IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CIVIL REVISION NO 8 OF 2020

(Originating from Miscellaneous Civil Application No 21 of 2020 of the Resident Magistrate's Court of Musoma)

SIMON KILESI SAMWEL.....APPLICANT

Versus

MAIRO MARWA WANSAGO..... RESPONDENT

(T/a MAIRO FILLING STATION)

RULING

1st & 10th September, 2020

Kahyoza, J.

Simon Kilesi Samwel sued **Mairo Marwa Wansaku** trading as **Mairo Filling Station** for the breach of contract before the Resident Magistrate Court of Musoma at Musoma claiming Tzs**. 97,295,119/=.** The suit is still pending.

The applicant lodged on the 8th June, 2020 **Miscellaneous Civil Application Case No 21 of 2020** for temporary injunction to close **Mairo Filling Station** and restrain the respondent or its agent or anyone working under the respondent's instruction from undertaking any form of selling fuel activities, and to close of **Bank Account No. 0150388473300** in the name of **Mairo Filling Station** at **CRDB Bank** pending hearing and final determination of the main suit. The

court heard the application on the 8th June, 2020 (the date of filing) and on the 9th June, 2020 granted the reliefs prayed *ex-parte*. It closed both **Mairo Filling Station** and the respondent's **Bank Account No. 0150388473300.** The Court did not only close the bank account but also issued a garnishee for unspecified amount.

On 29th July 2020 **Mairo Marwa Wansaku** submitted a letter complaining against the conduct of the proceedings of the trial court in case **Civil Case No 16 of 2020** specifically the order granted vide **Miscellaneous Civil Application No 21/2020.** Upon receipt of the letter, the Court called the file for inspection. The Court ordered the revision ***suo motu.*** For the sake of convenience, the Court will refer to the plaintiff and the defendant before the trial court as the applicant and the respondent respectively before this Court.

The Court invited the parties to address it whether the balance of conveniences tilted in favour of issuing a temporary injunction. The purpose of an injunctive order is to protect the plaintiff's right should he be successful and it is not to punish the defendant. The position was taken by **DR SPRY** in his book on **Equitable Remedies 6th edition LBC page 447** where he stated thus,

> ***"Interlocutory injunctions concern with-***
>
> ***(a)The maintenance of a position that will more easily enable justice to be done when its final order is made and (b) an interim regulation of the acts of the parties that is the most just and convenient in all the circumstances."*** *(emphasis added)*

A similar stance was taken in ***National Commercial Bank Ltd V Olint Corporation*** *2009 Wlr 1405, the Privy Council Stated*;

> ***"That the purpose of interlocutory injunction is to improve the chance of the court being able to do justice after a determination of the merits at the trial."***

Before the parties' advocates addressed the Court, Mr. Paul Obwana, one of the applicant's advocates raised a concern that the temporary injunction cannot be revised. Thus, the issues for determination are-

1. Whether the Court has jurisdiction to revise the order of temporary injunction.
2. Whether the balance of convenience tilted in favour of issuing an injunction.

Both parties enjoyed the services of learned advocates. Ms. Rachel P. Onesmo and Mr. Paul Obwana learned advocates represented the applicant while Mr. Motete Kihiri learned advocate represented the respondent. The learned advocates made detailed submissions despite being given a short time to prepare. I commend them. I will not reproduce the submissions but I will refer to the submissions while answering the issues.

Does the Court have jurisdiction to revise the order of temporary injunction?

The applicant's advocates of raised a concern that an order for temporary injunction cannot be revised on the ground that it is barred by section 79(2) of the **Civil Procedure Code** [Cap. 33 R.E. 2019] (the **CPC**). It was the applicant's advocates' stance that an injunctive order

can be revised only where it impacts the main suit. The applicant's advocates submitted that the cause of action in the main suit was the breach of contract and that should the applicant (the plaintiff) become successful, the order of closing the filling station and bank account will not affect the outcome of the main suit. He gave an example that if the order of temporary injunction was for demolishing a house or selling of the house which is a subject matter of the case that can be revised.

The applicant's advocates further argued that the trial court issued the temporally injunction to maintain the *status quo* because the applicant is the one who supplied petroleum in the under-storage tanks owned by the respondent.

