

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

MISC. COMMERCIAL APPLICATION NO.163 OF 2022
(Arising from Misc. Commercial Case NO. 105 of 2022)

NEW LIFE HARDWARE COMPANY APPLICANT

VERSUS

SHANDONG LOCHENG
EXPORTING CO. LTD.....1ST RESPONDENT

TAISHAN TECHNOLOGY LIMITED.....2ND RESPONDENT

CRYSOR COMPANY LIMITED.....3RD RESPONDENT

Date of Last Order: 30/09/2022.

Date of Ruling: 07/10/2022.

RULING

NANGELA, J.:

This application was filed under Order XXXVII Rule 1(a) (c) and Section 68 (e) of the Civil Procedure Code, Cap.33 R.E 2019. It arises from a Commercial Case No.105 of 2022, filed in this Court and currently still pending hearing and determination.

In her chamber summons, the Applicant prayed for ex-parte and inter-partes Orders as here below:

EX-PARTE:

1. That, this Court be pleased to order that the Applicant is dispensed from the requirement of serving notice to the Respondent before hearing of the Application for *ex-parte* Interim Orders.

2. That this Honourable Court be pleased to issue an *ex-parte* order for temporary injunction restricting the Respondents, Agents, Assignee or any other person from selling, transferring or changing the ownership of the sixteen (16) containers of prime repainted galvanized steel coils until the hearing of the Application inter-parties.

3. That this Honourable Court be pleased to issue an *ex-parte* order for temporary injunction restricting the Respondent, Agents, Assignee or any

other person from making any management decisions or entering into legal agreement or arrangement in relation to the sixteen (16) containers of prime repainted galvanized steel coils until hearing of the Application inter-parties.

INTER-PARTES

1. This Honourable Court be pleased to issue an Order for temporary Injunction to maintain *status quo ante bellam* in relation to the sixteen (16) containers of prime repainted galvanized steel coils.
2. That this Honourable Court be pleased to issue *inter-partes* for temporary injunction restricting the Respondents, their Agents, Assignees or any other persons from selling, transferring or changing the ownership of the sixteen (16) containers of prime repainted galvanized steel coils until the hearing

of the determination of the main case.

3. Any other and further orders as this Honourable Court will deem just and equitable to grant.
4. Costs of this application be provided for by the Respondents.

Earlier, the first order was granted following the ex-parte hearing which was conducted by this Court. On the 16th September 2022, the learned advocates for the parties appeared with a view to set a date for the hearing of the second part of the application. On the material date, Mr. Makaki Masatu, learned advocate, appeared for the Applicant while Mr. Agustino Kusalika, learned counsel as well, appeared for the Respondents.

In his submission in support of the application Mr. Masatu submitted that, the Applicant has filed a Commercial Case No. 105 of 2022, seeking for among other, declaratory orders in respect of alleged illegal sale of the containers with galvanized materials which belongs to the Applicant who is the Plaintiff in the said pending suit.

It was Mr. Masatu's submission that, this Misc. Application No. 163 of 2022 seeks for the temporary injunctive orders as set out in the chamber summons which is supported by affidavit of one Aloyce Michael as well as the reply to counter affidavit.

Mr. Masatu prayed to adopt the affidavit and the reply to the counter affidavit together with skeleton arguments filed in this Court as per Rule 64 of the Commercial Court Rules, to form part of his submission.

He submitted that, the guiding principles for the grant of temporary injunctive orders are well settled and different Court cases such as the case of **Abdi Ally Salehe vs. Asac Care Unit Limited**, Civil Revision No. 3 of 2012 have reiterated such principles authoritatively. In particular, Mr. Masatu contended that, the Applicant is required to establish that there is a *prima facie* case with a possibility of success and, that, the Applicant will suffer an irreparable loss if such injunctive orders are not granted, and, the loss is incapable of being remedied financially.

He contended that, as per this application, the Applicant has met all these conditions. To support his argument, he placed reliance on the case of **Asteria Augustine Mokwe vs NMB & 3 others**, Misc. Civil Application No. 148 of 2020 and contended that the first principle regarding presence of a *prima facie* case with a possibility of success, has been fulfilled as there is a dispute calling for this Court's attention.

Mr. Masatu further relied on paragraphs 3,4,5 and 6 of the Applicant's affidavit in support of the application, noting that, it is the Applicant who placed orders to be supplied with the materials in dispute and did fully pay for them, a fact which he contends to be admitted by the Respondents in paragraph 3 and 9 of their joint counteraffidavit.

According to Mr. Masatu, the transaction between the Applicant and 1st Respondent was a contract of sale of goods which, as per Section 3 of the Sale of Goods Act, Cap 214 R.E 2019, property passes immediately when payments are effected. He contended, therefore, that, there is currently, a dispute between the Applicant and the Respondents over ownership of the respective goods.

