

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)**

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 413 OF 2022

HEMED MSABAHA KANONIAPPLICANT

VERSUS

HAJI AMBAR KHAMIS 1ST RESPONDENT

MATHA RAPHAEL CHIOMBA 2ND RESPONDENT

AMEIR MSHINDANI ALI 3RD RESPONDENT

SUSANNE PETER MASELE 4TH RESPONDENT

BEATI A. MPITABAKANA 5TH RESPONDENT

MARTIN B. MNG'ONG'O 6TH RESPONDENT

RAMDHAN MANYEKO 7TH RESPONDENT

JOSEPH ROMAN SELASINI 8TH RESPONDENT

HASSAN RUHWANYA 9TH RESPONDENT

REGISTERED TRUSTEES OF THE NATIONAL

CONVENTION FOR CONSTRUCTION AND

REFORM – MAGEUZI (NCCR-MAGEUZI 10TH RESPONDENT

RULING

Date of last Order: 23rd Sept 2022

Date of Ruling: 24th Sept 2022.

E.E.KAKOLAKI, J.

The applicant herein under certificate of urgency and by way of chamber summons supported by his affidavit has moved this Court for the grant of an

order of interim injunction to restrain the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th respondents, their agents, associates, employees or any other person claiming to be under them from organising, preparing and hold any meetings of the Secretariat, Central Committee, National Executive Committee and National Congress of the National Convention for Construction and Reform-Mageuzi (NCCR-MAGEUZI) pending hearing and determination of the Miscellaneous Civil Application No. 384 of 2022. In the alternative he is praying for extension of Court's order of interim injunction granted on the 7th September, 2022 in Miscellaneous Civil Application No. 384 of 2022 to remain valid until determination of that application, costs of the application and any other order or orders as the Court deems fit and just to grant. The application which was preferred ex-parte is brought under section 68(c) and (e), Section 95, Order XXXVII Rule 1 of the Civil Procedure Code, [Cap. 33 R.E 2019], section 2(3) of the Judicature and Application of Laws Act, [Cap. 358 R.E 2019].

Upon admission of the chamber summons on 23/09/2022, I ordered the application to be served to all respondents so that both parties appear before me at 2.30 PM on the same day for hearing of the application inter-parties on merit, the order which was complied with. Both parties were heard viva

voce as counsel for the 1st up to 9th respondents due to the urgency of the application chose not to file the counter affidavit but was ready to be heard on merits. The applicant appeared represented by Ms. Loveness Denis while the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th respondents had the services of Mr. Novatus Muhangwa, both learned advocates. The 10th respondent appeared through the board member one Mr. Thomas K.F. Nguma, who when raised to submit in support of the application, his submission was challenged by Mr. Muhangwa on ground that, his locus standi and other purported board members of the 10th respondent is questioned and there is a pending matter before this Court to that effect in Misc. Civil Cause No. 408 of 2022 between **Beati A. Mpitabakana Vs. RITA, Attorney General and the 10th respondent**. Since his locus standi is still in suspense, I am not prepared to consider his submission until his locus is determined, given also the fact that, the sought prayers by the applicant are not directed to the 10th respondent hence not affected anyhow.

Under the cited provisions by the applicant in this application, this Court is satisfied that, it is clothed with jurisdiction to entertain the matter, therefore proceed to determine the same conclusively. Submitting in support of the application Ms. Denis echoed that, the applicant is seeking to restrain the

respondents from dealing in any manner prejudicial to him and the party pending hearing and determination of Misc. Civil Application No. 384 of 2022. She said, normally interim order is sought where the other party's action or conduct if not restrained might cause irreparable or immeasurable damage to the applicant. In this matter while referring to paragraph 3 of the affidavit Ms. Denis informed the Court that, contrary to the party's constitution the respondents convened meetings on 22/09/2022 for Central Committee, 23/09/2022 for National Executive Committee and were set to conduct the National Congress for NCCR-MAGEUZI on 24/09/2022. To support her argument, she referred the Court to the poster in annexure 'E' to the affidavit where the 1st and 2nd respondents seem to have crowned themselves with the titles of deputy party chairman and secretary general respectively in which they do not possess. She said, what is also seen in the said poster is the title of the party's General meeting to be held on 24/09/2022, the meeting which is intending to remove the applicant who possesses valid membership card and interested in party's affairs and wellbeing, from membership of NCCR MAGEUZI party and its leadership in the position of Secretariat, NEC and National Congress. According to her that intended conduct of the respondents creates a bonafide dispute and strong triable

case which needs to be investigated on and determined on merit by this Court. That aside she argued, the issue of dispute over who is the member of the board of Registered Trustees of NCCR-MAGEUZI party which also arose in the present matter and in Misc. Civil Application No. 384 of 2022, raises another triable issue calling for investigation and determination on merit by this Court. Basing on those submission, Ms. Denis invited this Court to grant the application by restraining the 1st up to the 9th respondents from organizing, preparing and holding any meeting including the 24/09/2022 meeting, any engagement into any matter or conduct which will be prejudicial to the applicant, as to hold otherwise will suffer the applicant irreparable damages that cannot be atoned by any monetary value. To fortify her stance she cited to the Court the case of **Atilio Vs. Mbowe** (1969) HCD 284, where the Court held that, the court may issue an interim order where the applicant is likely to suffer irreparable damages in case the said interim order is withheld.

