IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CAUSE NO. 259 OF 2015

(Originating from Commercial Case No. 119 of 2015)

GASLAMP HOLDINGS CORP ..... APPLICANT

VERSUS

PERCY BEDA MWIDADI
VICTOR JOSEPH PETER
MAKSIM CHALDYMOV
YURI VALENTINOVICH CHERNOMORCHENKO ..... **RESPONDENTS**
RUPHINUS ANTHONY MLORERE
GOLD TREE TANZANIA LIMITED

30th November & 14th December, 2015

RULING

MWAMBEGELE, J.:

This is an application for stay of execution filed by Gaslamp Holdings Corp. The application has been taken under the provisions of sections 68 (e) and 95 and Order XXXVII rules 1 (a) and 2 (1) of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (henceforth "the CPC"). It is supported by an affidavit of Juvenalis Ngowi; an advocate of this court and courts subordinate

hereto except the Primary Court. The application is seeking for the following orders:

1) The Honourable court may be pleased to issue an order of temporary injunction:
    a) Restraining the 1st, 2nd, 3rd, 4th and 6th respondents, their servants, workmen, agents and/or agents whosoever purporting to act on their behalf from dealing with the assets of the 6th respondent, from dealing in any manner with the shares of the 6th respondent including making any transfer and/or allotment of shares, changing the board of directors structure of the 6th respondent including but not limited to any appoint of new directors;

    b) Restraining the 1st, 2nd, 3rd, 4th and 6th respondents, their servants, workmen, agents and/or agents whosoever purporting to act on their behalf from dealing with the assets of the 6th respondent, from dealing in any manner with the shares of the 6th respondent including but not limited to Mining Licences Numbers ML 426/2011 and ML 468/2012 held in the name of the 6th defendant in any manner whatsoever;

    c) Costs of the application; and

    d) Any other relief as the Honourable court may deem just to grant in the premises thereof.

The application was heard *exparte* on 13.11.2015 after the respondents failed to file their counter-affidavits and thus they had no right to oral reply. The court had so ruled on 12.11.2015 relying on ***Fweda Mwanajoma & Another Vs R***, Criminal Appeal No. 174 of 2004, an unreported criminal decision of the Court of Appeal which this court felt it apposite to borrow a leaf from.

At the hearing, the applicant was advocated for by Mr. Sipemba, learned counsel. The oral hearing was preceded by the applicant filing skeleton written arguments as dictated by the provisions of rule 64 of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012.

At the hearing, Mr. Sipemba adopted the counter-affidavit supporting the application and the skeleton arguments earlier filed. He kicked off by submitting that the respondents having not filed the counter-affidavits, the application stands uncontested and thus the court should act on the basis of facts deponed to in the affidavit supporting the application, unless, on the face of it, the facts are palpably false. The learned counsel cited ***Fredrick Selenge & another Vs Agnes Masele*** [1983] TLR 99, the decision of this court, to reinforce this proposition. On this premise, the learned counsel, sought the indulgence of this court to take a similar course of action and grant the application as prayed in the chamber summons.

Without prejudice to the foregoing prayer, the learned counsel submitted on the substance of his application. He stated that the principles for issuance of injunctive orders were enunciated in the oft-cited ***Atilio Vs Mbowe*** [1969] HCD n. 284; that the following conditions must be satisfied; that is:

1) That there is a serious question to be tried on the facts alleged, and a likelihood that the plaintiff will be given the relief prayed;

2) The plaintiff must show that the court's intervention is necessary to protect the plaintiff from the kind of injury which may be irreparable before his legal right is established; and

3) That, on the balance, there must be shown that there will be great hardship and mischief suffered by the applicant from the withholding of the injunction than will be suffered by the defendant from the granting of the injunction.

On the first condition, the learned counsel submitted that there is a serious question of law to be determined by the court since the court must look into a trust arrangement between the applicant and the 1st and 5th respondents as well as the 6th respondent and make a determination on the applicant's rights thereof. He thus submits that a *prima facie* case has been made out in the present application.

