

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL APPLICATION No 97 OF 2018

(Originating from Commercial Application No 34 of 2018 and Commercial Case No 59 of 2017)

BETWEEN

MAXCOM AFRICA PLC ----- APPLICANT

VERSUS

UDA RAPID TRANSIT PLC ----- RESPONDENT

RULING

SONGORO, J

This is a ruling, on the application filed by Maxcom Africa PLC, the applicant applying for a court order of “*maintenance of status quo*” pending the hearing and determination of Misc Application No 34 of 2018 which seeks to restore Commercial Case No 59 of 2017 which was dismissed by this court.

The applicant application was made under Sections 95 and 68(e) of the Civil Procedure Code Cap 33 [R.E 2002] and is supported by an affidavit depone by Ahmed Lusassi, the applicant principal officer.

Respondent in the application are UDA Rapid Transit PLC who also filed counter affidavit sworn by Charles Seleman Newe, the Managing Director of the Respondent Company.

In additional, that, Respondent also filed a notice of preliminary objections which has two points reading as follows-;

- 1) The Honourable Court has not been properly been moved to grant the orders sought.

2) That, the application has no legs to stand as there is no pending suit.

So, in the light of the application and preliminary objections on points of law which the court invited both parties to pursue the application and objections raised. Therefore, Mr Clement Kihoko, Learned Advocate appeared for applicant and Mr Patrick Mtani, Learned Advocate appeared for Respondent.

Since the application was under “*a certificate of extremely urgent*” the court after consulting counsels from both parties, it decided that both preliminary objections on points of law and the suit be heard and determined together.

. So, Mr. Patrick Mtani Learned Advocate of the Respondent took the floor and argued the objections raised by submitting that, upon their perusal of the applicant chamber summon they noted that, the applicant is applying for an order of “maintenance of status quo” pending the hearing and determination of the application for restoration of the suit.

Further, Respondent’s counsel pointed out to the court that, the applicant application was made under Sections 68(e) and 95 of the Civil Procedure Code Cap 33 R, E [2002]. He then faulted the application that, the provisions of Sections 68(e) and 95 of the Civil Procedure Code Cap 33 R, E [2002] under which the application is made are not relevant and enabling provision of law because the deals with “*supplementary proceedings*” and may not be applied in the application for an order of “maintenance of status quo”.

It was the views and submissions of Mr Mtani that, the relevant provisions for the application of maintenance status quo is Section 2(1) of the Judicature and Application of Laws Cap 358, because the Civil Procedure Code Cap 33 is silent on the issuance of an order of status quo where there is no pending suit.

To support his argument, the respondent counsel drew the attention of a court to a decision in the case of Tanzania Electricity Co Ltd Versus Independent Power Tanzania Limited and two [2002] TLR page 327 where it was decided that, in the event the Civil Procedure Code is silent about the remedy applied, a party may apply the said remedy under Section 2(2) of the Judicature and Application of Laws Act Cap 358.

And the court has statutory powers to entertain and grant an interim order pending institution of the suit, or in any circumstances not covered by Order XXXVII of the Civil Procedure Code Cap 33.

Mr Mtani then argued that, since the Section 2 (2) of the Judicature and Application Act Cap 358 was not cited, it follows that the relevant provisions of the law was not cited and the application is incompetent ought to be dismissed. To support his argument the counsel further referred the court to a decision in Civil Application No 151 of 2008 between Chama Cha Walimu Tanzania versus Attorney General unreported Dsm Registry, where at page 17 it was stated that the omission to cite relevant and enabling provisions of the law is fatal and renders application to be incompetent, So the respondent counsel prayed for dismissal of the application.

Moving to second point of objection, Mr Mtani submitted the application and reliefs prayed without a pending. He then explained that, the purposes of temporary order

is to preserve the sub-stratum of the suit which currently is none existence... It was his argument and submission that since there is no suit which is pending the application has no leg to stand. So, he prayed to the court to uphold objections raised and dismiss the application.

In response to the objections, Mr. Kihoko Learned Advocate of the applicant first clarified that, currently there is Misc Commercial Application No 34 of 2018 before the court and the order prayer for restoration of Commercial Case No 59 of 2017.

So the present application under consideration seeks an order of maintenance of status quo pending the final determination of Misc Commercial Application No 34 of 2018 for restoration of the suit. He then pointed out the cited section in the chamber summon in the application are relevant and enabling provisions of the law which grant statutory powers to the court grant such an order.

The counsel then, clarified that, the cited case of Tanzania Electricity Co Ltd Versus Independent Power Tanzania Limited and two [2002] TLR has been misapplied by the respondent because the prayers there was for monetary judgment, while in the present application the order being sought is of *maintenance of status quo*.

Mr Kihoko then by relying on the decision in the case of Adonia Versus Mutakanga [1970] EA 429 quoted the words of Lord Spry (as then was) that, the High Court has unlimited powers which are only restricted by statute. He then explained that, it normal legal practice a court has powers to issue an order of maintaince of status quo... So he prayed to the court to dismiss the objection raised and exercise its discretionary powers to consider, and determined the application.

Turning to the merit of the application, Mr. Kihoko requested the court while considering the application to adopt details of the applicant affidavit. He then explained that, currently the respondent has issued a letter forcing the applicant's employees to vacate from UDART Bus Station on the basis that, a commercial case No 59 of 2017 was dismissed on the 16/2/2018. But the applicant has filed an application for its restoration, therefore there is a pending proceedings.

