

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

MISC. LAND CASE APPLICATION No. 677 OF 2019

**REGISTERED TRUSTEES OF
CALVARY ASSEMBLIES OF GOD (CAG).....APPLICANT**

VERSUS

**TANZANIA STEEL PIPES LIMITED.....1ST RESPONDENT
TREASURY REGISTRAR.....2ND RESPONDENT
ATTORNEY GENERAL.....3RD RESPONDENT**

Date of last Order: 16.12.2019
Date of Ruling: 02.03.2020

RULING

V.L. MAKANI, J

This ruling is in respect of preliminary objections on points of law that were raised by the 2nd and 3rd respondents herein. The said objections were as follows that:

- 1. The application is incompetent and bad in law for contravening the provision of Order VII Rule 1(b) and 2(b) of the Civil Procedure Code CAP 33 RE 2002 (the CPC).*
- 2. The application is incompetent and bad in law for non-citation of proper provisions of laws.*
- 3. The application is incompetent and bad in law for being supported by defective affidavit.*

Before the hearing of the preliminary objections could proceed, Mr. Msalama, State Attorney, with leave of the court, corrected the first objection to read as Order XXXVII Rule 1(b) and 2(b) CPC instead of

Order VII Rule 1(b) and 2(b) of the CPC. He also abandoned the last point of objection in the course of hearing.

Mr. Msalama arguing the first objection stated that the application is wrongly filed under section 68(c) and (e) and Order XXXVII Rule 4 of the CPC because firstly there is no pending suit and secondly the 2nd and 3rd respondents being government entities no temporary injunction can be ordered against them. He thus said since in the Chamber Summons the government is also restrained then it is contrary to the law. He further said that Order XXXVII Rule 2(1) of the CPC states that there has to be a main suit. In the present instance there is no pending suit and therefore contrary to the law and therefore the application ought to be dismissed.

As for the second point of objection he said that section 68 (c) and (e) of the CPC falls under supplemental proceedings. He said citing this section without specific orders meant that the application was incompetent for non-citation of proper provision of the law. Mr. Msalama relied on the case of **Saigon Shipping Limited vs. Mohamed Enterprises (T) Limited, Civil Appeal No. 37 of 2005 (CAT-DSM)** (unreported). He argued that the said section ought to be supported by Order XXXVII Rule 1 and 2 of the CPC and since this was not done then the said provision could not stand.

Regarding the citing of section 2(1) and 5 of Judicature and Application of Laws Act CAP 358 RE 2002 (**JALA**), Mr. Msalama argued that citation of this section without citing specific law under

the common law amounts to non-citation of the enabling provision of the law and renders the application incompetent. He relied upon the case of **Hashim Jongo & Others vs. Attorney General & TRA, Misc. Application No. 32 of 2008 (HC-DSM)** (unreported) at page 10 and **Freeman Aikaeli Mbowe vs. DSM Regional Commissioner & Others, Misc. Civil Application No. 9 of 2017 (HC-DSM Main Registry)** (unreported). He said these cases stated categorically that failure to state the provision of the law in the Common Law is non-citation of the proper provision of the law. He said by virtue of these cases the court was not properly moved as in the case of **Edward Bachwa & 3 Others vs. Attorney General & Another, Civil Application No. 128 of 2006 (CAT-DSM)** (unreported).

In response, Mr. Sanga Advocate for the applicant admitted that there was no pending suit because under section 6 of the Government Proceedings Act CAP 5 RE 2002 there is a requirement of 90 days' Notice to the respective Ministry subject of the dispute and the Notice has to be copied to the Attorney General. He said with this requirement no suit can be filed without the Notice being served to the Government. He however, said that this situation is cured by "*Mareva Application*" as the present application pending the 90 days' Notice which is referred in paragraph 13 the affidavit (Annexure AG2). He said section 68(c) and (e) of the CPC is properly cited because they could not cite Order XXXVII Rule 1(b) and 2(1) of the CPC because it is applicable where there is a pending suit. He said section 68(c) and (e) of the CPC are for interlocutory orders as in **Tanzania**

Building Works Limited vs. City Director, Mbeya City Council, Misc. Commercial Cause No. 51 of 2014 (HC-Commercial Division, DSM) (unreported). A party can file for an injunction order without a pending suit.

On the second point Mr. Sanga argued that he did not cite section 2(3) of JALA but section 2(1) and (5) of JALA. He said while section 2(1) gives full jurisdiction to this court both in civil and criminal matters, section (5) gives powers to a single Judge of the High Court to adjudicate on matters under JALA. He said the cases of **Freeman Aikael Mbowe** and **Hashim Jongo & Others** (supra) makes reference to section 2(3) of JALA as opposed to section 2(1) and (5) of JALA cited by them. He further stated that in the case of **Sea Saigon Shipping Limited** (supra) there was a pending suit between the parties as such Order XXXVII Rule 1(b) and 2(1) of the CPC becomes mandatory. He said this case is distinguishable from the present case. He prayed that if the court finds that the application is not proper before the court then the remedy is to strike out not to dismiss the suit. He went on to say that the preliminary objections on points of law have no merit and they ought to be dismissed with costs.

