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

COMMERCIAL REVISION NO.1 OF 2010

THE NATIONAL BANK OF COMMERCE LTD.....1ST APPLICANT

KAM COMMERCIAL SERVICES.....2ND APPLICANT

VERSUS

D.N. BAHRAM LOGISTICS LTD.....1ST RESPONDENT

DAD KARIM B. NURMOHAMED.....2ND RESPONDENT

Date of last order: 28/12/2010
Date of final submissions: 17/12/2010
Date of ruling: 05/08/2011

RULING

MAKARAMBA, J.:

This is a ruling on application for revision the Applicant lodged in this Court on the 25th day of October 2010 under a "***Certificate of Extreme Urgency.***" The Application was preferred section 44(1) of the Magistrates' Courts Act [Cap. 11 R.E 2002], section 79(1)(c) & (2) and 95 of the Civil Procedure Code Act [Cap 33 R.E 2002] and "any other enabling provisions of the law." In this Application, the Applicants' prayers are for the following orders:

(1) The Honourable Court be pleased to call for the record and proceedings of the District Court of Temeke in Civil Case No.38 of 2010 and having done so satisfy itself as to the correctness

and legality of the proceedings and orders made therein, in particular:

(a) *That the Honourable Court be pleased to revise and set aside the exparte order that the motor vehicles with* Scania 124 Tractor Reg. No.**T 978 ATN,** Trailer Reg. No. **T 267 ATW**, Scania 94 Truck **T 596 ATQ** seized by the 1st Defendant be immediately released to the Respondents.

(b) *The Honourable Court be pleased to revise and set aside the order that no further chattels be restricted by the Defendants (present Applicants) or its agents until final disposal of the matter.*

(2) *Having done so, the Honourable Court be pleased to set aside all the proceedings and orders of the District Court of Temeke made on 13th October 2010*
(3) *Costs of the application be provided for.*
(4) *Any other reliefs as the Honourable Court may deem fit and just to grant.*

The Chamber Summons has been taken out at the instance of Messrs IMMA Advocates and is supported by the affidavit of one ALEXANDER MZIKILA, the 1st Applicant's Legal Counsel attached hereto and on such further grounds canvassed by counsel at the hearing of the Application, which by consent of the learned Counsel for the parties was disposed of by way of written submissions, Mr. Nyika, learned Counsel for the Applicants, and Mr. Luguru, learned Counsel for the Respondents.

The record shows that upon being served with the Chamber Summons, the Applicants prayed for leave and time to file counter affidavit and

Written Statement of Defence and further that for an order for the parties to maintain the ***status quo***, in that the seized motor vehicles should not be sold pending hearing of the Application inter parties.

The matter, the subject of the present revision proceedings, traces its origins from the decision of the District Magistrates' Court of Dar es Salaam at Temeke, where the matter initially was preferred as **Civil Case No.38 of 2010**, by the present Respondents as Plaintiffs thereat against the present Applicants, the Defendants thereat.

From the record, on various dates the 1st Applicant herein, the 2nd Defendant thereat, had granted the Respondents here at, the Plaintiff thereat, credit facilities to finance purchase of motor vehicles for the Respondents'/Plaintiffs' business. The credit facilities the 1st Applicant/2nd Defendant granted to the Respondents/Plaintiffs was secured by the Respondents/Plaintiffs issuing several securities including a debenture, deed of undertaking, guarantee and chattels mortgage. As it turned out, the Respondents/Plaintiffs defaulted on repayment of the credit facilities and as at 30th September, 2010, the sum of **TZS. 745,160.638.52** was due and outstanding on account of the credit facilities. It is on record further that 1st Applicant/2nd Defendant exercising powers conferred on it under the Chattel Mortgage appointed MS KAM Commercial Services, the 2nd Applicant/1st Defendant, to seize and take possession of the charged chattels and auction them to recover the outstanding amount. On the 6th day of October 2010, the 2nd Applicant/1st Defendant managed to seize and take possession of the charged chattels, motor vehicles with registration Scania 124 Tractor Reg. No.**T 978 ATN,** Trailer Reg. No. **T 267 ATW**,

Scania 94 Truck **T 596 ATQ**. As a result of the seizure of the said motor vehicles the Applicants/Defendants allege to have incurred a loss amounting to TZS 45,000,000 (Forty Five Million Shillings). On the 13th October 2010, the District Magistrates' Court (Hon. Mkwawa R.M.) proceeding *exparte* ordered the motor vehicles, the Applicants seized, to be immediately released to the Respondents and that no further chattels be restricted by the Applicants or its agents until final disposal of the matter. This decision is what prompted the Applicants to spring into action and approach this Court on revision seeking for among other orders that this revise and set aside the exparte order of the lower court releasing the seized vehicles immediately to the Respondents and the order that no further chattels be restricted by the Defendants (present Applicants) or its agents until final disposal of the matter and hence this ruling.

