

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

COMMERCIAL CASE NO. 70 OF 2007

**ABDALLAH HASHIM ABDALLAH.....PLAINTIFF
VERSUS
TERRY DICKENS.....1ST DEFENDANT
RADI SERVICE LIMITED.....2ND DEFENDANT
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R U L I N G

1. Deadline for Filing Submissions – 15/11/2007
2. Date of Ruling – 20/11/2007

MASSATI, J

This application is for temporary injunction by the Plaintiff for an order to restrain the Respondents, their agents or anybody else:-

" From making any changes, registration or alteration of names of Directors to the Registrar of Companies or effecting any changes made on the 4th October 2007 pending the hearing and determination of the main suit."

The application is supported by the affidavit of the Applicant, ABDALLAH HASHIM ABDALLAH. According to paragraphs 2, 3, 4, 5 and 6 of the affidavit, the Respondents had convened an unlawful meeting to suspend him as director of the 2nd Respondent, and to

appoint a new director and that the changes were published in the local newspapers and are about to be registered with the Registrar of Companies, and if that stage is reached, he will suffer irreparable loss and the main suit will be rendered nugatory. In a reply to the amended counter affidavit, the Applicant was emphatic that as Secretary of the Board of Directors, he was not aware of any notice of a shareholders meeting. All through the reply the Applicant stood by the contents of paragraph 4 of his affidavit: -

"4. That the said removal of the Applicant was done without convening any Company meeting with the capacity and authority to do so."

Mr. Mwambene, learned Counsel for the Applicant, after revisiting the facts and background of the suit, submitted that as the Applicant has heavily invested in the 2nd Respondent Company, in terms of shares, human resources, salaries and skills since the formation of the company in 2002, he stood to suffer irreparably if the order sought was not granted. In a reply to the Respondents' submission, Mr. Mwambene submitted that the allegation that the application had been overtaken by events was not true, because not only was the meeting that effected the changes unlawful, but also the subsequent presentation of the notification of the changes to the Registrar of Companies, was fraudulently filed to defeat the suit. He also submitted that it was not true that the Applicant had not

satisfied the Court on the requirements for the grant of temporary injunction, because he had managed to show that there were serious issues to be determined by the Court. He distinguished the two cases cited by the Respondents, and said that they were irrelevant to the facts of the present case. With these Mr. Mwambene prayed for the grant of the temporary injunction.

The application was opposed by the Respondents, who instructed Mr. PAUL FAUSTIN KIHWELO to file a counter affidavit. Against the 6 paragraph affidavit, Mr. Kihwelo filed a 14 paragraph long counter affidavit. In essence, the contents of the counter affidavit were to show that the removal of the Applicant was preceded by a lawful resolution of the Company demanding his resignation as a director within 6 months in terms of Article 85 of the Articles of Association of the 2nd Respondent Company. Therefore the changes were lawful, and it was not true that his removal from the directorship would affect his livelihood, as he can be compensated in monetary terms. Furthermore, the changes having already been effected, the application has been overtaken by events. The counter affidavit also annexed the published Notices of Appointment of a new Director, and the Applicant's removal, to justify that the application has been overtaken by events.

Arguing against the application, Mr. Kihwelo, learned Counsel made a two point submission. First he said that the application has

an injunctive relief, are well established. According to **ATILIO VS MBOWE** (Supra) the said principles are that,

- (i) There is a prima facie case in the sense that there are serious questions to be tried on the facts with a probability that the suit would ultimately be decreed in favour of the applicant.
- (ii) That an award of damages to the Applicant at the conclusion of the suit would not provide an adequate remedy for any loss that the Applicant may suffer.
- (iii) That on balance the Plaintiff stands to suffer greater hardship from the withholding of the injunction than will be suffered by the Defendant if it is granted.

