IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

MISC. CIVIL CAUSE NO. 28 OF 2022

(Arising from Civil Cause No. 4 of 2022)

IN THE MATTER OF THE COMPANIES ACT NO. 12 OF 2002

AND

IN THE MATTER OF ATVANTIC GROUP (T) LIMITED

(hereinafter referred to as the Company)

AND

IN THE MATTER OF APPLICATION FOR CESSATION OF THE COMPANY'S BANK ACCOUNTS BY

AVINASH RAMESHKUMAR GALANI ..... 1ST APPLICANT

KISSHORI MUKESH MAGANLAL .....2ND APPLICANT

VERSUS

ANAMIKA AGNIHOTRI ..... 1ST RESPONDENT

RAHUL GANESHAN MUDALIAR ..... 2ND RESPONDENT

ATVANTIC GROUP LIMITED (T) COMPANY..... 3RD RESPONDENT

RULING

26th January, 2022, & 28th January, 2022

ISMAIL, J.

This is an application for an injunctive order of cessation of operation of the 3rd respondent's bank accounts, until final determination of the main suit (Miscellaneous Civil Cause No. 4 of 2022), that is pending in this Court. The application, preferred under Order XXXVII rule 1 (a) and section 95 of the Civil Procedure Code, Cap. 33 R.E. 2019 (CPC), is supported by an affidavit of Lugiko John, the applicant's counsel, setting out grounds for the prayers sought.

The application has been fiercely opposed by the 1st and 2nd respondent. Through their joint counter-affidavit, allegations levelled by the applicants have been contested. With respect to transactions in the 3rd respondent's bank accounts, the said respondents contend that the same were done lawfully and without any ill motive, to meet 3rd respondent's business operations and tax obligations. The 1st and 2nd respondents further averred that withdrawal transactions by cheques involved the 1st applicant as one of the signatories.

Hearing of the application pitted Mr. Lugiko John and Margareth Joseph, learned counsel for the applicants, against Mr. Antiphas Lakamu, learned counsel, whose able services were enlisted by the respondents.

In kicking off the discussion, Mr. John began by adopting the contents of the applicants' affidavit as part of the submission. He submitted that his application is anchored in the principles stated in the case of ***T.A. Kaare v. General Manager Mara Cooperative Union (1984) Ltd*** [1997] TLR 17. With respect to the existence of a prima facie case, Mr. John argued that there is a pending matter (Misc. Civil Cause No. 4 of 2022) which is pending in this Court, and it is scheduled for orders on 8th February, 2022. On the balance of convenience and suffering of irreparable loss, the contention by the applicants is that massive sums of money, amounting to TZS.232,560,000/-, have been withdrawn from the 3rd respondent's bank account and consumed in expenditures that benefit the 1st and 2nd respondent. The withdrawals were allegedly done without the applicants' involvement.

Mr. John further argued that the said withdrawal continued even after filing the instant matter, a fact that has been allegedly admitted by the respondents, through their joint counter-affidavit. Ms. Margareth Joseph, learned counsel who weighed in for the applicants, argued that the applicants stand to suffer an irreparable loss if the restrain order is not issued.

Submitting in rebuttal, Mr. Lakamu submitted that principles governing the issuance of injunctive orders have not been proved. With respect to the *bonafide* cause of action, he argued that there was none as removal of signatories is done by shareholders, and that the applicants, who are the majority shareholders, can appoint whoever they wish to represent them. With regards to irreparable loss, the contention by Mr. Lakamu is that this is not evident on the applicants' side. On the contrary, it is the 3rd respondent that stands to suffer the same way she did when the applicants ordered Azania Bank Limited to cease operation of the account.

On the balance of convenience, learned counsel argued that such balance operates in the 3rd respondent's favour, since she is an employer to several persons and liable to pay taxes, duties, and honour different trade deals. Issuance of injunctive orders, argued Mr. Lakamu, will cripple the 3rd respondent's operations. He urged the Court to decline to issue the order. To fortify his argument, learned counsel cited a couple of decisions of this Court in ***Mary J. Mkondya v. Poneka Patrick Mihayo***, HC-Land Application No. 494 of 2020; ***Registered Trustees of Redeemed***

Gospel Church v. Prof. Rocky Rajab Akaro & 2 Others, HC-Misc. Land Application No. 514 of 2017 (both unreported).

