

**IN THE HIGH COURT OF TANZANIA
MWANZA DISTRICT REGISTRY
AT MWANZA**

MISC. LAND APPLICATION No. 38 OF 2021

(Arising from the Misc. Civil Cause No. 04/2021)

RICHARD JOSEPH KWEYAMBA RUGARABAMU ----- APPLICANT

VERSUS

LWEMPISI GENERAL COMPANY LIMITED -----1ST RESPONDENT

CHARLES KAHATANO LWEMPISI----- 2ND RESPONDENT

MUGANYIZI TIBARUNGI RUGAKO-----3RD RESPONDENT

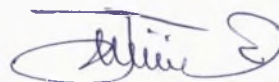
ESTHER CHARLES JOSEPH-----4TH RESPONDENT

RULING

14th June & 08th July 2021

TIGANGA, J

The applicant in this application is an individual person who is a shareholder in the 1st respondent company and one of the directors. The 1st respondent is a company dully incorporated in Tanzania with certificate of incorporation No. 56429 issued on 10th May 2006, while the 2nd to 4th respondents are shareholders and interested parties in the share and properties of the 1st respondent.

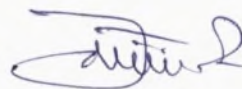


The Applicant through the service of Mr. Patrick Suruba Kinyerero, Advocate of Gratus Attorneys, moved this court by a chamber summons filed under certificate of urgency under section 68 (e) and Order XXXVII, Rule 1 (a) of the Civil Procedure Code [Cap 33 R.E 2019].

This application was filed subsequent to the main suit Land Case No. 04 of 2021 in which the plaintiff is asking for a number of reliefs, which for purpose of brevity I will not mention them here.

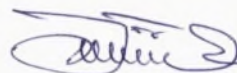
In this application, two orders are sought both, *ex parte* and *inter partes*, as follows;

- (i) A temporary injunction order be issued against the 2nd, 3rd and 4th respondents restraining them, their agents, servants, and or workmen from undertaking affairs of the 1st respondent which are conducted in a manner which is unfairly prejudicial to wit, passing resolutions, operating accounts, correcting rents from tenants being and situate on plots No. 24 and 25 Block "T" Rwagasore, Mwanza or any other activities whatsoever, pending the hearing and determination for an application for temporary injunction *inter partes*.
- (ii) Costs of the application be provided for.



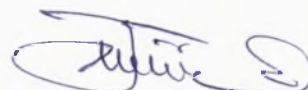
The application was supported by an affidavit of Mr. Patrick Suruba Kinyerero, an Advocate instructed to represent the applicant. In the affidavit sworn by the learned counsel, it was deposed that, the applicant was appointed as a director of the 1st respondent on 28th day of Sept 2007 before being appointed to be a Chief Executive Officer of the 1st respondent company on 03rd May 2012. On 10th day of September 2012 he was allotted 20,000 shares in the 1st respondent's company.

The fact leading to the present dispute are that, sometimes in the year 2007, the 2nd respondent obtained a loan facility to a tune of Tshs. 200,000,000/=from CRDB Bank with intent to develop his landed property situated at Nyerere Road, Mwanza City. Unfortunately he defaulted to service the said loan and following such default, the applicant intervened by commencing negotiation with NBC Bank to buy off the loan from CRDB Bank, which loan had already been overdue to Tshs. 300,000,000/=. That was done by NBC granting a credit facility to a tune of 2.2 Billions to the 1st respondent and the same was secured by the 2nd respondent's Lumumba and Nyerere Road properties as well as Plot No. 24 and 25 being and situated at Rwagasore held under joint venture between the 1st respondent and National Housing Corporation (NHC).



That among the conditions for allowing the loan from NBC Bank was that the Tshs. 300,000,000/= would be used to settle the CRDB loan, and another Tshs. 300,000,000/= be to used for development of the 2nd respondent's property along Nyerere Road which was supposed to be transferred from the 2nd respondent's names to the names of the 1st respondent. It was also agreed that, the proceeds obtained from Lumumba, Nyerere Road and Rwagasore properties be used to repay NBC loan.

