IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 80 OF 2017

THE REGISTERED TRUSTEES OF THE CIVIC UNITED FRONT (CUF-CHAMA CHA WANANCHI).....APLLICANT

VERSUS

THE REGISTRAR OF POLITICAL PARTIES..1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL...2ND RESPONDENT

R U L I N G

24 & 29 May, 2018

DYANSOBERA, J:

This is an application for an order of temporary injunction to restrain the respondents, their agents, employees or any person claiming or acting under them from disbursing the party's subventions from the Government pending the hearing inter-parties and determination of Misc. Civil Cause No. 68 of 2017 which is before Hon. Dyansobera, J.

From the affidavital disposition and the written statement in chief in support of the application by Mr. Joran Lwehabura Bashange, the Deputy Secretary-General of the Civic United Front (CUF-Chama cha Wananchi) for Tanzania Mainland and the Secretary of the applicant, the following are the facts and grounds in support of the application. The applicant filed in this court a Misc. Civil Cause No. 68 of 2017 for extension of leave and for leave to file an application for prerogative orders of Mandamus

and Prohibition: mandamus requiring the 1st respondent to disburse and deposit into account No. 021101002699 NBC Zanzibar in the name of CUF-Chama cha Wananchi all subventions from the Government due to the CUF from September, 2016 to the present and prohibiting and restraining the 1st respondent from disbursing the subventions from the Government due to the CUF into any other account than account No. 021101002699 NBC Zanzibar in the name of CUF-Chama cha Wananchi or any other designated for the purpose of receiving the subventions from the Government.

According to the submission in support of the application, the aim of this application is to prevent the wastage of the public funds in the form of government subventions due to the Civic United Front. It is contended on part of the applicant that while the application is pending before this court, the 1st respondent is processing and is hurriedly intending to deposit the parties subventions from the Government due to the applicant into an unrecognised account having no control of the applicant. Relying on Annexure F to the Affidavit which document is also annexed to the Counter Affidavit by the respondents, Mr. Joram Lwehabura Bashange argues that the application and the intended Misc. Civil Cause No. 68 of 2017 is intended to giving effect to the 1st respondent's suspension so that the public funds are protected and the party, that is the CUF gets its share of subventions from the Government when the disputes currently in court are determined and the situation within the party is settled.

In main, the reasons advanced in support of this application are the following.

First, that in contravention of the 1st respondent's order of suspending the issuing of the subvention, he unexpectedly deposited a sum of Tshs. 369,378,502.64 into account No. 207023004456 at NMB Bank, Temeke Branch in the name of the Civic United Front CUF Temeke which is an account of Temeke District Office of the party not held and managed by the applicant and the said sum was then transferred to a private account of Masoud Omar Mhina who is not a party leader and the party cannot account for its expenditure and that the Controller and Auditor General has raised a concern on this failure to account for the money. That the same 1st respondent also on 20.1.2018 disbursed into account No. 2070234456 at NMB Bank, Temeke Branch a sum of Tshs. 1, 07,982,032.12 and that all the money has been withdrawn without the knowledge of the party.

Second that the conditions set out in the case of **Attilio v. Mbowe** [1969] HCD No. 284 by Georges C. J. have been met, namely:

(i) There must be serious question to be tried on the alleged fact and a probability that the plaintiff will be entitled to the relief prayed,

(ii) That the court's interference in necessary to protect the plaintiff from the kind of injury which may be irreparable before his legal right is established and,

(iii) That on the balance there will be greater hardship and mischief suffered by the plaintiff from withholding of the injunction that will be suffered by the defendant from the granting it.

Mr. Bashange relied on the case of **Hon. Ally Saleh v. the**

Executive Officer of the Registration, Insolvency and Trusteeship Agency and 17 others; Misc. Civil Application No. 51 of 2017 and a Ugandan Case **Ndema and others v. Mubiru:** Misc. Application No. 225 of 2013 to support his contention.