On the second principle, the learned counsel submits that the applicant, who is the majority shareholder, is not in control of the assets of the 6th respondent; the same are in control of the 1st and 5th respondents. He submits further that the applicant is not in control of the actions of, and the decisions that are being made by, the respondents. On this premise, the learned counsel states that the plaintiff has shown it is important for the court to intervene by granting the orders sought. The decision of ***Giella Vs Cassman Brown & Co.*** [1973] EA 358 is cited to buttress this proposition.

On the third principle, the applicant's counsel states that the applicant has incurred a substantial amount to the tune of US $ 5,100,000.00 disbursed as loans to the 6th respondent for the purposes of continuation, operation and expansion of the company's prospecting in mining activities in Kungutas village, Chunya, in Mbeya region which loan has not been repaid. He submits further that the 6th respondent's properties are located at the mining site at Kungutas village, Chunya, in Mbeya region and the respondent are in the process of wasting the said properties. The said properties are charged in favour of the applicant by way of a Debenture dated 12.08.2015, he submits.

The learned counsel asks the court to exercise its discretion judiciously by appreciating the facts of this case and apply the principles of injunction to it as was the case in ***Ibrahim Vs Ngaiza*** [1971] HCD n. 249.

I have heard the learned arguments by the learned counsel for the applicant. Indeed, the application not being contested and thus, as was held in the ***Fredrick Selenge*** case (supra), this court has to act on the basis of the facts deposed to in the affidavit in support of the application, unless they are, on the face of it, palpably false. I have seen and read through the affidavit supporting the application. I have not been able to see any statement therein suggesting them being false. In the premises, for this reason only, I would grant this application.

The foregoing would have sufficed to dispose of this application. However, for completeness of this ruling and assuming that I am wrong on the course of action taken above, I wish to decide on the "without prejudice" arguments fronted by the learned counsel for the applicant. As the learned counsel submits, in order for an application of this nature to succeed, it must comply

with the principles set out in ***Atilio Vs Mbowe***. Basing on ***Atilio Vs Mbowe***, temporary injunction will not issue unless an applicant proves to the satisfaction of the court on the preponderance of probabilities the three conditions referred to above of which I find it necessary to reproduce them as under:

1) That there is a serious question to be tried on the facts alleged, and a likelihood that the plaintiff will be given the relief prayed;

2) The plaintiff must show that the court's intervention is necessary to protect the plaintiff from the kind of injury which may be irreparable before his legal right is established; and

3) That, on the balance, there must be shown that there will be great hardship and mischief suffered by the applicant from the withholding of the injunction than will be suffered by the defendant from the granting of the injunction.

Recent jurisprudence has added another principle to those in ***Atilio Vs Mbowe***. This principle is that:

> "... full and proper weight should be given to the starting principle that there has to be a good reason for depriving a Plaintiff from obtaining the fruits of a Judgment".

The foregoing principle was added by ***Cotton Marketing Board Vs Cogecot Cotton Co. SA*** [1997] TLR 63 and restated in ***Tanzania Electric Supply Company (TANESCO) Vs Independent Power Tanzania Ltd (IPTL) & 2 Ors*** [2000] TLR 324

The ***Cogecot Cotton*** and ***TANESCO*** cases (supra) were followed by this court in ***Independent Power Tanzania Limited & Another Vs Standard Chartered Bank (Hong Kong) Ltd & 2 Others*** Misc. Civil Application No. 174 of 2014 (unreported). It is therefore the law in this jurisdiction that in order for an application of this nature to succeed, there must be proof on the three conditions articulated in ***Atilio Vs Mbowe*** and the fourth condition added by the ***Cogecot Cotton*** case (supra).

Reverting to the case at hand, the immediate question which must be answered by this ruling is: are the three conditions in ***Atilio Vs Mbowe*** and the fourth condition laid by the ***Cogecot Cotton*** and ***TANESCO*** cases (supra) fulfilled in the present case as to entitle the applicant to be granted the prayers sought? This is the question to which I now turn.

I propose to begin by determining the question whether, on the facts alleged in the plaint, there is a serious question to be tried between the applicant and respondents, and a probability that the applicant will be entitled to the relief prayed therein.

