

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
COMMERCIAL DIVISION
AT DAR ES SALAAM**

MISC. COMMERCIAL APPLICATION NO. 27915 OF 2023

[*Arising from Commercial Case No. 02 Of 2023*]

DAR LUX COMPANY LIMITED.....1ST APPLICANT
SIMAGUNGA GENERAL TRADING COMPANY LIMITED.....2ND APPLICANT
DONALD XAVERY SIMAGUNGA.....3RD APPLICANT
PENDO DONALD XAVERY.....4TH APPLICANT

VERSUS

EQUITY BANK TANZANIA LIMITED.....1ST RESPONDENT
NISK CAPITAL LIMITED.....2ND RESPONDENT
EQUITY BANK KENYA LIMITED.....3RD RESPONDENT
INSPECTOR GENERAL OF POLICE.....4TH RESPONDENT
ATTORNEY GENERAL.....5TH RESPONDENT

RULING

May 31st, 2024 & June 21st, 2024

Morris, J

The present application contained identical *ex-parte* and *inter partes* prayers that;

1. This Honourable Court be pleased to order the 1st Respondent refrain from insisting and instigating on the criminal allegations in relation to

the loan in issue between the Applicants and the 1st Respondent, before this Honourable Court pending the hearing of the main application *inter-parties* and/or final determination of the main suit as the case may be.

2. This Honorable Court be pleased to issue an order of maintenance of the *status quo* against the 1st and 4th Respondents whatsoever from further unlawfully interfering with the privacy of the Applicants, in respect of the criminal allegations instituted by the 1st Respondent relating to the loan in issue before this Honourable Court pending hearing and final determination of the main suit.
3. This Honorable Court be pleased to have 90 days statutory notice to 4th and 5th Respondents, waved on the basis of the law and Mareva injunction, as protection order.
4. Any other order that the court may deem fit, just, fair and equitable to grant.
5. Costs of this Application be borne by the 1st, 2nd and 3rd Respondents.



The application is brought under sections 2(1) and (3) of ***the Judicature and Application of Laws Act***, Cap. 358 R.E. 2019 (***JALA***); 4(3) ***the Criminal Procedure Act***, Cap. 20 R.E. 2022 (***the CPA***); and Order XXXVII rule (1)(a)(b), sections 68 (e) & 95 of ***the Civil Procedure Code***, Cap. 33, R.E. 2019 (***the CPC***). The affidavit of Donald Xavery Simagunga (the 3rd Applicant and Managing Director of the 1st and 2nd Applicants) supports the application. However, the application is opposed by the respondents through their respective counter affidavits. Further, the 1st respondent, in addition to his counter affidavit, filed a notice of preliminary objection (***the PO***) comprising of seven (7) points of law, namely;

1. The Application as it stands is fundamentally flawed due to its nature as an Omnibus Application rendering it incurably defective.
2. The Honourable Court, regrettably, is not vested with jurisdiction to try and hear the Application therefore lacking the necessary powers (authority and mandate) to grant the prayers sought.
3. The Application is inherently defective as the orders sought are against third parties who not party to the suit.

4. The Application, as it stands, is prematurely brought before this Honourable Court due to lack of, or failure to issue, a Statutory Notice to both the 4th and 5th Respondents.
5. The Application is devoid of merit as it seeks orders that pre-empt the Statutory obligations entrusted to the 4th Respondent.
6. The Application is fundamentally flawed due to its premature nature, as it seeks orders for actions that are yet to occur.
7. The Application is both frivolous and vexatious, and as such, is not suitable for consideration by this esteemed Court.

On April 29th and May 31st, 2024 this court issued an order for simultaneous hearing of the PO and the main application by way of written submissions. Nonetheless, I have noticed that, the applicants filed their joint submissions in support of the application and in opposition of the PO, all together in one document. Conversely, only the 1st and 3rd respondents filed their submissions. Akin to the applicants' submissions, the 1st respondent's submissions are also for both: in support of the PO and in opposition of the application, in the same document.



The foregoing approach adopted by the subject parties is, to me, eccentric. This means that, the parties addressed rival arguments before being served with/reading the opposite side's contentions. Be that as it may, all grounds raised by each side were conversed. Further, the 3rd respondent rightly filed his reply submissions regarding the main application. Therein, the 3rd respondent's counsel, Mr. Shalom Samwel Msakyi, raised an issue to the scope that, the applicants' submissions in chief are filed contrary to the court order.

Logically, I will commence with determination of the PO. In terms of the 1st point of the PO, it was submitted by counsel for the 1st respondent Mr. Elly Kaunara John Mkwawa that, the application is omnibus for it contains many unrelated prayers. The prayers according to the counsel, are governed by different pieces of legislation; have different timelines; and partly touches on the jurisdiction of the court. He further averred that, the first, second and third prayers are governed by ***the CPC***; but the fourth prayer is governed by ***the Government Proceedings Act***, Cap. 5, R.E. 2019. According to him, those prayers cannot be dumped in one chamber summons. He cited the cases of ***Rutagatina C.L v The Advocates Committee & Another***,

Civil Application No. 98 of 2010; and ***Kija Redi v Tanzania Telecommunication Company Limited***, Civil Application No. 17/13 of 2022 (both unreported). From the latter, he quoted Court of Appeal's holding at page 8 that," the effect of lodging an application in an omnibus form renders that application incurably defective."

