

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MOSHI DISTRICT REGISTRY**

**AT MOSHI**

**MISC. CIVIL APPLICATION NO. 33 OF 2022**

(C/F Civil Case No. 2 of 2022)

**KAPESA BENEDICT MBERESERO A.K.A PATRICK BENEDICT**

**MBERESERO ..... APPLICANT**

**VERSUS**

**NGORIKA BUS TRANSPORT COMPANY LTD ..... 1<sup>ST</sup> RESPONDENT**

**THE REGISTERED TRUSTEES OF**

**ALI MBERESERO FOUNDATION.....2<sup>ND</sup> RESPONDENT (THIRD PARTY)**

**RULING**

01/08/2023 & 06/09/2023

**SIMFUKWE, J**

The applicant herein is seeking an order for temporary injunction pending determination of Civil Case No. 2 of 2022. The application was filed under **sections 68(e), 95 and Order XXXVII rule 1(a) and rule 4 of the Civil Procedure Code**, [CAP 33 R.E 2019] (the CPC) and any other enabling provision of the law. The applicant prayed for the following orders:

- 1. That this Honourable Court be pleased to issue an interim temporary injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, their family, agents, servant, or whomsoever*

*will be acting through them, from disposing, alienating, using and transferring the property subject of the suit to wit: buses and bank accounts number **017103004988** and **017061000430** in the name of **Ngorika Bus Transport Company Limited** at National Bank of Commerce, Moshi Branch together with account number **40203500002** in the name of **Ngorika Bus Transport Company Limited** at the **National Microfinance Bank, Mwanga Branch** until final determination of the main suit.*

- 2. That, this Honorable Court be pleased to issue an interim injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, their family, agents, servants, or whomsoever will be acting through them from changing, altering, appointing or whatsoever change the management of the 1<sup>st</sup> Respondent until final determination of the main suit.*
- 3. Costs of this application.*
- 4. Any other relief(s) this Honorable Court may deem it fit (sic) and just to grant.*

The application was supported by an affidavit sworn by the applicant which was contested by the joint counter affidavit of the respondents deponed by Charles Benedict Mberesero and Sabath Benedict Mberesero.

During the hearing, the applicant was represented by Mr. Daniel Lyimo, learned counsel while the 1<sup>st</sup> respondent was represented by Mr. Dickson Ngowi, learned counsel and the 2<sup>nd</sup> respondent was represented by the learned advocate Ms. Sikitu Mtikile.

Mr. Lyimo for the applicant on the outset narrated the historical background of the matter which I will not reproduce but I will consider the same where necessary.

In so far as the application for temporary injunction is concerned, Mr. Lyimo submitted that the applicant prayed for an order of temporary injunction against the Respondents and her agents from disposing, alienating, using and transferring the property subject of the main suit to wit buses or scrapper, bank account number 017103004988 and 017061000430 in the name of Ngorika Bus Transport Company Limited at National Bank of Commerce, Moshi Branch, together with account number 40203500002 in the name of the 2<sup>nd</sup> Respondent at National Microfinance Bank Mwanga Branch until final determination of the main suit to wit Civil Case Number 2 of 2022.

The learned advocate elaborated that before this court, the 1<sup>st</sup> Respondent instituted a suit against the Applicant to wit Civil Case No. 2 of 2022 claiming for an order against the Applicant to hand over ten buses, parking yards at Moshi, Toyota Land cruiser, motorcycle and truck all properties of the 1<sup>st</sup> Respondent herein. Also, the Applicant to render true account of profit from operating buses for the period of six years and seven months specifically from June 2015 to January 2022 together with payment of TZS 765,000,000 being unremitted profit and general damages. That, the applicant is seeking to restrain the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's agents and family from disposing, transferring or operating the mentioned accounts above until hearing and determination of the main suit.

Mr. Lyimo narrated to the court the misunderstandings of the family and argued that there are triable issues for determination on the main suit regarding legal status of the 1<sup>st</sup> Respondent's Company especially on the transmission of shares, operation and management of the company.

