

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA COMMERCIAL DIVISION AT  
PAR ES SALAAM MISC. COMMERCIAL APPLICATION NO. 9714 OF 2024 (Arising from  
Commercial Case No. 103/2022) Z. A. S INVESTMENT COMPANY LIMITED.....  
APPLICANT VERSUS EQUITY BANK TANZANIA LIMITED..... 1st RESPONDENT  
EQUITY BANK KENYA LIMITED..... 2nd RESPONDENT

**RULING**

Date of last Order: 15/05/2024 Date of Ruling: 30/05/2024 GONZI, J. The applicant through the services of her counsel Ms. Halima Semanda, learned advocate, lodged the present application under certificate of urgency praying for maintenance of status quo in Commercial Case No. 103 of 2022 which is pending before this court and whose judgment is fixed to be delivered on 11th June 2024. To quote from the Chamber Summons the Applicant prayed for orders that: 1

- i) That the Honourable Court be pleased to make an interim order for maintenance of status quo in Commercial Case No. 103 of 2022 pending hearing and final determination of the Commercial Case No. 103 of 2022. ii) Costs of this Application be provided for by the Respondents. iii) Any other orders as this Honourable Court deems just and fit to grant. The Application was brought under Order XLII Rule 2 and Sections 68(e) and 95 of the Civil Procedure Code, Cap 33 of the Laws of Tanzania. It was supported by an affidavit of Amit Ladwa, a principal officer of the applicant company. The application is resisted by the Respondents who have filed a counter affidavit of Priscilla Clemence, a principal officer of the Respondents. Mr. John Kamugisha, William Magena and Jasbir Mankoo, learned Advocates represented the Respondents. The brief background of the application is that the applicant filed Commercial Case No. 103/2022 in this court seeking, inter alia, a declaration that the banking facilities between the Applicant the 2 Respondents issued in February 2019 did not take effect in law and were never issued. While Commercial Case No. 103/2022 was pending in this court, the Applicant vide Misc. Commercial Application No. 211/2022 successfully applied for an interim injunction against the respondents which was granted on 11th April 2023. In the Ruling of Misc. Commercial Application No. 211/2022 dated 28th April 2023, Hon. Agatho, J., ordered that: "This order is granted to restrain the respondents from undertaking recovery measures against the applicant pending determination of the main suit. Concomitant to that the applicant is ordered not to dispose or anyhow dealing with the

properties mortgaged to the detriment of the respondents." After lapse of 6 months, on 19th October 2023, the interim injunction automatically expired as the life span of an interim injunction is six months. Therefore, the Applicant filed Misc. Commercial Application No. 161 of 2023 against the respondents seeking to extend the life span of the interim injunction. In its ruling delivered on 22nd March 2024, this Court (Hon. Agatho, J.) declined to extend the life span of the interim injunction. 3 "In the application at hand the applicant told the court that she was afraid that the respondents might dispose the collaterals as part of the recovery measures. However, there is nowhere in the affidavit that she had testified that the loss cannot be compensated in monetary terms. For that reason, the applicant's claim that she will suffer more loss than the respondents is unjustifiable as held in *Continental Reliabilities Clearing v. Equity Bank Tanzania Limited* and another Misc. Commercial Application No.24 of 2023 HCCD at DSM. That also means that some conditions set in *Atiio v Mbowe* (supra) have not been met such as the irreparability of the loss." Still desirous to have a protective order in her favour against the respondents pending the determination of the Commercial Case No. 103/2022, the applicant has filed the present application under a certificate of urgency seeking for the status quo in Commercial Case No. 103/2022 to be maintained pending the determination of that case. During the hearing of the application, Ms. Halima Semanda, learned advocate for the applicant, adopted the applicant's affidavit. Then she 4 submitted that although an order of interim injunction and an order of status quo appear to be the same, the two applications and orders are different. She argued that, therefore, this application is not a repetition of the Misc. Commercial Application No. 161/2023 which was seeking for an extension of the period of the interim injunction and which was declined by the court. She submitted that an order of status quo can be granted where there is a looming danger upon the applicant such that if the order is not granted, the consequences will be greater than if it is granted. On the other hand, she argued, the grounds for an application for temporary injunction as prescribed in the case of *Atilio versus Mbowe* (1969) HCD 284, are existence of prima facie case, irreparable loss and balance of convenience. She submitted that the difference in grounds is what differentiates the application for injunction from an application for an order of maintenance of status quo. He relied on the case of *Walji and 4 Others versus Forsters Auctioneers*, Misc. Commercial Application No. 55 of 2019 to substantiate her foregoing submissions. Ms. Halima Semanda, learned advocate submitted that there are triable issues in Commercial Case No. 103/2022 and that the hearing of the main case as well as the counter claim in that case is complete and that both 5 parties are waiting for the delivery of Judgment on 11th June 2024. She submitted that while that case is pending determination in a few weeks to come, the Respondents have started to enforce recovery measures in respect of the disputed credit facilities including the appointment of receivers' managers in the names of Stephen Axwesso and Godwin Nyaisa who have started recovery measures hence creating a looming danger upon the applicant such that unless the order of maintenance of status quo is granted the applicant will suffer greater hardship. Ms. Semanda submitted that it is not strange for a court to decline an order of injunction and yet proceed to issue an order for maintenance of status quo in the same case. She cited the case of *Continental Reliable*