In the present case, the Applicant has filed a suit for some declaratory orders against his removal and the appointment of a new director and also claims for general damages. From his pleadings, the Applicant acknowledges that he had come to this Court on 9/10/2007 to seek to undo what had already taken place and published on 4/10/2007. The Respondents' actions are being challenged for being illegal.

been overtaken by events, because the Applicant has already been removed from office and a new one appointed before the filing of the suit, and subsequently the changes registered with the Registrar of Companies, for which the Court was referred to Annexure RS – 1 to the Written Statement of Defence.

He said that in the circumstances, the status quo that the application seeks to maintain cannot, practically, be met. The second point taken by the learned Counsel is that the Applicant has not satisfied the Court on the requirements for granting a temporary injunction. Referring to the principles set out in **ATILLIO VS MBOWE** [1969] HCD 284, referred to in **COLGATE PALMOLIVE COMPANY VS ZAKARIA PROVISION STORES & 3 OTHERS** (Civil Case No. 1 of 1997) (unreported) and **GIELLA VS CASSMAN BROWN & COM LTD** [1973] EA 359, Mr. Kihwelo submitted that the only point raised by the Applicant was that he stood to suffer irreparable loss; but it was his view that any loss arising from the removal of the Applicant from directorship, could be compensated in monetary terms. Whereas on balance of convenience, it was the Respondents who stood to suffer greater hardship and mischief if injunction was granted. He therefore prayed for the dismissal of the application with costs.

I think that there is no dispute that the established principles guiding Courts in exercising their discretion whether or not to grant

Whether or not the Respondents actions were lawful would, indeed be the central issue at the trial, but with respect, I entirely agree with Mr. Kihwelo that, if the changes had already been done as the Applicant acknowledges, the Court cannot be asked, at this stage, to undo what has already been done for that is not the purpose of this equitable relief. Although the notion that the object of a temporary injunction is to preserve the status quo has come under serious attack as "misleading" as it is not a universal rule and that an injunction may be issued to alter the existing state of affairs – (See **RICHARD KULOBA – PRINCIPLES OF INJUNCTIONS** (OUP pp 42 – 43) the Applicant in the present case is not asking the Court to preserve the status quo prior to the changes, but "*to restrain the Respondents from making any changes registration or alteration of names of Directors, or effecting any changes made on the 4th October 2007.*" But there is irrefutable evidence that the said changes have already been effected. Whether illegally or not, is a different matter to be determined by the trial Court. It could, I think, not only be undesirable but dangerous and embarrassing to the merits of the main suit, if I were to order a reversal of those changes at this stage. In the event I have to agree with Mr. Kihwelo, learned Counsel, that the application has now been overtaken by events.

I would, on the other hand, think that the Applicant had made out a prima facie case, and brought forth triable issues, relating to the procedure of his removal as a director, and the appointment of a

new director, although without the benefit of tested evidence, it is difficult at this stage, to determine the degree of probability of success. However, I am satisfied that the losses that the Applicant may incur may be compensated in monetary terms. If the Applicant's concern was to maintain the status quo as to his earnings for his livelihood pending the determination of the suit, he did not say so, nor prayed for continued payments of whatever he was earning in the interim period. The Court cannot grant what it has not been asked for. I also agree with Mr. Kihwelo on balance of convenience, if it were possible to grant the injunction, the restoration of the Applicant to the Board, when the case was still going on, would most likely interfere with the smooth running of the 2nd Respondent, and thus lead the Respondent to suffer more by the grant of the injunction than the injury that would be done to the Applicant if the application is refused. I think it is in the interests of all the parties, to let the 2nd Respondent operate smoothly throughout the pendency of the suit. In the result, I agree that, as presented, the Applicant has failed to meet all the requirements for the grant of the temporary injunction.

It is for all the above reasons, that I refuse to grant the temporary injunction. The application is therefore dismissed. Costs shall be in the suit.

It is so ordered.

S.A. MASSATI

20/11/2007

JUDGE

1,573 Words

I Certify that this is a true and correct
of the original order judgement Ruling
sign _____
Registrar Commercial Court Dsm.
Date ... 21/11/07