

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

MISC. COMMERCIAL APPLICATION NO.76 OF 2023
(Arising from Commercial Case No.5 of 2023)

MEK ONE GENERAL TANZANIA LIMITED.....APPLICANT

VERSUS

VIVO ENERGY TANZANIA LIMITED.....RESPONDENT

Date - Last Order, 15/06/2023.

Date of the Ruling, 04/08/2023.

RULING

NANGELA, J:

This ruling is in respect of an application brought under Order XXXVII rules 2(1) & (4); section 68(c) and (e) as well as section 95 of the Civil Procedure Code, Cap.33 R.E 2019; Section 2(1) of the Judicature and Application of Laws Act, Cap.358 R.E 2019 and any other enabling provisions of the law.

Through the services of Dr. Rugemeleza Albert Nshalla, *Learned Counsel*, the Applicant herein brought the chamber summons and its supporting affidavit under a certificate of urgency and has divulged the reasons justifying the urgency of the matter.

In this application, the Applicant is praying for orders of the court, both *ex-parte* and *inter partes*. However, for now, I will dispense with the part regarding “*ex-parte orders*”. This is because, the parties appeared and argued the matter *inter partes* on the 15th of June 2023 having been issued with a summons to file all the necessary pleadings by 14th day of June 2023 and entered appearance on the 15th day of June 2023 for hearing.

For that reason, the hearing proceeded *inter partes* to determine the *inter partes* orders sought by the Applicant.

The same were, therefore, as follows: -

1. That, this Honourable court be pleased to issue an order for the maintenance of *status quo ante* between the parties as it were before the Respondent issued a 60-day Notice to terminate the Distributor Agreement on the 31st day of March 2023, pending the final and conclusive determination of the main suit *inter partes*.

2. That, the court be pleased to issue an injunction preventing the Respondent, its workmen, agents, subsidiaries, affiliates, and assignees from committing the breach of contract through the issuance of the 60-day Notice of intention to terminate the Distributor Agreement between it and the Applicant entered on the 2nd day of May 2022 pending the final and conclusive determination of the suit filed by the Applicant against the Respondent, i.e., Commercial Case No.55 of 2023.
3. A temporary Injunction be issued against the Respondent, its workmen, agents, subsidiaries, and assignees preventing it from usurping from the Applicant and assuming the roles of distributor or supplier of Shell Mysella S3-N40 and Shell Tellus S2-M100 products, from the parties'

primary area of responsibility
(PAR) (TANESCO) pending the
final and conclusive determination
of the main suit between the
parties.

4. Costs be granted.
5. Any other Order or relief this
Honourable Court may deem just
and fair to grant.

On the 7th day of June 2023, the Respondent, through the services of Mr. Josiah Noah Samwel, *Learned Counsel*, filed a counter affidavit which was as well replied to by the Applicant on the 14th day of June 2023. On the 15th day of June 2023, the matter was called on for its hearing.

Submitting in support of the Application, it was Dr. Nshalla's argument that this court should consider granting the Applicant's prayers as laid out in the chamber summons and the Applicant's supporting affidavits sworn by Mr. Mohamed Eidha Awadh, the Applicant's Managing Director.

Dr. Nshalla has advanced several reasons regarding why this court should grant the prayers. **One**, that, as the affidavit in support of the application indicates, as from the

15th of September 2012, the Applicant has been a supplier (distributor) of the products in dispute (*Shell Mysella S3-N40* and *Shell Tellus S2-M100*, following an agreement (Annex.MOGTL-1 to the affidavit) which she had inked with *Shell Tanzania Ltd* and *Wartsila Tanzania Limited*.

According to Dr. Nshalla, the agreement (**Annex.MOGTL-1**) was a basis for yet the signing, on the 29th of October 2012, of a tripartite agreement for distribution of the said product as per **Annex. MOGTL-2** and **MOGTL-3**. He contended that, it was out of such relationship with TANESCO that the Respondent came to the country to negotiate a distributorship plan with the Applicant and thereby signed an agreement on 20th of May 2022.

Two, that, the agreement gave the Applicant a status of Sole Distributor for a period of 3years, so argued Dr. Nshalla refereeing to **Annex MOGTL-4**, paragraphs 3.1 and 3.2. He submitted that though it is countered by the Respondent that, the two clauses are inapplicable, the Applicant submits that they are clearly applicable to the parties.

