

IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

CIVIL CASE NO. 247 OF 1997

BASIL NICHOLAS ALEXANDER JENNINGS BRAMLY - PLAINTIFF
VERSUS
1. PHOKION FILIOS
2. A & F CONTRACTORS LTD.
3. EXPO TANZANIA LTD - RESPONDENT

R U L I N G

KALEGEYA, J.

This is a ruling in respect of an application by B. N. A. J. Blamly, Applicant\Plaintiff for an injunction to restrain 1st Respondent from "disposing of the assets of the second and third Respondents or and liquidating the said Companies till determination of the suit". The first Respondent is a natural person in the name of Phokion Filios while A & F Contractors Ltd and Expo Tanzania Ltd, 2nd and 3rd Respondents respectively are limited liability Companies.

In his affidavits accompanying the chamber summons the Applicant\Plaintiff states that he is a shareholder in the 2nd and 3rd Respondents having paid US dollars 70,000 for 25% shares in the 2nd Respondent and US dollars 35,000 in the 3rd Respondent thus acquiring 10% shareholding; that the 1st Respondent is the principal shareholder in both companies; that despite being ashare holder the 1st Respondent has manifested clear intention of defrauding him by ignoring, neglecting, or refusing to call proper meetings of the 2nd and 3rd Respondents including denying him appropriate documentation on his shareholding. Applicant\Plaintiff went on to allege that apart from that he has also incurred US dollars 148,500 and Tshs. 16,980,000/= for 1st Respondent's activities both abroad and within Tanzania. Finally Applicant says that 1st Respondent has refused to recognise his shareholding in the 2nd and 3rd Respondents; to pay back the sums indebted to him, and that he has signified to him an intention to

liquidate the 2 Companies, an intention he has commenced effecting by disposing the assets of the two Companies, citing disposal of one Motor Grader type 14E worth about Tshs. 10m, the property of 2nd Defendant, to one Peter Mlima of Bukoba as an example.

Mr. Maugo, Advocate, represented the Applicant\Plaintiff while Mr. Majithia represented the Respondents\Defendants.

Mr. Maugo, Advocate, for his client prayed for an injunction to issue stressing that otherwise his client's interest will suffer irreparably. Mr. Maugo further argued that all the intended activities of disposing or dealing with the 2nd and 3rd Respondents' assets by 1st Respondent are being done without consultation of other share holders hence manipulating them with a purpose of defrauding them; that this is a proper case in which the court can exercise its discretion in favour of his client as all the requirements of the law in respect of issuing an injunction have been met. He cited *Atilio vs Mbowe* (1969) HCD 284 and *Aloys Anthony Due vs Alli Juyawatu* (1969) HCD 268 in support thereof.

In reply Mr. Majithia for Respondents countered by saying that this prayer should not be granted as 0.37 Civil Procedure Code was not complied with in that the plaint lacks the elements required, it is vague and that the chamber application does not relate to 0.4, R1, CPC. Mr. Majithia insisted that the plaintiff merely claim damages - that the prayer for injunction can't stand on a floating application; that the principles of law required to be met before such prayer is granted as laid down in *Giella Cassmne Brown & Coy Ltd* 1973 EA 358 have not been met; that Applicant has produced no evidence to show that he is a shareholder adding that even if he did he has come to court under a wrong procedure for he should have followed the procedure prescribed under s. 157 onwards of the Companies Ordinance and cited the case of *In the matter of East African Tobacco Coy Ltd*- Misc. 1 of 1931, *Tanganyika Law Reports*, Vol. 1; that the contents of the affidavit do not tarry to the plaint; that

applicant has not shown that he can't be compensated moneywise, and that injunction should act as defence and not as a sword.

Attached to the reply to Counter affidavit of Applicant, is Ann. P2 and 3 which shows that he has shares in 3rd Respondent but in the Respondents rejoinder to reply it is alleged that P3 is fictitious and nothing is said on P2.