On the 2nd ground of the PO, it was submitted that, this honourable court has no jurisdiction to determine this application because prayer number 1 in both, *ex parte* and *inter parte* sections of the application can only be granted by the criminal court. To him, the Commercial Division of the High Court, is specifically designed for civil suits of commercial nature. On this regard, he made reference to Rule 5 of ***the High Court (Commercial Division) Procedure Rules***, 2012 as amended by ***the High Court (Commercial Division) Procedure (Amendment) Rules*** 2019; and ***Tanzania Electric Supply Company (TANESCO) v Independent Power Tanzania Limited (IPTL)*** [2000] T.L.R. 324. He thus, buttressed his contention that jurisdiction of the court is a statutory creature.

On the 3rd point of the PO, the counsel argued that, in Commercial Case No. 2 of 2023 from which the present application originates, the

Inspector General of the Police and the Attorney General are not parties. Hence, they cannot be joined in this application. The counsel went on to submit on the 4th, 5th and 6th points of the PO jointly. He maintained that, any party who wishes to institute a suit against the government must first issue a statutory notice of intention to sue the Government under section 6(2) of ***the Government Proceedings Act*** (*supra*). Hence, he stated that, the instant application is premature for failure to adhere to the mandatory requirement of the law.

Moreover, the counsel submitted on temporary injunction and maintenance of *status quo* that, the same cannot be issued against the government. On this point, he cited the proviso under Order XXXVII Rule 1 of ***the CPC***. Conclusively, he urged this court to dismiss the application with costs.

Responding on the 1st point of the PO, counsel for the applicants Messrs. Donald Chidowu and Obadia Kajungu argued that, the law allows for omnibus application as long as the prayers are related. Hence, according to them, the prayers in the instant application are related. To buttress this contention, they cited ***Tanzania Knitwear Ltd v Shamshu Esmail*** [1989]

T.L.R. 48; and ***MIC Tanzania Limited v. Minister for Labour and Youth Development and Another***, Civil Appeal No. 103 of 2004 (unreported).

On the 2nd point of the PO, the counsel went on to submit that, the High Court has inherent powers to hear any matter including this application. Article 13(6) (a) of ***the Constitution of the United Republic of Tanzania***; section 95 of ***the CPC***; section 4(3) of ***the CPA***; as well as the case of ***Scova Engineering SPA and Another v Mtibwa Sugar Estates Limited and 3 Others***, Civil Appeal No. 133 of 2017 (unreported) were cited in support of such assertions.

On the 3rd point of the PO, it was submitted that, non-joinder of the 4th and 5th respondents in Commercial case No. 02/2023 does not make the application defective because Order I rule 10 (2) of ***the CPC*** allows such practice. In support hereof, the counsel referred to the case of ***Abdi M. Kipoto v. Chief Arthur Mtoi***, Civil Appeal No. 75 of 2017 (unreported). In regard to the 4th ground of PO, the applicants were brief. They submitted that, they have no intention to sue the 4th and 5th respondents as there is no cause of action against them. Hence, according to them, the instant application is not premature.

On the 5th point, they said the application at hand is according to the law. On the 6th point, it was contended that, the actions of the 4th respondent are of a nature to be contested at law. It was finally submitted in terms of the 7th point of the PO that, the application is according to the law applicable in this country. On this contention, the counsel cited the case of ***Tanzania Cigarette Company Ltd v The Fair Competition Commission and Another***, Misc. Civil Cause No. 31 of 2010 (unreported).

I have thoroughly considered the PO, the application and counsel's submissions. Consequently, I proceed to determine the most pertinent grounds of PO accordingly. The issue for determination is whether the PO is meritorious. On the 1st point of the PO, the contention is on omnibus nature of the instant application. While the 1st respondent contends that, the application is omnibus for containing many prayers, the applicants on the other hand, have insisted that, the same is not because the prayers contained in the chamber summons are interrelated. At this point in time, I find it pertinent to answer the question relating to what amounts to **"omnibus application."** Thus far, no statute defines the term "omnibus application". Nevertheless, it is case law that has promulgated this term

together with its related principles. One of the relevant cases in this regard is ***Mohamed Salimin v Jumanne Mapesa***, Civil Application No. 103 of 2014 (unreported). In that case, the Court held at page 3 that “.....as it is, the application is omnibus for combining two or more unrelated applications.”

