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

**Misc. Commercial Appl. No. 23 of 2021**
*(Arising from Commercial Case No.27 of 2021)*

**NATAL MARTIN CHARLES LTD.....APPLICANT**

**VERSUS**

**GAPCO TANZANIA LIMITED..... ....RESPONDENT**

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**RULING**

Date of Last Order: 05/05/2021
Date of Ruling: 09/07/2021

**NANGELA, J:.**

This application was brought to the attention of this Court under a Certificate of Urgency. For the sake of clarity, I will set out some brief factual background to this application based on the pleadings.

It is alleged that for almost forty (40) years now, the Applicant is a dealer or operator of the Respondent's Chang'ombe GAPCO Service Station under various Management Lease Contracts. According to the Applicant's assertions, such Contracts have been running periodically, between the parties, and, that, the Last

Management Lease Contract was entered on 1st March 2018 and was due to expire on February 28th, 2021.

It has been averred, however, that, having operated the respective service station for all those years and established a reputable goodwill, sentimental value, clientele base and business reputation, on 5th February 2021 the Applicant received a Notice of None-Renewal of the Management Lease Contract, which was to expire on 28th February 2021.

The Applicant alleges to have been gravely aggrieved by the short Notice for various reasons, as he claims to have invested heavily on that particular Service Station, including, among others, carrying out renovations of the Station, which ought to have been carried out by the Respondent.

In the midst of such discontent, the Applicant moved to this Court and filed *Commercial Case No.27 of 2021*, a case from which this application arises. As I stated earlier, the application was brought to the attention of this Court by way of a Certificate of Urgency and Chamber Summons filed under Rule 2 (2) of the High Court (Commercial Division) Procedure Rules, 2012 and Order XXXVII Rule 2(1) of the Civil Procedure Code, Cap.33 R.E. 2019.

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In the first place, the Applicant applied for *ex-parte* interim orders of temporary injunction to restrain the Respondent, its workmen or agents from evicting the Applicant from Chang'ombe GAPCO Service Station, pending the hearing and determination of the this application.

Secondly, the Applicant further asked for *inter-partes* orders as follows:

1. This honourable Court be pleased to issue a temporary injunction restraining the Respondent, its workmen and or agents from evicting the Applicant from Chang'ombe GAPCO Service Station, pending the hearing and determination of the main suit.
2. Costs of this Application.
3. Any other relief(s) as the Honourable Court may deem fit and just to grant.

On 2nd March 2021, the parties appeared before me. Mr Filbert Akaro, learned counsel, appeared holding the briefs of Mr Odhiambo Kobas, learned advocate, while Mr Ramadhani Karume and Hamisi Mikidadi, learned advocates represented the Respondent.

Having addressed this Court on the first limb of prayers which were made *ex-parte*, this Court issued an interim *ex-parte* Order restraining the Respondent, its workmen or agents from evicting the Applicant from Chang'ombe GAPCO Service Station, pending the hearing and determination of this application.

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As regards the *inter-partes* application, I ordered the Respondent to file counter affidavit on or before 5th March 2021 and, a reply thereto was to be filed on or before 10th March 2021. I thereafter set the hearing of this application to be on 12th March 2021. On the date set for the hearing of this application, Mr Odhiambo Kobas, learned advocate appeared in court for the Applicant while Mr Tairo, learned Advocate appeared for the Respondent.

The Court noted that, apart from filing their respective pleadings, the Respondent has as well raised a preliminary objection. Since the application at hand was brought under a certificate of urgency, and there being a preliminary objection raised by the Respondent, it was resolved, by agreement with both parties, that, the preliminary objection and the main application should be disposed of together by way of filing written submissions.

This Court issued a schedule of filing of the written submissions by the respective parties and, I am glad that both learned counsels have filed their respective submissions timely, as order by this Court.

Since there are, in the submissions, issues related to the preliminary objection, and, given that submissions were also filed in respect of the main application, I will start by addressing the merits or otherwise of the

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preliminary objection. If I will find that the preliminary objection raised by the Respondent is meritable, I will uphold it and end up the discussion regarding this application there and then. However, if it is found that the objection is without merit, I will overrule it and proceed with the submissions on the main application and, thereafter, render my verdict.

To begin with, the Respondent's preliminary objection was to effect that the Applicant the application is incompetent and should be struck out because the Applicant failed to cite a substantive provision of the law which enables the Court to grant the orders of temporary injunction sought in the application. As per the earlier order of this Court, Dr Onesmo Kyauke, the Respondent's learned counsel, filed his written submission in this Court in support of that objection.

