IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 65 OF 2022

LU HENG ..... 1ST APPLICANT

CLOUD INNOVATION LIMITED ..... 2ND APPLICANT

LARUS LIMITED ..... 3RD APPLICANT

VERSUS

MUKHANGU NOAH MAINA ..... RESPONDENT

RULING

17th June, & 19th July, 2022

ISMAIL, J.

This application has been taken at the instance of the applicants, and it seeks to restrain the respondent, his agents, assignees, workmen or anyone else acting under his instruction, from continuing to publish defamatory remarks against the applicants, pending hearing and determination of the pending suit. The application is supported by an affidavit Lu Heng, the 1st applicant and 2nd and 3rd respondents' principal officer. It sets out grounds on which the application is based. The averment

is that the respondent has written, published and disseminated scandalous, defamatory and contemptuous information and allegations against the applicant. That the emails portray the applicants as deceitful, fraudsters and dishonest, and that such composition and publication has been done by the respondent without making adequate inquiry, without honest belief and lawful cause, and with intent to defame the applicants.

The respondent has vehemently disputed the averments made by the applicant. He has taken the view that the allegations by the applicants are hopeless, lacking in merit, made in despair and envisioning the occurrence of fictional harm.

Pursuant to an order of the Court made on 17th June, 2022, the application was disposed of by way of written submissions.

In the submission in chief, Mr. Norbert Mlwale, learned counsel for the applicants began by restating three key principles enunciated in ***Atilio v. Mbowe*** (1969) HCD 284. He held the view that the instant application falls squarely within the listed criteria. Regarding the existence of a prima facie case, the argument by the learned advocate is that the contents of the affidavit and Annexure CA-2 reveals the contents of defamatory statements allegedly published by the respondent. It is also contended that the

culmination of all this is the institution of Civil Case No. 3 of 2022, in which several reliefs are sought. In the learned advocate's view, the question to be determined in the said case is whether words published by the respondent are defamatory and whether they injured the applicants' business and reputation. Relying on the decision in ***Pascal Sakaya v. Azania Bank Limited***, HC-Misc. Commercial Case No. 62 of 2018 (unreported), Mr. Mlwale urged the Court to see that there are serious questions to be tried and that the said questions constitute a *prima facie* case.

On the second test, Mr. Mlwale submitted that the damage suffered for three years and which is persistent cannot be remedied by way of damages. This is in view of the fact that the respondent's financial position is not known, dimming the possibility of having the applicants recompensed by way of damages. On this, Mr. Mlwale enlisted the assistance of a couple of decisions of this Court in ***Kibo Match Group Ltd v. Hs Impex Ltd*** [2001] TLR 152; and ***Latifa Hassan Alibhai v. Jayendra J. Amarchand & Another***, HC-Misc. Land Application No. 474 of 2019 (unreported). The applicants' counsel argued that grant of injunction will not harm the respondent, whereas refusal to grant the injunctive order has devastating consequences to the applicants.

Regarding the balance of inconvenience, the applicants' contention is that publication of the emails has tarnished and damaged the applicants' reputation and business, and that the respondent has nothing to lose as the alleged defamatory statements were aimed at the applicants, their reputation and business. Learned counsel bolstered his argument by citing the decision of ***John Pascal Sakaya v. Azania Bank Ltd*** (supra).

The applicants prayed that the application be granted.

For his part, Mr. Mwakibolwa began by acknowledging the fact that Order XXXVII rule 4 of the Civil Procedure Code, Cap. 33 R.E. 2019 (CPC) vests jurisdiction in the Court to grant injunction. He quickly submitted, however, that exercise of such powers is said to be proper where there is breach of contract and injury of any kind. Learned counsel took the view that the applicants have not shown that any of that exists in the pending case.

On the principles governing grant of injunction, Mr. Mwakibolwa argued that the applicants have failed to demonstrate how the principles apply in the instant application. He added that the applicants have not demonstrated that there is breach or that loss has been suffered as a result of the alleged publication.

On the defamatory statement, learned counsel's take is that, in the absence of any ruling on the alleged defamatory statement, granting of an injunctive order would amount to issuing a blanket order that would stop him from communicating with his professional college.

Regarding loss sustained by the applicants, Mr. Mwakibolwa firmly contended that none has been demonstrated. He argued that the applicants have not shown that standards set in ***Atilio v. Mbowe*** (supra) have been met. He urged the Court to follow the footsteps taken by the Court in ***Christopher Chale v. Commercial Bank of Africa***, HC-Misc. Civil Application No. 635 of 2017 (unreported). In the latter, the Court refused to grant injunctive orders. Mr. Mwakibola maintained that the principles for grant of injunction have been cumulatively proved, making the application lacking in substance. He urged the Court to dismiss it.

