

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

**MISCELLANEOUS COMMERCIAL APPLICATION NO. 113 OF 2016
(Arising from Miscellaneous Commercial Cause No. 259 of 2015)**

**GASLAMP HOLDINGS CORP APPLICANT
VERSUS**

PERCY BEDA MWIDADI

VICTOR JOSEPH PETER

MAKSIM CHALDYMOM

YURI VALENTINOVICH CHERNOMORCHENKO }..... RESPONDENTS

RUPHINUS ANTHONY MLORERE

GOLD TREE TANZANIA LIMITED

4th July & 24th October, 2016

RULING

MWAMBEGELE, J.:

On 14.12.2015, this court granted an application made by the applicant and made the following injunctive orders:

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 appointment 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.

As per order 3 above, the relief sought by the applicant expired on or about 13.06.2016. The applicant has thus applied for its extension. The application has been made under the provisions of sections 68 (e) and 95 and Order XXXVII rule 3 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (hereinafter "the CPC") and any other enabling provisions of the law. It is supported by three affidavits: of Thomas Mihayo Sipemba; the applicant's counsel, of Frank Philemon Milanzi; an advocate of this court and courts subordinate hereto except for the primary court and of Vincent Dominic Kilindila who identifies himself as the Managing Director of Vigour Security & Domestic Duties Limited; a security company engaged in providing for security services at the mining site in Kungutas Village, Chunya District in Mbeya Region.

On 14.06.2016, Mr. Chuwa, learned counsel from a law firm going by the name Chuwa and Co. Advocates representing the first, third, fourth and sixth

respondents filed a preliminary objection against the application. The preliminary objection comprises three points couched thus:

- (a) That the current application, the main suit and the application for injunctive orders are tainted with illegality as the East Africa Law Chambers who filed the main suit, the application for injunctive orders and the current application are the Company Secretary of the 6th respondent and thus they have conflict of interest;
- (b) That the application is bad in Law for being supported by defective affidavits of Thomas Mihayo Sipemba, Vincent Dominic Kilindila and Frank Philemon Milanzi which are based on information without disclosing the sources and which contain prayers and legal arguments; and
- (c) That the affidavit of Vincent Dominic Kilindila has no *locus* to swear an affidavit in this matter.

On 15.06.2016 the parties agreed and prayed to the court to dispose of the PO by way of written submissions. The court granted the prayer and proceeded to schedule the submissions dates. Both parties have complied with submissions schedule by filing their respective submissions timeously.

I must state at this juncture that this ruling ought to have been pronounced on 11.08.2016. However, because I was out of the station for two consecutive months for a special assignment upcountry which special assignment ended on 22.09.2016, that could not be possible.

For the first point of the PO, counsel for the first, third, fourth and sixth respondents (hereinafter referred to as simply "counsel for the respondents") submits that East Africa Law Chambers to which the applicant's counsel belongs is also a Company Secretary of the sixth respondent in which the

first, third and fourth respondents are directors. The learned counsel verifies that this is confirmed by a search at BRELA which revealed that the said East Africa Law Chambers is a Company Secretary of the sixth respondent. In the circumstances, the learned counsel submits, the applicant's counsel is an officer of the sixth respondent and therefore has privileged information and conflict of interest. The learned counsel submits that this is a pure point of law as it touches on the point of conflict of interest and forbidden by practice founded upon prudence as was held in **Rift Valley Cooperative Union & anor Vs Ngila Estates Ltd** [2010] 2 EA 428; the decision of the Court of Appeal. Mr. Chuwa has urged the court to follow the **Rift Valley** case which, he argues, is an exception to the famous **Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd** [1969] EA 696 which requires a point of objection to be a pure point of law. The learned counsel has also relied on **African Group (T) Ltd Vs Said Msangi** Commercial Case No. 87 of 2013 (unreported), **Eley Vs Positive Life Assurance Co. Ltd** (1876) 1 Ex. D 88 (C.A), **Panorama Developments (Guildford) Limited Vs Fidelis Furnishing Fabrics Ltd** [1971] QB 711 and **Jafferali and Another Vs Borrisow and another** [1971] EA 165 to underscore the importance and role of a Company Secretary in a company and the prohibition not to act as a counsel and witness in the same case.

On the second point of PO, Mr. Chuwa has attacked the affidavits of Thomas Mihayo Sipemba, Frank Philemon Milanzi and Dominic Kilindila which support the application as defective for not disclosing the source of information and for containing prayers and legal arguments.