I have looked at the submissions of Dr Kyauke. Essentially, his submission is anchored on the fact that the Applicant did not include section 68 (c) of the CPC in the provisions enabling the application. In efforts to support his submission, Dr Kyauke referred to this Court various cases concerning wrong or non-citation of the enabling law.

Such cases include **Manyama B. Maregesi t/a Africana Service Station vs. Total Tanzania Ltd,**

**Comm. Appl.No.365 of 2017 HC, Comm.Dvn, (Unreported); Almasi Iddie Mwinyi vs. National Bank of Commerce and Another [2001] T.L.R 83**; and **China Henan International Co-operation Group vs. Salvand K. A Rwegasira [2006] T.L.R 220**. He submitted that, such applications dealt with by the Court in those decisions were rendered incompetent.

Responding to Dr Kyauke's submissions, Mr Michael J.T. Ngalo, learned counsel for the Applicant, does not deny the fact that the Applicant omitted to cite section 68 in the Chamber Summons. What he seems to argue is that, such omission cannot lead to the striking out this application. Mr Ngalo argued that, the application at hand is competent since, in the case of **Sea Saigon Shipping Limited vs. Mohamed Enterprise (T) Ltd, Civil Appeal No.37 of 2005, CAT, (DSM) (unreported),** the Court held, *inter alia*, that, whoever applies for a specific order must cite the order under which he is applying. He maintained, therefore, that, because the Applicant has done so, the application is proper.

On the other hand, it was the learned counsel for the Applicant's further contention that, according to the case of **Attorney General vs. Board of Trustees of the Cashwenut Industry Development Trust Fund, Civil Application No.72 of 2015, CAT (DSM)**

**(unreported)**, whether to or not to entertain this application is in reality a matter within the discretion of this Court. He argued, for that matter, that, since the exercise of judicial discretion is involved, the application cannot be disposed of in a preliminary objection. Besides, it was Mr Ngalo's submission that, presently, it is a settled law that wrong or non-citation of the law cannot be a ground to rely upon to challenge the granting of an order which the Court has powers to grant.

I have given a careful consideration to the rival submissions taking into account the current trends in the dispensation of justice. I have, as well, looked at the cases relied upon by the Respondent's learned counsel in support of his submission.

In my considered view, I find Mr Ngalo's submission to be rightly inspired by the recent amendments made to the Civil Procedure Code, which introduced sections 3A and 3B to the Code. In principle, these provisions call upon the Courts in our jurisdiction to give effect to the overriding objective principle. The principle focuses on avoiding technicalities that may stand on the path of substantive justice. The two provisions provide as follows:

> 3A.-(1) The overriding objective of this Act shall be to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by this Act.

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(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

3B.-(1). For the purpose of furthering the overriding objective specified in section 3A, the Court shall handle all matters presented before it with a view to attaining the following-

(a) just determination of the proceedings;

(b) efficient use of the available judicial and administrative resources including the use of suitable technology; and

(c) timely disposal of the proceedings at a cost affordable by the respective parties.

(2) A party to civil proceedings or an advocate for such a party shall have a duty to assist the Court to further overriding the objective of this Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

(3) The Chief Justice may make rules for better carrying out the provisions of sections 3A and 3B."

With such a legal position in mind, it is my view that, Mr Ngalo is right. I find also that, the cases relied upon by the learned counsel for the Respondent are somehow outdated. I find it to be so due to the fact that, the amendments which brought into play the two provisions in the Civil Procedure Act, came into effect in 2018 by virtue of section 6 of the Act No. 8 of 2018. I am as well guided by the various decisions of this Court and

the Court of Appeal which have considered somewhat similar situations.

In the case of **Dangote Cement Ltd vs. NSK Oil and Gas Ltd, Misc. Commercial Appl. No.08 of 2020, HC CommDvsn, DSM (unreported)**, for instance, this Court, (Magoiga, J.) rejected an argument which was bent to call upon the Court to strike out an application for failure to cite relevant provisions of the law.

