**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISCELLANEOUS COMMERCIAL APPLICATION NO. 312 OF 2016**

**(Arising from Miscellaneous Commercial Application No. 310 of 2016)**

**ELIAS MASIJA NYONG'ORO**
**EDNA ELIAS NYANG'ORO** ..... **APPLICANTS**
**RODRICK ELIAS NYANG'ORO**

**VERSUS**

**MWANANCHI INSURANCE CO. LTD** ..... **RESPONDENT**

20th & ..... December, 2016

**RULING**

**MWAMBEGELE, J.:**

The applicants have filed the present application under a Certificate of Urgency. When the application was called on for hearing on 20.12.2016 I asked Mr. Imam Hassan Daffa and Ms. Gerida John, the learned counsel who appeared, respectively, for the applicants and respondent, to address me on whether the matter was indeed urgent. Upon agreement of the learned counsel for the parties, it was agreed that they should address the court on the point on the following day; that is, 21.12.2016. On 21.12.2016 both learned counsel for the parties appeared. However, Mr. Daffa, had not prepared himself to address the court on the urgency or otherwise of the

matter; he had instead prepared himself to address the court on the main application. On agreement of both parties, it was agreed that the counsel should address the court on the point on 22.12.2016. Indeed, the learned counsel for the parties walked the talk; they addressed me on whether the application is a matter of urgency or not. This is the ruling thereof.

The background to the present application, briefly stated, is that vide Miscellaneous Commercial Application No. 310 of 2016, this court made an order on 14.11.2016 that a warrant of arrest should issue to the applicants – Elias Masija Nyang'oro, Edna Elias Nyang'oro and Rodrick Elias Nyang'oro – to appear and show cause why they should not furnish security for their appearance in Commercial Case No. 135 of 2015. That order, as will be seen shortly, has not been effected. The learned counsel for the respondent has told the court that they (the applicants) are nowhere to be seen. In the meantime the applicants have come up with the present application seeking, *inter alia*, to lift that order; an order for a warrant of arrest to issue against them to appear and show cause why they should not furnish security for their appearance in Commercial Case No. 135 of 2015.

Addressing the court on the point, Mr. Daffa, learned counsel for the applicants, stated that there is an arrest warrant issued by the court in respect of Miscellaneous Commercial Application of 310 of 2016 under which the applicants can be arrested at any time. That the applicants have filed Commercial Review No. 12 of 2016 in this Court. It is expected that the review will have two outcomes; confirmation that the order is correct and the second could be nullification of the order for being incorrect.

The learned counsel clarified that the respondents on 01.12.2015 filed an application in this court under OXXXVI rule 1 (a) (iii) and (b) of the CPC

seeking to issue an arrest warrant against the applicant to appear in court as to why they should not furnish security for their appearance. As required under OXLIII rule 2 of the CPC, the learned counsel went on, that application was filed by a chamber summons supported by an affidavit and titled **Civil Application No. 310 of 2015** and the affidavit is titled **Miscellaneous Civil Application No. 310 of 2015**. The ruling in that application is titled **Miscellaneous Commercial Application No. 310 of 2016**. Thus, he went on, in determining the application for review, this court will have to satisfy itself as to whether **Civil Application No. 310 of 2015, Miscellaneous Civil Application No. 310 of 2015** and **Miscellaneous Application No. 310 of 2016** are the same.

He went on to argue that if the applicants are arrested and the court will rule that those applications are one and the same, there will be no problem but if it will not, then the applicants will suffer as they would have been arrested without justification. That is the reason why the learned counsel is of the view that the matter should be handled with urgency. The learned counsel reminded the court that this is an application for raising the arrest warrant pending determination of the Application for Review filed whose hearing has been slated for 20.02.2017.

Responding, Ms. John, learned counsel for the respondent, before embarking on the urgency or otherwise of the matter stated that there is forgery of signatures of the application's herein in the affidavit sworn and filed in court. That it has come to their knowledge that the signatures of the applicants in the present application are forged. That, she contended, had come to the respondent's knowledge after examining and comparing the signatures appearing in the pleadings filed in respect of Miscellaneous Commercial

Application No. 310 of 2016 in which the applicants herein are respondents. She reiterated that it is apparent that signatures in the affidavit sworn in the present application are forged. Because of this fact, she added, it shows clearly that the applicants are nowhere to be found to the extent that a stranger forged their signatures and brought the application at hand.

