

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM MAIN REGISTRY
AT DAR ES SALAAM**

MISC CIVIL APPLICATION NO. 17 OF 2003

THE KARATU DISTRICT COUNCIL.....APPLICANT

VS

1. THE MINISTER, REGIONAL ADMINISTRATION..RESPONDENT

2. THE ATTORNEY GENERAL.....RESPONDENT

RULING

Shangwa, J.

This is an application filed by KARATU DISTRICT COUNCIL for leave to apply for orders of Certiorari, Mandamus and Prohibition. It has been brought before this Court under S. 2 (2) of the Judicature and Application of Laws Ordinance, Cap. 453, SS 17 (2) and 17 A of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance, Cap. 360 as amended by Act No.55 of 1968 and Act No. 27 of 1991 together with SS 68(e) and 95 of the Civil Procedure Code, 1966. It is supported by affidavit of the chairman of the applicant council one Lazaro T. Massay.

In his sworn affidavit, made on behalf of the applicant Council, in connection to this cause, Mr. Kasikila, Advocate stated that leave is required to apply for an order of Certiorari to bring up into the High Court the Order issued by the 1st respondent contained in government Notice No. 18 of 31st January, 2003 so that it may be quashed, and for an order of mandamus to command him to act according to law and for an order of Prohibition to prohibit him from carrying out the threat of dissolving the applicant council as intimated in GN 18 of 31st January, 2003.

First of all, it is claimed by the applicant council that the issuance by the 1st respondent of GN 18 of 31st January, 2003 condemned it without giving it a chance to be heard which is contrary to the principles of natural justice.

Secondly, it is claimed that this Notice is discriminatory of the 14 CHADEMA Councillors as it orders them to apologise to the Arusha Regional Commissioner without giving similar orders to the 5 CCM councillors.

Thirdly, it is claimed that this Notice is ultra vires in that it purports to make councillors responsible for day to day collection of taxes and other levies.

Fourthly, it is claimed that this Notice is unlawful in that it purports to dictate to the Council to do things which it can only do in the exercise of its autonomous and free discretion such as the duty of awarding tenders to different contractors.

The heading of the Order against which the applicant Council craves for leave to file an application for orders of certiorari, mandamus and prohibition reads as follows:-

AMRI YA KUITAKA HALMASHAURI YA WILAYA YA KARATU KUTEKELEZA MAJUKUMU YAKE, 2003. Under this heading there is the following preamble:-

KWA KUWA, baada ya uchunguzi imedhihirika kwamba Halmashauri ya wilaya ya Karatu imeshindwa kutekeleza majukumu yake ya kisheria na hivyo kushindwa kutoa huduma kwa wananchi waliomo katika mamlaka yake:-

NA KWA KUWA, Pamoja na Serikali kuisaidia Halmashauri ya wilaya ya Karatu kutekeleza majukumu yake Halmashauri hiyo imeshindwa kutekeleza majukumu yake na kuendelea na migongano baina ya madiwani na watendaji:-

NA KWA KUWA, kufuatia migongano hiyo Waziri alichukua hatua za kurekebisha hali hiyo ikiwa ni pamoja na kutoa semina iliyofafanua nafasi, wajibu, mipaka na maadili ya watendaji na madiwani kukutana na viongozi wa wilaya ya Karatu ambao ni Mkurugenzi na Mkuu wa wilaya ya Karatu wakiongozwa na Mkuu wa Mkoa wa Arusha: -

NA KWA KUWA, Pamoja na hatua zilizochukuliwa na Waziri kurekebisha hali ya utendaji wa Halmashauri, Halmashauri

imeshindwa kujirekebisha na kuendelea kuvunja sheria kwa kumfungia nje ya ofisi Mkurugenzi kwa muda wa siku sita, kuingilia shughuli za utendaji, kutoa siri za vikao, kushiriki katika vikao na kutoa maamuzi ambayo wana maslahi nayo bila kutangaza maslahi hayo, na kushindwa kutekeleza wajibu wa kusimamia ukusanyaji wa mapato na hivyo kukusanya chini ya asilimia hamsini.

After this preamble, there are the following directives ending with the warning:-

HIVYO BASI, inaelekezwa kama ifuatavyo:-

1. Amri hii itajulikana kama Amri ya kuitaka Halmashauri ya wilaya ya Karatu kutekeleza majukumu yake, 2003 na itanza kutumika tarehe 15 Januari, 2003.