On the issue regarding which party will suffer more hardship if the application at hand will be granted, Mr. Lyimo elaborated that the 1<sup>st</sup> respondent managed to cause alteration on the management of the 1<sup>st</sup> Respondent Company that is not in operation, change of account signatory by terminating the Applicant as the only surviving signatory and appoint other signatories to operate account for the 1<sup>st</sup> Respondent Company without notifying the Applicant or other members of the family who are beneficiaries of the late Ali Mberesero. He argued that this act will not only cause hardships to the Applicant alone, but to the entire family at large.

The learned advocate for the applicant insisted that according to the facts narrated above and the affidavit in support of the application together with the filed written statement of defence, there is no way the 1<sup>st</sup> Respondent will succeed on the dubious claims presented against the Applicant. That, the Applicant herein has a great chance of success in the main suit as the claims made therein are dubious and of no legal merit.

To cement the above conditions, the learned advocate referred to the landmark case of **Atilio V. Mbowe (1969) HCD 284** together with the case of **Alloys Antony Duwe V. Ally Juu ya Watu (1969) HCD 268**, which set conditions for the court to consider when granting an order of temporary injunction. He articulated that the said cases insisted on the maintenance of status quo until final determination of the suit.

Mr. Lyimo notified the court that according to what he submitted together with the affidavit in support of the application, the bank accounts which are fixed deposit are not in operation by either of the parties. That, after the alteration and forgery by some members of the 1<sup>st</sup> Respondent Company the incident was reported to the Police station and an order was given that the accounts be freezed pending investigation. Also, the members of the family are still fighting regarding administration of the estates of the late Ali Mberesero, Stanley Mberesero and Stephen Mberesero who were the shareholders and directors of the 1<sup>st</sup> Respondent Company.

In addition, Mr. Lyimo specified that if the application at hand will not be granted, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents who are illegally appointed signatories will get access to the accounts and continue with embezzlement of the funds that will cause hardship to the Applicant and the family at large.

In his conclusion, Mr. Lyimo invited the court to go through the pleadings filed in this court, the case cited above together with the legal arguments made therein and grant the application on merit. Apart from that, the learned advocate informed this court that the base line of the matter at hand is from probate and administration of the estates of the late Ali Mberesero whereby inventory was filed illegally after institution of this matter which jeopardized the defence of the Applicant to the main suit.

In reply, the learned advocates for the 1<sup>st</sup> and 2<sup>nd</sup> respondents stated that the present application contains superfluous narrations and submissions from the bar and it does not address the principles governing grant of an order of temporary injunction. Mr. Ngowi and Ms. Sikitu opted to address

the issue as to whether the applicant's application is meritorious/ it has met the three tests adduced in the case of **Atilio vs Mbowe** (supra) while considering the affidavit, counter affidavit and their annexures. They adopted the counter affidavit sworn jointly by Charles Benedict Mberesero and Sabath Benedict Mberesero to form part of their submission.

The learned counsels continued to state that it is settled principle of law that **section 68 (e)** and **section 95 of the CPC** cannot be relied upon to grant prayers sought by the Applicant because they are only summarizing the general powers of court in regard to interlocutory proceedings. They referred to the case of **Tanzania Electric Supply Company TANESCO vs Independent Power Tanzania Limited (IPTL) and two others [2000] TLR 324** to support their argument.

While making reference to **Order XXXVII Rule 1 (a) of the CPC**, the learned advocates submitted that for the order of injunction to be issued two conditions must be met; one, there must be a pending suit; and two, the order is granted on the property in dispute and not otherwise.

In respect of the alleged Civil Case No. 2 of 2022, the learned advocates affirmed that the said case was filed by the first Respondent against the Applicant herein and the subject matter in dispute in the said case is return of ten buses and other vehicles held by the Applicant, parking yard, to render true account of profit to operate the buses and payment of general and specific damages. That, the named Bank accounts together with the management of the first Respondent is not part of the property in dispute. Therefore, they opined that the present matter has no legs to stand as there is no pending suit filed by the Applicant litigating over operation or running of bank accounts.

Also, it was observed that since the applicant did not comply with **Oder XXXVII Rule 1 (a) of the CPC**, then there is no citation of enabling provision of the law for the orders sought to be granted, which is a good cause to reject this application with costs. The learned counsels cemented their point with the case of **Akiley Fulanzis Msimbe & 130 others v. Jane Mwakatuma (Administratrix of the Estate of the late Emmanuel Ephraim Mwakatuma and Kishe Auction Mart Co. LTD**, Misc. Land Application No. 502 of 2022.