Regarding the urgent nature of the matter, counsel argued, the matter should not be considered as of extreme urgency since the applicants herein have not yet been arrested. She insisted that to date the arrest order has not yet been executed and the applicants are nowhere to be found. She stated that all initiatives have been taken to ensure that they are apprehended but all the efforts have end up in vain. For that reason, she argued, the applicants cannot come and bring the matter on urgency basis while they enjoy their freedom and their rights have not been infringed.

On the other hand, she contended, the matter could be considered of extreme urgency if the applicants had been arrested and placed under police custody. But under the current situation, she submitted, the applicants have no colour of right to bring the matter under a certificate of urgency.

The learned counsel reminded the court that Miscellaneous Commercial Application No. 310 of 2016 from which the present application emanates was also brought under certificate utmost of urgency where the applicant therein (respondent herein) was praying the matter to be disposed of under urgency basis on the ground that the applicants herein were disposing all assets and attempted to flee the country but this court did not consider it as a ground for hearing the case on urgency basis and the matter proceeded on normal procedures which resulted into the ruling under which the applications are seeking to raise its order under a certificate of urgency. Similarly, she went

on, the presence of application for review cannot be a sufficient ground to bring this matter on urgent basis by mere discrepancies of case numbers. She thus it submitted that the court should not consider the matter as of urgency; neither should it consider it as a matter of extreme urgency.

Rejoining, Mr. Daffa, learned counsel for the applicants stated point-blankly that the signatures are not forged. The learned counsel reminded the court that the applicants did not file any counter-affidavits in Miscellaneous Commercial Application No. 310 of 2016 but in Civil Application No. 310 of 2105. He added that the learned counsel for the respondent is not a forensic expert to say that the signatures are forged.

On the initiatives taken to have the applicants arrested to no avail, the learned counsel for applicant stated that the counsel for the respondent is not an authority to say so but the Regional Police Commander of Arusha to whom the Warrant was Arrest was addressed and no response has been heard from him to date.

The learned counsel for the applicants conceded that the applicants have not been arrested and that fact forms the urgency of this matter. If they would have been arrested, there would be no urgency in the matter as there would be no order of arrest to be lifted. He added that the fact that the respondent's application was not treated with urgency though so filed, should not affect the present application as this would sound more like retaliation to the way the court treated the previous application by the respondent.

The learned counsel thus insisted that the application is urgent.

I have subjected the learned arguments by the learned counsel for the parties to a serious scrutiny. Having so done, I think I am now in a position to determine the relevant questions in this ruling.

Let me start with the respondent's argument to the effect that the signatures of the applicants in the documents filed in the present application are forged. This issue will not detain me. The learned counsel for the respondent has argued that the signatures of the applicants in the documents filed in the present application are forged because she compared the signatures of the applicants in present application with the ones by the same persons appended in the previous application. To this, the learned counsel for the applicants has respondent that they are not an added, and to my mind rightly so, that the respondent's counsel is not a forensic expert to so state.

The correct position of the law is as somewhat expounded by the learned counsel for the applicants. The learned counsel for the respondent has arrived at the conclusion that the signatures of the applicants in the documents filed in the present application are forged by comparing the signatures in the documents filed in the present application with those filed in Miscellaneous Commercial Application No. 310 of 2016. At law, this would not amount to sufficient proof. As rightly stated by the learned counsel for the applicants, it is a forensic expert who has expertise to state with certainty that the signatures in the present application are forged. I am fortified by this stance by the practice of this court founded upon prudence that proof of fraud in civil cases is beyond the ordinary. It is elementary law that, generally, proof in civil cases is on the preponderance of probabilities. However, in civil cases, allegations of fraud are beyond that threshold. This stance was set, as far as I can remember, by the Court of Appeal for East

Africa, in an appeal originating from H. M. the High Court of Tanganyika (Crawshaw, J.) of ***Ratilal Gordhanbhai Patel Vs Lalji Makanji*** [1957] E.A 314 at 316, in the following words:

> "Allegations of fraud must be strictly proved. Although the standard of proof may not be as heavy as beyond reasonable doubt, something more than a mere balance of probability is required".

That stance was followed in ***Omari Yusuph Vs Rahma Ahmed Abdulkadr*** [1987] TLR 169 by the Court of Appeal of Tanzania in which it was held:

> "... it is now established that when the question whether someone has committed a crime is raised in civil proceedings that allegation need be established on a higher degree of probability than that which is required in ordinary civil cases ..."

The Court of Appeal went on to state the logic and rationale behind this stance as follows:

> "... the logic and rationality of that rule being that the stigma that attaches to an affirmative finding of fraud justifies the imposition of a strict standard of proof, though as Rupert Cross cautions and illustrates in his text-book on Evidence at page 124 the application of that rule is not always commodious ..."

