

TANZANIA / JUDGMENT

20250324 TZHC Dar es Salaam

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IN THE HIGH COURT OF TANZANIA AT DAR ES SALAAM MISC. CIVIL APPLICATION NO. 636 OF 2014 · PARDEEP SINGH HANS APPLICANT VERSUS DAR ES SALAAM CEMENT COMPANY LTD 1 ST RESPONDENT MEREY ALLY SALEH 2ND RESPONDENT

RULING

MKASIMONGWA, J By way of a Chamber Summons supported by an Affidavit sworn by ERIC SIKUJUA NG'MARYO Advocate the Applicant one PARDEER SINGH HANS, applies, under the provision of Order XXXVII Rule 5 of the Civil Procedure Code, Cap. 33 (R.E 2002) for the following:-

1. That this court be pleased to set aside its ex-parte order for injunction against the Applicant given on 24th November, 2011 in Civil Case No. 189 of 2011 and the subsequent inter-parties order given in the same matter on 7th March, 2012 confirming order of 24th November, 2011. Both orders having exceeded the Maximum period for injunctions allowed by the provisions of Order XXXVII Rule 3 of the Civil Procedure Code, Cap. 33 (R.E 2002).
2. That this court be pleased to give a consequential order to restore the applicant, Pardeep Singh Hans and all persons acting under him, into possession and Managerial Control of the Dar es Salaam Cement situated on Plot No. 62 - 64 Mbagala Industrial Area, Dar es Salaam.
3. That costs of this application be provided for
4. Any other relief this court will deem just and fit to grant. 1 In the supporting Affidavit Mr. ERIC SIKUJUA NG'IMBARYO avers to the effect that that, he is an Advocate duly instructed by the Applicant to represent him and depose this Affidavit. He was an Advocate for the Applicant (then 1st Respondent) in Civil Case No. 189/2011 filed in this court from which suit this application arises. Following an application made the plaintiff under Order XXVII Rule 1 (a), 2 (1), Section 68 (c), (e) and Section 95 of the Civil Procedure Code, Cap. 33 R. E 2002, to that effect, this court (Shangwa, J) did on 24th November, 2011 give interim ex-parte orders as follows:- "(a) That the Respondents, their agents, assignees and any person deriving authority from them are hereby restrained from interfering with the activities of the Applicant company notably the occupation, implementation and Management of the Applicant Company project namely construction of a Cement Factory on the applicant's site

situate on Plot 62-64 Mbagala Industrial Area, Dar es Salaam.

- (b) The 1st Respondent Mr. Pardeep Singh Hans, his agents, workmen, assignees and any person deriving authority from him are hereby ordered to vacate from the cement factory which is under construction at Plot No. 62-64 Mbagala Industrial area, Dar es salaam and hand over the Management of this factory to its sole owners on 26 th November, 2011 at 10.30 a.m. The respective Drawn Order and Ruling of the court were served upon Mr. Sarbjeet Hunjan, an employee of the Respondent Company then answerable to the Applicant, sometime on 25 th November, 2011 and Mr. Merely Ally Saleh whom the deponent believes to be the one expressed in the Ruling and Drawn Order given by Shangwa,J as "Sole owners" took over the Management and full control of the Dar es Salaam Cement Factory by a Handing over Deed executed by him and Sarbjeet Hunjan on 26th November, 2011. After hearing the 2 'i application inter-parties on 7th March, 2012 the court confirmed the initial ex- parte Ruling and order by stating that the status quo ante is preserved. To date the 2nd Respondents have neither made any application to extend the statutory period allowed for injunctions nor to do any diligent steps to settle the matter complained of in the First Respondent's ex-parte as well as the inter parties application for injunction. The Affidavit filed to support the chamber summons was responded by the Respondent who raised a Preliminary Objection to the effect that:-
1. The Application is fatally defective for the reason that in the Attestation clause in the Affidavit accompanying the Application, the Attestation Officer does not show whether he personally knows the deponent, or that the deponent has been introduced to him by another person known to him.
 2. The Application is time barred.
 3. The Application is fatally defective for reasons of wrong citation of the enabling provisions of the law viz a viz the orders that are sought by the Applicant.
 4. The Application is fatally defective for the reason that the deponent does not show how he came about the information in paragraph 4 which by deponent's own averments were results of Ex-pa rte proceedings.
 5. That, the Application is untenable in law in that paragraph 14 is argumentative and opinionated. In the alternative, the Respondents filed a Counter Affidavit sworn by MR. KIBATALA; the Respondents Advocate. In the Counter Affidavit Mr. Kibatata avers to the effect that, he is an Advocate for the Respondents having conduct of Civil Case No. 189 of 2009. He notes the contents of paragraphs 1 - 11 of the Affidavit of Mr. Erick Silungia Ng'amaryo, the Applicant's Advocate. He added that the documents referred to 3 in paragraph 12 had been duly considered by the court in the application for injunction and that they as well as their authenticity, weight and connotation if any, is subject to judicial scrutiny in the main suit at the right time. Mr. Kibatata avers further that from the Ruling of the court, the court has recognized Merey Ally Saleh as one of the sole owners of the Dar es Salaam Cement Company. As regards to paragraph 13 of the Affidavit, it is averred in the

