

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(TANGA SUB - REGISTRY)**

**AT TANGA**

**MISC. LAND APPLICATION NO. 000004504 OF 2024**

**MWANAHAMISI DUNSTAN MNKANDE ..... APPLICANT**

**VERSUS**

**HONEST MACHA .....1<sup>ST</sup> RESPONDENT**

**LILIAN JOHN MACHA** (As Co-Administratrix of the Estate of the

Late JOHN THEOBALD MACHA) .....2<sup>ND</sup> RESPONDENT

**LINUS SAKIA MACHA** (As Co-Administrator of the Estate of the

Late JOHN THEOBALD MACHA) ..... 3<sup>RD</sup> RESPONDENT

**TAOMTRA LIMITED ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

8<sup>th</sup> & 12<sup>th</sup> March, 2024

M.J. Chaba, J.

Before me is an application for revision brought by way of chamber summons predicated under sections 79 (1) (b) and (c) and 95 of the Civil Procedure Code [CAP. 33 R.E. 2019] (the CPC) in which the applicant is seeking for the intervention of this Court to call for, examine and revise the proceedings and decision of the District Land and Housing Tribunal for Tanga, at Tanga (the DLHT) by Hon. D. W. Mangule, Chairperson in Misc. Application No. 31 of 2023 and correct procedural irregularities and substantive material errors in its ruling and order delivered on the 28<sup>th</sup> day of February, 2024.



The chamber summons has been preferred under certificate of urgency and it is supported by the affidavit deposed by Mwanahamisi Dunstan Mnkande, the applicant.

When the matter was placed before me for necessary orders on 8<sup>th</sup> March, 2024, Mr. Thomas Kitundu, learned advocate entered appearance for the applicant and the applicant herself appeared in person, whereas the Mr. Eric Akaro, learned advocate appeared for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. The 2<sup>nd</sup> respondent also attended in Court. The 1<sup>st</sup> and 4<sup>th</sup> respondents did not attend and without notice, though it was alleged by the Counsel for the applicant that both were duly served. Mr. Kitundu produced proof of services to reinforce his argument and prayed the matter to proceed *ex-parte* against the 1<sup>st</sup> and 4<sup>th</sup> respondents.

To his part, Mr. Eric Akaro, learned advocate for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents admitted the fact that, they were duly served on 6<sup>th</sup> March, 2024 and prayed to file a joint counter affidavit on behalf of his clients as required by the law. In the meantime, Mr. Eric Akaro lodged a notice of preliminary objection dated 7<sup>th</sup> March, 2024 and duly served the counsel for the applicant.

While preparing to issue the necessary orders, Mr. Thomas Emanuel Kitundu prayed the Court to issue orders to restore the applicant to her business place relying upon the following reasons:

**One;** This application has been preferred under certificate of urgency and predicated under sections 79 (1) (b) and (c) and 95 of the CPC which gives the Court inherent powers and wide discretion to deal with the prayers advanced by the applicant and grant the same as prayed. He said, since this kind of prayers can be

made either written or orally, the applicant has preferred to move the Court by way of chamber summons. **Two;** after the decision of the DLHT for Tanga, at Tanga on 28/02/2024, immediately the respondents on the following day / date on 29/02/2024 rushed to the applicant's Hotel known as, New Raskazone Hotel and took out all customers from the building and removed their belongings and other properties that were inside the Hotel. Afterwards, the respondents locked the doors and left all properties outside the building / Hotel including the properties of the applicant herself. He stated further that, from that particular date, the applicant's clients and their belongings / properties are still hanging outside the Hotel. He averred that, when all these occurred, the applicant was in Dar Es Salaam Region and her clients who are medical doctors were in the outskirts of Tanga Municipality. He went on stating that, inside the Hotel there were perishable goods like meat, hard and cold drinks, juices, soda, beer and the like which are supposed to be removed therefrom. **Three;** the applicant has a loan at CRDB Bank and she is required to reservice or repay the same as agreed by the Bank Administration. **Four;** TRA machines have been locked inside the Hotel meanwhile the applicant is supposed to pay taxes and other levy. **Five;** The applicant's emotional sentiments, agony and her family have rendered to suffer loss of income that cannot be compensated by damages.

Based on the foregoing reasons, and on the basis of the interest of justice, Mr. Kitundu prayed the Court to restore the applicant to her business at New Raskazone Hotel so that could continue to run the same as usual.

