

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

MISC. CIVIL APPLICATION NO. 43 OF 2019

*(Arising in Misc. Civil Application No. 118 of 2013, Original HC. Civil Case
No. 35 of 2013)*

JOHN JOSEPH MAGAZETI.....1ST APPLICANT

DEOGRATIAS JOSEPH KISOKA 2ND APPLICANT

G. J. HOLDING COMPANY LIMITED 3RD APPLICANT

G. J HOTEL & TOURISM LIMITED 4TH APPLICANT

VERSUS

GABRIEL MUSHI @ GABRIEL STEPHEN MASHA ...1ST RESPONDENT

GEORGE MUSHI @ GEORGE GABRIEL MUSHI 2ND RESPONDENT

S. L. ISANGI 3RD RESPONDENT

RULING

18th & 26th, Feb. 2020

TIGANGA, J.

In this Application, the Court has been moved under order XXXVII Rule 5 and section 95 of Civil Procedure Code (Cap 33 RE 2002) to grant the following orders:

1. That this Honourable court be pleased to vacate its order by Hon. A. N.M. Sumari, J dated 06/11/2013 restraining the 1st and 2nd Applicants from removing the Merchandise/goods from the four godowns located at Mwanza South hired by G. J. Holdings Limited and G.J. Hotels and Tours Limited.

In the Alternative.

2. L.S. Isangi be ordered to unlock and remove the padlocks to the said four godowns Located at Mwanza South in Mwanza City.
3. That L.S. Isangi be ordered to handover the goods locked in November 2013 pursuant to the order of the court dated 06/11/2013.
4. Costs of the Application be provided for.
5. Any other relief this Honourable Court may deem fit to award.

The Application was preferred by a Chamber Summons supported by Affidavit sworn by John Joseph Magazeti the 1st Applicant. It was also annexed with an order (interim order) subject of this Review proceedings.

The Affidavit in support of the Application and the record are of the help in as far as the historical background of this application. This matter traces its history in the year 2013 when the 1st and 2nd Respondents filed in the High Court, Civil Case No. 35/2013 and Civil Application No. 118 of 2013. In the Civil Application No.118 of 2013, the applicant got an exparte order of injunction in their favour, which order also ordered the 3rd Respondent S.L. Isangi to lock the four godowns at Igogo in Mwanza pending the hearing of the application interparties.

It is the fact that the main case that is Civil Case No. 35/2013 was disposed off by the order of Hon. Mlacha, J dated 28/07/2016 after sustaining the Preliminary Objection thus striking out the main suit.

The deponent avers further in the Affidavit that after striking out the main case, the Application No. 118 of 2013 and all orders made thereunder were defeated, and that the Respondents have neither Appealed against the decision by Hon. Mlacha, J striking out the main case, nor sought the order by Hon. Sumari, J dated 06/11/2013 to be removed or vacated.

He further averred that the goods stored in the closed four godowns are deteriorating and an order removing the injunction will mitigate the loss, as the 3rd Respondent has been in control of the same since when he put the padlock on the doors to the four godowns. It is furthermore stated in the affidavit that the request was made that the 3rd Respondent be ordered to hand over the godowns and the goods in writings for certainty.

The record shows that the Application was served to the Respondents who more than once appeared through Mr. Constantine Mutalemwa learned counsel. The record also shows that on 30/07/2019 Mr. Mutalemwa asked for leave to file Counter Affidavit which prayer was granted by an order that the counter Affidavit be filed within 21 days from that date. However, the counter Affidavit has never been filed to date and since then the appearance of the respondents ceased. On 18/02/2020 when this application was called for hearing, Mr. Outa learned counsel who represents the Applicants prayed for the leave to proceed with hearing of the application exparte, which order was granted.

During the exparte hearing, Mr. Outa reiterated the contents of the affidavit filed in support of the Application which for the interest of time, I will not repeat in this Ruling. He prayed in the end that the temporary injunction order be vacated and the 3rd respondent, the court broker, be ordered to unlock the padlock appended to the premises in disputed that is the four godowns, so that the applicants can enjoy their rights.

Frankly speaking, I was surprised to hear that the four commercial godowns locked in the year 2013 by the court broker acting under the interim order are still locked to date almost four years after the main case from which the said order was stemming was finalised. Following that surprise, I dared to ask the counsel who appeared before me as to whether the said injunction was permanent, but the answer I got was that it was not. However Mr. Outa told me that, after the main case was disposed, his client and himself went to the Deputy Registrar asking for a letter or order directing the court broker to open the said godowns but the Deputy Registrar refused to do the same.

