IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM.

LAND CASE NO. 62 OF 2010

AGRICOM AFRICA LTD.....APPLICANT

VERSUS;

JOHN MALYA.....1st RESPONDENT.

USU MALLYA .....2ND RESPONDENT

RULING;

31/10/2011 & 23/04/2012.

Utamwa, J.

This is an application made by the applicant, **Agricom Africa Ltd** under S. 68 (c) of the Civil Procedure Code, (Cap. 33, R. E. 2002) and supported by the affidavit of one **Angelina Ngalula**, Principal Officer of the applicant. The application is against the two respondents, **John Mallya** and **Usu Mallya** (the first and second respondent respectively) seeking for the following orders.

a) An order committing the respondents as civil prisoners for disobeying a temporary injunction order.

b) That the respondents be ordered to restore electricity and water to the suit premises.

c) Costs be provided.

d) Any other order or relief this court may deem just to grant.

Both respondents objected the application and accordingly filed a joint counter affidavit that was sworn by the first respondent on behalf of both respondents. In this application the applicant is represented by Professor **(Prof.) Shaidi** learned Counsel while both respondents enjoy the services of **Mr. Mbuya** learned Counsel.

The brief background of this matter is this; the applicant, a limited liability company incorporated in Tanzania and conducting business of marketing agricultural implements filed a suit against the respondents who are private persons for damages arising out of a breach of contract. According to the plaint the parties entered into a lease agreement whereby the applicant leased the respondents' premises for a period from February 2010 to January, 2011. In between, a misunderstanding arose between the parties, hence the suit which is still pending. At a time the applicant filed an application for temporary injunction, and upon the agreement by the parties the court granted it and ordered *inter alia* that the status quo of the parties be maintained pending the determination of the main suit. After a lapse of time the applicant filed the application at hand, complaining that the respondents have breached the temporary injunction order, hence this ruling.

In the affidavit supporting the application the applicant swore to the effect that; as principal officer of the Applicant Company, the deponent (Angelina) is conversant with the facts of this matter, and she thus narrated what had transpired (as demonstrated into the background of this matter herein above). Angelina further deponed that on 6th October, 2011 the first respondent instructed the Tanzania Electrical Supply Company Limited (TANESCO) to disconnect electricity from the suit premises (meter No. 04167568353), which they did under his personal supervision. The said disconnection was done without any notification or warning to the applicant notwithstanding that the applicant had a LUKU prepaid units meter and receipts.

It is further sworn in the affidavit that when the applicant pleaded with TANESCO to restore power, it was informed that the first respondent had ordered it to disconnect power because he wanted to make renovations to his premises, and further that on 30th September, 2011 the first respondent also ordered the Dar es Salaam Water and Sewage Corporation Limited (hereinafter, DAWASCO) to disconnect water supply from the suit premises, and the same was effected. At the moment the Applicant is without electricity and water (here in cumulatively referred to as the services), and this has brought its operations to a standstill.

According to the counter affidavit both respondents admit all the facts into the affidavit supporting the application except the fact that

they did instruct the said TANESCO and DAWASCO to disconnect their respective services from the suit premises, they also disputed the fact that the electricity was disconnected without notice to the applicant. The respondents also disputed the fact that TANESCO informed the applicant that the respondents had instructed it to disconnect the electricity. The respondents also swore into the counter affidavit to the effect that the temporary injunction order had expired when the services were disconnected and no application to extend its time has been made, and if the disconnection of the electricity and water services was effected by TANESCO and DAWASCO respectively, they (respondents) should not be ordered to restore the same.

During the hearing of the application Prof. Shaidi, learned Counsel for the applicant adopted the contents of the affidavit in support of the application and further argued orally to the following effect; that the conduct of the respondents complained of above was against the temporary injunction order dated 24th January, 2011 (herein called the order in short) which was to the effect that the status quo of the parties had to be maintained pending the final determination of the main suit. The learned Counsel further argued that, the court must thus take action under S. 68 (c) of Cap. 33. In fortifying his argument he cited the case of **Tanzania Mbundu Safari Ltd v. Director of Wildlife and another [1996] TLR. 246 (HC)** where this court (at page 246) ordered a fine or

imprisonment for a breach of the court order. He thus pressed this court to grant the orders prayed.

