

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 25 OF 2005

A1 OUTDOOR TANZANIA
LIMITED.....PLAINTIFF/APPLICANT
VERSUS
ALLIANCE MEDIA TANZANIA
LIMITED.....DEFENDANT/RESPONDENT

R U L I N G

KIMARO, J.

The plaintiff, (A1 Outdoor (Tanzania) Limited), has filed a suit in this court in which it is praying for several declaratory orders against the defendant for interference with its business. The plaintiff is also praying for an injunction as well as damages and costs. The plaintiff's suit is founded on an agreement for sale of assets between Monier 2000 Limited and the plaintiff. The agreement is annexed to the plaint and it shows that it was executed by the parties on 18th March 2005.

The defendant (Alliance Media (Tanzania) Limited) filed its written statement of defence together with a counter claim. In the Counter claim, the defendant is also suing on an agreement for sale of

assets executed by Monier 2000 Limited and itself on 19th December 2004. Both sale agreements relate to same assets. Each party claims that it has a lawful agreement with Monier 2000 Limited. In the counter claim the defendant has also prayed for declaratory orders against the plaintiff as well as an injunction in relation to the assets.

Together with the written statement of defence and the counter claim, the defendant filed a chamber application seeking for temporary orders pending the determination of the main suit. The application was supported by the affidavit of James Muhoro, the General Manager of the defendant. The application was set for hearing on 25th April 2005 and the plaintiff was dully served. The plaintiff defaulted appearance on the date fixed for the hearing of the chamber application. There was no explanation for the default.

The court heard the application ex parte and granted the defendant orders for -

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- (1) *Restoration of the assets.*
- (2) *Removal of the plaintiffs stickers from the assets – the advertising sites*
- (3) *An injunction against the plaintiff from interfering with the possession of the assets."*

The plaintiff was aggrieved by the temporary orders. It is now before this court with a chamber application in which it is seeking for two orders -

- " i) Discharge, set aside or lifting of the injunction orders
and*
- ii) Penal sanctions against either the defendant or one James Muhoro for perpetrating the commission of perjury and or perversion of the course of justice."*

The application is supported by the affidavits of Shay Mordo and Walter Shoo. The application has been filed by Nyange, Ringia & Co. Advocates. The respondent is represented by M/S Ngalo & Company Advocates.

During the hearing of the application, Mr. H.H.H.Nyange, Learned Advocate who appeared for the applicant informed the court that the applicant was not asking for the discharge, or variation of the orders with a view of having the application be restored for hearing on merit. He said he was asking for the discharge of the injunction because it was granted while the grounds for granting an injunction were not in existence. Relying on the affidavits sworn in support of the chamber application, the argument advanced by Mr. Nyange on this point was that there was concealment and non-disclosure of material facts by the defendant which in turn led to

failure to establish the grounds necessary for granting an injunction. Mr. Nyange said the defendant failed to disclose to the court that there was no consideration for the agreement for sale of assets executed between itself and Monier 2000 Limited. Failure of consideration made the contract unenforceable. Consequently there was rescission of the same by Monier 2000 Limited. Mr. Nyange submitted that the defendant concealed the fact that the Directors for the Defendants are foreigners with no property in Tanzania and they are also the directors of a similar Company in Kenya (Alliance Media (Kenya) Limited). He said another fact concealed is that, currently, Alliance Media (Kenya) Limited is under winding up proceedings and this may also befall the defendant in Tanzania. He concluded that the defendant failed to show that there was in existence the principle of a *prima facie* case on the part of the defendant when the injunction order was granted.

Mr. Nyange's further argument was that the defendant equally failed to establish that failure to grant it injunction would have led the defendant to suffer substantial loss which the plaintiff would have failed to atone by way damages.

As for the principle of the balance of convenience, Mr. Nyange said the defendant did not establish that it would have been more inconvenienced than the plaintiff if the injunction was not granted.

The plaintiff has not disputed that it did not enter appearance on the date when the application was called up for hearing when the temporary orders were granted. Mr. Ngalo Learned Advocate for the defendant submitted that this was the opportune time for the plaintiff to put up the arguments advanced in this application. Since the plaintiff has not accounted for its nonappearance on the date when the orders were granted, the court should leave the injunction to stand because there are no grounds sufficient for the variation of the order. He disregarded the question of consideration raised by the plaintiff as being relevant to the application, arguing that it is a matter for consideration in the main suit. The same argument was given by Mr. Ngalo on the question of the same directorship in the defendants company and that of the Kenyan Company (Alliance Media (Kenya) Limited) and the winding up of the Alliance Media (Kenya) Limited. Mr. Ngalo's views are that no sufficient reasons have been given warranting the discharge of the orders for injunction. Mr. Ngalo made reference to commentaries by **Sarkar and Mulla** on the Civil Procedure Code - Order 37 which is pari materia to our Order 39 and argued that variation of injunctions is permissible only where there is a change in the circumstances. Since there are no changed circumstances, the court should refuse variation of the injunction.