In his judgment, the learned judge had the following to say, at page 15 and 18 of the typed ruling:

> "The question I have to ask myself is whether failure to cite the relevant provisions of the law has the effect of striking out this application? I agree with the learned counsel for respondent that in the past this was fatal and incurable in all respects, even without citing any case law. However, with the introduction of overriding objective this is not the case in both civil and criminal laws as amended requiring basically courts to focus on substantive justice. The immediate question now, is can I close my eyes and struck out this application? .... one, in my opinion, the jurisdiction to grant orders in any application is not conferred by the chambers summons but by the law, and this being a court of law, in my opinion, is presumed to know the law, hence, I am enjoined to overrule the objection irrespective of the failure to cite the specific provision of the law in the chamber summons so long as the jurisdiction to grant the

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orders exist under section 283 of the Companies Act. Two, the argument that the court is not properly moved, in my opinion, is a technicality that we have engaged for years and yet in most cases we have failed to reach the yolk of the dispute between parties and miserably failed to determine the real controversy in issue at the expense of that technicality. Courts need to be jealous of their jurisdiction granted by the Acts of Parliament or any law for that matter and deny any suggestion of undermining that jurisdiction."

From the above cited decision of this Court, it is clear to me, that, where a court's jurisdiction to entertain a matter before it is not ousted by a party's failure to cite an appropriate enabling provision of the law, such omission is not fatal, and, the court may proceed to order amendment to the pleadings by inserting the missing provisions and move ahead to the merits.

That legal position is also well supported even more authoritatively by the decision of the Court of Appeal in the case of **Amani Girls Home v Isack Charles Kanela, Civil Application No.325 of 2019, CAT, (MZA) (unreported).**

In that case, the Court of Appeal stated as follows, on page 7 of the typed decision of the Court:

" That, aside, it is my considered opinion that, although the applicant herein was supposed to cite rule 10 of the Rules in his application which he did not, the Court's jurisdiction to entertain

> this application has not been ousted by such failure. The law is settled, whenever such omission occurs, the Court has power to order parties to insert the omitted provision."

In view the above settled legal position, I find that the Respondent's preliminary objection is without merit and I hereby proceed to overrule it. I will proceed to order that the relevant omitted section be inserted in the court file and all records.

Since I had earlier ordered the parties to, as well, file their written submissions in respect of the main application, I will move on to determine the merits of the application. I do take that position, however, on the presumption that, the relevant provisions which ought to have been added to the Chamber summons have been so added by virtue of the earlier orders of this Court that submissions in respect of the application be filed in-tandem with those in respect of the preliminary objection.

As regards the application at hand, the issue which I am called upon to resolve, therefore, is:

> ***whether it is appropriate, in the circumstances of this case, to grant the injunctive reliefs sought by the Applicant.***

From the submissions filed in this Court in support of the prayers for temporary injunction, the Applicant has submitted that, there is a pending case before this Court

in which there exists serious questions of law based on the facts stated therein and, that, such issues have a very probable chance of being upheld by this Court.

The attention of this Court was drawn to the facts adduced in the affidavit supporting the application, which allegedly, establishes a prima facie case. With such an alleged *prima facie* case, therefore, this Court was urged to grant the prayers since, existence of a prima facie case, is one of the necessary conditions for the grant of the kind of prayers sought by the Applicant. To support that contention, the attention of this Court was drawn to the cases of **Abdi Ally Salehe vs. ASAC Care Unit Ltd and 2 Others Civil Revision No.3 of 2012, CAT (DSM) (unreported)** and **Total Tanzania Ltd vs. River Oil Petroleum (T) Ltd and Another, Misc. Land Appl.No.03 of 2020, HC (MZA Registry) (unreported)**.

Secondly, it was the submission of the Applicant's counsel that, the Plaintiff (Applicant) is in need of the necessary protection of this Court against the kind of harm which will be irreparable if he will not be granted the orders sought before he establishes his legal rights under the suit. To support that contention, reference was made to paragraph 6 of the Respondent's Counter Affidavit and the facts that the Applicant has been

renewing the Management Lease Contracts with the Respondent's for the running of the Chang'ombe GAPCO Service Station for almost forty (40) years now and, thus, stands the chance of suffering irreparable loss. The attention of this Court was drawn to the case of **Abdi Ally Salehe** (supra) regarding the issue of irreparable harm and paragraphs 8, 9, 11, 12, 13, 14, 15, 16 and 17 of the Applicant's affidavit.

Finally, it was the Applicant's submission that, on the balance of convenience , there will be greater hardship and mischief suffered by the Plaintiff (Applicant) if the orders sought are not granted, than those to be suffered by the Defendant (Respondent) if they are to be granted. This Court's attention was, as well, drawn to the case of **Abdi Ally Salehe** (supra) in support of the view that, the Court must as well weigh in that factor, when deciding whether to grant the kind of the orders sought in this application or not.

