IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 323 OF 2021

GREEN DIAMOND JOINT STOCK CO. LTD....................................APPLICANT

VERSUS

TATA HOLDING CO. LTD..1ST RESPONDENT

ADILI AUCTION MART LTD..2ND RESPONDENT

RULING

20th Oct, 2021 & 26th Nov, 2021.

E. E. KAKOLAKI J

Under certificate of urgency and by way of chamber summons supported by affidavit on one Ahmed Waziri Gao, applicant's officer able to swear the affidavit, preferred under Order XXVII Rule 1(a), sections 68(e) and 95 of the Civil Procedure Act, [Cap. 33 R.E 2019], the applicant has moved the court for two temporary orders after the order on maintenance of status quo was issued by this court on the 1st of June, 2020, against the respondents. These are orders:

1. That the Honourable court may be pleased to issue an order of temporary injunction restraining the Respondents, their workers, servants, contractors, agents or any other person working under them from attaching, impounding, repossessing, selling, Applicant's 2 Equipment described as **TATA HITACHI EX210 LC SUPER MODEL EXCAVATORS** Reg. No. **T542 DJE** and **T915 DJQ**.
2. That the Honourable court may be pleased to issue an order of temporary injunction restraining the Respondents, their workers, servants, contractors, agents or any other person working under them from selling and transferring or if sale has been done, then transferring the Applicant's 2 Motor Vehicles (Lorries) Make **TATA LPK 2516-14 TIPPER** Registration **No. T216 DKZ and T468 DLL**.
3. Costs.
4. Issue of orders pending hearing and determination of the suit.

When the chambers summons was served to the respondents the application was vehemently resisted by the 1st respondent who filed the counter affidavit to that effect. With leave of the court parties were ordered to proceeded with hearing of the matter by way of written submission and the filing schedule orders issued as both applicant and 1st respondent were

represented by Mr. Amini . M. Mshana and Mr. Richard Magaigwa, learned advocates respectively. It was ordered the applicant should file the submission in chief in support of the application by 21/09/2021, Respondent's reply submission by 05/10/2021, rejoinder submission on or before 12/10/2021 and the matter was set to come for mention for necessary orders on the 20/10/2021. On the 20/10/2021 when the matter came for mention only the applicant had filed the submissions and the 1st respondent could not appear in court to tell why she failed to file her submission in time hence the matter was set for ruling date while issuing a notice ruling to the respondent. This ruling will therefore base on the submission by the applicant though non-filing of the submission does not mean that the application is uncontested. See the cases of Fatuma Ally Mohamed Vs. Mohamed Salehe, Misc. Land Case No. 365 of 2019 and Sakina Issa Vs. Rashid Juma, Misc. Civil Application No. 55 of 2021 (both HC-unreported). As regard to the 2nd respondent no counter affidavit was ever filed in contest of the application thus hearing proceeded ex-parte against her.

Briefly as gathered from the applicant's affidavit, the applicant a prospective company in mining venture (under sister company known as Central Geita Gold Mines Limited) on diverse dates in 2017 and 2018 entered into hire

purchase agreements with the 1st Respondent for purchase of mining equipment and lorries, wherein the Plaintiff had to pay the purchase price from a down payment followed by equal instalments as title of the said goods would pass to the applicant upon full payment of the total price of USD 319,280. When the applicant had paid two third of the purchase price to the tune of USD 199,280, she defaulted on the reason that the mining activities at Saraguwa, Nyamwilolwlwa in Geita District was frustrated and stopped pending compliance of the Government requirement of obtaining the Environmental Impact Assessment Report, hence none use of the equipment and lorries as intended. It is from that default the 1st respondent instructed the 2nd respondent to attach, impound and sale the 2 equipment described as **TATA HITACHI EX210 LC SUPER MODEL EXCAVATORS** Reg. No. **T542 DJE** and **T915 DJQ** while successfully attaching, repossessing and selling 2 Motor Vehicles (Lorries) Make **TATA LPK 2516-14 TIPPER** Registration **No. T216 DKZ and T468 DLL**. It is from that attachment and sale instruction of the said two equipment and the sale of the two (2) lorries the applicant preferred this application on the above cited reliefs. Having narrated the background story that necessitated this

application I now move to consider and determine the merit or demerit of the application as submitted on by the applicant.

