

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

MISC. CIVIL APPLICATION NO. 07 OF 2023

*(Originating From High Court Civil Case No.144 of 2021 And Misc. Civil Application
No. 456 Of 2021)*

TARGET BOREWELLS LIMITED APPLICANT

VERSUS

SHABAN COSLA 1ST RESPONDENT

ABDALLAH M. MKATA T/A

SENSITIVE AUCTION MART AND

COURT BROKER 2ND RESPONDENT

ESCON BOREWELLS COMPANY

LIMITED 3RD RESPONDENT

RULING.

S.M. MAGHIMBI, J:

The applicant herein has moved this court under the provisions of Order XLIII Rule 2, Order XXXVII Rule 1(a) & (5) and Sections 68(e) and 95 of the Civil Procedure Code, Cap. 33 R.E 2019 ("the CPC"). She is moving the court to vary its temporary injunction order granted by this Court (Honourable Mr. Justice A. R. Mruma) on 18th March 2022 in Misc.

Civil Application No. 456 of 2021. Specifically, in her chamber summons, the applicant sought for orders in the following terms:

1. That, this Honourable Court be pleased to certify the Applicant's application as urgent and the same be directed to proceed to hearing immediately in view of its urgency.
2. That, this Honourable Court be pleased to vary injunction orders given by Honourable Mr. Justice A. R. Mruma in High Court Misc. Civil Application No. 456 of 2021, on 18th March 2022 to the extent of ordering the 2nd Respondent to release to the Applicant, the Applicant's Motor Vehicles Trucks with Registration Nos. T 392 BLJ, T 476 DER, T252 DKM and T 394 DBP for the purposes of preventing wasting, damaging and/or loss in value and loss of business until disposal of Civil Case No. 144 of 2021, on condition for the Applicant giving securing guaranteeing payment of Tshs Two Hundred Thirty Million (Tshs 230,000,000/=) in favour of the 1st Respondent under Kisumu Resident Magistrates Court's decree given in Civil Case No. 99 of 2012 against ESCON BOREWELLS CO. LTD (the 3rd respondent herein).
3. The costs of this application be paid by the Respondents.
4. Any other relief(s) this Honorable Court deems just be granted.

The application was supported by the affidavit of Ravula Srinivasa Reddy, the Applicant's Managing Director, an affidavit deponed on the 09th day of January, 2023.

On the other hand, after being served, the 1st and 2nd Respondents opposed the application by filing their counter affidavit on 20th January 2023. The 3rd Respondent was not found in both direct and substituted service and thus the matter proceeds ex-parte against the 3rd Respondent. On 06th February 2023, when this application came for hearing before me, by consent of all parties, I ordered hearing of the application to proceed by way of written submissions. All parties filed their submissions accordingly hence this ruling.

In order to grasp the gist of this application, brief background is narrated. Initially, the 1st and 3rd respondents were parties to a Civil Case No. 99 of 2012 ("the Original Suit") before Kisumu Resident Magistrate's Court ("RM's Court"). The case was decided in favour of the 1st respondent herein whereby he was awarded and decreed a payment of Tshs 90,000,000/= as general damages and Tshs 20,000,000/= as punitive damages, which totaled to Tshs 110,000,000/=. The 1st respondent subsequently lodged Execution Application No. 99 of 2015 ("Execution") at the RM's Court where several properties; ownership of

which is a subject matter Civil Case No. 144/2021 pending before this court ("the pending suit"); were attached.

Claiming ownership to the attached properties, the Applicant unsuccessfully challenged the above referred attachments through objection proceedings. Still in pursuance of proving her ownership to the properties, the applicant consequently filed in this court the pending suit under Order XXI Rule 62 of the CPC seeking to establish ownership of the attached properties in the execution application. Along with the pending suit, the applicant also filed Misc. Civil Application No. 456 of 2021 ("the Misc. Application"), seeking injunctive orders to stop disposition by sale of the attached properties. On the 18th March 2022, this court granted the injunction. It is this injunction order the Applicant is now seeking to vary to the extent of ordering the 2nd Respondent to release to the Applicant, the attached properties.

However, there is also a crucial center of controversy in the Civil Case No. 144/2021 that is pending before me, a controversy which revolves around the existence of the 3rd respondent. The applicant herein, who is also the plaintiff in the pending suit, alleges that the 3rd Respondent is non-existing person as revealed by police investigation reports (annexure "PA-9"). The applicant also alleges that in the execution proceedings, the RM's court attached and proclaimed for sale

some properties in form of Motor Vehicles Trucks with Registration Nos. T 392 BLJ, T 476 DER, T252 DKM and T 394 DBP which belongs to the applicant and not the judgment debtor/3rd respondent herein. She is therefore challenging the validity of the sale process on grounds of fraud because the purported buyer, one Maryam Nassoro Hamadi, disowned her participation in buying the said trucks. Further that the said trucks were converted into the 1st respondent's own business use and as a result, the said Maryam Nassoro Hamadi required the police to return the trucks to the true owner who is the Applicant herein (annexure "PA-10").

