**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**
**(COMMERCIAL DIVISION)**
**AT DAR ES SALAAM**
**MISC. COMMERCIAL APPLICATION NO.114 OF 2022**
*(Arising from Commercial Application No.27 of 2022)*

IN THE MATTER OF SECTION 233 (1) OF THE COMPANIES ACT, CAP.212 R.E 2019

AND

IN THE MATTER OF APPLICATION FOR AN ORDER OF COURT REGARDING PURCHASE OF SHARES BY OTHER MEMBERS OF THE COMPANY OR BY THE COMPANY ON THE BASIS OF APPLICANT'S FAIR SHARE OF THE VALUE OF COMPANY'S ASSETS UPON VALUATION.

BETWEEN

MOHAMED SAID KILUWA .....APPLICANT

**VERSUS**

KILUWA FREE PROCESSING ZONE LTD.....1ST RESPONDENT
JURIJS MARTINOVS.....2NDRESPONDENT

KAMAKA CO. LIMITED.....3RD RESPONDENT

Date of Last Order: 18/10/2022
Date of Judgment: 08/12/2022

**RULING**

**NANGELA, J.**

Through the services of Mr. Alex Mashamba Balomi, learned advocate, the Applicant filed this application under Order XXXVII Rule 1 (a) and (b) and Order XLIII Rule 2, Second 68 (a)

and (e) of the Civil Procedure Act, Cap.33 R.E 2019 seeking for the following orders, that:

1. This honourable Court be pleased to issue a temporary injunctive order restraining the Respondents, their agents, servants, nominees, assignees or anyone acting under their instructions from managing all the operations of the entire industrial park or free processing zone in the 1st Respondent Company together with all illegal disposition of all landed properties granted under 73 Certificates of Titles of Rights of Occupancy known as Plots 1 to 48, Block 'B" Disunyara Kibaha, and Plots 202 to 230 located at Kikongo also in Kibaha pending determination of the main Commercial suit/Application;
2. This Honourable Court be pleased to issue an order restraining the Respondents from amalgamating or merging the Applicant's Company with other Company or and incorporate any other Company whatsoever.
3. Costs of this Application be borne by the Respondents;
4. Any other orders as this Honourable Court deems fit and just to grant under the circumstances of this application.

Through the services of Mr. Bakari Juma, learned advocate, the Respondents contested this application by way of filing counter affidavits. The Applicant filed reply to the Respondents' counter affidavits and, somewhat raised what the Respondents termed as "a surprise point of law" regarding the counter affidavit deponed by one Yusuf Manzi.

However, on the 5th of September 2022, the Applicant's learned counsel withdrew the preliminary objection from the Court. He also prayed to proceed by way of filing written submissions. The parties were directed to dispose of this application by way of written submissions and I did issue a schedule of filing of their respective submissions and, the parties' learned advocates have duly complied with the orders.

Submitting in support of the application, Mr Balomi, submitted that there is no counter affidavit since what was filed lumped together the sources of information which the deponent divulged in his counter affidavit making it to be defective. He argued that, the lumping together of the sources of information relied on in opposing the application which ought to have been separately given offends the well settled precedents one being the case of **Uganda vs. Commissioner of Prisons Ex-parte Matovu** [1966] E.A 520.

He also contended that, the same offends the Oaths (Judicial Proceedings) and Statutory Declarations Act, 1966, the Notaries Public and Commissioner for Oaths Act, Cap.12 R.E

2019 and Order 19 rule 3 (1) of the Civil Procedure Act, Cap.33 R.E 2019.

The learned advocate for the Applicant submitted further that, the current application was brought with a sense of urgency as the Respondents seek to fraudulently dispose of portions of landed properties known as Plots 1 to 48 Block 'B' Disunyara, Kibaha, and Plots 202 to 230 located at Kikongo Area, also in Kibaha Region in the name of the 1st Respondent Company, a likelihood that the 1st Respondent will remain propertyless if no immediate intervention by this Court is done.

In his submissions, Mr Balomi contended further that, it is the Respondents who are now in the full control and possession of the 1st Respondent Company in prejudice of the Applicant and, that, in the current existing hostile state of affairs, the 2nd and 3rd Respondents are likely to sabotage all entire industrial park or the Free Processing Zone together with all the landed properties granted under the 73 Certificates of Titles of Right of Occupancy named earlier hereabove. If that is done, he contended that, the Applicant stands to suffer irreparable losses.

To support the application, the Applicant relied on the Court of Appeal's Decision int the case of **Registered Trustee of Social Action Fund & Another vs. Happy Sausage & Others** [2004] TLR 264; **Kibo Match Group Ltd vs. H.S Impex Ltd** [2001] TLR 152; **Atilio vs. Mbowe** (1969) HCD No. 284 and **Ibrahim vs. Ngaiza** (1979) HCD No. 249.

The learned counsel for the Applicant surmised, therefore, that, based on these cases, the Applicant's supporting affidavit does, cumulatively, meet and satisfy all necessary conditions for the grant of a temporary injunction. In view of all that, he urged this Court to firstly, expunge from the record the defective counter affidavit and proceed to grant the reliefs sought.