On his side Mr. Muhangwa resisted the applicant's prayers by calling the Court to answer first the issue, as to whether the applicant has shown a case or good cause warranting this Court grant him the orders sought in the chamber summons. According to him the answer is in negative as the

applicant failed miserably to show any good case warranting this Court exercise its discretion as it is the respondents who stand a chance to suffer more if the orders sought are granted. He argued, upon his proper scrutiny of paragraph 3 of the affidavit relied on by the applicant it is revealed that, the same does not disclose any specific article of the party's constitution violated by the respondents as alleged. He averred, what remains therefore is the applicant's sheer fear and suspicion of the ongoing meetings as it can be seen in paragraph 7 of the affidavit where the applicant alleges to suffer irreparable loss on the ground that, the respondents are intending to remove applicants from their leadership and membership to NCCR – Mageuzi party. In his view, that allegation is unfounded as there is nothing in the affidavit suggesting what are the agenda of the said meetings which if not revealed to the Court remains with nothing in hands to assist the same to appreciate the allegations by the applicant that, indeed respondents are intending to remove him from membership and leadership of NCCR –Mageuzi party. He argued, on that ground the applicant has failed to comply with the cardinal principle of law of evidence under section 110 of the Evidence Act, [Cap. 6 R.E 2022], that he who alleges must prove. In the absence of such agenda or matters to be discussed on the forthcoming meeting the averments under

paragraph 7 of the applicant's affidavit remains to be mere allegations which the Court of law cannot base its decision on, Mr. Muhangwa stressed. He cited to the Court the case of **Abdi Ally Salehe Vs. Asac Care Unit Limited and 2 Others**, Civil Revision No. 3 of 2012, on the principles guiding the Court in granting temporary injunction and asked this Court to be pleased to follow them when determining this matter. He mentioned the principles to be, **one**, existence of prima facie case, **second**, imminent irreparable loss incapable of being atoned for by way of damages and, **third**, balance of convenience. Applying the said principles to this matter Mr. Muhangwa voiced, from the applicant's submission there is no disclosed threat or fact suggesting that he will be terminated from the party, thus on the balance of probabilities the scale tilts on the respondents' side as they have incurred huge costs in preparation of the said ongoing three meetings of 22/09/2022, 23/09/2022 and 24/09/2022, held at Dodoma. So, should injunctive order be granted then it is the respondents who will suffer more than the applicant would do. Mr. Muhangwa also attacked the posters relied on by the applicant in annexure 'E' of the affidavit as being screen shot from Whatsapp social media the evidence which is in contravention of section 18(2) of the Electronic Transactions Act, 2015, thus prayed this Court to

disregard it as it was held in the case of **The Attorney General and Another Vs. Bob Wangwe**, Civil Appeal No. 138 of 2019 (CAT-unreported). Secondly he argued, the applicant did not disclose how he came into knowledge of the said posters, hence the same should not be relied on by this Court to base its decision. If such evidence is disregarded he submitted, there will be no cogent evidence left to establish the applicant's claim that, the respondents are intending to hold meeting on the 24/09/2022 to expel him from party's membership and leadership. He therefore prayed the court to dismiss the application with costs.

On the part of the 10th respondent as stated earlier on, the submissions in support of the application by Mr. Thomas F. K. Nguma as one of the members of the board of the Registered Trustees of NCCR-Mageuzi party, were challenged for want of locus standi. Since the issue as to whether he could appear and represent the 10th respondent is pending in court for determination, I will disregard his submission and proceed to narrate the rejoinder submission by the applicant.

In her rejoinder submission Ms. Denis on the issue of applicant's fear as raised out of his averments in paragraphs 3 and 7 of the affidavit she said, the submission by Mr. Muhangwa is misplaced as the stated meeting is set