Clearing Limited versus Equity Bank (T) Limited, Commercial Application No. 24 of 2023 to support her argument that the court had declined to grant an application for temporary injunction for lack of merits and then it later on went ahead and granted an order for maintenance of status quo in the same case pending determination of the main suit. The learned counsel for the applicant argued that the aim of the order for maintenance of status quo which is sought in this application, is to preserve the status of the matter temporarily pending delivery of the 6 decision in Commercial Case No. 103/2022. She argued that while parties are waiting for the judgment in the main case, the respondents are in the process of disposing of the securities for the disputed credit facilities. If not stopped, she submitted, this will defeat the purpose of sections 68(e) and 95 of the Civil Procedure Code. The disposal of the securities, she argued, is evidenced by the advertisements by the Respondents' agent named Citiland Company Limited which has published in newspapers, inviting the public to purchase by auction, the landed properties of the applicant secured by deed of assignment by the Applicant. She submitted that as it can be gathered from the affidavit in support of the present application, the applicant's landed properties liable to be sold by the Respondents' agent is Plot No. 1520, 1521, 1523, with CT No. 41371, Msasani Peninsular, Dar es Salaam. She submitted that if the property will be auctioned as advertised in the Habari Leo Newspaper of 2nd May 2024, it will expose the Applicant to danger of losing the securities. She argued that the hardship likely to be suffered by the Applicant will be greater than those likely to be suffered by the respondents if the order is granted. Mr. Kamugisha, learned advocate for the Respondents replied to the submissions by the applicant's learned counsel. After adopting the 7 Respondents' counter affidavit, Mr. Kamugisha, learned advocate for the respondents, submitted that this court is now functus officio to entertain the present application after it heard and dismissed on merits the Misc. Commercial Application No. 161/2023 which was seeking extension of the temporary injunction until date of delivery of the Judgment in Commercial Case No. 103/2022. Mr. Kamugisha, learned advocate submitted that the aim of the order of maintenance of status quo which is being sought under the current application is the same like the aim of the order of temporary injunction which was sought by the applicant in Misc. Commercial Application No. 161/2023. He argued that the cannot aim of the two orders to restrain the parties to do anything over the mortgaged properties pending final determination of the suit. He argued that as the court has already heard the same parties on the application for temporary injunction and refused to grant the application, this court is now functus officio to determine the present application that is essentially seeking the same remedy since the purposes of the two orders is the same. Mr. Kamugisha cited Misc. Land Application No. 493 of 2023 between Petro versus Trustees of PSSSF and 3 others where at page 6 the High Court held that maintenance of status quo is also a temporary injunction as both 8 parties are restrained from doing anything affecting the current status of the suit. Mr. Kamugisha learned advocate also cited the case of Vodacom Tanzania PLC versus Planetel Company Limited (2019) TZCA where at page 9 the Court of Appeal of Tanzania held that the purpose of a temporary injunction is to maintain the status quo until the matter is determined. Mr. Kamugisha learned advocate for the Respondents submitted that an order for maintenance of status quo is not different from an order of temporary

