

TANZANIA / JUDGMENT

HASH ENERGY T LTD VS RICHOL CO LTD MISC

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1 January 2015

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT PAR ES SALAAM
MISCELLANEOUS COMMERCIAL CASE NO. 52 OF 2015 (Originating from Commercial case No.
149 of 2014) HASH ENERGY TANZANIA LIMITED..... APPLICANT VERSUS RICHOL
COMPANY LIMITED SINGIDA COPEC SERVICE STATION KCB BANK TANZANIA
LIMITED RESPONDENTS KHAMIS MAGANGA 16th September & 15th October,
2015

RULING

MWAMBEGELE, J.: The applicant had through this application sought for both exparte and interpartes interim orders. However, upon careful consideration the court was of the view that justice would be served better upon hearing both parties. Accordingly this is the ruling in respect thereof. The orders sought for by the applicant are: i

- a) The Honorable court be pleased to issue a temporally injunction restraining the 4th respondent from disposing of, and or alienating 38,000 litres of petrol loaded in T 357 CBU/T958CAX; 38,000 litres of petrol loaded in T364 CBU/T884CAX and 37,000 litres of diesel loaded in T817BRW/T693BQY of a total value of Tshs. 231,050,000/= pending the hearing and determination of the main suit;
- b) That the honorable court be pleased to make an order for the detention and preservation by the Court broker of the said 38,000 litres of petrol loaded in T 357 CBU/T958CAX 38 litres of petrol loaded in T364 CBU/T884CAX and 37,000 litres of diesel loaded in T817BRW/T693BQY of a total value of Tshs. 231,050,000/= pending the hearing and determination of the main suit;
- c) The Honorable court be pleased to make an order authorizing samples of the said petroleum products referred to herein above to be taken for purposes of obtaining full information and evidence of the said products;
- d) That cost of this application be provided for.; and

- e) Any other relief as the Court may be pleased to grant. An affidavit in support of the application was sworn by one Dr. Asmahan Adan who therein he introduced himself as Group Corporate and Country Director of the applicant Company. He states therein that through the main suit the applicant sues the respondents jointly and severally for the orders that: 2
- a) That the Respondents be jointly and severally ordered to pay the Applicant the sum of Tshs. 829,960,000/=;
- b) A Declaration that the 3rd Respondent is liable to the applicant in the sum of Tshs. 850,000,000/= undertaken to be paid under the Bank Guarantee;
- c) A declaration that the 4th respondent is liable to pay the Applicant the sum of Tshs. 231,060,000/= being the value of the petroleum products. He illegally took from the applicant. Alternatively the 4th respondent be ordered to return to the applicant 76,000 litres of PMS and 37,000 litres of AGO.
- d) That the Respondents be respectively ordered to pay interest on the amounts stated in paragraphs (a), (b) and (c) above at the commercial rate of 21% per annum from August 2014 to the date of judgment; and
- e) That the respondents be ordered to pay interest on the decretal sum at the court rate of 12% per annum from the date of judgment to the date of full satisfaction. By further scan of the affidavit, I have been able to decipher the story leading to the cause of action and hence this application. It goes thus: the applicant is a fuel supplier, whereas the 1st and 2nd respondents who are sister companies managed and ran by same Managers and Directors are its customers. The applicant and the 1st respondent had concluded a Fuel Supply Agreement whereby the latter was to take fuel on credit basis and payment to be effected within 14 days of delivery. The former demanded a bank guarantee as a security thereof and the latter secured the same from the 3rd respondent in favor of the applicant to the tune of Tshs. 850M/=. Pursuant thereto, fuel valued at Tshs. 1,670,580,000/= was supplied and delivered to the 1st respondent. As for the 2nd respondent, fuel was supplied to her on cash basis whereby the arrangement was that after confirmation of cash deposit for the purchase price, the applicant would release fuel. It is alleged that the applicant had released petroleum products valued at Tshs. 239,100,000/= upon presentment of pay-in slip by the second respondent but later on discovered from the bank that the said pay-in slips were forged and no monies were actually deposited. It was then, as stated further in the affidavit, that the 1st and 2nd respondents went into hiding, switched off their cell phones and closed their business. Upon recalling of the Bank guarantee, it is stated, the 3rd respondent refused to honour it for the reason that the said guarantee was not genuine. The applicant states that she reported the matter to the police and they managed to track and arrest three trucks with same quantities of petroleum products that had been loaded on forged pay-in slips. The said trucks were found in custody of the same drivers of the 4th respondent who is a transporter and thereafter placed into the applicant's custody pending further investigations regarding

