IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 136 OF 2021

BETWEEN

HOTELS AND LODGES TANZANIA LIMITED .... APPLICANT

VERSUS

CONSERVATION COMMISSIONER .... 1ST RESPONDENT

NGORONGORO CONSERVATION AUTHORITY .... 2ND RESPONDENT

ATTORNEY GENERAL .... 3RD RESPONDENT

Date of Last Order: 24/09/2021

Date of Ruling: 08/10/2021

RULING

MAGOIGA, J.

The applicant, HOTELS AND LODGES TANZANIA LIMITED instituted the instant application under certificate of urgency against the above named respondents under the provisions of Order XXXVII Rule 1(a), (b), sections 68(e) and 95 of the Civil Procedure Code [Cap 33 R.E. 2019], section 2(3) of Judicature and Application of Laws [Cap 358 R.E. 2019] and any enabling provision of the law praying the orders that:-

EX-PARTE.

1. This honourable court be pleased to issue a mareva injunction to restrain the 1st respondent to refrain from granting licence to new investor or any other person by whatever title and name other than the applicant as per asset sale and lease agreements pending the hearing of the main application inter parties;
2. To issue a temporary mareva injunction against the 1st respondent and its assigns, agents, workmen or any person working under the instruction of the 1st respondent whatsoever from further unlawful evicting the applicant from its landed property (the suit property) or removing its assets known as Ngorongoro Wildlife Lodge located in Ngorongoro Conservation area (the suit property) pending filing, hearing and final determination of the prospective main suit;
3. To evict the 1st respondent or any other party illegally occupying the premises or assets of the applicant at Ngorongoro Conservation Area (the suit premise)
4. That this honourable court be pleased to dispense with the requirement of issuing 90 days statutory notice against the respondents prior filing of the suit;

5. An order that the applicant proceed doing her business in the disputed premises until the determination of the prospective suit;
6. Any other order that the court may deem fit, just, fair equitable to grant;
7. That the costs of this application be borne by the respondents.

INTER PARTIES

1. This honourable court be pleased to issue a mareva injunction to restrain the 1st respondent to refrain from granting licence to new investor other than the applicant as per asset sale and lease agreements pending the hearing of the main suit to filed after expiry of 90 days' notice;
2. To issue a temporary mareva injunction against the 1st respondent and its assigns, agents, workmen or any person working under the instruction of the 1st respondent whatsoever from further unlawful evicting the applicant from its landed property (the suit property) or removing its assets known as Ngorongoro Wildlife Lodge located in Ngorongoro Conservation area (the suit property) pending filing, hearing and final determination of the prospective main suit before this court;

3. An order that the applicant proceed doing her business in the disputed premises until the determination of the prospective suit;
4. Any other order that the court may deem fit, just, fair equitable to grant;
5. That the costs of this application be borne by the respondent.

The application was accompanied by supportive affidavit taken by Mr. Ahmed Said El-Maamry, the company secretary of the applicant stating the reasons why prayers as contained in the chamber summons both ex-parte and inter parties should be granted

This application was filed under certificate of urgency and was assigned to me for necessary orders on 22/09/2021. Considering the urgency, I immediately declined to entertain ex-parte orders, and instead, I ordered and directed that, the applicant to serve the respondents who are within reach and available. I scheduled the application to come the following day.

On 23rd October, 2021 when the application was called on for orders, Mr. Edwin Joshua Webiro, learned State Attorney appeared for the respondents. The learned Attorney prayed for time file counter affidavit and to prepare for hearing and the matter was scheduled for hearing at 4 p.m. When the

application was called on at that time, Mr. Webiro told the court that, they could not be able to file counter affidavit to pave way for hearing of the application because the principal officer of the respondents able to depose to the facts of the application was on his way to Dar es Salaam from Dodoma and is expected to arrive late in that evening. In the circumstances, the learned Attorney sought for an adjournment and assured the court that, by tomorrow morning, the counter affidavit will be filed in court, and the matter to proceed for hearing and that Solicitor General will appear personally. In the circumstances, the application was adjourned to allow the respondents to file counter affidavit and same was set for hearing on 24/09/2021.