Responding to the submissions by Mr Balomi, it was the submission of Mr Bakari, the learned counsel for the Respondents, that, there is nothing wrong in the Counter affidavit filed by the Respondents as whatever the deponent stated was known to him and correctly verified in the verification clause. Reliance was placed on the case of **DPP vs. Dodoli Kapufi and Another**, Crim. Appl. No.11 of 2008 (CAT) (unreported) regarding the kind of information to which an affiant is supposed to be confined to.

As regards the granting of this application, it was Mr. Bakari's submissions that, for an application for a temporary injunction as the one at hand to be granted, one has to satisfy the conditions set or required for its grant. He relied on the case of **Atilio vs. Mbowe** (1969) HDC No.284, which set out the relevant conditions as being, that:

(a) there must be a prima facie case, which involves a serious question of law;

(b) there must be a possibility of suffering irreparably, and;

(c) the balance of convenience leaning towards granting the application as the Applicant stands to suffer the most if no injunction is granted.

Mr Bakari submitted that, the first condition is fully satisfied and, that, there is no need to labour much in establishing it. However, he maintained that, the Applicant has not been able to demonstrate the second condition, in particular how he stands at an irreparable loss or suffering if this application is denied.

He contended that, even in his own application the Applicant is praying for compensation and, as such, if he can be compensated, he cannot contend that if this application is denied he will suffer irreparable losses. To support his point, reliance was placed on the case of **Abdi Ally Saleh vs. Asac Care Unit Limited & 2 Others**, Civil Revision No.03 of 2012 (CAT) (unreported). He likewise contended that; the third condition as well cannot stand. He urged this Court, therefore, to dismiss the application.

The Applicant did not file a rejoinder submission. The issue which I need to look at, therefore, is whether this application should succeed or not. In the first place, I find it necessary to point out that, since the Applicant had earlier withdrawn his preliminary objection from the Court, there was no room again to raise the same points in his submissions. I will not, therefore,

address any issue related to whether the counter affidavit of the Respondents is defective or not.

As regards the rest of the submissions, I do quite agree that for a grant of the kind of prayers sought in the chamber summons, the Applicant must satisfy all requisite conditions for the grant of an injunction. Essentially, in an application for an injunctive relief, be it interim or permanent injunction, is an equitable remedy, the purpose of which may be varied but the requisite conditions for its grant must be there. The case of **Giella vs. Cassman Brown [1973] EA 358**, a case which is quite instructive, summarizes the requisite conditions as follows: -

> "The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

Further in an Indian case of **Kashi Math Samsthan vs. Srimad Sudhndra Thirtha Swamy,** AIR 2010 S.C. 296, the Indian Supreme Court observed that, where the party seeking for such a relief was unable to make out a prima facie case, even if balance of convenience and irreparable loss are made out, such a party is not entitled to the relief.

In this present application, however, as correctly submitted by Mr. Bakari, the first point is not contested. Indeed, there is a *prima facie* case taking into account that this application is base on Commercial Case No.27 of 2022. The pertinent concern, however, rest on whether the 2nd and 3rd conditions are fulfilled or not. In his submissions, the Respondent's learned counsel has contended that, the Applicant has not fulfilled those two conditions and, hence, urged this Court to dismiss this application.

I have looked at the submissions made by both learned counsel for the parties. In the case of **East Africa Warehousing (T) Ltd & 3 Others vs. African Banking Corporation (T) Ltd**, Misc. Commercial Application No.100 of 2020, (unreported), this Court did state that, as regard the two other conditions which an applicant for an injunction needs to fulfil, that:

> "…. a person who claims to be on the brinks of suffering such an irreparable injury, is duty bound to demonstrate that, the kind of

> injury to be suffered cannot be atoned through monetary means. As regard balance of convenience, the same should be parallel and tilt to the favour of the Applicants."

In this current application, I am in agreement with the leaned counsel for the Respondent that, the Applicant has not ably demonstrated how he stands to suffer irreparably if this application is refused. Much as Annexure MSK 10 to the supporting affidavit of the Applicant does show that there were fraudulent attempts to remove him from the Company (the 1st Respondent) and BRELA's intervention was sought, such evidence does not show how he stands to suffer irreparably.

As this Court stated in the case of **East African Warehousing (T) Ltd** (supra), there must be a demonstration that, the kind of injury to be suffered cannot be atoned through monetary means. Failure to lead evidence to that effect means that, the condition stands unsatisfied and any injury suffered can still be atoned monetarily. There being an inability to satisfy this condition alone makes it a sufficient ground to deny the application without much ado.

Let me point out as well, that, even after looking at the supporting affidavit, it is clear to me that, most of the Applicant averments therein, are averments which tend to lure this Court

to investigate or attend matters which ought to be dealt with in the main suit, a fact which I cannot accede to at this point.

For the reasons so stated, I refuse the granting of this application. The parties are to proceed with the main suit on the date to be notified to them by the Court. Costs to be in the main cause.

**It is so ordered.**

**DATED AT DAR-ES-SALAAM ON THIS 08TH DAY OF DECEMBER 2022**

.....

DEO JOHN NANGELA

**JUDGE**