IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM SUB REGISTRY

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 26816 OF 2023
(Arising from Civil Case No. 26147 of 2023)

AMARACHI INVESTMENT COMPANY LIMITED……APPLICANT

VERSUS

NECST MOTORS TANZANIA LIMITED……1ST RESPONDENT

BILO STAR DEBT COLLECTORS CO. LTD……2ND RESPONDENT

RULING

Date of last order: 2nd May 2024
Date of Ruling: 13th May 2024

MTEMBWA, J.:

Under ***Sections 68 (e), 95 and Order XXXVII Rule 1 (a) and 2 (1) of the Civil Procedure Code Act, Cap 33, RE 2002 (Now RE 2019),*** the Applicant is seeking for temporary injunction restraining the Respondents, their servants, agents, and other person(s) deriving title from them, from entering, mortgaging, selling or order to sale by auction, appoint receiver, leasing or exercising any legal remedy against the Applicant's properties namely **SDLG Motor Grader** with chassis **No. VLGG9190TL0600931**, **SDLG Motor**

Grader with chassis **No. VLGG9190PL0600932**, **SDLG Compactor** with chassis **No. VLGR8140AL0600424**, **SDLG Compactor** with chassis **No. VLGR8140PL0600397** and **SDLG Wheel Loader No. T 488 DTQ** with chassis **No. MMN800900700** of the Plaintiff pending determination of the main suit.

The Applicant is also in addition seeking for an order restraining the 1st Respondent from counting or calculating the interest pending the determination of the main suit. The Application was supported by an Affidavit of **Mr. Benard Akilimali Temu** and the Supplementary Affidavit of **Mr. Brian Mwasa.**

Before I embark to the crux of the matter, I find it opt to narrate the factual background information, albeit briefly, as revealed by the supporting Affidavits. That, on the **17th November 2021,** the 1st Respondent and the Applicant entered into the contract **No. 2G9190F-2021** in which the former sold to the later the motor machines described as **SDLG Motor Grader** with chassis No. **VLGG9190TL0600931** and **SDLG Motor Grader** with chassis No **VLGG9190PL0600932** for the consideration of **USD 230,000/=.** Parties agreed that 20% of the total purchase price shall be paid before the delivery of the machines and the remaining be paid in twelve (12) equal installments up to **20th August 2022.**

That, following a remarkable repayment, promptness and swiftness, the 1st Respondent decided to enter into another contract with the Applicant herein dated **12th August 2022** in which the former herein agreed to sell to the later another two motor machines described as **SDLG Compactor** with chassis **No. VLGR8140AL0600424** and **SDLG Compactor** with **chassis No. VLGR8140PL0600397.** It was agreed that the 20% of the total purchase price be paid upfront before the delivery of the machines and the remaining 80% be paid in six (6) equal installments up to **30th August 2022.**

That, the Applicant successfully and in good time paid the installments as agreed until sometimes on January 2023 when she experienced unpleasant and harsh business environment, which was caused among other things by the outbreak of the coronavirus pandemic (COVID 19) and thus failed to remit some of the installments with a total of approximately **USD 76,000/=.** The facts reveal further that, by 7th December 2022, the Applicant had already discharged her obligations with regard to the first contract.

That on the **13th September 2023**, the applicant was served with a contract termination notice in respect of both contracts. Subsequently, on the **22nd September 2023**, the 1st Respondent

directed the 2nd Respondent to commence recovery process against the Applicant by seizing the Applicant's motor machines to realize the sum of **USD 145,854.95.** Consequently, the Applicant's motor machines described as **SDLG Motor Grader** with chassis No. **VLGG9190TL0600931, SDLG Motor Grader** with chassis No. **VLGG9190PL0600932, SDLG Compactor** with chassis No**. VLGR8140AL0600424**, **SDLG Compactor** with chassis **No. VLGR 8140PL0600397** and **Wheel Loader No. T 488 DTQ** with chassis **No. MMN800900700**.