In reply, Mr. Eric Akaro, learned advocate for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents vehemently resisted the prayers made by Mr. Kitundu and averred that, it would be

dangerous for the Court to grant the prayers sought by the applicant because all the facts and / or reasons submitted by the Counsel for the applicant are statements from the bar. He stressed that, the grounds narrated by Mr. Kitundu have not been pleaded by the applicant, hence are nowhere to be seen in the pleadings lodged by the applicant. He referred this Court to the principle of law that, parties are bound by their own pleadings and not otherwise. He said, in this application, the Court cannot act upon a statement narrated by the Counsel for the applicant and refrain from paying attention to the parties' pleadings.

He went on submitting that, since the applicant chose to move this Court by way of chamber summons and not by way of oral application, thus, the applicant was duty bound to state precisely in the chamber summons that the application either was supposed to be heard *ex-parte* or *inter-parties*. He reiterated that, in this case, the prayers narrated by the Counsel for the applicant are nowhere to be seen in the applicant's pleadings and the same are unknown and unfounded in law for a reason that, such facts have never been deponed by the applicant.

It was Mr. Akaro's contention that, in the chamber summons, the applicant prays the Court to call for, examine and revise the proceedings in Misc. Application No. 31 of 2023 issued by the DLHT for Tanga, at Tanga and correct procedural irregularities and substantive material errors in its ruling and the subsequent orders dated 28<sup>th</sup> February, 2024 together with the main case, Land Application No. 92 of 2021 which is still pending before the trial DLHT and not to restore the applicant to her original position and maintain her status quo. He said, since the main case is still at the hearing stage pending determination on merits, this is why Mr. Kitundu did

not mention the provision of the law under which his prayers for an interim order can be made and rely upon.

From the foregoing, Mr. Eric Akaro had the view that, the prayers made by the Counsel for the applicant are misconceived and the same have been brought under a wrong forum. He prayed the Court to refuse granting the prayers sought by the applicant for being hazardous. Substantiating his contention, Mr. Eric Akaro highlighted that, the facts that, the applicant has a loan at CRDB Bank, TRA machines have been locked inside the Hotel, the applicant is now compelled to pay the taxes and other levy, her clients who are foreigners and medical doctors have been locked outside the Hotel and the fact that, there are various perishable goods which are inside the building and are about to be perished, this kind of submission is sadly a statement from the mouth of the Counsel for the applicant. Explaining why it is a statement from the bar, Mr. Eric Akaro said, the affidavit deposed by the applicant is silent on all what have been narrated by Mr. Kitundu. Even the contents of the impugned ruling issued by the DLHT does not support his allegation.

As regard to the powers vested upon this Court under the provision of section 95 of the CPC, Mr. Akaro had the view that, in the circumstance of this case, the Court cannot be vested with the powers so stated by the Counsel for the applicant for a reason that, Mr. Kitundu neither presented the instant applicant for revision before this Court nor deposed the affidavit supporting the application. He stressed that, his submission is full of statements from his own mouth.

He highlighted further that, in as much as the impugned decision / ruling of the trial Tribunal is concerned, it would appear that, the applicant's thirsty was to see that, is returned to a former condition or position (restored to her place of business)



pending determination of the main suit at the DLHT. However, the trial DLHT refused to grant her prayers sought by the applicant for failure to meet the terms and conditions set in the famous case of **Atilio vs. Mbowe [1969] HCD 284**. In addition, Mr. Eric Akaro opposed the allegation of suffering raised by the Counsel for the applicant and prayed the Court not to grant the prayers sought by the applicant.

By way of rejoinder, Mr. Kitundu, Counsel for the applicant reiterated his submission in chief and added that, the applicant cited section 95 of the CPC to move the Court and further prayed for any other reliefs that the Court can deem fit and just to grant. He said, apart from the affidavit deposed by the applicant, the applicant also stated that other facts will be adduced during hearing of the application. When Mr. Kitundu was probed by the Court as to whether his submission is tantamount to the trial or hearing of this application, his answer was positive. He underlined that, basically, the applicant has come to this Court aiming to challenge the decision of the trial DLHT in Misc. Land Application No. 31 of 2023 as she believes that, such a ruling did determine the entire Land Application No. 92 of 2021 to its finality.

The Counsel admitted the fact that, what the applicant prayed before the trial DLHT is what she is now craving before this Court. He insisted that, the applicant's main prayer is for the Court to revise the decision of the trial DLHT in Misc. Land Application No. 31 of 2024.

To conclude, Mr. Kitundu reiterated his prayers and urged the Court to restore the applicant to her business place and allow her to continue doing and/or running her business and avoid suffering from getting loss and damages as well.



