

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISC.COMMERCIAL APPLICATION NO. 178 OF 2023**

**(Arising from Commercial Case No. 16 of 2023)**

**BETWEEN**

**EQUITY BANK (TANZANIA) LIMITED.....1<sup>ST</sup> APPLICANT**

**EQUITY BANK (KENYA) LIMITED .....2<sup>ND</sup> APPLICANT**

**VERSUS**

**CONTINENTAL RELIABLE (T) LIMITED.....RESPONDENT**

**RULING**

*Date of last order: 11/12/2023*

*Date of ruling: 08/03/2024*

**AGATHO, J.:**

This ruling is in respect of the respondent's Preliminary Objections (POs) that were raised against the applicants' application. The POs were five, that:

- (1) The application is misconceived and bad in law.
- (2) That the application is time barred.
- (3) That the court is functus officio to hear and determine this application after having declared a similar application as

misconceived and abuse of court process. Misc. Commercial Application No. 97 of 2023.

- (4) That the provisions of law cited do not support orders sought.
- (5) That the contents of paragraph 10 and 11 of the Affidavit are argumentative, hence contravening rules of affidavit.

The parties were under legal representation. Whereas Mr. Shalom Msakyi represented the applicants, Mr. Frank Mwalongo appeared for the respondent. The application was heard by way of written submissions.

A brief background of the application is that, the parties are battling in the impending Commercial, Case No. 16 of 2023. It is also true that there was an application like the present, that is Misc. Commercial Application No. 97 of 2023 in which the applicants moved the court to set aside its order for maintenance of status quo in Commercial Case No. 16 of 2023. That application was struck out after sustaining three POs, namely: that the application was misconceived and bad in law, that paragraphs 8, 9, 10, 12 and 14 of the affidavit of Isabela Maganga are argumentative, and the paragraph 9 of the affidavit of Ashura Mansoor Salum is also argumentative. The application was misconceived and bad in law as it was the application

for review brought and wrong provision of the law and that there were no grounds for review.

Since the Misc. Commercial Application No. 97 of 2023 was struck out, I need not waste time on the 3<sup>rd</sup> PO that the court is functus officio to hear and determine this application after having declared a similar application as misconceived and abuse of court process. Misc. Commercial Application No. 97 of 2023. As rightly submitted by the applicants' counsel that once a matter is struck out, the parties are at liberty to refile it. The effect of striking out an application or a suit is that the said matter is regarded by the law as if it had never been filed in court. Therefore, the PO (3) is without merit. It is overruled.

Turning the 4<sup>th</sup> PO that the cited provisions of the law do not support the application, that too is without merit. In my view the application at hand which is for lifting or setting aside the order for maintenance of status quo is correctly made under Sections 68 and 95 of the CPC. These provisions are for discretionary and inherent powers of the court. There is no specific provision under the CPC dealing with maintenance of status quo. That is why such application is brought under aforesaid provisions. The PO (4) is dismissed for lacking substance.

Regarding the 5<sup>th</sup> PO that the contents of paragraph 10 and 11 of the Affidavit are argumentative, hence contravening rules of affidavit. Order XIX Rule 3 of the CPC deals with content of affidavits. It states that affidavits should not contain arguments, opinions, or conclusions.

Paragraph 10 of the affidavit avers that:

*"That the presence of the order for maintenance of status quo of 24<sup>th</sup> April 2023 in this court prohibits Applicants herein ability to secure the Motor Vehicles including seeking necessary orders before this honourable Court taking necessary actions to preserve the securities subject to alienation and disposition."*

Paragraph 11 of the affidavit reads as follows:

*"That the above circumstances it is evident that the status quo has evolved due to occurrence of new events since 24<sup>th</sup> April 2023 therefore such order been overtaken by events and hence defeating the court order and rendering Commercial Case No. 16 of 2023 nugatory."*

Briefly, the above paragraphs of the affidavit are indeed argumentative. But what are the implication of argumentative affidavit, can we expunge these offending paragraphs and yet remain with a sensible affidavit? The general rule is that a defective affidavit should not be acted upon by a court of law, that was held in **Omari Ally v Idd Mohamed and Others, Civil Revision No. 90 of 2003, HCT at Dar es salaam**. But in other instances where appropriate the court may order amendment of the affidavit. It is also possible that the court may expunge the offending paragraph (s) if the rest of the paragraphs will still retain the substance of the affidavit.

