

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM**

MISC. CIVIL APPLICATION NO. 90 OF 2023

MOHAMED ISLAM - NAHDI.....1ST APPLICANT
SALMIN SALEH AL-JABRY.....2ND APPLICANT
SALIM SALEH ALJABRY3RD APPLICANT
AHMED SHARIFF ALAWY.....4TH APPLICANT
AHMED ABDALLAH SAGGAF.....5TH APPLICANT

VERSUS

THE REGISTERED TRUSTEES OF AL-JUMAA

ARAB MOSQUE.1ST RESPONDENT
ADMINISTRATOR GENERAL.....2ND RESPONDENT
ATTORNEY GENERAL.....3RD RESPONDENT
ABDULAZIZ HASSAN.....4TH RESPONDENT
FAUZ ABOOD.....5TH RESPONDENT
ADIL DHIYEBI.....6TH RESPONDENT
ABDALLAH MUNIF.....7TH RESPONDENT

RULING

16th & 4th April 18, 2023

MKWIZU, J:-

By a chamber summons taken under sections 2(1),2(2) and (2(3) of the Judicature and Application of Laws Act, (Cap 358 RE 2019), Order XXXVII (2) (1) and section 95 of the Civil Procedure Code (R.E 2019), Applicants are seeking an injunctive order restraining the 1st, 4th, 5th, 6th and 7th Respondents from conducting General Meeting and Election at a date unknown to the Applicant's pending the expiry of ninety days' notice

issued to the 2nd and 3rd respondents and upon the disposition of an intended suit. The application is supported by a joint affidavit of the applicants.

In response to the application, counsel for the 1st, 4th, 5th, 6th, and 7th Respondents countered it through a preliminary objection predicated on the following grounds: -

1. The application is hopelessly time-barred under the provisions of paragraph 21 Part 111 Applications of the Schedule to the law of Limitation, Act Cap 89 RE 2019
2. The Application is bad in law and abuses the court process as it offends the ruling and order of this court (Hon Nkwabi J) dated 06th day of March 2023
3. The Application is misconceived and not tenable as it offends the mandatory provisions of section 26 of the Trustees Incorporation Act Cap 318 RE 2019, section 6(2) of the Government Proceedings Act, Cap 5 Re 2019 and order XXXVII Rule 2(1) of the Civil Procedure Code Cap 33 RE 2019.

At the hearing of the application, the applicants were represented by Mr. Yahaya Njama advocate, the 1st, 4th, 5th, 6th, and 7th Respondents were represented by Mr. Kasim Nyangarika learned to advocate while the 2nd and 3rd respondents had services of Mr. Edwin Joshua Webilo learned State Attorney.

Submitting in support of the 1st preliminary objection Mr. Nyangarika for the 1st, 4th, 5th, 6th, and 7th respondents said, the application is time-barred

under item 21, Part III of the schedule to the Law of Limitation Act. The grievance by the applicants, according to Mr. Nyangarika, rests on the permission given on 19/7/2022 and 29/7/2022 by the 2nd respondent to authorize the 1st respondent's intended General Meeting and Election exhibited by annexure L4 and L5 to the supporting affidavit. He was of the view that, in terms of the Law of Limitation Act, the application was to be filed within 60 days from the date of the complained order but contrary to that, the application at hand was filed on 9/3/2023, 223 days after the said permission which is beyond the 60 days prescribed by the law.

Regarding the second point of objection attacking the application for being bad in law, abuse of the court process, and offending the order of this court dated 6th March 2023, Mr. Nyangarika said, the application is speculative in nature as it requests the court to restrict the happening of the General Meeting and election which is to be conducted on an unknown date and upon determination of the suit which is yet to be filed in court. To him, this application contravenes this court's order dated 6/3/2023 directing the applicants to issue a 90 days' notice before the same is instituted and that its maintainability is questionable for there is no pending matter before the court to support the same in terms of order XXXVII Rule (2(1) of the CPC. He in support of his point cited the case of **Moshi Municipal Council V Malaki Mmari and 3 others**, Civil Appeal No 19/2015 (unreported).

The last P/O by Mr. Nyangarika challenges the application for contravening the mandatory provisions of section 26 of the Trustees

Incorporation Act, Cap 318 R: E 2019, Section 6 (2) of the Government Proceedings Act, Cap 5 R: E 2019 and Order XXXVII, Rule 2 (1) of the CPC. He said, Order XXXVII (2) (1) proviso restricts injunction against the government. The Government, particularly the 2nd respondent being a party in these proceedings renders the application for interim injunction untenable. He finally prayed for the striking out of the application with costs.

Mr. Edwin Webilo, the learned State Attorney was in support of the 1st preliminary objection raised. He contended that the application is time-barred because all acts complained of are dated 19/7/2022 and 26/7/2022 and the application was brought to the court beyond the 60 days stipulated by the law liable to be dismissed under section 3(1) of the Law of Limitation Act. He, in elaboration, said, there being no specific time prescribed for an application of this nature to be brought before the court, then the same ought to have been instituted within 60 days under item 21, part III of the schedule to the LLA from the date of the complained order. He supported his argument with the decision in **Israel Solomoni Kivuyo V Wayani Wangoi and another**, (1989) TLR 140.

On the other hand, Mr. Njama's advocate for the applicants opposed the objection. He said, all the preliminary objections are misconceived. To him, item 21 of part III of the schedule to the Law of Limitation Act relates to applications for which no specific time is provided by the law. He said the confusion began with the respondent's interpretation of annexures L4 and L5 to the applicant's affidavit relating them with the directives by the 2nd Respondent which is not the case. To him, the referred Annexure L4

is a letter by the applicants to the 2nd respondent complaining about the misconduct and violation of the 1st, 4th, 5th, 6th, and 7th respondents while Annexure L5 is the response of the 2nd respondent to the Applicants explaining his position on what the complained respondents were intending to do, by giving his opinion that the meeting that was organized by the complained respondent is proper and should go ahead. He contended that there were no directives given by the 2nd respondent to the 1st respondent and therefore time could not at any rate start to run from the dates indicated on annexures L4 and L5.