It was revealed further that, having seized the said motor machines, the 2nd Respondent delivered them to the 1st Respondent. Furthermore, it was alleged that, the seizure of the Wheel Loader with registration No. T 488 DTQ was unlawful as it was not part of the Contracts with the 1st Respondent. That the seizure generally resulted into financial loss. The Respondents forcefully resisted the Application.

On **25th March 2024** when the matter was placed before me for orders, parties agreed to argue this Application by way of written submissions. I passed through the records and noted that, the parties adhered to the agreed schedule which I personally recommend. Initially however, on **19th December 2023**, I ordered parties to

maintain the status quo pending determination of this Application interpaties.

In the conduct of this Application by way of written submissions, **Ms. Ernestilla Bahati** argued for and on behalf of the Applicant whereas **Mr. Mohamed Muya** argued for and on behalf of the Respondents.

Taking the podium and having prefaced on what transpired under contract No. 2G9190F-2021 of November 2021 and the one dated 12th August 2022, Ms. Bahati submitted that, the Applicant discharged her obligations under the November 2021 contract by paying a total **of USD 250,365.66** as per annexure AMA 5 and paid further a total of **USD 64,828,26** in respect of the August 2022 Contract. In that respect, the remained outstanding balance was **USD 76,000**.

Ms. Bahati continued to note that, the 1st Respondent sold to the Applicant two machines at **USD 248,380** as per the 2021 Contract and acknowledged receipt of **USD 222,365.** She referred this Court to payment proof attached to the supplementary Affidavit. That, despite acknowledging receipt of the said sum, the 1st Respondent has repossessed three machines described as SDLG Compactor T898 EAE, Motor Grader registered as T654 DXX and a wheel loader registered

as T488 DTQ. She contended further that, a Wheel Loader registered as T488 DTQ does not fall under the ambit of any of the two contracts.

Ms. Bahati continued to submit that, the Applicant herein seeks for orders to restrain the Respondents and their associates from selling the machines that are in their possession as well as other machines that formed part of the two Agreements subject of this Application. That, the Applicant further seeks for orders to restrain the Respondents from calculating interests whilst this Application as well as the main suit remain pending before this Honourable Court. She added further that, such powers are bestowed to this Court under ***sections 68 (e) and 95 and Order 35 Rule (1) (a) and (2) (1) of the Civil Procedure Code (supra).***

Ms. Bahati indicated three elements to be considered before the Application for injunction is granted as outlined in the case of ***Atilio Vs. Mbowe (1969) IICD 284***. These are; **one**, there must be a prima facie case; **two**, there must be presumed irreparable injury and **three**, the balance of convenience. She added that, the said elements were reinstated in the case of ***Jaluma General Supplies Limited and Two Others Vs. International Commercial Bank of Tanzania, Miscellaneous Civil Application No. 175 of 2022***, the Court having quoted a book titled **Sohoni Law of Injunctions,**

Second Edition 2003, articulated the same principles. She also cited the case of ***Agency Cargo International Vs. Eurafrican Bank (T) Ltd, Civil Case No. 44 of 1998, High Court at Dar es Salaam***.

Ms. Bahati substituted the Applicant's claim in view of the principles established in the case of ***Jaluma Enterprises*** which is the replica of the submissions above. I will therefore not discuss the submissions any further. She however cited the cases of ***Kaarc v. General Manager Mara Cooperation Union 1924 (1987) TLR 17*** and ***the Registered Trustees of the Evangelical Lutheran Church in Tanzania v. Commercial Bank of Africa, Misc. Land Application No. 1071 of 2017***. Lastly, she implored this Court to grant the Application.

In rebuttal, Mr. Muya submitted that, the Applicant has failed to satisfy the three principles established in the case of ***Atilio vs Mbowe (1968) HCD 284*** and he implored this Court to disregard this Application. He added that, the first principle relates to the determination of whether there is a serious question to be tried on the facts alleged and the probability that the plaintiff (Applicant in this Application) will be entitled to the reliefs prayed. He continued to submit in length that, since the Applicant is not denying to have failed to service the agreed contracts resulting into breach and since she has

admitted to have been still indebted to some amount, there is no serious question to be tried and a possibility that the reliefs claimed will be in her favour.