Submitting in support of the application Mr. Mshana intimated that, the criteria for granting temporary injunction are met in this application as expounded in the case of **Attilio Vs. Mbowe** (1969) HCD 284. It should be noted from the outset that grant of application of this nature is solely based on the discretion of the court upon the applicant meeting the three conditions/principles as enunciated in the case of **Attilio Vs. Mbowe** (supra) and restated in a litany of cases. See also cases of **E.A Industries Ltd. Vs. Trufford Ltd** [1972] EA 20, **CPC International Inc. Vs. Zainabu Grain Millers Ltd**, Civil Appeal No. 12 of 1999 (CAT-unreported), **Vodacom Tanzania Public Limited Company Vs. Planetel Communications Limited**, Civil Appeal No. 43 of 2018 (CAT-unreported) and **Urafiki Trading Agencies Ltd and Another Vs. Abbasali Aunali Kassam and 2 Others**, Misc. Civil Application No. 53 of 2019 (HC-unreported). The said three conditions/principles 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 reliefs 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 of convenience 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.

It should further be noted that the onus of proving existence of the above mentioned conditions/principles exists lies on the applicant as per section under section 110(1) and (2) of Evidence Act, [Cap. 6 R.E 2019], dictating that any party desiring any court to give him/her judgment in his favour basing on certain existing facts must to prove to the court that the same do exist. The said provision of section 110(1) and (2) of [Cap. 6 R.E 2019] provides thus:

110.-(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

In discharging the onus alluded to herein above Mr. Mshana argued the applicant has met the three conditions as set forth herein above. On the first condition he submitted there is serious case in the main suit to be determined by this court and the probability is that the applicant will succeed as the court is called upon to determine the legality and validity of the agreement arising from the defects therein as registered in the applicant's

affidavit. The defects mentioned in paragraph 18 of the affidavit are: **One**, matters of duress and conscionability in the agreements evidenced by the desire to commence business immediately and the advantage takenby the 1st respondent. **Second**, effect of not stating in the memorandum signed by the parties, the 'cash price' payable if the purchase was a 'cash transaction' as distinguished from 'high purchase' price in contravention of section 6(1) of the Hire Purchase Act, Cap. 14 and Rule 2(b) of the Hire Purchase Rules, GNs No. 310 ad 327 of 1966. **Third**, Legality of the 1st respondent through the 2nd respondent to enter applicant's premises and attach, repossess and sale goods of hire purchase in contravention of section 7(a) of the Hire Purchase Act. **Fourth**, legality of unilateral enforcement of the agreement by attachment, impounding, repossession and sale of goods by the respondents in contravention of section 17(1) of the Act and section 19 of the Act for not accounting for the proceeds of sale. And further the attempt of repossession which is in infraction of the provision of section 23(a) and (b) of the Act. **Fifth**, Legality of clause of purchase price paid by the applicant (purchaser) being taken to have been forfeited to the vendor whole as liquidated damages instead of deducting the defaulted amounts plus costs incurred on sale and return the rest of the amount to the applicant, thus

rendering the agreement unconscionable as it contravenes the provisions of section 19 of the Act. **Sixth**, non-enforceability of the agreements which have not been registered in the 'Registry' established under section 4(1) as provided by section 5(1) and 5(4) of the Hire Purchase Act, Cap. 14. **Seventh**, legal effect of the applicant having paid more or less than two third of the purchase price. **Eighth**, legality and effect of the agreement lacking any clause on vendor obligations but having those on the hire purchaser only. **Ninth**, legality of the 2nd respondent impounding 2 equipment while the letter by the 1st respondent mentions only one which is in violation of section 23(b) of the Act. And **tenth**, failure and effect of the whole agreement to abide by the Rule 2 of the Hire Purchase Rules, GN. No. 310 and 327 of 1966.