The present application has been preferred among other provisions, section 44(1) of the Magistrates' Courts Act [Cap. 11 R.E 2002], section 79(1)(c) & (2) and 95 of the Civil Procedure Code Act [Cap 33 R.E 2002]. Section 44(1) of the Magistrates' Courts Act [Cap. 11 R.E 2002], provides as follows:

> *"(1) In addition to any other powers in that behalf conferred upon the High Court, the High Court–*
>
> *(a) ....(NA);*
>
> *(b)* ***may, in any proceedings of a civil nature determined in a district court or a court of a resident magistrate*** *on application being made in that behalf by any party or of its own motion,* ***if it appears that there has been an error material to the merits of the case involving injustice****, revise the proceedings and make such decision or order therein as it sees fit:*

Provided that no decision nor order shall be made by the High Court in the exercise of the jurisdiction conferred by paragraph (b) of this subsection, increasing any sum awarded or altering the rights of any party to his detriment, unless the party adversely affected has been given an opportunity of being heard."

In terms of section 44(1)(b) of the Magistrates' Courts Act [Cap. 11 R.E 2002], the revisionary powers of this Court are discretionary and are exercisable either upon application or suo motu. Such powers are exercised if it appears that there has been an error material to the merits of the case involving injustice in a case of a civil nature determined by a district court or a court of a resident magistrate.

Section 79(1)(c) & (2) of the Civil Procedure Code Act [Cap 33 R.E 2002] stipulates as follows:

*"(1) The High Court may call for the record of **any case** which has been decided by any court subordinate to it and in which no appeal lies thereto, and if such subordinate court appears–*

(a) to have exercised jurisdiction not vested in it by law; or

(b) to have failed to exercise jurisdiction so vested; or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit.

(2) Nothing in this section shall be construed as limiting the High Court's power to exercise revisional jurisdiction under the Magistrates' Courts Act."

The provisions of section 79(1) & (2) of the Civil Procedure Code amplifies the grounds for the exercise by the High Court of its revisionary jurisdiction in any case *decided by any court subordinate to it and in which*

no appeal lies thereto on the grounds stated therein. Clearly whereas the provisions of section 44(1)(b) of the Magistrates' Courts Act deals with "***any proceedings of a civil nature*** *determined in a district court or a court of a resident magistrate",* section 79(1) of the Civil Procedure Code deals with "***any case*** *which has been decided by any court subordinate* to the High Court but without limiting the revisionary powers of the High Court under section 44(1)(b) of the Magistrates' Courts Act. The gist of these provisions is that the High Court has jurisdiction to exercise revisionary powers over both civil and criminal cases decided by any court subordinate to it. In my view, the basis for the High Court to be able to determine whether there has been an error material to the merits of the case involving injustice, is by addressing its mind on whether *the subordinate court exercised jurisdiction not vested in it by law*; or *failed to exercise jurisdiction so vested*; or *in the exercise of its jurisdiction it acted illegally or with material irregularity*. In order for this Court to revise such proceedings, an applicant has to establish that either one or all of these grounds exist. In the present application, the Applicants have asked this Court to call for and satisfy itself as to the correctness, propriety and or legality of the proceedings which resulted into the exparte orders.

The Counsel for the Applicants submits that the Applicants after being served with chamber summons, they prayed before the trial court to file Counter affidavit and the Written Statement of Defence and also prayed for an order to maintain the status quo in that **the seized motor vehicles should not be sold** pending hearing, instead the Court proceeded to grant the *ex-parte* order prayed in the chamber summons.

In the lower court, the Respondents filed a Chamber Summons praying for exparte and interpartes orders of interim and temporary injunction as follows:

Exparte Orders:

(1) That the Honourable Court be pleased to order for immediate release of the Motor Vehicle Registration No. Scania 124 Tractor Reg. No. T978 ATN, Trailer Registration No. T267 ATW, Scania 94 Truck T596 ATQ seized illegally by the 1st Defendant.