In this application, the applicant was represented by Mr. Emmanuel Safari, learned advocate while the respondent was represented by Mr. Sylvatus Sylvanus Mayenga, learned Advocate. I appreciate the submissions of all parties both in support of the application and in opposition thereto. I must be clear on the onset that I have noted Mr. Safari's lengthy allegations on the validity of the sale and the fraud that was committed by the 1st respondent; however, those submissions are misplaced in this application. The issues that Mr. Safari has narrated require evidence and proof and indeed that can only be achieved by calling witnesses and bringing evidence, which, is a subject to be executed in the pending suit.

At this point, my main obligation is to analyse the validity of this application in relation to the orders sought in the Chamber Summons, the pending suit and the determined application for injunction which was at the instance of the applicant herein. Having said so, I will now see if the orders sought in this application are tenable by considering the circumstances of the case particularly the prayers sought in the pending suit.

In his submissions to support the merits of this application, Mr. Safari submitted that the application has merits and prayed that the orders sought by the Applicant be granted for the best interest of justice. He then submitted that because it is clear that this is an application for variation of the temporary injunction order granted on 18th March 2022 in Misc. Civil Application No. 456 of 2021, the injunction order operates to restrain/stop the 2nd Respondent from disposing of by way of sale of the disputed Motor Vehicles Trucks with Registration Nos. T 392 BLJ, T 476 DER, T252 DKM and T 394 DBP pending the hearing and determination of Civil Case No. 144 of 2021. He went on submitting that the trucks were left in possession of the 2nd Respondent as security for payment of the said Tshs 230,000,000/= in favour of the 1st Respondent and that the Applicant is seeking to establish his ownership as he was not a party to the original suit. His argument was that the

said motor vehicles are not liable for attachment because they do not belong to the judgment debtor in terms of the ownership history records from Tanzania Revenue Authority (TRA) (annexure "PA-12A").

Mr. Safari went on submitting that they have established sufficient reasons for grant of this application to the extent of ordering the 2nd Respondent to release to the Applicant, the disputed Motor Vehicles Trucks on condition for the Applicant to deposit in Court insurance performance bond as alternative security for due performance of the decree guaranteeing payment of Tshs Two Hundred Thirty Million (Tshs 230,000,000/=) in favour of the 1st Respondent as per RM's Court warrant of attachment issued in execution application. In elaborating the sufficient reasons for the grant of the application, Mr. Safari identified the reasons as one; loss of income and costs, two is a loss as a result of diminishing value due to improper storage and exposure to bad weather dust and rusting causing decay wastage and damages. He elaborated that since 16th September 2020 to date, more than 2 years of depreciation have lapsed which means that the Applicant's motor vehicles have suffered heavy depreciation of value. His third reason was based on a loss of business as a result of being prevented to participate in tender projects and thus, suffering heavy damages. Fourth is that there is loss as a result of depreciation in value which is rendering the

Applicant's motor vehicles useless, arguing that it will result into enormous loss indicated. His last reason was the irreparable loss, great hardship, inconvenience and financial loss indicated.

Mr. Safari submitted further that the 2nd Respondent being the one in possession of the Applicant's motor vehicles, did not swear affidavit disputing the wasting, rusting damages suffered by the said motor vehicles. Further that the affidavit by the 1st Respondent is incompetent to oppose this application because it only mentions the 2nd Respondent without attaching any evidence. He supported this line of submission by citing the decision of the Court of Appeal in **Civil Application No. 245/20 Of 2021, Dianarose Spare Parts Ltd Vs. Commissioner General, Tanzania Revenue Authority** (Unreported) where at page 9 the Court held: -

"The stance of the law is that, where an affidavit mentions another person on material point, that other person should also take an affidavit."

In the light of the above quoted decision, he prayed that this court find the Applicant's application stands unopposed by the 2nd Respondent.

He went on submitting that the discretion to determine the kind of security lies with the Court, but in this case the Applicant has

established vide annexure "PA-18" that she has secured reliable insurer who has confirmed his willingness to execute insurance bond guaranteeing performance of decree in favour of the 1st Respondent. He hence prayed that this Court find the proposed insurance bond acceptable and advantageous security because it will allow the 1st Respondent to withdraw the value of the decree without depreciation or liability. He supported this line of argument by citing the decision of the Court of Appeal in **Civil Application No. 24/16 Of 2021, Junior Construction Company Limited & 2 Others Versus Mantrac Tanzania Limited** (Unreported) where at page 9 the Court said: -