Counter Affidavit that on 24th November, 2011 Ex-parte Injunctive Orders were issued to facilitate for continuing construction of Cement Factory a subject of the Main Suit. After Inter-partes hearing, on 7th March, 2012 the court ordered that status quo be maintained pending hearing and final determination of the main suit. Sometime the parties attempted to pursue an out of court settlement of the dispute, which failed due to un-shifting stands on both the Applicant and Respondents. The Respondents' Advocate one Mr. Erick Sikujua Ng'maryo, Peter Kibatala, the deponent and Advocate Magusu for Exim Bank (T) Ltd partook in these attempts to no avail. The parties therefore agreed to leave all outstanding matters for litigation. The court ordered for written submissions and that parties should simultaneously submit on both the Preliminary objection and the application. In the Respondents' written submissions in support of the points of objections against the application Mr. Kibatala abandoned the 3rd ground of the objection. He contended that a look at the attestation clause of the affidavit in support of the application clearly shows that the attesting officer does not indicate whether he personally knows the deponent, or that the deponent has been identified to him by another person who is known to the attesting officer. The Attesting Officers indication to that effect is a mandatory requirement that is part and parcel of the efficacy of the affidavit. It is a question of law and not a question of choice or convenience. Regarding to the second limb of the objection Mr. Kibatala submitted that the Application is time barred. As admitted by the applicant the Ruling of this court from which this application emanates was read on 24th November, 2011. If going by the Applicants' argument that the orders to maintain the status quo lapsed after a maximum of one year, this application should have been brought within 60 days from the date when the Ruling was delivered. This is by virtue of the provision of Item 21 4 Part III of the Schedule to the Law of Limitation Act [Cap. 89 R.E 2002] which provision carter for application whose limitations are not provided for by the Law of Limitation Act. This application is brought more than two years of the status quo orders contested. Mr. Kibatala also submitted that in paragraph 4 (a) and (b) of the Affidavit the deponent refers to matters that emanates from Ex-parte proceedings of this court of which he did not attend. As such the deponent could only have come upon this information by perusal of the court proceedings, which should have been reflected in the verification clause. The verification clause does not show that Advocate Mr. Ng'maryo has acknowledged how he came about the information and that fact renders the verification clause defective and liable to be struck out. Lastly Mr. Kibatala submitted, to the effect that paragraph 14 of the Affidavit is argumentative and opinionated in that it invites a counter argument regarding whether or not the Respondent has taken step to settle the matter. An affidavit that offends the rule against arguments and opinions must be struck out. In totality of the foregoing and with respect to the respective points of objection, Mr. Kibatala invites the court to find as submitted. On the other hand in his Written Submission refuting Preliminary Objection, the counsel for the Applicant submitted to the effect that, although the learned Advocate for the Respondent was supposed to file his submission in support of the preliminary objection by 20 th January, 2015, up to 29 th January, 2015 at 4.00 pm no submissions had been served from the learned Advocate for the Respondent. The Respondent had no justification or order of this court to file any submission in support of