In the matter at hand, the allegations of forgery of signatures of the applicants in the present application have just been raised by the learned counsel for the respondent and from the bar. Not in an affidavit or counter-affidavit. I understand that the learned counsel for the applicant has raised the allegations in this manner given the manner the question was raised; it is the court which asked the learned counsel for the parties to address it on the issue. The learned counsel for the parties were not ordered to file affidavits on the question. That notwithstanding, the statement of the learned counsel for the respondent does not suffice to prove the allegation to the required standard; above the balance of probabilities. As already alluded to above, the burden of proof of allegations of fraud in civil cases is heavier than a balance of probabilities generally applied in civil matters. As rightly put by the learned counsel for the applicants, the respondent's allegation could have reached that threshold if the signatures alleged to have been forged were put to the test of a forensic expert. For this reason, I reject the argument of the learned counsel for the respondent.

Now back to the urgency nature, or otherwise, of the matter. I have gone through the Certificate of Urgency as well as the supporting affidavit deposed by the applicants. I listened to the learned counsel for the applicants as well as the learned counsel for the respondent on the point. Unfortunately, both the documents and submissions before me by the applicants do not sufficiently show why the applicant thinks the application is urgent. The order of this court has not been effectuated and the learned counsel for the respondent submits that the applicants have disappeared in thin air perhaps to evade the law taking its course. I would have understood, just like the respondent's counsel thinks, if the applicants were under custody and were seeking this application to be heard urgently to minimize their ordeal. Short

of that, to hold the matter as urgent would be tantamount to vindicating the applicants' endeavour to escape from the long arm of the law.

My brother at the Bench; Ndika, J. [as he then was (now Justice of Appeal )] was once caught up with a situation akin to this one in ***Sophia Amir Mrisho Vs Mapambano Building Materials Cooperative Society Limited***, Land Case No. 15 of 2015 (unreported). In that case, the applicant had filed an application under a certificate of urgency seeking, *inter alia, ex parte* reliefs. Despite filing that application under certificate of urgency, the case record and documents did not unveil any urgency. His lordship had this to say:

> "Litigants filing their actions under the certificate of urgency should bear in mind that dispensing with the requirements of service of summons on the opposite party so as to proceed to an ex parte hearing should only be allowed to the extent necessitated by the urgency. It is not a course to be taken lightly or perfunctorily."

His Lordship Ndika, J. (as he then was) went on to quote the following excerpt from the decision of Nganunu, J. of the High Court of Botswana in the case of ***Letsoalo Vs Lesuma Trading Company (Pty) Ltd & Another*** [1993] BLR 201:

> "Urgency has degrees and where a matter, though urgent, is not desperately urgent as to require immediate court attention, a litigant is required to comply with the Rules to the extent possible and to move the court in a reasonable manner and not

> a desperate hurry. When you dispense with the Rules, you in fact reduce the time of service on the opposite party and in some cases, the urgency will require that a litigant omits altogether any service on the other party. Further, a Judge should drop whatever he is doing and accommodate the case. There is a disruption of the usual roll and routine. It is important, therefore, that litigants should tailor their applications to the level of the urgency in the case."

Both the decision of this court in ***Sophia Amir Mrisho*** and that of the High Court of Botswana in the ***Letsoalo*** case are not binding upon me. However, I wish to register my confession that I am highly persuaded by them. I wish to remind anybody who happens to read this ruling that it is the law in this jurisdiction founded upon prudence that a judge should not lightly dissent from the considered opinions of his brethren. That this is the law was stated in ***Ally Linus & 11 others Vs Tanzania Harbours Authority & the Labour Conciliation Board of Temeke District*** [1998] TLR 5, at 11 where it was stated:

> "... it is not a matter of judicial courtesy but a matter of duty to act judicially which requires a judge not lightly to dissent from the considered opinions of his brethren."

I thus find the exposition by my brother Ndika, J. (as he then was) in ***Sophia Amir Mrisho*** and the persuasive case of ***Letsoalo***; a case from Botswana, to

be highly persuasive and depict the correct position of the law in this jurisdiction.

In those cases; that is, in ***Sophia Amir Mrisho*** and ***Letsoalo***, the court found that the matters did not call for immediate attention of the court. I also find myself in the same position as my fellow judges in the above two cases. That is to say; I do not find and material in the present application which would suggest that the matter needs an urgent attention of this court.

The above said, I consequently order that the present matter be fixed in accordance with the convenience of the diary of the court. Costs will be in the cause.

Order accordingly.

DATED at DAR ES SALAAM this..... day of December, 2016.

**J. C. M. MWAMBEGELE**
**JUDGE**