the forged bank pay-in slips. The affidavit reveals further that after some few days the 4th respondent instigated the police and came at the applicant's business place whereby they drove away the said three trucks after removing the seals from the trailers loaded with the fuel and to the date of affirming the affidavit the applicant was not aware of the whereabouts of the said trucks with the petroleum products. The 4 applicant thus seeks an order for injunction so that the said fuel could not be sold pending the determination of the suit because the 1st and 2nd respondents have gone into hiding and the said trucks carried the loaded fuel which was not paid for. It is stated also that for the reason of breaking the seals, an order for detention and authorization of sample taking for verifying the contents is sought in order to get full information and evidence on the said products. On the other hand, the 4th respondent who replied to the affidavit denies the allegations and states that the said trucks had been containing the petroleum products belonging to one Charles Pius Tungu who had purchased the same from Acer Petroleum (T) Ltd. It is his averments that upon retaking the trucks with the products the police instituted investigation and upon engaging the Energy and Water Utilities Regulatory Authority (EWURA), it was found out that the said content were not petroleum but water. It is averred that since then, the 4th respondent had never taken back the three trailers because they are still in the police custody pending criminal investigation. At this juncture, let me record the parties' representations. Mr. Martin Matunda appeared and argued the application on behalf of the applicant whereas Captain Bendera, learned counsel represented the 4th respondent. I note that the matter proceeded ex parte as against the 1st and 2nd respondents who had neither entered any appearance nor filed any opposition against the application. The learned counsel appearing for the parties prayed to have the application disposed of by way of written 5 submissions. I allowed their prayer and I commend them for duly observing the filing schedule. I must assure them that I have taken ample time to go through them and I have comprehended every bit therein. I will refer to them in the course of my ruling as handy as they have been. In his written submissions, the learned counsel for the applicant commenced by summarizing the operative principles in grant of injunction as articulated in the oft-quoted case of *AtiHo K? Mbowe* [1969] HCD n. 268 that:

- a) Whether there is a main suit with serious triable issue on the facts alleged with a probability that the plaintiff will be entitled to the relief prayed for;
- b) Whether the court's interference is necessary in order to protect the Applicant from the kind of injury which may be irreparable before his legal right is established; and
- c) Whether on the balance of convenience there will be greater hardship and mischief suffered by the plaintiff from withholding of the injunction than would be suffered by the defendant from granting it. As regards the first condition, his submissions are to the effect that a serious question as to the true owner of the petroleum products exists. This is because, according to him, the 4th respondent had took away the said products from his custody without paying for the same and that the said product could not belong to any other person, otherwise that other person should have been the one to come to court to claim ownership.