That later on after utilization of the said amount obtained from loan, the 2nd respondent, did not only refuse to transfer the said property or caused it to be transferred to the joint venture, but also that, he refused the property to be rented for repayment of the NBC loan thereby causing the 1st respondent to suffer loss of over Tshs. 2 Billions. Following that refusal by the 2nd respondent, the 1st respondent defaulted to service the loan of Tshs. 2.2 Billions from NBC, which act prompted NBC to institute legal proceedings via Commercial Case No. 04 of 2015 HC-Commercial Division, where the NBC got the judgment in its favour of Tshs. 3,838,154,382.95/=. However, through the efforts of the applicant, the matter was settled amicably, thereby it was agreed that only Tshs. 2.5



Billions be paid and it is payable for a period of 7(seven) years from the date of such settlement.

That despite all efforts, it came to the knowledge of the applicant that, the 2nd respondent in corroboration with the 3rd and 4th respondents forged the minutes purporting to show that, the 3rd and 4th respondents were appointed as directors of the 1st respondent, and having so purportedly appointed, they opened and started to operate the bank account with CRDB Bank account No. 01J0457764400 in the name of the 1st respondent.

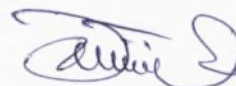
That conduct prompted the applicant to file Misc. Civil Cause No. 04 of 2021 seeking for an order of the court that, the 2nd, 3rd and 4th respondents be restrained from conducting the 1st respondent's business. And that this order is asked pending hearing and determination of the said main Misc. Civil Cause also before this case.

The Application was opposed by the counter affidavit by Mr. Abdallah Kessy Abdallah, Advocate who claimed to be instructed to represent the respondents. The Counter Affidavit affirmed that, in the year 2007, the applicant was not part of the company and was not holding the position of

the Chief Executive Officer in the 1st respondent ever since. Also that, the applicant claims are based on unfair prejudices hence what was stated regarding the loan taken to facilitate the development of the landed property of the 2nd respondent has nothing to do with the business of the 1st respondent.

He submitted further that the business of the 1st respondent is organized not by a single person but by the directors as governed by the Memorandum and Articles of Association. Therefore the applicant has no mandate to pursue the court settlements agreement in cases involving the 1st respondent, and the properties of Lumumba and Nyerere Road are belonging to the 2nd respondent as sole proprietor.

Further to that, he stated that the applicant's claims are for unfair prejudices, not for derivative actions. According to him, the claims are unfounded and vexatious as the appointment of the of the 3rd and 4th respondents as directors of the 1st respondent was in accordance with Memorandum and Articles of Association of the 1st respondent and all necessary requirements were adhered to, that is why they were accepted by the Registrar of companies and the change was updated in the online registration system at BRELA.

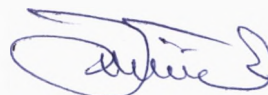


Further more, it was affirmed that a letter given to the applicant concerning income and expenditure of the Rwagasore project was dully sanctioned by the board of directors for the purpose of developing the affairs of the 1st respondent.

Lastly, the counsel for the respondents affirmed that, the activities of the 1st respondent as an artificial person depend on the directors as natural persons whom are respondents to this application; if they are restrained from undertaking the affairs as prayed, the 1st respondents will suffer irreparable loss as she has liabilities which need to be cleared.

The reply to the counter affidavit, though responded to the deposition in the counter affidavit, it to the great extent, reiterated the contents of the affidavit filed in support of the application. Therefore for purposes of brevity, I will not reproduce them as deposed but will take on board the contents therein.

