

TANZANIA / JUDGMENT

RULING CHEN KAI VS HUO TAI edited

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA
SUB - REGISTRY AT MBEYA MISCELLANEOUS CIVIL APPLICATION NO. 28764 OF 2024 CASE
REFERENCE NO. 202411131000028764 CHEN

KAIAPPLICANT VERSUS HU
TAO 1ST RESPONDENT HU
YAN 2ND RESPONDENT SALINA DRINKS
COMPANY LIMITED3RD RESPONDENT

RULING

19th & 26th November 2024 NONGWA, J. The applicant, Chen Kai has filed this application seeking temporary injunction by restraining the 1st and 2nd Respondents jointly and severally, their agents, representatives or any person acting under their authority from disposing the company, production of drinks, transferring company’s goods, selling Company’s machineries, selling Applicants shares and making any decision or take any measures that will affect the prevailing status quo of the Company, pending the determination of main suit. It is made under sections 68(a)(e), 95 and Order XXXVII rule 1(a), 2(1) & 4 1 of the Civil Procedure Code Cap 33 and supported by the applicant’s affidavit. Briefly, the applicant is a founding member and shareholder of 40% in the 3rd respondent, Salina drinks Company Limited which was incorporated in 2021 under the Laws of Tanzania. He was appointed the director and secretary of the 3rd respondent from incorporation until in 2023 when he alleges was procedurally removed from the two position he was holding. That as the result has been blocked in the management of the company and as shareholder and the 1st and 2nd respondents are misappropriating the company resources by directing sale of company’s products in their person accounts. The applicant also alleges that the 1st and 2nd respondent are depositing money to the outsiders. Further that the 1st and 2nd respondent has announced sale of his shares and the company to whoever shows interest. Thus, has filed a petition for unfair prejudice under the Companies Act which is still pending but to protect the petition from being nugatory has made this application for temporary injunction. The respondent filed counter affidavit sworn by Hu Tao for himself and on behalf of the 2nd and 3rd respondents to oppose the application. It is admitted that the applicant is the founding member and shareholder in 3rd respondent. Further that he was removed from the position of director 2 and secretary in accordance with procedure laid down by the company’s constitution after the applicant was sported misappropriating the company

fund for personal gain. The respondents have disputed misappropriation of the company money and making payment to non shareholders and put the applicant to strict proof. Further that if the order is granted those depending on the company will suffer. When the application came for hearing, the applicant was represented by Mr. Frank Yona, learned counsel whereas Mr. Ntengwa Mpinyagwa, also learned counsel appeared representing the respondents. Taking the floor, Mr. Yona adopted the contents of the affidavit of the applicant to form part of the oral submission. He submitted that in order for the court to grant temporary injunction three conditions must be met, that is proof of existence of serious case a prima facie case, irreparable loss and balance of inconvenience. He referred the court to the case of Mwacotra Limited vs MSG Mining Services Limited & Another, Misc. Commercial Application No. 6999 of 2024, HCT Commercial Division (Unreported). With respect to the first condition, existence of serious triable issue, counsel submitted that applicant has filed main case petition No. 28765/2024 which awaits hearing before this court. He referred to paragraph 4, 6, 7,9,11, 13, 14, 15 and 16 of the Affidavit and said it raises 3 the question of unfair conduct against the applicant which has to be resolved by this court. In the second condition of irreparable loss, Mr. Yona made reference to same paragraphs of the Affidavit together with annexure C4, C6 and C7. He contended that the applicant was unprocedurally removed from managerial position of the company and as of now, he is not aware of what is going in the company. Further that the respondents have announced sale the applicant's shares and the whole company. Also, that the 1st and 2nd respondents are depositing sales of the company products in their personal accounts. Taking as a whole, Mr. Yona submitted it establishes irreparable loss. Submitting in last condition of balance of convenience, it was submitted that the applicant is the one who will suffer more than the respondents, because the applicant is no longer in the management position and the respondents are continuing to transfer company's properties to their own, the applicant can no longer see the production, profit and other issues of the company. Counsel prayed the orders sought be granted. Submitting in rebuttal, Mr. Mpinyagwa as expected adopted the contents of counter affidavit sworn by the 1st respondent on behalf of other respondents. Counsel conceded that temporary injunction is granted 4 upon satisfying three condition and made reference to the case of Atilio vs Mbowe (1969) HCD 284. However, he pointed that the applicant has not met the conditions Mr. Mpinyagwa had the issue with authenticity of annexure C3, C4, C5 and C7 as the author and custodian of the documents was unknown. Further that annexure are not showing customers paying respondents in their personal accounts. That exhibits did not connect to show that those sending money were customers of the respondents and the payments were for the companies account as alleged. He contended as authenticity of the annexure has not been proved, temporary injunction cannot be granted. Replying to the main argument, he submitted since 2021 the applicant was alone in the management of the 3rd respondent and was doing unfair conducts, he referred to annexure S4 a bank transaction done by the applicant to his private casinos. Further seeing that, they decided to remove the applicant from the position he held. Counsel submitted that his removal followed the procedure by calling the members meeting as per their MEMART. Counsel argued that it was the company which made all purchase of the production equipment, referring to annexure S3. According the respondents counsel, if it was the applicant who provided all fund then share division ought to have not been done. 5 On

