**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**
**IN THE SUB - REGISTRY OF MWANZA**
**AT MWANZA**

**MISC. CIVIL APPLICATION NO. 127 OF 2022**
*(Arising from High Court Civil Case No. 50 of 2022)*

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| **TORIDO INVESTIMENT LIMITED** | ..... | **APPLICANT** |
| | **VERSUS** | |
| **EFTA LIMITED** | ..... | **1ST RESPONDENT** |
| **JODAC PROFESSIONAL LTD** | ..... | **2ND RESPONDENT** |

**RULING**

*Nov.16th & 18th, 2022*

**Morris, J**

Torido Investment Limited, having filed civil case no. 50 of 2022 before this Court; is now applying for temporary injunctive order against the respondents in order to protect four vehicles from being alienated by the latter. The vehicle sought to be protected are T 549 DWN, T550 DWN, T740 DWN and T741 DWN.

The application is supported by the affidavit of Ssamula Richard Lusozi. The same is countered by the depositions from the respondents' Counsel, Godfrey Daniel Goyayi. Discernible from the rivalry depositions, is clear establishment that the applicant and the 1st respondent concluded an equipment loan agreement in June 2021. Per the agreement, the applicant is supposed to repay the equipment price in several instalments.

Having paid several instalments, the applicant fell in repayment default which necessitated the 1st respondent to repossess the vehicles through the 2nd respondent. In resistance to the that move, the applicant has filed the stated suit above. Meanwhile, it is deposed further that the impounded vehicles are likely to be disposed of thereby prejudicing parties' rights.

During the hearing, the applicant appeared in person through her Director – Mr. Lusozi while the respondents were represented by Mr. Godfrey Goyayi, learned Advocate. Mr. Lusozi started submitting that, for the past 14 months of the agreement, the applicant had already invested heavily in the project by injecting over TZS 180 million; time and skills. That is, out of the whole principal amount, the pending actual investment stands at TZS 45 million only, interest excluded. He submitted further that, the applicant filed civil case no.50/2022 which is pending in this court because, to him, the applicant is still in time to service the 24-month contract.

It was also the applicant's argument that though he had constantly been requesting the 1st respondent to restructure the loan amount and repayment plan, such requests were not successful. Instead, the respondents confiscated the vehicles on 16th September, 2022. The respondents' step herein has negatively affected the applicant's operations. Moreover, Mr. Lusozi submitted that the Respondents did not

follow contractual procedures of repossessing the vehicles. According to him, the contract's emphasis is mediation than abrupt or outright confiscation or repossession. Further, the 1st respondent's main banking spirit/policy being to support his clients to sustainability, the applicant wonders why his counterpart has all along showed negative gesture towards supporting the applicant in this regard. Hence, he prayed for the application to be allowed.

Advocate Goyayi for the respondents objected the application. He hastily remarked that though the application has been filed under Order 37 Rule 1(a)(b) of CPC, the most appropriate provision is Order 37 Rule (1)(a) only. Then, he submitted that the subject provision outlines circumstances under which injunction can be granted. His initial intervention was an argument that the applicant is intending to protect vehicles from being sold while the repossession has already taken place which renders this application a nugatory effort. Thus, to him the same cannot be granted as it has been overtaken by event. That is the 1st Respondent has already confiscated the vehicles. See paragraph 4-7 of applicant's affidavit. Hence, the application is not tenable because the court lacks jurisdiction.

He made reference to paragraph 10 of applicant's affidavit; ***SCI (T) Ltd v Gulam Mohamed Ali Punjani & Another***, HC(comm.), Misc.

Application No. 184/2022 (unreported-page 5); ***OTA Edward Msofu & Co. Ltd v Equity Bank (T) Ltd and 5 Others***, HC(DSM), Misc. Civil Application No. 681/2020 (unreported-page 6); and ***CAMEL Oil (T)Ltd v Bahdela Company Ltd***, HC(DSM) Misc. Civil Application No. 377/2021 (unreported-page 15).

In addition, the respondents' Counsel maintained that the basic conditions underlying grant of injunctive orders have not been met in this application. He argued that, for example, the pending case must disclose a serious question/*prima facie* case to answered at trial; there must be irreparable loss on the part of the applicant; and the order should consider the balance of convenience to parties [*SCI* case (*supra)*; ***Salum A. Kunguge v Maendeleo Bank Plc***, HC (DSM) Misc. Land Application No. 388/2021 (unreported- page 6)]. He submitted further that, pursuant to clause 6 of lease agreement, the applicant has a right/option of purchase upon paying all the amount due. But this option has not been achieved because of the applicant's conceded default in monthly repayments.

Further, the Court was referred to section 12(3) of the ***Financial Leasing Act***, 2008 which contains irrevocable obligations to lessee and lessor. Consequently, section 13(1)(2)(3)(a) of same statute, empowers lessor to repossess the leased equipment; as was the case with the vehicles subject of this application. Reference was also made to clause 25

of the lease agreement which prohibits the lessee to resort to court if lessor exercises his powers under the agreement. To him, the main suit is accordingly baseless. In consequence, this application is untenable.