Replying to the concern raised by the applicant's advocate, the respondent's learned advocate contended that section 79(1) of the CPC provides for the circumstances to which the High court may interfere and among of the circumstances is where the court has failed to exercise or exceeded its jurisdiction, or acted with immaterial irregularity.

The learned advocate added that even if the injunctive order did not fall under the exceptions of sub-section (1) of section 79 of the CPC, the Court can still revise an injunctive order as sub-section (3) of section 79 of the CPC stipulates that section 79(2) does not intend to limit the powers of the High Court. He also contended that even if the Court cannot exercise its mandate under section 79 it can still invoke its inherent powers under section 95 of the CPC to revise the injunctive orders. The law provides that the inherent powers of the Court should

not be limited if there is an abuse of justice in the Court process.

He added that the applicant was not seeking for orders that fuel in the underground tanks be given to back to him. He added that the applicant did not supply the respondent with the fuel in the under-storage tanks as the contract halted in March.

I wish to reproduce Section 79 of the CPC, which was relied upon by parties leaned advocates as follows-

"79.- The High Court may call for the record of any case which has been decided by any court subordinate to it and in which no appeal lies thereto, and if such subordinate court appears-

(a) to have exercised jurisdiction not vested in it by law;

(b) to have failed to exercise jurisdiction so vested; or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as thinks fit. .

(2) Notwithstanding the provisions of subsection (1), no application for revision shall lie or be made in respect of any preliminary or interlocutory decision or order of the Court unless such decision or order has the effect of finally determining the suit.

(3) Nothing in this section shall be construed as limiting the High Court's power to exercise revisional jurisdiction under the Magistrates' Courts Act."

It is clear that the above cited law prohibits this Court to entertain application for revision in respect of preliminary or interlocutory matter. It is my construction that the above cited law prohibits parties to apply

for revision of interlocutory or preliminary orders of the subordinate courts. It reads *no application for revision* ***shall lie or be made*** *in respect of any preliminary or interlocutory decision.* It does not bar the Court from calling *suo motu* the record of the subordinate court to satisfy itself as to the correctness, legality or propriety of the decision or order.

Even if, I was to subscribe to the submission that this Court is barred to revise the temporary injunction or an interlocutory order *suo motu*, the issue would arise whether the order given was an injunctive one. An injunctive order may be what it does not purport to be. I therefore, find it vital to explain what is an interlocutory order albeit briefly. Halsbury's Laws of England (4th Ed.) vol. 26 para. 506 defines the term interlocutory order or decision as follows:

> *"an order which does not deal with the final rights of the parties, but either (1) is made before judgment, and* ***gives no final decision on the matters in dispute****, but is merely on a matter of procedure; or (2) is made after judgment, and merely directs how the declarations of right already given in the final judgment are to be worked out, is termed interlocutory." (emphasis is added).*

The catch words in that definition is that interlocutory order or decision ***gives no final decision on the matters in dispute***. we shall find out later whether the order under review was final and conclusive or not. The Court of Appeal did also define that term in **University of Dar es Salaam Vs Silvester Cyprian & 210 Others** [1998] TLR 175 where it cited with approval the definition by John B. Saunder in work

titled "**Words and Phrases Legally Defined**", 2nd Ed. Vol. 3 at page 82 as follows-

> *"These applications only are considered interlocutory which [do] not decide the rights of parties, but* ***are made for the purpose of keeping things in status quo till the rights*** *can be decided, ..."* *(emphasis added)*

Given the above definition it is undisputed fact that the temporary injunction or interlocutory order may purport to be what it is not. It is settled that an interlocutory order may be revised if it is final and conclusive in effect. See the case of **JUNACO (T) Ltd and Justine Lambert vs. Harlel Mallac Tanzania Limited**, Civil Application No. 373/12 of 2016.

I will now determine whether the order under review was an interlocutory order in the meaning provided above or it was final and conclusive. It is not an easy task to determine whether an injunctive order is final and conclusive in effect. In order to discharge that task courts have developed various tests. The most common tests applied to determine whether an order is interlocutory or otherwise in Common Law Jurisdictions from legal authorities fall into three categories namely, **nature of order test**, **application test** and **substantive matter test**. I must confess my quick research did not give me authorities on the last two tests from our jurisdiction. The Court of Appeal applied the first test that is **the nature of order test,** in **JUNACO (T) and Another v. Harel Mallac Tanzania Ltd** (Supra).

