

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
MISC CIVIL APPLICATION NO. 377 OF 2021**

CAMEL OIL (T) LIMITED APPLICANT

VERSUS

BAHDELA COMPANY LIMITED RESPONDENT

R U L I N G

Date of last Order: 30/08/2021

Date of Ruling: 31/08/2021

MGONYA, J.

The Applicant herein namely **CAMEL OIL (T) LIMITED** represented by **Mr. Twarah Yusuph** learned Advocate prays for Orders among others:

- 1. This Honourable Court be pleased to make immediately temporary order, by ordering the Respondent to allow the Applicant to proceed with her business in the disputed petrol station which is now under unlawfull possession of the Respondent due to illegal eviction on 16th July, 2021;***

2. That cost of this application follow the event; and

3. Such other orders as this Honourable Court deems just and fit to grant.

The court has been moved under the provisions of **Sections 68(e) and 95 and Order XXXVII Rule (a) and (b) and 2(1) of the Civil Procedure Code Cap. 33 [R.E. 2019]**. Whereas the Application is supported by an Affidavit duly sworn by one **Salim Abeid Baabde** the Applicant's Principle Officer.

When the matter came up for hearing on 12th August, 2021, I ordered the parties to argue the Application by way of written submissions. As said above, the Applicant herein is enjoying the services of **Mr. Twarah Yusuph** learned Advocate while Respondent herein is enjoying the services of **Mr. Samson Mbamba** and **Mr. Godwin Mussa** learned Advocates respectively.

In determining this Application, I took time to go thoroughly the Parties' pleadings and the written submissions for and against the instant Application. In that case, I have decided not to reproduce the same and instead go straight to determine the Application before me. Let the parties be rest assured that their

respective arguments have been well taken into consideration in determining this Application.

Before I venture into the crucial issue which revolves around on the argument for and against the contemporary Application before the court, I am conversant with the position of law for the prayer sought. Of course, the powers for ordering a temporary injunction are prescribed for under **Section 68 (c) of the Civil Procedure Code Cap. 33 [R. E. 2019]**. However the procedure for obtaining a temporary injunction is set under **Order XXXVII**, and the powers of making such other interlocutory orders as may appear to the Court to be just and convenient are provided for under **Section 68 (e)**. Further, it is a fact that **Section 68 of CPC** is supplemental proceeding since it summarizes the general powers of the Court in regard to interlocutory proceedings.

Now the capital issue here is whether the Applicant has made out his case deserving issuance of the order sought pending the final determination of the main suit before this honorable court.

The principles governing in determining whether or not an Applicant is entitled to an order for temporary injunction have

aptly been laid down by courts. Since then, they have been repeatedly reinstated in numerous decisions.

These principles/conditions are:

- 1. That, on the facts alleged, there must be a serious question to be tried by the Court and a probability that the Plaintiff will be entitled to the relief prayed for (in the main suit);***
- 2. That, the temporary injunction sought is necessary in order to prevent some irreparable injury befalling the Plaintiff while the main case is still pending; and***
- 3. That, on the balance greater hardship and mischief is likely to be suffered by the Plaintiff if temporary injunction is withheld than may be suffered by the Defendant if the order is granted.***

All the three above principles must be met before a temporary injunction can be granted.

I am also aware that there is a basketful of other authorities restating the principles above. Among them are:

- i. ATILIO VS. MBOWE [1969] HCD 284;***
- ii. SURYAKANT D. RAMJI VS. SAVINGS AND FINANCE LTD & 3 OTHERS; HIGH COURT COMMERCIAL***

DIVISION, DAR ES SALAAM, CIVIL CASE NO. 30 OF 2000 (UNREPORTED);

iii. E. AS INDUSTRIES LTD VS. TRUFOOD LIMITED [1972] E.A. 420;

iv. GIELLA VS. CASSMAN BROWN [1973] E.A 358;

v. COLGATE PALMOLIVE COMPANY VS. ZAKARIA PROVISIONAL STORES & 3 OTHERS, HIGH COURT, DAR ES SALAAM, CIVIL CASE NO. 1 OF 1997;

vi. CPC INTERNATIONAL INC. VS. ZAINABU GRAIN MILLERS LTD CIVIL APPEAL NO. 49 OF 1999 [CA],

just to mention a few of relevant cases.

Let me start with the first principle/condition, which is establishment of a *prima facie* case/serious question with a probability of success. In this principle, the Applicant cannot escape from showing two things:

i. The relief sought in the main suit is one which court is capable of awarding and

ii. The Applicant should at the very minimum show in the pleading that in the absence of any rebuttal evidence he is entitled to said relief.

In the case of ***AMERICAN CYANAMID VS. ETHICON [1975] I ALL E. R. 504***, it was stated that:

"In order to grant a temporary injunction the court no doubt must be satisfied that the claim is not frivolous or vexations."

In the same series, my learned brother Nsekela, J. as he then was in the case of ***AGENCY CARGO INTERNATIONAL VS. EURAFRICAN BANK (T) LTD, HIGH COURT, DAR ES SALAAM, Civil Case No. 44 of 1998*** (Unreported) when explaining what the Applicant is required to show, Hon, Judge said:

"It is not sufficient for the Applicant to file a suit with claims, the Applicant must go further and show that he has a fair question as to the existence of a legal right which he claims in the suit."

