IN THE HIGH COURT OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM.

MISC. CIVIL APPLICATION NO. 44 OF 2013

LAS CONSTRUCTION

COMPANY LIMITED.....APPELLANT

VERSUS

1. PUBLIC PROCUREMENT
   REGULATORY AUTHORITY.....1ST RESPONDENT
2. THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

30/12/2013 & 02/09/2014.

The first respondent in this application, the PUBLIC PROCUREMENT REGULATORY AUTHORITY lodged a preliminary objection (PO) against the application filed by the applicant, LAS CONSTRUCTION COMPANY LIMITED. The application is preferred under s. 18 (1) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap. 310 R. E. 2002, s. 2 (1) and (3) of the Judicature and Application of Laws Act, Cap. 358 R. E. 2002 and s. 95 of the Civil Procedure Code, Cap. 33 R. E. 2002. The applicant seeks for the following orders;

1. That the Honourable Court may be pleased to issue an interim order allowing the applicant to continue with all its usual businesses, including taking part in the public procurement process pending hearing and determination of the application for leave to apply for prerogative orders, and also, in case the leave is granted, pending hearing and determination of the application for prerogative orders.
2. That the Honourable Court may be pleased to make an order granting leave for the applicant to apply for the orders of *certiorari* and *mandamus.*
3. Costs of this application

4. Any other relief.

The application is supported by an affidavit of one Steven Mwemezi, the Director of the Applicant company.

The PO is footed on a single point of law that the application is incompetent for wrong citation of the provisions of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap. 310. The first respondent thus prays the chamber application be struck out, but the applicant does not concede to the PO. The second respondent, the ATTORNEY GENERAL opted to remain soundless on this squabble. The applicant was represented by Mr. Audax Kahendaguza Vedasto, learned counsel while the first respondent was advocated for by Mrs. Samba, learned counsel. The PO was argued by way of written submissions, hence this ruling.

In supporting the PO the learned counsel for the first respondent argued thus; the applicant has cited s. 18 (1) of Cap. 310 as the enabling law for this application. But, the same provides only that where leave for application for prerogative orders is sought against the Government, the Court shall order the Attorney General to be summoned to appear as a party to those proceedings. The provisions does not thus give powers to this court to grant the sought leave. The learned counsel further argued that, the application ought to have been brought under s. 19 (3) of Cap. 310 which requires that in the case of an application for an order to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of the proceeding.

The learned counsel for the first respondent also argued that, the legal remedy for an incompetent application for wrong citation of the law is to strike it out. He fortified his argument by the decision of the Court of Appeal of Tanzania (CAT) in **Edward Bachwa and 3 others v. The Attorney General and others, Civil Application No. 128 of 2006** (unreported) which held that wrong citation of the law, section, sub-section and or paragraphs of the law or non citation of the same will not move the court to do what it is asked and renders the application incompetent, and it (the CAT) struck out the application before it. The learned counsel also submitted that, in that case the CAT followed its previous decisions

including the one in **China Henan International Cooperation Group v. Salvant K. A. Rwegasira, Civil reference No. 22 of 2005.**

It was also the submissions by the learned counsel for the first respondent that, s. 95 of Cap. 33 is not applicable in the matter at hand for, the same preserves the inherent powers of the courts in giving necessary orders and applies only where the law makes no any guidance on a specific situation. He cited the CAT decision in the case of **Oysterbay Properties Limited and Kahama Mining Corporatio Ltd v. Kinondoni Municipal Council and others, CAT Civil Revision No. 4 of 2011** (unreported) to cement the point. He added that, as long as the application at hand ought to have been brought under s. 19 (3) of Cap. 310, then s. 95 of Cap. 33 is inapplicable.

Regarding s. 2 (1) and (3) of Cap. 358, the learned counsel for the first respondent contended that, the same relate to common law doctrines of equity which apply in our jurisdiction only where there are no specific provisions of law governing a give situation, which is not the case in the matter under discussion. He again cited the **Osterbay Case** (supra) to underscore the point.

In his replying written submissions, the learned counsel for the applicant submitted to the following effect; the law requires a party applying to court to cite a substantive provision of law that gives him a right to the orders sought or that gives the court powers to grant such orders. It is not necessary that the party cites procedural rules that guides the procedure for the application. He supported these arguments by the CAT decisions in **Mbeya-Rukwa Autoparts and Transport Ltd v. Jestina [2003] TLR. 251** and **Zablon Pangamaleza v. Joachim [1998] TLR. 140.** He thus contended that both s. 18 (1) and 19 (3) of Cap. 310 are mere procedural rules that do not give this court powers to grant the leave sought in the chamber summons.

The learned counsel for the applicant further argued that, the applicable/enabling law in the matter under discussion is s. 2 (3) of Cap. 358 which gives this court powers to exercise jurisdiction in conformity with the substance of common law in force in England on the 22 July, 1920 (reception date). He added that by 1920 courts of justice and Equity in England had powers to grant prerogative orders. He also argued that in our jurisdiction an application for

prerogative orders must be preceded by an application for leave to file the same, citing the CAT decision in **Mecaina Establishment v. Commissioner of Income Tax, Civil Appeal No. 14 of 1995, at Dar es salaam** (unreported). That case, he argued, also held that the procedure obtained in England apply in our jurisdiction because there are no rules made by the Chief Justice to provide for the applicable procedure. He additionally submitted that the **Oysterbay Case** (supra) also underscored the stance that s. 2 (3) of Cap. 310 applies where Cap. 33 is silent. For these grounds he argued, the court was properly moved for citing s. 2 (3) of Cap. 310.