The Court of Appeal **in JUNACO (T) and Another v. Harel**

Mallac Tanzania Ltd (Supra) considered circumstance under which an interlocutory order may have a final and conclusive effect. It reiterated its position in the **Tanzania Motor Services Ltd and Another v. Mehar Sing t/a Thaker Singh**, Civil Appeal No. 115 of 2005 (CAT unreported) by quoting Lord Alverston in **Bozson v Altrinchman Urban District Counci**l [1903]1 KB 574 at 548, thus-

> *It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order"*

The Court of Appeal, then concluded **in JUNACO (T)** that –

> *In view of the above authorities it is therefore apparent that in order to know whether* ***the order is interlocutory or not*** *one has to apply* ***"the nature of the order test'****. That is, to ask oneself whether the judgment or order complained of finally disposed of the rights of the parties. If the answer is in affirmative, then it must be treated as a final order. However, if it does not, it is then an interlocutory order.*

Further still, The Court of Appeal had another opportunity to consider whether given order is interlocutory or otherwise in the **Republic v Harry Msamire Kitilya and Two Other** Cr Appeal No. 126 of 2016 (CAT Unreported). In that case, the trial court struck out the eighth count of money laundering from the charge sheet. The D.P.P.

appealed to High Court. The High Court struck out the appeal on the ground that the trial court's order was interlocutory and thus, not subject of appeal.

> *We have purposely supplied emphasis on the extract of the provisions to demonstrate that the appropriate test for determining whether the impugned order was final or interlocutory is patently discernible from the language of the extract provisions. Thus, in the matter under consideration, the test is whether or not the impugned had the effect of finally determining the criminal charge. .....Thus, to* ***the extent that the trial court's order extinguished the criminal charge of money laundering, we are of he settled view that the same was not an interlocutory order****.*

The temporary order under review closed the respondent's bank account and the filling station. Is it final and conclusive? Was it ***made for the purpose of keeping things in status quo till the rights*** *can be decided*? I quickly reply that the order under review was not ***made for the purpose of keeping things in status quo till the rights*** *can be decided*. The reasons for my finding are; **one**, the subject matter in the pending suit is breach of contract and the applicant claimed 97,000,000/= and general damages to be assessed by the court. The applicant did not show the nexus between closing the bank account and the petroleum filling station on one side and the subject matter of this case. How do the operation of the bank account and petroleum filling station endanger the rights of the applicant if the suit is

determined in his favour? The applicant's right or entitlement is compensation for breach. The respondent will compensate the applicant by paying the decretal sum and not by the applicant taking over the petroleum filing station and the bank account.

I further, scrutinized the order and found that the court issued a garnishee order nisi for unspecified amount. A garnishee order is a common-law mode of executing a court decree of liquidated sum. A court issues a garnishee order upon a decree holder filing an application seeking the assistances of the court to attach the judgment debtor's debt or movable property in the possession of another person or the bank (garnishee). Was there a decree in favour of the applicant? There was no such a decree. Was the garnishee order issued to guard the applicant from obtaining an empty decree at the end of trial? Had that been the intention then the applicant ought to have applied for attachment before judgment and for temporary injunction. I wish to emphasis here that the purpose of temporary injunction is to protect the plaintiff's right should he be successful and is not to punish the defendant. The plaintiff's right in this case is **payment of the liquidated sum and not running of the petroleum filling station or the bank account.**

Two, the order under review was not ***made for the purpose of keeping things in status quo till the rights*** *can be decided,* as the respondent's act of running the petroleum filling station and the bank account does not by any means jeopardize the applicant's right in the instant case, that is the right to be compensated for breach of contract. Rather, it puts the respondent in a position to settled the decree amount

once the case is finally determined.

I abstain from discussing other test of whether a given decision is temporary (interlocutory) or final and conclusive or not.