He further argued that in Misc. Civil Cause No. 68 of 2017 a prima facie case has been established as there a bonafide dispute raised and a strong case for trial which needs investigation and decision on merits. As to irreparable injury, it is argued for the applicant that if the temporary injunction is not issued, the respondent will continue to disburse public money to ineligible people thereby fuelling dispute and rift within the party with the possibility of having more cases filed in courts of law hence deteriorating peace, harmony and cohesion within the party. On the balance of convenience, Mr. Bashange told this court that on the facts and circumstances of the present case more harm is likely to be done in withholding the temporary injunction than granting it. That if the order of temporary injunction is granted and the subvention is not disbursed, there is a great possibility that public funds will be protected and preserved and the disputes currently in court will come to an end, there will be peace, harmony and cohesion within the party and that there will be more democratic space within CUF and more enjoyment of the constitutional right.

Responding to these submissions, Mr. Gabriel Malata, learned Principal State Attorney for the respondents started his submissions by highlighting the governing principles on temporary injunction stipulated in the case of **Attilio v. Mbowe** (supra). Relying on the case of **Tanzania Cotton Marketing**

Board Cogecat Cotton (COSA) [1997] TLR 63 which amplified the said principles, Mr. Malata submitted that the applicant in that case had not gone beyond the mere assertion that it would suffer great loss and that its business would be brought to a standstill. Unless details and particulars of the loss were specified was no basis upon which the court could satisfy itself that such loss would incur. Further that the applicant had further more failed to indicate, beyond the vague and generalised assertion of substantial loss, that the loss would be irreparable. Any loss which the applicant was likely to suffer to could be adequately compensated for by an award of damages.

This court was also addressed to another principle governing the court on the ordering or otherwise of the temporary injunction noted in the case of **State of Assam v. M/s Associates** AIR [1994] GAU 105 where it was held

> *"While granting a temporary injunction not only three ingredients must be observed but in addition to it public interest and/or public policy also will have to be considered. The court cannot be used as an instrument to cause injury to society, and or loss to community by exercising equitable jurisdiction to give benefit to somebody the large interest cannot be sacrificed.*

Learned Principal State Attorney also referred this court to Misc. Cause No. 54 of 2000 between **Alhay Muhidin Ndolanga and Alhay Ismail Aden Rage v. the Registrar of Sports and Sports Association and others** (unreported) where the court held:

"It is trite law, as well as trite learning, that in granting or not granting injunction public interest, or public policy has to be considered, so that the Court makes sure that it is not used as an instrument or tool to cause injury to society, or loss to community. Thus, in the court's exercise of its equitable jurisdiction to give benefit to somebody the large interest of the community cannot be sacrificed. In the event, balance of convenience, must always be in favour of the public. In summary therefore, with only one principle satisfied the injunction cannot stand on one foot like a Masai in the grazing grassland."

Having elaborated on these principles learned Principle State Attorney invited the court when exercising its discretion to consider them as they were affirmed by the Court of Appeal of Tanzania whose decisions are binding on this court.

On the application of those principles in the present matter, it was submitted for the respondents that the applicant has miserably failed to canvass the requirements of the law as enunciated by the above legal principles, at any reasonable meaningful length and that the balance of convenience is hardly in the respondent's favour, in such circumstances. This court was taken through whole affidavit and as far as paragraphs 1, 2 and 3 of the affidavit is concerned, learned Principal State Attorney stated that they have nothing to do with the proof of the legal requirements of granting a temporary injunctions. As to paragraph 4 of the affidavit, Mr. Malata said that it details two things; first, that there is a pending case before this Honourable Court and second that the 1st respondent is processing and

hurriedly intending to deposit the party's subventions form the Government to the applicant into unrecognised account having no control of the applicant. He argued that *this paragraph does not provide and establish any prima facie circumstances for the existence of the same but mere allegation with no evidential support.* Further that if it can be said that the said paragraph 4 of the affidavit is the centre of the facts relied upon by the applicant in persuading this Honourable to grant the temporary injunction, then the paragraphs contains allegations not of facts which is in contravention of O.XIX rule 3 (1) of the Civil Procedure Code [Cap. 33 R.E.2002] which provides that an affidavit shall be confined to such facts as the deponent is able of his own knowledge to prove, the position which is backed up by the case of **Uganda v. Commissioner of Prisons, Ex parte Matovu** [1969]EA 514 at p. 520:

> *As a general rule of practice and procedure, an affidavit for use in court, being a substitute for oral evidence should only contain statements of facts and circumstances to which the witness deposes either of his own personal knowledge or from information which he believes to be true and that such an affidavit must not contain an extra new matter by way of objection or prayer or legal argument or conclusion."*

