after the year is made in bad faith and meant to frustrate the Decree Holder; that the judgment sought to be executed is 13 years old and litigation must come to an end; that it is noteworthy that the Government of Tanzania s not disputing the existence of the decree and that no useful purpose will be served by reopening proceedings; that the decree holder has at a great expense, followed due process in pursuing the fruits of the judgment and the court should see through the application as the latest attempt to delay the proceedings; that the land parcel being Nairobi L. R No. 209/13678 is owned by the United Republic of Tanzania; that the proceedings have proceeded against the judgment debtor Bizanje K.U.D.K was a government entity that was wholly owned by the government of Zanzibar; that the United Republic of Tanzania is a federation and the argument that they should be segregated in not sound in law; that the argument that the property that has been attached is not protected by diplomatic immunity.

In response to the affidavit by Lamshore Limited the applicant maintains that the Government of the

United Republic of Tanzania is not a judgment debtor nor a legal person against whom the registered foreign judgment is enforceable under the law of the country of the original court; that the decree holder applied for the registration of the foreign judgment after six (6) years; that the decree-holder has not exhausted the local remedies available in Zanzibar in execution of the same judgment and decree; that Tanzania is a sovereign United Republic and her properties , the land parcel in dispute inclusive are free from seizure or attachment. The applicant reitared what was deponed in grounds and affidavits filed in support of the application.

SUBMISSIONS

APPLICANT 'S SUBMISSIONS

Mr. Kameya reiterated what is deponed in the applicant's affidavits and gave a detailed background of the matter. He submitted that the foreign judgment was registered almost nine years later contrary to the provisions of Section 5 of the Foreign Judgments and Reciprocal Enforcement Act Chapter 43, which Act requires that the judgment to be registered within six (6) years from the date of delivery hence it was time barred for 3 years, that registering the same on the 4th of November 2011 gave it a period of 10 years; that at the time the application was done the Court's attention was not drawn to section 5 of Cap 43, neither was leave sought and therefore the application was time barred; it was submitted that the provisions of section 5 (4) requires that a certificate be issued were also not complied with , and sought to have the said exparte order of 4th November 2011 set aside.

It is further submitted that the decree holder has not exhausted all the avenues open to it in the High Court of Zanzibar in executing the decree but has rushed to this court, hence their prayer for stay of execution; that if the Court agrees with them that the order of Zanzibar exits then the matter is sub-judice to the matter in Zanzibar and by moving to this Court the Decree holder's actions amount to an abuse of the Court process. Counsel submitted that the Governments of Zanzibar and Tanzania are separate legal entities, for this argument he referred to Article 1 of the Constitution of the Republic of Tanzania which refers to the state of Tanzania as a sovereign state with its territories include the area of Mainland Tanzania and the whole of the area of Tanzania Zanzibar including the territorial waters. Article (1) vests each state with the executive, judicial and legislative /and supervisory powers and that sub-article (3) states what matter are union matters and which ones are not and that the land that has been attached is one of them, as the land was acquired by reciprocal bilateral arrangements between the government of Kenya and Tanzania. Counsel referred the Court to read Article 4, 33(1), (2), 34, 35, 36, 46 ,47 ,49 51 (1) (2), 52(1) (2), 54 (1) and (3), which establish the executive organs of the United Republic Of Tanzania. He submitted that the distinction between the 2 states depends on the nature of the transaction and that the matter in question relates to Zanzibar only and that's why Bizaye was established under the power of the Republic of Zanzibar and that any civil liability in the law of Zanzibar cannot relate to the government of Tanzania and her properties; that the cooperate veil lifted cannot extend to the government of Tanzania.