By the leave of the court, the application was argued by way of written submissions which were filed as ordered. The applicant was represented by Mr. Patrick Suluba Kinyerero, Advocate for the applicant, and Abdallah Kessy Abdallah, Advocate, for the respondent. In the



submission in chief the counsel for the applicant cited and relied on the case of **Atilio vs Mbowe** (1969) HCD 284 pointing out three conditions for the temporary injunction to issues namely;

- (i) *That there must be serious question to be tried on the facts alleged, and a probability that the plaintiff will be entitled to the relief prayed;*
- (ii) *That the court's interference is necessary to protect the plaintiff from the kind of injury which may be irreparable before his legal right is established; and*
- (iii) *That on the balance there will be greater hardship and mischief suffered by the plaintiff from the withholding of the injunction than will be suffered by the defendant from the granting of it.*

He also cited the authority in the case of **T. A. Kaare Vs General Manager Mara Cooperative Union** (1987) T.L.R 17 which provides also that for the temporary injunction to issue the three conditions must be fulfilled. He submitted that the above three conditions mentioned herein above exist in the application at hand.

Discussing the conditions one after the other, he started with the first condition that, *there must be serious question to be tried on the facts alleged, and a probability that the plaintiff will be entitled to the relief*

prayed. According to him, there is a serious question in the main case which is the misconducts of the 2nd, 3rd and 4th respondents, by taking an unlawful resolution which is unfairly prejudicial to the welfare of the 1st respondent which includes opening and operating the bank account in the name of the 2nd respondent. The other serious question for determination by the court in the main case is appointment of the 3rd and 4th respondents as directors without a valid sanctioned meeting. The applicant who was supposed to be involved was not involved and did not get any information of the meeting while he is the one in charge of the day to day activities of the 1st respondent.

The other serious issue is the liability of un serviced loan of NBC, which given the nature of the disputes the applicant has the strong probability of success in the suit, thus meeting the requirement of the first condition. In his opinion, these are serious issues to be proved before the court in the main case thus making them to be serious questions to be determined.

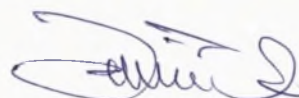
Submitting on the second condition, *that the court's interference is necessary to protect the plaintiff from the kind of injury which may be irreparable before his legal right is established;* he submitted that, the

interference of the court is necessary to stop the respondent from collecting the rents because if the court will not interfere to injunct the 2nd, 3rd, and 4th respondents, the relief sought in the main case will be rendered nugatory and the 1st respondent's failure to service the loan from NBC, the recovery measures may be taken leading to the auction of the properties of the 1st respondent which may run bankrupt. That liability may extend to the individual directors.

To buttress his argument, he cited the case of **Kibo Match Group Limited vs H.S. Impex Limited**, [2001] TLR 152 *where the court was of the view that,*

"..if the court is satisfied that, unless immediate action is taken the applicant may suffer irreparable damage whether quantifiable or not and further the final decision will be rendered nugatory as a consequence of not granting the temporary injunction."

He submitted that, in the light of a foregoing authority, unless immediate action is taken to stop the 2nd, 3rd, and 4th respondents, the applicant and the 1st respondent will suffer irreparable damage.



On the third condition in the case of **Atilio vs Mbowe** which he simply named the balance of convenience, but which in its expansive meaning means that, *on the balance of convenience, there will be greater hardship and mischief suffered by the plaintiff from the withholding of the injunction than will be suffered by the defendant from the granting of it*, he submitted that, the applicant who is the managing director of the 1st respondent stands to suffer more hardship if the application is not granted than what will be suffered by the 2nd, 3rd and 4th respondents if the application is granted. He cited the case of **Hardmor productions Ltd vs Hamilton: HL 1982 (1983) I A C 1981** where Lord Diplock, L,J at page 220 stated that;

"An interlocutory injunction is a discretionary relief and the discretion whether or not to grant is vested in the High Court Judge by whom the application for it is heard."

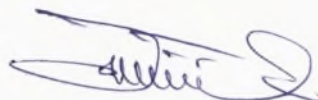
Having so submitted he said the applicant has met the conditions set out in **Atilio vs Mbowe** (supra) to entitle him the temporary injunction as prayed.