Three, that, after the signing of the agreement, the Respondent started to act strangely as paragraphs 9, 10, 11 and 12 of the Applicant's supporting affidavit reveal. He submitted that; such acts denoted bad faith on the part of the Respondent as he was bent to upset the agreement, a fact which the Applicant raised to the attention of the Respondent, so argued Dr. Nshalla.

Four, that, on the 14th of March 2023, the Respondent, while fully aware of the Sole Distributorship Agreement, did still negotiate with TANESCO to be allowed to directly supply the products while the distributorship agreement was still subsisting. He relied on paragraph 14 of the counter affidavit of the Respondent where it is revealed that, the negotiations with TANESCO are about to come to an end.

Five, that, on the 31st of March 2023, the Respondent issued the 60-days' Notice to the Applicant (***Annex.MOTGL-10***) stating that she was exercising her rights to terminate under Clause 36.1 of the Agreement. He argued, however, that, the reading of the Agreement indicates that, that

provision can only be invoked where there is breach of the terms and conditions of the Agreement.

He contended, however, that, as per the 17.2 paragraph of the counter affidavit of Ms. Flora Obeto, the Respondent does acknowledge that the Notice was never intended to be issued under Clause 36.1 which signified that there was no incidence of breach on the part of the Applicant, though the Respondent seems to walk-back when trying to rely on Clause 36.3.

Dr. Nshalla has submitted that, as a cardinal principle of law, contracts must be honoured, and good faith must decorate the performance of contract. As such, he submitted that, what the Respondent was doing was unjustified as one cannot eat her cake and still have it. He submitted that, on those reasons, the Applicant seeks this court's intervention to maintain *status quo ante* and what the Respondent states in relation to Clause 36.3 be considered an afterthought.

He urged this court to consider the averments made in paragraphs 13, 14, 15, 16, 17 and 18 of the supporting affidavit and grant the orders sought. He argued that, although paragraph 10 of the counter affidavit of Ms. Obeto

seems to dispute what the Applicant stated in paragraph 8 of the supporting affidavit, the affiant of the counter affidavit still contradicts herself in terms of what she asserts in paragraphs 14.1 to 14.6 of her counter affidavit, hence, the affidavit is tainted with falsehood.

He submitted that, it is elementary that any affidavit which contains lies should not be relied upon as per the decision of the Court of Appeal in the cases of **Ignazio Messina vs. Willow Investments II SPRL**, Civil Application No. 21 of 2001; and **Kidodi Sugar Estates & 5 Others vs. Tanga Petroleum Company Ltd.**, Civil Application No. 110 of 2009 (both unreported).

Dr. Nshalla has also faulted the counter affidavit of Ms. Obeto on the ground that, whereas it has made mention of one Mr. Felix Ogolla as the person from who information was obtained, Mr. Ogolla fielded no affidavit in court to support what Ms. Obeto asserted in paragraph 14.1 to 14.6 of the counter affidavit. He also noted that, while paragraph 21.1 and 21.3 refers to TANESCO, there is no affidavit from TANESCO to support averments under those paragraphs.

In view of all that, Dr. Nshalla urged this court to expunge those offending paragraphs from the counter affidavit. To support his submission, reliance was placed on the case of **Lalago Cotton Ginnery and Oil Mills Co. Ltd vs. Loans and Advances Realization Trust (LART)**, Civil Application No. 80 of 2002 (unreported).

Dr. Nshalla submitted that, the principle regarding grant of injunction were restated in **Msimbazi Creek Housing Estate Ltd vs. KEDS Tanzania Co. Ltd & Another**, Misc. Land Appl. No.55 of 2020 and **BISH Tanzania Ltd vs. National Housing Corp. & Another**, Misc. Land Appl. No.372 of 2022 (both unreported) and the case of **ATILIO vs. Mbowe** (1969) HCD 284.

He submitted, therefore, that this application meets all the three requirements stated in those cases and urged the court to grant it with costs.

For his part, Mr. Josiah was very brief. He first adopted the counter affidavit of Ms. Obeto and submitted that, the 60days-Notice was only for the 60 days, hence, the prayers 1,2,3 and 4 have been overtaken by events. Mr. Josiah submitted that, as paragraphs 24 of the counter affidavit

shows, the parties are no longer in business as far as the distributorship agreement is concerned. He contended that, that fact has not been contested meaning that it was conceded.

As regards the prayer for injunction, Mr. Noah submitted that, the same is a discretionary prayer granted only if the conditions set out in the case of **Atilio vs. Mbowe** (supra) and rest of the cases cited are fulfilled. He contended that the issue is whether such conditions were met. His take was that the conditions were not met, and the application should be dismissed with costs.