to be conducted on 24/09/2022 as exhibited in annexure 'E' to the affidavit. As regard to the submission that there is no established prima facie case by the applicant she argued, since Mr. Muhangwa conceded that, there are meetings already held on 22/09/2022 and 23/09/2022, that exhibits that, he is aware of the ongoing meetings including that of 24/09/2022. On the cited case of **Abdi Ally Salehe** (supra) she contended, the same supports applicant's case for stating at pages 11-13 that, the purpose of temporary injunction is to maintain status quo pending determination of the suit in which the applicant is up for. In this matters she argued, withholding grant of applicant's prayer will render nugatory the said pending Misc. Civil Application No. 384 of 2022, as well as the main suit. As regard to the assertion that there is no provision of the constitution mentioned to have been violated Ms. Denis responded that, citation of provisions of the law in the affidavit contravenes the provision of Order XIX Rule 3(1) of the CPC, so the applicant could not state the violated article of party's constitution for avoiding arguments in the affidavit. And concerning the submission on violation of section 18(2) of the Electronic Transaction Act, 2015, on the use of posts in annexure 'E' to the affidavit, Ms. Denis conceded to the objection raised by Mr. Muhangwa on the ground that, its is true the said posts were

retrieved from whatsapp page hence should be disregarded by the Court. She was however quick to add that, the posts do not cover the poster titled '*Mkutano Mkuu*' which she prayed the Court to rely on as it was not retrieved from the Whatsapp media.

Ms. Denis went on to rejoin on the submission of the loss likely to be suffered by the applicant stating that, paragraph 7 of the affidavit is categorical that, the respondents are intending to remove the applicant from leadership and membership of the party. According to her if the prayers sought are withheld then applicant will suffer irreparable loss for losing his membership and leadership in the party. She added since there is an order of this Court of 07/09/2022, restraining the respondents from conducting meetings of 8th and 10th of September, 2022, the same be extended and in addition that all other applicant's prayers be granted as indicated in the chamber summons.

I have taken time to peruse the applicant's affidavit and its attachment and consider both fighting submissions by the parties for and against the sought prayers. Glancing at the chamber summons, this application is arising from Civil Case No. 150 of 2022 which is pending in this Court in which the applicant is one of the plaintiffs therein. Since it is not stemmed from Misc. Civil Application No. 384 which is also pending before this Court, the same

deserves to be determined independently, as if the applicant had intended the same to be considered as arising from both main suit and Misc. Civil Application No. 384 of 2022, it would have been conspicuously seen in the chamber summons. It is also noteworthy at this stage that, parties are not at dispute that, the three principles for the grant of temporary injunction are applicable in determination of this matter as both counsels referred the Court to the cases of **Atilio Vs. Mbowe** (supra) and **Abdi Ally Salehe** (supra) while each inviting it to consider them in his/her favour when determining the application. See also the cases of are **CPC International Inc. Vs. Zainabu Grain Millers Ltd**, Civil Appeal No. 49 of 1995 (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), on the said principles. Stating the said principles briefly and in simple language, for the applicant to be granted injunctive order has to establish to the Court the following:

- (1) The existence of prima facie case in the main case.

- (2) Imminent irreparable loss likely to be suffered, incapable of being atoned by way of damages or monetary value, and
- (3) To whom does the scale of balance of convenience tilts?

In this case it is Ms. Denis's beliefs that all the principles have been met by the applicant while Mr. Muhambwa has divergent views that, he has miserably failed to comply with any of them. To start with the first principle, Ms. Denis argued that, there is bonafide dispute between parties on the respondents' intent to remove the applicant and staunch member of NCCR - Mageuzi party from his membership and leadership in the position of Secretariat, NEC and National Congress in the General meeting to be held on 24/09/2022. And secondly that, membership of the board members of the Registered Trustees of NCCR-Mageuzi party is called into question hence raising another arguable issue calling for determination by this Court. This Court has been insistent that, in establishing whether triable issues exist or not before the grant of injunctive orders by the Court, facts must be disclosed in the plaint or affidavit leading to that conclusion as it was observed in the Case of **Surya Kant D. Ramji Vs. Saving and 12 Finance Ltd & three Others**, Civil Case No. 30 of 2000, HC Com. Div. at DSM (unreported), the observations which I subscribe to:

"...in proving whether there is a serious question for determination by the court, it is not conclusive evidence which is required but rather the facts as disclosed in the plaint and the affidavit."

Having examined the above asserted facts as demonstrated by the applicant in his affidavit and submitted on by Ms. Denis and having glanced eye on paragraph 6(a),(b) and (c) of the applicant's affidavit carrying his claims as stated in the plaint in which this application arises from as per the chamber summons, there is nothing indicative that, the alleged facts on removal of the applicant from membership and leadership of NCCR-Mageuzi party and membership of the board of Registered Trustees of NCCR-Mageuzi, form part of his claims therein so as to lead this Court to the conclusion that the same constitute triable issues. The said paragraph 6(a),(b) and (c) of the affidavit reads:

6. That, the applicants have instituted a suit against the respondents, claiming inter alia, orders that:-

(a) Declaratory order that the meeting of the National Executive Committee on NCCR-Mageuzi organized by the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th respondents and held on 21st May, 2022 at Salvation Army conference Hall is unlawful, illegal and void,

anything transacted therein and resolved thereafter are of no effect.

