IN THE HIGH COURT OF TANZANIA

(DAR ES DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 116 OF 2022

1. **ALLAN CHARLES KIWIA**
2. **MOHAMED MUSTAPHA ISSA**
3. **ROBERT ELITWAZA MMBAGA**
4. **ANNASTAZIA MUSSA NYAGABONA**
5. **CHARLES VICENT NYAKI** **.....APPLICANTS**
6. **SHABAN MOHAMED SHEMWETA**
7. **ALIBBA JAFARI SALIM**
8. **MOHAMED BAKARI SELEMAN**
9. **HUSSEIN HASSAN MSIGITI**

VERSUS

UBUNGO MUNICIPAL COUNCIL.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

14th & 22nd April 2022

MASABO, J:-

By a chamber summons filed under section 2(3) of the Judicature and Application of Laws Act [Cap 358 RE 2019] and accompanied by a certificate of urgency, the applicants pray for the following orders:

1. that this Court be pleased to issue a declaration order that the applicants have right to stay to and do business at Mbezi Luisi/kwa

Yusufu/mshikamano/NHC streets pending expiry of 90 days' notice and filling of the main suit

2. that the costs of this application be upon the Respondent
3. any other order (s) or relief (s) this court may deem just and fit to grant.

Supporting the chamber summons is an affidavit jointly deponed by the applicants in which they depone that, they are all business persons working/running business premises along Mbezi Luisi/kwa Yusufu/Mshikamano/NHC streets. That, at different times they sought and obtained business license from the 1st respondent vide which they were licensed to conduct transportation business in the above-mentioned streets all located close to the Magufuli Bus Terminal. Upon obtaining the licences they entered occupancy and started to do their businesses but, to their surprise, they were issued an oral notice and written notices requiring the to close their business.

Further to notice, the 1st respondent has through its auxiliary police been forcing the applicants to close their business and on 3rd March 2022 the said

auxiliary police harassed the applicants an act which has disgruntled the applicants who now intends to institute a civil suit but they have been delayed by the mandatory legal requirement for issuance of a 90 days' notice to the Attorney General. The prayer is thus sought pending the maturity of the 90 date which has already been issued on 3rd March 2022. The application was contested by the respondent who through an affidavit deponed by Erick Paul Bakilana, a principal officer of the 1st respondent.

During the hearing, Mr. Nickson submitted that the prayer is sought pending the maturity of the 90 days' notice and that it is in the interest of justice that it be issued because, (i) the respondent admit to have issued the licenses permitting the applicant to conduct the business; (ii) there is no proof that the applicants are in breach of the conditions of their license; (iii) the respondent stands to suffer no loss if the prayer is granted; (iv)the prayer is intended to enable the applicants to exercise their right to be heard and lastly, the notice issued by the respondent does not any how relate to the applicants' businesses. Buttressing his submission, he cited the case of **Abdallah Maliki & 545 others v Attorney General**, Misc. Land Application No. 119 of 2017; **Outomech Ltd v TIB & Others**, Misc. Land

Application No. 13 of 2020 and **Ali Kondo Mshindo v Kinondoni Municipal Council** & Others, Misc. Land Case No. 822 of 2015.

Ms. Gathi Mseti, learned State Attorney for both respondents had an opponent view. She submitted that for an application for this nature to succeed, the applicant must demonstrate the three conditions articulated in **Atilio v Mbowe** (1969) HCD 284; to wit, there is a triable issue between the parties; interference of the court is necessary to preserve an irreparable injury to the applicant and that the balance of convenience overwhelmingly learns towards the applicant in that, he stands to suffer more than the respondent if the prayer is not granted.