It was further submitted that the property attached is diplomatic property and enjoys diplomatic immunity under Cap 179 of the laws of Kenya which then brings into force the Vienna Convention and that had the court been given the said provisions it would not have issued the said orders; that Article 24 of the Vienna Convention prohibits attachments of archives. For this argument Counsel referred to the case of ***Humphrey Construction ltd vs. Pan African Postal Union*** where the court held that the property of a sovereign government is immune from seizure and that by deciding to defend an interest in a subject matter that does not waive its immunity, counsel argued that the fact that the government of Tanzania had applied to be an interested party did not mean that it had waived its immunity. Counsel argued that it was a misconceived for the decree holder to submit that the Government of Tanzania is the judgment debtor and that section 3 (2) of Cap 43 defines who a judgment debtor is; that the Government of Zanzibar is an independent entity and the judgment can be executed against it as the country of original Court and that the government of Tanzania was not a party to the proceedings in Zanzibar, but it was enjoined as an interested party and not as a judgment debtor. He argued further that there is no provision in the Kenyan law that prohibit the setting aside of a foreign judgment. On the AG representing the government of Tanzania, counsel submitted that Article 2 is relevant as the AG can advise the Court in respect of rules of law on foreign government and their interests.

1ST INTERESTED PARTY'S SUBMISSIONS

The Respondent referred the Court to section 5, 6 and 10 of the Foreign Judgments and Reciprocal Enforcement Chapter 43. Section 5 sets out the requirements to be met in an application of registration of a foreign judgment, Section 6 provides for registration of foreign judgment upon meeting the criteria set out under section 5, while section 10 provides for instances when a judgment so registered can be set aside. The Respondent further referred the Court to Section 9 of the Privileges and Immunities Act Cap 179 Kenya which provides for privileges of certain International organizations and persons connected. The Respondent submitted that the main issues the court has to consider are;

i. Has the registration of the judgment been done within the time as prescribed by the Act?
ii. Has the decree holder exhausted all the legal requirements in Zanzibar before proceeding in Kenya?
iii. Is there a distinction between the government of Zanzibar and Tanzania?
iv. Does the attached property enjoy diplomatic immunity?

The above issues were dealt with as follows by the Respondent ;

The Respondent argued that the decree holder did comply with the provisions of section 5(1) which provides that for a foreign judgment to be registered the same has to be done within 6 years of the date of judgment and where there have been proceedings by way of appeal on the last day of the last judgment in the proceedings; that simple calculations from 20th January 2011 when the matter was in the High Court in Zanzibar to 4th November 2011, indicates the same was registered within 1 year of the last proceedings in Zanzibar. It was further submitted that the decree holder had exhausted all remedies available to him in Tanzania as his last appeal was in the Court of appeal in Dare salaam which was declined on 20th November 2003. That the Court of appeal being the highest Court in Dare salaam and is the last court of result; that the decree holder is left with a judgment that is unable to execute; that since the respondent has attempted various forms of execution which have been resisted; that the decree holder has since terminated all the then proceedings in Dares salaam before resulting to this Court; that though dissatisfied with the decision of the Court of Appeal of Tanzania there was no avenue to appeal on the same and that he is still interested in executing the judgment as there is no other avenue to execute the judgment in Dares salaam and that in filing the application for registration of judgment he obtained a statement from Zanzibar confirming that the proceedings being registered had been completed; that there is no distinction between Zanzibar and Tanganyika and that the said attached property is registered jointly under the united Government of Tanzania.

On diplomatic immunity, it was submitted that the same is established under the Vienna Convention and granted to individuals depending on rank and amount of immunity they need to carry out their duties without legal harassment; that the AG was enjoined as Amicus Curie, further that no affidavit has been filed to show that the property has been gazetted as one enjoying diplomatic privilege and the letter dated 13th October 2010 from the defunct Office of the Prime Minister without the said gazette notice does not constitute exemption or diplomatic waiver as it must be specifically gazette thus it has no legal effect and no judicial notice can be taken on the same and the same needs to be specifically proved. Therefore there being no distinction between the judgment debtor and the 2nd interested party its application should be dismissed with costs.