injunction which the court has already refused to grant in Misc. Commercial Application No. 161/2023, as such the application is an attempt by the applicant to get the same order which was denied by this very court but now the applicant has come through the back door of second bite application which is not a valid procedure before the High Court. Mr. kamugisha argued further that the application at hand has been overtaken by events as it seeks to stop or prevent the appointment of receiver's managers in respect of the applicant's landed properties put as security for the credit facilities while the said receivers' managers have already been appointed and are at work. He pointed to Annexure ZAS 5 to 9 the affidavit and annexure R-2 to the counter affidavit as proof of appointment of receiver's managers on 28th March 2024. Mr. Kamugisha submitted that an order of status quo cannot quash the action of the respondents which has already been done. He added that the appointed receivers against who this order is sought are not even parties to this application. He argued that the application is also fatally defective as adverse orders affecting rights of the appointed receivers' managers who are necessary parties, cannot be issued against strangers to the case. Mr. kamugisha relied on the case of Abdulatif Mohamed Hamis versus Mahamud Yussuf Othman (2018) decided by the Court of appeal of Tanzania where it was held that failure to join a necessary party makes the proceedings a nullity. Mr. Kamugisha concluded by submitting that the affidavit supporting the application does not contain sufficient facts to support the application for maintenance of status quo. He submitted that the mere pendency of Judgment in Commercial Case No. 103/2022 does not warrant the granting of the order of maintenance of status quo in absence of credible reasons in the affidavit. He submitted that the appointment of the receivers' managers 10 by the Respondents is not a danger rather it is a right of the Respondents under the mortgage agreements. Mr. Magena learned advocate accompanying Mr. Kamugisha added one point that actually in the case of Continental Reliable versus Equity Bank Tanzania Limited (supra) cited by the applicant's counsel, the court firstly had dealt with an application for grant of status quo and granted it, then it determined an application for temporary injunction and declined to grant the same. It was not the other way round. In rejoinder, Ms. Semanda submitted that the orders of maintenance of status quo and temporary injunction have the same aim but they are based on different grounds or conditions and therefore the application at hand is not a repetition of the application for an interim injunction which was made by the applicant and refused by the court. Hence, she argued that the court is not functus officio in this application. Further, Ms. Semanda submitted that the application is not overtaken by events and it is not sought against strangers to the application. She argued that the receivers' managers are acting under instructions of the Respondents herein and therefore once an order is made against the 11 respondent's the respondents can, in turn, issue directions to the receivers' managers accordingly. She argued that the order against the principals will also bind the agents. On the argument that in the case of Continental Reliabilities (supra) the order of status quo was sought before an application for injunction, Ms. Halima Semanda argued that reading through the Ruling of the Court it is clear that there were typing errors, but the correct position is that the court issued an order for maintenance of status quo after it had rejected the application for temporary injunction. That was the end

of the submissions by the learned counsel for the parties. The first issue to be determined is that raised by the learned counsel for the Respondents Mr. Kamugisha and Mr. Mang'ena who argued that this court is now functus officio to determine the application at hand after having determined a similar application between the same parties in respect of the same subject matter vide Misc. Commercial Application No. 161/2023 and refused an extension of life span of the temporary injunction which had earlier on been granted to the Applicant. In the Black's Law Dictionary, Ninth Edition, the term functus officio is defined at page 743 as follows: 12 "[Latin having performed his or her office"] (19c) of an officer or official body without further authority or legal competence because the duties and functions have been accomplished..... . From the definition given above for the doctrine of functus officio to apply, the court must have fulfilled its function by determining the question in dispute, and therefore, subject to the power of review and correction of errors,.... of no further force or authority on the question determine. " The Court of Appeal for Eastern Africa in KAMUNDI V R (1973) EA 540, had the occasion to enlighten on the doctrine of functus officio. The Court of Appeal among others, stated: "A further question arises, when does a magistrate's court become functus officio, and we agree with the reasoning in the Manchester City Recorder case that this case 13 only be when the court disposes of a case by a verdict of not guilty or by-passing sentence or making some orders finally disposing of the case" (emphasis added). Under the doctrine of functus officio, I will have no jurisdiction now to determine the application for maintenance of status quo in respect of the landed properties in dispute in Commercial Case No. 103/2022, if indeed the same issues were determined by this very Court (Hon. Agatho, J.) in Misc. Commercial Application No. 161/2023. That is why I have to start my decision with this issue as, in my view, it goes to the root of my jurisdiction. As it was stated in the "MV Lilian S" case [1989] 1 eKLR that: - "Jurisdiction is everything, without it, a Court has no power to make one more step. Where the Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction." 14 In this case it is not disputed by the parties that Commercial Case No. 161/2023 was in respect of the same landed properties securing the disputed credit facilities which form part of the Commercial Case No. 103/2023 between the same parties. It is not disputed that the application for an extension of a temporary injunction was made by the Applicant against the same Respondents herein and the court (Hon. Agatho, J.) sitting in this court declined to grant the application for an extension of the life span of the temporary injunction. It was argued by Ms. Halima Semanda, learned counsel for the applicant that an application for temporary injunction and an application for maintenance of status quo are different with different grounds. Further that the issues being raised in the present application for maintenance of status quo have not been determined by the Court in Misc. Commercial Application No. 161/2023 between the same parties and hence the court now is not functus officio to determine the application at hand. The difference which Ms. Halima Semanda, learned advocate advanced is with respect to the grounds for granting an application for maintenance of status quo which are existence of looming danger such that if the application is not granted the applicant will suffer greater loss whereas the grounds for