2. Katika Amri hii:- "Halmashauri" maana yake Halmashauri ya wilaya ya Karatu, "Mkurugenzi" maana yake ni Mkurugenzi Mtendaji wa Halmashauri ya Karatu; "Waziri" maana yake ni Waziri mwenye dhamana ya Serikali za Mitaa;

3. Halmashauri inapewa muda wa miezi mitatu (3) kuanzia tarehe 1 Januari, 2003 kuhakikisha kwamba:

(a) Inakusanya mapato yake kwa malengo ya kila mwezi kwa mujibu wa bajeti yake; na kumchukulia hatua kwa mujibu wa sheria mtendaji au mtu yeyote atakaye thibitika kufuja fedha za Halmashauri;

(b) Madiwani wanajihusisha kikamilifu katika kuhamasisha ulipaji wa kodi na ushuru mbali mbali;

(c) Inatenga fedha za kuwaajiri wakusanyaji wa mapato katika kata na kuacha kuwatumia maafisa watendaji wa kata na vijiji katika kukusanya mapato ya Halmashauri;

(d) Inawaelekeza Mkurugenzi, mweka Hazina, Wakuu wa Idara, Maafisa watendaji wa Kata na vijiji kutoa kipaumbele katika kukusanya mapato na kutoa taarifa kwenye mikutano ya kila mwezi ya kamati ya Fedha, uongozina Mipango; na

(e) Mkurugenzi anawasilisha kwa Katibu Mkuu, ofisi ya Rais, Tawala za Mikoa na Serikali za mitaa, Mkuu wa Mkoa na Mkuu wa wilaya, taarifa ya Makusanyo ya kila mwezi kwa ujulisho wao na kusambaza nakala za taarifa za makusanyo ya kila mwezi kwenye ofisi za kata kwa ujulisho na ufuatiliaji wa kata;

(f) Inasimamia matumizi ya fedha zake kama ifuatavyo:-

(i) Mwenyekiti wa Halmashauri anaitisha kikao cha kamati ya fedha, Uongozi na mipango kujadili na kufanya maamuzi kuhusu kasma za matumizi ya kawaida zilizoishiwa fedha-na

(ii) Fedha zote za Halmashauri, ziwe za mapato yake yenyewe, fedha za wahisani ruzuku toka Serikali kuu au michango ya wananchi zinatumiwa kwa mujibu wa Bajeti iliyoidhinishwa;

(g) Miradi yote iliyosimama kwa kukosa michango ya Halmashauri na wananchi inaendelezwa;

(h) Inazingatia Sheria katika kutoa zabuni kwa kufanya yafuatayo:-

(i) Kutoa zabuni ya ujenzi wa sehemu ya kutibia wagonjwa

wa nje (OPD) na jengo la utawala katika kituo cha Afya Karatu kwa Abuz Investments kwa gharama ya Shs.30,401,000/= kama ilivyopendekezwa na Tume ya Tathmini na kuzingatiwa na Bodi ya Zabuni katika kikao chake cha tarehe 30/08/2002;

(ii) Kutoa zabuni ya ujenzi wa barabara ya TFA hadi Oldeani na Manyara hadi kambi ya Simba Lositete kwa kampuni ya M/S Classic Construction Ltd., kwa Shs.26,414,000/= kwa kuzingatia uwezo wa kampuni; na

(iii) Kutoa zabuni ya matengenezo ya barabara ya Endamarariiek-Getamok kwa SACON Ltd. kwagharuma ya Shs.5,677,000/= ambayo ni ya chini kuliko waombaji wengine.

(i) Vikao vya kisheria ngazi ya kata na vijiji vinafanyika kwa mujibu wa sheria na ratiba na kisha mihtasari inawasilishwa kwa Halmashauri na Mkuu wa wilaya ambaye naye atamtaarifu Mkuu wa Mkoa.

(j) Inafanya vikao na viongozi wa vijiji vilivyowakataa maafisa watendaji wapya ili kufikia muafaka utakaozingatia maslahi ya vijiji husikana maendeleo ya Karatu; na

(k) Inawapa mafunzo Maafisa watendaji wa vijiji wote juu ya nafasi, wajibu madaraka na mipaka ya madaraka yao;

(l) Madiwani wote kumi na nne(14) wa CHADEMA wanamwandikia barua ya kuomba radhi Mkuu wa Mkoa wa Arusha kwa kitendo chao

cha kukaidi kukutana naye kwenye ukumbi wa Mkutano wa K.K.K.T. Karatu ili kuzungumzia mgogoro uliokuwa umezuka katika Halmashauri; Pia wanatakiwa kuahidi kwa maandishi kuwa hawatarudia kukaidi wito wowote wa kiongozi yeyote wa Serikali wakati wote wanapoendelea kuwa viongozi na wawakilishi wa wananchi katika Halmashauri ya wilaya ya Karatu au Halmashauri nyingine yoyote; na

m) Madiwani wanaonywa kuhusu tabia yao ya kutoa nje taarifa zinazojadiliwa katika vikao vya Kamati ambazo hazijapata maamuzi ya Baraza la Madiwani kinyume cha maelekezo ya kifungu cha 29(1) cha kanuni za Serikali za mitaa (Mamlaka za wilaya (Maadhi ya Madiwani) za mwaka 2000.

After the said directives and warning, there is a caution which reads as follows:-

Mnatahadharishwa kwamba endapo katika muda wa miezi mitatu mtashindwa kutekeleza baadhi au yote yaliyoelekezwa katika Amri hii, Waziri mwenye dhamana ya Serikali za mitaa atachukua hatua kwa mujibu wa kifungu cha 171(1) (b) cha Sheria ya Serikali za Mitaa(Mamlaka za wilaya) ya mwaka 1982, kwa kuhamisha majukumu ya Halmashauri na kukipa chombo kingine chochote kama atakavyoona inafaa.