It is his contention that the facts, as disclosed, satisfy the first condition for the grant of injunction. The case of Charles D. Msumari and 83 others Versus the Director General of THA, Civil Case No. 14 of 1997 (unreported), was relied on in this point. As for the second condition, he restates the requirement that the applicant is enjoined to demonstrate that the injury he seeks to be protected against is one of irreparable nature which cannot be fully compensated by money. His demonstration to that effect is found firstly in the following paragraph of his submissions: "under paragraph 22 of the supporting affidavit it is stated that unless the 4th respondent is restrained from disposing of the said products which constitute the subject matter of the main suit against the 4th respondent, the applicant's suit shall be pre-empted in as much as the 4th respondent does not have known immovable properties apart from the trucks and trailers which can be easily hidden to avoid execution. Further that in the process the applicant shall suffer an irreparable injury." Then he contends further in that regard that the 4th respondent has not demonstrated to have any ability to satisfy the decree and also that there will be no one to satisfy the decree because the 1st and the 2nd respondents closed down their offices and businesses after the death of their common shareholders-cum-Directors and as such it will be an irreparable injury. Regarding the question of balance of convenience, he restated the principle that it is a procedural requirement which makes it mandatory for the applicant to show that the inconvenience the applicant wants to be protected against outweighs that which will be placed on the respondent if injunction is granted. He went on to submit that the balance of convenience tilts in favour of the applicants as there will be no hardship to the 4th respondent because he is a mere transporter and not owner of the said products. On the other hand, the 4th respondent submitted in the main that the first condition has not been satisfied because, by the admission of the applicant that the fuel was sold and duly delivered to the 1st respondent, then the applicant maintains no prima facie case against him. Regarding the second condition on inseparability of the loss or injury to be suffered by the applicant, it was his submission that neither the trucks nor said petroleum products are in the 4th respondent's control but rather they are in the hands of the police since they have never been returned to him after they were taken for investigation. He contends that there is no irreparable loss to the applicants because the petroleum products belong neither to the applicants nor to the 4th respondent instead they belong to one Charles Tungu trading as Maganzo Filling station. 8 On the balance of convenience, it was his contention that greater hardship will be suffered by the defendant from granting the injunction than would be suffered by the plaintiff by denying the same. He submits further that, clearly, the said petroleum products are in the control of the applicants and its directors are facing criminal charges for stealing the same and therefore the applicants want the court to issue injunction for nonexistent petroleum products which are not in the hands of the 4th respondent. It is his assertion that by praying for injunction for the said amount of petroleum products which are in their own hands, the applicants want double allocation. Rejoining, the learned counsel for the applicant in the main reiterates that there is a serious cause of action against the 4th respondent because him being a transporter and also dealer in the fuel who was hired by the 1st and 2nd respondents to transport the said fuel is the one

who instigated the police to release the said fuel to him. It is also his main contention that since the counsel for the 4th respondent has relied on documents which were not annexed to the affidavit in reply, the same are not part of evidence and this court cannot consider them in this application. To hammer home the point, he cited the case of TUICO at Mbeya Cement Co. Ltd Ks Mbeya Cement Co. Ltd & the National Insurance Corporation Ltd [2005] TLR 41. He also contends in rejoinder that since the 4th respondents does not deny that the said trucks and contents were taken by the police and the 4th respondent, and that the same drivers were the ones who drove the said 9 trucks, that the samples were taken without involving the applicant or any third neutral person, then he cannot be heard to say that the petroleum product are with the applicant. Regarding the submissions on criminal charges for stealing the said fuel against one of the directors related to the applicant, it is the counsel's submissions that the same should be disregarded for want of evidence. He cited the case of Ismail Bushaija Vs R [1991] TLR 100 to add that the pendency of a criminal case is not a bar to the prosecution of a civil case even if it involves the same person and further that the criminal prosecution should be stayed pending determination of this suit. Regarding the submission that there is no irreparable loss because the said petroleum products belonged to the third party, he contended that the 4th respondent does not have the locus standi to sue for the goods belonging to a third party and, instead, the said Tungu should have applied to be joined in the suit. The learned counsel noting that the counsel for the respondent did not respond in respect of prayers made under Order XXXVII rule 8 of the CPC, it was his prayer that prayers (b) and (c) in the chamber summons be granted since they are not contested by the 4th respondent. I have gone through the contending submissions and I must admit that they were all well tailored which display of seriousness and zeal with which each counsel had represented their respective clients' cases. Their labour notwithstanding, I am certain that the matter at hand will not detain me much, for, the only question I am called to determine is whether it is io proper for the court, in the circumstances of this case, to be moved to grant the order for temporary injunction as well as orders for investigations. I will start by stating the obvious that in granting an order of injunction, the court should bear in mind that its origin is from an equitable jurisdiction and as such, before making such order, the claim must be tested on all principles of equity. To that end, the three tier test was developed by the House of Lords first in the case of American Cynamid Co. Vs Ethicon Ltd. [1975] A.C. 396 (H.L). This entails demonstration of the strength of the plaintiff's case (that there must be a prima facie case), that the plaintiff will suffer irreparable harm without injunction and thirdly that the balance of convenience tilts more to granting injunction in favour of the plaintiff than it is in denying it to the defendant. The said test in our jurisdiction was well articulated in the Atiio case (supra) and restated in various cases including Tanzania Cigarette Co. Ltd Vs Mastermind Tobacco (T) Ltd, Commercial Case No. 11 of 2005 (unreported); cited by counsel for the respondent, as well as Kibo Match Group Limited Vs Mohamed Enterprises (T) Limited, Civil application No. 6 of 1999 (unreported); the decision of this court. More often, the purpose of interlocutory injunctions is to "freeze" or avert an imminent danger of waste, damage, sale, removal, alienation or loss of value of the property the subject matter of the suit by

