

**IN THE HIGH COURT OF TANZANIA**

**MAIN REGISTRY**

**AT DAR ES SALAAM**

**MISCELLANEOUS CIVIL APPLICATION NO. 3 OF 2021**

(Arising from Miscellaneous Civil Application No. 57 of 2020 by Hon. Feleshi J.K. dated 30<sup>th</sup> day of April, 2021)

**BETWEEN**

**COMISIONER GENERAL**

**TANZANIA REVENUE AUTHORITY ..... 1<sup>ST</sup> APPLICANT**

**ATTORNEY GENERAL OF THE**

**UNITED REPUBLIC OF TANZANIA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**MIRAMBO LIMITED ..... RESPONDENT**

**RULING**

*23/9/2021 & 16/11/2021*

**MASOUD J.**

This is an application for leave to appeal before the Court of Appeal made under section 5(1)(c) of the Appellate Jurisdiction Act Cap 141 R.E. 2019, and rule 45 of the Tanzania Court of Appeal Rules, R.E. 2019, section 95 and Order XLIII rule 2 of Civil Procedure Code R.E. 2019. The applicant being aggrieved by the decision of High Court, Main Registry Dar es salaam, by Hon. Feleshi J.K. in Misc. Civil Application no. 57 of 2020 is intending to appeal to the Court of Appeal, hence this Application for leave.

Instead of addressing the court orally, parties made their submissions in writing pursuant to the order of this court. Both were represented. While Mr. Gabriel Malata, the Solicitor General, appeared for Applicants, Yohanes Konda, learned Advocate, appeared for Respondent.

Mr. Malata opened the arena by adopting his own affidavit to form part of his submission. He thereafter submitted on the question of jurisdiction of High Court in exercising judicial review, powers to adjudicate application for extension of time, and subsequent application for leave and judicial review of the decision of the Commissioner General of Tanzania Revenue Authority exercising his power under Tax Administration Law.

The respondent applied for extension of time to file an application for leave to apply for prerogative orders of certiorari and mandamus to challenge the act by the 1<sup>st</sup> Applicant of not delivering the decision on tax objection preferred by the Respondent under the Tax Laws, issuance of the agency Notice without assessment being made and that revocation of the private ruling issued in favour of the Applicant was unjustified.

Further, he submitted that jurisdiction of the court or any organ is a creature of the constitution or statute. The application before the court which rendered the impugned decision was seeking its intervention in the



dispute arising from the Tax Laws. He cited section 7 of Cap 408 R.E. 2019 and said that it is with no iota of doubt that tax disputes have exclusive forums for determining the same. He also relied on the cases of **Commissioner General Tanzania Revenue Authority v Atomredmetzoloto (ARMZ), Consolidated**, Civil Appeal no. 78 & 79 of 2018, and **Pan African Energy v. Commissioner General Tanzania Revenue Authority**, Civil Appeal No. 89 of 2019.

The learned Solicitor General invoked sections 7 and 16(1) of the Act which provide for the right to appeal, and where to appeal, in case of being dissatisfied by any decision arising from tax laws. He was of the view that the parliament intended to vest powers to adjudicate on tax disputes to Tax Appeal Board (TAB), Tax Revenue Appeal Tribunal (TRAT) and the Court of Appeal. He argued that such intention is underscored in a number of decisions including **Vodacom Tanzania Public Ltd. Co. v The Commissioner General TRA and another** (Misc. Civil cause no. 33 of 2020). In respect of the case at hand, this issue raises an arguable principle of law which need to be determined by the Court of Appeal of Tanzania.

On the second point of law to be discussed by the Court of Appeal, the learned Solicitor General submitted that on 29<sup>th</sup> January, 2021 and 12<sup>th</sup>

February 2021 the respondent herein initiated an appeal process to the Tax Revenue Appeal Board by notice of appeal and statement of appeal No. 48 of 2021 between Mirambo Limited and Commissioner General TRA Challenging the decision of 1<sup>st</sup> Applicant of issuing agency notice and notice of revocation of the private ruling. At the same time the respondent filed Misc. Civil Application No. 57 of 2020 for extension of time. This is against the principle that one should not ride two horses at a time in pursuing his rights. The principle was propounded by the Court of Appeal in **Serengeti Breweries Limited vs Hector Sequiraa**, Civil Application No. 395/18, CAT at DSM

Regarding the third point of law to be discussed by the Court of Appeal which is the effect of respondent's failure to account for each and every day of the delay in the application for extension of time, the applicants submitted that the same was not caused by Applicants' silence by not replying the Respondent's complaint and notice of objection. The respondent ought to have appealed against the decision under the Tax Revenue Appeal Act and that, the failure by the 1<sup>st</sup> applicant to respond to the objections amounted to nothing but to the fact that the objections has been disallowed.