the granting of a temporary injunction are existence of triable issues or prima facie case, likelihood of the applicant to suffer an irreparable loss and balance of convenience tilting in favor of the applicant. Mr. Kamugisha, learned counsel for the respondents on the other hand argued that the purposes of the two orders is the same such that the present application is in fact an attempt by the applicant to secure a temporary injunction through the back door after having attempted, in vain, to secure a temporary injunction in Misc. Commercial Application No. 161/2023 before Hon. Agatho, J. Are the orders of maintenance of status quo and temporary injunction the same? My answer is unwavering in the negative. The two orders have a common background in equity, are intended to achieve a similar objective and at times they are used interchangeably by litigants knowingly or unknowingly. However, in their proper contexts, they are completely different; each with its own sphere of dominance, scope of application and distinct grounds which at times coalesce and overlap each other. A brief exposition in respect thereof is necessary for the purpose of the present application. As to the common ancestry of the equitable orders of temporary injunction and maintenance of status quo, I find the following excerpt useful and I would like to quote it in extenso. In the article authored by Thomas R. Lee entitled "Preliminary Injunctions and the Status Quo," published in Washington and Lee Law Review, Volume 58 Issue 1, Winter 1-1- 2001, it is observed that: "The seeds of the modern notion of a special standard for preliminary injunctions were sown in the seventeenth and eighteenth centuries. During this era, the Court of Chancery began to speak in terms of irreparable harms and of an assessment of the outcome on the merits. In *Tonson v. Walker*, (36 Eng. Rep. 1017 (Ch. 1752) for example, the Lord Chancellor proceeded on the premise that "if the case is doubtful, that may be a ground to grant an injunction until the matter can be considered at the hearing." In other cases, the Chancellor expressly began to speak of balancing hardships, concluding in one case that an interlocutory injunction "was very proper to stay [defendants] from doing an act, which if it turned out they had no right to do, would be irreparable," while refusing in another to enjoin defendants because "in case the right should be found with them, they would by such prohibition receive a prejudice that he could not compensate nor make good to them. By the nineteenth century, the Court of Chancery first began to speak of the role of preliminary injunctions in preserving the "status quo." The court's seminal use of this phrase seems to have appeared in *Great Western Railway Co. v. Birmingham & Oxford Junction Railway Co.* (41 Eng. Rep. 1074 (Ch. 1848). In that case, the plaintiff Great Western Railway Co. entered into a contract to purchase the defendant railway upon its completion. The contract provided that all parties would concur in an application to Parliament to secure any necessary powers to carry the agreement into effect. Before the contract was fulfilled, defendant began to construct its railway in a manner inconsistent with the contract and took steps toward selling the railway to a third party. Great Western sued for specific performance and sought a preliminary injunction against the defendant's disposition of its railway; the Court of Chancery affirmed the issuance of such injunctive relief. In so doing, Lord Cottenham articulated the purpose of preliminary relief in terms familiar to the modern ear: "It is certain that the Court will in many cases interfere and preserve property in status quo during the pendency of a suit, in which the rights to it are to be decided, and