Submitting under the title **Literature and principles governing grant of temporary injunction**, the learned advocates referred to **Mullar, The Code of Civil Procedure, 16<sup>th</sup> Edition, Volume 4**, at Page 3705 which states that:

*"Granting of an interim injunction is purely within the discretion of the court, but the discretion has to be exercised in accordance with the sound judicial principles. The principles which govern the exercise of the discretion are that the party claiming the interim injunction should establish that it has a prima facie case, that if an injunction is not granted that party is likely to suffer a great mischief and that interference of the court is necessary to protect the party from an irreparable injury. If the plaintiff does not file an important document the court may refuse to grant an injunction. The court cannot grant an injunction merely on the basis of pleadings."*

It was further submitted that the above principle was stated in the famous case of **Atilio vs Mbowe** (supra) which was later followed and adopted by this court and the Court of Appeal in the case of **Abdi Ally Salehe vs Asac Care Unit Limited and 2 others, Civil Revision No. 3 of 2012**

as quoted in the High Court case of **Hussein Vahaye and 4 others v Mbarali District Council and Another**, Misc. Civil Application No. 18 of 2022, [Unreported].

The learned advocates expounded further that, conditions for granting temporary injunction are: **First**, the plaintiff must show a prima facie case with probability of success. **Two**, that, the applicant will suffer irreparable loss if injunction is not granted, such loss being incapable of being compensated by an award of damages; and if in doubts; **three**, the balance of inconvenience is in favour of the party who will suffer inconvenience in the event the injunction is or is not granted.

Mr. Ngowi and Ms. Sikitu highlighted that the above conditions must exist and be met cumulatively and not otherwise by the Applicant. In the present matter, they challenged the applicant's affidavit with its annexures for failure to state the said conditions.

Submitting on whether the plaintiff has shown a prima facie case with probability of success, the learned advocates averred that the Applicant has failed to establish in his affidavit a prima facie case or a serious question to be tried and the applicant's likelihood of succeeding in a pending suit, taking in mind that there is no pending suit filed since the pending suit is filed by the 1<sup>st</sup> Respondent. That, in his affidavit, the applicant has not established what interest is he holding worthy protection vis-a-vis restraint of operation of Bank accounts owned and operated by the 1<sup>st</sup> Respondent. That, the applicant does not dispute the 1<sup>st</sup> Respondent to be the lawful owner of the vehicles mentioned in Civil Case No. 2 of 2022.



Responding to the argument that there are triable issues for determination on the main suit regarding legal status of the first Respondent's Company especially on the transmission of shares, operation and management of the company; the learned advocates believed that this argument lacks merit because of the following reasons: ***First***, the submission of the applicant are from the bar and submissions from the bar are not evidence hence, they cannot be relied upon as stated in the case of **The Registered Trustees of Archdiocese of Dar es Salaam vs. Chairman Bunju Village and Eleven Others, Civil Appeal No. 147 of 2006**. ***Second***, there is no pending suit in any court filed by the Applicant or the Respondents litigating on the legal status of the 1<sup>st</sup> Respondent, transfer of shares or management. ***Three***, the Applicant is not and or he has never been the director or shareholder of the 1<sup>st</sup> Respondent because according to Annexure KBM-2 attached to the affidavit, directors of the 1<sup>st</sup> Respondent are Mariam Ally Simbano, Lilian Stephen Mberesero, Charles Benedict Mberesero and Sabath Benedict Mberesero. Whereas, the shareholders are The Registered Trustees of Ali Mberesero Foundation, Benedict Stanley Mberesero, Lilian Stephen Mberesero, Irene Stephen Mberesero, Jennifer Stephen Mberesero, Mariam Ally Simbano and Emmanuel Stephen Mberesero. Thus, the Applicant is neither a director nor shareholder and has failed to establish prima facie case/ cause of action against the 1<sup>st</sup> Respondent or establish that there are triable issues to be determined by this court.

In respect of the second condition on who will suffer irreparable loss if injunction is not granted, Mr. Ngowi and Ms. Sikitu averred that the applicant's affidavit lacks material facts and he did not submit anything regarding this condition in his written submission.