It was further submitted that there was no sufficient reason for extension of time warranting the application for judicial review by the Respondent. Revocation of the second private ruling by itself constitute a decision of the Commissioner of Tanzania Revenue Authority in accordance with section 50(1) of the Tax Administration Act Cap. 438 R.E. 2019. The argument that the applicant was trying to exhaust all the remedies available including asking the intervention of the 2<sup>nd</sup> applicant is not a good cause for delay as the remedies she was exhausting are not statutory. Thus, the delay was caused or contributed by the respondent's dilatory conducts.

As to the duty of accounting for each and every day of the delay, the learned Solicitor General cited the case of **Lyamuya construction Co. Ltd vs The board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application no. 2 of 2010, and concluded that in the instant matter the delay was unreasonable as the respondent never acted promptly and failed to show any due diligence on her part to pursue her case.

The counsel for the respondent replied on what was submitted by the learned Solicitor General. He was of the view that it is legally wrong, under

section 5(2)(d) of The Appellate Jurisdiction Act Cap 141 R.E. 2019 for the applicants to apply for leave to appeal against an interlocutory order of the Court to override the Applicants' preliminary Objection on the lack of jurisdiction. The court overruled the objections and proceeded to grant extension of time within which the Respondent herein would apply for leave to file an application for prerogative orders of certiorari and mandamus.

The case of **Tanzania Ports Corporation versus Jeremiah Mwandi**, Civil Appeal No. 474 of 2020, was invoked by the counsel for the respondent in relation to the meaning of interlocutory order. Likewise, cases such as **JUNACO (T) Limited and Justine Lambert v. Harei Mallac Tanzania Limited**, Civil application No. 473 of 2016, **Murtaza Ally Mangungu vs The Returning Officer of Kilwa and 2 others**, Civil Application No. 80 of 2016, and **Peter Noel Kingamkono v. Tropical Pesticide Research**, Civil Application No. 2 of 2009 were equally cited.

The learned counsel further went on explaining that it is only the High Court that is vested with the jurisdiction to grant leave and prerogative orders of mandamus and certiorari. The Application No. 57 of 2020 was it was argued not a tax matter. Rather, it was an application in which the



Respondent was challenging the misuse of public powers conferred to the first applicant. The misuse of public powers by the 1<sup>st</sup> Applicant is the revocation of the private ruling and the immediate issuance of agency notice and the usurpation of TZS 146,118,017,395/= from the respondent without an assessment or a tax liability calculated confirmed against the Respondent was contrary to the governing laws amounting to illegalities remediable by a way of an application for judicial review. The illegalities committed and inaction by the 1<sup>st</sup> Applicant on the respondent's objections, that has impacted unexplainable anguish to the respondent, would only be determined by the High court through quashing his decision and directing to act in accordance with the law.

He went on saying where there is an alternative remedy, the respondent for prerogative orders ought to, as a matter of general rule, exhaust that remedy. This was stated in the case **of Deuseddit Sylvanus Malebo v. The Chief Court Administrator, the Judicial Service Commission and the Attorney General, Misc. Civil cause No. 15 of 2018** which cited with approval the case of **Obadia Salehe vs Dodoma wine Company Ltd [1990] TLR 113.**

The cited cases by the applicants support the argument on the lack of jurisdiction of the court. Thus court is seized with a matter premised on

the judicial review and not original tax dispute or appeal governed by provisions of article 107A (2) and 108 of the constitution

With regards to forum shopping, he submitted that, the application before the high court was filed before this court on 15<sup>th</sup> December, 2020 whereas Appeal No. 3 of 2021 against Stamp duty Assessment No. 2/2019; No. 2/2019; appeal no. 49 of 2021 against the agency notice; and Appeal no. 50 of 2021 against the Agency notice were filed on 12<sup>th</sup> February, 2021. The present application was filed even before the expiration of the six months' period which are required for the one to appeal to the Tax Revenue Appeal Board. The case of **Serengeti Breweries Limited vs Hector Sequiraa**, is distinguishable from the present application. The application is purely concerned with the legality of the 1<sup>st</sup> applicant's action in administering tax laws.

As far as time is concerned, the counsel submitted that the respondent accounted for each day of delay as stated in the affidavit in support of applications. The application was cleared for filing on 15<sup>th</sup> December, 2020 and the Lyamuya's case is inapplicable in this application.

In rejoinder, the learned Solicitor General reiterated that the respondent's submission that this leave is for appeal on interlocutory order is irrelevancy, illogical and misconception based on the facts what applicants



are seeking before this court is for leave to appeal the whole ruling and Drawn order in Misc. civil Application No. 57 of 2020 prompted under section 5(1)(c) of the Appellate Jurisdiction Act and rule 45(a) of the Tanzania Court of Appeal Rules and section 95 and Order XLII rule 2 of Civil Procedure Code. He referred the case of **Tanzania Posts Corporation vs Jeremia Mwandu** (supra) where the court of appeal raised the issue of *nature of order test* which requires to answer questions; whether remedies were sought and whether all remedies were determined conclusively by the high court. Applying the test, Civil Application No. 57 of 2020 was seeking for extension of time to file an application for leave to apply for prerogative orders of certiorari and mandamus and ruling and drawn order of the High court in Civil Application No. 57 of 2020 was final and conclusively determined.