On the proposition that the application offends this court's order dated 6th March 2023 which relates more or less to the same issue in the second preliminary objection, Mr. Njama contended that the said order did nothing more than striking out the application for being incompetent.

On whether the application is speculative, he said, the 1, 4, 5, 6, and 7 respondents have shown a clear intention of going on with the meeting. The intended meeting is imminent and can go ahead at any time unless the respondent is restrained by an order of this court therefore the application is not speculative.

Regarding the third objection, Mr. Njama said, the application is seeking to restrain the decision of the 1, 4, 5, 6, and 7 to conduct the meeting and election and not the 2nd respondent's directives as suggested. While acknowledging the restriction under Rule 2(1) of order XXXVII of the CPC, Mr. Njama submitted that restriction in that proviso is only when the defendant is the Attorney General and it does not extend to other

defendants where the Attorney General is one of the defendants. He was of the view that an interim injunction order could be made to restrain other defendants other than the Attorney General as requested in this application. He as well prayed for the third objection to be overruled.

Mr. Nyangarika's rejoinder submissions are a repetition of his submissions in chief insisting that the contents of annexure L5 show that the intended meeting was a directive from the 2nd respondent.

The learned State Attorney also insisted on his earlier prayer to have the application dismissed for being time-barred. He went further to submit that Order XXXVII covers an interim injunction application in a situation where there is a pending suit and therefore, this application is unmaintainable.

I have considered both parties' submissions. Indeed, the first preliminary objection was brought in a court in a total misconception of the law regulating temporary injunction orders. It is settled law in our jurisdiction that interim orders maybe be made either before or after the institution of the suit. The filing of an interim injunction application after the institution of the suit is governed by Rules (1) and (2) of order XXXVII of the CPC while a temporary injunction issued before the institution of the main case commonly referred to as Mareva injunction, is governed by section 2(3) of the Judicature and Application of Laws Act which allows application of common law doctrine of equity and statutes of general application in force in England on the twenty-second day of July 1920 in our jurisdiction through which an interim injunction order before the

institution of a suit is permissible. There are authorities without numbers on this aspect including the decision of **Tanzania Sugar Producers Page 13 of 17 Association vs. The Ministry of Finance of the United Republic of Tanzania and The Attorney General**, Miscellaneous Civil Case No. 25 of 2003 and **Leonard Net Logistics Company Limited Vs. Tanzania Commercial Bank Limited & 3 others**, Misc. Civil Application No 585 of 2021(All unreported) to mention just a few.

Looking at the matter at hand, the applicant's application is for an interim injunction to restrain the 1st 4th, 5th, 6th, and 7th respondents from conducting the general meeting and election pending the expiry of 90 days' statutory notice of intention to sue the Government issued to the 2nd and 3rd respondent herein and this is exhibited by the citation of the sections 2(1),2 (2) and (2(3) of the Judicature and Application of Laws Act. This is nothing but a Mareva injunction falling within the ambits of section 2(3) of JALA and not the Law of the Limitation Act relied upon by the Respondent's counsels. The first preliminary objection is thus overruled.

The second issue to investigate is whether the application is bad in law and abuse of the court process for offending the ruling and order of this court (Hon Nkwabi J) dated the 06th day of March 2023. I had the advantage of reading the refereed decision by my brother Nkwabi J in Civil Cause No 324 of 2022. In that ruling the applicant's petition for declaratory orders against the respondents, Administrator General, and the Attorney General inclusive was struck out for failure to issue a

requisite 90 days' notice. In other words, applicants were, by that ruling directed to first issue 90 days' notice before instituting their petition in court and this is what the applicants did. I do not find any flouting by the applicant. The second preliminary objection is as well without merit.

The last point is whether in terms of order XXXVII Rule 2(1) of the Civil Procedure Code Cap 33 RE 2019, injunctive orders cannot be issued against the Government. Truly, the proviso to rule 2(1) of Order XXXVII restricts the issuance of temporary injunction orders where the Defendant is the Attorney General. The provisions read:

"2.-(1) In any suit for restraining the defendant from committing a breach of contract or another injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right:

Provided that, no application shall be made for a temporary injunction where the defendant is the Attorney General but, in such case, the plaintiff may apply to the court for an order declaratory of the rights of the parties."(Emphasis added)

Mr. Njama agrees to that position, but he said the restriction imposed in the proviso to rule 2(1) of order XXXVII is only applicable to the Attorney General as the defendant, not against other defendants. I agree. The restriction expressed in the above section is not absolute. The interim injunction order is aimed at protecting the applicant from irreparable injuries before his/her legal right is established as pronounced in **Atilio V Mbowe** (1969) HCD 284, so such a prayer may be permitted where the court's intervention is necessary and in an application of this nature, the circumstance of the case usually is key in deciding whether the prayed order is permissible or not.

In this application for instance, though Attorney General is a party, the order sought is directed to other respondents. I am in support of the Applicant's counsel submissions that, the restriction imposed by the proviso to rule 2(1) of order XXXVII does not extend to other *respondents*, where the Attorney General is among the listed respondents. This point also fails.

All said and done, all preliminary objections are overruled, and the matter is ordered to proceed on merit. Order accordingly.

Dated at Dar es Salaam, this 4th Day of April 2023



**E.Y. MKWIZU
JUDGE
4/04/2023**