Now the issue before the court for determination is whether the applicant has successfully established the first condition. It is trite law that, in dealing with application of this nature the duty of this Court is to examine though not exhaustively merits of applicant's case in the main suit as to whether his/her rights therein exist and that there are chances of him/her succeeding or not. This position of the law is supported by the words of **Justice P.S.**

Narayana in his book **Law of Injunctions** (supra) at page 85 when commented that:

> *"When the Court is called upon to examine whether the plaintiff has a prima facie case for the purpose of granting temporary injunction,* ***the Court must perforce examine the merits of the case and consider whether there is a likelihood of the suit being decreed and the depth of investigation which the Court must pursue may vary with each case.****" (emphasis is supplied).*

In this matter therefore, this Court is duty bound to examine the merits of the case more particularly on the existence of triable issues in the main suit filed by the applicant and the possibility of the applicant succeeding in which Mr. Mshana is submitting there is as the court in the main suit is called to determine the legality and validity of the agreement. In discharging this noble duty ***the Court must perforce examine the merits of the case and consider whether there is a likelihood of the suit being decreed*** by subjecting the facts of the case to test as well as the reliefs prayed for in the main suit. In the present application I note, the applicant did not indicate under which main suit is this application is traced or originating from nor did she annex the plaint exhibiting the main suit number or cite the case number

of the main suit in her prayers in the chamber summons or her written submissions to assist this court make reference to and establish to its satisfaction whether the alleged ten defects of the agreement and complaints on infractions of the law of Hire Purchase Act and its Rules sought to be challenged in the main suit do exist and that there is triable issues or prima facie case, which if heard on merits the applicant is likely to succeed as rightly stated by **Justice P.S. Narayana** in his book **Law of Injunctions** (supra). It is settled law that, parties are bound by their pleadings as they should always adhere to their pleadings so as to avoid taking the other party by surprise. Any party seeking to make reference to any document not pleaded and/ or annexed to the pleadings must seek court's leave to amend the pleadings so as to enable him make reference thereto. This position of the law and its object was stated in the case of **Charles Richard Kombe t/a Building Vs. Evarani Mtungi and 2 Others**, Civil Appeal No. 38 of 2012 (CAT-unreported) where the Court had this to say:

> ***"It is cardinal principle of pleadings that the parties to the suit should always adhere to what is contained in their pleadings unless an amendment is permitted by the Court. The rationale behind this proposition is to bring the parties***

to an issue and not to take the other party by surprise*. Since no amendment of pleadings was sought and granted the defence ought not to have been accorded any weight." (Emphasis supplied).*

Guided with the above cited authority and the fact that, the applicant in this matter neither annexed the plaint in his affidavit nor referred its case number in the chamber summons or submissions to enable this court to not only make reference to but also take cognisance of its existence and base its decision therefrom when establishing whether there is prima facie case or triable issues or not in the main suit, I hold the applicant has failed to establish the first condition whether there are trible issues in the main suit and demonstrate to this Court that, the reliefs sought in the plaint if any existing are capable of being decreed. In other words he has failed to establish to the court's satisfaction that there are existing triable issues or the prima facie case in the main suit worth of determination by this court, so as the enable this court exercise it discretion judiciously by granting her temporary injunction pending determination of the alleged ten issues. Thus, I find the applicant has failed to meet the first condition.

Moving to the second condition it is Mr. Mshana's contention that basing on what is stated and established in the first condition, interference of this court is necessary to protect the plaintiff from the kind of injury which may be

irreparable before his right is established. He submitted the injury is irreparable as mining being a serious and capital intensive venture, the 1st respondent may not be able to pay the awarded damages for being a mere agent of a foreign entity (from India) and further that the 2nd respondent is a mere broker without sufficient liquidity to pay damages that may be awarded. I don't find difficulties in determining this condition/principle as the object of this principle is for the court to examine whether its interference is necessary for protection of the applicant from suffering irreparable injury should the injunction order be withheld. **"Irreparable injury"** is something which is substantial and which cannot be remedied by damages. The reason tabled by applicant on incapacity of the 1st respondent to pay the damages if ordered after full trial of the case for being agent of a foreign company (Indian Company) and 2nd Respondent for being mere court broker respectively, in my profound view is unfounded for not being pleaded in the affidavit or reply to counter affidavit. I so hold as there is no evidence advanced by the applicant to prove those facts are existing as the same are mere submissions coming from the bar. It is trite law that, submission is a mere argument which does not introduce evidence upon which this court can base its decision for coming from the bar. See the cases of **The**