that without expressing, and often without having means of forming, any opinion as to such rights.... It is true that the Court will not so interfere, if it thinks that there is no real question between the parties; but seeing that there is a substantial question to be decided, it will preserve the property until such question can be regularly disposed of." The above passage quoted in extenso shows that the origins of an order for maintenance of status quo and temporary injunction is the same. They are both equitable reliefs which were developed by the Chancery Court. The purpose of an order of temporary injunction is to preserve the status quo in the case. This shared purpose was also expressed in the case of Vodacom Tanzania PLC versus Planetel Company Limited (2019) TZCA where at page 9 the Court of Appeal of Tanzania held that: 19 "Therefore, the purpose of an injunction in law is said to be interlocutory when granted in an interlocutory application and continues until a defined period. It aims at preserving the status quo until the final determination of the main application or suit." Though the two orders have a shared purpose, they are different. The term "Status quo" is a Latin phrase which refers to current situation. In law, the phrase "status quo" describes the current state of affairs. To prevent any of the parties to a dispute from acting while the matter is still being adjudicated, a judge may issue a status quo order. In order to protect a party's position while awaiting a settlement, it seeks to prevent harm or maintain the current status. Perhaps the most clearer explanation of what amounts to status quo is the one given in Transport Company of Texas versus Robertson Transports Inc. 152 Tex 551, the Supreme Court of Texas in 1962 defined status quo as: "The last, actual, peaceable, non-contested status which preceded the pending controversy." 20 As for the temporary injunction, in Dalpat Kumar and another versus Prahlad Singh and Others, the Supreme Court of India, in 1991 defined an injunction that: "Injunction is a judicial process by which a party is required to do or refrain from doing any particular act. It is in the nature of a preventive relief to a litigant to prevent future possible injury. In other words, the court, on exercise of the power of granting an interim injunction, is to preserve the subject matter of the suit in the status quo for the time being. It is settled law that the grant of an injunction is a discretionary relief." There are many differences between an order for maintenance of status quo and an order for temporary injunction, but for the purpose of this ruling I will restrict my analysis to only three such differences and apply them to determine the issue of this Court being functus officio to determine the application before me. The first difference pertains to the grounds. Ms. Halima Semanda, learned advocate properly distinguished the grounds for seeking an order for maintenance of status quo and one for temporary injunction. To give more 21 legal footing to her distinction, I will simply quote from refer to Miscellaneous Commercial Application No. 55 of 2019, Quality Corporation Limited and 4 Others versus Forsters Auctioneers & General Traders and NBC Ltd, where this Court through Hon. Fikirini, J., (as she then was), stated at page 10 of the Ruling that: "Coming to the application before this Court, the applicant is essentially seeking maintenance of status quo or stay of execution and restitution of the property. Each of the prayed relief has its requirements to fulfill before the said application is granted. With the stay of the status quo the applicant has to show that there is imminent danger looming upon the applicant and if no such step is taken or order is given the consequences and hardships to be faced will be

