

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF DAR ES SALAAM**

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 534 OF 2020

TOSHIBA PLANT SYSTEMS & SERVICES CORPORATION APPLICANT

VERSUS

VICTOR OTIENO OLAL 1ST RESPONDENT

ZAINAB RASHID 2ND RESPONDENT

**VOLTECH PRODUCTS AND SERVICES
(TANZANIA) LIMITED 3RD RESPONDENT**

KIWANGO SECURITY GUARDS (T) LTD 4TH RESPONDENT

LIVING ADVENTURES COMPANY LIMITED 5TH RESPONDENT

AND

**STANDARD CHARTERED BANK
TANZANIA LIMITED 1ST NECESSARY PARTY**

STANBIC BANK TANZANIA LIMITED 2ND NECESSARY PARTY

DIAMOND TRUST BANK TANZANIA LIMITED 3RD NECESSARY PARTY

(Arising from Civil Case No. 148 of 2020)

RULING

13th and 30th May, 2022

KISANYA, J.:

This is an application for temporary injunction in terms of Order XXXVII rule 1 (a), 8 (1)(a) and (c) and section 68(e) of the Civil Procedure Code, Cap. 33, R.E., 2019 (henceforth "the CPC"). It stems from Civil Case No. 148 of 2020.

A brief background of this matter is that, the 1st respondent was the applicant's employee. He was, among others, responsible for the financial activities of the applicant, but under instruction and authority of the applicant. It is alleged that on or about 16th September, 2020, the 1st defendant unlawfully and without the applicant's consent stole from the latter, a laptop make Toshiba Satellite C55-C and other properties. It is further alleged that, the 1st respondent fraudulently, unlocked the token code for the applicant's bank account. The applicant claims that the 1st respondent used the said token code for the bank to access her (applicant) bank accounts and illegally withdrew cash/and or transferred funds to tune of TZS 181,649,000 and USD 229,328.89 to himself and to the 2nd, 3rd, 4th and 5th defendants. The applicant avers that some of the funds were transferred in the respondents' bank accounts held at the 1st, 2nd and 3rd necessary parties. Therefore, the applicant instituted a suit against the respondents and necessary parties in which she prayed against the respondents for payment of TZS 181,649,000 and USD 229,328.89 and interest commercial rate of 18% per annum and 10% per annum, respectively, from 17th September, 2020 to the date of judgment.

After instituting the said suit, the applicant filed this application seeking the following reliefs:-

- 1. That this Honourable Court be pleased to issue freezing orders pending the hearing and determination of the suit as follows;*

- (a) *restraining the 1st Respondent from withdrawing and/order transferring funds or any other banking transaction that may lead to debiting of the funds held in bank account no. 91200013966682 and 91200033397 held with the 2nd Necessary Party's so as to preserve the funds held in the said account.*
- (b) *restraining the 2nd Respondent from withdrawing and/order transferring funds or any other banking transaction that may lead to debiting of the funds held in bank account no. 9120001846599 held with the 2nd Necessary Party so as to preserve the funds held in the said account.*
- (c) *restraining the 3^d Respondent from withdrawing and/order transferring funds or any other banking transaction that may lead to debiting of the funds held in bank account no. 0094030002 held with the 3^d necessary Party so as to preserve the funds held in the said account.*
- (d) *restraining the 4th Respondent from withdrawing and/order transferring funds or any other banking transaction that may lead to debiting of the funds held in bank account no. 912000509211 held with the 2nd Necessary Party so as to preserve the funds held in the said account.*
- (e) *restraining the 5th Respondent from withdrawing and/order transferring funds or any other banking transaction that may lead to debiting of the funds held in bank account and 9120001333702 held with*

the 2nd Necessary Party so as to preserve the funds held in the said account

2. That this Honourable Court be pleased to issue an order restraining the 1st respondent and or his servants and agents or any other person acting under instruction of the 1st Respondent from withdrawing and/or transferring funds or any other banking transaction that may lead to debiting of the Applicant's funds held USD Account No. 8706021977600, TZS Account No. 0106021977600 and TZS Account No. 016021977601 held at the 1st Necessary Party pending hearing and determination of the application inter-parties..."

In support of the application, Samasundaram Sambandam, the applicant's Project Coordinator, affirmed an affidavit. It is worth nothing here that the application is challenged by the 4th and 3rd respondents only. Other respondents and the necessary parties did not file their respective counter affidavits thereby implying that they don't contest the facts deposed in the supporting affidavit.

In determining this application, I ordered that the application to be disposed of by way of written submissions. The said order was complied with by the applicant and 4th respondents only. That being the case, I will proceed to determine the matter basing on the filed written submissions.