Registered Trustees of the Archi Diocese of Dar es salaam Vs. The Chairman Bunju Village Government and 11 Others, Civil Appeal No. 147 of 2006 (Unreported) and **Morandi Rutakyamirwa Vs. Petro Joseph** (1990) TLR 49 (CAT). Since the damages claimed to be or likely to be suffered by the applicant can be quantified in monetary value and since there is not proof whatsoever to the satisfaction of this court that the respondents lacks liquidity to satisfy the court's orders for damages in favour of the applicant should the same be granted in the main suit if the same is existing, I hold the second condition is not met too.

Next for determination is the third condition on whether on the balance of convenience greater hardship and mischief is likely to be suffered by the applicant if temporary injunction is withheld than would be suffered by the respondents if the order is granted. It is Mr. Mushana's submission in this condition that, the applicant stands in a position to suffer more than the respondents would do if the order sought is withheld. He reasoned that, the price of the sold goods/lorries was not disclosed to the applicant nor accounted for something which is in contravention of section 19 of the Hire Purchase Act, as the defect is sought to be challenged in the main suit. That if an order restraining the respondents from selling the equipment is not

granted and the other equipment is let to be sold and the sale price concealed, and the clause '**any purchase price paid by the Plaintiff (purchaser) is taken to have been forfeited to the Vendor as liquidated damages**', is executed the owner will benefit thrice as the applicant has already paid two third of the hire purchase price which is **USD 199,280**. He claimed the clause is unconscionable, oppressive and violative of the existing law, whose legality ought to be determined by this Court in the main suit. I have already found in the first condition that the applicant has failed to establish to the court satisfaction that triable issues or prima facie case exists in main suit. That being the case there is no proof that the alleged clause referred hereinto sought to be challenged exists in the main suit, for failure of the applicant to either attach the plaint or cite its case number in both chamber summons and submissions hence denial of this court with the right to make reference to the facts of the main suit. Consequently, the applicant has failed to prove that, there are some legal right(s) in the main suit or an injury(ies) which ought to be protected , hence lack of proof that withholding the orders sought by her (applicant) will suffer her greater hardship than the 1st respondent would do. My stance finds support in the case of **Charles D. Msumari and 83 Others Vs. Director**

General of Tanzania Harbours Authority, Civil Appeal No. 18 of 1997 (CAT-unreported) when the Court was considering the principle of balance of convenience before granting the injunctive order where it had this to say:

> *"Courts cannot grant injunctions simply because they think it is convenient to do so. Convenience is not our business. Our business is doing justice to parties. They only exercise this discretion sparingly and only protect rights or prevent injury according to the above stated principles. The courts should not be overwhelmed by sentiments, however lofty or mere high driving allegations of them and their families without substantiating the same.* ***They have to show that they have a right in the main suit which ought to be protected or there is an injury (real or threatened) which ought to be prevented.****" (Emphasis supplied)*

Since there is no material supplied by the applicant before the court to enable it to gauge in which side the balancing scale of convenience will tilt, I hold the applicant has failed to prove the third condition or principle that on the balance of convenience she will suffer more and irreparably than the respondent will do if the grant of temporary injunction is withheld. For the foregoing, authorities and law and having weighed the exhibited evidence in its totality, I am convinced that this is not a proper case for issue of temporary injunction as prayed. I therefore dismiss it with costs.

It is so ordered.

DATED at DAR ES SALAAM this 26th day of November, 2021.

E.E. KAKOLAKI

JUDGE

26/11/2021

Delivered at Dar es Salaam in chambers this 26th day of November, 2021 in the presence of the Mr. Richard Magaigwa, advocate for the respondent and Ms. Asha Livanga, court clerk and in the absence of the applicant.

Right of appeal explained.

E.E. KAKOLAKI

JUDGE

26/11/2021