Mr. Muya argued further that, this Honorable Court has no mandate to interfere with the agreed terms and conditions of the contract freely entered into by the parties. He cited the case of ***Harold Sekiete Levira & Florence Kokujama Mkyanuzi vs. African Banking Corporation Tanzania Limited (Bank ZBC) & Nkya Company Limited, Civil Appeal No. 46 of 2022, Court of Appeal of Tanzania at Dar es Salaam*** where it was observed that, once parties competent to contract for a lawful consideration with a lawful object entered into an agreement freely, the contract entered become sacrosanct. That is, the parties to the contract become bound by the terms and conditions stipulated and each has to fulfil his/ her part of bargain. Neither a third part nor courts should Interpolate or tamper with the terms and condition therein.

Mr. Muya noted further that, the courts have been consistently not ready to interfere with the freely executed agreement where no sign of fraud or misrepresentation. He said, in this case, there is no fraud exhibited. He cited the case ***Abualy Alibhai Aziz Vs. Bhatia Brothers Ltd [2000] TLR 288*** where it was observed that, the

principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement.

As to whether the Court's interference is necessary to protect the applicant from the kind of injury which may be irreparable before her rights are established, Mr. Muya argued that, the Applicant has failed to show how she will suffer irreparable loss if this application is refused. He added further that, the argument would be different had the Applicant managed to service the contract yet failed to access the said motor machines paid for. He continued to argue that, if this Application is granted, that mean the Applicant will access the said vehicles thereby causing irreparable loss to the 1st Respondent.

As to whether on balance of probability there will be hardship and mischief suffered by the Applicant than would be the case on the part of the 1st Respondent, Mr. Muya observed that, the applicant has failed to demonstrate how she will suffer if the application is not granted. He added that, the arguments that the first Respondent is in possession of the machine is immaterial as only two of them were repossessed out of four. He was of the view that, the 1st Respondent repossessed the machines due to reason that the Applicant defaulted

payment of the contractual price. As such, if this Application is granted, the 1st Respondent stands to suffer more than the Applicant.

On serious note, Mr. Muya cited the case of ***Lekuni General Enterprises Co. Ltd vs NMB Pank PLC, the Miscellaneous Civil Application No. 323 of 2023*** where it was observed that, temporary injunctions are discretionary remedies and that courts cannot grant them even when it is convenient to do so if the applicable principles enumerated above have not been fully met. He contended further that, since the Applicant has admitted to have failed to satisfy the contractual terms, there is no prima facie case established and thus the 1st Respondent was justified to repossess the motor vehicles. Lastly, He beseeched this Court to dismiss the Application.

In rejoinder, Ms. Bahati insisted that, there is a serious issue to be tried. She continued to noted that, the Applicant entered into two agreements with the 1st Respondent whereas the first one was executed on the 17th November 2021 for the total consideration payment of **USD 230,000** where **USD 46,000** was paid upfront and the balance of **USD 184,000** was agreed to be paid in twelve (12) equal instalments. She added further that, by December 2022 the total sum of **USD 250,365.66** had already been paid to the 1st Respondent in respect of the **SDGL Motor Grader** with Chassis Number

VLGG9190TL0600931 and **SDGL Motor Grader** with Chassis Number **VLG190TL0600932.** She referred this Court to **Annexture AMA-5** to the Supplementary Affidavit.

As for the second one, Ms. Bahati submitted that, the second contract was executed on 12th August 2022 for a total consideration of **USD 140,246.00** and USD 28,049.20 was paid upfront and the remaining **USD 112,196.80** was agreed to be paid in six equal instalments. At the time of insurance of the notice of termination by the 1st Respondent the total outstanding balance remained was **USD 76,000**.

That, to surprise of the most, the Applicant's machines in respect of the first contract were seized by the 2nd Respondent under the instructions of the 1st Respondent while the contract price was fully paid and discharged in December 2022 as per Annexture AMA-5 to Supplementary affidavit. She added that, a Wheel Loader with **Registration No. T488 DTQ** was not part of any of the two contracts.