The counsel for the respondents filed a joint written submission in which he submitted that, the applicant was wrong to file this kind of

application, as he was supposed to file a petition under section 234(1) of the Companies Act, 2002, as held in the case of **The National Investment Company Limited "NICOL" vs The Registered Trustees of the Parastatal Pension Funds "PPF" and 4 Others**, Misc. Commercial Application No. 288 of 2014 and the case of **FOSS vs HARBOTTLE (1843) 2 Hare 461, 67 ER 189** in which he alleged that the general principle of company law was propounded that an individual shareholder cannot sue for wrongs done to a company or complain of internal irregularities.

Regarding the temporary injunction, he reiterated the principles in the case of **Atilio vs Mbowe** (supra) as repeatedly restated in various decisions one of them being **Mariam Christopher vs Equity Bank Tanzania Limited and Another**, Misc. Land case Application No. 1070 of 2017 HC – Land Division Dar Es Salaam. Hon. Mgonya, J

Submitted that, the conditions in these cases are not met by the applicant, as the claim is basing on the interest of the 1st respondent not the applicant, and the claim is frivolous and vexatious. He cited the case of **American Cynamid vs Ethicon** (1975) 1 All ER 504 in which it was held that, in order to grant temporary injunction, the court no doubt must be



satisfied that the claim is not frivolous or vexatious. He submitted therefore that, there is no serious question to be resolved by the court.

Submitting on the second condition in **Atilio vs Mbowe's** case, he submitted that the complaint in the petition shows that, the alleged injuries is not of the applicant but of the 1st respondent, therefore as the facts shows that, the one who will suffer irreparable loss is the 1st respondent as opposed to the applicant, therefore the second condition has not been met.

Further to that, he argued that, the company is an artificial person therefore it must act through its directors as provided in the case of **The National Investment Company Limited "NICOL" vs The Registered Trustees of the Parastatal Pension Funds "PPF" and 4 Others** (supra), and in this case since the 2nd, 3rd and 4th respondents are the directors of the 1st respondent if are restrained to manage the affairs of the 1st respondent leaving the affairs of the 1st respondent in the hand of the applicant, it will not be proper and the company will collapse automatically.

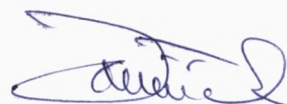
He submitted that the 1st respondent was created by the 2nd respondent himself, and the property at Rwagasore is owned by the 1st respondent, therefore it is not proper for the applicant to claim to collect the rents.

Submitting on the third condition that is, who will suffer great hardship if the injunction is withheld, the counsel submitted that, since the activities of the 1st respondent depends on the board of directors whereby the majority are the 2nd, 3rd, and 4th respondents, therefore if the majority members of the board are restrained from the activities of the 1st respondent, then the 1st respondent will collapse, because the applicant will operate the company for personal gain.

Submitting on the act of restraining the applicant, the counsel submitted that, there was nothing wrong for the board of directors to restrain the applicant from collecting rents as it did so under the best interest of the company and not a sole proprietors business as the applicant wish it to be.

He in the end submitted that, the applicant has failed to meet the conditions in the case of **Atilio vs Mbowe**, he prayed for the application to be dismissed with costs.

In rejoinder, the counsel for the applicant cited the case of **Tanzania Posts Corporation vs Salehe Komba & Another**, Revision No. 59 of 2018, HC- Mwanza, Rumanyika, J in which it was held *inter alia* that, the court's jurisdiction is not taken away by the wrong citation or non citation



of the enabling provision. He also cited the case of **Dangote Cement Ltd vs NSK Oil and Gas Limited**, Misc. Commercial Application No. 08 of 2020 in which the court while faced with similar circumstances held that the court has powers, to grant temporary injunction to prevent the end of justice from being defeated. He insisted that there are triable issues in the main case and irreparable loss is likely to results if the injunction will not be issued. He to the great extent, reiterated what he submitted in chief and finally submitted that, the application be granted as the applicant has managed to establish all the conditions set out in the case of **Atilio vs Mbowe**.

