

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CIVIL CASE NO. 89324 OF 2023

LULU ATHUMANI RAMOLE (*As Administratrix
Of the Estate of Late Athumani Abdul Ramole*).....**APPLICANT**

VERSUS

OSY GRAND HOTEL LIMITED1ST RESPONDENT

ABDUL ATHUMANI RAMOLE2ND RESPONDENT

ISMAIL ATHUMANI RAMOLE3RD RESPONDENT

ADAM SELEMANI4TH RESPONDENT

DENIS SWAI5TH RESPONDENT

DONATHA MATABALO6TH RESPONDENT

MBUGANI HOTEL LIMITED7TH RESPONDENT

RULING

28th December 2023 & 3rd January 2024

A.P.KILIMI, J.:

The applicant by certificate of urgency has moved this court under Order XXXVII Rule 1 (a), Rule 2 (1), Rule 4, and Rule 8 (c); Order XXVI Rule 9, Rule 11 and Rule 12: AND Section 68(e) of the Civil Procedure Code [CAP 33 R.E. 2019] "CPC" praying the following orders;

1. That, this Court be pleased to issue a Temporary Injunction order restraining the First, Second and Third Respondents and or their agents, servants or anybody

claiming title under them from collecting whole or part of the rent over lease of the building known as OSY GRAND HOTEL LIMITED situated at Plot NO.5 Block 'J' SECTION III Moshi municipality with C.T No 11477 pending final determination of the main suit.

2. That this Court be please to issue a Temporary Injunction order restraining the First, Second and Third Respondents and or their agents, servants or anybody claiming title under them to operate a bank account with tollowing particulars: Bank name: CRDB, Account name: OSY GRAND HOTEL LIMITED, Account number: 01J1040542300 pending final determination of the main suit.
3. That the Honourable Court be please to issue a Temporary Injunction order restraining the Fourth, Fifth, Sixth and Seventh Respondents and or their agents, servants or anybody claiming title under them from paying whole or part of the rent over lease of the building known as OSY GRAND HOTEL LIMITED situated at Plot NO.5 Block 'J' SECTION III Moshi municipality with C.T No 11477 to the First, Second and Third Respondents and or their agents, servants or anybody claiming title under them pending final determination of the main suit.
4. That the Honourable Court be please to issue a Temporary Injunction order directing the Fourth, Fifth, Sixth and Seventh Respondents and or their agents, servants or anybody claiming title under them to pay; deposit the whole or part of the rent over lease of the building known as OSY GRAND HOTEL LIMITED situated at Plot NO.5 Block 'J' SECTION III Moshi municipality with C.T No 11477 to the bank account designated by this Honourable Court pending final determination of the main suit.
5. That the Honourable Court be please to issue a Temporary Injunction order directing the Fourth, Fifth, Sixth and Seventh Respondents and or their agents, servants or anybody claiming title under them to pay / deposit the whole or part of the rent over lease of the building known as OSY GRAND HOTEL LIMITED situated at Plot No.5 Block 'J' Moshi munipality with C.T No 11477 to The bank account with the following particulars: Bank name: CRDB, Account name: OSY

GRAND HOTEL LIMITED, Account number: 01J10405423000 pending final determination of the main suit.

6. That the Honourable Court be pleased to issue a commission to appoint a qualified Public Accountant (or a firm of Qualified Public Accountant or Auditors) to make investigation, prepare and provide a report of the current financial position of the First Respondent to the Court pending the hearing and final determination of the main suit.
7. That the Honourable Court be pleased to issue a commission to appoint a qualified Public Accountant (or a firm of Qualified Public Accountant or Auditors) to make examination or adjustments and provide a report of the current financial position of the First Respondent to the Court pending the hearing and final determination of the main suit.
8. Costs of this matter and any other order(s) this Honourable Court may deem fit and just to grant.

The above prayers has been supported by the affidavit duly affirmed by the applicant whereas the application has been resisted by the first, second and third respondents through their joint affidavit. While the fourth, fifth, sixth and seventh respondents just muted.