Interpartes:

(2) The Honourable Court be pleased to restrain these Defendants their agents, assignee and any other person claiming under them from seizing and detaining the Motor Vehicle Registration No. Scania 124 Tractor Reg.No.T978 ATN, Trailer Reg. No. T267 ATW, Scania Truck T596 ATQ till final disposal of the suit.

The Applicants' Counsel submits further that the Court by ordering that no further chattels to be restricted by the Defendants/Applicants or its agents until final disposal of the matter, went beyond what had been prayed for by the Respondents *ex-parte*. It was improper for the Court to proceed to issue the *ex-parte* order when the Applicant was served and indeed appeared in Court, the Applicants' Counsel further submits. The Court ought to have allowed the Applicants to file counter affidavit and proceed with the hearing of the application *interpartes,* the Applicants' Counsel further submits and cites Order XXXVII Rule 4 of the Civil Procedure Code, [Cap.33 R.E. 2002], which requires an Applicant to notify the opposite party before an order of injunction is issued unless it appears that the giving of such notice would cause undue delay and that the object of granting injunction would thereby be defeated. The Applicants' Counsel

submits further that the orders prayed for *ex-parte* and granted were not injunctive orders within the ambit of Order XXXVII of the Civil Procedure Act, [Cap.33 R.E. 2002]. *Ex-parte* orders are meant to be granted only in the presence of the party who prayed for the order and in the absence of the other party, the Applicant's Counsel further submits. Since both parties were present, the Court ought to have given leave to the Applicant's Counsel to file the Counter affidavit, the Applicants' Counsel further submits. In buttressing his point, the Applicants' Counsel cites the case of **DEO SHIRIMA AND OTHERS V. SCANDINAVIAN EXPRESS SERVICES LIMITED, Civil Application No.34 of 2008,** (CAT) (DSM)(unreported) where Rutakangwa, J.A, Bwana, J.A and Mandia, J.A observed as follows:-

> *"We have already shown that the order of 8th June 2007 was made suo moto. None of the parties had pressed for that order. None of the parties was heard at all before the order was made. As it turned out, the order, made in breach of the rules of natural justice, immediately adversely affected the Plaintiffs in the suit and subsequently the current Applicants who were the Agents/servants of the former. It is established law that any judicial order made in violation of any of the two cardinal rules of natural justice is void from the beginning and must always be quashed, even if it is made in good faith."*

The Applicant's Counsel submits further that the Applicants prayed for leave and time to file Counter Affidavit, however, instead of allowing the Applicants' prayer and fix the hearing of the application *interpartes,* the Court proceeded to issue the *ex-parte* order thus rendering academic the

whole exercise of filling a Counter Affidavit as the Respondents had already gotten what they wanted.

The motor vehicles had been seized by the Applicants in exercise of the power provided under the chattel mortgage and loan agreement and that the motor vehicles were not attached in execution of a Court order or decree, the Applicants' Counsel hinted. It was therefore wrong for the Court to issue an order raising the attachment as it had not made any order of attachment capable of being raised, the Applicants' Counsel further submits and surmises that this was a serious irregularity in the proceedings.

The Applicants' Counsel further submits that the third irregularity they would like this Court to investigate is whether the *exparte* order issued by the Court was within its jurisdiction as per Order XXXVII of the Civil Procedure Code. Temporary injunctions are made for the purpose of staying and preventing wasting or damage of the property until the disposal of the suit or until further orders, the Applicants' Counsel pointed out.

The Applicants' Counsel further submits that the Applicants had already seized the three motor vehicles from the Applicants on **06th October 2010.** As such the status as at **13th October 2010**, the date the parties appeared for hearing of the application was that the motor vehicles were already in the hands of the Applicants. It is on that basis that the Applicants' Counsel agreed to an order to maintain the status quo, in that the motor vehicles should not be sold pending hearing and determination of the application *interpartes,* the Applicants' Counsel further submits.

Instead of the Court granting an order preserving the status quo it proceeded to nullify the Applicants actions and ordered for the return of the motor vehicles and injunction from any further attachment, the Applicants' Counsel submits further.