(b) Declaratory order that the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th respondents or their agents and associates have no power and mandate to organize, prepare and convene meetings of the Secretariat, Central Committee, National Executive Committee and National Congress of the National Convention for Construction and Reform-Magezi (NCCR-Magezi).

(c) The declaratory order that the meetings to organize prepare and convene meetings of the National Executive Committee in the 8th September, 2022 and National Congress of the National Convention for Construction and Reform-Magezi (NCCR-Magezi) on 10th September, 2022, to be held on any other date unlawful, illegal and void.

What is gathered from the above applicant/plaintiff's claims in the main suit are the sought reliefs on the conducted and to be conducted meetings by the respondents which are also contentious issues disclosed in Misc. Civil Application No. 384 of 2022 pending before this Court and not the question of removal of the applicant from the party or membership of the board of Registered Trustees of NCCR-Magezi which seem to be subject of this application as claimed by Ms. Denis in her submission.

The above notwithstanding while Ms. Denis is seeking to rely on annexure 'E' collectively to the affidavit to establish that, there is an isolated post indicating the title of the meeting by the respondents as General Meeting (Mkutano Mkuu) and its date to be 24/09/2022, I find the objection by Mr. Muhangwa on none compliance of section 18(2) of the Electronic Transaction Act, 2022, to be valid and meritorious as conceded by Ms. Denis, hence affects their credibility generally and not in isolation as Ms. Denis would want this Court to believe and treat. See the case of **Bob Wangwe** (supra). I thus disregard annexure 'E' to the affidavit collectively on the ground that, as per the averment of paragraph 3 of the affidavit all of them were pleaded and annexed as electronic evidence retrieved from whatsapp group usually used by the respondents in their communication. Nevertheless, it is not disputed fact as submitted by both counsels that, there has been continuous meetings by the respondents held on 22/09/2022 and 23/09/2022 and the next one set to be held on 24/09/2022. Now as to whether the said meeting of 24/09/2022, is intending to remove the applicant from his membership and leadership of NCCR-Mageuzi party, I disagree with Ms. Denis's assertion on two grounds. **One**, as submitted by Mr. Muhangwa the submission which I embrace, there is no stated facts by the applicant in his affidavit disclosing

the agenda of the said meeting of 24/09/2022 to exhibit to the Court's satisfaction that, the same is intended for removal of the applicant from the party. **Secondly**, assuming that agenda for expelling some party members from membership and leadership is there, which is not established, still I would hold the same position for want of proof by the applicant's affidavit that, the applicant is actually an active member of NCCR- Mageuzi party and that, he holds the claimed positions of the party Secretariat, NEC and National Congress representative or member. In absence of all those facts I am satisfied that, the first principle has not been established by the applicant.

Next for determination is the second principle as to whether the applicant is likely to suffer irreparable loss, incapable of being atoned by monetary value. It is averred under paragraph 7 of the applicant's affidavit that, the applicant stands to suffer irreparable loss if the grant of interim order is withheld as respondents intend to remove him from leadership and membership of NCCR-Mageuzi party and that, respondents' conducts are not for the benefit and interest of the applicant and the party in general, in which he is serving as a member. On the other hand Mr. Muhangwa is of the contrary view submitting that, it is the respondents who stand to suffer more as they have

already incurred costs in preparation of the meeting. Much as I have found in the first ground that, there is no triable issues established by the applicant, I agree with Mr. Muhangwa in this principle that, the applicant has failed to convince this Court that he stands a chance of losing irreparably than the respondent would do, as there is no facts leading this Court to believe that he is likely to suffer loss which cannot be compensated by monetary value. If at all there is an agenda of expelling him from the party which is not established and he is so removed from the party membership and leadership as alleged, I believe there are available remedies at his disposal including coming to the Court to challenge that decision, hence his loss if any can be remedied. With those observations, I hold the applicant has failed to establish this ground too.

Lastly, is the third principle on whose party does the scale of balance of convenience tilts? I think this ground need not detain me much, as I shoulder up with Mr. Muhagwa's submission that, considering the injury which is likely to be caused to the 1st up to 9th respondents than it would do to the applicant as already found when considering the second ground/principle, the balance of convenience tilts on the respondents' side. Hence this principle is not proved too by the applicant.

In the final analysis, I find the applicant has failed to convince this Court that he has meritorious application. The application is therefore dismissed.

I order each party to bear its own costs.

Order accordingly.

Dated at Dar es Salaam this 24th September, 2022.



E. E. KAKOLAKI

JUDGE

24/09/2022.

The ruling has been delivered at Dar es Salaam today 24th day of September, 2022 in the presence of Ms. Loveness Denis, advocate for the applicant, Mr. Novatus advocate for the respondent and Ms. Asha Livanga, Court clerk.



E. E. KAKOLAKI

JUDGE

24/09/2022.

