

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MOSHI

AT MOSHI

MISCELLANEOUS CIVIL APPLICATION NO. 28 OF 2021

THE BOARD OF THE REGISTRED

TRUSTEE OF MAGADINI MAKIWARU

WATER SUPPLY TRUST.....APPLICANT

VERSUS

1. RUWASA SIHA DISTRICT.....1ST RESPONDENT

2. CRDB BANK SIHA BRANCH.....2ND RESPONDENT

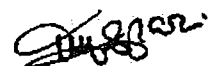
3. HON. ATTORNEY GENERAL.....3RD RESPONDENT

RULING

20/10/2021, 17/11/2021

MWENEMPAZI, J.

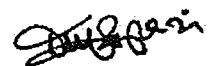
The applicant has made this application under the provisions of section 2(1) and 2(3) of the *Judicature and Application of Laws Act [Cap. 358 R.E.2019]* praying for the orders, as follows: -



1. That, this Honourable Court be pleased to issue interim orders restraining the 1st Respondent from dissolving the board of the applicant and from discharging day today activities on behalf of the board including but not limited from operating the applicant's bank accounts.
2. That, this court be pleased to restrain the 2nd respondent from allowing the 1st Respondent to operate the applicant's bank account and an order restraining the board members into their positions till final determination of the review filed to the 1st respondent.
3. Any other order(s) and or relief(s) this court may deem fit and just to grant.

The application is supported with an affidavit sworn by JULIUS ELIPOKEA MOLLEL, who is the Chairman of the applicant. In it, the deponent has averred that the applicant is a registered Board of trustee for the purpose of supplying Water and collecting water bills from the community of twenty-seven villages. The said villages have been mentioned under paragraph 5 of the affidavit.

The deponent has averred in the affidavit that applicant was registered by ***Administrator-General of Trustees*** under the ***Trustees' Incorporation Act, [Cap. 318 R.E. 2002]*** on the 18th June, 2002. In that account, a certificate of incorporation has been annexed. It is also averred that the applicant made an application to be registered with the District Executive Director of Siha District in the year 2016 for the purpose of services of community water distribution and paid all necessary fees and in the year 2019. A tax invoice prepared on the 26th day October, 2018 with control



Number 992960001753 for payment of Tshs. 100,000/=., NMB pay-in-slip and 'Stakabadhi ya Ada ya Kawaida' for payment of the same has been annexed to the affidavit.

The applicant could not be granted with the certificate and no any notification was given to the applicant until the enactment of the new law on Water and Sanitation in the year 2019. In that very year, on the 26th February, 2019, a general meeting was convened and members elected the Chairman, Vice Chairman and Members of the Executive committee who will be in office for three years.

The applicant has averred that the activities by her are according to its registered constitution, which has been blessed and passed by the General meeting and duly registered by the Administrator General. She manages, operates and maintains public taps and water works as well as providing an adequate and safe supply of water to its village consumers, charge consumers for the water supplied from public taps and or water works.

In paragraphs 9-15 of the affidavit, the deponent has averred that the applicant had to comply with the new law, that is **Water Supply and Sanitation Act, No. 5 of 2019**, and the **Water Supply and Sanitation (Registration and Operation of Community Based Water Supply) Organization, G. N. 829 of 2019**. Thus, she made an application for registering its constitution with RITA as was done earlier, however the application with the District Executive Director could not bear fruits.

The applicant made a reminder through a letter to the Manager of RUWASA in the office of the District Executive Director, that was by the letter dated

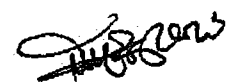
21st June, 2021 and reference No. MMWST/C/376/21. There was no any response to the said letter. On 16th July, 2021 the applicant wrote a reminder letter with reference No. MMWST/C/383/21 to 1st Respondent requesting to be registered but no reply was made to the applicant.

The Manager RUWASA on the 26th June, 2021 wrote a letter to the Manager of the applicant with reference No. LB.26/116/01/67 directing rectifications to the constitution of the applicant for the purpose of registering the applicant under the requirement of the new law.