The learned counsel has especially attacked para 7 of the affidavit of Thomas Mihayo Sipemba and paras 2, 4 and 9 of the affidavit of Frank Philemon Milanzi as well as the verification clause of the said Frank Philemon Milanzi.

That para 7 of the affidavit of Thomas Mihayo Sipemba to the effect that "the first respondent has been making attempts to remove some of the equipment and machinery located at the mine site in Chunya in contravention of the lawful injunctive orders of this court" is not within the knowledge of the deponent and the source thereof has not been disclosed. This makes the affidavit defective and should therefore not acted upon, the learned counsel for the respondents argues.

That para 2 of the affidavit of Frank Philemon Milanzi contains information that are not from the knowledge of the deponent but from the information of Vincent Dominic Kilindila but not disclosing the source thereof. And that para 9 of the said Frank Philemon Milanzi contains prayers thereby making it defective. Also that para 4 of the said Frank Philemon Milanzi a fact which is based on information but and the source is not disclosed.

The learned counsel has relied on the case of ***Uganda Vs Commissioner of Prisons Ex Parte Matovu*** [1966] EA 514 and ***Sinani Umba Vs National Insurance Corporation (T) Limited and City Insurance Consultants***, Civil Application No. 50 of 2003 (CAT unreported) to underscore what an affidavit should contain. On this premise, he has urged the court to strike out the application for being supported by incurably defective affidavits.

On the third point of PO, the learned counsel for the respondents has argued that Vincent Dominic Kilindila has no *locus standi* to swear an affidavit in this matter because the contents thereof are more appropriate and the affidavit was meant to support an application for contempt of court rather than this application for extension of time of the injunctive orders. He adds that Vincent Dominic Kilindila's affidavit is essentially hearsay.

On the above arguments, the learned counsel has beckoned the court to strike out the application with costs.

On the other hand, Mr. Thomas Mihayo Sipemba, learned counsel for the applicant, has strongly argued against the PO. On the first point, the learned counsel has argued that the point does not fall with the standards of a PO as set out in **Mukisa Biscuit** as there will be need of evidence to prove it. He has argued that Mr. Chuwa, learned counsel for the respondents, has left out the principle established by the **Rift Valley** case which is that:

“... if the court is to determine *suo motu* whether or not the action of the advocate is to be constituted or did not constitute a conflict of interest, the merits of the case have to be considered, which the court cannot do as there is a preliminary objection”

The learned counsel argues that the **Rift Valley** case is an authority for the proposition that an advocate should not act as a counsel and a witness in the same case but that the rule is not violated until the advocate is called as a witness and that the court cannot make an order to prevent an anticipated violation.

He thus submits that to know that the applicant's counsel is also a Company Secretary of the sixth respondent is entirely based on material facts and therefore not a pure point of law. This point, he argues, should therefore be overruled. He has cited **Mukisa Biscuit** (supra) followed in **Hezron Nyachiya Vs Tanzania Union of Industrial Commercial Workers and another**, Civil Appeal No. 79 of 2001 (CAT unreported) for this proposition.

On the second point of the PO which is a complaint against para 7 of the affidavit of Thomas Mihayo Sipemba and paras 4 and 9 of the affidavit of Frank Philemon Milanzi, Mr. Sipemba submits that Mr. Chuwa, learned counsel for the respondents, has not submitted substantially on the complaint against para 7 of the affidavit of Thomas Mihayo Sipemba more than averring that the contents of the paragraph are not within the knowledge of the deponent. Mr. Sipemba submits that the averments contained in para 7 of the affidavit are well within the knowledge of the deponent.

Likewise, the complaint against the phrase "... I was informed ..." in paragraphs 2 and 4 of the affidavit of Frank Philemon Milanzi are stated by Mr. Sipemba, learned counsel, to be within the knowledge of the deponent in that the deponent personally met Vincent Dominic Kilindila who informed the deponent of the meeting that was to be held at the mine site in Chunya on 03.06.2016 which meeting the deponent personally attended. He submits further that the principle enunciated in ***Sinai Umba*** has not been violated.

Rejoining, the learned counsel for the respondents submits that they are aware of the position of the law set out in ***Mukisa Biscuits*** on the essence of a preliminary objection. The learned counsel concedes that the first point of objection is based on a pure point of fact but that it is an exception to ***Mukisa Biscuits*** as held in ***Rift Valley***.