greater than if the order is given. Also, this order when given its intention is to see that the status remains as it is when the application was being made. This is different from temporary injunction which has three requirements to be fulfilled as propounded in the case of *Attiiio vMbowe* (1969) H.C.D. 284. 22 The following three principles has to be observed prior to the grant of injunctions. Those principles are: 1. That there must be a serious question to be tried on the facts alleged and a probability that the plaintiff will be entitled to the relief prayed. 2. That the court's interference is necessary to protect the plaintiff from the kind of injuries which may be irreparable before his legal rights is established, and 3. That on the balance there will be greater hardship and mischief suffered by the plaintiff from withholding of the injunction than will be suffered by the defendant from granting it." Apart from their grounds, the second difference is in respect of scope of coverage of the prohibition or restriction contained in the order. This refers to the subjects of the order or the persons on whom the order attaches. Injunction order restrains the defendant(s) covering his legal representatives, employees, agents, his friends or anyone claiming title through such defendant(s) alone; whereas the status quo order binds only the defendant(s) as well as the plaintiff against alteration of the existing situation/status of the property. It binds the parties to the suit only, (see <https://www.lawweb.in/>) 23 The third material difference is with respect to the nature of the interest protected by the two orders. This refers to what is prohibited or restricted by the order of status quo and an order of temporary injunction. Perhaps this difference is better explained in the following two references. From an online platform [www.lexspeak.in](http://www.lexspeak.in), it is explained that: "If a Court order maintaining the status quo on the property it means that two components of the property come under the purview of status quo; one is the possession and the other is the title. When status quo is ordered when a suit is instituted then the person who is holding the possession and title shall retain such possession and title until the suit is disposed of Basically status quo is ordered to prevent the third-party interests in the property that is with respect to leasing, selling, mortgaging, gifting or any act which is done to transfer the interest in the property. However, if a status quo is ordered then a party who is in the possession of the property will be free to enjoy the possession of the property as he feels like, he shall be free to continue to do his business or use the 24 property as he was using, the only restriction is on the transfer of rights, title or interest in the property to a third person." More authoritatively, the third difference is judicially exposed by the decision of the Indian case of *N. Ramaiah vs. Nagaraj S. & Others*, AIR ,2001. In this case the Court had entered an order that "status quo be maintained" and subsequently the property subject of the status quo order was included in a Will. In an application for contempt of court for violation of the order of status quo, the court considered the implications of an order for maintenance of status quo and whether the inclusion in the will, of the property subject of an order of status quo, eroded the interest protected by that order. It was held as follows, and I quote in extenso: "The differences between a transfer and a Will are weii-recognised. A transfer is a conveyance of an existing property by one living person to another (that is transfer inter vivos). On the other hand, a Will does not involve any transfer, nor effect any transfer inter vivos, but is a legal expression of the wishes and intention of a person in regard to his

properties which he desires to be carried into effect after his death. In other words, a Will regulates succession and provides for succession as declared by it (testamentary succession) instead of succession as per personal law (non-testamentary succession). The concept of transfer by a living person is wholly alien to a Will. When a person makes a Will, he provides for testamentary succession and does not transfer any property. While a transfer is irrevocable and comes into effect either immediately or on the happening of a specified contingency, a Will is revocable and comes into operation only after the death of the testator. Thus to treat a devise under a Will as a transfer of an existing property in future, is contrary to all known principles relating to transfer of property and testamentary succession. The learned Single Judge proceeded on a wrong premise when he observed that execution of a Will by a testator devising his property, amounts to execution of a document creating new right, title or interest in a property and therefore execution of a Will violates the order of status quo. No Court has the power to make an order, that too an interim order, restraining an individual from exercising his right to execute a Will and thereby regulate succession on his death. A direction to a party to maintain status quo in regard to a property does not therefore bar him from making a testamentary disposition in regard to such property. By making a Will, the testator neither changes title nor possession in regard to a property nor alters the nature or situation of the property nor removes or adds anything to the property. In short the testator, by making a Will does not alter the existing state of things in regard to the property. It follows therefore that making of a Will in regard to a property does not violate an order of status quo in regard to such property, and consequently, the testamentary disposition is neither void nor voidable." Reading carefully the above reproduced passage, it becomes clear that an order for maintenance of status quo has limited restrictions. It only prohibits changes in title or possession in regard to a property or altering the nature or situation of the property or removing or adding anything to the property. The scope of prohibition in the temporary injunction, on the other hand, is limited by the wishes of the applicant in the way he crafts the orders sought depending on the circumstances of the case. A snapshot of the law on interim injunction and maintenance of status quo, therefore, ultimately, yields the following take-aways. One, the two orders aim at the same purpose that is to protect the status quo of the matter in dispute pending determination of the pending suit. Two, an order of maintenance of status quo is minor cognate to the order of temporary injunction. In other words, they are of the same species but within an order of temporary injunction, all elements of an order for maintenance of status quo are found, but the opposite is not the case. All the grounds for granting an order of maintenance of status quo are also among the grounds for temporary injunction and yet injunction has more grounds which do not apply to the order for maintenance of status quo. The grounds of looming danger upon the applicant such that if the order is not granted, the consequences will be greater than if it is granted; are merely lexical variations of the grounds of irreparable loss and balance of convenience which apply in a temporary injunction. The parties upon whom the order for maintenance of status quo binds, that is the parties to the suit are also the parties upon whom an order for temporary injunction may attach; and yet injunction may attach to more than the parties to the suit. The extent