In his replying submissions the learned Counsel for the respondent contended that under order 37 rule 3 of Cap. 33 the life span of an order for temporary injunction is only six months unless there is an extension. He thus asserted that the order was made on 24/1/2011 and lapsed on 24/7/2011, and the action complained of by the applicant took place on the 30/09/2011 and 6/10/2011 when the order had expired, there was thus no any temporary injunction order at that time, hence the respondents were not in contempt of any order. The learned Counsel cited the case of **Alfred Matatiro v. Shelter Construction Limited and two others [2006] TLR. 206** (HC) to fortify his stance. Again, the learned Counsel for the respondent drew the attention of this court to the case of **African Trophy Hunting Ltd v. Attorney General and 4 others [1999] TLR. 407** where he said the Tanzania Court of Appeal (TCA) held that the provisions of order 37 rule 3 of Cap. 33 do not depend on compliance of the terms of the order, and that where the period for the order has elapsed there may not be any application to set aside the temporary injunction order. The learned Counsel thus pressed this court to dismiss the application with costs.

In his rejoinder submissions the learned Counsel for the applicant contended that the order was specific that it was made "*pending the final determination of the case*" and it was based on the consensus of the

parties depending on the speed truck which was to be fixed by the court. He added that the respondents conduct in disconnecting the services thus amounted to harassment against the applicant and lack of good faith aimed at paralyzing the applicant's activities.

From the arguments by both Counsel it is clear that the parties do not dispute that the order was actually made on 24/1/2011, and the services were in fact disconnected from the disputed premises by the respective suppliers after the expiry of six months from the date of the order. The parties are also at one that the order was a result of the agreement between them. The contention between the parties is this; while the applicant argues that the respondents were instrumental to the disconnection of the services, and their act amounted to contempt of the order, the respondents contended that they were not influential in the disconnection, they alternatively argued that the act did not amount to any contempt because the life span of the order had expired when the disconnection was committed.

The main issues for determination before me are therefore, two as follows;

1. *Whether or not the respondents were instrumental in causing and supervising the disconnection of the services from the disputed premises.*

2. *If the answer in the first issue will be affirmatively, then whether or not such acts of the respondents were contemptuous to the order.*

Before I engage myself in testing the two issues it is vital at this juncture to make it lucid that the burden of proof in civil contempt is on the person alleging that there was a contempt, and the standard of proof is beyond reasonable doubts; see the holding of this court in the case of **Tanganyika Investment Oil and Transport Company Ltd v. Tanzania Revenue Authority, High Court (Commercial Division) Commercial case No. 4 of 2006, at Dar es salaam** (Massati, J. as he then was). It is also pertinent to quote from the court record the order at issue and the proceedings that resulted to it for the sake of a readymade reference; these are the pertinent proceedings;

> ***"Date;*** *24/01/2011.*
>
> ***CORAM;*** *Hon. Utamwa, J.*
>
> ***For the Applicant;*** *Professor, Shaidi (advocate).*
>
> ***For Respondent****; Mr. Mbuya (advocate).*
>
> ***CC;*** *.Janet*
>
> ..... *(irrelevant)*
>
> *Prof. Shaidi; we have now remained with the actual application which we filed under certificate of urgency as the danger which we apprehend is on 31/1/2011, we thus pray for hearing of the main application.*

Signed; JHK. Utamwa

Judge

24/01/2011

Mr. Mbuya (advocate); My position is that, we may be in consensus with the applicant, in that we may not object to the maintenance of the status quo so long as the main suit will be heard timely as per the speed track to be fixed at the P.T.C. (meaning pre-trial conference).

Signed; JHK. Utamwa

Judge

24/01/2011

Prof. Shaidi; I will thus have no objection to the suggested idea by Mr. Mbuya so long as the matter will be speeded as per the s/truck (meaning speed track) to be fixed by the court;

Signed; JHK. Utamwa

Judge

24/01/2011

.....(irrelevant)

ORDER;

Utamwa, J.

Following the consensus by the parties (Prof. Shaidi for the Applicant and Mr. Mbuya for the Respondents) it is hereby ordered that the main chamber application for temporary injunction is hereby granted and the status quo of the parties should be maintained as prayed, in that; the respondents, their agents and or workmen are hereby restrained from

implementing their intention of evicting the applicant from the suit plot, i. e. ***plot no; 51 Bloc 45C, old Bagamoyo road in Dar es salaam****, pending the final determination of the main suit now pending before this court.*

It is further ordered that costs of this application be costs in the main course. This order is made, upon the agreement that the main suit will be timely determined as per the speed-truck which will be fixed by the court at the first pre-trial conference. It is so ordered.