Having considered the arguments by both parties, the following is my decision on them. I start with the complaint on the first point of the PO; that the applicants' counsel is also the Company Secretary of the sixth respondent and therefore that he has conflict of interest unfit to represent the applicant. Mr. Sipemba, learned counsel relies on the *ratio decidendi* in the ***Rift Valley*** case to the effect that that an advocate should not act as a counsel and a witness

in the same case but that the rule is not violated until the advocate is called as a witness and that the court cannot make an order to prevent an anticipated violation.

I think Mr. Sipemba is right. It is now settled law founded on the decision of the oft-cited ***Mukisa Biscuit*** that a preliminary objection has to be a pure point of law and is argued on assumption that all facts are correct. And that it is not a preliminary objection if there is need of evidence to ascertain it. In the case at hand, one will need evidential proof to ascertain the fact that the applicant's counsel is indeed the Company Secretary of the sixth respondent. That is perhaps the reason why Mr. Chuwa, learned counsel for the respondents, has gone to the extent of verifying at BRELA and has allegedly unveiled the fact that the applicant's counsel is still the Company Secretary of the sixth respondent. This is clear vindication of the fact that this point can only be ascertained by evidence thereby removing it within the scope and purview of a point of law within the principles set out in ***Mukisa Biscuit***. I am not prepared to buy Mr. Chuwa's argument to the effect that the ***Rift Valley*** case is an exception to ***Mukisa Biscuit***. To the contrary, as rightly submitted by Mr. Sipemba, ***Rift Valley*** is an authority for the point that an advocate cannot represent a party in a case in which he has a conflict of interest. The burden of proving that conflict is on the one who alleges. For the court to prove *suo motu* that conflict of interest exists, going into the merits of the case will be inevitable which cannot be done in the wake of a preliminary objection. For easy reference let me quote the relevant holding hereunder as summarized by the editor:

"An advocate who has previously acted for one party may come to act for another party in a disputed on the same subject matter and involving

the parties provided that there is not conflict of interest or embarrassment on the part of the counsel. The onus of proving that conflict or embarrassment is on a party alleging the same. The appellant's advocate did not however do so and if the court is to determine *suo moto* whether or not the action of the advocate constituted or did not constitute a conflict of interest, the merits of the case have to be considered, which the court cannot do as there is a preliminary objection"

Also relevant from that case is an observation to the effect that an advocate cannot act as a counsel and a witness in the same case but that the rule is not violated until the advocate is called as a witness and that the court cannot make an order to prevent an anticipated violation.

Mr. Chuwa, learned counsel, is, I think, just in apprehension of fear that Mr. Sipemba, learned counsel for the applicant, will perhaps be called as a witness while, according to him, he has conflict of interest. Conflict of interest, if any, cannot be decided at this stage and the apprehension of fear that Mr. Sipemba will be called as a witness can also not be ascertained at this stage. This court, on the authority of ***Jaferrali*** cited in ***Rift Valley***, cannot make any order to prevent an anticipated violation. On this premise, the first point of the PO is overruled.

I now turn to determine the second point. This is a complaint on some paragraphs in the affidavits supporting the application. Let me start by reproducing the paragraphs complained of. Para 7 of the affidavit of Thomas Mihayo Sipemba reads:

"That while the injunctive orders referred to under paragraph 4 above are still in force, the 1st Respondent has been making attempts to remove some of the equipment and machinery located at the mine site in Chunya in contravention of the lawful injunctive orders of this court. The Applicant has since filed Miscellaneous Commercial Application No. 44 of 2016 asking the court to hold the 1st Respondent in contempt of lawful orders of the court.

It is now shown of me a copy of miscellaneous Commercial Application No 14 of 2016 which is attached herewith and marked as Annexure GHC 2 and forming part of this Affidavit."

Para 2 of the affidavit of Frank Philemon Milanzi reads:

"That on 2nd June 2016 I was informed by one Vincent Dominic Kilindila, the Managing Director of Vigour Security & Domestic Duties Limited, a security company engaged to provide services at the mining site in Kungutas village, Chunya District in Mbeya Region that he had been summoned to attend an official meeting with the Chunya District Committee for Safety and Security on 03rd June, 2016 at 8:00 a.m."

Para 4 of the affidavit of the said Frank Philemon Milanzi reads:

"That, the District Commissioner informed us that the said meeting was initiated by the 1st Respondent who went to the District Commissioner's office and submitted his complaints that the Applicant want to take possession of the disputed mining site illegally. Further, the District Commissioner informed us that, the purpose of the meeting was to reconcile the parties who are in dispute and to see whether the committee might be able to resolve the said dispute amicably."