the Preliminary Objection nine days after the due date. It follows therefore that the Preliminary Objection whose notice was filed by the Respondents has been unattended and therefore effectively abandoned. In what it seems to be the alternative to the submissions above, Mr. Ng'maryo, counsel for the Applicants stated that the objection as raised by the counsel for the Respondent has no merit. The first point of objection is spurious. The Learned Advocate, who attested the signature of Mr. Erick Sikujua Ng'maryo, clearly struck out the part indicting that the said Mr. Erick Sikujua was identified to him. As to the second point of objection, it is submitted by Mr. Ng'maryo that once an injunction has past its life time it is null and void, and delay in setting it aside does not give validation to such an order. The counsel submitted that, the citation of enabling provision of the law in respect of the Application is perfect. Paragraph 14 of the Affidavit stands correct. The contents in it are neither argumentative nor opinionated. The Learned advocate prays the court that it dismisses the objection with costs. ' In rejoinder Mr. Kibatala submitted reiterating that the attestation clause is ambiguous and it is not clear as it is alleged by Mr Ng'maryo. An ambiguous attestation clause cannot support a valid affidavit. It must be struck out. As to time limitations, it is submitted by Mr. Kibatala that there are set rules for an applicant to approach a Court of Law with an application. An applicant cannot choose to make a formal application as and when they wish on the pretext that an injunction as past its time and therefore null and void. The Applicant has moved the court to make such a finding, and as such laws of limitation apply and without reserve. This Application is time barred and must be dismissed with costs. As for ground 4 Mr. Kibatala reiterates that the Deponent had a duty to disclose the source of the information that he obtained from the Ex-parte proceedings which he was not a party. The proposition that the court can easily verify the averments in that paragraph by going back to the record is a desperate argument. As submitted earlier Mr. Kibatala remains of the same view that paragraph 14 of the Affidavit is both opinionated and argumentative. He added that the applicant's failure to respond to their argument and to hide behind "this is Respondent's misguided view" amounts to an admission. As for the application, Mr. Erick Sikujua Ng'maryo, learned Advocate for the Applicant submitted that following institution, of a Civil Case No. 189 of 2009 sometime on 17th November, 2011, on 23 rd November, 2011 this court issued an interim ex-parte. order restraining the applicant from interfering with the running of the Dar es Salaam Cement Company (DCC), construction process at Mbagala and the Applicant who was in possession and Manager Control of the DCC Cement factory at Plot 62-64 Mbagala Industrial Area, Dar es Salaam vacates the DCC Cement Factory and hands it over to its sole owner. The order was served the an officer of the applicant on 25 th November, 2011 at 2.40 pm and on 26th November, 2011 the DCC Cement Factory was handed over to Mr. Merey Ally Saleh as ordered by the court two days before. Mr. Ng'maryo submits further that the inter-parties application seeking for the same relief as it was in the application for ex-parte interim orders was not argued and ruled upon until on 7th March, 2012 that is after more than three months. In the ruling the court confirmed the ex-parte interim orders. Under Order XXXVII Rule 3 of the Civil Procedure Code, (Cap. 33 R. E 2002) - (the CPC), courts are allowed to grant orders for injunction. The legal life time of any injunction is 6 (six) months, where it is in the