After the said caution, there is the address and signature of the 1st respondent and the date of signing the Order which reads as follows:-

Imetolewa rasmi leo tarehe 28 mwezi wa Januari, 2003.

IKULU,

Benjamin William Mkapa

Par es Salaam

MIS

28 Januari, 2003

After publication, this Order was submitted from the President's office to Lazaro Massay, chairman of the applicant Council for purposes of being implemented within the prescribed time

The 1st respondent issued this Order under S.171(l) (a) of the Local Government (District Authorities) Act, 1982 in his capacity as Minister for the time being responsible for local Government. The said section reads as follows:-

"S. 17 (1) If, after due enquiry, the Minister is satisfied that any local Government authority has made default in the performance of any functions conferred or imposed upon it by or under this Act or any other written law for the time being in force, he may make an order, to be published in the **Gazette**, declaring the authority to be in default and may, by the same or any other order:-

(a) For the purposes of removing the default, direct the authority to perform such of its functions in such manner and within such time or times as may be specified in the Order.

The caution given in this order was made by the 1st respondent under subsection 1(b) of S.171 of this Act which gives him Power, upon failure by the authority declared to be in default to comply with

any requirement of the order within the specified time or times, to transfer to such person or body of persons as he may deem fit such of the functions of the authority in default as may be specified in the order.

Under subsection 3 of S.171 of the Act, it is provided that "where an order made under subsection 1 (a) involves default in the performance of many or a majority of, or the basic, functions of

the authority, the Minister may, by the same or a subsequent order, dissolve or suspend the authority for such time as he may think fit from the performance of such of its functions as may be specified in the order and, where he dissolves the authority he shall specify a date, being not later than six months from the date of dissolution, for the holding of elections to constitute a new authority, or nomination for re-election".

According to subsection (4) of S.171 of the Act, every order made under this section has to be laid before the National Assembly of the United Republic of Tanzania at its next meeting after it has been made.

As a matter of fact, the 1st respondent issued the relevant order in the exercise of his statutory default Powers over the applicant Council. Under this order, a first step has been taken by him in declaring it to be in default in the performance of its functions imposed upon it by Act, No. 7 of 1982.

For the purpose of removing the default, the applicant Council which is composed of CHADEMA and CCM Councillors is being directed to perform its functions within three months with effect from 1st January, 2003. As a matter of prudence, it is being cautioned of what might legally follow in case it fails to comply with the instructions given by the 1st respondent.

It is common knowledge that the order of certiorari lies to quash decisions which are ultra vires, void or voidable. Mandamus lies to compel the performance of a public duty by public authorities and the order of prohibition lies to prohibit a wrongful action.

In this case, apart from declaring the applicant council to be in default and directing it to do 'certain acts' in order to remove the default, no decision whatsoever has effectively been made against it such as transferring its functions to another person or body of persons as intimated in the 1st respondent's order nor has it been dissolved or suspended as it might be done if the 1st respondent so decides in a separate order. A warning that if the applicant council does not comply with the 1st respondent's directives, its functions will be transferred from it does not amount to actual decision. It is rather "a prescribed step in a statutory process" which will lead to actual decision.

Mr. Kasikila referred to me the case of JUMA YUSUPH VS MINISTER FOR HOME AFFAIRS 190 TLR 80 where the

Minister's order to deport the applicant Juma Yusuph who was a

Tanzanian citizen amounted to a decision. In this case of whose facts are quite quite different from Juma Yusuph's case, the 1st respondent's order does not amount to a decision against which certiorari can lie.

Another case which was referred to me by him is the case of SENZIA ALPHONSE MBAGA VS ELECTION COMMISSION, 1996 TLR 102 in which leave of the Court to apply for the orders of certiorari and mandamus was given by the late Mkude, J. after being satisfied that there were grounds for application of the said orders as the applicants had been denied a right to be heard before the Panel made its decision.

As I have already stated there is no decision whatsoever that has been made in this case by the 1st respondent against which certiorari can lie. Naturally so there is no decision of whose enforcement or execution would require its restraint or prohibition

Furthermore, as a matter of fact and in the eyes of the law there is no public duty in this case that the 1st respondent has not performed which he has to be compelled to perform by way of mandamus.

It appears to me from the facts of this case that this Court is being urged to countenance a defaulting District authority namely Karatu District Council. Now, can leave be granted in such cases? I do not think so. As it was well pointed out by Miss Temi for the respondents this matter is in the discretion of this Court. In the exercise of my discretion, I do not think that apart from sheer circumvention of matters there is any arguable case for me to

grant the said District Council leave to apply for the prerogative orders of certiorari, mandamus and prohibition.

For the reasons I have given, leave to do so is accordingly refused.

Delivered in Court this 28th day of May, 2003.

**A. Shangwa, Judge
28/05/2003**