

THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE ARUSHA DISTRICT REGISTRY

AT ARUSHA

MISC. CIVIL APPLICATION No. 66 OF 2022

(C/F Misc. Civil Application No. 47 of 2022 and Civil Case No. 13 of 2022)

RUWAICHI JOHN KERETH..... APPLICANT

VERSUS

M'RINGA ESTATES LIMITED.....1ST RESPONDENT
DONOUGH JOHN MAHON.....2ND RESPONDENT
DIANA JULIAN MAVIS BANNISTER.....3RD RESPONDENT
SALLY JUNE MANN.....4TH RESPONDENT
CHRISTOPHER JOHN BANNISTER5TH RESPONDENT
DAWN FRANCES BUNTING 6TH RESPONDENT
ROWENA MARGRETH GRIFFITHS.....7TH RESPONDENT
CATHRYN ELIZABETH HOWARD8TH RESPONDENT
AMANDA LOUISE FRISBY..... 9TH RESPONDENT
SARAH GAYE BANNISTER..... 10TH RESPONDENT
DENISE LUCINDA BANNISTER..... 11TH RESPONDENT
STEPHEN PATRICK MANN..... 12TH RESPONDENT
LIZA JOY MANN..... 13TH RESPONDENT

RULING

03th August & 16th September, 2022

TIGANGA, J.

This is an application moving the court to cite the respondent for contempt of court. It was brought under Order XXXVII, Rule 2(2) and



rule 4, Sections 68(e) and 95 all of the Civil Procedure Code, [Cap. 33 R.E 2019] and Section 114(1)(k) and (3) of the Penal Code, [Cap. 16 R.E 2019]. It is made through the chamber summons supported by an affidavit sworn by the applicant, Ruwaichi John Kereth in which the grounds of the application were put forth.

The application was contested through counter affidavit sworn by Denise Lucinda Bannister and Geway Gesso Bajuta.

In the chamber summons, it was prayed that, **one**, this Honourable Court be pleased to issue an order that, the respondents are guilty for disobedience of court's order issued on 05th May, 2022 and order that the 2nd and 5th to 11th respondents be detained as civil prisoners including one Gesso Heghon Bajuta and Godfrey Gabriel Mshana. **Two**, costs of this application and **three**, any other relief(s) this Honourable Court deems fit to grant.

The application is the result of the restraint order issue by this court on 05th May, 2022 with the purpose of maintaining temporarily the status quo pending hearing and determination of the main application inter-parties.



Before I venture into the merits of the application, with the guide of the very recent decision by the Court of Appeal of Tanzania in **Yusuph Shaban Luhumba versus Happyness John and 3 Others**, Civil Application No. 304/14 of 2022, I would like to stress on the importance of cohesive function of the court to make sure its orders respected and adhered to acted upon. In other word, it is instructive to hold that, orders issued lawfully must be respected and obeyed to the exclusion of all excuses that may be inferred save only when the order(s) is vacated by the very jurisdictional court or reversed by higher court on appeal or revision. In the above cited case the the Court of Appeal of Tanzania observed as;

"At the outset, we subscribe to the trial Judge that, courts of law have inherent powers to ensure obedience of their lawful orders. In exercise of such powers therefore, courts of law are mandated, where necessary, to impose penal sanctions to compel obedience of its orders, including, as rightly observed by the trial Judge, court summons. The rationale behind the law is not only to protect the orderly administration of justice from being abused but to maintain public trust of the supremacy of the rule of law as well".



Therefore, court should always be jealous of its mandate which in fact indicate a true reflection of the rule of law thus fostering public trust without respecting court orders duly issued, the constitutional purpose for establishment of the courts becomes futile and ineffectual. Without obedience and compliance that may create chaos.

In dealing with this matter, I would also like to be guided by the stands of the law, **one**, contempt of court is both, a criminal offence and a civil wrong. It is a criminal offence under section 114 of the Penal Code [Cap 16 R.E 2022]. Whereas criminal contempt results from words, acts, omission or writings which tend to interfere with the administration of justice. Civil contempt is basically rooted in disobeying judgment of the court or court orders one of which being injunctive order, summons or refusing to testify or failing to appear as a witness. Just like any other wrong, civil contempt has recognised ingredients. For the respondent to be found to be guilty of contempt the following must be established (i) that there was a lawful court order, (ii) that, the order was clear and certain not ambiguous (iii) that the respondent went against or disobeyed that court order, (iv) that the disobedience was wilfully and intentional. See **Mary Joseph vs Rachael Zephania**, Misc. Land Application No. 37 of 2020, High Court –Mwanza.



It also has some recognised defence which can be invoked by the defendant, these defence are, but not limited to the following; (a) that, the order was not lawful, (b) that, the disobedience was not wilful and intentional (c) that, the order was ambiguous and was reasonably capable of more than one interpretation. See. **Mansoor Daya Chemicals Ltd vs Ahmedali Mussaji Issaji and 3 others** 1991 CAT-unreported.