irreparable loss to be suffered, Mr. Mpinyagwa stated that not only the parties will suffer but rest of the employees who depend on the salaries and the government will lose tax. In principle he submitted the applicant is still a share holder in 3rd respondent, they have no intention to transfer his shares and sale the company. In that sense, counsel argued the order sought should not be granted. During rejoinder, Mr. Yona submitted that the misconduct allegedly done by the applicant was not proved, that there was no proof that the applicant was served with notice of meeting. That the applicant will suffer loss compared to the respondents and there was no proof that other people will suffer. Having considered rival submission, I will start with the issue of authenticity of annexures of the applicant. According to Mr. Mpinyagwa its source, purpose and custodian was not disclosed, hence its authenticity questionable. Mr. Yona did not make any reply to this. The respondent might have genuine concern on this point, however at the stage of the hearing temporary injunction the court is not required to rule on the validity or otherwise of the contents including the attached document. Faced with similar issue, in *Abdi Ally Salelhe Applicant vs Asac Care Unit Ltd & 2 Others*, Civil Revision No. 3 of 2012 (unreported) the Court stated; 6 ‘... 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 ...’[Emphasize added.] With the above law the question of authenticity of annexures to the applicant’s affidavit cannot be determined at this stage. In granting order for temporary injunction parties are in agreement that for temporary injunctive order to be granted three conditions must be established. These are one, existence of a serious question of facts or triable issues; two, the possible existence of irreparable loss that needs to be protected by the court; and three, balance of convenience, the plaintiff is likely to suffer more significant hardship and mischief if the injunction is withheld. In that accord, I will examine the three conditions if has been satisfied by the applicant. Regarding existence of serious triable issue, the applicant has imputed, in paragraphs 4, 6, 7,9,10,11, 13, 14 15 and 16 of the supporting affidavit, unfair prejudice in the handling affairs of the 3rd respondent and that there is a contest between the parties on the running of the company. That contest is in the form of a petition that is pending 7 in this Court. The respondent has acknowledged but states everything is in the order and the interest of the applicant is not at stake. It is the law at this stage is to assess if there exists a bonafide contest between the parties, known as a prima facie case. Sarkar in Sarkar on the Code of Civil Procedure, 10th Ed., Vol.2 p. 2011, comments; ‘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 fact that there is claims of unfair prejudice raised in the petition sufficed to establish that there is contest between the parties. That is also seen in the averments in the affidavit and counter affidavit together with rival submission in which parties are locked horn on the alleged facts by the applicant and is awaiting to be resolved in the main petition. The applicant has therefore satisfied the first condition. In respect of the second condition whether the Court's interference is necessary to protect the applicant from irreparable loss, this carries a hallmark in deciding whether to grant or not temporary injunction. Here the applicant is