When the application was called on for hearing on 24/09/2021, the applicant had legal team of learned advocates led by Messrs. Donald Chidowu, as lead counsel, assisted by Obadia Kajungu, and Onesmo Mpenzile, learned advocates. On the other hand, the respondents had the legal services of Mr. Gabriel Pascal Malata, learned Solicitor General, Ms. Jesca Shengena, learned Principal State Attorney and Ms. Debora Mcharo, learned Senior State Attorney.

Mr. Chidowu arguing the application, adopted the affidavit in support of the application and went on to submit that, this is an application for

interlocutory orders pending the institution of the suit after expiry of the statutory notice served to the respondent. The learned advocate told the court that, this application is on landed property situate at Ngorongoro Conservation Authority, particularly, between the applicant and 1st and 2nd respondents.

According to Mr. Chidowu, prayers for mareva injuction can only be granted if three conditions for grant of interlocutory orders are met which are; **one,** if there is a serious question to be tried on the facts alleged and probably that the applicant will be entitled to relief thereof. Expounding on the first point, Mr. Chidowu pointed out that, under paragraphs 2 and 7 of the affidavit, the applicant asserts ownership of the disputed property by way of bona fide purchaser in 2001, a fact admitted under paragraph 2 of the counter affidavit of the 1st and 2nd respondents as such claims ownership as well, hence, because of this rivaling claims, there is triable issue between parties; **two,** the court's interference is necessary so as to protect the applicant from the kind of injury which may be irreparable before his alleged rights are established. Expounding on this point Mr. Kajungu pointed out that, paragraph 9 of the affidavit shows the hotel in dispute serves international tourists as such the irreparable loss cannot be atoned by

money, and **three,** on balance of inconvenience the applicant stands to suffer more than the respondents in case the order is not granted.

The learned advocate to bolt up their arguments, cited the cases of ATTILIO vs. MBOWE [1967] HCD 284 which set out the famous trio principles for grant of injunctions; GIELLA vs. KASMAN BROWN [1973] EA 358 in which, it was held that, once it is satisfied that damage is there the court must grant the order. Another case cited was the case of CHAVDA vs. DIRECTOR OF IMMIGRATION SERVICES [1995] TLR 125 in which the court granted the mareva injunction awaiting the expiration of the notice for the first time in Tanzania.

On the totality of the above reasons, the learned advocates for the applicant strongly urged this court to grant the prayers as contained in the chamber summons.

Mr. Malata, learned Solicitor General when rose to argue in opposing this application readily prayed to adopt the joint counter affidavit filed by the respondents. According to Mr. Malata, guided by the case of MUHIDIN NDOLANGE AND ANOTHER vs. THE REGISTRAR OF SPORTS AND SPORT ASSOCIATION AND OTHERS, MISC. CIVIL APPLICATION NO. 54 OF 2000,

HC DSM (UNREPORTED) joined hands with Mr. Chidowu on the three principles stated for grant of the orders but went further to add that, courts over time have developed new principle that, in granting the orders, public policy or public interest has to be considered to make sure that an order should not be a tool to cause injury to the society or community at the sacrifice of an individual person.

According to the learned Solicitor General, for mareva injunction to be granted the fourth principles along with others must be satisfied by the applicant before the court can grant injunction sought. To bolt up his point the learned Solicitor General cited the case of THE REGISTERED TRUSTEES OF CUF vs. THE REGISTRAR OF POLITICLA PARTIES AND ATTORNEY GENERAL, which underscored the point in dispute.

Guided by the above stance, the learned Solicitor General told the court that, since the applicant has been evicted as stated in paragraph 7 of the affidavit, as such, therefore, there is nothing to preserve, and principally, the application has been overtaken by events.