J. H. K. Utamwa,
Judge,
24/01/2011.

Court; *Order pronounced in chambers in the presence of Prof Shaidi and Mr. Mbuya learned Counsel for the Applicant and Respondents respectively, this 24th day of January, 2011.*

J. H. K. Utamwa,
Judge,
24/01/2011".

As to the first issue of *whether or not the respondents were instrumental in causing and supervising the disconnection of the services from the disputed premises* the applicant relied upon the evidence adduced into the affidavit supporting the application as demonstrated herein above. My task is thus to test if there is any proof beyond reasonable doubts against the respondents. In the first place it is clear from the affidavit supporting the application that it was the first respondent (alone) who was instrumental in the whole trend. There is no

scintilla of allegation, let alone evidence implicating the second respondent personally. There is also no any suggestion that the first respondent acted on behalf of both respondents in committing the act complained of. I thus promptly find that the second respondent neither caused nor supervised the disconnection of services from the suit premises.

As to the first respondent, it is clear that the evidence into the affidavit supporting the application was adduced by Angelina, principal officer of the applicant conversant with all the facts as stated into the first paragraph of the affidavit, and the evidence is to the effect that the first respondent was active in disconnecting the services by instructing the suppliers so to do, which said instructions were effected in the personal supervision of the first respondent and without notice to the applicant. The evidence is also to the effect that now the lack of services is affecting the operation of the applicant.

In law affidavital evidence takes place of oral evidence, it follows thus that an affidavit is equally competent enough to prove any fact at any standard the same way oral evidence does. This is the reason why the law is further to the effect that affidavits, like any other piece of evidence, must be analysed and evaluated by the courts, see **Caritas Tanzania and another v. Stuward Mkwawa [1996] TLR 239 (HC).** It is thus my duty to analyse and evaluate the affidavit of Angelina as I hereby do; In the beginning, I must highlight one vital legal principle of

evidence which is pertinent in the matter at hand; it is trite law that any person giving evidence in court is entitled to credence and must be believed, and his testimony accepted unless there are good and cogent reasons for not believing him, see the TCA decision in the case of **Goodluck Kyando v. Republic, Criminal Appeal No; 118 Of 2003, at Mbeya**. The respondents' counter affidavit was only to the effect that they were denying the facts stated into the affidavit, but they did not indicate why this court should not believe Angelina's evidence into the affidavit supporting the application. There is therefore, no any reason for not believing Angelina.

I am also live that in her affidavit Angelina deponed on some facts based on information received from suppliers that they (suppliers) had been instructed by the first respondent to disconnect the services. These kinds of facts when deponed into affidavits are also competent evidence in interlocutory proceedings where the source is disclosed as Angelina did in the affidavit supporting the application. The TCA in **Salima Vuai Foum v. Registrar of Cooperative Societies and Three others [1995] TLR. 75** held that where an affidavit is made on information, it should not be acted upon by any court unless the sources of information are specified. Even if this was not the case, this court is entitled to presume that a supplier of services like electricity and water in this country will not disconnect the same from the premises in which the services are supplied without instructions from the owner of the premises, unless

there are some defaults in the terms of providing the services or there are other reasons for the disconnection, this is so regard being had to the common course of public and private business, in its relation to the facts of the matter at hand. This particular inference of facts is pegged on the provisions of S. 122 of the Evidence Act, 1967 (Cap. 6 R. E. 2002). In the case at hand there is no any reason adduced by the respondent or indicated anywhere in the record in rebuttal of this statutory presumption of evidence. The presumption above is fortified further by the fact that there is a dispute between the applicant and the respondents, which said dispute arose from misunderstanding between them leading to the latter raising the monthly rent which is disputed by the former (see the affidavit supporting the chamber application that led to the order). This court thus believes the submissions by the plaintiff's Counsel that the respondents act amounted to lack of trust and deliberate harassment to the applicant.

It must be noted here that the evidence against the first respondent is purely circumstantial by nature, the law is to the effect that for proving a fact beyond reasonable doubt circumstantial evidence must be water tight. In the matter at hand, and for the reasons stated herein above I am convinced that such circumstantial evidence is water tight enough to prove beyond reasonable doubts that the first respondent was active in causing and supervising the disconnection of the services from the disputed premises. The first issue is thus answered partly positively and

partly negatively to the effect that it was the first respondent and not the second, who in fact caused and supervised the disconnection of services from the suit premises.