Mr. Josiah submitted that, there have been serious allegations that the Respondent has been interfering with the Applicant's right to distribute the products in disputed areas. He charged that, while the Respondent does not dispute that the Applicant was appointed sole distributor, the point of disagreement was that the exclusivity appointment did not extend to the Respondent as per clause 2 of the **Annex. MOGTL-4**, the Respondent being the licenced owner of the lubricants.

Relying on clause 3.2 of the contract (**Annex.MOGTL-4**) he contended that the same is not restrictive at all and given the rights under clause 2.1 to the agreement distribution by the Respondent is not restricted in the stated primary area of responsibility (PAR) but it is in respect of other distributors other than the Respondent.

He submitted that; the Respondent was not involved in the cancellation decision by TANESCO for tender No.PA/001/2021-22/HQ/G/152 issued by TANESCO as alleged. He contended rather that, the Notice of Rejection (Annex. MOGTL-8 does not state anywhere that, the tender was rejected due to influence from the Respondent.

Mr. Josiah contended that, it was a decision solely of TANESCO on her own and paragraph 3 of Annex. MOGTL-8 is clear on that. Further, that, the Respondent has no links with or control of TANESCO's decision making processes be it directly or otherwise. He also denied that the Respondent was double-crossing the Applicant by pursuing business opportunities with TANESCO directly.

He submitted, however, that, the Respondent is not restricted from doing so and has a right to seize such

opportunity as it unfolds to catch up with his sales. As regards paragraph 14 of the affidavit of Ms. Obeto, Mr. Josiah submitted that, the averments are based on **Annex. VIVO - 1** as the source of information and since the source is disclosed, there was no need for the said Mr. Ogola to swear and file an affidavit.

He submitted that, on 28th August 2023, TANESCO did contact the Respondent on behalf of Shell (T) Ltd to obtain lubricants directly from the manufacturer as per **Annex. VIVO-2**, and the reasons are shown in paragraph 2 and the same can be noted in **Annex-VIVO-3**, he contended.

As regards the Tender No.PA/001/0021-23/HQ/G/191, Mr. Josiah submitted that, it was TANESCO who invited the Respondent to bid for the supply of lubricants for Ubungo Gas Plant through a single source mode. He referred this court to **Annex. VIVO -4** regarding TANESCO's intention to award, and argued that, that had nothing to do with the cancellation of the old tender.

He contended that, the Applicant's averments that there were negotiations between TANESCO and the Respondent and reliance on Annex.MOGTL-9, are incongruent

assertions. He submitted that, the minutes referred to do not support that the Respondent was present in such meetings, was not a beneficiary and the minutes are not confirmed as being the correct matters discussed.

As regards the 60-days' Notice, Mr. Josiah submitted that, the same was meant to refer to its being issued under Clause 36.3 of the Agreement and not Clause 36.1. He contended that, had it not been so, the Respondent would have issued a 7 days' notice, so it was a slip of the pen.

He relied on the case of **Dr. Crispin Semakula & Another vs. Hashim Hassan Mussa & Another**, Misc. Com. Case No.49 of 2020 (unreported) and contended that, no possible damages which the Applicant may suffer loss if the injunction she has sought will be declined on balance of convenience given that the Applicant was not guaranteed a continuous business with TANESCO.

Mr. Josiah submitted further that, the Applicant's arguments that, she had a sole distributorship right and had attained goodwill are irrational as TANESCO would not have gone through the competitive process. Further that, if any loss, the same can be remedied as the claims are quantified

in the pleadings filed in court. Reliance was placed on the case of **American Cynamid Co. vs Ethicon Ltd**, [1975] AC, 397.

He argued further that, as per **Mulla, The Code of Civil Procedure**, 18th ed, at pg.3359, public interest is one of the material relevant considerations in either exercising or refusing to grant ad interim injunction. He argued that there is public interest in the matters of TANESCO and the court should take that into consideration. He thus urged this court to dismiss the application with costs.

By way of rejoinder, Dr. Nshalla restated his position. He contended that, the contradictions in the affidavit of Ms. Obeto is an indication of falsehood and the case referred to, were still relevant. He also rejoined that, there are other non-monetary prayers which were made as per Annex MOGTL -11 and so, the application should be granted.

As regard the public interest considerations, he rejoined that, there is no affidavit from TANESCO since those are matters for which only TANESCO could depone and affirm to the court. Dr. Nshalla contended that, as regards the tender issues, it is clear and loud that the Respondent's

actions were unethical and, hence, improper. He urged this court, therefore, to grant the application with costs.