The 1st Respondent on the 19th July, 2021 wrote a letter with reference No. LB.26/116/01/71 notifying the applicant that the Board of Trustee of MAGADINI MAKIWARU has ceased to be functional due to failure to re-register according to the new law. That letter is annexed to the affidavit as MM-E. Paragraph 4 of the letter starting from the second sentence, it reads:

"...Mpaka sasa Bodi ya Wadhamini Magadini Makiwaru haijafanya mabadiliko hayo kutokana na kushindwa kutekeleza matakwa ya sheria ya Maji na Usafi wa Mazingira Na. 5 ya mwaka 2019 ndani ya muda uliowekwa nakutaarifu kuwa Bodi ya Wadhamini iliyopo madarakani imefikia ukomo wake na hivyo hairuhusiwi kuendelea kusimamia shughuli za Bodi tangia tarehe ya barua hii. Pia majukumu yoyote yaliyokuwa yakitelezwa na Bodi ikiwa ni Pamoja na kupitisha malipo hayaruhusiwi kuendelea mpaka Bodi nyingine itakapoundwa."

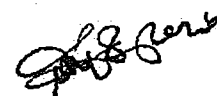
According to the affidavit, the 1st Respondent did order the 2nd Respondent to close the applicant's account and stopped the applicant from operating the same and that the 1st respondent reported the applicant to the police



that she is conducting her businesses by supplying water to its community without being registered. The applicant's manager on the 23rd July, 2021 received a letter from the 1st respondent informing him of the meeting to be held on the 29th July, 2021 informing him of a new list of board members. That means the board has been appointed and is in operation. It is also an averment by the applicant that the orders of the 1st respondent invite conflicts which has an effect to the society which is being served by the applicant. In effect, the deponent has averred that the 1st and 2nd respondent's orders and actions affect directly and substantially water bill collection and applicants is fearing the possibility of having irreparable loss. It is against this background the applicant prays for the orders sought as shown above.

The respondent is opposing the application and have as well filed a Counter affidavit. The counter affidavit is sworn by one Emmy George who is the District Manager of the 1st Respondent who administers water supply and sanitation in Siha District. In it she has deposed that Mr. Julius Elipokea Mollel, was removed from office as chairperson of water committed following the Kandashi Village Assembly dissolving the Water Committee pf the said village. Minutes of the assembly meeting that removed Julius Elipokea Mollel from office have been annexed. This could not be authenticated apart from the statement the annexure is not attached to the counter affidavit in the record of the court. She admits to the fact that the applicant applied for registration to the District Executive Director.

The deponent has faulted the constitution of the applicant which seems to have been amended on the 26th February 2019 and members signed on the



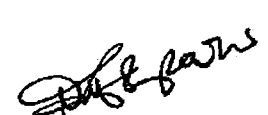
2nd December, 2020. That brings confusion on the reason that at the time the Siha District Manager of the 1st Respondent was Emmy George and not Joyce Behati.

In the communications made, the applicant had not made required changes that is why the registration could not be done. That was supposed to be done in order to meet the requirements of the new law, the Water Supply and Sanitation Act, No. 5 of 2019 and **Water Supply and Sanitation (Registration and Operations of Community Based Water Supply Sanitations) Regulations, 2019.**

In the counter affidavit the deponent has averred that after the repeal of the law under which the applicant was registered, the applicant has not taken any rational and meaningful effort to comply with the saving provisions of the repealing law neither has complied with the current law which repealed the 2009 law. That the applicant did not amend the constitution and present the previous certificate of registration under the repealed law for them to be re-registered.

The deponent has also denied that she ordered the 2nd Respondent to close the applicant's account and that at the time of deposing this counter affidavit the Applicant's account with the 2nd Respondent is operative.

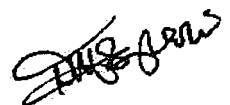
At the hearing Mr. Engelbart Boniphace, Advocate appeared for the applicant and Mr. Yohana Marco, State Attorney was for the Respondents. They agreed and sought leave to present their cases by way of written submission. Leave was granted and they duly complied to the scheduling order of the court.



In the submission by the counsel for the applicant, he has commenced by first submitting on the general complaints and also praying not to submit on the preliminary objection raised by the counsel for the respondent. He has instead prayed a schedule of filing main application be adhered to leaving that for the preliminary objection.