The Applicant's counsel then informed the court that, currently applicant's staff are running day to day activities of collecting revenue in UDART Bus Station and are also tasked to deposit all collected revenue in the designated government account. He then enlighten the court that, if an order of "maintenance of status quo" is not granted, there is a big risk of loss of government revenue and applicant is likely to face legal action from the government on its revenue.

Further, the applicant counsel explained that, currently is incurring operation costs of paying employees their salaries. So immediate eviction of the applicant's staff will cause and expose applicant into legal and labour disputes. Also it may cause applicant to suffer loss and its business reputation and image in the general public will be negatively affected.

The counsel then explained that, although the contract between the applicant and respondent has expired, but the balance of convenience is in favour of granting of an Order of maintaince of status quo because the applicant employees are still discharging their duties at various bus stations.

He then elaborated that take into account that, even after expiry of the contract and dismissal of the suit, the applicant continued to collect government revenue at the

bus stations, impliedly the respondent has accepted the applicant to continue with the work of collecting government revenue. So it is ideal if the court may issue an order of maintenance of status quo.

In response to the application, Mr. Mtani for the respondent submitted that, there is admission on the part of the applicant that Commercial case No 59 of 2017 was dismissed. The counsel then argued since there is pending suit the applicant has failed to demonstrate to the court there is a prima facie case, also has failed to show that, the applicant will suffer irreparable loss if orders sought are not granted.

On collection of government revenue on the bus stations, the Respondent Counsel submitted that, indeed the applicant was contracted by the applicant to collect revenue and not the Government, and it is the applicant alone who commissioned to run the project by the Government

It was the argument of Respondent's Counsel that, since the contract between the two expired way back in May, 2017 and currently there is contract which binds the parties, it follows therefore if the court makes an order of "maintenance status quo" the respondent and applicant will be operating without a contract and any binding terms of the contract. So that may negatively affects the performance of the project

Mr. Mtani also draw the attention of the Court to a decision in the Court of Appeal in Civil Application No 3 of 2012 between Abdi Ally Swalehe Versus Asac Care Unit Ltd and 2 Others Unreported Dsm Registry where at pages 8 and 9 Hon. Massati JA (as then was) stated that, where the court is satisfied that, the condition for granting an order of injunction has been satisfied, it has to consider other factors such delay in making the application and lack of clean hands in the said application. He then explained that, the application for an order of "maintenance status quo" has

been filed after a long delay from a date of dismissal of commercial Case No 59 of 2017. Mr. Mtani maintained that the application has failed to meet the test of legal requirement of granting an order of “maintenance of status quo”

The court has considered all arguments advanced by the parties and find the court under Section 68 (e) of the Civil Procedure Code Cap 33 [R.E 2002] is vested with statutory powers to make an order to prevent the end of justice from being defeated including making an order of maintenance of status quo. The test of applying Section 68 (e) of the Civil Procedure Code Cap 33 [R.E 2002] is if in the present application there is a need to prevent the end of justice.

So, the orders prayed in the chamber summon may be made under the cited sections of the law, as long as the court is convinced that, are just and convenient.

So honestly, I find by citing Section 68(e) of the Civil Procedure Code Cap 33 in the application, the applicant has cited the relevant and enabling provisions of the law which may enable the court to make any order to prevent the end of justice including the ones prayed in the chamber summons. It is in this respect I find the Respondent’s preliminary objections on points of laws has no merit and are hereby dismissed.

Turning to merit of the application for an order of *maintenance of status quo* the court after considering all points raised by both parties, it find as a matter of fact previously there was Commercial Case No 59 of 2017 which was dismissed.

Further, it found there is a pending Misc Application No 34 of 2018 seeking restoration of Commercial Case No 59 of 2017.

Next the court finds both counsels have expressed to the court that, the contract between the applicant and respondent expired way back on May 2017.

So the legitimate question to be considered in the application is whether or not the interest of justice demands granting an order of “maintenance of status quo” be issued in prevailing circumstances.

I have considered all points in their totality, and the court is persuaded that, it is the respondent who has a duty of overseeing the project, and large number of customers depends on him. In view of the above the court find it is Respondent who stands to be inconvenient most, and is likely to suffer great hardship and loss compared with the applicant if “an order of maintaince of status quo” is granted because such order will allow and enables the parties to continue with their business without a binding contract, and without knowing the terms governing their ongoing business.

So, continuation of such project business which is not governed by a contract even if is supported by a court order of “maintenance of status quo”, it may lead to inefficiency in the project and cause more inconvenience to the Respondent.

More, the court find since the applicant and respondent relationship emerges from a contract which has expired, I am persuaded that, loss which applicant stands to suffer is reparable” by a way of damages and in monetary terms.

After, all the court was not furnished with the details of the applicant claims for assessment if there is or are serious issue to be tried.

For reasons explained above the court hereby decline to grant an order of “maintenance of status quo”. So application fails. The costs to follow the event.

Delivered and Dated at Dar es Salaam on this 8th day of May, 2018



H.T. SONGORO
(JUDGE)

The Ruling was delivered in the presence of Mr. Mathew Fuko Learned Advocate of the applicant and Ms Queen Patrick Learned Advocate of the Respondent.