However, the learned advocates referred to paragraph 4 of the counter affidavit where it was stated that the Applicant was an employee of the 1<sup>st</sup> Respondent as transport manager until 2017 when he was terminated and notice of his termination was communicated/ circulated to the public via newspaper annexure KBM-1 attached to the affidavit. That, from 2017 up to December 2022 when the applicant filed this application, it is five years gap and the applicant has never challenged his termination in any court of law. That, the Applicant's affidavit did not establish what interest he holds which will be incapable of being compensated by damages if the order of injunction is not granted. Thus, the applicant did not meet the second condition as established in **Atilio' s** case (Supra).

Submitting on the third condition in respect of balance of inconvenience, Mr. Ngowi and Ms. Sikitu disputed the fact that it is the applicant who will suffer more hardship because the 1<sup>st</sup> Respondent has made changes of the account signatory, alteration of the management of the 1<sup>st</sup> Respondent Company that is not operational and termination of the Applicant as company signatory. The basis of disputing this argument was that the applicant's argument were submissions from the bar which cannot be relied upon. That, in his affidavit the applicant did not state to be signatory of which bank account and if the 1<sup>st</sup> Respondent Company is not operational. It was observed that introducing these facts in the submission is not proper and they cannot be relied upon as stated in the case of **Registered Trustees of Archdiocese of Dar es Salaam** (supra).

It was further submitted that since the applicant has failed to establish how he will suffer irreparable loss that cannot be compensated by monetary terms, then it is the Respondents who will suffer more if the

application is granted since the Applicant is in possession of ten buses and he has grounded them unjustifiably leading the 1<sup>st</sup> Respondent to institute Civil Case No. 2 of 2022 pending in this court.

Mr. Ngowi and Ms Sikitu maintained that granting this order means that the 1<sup>st</sup> Respondent's other activities have to come to an end as no salaries of employees such as security guards and other staffs will be paid, utilities will not be paid, government taxes will not be paid on time, payment of third-party suppliers who are in contract with the 1<sup>st</sup> Respondent will not be paid as well. Thus, it is the 1<sup>st</sup> Respondent who stands to suffer more if the application is granted. That, the balance of convenience lies on the 1<sup>st</sup> Respondent's side.

It was concluded that the applicant has not established the three principles for granting temporary injunction and the application is incompetent before the Court since it did not meet legal requirement of **Order XXXVII Rule 1 (a) of the CPC**. The learned counsels prayed the application to be strike out with costs for want of merit.

I have examined the submissions of the learned counsels of both parties as well as their respective pleadings, the issue for determination is *whether the applicant has established the prescribed conditions for the temporary injunction to be granted*.

It is evident that the enabling provisions cited by the applicant do not establish factors to be considered by the court when entertaining application of temporary injunction. In interpreting the above provisions, courts have in numerous decisions established three main factors to be considered when granting temporary injunction as established in the landmark case of **ATILIO** (supra) which was referred

by the learned advocates of both parties. For instance, in the case of **Abdi Ally Salehe vs ASAC Care Unit Limited & Others** (supra) the Court of Appeal held that:

*"Once the court finds that there is a prima facie case, it should then go on to investigate whether the applicant stands to suffer irreparable loss, not capable of being atoned for by way of damages. There, the applicant is expected to show that, unless the court intervenes by way of injunction, his position will in some way be changed for the worse; that he will suffer damage as a consequence of the plaintiff's action or omission, provided that the threatened damage is serious, not trivial or minor, illusory, insignificant, or technical only. The risk must be in respect of a future damage..."*

Therefore, in dealing with this application, I will be guided by the following three factors as established in the case of **Atilio** (supra) to wit:

- 1. Whether there is a serious issue to be tried.*
- 2. Whether the court's interference is necessary to protect the applicant from irreparable loss.*
- 3. Whether on balance of convenience, there will be greater hardship and mischief that will be suffered by the applicant from withholding the injunction than will be suffered by the respondent from granting it.*

Starting with the first question on whether there is a serious issue to be tried, according to paragraph 2 of the applicant's affidavit which was admitted under paragraph 3 of the respondents' counter affidavit, there

is a pending case before this court which is **Civil Case No. 2 of 2022** in which the applicant has been sued by the 1<sup>st</sup> respondent which is yet to be determined. I am of settled opinion that the said case suggests that there are serious and arguable issues between the parties which are to be tried by the Court.