Mr. Gaspar Nyika, learned advocate, filed the written submission on behalf of the applicant. Having adopted the supporting affidavit as part of his

submission, the learned counsel submitted that Order XXXVII Rule 1(a), 8(a) and (c) of the CPC empowers this Court to issue the reliefs or orders prayed for in the chamber summons. His submission was supported by the case of **Vita Grain Limited vs Pradeekumar Lalji Galjjar & 2 Others**, Commercial Case No. 71 of 2011 (unreported) and **Mareva Compania Narieva SA vs International Bulcarries SA, The Mareva** (1980) 1 ALL ER 213. He argued that in the latter case, the Court observed that restraining orders are issued in the following circumstances; one, if the debt is due and owing, *two*, there is a danger that the debtor may dispose of his assets so as to defeat it before judgment; and *three*, the Court has jurisdiction to grant an interlocutory judgment so as to prevent the debtor from disposing of the assets. Making reference to paragraphs 8 and 9 of the supporting affidavit, Mr. Nyika went on to contend that the application seeks to conserve the funds that the 1st respondent converted to himself and transferred to other respondents on the ground that the latter had no contractual relationship with the applicant to entitle them to receive the money from her (the applicant).

The learned counsel restated the principles for grant of temporary as underlined in the case of **Attilio vs Mbowe** [1969] HCD No. 284. These were, the existence of a *prima facie case*, proof of imminent irreparable loss and balance of convenience. Expounding how each condition was met, he cited the cases of **Giella vs Cassman & Co. Ltd** [1973] E.A. 358, **American Cynamid**

vs Ethicom [1951] 1 ALL E.R. 504, **Noormohamed Janmohamed vs Kassamali Virji Madhani** (1952) 19 E.A.C.A 11 and **China Henan International Cooperation Group Co. Limited vs Salvanda K. Rwegasira**, Civil Application No. 71 of 2005 (unreported). From the foregoing submissions, Mr. Nyika urged this Court to grant temporary injunction orders pending determination of the suit between the applicant and the respondents.

In response, Mr. Leonard Masatu, learned counsel who advocated for the 4th respondent vehemently contested the application. He commenced his submission by adopting the counter-affidavit filed by Raisa Zakayo, in opposing the application. The learned counsel contended that the alleged USD 9,029.59 was not transferred into the 4th respondent's account.

Mr. Masatu concurred with Mr. Nyika that an order for temporary injunction is granted upon meeting the conditions set out in the case of **Atilio vs Mbowe (supra)** and **Giella vs Cassman Brown & Co. Ltd (supra)**. However, he submitted that, all conditions had not been met, as far as the 4th respondent is concerned.

With regard to the first condition, the learned counsel contended that there is no triable issues. His argument was based on the contention that there is no evidence to prove that USD 9,029.59 was transferred into the 4th respondent's account. In that regard, he was of the view that there is no good arguable case which is one of the conditions for granting a freezing injunction

in terms of the book titled **Goode on Commercial Law, 4th Edition, page 1287**. He urged me to consider that the fund alleged to have been transferred into the 4th respondent's account does not feature in the 4th respondent's bank account and that the applicant did not file a reply to the 4th respondent's counter affidavit to contest the said fact.

As regards the second condition, Mr. Masatu submitted that the 4th respondent stands to suffer irreparable loss because her account was frozen and thus, refrained from drawing and transferring the fund thereby affecting her business operation. The learned counsel went on to submit that the freezing order, if any, should be limited to security equal to amount that is equal or sufficient to cover the decretal sum that may be issued against the 4th respondent and not otherwise.

As regards the third condition, Mr. Masatu submitted that the applicant has not made a full and frank disclosure of all matters within his knowledge. He further contended that there is no material disclosure on the source of information to prove that it is difficult to recover the sum of money from the 4th Respondent in the event the main suit is decided in favour of the applicant. That said, the learned counsel prayed that the application be dismissed.

To begin with, it is common ground that the grant of a temporary injunction is based on the existence of the conditions that; there is serious triable issue between the parties with a probability that the Applicant will be

entitled to the reliefs prayed for in the main suit; two, the temporary injunction is necessary in order to prevent some irreparable loss being suffered by the Applicant even if such Applicants succeed in the main suit; and on the balance of convenience, the applicant will suffer more hardship if the injunction is not granted than what the respondent will suffer if the order is granted. See the case of **Attilio vs Mbowe** (supra).

Therefore, first for determination is whether there is a serious triable issue between the parties. In dealing with this issue, the court is required to go through the record to find out if there is a bona fide contest between the parties and serious questions to be tried. At this stage, the court cannot predicate the case of either party or make a finding on the main controversy involved in the suit.

According to Mr. Nyika, the issue which arise from the pleadings in the case at hand is whether the 1st respondent was entitled to convert the applicant's money into his own money. Indeed, the applicant's supporting affidavit shows that the 1st respondents converted the applicant's money to the tune of USD 181,649,000 and USD 229,328.57 into his own use and some of the funds transferred to the bank accounts of the 2nd, 3rd, 4th and 5th respondents. Accompanied to the supporting affidavit is the statement (Annexure TPSC 2) which indicates the money deposited in each account of respondents.