She then proceeded that, none of these three has been demonstrated. There is no triable issue as the applicant are still in occupation of suit premises and are conducting their business in blatant violation of the conditions stated in their business licenses. Also the applicant has not demonstrated that they stand to suffer an irreparable injury if the application is not granted. As regards the balance of convenience, she submitted that, the applicant stands to suffer no loss if the application is not granted because, they are in

possession of the business premises and have continued to do their businesses although it is contrary to the law. On the other hand, it is the 1st respondent who stands to suffer as the continued presence of the applicant inhibits the enforcement of its rules. In the alternative, she submitted that the application is not tenable as the prayer fronted by the applicants if granted will permanently allow the applicants illegally continue with their businesses.

In rejoinder, Mr. Nickson argued that the applicant's will suffer more if the application is not granted as they will be evicted from their business premises. He then distinguished this application from **Atilio v Mbowe** (supra) and argued that the principle in **Atilio v Mbowe** (supra) is applicable in applications for injunction made under Order XXXVII of the Civil Procedure Code which is not the enabling law in this application. In the alternative, he argued that there exists a triable issue between the parties as the applicants asserts that they have license whereas the respondents are refuting. Further he submitted that, interference of the court is necessary as the applicants depend on the businesses as sole source of income and if the declaratory order is not issued, they stand to suffer more than the

respondents. Lastly, he submitted that the application is tenable as the orders sought is interlocutory pending the maturity of the 90 days' notice.

I have carefully considered the application and the submission by the parties. It is a common ground between the parties that, the prayer is sought pending the maturity of the 90 days. As the respondent has questioned the nature of the prayer sought and its ramification, I will prefer to start with this point. The application has been brought under section 3(2) of the Judicature and Application Laws Act. Starting with the provision of section 3(2) of the Judicature and Application of Laws Act through which, our jurisdiction received into law, the statutes of general application, common law and doctrines of equity. As stated in **Freeman Aikael Mbowe v The Dar es Salaam Regional Commissioner,** Misc. Civil Application No. 9 of 2017, HC, Dar Es Salaam (unreported) cited in **Automech v TIB and 3 others** (supra), the application of these three substances of law, empowers this court to exercise its jurisdiction in matters not governed by local legislation. In circumstances like the present one where a relief is sought pending institution of a suit, it is now fairly settled that, the court can

justifiably resort to receive law as the issuance of relief pending institution of suit is not provided for under our statutes.

There are countless cases where this court has invoked the English case of **Mareva Companies Naviera S.A v International Bulk** Carriers SA (1980) 1 All ER 213 in which the jurisdiction of court to issue an interim order where there is no pending case was recognized. There is a plethora of authorities in which this court has invoked the above authority to grant what has been termed as *mareva injunction*. In addition to the cases cited by the applicant, other relevant cases include, **Tanganyika Game Fishing and Photographic Ltd v The Director of Wildlife and Others**, Misc. Civil Cause No. 42 of 1998, HC (unreported); **Abdallah M. Malik & 545 Others v AG**, Misc. Land Appl. No. 119 of 2017, HC. Land Division (unreported), **Jitesh Ladwa v Yono Auction Mart and Co. Ltd & Others,** Misc. Civil Land Application No. 26 of 2020 HC Land Division); **Ugumba Igembe & Machanya Nemba Singu v The Trustees of the Tanzania National Parks & The Attorney General***,* Miscellaneous Civil Application No. 1 of 2021, HC- Mbeya and **Daudi Mkwaya Mwita v Butiama Municipal Council & AG**, Misc. Land Application No 69 of 2020, HC Musoma and (all

unreported). These cases converge that, *mareva injunction* can be grated where there is no pending suit and upon the applicant demonstrating the three conditions for temporary injunctions as articulated in **Atilio v Mbowe** (supra). I will revert to these conditions in the due course.

In the present case, the applicants' main prayer is for a declaratory order that they have a right to stay and continue with business at Mbezi Luisi/kwa Yusufu/mshikamano/NHC streets pending expiry of 90 days' notice and filling of the main suit. The parties have contending views over the tenability of this prayer. For the respondent it has been argued that it is untenable as it entails determination of rights a task that can only be done after trial. For the applicant it has been argued that the declaration does not entail determination of rights.