This court was told that the allegations made in the affidavit were not provable or proved and that there is no legal decision to be implemented. It was further submitted the alleged irreparable loss was not particularised and the mere assertion was in contravention of the principle in the case of **Tanzania Cotton Marketing Board** (supra). Learned Principal State Attorney told

this court that the applicant is not the spokesman of the Government and he cannot be heard to say that the irreparable loss with affect the Government. This court was referred to Article 35 (1) of the United Republic of Tanzania Constitution which provides that *'shughuli zote za utendaji za serikali ya Jamhuri ya Muungano zitatekelezwa na watumishi wa serikali*". A reference was also made to section 17 of the Office of the Attorney General (Discharge of Duties) Act, 2005 on the fact that it is the Attorney General or officer authorises so stand for. There was also an argument on part of the respondents that the Registered Trustees for the Civic United Front has given no consent or authority to institute this case.

On the documents attached to the submission showing the amount of money deposited in some accounts, learned Principal State Attorney urged this court to disregard them arguing that they have been wrongly attached as the submission is a summary of arguments and not evidence and the said documents cannot be used to introduce evidence. In support of this argument, learned PSA relied on the case of **Tanzania Union of Industrial and Commercial Workers (TUICO) at Mbeya Cement Company Ltd v. Mbeya Company Ltd and National Insurance Corporation (T) Ltd** [2005] TLR 41 and that the same goes against the application and facts narrated that the respondent is intending to deposit money to unrecognised account.

Concluding the submission, learned PSA pointed out that the legal requirements for the grant of orders for injunction have not been met and that the application has nothing but full of personal feelings as opposed to facts which the law entitles to be.

In determining this application, I undertake to be guided by the following principles:

One, a temporary injunction is not conclusive to the rights of the parties. Two, a temporary injunction does not determine the merits of the case or decide the issues in controversy. Three, it seeks to prevent threatened wrong, further injury and irreparable loss/harm or injustice until such time as the rights of the parties can be ultimately settled. Four, it ensures the ability of the court to render a meaningful decision and fifth, it serves to prevent a change of circumstances that would hamper or block the granting of proper relief to the proper party following a trial on the merits of the case.

In the light of these principles, I shall confine myself to the affidavit, the counter affidavit and the submissions, particularly the principles enunciated in the case of **Attilio v. Mbowe** (supra).

It should be recalled that the applicant's affidavit was challenged by learned Principal State Attorney in his submission, under paragraphs 10,11,12,13,14,15,16,17,18,19,20,21 and 22, in particular and it being contended that the said affidavit contravened O.XIX rule 3 (1) of the Civil Procedure Code [Cap. 33 R.E.2002] which provides that an affidavit shall be confined to such facts as the deponent is able of his own knowledge to prove, the position which is backed up by the case of **Uganda v. Commissioner of Prisons, Ex parte Matovu** [1969]EA 514 whereby the Court had this to say at p. 520:

As a general rule of practice and procedure, an affidavit for use in court, being a substitute for oral evidence should only contain statements of facts and circumstances to which the witness deposes either of his own personal knowledge or from information which he believes to be true and that such an affidavit must not contain an extra new matter by way of objection or prayer or legal argument or conclusion."

While I agree with learned Principal State Attorney on the legal status of an affidavit and what it should not contain, I have no flicker of doubt that the affidavit filed in support of the chamber summons is proper and does in no way contravene either the law or the legal position discussed in the case of **Uganda v. Commissioner of Prisons, Ex parte Matovu** (supra). There is nowhere indicated that the affidavit contains extraneous matters by way of objection, prayer, legal argument or conclusion. Under paragraph 18 of the respondents' submission, it is argued that the deponent in this case has merely made allegations which is not provable or has not been proved in any way either by itself or through any documents evidencing the existence of such facts.

With due respect to learned Principal State Attorney, this argument is misconceived. An affidavit constitutes the factual evidence before a court upon which the matter is to be adjudicated. It cannot *contain provable or proved evidence through any documents evidencing such facts.* As I understand, an affidavit, a counter affidavit or even a reply to counter affidavit have dual purposes. First, they constitute evidence before the court and play the same role as oral evidence in action

proceedings. Second, they define the issues both factual and legal which results in *litis contestatio* between the parties in the same way as pleadings in an action.