For its part, the Respondent did file a written submission in response to the submission in chief filed by the Applicant. In the first place, I must state, as I look at the learned counsel for the Respondent's submission, that, he seems to be reintroducing into a discussion in respect of the issue of non-citation which I have already resolved.

That fact aside, the gist of his submission is mainly the failure on the Applicant's side to fulfill the requisite conditions that apply when granting an injunctive relief, as the one sought in this application. In his submission, the learned counsel submitted, as a condition precedent for an application for temporary injunction to stand, that, there must be a pending suit. In our instant application, it is indeed clear, that, there is a pending suit in this Court.

However, let me say as well that, while it is true that there must be a pending suit, that, itself is not a hard and fast rule. It is a settled law that, in special circumstances, an application for temporary injunction can be applied and also granted without a pending suit. The case of **Registered Trustees of Calvary Assemblies of God (CAG) v Tanzania Steel Pipelines and 2 Others Misc. Land Appl. No.677 of 2019, (unreported),** for instance, attests to that.

Having looked at the Respondent's submission, I do also find some difficulties to agree with it in all fours. In the first place, I find that the Respondent seems to be enticing or luring this Court to somewhat discuss the main case, including whether there has been a breach of contract or not, a fact which I cannot approve. In essence, and, as correctly stated by Mr Ngalo, what this Court is to establish as far as the first ground when

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seeking to grant an order of the kind sought by the Applicant herein, is whether there is an established a *prima facie* case.

In the **Abdi Ally Salehe's case (supra)**, the Court of appeal had this to say, 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."

The learned counsel for the Respondent has also argued that, since the Management Lease Contract expired on 28th February, 2021, that fact makes the application useless. The Applicant has rejoined arguing that even if the agreement was due to expire on 28th February, 2021, the fact remains that the suit was filed prior to the date of expiry of the agreement and there are continuing breach. I have considered such rival submissions as well.

Agreeably, it is a settled law 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 case** (supra). 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) is finally determined.

In the case of **Atilio vs.Mbowe (1969) HCD 284**, this Court was of the view, as regards the *status quo* preserved, that:

> "The status quo, in my view, is the status quo at the date of filing of the action."

With that position, as stated herein above, it is clear to me, that, whether the Management Lease Agreement has Expired or not, does not matter given that, the *status quo* which the Applicant is seeking to be maintained, is the *status quo* at the date of filing of the pending main suit. It means, therefore, that, the application is still relevant.

As I stated, the bottom line of the Respondent's submission is to the effect that the Applicant has not met the conditions for the granting of the orders sought.

In the case of **T. A. Kaare v General Manager Mara Cooperative Union (1984) Ltd [1987] TLR 17 (HC),** this Court summed up such conditions stating, that:

> "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, and looking at the pleadings filed in this Court by the Applicant, I am fully convinced that the Applicant has met the relevant conditions. In particular, based on the facts disclosed in the affidavit of the Applicant, I am satisfied that there is a *prima facie* case pending before this Court.

Secondly, as regards the issue of irreparable loss, I am satisfied that if there will be a non-granting of the orders sought, the Applicant will suffer irreparable loss given the nature of relationship that had existed between the parties and their future expectations in relation to their contractual relationship as disclosed in paragraphs 8, 9, 11, 12, 13, 14, 15, 16 and 17 of the Applicant's affidavit.

Finally, I am also satisfied, on the balance of convenience, that, the same does, as well, indicate that the Applicant stands to be more inconvenienced

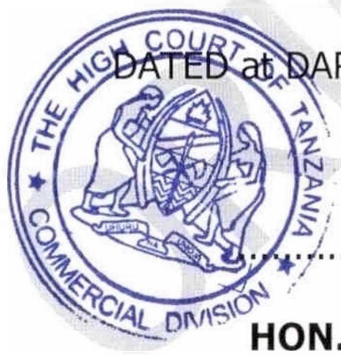
compared to the Respondent if the injunctive relief sought in this application is withheld.

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

1. That, the Respondent, its workmen and or agents are hereby restrained from evicting, harassing, preventing or interfering with the Applicant operations at the Chang'ombe GAPCO Service Station, pending the hearing and determination of the main suit.
2. Costs of this Application shall be in the cause.

**It is so Ordered**

DATED at DAR-ES-SALAAM, this 09 JULY 2021

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**HON. DEO JOHN NANGELA**
**JUDGE,**