preserving its status quo until a hearing or further order and/or until the case can be decided on the merits. Apparently therefrom, and in addition to the said conventional three tier test requirement, the property for which an order is sought to be protected must be in existence or at least its whereabouts must be certain. This requirement comes out lucidly, in addition to the various authorities, from the provision of Order XXXVII Rule 1 (a) of the CPC. Thus, it is my well considered view that for an order of temporary injunction to be meaningfully issued by a court of law, the party seeking to have the property so temporarily preserved must satisfy the court on the whereabouts and/or existence of the said property. This is logically so, for, a property will not be protected unless it exists, and as such, a court order to that effect will be rendered nugatory in the absence of such proof thereby abusing the very whole court process. Perhaps, the persuasive observations by Justice R. R. K Trivedi of Allahabad High Court in India in his article entitled Law of Injunctions [J. T. R. I Journal - Second Year, Issue 4 & 5, March, 1996] (also available at <http://ijtr.nic.in/articles/art25.pdf>) will clarify and back up my view. These are: "... The normal requirements that the applicant praying for the injunction should have a good prima facie case, chance of suffering irreparable injury and balance of convenience is in his favour and other principles connected with the matter, the Court should have extra 12 cautious approach in testing the prima facie case with a certain amount of extra rigour to avoid the abuse of the process of the Court..." [Emphasis mine]. In that accord, I take it that the said "extra cautious approach" with a certain amount of "extra rigour to avoid the abuse of the process of the Court" will inter alia, entail ascertainment of the existence and/or whereabouts of the property subject of the temporary injunction sought. Equipped with such principles, I will now put the facts into the sieve in order to see whether in the present instance the same warrants issuance of an order of temporary injunction as well as the investigative orders. I will state outrightly and as rightly submitted by the learned counsel for the applicant, that the nature of the facts, particularly pertaining to the ownership of the said petroleum products discloses the plaintiff's prima facie case. Thus, the competing facts are that the said products belonged to the applicant because they had been taken without being paid for and were accordingly apprehended in exercise of the right of stoppage in transit on the one hand, and that the said product belongs to another customer namely Charles Pius Tungu, whereby the 4th respondent had been contracted to transport the same. 13 To vindicate the said ownership, whereas the applicant relies on the fact that the said product were found in same quantity, same trucks that had loaded and same drivers who were employees of the 4th defendant, the latter relies on Delivery Notes issued by one Acer Petroleum (T) Ltd from where the said products were allegedly obtained in respect of Maganzo Filling Station allegedly owned by the said Charles Pius Tungu. In my view, this is a serious issue befitting trial in order to establish the rightful owner thereof. Accordingly, the question of want of cause of action against the 4th respondent does not arise since the said respondent technically and indisputably was found in possession of the said disputed product on which the applicant asserts right of ownership and who (the 4th respondent) disputes such applicant's ownership or rights thereof. This paves a way to determining whether the facts discloses existence or whereabouts of the said petroleum products. This,