It was further submitted by the Counsel that the applicant is not likely to suffer irreparable loss. The envisaged loss in the application, per the respondents, is likely to be repaid in form of money for it is specific. Though, paragraph 12(b) of applicant's affidavit alleges that the respondents cannot refund the loss, the applicant's concern is specific and monetary; thus, capable of being paid should the applicant's suit succeed. Mr. Goyayi insisted too that refund cannot be realized through application for injunction [***SCI case*** (*supra*) p.9].

Regarding balance of convenience, the respondents submitted that the applicant does not stand to suffer more inconveniences than former. To support such argument, the Counsel submitted that obviously the 1st respondent, being a financial institution depending on peoples' investment for capital, is likely to suffer more than the other party. Conclusively, he prayed for this application to by being dismissed with costs.

Having heard the two sides' submissions, the Court will be determining one basic issue; to wit, whether the applicant has exhibited satisfactory grounds to warrant the court to grant the application. The law provides for various conditions to be satisfied for injunctive reliefs to be

granted. The foregoing conditions are also echoed in the cases cited by the respondents' counsel together with ***Giella v Cassaman Brown & Co Ltd*** (1973) EA 358; ***Atilio v Mbowe*** (1968) HCD 284; ***Agency Cargo Intnl. V Eurafrican Bank (T) Ltd***, HC Civ. Case No. 44 of 1998 (unreported).

Moreover, in this connection, Order XXXVII Rule (1)(a) and (b) of the ***Civil Procedure Code***, Cap 33 R.E. 2019 (elsewhere CPC) states the following;

> *"Where in any **suit** it is **proved** by affidavit or otherwise–*
> *(a) that any **property in dispute** in a suit is in danger of being wasted, damaged, or **alienated** by any **party to the suit** of or suffering loss of value by reason of its continued use by any party to the suit, or wrongly sold in execution of a decree; or*
> *(b) that the defendant threatens, or intends to remove or dispose of his property with a view to defraud his creditors,*
>
> *the court may by order grant a temporary injunction to **restrain** such act or make such other order for the purpose of staying and **preventing** the wasting, damaging, **alienation**, sale, loss in value, removal or **disposition** of the property as the court thinks fit, until the **disposal** of the suit or until further **orders**"* [bolding done for emphasis].

From the excerpt above, the key elements are: there must a suit; there must be proof by affidavit or otherwise; the property must be subject of the suit; it must be facing a danger that is likely to affect its status; and the purpose of injunction should be to protect/preserve such property pending determination of the suit or as the court may otherwise order. I undertake to test each element in this application. The objective is to establish the tenability of the application on the basis of each element.

Regarding existence of a triable case, it is undisputed that the application emanates from civil case number 50 of 2022 pending before this Court. One of the underlying conditions within this ground is that the suit must have *prima facie* trial issue and/or prospects of success. The respondents' counsel argued that the suit from which this application emanates does not have this requisite characteristic. That is, from its outset, the suit does not disclose any serious issue to warrant trial.

However, it should be noted that both the plaint and affidavit in support of the application allege that the applicant has already paid above 78 percent (78%) of the vehicles' total value. This fact notwithstanding, the fate of the applicant's right in the repossession exercise is unclear. In the same connection, the respondents are categorical that they have repossessed the vehicles and they still retain the right to claim the

outstanding balance. Reference is made to paragraph 4 of the respondents' counter affidavit. As such, it is obvious that the parties to the suit will have to each prove respective rights under the contract. Hence, the suit discloses a triable issue in such connection. Reference is made to ***TBL v KBL and Another*** (1999)1 EALR 340.

Further, the application is supported by affidavit deposing that the vehicles (property) which is an integral part of the suit were repossessed by the respondents according to respective paragraphs and annexures 4 and 7 attached to the applicant's affidavit. Further, paragraphs 5 and 8 of the respondents' counter affidavit complement the applicant's disposition in this regard. It is obvious that repossessing of any property involves rights therein to revert to the repossessing party from the previous possessor/lessee-owner.

Consequently, it is upon the former party to deal with the property the way he deems fit, including disposition – where necessary. It is an inherent danger to the property in terms of changing its equity status and/or pattern. Thus, the vehicles in this matter are facing the looming danger of changing status through alienation of rights.

Finally, the objective of the injunction is to preserve or protect the property from the disclosed danger. In this application the stated danger is sale/leasing to another person(s). That is, the applicant is averring

though the affidavit (paragraph 10 and annexure TORIDO 9) that the vehicles have been or would be sold by the respondents to the third party. The respondents' advocate vehemently submitted that the vehicles have already been sold and that the envisaged injunction order will serve no useful purpose. With respect, I record my dissent to such argument. I have a couple of reasons. One, the applicant is not committal as to whether the selling has been effectual. He simply asserts that he has been informed of the sale with no particular express evidence in this regard.

Two, applicant's allegations hereof are not conclusively supported or negated by the respondents. In this connection, paragraph 11 of the respondents' counter affidavit states that the vehicles have been leased to another person because the vehicle legally belong to the 1st respondent. This assertion poses a critical contentious situation. While the applicant is alleging sale, the respondents are fronting leasing. Further, it is unclear as to whom such vehicles have been leased. There is not a mention of such person's names or particulars and/or a copy of the purported lease agreement being attached to counter affidavit.