"But we have no doubt that, all things being equal, an insurance performance bond from a reputable insurance company would equally be acceptable security. For a performance bond is, in essence, an instrument "giving security for the carrying out a contract" – see Oxford Dictionary of Law, 5th Edition, Oxford University Press, Oxford, 2002. Learned authors Geraldine Andrews and Richard Millet in The Law of Guarantees, 6th Edition, Sweet & Maxwell, London, 2011, at page 271, succinctly summarize the obligation of a surety or guarantor thus;

"A contract of guarantee is an accessory contract, by which the surety undertakes to ensure that the principal performs the principal obligation. It has been described as a contract to indemnify the creditor upon the happening of a contingency, namely the default of the principal to perform the principal obligation. The surety is therefore under a secondary obligation which is dependent upon the default of the principal and which does not arise until that point." (Emphasis added)

Mr. Masumbuko's submission that an insurance performance bond would not be sufficient is plainly unsubstantiated and, therefore, carries no weight of persuasion in our mind. The insurance industry in the country is regulated under the framework of the Insurance Act, No. 19 of 2009 ("the Act"). Within that statutory framework, the business of surety ship, that is, effecting and carrying out performance bonds or similar contracts of guarantee, is listed as a category of regulated "general business" of insurance as item 15 of Part B of the Second Schedule to the Act made under section 51(1) (b) of the Act."

He then argued that in the light of all the above quoted Court of Appeal decision, it is clear that insurance performance bond is an acceptable security and prayed that the Applicant's application be granted.

In reply, Mr. Mayenga was brief and focused. He submitted that according to the plaint lodged in the pending suit, the Applicant lodged the suit following the dismissal of the application for objection proceedings rejected by the RM's court in its order dated 27th August 2021. That it is the ruling of the RM's Court which triggered the filing of the pending suit. That the objection proceedings lodged at the RM's court, followed the attachment order issued by the very court, on the disputed attached vehicles. On that note, his argument was that the release of the disputed motor vehicle being the main prayer sought, its genesis is attachment order issued by Kisumu Court which in essence is still intact. Further that this Court cannot order the release of the vehicles which it did not attach without determining the real questions of controversy between the parties which is in the pending suit.

Replying on the applicant's third prayer, he submitted that the same prayer was earlier on made by the Applicant and refused by the Court. He pointed this court to page 6 of the court ruling in the Misc. Application which clearly answered that the prayer was not subject of

the application for injunction. He argued that this prayer is now brought through backdoor while already determined by the Court. He supported his submissions by citing the decisions of this Court and the Court of Appeal that the Court cannot grant something not asked for. He particularly cited the case of **Dr. Abraham Israel Shuma Vs. National Institute for Medical Research and Another, Civil Appeal No.68 of 2020** (unreported) where the said position was held. He then submitted that from the point above, this Court cannot be invited to vary something which does not exist.

On the cited cases by Mr. Safari, Mr. Mayenga submitted that most of the decision cited by the Applicant Counsel relates to stay of execution which is not the case in our present matter. He also argued that attachment being at the centre of the dispute and what is pleaded in the plaint, in prayer (a) and (b); granting the release of the vehicle will be tantamount to determining the suit which unfortunately is yet to be determined.

He went on arguing that assuming in favor of the Applicant that variation is a proper remedy sought and that the injunction order pronounced by this Court on 18th March 2022 can be varied as prayed, his submission was that this application is brought on non-existing order. He then pointed out that in terms of Order XXXVII Rule 3 of the

CPC, the order of temporary injunction has a life span of 6 months and that counting from 18th March 2022 until 10th January 2023 when the application was lodged in this Court, it is almost a year and therefore it is hopelessly brought out of time. He supported his submission by citing the case of **Petro Robert Myavilwa (*Administrator of Estate of the late Robert Myavilwa*) vs Rahim Mchalikwao, Misc. Land Application No.75 of 2021** which propounds principles regarding the life span of the temporary injunction order. He also pointed out that the permanent injunction relief sought for under prayer (d) of the plaint is yet to be determined by this Court.

He submitted further that in the pending suit, this court is called to investigate on ownership of the vehicles, therefore handing the vehicles to the Applicant while the ownership is the issue at the centre of the dispute will be tantamount to issuing the decree to the Applicant while the main suit remain undetermined. He also questioned as to how the Applicant reached to the assessment that the attached vehicles are equal to the sum requested to be deposited? His argument was that the Applicant's affidavit plus submissions is silent on this aspect and that the application for injunction did not touch issues relating to security therefore the facts deponed under paragraph 25 of the Affidavit seeking to give alternative security is unfounded. He argued that Mr. Safari is

changing rules during the game as the injunction order dealt with restraining orders for auctioning the referred motor vehicles and not otherwise.