DECREE HOLDER'S SUBMISSIONS

The decree holder submitted that it obtained judgment as against the judgment debtor, when the High Court in Zanzibar found the judgment debtor in breach of contract; that the judgment debtor has done everything required of it under the law and by its application the Government of Tanzania seeks to re-open the proceedings, which is tantamount to an abuse of the Court process. That it is trite law that litigation must come to an end. Section 3A of the Civil Procedure Act empowers the Court to make such orders as maybe necessary for the ends of justice to be met to prevent the abuse of Court process and that allowing the applicant to open new fronts would be tantamount to giving the Court's seal of approval to

play lottery of the judicial process; that the current application was made with aims to deny the judgment debtor the fruits of his judgment.

In its application the Government of Tanzania alleges that the Decree holder contravened domestic procedures for execution of a decree as against the government which they submit is not true and further submitted that obtaining the judgment it moved to register the it in accordance to Section 5 of the Foreign Judgment (Reciprocal Enforcement Act) Cap No. 43 and the same had been registered subject to Justice Rawal's order of 29th January 2010 who subsequently vacated the said orders on 30th September 2010 but subsequently the said judgment was registered in Kenya by Justice Mwera.

The decree holder denied that the execution of the said judgment is not enforceable against the Republic of Tanzania; that the Court issued orders to lift the corporate veil in regards to the judgment debtor and it was found that the judgment debtor is fully controlled by the Government of Zanzibar; that in satisfying its judgment the Decree Holder moved to attach a parcel of land known as L.R. No. 209/13678. That in order to satisfy the decree the decree holder moved to attach the parcel of land registered to Tanzania, which it argues is not an independent entity hence judgment could not be enforced against it. On the argument that the parcel of land is diplomatic property and enjoys diplomatic immunity it was submitted that Zanzibar was not a state and hence not a member of the United Nations and so the provisions of the Vienna Convention on diplomatic relations do not apply; that the diplomatic mission of Tanzania does not reside in the suit property and the same as per the averments states the property is used as an archive; that there is an exception in international law in regards to attachment of property intended for commercial use purposes even without state's consent. Counsel referred the Court to Article 19 of the United Nations convention on Jurisdictional immunities of state property which provides inter alia that;

"No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

> *(a) the State has expressly consented to the taking of such measures as indicated:*
>
> > *(i) by international agreement;*
> >
> > *(ii) by an arbitration agreement or in a written contract; or*
> >
> > *(iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or*
>
> *(b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or*
>
> *(c) it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed."*

It was submitted that the wording of the said Article means that the property in use or intended use for commercial purposes can be subjected to enforcement measures and that the said property does not fall within the strict meaning of Article 1 of the Vienna Convention on Diplomatic Relations 1961 as the same is used for commercial purposes. Counsel relied on the case of **Bird Shifting Corporation –vs- The embassy of the United Republic of Tanzania ,United States district Court, District of Columbia 1980** where the court held that, "*in determining the immunity the foreign state must have waived its immunity and the property attached must be used for a commercial purpose. It was further held that a Court Judgment could be acted upon any award rendered pursuant to the arbitration agreement. It was found that the property in that case was not immune from attachment .It was a commercial property*."

Counsel urged that the Court to consider the prevailing judicial shift from the concept of absolute

immunity to a narrower principle which excludes ordinary mercantile transactions from the ambit of sovereign immunity. The respondent relied on the case of ***Tredex –vs- Central bank of Nigeria (1977) 1ILR 111*** where the Court held that a state organ cannot plead state immunity in relation to ordinary commercial transaction as distinct from the governmental acts of a sovereign state. He also directed the Court to the case of ***RAHINTOOLIA V HE.H THE NIZAM OF HYDERABAD AND OTHERS [1957] ALL E.R. 441***, where Lord Denning held that;

"Sovereign immunity should not depend on whether a foreign government is impleaded directly or indirectly, but rather on the nature of the dispute … if the dispute brings into question, for instance, the legislative or international transactions of a foreign government or the policy of its executive, the Court should grant immunity if asked to do so, because it does offend the dignity of a foreign sovereign to have the merits of such a dispute canvassed in the domestic Courts of another Country; but if the dispute concerns , for instance, the commercial transaction of a foreign government, and it arises properly within the territorial jurisdiction of a sovereign government, and it arises properly within the territorial jurisdiction of our Court, there is no ground for granting immunity".