In the upshot, applying the nature of order test I find the order in this case was final and conclusive. The order decided the issue of attaching the respondent's property before judgment conclusively. The order is final and conclusive as shown above, due to the fact that it was not made ***for the purpose of keeping things in status quo till the rights*** *can be decided* but for any other purpose. Thus, the order is subject to revision as per the position of the Court of Appeal in **JUNACO (T)' s** case cited above.

Did the balance of conveniences tilt in favour of issuing an injunction?

The applicant's advocates argued in favour of an injunctive order that that the applicant stood to suffer greater hardship and mischief due to the breach of contract than the respondent. To support his contention, he argued that the relationship between the applicant and the respondent was contractual, where the applicant supplied capital (fuel) while the respondent was the owner of filling station and they agreed to join together and commence business. They also agreed to share profits equally. The advocates contended that the applicant was on the losing end as he parted with his capital while the respondent possessed the petroleum filling station and the respondent could look for another investor, proceed with the business at the applicant's detriment.

The applicant's advocates further submitted that the respondent lied the applicant on the profits obtained as according to his letter of complaint to this Court the applicant made a profit of Tzs. 6,000,000/= per day from daily sales which is equal to Tzs. 180,000,000/= per month. However, the respondent under declared the profit in February. He declared a profit of Tzs. 35,000,000/=, which they divided equally. Thus, the respondent appropriated Tzs. 75,000,000/=, which the applicant's entitlement. They added that in April, May and June the respondent declared no profit and as result he paid nothing to the applicant.

They submitted further that the respondent was deceitful in conducting business. They added that if the Court opens the business, the respondent will run it at the applicant's detriment. The applicant will sell fuel and neglect to pay profit or return the capital investment to the applicant.

The applicant's advocates also stated that the respondent paid Tzs. 40,000,000/= after the trial court closed the down his business, which depicts that he was making profits.

The applicant's advocates refuted the allegation that the trial court was unnecessary adjourning the case. They submitted that the trial court was committed to timely determine the case. To support their contention, they stated that the trial court one day conducted the case up to late evening. They concluded that the respondent was a cause of the delays.

The applicant's advocates prayed this Court to abstain from lifting the injunctive order until the trial court finally determines the main suits,

because to open the petroleum station will cause the applicant to suffer irreparable loss. In the alternative, they requested this Court appoint a care taker person who will run the filling station if, it opts to open the station.

The respondent's learned advocate stated that the court granted the *ex-parte* order closing the petroleum filling station and the bank account vide Miscellaneous Civil Application No 21 of 2020. Later, the court heard the application *inter partes* confirming its previous order. He contended that an application for temporally injunction is guided by Order XXXVII Rule 1 of the **CPC** and case law. The applicant did not disclose any irreparable loss he stood to suffer if the filling station was running. He contended that the applicant did not depict how he stood to suffer more, if the petroleum station is operating than what the respondent was to suffer once it (petroleum station) is closed. He submitted that the subject matter in the pending suit is breach of contract and the applicant prays for Tzs. 97,000,000/=, and that the applicant neither claimed for fuel in under-ground storage or for possession the petroleum filling station.

The respondent's advocate further, stated that the purpose of Order XXXVII of the **CPC** is to maintain the subject matter of the suit and not otherwise and the subject matter was money and not the petroleum filling station or fuel in the underground tanks. He referred to case of **Atilio V Mbowe**, (1969) HCD 284, which developed three principles guiding issuance of temporally injunctions. He submitted that on the balance of conviniences the respondent stood to suffer greater hardship and mischief from the granting temporally injunction by closing

the petroleum filling station and bank account than the plaintiff stands to suffer by withholding of the injunction.

The respondent's advocate submitted that the applicant failed to convince the court as to what mischief he stood to suffer. Thus, the court erroneously issued the temporary injunction. The contention that the applicant mismanaged the filling station was not a ground for issuing an injunctive order. He contended that the parties' relationship was contractual for that reason the contract specified their rights and duties.