As to the second issue, I am of the view that it must be re-framed following the fact that the first issue has been partly negatively determined as far as the second respondent is concerned. The second issue is thus rephrased thus; *whether or not the first respondent's acts of causing and supervising the disconnection of services were contemptuous to the order.* I am of the settled view that from the counter affidavit and the submissions by the learned Counsel for the respondents, the first respondent does not consider the act complained of as contemptuous to the order for a single reason that the same was committed after the expiry of the six months period from the date of the order, which said period is the life span of an order for temporary injunction under Order 37 rule 3 of Cap. 33. The applicant is of the view that the order was issued pending the final determination of the main suit and was a result of an agreement between the parties. It (the order) was thus still in force when the act complained of was committed.

Having considered the order at issue and the proceedings that led to its making (as quoted herein above from the record) I am convinced that the order was not an ordinary temporary injunction envisaged under Order 37 rule 3 of Cap. 33. This order resulted from the clear agreement by the parties to maintain the status quo of the parties pending the

finalisation of the main suit according to the speed track that the court could fix at the first pre-trial conference. Again, from the same record, it is clear that the agreement by the parties was aimed at avoiding the hearing of the application which the applicant had filed applying for the order of temporary injunction; this accord by the parties was in fact for the sake of speeding the trial of the main suit. I am thus entitled to take that the parties had agreed not to be bound by the provisions of Order 37 rule 3 of Cap. 33. It must also be noted that this rule is a mere procedural rule which does not in law preclude this court from making any other order in exercise of its inherent powers under S. 95 of Cap. 33 for the sake of justice.

The provisions of Order 37 rule 3 of Cap. 33 could not thus bar this court from making the temporary injunction order pending the determination of the main suit as per the speed track that could be allocated to the suit, and it was more so considering the deliberate agreement by the parties aimed at speeding the trial. In fact the interests of justice require courts to speed trials, see article 107A (2) (b) of the Constitution of the United Republic of Tanzania, 1977 (R. E. 2002). According to the prudence of the TCA in the case of **Ibrahim Said Msabaha v. Lutter Symphorian Nelson and Attorney General, Civil Appeal No; 4 Of 1997, at Dar-Es-Salaam** the law is also to the effect that parties to civil proceedings are at liberty to compromise their rights and courts must respect their compromise unless the same amounts to

abuse of court process or violates law or public policy, which is not the case in the matter at hand for the reasons I demonstrated herein above. Under the circumstances of this matter, the respondents cumulatively or the first respondent alone cannot be heard eating their own words by disrespecting what they had agreed with the applicant (in court by express terms, which said agreement led to the court order at issue) by taking shelter under the provisions of Order 37 rule 3 of Cap. 33. This court is also of the view that the agreement between the parties and the consequent order, might have made the applicant and the court itself to believe that there was no need of extending the life span of the order after the expiry of the six months. I thus find that, permitting the first respondent to hide under these provisions of Order 37 rule 3 of Cap. 33 will amount to authorizing dirt games in the process of dispensation of justice, where a dishonest party may freely set a trap against an adverse honest party by executing a feign agreement so that the former may ingeniously procure the laxity of the latter (in not taking proper legal steps in time) with the view of (the former) using procedural rules afterwards to defeat justice in the detriment of the latter. This is the trend that courts of law must be prepared to discard at any costs.

Even if it could be taken that the order was erroneous for extending the temporary injunction pending the final determination of the main suit as against the provisions of order 37 rule 3 of Cap. 33 (as the respondents' Counsel tried to suggest in his submissions), that could not

justify the first respondent's act of causing the disconnection of services because, the law is clear that any court order remains enforceable irrespective of its correctness unless legally set aside, see **R. v. Mahamod Mohamed [1973] LRT. 79**. The same position applies in Kenya, where the Kenyan High Court, in discussing civil contempt of court in the case of **Wildlife Lodges Ltd v. County Council of Narok and another [2005] 2 EA 344** (following Hadkinson v Hadkinson [1952] 2 All ER 575) held that the whole purpose of litigation as a process of judicial administration is lost if court orders are not complied with, and that a party who knows of an order whether null or valid, regular or irregular, cannot be permitted to disobey it. It would be most dangerous to hold that suitors, or their solicitors, could themselves judge whether an order was null or valid, whether it was regular or irregular. I adopt this very persuasive decision from Kenya. The order in the case at hand has not been set aside in any way, and in fact it is still enforceable to date because the main suit is still pending and even the speed track of the same (that formed one of the terms of the agreement between the parties leading to the order) has not been set yet by the court.

The respondents also intended to vindicate the act of the first respondent by seeking cover under the authorities of **Alfred Matatiro** (supra) and that of **African Trophy Hunting Ltd** (supra) cited by their learned Counsel in his submissions. This strategy however, was also not good enough to rescue the first respondent from the legal consequences.