The task then before me is to exhaust and measure out from the submission elaborated by Mr. Twarah Yusuph learned Advocate for the Applicant whether the court has been referred to the reliefs sought in the main suit in order to see whether the claims made have raised a serious question for determination by the court. Of course in the instant principle my task is to look at the reliefs sought in the main suit and the claims made and see if they raise a serious question for determination by the court and

then assess whether there is a justification for granting a temporary injunction.

I am aware of the extent of proving whether there is a serious question for determination, it is not conclusive evidence which is required but rather the facts as disclosed by the **Plaint** and the **Affidavit** and so the standard of proof required would be somehow below the expected standard in full trials. See the case of ***SURYA-KANT D. RAMJI VS. SAVINGS AND FINANCE LTD & 3 OTHERS, HIGH COURT, Commercial Division Dar es Salaam, Civil Case No. 30 of 2002 (Unreported)***.

Now having carefully gone through the facts disclosed in the **Plaint** and the supporting **Affidavit** to this Application, it is unfortunately the learned counsel for the Applicant has not solicited exhaustively as to whether the reliefs sought in the main suit are ones that this court capable of awarding. In addition, I find the learned Counsel has failed to show at the very minimum in the pleading that in the absence of any rebuttal evidence; Applicants/Plaintiffs are entitled to the said reliefs.

It was not sufficient for the learned Counsel to explain on the claims in the suit but he was required to go further and show on how the Applicant has a fair question as to the "***existence of a legal rights***" which he claims in the Application.

Since the Affidavit is the only evidence upon which the Application is pegged of course the controversy can only be appreciated by traversing the **19** paragraphs, thereof. For the purpose of the prayer before the Court, I choose to quote paragraphs **13 and 14** which reads:

*13. That on 15th July, 2021 the Plaintiff filed a suit i.e Land Case 104 of 2021 together with Miscellaneous Land Application No. 350 in the High Court of Tanzania Land Division seeking court intervention **to protect the Plaintiff's rights** under the contract dated 1st June, 2016. On 16th July, 2021 the Misc. Land Application was heard ex parte and the court intervened by granting maintenance of status quo at 11:20 noon and that order was dully served to Defendant on the same day at 11:40 but the Defendant unlawfully failed to heed such court order forcefully through **bouncers who took the possession of the petrol station during 14:30 noon** as the defendant aimed in her letter dated 14th July, 2021 (i.e annexure Camel - 3). Copy of ruling dated 16th July, 2021 is attached to this plaint and marked as Annexure Came-5. The Plaintiff shall crave leave of this Honourable Court to refer to it as forming part of this Application.*

*14. That, the Plaintiff failed to report the matter before court granting **order of maintaining status quo on time since forcefully taking over of the petrol station was done starting from 14:40 and 16th July, 2021 was Friday**, then the Plaintiff on next Monday i.e. 19th July, 2021 early in the morning report the matter to the court since the act done by the defendant **amount to contempt of the court** but the court's wisdom issued a summons to call the defendant to appear before court on the same 19th July, 2021 at 12:00 noon to hear the matter inter-parte. At 12:00 both parties appear in the session and the defendant alleged that the taking over of petrol station was done before they receive order of the court hence the order was taken by event as during the material time the defendant served with the order the defendant was already take over the station, the thing which is not true."*

It is in record that the Respondent herein has seriously opposed the Application through a Counter Affidavit deponed by **Ali Omar Bahdela**.

Apart from responding, it is not harmful if I choose and quote also the wording of **paragraph 12, 13 and 17** of Counter Affidavit. They reads:

"12. With regard to the contents of paragraphs 12 and 13 of the affidavit I state that the notice dated 15th April, 2021 is valid and it is now after expiry of the period of 3 months that the respondent seeks orders from the court to be protected against handing over while the fuel station has already been taken over by the respondent and the application has been overtaken by events.

13. The contents of paragraphs 13, 14 and 15 of the affidavit are in respect of the history of what transpired in a Land Case no. 104 of 2021 of which, the schedules, proceedings and orders ceased to have any meaning after the striking out of the said land Case for want of jurisdiction and cause of action of that reason the said depositions are of no use and help to the facts and record of this case.

17. In reply to the contents of paragraph 17 of the affidavit I state that the respondent did not evict the Applicant as alleged but took over its station after expiry of the term

and upon clear notices. The taking over was, therefore, proper and lawful.”

Further to that, upon perusing both an Affidavit and the Complaint to this case, I have noted that the prayers sought in the Application and reliefs sought in the Main Case have departed at far. This is because the Applicants' prayer under the enabling law that is under **Order XXXVII** is **to restrain the Respondent from taking over the petrol station while in the real situation** as well evidenced by the Applicant's pleadings is that the said petrol station which is the subject matter in this case is already under the Respondent's possession. The question then comes: What is the court supposed to restrain in order to save the Applicant's situation under the given circumstances?