The applicants' rejoinder has mainly reiterated issues which were addressed in the main submission, while others touched on matters raised by counsel for the respondent, but which I consider to be of little or no significance. I find nothing meriting in dealing with it.

The question to be resolved is whether the application for injunction has what it takes to have it granted.

Both counsel are correct in their unanimous view, that temporary injunctive orders are a conservatory remedy or an equitable relief whose sole purpose for issuance is to shield an applicant from suffering an irreparable loss or injury as he awaits a resolution of the suit that is pending in court. Through the said restraint, the state of affairs, as it obtains at the filing is maintained, while settlement of the main contest between the parties is awaited. Unanimously agreed, again, is the fact that the court can only grant such relief if the applicant is able to demonstrate that he has a concluded right capable of being addressed through the order he seeks in the application (See ***Agricultural Produce Market Committee v. Girdharbhai Ramjibhai Chhaniyara***; AIR 1997 SC 2674).

In our jurisdiction, courts base their decision, to grant or not to grant, on cumulative demonstration of three key principles enunciated in ***Atilio v. Mbowe*** (supra). These are: existence of a *prima facie* case; likelihood of suffering an irreparable loss; and that the balance of convenience should tilt in the applicant's favour. These imperative requirements have been given an extended and a more refined postulation in subsequent decisions. Thus, in ***Abdi Ally Salehe v. Asac Care Unit Ltd & 2 Others***, CAT-Civil Revision No. 3 of 2012, the Court of Appeal of Tanzania held as follows:

"The object of this equitable remedy is to preserve the pre-dispute state until the trial or until a named day or further order. In deciding such applications, the Court is only to see a prima facie case, which is one such that it should appear on the record that there is a bonafide contest between the parties and serious questions to be tried. So, at this stage the court cannot prejudice the case of either party. It cannot record a finding on the main controversy involved in the suit; nor can genuineness of a document be gone into at this stage.

Once the court finds that there is a prima facie case, it should then go on to investigate whether the applicant stands to suffer irreparable loss, not capable of being atoned for by way of damages. ***There, the applicant is expected to show that, unless the court intervenes by way of injunction, his position will in some way be changed for worse; that he will suffer damage as a consequence of the plaintiff's action or omission, provided that the threatened damage is serious, not trivial, minor, illusory, insignificant or technical only.*** *The risk must be in respect of a future damage (see* ***Richard Kuloba Principles of Injunctions*** *(OUP) 1981)…."* [Emphasis added]

The combination of the cited decisions convey one key message. This is that, a temporary injunctive order should only be granted in a fitting

circumstance. It should not be served on the parties out of sheer convenience of such parties for, convenience is never the business of any court. The court's only pre-occupation is to dispense justice. In affirming that position, this Court (Rutakangwa, J as he then was) held in ***Charles D. Msumari & 83 Others v. The Director of Tanzania Harbours Authority***, HC-Civil Appeal No. 18 of 1997 (unreported):

> *"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 the parties. They only exercise this discretion sparingly and only to protect rights or prevent injury according to the above stated principles, court should not be overwhelmed by sentiments however lofty or mere highly driving allegations of the applicants such as the denial of the relief will be ruinous and or cause hardship to them and their families without substantiating the same.* ***They have to show 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 by an interim injunction and that if that was not done, they would suffer irreparable injury and not one which can possibly be repaired****."* [Emphasis added]

My scrupulous review of the application brings me to an unflustered conclusion that the application for the restraint order has demonstrated that, unless the Court intervenes by way of injunctive orders:

(i) The applicants' position will in some way be changed for worse;

(ii) The applicants stand to suffer damage as a consequence of the respondent's continued publication of material that is alleged to be defamatory; and

(iii) The threatened damage is serious, not trivial, minor, illusory, insignificant or technical only, and that there will be nothing left of the applicants' reputation, if publication of the contested material proceeds unabated.

In my considered view, the right that the applicants allege to exist in the main suit, and which they seek to protect through the pending suit are on the verge of being irreparably damaged if a restraint order is not granted.

Consequently, I take the view and hold that the application has met the requisite threshold for its grant and it is hereby granted. Costs to be in the cause.

Order accordingly.

DATED at **DAR ES SALAAM** this 19th day of July, 2022.

M.K. ISMAIL

JUDGE

19/07/2022