In their rejoinder submission, learned counsel for the applicants reiterated what was stated in their submission in chief. With respect to cited decisions, counsel's view is that the same are distinguishable as they dealt with injunction in land matters. On the alleged failure to prove the existence of principles, both counsel argued that it is the applicants, who have fully paid up for their shares, that stand to suffer if injunctive orders are not granted. They contended that there is no evidence that grant of such orders will cripple the 3rd respondent's operations.

Deducing from the counsel's rival depositions and submissions, the singular question is whether a case has been made out for the grant of a temporary injunctive order.

It is common knowledge that the object of an injunctive order is to keep matters or things in status *quo* as the hearing and decision on the substantive action is awaited. Temporary injunction is, therefore, an equitable conservatory restraint or relief that is issued before or during trial, in order to prevent an irreparable loss or injury from accruing before the court has a chance to decide the case (see Black's Law Dictionary, 8th

ed., pg. 800). It is intended to maintain the current state of affairs as the disputants tussle each other in the pending substantive matter. Before an injunction is granted, the applicant should satisfy the court that he has a concluded right capable of being addressed through the restraint order. Accentuating this position was the Supreme Court of India in ***Agricultural Produce Market Committee v. Girdharbhai Ramjibhai Chhaniyara***, AIR 1997 SC 2674, in which it was held as follows:

> *"a temporary injunction can be granted only if the person seeking injunction has a concluded right, capable of being enforced by way of injunction."*

Back home, the principles governing the grant of a temporary injunctive orders were laid down in ***Atilio v. Mbowe*** (1969) HCD 284. This decision served as a springboard for subsequent decisions which emphasized the need for having all of the conditions set out met in their cumulative nature. Epic among them is the decision in ***Abdi Ally Salehe v. Asac Care Unit Ltd & 2 Others***, CAT-Civil Revision No. 3 of 2012, wherein the Court of Appeal of Tanzania (Massati, J.A.) held:

> *"The object of this equitable remedy is to preserve the pre-dispute state until the trial or until a named day or further order. In deciding such applications, the Court is only to*

see a prima facie case, which is one such that it should appear on the record that there is a bonafide contest between the parties and serious questions to be tried. So, at this stage the court cannot prejudice the case of either party. it cannot record a finding on the main controversy involved in the suit; nor can genuineness of a document be gone into at this stage.

Once the court finds that there is a prima facie case, it should then go on to investigate whether the applicant stands to suffer irreparable loss, not capable of being atoned for by way of damages. There, the applicant is expected to show that, unless the court intervenes by way of injunction, his position will in some way be changed for worse; that he will suffer damage as a consequence of the plaintiff's action or omission, provided that the threatened damage is serious, not trivial, minor, illusory, insignificant or technical only. The risk must be in respect of a future damage (see ***Richard Kuloba Principles of Injunctions*** *(OUP) 1981).*

And on the question of balance of convenience, what it means is that, before granting or refusing the injunction, the court may have to decide whether the plaintiff will suffer greater injury if the injunction is refused that the defendant will suffer if it granted."

See also: ***Giella v. Cassman Brown & Co. Ltd*** [1973] EA 358, at p. 360; ***Tanzania Breweries Ltd v. Kibo Breweries Ltd & Another*** [1998] EA 341; ***T.A. Kaare v. General Manager Mara Cooperative Union (1984) Ltd*** (supra); and ***Anastasia Lucian Kibela Makoye & 2 Others v. Veronica Lucian Kibela Makoye & 4 Others***, CAT-Civil Appeal No. 46 of 2011 (unreported).

A glance at supporting affidavit and the counsel's submissions have demonstrates, sufficiently in my view, that there is a pending petition in which the respondents' actions are called into question, including those that allegedly jettisoned the applicants from running the affairs of the 3rd respondent. There is also an issue of alleged fleecing of humongous sums from the 3rd respondent's bank account. The sum quoted is TZS. 232,560,000/-.

From the totality of all these, I take the view that there is an issue that calls for the Court's intervention. This is what is meant by *prima facie* case. At this stage, the applicants need not cast any projection or prediction on the chances of success in the pending matter. It is sufficient if a fair question for determination is in existence. The latter position

mirrors the reasoning made by ***Sarkar on the Code of Civil Procedure***, 10th ed., Vol.2 p.2011. They opined as follows:

> *"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."* [Emphasis added]

See also: ***Colgate Palmolive v. Zacharia Provision Stores & Others***, Civil Appeal No. 1 of 1997 (unreported); and ***Kibo Match Group Ltd v. H.S. Impex Ltd*** (2001) TLR 152).