Now, having summarised at length the contents of the affidavits filed in support and opposition of the application respectively, the submission filed by counsels for the parties, which includes the authorities cited. It is worthy saying that, under section 68(e) of the Civil Procedure Code [Cap 33 R.E 2019], this court is empowered to make any interlocutory orders in order to prevent the ends of justice from being defeated subject to any rules in that behalf.

While Order XXXVII Rule 1(a) of the CPC provides that;

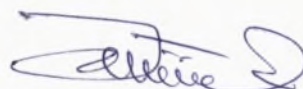
"Where in any suit it is proved by affidavit or otherwise—

(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 suffering loss of value by reason of its continued use by any party to the suit, or wrongly sold in execution of a decree; or

the court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, loss in value, removal or disposition of the property as the court thinks fit, until the disposal of the suit or until further orders."

From the above provisions, it is worthy saying that, this court has powers to grant temporary injunction. However, although the law empowers this court to grant temporary injunction, it does not give out the factors to consider in granting or refusing the application for injunction.

The conditions for the applications to be granted or not are articulated in the case of **Atilio vs Mbowe** (supra), the said conditions must be fulfilled before the applicant has been entitled temporary injunction. This position was also made clear in the case of **National Bank of Commerce vs Dar es salaam Education and Office Stationary** (1995) 272, **Augustine L. Mrema and Others vs Abdallah Majengo & others** CAT, Civil Appeal & others CAT, Civil Appeal No. 41/1999 DSM CAT



(unreported) and **T. A. Kaare Vs General Manager Mara Cooperative Union** (1987) T.L.R 17.

Without unnecessarily repeating a historical background of this matter, the background albeit brief will suffice to bring home the nature and root cause of the dispute between the parties. The 1st respondent being the company established by the 2nd respondent as one of the founding directors and a majority shareholder, has been running business and recruiting new members. The new members so recruited included the applicant, who was also made the member of the board of directors, a share holder and a Managing Director before being made the Chief Executive Officer in the latter days.

During his tenure as the Managing Director, his fellow recruited new other members who are the 3rd and 4th respondents, who were made directors making the directors to be four.

In his capacity as the Managing Director, the applicant had powers to collect rent from the building owned and maintained by the 1st respondent. from the evidence, in one of the meetings on which the applicant was not present the 2nd, 3rd, and 4th respondent being the directors, convened the

meeting in which they resolved that the applicant should stop from collecting rent from the House at Rwagasore, in Mwanza City.

Together with this banning, they also restrained him from exercising some of the powers vested in him by virtue of his position in the company, and it is out of this resolution the applicant was aggrieved and filed the main case that is Misc. Civil Cause No.04 of 2021 and this application.

The issue for determination is whether the conditions stipulated in the case of **Atilio vs Mbowe** have been established to entitle the applicant the order for temporary injunction?

As earlier on pointed out, the principle in the case of **Atilio Vs Mbowe** (supra) gives three conditions for the applicant to fulfill for the temporary to issue. Starting with the first condition which is that; it must be established that, there is a serious question to be tried on the facts alleged and the probability that the plaintiff will be entitled to the relief prayed;

From the record as summarized above, it has been established that the applicant is the director and shareholder in the 1st respondent company, there is also no dispute that the 1st respondent has some financial liabilities some of them being to service the loan of Tshs. 2.5

Billions payable for a period of 7 (seven) years with NBC Bank which fact has not been disputed by the respondents. That liability has already been turned into the decree of the court vide Commercial Case No. 04 of 2015 capable of being executed.

There is also no dispute that, the meeting which resolved the issues complained of did not involve the applicant, despite the fact that he is one of the directors, and further to that, being the Managing Director, the meeting took away some of his powers but without necessarily according him the right of hearing. I entirely agree with the counsel for the respondent that, looking at the number; the directors who passed the resolution are majority and did so for the interest of the 1st respondent, however, that should not be taken to justify taking away the fundamental rights of minority. That would have been justified had the resolution been passed by majority votes in the presence and actual participation of the applicant, that was not done.