And para 9 of the affidavit of the same Frank Philemon Milanzi reads:

"That, for the interest of justice, the Applicant prays before this Honourable Court to grant prayers as prayed in the Chamber summons and any other orders that the Court may deem fit to grant."

I will now deal with one para after another.

The complaint against para 7 of the affidavit of Thomas Mihayo Sipemba hinges on the words that "the first respondent has been making attempts to remove some of the equipment and machinery located at the mine site in Chunya in contravention of the lawful injunctive orders of this court" which according to the learned counsel for the respondents show that what is deposed in not within the knowledge of the deponent to which Mr. Sipemba, strenuously rebuts that what is deposed in that paragraph is well within the knowledge of the deponent. I have considered this argument anxiously and

find nothing in the para suggesting that such facts are not within the deponent's knowledge. The deponent is the applicant's counsel who, I think, is vigilant in following up the case of his client and in that process one cannot be surprised if the facts deposed upon in the paragraph are well within his knowledge. I find no merit in the complaint and overrule it.

The complaint against para 2 of the affidavit of Frank Philemon Milanzi is that it contains information that are not from the knowledge of the deponent but from the information of Vincent Dominic Kilindila. Particular reference is on the use of the words "I was informed" in the paragraph. With due respect to the learned counsel for the respondents, I do not find any merit in his argument as well. It is true that the deponent has used the words "I was informed" in the paragraph. But the deponent has quite appositely disclosed the source of such information to be "one Vincent Dominic Kilindila, the Managing Director of Vigour Security & Domestic Duties Limited, a security company engaged to provide services at the mining site in Kungutas village, Chunya District in Mbeya Region". Mr. Chuwa's complaint on this para, to say the least, is unfounded and is hereby dismissed.

Against para 4 of the affidavit of the said Frank Philemon Milanzi, Mr. Chuwa's complaint is that it is based on information whose source is not supplied. With respect, I do not agree. The paragraph quoted above is indeed based on information whose source has been disclosed in the very paragraph that it is the District Commissioner. Mr. Chuwa, learned counsel has not explained sufficiently why he thinks the details as to the source of the information are not disclosed. This complaint is dismissed as well.

The next complaint regards para 9 of the same affidavit to the effect that it contains prayers thereby making it defective. I think Mr. Chuwa is justified on

this complaint. The paragraph reproduced above, undoubtedly, contains prayers in that the deponent prays that it will be in the interest of justice if the prayers prayed for in the Chamber Summons and any other orders that the court may deem fit to grant are granted. Para 9, reproduced above, contains prayers. I find merit on the complaint of Mr. Chuwa against this point.

I already held in ***Gaslamp Holdings Corp Vs Percy Beda Mwidadi & 5 Others***, Miscellaneous Commercial Cause No. 14 of 2016, a ruling on this matter which was handed down on 17.10.2016 that once as paragraph or paragraphs of an affidavit are found to be offending against the law, the remedy is to expunge them; that is, the offending paragraphs. For this stance, I found solace in ***Phantom Modern Transport (1985) Limited Vs D. T. Doble (Tanzania)***, Civil References No. 15 of 2001 and 3 of 2005 and ***Attorney General Vs SAS Logistics***, Criminal Application No. 9 of 2011, both unreported decisions of the Court of Appeal. Prayers are not allowed in affidavits and therefore paragraph 9 of the affidavit of Frank Philemon Milanzi is expunged.

I now turn to determine on the last point of the PO. The gist of this point is that Mr. Vincent Dominic Kilindila has no *locus standi* to swear in the present matter as he is not a party to it and his affidavit is essentially hearsay. It is Mr. Chuwa's view that Vincent Dominic Kilindila's affidavit was relevant in an application for contempt of court rather than in the present application for extension of time of the injunctive orders. Mr. Chuwa has not come out clearly in his one-paragraph arguments why he is complaining against the affidavit. Neither has he prayed anything to be done against the paragraph. I think it is only fair that the complaint against this paragraph is, and it is hereby, dismissed.

The sum total of the foregoing discussion is that, except for the complaint against para 9 of the affidavit of Frank Philemon Milanzi, the preliminary objection is overruled with costs to the applicant.

Order accordingly.

DATED at DAR ES SALAAM this 24th day of October, 2016.

J. C. M. MWAMBEGELE
JUDGE