The learned counsel further contended that s. 18 (1) of Cap. 310 was cited in the chamber summons, but s. 19 (3) of Cap. 310 was not. However, according to the **Mbeya-Rukwa** Case (supra), non-citing of procedural rules is not fatal though citing the same is encouraged. On encouragement to cite procedural rules he as well cited the case of **OTTU and others v. Ami Tanzania Ltd, Civil Application No. 35 of 2011**. He added that citing the applicable law and inapplicable laws is also not fatal, basing the argument on the **Zablon Pangamaleza** Case (supra).

Lastly, the learned counsel for the applicant contended that, the CAT decision in the **OTTU and others** case (supra) held to the effect that non-citation or wrong citation of the relevant provisions of law is no longer fatal to the application. This decision interpreted the CAT rules which do not apply in the proceedings at hand, but there is no statutory rule that requires such citation as far as proceedings before this court are concerned. The practice in this court follows the common law practice as shown here in above.

In the rejoinder submissions, the first respondent reiterated the submissions in chief and distinguished the **Mecaina** Case (case) from this matter on the ground that, in that case the CAT only held that there were no established procedure on the stage of summoning the Attorney General as a party to the proceedings related to prerogative orders. The learned counsel also distinguished the **OTTU** case (supra) on the ground that it discussed the CAT rules which do not apply to this court.

I have considered the submissions by the parties and I am convinced that there are only the following two main issues to be determined;

1. Whether or not the applicant cited proper provisions of the law in moving this court for the sought leave.
2. In case the answer in the first issue is negatively answered, then what is the legal effect of the improper citation of that law?

Regarding the first issue, I have revisited the provision of law cited in the chamber summons and s. 19 (3) of Cap. 310 which the first respondent insists is the enabling law. I will quote s. 19 (3) for a readymade reference;

> "In the case of an application for an order to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, **leave shall not be granted unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed under any Act,** and where the proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the Court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired." (bold emphasis is provided).

In my view, s. 19 (3) of Cap. 310 should not be read in isolation from the entire part VII of Cap. 310 that guides on matters related to MANDAMUS, PROHIBITION and CERTIORARI, which said part converses ss. 17-19. By reading the entire part of the Act, it is clear that this court has been vested with powers to make prerogative orders (i. e. Mandamus, Prohibition and Certiorari) according to the procedure to be guided by the rules made by the Chief Justice under s. 19 (1) of Cap. 310. Again, it is implied from that part of the Act that before one applies for the prerogative orders, he must apply and obtain leave of this court. This has been the trite practice in this land and there is no dispute about it. In my view therefore, s. 19 (3) of Cap. 310 essentially provides for the time limitation in applying for leave before this court, prior to the exercise of its powers vested to it by other provisions of the law, apart from s. 19 (3) itself. It follows thus that, the legislature envisaged that there shall be another law giving powers to this court to grant the leave which would be sought within the time prescribed under s. 19 (3) of Cap. 310.

Now the sub-issue here is, which is that other law vesting this court with the powers to grant the leave envisaged under s. 19 (3) of Cap. 310? In my view, part VII of Cap. 310 does not contain any specific provision for that purpose. It is also true as argued by the learned counsel for the applicant, which said argument is not disputed, that to date, the Chief Justice has not made any rule to that effect. Again, it is clear that the practice of prerogative orders is a borrowed from common law practice which forms an important source of administrative law in our jurisdiction, see also the book by B. D. Chipeta, titled Administrative law in Tanzania, A Digest of Cases, Mkuki na Nyota Publishers, Dar es salaam, 2009 (at page xxviii). I will thus agree with the argument by the learned counsel for the applicant that where there is *lacuna* of law in the practice related prerogative orders we must resort to common law practice, the door of which is s. 2 (3) of Cap. 358. This view was also supported by the envisaging in the cases of **Alfred Lakaru v. Town Director (Arusha) [1980] TLR. 326** and the **Republic Ex-Parte Peter Shirima v. Kamati ya Ulinzi na Usalama, Wilaya ya Singida,the Area Commissioner and the Attorney General [1983] TLR 375.** The provisions of s. 2 (3) of Cap. 358 thus apply where there is no law guiding a situation in our country and where Cap. 33 is silent, see also the CAT decision in **Tanzania Electrical Supply Company (TANESCO) v. Independent Power Supply Tanzania Ltd (IPTL) AND 2 others [2000] TLR 324.**

I therefore, agree with the applicant's counsel that, citing s. 2 (3) of Cap. 358 in the chamber summons sufficiently moved this court, and the mere citing of other provisions therein did not vitiate the competence of the application. I therefore, answer the first issue positively. This finding reliefs me from testing the second issue because its consideration depended much on the first issue being determined negatively. Having found as above, I overrule the PO. It is so ordered.

J.H.K. UTAMWA

JUDGE.

02/09/2014