Mr. Nyange replied that an injunction is an equitable remedy and who ever comes before the court of Equity must come with clean

hands. He said that even if the injunction was granted ex parte, that did not take away the standard of proof which the defendant had to discharge before being granted the injunction orders. Mr. Nyange's opinion is that the standard of proof becomes even higher where such orders are granted ex parte. He said the disclosure of the lacking circumstances under which the temporary injunction was granted amounts to showing changed circumstances warranting variation of the injunction.

In brief what I have given above are the main arguments which I consider to be important for the determination of the application.

It was correctly submitted by Mr. Nyange that a temporary injunction is an equitable remedy and who ever comes to equity must come with clear hands. The question which I must consider is whether the defendant came to Equity with clear hands when asking for the temporary orders.

The principles warranting grant of temporary injunction were laid down in the long recognized case of **Attilio V Mbowe** [1969] HCD 284. The principles are three and they must all exist before an order for temporary injunction is issued -

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- i) *There must be a serious question to be tried on the facts alleged and a probability that the plaintiff will be entitled to the relief*

prayed (The prima facie case and overwhelming chances of success).

- ii) The courts interference is necessary to protect the plaintiff from the kind of injury which may be irreparable before his legal right is established.*
- iii) That on the balance of convenience there will be greater hardship and mischief suffered by the plaintiff from the withholding of the injunction than will be suffered by the Defendant from the granting of it."*

Since then, there has been several cases decided on same lines. These include the cases of **Giella Vs Casman** [1973] EA 358, **Tanzania Tea Parkers Ltd V Commissioner of Income Tax & Another** CC 9 of 1999 (High Court) (Unreported) and **Glaxo Group Ltd V Aggregate Ltd** CC 73 of 2002 (High Court) (Unreported).

Coming to the order which is sought to be set aside, it is true that the defendant has not responded to the aspect of its failure to pay consideration in the agreement entered into between itself and Monier 2000 Limited. Neither was this fact disclosed in the counter claim, nor the affidavit which supported the chamber application for which the temporary orders were granted. The respondent has not even responded to it despite of the fact that it was raised in the

affidavit of Shay Mordo and Walter Shoo. The defendant's pleadings are framed in a style which does not suggest that there was a need to address the question of consideration in the agreement between the Defendant and Monier 2000 Limited when the temporary orders were granted. Failure by the defendant to disclose whether or not consideration had passed, inevitably led to failure to establish the principle of existence of a *prima facie* case and overwhelming chances for success on the part of the defendant.

Likewise, there was also failure by the defendant /respondent to establish the two remaining principles because of the manner in which the pleadings are framed and the silence of the defendant when the application was heard.

The submission by Mr. Nyange on the non-disclosure and concealment made by the defendant has brought to light the circumstances under which the orders of 25/04/2005 were granted. The orders were granted under circumstances which did not entitle the defendant to the orders. The disclosure made by the plaintiff now, amounts to showing changed circumstances which warrant the lifting and setting aside the orders granted to the defendant *ex parte* by this court on 25/04/2005. The defendant came to equity with dirty hands. The court was mislead to grant orders which the defendant had prayed for. The defendant did not disclose to this court that consideration for the agreement upon which the counter claim was

founded had not been paid. The situation would have been different if this aspect was brought to the knowledge of this court.

Under this circumstances, to the extent that the temporary orders were granted to the defendant/respondent after concealment of important material facts, the application has merit.

The application by the plaintiff requesting this court to set aside and lift the injunctive order granted by this court on 25th April 2005 is granted.

As regards the prayer for penal sanctions, that application should be pursued in the criminal process system.

Costs to the applicant/plaintiff.



N.P.KIMARO,

JUDGE

4/07/2005

Date 11.7.2005

Coram: Hon. N.P.Kimaro, Judge.

For the applicant – Mr. Ringia

For the Respondent – Mr. Ringia/Mr. Ngallo.

CC: R. Mtey.

Court: Ruling delivered today.

Order: The injunction orders granted to the defendant on 25/04/2005
are lifted. Costs to the applicant/plaintiff.



N.P.KIMARO,

JUDGE

11/07/2005

2,015 -words

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