The counsel for the applicant has submitted that the applicant has been supplying water in the District of Siha for the past 20 years. For the time there has not been any disturbance. The 1st respondent awarded the applicant with the reward for best performance. It is the 1st respondent who administered the general meeting to appoint the current board members and at the time the current law was in force. The question is what criteria were used to appoint the board members; whether the applicant's constitution or the 2nd schedule to Act NO. 5 of 2019.

The counsel has also addressed the averment on the locus standi of the chairman of the applicant, Julius Elipokea Mollel. The said chairperson of the applicant was dully appointed by the general meeting as provided for under article 12 of the Constitution of the Applicant's and before that, the applicant's chairman was dully appointed by '*Kamati za Watumiaji wa Maji za Vijiji*' of whom are separate entities different from the village general meeting and the village counsel. In that regard, the counsel is suggesting that the meeting to discuss any dispute regarding any leader in the applicant's coverage should adhere to the requirements of Article 29 of the Applicant's constitution, 2015, in the amended constitution of February, 2021. The article provides that:



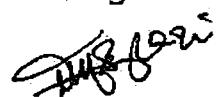
"Kama kutajitokeza mgogoro ambao unapaswa kusuluhishwa au hauwezi kusuluhishwa kwa kutumia vifungu vya katiba ya bodi ya wadhamini itabidi iundwe tume ya wasuluhishi watano kutoka kwenye bodi kushughulikia mgogoro au shauri hilo. Maamuzi ya wajumbe wa kamati yatachukuliwa kama maamuzi halali ya mgogoro huo na endapo kutakuwepo na upande ambao hautaridhika na maazuzi ya tume, upande huo utapeleka mgogoro huo RUWASA"

The counsel has concluded that the village government in whatever way has no mandate to make decisions on behalf of the board and water user organization and in case there are disputes in the organization then the Constitution of the applicant did set a methodology to settle the same.

The counsel has complained that the minutes annexed is not dated, the person who signed is not a member of the board of the Applicant thus he has no mandate and it is not averred that the said Julius Elipokea Mollel was summoned and heard. He has invited this court to disregard the averment.

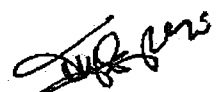
I would as well concur to the prayer as that document is not attached and I am not in a position to decide whatever has been argued. I therefore disregard it as prayed.

In submitting on the main application, the applicant prayed that the chamber summons and affidavit together with the annexures thereto be adopted to form part of the submission. He also reminded the court that the matter is brought under the provisions of section 2(1) and 2(3) of the Judicature and Application of Laws Act, [Cap. 358 R.E.2019]. The applicant is seeking an interim order from this Honourable Court, first by restraining the 1st



Respondent from dissolving the board of the Applicant and from discharging day to day activities on behalf of the board including but not limited to operating the Applicant's bank account; Second, this court be pleased to restrain the 2nd Respondent from allowing the 2nd Respondent to operate the bank account and an order reinstating the board members into their positions till final determination of the review filed to the 1st respondent.

The counsel has submitted that the order being sought is Mareva Injunction, as extracted from the cited provisions may be issued basing on three conditions which must exist. These are, **one** that the civil procedure isn't exhaustive; **two**, that the High Court has jurisdiction to grant interim injunction pending institution of a suit in the circumstances not covered by Order XXXVII Rule 1 of the Civil Procedure Code; **Three**, the High Court has jurisdiction to apply relevant rules of common law statutes of general application in force in England on the 22nd July 1920 where the code is silent. These conditions were discussed in the case of **Abdallah M. Malik & Others Vs. Attorney General & Another, Misc. Land Application No. 119 of 2017**(unreported) the same having been extracted from the case of **Edward Epimark Lasway, T/A Lasway Truck & 3 others versus Natinal Bank of Commerce & 2 others, Misc. Commercial Application No. 08 of 2020, in the High Court of Tanzania (Commercial Division) at Dar es Salaam**(unreported). The counsel has proceeded to discuss the three grounds in details that Mareva Injunction is not covered by the provisions of the Civil Procedure Code, Cap. 33 R. E.2019 and the only way the applicant has to attain it is by invoking the provisions of section 2(1) and (3) of the Judicature and



Application of Laws [Cap. 358 R.E.2019]. That means the Civil Procedure Code, Cap. 33 is not exhaustive.