When this application was called for hearing, Mr. Patrick Paul, Ms. Beatrice Chami and Mr. Caesar Shayo learned advocates appeared for the applicant and the first, second and third respondents respectively enjoyed the service of Peter Njau learned advocate. Starting arguing for the application, Mr. Patrick sought an adoption of the applicant's affidavit and

thereafter continued arguing that the applicant prays for injunction against the first, second and third respondent not to receive rent from 4th to 7th Respondents, instead the rent be paid to CRDB bank account with the name of OSY GRAND HOTEL LIMITED account No. 01J1040542300.

Mr. Patric further said from the affidavit and counter affidavit it is not disputed that there is pending case in this court between Applicant and the respondents concerning their interest of the leased premises. Also, it is not disputed that the tenants are supposed to pay on that account. He also added that, 1st to the 3rd respondents did not provide any security or guarantee to show that they can reimburse the said rent if the pending case is decided against them.

In respect to the access of the said account, Mr. Patrick argued that the said account is neither accessed by the applicant nor the respondents, therefore, until the final determination of the main suit will be secured. He further said the application has met the criteria guided in **Atilio vs. Mbowe** and prayed the same be granted. He also concluded that they had prayed this court to appoint a qualify public accountant, to make investigation, and prepare a financial report as per financial status of the first respondent from July 2021, when the Athuman Ramole died in 25/7/2021 to the date of order,

so that the financial position of first respondent which will enable smooth determination of the main case which is Civil Case No. 7 of 2023.

Mr. Ceazar Shayo also supporting the application added that from counter affidavit filed, it is not disputed that the late Athuman Abdul Ramole was majority shareholder of the first respondent, since 25/7/2021 when he passed away, the second and third respondent have continued to benefit from first respondent, and denied other beneficiaries of the late Athuman Ramole to benefit on part of the rent paid by 4th to 7th respondents despite the effort done by the applicant, thus prayed this court to restrain them to continue receiving the benefit from the first respondent while the other beneficiaries are not doing so.

Responding to the above, Mr. Peter Njau prayed to adopt the joint affidavit of respondents to form part of his submission and further contended that the issue of lack of guarantee for the 2nd and 3rd respondent is a new issue which is not pleaded, thus prayed the same be expunged from court record.

In regard to prayer by the applicant for appointment of certified accountant to audit the company, Mt. Njau contended that, that should be

taken to the main case, since it requires evidence to be proved to such effect, thus prayed the same not to be granted.

In respect to the application sought, Mr. Njau contended that 1st, 2nd and 3rd respondents object the same, because by so doing, first respondent which is company will fail to execute its daily operation by means of paying tax, rehabilitation, run business hotel, salaries, water, utilities, repayment of loans. He further argued that all conditions stated by **Atilio vs. Mbowe** were not met specifically balance of convenient, because when prayer is granted, the second and third respondent will fail to run affairs of the first respondent, thus prayed the application be dismissed.

In rejoinder Mr. Patric Paul argued that, since the financial position of the company is not known, therefore there is a need for the audit as prayed, in respect to hotel business, he stated that since is a business the three respondents may continue to run it and pay tax, salaries and utilities as claimed. Thus, the counsel insisted, the applicant prayer is in regard to rent, which has nothing to do with utilities and salaries, because the tenants used to pay for utilities and salaries of their employees themselves.

Replying on the issue of guarantee, Mr. Patrick argued that it aimed to show that the respondent will be able and ready to compensate the applicant if the main case is decided against the respondents. And further added that, if the injunction prayed is not granted, and the main case is decided in favour of the applicant, therefore her loss will be irreparable as provided in the principle of **Atiio vs. Mbowe**. Therefore, Mr. Paul concluded that it is in balance of convenience that the order sought be granted, which will cause the said rent being deposited in bank account, and the fact it cannot be accessed by any party until the determination of the main suit each party will remain at equal status.

In order to appreciate the context in which this application is instituted, I find it necessary to begin with a summary of the essential facts decerned from pleadings. The Applicant herein is the legal administratrix of the estate of late Athuman Abdul Ramole who passed away on 25th day of July 2021 at Kindi, Moshi, Kilimanjaro. The said late Athumani Abdul Ramole was the majority shareholders of the first respondent which is a limited liability company registered in the United Republic of Tanzania.

After his demise, the second and third respondents as co-directors of the first respondent have been in control of all the affairs of the first

respondent with exclusion of the Applicant and beneficiaries of Late Athumani Abdul Ramole. Furthermore, it is alleged that the 2nd and 3rd Respondents as the directors of the first Defendant have refuse to cooperate with the Applicant in any way over the request to provide her with the financial position of the First Respondent.

