

**IN THE UNITED REPUBLIC OF TANZANIA
THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

MISCILLENIOUS CIVIL CAUSE No. 509 OF 2019

(Originating from Civil Case No. 153 of 2004)

DAVID MTITU

MARY CHONGE MWANKEMWA

SAMWELI KAANI MTALI

JULIETH NDYETABURA

ANTHONY YOHANA LENGANA

..... APPLICANTS

Versus

TIB DEVELOPMENT BANK LIMITED.....RESPONDENT

RULING

28th May, 2020 - 11th June, 2020

J. A. DE - MELLO J;

The Applicants have moved this Court under **section 2 (3)** of the **Judicature and Application of Laws Act Cap. 358 R.E 2002** and, **Order XLIII, Rule 2** and, section **95** of the **Civil Procedure Act Cap. 35, R.E 2002** praying for the following orders;

1. That, this Honourable Court be pleased to investigate the conduct of the Respondent who is embarrassing and defaming the Applicants by publishing their names and printing their photographs in newspapers like daily News dated the 23rd August, 2019 at page 23 of the issue while the matter was conclusively determined by this Court vide Civil Case No. 153 of 2004 by passing no Decree against the applicants and this Court be pleased to make permanent orders restraining or prohibiting the Respondent by himself, its Agents, Associates, Workmen, and Servants from furthering the purported illegal demand in the form embarrassing and defaming the Applicants in public.

2. Cost of this Application be provided for and;

3. Any other Relief that this Honourable Court may deemed fit to grant.

The Application is supported by the joint Affidavit of the Applicants, whereas; the Respondent filed his Counter Affidavit resisting the prayers, accompanied with Preliminary Objection on the following Point of Law;

1. That, the Application is misconceived and the Court is not moved properly.

On **26th March, 2019**, parties preferred to argue the Preliminary Objection by way of written submissions of which am grateful to both, for their compliance. Arguing the said objection, the Respondent articulated that, the

basis of the Applicant's claim is that of, illegal publishing of their names and, photographs in the Daily Newspaper of 23rd August, 2019 for illegal demands, as stated in the first paragraph of the Chamber Summons. It is the Respondent's belief that, the Application is misconceived based on the nature of the Reliefs sought in the Chamber Summons that, cannot be granted by way of an Application, it arising from **Civil Case No. 153 of 2004**, which does not exist as the Decree has already been passed thus rendering this Court **Functus Officio**. In support of this, the case of **Mohamed Enterprises (T) Ltd vs. Masoud Mohamed Nasser, Civil Application No. 33 of 2012, Unreported**, was cited. If at all, the Relief sought being a Tortious one on defamation, then a fresh suit was appropriate, he retorts. It is the Respondent's further argument that, this Court is not moved properly for wrong citation of the law not conferring the Court with powers to entertain as he referred **section 2 (3) of Judicature and Application of Laws Act (JALA)** which allows the Courts to look for specific laws outside our jurisdiction in absence of specific provisions. Section **95** of the **Civil Procedure Code, Cap. 33** provides for inherent powers of the High Court, which cannot stand alone to move this Court, but supplemented by specific law. Lastly, **Order XLIII, Rule 2** is a procedure which provides how similar Applications should be made but, which does not give power to any Court to grant reliefs sought. This, he observed, was the position held in the case of **China Henan International Cooperation Group vs. Salvand K.A Rwegasira, Civil Reference 22 of 2005 (unreported)**, praying for dismissal of the said Application in its entirety, with costs.

Replying to the objection, the Applicants submitted that, the Relief sought is a permanent order restraining or prohibiting the Respondent himself, its agent from furthering the purported illegal demand embarrassing and, defaming the Applicants in public. It is also intended to investigate the conduct of the Respondent, order a restraint, whose nature of such relief can only be granted by way Application, moving the Court to exercise its powers by prohibiting the Respondent from publishing the Applicants in the newspaper, irrespective of the fact that, the matter has already been decided to its finality. Further that, the Civil Procedure Code is not exhaustive on every aspect and, this is what lead the Applicants to file this Application under section **2 (3) of JALA, Cap. 358, R.E 2002**, citing the case of **Tanzania Electricity Supply (TANESCO) vs. Independent Power Tanzania Ltd (IPTL) & 2 Others (2002) TLR 324**, in support of the contention. Furthermore that, the Court has the power to grant interim orders even if there is no suit pending as held in the case of **Lekule vs. Independent Power (T) Ltd and Attorney General, Miscellaneous Civil Case No. 42 of 1998**. he reliance on section **95** of the **Civil Procedure Code, Cap. 33** which provides for the inherent powers of the Court, according to **Mulla Code of the Civil Procedure Code, Vol 1, (1st ED)** at page **942** it states that;

“the inherit powers are to be exercised by the Court in very exceptional circumstances for which the code lays down no procedure”.

It is conclusively, the Applicants prayer for the Court to invoke section **3A** of the **Civil Procedure Code, Cap. 33** requiring them to focus on substantive justice, praying dismissal of the same with costs.

The Respondent rejoined, that, it is inconceivable what the Applicants are asking from this Court. Reading from the Chamber Summons, the Applicant had prayed for the permanent restraint order against the Respondent, while in the submission they submitted that, this Court has jurisdiction to grant temporary injunction. The two notwithstanding, the Application at hand is a serious misconception, the Court being improperly moved.

Having considered the rival submissions of Counsels, it is settled law that, in some special circumstances an Application for Temporary injunction can be applied and, also granted without a pending suit. There are many cases to that effect, amongst others, is the case of, **TANESCO vs. IPTL (supra), Tanzaco E.A Mining Limited vs. Minister for Energy & Minerals & Another, Commercial Case No. 74 of 2014**, just to mention a few. Based on the said Application, one cannot fail to appreciate the prayers sought, those of restraining orders to prohibit the Respondent from defaming through publishing their names and, photographs in the newspaper. This then brings us to the fact that it being a Tort, the law used is **The Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014**.

Rule 2 clearly stipulates that;

"These Rules shall apply to applications for the Prerogative Orders of Mandamus, Prohibition and Certiorari."

Section 95 of the **Civil Procedure Code, Cap. 33 R. E 2019** provides for the inherit powers of the High Court whereas; **Order XLIII, Rule 2** of **JALA** provides for the procedures of such application under the code. As evident this is missing to move the Court by law.

Order XXXVII, Rule 2(1) is the appropriate law upon which this Court and for defamation as it clearly states that;

"In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right..."

Similarly, is the prayer for investigating the conduct of the Respondent who is embarrassing and, defaming the Applicants by publishing their names and, printing their photographs in newspapers, like what the Daily News dated the **23rd August, 2019** at **page 23** reflected. The above and, without mincing words, is founded on law of Torts, in which this Application is misconceived. It is only by a substantive suit which can support this claim as opposed to restraining orders, which as already discussed had been heard and, duly determined. In the case of **Registered Trustees of Calvary Assemblies of God (CAG) vs. Tanzania Steel Pipes Limited** and **2**

Others, Misc. Land Case Application No. 677 of 2019 (Unreported)

the Application similar to the one at hand ended up being **Struck Out** for being incompetent. The Tortious nature of the matter alone is sufficient to dismiss this Application, as I refrain to address the wrong citation whose premise if at all is as observed, a nullity. This Court finds that, the prayer sought falls under Tort and, there is a specific laws to move the Court. I therefore proceed to dismiss the Application with costs, it being misconceived.

It is so ordered.


J. A. DE- MELLO
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JUDGE

11th June, 2020