I will respectfully differ with Mr. Nickson. In my considered view and as correctly submitted by Ms. Mseti, a declaratory order that the applicants have a right to stay/occupy and continue with business for a temporary duration or otherwise cannot be made without hearing the parties on merit and ascertainment of the right of each of them a task which can only be exercise

after trial of the suit. It need not be overemphasized that much as this court has jurisdiction to grant reliefs pending institution of a suit, the reliefs so granted are interlocutory in nature and not one that would determine the rights of the parties. The sole purpose of such reliefs is to protect the parties from an irreparable injury pending institution of the suit which would finally determine their right. Correspondingly, as the suit has not yet landed in this court, it will be lucidly wrong to make a declaratory order on the rights of the parties as in doing so, I will be risking to pre-maturely determining a suit before it lands in court. That said, I join hands with the applicant's respondent that the prayer is untenable.

Much as this finding suffices to dispose of the application, in the spirit of section 2(3), I will stretch my mind to the merit of the application. Assuming that the prayer entails maintenance of status *quo* or a *mareva* injunction, the application will have to pass the tri-test articulated in **Atilio v Mbowe** (supra). As correctly argued by the learned State Attorney, the conditions for grant of ordinary temporary injunction as demonstrated in **Atlio v Mbowe** (supr) are relevant and applicable to *mareva* injunction. Just as in an application for an ordinary temporary injunction under Order XXXVII of

the Civil Procedure Code, for an application for *mareva* injunction to succeed, the applicant must demonstrate that there is a *prima facie* case/triable issue between him and the respondent. that the court's interference is necessary to protect him from an irreparable harm and lastly, that, on the balance of convenience, there will be greater hardship or mischief suffered by the plaintiff from withholding of the injunction than will be suffered by the defendant from granting of it.

In my scrutiny of the affidavit and the its annexures to discern the existence of the ridable issue, I have observed that, much as all the 9 applicants have jointly claimed to have licences permitting to do business which is the genesis of the application, the annextures the joint affidavit show that only the first seven applicants have licenses and one of these licensees has already expired (Allan Charles Kiwia- 1st Applicant expired on 18/3/2022. Although at this stage I am not expected to dwell much on the factual issues as that would be tantamount to prematurely determining the suit, with the revelations above, I have found no legal basis upon which to discern the arguable case between the respondents and the last two applicant and as well, the 1st applicant whose licence appear to have expired.

Coming to the second test, paragraph 6 of the affidavit which alludes to the impending injury asserts that the applicants, in their capacity as agents of several buses, have been served with notices requiring them to stop their business. In my scrutiny of these notices I have observed two things. First, the notices are not addressed to the applicants. They are addressed to Arizona Coach; Abood Bus Services; Tshrif, CNC Cargo and Logistics; Capricorn Royal Class, Osaka Express; New Force, and Alibaba transport Agent. Although they claim to be agents of the addresses, no material has been rendered to show the relationship between the applicants and the addressees of the notices which would have help this court to discern the irreparable loss suffered/anticipated by the applicants.

Second, the notices appear to have been issued on 16/11/2021. Thus, there is duration of 4 months between this period and 22nd March 2022 when the instant application was instituted under certificate of urgency. Surprisingly, apart from general assertions that the 1st respondent has been using auxiliary police to exert harassment and inhumane treatment on the applicants, the affidavit does not divulge any particulars of the alleged

harassment/ inhumane treatment and the consequential irreparable injury suffered/likely suffer if the application is not granted. Because of this omission, I am constrained to agree with the respondent's counsel that the applicants have miserably failed the second test. Needless to say, the requirement to demonstrate the irreparable loss is not a cosmetic. It is a mandatory requirement and its omission fatally affects the application.

In the foregoing, the application fails and is dismissed for want of merits. Costs to be shared.

DATED at DAR ES SALAAM this 22nd April 2022.

4/29/2022

X

Signed by: J.L.MASABO

J.L. MASABO

JUDGE