Whereas the first, second and third Respondents are contending that since her appointment as the Administrator of Estate of the Late Athumani Ramole, the Applicant never followed proper procedure to communicate with the first Respondent Management rather than engaging unnecessary conflicts to the first Respondent's Tenants. The Respondent also maintained that the Applicant never requested for dividend out of the shares of the Late Athumani Ramole from the first Respondent. And finally, it is their contention that issue of rent collection is supposed to be administered by the first respondent's Management.

Having examined the parties' affidavits and oral submissions, I am of the considered view the issue before me is whether the applicant has sufficient grounds to convince this court to grant the application.

It is a trite law, principles of granting temporary order or injunction were established by the court in **Atilio v. Mbowe** (1969) HCD 284. In this case the court observed that it is an established principle that, what is basic in granting the temporary injunction is that:

"a) There should be in existence a serious triable issue between the parties.

b) A looming danger of irreparable injury to the plaintiff and

c) On the balance of convenience, the existence of more sufferings by the plaintiff if the injunction is refused than would be the case with the defendant if granted"

(See also the case of **Tanzania Cotton Marketing board vs Cogecot Cotton company S.A** [1997] TLR 63.)

To start with the issue of lack of guarantee for the second and third respondent, I am in agreement with Mr. Njau that the same was not raised in the affidavit of the applicant, therefore, it is a new matter which is the submission from the bar, hence must be surprise to the opponent party. I wish to back up my view by the decision of the court of **Barclays Bank T. Ltd vs Jacob Muro** [2020] TZCA 1875 (TANZLII) which cited with approval

is earlier case of **James Funke Ngwagilo vs Attorney General** [2004]

TLR 161 and said as follows;

*"We feel compelled, at this point, to restate the time-honoured principle of law that **parties are bound by their own pleadings** and that any evidence produced by any of the parties which does not support the pleaded facts or is at variance with the pleaded facts **must be ignored**"*

[Emphasis added]

Having said so, I am satisfied that the prayer by the applicant in respect to guarantee cannot be entertained by this court hence dismissed.

In regard to prayer number 6 and 7 the applicant prayed this court to issue a commission to appoint a qualified public accountant to make investigation and provide current financial position of the first respondent. The prayer was backed up by paragraph 38 and 39 of the applicant's affidavit. According to the law, the issuance of the commission is provided under Order XXVI of the CPC and for purpose of clarity specific rules prayed by the applicant provides that;

*"9. In any suit in which the court deems a local investigation to be requisite or **proper for the***

purpose of elucidating any matter in dispute or of ascertaining the market value of any property or the amount of any mesne profits or damages or annual net profits, the court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the court.

11. In any suit in which an examination or adjustment of accounts is necessary, the court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment."

[Emphasis added]

From the law above, there is no dispute that the same must be done in a suit, however it must be exercised at the discretion of the court upon realizing there is a need to do so. I have considered the nature of this application wherein the applicant is seeking temporary injunction, in my view of the law above, I think it cannot be coupled in this application for the suit which is pending before this court which is not yet to be ascertained that there is a need of making examination in respect to the said allegation in such pending case. Therefore, in the premises I invoke the discretion of this

case and reject the prayer of issuing a commission as prayed by the applicant.

Now back home to the principle in **Atilio vs Mbowe**, to start with the first principle, according to paragraph 40 of the applicant's affidavit though not mentioning specific triable case. But, since was not refuted by the respondents seems to support the oral submission that there is a pending case Civil Case no. 7 of 2023 which have the prayers stipulated at the said paragraph. Moreover, in paragraph 33 of the applicant's affidavit shows that this application intend to restrain the respondent to collect total sum of a Tanzania shillings Six Millions and One Hundred thousand only (TZS 6,100,000/=) per month pending determination of the main suit, so that the successful part will be able to access the said amount which will not be disturbed if will be deposited to the account of the first respondent.

I have considered the said case pending before this court, in my view there is direct connection to the benefit accruing to the first respondent which the applicant is the administrator of the estate of the majority share holder, therefore since the applicant is there to save the interest of the said shareholder, I am convinced that this is a serious triable issue to be dealt

by this court. In that regard I am settled that the applicant has established this first requirement.