interest of justice, necessary and desirable to grant the extension, the court granting the injunction may from time to time extend such period. This was the decision of this court (Mrosso, J as he then was) in the case of CAPCO TANZANIA LIMITED V /S SHARIF MANSOOR t/a MANSOOR SERVICE STATION [2002] TLR 99. It is 3 years and 1 week from the date when the ex-parte interim orders were given to the time this application was filed. Again it is 2 years and 9 months and 26 days from when the Inter-parties injunctive orders were given to the date of filing this application. At no time was there any attempt by the Respondent in this matter to extend the life time of the injunctions. It is also submitted that, an order to maintain "status qud" is the same as an injunction. This court's decision in the case of ALFRED MTATIRO V /S SHELTER CONSTRUCTION LYD AND OTHERS [2001] TLR 206 makes it clear that an order given to maintain "status qud" falls under the ambit of the prescribed lifetime for injunction. The injunction given against the present applicant has lapsed. It ought therefore to be set aside. Once and if this is done by this court, the present applicant prays to be fully restored to his possession and managerial control of the cement factory at plot No 62-64 Mbagala industrial Area, Dar es Salaam. On the other hand in the written submissions filed in opposition to the applicant's Application Mr. Kibatala, counsel for the Respondent stated that the submissions made by the applicant lack merit in law. This court issued orders maintaining Status Quo pending the Hearing and Final Determination of the main suit. The enactment of Order XXXVII Rule 3 of Civil the Procedure Code [Cap. 33 R.E 2002] was envisaged to operate 7 in the circumstances where cases are speedily resolved by the court within the parameters of the speed trucks. It was not the intention of the legislative that the court would permit, for example, a Bank to sell a property in dispute while the terms of the mortgage are being litigated in the court and the case takes more than 6 months because of inherent impediments such as illness of the Judges or presence of murder sessions or BRN (Big Results Now) Special Clearance Programs. The results would be not only unjust, but also observed. The counsel for the Respondent submitted further that the wording of the Ruling granting injunctive orders are very important. According to Mr. Kibatala there is a huge difference between where a court holds "temporary injunction is hereby granted" and "Status Quo is maintained pending the Hearing and Final Determination of the main suit". The decision in ALFRED MTATIRO case cited by the Applicant must be construed in its own limited and peculiar context. Issues raised by the Applicant such as of sole ownership had relevance during hearing of the application for injunction, and upon issuance of the injunctive orders this court becomes fantus officio vis a vis them until hearing of the main suit and if the applicant wishes to have them re-addressed they should proceed by way of Review, not a disguised Review cum Application for setting aside injunctive orders, rolled into one. The counsel added that in the applicant's submissions, the Applicant makes a . prayer for restoration of the Applicant to the premises. The prayer suggests to the court that it decides the main suit and assigning rights at this juncture and invites the court to commit an error by deciding a case's merits during interlocutory application. Mr. Kibatala ended by submitting that the orders given by the court are clear and unambiguous that the states quo to be maintained pending hearing and final determination of the main suit. As such the applicant's application is untenable and

must be dismissed with costs. If the applicant is of the opinion that there were factual or other errors contained therein, he should be advised. The record is silent if the applicant filed any submission by way of rejoinder and that marks the end of the submissions. Going by the submissions made by the 8 respective counsels for the parties, the plaintiff in Civil Case No. 189/2011 of this court made inter parties an application for an order of temporary injunction:-

- (i) Restraining the Respondents (Defendants), their assignees and any person deriving Authority from them from interfering in any way with the activities of the Applicant particularly the Applicant's project, namely construction and Management of the Applicant's Cement Factory on the Applicant's site situate at Plot No. 62-64 Mbagala Industrial area, Dar es Salaam pending hearing and final determination of the main suit herein. (ii) Directing the Respondents to release and allow access and handover Management of the Applicant's Project, namely, a Cement Factory on . the Applicant's site located at Plot No. 62-64 Mbagala Industrial Area, Dar es Salaam thus maintaining status quo pending hearing and final determination of the main suit herein. The Application was made under Order XXXVIII Rule 1 (a), 2 (1), Sections 68 (c)
- (e) and 95 of the Civil Procedure Code [Cap. 33 R.E 2002]. After hearing it the court (Shangwa, J) had this to say: "For these reasons, I grant this application for a temporary injunction to restrain the Respondents, their against, assignees and workmen from interfering with the activities of construction and Management of the Cement Factory in issue" The Honourable Judge went on making an order in the following words:- "I now order that the status quo ante should be maintain pending the hearing of the main suit between the parties." These orders were given on 7th March, 2012. On the 2nd December, 2014, this present application was filed in court by the applicants seeking for orders as shown above. The Respondents raised preliminary objections as again shown above. The case of MUKISA BISCUIT COMPANY LTD VS WEST END DISTRIBUTORS LTD (1969) EA 696 which was discussed with approval by the Court of Appeal of Tanzania, in MECHMAR CORPORATION (MALAYSIA) BERHARD V/S VIP ENGINEERING 9 AND MARKETING LTD, CIVIL APPLICATION NO 9 of 2011, DAR ES SALAAM (Unreported) defines the terms "preliminary objection" as:- "a point of law which has been pleaded, or which arises by clear implication out pleadings and what if agreed as a preliminary point may dispose of the suit". In the Notice of Preliminary point of the objections the counsel for the Respondent raised five ground_s. Of the five grounds I prefer to discuss first in which the counsel for the Respondents say that the application is time barred. As stated above, this application is brought under Order XXXVIII Rule 5 of the Civil Procedure Code [Cap. 33 (R. E 2002)]. For easy of reference, the Rule is reproduced hereunder. "Any order for injunction may be discharged, or carried, or set aside by the court on application made thereto by any party dissatisfied with such order" Why this Application is made? The reason is stated in the chamber summons and that is: the injunctive orders have exceeded the maximum period for injunctions allowed by the provisions of Order XXXVII Rule 3 of the Civil Procedure code, [Cap. 33 R.E 2002]. This is echoed by Mr. Eric Sikujua Ng'maryo, the learned advocate, in his submission where he states that under Order