The order of the release of the vehicles is a substantive prayer made in the Plaint at paragraph (b) of the prayers, the Applicants' Counsel pointed out. Under Order XXXVII of Rule 1(b) of Civil Procedure Code, a litigant before a Court of law in this country is not entitled in law to be granted a final judgment before the dispute is determined, the Applicant's Counsel observed and supports his submissions by citing the decision of the Court of Appeal of Tanzania in the case of **TANZANIA ELECTRIC SUPPLY COMPANY LIMITED V. INDEPENDENT POWER TANZANIA LIMITED Consolidated Civil Application Nos.19 of 1999 and 27 of 1999 (CAT)(DSM)(Unreported)** where it was stated that:-

> *"...first, neither under Order XXXVII Rule 1(b) of the Code, which permit a party to a suit to seek from the court conservatory measures, nor under any provision of other laws is a litigant before a court in this country entitled in law to be granted a "final judgment" before the dispute before the court is determined."*

The order of the trial Court has barred the 1st Applicant from taking any other steps to recover the outstanding amount from other securities pledged by the Respondents, the Applicants' Counsel surmised.

Responding, the Respondents' Counsel submits that the Respondent's Application before the Temeke District Court was necessitated by the way the 1st Applicant had acted by seizing the Respondent's motor vehicles

without following the proper procedure. The Respondents had been engaged in serious negotiations for rescheduling the repayment of the loan, and that negotiations were well known to the 1st Applicant and they had reached an advanced stage, the Respondents' Counsel hinted. The seizure and detention of the motor vehicles by the 2nd Applicant had led to the vandalization of those motor vehicles, while in the custody of the 2nd Applicant, the Respondents' Applicant revealed. A continued detention of the motor vehicles by the 2nd Applicant would have caused further vandalization and their value would have been lowered and their sale would have fetched less money to the detriment of both the Respondents and the 1st Applicant, the Respondents' Counsel further submits.

The Temeke District Court had not erred in granting the prayers prayed for by the Respondents, as the Court was properly moved and the orders were meant to maintain the "status quo" pending the hearing of the main suit, the Respondents' Counsel confidently submits. The Applicants' application for revision should not entertained as the orders issued by the Temeke District Court are temporary orders, and by the Applicants' filing the application for revision would impede the smooth and speedy disposal of the main suit and hence will go against the spirit of the maxim, "Justice delayed is justice denied", the Respondents' Counsel recalled.

The Respondents are of the view that the amount claimed by the applicants as being due from the respondents is incorrect, since the amount is less than that shown by the Applicants, and therefore this will show that the seizure of the motor vehicles was not meant to facilitate the

repayment of the credit facilities extended by the 1st Applicant but rather to frustrate the repayment, the Respondents' Counsel pointed out.

Rejoining, the Applicants' Counsel submits that the order for maintaining the status quo was enough to guarantee the Respondents that no irreparable injury would be suffered. The issue of the Applicants following or not following procedure to arrest the vehicles would have been dealt with in the determination of the suit on merit, the Applicants' Counsel further submits. The negotiations which were ongoing between the Applicants and the Respondents if any are not relevant to the current application, the Applicants' Counsel remarked. The interest of the 1st Applicant was for the vehicles to be attached and sold to recover the outstanding amount and not otherwise, the Applicants' Counsel surmised. The order of the lower court was not an order for status quo but it was an order granting the Respondent reliefs determining the main suit, the Applicants' Counsel insists.

The gist of the argument by the Applicants' Counsel is that the orders prayed for *ex-parte* by the Respondents in the lower court and granted were not injunctive orders within the ambit of Order XXXVII of the Civil Procedure Act, [Cap.33 R.E. 2002]. The Applicants' Counsel argues that the order of release of the motor vehicles is a substantive prayer made in the Plaint at paragraph (b) of the prayers contrary to the established legal principle that a litigant before a Court of law in this country is not entitled in law to be granted a final judgment before the dispute is determined.

It is trite therefore to examine the provisions of Order XXXVII Rule 1(a) of the Civil Procedure Code, [Cap.33 R.E 2002] which provides as follows:-

> *(a) Where in **any suit** it is proved by affidavit or otherwise; that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit of or **suffering loss of value by reason of its continued use by any party to the suit**, or wrongly sold in execution of a decree; or*
>
> *(b) ...(Not relevant),*
>
> *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. ((the emphasis is of this Court).*

In terms of Order XXXVII Rule 1(a) of the Civil Procedure Code, [Cap.33 R.E 2002] cited above, the court has discretionary powers to grant temporary injunction to restrain an act among other things, causing a property in dispute in a suit from "***suffering loss of value by reason of its continued use by any party to the suit***." However, before granting an injunction, the court has to direct notice of the application to be given to the opposite party "***except where it appears that the giving of such notice would cause undue delay***." This is clearly stated in Order XXXVII Rule 4 of the Civil Procedure Code, [Cap.33 R.E 2002] which provides that:

"The court shall in all cases, before granting an injunction, direct notice of application for the same to be given to the opposite party, ***except where it appears that the giving of such notice would cause undue delay*** *and that the object of granting the injunction, would thereby be defeated." (the emphasis is of this Court).*

It is the contention of the Applicants' Counsel that the orders prayed for *ex-parte* by the Respondents in the lower court and granted were not injunctive orders. It is trite to revisit ***Black's Law Dictionary 7th Edition by Bryan, A. Garner at page 1221***, according to which ex-parte proceeding is defined to mean "*proceedings in which not all parties are present or given the opportunity to be heard.*" Exparte proceedings are therefore an exception to the general rule that both parties must be present in court. *Exparte* proceedings therefore do not require the participation by the opposing party and are usually reserved for urgent matters where requirement for issuing of notice would subject the applicant to irreparable harm and it is at the discretion of the court whether or not to grant the injunction application ex-parte.

With due respect to the submission by the Applicants' Counsel, in granting an injunction under Rule 4 of Order XXXVII Rule 4 of the Civil Procedure Code it is not that in all cases the Court must direct notice of the application to be given to the opposite party since in some cases the court may dispense with the requirement of giving notice of the application for injunction order to the opposite party "*where it appears that the giving of such notice would cause undue delay.*" In the present case, the Applicants' Counsel conceded that notice was duly served on the Applicants/Defendants and that the Applicants entered appearance in court

on that day. However, as the Applicants' Counsel rightly submitted despite of the appearance of the Applicants/Respondents in court on that day the learned trial magistrate proceeded to grant an order ex-parte. This in my view was procedurally wrong. The circumstances of the case in my view did not fall within the ambit of the exception for notice in that requiring the appearance of the Applicants would amount to delay and hence defeat the object for which the application had been made. As rightly submitted by the Applicants' Counsel the learned trial magistrate ought to have ordered the matter to be proceeded between the parties, that is, *inter parties*. I am fortified further in this view by the decision in the case of **HANS WOLFGANG GOLCHER vs. GENERAL MANAGER OF MOROGORO CANVAS MILL LIMITED (1987) T.L.R. 78 (HC)**, where Hon. Maina J. (as he then was) held as follows:-

> *"(i) The rule that the court shall in all cases, except where it appears, that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application to be given to the opposite party, is mandatory;*
>
> *(ii) if the opposite party can be served without delay, as was the position in this case, an ex parte injunction should not be issued."*

In **HANS WOLFGANG GOLCHER vs. GENERAL MANAGER OF MOROGORO CANVAS MILL LIMITED** (supra) Hon. Maina J. also cited the case of **DEVAN vs. BHADREASA AND ANOTHER [1972] E.A. 23** where there was no difficulty in serving the opposite party with the chamber summons and the ex-parte interim injunction was set aside. Yet

in another case of **AUGUSTINO LYATONGA MREMA AND ANOTHER vs. ABDALLAH MAJENGO AND OTHERS, Civil Appeal No. 41 of 1999**, the Court of Appeal sitting at Dar es Salaam held as follows:

> *"...the effect of rule 4 of Order XXXVII of the Civil Procedure Code is to make it compulsory for the giving of notice to the opposite party in all cases* ***except in situations covered by the exception to the rule****....Without the respondents satisfying the court as to the necessity of dispensing with the notice under the exception to rule 4,* ***the court had no power to grant ex-parte the injunction against the appellants.****" (the emphasis is of this Court).*

Since both parties were present on the date set for the hearing of the application, as the Applicants' Counsel rightly submitted, the Court ought to have given leave to the Applicants' Counsel to file counter affidavit and then order the matter to be disposed of inter partes. The record of the lower court shows that Hon. Mkwawa, K.S (RM) granted leave to file counter-affidavit on the 13th day of October 2010. The matter was scheduled for mention with view of fixing the hearing date on the 5th November 2010. However, on the 13th day of October 2010 the trial magistrate granted application for injunction ex-parte. Essentially, a temporary injunction, which is in the nature of a holding order pending another order, normally emanates from the main suit pending in court between the parties. The main question at the main suit is whether the notice to seize vehicles by the Defendants/Applicants was issued to the Plaintiffs?