On the allegations that there exists triable issue on ownership, it was the learned Solicitor General submissions in rebuttal that, this ground cannot

stand because according to annexture 'AHLL1' the parties are HOTELS AND LODGES LIMITED but the applicant is HOTEL AND LODGES TANZANIA LIMITED as such two different companies whose allegations of ownership cannot be an issue.

Not only that but also that, the applicant has attached Addendum AHLL-1 which refers to HOTELS AND LODGES LIMITED and not HOTELS AND LODGES TANZANIA LIMITED so no prima facie case can be established because the applicant has no cause of action and locus standi to create any interest in the matter, pointed out the learned Solicitor General.

Further submitting on the point, Mr. Malata went on to argue that, in paragraph 5 applicant is alleging to have entered Licence Agreement with the 2nd respondent to operate the area which confirms that the applicant is a lessee to the area and no issue of ownership because the issue of ownership is just but submission from the bar as no single paragraph in the affidavit stated so. To bolt up his pointed cited the case of THE REGISTERED TRUSTEES OF ARCHIDIOCESE OF DAR ES SALAAM vs. CHAIRMAN, BUNJU VILLAGE GOVERNMENT AND 4 OTHERS, CIVIL APPEAL NO.147 OF 2006 underscore the point on the status of submission of the from the bar.

The learned Solicitor General, went on to point out that, paragraph 4 contain bare allegations with no justification because no proof of any payment of 50 million and employment of 115 employees. Further as to paragraph 8 was the submissions in rebuttal that, in the intended suit they will claim any loss which they have quantified and as such no irreparable loss as alleged. Not only that but also that, no facts were put forward to prove to irreparable loss at all.

Mr. Malata went on to argue that, in the counter affidavit at paragraph 2 they stated that, the 2nd respondent is the owner of the hotel in dispute and by virtue of the licence agreement termination was done on 1st September, 2021 after complying with terms of the agreement by giving notice of termination after elapse of 10 months. According to Mr. Malata, the termination was done because of continued breaches as evidenced in AG 2 and which breached have not been remedied and the hotel is in dilapidated condition and the government has been suffering from 2003.

On the totality of the above, Mr. Malata concluded that the applicant has utterly failed to prove any tangible facts which the court can rely to grant the orders sought in the chamber summons and eventually prayed that this application be dismissed with costs.

In rejoinder, Mr. Chidowu admitted that, looking at the names, the two companies are different but was quick to point out that, after HOTELS AND LODGES LIMITED which was incorporated in Mauritius bought the disputed premise, was later incorporated in Tanzania and now its name is HOTELS AND LODGES TANZANIA LIMITED as indicated in annexure AHLL4.

Mr. Chidowu replied that, at this stage of the application, details are not needed because details will be given during trial. To bolt up his point cited the case of KIBO MATCH GROUP vs. IMPEX LIMITED [2001] TLR 152.

According to Mr. Chidowu, the applicant is the same here and before. On eviction, the learned advocate for the applicant admitted the applicant is a licencee and went on to submit that, under the contract the respondent have no powers to evict the applicant from the suit premise, and that the proper cause, if any, was to cancel the licence to bar the applicant from operations. Mr. Chidowu, therefore, concluded that this is a fit case to grant the orders as prayed in the chamber summons.

On arguments that no details were given, it was the rejoinder of Mr. Chidowu that, details are to be given when the intended suit is filed. And went on to argue that, on dilapidated and the pictures shown, it was the

rejoinder of Mr. Chidowu that, details are subject to cross examination during trial of the suit. Mr. Chidowu on cases cited and relied by Mr. Malata, it was his brief rejoinder that, same are distinguishable because were dealing with national interests as opposed to this case, which no public interest arises.

In addition to what was rejoined by Mr. Chidowu, Mr. Kajungu added that, the issue of ownership as root for cause of action and locus standi is outside the jurisprudence of the grant of the injunctions in this country. Mr. Kajungu went on to submit that, the case of MUHIDIN NDOLANGE (supra) is distinguishable because the case was dealing with contract and as opposed to public interest. According to Mr. Kajungu, where there is illegal termination public interest cannot override what parties agreed. Another point rejoined was that at this stage it is improper to go into the contents of the sale and lease agreements.