I should outrightly state that both learned Counsel are clearly agreed on the principles of the law applicable on the matter and I should briefly summarise them here. The purpose of an injunction is that matters should be preserved in status quo pending a final determination of the investigation of a particular question in a suit. For that order to issue there must exist danger of the property in the suit being wasted, damaged or alienated or that the defendant threatens or intends to remove or dispose of his property with view to defraud his creditors (O.37 (1) CPC). The Courts have also laid down other principles which include the existence of a serious issue to be determined between parties and a likelihood of applicant\plaintiff succeeding in the suit (that is existence of a prima facie case of success); and finally that failure to grant the same would cause the applicant irreparable damage which cannot be adequately remedied or attained by way of damages than what would the Respondent\Defendant suffer if granted.

In the issue at hand, in effect, the only controversy between the parties is whether the facts of the present case fall under the said principles.

Having carefully considered the affidavits in support of the chamber application, the replies thereto, the submissions of the Learned Counsel, the plaint and the law applicable I have reached an opinion that the prayer for injunction should be granted for the following reasons.

The Applicant\Plaintiff claims, in the main suit, that he has 25% and 10% share holding in the 2nd and 3rd Defendant companies but that the 1st Defendant\Respondent has refused to recognise him as such, and that instead he is now disposing the

assets of the said Companies and intends to liquidate the same. Thus the plaint is specific on this matter. In the reply to Counter affidavit applicant has produced a documents, P2 and P3, which show that he has shares in 2nd Respondent\Defendant. Although 1st Respondent has branded P3 as fictitious he is silent on P2. In para 3 of the 1st Respondent's Rejoinder to Reply, the 1st Respondent seem to admit that Applicant\Plaintiff has been running activities of the Companies in one way or another. Also it is not without significance that in the submissions in Court, Mr. Majithia was of the view that if anything Applicant\Plaintiff should resort to the provisions of the Companies Ordinance. It is my considered opinion that all this clearly shows that the parties are not strangers to each other; that there is a serious issue between them which has to be determined; that it involves the interests of the applicant\Plaintiff in the two Companies. Obviously these are matters which will be resolved by evidence on full hearing of the case.

Secondly, there is evidence that the 1st Respondent\Defendant has commenced disposing of the Companies assets. Mr. Majithia did not deny this. So it stands out as a fact.

Thirdly, as the issue centres around the shareholding in 2nd and 3rd Defendants is it not common sense that if the 1st Respondent\Defendant disposes all the property in the said companies, in the event of the Applicant\Plaintiff succeeding in the main suit nothing will be available for his share? Of Course, one of the principles of the law laid down is that if such damage can be remedied moneywise then injuction should not issue - but this depends on circumstances of a particular case. In the case at hand, assuming he succeeds, can we say that applicant would be adequately compensated moneywise than if the status quo is maintained and the Company assets remain intact, so that, as a share holder he fully participates in their disposal if need be or liquidation of the companies themselves if necessary? My

answer to this is no. On the other hand what would be the loss on the side of the Respondents? Apart from the fact that they have not bothered to show any, in my view, as the status quo does not stop the companies from operating, there would be no loss as such.

With that I should at this point respectively say that the case cited by Mr. Majithia (Misc. Cause No. 9 of 1934 - In the matter of the Companies Ord. 1931 and in the matter of East African Tobacco Company Ltd - reported Tanganyika Law Reports Vol. 1) is not relevant. There the Court was dealing with a question of winding up the Company -there was no dispute regarding shareholding but in here that is the core of the matter in controversy.

Order 37, Rule 1 of the Civil Procedure Code is very clear-

"1. Where in any suit it is proved by affidavit or otherwise- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit or suffer loss of value by reason of its continued use by any party to the suit, or wrongly sold in execution of a decree, or

(b) that the defendant threatens, or intends, to remove or dispose of his property with a view to defraud his creditors, the court may by order grant a temporary injunction....."

On the whole therefore I am satisfied that O.37 CPC has been complied with and the prayer for temporary injunction to restrain the 1st Respondent\1st Defendant from disposing the assets of the 2nd and third Respondents\Defendants or liquidating the said companies till determination of the main suit is accordingly granted.

AT DAR ES SALAAM
15TH SEPTEMBER, 1997

(L. B. Kalegeya)
JUDGE

Delivered today the 17th September, 1997 in the presence of
the parties and their Advocates.

(L. B. Kalegeya)

JUDGE

17\9\97