On the bond purported to be issued by the third party, that is TanzaIndia Assurance Company Limited, he challenged how the Court can believe the third party and the Applicant undertakings which are not backed up by any affidavit. He then cited the decisions of the Court of Appeal which categorically demands the existence of affidavit to prove the required facts, the case of **Vietel Tanzania Limited Vs Asa General Supplies and Construction Co. Limited, Civil Application No.126/08 of 2021**. He emphasized that the case clearly imports the necessity of the affidavit where certain facts are pleaded like in the instant matter. He then pointed out that the letter purported to be marked as a bond, is between the Applicant and TanzaIndia Assurance Company Limited and there is no resolution to offer a proof that indeed it is a valid bond from the bond issuer. His conclusive prayer was for the dismissal of this application.

Having considered the submissions of both parties, I must point out that at the onset, I am inclined to the submissions of Mr. Mayenga that the current application intends to pre-empt the main suit. As I have pointed out earlier, I will analyse the validity of this application in

relation to the orders sought in the Chamber Summons, the pending suit and the determined application for injunction which was at the instance of the applicant. The pending suit takes its origin from a granted order of attachment and proclamation for sale of the disputed properties in execution application. The applicant attempted to challenge the process through objection proceedings lodged under Order XXI Rule 57 (1) &(2) of the CPC by claiming ownership of the attached properties as against the judgment debtor who is the 3rd respondent herein. Having lost in the objection proceedings, the applicant has lodged the pending suit pursuant to Order XXI Rule 62 of the CPC. The Rule 62 provides:

"Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive."

As per the provisions of Rule 62 of the Order XXI, the pending suit was lodged to establish the right which the applicant claims to the property in dispute. The order is further clear that the order in the objection proceedings shall be conclusive, subject to the result of such suit. So what is the interpretation of this rule? The Rule means that until the outcome of the suit is out and is to the contrary to the order in the

objection proceedings, the order pronounced in objection proceedings is conclusive. Therefore in the pending suit, until the ownership of the disputed properties is otherwise determined in the pending suit, the properties attached are presumed to be the properties of the judgment debtor unless and until the outcome of the pending suit declares otherwise. At this point is where the argument of Mr. Mayenga comes in.

It is apparent that the applicant moves the court to release the attached properties in exchange of an insurance bond. The question remains of what will be of the disputed properties in the pending suit should the pending suit end in favour of the 3rd respondent who is also the judgment debtor in the execution? What is if it is proved that the properties actually belong to the 3rd respondent? The applicant would have enjoyed the use of the properties and make the properties even less worthy for the owner at the time of their return. This is exactly what the worry of the applicant that pushed him to move this court, the depreciation of those properties.

I appreciate the authorities cited by Mr. Safari, but as correctly argued by Mr. Mayenga, the situation in all the cited authorities differ from our current situation. I have gone through the cited cases, particularly the cited cases of **Civil Application No. 117/17 Of 2018,**

The Registered Trustees Of The Chama Cha Mapinduzi And 3 Others Vs. Mehboob Ibrahim Alibhai (As Legal Representative Of The Late Ibrahim) and in **Civil Application No. 469/17 Of 2019, The Registered Trustees of Vignan Education Foundation Bangalore, India & Another Vs. National Development Corporation.** In both cases, the court was dealing with an application for stay of execution and it was the judgment debtor who was moving the court to stay execution. On the other hand, our situation is distinguishable for reasons that **one;** the application before me is not an application for stay of execution and **two;** and more important so, the applicant herein is not a judgment debtor, rather an objector claiming ownership on the properties alleged to belong to the judgment debtor. She is a third party claiming ownership of properties attached in execution hence in situations like the one at hand, determination of the real controversy of ownership is crucial before risking the attached property to the hands of a third person with regard to the execution proceedings.

I have also noted the arguments raised by Mr. Safari on the alleged fraud and non-existence of the 3rd respondent, with respect; those are issues to be determined on evidence in the main suit hence they cannot be used as supporting fact in granting the current application.

Coming back to the merits of this application, as per the submissions and according to the pending suit, the applicant prays for declaratory orders that the properties attached in the execution application are not properties of the third respondent/judgment debtor therein, rather they are the properties of the applicant. This court is called to investigate the ownership of the properties attached in execution application, therefore releasing the disputed vehicles to the Applicant while the issue of their ownership is the central issue of the dispute in the pending suit will be nothing but issuing the decree to the Applicant while the main suit is yet to be determined. The granting of this application will pre-empt the pending suit because the crucial issue in controversy would have been replaced by an insurance bond. Should the suit be determined in favour of the 3rd respondent, the amount of loss and injustice done to him will be irreparable as compared to what the applicant claims now. In conclusion therefore, the determination of the application at hand in favour of the applicant is to pre-empt the pending suit. Hence the application is devoid of merits. It is hereby dismissed with costs awarded to the 1st and 2nd respondents.

Dated at Dar-es-salaam this 13th day of March, 2023.



S.M. MAGHIMBI.
JUDGE.