Lastly Mr. Kajungu rejoined that, the contract has been terminated and the applicant is seeking remedy through that termination as such the court is enjoined to give the injunction which will restore the applicant to the suit premises.

On that note, the learned advocates for the applicant pressed that the instant application be granted as prayed with costs.

The notable duty of this court now is to determine the merits or demerits of this application. However, before going into the rivaling arguments, I find it imperative to understand what is mareva injunction? Mareva injunction in reality is similar to interlocutory and anticipatory injunctions because it is granted pending the determination of the anticipatory dispute between the parties.

My quick research shows that, mareva injunction traces its genesis from the case of MAREVA COMPANIA NAVIERA SA vs. INTERNATIONAL BULKCARRIERS SA THE MAREVA [1980] 1 ALL E.R.213 in which the court cautiously considering the order as freezing injunction on the basis that the order freezes the assets of the prospective judgement debtor, pending the determination of the anticipatory case observed that, it has to apply in special and proper cases. It should be noted as well that, the order of mareva injunction was later accepted both in English Courts and in Common Wealth countries, and in Tanzania, particularly, was first embraced in the case of CHAVDA vs. DIRECTOR OF IMMIGRATION SERICES [1995] TLR 125

in which the court granted injunction pending the hearing of an application against the Government.

It should further be noted that, in both situations in the ex-parte prayers and inter parties prayers, the applicant is praying for mareva injunction. Being aware that, mareva injunction by its nature and prayers, same could be open to abuse, I opted that I will hear the application inter parties' as the respondent is at reach and available. This in line with my own trend to always decline to entertain ex-parte orders, and instead, I usually order for service to respondent(s) and proceed inter parties hearing as I did herein.

Now back to the application, I noted that, parties' learned counsel join hands that, in order for the court to grant the order of mareva injunction, like any other injunctions, the applicant has to prove three key principles for grant of injunctions namely; one, triable issues or prima facie case; two, irreparable loss; and three, balance of conveniences. On the fourth principle of public policy or interest principle, they lock horns that same cannot apply to contract of this nature.

It should be further be noted that, the three key principles must co-exists to warrant the grant of the orders sought.

Now looking at one principle after the other, I will start with the first principle that there must be triable issue as one of the key consideration for grant of the orders, mareva injunction, inclusive. Mr. Chidowu premised their arguments to prove the first principle on **exhibit 'AHLL'** in which was supporting that there are rivaling ownership of the land between parties as stated in paragraphs 2 and 3 of the affidavit.

On the other hand, Mr. Malata submitted that the applicant have never been owner of the disputed hotel and pointed out that **'exhibit AHLL'** refers to a distinct and different company by the name of HOTELS AND LODGES LIMITED and strongly concluded that legally speaking as between the applicant and the respondents, no rivaling ownership can be proved and as such the applicant has no *locus standi* to institute the instant application based on ownership.

Further in rejoinder, the learned advocates for the applicant submitted that, it is true HOTELS AND LODGES TANZANIA LIMITED and HOTELS AND LODGES LIMITED are two different companies but were quick to point out that, when the applicant was later incorporated in Tanzania became the owner of the properties as indicated in AHLL4. Further rejoinder was that,

the issue of ownership as root to cause of action and *locus standi* is outside the jurisprudence of the grant of injunction in this country.

Having dutifully listened and considered the rivaling arguments of the learned counsel for parties' and looked at the exhibits annexed to the affidavit and counter affidavit in proving and disproving this application, I am inclined to find that this ingredient as correctly argued by Mr. Malata, and rightly so in my opinion, will not stand because a mere submission from the bar that the applicant is the owner of the disputed property is not supported with evidence at all. See the case of THE REGISTERED TRUSTEE OF THE ARCHDIOCESE OF DAR ES SALAAM vs. THE CHAIRMAN BUNJU VILLAGE GOVERNMENT AND 4 OTHERS (SUPRA) in which it was held that submission are not evidence.