In rejoinder Mr. Msalama pointed out that the applicant has not prayed for the court to dispense with the Notice and he further stated that *Mareva Injunctions* apply in the Common law only and the mandate by this court is derived from section 2(3) of JALA which gives power to this court to apply common law principles. He said since the application did not cite such provision then it was wrong citation. He

said section 68(c) and (e) of the CPC are for interlocutory applications so they must have main orders such as Order XXXVII Rule 1(b) and 2(1) of the CPC. He said in the case of **Tanzania Building Works Limited** (supra) the application therein was under section 68(c) and (e), section 95 and Order XXXVII Rule 1(b) and 2(1) of the CPC together with section 2(3) of JALA. He was of the view that the case was distinguishable from the present case. As regards section 5 of JALA Mr. Msalama said the court has been given powers but there has to be specific provision to move the court. He argued that since the applicant cited wrong provisions of the law then the application is incompetent as the court has not been properly moved. He prayed for the application to be dismissed with costs.

I have listened to the submissions by learned State Attorney and Advocate. It is not in dispute that the application before this court is for temporary injunction and that there is no pending suit before this court as required by the Order XXXVII which governs temporary injunctions. In considering the preliminary objections raised I will start with the second point of objection.

It is settled law that in special circumstances an application for temporary injunction can be applied and also granted without a pending suit. There are many cases to that effect, amongst others, **TANESCO vs. IPTL** (supra), **Tanzaco EA Mining Limited vs. Minister for Energy & Minerals and Another, Commercial Case No. 74 of 2014, Issa Selemani Nalikila and 23 Others vs. Tanzania National Roads Agency & Attorney General Misc.**

Land Application, No. 12 of 2016 (HC-Mtwara) (unreported) and **Tanzania Sugar Producers Association vs. The Ministry of Finance of the United Republic of Tanzania and The Attorney General, Miscellaneous Civil Case No. 25 of 2003 (HC-Commercial Division, Dar es Salaam)** (unreported). In the latter case of **Tanzania Sugar Producers Association**, Hon. Kalegeya, J (as he then was) explained clearly the genesis of such applications. He quoted with approval the cases of **Nicholas Nere Lekule vs. Independent Power (T) Limited and The Attorney General, Misc. Civil Cause No. 117 of 1996** and **Tanganyika Game Fishing and Photographic Limited vs. The Director of Wildlife, The Attorney General and Muanauta & Company (T) Limited, Misc. Civil Cause No. 48 of 1998** where Hon. Kaji and Katiti, JJ (as they then were) held that a court has jurisdiction to issue an interim order where there is no pending suit. In England applications of this nature are known as "*Mareva injunctions*" having its roots in the famous case of **Mareva Compania Naviera SA v International Bulk Carriers SA [1980] 1 All ER 213**. The reasoning in this case followed in the case of **Nicholas Lekule** (supra) where the court held:

"Since courts in England used to issue injunction orders before institution of the main suit under S. 25 (8) of the Judicature Act 1873, and since that Act was in force in England on 22/7/1920 and would appear to have been of general application in England at that time, I am satisfied that under S. 2(2) of the Judicature and Application of Laws Ordinance Cap 453, in a proper case this court can grant such an order notwithstanding its peculiar name of Mareva. Suffice to call it an interim

injunction order before institution of the main suit.

It is apparent from the above quote and in all the cases cited that the provision moving the court in cases where there is no pending suit was section 2(2) of the Judicature and Application of Laws Ordinance and 2(3) of JALA. The rationale is that the *Mareva Injunctions* apply in the Common Law and its application in our courts is by virtue of section 2(2) of the Judicature and Application of Laws Ordinance and now section 2(3) JALA.

The present application, as conceded by Mr. Sanga, has been brought under section 68 (c) and (e) of the CPC, section 2(1) and (5) of JALA. In my considered view, the provisions of CPC are inapplicable as there is no pending suit in this court. Subsequently sections 2(1) and (5) of JALA are not helpful to the applicant either as they give general powers to the High Court and an individual High Court Judge in civil and criminal matters. The only provision to move the court as stated hereinabove would have been section 2(3) of JALA which brings into Tanzania the common law, doctrines of equity and statutes of general application in so far as the circumstances of Tanzania its inhabitants permit, and subject to such qualifications as circumstances may render necessary. The principle of *Mareva Injunctions* is one of such circumstances where the common law principles are applicable, but unfortunately the applicant did not cite the provision of section 2(3) of JALA to mandate this court to adjudicate upon the matter. This

therefore means that the application has been brought under the wrong provision of the law.

What are consequences of citing the wrong provision of the law? It is trite law that wrong citation of the enabling or applicable law in moving the Court renders the application incompetent and liable to be struck out. In the case of **Edward Bachwa & 3 Others** (supra) the Court of Appeal stated:

"That wrong citation of the law, section, subsection and or paragraph of the law is liable to render the application incompetent"

Further in the case of **China Henan International Co. Operation Group vs. Salvand K.A Rwegasira [2006] TLR 220**, the Court of Appeal said that it is imperative to cite the correct provisions of the Rules. It went on to say that, an error to cite the correct provision is not a technical one but *"a fundamental matter which goes to the root of the matter..... Once the application is based on wrong legal foundation, it is bound to collapse"*.

In a similar vein, as the present application has been brought under the wrong provisions of the law it is defective and therefore incompetent.

In the result, the second point of preliminary objection is upheld, and I proceed to strike out the application with costs for being incompetent. In view of this I find no pressing need to consider the other grounds of the preliminary objections raised.

It is so ordered.


V.L. MAKANI
JUDGE
02/03/2020