From the above, I find hard to follow the line of reasoning adopted by Mr. Twarah who submitted the Application under **Order XXXVII of the Civil Procedure Act. (Supra)**. Even in the event where the Counsel could wish to depend on the previous Order that was granted *Ex parte* for maintenance of the status quo just before the possession of the suit property, the same could have been untenable since after the struck out of the Application for want of jurisdiction, the said order could not stand under the situation.

On this I would like to refer to the case of **ROBERT JOHN MUGO (ADMINISTRATOR OF THE ESTATE OF THE LATE JOHN MUGO MAINA) V. ADAM MOLLEL - Civil Appeal No. 2 of 1990 (Unreported)**. In this case, the appeal was struck out on a preliminary objection for want of a properly signed decree, with a direction that the appellant was at liberty to re-institute the appeal if he so wished within fourteen days from the date of obtaining a properly signed decree. The appellant obtained a properly signed decree and filed Civil Appeal No. 15 of 1991 within the prescribed period of fourteen days, but based on the notice of appeal which had previously been lodged in Civil Appeal No. 2 of 1990. The respondent's advocate raised a preliminary objection that, when Civil Appeal No. 2 of 1990 was struck out, the notice of appeal was also struck out, and therefore the appeal was incompetent. The Court sustained the preliminary objection, and further stated that, the appellant was expected to comply with the Court of Appeal Rules in pursuing the appeal afresh. The Court also stated that the directions which were given in the decision in Civil Appeal No. 2 of 1990, were subject to the rules of the Court and not otherwise. This view was reiterated by the Court in the case of **WILLIAM SHIJA V. FORTUNATUS MASHA (1997) TLR 213.**

In the instant matter, I also affirm the same view that when the Application at Land Division was struck out, the maintenance of the *status quo* order was struck out as well. It had no validity to support the situation as it was ineffectual.

That being the case, under the given circumstances, it is obvious that the matter has **been overtaken by event** and that **it is impossible** for this Hon. Court to grant the prayer sought particularly to **restrain the Respondent from what has been done**. However, since the matter between the Parties is a contractual one, the prayers sought under the Main case can be entertained upon issuance of evidence for determination when time comes. For this reason, I will thus hold that **this condition has not been satisfied**.

On the second condition which is that of suffering irreparable injury if the prayer for injunction is refused; I am mindful that the purpose of granting temporary injunction is **to prevent irreparable injury** befalling on the Applicant/(s) while the case is still pending.

At this juncture, let me refer to **Order XXXVII Rule 1(a) of the Civil Procedure Code, Cap. 33 [R.E. 2019]** as enabling provision to this Application. The same states:

"Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit or suffering loss of value by reason by its continued use by any party to the suit, or wrongly sold in execution of a decree; or....

the Court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging alienation, sale, loss of value removal or disposition of the property as the court thinks fit, until the disposal of the suit or until further orders"

From the wording of the above provision, the key words are:

"....to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging alienation, sale, loss of value removal or disposition of the property

.....any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit or suffering loss of value."

It is indeed, this kind of an Application is **to prevent from all such acts which will make the Applicant suffer loss of value, damage, sell etc.** However, under the given circumstances, the grant of the order sought is inevitable.

Again, it is from the Applicant's Affidavit contents in that the Applicant clearly stated that the Petrol station is already under the Respondent's possession, then what the court can do at this particular moment. From the record, the time that was wasted to file the matter at the previous court which came to declare that it had no jurisdiction, at least by that time, it was the moment that the prevention order could have been of use; not now. As of now, again the matter has been overtaken by events.

Under the circumstances of this Application, as I have said earlier is that, there is no any irreparable loss on the side of the Applicant as the matter has already been overtaken by events.

From the above explanation, I have no doubt to find that the purported injury mentioned is untenable for the reasons stated earlier. From the above therefore, the 2nd test for temporary injunction that the Applicant will suffer irreparable loss if the Application is not granted, **has miserably failed.** I proceed to find **the second condition has not been met.**

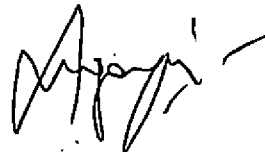
Under the circumstances, where the 2nd test has failed for the above stated reason, then automatically, the 3rd test on balance of convenience and as to who is going to suffer the greater hardship if temporary injunction is withheld, **cannot stand and therefore it fails accordingly.**

On my comparative basis from the submissions for and against, I proceed to find all three tests to the prayer for Temporary Injunction order **have not been met.**

At this juncture therefore, having weighed the facts in totality, I will hold that this is not a fit case for Temporary Injunction because all the conditions for granting the temporary injunction order as sought have not been met.

Consequently, I have no any other option rather than to **DISMISS the Application with costs,** as I hereby do.

It is so ordered.



L. E. MGONYA

JUDGE

31/8/2021

COURT: Ruling delivered in the presence of Advocate Twarah Yusuph for Applicant, Advocate Godwin Mussa for

Respondent and Mr. Richard RMA in my Chamber today
31st August, 2021.



L. E. MGONYA

JUDGE

31/8/2021