After the above executive summary, and the guiding principles, I now go to the historical background giving rise to the dispute at hand, albeit briefly. Whereas the applicant in this application is also the plaintiff in Civil Case No. 13 of 2022 which is pending before this Court, the respondents are also defendants in that very main case save for the ones Gesso Heghon Bajuta and Godfrey Gabriel Mshana who are not parties to the applications and the main case but their roles played in the complained contempt will be expressed soon hereinafter in this ruling.

As can be gathered from the pleadings, on 4th February, 2021 the applicant communicated his offer to the respondents for purchase of 100% shares in the first respondent company at the amount of USD 8,000,000/=. The applicant alleges that the offer was accepted by the

respondent pending other process including effecting payments on the agreed instalments. Also, that due to financial constraints, the applicant decided to invite one Gesso Bajuta to beef up finance in order to secure all the said shares. According to the applicant the two failed to reach to the consensus between them and therefore the applicant prohibited Mr. Bajuta from further communicating with the respondents with regard to purchase of the said shares.

To his dismay, respondents via an email dated 19th April, 2022 informed the applicant that they have no intention of pursuing any transaction with him. The applicant filed Civil Case No. 13 of 2022 on the basis that, the binding contract between him and the respondents had already been entered and therefore, enforceable. That, the respondents breached the alleged binding contract. Thus, among other reliefs the applicant is claiming in the said civil case is specific performance of the contract between him and the respondents and also for the court to declare that, the disposition of shares between the respondents and the third party is illegal and void *ab initio*.

After filing the said civil case, the applicant applied for temporary injunction order ex-parte prohibiting the respondents from further interfering with the property in dispute pending hearing inter-partes.



The prayer was granted in the following terms as hereunder reproduced;

"The respondents are ordered to maintain "Status quo", pending hearing and determination of the main application inter-parties."

Thus, it is the order quoted above which the respondents (2nd and 5th to 11th), Gesso Haghon Bajuta and Godfrey Gabriel Mshana are condemned to have disobeyed, a result of which the applicant is moving this Court to find them guilty of disobedience of the court order and detain them as civil prisoners.

From the above exposition, it is glaringly clear that the order to maintain status quo constituted the lawful order of the court. It was also clear, certain and unambiguous. The issues calling for the decision are;

1. Whether the respondents (2nd and 5th to 11th), Gesso Haghon Bajuta and Godfrey Gabriel Mshana went against or disobeyed the Court order issue on 5th May, 2022
2. If the first issue is resolved in affirmative, the next issue is whether, the disobedience was wilfully and intentional.
3. If the answer to both issues are in the affirmative what is the remedy thereof?



In this application the applicant had legal service of Messrs. Eric S. Ng'maryo and Boniface Joseph, learned Advocates whereas the respondents were represented by Messrs Mr. Deusdedith Mayomba Duncan, Peres Seneto Parpay and Mr. Henry Simon Katunzi also learned Advocates.

At the request of the parties and by leave of the court, the hearing of the application was conducted through written submission whereby both parties adopted their respective affidavits. On the part of the applicant the counsel adopted the affidavit sworn by the applicant, while the counsel for the respondents adopted the affidavits of Denise Lusinda Bannister and Geway Gesso Bajuta respectively to form part of their respective submissions.

These affidavits and submissions made by the counsel for the parties will be considered together in this ruling. However, from them I find it apposite before indulging to the merit of the matter, I find it important to point out some matters which are not in dispute as follows:

It is not disputed that, the order for maintaining *status quo* was issued on 05th May, 2022 and was directed to the respondents and their agents. That, Denise Lusinda Bannister (the deponent) and Gesso Haghon Bajuta were in court when the ruling for maintaining *status quo*

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was delivered. That, Gesso Haghon Bajuta and Godfrey Gabriel Mshana are not parties or were parties the Miscellaneous Civil Application No. 47 of 2022 in which the order for maintaining status quo was issued and from which this application arise. Also that, the payments to the Fair Competition Commission (herein to be referred to as 'FCC') on merger application fee of fifty million shillings (50,000,000/=) was paid and received on 5th May, 2022 at 10:36:55 am. It has not been disputed either that the said amount was paid by Bajuta International (T) Limited being authorized by one of her Directors Geway Gesso Bajuta.

Also that, the Notice of completing filing was issued by the FCC on 18th May, 2022 through the Dodoma office, but the order for maintaining *status quo* was served to FCC on 18th May, 2022 at Dar es salaam office. Lastly that, the order for maintaining *status quo* was served to the respondents and Bajuta International (T) Limited by the applicant on 10th May, 2022 but the Advocates for the respondent were present during the time when the order was made and pronounced.

In the submission in chief Messrs Mg'maryo and Boniface contend that, the respondents by paying the said Merger application fee were in contravention of the order issued to maintain status quo and they deserve being condemned for disobeying the lawful order of this court,

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therefore, they should suffer as civil prisoners. The reason for so contending is that, the respondents were involved in signing the documents necessary for warranting Bajuta International (T) Limited to effect payments. Messrs Duncan, Katunzi and Peres are faulting such contention. The reason for so doing is that, the respondents did not make the said payments but Bajuta International (T) Limited under the authoritative of Geway Gesso Bajuta.