My close scrutiny of the affidavit does not lead me to the conclusion that the affidavit under attack contains irrelevant and inadmissible material not contributing anything to the legal issues.

I now turn to the affidavit in support of the application and the counter affidavit in opposition. In his submission, Mr. Bashange is contending that the move to apply for temporary injunction is to affirm the step taken by the 1st respondent in suspending the subventions to the CUF until the administration within the party has resolved their differences. I agree. The respondents have attached a letter from the 1st respondent. Under paragraph 5 of the counter affidavit affirmed by Haruni Benge Matagane, Senior State Attorney, it is averred as follows:

> 5. that further, to paragraph 4 above, the respondents state that he suspended allocation of subsidies, by a letter with Ref. No. HA. 322/32/14/17 dated 10th October, 2016.
>
> *A letter from the registrar of political parties is attached here and marked "A" to form part of this counter affidavit.*

The crucial part of that annexure to the respondents' counter affidavit reads:

> *"Hali hii, inatia shaka kama kweli, kwa mtazamo niliyobainisha hapo juu kama kuna usimamizi makii kwa rasilmali za chama unaohitajika. Mathalani hat mkipewa magao wa fedha za ruzuju ya Serikali, nina mashaka kama*

chama chenu kwa mvutano uliopo kwa sasa kinaweza kusimamia vizuri matumizi ya hali niliyoibainisha.

Aidha, hata kwa mujibu wa barua nilizoorodhesha hapo juu pia zinaonyesha kuwa, hata Bodi ya Wadhamini ambayo ndiyo yenye dhamana ya kusimamia hali za chama pia imegawanyika hivyo haiwezi kufanya kazi inavyopaswa.

Kwa kuwa fedha za ruzuku ni feha za umma ambazo zinahitaji usimamizi mzuri katika matumizi yake, na kwa kuwa ofisi ya Msajili wa Vyama vya siasa ina dhamana ya kugawa fedha za ruzuku kwa vyama vya kisiasa vinavyostahili na kusimamia uwajibikaji katika matumizi ya fedha hizo, hivyo baada ya tafakari ya kina nimeona ni busara kwanza kusimamisha kwa muda mgao wa ruzuku kwa chama chenu mpaka hapo chama chenu kitakaporejea katika hali shwari kiutendaji inayowezesha viongozi husika kusimamia matumizi ya fedha hizo ipasavyo"

As rightly pointed out by Mr. Bashange, the application on hand is intended to give effect to the letter authored by the 1st respondent so that the public funds are protected and the subventions are distributed after the situation within the party is settled. The applicant's fear is that the 1st respondent is processing and hurriedly intending to deposit the party's subventions into an unrecognised account having no control of the applicant as averred under paragraph 4 of the affidavit and denied under paragraph 4 of the counter affidavit, contentious as it is, its correctness remains to be seen. Until the main application is heard and determined, it remains an arguable case.

In the submissions, both learned Principal State Attorney and Mr. Bashange are at one that the principles applicable in applications for temporary injunction are those as stipulated by Georges C. J. in the case of **Attilio v. Mbowe** [1969] HCD No. 284 are the following:

(i) There must be serious question to be tried on the alleged fact and a probability that the plaintiff will be entitled to the relief prayed,

(ii) That the court's interference in necessary to protect the plaintiff from the kind of injury which may be irreparable before his legal right is established and,

(iii) That on the balance there will be greater hardship and mischief suffered by the plaintiff from withholding of the injunction that will be suffered by the defendant from the granting it.

The issue for determination is whether the applicant has met these guiding principles. As far as the first principle is concerned, Mr. Bashange wanted the court to answer it in the affirmative arguing that on the facts and circumstances, a prima facie with the probability of the entitlements of the reliefs sought has been established. He referred this court to its decision in the case of **Hon. Ally Saleh v. the Executive Officer of the Registration, Insolvency and Trusteeship Agency and 17 others**; Misc. Civil Application No. 51 of 2017 and a Ugandan Case **Ndema and others v. Mubiru:** Misc. Application No. 225 of 2013.