That being the case, I am convinced that the applicant has demonstrated a prima facie case against the respondents. This is so when it is considered that the applicant's averments were not challenged by the 1st, 2nd, and 5th respondents. As regards the 4th respondent, her contention that alleged money was not deposited in her account suggests that there is a triable issue. I hold so basing on the fact that each side has produced the bank statement to support its position. Therefore, the issue whether or not the applicant's money was deposited in the 4th respondent's account will be determined in the main case.

The next issue is whether the applicant stands to suffer an irreparable loss. In the case of **Kaare Vs. General Manager Mara Cooperation Union [1924] Ltd** [1987] TLR 17, this Court (Mapigano, J., as he then was) had this to say on the second ground for the grant of temporary injunction:-

"The Court should consider whether there is an occasion to protect either of the parties from the species of injury known as irreparable injury" before his right can be established...

By irreparable injury it is not meant that there must be no physical possibility but merely that the injury would be material, for example one that could not be adequately remedied by damages."

It is, therefore, clear from the above position that, irreparable injury is an injury which cannot be adequately remedied by damages. In determining this condition, the court is required to consider whether the applicant has

demonstrated how his condition will change for the worse if the relief is not granted and that he or she will suffer damages.

In the present case, paragraph 9 of the supporting affidavit shows that the applicant's claims in the main suit is to the effect that the amount amounted deposited in the respondents' account continues to attract interest. It was also deposed that, unless restrained, there is a risk that the 1st respondents will continue to withdraw and or transfer funds because he still has access to the applicant's bank account. The applicant further adduced that the respondents will withdraw and or transfer funds credited in their account and that she will have no means of accessing the funds. Other averment by the applicant is reflected in paragraph 15 of the supporting affidavit which reads:

"The Applicant has no access to the accounts held by the Respondent to be able to trace the funds that were illegally taken from the Bank Accounts credited in their account and that she will have no means of accessing the funds."

In view of the foregoing, I am of convinced that the applicant has demonstrated that she may not be able to execute the decree in the event the main suit is decided in her favour, if the order for temporary injunction is not granted. Therefore, the second condition has been met.

Last for consideration is whether the applicant stands to suffer more if the injunction is not granted than what respondent would suffer if granted. Having answered the first and second issues in favour of the applicant and upon

weighing the facts in totality, I hold the view that the third condition has been met. However, I am of the view that the temporary order shall be limited to the funds alleged to have been deposited from the applicant's account and not the all funds in the respondent's account. As rightly argued by Mr. Masatu, this will enable the respondents to access and make use of the funds which are not subject to the pending case.

In the fine, the application is allowed to the extent shown herein. Thus, pending determination of the main suit:-

1. The 1st respondent is restrained from withdrawing and/order transferring funds or any other banking transaction that may lead to debiting of the funds credited in his bank account No. 91200013966682 and 91200033397 held with the 2nd Necessary Party from the applicant.
2. The 2nd Respondent is restrained from withdrawing and/order transferring funds or any other banking transaction that may lead to debiting of the funds credited in her bank account no. 9120001846599 held with the 2nd Necessary Party, from the applicant.
3. The 3rd Respondent is retrained from withdrawing and/order transferring funds or any other banking transaction that may lead to debiting of the funds credited in her bank account no. 0094030002 held with the 3rd necessary Party, from the applicant.

4. The 4th Respondent is restrained from withdrawing and/order transferring funds or any other banking transaction that may lead to debiting of the funds credited in her bank account no. 912000509211 held with the 2nd Necessary Party, from the applicant.
5. The 5th Respondent is restrained from withdrawing and/order transferring funds or any other banking transaction that may lead to debiting of the funds in her bank account no 9120001333702 held with the 2nd Necessary Party, from the applicant.
6. The 1st respondent and or his servants and agents or any other person acting under instruction of the 1st Respondent are restrained from withdrawing and/or transferring funds or any other banking transaction that may lead to debiting of the Applicant's funds held at USD Account No. 8706021977600, TZS Account No. 0106021977600 and TZS Account No. 016021977601 held with the 1st Necessary Party.

For avoidance of doubt, it is directed that the temporary orders in paragraphs 1 to 5 above are limited to the funds deposited in the respondents' account from the applicant. Lastly, costs shall follow the event. It is so ordered.

DATED at DAR ES SALAAM this 30th day of May, 2022.



S.E. Kisanya
JUDGE

Court: Ruling delivered this 30th day of May, 2022 in the presence of Ms. Mariam Mabina and Ms. Joyce Shayo, learned advocates for the 3rd and 4th respondents, respectively, and in the absence of the applicant, 1st and 5th respondents. B/C Zawadi present.



S.E. Kisanya
JUDGE
30/05/2022