XXXVII of Rules 3 of the CPC, the court is allowed to grant an order for injunction and such order shall be in force for a period as specified by the court but, not exceeding six months. The learned Advocate added that under the proviso to the Rule, the court granting the injunction may, from time to time extend such period for a further period which in aggregate shall not exceed one year. It has been held in many cases including that of ALFRED MTATITO (Supra) that under Order XXXVII, Rule 3 of the Civil Procedure Code as amended by G.N. 508 of 1991 a temporary injunction lasts for 6 months unless the period is extended to that which, however, should not exceed 12 months aggregate. The issue is where the legal lifetime of a temporary injunction order ends what course should a party against whom it was made should take to relieve himself of the effects of the order? In my view for the proper administration of justice it will not be wise for that person to simply rise and 10 I I proceed into, doing, saying or writing etc. what was restrained from being done, said or written in order to stay and preventing wasting, damaging alienation sale, loss in value, removal or disposition of the property. As it has been done by the applicant, there must be an application to the court for an order declaring the order for temporary injunction as being of no effect following lapse of legal time/period of its existence. That application must be brought under a proper provision of law and within a period of time prescribed by the law regarding limitation of time. This application was brought under Order XXXVII Rule 5 quoted above. Going by the Rule, the same was enacted to enable a party who is aggrieved by an order for injunction, to apply to the court to have it discharged, varied or set aside. It is a common sense that a competent court cannot discharge, vary or set aside its order or order of another court which in the eyes of the law does not exist. This Rule presupposes therefore the order against which an order to vary, discharge or set it aside, is a live order. As such, the provisions of order XXXVII of Rule 5 of the Civil Procedure Code cannot be properly cited as an enabling provision in moving the court to declare the temporary injunction as of no effect. Although Mr. Kibatala sought to abandon his 3rd ground of the preliminary objection I find the same to have merits. Secondly, the right to apply for an order declaring a temporary injunction order as of no legal effect due to lapse of the legal period of its existence, accrues when that period elapses. In my view such applications should be brought under the Civil Procedure Code. It is unfortunate that the Code does not provide for a specific period of time in which the application shall be brought. Under such a situation, the Law of Limitation Act comes into play. Item 21 of Part III of the Schedule to the Law of Limitation Act [Cap. 89 R. E 2002] covers for this like a situation. The Item provides for Sixty days period of Limitation for applications under the Civil Procedure Code, the Magistrates Court Act or other written laws for which no period of limitation is provided in the Law of Limitation Act or any other written law. As it has been clearly shown the orders for injunctions were given on 11 March, 2012. There was no any extension of time granted by the court to extend the legal life time of the orders. Surely by 6th 11 September, 2012, the Applicant had the right to apply to the court for an order to declare the order of temporary injunction as of no legal effect. The attempt, if any, came on 2nd December, 2014 that and more than two years after the accrual of the right to apply. This was done without seeking for an obtaining leave of the court to file the application out of time. From the foregoing

discussion, I find this court was wrongly moved by citing a wrong enabling provision of law regarding the orders sought by the applicant. I also find the attempt to have the orders set aside/declared of no legal effect caught by limitation of time. As such the application is misconceived and time barred and it is accordingly dismissed. No order is made as to costs. E.~ JUDGE 24/3/2025 12

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