Therefore, in line with the above laid down principle, I am of the firm view that, an omnibus application is the one combining two or more unrelated applications. Accordingly, I have scrupulously, analysed the chamber summons and discerned that, it contains four (4) specific prayers: restraining the 1st respondent from instigating criminal allegations; maintenance of status quo against the 1st and 4th respondents and their agents from interfering the applicants’ privacy (*sic*); waiver of the 90-day Statutory Notice to the 4th and 5th respondents; and costs of the application to be borne by the 1st, 2nd and 3rd respondents. As rightly argued by the counsel for the 1st respondent, these prayers are not only incongruent but also are governed by different laws with specific conditions. To wit, the laws upon which the prayers are founded are vividly indicated in the chamber

summons, namely, ***the JALA; the CPA*** and ***the CPC***. Procedural requirements under each of these statutes are dissimilar.

I as well, comment on the cases relied upon by the applicants in opposition of this point of this point of the PO. With adequate respect, all such cases are not in support of omnibus applications. As an exception to the general rule against omnibus applications, the cases only condone combination of many prayers in one application in circumstances where the former are related. However, that is not the case in the instant application because herein the prayers are unrelated. I find no justification as to how the same are related.

For the foregoing reasons, I find this point of the PO meritorious. I proceed to sustain it. It is the position of law that, remedy for an omnibus application is to strike it out. See, ***Mohamed Salimin's case*** ^(supra); and ***Mohamed Saad Bin Jung And Another v Ally Kea Ally and 4 Others***, Misc. Civil Application No. 54 of 2023 (unreported).

Regarding the notice to the government, the law requires that the suit against the government must be preceded by a 90-day notice. Nonetheless, in suitable circumstances, the court may issue *Mareva injunction* to meet the

ends of justice pending the expiry of the statutory time in the notice. But as the name goes, the order is given pendency expiry of the time in the notice. In this matter, however, the requisites have not been satisfied. **One**, the notice has not been issued to the 4th and 5th respondents. Thus, there is no pending duration of time howsoever. **Two**, the applicants state that they have no intention to sue the government; and **three**, as correctly argued by the 1st respondent, there is no pending suit involving the 4th and/or 5th respondents. In the circumstances, the sought injunction cannot be issued in vacuum. I refer to ***Daudi Mkwana Mwita v Butiama Municipal Council and AG***, Misc. Land Appl. No. 69 of 2020 (unreported). Consequently, I sustain this ground, as well.

However, before I finalise, I find it compelling to comment on issue raised by the 3rd respondent's counsel. According to him, the court's scheduling of submissions in this matter was that, the applicants were to file their submissions on or before 6th May, 2024. However, the same were filed on 7th May, 2024. Hence, he pointed out that, failure to file submission in time is tantamount to failure to prosecute a case. On this stance, he referred to the case of ***Monica D/O Dickson v. Hussein J. Wasuha (Kny Chama***



Cha Wafanyabiashara), PC Civil Appeal No. 04 of 2019 (unreported). He therefore, prayed for dismissal of this application with costs for want of prosecution. It is trite law that, the practice of filing written submissions is tantamount to hearing. As such, failure to file the same as ordered is equated to non-appearance at hearing or want of prosecution. See ***Monica's case*** (*supra*); ***P 3525 LT Idahya Maganga Gregory v The Judge Advocate General***, Court Martial Criminal Appeal No. 2 of 2002; ***Famari Investment (T) Ltd v Abdallah Selemani Komba (As Administrator of the Estate of the Late Sharif Abdallah Salama***, Misc. Civ. Appl. No.41 of 2018; and ***Marian Boys High School v Rugaimukamu Rwekengo***, Misc. Labour Appl. No. 367 of 2020 (all unreported).

As earlier on stated, the order for filing written submissions was issued on 29.04.2024. The applicants have not filed the rejoinder submissions and disclose the exact date when they filed the submissions herein. Regarding the arguments on the purported lateness in filing the submissions by the applicants, however, I have taken liberty to check the Court record. It is evident that the applicant lodged his submissions online on time (*id est* May



6th, 2024). Hence, the query on competence of the submissions is accordingly settled.

Nevertheless, since it is already determined that, the application is omnibus and the applicants did not serve the notice to the 4th & 5th respondents; it is defeated in form and appropriateness under the law. I proceed to hereby strike it out for being omnibus and for want of the requisite statutory notice. Given the circumstances prevalent in this matter, the Court finds negligence on the part of the applicants for failure to take the suitable recourses and engage the Court accordingly. As such, the 1st respondent earns the costs hereof.

Further, as the above grounds of PO sufficiently dispose of this matter; I hold no justification to deliberate on and determine the remaining grounds hereof. It is so ordered.




C.K.K. Morris



Judge

June 21st, 2024

Ruling delivered this 21st day of June 2024 in the presence of Advocate Obed Mwandambo for the 2nd Respondent; also holding the briefs of Mr. Donald Chidowu, Advocate for the applicants and Mr. Elly Mkwawa, Advocate for the 1st Respondent. Mr. Mungumi Samadani held the brief of Advocate Shalom Msaky for the 3rd respondent.



C.K.K. Morris

Judge

June 21st, 2024