Not only that but also that the arguments that exhibit AHLL4 proves ownership is not true but the truth is that, exhibit AHLL4 to the affidavit was Memorandum of Understanding between the parties herein which was on collective way of contributing the costs of laying Main High Tension Cable and has nothing to do with ownership.

Further and strange arguments, from the learned advocates for the applicant was that, cause of action and *locus standi* is outside the jurisprudence for the grant of injunctions. If got them right, then, are saying you don't need to have a cause of action and need not a *locus standi* to be granted an injunction. However, no authority was cited to substantiate these strange arguments.

Let me hasten to say, truly, I am not convinced by this argument otherwise is a trite law court do not entertain a person with no locus standi and with no interest to assert. I state and strongly observe that, in my strong considered opinion this court will not grant an injunction to protect a person who has no legal or equitable right whatsoever.

On the totality of the above reasons, I find the applicant utterly failed to prove ownership as basis for finding that, there is, indeed, triable issue for consideration. The applicant might have an interest but not on ownership as argued by his counsel.

This takes me to the second issue on irreparable loss. Mr. Chidowu only ended up stating the principle and since he adopted the affidavit, then in paragraphs 4 and 6 clearly state that the applicant paid Tshs.50 billion to the

Government and have so far employed 211 employees. Further, the applicant in paragraph 6 stated that in 2019 injected Tshs. 519 million and in 2020/2021 she injected Tshs.300 million. This time on the basis of licence agreement. Mr. Kajungu added that the irreparable loss is due to the fact that hotel is serving international tourists.

On the other hand, Mr. Malata strongly argued in rebuttal that no particular or facts are stated to prove actually that there is irreparable loss that cannot be atoned by compensation. The learned Solicitor General cited the case of CHRISTOPHER CHALE vs. COMMERCIAL BANK OF AFRICA, MISC. CIVIL APPLCATION NO.635 OF 2017 (HCCD) DSM (UNREPORTED) in which it was held that, courts will only grant injunctions if there is evidence that there will be irreparable loss which cannot be adequately compensated by award of the general damages.

No much was rejoined on this point by counsel for the applicant.

Having carefully considered the rival arguments and having read the cases cited and in particular what is contained in the affidavit and counter affidavit, I am increasingly of the opinion that, nothing has been established that there is irreparable loss if the order is not granted. The applicant himself has

stated in paragraph 4 that he paid to the Government Tshs.50 billion and in 2019 he injected another Tshs.519 million and in Tshs.300 million. This is to prove that, the applicant can be compensated on the amount stated in the affidavit in case successfully prosecute his suit. In other words, the claims by the applicant are measurable and can be atoned by way of compensation in the main suit. The irreparable loss in my considered opinion must proved by evidence and not just allegations.

The argument that the hotel serves international tourist and as such to be the basis of grant of the orders was not substantiated by any bookings or was any evidence that, indeed, the applicant has that number of employees. It was alleged yes, but no material facts were put forward to convince the court otherwise.

On the totality of the above reasons, this principle was not at all proved, and it has to fail.

On last principle on balance of conveniences between parties, I find this principle; no much was submitted by the counsel for applicant. Both parties claim to be more inconvenienced in case the order is not granted and granted respectively. I have considered both rivaling assertions and I must

admit I find this point not proved on the part of the applicant. The applicant was served with notice of termination and consequently terminated as per the agreement. The argument that clause 6 do not allow termination but allows cancelling is not what parties agreed. The section is very clear parties intended in case of breach to terminate and not to cancel.

In that vein this point was not as well proved and has to fail miserably.

Given what I have discussed and concluded above, I find no reason to discuss the fourth principle which will not change the end results of what I have already determined.

In the vein I find this application wanting for orders sought and same must be and is hereby dismissed with costs.

It is so ordered.

Dated at Dar es Salaam this 8th day of October, 2021.

S.M. MAGOIGA

JUDGE

08/10/2021