As rightly submitted by the Applicants' Counsel, since the ex-parte order granted is the same with the prayer made under paragraph (b) of the Plaint, I am at one with the Applicants' Counsel that the order for release of the motor vehicles the Applicants had seized is a substantive prayer which should be determined in the main suit.

The Applicants' Counsel contends that the ex-parte order granted by the trial magistrate did not accord with procedures and conditions set in the law. The general principles for issuance of temporary injunction were succinctly stated by Georges, CJ (as he then was) in the now classicus case of **ATILIO V. MBOWE 1969 (HCD) 284,** which established three conditions to be satisfied before an injunction is issued by court, namely: that *there must be serious question to be tried on the facts alleged, and a probability that the plaintiff will be entitled to the relief prayed; that the court's interference is necessary to protect the plaintiff from the kind of injury which may be irreparable before his legal right is established; and that on the balance 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.*

The Plaintiffs/Respondents do not deny that they have defaulted on repaying the loan. They are still indebted to the Defendants/Applicants. The Plaintiffs/Respondents Counsel submitted that the Respondents/Plaintiffs were in serious negotiations with the Defendants/Applicants on how to reschedule the payment arrangement of the loan and that the negotiations were at an advanced stage. If this is the case then it means that the request for new repayment

schedule/arrangement has yet to be reached, and in fact there is no any proof before this Court of the alleged ongoing negotiations as alleged by the Respondents' Counsel. The loan facility the Applicants/Defendants granted to the Respondents/Plaintiffs was for the buying of motor vehicles the Respondents/Plaintiffs allege that the Defendants/Applicants wrongly seized. It seems to me therefore that the Plaintiffs/Respondents merely are contesting the procedures the Applicants/Defendants used in seizing the motor vehicles. The Plaintiffs/Respondents do not deny that there is an outstanding balance to be settled. It is not hard for anyone to realize that it is the Defendants/Applicants, who to a large extent, will suffer loss as a result of the continued use of the charged chattels by the Plaintiffs/Respondents. It is a trite principle in granting injunction that the Court must among other things be satisfied that the damage the Plaintiffs/Respondents will suffer will be such that mere monetary compensation will not be adequate. This is not the case presently. The Respondents/Plaintiffs allege to have incurred a loss amounting to TZS 1,000,000 towards buying and/or replacing parts of the motor vehicles. This can easily be atoned by way of general damages. In my view, the case did not meet one of the conditions stated in **ATILIO V. MBOWE 1969 (HCD) 284** for grant of injunction, namely, that on the balance 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.

From the contents of the Loan Facility which is on record, there is no doubt at all as to the resolution of the issue whether the Plaintiffs/Respondents can win their case. In the first place, the *Dispute Clause* in the Loan Agreement ousts the jurisdiction of the Temeke District Court to hear the matter as it vests the jurisdiction with the Commercial Division of the High Court of Tanzania to hear disputes arising from the contract entered between the parties. Article 13 of the Loan Facility dated 25.11.2008 states as follows:

> *"In the case of any dispute arising out of the interpretation, performance or non performance of the terms and conditions contained therein, depending on the amount claimed by any of the two parties, the parties hereto irrevocably submit themselves to the Commercial Division of the High Court of Tanzania for adjudication of the dispute unless the law provides otherwise."*

I wish to point out here however that jurisdiction is conferred by statute and parties cannot therefore by consent outs the jurisdiction of the court. The issue whether the *Dispute Clause* in the Loan Agreement ousted the jurisdiction of the Temeke District Court to hear the matter and vested it with the Commercial Division of the High Court of Tanzania to hear disputes arising from the contract entered between the parties was a preliminary matter which is to be determined by the court.

In any event, whatever decision the trial court will have arrived at definitely it could not exempt the Plaintiffs/Respondents from their obligation to pay the outstanding amount of the loan facility. As I have