First of all, I agree that the respondents (2nd and 5th to 11th) did not make payments to the FCC. The reason is very apparent that, the one who paid the amount is Bajuta International (T) Limited under the authorisation of Geway Gesso Bajuta. This fact is conceded by Geway Gesso Bajuta in his affidavit at paragraph 10 and corroborated by the CRDB bank's cheque receipt with number EP446781651736215 annexed to the applicant's affidavit.

It is obvious that the payment process might have been started long time ago because the process of payment I can assume, is not done in a blink of an eye. It is prepared including signing of various documents. Because of that, that is why I agree with the submission of the respondents together with both counter affidavits that, the process started on 29th April, 2022.



In my settled view, the respondents cannot be condemned for the process they did before the issuing of the restraint order. It seems things were still in pipeline and effected before the delivery of the ruling. Had the respondents appeared in the documents of payments, probably I would have been convinced that despite the fact that, some of them were in court on the very date of delivering the ruling and other were abroad, probably, electronic payment might have been done by them. Owing to that, I believe they are none and I reasonably part ways with the applicant arguments regarding the condemned respondents, that is (2nd and 5th to 11th) respondents. These did not disobey the said order by effecting payment to FCC on 05th May 2022.

Regarding Mr. Gesso Haghon Bajuta, as said and not disputed, the day when the ruling was delivered restraining respondents from continuing with the process of transferring shares, he was present in court as rightly deposed and submitted by the applicant and the applicant's counsels respectively. As already been pointed out that, the payment was made by Bajuta International (T) Limited. From the record Bajuta International (T) Limited is the limited liability Company which obviously acts through its directors and or principal officers. The question whether the director who actually, did not authorize payments



can be punished for the action done by the limited liability company. The obvious response in my view is not. There are some reasons for that findings, which are; **One**, the applicant did neither depose or allege in his affidavit nor his counsel argued in submission in chief that, Mr. Gesso Haghon Bajuta being attending the proceedings was representing the company (Bajuta International (T) Limited) which both are not parties either to the main case or applications involving parties herein. **Two**, can the director Mr. Gesso Haghon Bajuta be held responsible for the act of the company without first lifting the corporate veil and hold him individually responsible for committing contempt of court or disobedience of lawfully order as a case may be, and lastly commit him as a civil prisoner. The answer is definitely not; the corporate veil must be lifted first before the director is held liable for the act of the company. In my view, if the applicant would have wanted to hold Mr. Gesso Haghon Bajuta personally responsible, the first thing they would have done is to make application for piecing the corporate veil. In the event, therefore holding Mr. Gesso Haghon Bajuta accountable for contempt of court is not maintainable in this application.

Lastly, I come to Mr. Godfrey Gabriel Mshana. This is an officer of the FCC, is the one who issued the notice of complete filing to Bajuta

International (T) Limited on 18th May, 2022 via Dodoma office. As above said, the order restraining continuation of any transaction for transfer of share was sent to FCC on the same date of 18th May, 2022 at Dar es salaam office.

As we all know contempt of court is a criminal offence which should be proved beyond reasonable doubt even if, it appears in the midst of civil case or the application like this one at hand. Before convicting and or deciding that the respondent has a *prima facie* case for contempt of court, the applicant must satisfactorily prove beyond reasonable doubt that the terms of the order breached/contravened have been properly served to the respondent at the time when the alleged contempt was committed. This principle is cherished in the case of **Nchangwa Marwa Wambura versus The Republic**, Criminal Appeal No. 44 of 2017, CAT at Mwanza (unreported) it was held:

"It is trite law that the burden of proof against the accused always lies on the prosecution and no conviction shall be entered on account of weak defence but upon proof of the case beyond reasonable doubt.

It is crystal clear that, the order for maintaining *status quo* was served to the FCC on 18th May, 2022 at Dar es salaam office. This is



substantiated by paragraph 4 of the applicant's affidavit. The notice for completion of filing was issued by Mr. Mshana on the same date but while at Dodoma office of the FCC as proved by paragraph 6 of the applicant's affidavit.

In honouring the principle of law as above stated that, in criminal matters the offence must be proved beyond reasonable doubt, I would have expected the applicant to prove that, despite the fact that, the order and ruling was sent to the FCC Dar es Salaam office, it came to the knowledge of Mr. Mshana who is working in the office of FCC located in Dodoma. Without such proof, it remains doubtful, the advantage which goes to Mr. Mshana.

For the foregoing reasons therefore, I find this application being preferred out of context. It has no merit on its entirety. It deserves for want of merit as I hereby do. Costs to follow event.

It is ordered accordingly.

DATED at **ARUSHA** on the 20th day of September 2022.




J.C. TIGANGA

JUDGE.