of prohibition which is the subject of an order for maintenance of status quo, namely restrictions on changes in title or possession of the property or altering its nature or situation or removing or adding anything to the property, are also restrictions covered by an order of temporary injunction. Yet, an order of temporary injunction is capable of imposing more restrictions or prohibitions over and above the restrictions typically in the domain of an order for maintenance of status quo. I am of the settled view that if a temporary injunction is a set, then maintenance of a status quo order is a sub-set thereof. One who exhausts the remedy of temporary injunction does not any longer have the remedy of maintenance of status quo in respect of the same property, in his menu. But one who exhausts the remedy of maintenance of status quo, may, in appropriate circumstances upgrade to applying for the order of temporary injunction. By applying for maintenance of status quo, one does not thereby exhaust all the elements of a temporary injunction. At this juncture I should state that the learned counsel for the Applicant in her submissions misconceived the rule in *Continental Reliable Clearing Limited versus Equity Bank (T) Limited* (supra). That case did not grant an order for 29 maintenance of status quo subsequent to refusal to grant an order of temporary injunction. The application was sought for *ex parte* and *inter partes* injunction. The Honourable Judge declined to grant *ex parte* injunction but granted an order for maintenance of status quo and proceeded to determine the application *inter partes* where he declined to grant the temporary injunction, on lack of merit. This is evidenced by reading at page 4 of the Ruling of Hon. Agatho, J., where he stated: "On 27th day of February 2023 this application as noted above was preferred among others, under certificate of urgency, was brought to my attention and on that date, I refused to entertain *ex-parte* prayers instead I ordered that the applicant to immediately serve both respondents, and if wish, to file a counter affidavit. However, considering the application and interest of justice, I ordered parties to maintain status quo pending the hearing of this application *inter-parties* as such the application by consensus was scheduled for hearing *inter-parties* and on Sfh March, 2023 and the court ordered the application be argued by way of written submissions." 30 The record of the court contradicts what was submitted by the learned counsel for the applicant. I have gone through the entire Ruling in Misc. Commercial Application No. 161/2023 between the same parties herein in which the applicant was applying for an order of a temporary injunction. In Misc Commercial Application No. 161/2023, the Chamber summons was made under section 68(c) and (e); Order XXXVII Rules 1(a), 3 and 4 and Order XLIII Rule 2 of the Civil Procedure Code Cap 333 and contained the following prayers: "That the court order extension of the duration of the temporary injunction dated 2(fh April 2023 granted in Commercial Case No. 103 of 2022 to restrain the Respondents or their agents, servants, assigns or whomsoever will be acting under their instructions or authority from selling any collaterals and from taking any step towards recovering USD 8,382,836.90 being USD 5,771,319.90 for the 1st Respondent and USD 2,611,517 for the 2fd respondent and any interests and penalties therefrom, the applicant resulting from banking facilities 31 between the applicant and the respondents pending hearing and final determination of the Commercial Case No. 103 of 2022." In determining the issues related to the granting of a temporary injunction, Hon. Agatho, J., in