He added that in giving the injunctive order, the court did not take into consideration the nature of products that was restrained. He submitted that petroleum products by nature are volatile. They evaporate and explode. The products require attention at all time. He added that the court did not consider the hardship suffered by the respondent such as-

a) loss of business, the respondent was sole agent of Total Card and the order led him to lose reputation and he lost business for his inability to supply fuel to people he had contracts with.
b) Suffering greatly in business competition. The order weakened the respondent's capacity to compete with other dealers in petroleum products. He added that one of the terms of the agreement was neither party should enter into agreement with another person to conduct a similar business within Tarime. The applicant violated that term by entering into a contract with another person for conducting a similar business.
c) The respondent stood to suffer and he is suffering greatly on

account that the business was registered in his name and he is therefore, required to pay taxes, fees from government authorities, (central and local authorities) levies, pay contributions to workers' compensation funds and National Social Security Fund. He added that the applicant suffers nothing of that sort because the business is not in his name.

d) The respondent also was to suffer and he is suffering consequences of failure to service loans and to pay salaries to employees.

It is settled from established principles stated above, that an injunctive order can only be issued in the circumstance where the plaintiff is in danger of obtaining an empty decree at the end of trial. Thus, injunctive order is issued to protect the interest of plaintiff and not to punish the defendant. In the celebrated case of **Attlio v Mbowe** (1969) **HCD** 284 the Court laid down as -

> ***(a)*** *an applicant must show a prima facie case with a probability of success;*
>
> *(b)* ***In an interlocutory injunction, the applicant must show that unless injunctive orders are granted he will suffer irreparable harm which would not be adequately compensated for by damages****; and*
>
> *(c) And if in doubt in any of the above conditions the court will decide then on a balance. (emphasis is added)*

That done, I now consider whether the applicant adduced evidence he stood to suffer irreparable loss which cannot be adequately

compensated by award of general damages. In **American Cynamid Co. V. Ethicon Ltd** [1975] 1 All ER 504 at p.509 Lord Diplock stated-

> "... *The object of the temporary injunction is to protect the plaintiff against injury by violation of his rights for which could not be adequately compensated in damages recoverable the action if the uncertainty were resolved in his favour on the trial...."(at p.509)*

There is no dispute that the subject matter of the pending suit is breach of contract and the applicant claims Tzs. 97,000,000/= and general damages. I am unable to buy the submission that if the respondent runs the petroleum filling station and the bank account the respondent will suffer irreparable loss. In other words, if the respondent runs the petroleum filling station he will not be able to pay the decreed amount to the applicant should the later win the suit. That submission implies that respondent will be able to pay the decretal sum when he runs no business.

On the balance of conveniences, I find the respondent stood to suffer and has suffered irreparable loss far worse than the applicant will suffer by raising the injunctive order. To be specific the applicant will suffer nothing by raising the injunctive order. The injunctive order renders the respondent incapable to pay the decretal sum should the applicant win, pay salaries to employees, pay levies and dues. The respondent will suffer greatly by losing income and profit, and good will or reputation.

It is my firm view that the court did not balance and weigh the

mischief or inconvenience to either side before issuing or withholding the injunction. The applicant stands to suffer no irreparable loss as the process of executing court decrees guarantees the applicant's right should the court determined the suit in his favour. Consequently, I invoke my revisionary powers under section 44(1)(b) of the **Magistrates Courts Act**, [Cap. 11 R.E. 2019] to quash the proceedings and set aside the ruling and the subsequent orders closing **Mairo Filling Station** and Bank Account No. **0150388473300** in the name of **Mairo Filling Station** at **CRDB. The respondent is at liberty to operated Mairo Filling Station** and Bank Account No. **0150388473300** in the name of **Mairo Filling Station** at **CRDB Bank** immediately from today until otherwise ordered during the execution of the decree**.** No order as to costs.

Trial of the main suit shall proceed before another magistrate.

It is ordered accordingly.

J. R. Kahyoza
JUDGE
10/9/2020

Court: Ruling to be delivered by the Deputy Registrar.

J. R. Kahyoza
JUDGE
10/9/2020

Court: Ruling delivered in the presence of applicant's advocate, Ms. Rachel and in the presence of the respondent in person and his advocate, Mr. Motete. The applicant was absent. B/C Ms. Catherine Tenga present.

M.A. MOYO
DEPUTY REGISTRAR
10/9/2020