I have dispassionately considered the applicant's prayers for restoration to her business at New Raskazone Hotel pending determination of this application on merits, followed by contending arguments for and against the prayers made by the Counsel for the applicant for restoration of the applicant to her original position. It is undisputed fact that, in the chamber summons, the applicant's main prayer is for the Court to call for, examine and revise the proceedings in Misc. Application No. 31 of 2023 issued by the DLHT for Tanga, at Tanga and correct procedural irregularities and substantive material errors in its ruling and the subsequent orders dated 28<sup>th</sup> February, 2024 and not to restore the applicant to her original position and maintain her status quo. Again, Mr. Kitundu did not hesitate to inform this Court that, what the applicant prayed before the trial DLHT and finally denied, is same as what she is now pressing to be granted by this Court. With due respect to Mr. Kitundu, this act is tantamount to forum shopping and indeed it is an abuse of Court process.

From the foregoing, I wholly concur with the submission made by Mr. Eric Akaro, Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents that, parties are bound by their own pleadings. The Apex Court of our Land, speaking through Hon. Kihwelo, JA, underscored this principle in the case of **Sure Freight Tanzania Ltd & Two Others vs. XCMG Tanzania Ltd**, Civil Appeal No. 101 of 2020, (unreported) wherein the CAT observed that:

*"....The second principle is that parties to the case are bound by their own pleadings and they cannot be allowed to raise a different matter without due amendments being properly made. Furthermore, the court itself is as bound*

*by the pleadings of the parties as they are themselves.*

*The rule aims at barring parties from departing from their pleadings during the trial thereby taking the opponent by surprise in line with our previous decisions, amongst others; James Funke Gwagilo v. Attorney General [2004] T.L.R. 161 and Barclays Bank (T) Ltd v. Jacob Muro, Civil Appeal No. 357 of 2019 (unreported)....”.*

See also the case of **Njeru & Another vs. Nyakundi (Civil Appeal E021 of 2021) [2022] KEHC 13963 (KLR) (11 October 2022)** (Judgment). In fact, the parties are not allowed to depart from their pleadings and bring another new issue of facts not pleaded before.

I have further gone through the case file complained of by the applicant, registered as Misc. Application No. 31 of 2023 at the DLHT for Tanga in which the impugned ruling stems and revealed that the parties to the case were the applicant and the respondents herein, respectively. My scrutiny unveiled further that, what Mr. Eric Akaro, Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents submitted before this Court that, the submission made by Mr. Kitundu, Counsel for the applicant is full of mere statements from the bar, is a true story and I will enlighten. During scrutiny of the record of the DLHT I noticed that, there is a letter written by so-called “Ofisi ya Serikali ya Mtaa wa Raskazone Kata ya Central” (The Office of the Local Government Street at Raskazone in the Ward of Central” termed as a report for handing over of the New Raskazone Hotel between Salimu Jumbe Adamu from TAOMTRA Limited (Court Brokers) and Mwanahamisi Dunstan Mnkande, the applicant herein, explaining how the exercise of handing over took place between these two persons.

For ease of reference, I find it pertinent to replicate the contents thereof and what exactly transpired on the 10<sup>th</sup> - 12<sup>th</sup> November, 2023. I quote:

**“HALMASHAURI YA JIJI LA TANGA  
OFISI YA SERIKALI YA MTAU WA RASKAZONE KATA CENTRAL,**

YAH: MUHTASARI WA RIPOTI YA MAKABIDHIANO KATI YA SALIMU JUMBE ADAMU WA  
TAOMTRA LIMITED (COURT BROCKERS) NA MWANAHAMISI DUNSTAN MNKANDE  
(MWENDESHA BIASHARA YA HOTELI YA NEW RASKAZONE (KIWANJA NA. 143, BLOCK  
KBVI, RASKAZONE TANGA MJINI).

Tarehe 10/11/2023 Court Brockers walimtoa kwa nguvu Mwendesha Biashara wa New Raskazone Hotel kwenye jengo la Hotel lililopo Mtaa wa Raskazone Kiwanja 143, Kitalu KBXVI, RASKAZONE TANGA. Zoezi hilo lilianza siku ya ijumaa tarehe 10/11/2023 hadi Jumapili tarehe 12/11/2023, zoezi hili lilihusisha kuwatoa watu wote waliokuwa Hotelini, wakiwemo wageni wanafunzi madaktari kutoka nje ya nchi Denmark na Marekani ambao wanaishi Hotelini walimolipia ukaaji wa muda mrefu.

Kati ya makabidhiano hayo, uongozi wa Serikali ya mtaa wa Raskazone ulishuhudia vyumba vyote vipo salama isipokuwa mapungufu yalikuwa sehemu ya jikoni, Bar pamoja na uharibifu wa mabango ya matangazo ya Hoteli.