Being the shareholder there is no way his interest can be separated from that of the 1st respondent, the 1st respondent is built up by the shares of the directors, the same is not complete if the shares of one of the



directors are missing or in jeopardy, therefore, the interest of the 1st respondent is the interest of the shareholders.

It should be noted that, the dominance of the founder shareholder ceased immediately after recruiting other members, unless the Memorandum and Articles of Association have categorized such shareholder which is not the case in this matter.

As in this case we have not been told who is the equity or common shareholder and who are the preferred or preference shareholders. Having not been categorized then the status of the shareholders is equal, this means that, the applicant is of equal status with the 2nd respondent.

That said, I find that there is a serious issue to be tried in the main case and there is a probability that the applicant who is the plaintiff will be entitled to some of the relief he has claimed in the main suit.

I also find that, given the reasons and the facts above, should the court's interference been not made then, the applicant who is a shareholder is likely to suffer irreparable loss or injury. Also that on the balance of convenience, there will be greater hardship and mischief likely

to be suffered by the plaintiff from the withholding of the injunction than will be suffered by the defendant from the granting of it.

However, I find the prayers sought in the chamber summons are so many some of which if granted, will mean to paralyse the operation of the 1st respondent. Moreover, looking at the presentation made by the applicant, the worry and danger, is in the facts that servicing the loan with NBC is the main eminent danger for which if the application will not be granted, there will be a danger for the 2nd, 3rd, and 4th respondent misusing or misappropriating the rent to be collected from Rwagasore property. This is because failure to service the loan will endanger the property of the 1st respondent, its assets and the assets of the directors, the applicant being one of them. Continuing operating in a manner that will further endanger the position of the applicant like passing new resolution is also injuncted. However, since this case is not intended to stop the operation of the 1st respondent, some of the order cannot be granted.

That said therefore the injunction is in favour of the applicant restraining the 2nd, 3rd, and 4th, respondents, their agents, workmen and assignee from collecting rent from the tenants in Rwagasores property, of the 1st respondent and from passing resolutions which further determine

the issue of leadership and administration of the 1st respondent pending hearing and determination of the main case Misc. Civil Cause No. 04 of 2021

Although the respondents have been restrained to collect rent, that does not mean that the tenants will be exempted from payment of rent. Whenever rent is due, the same must be paid, and by the order of this court, the tenants shall be required to pay rent at the time when the same will be due in the Judiciary Deposit Account, to be furnished by the Court Administrator.

In summary, in this application, it has been ordered as follows;

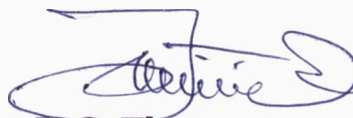
- i) The 2nd, 3rd and 4th respondents are restrained from collecting rents from the house on Plots No. 24 and 25 Block "T" situated at Rwagasore, in Mwanza City pending hearing and determination of Misc. Civil Cause No. 4 of 2021,
- ii) The 2nd, 3rd and 4th respondents are also restrained from further passing resolutions determining the leadership and administration of the 1st respondent pending hearing and determination of Misc. Civil Cause No. 4 of 2021,

- iii) The tenants in the house on plots No. 24 and 25 Block "T" situated at Rwagasore in Mwanza City the property of the 1st respondent, shall pay rent in the Judiciary Deposit Account, which shall be furnished by the Court Administrator, High Court Mwanza, pending hearing and determination of Misc. Civil Cause No. 04 of 2021,
- iv) The Deputy Registrar should communicate this order in writing to the tenants for compliance,
- v) The applicant should furnish the Deputy Registrar with a current, up to date and accurate list of the tenants.

The rest of the day to day activities of running the 1st respondent, company will continue as usual. Costs shall be determined in the main suit.

It is so ordered.

DATED at MWANZA, this 08th day of July 2021



J. C. Tiganga

Judge

08/07/2021

Ruling delivered in open chamber in the presence of Mr. Patrick Suruba Kinyerero, Advocate for the applicant and Mr. Abdallah Kessy Abdallah, Advocate for the respondent.



J. C. TIGANGA

JUDGE

08/07/2021

ORIGINAL