Having listened to the oral submissions made by the Learned Counsel for the parties, the issue which I am called to address is whether this court should grant the prayers sought by the Applicant. However, before I address that issue, there are some other pertinent matters which were raised during submissions.

The first collateral initial issue is in relation to matters deposed by Ms. Obeto in her counter affidavit filed in this court on the 07th of June 2023. Specifically, Dr. Nshalla has assailed the truthfulness of what is deposed under Paragraph 14:1 to 14:6 as matters for which supporting affidavits from the persons named thereunder, who are Mr. Phelix Ogola and TANESCO. He also noted that, while paragraphs 21.1 and 21.3 refers to TANESCO, there is no affidavit from TANESCO to support averments under those paragraphs.

In principle, I would agree that where there is a mentioning of another person in an affidavit in a manner that such other person should have filed an affidavit to support what has been stated about him or her, such other person

must file an affidavit. But where such information though relevant to the matter can be expunged, the court is entitled to expunge the offending paragraphs from the affidavit in question and there will be no need for such other affidavit.

The above stated position is supported by the decision of the Court of Appeal in the case of **Benedict Kimwaga vs. Principal Secretary, Ministry of Health**, Civil Application No. 31/2000 –(CAT) (DSM). In that case the Court of Appeal stated that:

“ If an affidavit mentions another person, then that other person has to swear an affidavit. However, I would add that that is so where the information of that other person is material evidence because without the other affidavit it would be hearsay. Where the information ... can be expunged, then there is no need to have the other affidavit or affidavits.”

In this application, paragraph 14.1 and 14.2 of the counter affidavit, contain information which should have been stated by Mr. Ogola and not Ms. Obeto. In my view, it is material evidence and being not from Mr. Ogola, it remains hearsay evidence which in law is unreliable. However, the information can be expunged from that affidavit. Paragraphs 14.1 and 14.2 of Ms. Obeto's affidavit are thus hereby expunged from the counter affidavit.

The second issue is in respect of paragraphs 21, 21.1 to 21.3 which are also paragraphs divulging information or facts which only TANESCO could state. In the same way I do hold that, the information therein is pure hearsay and being material evidence, without the affidavit from TANESCO it renders the information hearsay. I would as well expunge paragraphs 21, 21.1 to 21.3 from the affidavit.

Having stated that way, let me revert to the main issue regarding whether this court should grant the prayers sought. It is undisputed fact that, the Applicant herein is seeking for orders of maintenance of *status quo ante* certain acts which took place during the pendency of the main suit from which this application arose (i.e., Commercial Cause No.55 of 2023).

In the case of **Car Truck Distributors Limited vs. MKB Security Company Ltd & Another** Misc. Land Application No.688 of 2021 (unreported), this Court (Mwenegoha, J) (Land Division) defined the phrase "maintenance of *status quo ante*" stating as follows:

"In plain language, the phrase *status quo ante* means the situation that existed before..."

In this application, the applicant is seeking for such an order of maintenance of *status quo ante* the 60days' Notice which the Respondent issued simply because she is contesting the legality of that Notice and has filed a case to that effect (**Commercial Case No.55 of 2023**).

But generally speaking, it is that in order to uphold the decorum and the authority of the courts of law, once disputed matters are laid before a court of law, all persons are by all intent and purpose, restrained from laying their hands on anything touching such matters until the court determines the dispute. That in part, is what respect to the authority of the courts means.

As regards the rest of the prayers, the issue is whether the necessary factors for the grant of injunctive orders are established by the Applicant. Agreeably, it is a settled legal position that an injunction is an equitable and discretionary remedy. The rationale for its granting as an equitable relief is as it was authoritatively stated in **Abdi Ally Salehe vs. ASAC Care Unit Ltd and 2 Others Civil Revision No.3 of 2012, CAT (DSM) (unreported)**. That is to say, it is meant to preserve the subject in controversy or maintain the *status quo* until the questions of rights involved in another suit (main suit) are finally determined.

As such, maintenance of *status quo ante* is a necessity if the court is to give meaningful decision on the pending matters before it. It should as well be noted that, this application does not entitle this court to go deep to the matters which ought to be looked at in the main case.

That guidance was readily given by the Court of Appeal in the case of **Abdi Ally Salehe** (supra). In that case the Court of Appeal was of the view that:

“In deciding application for interim injunction, the Court is to see only

prima facie case, and not to record finding on the main controversy involved in the suit prejudging issue in the main suit; in the latter event the order is liable to be set aside.”