**HASARA ILIYOTOKANA NA ZOEZI HILI LA KUTOLEWA KWA NGUVU.**

Mapungufu yaliyotokana na upande wa jikoni ni chakula cha wageni kilichoandaliwa kwa wageni 8 kimetoweka, thamani ya chakula hicho ni shilingi 14,000/= kwa sahani ambayo huleta jumla ya shilingi 112,000/= (Chakula hiki kimeliwa na watumishi wa court brokers) pia

Wametumia gasi ya makadirio ya shilingi 20,000/=;

Wametumia mkaa wa makadirio ya shilingi 20,000/=;

Jumla hasara ya jikoni ni shilingi za kitanzania 152,000/=;

Kwa upande wa Bar mapungufu yaliyobainika ni kama ifuatavyo:

Beer	5,500/=;
Red bull 6 gharama ya mauzo ni shilingi	30,000/=;
Konyagi	210,000/=;
K-Vant 3	15,000/=;
Maji	2,000/=;
Soda 15	15,000/=;
Jumla ya hasara ya vinywaji shilingi ni	95,500/=;

Jumla ya hasara ya vinywaji na chakula vilivyotoweka ni shilingi za Kitanzania 247,500/=, Wameharibu pia mabango ya matangazo ya biashara (2) ambayo kurudisha kwake kwenye ubora itagharimu Shilingi 500,000/=.

Pamoja na hayo yote, Mwendesha Biashara ya New Raskazone Hoteli, amepoteza wateja wake 8 ambao ni kutoka nje ya nchi (foreigners), wapangaji hawa walikuwa waishi / wakae hotelini hapo hadi tarehe 28/12/2023. Nakala ya booking (ambatanisho), lakini kutokana na hofu waliyoipata kutokana na zoezi hili lililofanywa na TOAMTRA (Court Brockers) walivunja mkataba wao wa ukazi katika hoteli kuendelea kukaa na kwenda kukaa hoteli jirani. Kitendo hicho kimemgharimu mwenye biashara (Mwanahamisi Dunstan Mnkande) hasara ya shilingi milioni ishirini na mbili (23,000,000/=), (Sic).

Wageni 8 kwa siku ni sawa na mauzo ya shilingi 500,000/= za Kitanzania kwa siku zidisha siku 46 zilizobakia.

Huleta jumla ya shilingi 23,000,000/= (Milioni ishirini na tatu tu za Kitanzania).

Mwendesha biashara ya KIWANJA Na. 143, BLOCK KBVI, RASKAZONE TANGA MJINI Anakabiliana na madai ya wageni wake kwa kuondolewa kwa ghaffa na nguvu kinyume cha makubaliano na sheria za uendeshaji



wa biashara ya hoteli.

Makabidhiano yalianza saa 11:00 asubuhi na yakamalizika saa 12:30 mchana.

Makabidhiano haya yalifanyika mbele ya:

JINA:

1. MIRIAM KIWAMBO (Signed) .....M/KITI RASKAZONE (Signed);
2. NADHIFAJUMA .....MTENDAJI MTAA RASKAZONE (Signed);
3. MWANAHAMISI D. MNKANDE (Signed) MWENDESHA BIASHARA NEW RASKAZONE HOTEL
4. SALIMU JUMBE ADAMU (Signed) MWAKILISHI (TAOMTRA LIMITED COURT BROKERS”.

End of quoting.

From the forgoing, however, there is no any other order of the Tribunal, vital information or evidence indicating that, soon upon removed from the building (New Raskazone Hotel) as indicated in the report reproduced hereinabove, the applicant on the basis of the interim injunctive order issued by the trial DLHT for Tanga, at Tanga on 14<sup>th</sup> November, 2023 was restored to her place of business, New Raskazone Hotel, unless if there was private arrangements made orally by the parties themselves, which is unknown by this Court.

As correctly submitted by the Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, which I subscribe to, truly it would be dangerous for the Court to grant the prayers sought by the applicant because all the facts and/or reasons submitted by Mr. Kitundu are statements from the bar. However, as shown above, it appears that his mere statement has been overtaken by event nearly four months now. Again, the facts that the applicant has a loan at CRDB Bank and she is supposed to reservice or pay the same, TRA machines have been locked inside the Hotel meanwhile the applicant is supposed to pay taxes and other levy, the applicant's emotional sentiments, agony and her family have rendered to suffer loss of income that cannot be compensated by damages, all these statement as exhibited by the report replicated hereinabove,



which was submitted before the trial DLHT and received on 15<sup>th</sup> November, 2023 are mere words from Mr. Kitundu's mouth which are supposed to be thrown over the board, which I hereby do.