The second requirement is that the High Court has jurisdiction to grant interim injunction pending institution of a suit in the circumstances not covered by order XXXVII Rule 1 of CPC. Mareva injunction is not at all covered by the Civil Procedure Code in our jurisdiction as the same applies where there is no pending suit in the court. In his submission he has also compared the Mareva Injunction with the ordinary temporary injunction under the provisions of Order XXXVII Rule 1 of the Civil Procedure Code, Cap. 33 R.E.2019.

The third requirement the court has to consider for the grant of the orders of Mareva Injunction, that it has jurisdiction to apply relevant rules of common law statutes of general application in force in England on the 22nd July, 1920 where the Code is silent; section 2(3) of the Judicature and Application of Laws Act, Cap. 358 R.E.2019 confers jurisdiction to grant the sought orders by the applicant.

In the submission by the applicant's counsel, the essence of the application lies in the acts by the 1st Respondent whereby the applicant allege the 1st Respondent exercised powers which are not vested to her, because according to section 43(2)(a) -(m) of the Water Supply and Sanitation Act, NO. 5 of 2019 there is no function of the 1st Respondent which allows her to dissolve the Board of the applicant. Thus, her actions were contrary to the law. Also, the 1st Respondent went far to

order the 2nd Respondent to close the Applicant's bank account and all the transactions whatsoever of any kind to be authorized by the 1st Respondent. He has referred to paragraph 4 of the letter annexure MM-E of the applicant's affidavit, which reads: -

"...Mpaka sasa Bodi ya Wadhamini Magadini Makiwaru haijafanya mabadiliko hayo kutokana na kushindwa kutekeleza matakwa ya sheria ya Maji na Usafi wa Mazingira Na. 5 ya mwaka 2019 ndani ya muda uliowekwa nakutaarifu kuwa Bodi ya Wadhamini iliyopo madarakani imefikia ukomo wake na hivyo hairuhusiwi kuendelea kusimamia shughuli za Bodi tangia tarehe ya barua hii. Pia majukumu yoyote yaliyokuwa yakitelezwa na Bodi ikiwa ni Pamoja na kupitisha malipo hayaruhusiwi kuendelea mpaka Bodi nyingine itakapoundwa."

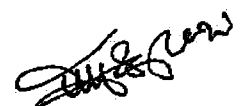
The counsel concluded by stating that the 1st Respondent acted ultra vires as no law requires her to act in such a way as she did so and as far as Section 43 of the Act NO. 5 of 2019 is concerned.

I believe, the above summarized account of the events and submission by the counsel for the applicant is the basis of this application. The rest of the submission is an explanation as to why the applicant believes the 1st Respondent erroneously interpreted the law and thus, I won't refer to the submission on the reasons which will be apparent in the following pages.

The respondent also has submitted on the issue of interpretation of the law as submitted by the applicant. However, despite of the importance of the tools stated I will also skip the technical justification on the tools for interpretation and jump straight into the main concern of application, which is the application for an order of *mareva* injunction.

He has also submitted that the applicant brought this application, particularly prayer (b) pending determination of the review by filed by the applicant. The final determination of the said review was delivered on the 2nd August, 2021 and the applicant was again dissatisfied and appealed to the Director General of RUWASA whose determination was done on 20th September, thus there is no any review which is pending. Therefore, prayer (b) is rendered redundant and the same should be dismissed. The decisions of the 1st Respondent and Director General of RUWASA were annexed in the submission.

At paragraph 3 of the submission by the counsel for the respondents he has submitted that they agree with the Applicant's counsel that Mareva injunction, being a common law principle, applies to our jurisdiction by virtue of section 2(3) of the ***Judicature and Application of the Laws Act (Supra)*** as was stressed in the case of ***Calvary Assemblies of God Vs. Tanzania Steel Pipes Ltd and 2 others, Misc. Land Case Application No. 677 of 2019, High Court (Land Division) at Dar es Salaam*** that:

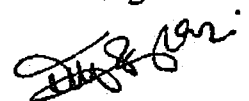


"In England applications of this nature are known as "Mareva injunctions" having its roots in the famous case of Mareva Compania Naviera SA vs. International Bulk Carriers SA [1980] 1All ER 213. The reasoning in this case followed in the case of Nicholas Lekule(supra) where the court held:

"Since courts in England used to issue injunctions orders before institutions of the main suit under S. 25(8) of the Judicature Act, 1873, and since that Act was in force in England on 22/7/1920 and would appear to have been of general application in England at that time, I am satisfied that under s. 2(2) of the Judicature Application of Laws Ordinance, Cap. 453, in a proper case this court can grant such an order notwithstanding its peculiar name of Mareva. Suffice to call it an interim injunction order before institution of the main suit."