The next limb for consideration is the question of irreparable loss and, on this, the trite position is that the loss to be prevented must irreparable and evidenced by the applicant of the injunctive orders. Underscoring this requirement was Lord Diplock, in ***American Cynamid Co. v. Ethicon Ltd*** [1975] 1 All E.R. 504 at p. 509, wherein he held:

> *"Evidence that there will be irreparable loss which cannot be adequately compensated by award of general damages."*

Thus, a refusal by court to grant an injunctive order is justified where no evidence exists to prove that loss to be suffered is not irreparable, as

was held in the Indian case of ***Best Sellers Retail India (P) Ltd. v. Aditya Nirla Nuvo Ltd.***, (2012) 6 SCC 792. It was held:

> *"Yet, the settled principle of law is that even where prima facie is in favour of the plaintiff, the Court will refuse temporary injunction if the injury suffered on account of refusal of temporary injunction was not irreparable."*

Mr. John has contended that an irreparable loss is looming, if the current operation of the 3rd respondent's bank accounts continues unabated. This is in view of the fact that the 1st applicant has sunk a whopping sum of TZS. 800,000,000/- into the business, and that the 1st and 2nd respondents' withdrawal spree threatens to dissipate the 3rd respondent's financial position at the applicants' expense. Withdrawal of TZS. 13,000,000/- has been cited as one of the instances of such irregular withdrawals. Mr. Lakamu has also expressed the same worry in case a halt is imposed on the operation of the accounts. Failure, by the 3rd respondent, to meet her financial obligations, a recipe for reputational loss, has been cited as an irreparable loss likely to be sustained.

What comes out of the rival contentions is that, either way, losses are bound to be suffered if certain steps are taken, meaning that the Court

is damned if it issues injunctive orders as much as it if the injunctive orders are not issued. This is not uncommon in the dispensation of justice. What is important, however, is that the applicants have shown that the loss that is likely to be suffered if the restraint order is not granted.

As we grapple with the losses that both parties are likely to incur if the decision goes this or that way, it is the balance of convenience that will tilt the scale. While losses likely to be suffered by the applicants are monumental and too much to bear, I take inspiration from the splendid and invaluable guidance ushered in ***T.A. Kaare v. General Manager Mara Cooperative Union (1984) Ltd*** (supra). I hold the view that, whilst the sum constituting the applicants' contribution in the company is colossal, the same may be made good and adequately recompensed, the vagaries that come with the cessation or halting of the operation of the bank accounts are mammoth hardly atonable by way of damages. This is in view of the fact that the intrinsic value or goodwill of the 3rd respondent's business is priceless, likely to be dealt a huge blow if she fails to honour her legal and contractual obligations as a result of the countermand that will come with the craved restraint order. In the words of the upper Bench in ***Abdi Ally Salehe's case,*** the threatened damage arising out of

issuance of such orders is serious, not trivial, minor, illusory, insignificant or technical only. On this, I find that comparative loss to be suffered by the 3rd respondent is far greater than that which will be suffered by the applicants and the 1st and 2nd respondents. In other words, whereas the applicants will suffer huge losses, it is the 3rd respondent that will suffer irreparable loss if the restraint order is granted.

I take the view that, as much as the applicants face the agony of having to see their investment wanes, the balance of comparative loss, *i.e.* balance of convenience, weighs heavier on the 3rd respondent's side than it is on the applicants' side.

A critical review of the circumstances of this case reveals a little bit of peculiarity that requires a delicate balancing act. It is a case that calls for a bit of "Solomonic wisdom" in its handling lest the future of the 3rd respondent and the rights of the parties, especially the applicants, are thrown into a serious confusion. Mindful of Mr. John's admission that the 1st applicant is still one of the signatories of the 3rd respondent's accounts, his participation in the handling of the affairs of the 3rd respondent will serve as a safety valve that will forestall any possible mishandling of the financial resources. Thus, instead of issuing restraint orders that are likely to cripple 3rd respondent's operations, I order that operations of the bank

accounts should, hence forth, fully involve the 1st applicant. This means that all withdrawals and transfers from the 3rd respondent's bank accounts should not be effected, unless and until the same is endorsed by the 1st applicant. This order, that is issued consistent with the Court's powers bestowed under section 95 of the CPC, shall operate and be in force for the entirety of the period that Misc. Civil Cause No. 4 of 2022 will be pending. Costs of the application shall follow the cause.

Order accordingly.

DATED at **DAR ES SALAAM** this 28th day of January, 2022.

M.K. ISMAIL

JUDGE