expected to show that, unless the court intervenes by way of injunction, it must be irreparable and the applicant's duty is to demonstrate that his position will, in some way, be changed for worse, if the respondents' acts or omissions are left to run unabated. In this application, through paragraph 3 and 4 of the applicant's affidavit and 3 and 4 of the counter affidavit, there is no contest that the applicant was from the beginning in the managerial position serving as a director and secretary of the 3rd respondent. Also, through paragraph 5 and 7 of the affidavit and counter affidavit, it is clear that the applicant say together with the 1st and 2nd respondents put their money, time, energy and effort in making sure the 3rd respondent comes into existence. Further to that there is no dispute that the applicant has been removed from the position of director and secretary and has turned to be the ordinary share holder. Under paragraphs 9, 11 and 14 of the affidavit the applicant has pleaded unfair conduct by the 1st and 2nd respondent to the effect that the 1st and 2nd respondents are depositing company sales into their personal account and making payment to third party in exclusion of the applicant. Further that the 1st and 2nd respondents are in the verge of transferring his shares and sale the 3rd respondent. The averments were not seriously controverted in counter affidavit; the applicant was put to strict proof which is improper. I seek inspiration in the case of *East African Cables T. Limited vs Spenco Services Limited* Misc. 9 Application Case No. 42 of 2016 [2016] TZHCCoMD 2077 (1 July 2016) in which Mruma J. made the following observation; 'When a fact is stated on oath, it has to be controverted on oath and this gives the court an opportunity to weigh which fact is probably true than the other. When the fact sworn to or affirmed is not controverted then it is deemed to be admitted. When a person swears or makes a sworn declaration of a fact, the best way to challenge him/her is to swear a fact which tends to show that what he sworn to was false. Putting him to strict proof of the fact without giving your side of the story which you want to be believed, amounts to admission of the fact. A requirement of strict proof of the facts applies to pleadings in the suit (ie. Plaintiff, written statement of defence reply etc) and not to affidavit and counter-affidavit which are as said earlier evidence' Taking the above, averments in paragraphs 9, 11 and 14 of the affidavit then threatened damage is serious if established. Conducting management of the company to the exclusion of the other, making payment of the company in personal accounts and the allegation that the applicant's shares is in threat to the sold and the company at large, it cannot be atoned by a claim of damages. Further in my view the allegations are not trivial, minor, illusory, insignificant or technical only. *Jitesh Jayantilal Ladwa vs Houses and Homes Ltd & 5 Others*, Misc. Civil Application 97 of 2022 [2022] TZHC 11012 (27 July 2022; TanzLII). 10 There was argument that if temporary injunction is granted it will not affect only the respondent by the employees and government. Mr. Yona replied it was not proved. Indeed, the argument is attractive and convincing one, however, it lacks legs to stand. Apart from mere words posited under paragraph 16 of the counter affidavit, there was no documents proving who are the employees and their contracts if any and the taxes alleged paid to the government. In my view this are kind of allegation which could be supported by production of documents which supports existence of the alleged fact. Last is 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 than the defendant will suffer if it is granted. Taking the averments in paragraph 4 7, 8, 9 11 14 of the affidavit and the rival submissions by the counsel for

the parties. The applicant having been marginalized in the management and gaining information of the 3rd respondent, I entertain no doubt that it tilts in the applicant's favour if the restraint order is not granted. In the upshot the applicant has met conditions warranting this court to make the orders sought save for restraining production of drinks. I therefore grant the application and make the following order; 11

1. The 1st and 2nd Respondents, their agents, representatives or any person acting under their authority are restrained from disposing the company, transferring company's goods, selling Company's machineries, selling Applicants shares and making any decision or take any measures that will affect the prevailing status quo of the Company, pending the determination of Misc. Civil Cause No. 28765 of 2024 in this court.
2. Costs to be in the cause. V.M. NONGWA JUDGE 26/11/2024 Dated and Delivered at Mbeya this 26th November 2024 in presence of Mr. Yona Frank counsel for the applicant and Mr. Ntegwa Mpinyagwa Counsel for the respondent. V.M. NONGWA JUDGE 12

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