The counsel for the respondent has also submitted on the manner injunction applies in our jurisdiction. He has referred this court to the case of **Daud Makwaya Mwita Vs. Butiama District Commissioner and Another, Misc. Land Application No. 69 of 2020, High Court of Tanzania at Musoma** (unreported) wherein at page 3 the court observed:

"...a Mareva Injunction cannot be applied or be granted pending a suit. It is an application pending obtaining a legal standing to

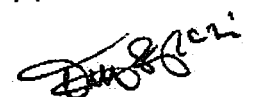


institute a suit. A Mareva Injunction may be applied where an applicant cannot institute a law suit because of an existing legal impediment for instance where law requires that a statutory notice be issued before a potential plaintiff can institute a suit..."

It is submitted that Mareva Injunction being an interim order, different from that under Order XXXVII Rule 1 of the Civil Procedure Code[Cap. 33 R.E.2019] on aspect of existing pending suit, must meet requirements which are pertinent to the issue of interim injunctions which are; **One**, presence of arguable case (whether instituted or not); **two**, the applicant is likely to suffer irreparable loss, and ; **three** the balance of convenience that is the applicant is likely to suffer more compared to the applicant as was held in the Case of **Atilio vs. Mbowe[1969]. HCD 284.**

The counsel for the respondent has then argued that the applicant has no intention to sue the respondents. It is clear that to be a valid statement because there has never been issued a statutory notice to sue. As such that also translated that there is no arguable case and the orders sought being interim in nature, has nothing to protect in pendency. Automatically he argues, the two conditions of irreparable loss and balance of inconvenience are redundant because these elements are tested on facts of arguable case.

The counsel for the respondent has concluded that the circumstances as they are the respondents stands to suffer more than the Applicant if



this application is granted in the manner it is brought. Also, as the applicant have prayed for orders which are interim in nature it means the Respondents shall be restrained indefinitely from enforcing the law, that is the **Water Supply and Sanitation Act, No. 5 of 2019** whose loss is unquantifiable and cannot be adequately atoned to by award of damages. He has thus prayed on behalf of the respondents that

- (i) the application be dismissed in its entirety with costs, and
- (ii) Any other relief the court may deem fit to grant in favour of the Respondents.

I have read the application and the submissions by the parties to the application whereby I am now required to decide whether the prayers made by the applicant in the chamber summons be granted or not. The applicant has tagged the application to the decision of the 1st Respondent and has apprehended possible loss due to an order to stop the activities of the applicant in the areas she was registered to operate. Basically, the applicant has an opinion that the 1st respondent acted ultra vires and they are apprehending a possible loss if the situation will remain without stopping the 1st Respondent from acting the way she has directed and or ordered.

Before determination of the application, I would like to first refer to the decisions of the 1st Respondent and the Director General of RUWASA concerning the status of the applicant. In the decision of the review by the 1st Respondent, she has essentially observed that the decision to

stop the activities of the applicant are due to lack of a certificate of registration under the **Water Supply and Sanitation Act, Act. No. 5 of 2019** which renders the applicant not to be legally recognized by the new law. Also, lack of the certificate under the repealed law, Act No. 12 of 2009 makes it impossible for the applicant to be re-registered for provision of water supply services at the community level under the new law.