Lastly it was argued that the Government of Tanzania is not disputing the existence of the Decree, that the prayer to set aside the registration is malafides and is meant to circumvent a binding agreement entered into by the parties and further frustrate the Decree Holder; they submitted that the application is an attack on a valid judgment that was endorsed and entered by the Court.

Re Joinder submissions by the United Republic Government of Tanzania

In response to the decree holder and the Galaxy auctioneers counsel gave a brief background culminating to the current application. Counsel submitted that the judgment debtor who was found in breach was Bizanje K.U.D.K an independent legal unit and not the Republic of Tanzania; that the prohibition orders dated 3rd May 2012 were made ex-parte against the Republic of Tanzania and further that the corporate veil was lifted. Counsel refuted the decree holder's submission that the applicant seeks to open up fresh front on litigation adding that the application is properly before the Court and sought to point out the illegalities committed by the Decree Holder in registration of the said judgment and obtaining the prohibition orders. In regards to the proceedings in Misc. No. 655 of 2009 it was argued that the United Republic of Tanzania was not the judgment debtor but had been enjoined as an interested Party/Applicant on application however, the order in Misc. No. 655 of 2009 was found incompetent, quashed and set aside. It was further submitted that the Decree Holder has contravened domestic laws in execution of a decree against the Government and had failed to exhaust local remedies available. That the Decree holder sought to execute against Bizanje K.U.D.K by attaching the properties owned by the Government of Zanzibar but the same was lifted as the property did not belong to the judgment debtor Bizanje K.U.D.K, this prompted him to appeal to the Court of appeal of Zanzibar but was unsuccessful. That the decree holder attached the properties of the shareholders Government of Zanzibar before lifting the corporate veil to the shareholders that is the Government of Zanzibar. He argued that the company is in law a different person from the subscribers to the memorandum nor are the subscribers as members liable. On this counsel relied on the case of ***Solomon –vs- Solomon & Co. Ltd. (1987) AC 22*** i.e a genesis of this principle.

It was further submitted that the attachment by the decree holder was illegal and therefore can no longer be relied upon; that vide Mic. application 8 of 2001 the Decree Holder applied for lifting of the Corporate veil from Bizanje K.U.D.K to the Government of Zanzibar and proceeded for execution against the Government of Zanzibar vide Misc. Civil application No. 10 of 2007 where the Decree holder sought to withdraw the application for execution in order to comply with the Government proceedings Act, the said application was granted. However, the Decree Holder did not file a new application for execution proceedings in line with the aforementioned Act. Counsel contended that the Decree Holder therefore never applied for a certificate containing particulars of the order as required under Section 15(1) and 16(1) of the Government Proceedings Act Cap 7 R.E 2002 and also he failed to exhaust all the remedies local remedies available to him.

On the issue of registration of the foreign judgment it was submitted that the registration of the said

judgment was registered out of time and not within the six (6) years provided for, without leave of Court which was contrary to Section 5 of the Foreign Judgment (Reciprocal Enforcement) Act (Cap 43) and that time limitation ousts the Jurisdiction of the Court to register such a judgment having been delivered in January 2000 which is more than 10 years prior. Counsel further submitted that the execution proceedings do not constitute appeal proceedings as provided for under section 5(1) of the Foreign Reciprocal Enforcement Act (Cap 43). That an appeal under the said Act is defined as, "*proceedings by way of application for the discharge or setting aside of a judgment or for a new trial or stay of execution*."

That the fact that since the application was made ex-parte the time of time limitation was not brought to the attention of the judge; that no certificate was issued to certify that the proceedings were completed in Zanzibar by the High Court at Zanzibar as required under section 5(4) (c) (iii) of the Foreign Judgment Reciprocal Enforcement Act Cap 43 Laws of Kenya.