The respondents' advocates have tried to persuade this court that the accounts sought to be restrained are not part of the dispute in the main suit and that the pending case has been filed by the 1<sup>st</sup> respondent. With due respect to learned counsels, the application for temporary injunction can be brought by either the defendant or the plaintiff, what is required is for the applicant to establish the factors for the same to be granted. There is no law and they failed to cite any which requires only the plaintiff to apply for temporary injunction.

In respect of the argument that the said accounts are not part of the subject matter in the main case, and that the applicant has not been the director or shareholder of the 1<sup>st</sup> Respondent, this argument proves to me that there are arguable issues to be discussed in the main case. Also, according to the chamber summons and paragraph 6 of the applicant's affidavit, the named accounts which the applicant prayed for restraint order, are in the names of the 1<sup>st</sup> respondent which the respondents require true accounts of the same from the applicant in the main suit. In the circumstances, I am of considered opinion that there are triable issues.

Concerning the second condition whether irreparable loss will be suffered by the applicant, **Order XXXVII Rule 1 (a) of the Civil Procedure Code**, provides that:

*"1. 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 or of suffering loss of value by reason of its continued use by any party to the suit, or wrongly sold in execution of a decree;*

*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."*

In the instant matter, the properties which are subject of the injunction and which the applicant is required to hand over in the main suit are ten buses, parking shades at Moshi, Toyota Landcruiser, motorcycle and truck. It has been deponed under paragraph 4 of the applicant's affidavit that the applicant was once a manager of the 1<sup>st</sup> respondent until 2017 when he was terminated from management. In the main case (Civil Case No. 2 of 2022) the 1<sup>st</sup> respondent requires the applicant to hand over some of the properties including tendering true account of profit. Since in the main case, the applicant is required to hand over the said properties and give account of the same, I am convinced that it is prudent for the status quo to be maintained pending determination of Civil Case No. 2 of 2022 in order to avoid pre-empting the main case. I am inspired with what is stated in **SARKAR ON CODE OF CIVIL PROCEDURE**, 10<sup>th</sup> Edition Volume 2, at page 2011 that:

*"In deciding application for interim injunction, the Court is to see only prima facie case, and not to record finding on the main controversy involved in the suit prejudging issue in the main suit, in the latter event the order is liable to be set aside."*

On the last question as to whether there will be greater hardship to be suffered by the applicant by withholding the injunction than will be suffered by the respondents if the application is granted; I think, the applicant may suffer irreparable loss if this application will not be granted on the reason that the alleged properties which he is required to give account are associated in the main case.

It has been submitted by the respondents' advocates at page 6 of their written reply submission that the applicant is in possession of the said properties which triggered the first respondent to institute the main case against him. Surprisingly, the learned advocates asserted that the first respondent will suffer more as he will fail to pay some staffs salaries, utilities and taxes. Their two statements are contradictory because it is impossible for the 1<sup>st</sup> respondent to generate income on the properties which he alleged are in the hands of the applicant. I am of considered opinion that it is in the interests of justice for the injunction to be granted pending determination of the main case in order to prevent it from being nugatory.

For the foregoing reasons, I hereby grant temporary injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, their families, agents, servants, or whomsoever will be acting on their behalf, from disposing, alienating, using and transferring the property subject of the suit to with: buses and

bank accounts number 017103004988 and 017061000430 in the name of Ngorika Bus Transport Company Limited at National Bank of Commerce, Moshi Branch together with account number 40203500002 in the name of Ngorika Bus Transport Company Limited at National Microfinance Bank, Mwanga Branch until final determination of the main suit. Also, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, their families, agents, servants, or whomsoever will be acting on their behalf, are hereby restrained from altering, appointing or whatsoever change of the management of the 1<sup>st</sup> Respondent until final determination of the main suit. No order as to costs.

It is so ordered.

Dated and delivered at Moshi this 06<sup>th</sup> day of September 2023.



X

S. H. SIMFUKWE

JUDGE

Signed by: S. H. SIMFUKWE

**06/09/2023**