The two cases are distinguishable in the matter at hand because they both discussed on the expiry of interim orders that had been made pending the hearing of main applications for temporary injunctions. Such orders in both cases were not issued pending the final determination of the respective main suits, and both orders were not resulted from the consensus of the respective parties as it was in the matter at hand.

I have also tasked my mind to determine what may be the necessary ingredients of civil contempt, and found that they include the following; that the terms of the order must be clear and un-ambiguous, the respondent had a proper notice of the terms and there is a breach of the order, see the case of **Tanganyika Investment Oil and Transport Company Ltd** (supra; following *Halsbury's Laws of England, 4th edition, vol. 9 (1) paragraph 469, at page 287*). From the above consideration, and so long as the first respondent clearly knew the existence and the terms of the order following the fact that he was legally represented in court when the order was pronounced, which said order was a result of the agreement by the parties, and so long as I have held above that the first respondent actively caused and supervised the disconnection of the services from the disputed premises, and as long as the order was in force when the disconnection was effected and is still in force to date, and as long as the disconnection of the services is against the status quo which existed at the time when the order was made and it

(the disconnection of the services) affects the operations of the applicant, then I am convinced that the act by the first respondent amounted to contempt of court in terms of the ingredients demonstrated above. The re-framed second issue is thus positively answered to the effect that *the first respondent's acts of causing and supervising the disconnection of services were contemptuous to the order.*

For the above findings in respect of the two issues, I agree with the learned Counsel for the applicant that courts of law are enjoined to take proper action under S. 68 (c) of Cap. 33 against trends of this nature. This view has support in the case of **Tanganyika Investment Oil and Transport Company Ltd** (supra) where it was held that the powers for this court to punish for contempt are vested on it not only through Cap. 333, but also through S. 2 (3) of the Judicature and Application of Laws Act, (Cap. 358, R. E. 2002). In support of this view this court held in the case of **Tanzania Mbundu Safari Ltd** (cited by the applicant's Counsel) that the prime object of civil contempt proceedings is to vindicate the rule of law and sometimes to punish where necessary, see also the case of **Tanganyika Investment Oil and Transport Company Ltd** (supra). Discussing on civil contempt the High Court of Kenya in the case of **Osero and Company Advocates v Labhsons Limited [2007] 1 EA 312** remarked that it cannot be over-emphasized that courts are the custodians of law and order; they are expected to safeguard the legal rights of all persons who appear before them, and that in an

endeavour to uphold the dignity of the court, persons disrespecting court orders would ordinarily be cited for contempt and then hauled off to serve a jail sentence. It is only by so doing that the court would be sending a clear message that all persons should at all times not do anything that could lead the court into disrepute. I also adopt this persuasive Kenyan decision.

For the above reasons I grant the application as far as the first respondent is concerned. However, it is the law that civil contempt is also punishable by imposition of fine at the tune that according to the court's judgment corresponds to the measure of contempt and the injury due to the public interest, and if the person found guilty of contempt fails to pay the fine then he goes to prison, see **Tanzania Mbundu Safari Ltd** (supra). I therefore, find that for the circumstances of this case, in which said case the first respondent breached the court order resulting from his own agreement with the applicant, which said conduct indeed manifests not only a designed strategy to harass the applicant as rightly argued by the applicant's learned Counsel, but also implies a serious disrespect to this court, the commensurable fine that will meet the justice of the case is Tanzanian Shillings two millions (2, 000, 000/=).

Consequently I make the following orders under the powers vested on this court through S. 68 (c) and (e) of Cap. 33 and S. 2 (3) of Cap. 358; The first respondent is thus ordered to pay the amount Tshs. 2, 000,

000/= (two millions only) as fine, and in default to pay the same within a week (7 days) he shall be sent to jail as a civil prisoner as prayed by the applicant for 12 months. The first respondent is further ordered to cause the disconnected services restored in the disputed premises within the same period of a week from the date hereof. Lastly the he shall pay the costs of this application. It is so ordered.

JHK. UTAMWA.

JUDGE

23/04/2012.

Date; 23/04/2012.

CORAM; Hon. Utamwa, J.

Applicant; Mr. Mandele (advocate) for Prof. Shaidi.

Respondent; Mr. Mandele (advocate) for Mr. Mbuya.

BC; Mrs. Kaminda.

Court; ruling delivered in the presence of Mr. Mandele (advocate) holding briefs for Prof. Shaidi and Mr. Mbuya for the applicant and respondents respectively, this 23th day of April, 2012.

JHK. UTAMWA.

JUDGE

23/04/2012.