In the case at hand while paragraphs 10 and 11 are offensive these could be expunged and the substrum of the affidavit remains. Therefore, I proceed to expunge paragraphs 10 and 11 of the affidavit. See the cases of **Msasani Peninsula Hotels Limited & Six Others v Barclays Bank Tanzania Limited and Others, Civil Application No. 192 of 2006, CAT; Modern Transport (1985) Limited v D.T. Dobie (Tanzania) Limited, Civil Reference No. 15 of 2001 CAT**. Therefore, it my profound view that the expunging of offending paragraphs in the case at hand does

not weather away the substantive parts of the affidavit. The affidavit substantial part remains intact, and the court can act on it.

The second PO that the application is time barred, I should state here that the parties while submitting on this PO had divergent views. The respondent was talking about time bar of the application in relation to the time the order of maintenance of status quo was given. However, the applicants were referring to events that were taking place at Kisutu RM's court in Execution No. 79 of 2023. I think this was a confusion. The time limits cannot be linked to the Kisutu RM's court case. The parties ought to have focused as to when the order for maintenance of status quo was given by this court. That said though the respondent was right to point out that the time bar was to be drawn from the order for maintenance of status quo, I do not subscribe to the view that the application at hand is time barred. I am saying so because the order for maintenance of status quo is active until when the main case is conclusively determined. That means parties are at liberty to ask the court to lift or vary the order for maintenance of status quo if there is sufficient cause. That can be done at anytime so long the order for maintenance of status is still in force. That said the PO (2) is overruled for lacking merit.

Lastly, on the first PO, that the application is misconceived and bad in law, I would firstly touch upon diction as to whether this was an application to set aside the order for maintenance of status quo or the application to lift the order for maintenance of status quo, and whether these sentences make any significant difference. To decrypt the message here, one has to consider the Misc. Commercial Application No. 97 of 2023 where the Applicants were seeking an order to vary or set aside the order for maintenance of status quo. In the present application the applicants are beseeching the court to lift the order for maintenance of status quo. In my these are merely play of words. The message carried in setting aside the order and lifting the order is the same. It is semantical or dictional play. The implication of setting aside the court order is no different from the order lifting the court order. Back to the PO that the application is misconceived and bad in law, we examine the purpose of the application at hand. The applicants are asking inter alia that the court to set aside the order for maintenance of status quo dated 24<sup>th</sup> April 2024. This is what is found in the chamber summons.

While it is sound that the order for maintenance of status quo binds the parties and does not extend to third parties, nor does it bind Kisutu RM's in its execution proceedings. But what makes an application misconceived

and bad in law is whether such application is legally sound, incompetent or whether it is an abuse of court process. As the pleadings indicate the court order for maintenance of status quo sought to set aside was intended to save the interest of the parties. Unlike the Misc. Commercial Application No. 97 of 2023 which was misconceived for it sought to move the court to examine its own order claiming to have been give erroneously, the present application seeks the court to set aside its order for what it was attempting to protect has been weathered away. This suggestion in my view is wrong. That is because the Motor Vehicles have not been disposed. Nevertheless, to determine whether these Motor Vehicles have been disposed or not will require digging into evidence. Moreover, the present application cannot be said to be misconceived and bad in law because the provision cited are proper, and again the court is not blamed to have made the order erroneously which would have been a different story as that would have meant the court is examining its own order on merit. In the end the 1<sup>st</sup> PO is thus overruled.

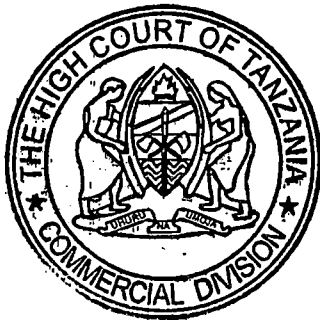
In lieu of the foregoing the POs have been partly sustained and partly overruled for lacking merits. The application shall thus proceed to be heard and determined.



Considering the outcome of the POs each party shall bear its costs.

Order accordingly.

**DATED** at **DAR ES SALAAM** this 8<sup>th</sup> Day of March 2024.



A handwritten signature in black ink, appearing to be "U. J. Agatho".

**U. J. AGATHO**

**JUDGE**

**08/03/2024**

**Court:** Ruling delivered today, this 8<sup>th</sup> March, 2024 in the presence of Shalom Msakyi, advocate for the applicants, and Frank Mwalongo for and Shaba Mtung'e for the respondent.



A handwritten signature in black ink, appearing to be "U. J. Agatho".

**U. J. AGATHO**

**JUDGE**

**08/03/2024**