Further, there is no doubt that the action or conducts which were challenged by the respondent were those done by the 1<sup>st</sup> Applicant while administering Tax Laws, thus any dispute arising from them is a tax dispute emanated from the exercise of powers vested to the Commissioner General of Tax under the TAA. Cases cited by the respondent to support his argument are distinguishable as they apply

where the court is not ousted with jurisdiction and rest where other remedies are available but not efficiently.

While concluding the applicants submitted that application for leave to appeal to the court of Appeal of Tanzania, the applicant is only required to raise arguable point of law and the trial court must refrain from determining substantive issues before the appeal regardless those grounds raised have merits or not. **Bulyanhulu Gold Mine Limited and 2 others vs Petrolube (T) Limited and another, Civil application No. 364/2016 of 2017.**

I have considered the rival submission by parties and I wish to stress that this is an application for leave to appeal to the Court of Appeal and it will not deeply go to the facts to be discussed in the intended appeal. However, the grounds of intended appeal can be captured from the Applicants' affidavit at paragraph 8 to read: -

- (i) The jurisdiction of the High Court of Tanzania exercising Judicial review powers to adjudicate application for extension of time and subsequent application for leave and Judicial Review of the decision of Commissioner General of Tanzania Revenue Authority exercising powers under the Tax Administration Laws.



- (ii) The effects of Respondent's action pursuing the same matter (forum shopping/ riding two horses at a time) through the remedies available under the Tax Administration Laws.
- (iii) The effects of Respondent's failure to account for the number of days delayed in filling the application for extension of time.

The same were disputed by the Respondent saying Miscellaneous Application No. 57 of 2020 from which this application originated is not a tax matter but an application for challenging the 1<sup>st</sup> Applicant's misuse of power of revocation of private ruling followed by immediate issuing of agency notice and usurpation of Tzs 146,118,017,395/=. For the allegation of forum shopping, the same was misconceived as two alleged matters are different from each other, one is on substantive issue while the other is on illegalities and the first to be filed. Also, failure to account for one day of delay was disputed to the extent that the Applicants are to blame themselves for respondent's time lost waiting for 1<sup>st</sup> Applicant response from the Respondent's letters.

Basically, this application is brought under **section 5(1)(c)** of the Appellate Jurisdiction Act Cap 141 R.E. 2019 which provides: -



*'any appeal shall lie to the court of appeal with the leave of the High Court or of the Court of Appeal, against every other decree, order, judgment, decision or finding of the High Court'.*

However, the law does not provide for criteria upon which the leave shall be granted. It remains as an issue this court has to answer. This has been taken care in number of cases such as **Hamis Mdia and Another vs the Registered Trustees of Islamic Foundation, Civil Appeal No. 232 of 2018, CAT at Tabora** (unreported) where it held that:

*"While the application for leave must state succinctly the factual or legal issues arising from the matter and demonstrate to the court that the proposed grounds of appeal merit an appeal, the court concerned should decide whether the said proposed grounds are prima facie worthy of consideration of the Court of Appeal."*

In **Harban Haji Mosi and Another Vrs Omar Hilal Seif and Another, Civil Reference No. 19 of 1997 CAT**, the following principles were laid down;

*"Leave is grantable where the proposed appeal stands reasonable chances of success or where/ but not necessarily the proceedings as a whole reveals such disturbing feature as to require the guidance of the Court of Appeal. The purpose of the provision is*



*therefore to spare the court the spectre of un meriting matters and to enable it to give adequate attention to cases of true public importance"*


I have carefully considered the application, the supporting affidavit and counter affidavit together with the submissions by the parties in support and opposition of the application in line with the guiding principle as enunciated in the case authorities cited above. As rightly submitted by the Respondent, what is before me is just the application for leave, it is out of mandate to revisit the evidence at the trial court to reach at its decision. What I am required to do, is to look from the material before me to ascertain whether there are points shown to entitle the grant of leave to appeal.

Applying the principle in the above relied on authorities, I find arguable point of law which the Court of Appeal has to answer as whether this court has jurisdiction to exercise Judicial Review Power on acts or decisions of Commissioner General of Tanzania Revenue Authorities while exercising Tax laws, whether the respondent did forum shopping when by bringing this application before this court and whether the respondent failed to account for a one-day delay.

In the results, there is need for the Court of Appeal to adjudicate upon the rival contentions by the parties, specifically on the issues raised. Consequently, I find merit in this application. I accordingly grant the orders sought in the chamber summons. The costs shall follow events.

Dated at Dar es Salaam this 16<sup>th</sup> day of November 2021



  
.....  
**B. S. Masoud**  
**Judge**