That section 16(4) of the Act No. 3 of 2010, provides inter alia that;

"*Save as provided in this section, no execution or attachment or process in the nature thereof shall be issued out of any Court for enforcing payment by the government of any such money or costs referred to this section."*

That the judgment cannot be and still cannot be enforced by execution against both the Government of Zanzibar and the Government of Tanzania as such he submits that the judgment was not supposed to be registered by the Court as provided for under Section 6(2)

"An order shall not be registered under sub section (1) if it appears to the High Court that –

(a) ….…

(b) It could not be enforced by execution in the country of Original Court."

That legal entity or organ for Zanzibar executes matters solely for Revolutionary Government of Zanzibar and the same cannot extend to the United Republic of Tanzania and denies that the Republic of Tanzania is a judgment debtor within the meaning of section 2(1) of Cap 43.

On the question on diplomatic property enjoying diplomatic privileges and immunities, it was submitted the suit property was obtained n reciprocity basis between the Government of the United republic of Tanzania and republic of Kenya ; that the said property is registered in the names of the High Commission of the United Republic of Tanzania in the Republic of Kenya and the same is in the process of construction a High Commission office which was the primary purpose of obtaining the suit property and that the Tanzanian Mission documents are kept in the existing building; that the Vienna Convention on Diplomatic Relations 1961 applies and that the attached property is used for Sovereign State purposes. It was further submitted that the suit property had been gazetted as stated in the letter from the office of the Prime Minister of the Republic of Kenya and that this was evident by the Notice by the Ministry of Foreign Affairs in the republic of Kenya published in the Daily nation newspaper , Wednesday June 23,2010 and that a copy was availed to them by way of Note Verbale MFA.LEG 10/60V dated 27th February 2014 and that the same enjoys diplomatic privileges and immunity and that the orders for attachment and prohibition were erroneously issued to the Decree Holder and should be vacated or/ set aside. Counsel denied that the said land was not used for commercial purpose and refutes that an archive does not fall within Article 1 of the Vienna Convention on Diplomatic Relations 1961. Counsel sought to distinguish authorities cited by the Decree Holder as follows that in the case of ***Bird shipping Corporation vs. The Embassy of United Republic of Tanzania,*** the Court held that; "*in determining immunity, Foreign State must have waive its immunity and the property attached must be used for a commercial purpose.*". He submitted that neither the head of the mission nor the United Republic of Tanzania waived her immunities and that the said property is intended to be used for diplomatic purposes.

On the case of **Trendex v. Central Bank of Nigeria (1971)1 ILR. 111**.

That this case does not apply to the instant case in that the state (United Republic of Tanzania) was not a party to the said ordinary commercial transaction and Bizanje was not a state organ and that lifting the corporate veil did not waive diplomatic immunities of the united Republic of Tanzania. It was submitted that the case of *Rahimtoolla vs. H.E.H.(supra)* the state of Pakistan did not prove ownership or establish any interest in the fund while in the current case the United Republic of Tanzania has established that the suit property is in the name of the High Commission in the Republic of Kenya. Lastly that that the Vienna Convention on Diplomatic Relations signed in 1961 have the force of Law under Section 5(4)(1)(2) of privileges and immunities Act Cap 179 of the Laws of Kenya. Counsel urged the Court to set aside the Order for attaching of the suit property and prohibitory order dated 3rd May 2013.

DETERMINATION

Prayer No. 1 was not opposed by the Respondent. At the time the application was being heard that was dealt with.

Prayer 2.