In regard to the second requirement, which is the danger of irreparable loss to the applicant. According to paragraph ten the applicant's affidavit, the applicant has averred that, she was appointed to be the administrator of the estate of deceased Athmani Ramole the majority shareholder of the first respondent, furthermore, her allegation at para 36 and 37 are to the effect that the second and third respondents have failed to supply her financial report of the first respondent. I have considered the above, by virtue of being appointed administrator of the estate of one of the directors who had a majority shares, there is no dispute that, in law, as administratrix may enter into the shoes of the deceased, therefore is legally empowered to do anything in respect of the affairs of the deceased estate, including instituting legal proceedings in the course of administering the estate. See section 44 of the Probate and Administration Estates Act, [Cap.352 R.E.2002].

However, the applicant must be mindful that the money she prayed to be restrained belong to the company which is live, the first respondent as company carries out its management functions by its directors, and that the directors must act collectively and by resolution, unless provided otherwise

in the Articles of its association. The applicant has not brought the prove of any otherwise of the above. However, the applicant has not proved that she has failed in necessary procedure available statutory as personal representative of one of the shareholders to meet with the directors of the first respondent and resolve the issue of rent she is claiming for.

Be it as it may, still as said above, the company is run by meeting of members, the applicant has not satisfied this court that the same have refused to be done since she legally steps into the shoes of the deceased by operational of law. Nonetheless, first respondent as the company obvious have assets and the fact that at the end, the applicant as administrator of the estate of one of the giant shareholders has a duty to ascertain all shares of the deceased to the interest of deceased heirs. Therefore, in my view of the foregoing, I am of considered opinion applicant being an administratix cannot suffer irreparable loss, since the existence of the first respondent as a company is in according to shares which is governed by the articles of association. Thus, fraud or loss if any caused maliciously by the remaining two shareholders will be to their detriment when it comes to the division of shares and dividends. I am saying this because, the first respondent being

an institution, in my view, is capable of compensating the applicant the loss if any when she will succeed in the main case stated above.

In respect to the balance of convenience, it is a trite law the convenience should be taken parallel with rights of the parties and legal principled. (See **General Tyre E.A Ltd vs. HSBC Bank PLC**, [2006] TRL 60). According to the nature of the business of the first respondent, I subscribe to the contention of Mr. Njau that the second and third respondent as directors are running the affairs of the first respondent, even if this court could have granted the prayer, the said account belong to the company itself which the second and third respondent are directors. Therefore, as company, statutory has ways to run its affairs including the alleged account. Thus, it will not be fair and convenience to the first respondent as a company for this court to grant the prayers sought.

It also my view, I think this is matter prudent must dictate for parties who are family members to sit and resolve amicably instead of pointing fingers only for evils suspected to be done among themselves.

Otherwise, the law should follow the suit, that is the first respondent as company, is regulated by the law to run its business, these laws provide

on procedure if one of the director demises. This may either be possible under Section **78 of the Companies Act**, which provides that:-

"A transfer of the share or other interest of a deceased member of a company made by his personal representative shall, although the personal representative is not himself a member of the company, be as valid as if he had been such a member at the time of the execution of the instrument of transfer".

In this case, the personal representative of the late Athmani Abdul Ramole is the applicant. As the personal representative of the deceased has power to transfer the shares of the deceased as if it were the deceased himself. I think the applicant is duty bound to exercise this right provided by the law instead of attempting the directors not to exercised their statutory duty to run the first defendant as a company.

In conclusion thereof and for the foregoing reasons, I am satisfied that this application is devoid of merit. I therefore, hereby accordingly dismiss in its entirety. From the nature of the parties' dispute which is probate, I order that they shall bear their own costs.

It is so ordered.

DATED at **MOSHI** this 3rd day of January, 2024.



X

JUDGE
Signed by: A. P. KILIMI

Court: - Ruling delivered today on 3rd day of January, 2024 in the presence of Ms. Beatrice Chami, learned Advocate for the Applicant, Mr. Peter Njau learned Advocate for 1st, 2nd and 3rd Respondent, also second and third respondent present in persons.

Sgd: A. P. KILIMI
JUDGE
03/01/2024