Ms. Bahati submitted further that, the Agreement entered into by the parties allows for repossession of the machines in case of delay or non-payment. However, before initiating repossession, it is crucial to consider the extent of such action. That, the 1st Respondent

acknowledged receipt of USD 222,365 for the first Contract but then, proceeded to seize three machines belonging to the Applicant, one of which was not part of any of the two contracts. That repossessing three machines to settle an outstanding amount of **USD 76,417** was both unlawful and unjustifiable. She added that, the 1st Respondent seized the Applicant's machines, which are not part of the August 2022 contract. She invited this Court to intervene to protect the Applicant from the prospect of sell.

As to whether the Applicant will suffer irreparable loss, Ms. Bahati submitted that, the said wheel loader was purchased by the Applicant through a separate transaction and it is thus not part of the two contracts. She added further that, the applicant stands to suffer loss of income for each day the wheel loader is held because it was leased to a third part for a consideration of Tsh. 800,000/= per day as per Annexure AMA-4 to the supplementary affidavit. In the circumstance therefore, she submitted that, the Applicant will suffer more loss is this Application is not granted. Lastly, she beseeched this Court to grant the Application.

Having heard the rival arguments by the parties, the question before me is whether temporary or interlocutory injunction should be

granted under **order *37 rule (1) (a) and (2) of the Civil Procedure Code (supra)*.**

At this juncture, I feel instructive to restate the principles governing an order for Temporary Injunction which are generally founded under three main grounds. **Firstly**, the Applicant should show a prima facie case with a probability of success against the Respondent. **Secondly**, the Applicant should prove that if the application is not granted, the injury that would be suffered would be irreparable by way of damages and **third** principle is on the balance of convenience, that the Applicant would stand to suffer greater hardship if the order is refused than what the Respondent would suffer if granted. These principles have been cherished in a number of decisions including the famous case of ***Atilio Vs. Mbowe (1969) HCD 284*** which was correctly cited to me by both counsels.

According to **Mulla** in his cerebrated Book titled **"the Code of Civil Procedure"** 17th edition, at page 258;

> *At the stage of deciding the application for temporary injunction, **the court is not required to go into the merits in details**. What the Court has to examine is (i) the plaintiff has a prima facie case to go for trial; (ii) the protection is necessary from that species of injuries known as irreparable before his legal right can be established; and (iii) that the mischief of inconvenience likely to arise from withholding*

injunction will be greater than what is likely to arise from granting it. ***Where no violation of the right of the Plaintiff is involved, the interim injunction should not be granted.***

(Emphasis mine)

In an Indian case of ***Subodh Gopal Bose Vs. Province of Bihar, AIR 1950,*** the supreme Court of India observed that, one of those principles is that the Court, in granting a temporary injunction must first see that there is a bonafide contention between the parties, and then, on which side, in the event of success, will lie the balance of inconvenience if the injunction does not issue. In my strict conviction however, in some circumstances, there is no need that all above principles be met cumulatively. For purposes of this Application, I will apply them accordingly.

For an application of this nature, the first test is whether there is a prima facie case with a probability of success. Before I proceed however, I should explain what amounts to it. At page 263, **Mulla** (supra) observes as follows;

A prima facie case implies the probability of the plaintiff obtaining a relief on the materials places before the Court. Every piece of the evidence produces by either party has to be taken into consideration in deciding the existence of a prima facie case to justify issuance of a temporary injunction.

> *In order to find a prima facie case or a serious or substantial question involved in a case, it may be examined from two points of view. One is that it should appear to the court that on the facts stated in the Plaint, the Plaintiff has chance to get a decree.*

The Applicant's main complains are; **first**, that at the issuance of the notice of termination, the total sum of **USD 250,365.66** had already been paid to the 1st Respondent in respect of the **SDGL Motor Grader** with Chassis Number **VLGG9190TL0600931** and **SDGL Motor Grader** with Chassis Number **VLG190TL0600932** in view of **Annexture AMA-5** to the Supplementary Affidavit. According to the Applicant, the first contract was satisfied by December 2022 and thus she was discharged from the contractual obligations.