On prayer No. 2 the applicant claims that the attached property is the property of High Commission of the Government of the United Republic of Tanzania. To support this claims applicant has annexed the title deed Government No. IR 84779 that show that L. R 209/1378 is the property of the United Republic of Tanzania. It has been argued that the property was not gazetted and that it does not enjoys diplomatic immunity and also that it is used for commercial purposes. I note that Counsel for the 1st interested party did not refer to the specific law that supports this argument that the property must be gazetted. This was refuted by the applicant who went out of its way to show that the property belongs to the Government of Tanzania, this court was referred to a letter it cannot ignore, the letter dated 13/10/10 by the Permanent Secretary in the office of the Prime Minister that states that;

"***I am pleased to inform you that on the 22nd of June 2010 the Court of Kenya through the Ministry of Foreign Affair published a public notice in the daily newspapers to the effect that the above property (the subject of this ruling) Court be subject of sale auction and transfer or any dealing or encroachment whether he express authority of the Government of the United Republic of Tanzania as it enjoys diplomatic protection which in inviolable"***

The letter speaks for itself and therefore the applicant's arguments that the property enjoys diplomatic immunity stands. Kenya being a signatory to the Vienna Convention on Diplomatic Relations must ensure that any property that enjoys diplomatic immunity is protected. Further there no proof from the Decree Holder that the said premises was being used for commercial purposes. The applicant deponed that the suit land is specially for building of the Office of the High Commissioner of the United Republic of Tanzania in the republic of Kenya and that the construction is ongoing and that an archive is not necessarily for commercial purposes. This was not challenged. Indeed the facts in this case is unlike the facts in the case of **Bird shipping Corporation vs. Embassy of the united Republic of Tanzania** (supra) where the court found that he premises was not immune from attachment. Hence the provisions of Article 19 (c) of The United Nations Convention on Jurisdictional Immunities of State property 2004 cannot apply.

I therefore stay the execution of the attachment of the subject property L. R 209/13678 at Nairobi and all consequential orders thereto. I further stay execution of the ex-parte prohibitory order issued by this Court on the 3/5/12 and all consequential orders.

Arguments were made on whether the state of Tanzania and Zanzibar are one United Republic. I have considered the arguments made but I will not make a finding on the same as in my view it requires this court to make an interpretation of the provisions of the Constitution of the United Republic of Tanzania of 1977 at this interlocutory stage. I have not been made aware whether such arguments have been advanced in the Courts in Tanzania and if the courts in Tanzania or Zanzibar have made determinations on the same. Having found that the property enjoys diplomatic immunity I refrain from commenting or making a finding on the issue of the sovereignty of both states in this matter.

Prayer 4

On whether the ex-parte order issued on the 4/11/11 should be vacated. The provisions of section 5(1) of the Foreign Judgment Reciprocal Act (Cap 43) are clear. Where a judgment has been given in a designated court the judgment creditor may apply to the High Court to have the judgment registered within 6 years from the date of judgment or where there have been proceedings by way of appeal against the judgment, of the date of the last judgment in the proceedings. The issue of 6 years is debated in this case. The judgment was delivered in January 2000. The application filed by the decree holder referred to the judgment delivered in January 2000.Going by the said date then it is obvious that the six years had lapsed. It has averred that there is no appeal against the judgment, if that is so then the application that was made on the 28/9/11 was made after the expiry of six years without leave of Court. Section 10(1) of the Foreign Judgments reciprocal Act (Cap 43) provides for the grounds upon which such a judgment may be set aside. The Court under the said provision is empowered to set aside the judgment that was registered if it is in contravention of the Act, (see section 10 (2) (b)). Having made a finding that the judgment was registered after 6 years then I find that the orders granted on the 4/11/11 cannot stand. I therefore set aside the said order. I also find that the applicant decree holder has not exhausted all the avenues available to it in the country of origin. The Interested Party's application has merit and it succeeds on prayers 4, 5 and 6, the said prayers are granted. Each party to bear its own costs.

Orders accordingly.

Dated, signed and delivered this 6th day of October 2014.

R.E. OUGO

JUDGE

In the presence of:-

……..……. For the Interested Party/Applicant

……..2nd Plaintiff/ Respondent

……..…..…….…….… …For the Decree Holder/Respondent

……1st Interested Party (Auctioneer)/Respondent

…….……Court clerk