In view of the above, though at some point the Learned Counsel for the parties seem to have been tempted to cross the boundaries I stand to be guided by what the Court said in the above cited case of **Abdi Ally Salehe** (supra) and nothing else.

In essence, and as I stated earlier herein, at the end of the day, the bottom line is that for an injunctive relief to be granted, the Applicant must satisfy the required conditions or factors for a grant of such an equitable relief. In his submissions, Mr. Josiah, the learned counsel for the Respondent, contended that, the Applicant has not met the conditions for the granting of the orders sought.

For his part, however, Dr. Nshalla maintained that the requisite conditions for the grant of the orders sought have been fully satisfied. With such a rival stance, what then should be the settled position?

Ordinarily, as stated in the case of **T. A. Kaare v
General Manager Mara Cooperative Union (1984) Ltd**

[1987] TLR 17 (HC):

“the power to grant such an application has always been discretionary, to be exercised judicially by the application of certain well-settled principles. The *first* such governing principle, as indicated supra, is that the court should consider whether there is a bona fide contest in between the parties. *Secondly*, it should consider on which side, in the event of the plaintiff’s success, will be the balance of inconvenience if the injunction does not issue, *Thirdly*, the court should consider whether there is an occasion to protect either of the parties from the species of injury known as “irreparable” before his right can be established, keeping it in mind

that by "irreparable injury" it is not meant that there must be no physical possibility of repairing the injury but merely that the injury would be material, i.e., one that could not be adequately remedied by damages.."

In this instant application based on the facts disclosed in the affidavit of the Applicant, and considering the submissions made by Dr. Nshalla, I am fully convinced that the Applicant has met the relevant conditions. There is no doubt, therefore, that, there is established a *prima facie* case as there is in this court a pending suit.

Secondly, there is also no doubt that, by not granting the orders the Applicant stand to suffer irreparable loss. In his submission Mr. Josiah contended that the possible loss alleged is quantifiable hence can still be atoned by monetary compensation. However, not every loss is atoned by monetary compensation. In my view, given the nature of relationship that had existed between the parties and the Applicant's future expectations in relation to their contractual relationship as disclosed in paragraphs 2, 4, 5, 6, 12 and 17

of the Applicant's affidavit, there is a need to uphold the Applicant's prayers.

Finally, as regards the balance of convenience, by all standards if the orders sought are denied, the Applicant stands to suffer more than the Respondent. The issue of public interest which Mr. Josiah had enticed that this court should consider taking into account does not, in my view, have a place here because, once the *status quo ante* has been restored, all supplies will be flowing in as it was before until the pending matters in court are laid to rest.

In view of the above, I hereby make the following orders:

1. That, an order for the maintenance of *status quo ante* between the parties as it were before the Respondent issued a 60-day Notice to terminate the Distributor Agreement on the 31st day of March 2023, pending the final and conclusive determination of the main suit *inter partes* is hereby made and issued for immediate execution by the relevant parties herein.

2. That, the Respondent, its workmen, agents, subsidiaries, affiliates, and assignees are hereby restrained from committing the breach of contract through the issuance of the 60-day Notice of intention to terminate the Distributor Agreement between it and the Applicant entered on the 2nd day of May 2022 pending the final and conclusive determination of the suit filed by the Applicant against the Respondent, i.e., *Commercial Case No.55 of 2023*.
3. That, the Respondent, its workmen, agents, subsidiaries, and assignees are temporarily restrained from usurping from the Applicant and assuming the roles of distributor or supplier of **Shell Mysella S3-N40** and **Shell Tellus S2-M100** products, from the parties' primary area of responsibility (PAR) (TANESCO) pending the final and

conclusive determination of the main
suit between the parties.

4. That, the application succeeds with costs.

It is so ordered.

DATED AT DAR-ES-SALAAM ON THIS 04TH DAY OF AUGUST
2023



.....
DEO JOHN NANGELA
JUDGE

Date: 04/08/2023 Coram: Hon. Nangela, J.

For the Applicant: Ms. Inviolata Wangoma, Ms. Judith Ulomi
and Mr. John Chogora, Advocates.

For the Respondent: Mr. Dismas Mallya and Ms. Denisia
Michael

C/Clerk: Fortunata

Court: Ruling delivered today, this 04th of August 2023 in the
presence of both parties.



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DEO JOHN NANGELA
JUDGE.