Moreover, I agree with the Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents that, the reasons narrated by Mr. Kitundu, not only are superfluous, frivolous and vexatious but also are like an empty shell and wanting as all reasons advanced by him have been overtaken by event as shown in the report hinted above. As suggested by Mr. Eric Akaro, the Court truly cannot rely on and act upon such mere statements from Mr. Kitundu who did not depone the affidavit.

Besides, I am in agreement with the Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents that, the provision of section 95 of the CPC has no place and cannot apply in the circumstance of this case due to the following reasons: **One;** the order sought by the applicant for restoration and the prayers narrated or indicated in the chamber summons are incompatible, **Two;** the order sought by the applicant was neither pleaded by the applicant nor deposed by herself, and **Three;** the Counsel for the applicant instead of doing his work as an advocate in accordance with the law, has decided to wear and put on the responsibility of the applicant and stepped into her shoes pretending himself as if he is the applicant while the affidavit deposed by the applicant is silent on all what have been submitted by Mr. Kitundu. And the worst thing is that, Mr. Kitundu did not depose the affidavit. In my view, the act done by Mr. Kitundu is out of his professionalism and it should be condemned.

In view of what I have endeavoured to demonstrate hereinabove, I find and hold that, the prayers made by the Counsel for the applicant is misconceived and the

same, as rightly submitted by the Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, has been brought under a wrong forum and unfounded in law, hence lacks merits.

Before I pen off, I am mindful that there is a piece of evidence which shows that, after the decision of the DLHT for Tanga, at Tanga in Misc. Application No. 31 of 2023 on 28/02/2024, on the following day/date on 29/02/2024 the respondents rushed to the applicant's Hotel, New Raskazone Hotel and took out from the building all customers and removed their belongings and other properties that were inside the Hotel. Afterwards, the respondents locked the doors and left all properties outside the building/Hotel including some properties belonged to applicant. This act in my minds, sounds to be harsh and inhuman. Even the law itself gives leeway of some days to a losing party to reorganize himself/herself and find a better way to move away so as to avoid the consequences and damages that might be caused by the winning party.

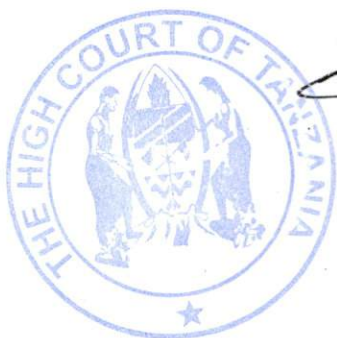
Therefore, having in mind that, equity is a branch of law that developed alongside with common law in order to remedy some of its defects in fairness and justice, usually it plays a large, but largely hidden role in all our lives. Based upon the facts indicated hereinabove, I find it apt to apply this principle of equity which is both a different system of law which recognizes rights and obligations that the common law does not, and a system which seeks to address the inherent gaps which can exist in following any set of rules, and issue a temporary interim injunctive order, commonly known as, "Holding Order" restoring the applicant to her rented premises, that is New Raskazone Hotel with a view to reorganise herself and remove all her properties and belongings (if any) within thirty days from today on the 12<sup>th</sup> day of March, 2024. In other words, this Holding Order will expire on the



10<sup>th</sup> day of April, 2024 at 00:59 hours in the midnight, pending determination of this application for revision.

In the upshot, this application is unmerited save for the holding order hereby issued by this Court, of which its survival will expire on the 10<sup>th</sup> April, 2024 as stated hereinabove. Order accordingly.

**DATED** at **TANGA** this 12<sup>th</sup> day of March, 2024.



A handwritten signature in black ink, appearing to read "M.J. Chaba", is written over the seal.

M.J. Chaba

**Judge**

**12/03/2024**

**Court:**

Ruling delivered under my Hand and the Seal of the Court in Chambers this 12<sup>th</sup> day of March, 2024 in the presence of Ms. Ernesta Chuwa, learned advocate for the Applicant and Mr. Eric Akaro, learned advocate for 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.



A handwritten signature in blue ink, appearing to read "Beda R. Nyaki".

Beda R. Nyaki

**Deputy Registrar**

**12/03/2024**

**Court:**

Rights of the parties to appeal to the Court of Appeal of Tanzania fully explained.



A handwritten signature in blue ink, appearing to read "Beda R. Nyaki".

Beda R. Nyaki

**Deputy Registrar**

**12/03/2024**

A small, circular handwritten mark or stamp in blue ink.