Further, the Applicant observed that, the second contract was executed on the 12lh August 2022 for a total consideration of **USD 140,246.00** whereby **USD 28,049.20** was paid upfront and the remaining **USD 112,196.80** was agreed to be paid in six equal installments. It was submitted further that, at the time of insurance of the notice of termination by the 2nd Respondent the total outstanding balance was **USD 76,000.** Therefore, she observed that, the seizure was unlawful considering the outstanding balance.

In his part, the Respondents' counsel observed that, the arguments that the first Respondent is in possession of the machine is immaterial as only two of them were repossessed out of four. He was of the view that, the 1st Respondent repossessed the machines due to reason that the Applicant defaulted payment of the contractual price.

From what I have observed, the parties are not at issue with regard to the 1st Respondent's powers to repossess the machines once there is none or late payments. The complaint by the Applicant is that the whole of the contractual price under the first contract was paid in full as such there was no point of seizing the **SDGL Motor Grader** with Chassis Number **VLGG9190TL0600931** and **SDGL Motor Grader** with Chassis Number **VLG190TL0600932.** She attached to the supplementary Affidavit Annexure AMA -5 as proof of payment. The Respondents' counsel insisted that, the applicant is still indebted to the sum of **Tsh. 515,517.906/=.** He faulted the sum of USD 250,365.66 as full satisfaction of the first contract as the statement was prepared by the Applicant herself.

From the above, the point of contention between the parties is on the outstanding amount arising from the two contracts. It could appear also the Respondents are at issue with regard to satisfaction of the first contract. The lawfulness of attaching or repossessing the

two mentioned machines depends on the determination of the issue relating to outstanding amount in respect to each of the executed contract. Although I am not entitled to discuss the inner part of the main case, it suffices here to note that there is serious question or issue to be discussed in the main case. This is because the parties are at issue with regard to the outstanding amount. That alone constitutes a prima facie case.

There are allegations that, Wheel Loader with **Registration No. T488 DTQ** was not part of any of the two contracts however, it was seized and currently is under the possession of the 1st Respondent. This issue was not replied at all by the Respondents' counsel. It follows therefore that there is truth on it considering the available records. In my conviction therefore, there is a serious question to be tried in the main case as to the lawfulness of seizure of the said motor machine and probably, the issue may be resolved in favour of the Applicant if everything remains constant. Again, this also constitutes a prima facie case.

If I have to go with the Applicant's assertion that the first contract relating to **SDGL Motor Grader** with Chassis Number **VLGG9190TL0600931** and **SDGL Motor Grader** with Chassis Number **VLG190TL0600932** was fully satisfied, and that, Wheel

Loader with **Registration No. T488 DTQ** is not part of any of the two contracts but yet it was seized, it follows therefore that, the Applicant will suffer irreparable loss if the said machines are alienated or disposed off by any way. In that stance also, the Applicant stands to suffer if this Application is not granted than it would be the case on the part of the Respondents.

In fine therefore, I find that the principles in ***Atilio Vs. Mbowe*** were fully established by the Applicant. In the circumstances, this Application is hereby granted.

To that end, the Respondents, their servants, agents and or other person(s) deriving title from them, are temporarily restrained from entering, mortgaging, selling or order to sale by auction, appoint receiver, leasing or exercising any legal remedy against the Applicant's properties described as **SDLG Motor Grader** with chassis **No. VLGG9190TL0600931**, **SDLG Motor Grader** with chassis **No. VLGG9190PL0600932**, **SDLG Compactor** with chassis **No. VLGR8140AL0600424**, **SDLG Compactor** with chassis **No. VLGR8140PL0600397** and **SDLG Wheel Loader No. T 488 DTQ** with chassis **No. MMN800900700** pending final determination of Civil Case No. 26147 of 2023.

A prayer in the Chamber Summons that, this Court restrains the 1st Respondent from counting or calculating the interest pending the determination of the main suit is hereby refused because I did not see any justification to that effect. Considering the circumstances, I issue no order as to costs.

I order accordingly.

Right of appeal explained.

DATED at **DAR ES SALAAM** this 13th May 2024.

H.S. MTEMBWA
JUDGE

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