his Ruling dated 22nd March 2024, at page 4 stated: "In the application at hand the applicant told the court that she was afraid that the respondents might dispose the collaterals as part of the recovery measures. However, there is nowhere in the affidavit that she had testified that the loss cannot be compensated in monetary terms. For that reason, the applicant's claim that she will suffer more loss than the respondents is unjustifiable as held in *Continental Reliables Clearing v. Equity Bank Tanzania Limited* and another Misc. Commercial Application No.24 of 2023 HCCD at DSM. That also means that some conditions set in *Atiio v Mbowe* (supra) have not been met such as the irreparability of the loss." The drawn Order in Misc. Commercial Application No. 161/2023 reads that: "the application is declined for want of merit." 32 I am fortified in my finding that inevitably, the relevant issues during an application for granting of an order for maintenance of status quo inevitably and pervasively impose themselves in the issues for consideration of an application for an order of temporary injunction. I am also fortified in my finding that the said relevant issues for granting an order for maintenance of status quo in this case were actually explicitly raised and determined on merit by this court in Misc. Commercial Application No. 161/2023. I am therefore decidedly of the settled position that the issues now brought before me have already been finally determined by this court in Misc. Commercial Application No. 161/2023. In that regard, sitting in this very Court now, I am functus officio and further that the issues before me are debarred under the doctrine of issue estoppel from being re-litigated upon before this court. The doctrine of issue estoppel would debar this Court to re-open and determine once again the issues of irreparable loss and balance of convenience now brought under the name-tag of looming danger and greater loss, which issues under their proper name tags were determined in Misc. Commercial Application No. 161/1013 and the Court held that "However, there is nowhere in the affidavit that she had testified that the 33 loss cannot be compensated in monetary terms. For that reason, the applicant's claim that she will suffer more loss than the respondents is unjustifiable as held in *Continental Reliables Clearing v. Equity Bank Tanzania Limited* and another Misc. Commercial Application No.24 of 2023 HCCD at DSM. That also means that some conditions set in *Atiio v Mbowe* (supra) have not been met such as the irreparability of the loss." In *Issa Athumani Tojo Versus The Republic*, Criminal Appeal No.54 Of 1996, Court of Appeal of Tanzania at Dar Es Salaam at page 7, the Court quoted with approval the finding in *Regina v Hogan*, [1974] 1 Q. B. 398, at P. 401: "Issue estoppel can be said to exist when there is a judicial establishment of a proposition of law or fact between parties to earlier litigation and when the same question arises in later litigation between the same parties. In the later litigation the established proposition is treated as conclusive between those same parties. It can also be described as a situation when, between the same parties to current litigation, there has been an issue or issues distinctly raised and found in earlier litigation between the same parties." 34 The basis of the Applicant's application is that there is a looming danger which may greatly affect the applicant in case the application is not granted than it may affect the Respondent if the application is granted. These issues are substantially the same like the issues of great irreparable loss and balance of convenience which have already been determined in Misc. Commercial Application No.161/2023. The application at hand is therefore bound to fail from

this perspective. Since I have no jurisdiction to determine the present application for being functus officio, I find that it is not necessary to determine the rest of the issues and arguments raised by the parties in the present application. The issue of functus officio finally determines the present application. As I conclude, I would like observe by passing that it seems many counsel would easily make a prayer for status quo to be granted expecting the court to endorse the prayer by a simple order that "status quo be maintained" without due regard to the full ramifications and implications of such an order. Counsel should be careful not to seek controversial orders which may become difficult to implement. In the Indian case of N. 35 Ramaiah vs. Nagaraj S. & Others, AIR ,2001, a sound and reasonable opinion is expressed thus: "An order of status quo is a specie of interim orders, when granted indiscriminately and without qualifications or conditions, leads to ambiguity, difficulties, and injustice. If Courts want to give interim relief, they should endeavour to give specific injunctive relief If grant of order of 'status quo' is found to be the only appropriate relief, then Courts should indicate the nature of status quo, that is whether the status quo is in regard to possession, title, nature of property or some other aspect. Merely saying 'status quo' or 'status quo to be maintained' should be avoided. If in a suit for injunction, where plaintiff claims that he is in possession of the suit property and the defendant is attempting to interfere with his possession, and the defendant contends that he is in possession and petitioner was never in possession, if the Court merely directs status quo to be maintained by parties, without saying 36 anything more, it will cause confusion and, in many cases, even lead to breach of peace. On the basis of such order, the plaintiff would contend that he is in possession and he is entitled to continue in possession; and the defendant would contend that he is in possession and he is entitled to continue in possession. In such a case, if the Court wants to direct status quo, it should specify the context in which, or conditions subject to which, such status quo direction is issued." On my part, I accept the above useful counsel given by the Court way back in 2001 as sound advice in the administration of justice. However, it is unfortunate that the same had not yet been registered in my mind on 6th May 2024, when, after hearing brief arguments from counsel for both sides, I granted an order for maintenance of status quo in Misc. Commercial Case No. 103/2022 pending determination of this application on merit. Yet again, I could not utilize the above counsel in the present application since the application has been declined due to the court being functus officio and the subject matter in dispute being barred under the doctrine of estoppel issue. In the upshot the present application stands dismissed with costs. 37 A. H. GONZI M &/ JUDGE 30/05/2024 Ruling is delivered in Court this 30th day of May, 2024 in the presence of Mr. Frank Mwalongo, learned advocate for the Applicant and Mr. John Kamugisha learned advocate for the Respondents. AsM A. H. GONZI WWk/\* JUDGE 30/05/2024 38

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