Three, the vehicles are allegedly registered in the name of the applicant. Going by state of affairs/on the face of the record; the vehicles are deemed to belong to the applicant until the contract between the parties is interpreted otherwise by a competent body after evidence from

interested parties. Consequently, the capacity to lease or sale the vehicle presupposes that the applicant must be made one of the interested parties, if not exclusive party; so, to say.

Four, according the applicant's affidavit, Tanzania Revenue Authority (TRA) is under notice/caveat not to transfer vehicles equity from them to any other party pending determination of the suit herein. The respondents have not deposed to the effect that the TRA have already carried on any contrary instructions. Hence, from the face of it, the record indicates that the status of the equity in the vehicle is still intact. Six, the submissions are not substitute of evidence. That is, the submissions by the respondents' counsel that the application has been overtaken by events is not evidence. Law holds so. Statements or submissions from the bar are essentially the reflection of the general features of a parties' case, and are therefore not evidence. It is a settled legal principle per the ***Registered Trustees of the Archdiocese of Dar es Salaam v. The Chairman, Bunju Village Government & 11 Others***, Court of Appeal Civil Appeal No. 147 of 2006 (unreported); ***Bish International B.V. & Rudolf Teurnis Van Winkelhof v. Charles Yaw Sarkodie &. Bish Tanzania Ltd***, Land Case No. 9 of 2006 (unreported); and ***Rosemary Stella Chambejairo v David Kitundu Jairo***, Court of Appeal (Dar Es Salaam) Civ. Reference No. 6 of 2018 (unreported).

Further, the value of depositions in the affidavits is also traceable in case of ***D.T. Dobie (T) Ltd v Phatom Modern Transport (1985) Ltd.***, Court of Appeal (Dar es Salaam), Civil Appl. No. 141/01(unreported); ***OTTU v AG and others,*** High Court (Dar es Salaam), Misc. Civil Appl. No. 15/97 (unreported); ***SGS Societe General de Survillace SA v TRA***, High Court (Dar es salaam), Civil Appl. No. 8/99 (unreported); and ***Omari Ally Omary v Idd Mohamed and others***, High Court (Dar es Salaam) Civil Revision No. 90/03 (unreported).

Another, equally important principle is that for injunction to issue, the remedy-seeking party must stand to suffer irreparable loss. The respondents' counsel ably submitted in support of this ground. Cases named above were also cited to buttress his argument in this regard. I have no reason to think contrary to the pronouncements in the cited cases. However, in law, each case should be determined on the basis of own set of facts/merits/circumstances. [***Kimbute Otiniel v R***, Court of Appeal Crim. Appeal No 300 of 2011 (unreported); and ***Nelson Mang'ati v R***, Crim. Appeal No 346 of 2017 (unreported)].

The foregoing said and done, in the present matter; affidavits of both parties are vindicative of the justification for applying the fundamentals of such principle sparingly. In my view, on the scales of justice, it is the applicant who is likely to suffer most if the sought order

is not granted. For example, according to paragraph 3 of his affidavit, the applicant has already repaid over TZS 170 million out of TZS 230 million (principal loan amount). This fact notwithstanding, paragraph 11 of the respondents' counter affidavit is blatant that the "motor vehicles in dispute are legally the properties of the 1st respondent" implying that the applicant is deemed as having lost any of his equity. In addition, as the respondent is confident that, per the contract, the subject vehicles are his and are legal in his possession; the issuance of injunction order which does not have the effect of declaring ownership to either party is not likely to prejudice the respondents.

Furthermore, according to clause 25 of the agreement between the parties, it is apparent that the 1st Respondent has three (3) options. Repossession being the last on the list. In the case herein, the respondents have resorted to the last option. In so doing, they have more rights after repossession than the applicant. Consequently, on balance of convenience the applicant is likely to be affected the most than the respondents.

In law, the party who seemingly is likely to be prejudiced the most if injunction is not granted, should be considered accordingly. This is the position in cases such as ***Constatine Kalipeni v Azania Bank & Another***, HC(Comm.) Case no. 78 of 2010; ***American Cyanamid Co. v***

***Ethicon Ltd*** (unreported); and ***Nicholaus Lekule v IPTL & Another*** (1997) TLR 58.

In fine, this application passes the test of statutory and/or legal conditions of granting temporary injunction. It is, thus, allowed to the extent that: respondents and their agents are hereby restrained from alienating or selling or transacting on vehicles described as T549 DWN, T550 DWN, T740 DWN and T741 DWN until hearing and determination of Civil Suit No. 50 of 2022 which is pending in this Court. Costs will abide the forthcoming proceedings.

It is accordingly ordered.

**C.K.K. Morris**

**Judge**

**November 18th, 2022**

Ruling delivered in the presence of Mr. SSamula R. Lusozi, applicant's Director and Advocate Godfrey Goyayi for the Respondent.

**C.K.K. Morris**

**Judge**

**November 18th, 2022**