.. From the materials before me, I find this case to be one of the rare incidents where the parties to the case have acted in such a manner which casts the blame to the Judiciary but unnecessarily. I find so because, since when the main case was finalised there is no record that there is ever any action taken by the Applicant to make sure that the said interim order is lifted.

It is a well known principle that interim order is **interim pending** the determination of the main suit; and temporary injunction is also

temporary as it sounds. It is an order of the court directed to the defendant restraining him from doing a certain act for the purpose of preventing future injury or to prevent the continuation of the present injury. It is normally given as an interim measures to prevent such present or future injury but pending the determination of the main suit.

Temporary injunction under order XXXVII Rule 1 may be issued where there is a suit pending before the court. This means, it is a condition precedent that temporary injunction exist during the pendency of the suit, the determination of the main suit goes away with the existing injunction.

Under order XXXVII Rule 3 of the CPC (Cap 33 RE 2002) the time limit for the existence of the temporary injunction is specified as follows:-

"In addition to such terms as the keeping of an account and giving security, the court may by order grant injunction under rule 1 and 2 and such order shall be in force for a period specified by the court, but not exceeding six months.

*Provided that the court granting the injunction may from time to time extend such period for a further period which in aggregate shall not exceed one year, upon being satisfied on the application of the holder of such court injunction that the Applicant has **deligently** been taking steps to settle the matter complained of and such extension sought is in the interest of Justice, necessary or desirable"*

Also see **Africa Trophy Hunting Limited Vs. The Hon. Attorney General and 4 others** Civil Appeal No. 25/1997 (CAT) at Dar es Salaam (unreported).

From the provision and the authority cited above, at least the following can be taken to be the proper interpretation of the law in as far as the duration of existing of the temporary injunction is concerned;

- i. That temporary injunction order shall be in force for the period specified by the court in that order.
- ii. That the period so specified should not exceed six months.
- iii. That the period may be extended from time to time for further period upon application by the holder of such a court injunction.
- iv. That the extension for such further period shall in aggregate not exceed one year.
- v. That the extension should be allowed after the court has been satisfied that the applicant has been diligently taking step to settle the matter complained off.
- vi. That such extension shall be granted only when the court is also satisfied that it is in the interest of Justice, necessary or desirable.
- vii. That it should be so extended and continue to be in force after the conditions highlighted above have been met and during the pendency of the suit under which the same was granted.

In this case, the temporary or rather interim order was issued on 06/11/2013, although no time was specified in that order, but its existence was supposed to be six months. Should the Applicants in that Application,

(now the Respondents in this Application) needed to extend it, they were supposed to apply for extension which would have, in aggregate lasted for a year i.e 06/11/2014 of course after complying with the above seven conditions. Failure so to do that means the temporary injunction or interim order ceased to be in force after the expiry of six months of its existence, and therefore no court order vacating the same or uplifting it was needed to make it ineffective.

Further to that, even if we work on the assumption that it was and continued to be valid indefinitely, the termination of the main suit in the years 2016, would have been another factor to put it to an end. What surprises me is that the applicants who pose to have interest in the premises locked in year 2013, with their merchandise locked in, have never taken any visible action, until the year 2019 March when they filed this Application.

I take the facts submitted in the affidavit to be true as the same were not countered by the respondents, and so I believe that the said godowns are still locked by the court broker S.L. Isangi the third respondent.

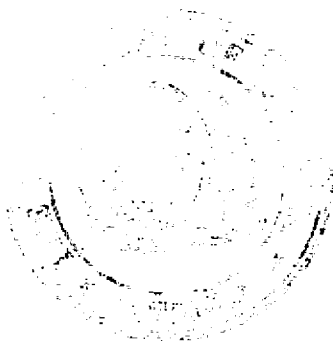
In my considered opinion (view) my role here is not to vacate the said order as the same does not exist, it expired six months after its issue. I cannot therefore vacate an order which does not exist. My role at this juncture in my view and the perfect and correct one in the circumstances of this case is to inform the parties including the said court broker that the interim order issued on 06/11/2013, which ordered him to close by fixing

padlocks to the said four godowns located at Igogo Mwanza city expired six months later as the same was not extended. Further to that it is also important to inform the parties that the said order was issued pending hearing of the Application interparties, the order was neither permanent nor perpetual.

That said, I find that there is no order to vacate, and if parties need the assistance of the court, they approach the office of the Deputy Registrar for assistance.

It is so ordered.

DATED at MWANZA this 26th day of February 2020




J.C. Tiganga
JUDGE