The directives issued to the manager were for them to cooperate with RUWASA in their activities without affecting provision of water services to the community. The required cooperation, though not explicit is to register the board in compliance to the new law. In the opinion of the Registrar, Manager of RUWASA District of Siha, the applicant has been operating illegally contravening the provisions of regulation 22 of ***Water and Sanitation (Registration of Community Owned Water Supply Organizations) Regulations, G.N. 21 of 2010.*** That certificate is necessary for the applicant to be recognized and re-registered under the ***Water Supply and Sanitation (Registration and Operations of Community Based Water Supply Organizations Regulations, G.N. No. 829 of 2019.***

It is in the record that the applicant after the decision of the Registrar delivered on the 2nd August, 2021 was aggrieved and appealed to the Registrar General of RUWASA. The latter, upheld the decision of the decision of the Registrar of RUWASA. Without going into the detailed, I

think it will serve to quote the relevant paragraphs in the decision of the Director General of RUWASA dated 20th September, 2021 as hereunder: -

"...the Registrar being the Regulator of rural water supply and sanitation services in Siha District acted within the powers conferred to her under section 41 of the Act by taking appropriate measures to stop the operations and access to the bank account for the respective community organization since the respective community organization contravened the legal requirement as pinpointed above.

In concluding this matter, and in consideration of the above stipulated enumerations, and powers conferred to me by Regulation 20(2) of Water Supply and Sanitation (Registration and Operations of Community Based Water Supply Organizations) Regulations, 2019 G.N. No. 829 of 2019, I uphold the decision of the Registrar in its entirety. Therefore, in order to proceed with operation, you are required to commence registration process in compliance with the Act No. 5 of 2019 and G. N. No. 829 of 2019 prior to expiry of two years grace period as stipulated under G.N. NO. 829 of 2019." (Emphasis added)

Now, coming to the case at hand, the applicant is seeking the two orders as shown in the introduction. In the decision of the Registrar of RUWASA which was challenged by the applicant, the board was ordered

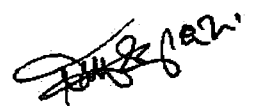
to stop operating due to lack of legal recognition, which is certificate of registration issued by the Registrar of RUWASA until such other board is constituted. If we refer to the provisions of section 32(2) it is not necessary that it is a board but any organization so registered as per categories listed. The decision by the Registrar may thus be understood that the board stops operation for the purpose of community water works (not **"dissolved as a board"**) until such time another community organization is registered for the purpose of provision of water distribution services. Thus, as explained in the review it is the board which has ceased to be recognized due to lack of certificate by the registrar of RUWASA. Under the circumstances the 1st prayer made by the applicant to restrain the 1st respondent from dissolving the board is rendered impractical.

On the 2nd prayer, the restraint order is being sought against 2nd respondent so that she does not allow the 1st Respondent to operate the applicant's account and reinstate the board members into their positions until final determination of the review filed to the 1st respondent.

The circumstances of this case were that an order was issued to maintain the status quo pending hearing inter-parties and determination of the application. Thus, as of this date the applicant is still operating the activities in the villages as averred in the affidavit. However, given the decisions which have been made by the Registrar

and the Director General's confirmation on appeal, the applicant must comply to the law before continuing with the operation in the business of Community Water distribution services. Practically, the order cannot be issued in contravention of the law. Under the circumstances the prayers in the application are not granted as prayed.

However, both parties have sought the discretion of this court to issue any other relief the court may deem fit and just to grant. In consideration of the circumstances of the case and approval of the wisdom of the Director General in his decision, I believe it will be fair and just, that the applicants are given a chance to register their organization for the community water distribution. This is because, I believe, the contentions which were in existence would have been avoided if parties would have allowed themselves to be guided and guide according to the rules in place. In the sense that the 1st respondent guides the applicant on the proper way to comply with the law and the applicant proceed to register according to the law and regulations in place instead of opting to await court orders. This is more important given the nature of services provided to the society. Under the circumstances, assuming that had it not been for this application, the applicants would have complied with the guidance by the Director General of RUWASA on appeal, to register their organization according to law, I order that the applicants comply with the requirement to register with Registrar of RUWASA within forty-five (45) days from

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today if they wish to continue providing services for distribution of water in the communities they registered for. Due to the circumstances, I observed, I have opinion that it will be just and fair again if each party will bear her own costs. It is ordered accordingly.

Dated and delivered at Moshi this 17th day of November, 2021




T. M. MWENEMPAZI

JUDGE

Ruling delivered this 17th Novembr, 2021 in the presence of the Julius Mollel, Chairman of the Applicant and Mr. Engleberth Boniphace, Advocate for the applicant, Emma George, Manager of RUWASA and Mr. Yohana Marco, State Attorney and Counsel for the Respondents.


T. M. MWENEMPAZI

JUDGE