Submitting on the 2nd principle, he submitted that, the Applicant is bound to suffer irreparable loss which cannot be remedied by any financial means. According to Mr. Makaki, that fact was pleaded in paragraph 16 of the Applicant's supporting affidavit as well as paragraph 9 of the reply to counter affidavit. He contended, as well that, that fact was not controverted by the Respondents which means that the same was admitted.

To support his views, he relied on the case of **Mic (T) Ltd vs. CXC Africa Ltd**, Civil Application No. 172/01 of 2019, where the Court was of the view that, a fact not controverted by way of a reply affidavit is accordingly deemed to have been conceded. He finally submitted on the aspect of irreparable loss and balance of convenience by submitting that, it is the Applicant who, compared to the Respondents, stands to suffer most if the prayers are denied.

In particular, Mr. Masatu contended that, the loss which the Applicant is likely to suffer is the total collapse of the Applicant's business. He contended that, unlike the Respondents, the Applicant has already paid consideration

over the goods, so not allowing the application will greatly affect the Applicant. He therefore prayed that the application be granted with costs.

In response to Mr. Masatu's submission, Mr. Kusalika commenced his submission by adopting the joint counter affidavit of the Respondents as well as the skeleton argument filed in Court to form part of his submission. Mr. Kusalika submitted that, while he concedes that the first condition was fulfilled, the rest were not.

He contended that, as regards the second condition in respect of the irreparable loss, it was the 2nd Respondent who is going to suffer much when compared to the Applicant because, one of the reliefs sought by the Applicant was an order for a refund, and, for that matter, the injunctive relief should be denied.

Mr. Kusalika further submitted that, there has been no demonstration of the extent of loss on the part of the Applicant, while in their joint counter affidavit, the Respondents have, at paragraphs 13, 14 and 15 demonstrated clearly how the 2nd Respondent was suffering as per annexure GF-6 and 7.

He contended that, the 2nd Respondent had commenced the clearing of the containers and 8 of the containers were already cleared and, that, she is now incurring demurrage costs amounting to TZS 45,235,200/= and ICD storage charges which have so far accrued to TZS 71,170,048 as well as TRA fees amounting to TZS 4,523, 520/=. He thus urged this Court to refuse this application as the last two tests for the grant of an injunctive relief have not been fulfilled.

In his brief rejoinder, Mr. Masatu rejoined that, it is the Applicant who should show that he is likely to suffer irreparable loss and not the 2nd Respondent as argued since that is not what the case of **Abdi Ally Salehe** (supra) states. He submitted that; the Applicant has sufficiently demonstrated all the requisite elements that entitles her application to be granted by this Court. He submitted, therefore, that, even the condition regarding balance of convenience has been fulfilled. He urged this Court to grant this application with costs.

I have given careful consideration to the submissions by the learned counsel for the parties herein. The issue I am to address is whether I should grant the prayers sought by the

Applicant. As correctly stated by Mr. Masatu, the requisite conditions for the grant of injunctive orders are well settled. In law, it is trite, for a temporary injunction to be granted, that, the Applicant establish the following elements, that:

- (i) There is a prima facie case;
- (ii) There is a possibility of suffering an irreparable harm or loss which cannot be adequately atoned monetarily by way of compensation, and
- (iii) the need to grant is based on existence of balance convenience.

The three factors above have been canvassed in a number of cases such as the case of **Atilio vs.Mbowe** (1969) HCD 284; **Abdi Ally Salehe vs. ASAC Care Unit Ltd and 2 Others**, Civil Revision No.3 of 2012, CAT, (DSM) (Unreported); **T. A. Kaare vs. General Manager Mara Cooperative Union (1984) Ltd** [1987] TLR 17 (HC), just to mention but a few.

Taking into account Mr Masatu's submission and looking at the affidavit supporting the application, it is clear to me that, there is a need to grant the application since, if not granted, the Applicant stands to suffer a great deal. The issue of demurrage charges which was raised by the Respondents, should not be an issue of much concern since all such costs can still be atoned by way of payments of damages by whoever shall lose the main suit pending in this Court.

As I once stated elsewhere, the skies are not falling and, as such, I see no reason why the orders sought should be denied once it is established, as I hereby confirm, that, the three conditions mention earlier here above have been fulfilled. The orders sought should, therefore, be granted and the Applicant be given a breathing space to allow her to pursue her case already filed in Court.

In view of the above, this Court settles for the following orders:

1. That, an Order for temporary Injunction to maintain *status quo ante bellam* in relation to the

sixteen (16) containers of prime repainted galvanized steel coils is hereby granted.

2. That, the Respondents, their Agents, Assignees or any other persons acting for or on behalf of the Respondents, are hereby restricted from selling, transferring or changing the ownership of the sixteen (16) containers of prime repainted galvanized steel coils until the hearing of the determination of the main case, i.e., Commercial Case No.105 of 2022.
3. The Application is granted with costs.

It is so ordered.

DATED AT DAR-ES-SALAAM ON THIS 07TH OCTOBER 2022



Nangela

DEO JOHN NANGELA
JUDGE

ORIGINAL