in my view should be determined first before determination of whether the loss to be suffered is or is not irreparable and accordingly, where does the balance of convenience lie as between the applicant and defendant by granting or denying temporary injunction. It is with such answer that this court at this stage can safely guard against abuse of its process. I have had a deep scrutiny of the entire pleadings as well as submissions and various documents attached thereto, and I have come to a settled conclusion that existence or whereabouts of the said petroleum products is not certain. The first indicator to this conclusion is apparent from 14 paragraph 20 of the affidavit of one Dr. Asmahan Adan sworn in support of the application. The relevant part reads: "...and on the following day the 4th respondent and the Policemen drove away the said trucks with its fuel and todate the applicant is not aware of the whereabouts of the fuel it had already recovered which has a value of Tshs.231,050,000/= ..." [Emphasis mine]. Against such statements, and among other statements by the respondents, there are the following statements at paragraph 14 of the affidavit in reply: "That the contents of paragraph 22 of the affidavit are blatant lies as the petroleum products which were in my three trailers when the Police took them and stored them at the applicant's premises were no longer in the trailers when the Police took them back as depicted in EWURA inspection document". [Emphasis supplied]. A statement disclosing the findings in the said EWURA report which further points to uncertainty of the existence or whereabouts of the said petroleum products is found at paragraph 8 of the said affidavit in reply. This goes thus: 15 "That before the Police took back my Motorvehicles and trailers from the applicant's premises, they engaged EWURA Petroleum Inspectors to take samples from the trailers and analyse the contents which were found out to be water instead of the petroleum products when the vehicles were stored in the Applicant's premises". [My emphasis]. I am aware of the concern maintained by the applicant regarding the genuiness of the said reports for want of a third neutral part in the process of testing, but, in my considered opinion, the concern, as well as the prayer by the applicant to have the sample taken for re-testing strongly indicates the serious doubts maintained by both parties on the existence or otherwise of the said petroleum products. Unfortunately, the court has not been privileged with any depositions from the said Police in relation to the custody or otherwise of the said fuel and trucks. All what is available are some documents which point to possibility of the said trucks with their contents, if any, being in the hands of the said Police. Reference here is made in particular to annexure HASH-7 to the affidavit which is a letter dated 14.02.2014 from the Ilala Police Region head of Investigation to the applicant's Managing Director. This is partly couched thus: 16 'YAH: KUREJESHA VIELELEZO ULIVYOKABIDHIWA KWA AJILI YA KUVIHIFADHI JALADA: CD/IR/3080/2014 Tafadhali husika na kichwa cha habari hapo juu, pia rejea barua zangu zenye Kumb. Na DSM/ILALA/CID/B.I/VOL. 17/175 ya tarehe 30/08/2014 na DSM/ILAU/CID/B.I/VOL. 19/243 ya tarehe 11/09/2014 Kwa barua hizo ulikabidhiwa vielelezo magari matatu, Gari nambari T 357 CBU aina Scania lenye trailer/Tanker namba T 958 CAX likiwa na mafuta aina ya petrol lita 40,000, Gari nambari T 364 CBU aina ya Scania lenye Trailer/Tanker namba T 884 CAX likiwa na mafuta aina ya petrol lita 40,000, na Gari nambari T 817 BRW aina ya Scania lenye Trailer/Tanker namba T 613 BQY likiwa na mafuta aina ya Diesel Lita 37,000 yote kwa pamoja

yakiwa namafuta lita 117,000 ili uyahifadhi wakati kesi tajwa hapo juu ikiendelea kupelelezwa. 17 Kwa barua hii nakuagiza kurejesha vielelezo hivyo Polisi kama ulivyokabidhiwa ifikapo tarehe 16.02.2014 kwani upelelezi wa shauri umefikia hatua ya kuhitaji vielelezo hivyo ..." Literary put, it is to the effect that the applicant is required to return the said trucks with its contents which were entrusted into its custody for preservation pending criminal investigation. He is thus being informed that the said investigation has reached a stage where the same are required and accordingly should be taken back to police custody. I gather that this was the letter referred to at paragraph 19 of the said affidavit in support of the application which purportedly emanated from the 4th respondent's instigations of the police which reached the applicant's office in absence of the directors to undertake the said directives and upon which, as alleged under paragraph 20, the 4th respondent and the police drove away the said trucks with the said petroleum. A further pointer to the trucks and its contents being in police custody are statements contained in paragraphs 9 and 13. These are: "9. That since I became aware that there are no petroleum products in my trailers ... up to today I have not taken them back from the Police until they contain the same petroleum products therein ..." 18 "13. ... the Trucks and trailers are in the hands of the police and the petroleum products are in the hands of the Applicant..." As I have intimated, and from the above, nothing is certainly pointing to the exact point where the said products currently are located and nothing was brought in the nature of depositions from the said police to assist the court apart from what I have endeavored to show hereinabove. In fine, therefore, the above circumstances go to show that, indeed, the products sought to be protected are either not in existence or are nowhere to be seen or located so far. This uncertainty vitiates an order for injunction ab initio as the requirement implied in the said Order XXXVII rule 1 (a) of the CPC is not met. Further, I am of the settled view that, even if, for the sake of argument, it is concluded that the said fuel and trucks are still in the custody of the police, it would therefore be not proper to make an order for injunction against the 4th respondent for apprehension of alienating or selling the same; the course would be mere illusory. That being the stance, what about the question of irreparability of loss and or injury? In my well considered view and based on the nature of the claim, the question does not, for all intents and purpose, arise. I shall demonstrate. 19 First, the nature of the suit is in the breach of contract and accordingly, all prayers are tailored in a nature of seeking for damages from all of the 4 respondents/defendants jointly and severally. The reliefs prayed for are as quoted earlier on. I deem it prudent to repeat the same here:

- a) That the Respondents be jointly and severally ordered to pay the Applicant the sum of Tshs.829,960,000/=;
- b) A Declaration that the 3rd Respondent is liable to the applicant in the sum of Tshs. 850,000,000/= undertaken to be paid under the Bank Guarantee;

- c) A declaration that the 4th respondent is liable to pay the Applicant the sum of Tshs. 231,060,000/= being the value of the petroleum products he illegally took from the applicant. Alternatively the 4th respondent be ordered to return to the applicant 76,000 litres of PMS and 37,000 litres of AGO;
- d) That the Respondents be respectively ordered to pay interest on the amounts stated in paragraphs (a) (b) and (c) above at the commercial rate of 21% per annum from August 2014 to the date of judgment; and
- e) That the respondents be ordered to pay interest on the decretal sum at the court rate of 12% per annum from the date of judgment to the date of full satisfaction. I am alive to the 3rd prayer made specifically in respect of the 4th respondent, as well as the applicant's apprehension of loss due to the 20 likelihood of evasion of execution of decree by the said respondent. These, in my considered opinion, are unfounded apprehensions, and a mere wish to cross the bridge before actually reaching it because, upon the claim being established, the question as to the satisfaction or otherwise of the decree becomes in the confines of another stage and another process. At this juncture, I wish to state the obvious that the loss is irreparable if the applicant cannot be put into original position or as before by way of damages or that which cannot be atoned through restitution. This fact has to be strictly established to the satisfaction of the court before an order for injunction is issued. This is so because; the court is enjoined at this stage to look at the nature of the loss which will be suffered and not the status of the parties. Thus, in assessing the nature of the loss to be suffered the court is not enjoined to look at the ability of the defendant to satisfy the decree or otherwise for that stage is not yet reached. In that accord, and given the uncertainties as to existence of the said products, the death of the shareholders of the 1st and 2nd respondents as well as want of 4th respondent's immovable property and the possibility of his evading execution which remains largely allegations cannot be the basis of evaluating the nature of the loss at this stage. I thus find and hold that the circumstances and facts incline to the conclusion that loss, if at all there is any, can be easily atoned by way of damages as appositely prayed for in the applicant's prayers in the main suit. 21 It thus goes without saying that the foregoing vitiates the requirements that the imminent loss should be such that it cannot be repaired by way of damages. The totality of the above findings further demonstrates that the balance of convenience tilts more in denying the injunction than granting it. This is vindicated mostly by the fact that, so far, there is no specific entity or person against whom an order of injunction could be meaningfully directed and fully complied with. Accordingly, in the circumstances, it would be a greater hardship making an order in the nature of injunction against the 4th respondent or the court broker for that matter, for it would be sending him on a fishing expedition possibly without the necessary gears. Same account is made in respect of the prayers for detention and preservation of the said petroleum products as well as authorization of sample taking for testing for purpose of obtaining full information thereof. Without prejudice to the foregoing, entertaining the said prayer for taking of sample to obtain full information while the main suit is still pending is, in my considered view, an investigative action which, this court

cannot legally and procedurally take at this stage. This is because, the tenets of common law system of litigation requires parties to be responsible to undertake fact finding on their own or gather evidence and adduce the same before the court of law. Unlike in inquisitorial system of the civil law jurisdictions, the court does not play a role of fact finding but mere umpire, whereby control of litigation in so far as proof is concerned, is left in the hands of the litigants. Accordingly, making such an order would be turning 22 this Court into an investigator who is required to seat and make judgment on the very same case, a move that violates the trite principle of *nemo iudex in causa sua* and hence abuse of the court process. In fine therefore the application for temporary injunction is hereby refused for the serious want in merit. The sister orders prayed for under (b) and

- (c) in the chamber summons are equally devoid of merit. They are altogether hereby dismissed in their entirety with costs. JUDGE 23

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