pointed out earlier in this ruling, the Plaintiffs/Respondents conceded that they are still indebted to the Applicants/Defendants to the outstanding amount of the loan facility. In my view, much as the test that ***there should exist a probability that the matter would be decided in the plaintiff's favour*** should not be exaggerated and taken to unproportional limits at the risk of giving verdict prematurely given that the court would not be in possession of full evidence at that stage, I wish to associate myself with my brother judge, Hon. Kalegeya J. (as he then was) who succinctly stated in the case of **SURYAKANT D. RAMJI V. SAVINGS AND FINANCE LTD AND OTHERS, Civil Case No. 30 of 2000, Commercial Division of the High Court of Tanzania at Dar es Salaam** (unreported), that in granting orders for temporary injunction ***"the controlling factor should be the existence of a serious triable issue."*** This observation is in consonance with the test in **ATILIO V. MBOWE 1969 (HCD) 284** that before granting temporary injunction the court must be satisfied that there is **a *serious question to be tried on the facts alleged, and a probability that the plaintiff will be entitled to the relief prayed.*** Amplifying further on this test, one cannot but be enthused by the words of Hon. Mushi J. in **ARUSHA MUNICIPAL COUNCIL VS TANGO TRANSPORT CO. LTD, Misc. Civil Appeal No. 9 of 1989, (High Court at Arusha)**(unreported) pointing out that the principle for granting injunction that the court should be satisfied that there is a serious question to be tried at the hearing and that on the facts before it, and that there is a probability that the plaintiff is entitled to a relief, the test should be ***whether matters should not be preserved in the***

status quo until that question can be finally decided." In my view at the main suit, the serious question to be tried on the facts alleged is whether the plaintiff is entitled to an order for immediate release of the seized motor vehicles. As I have already pointed out above, the Plaintiffs/Respondent do not deny the fact that they are still indebted to the Defendants/Applicants for the amount of the loan facility. It is not hard therefore for a properly directed court to determine the issue as to whether on a probability the plaintiffs/respondents will be entitled to the relief.

I should now turn to consider the prayer by the Applicants' Counsel that this Court should investigate whether the *exparte* order granted by the lower court under Order XXXVII of the Civil Procedure Code was within its jurisdiction. It is on record that the Chamber Summons the Plaintiffs/Respondents lodged at the lower court on the 12th day of October 2010 for an order for the immediate release of the motor vehicles was preferred under Order XXX VII Rule 1(9) of the Civil Procedure Code Act, 1966 Cap.33 R.E 2002. With due respect, such provision does not exist in our Civil Procedure Code. Clearly, the application for exparte injunction order was clearly made under a wrong or non-existent provision of the law, thus rendering it incompetent and liable to be struck out. Instead the trial assumed jurisdiction albeit wrongly in my view and proceeded to grant the exparte order. The trial court having been wrongly moved and thereby wrongly assuming jurisdiction, clearly all that followed was rendered a nullity ab initio. As such the exparte order granted by the trial court having wrongly assumed jurisdiction was a nullity and incapable of conferring any

enforceable rights. A plethora of case authorities by the highest court of the land has times and again held that citation of a wrong provision of the law or non citation of law renders an application incompetent and the only remedy is to be struck out.

Emanating from the foregoing, clearly there has been an error material to the merits of the case involving injustice warranting this Court to exercise its revisionary powers. Much as the trial court exercised jurisdiction vested in it by law, in the exercise of its jurisdiction it acted illegally or with material irregularity. Furthermore, the exparte order of release of the motor vehicles is a substantive prayer made in the Plaint at paragraph (b) of the prayers contrary to the established legal principle that a litigant before a Court of law in this country is not entitled in law to be granted a final judgment before the dispute is determined. The exparte order of the lower court was therefore not an order for maintaining the status quo but it was an order granting the Respondents/Plaintiffs reliefs determining the main suit.

In fine the application for revision is hereby granted.

The exparte order issued by the District Court of Temeke that the motor vehicles with Scania 124 Tractor Reg. No.**T 978 ATN,** Trailer Reg. No. **T 267 ATW**, Scania 94 Truck **T 596 ATQ** seized by the 1st Defendant (the 2nd Applicant hereat) be immediately released to the Respondents (the Plaintiffs thereat) is hereby quashed and set aside.

Further, it is ordered that the order of the District Court of Temeke that no further chattels be restricted by the Defendants (present Applicants) or its agents until final disposal of the matter is hereby also quashed and set aside.

It is further ordered that all the proceedings and orders of the District Court of Temeke made on the 13th day of October 2010 are hereby quashed and set aside.

The Applicants shall have their costs in this application.

Order accordingly.

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R.V. MAKARAMBA
JUDGE
05/08/2011

Ruling delivered this 5th day of August 2011 in the presence of Mr. Luguru, Advocate for the Respondents and in the absence of the Applicants.

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R.V. MAKARAMBA
JUDGE
05/08/2011.

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