But let me state, at this juncture, that the question whether the plaintiff's case has a probability of success, is rather tricky. I say so because, in determining this principle, there is a danger of this court crossing borders by clothing itself with the powers of an appellate court. This predicament was

explained better by my Brother at the Bench Nsekela, J. (as he then was) in ***Mazaher Limited Vs Murray K. Chume & Anor*** Commercial Case No. 89 of 2002 (unreported) in which His Lordship, caught up with an identical situation, hesitated to hazard an opinion that there was a possibility of success as it would be premature to do so at that stage since the parties had not adduced any evidence. In harbouring this stance, His Lordship had in mind ***CPC International Inc. Vs Zainab Grain Millers*** **Ltd**, Civil Appeal No. 49 of 1995 (unreported) in which it was so stated. His Lordship went on to quote the following dictum of Lord Diplock in ***American Cyanamid Co. Vs Ethicon Ltd*** [1975] AC 396, at page 409 to buttress this proposition:

> "Your Lordships should in my view take this opportunity of declaring that there is no such rule. The use of such expressions as "a probability," "a prima facie case" or "a strong prima facie case" in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried. It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and nature considerations."

Guided by the foregoing authorities, I am satisfied that the applicant has shown to the satisfaction of the court; on a balance of probabilities, that there are serious issues in the suit to deserve resolving them by a full trial but I am loathe to pronounce that there is "a probability," "a prima facie case" or "a strong prima facie case" worth succeeding upon trial.

On the second condition, the applicant's counsel has stated that the applicant, who is the majority shareholder, is not in control of the assets of the 6th respondent. It is the 1st and 5th respondents who are in control of the same. Neither is the applicant in control of the actions of, and the decisions that are being made by, the respondents. I think the applicant, on a balance of probabilities, has sufficiently shown that intervention by this court is necessary to protect the it from the kind of injury which may be irreparable before its legal right is established.

Regarding the third condition, the applicant has stated that the assets of the 6th respondent situate at a mining site at Kungutas village in the Chunya District of Mbeya region are in control of the respondents and are in the process of being wasted. It is also averred that the applicant and other lenders loaned the 6th respondent which loan remains unpaid but worse still the respondents are in the process of securing another loan behind the applicant's back. I think the applicant has shown sufficient reasons which point to the fact that great hardship and mischief will be suffered by it (the applicant) from the withholding of the injunction than will be suffered by the defendant from the granting of the injunction.

As to the fourth principle, it is undoubted that it will not be applicable in the present case as no party is in possession of any decree. This is essentially an application for injunctive orders pending determination of Commercial Case No. 149 of 2014 between the applicant and respondents which case is now pending in this court.

Thus, in view of the foregoing discussion, even on the "without prejudice" submissions by the learned counsel for he applicant, this application would have succeeded.

In the end, therefore, I am satisfied that this application which has not been contested has merit and must be allowed in terms of the facts deponed to in the affidavit supporting the application. I thus proceed to order as follows:

1. The 1st, 2nd, 3rd, 4th 5th, and 6th respondents, their servants, workmen, agents and/or whosoever purporting to act on their behalf, are restrained from dealing with the assets of the 6th respondent, dealing in any manner with the shares of the 6th respondent including making any transfer and/or allotment of shares, changing the board of directors structure of the 6th respondent including but not limited to any appoint of new directors;

2. The 1st, 2nd, 3rd, 4th 5th, and 6th respondents, their servants, workmen, agents and/or whosoever purporting to act on their behalf are restrained from dealing with the assets of the 6th respondent, dealing in any manner with the shares of the 6th respondent including but not limited to Mining Licences Numbers ML 426/2011 and ML 468/2012 held in the name of the 6th defendant in any manner whatsoever;

3. The lifespan of the orders in 1 and 2 above shall, unless extended under the relevant law, be six months; and

4. As this application was not contested, no order is made as to costs.

Order accordingly.

DATED at DAR ES SALAAM this 14th day of December, 2015.

J. C. M. MWAMBEGELE
JUDGE