On the second principle, Mr. Bashange told the court that if the temporary injunction is not issued, the 1st respondent will

continue to disburse public money to eneligible people thereby fuelling dispute and rift within the party with the possibility of having more cases filed in courts of law hence deteriorating peace, harmony cohesions within the party.

As to the third principle, Mr. Bashange stated that more harm is likely to be done in with holding the temporary injunction than granting it arguing that if the order of temporary injunction is granted, the subventions will not be disbursed, there will be great possibility that public funds will be protected and preserved and the disputes currently in court will come to an end hence advancing peace, harmony and cohesion within the party and that there will be more democratic space for the CUF and more enjoyment of the Constitutional right.

Mr. Malata, on the other hand, with a great vigour, told the court that the applicant has miserably failed to canvass the requirements of the law as enunciated by the above legal principles, at any reasonable meaningful length and that the balance of convenience is hardly in the respondent's favour, in such circumstances.

In the case of **Hon. Ally Saleh v. the Executive Officer of the Registration, Insolvency and Trusteeship Agency and 17 others** (supra) I observed:

> *"The applicant must establish that there is a bonafide dispute raised by the applicant and that there is a strong case for trial which needs investigation and decision on merits".*

Besides my fellow sister Lady Justice Percy Night Tuhaise in a

Ugandan High Court case of **Ndema Emanzi Rukandema and others v. Mubiru:** Misc. Application No. 225 of 2013, the court said:

> *"As to whether the suit established a prima facie case with possibility of success, case law is that though the applicant has to satisfy the court that there is merit in the case, it does not mean that one should succeed. It means the existence of a triable issue or serious question to be tried, that is an issue which raises a prima facie case for adjudication.".*
>
> I subscribe to her views as stated above.

On the second principle, in the same case of **Hon. Ally Saleh v. the Executive Officer of the Registration, Insolvency and Trusteeship Agency and 17 others,** I observed:

> *"As to the second principle of irreparable loss, this means that there is no any other remedy open to her by which she can protect herself from the consequences of the apprehended injury. Here, the expression of irreparable injury does not mean, in my view, that there should be no possibility of repairing the injury but means that the injury must be material meaning that which cannot be adequately compensated by damages. In this sense, injury will be regarded irreparable where there exists no certain pecuniary standards for measuring damages."*
>
> I still stick to my guns.

I totally agree with Mr. Malata that this court in thinking to exercise its discretion on whether to grant or not the prayed orders, has to abide by the decision of the Court of Appeal which affirmed those three principles the reason behind being that the decision of the Court of Appeal is binding on this court.

means is that, before granting or refusing the injunction, the court may have to decide whether the plaintiff will suffer greater injury if the injunction is refused than the defendant will suffer if it is granted.

When the above minimal conditions are established, the court, before deciding one way or another should then consider other factors, such as the conduct of the parties, delay, acquiescence, lack of clean hand etc. this is because, as seen above, the remedy of injunction has its roots in equity and so, equitable principles may be applied in appropriate case."

In the instant case, it has been amply demonstrated that the subject matter is the subventions which is the public funds. The 1st respondent is in the management and control of the said funds. It is Government money. The same 1st respondent has suspended the disbursement of the said funds due to the unsettled situation of the administration within the party itself. In case the funds are dissipated, the 1st respondent or even the Government cannot make the good of it because the public funds are obtained and disbursed according to the settled legal procedures including the authorisation by the Parliament of the United Republic of Tanzania. As correctly submitted by Mr. Malata, learned Principal State Attorney at page 5, first paragraph of his written submission, , **"the balance of convenience is hardly in the respondents' favour in such circumstances"** meaning that the balance of convenience is by no means or not at all in the respondents' favour.

The sum total of the above, is that I grant the application for

temporary injunction by restraining the respondents from disbursing the applicant's party's subventions from the Government pending the hearing and determination of Miscellaneous Civil Cause No. 68 of 2017 which is pending in court or until further order of a competent legal authority.

Costs to be in the main cause.

Order accordingly.

W.P. Dyansobera

JUDGE

29.5.2018

Delivered this 29th day of May, 2018 in the presence of Mr. Paul Shaidi, and Ms Rehema Mtulya, learned State Attorneys for the respondents and Mr. Joran Lwehabura Bashange for the applicant.

W.P. Dyansobera

JUDGE