THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
CIVIL CASE NO. 02 OF 2022

RABIA ISIAKA JAFARI @ JAPHARI ISIAKA MWAILENGE.....PLAINTIFF

VERSUS

LAND TRANSPORT REGULATION AUTHORITY.....1ST DEFENDANT
THE HON. ATTORNEY GENERAL.....2ND DEFENDANT

RULING

Dated 21th June & 18th August, 2022

KARAYEMAHA, J

This ruling is in respect of points of preliminary objections (the pos) raised by the defendants, to wit;

(i) The plaintiff has not exhausted the available alternative remedies before recourse to this court.

(ii) That the suit has been filed under the wrong forum.

The applicant was represented by Ms. Selina Mloge, learned counsel whereas the plaintiff procured the services of the learned counsel Ignas F. Ngumbi. At the instance of the parties, the Pos were canvassed by way of written submissions. Both parties complied with the time line set by the court in filing their written arguments.

I shall first deal with the 1st limb of preliminary objection. Under this point the learned counsel for defendants observed that under section 27(1) of the Land Transport Regulatory Authority Act, 2019 (hereinafter the LATRA Act) the plaintiff was, if aggrieved by the decision of the Authority, constrained before filing the instant case in this court to go for review mechanism. The learned counsel submitted that the application for review was to be submitted within 14 days after receiving the decision. She said that the procedure for review is stipulated under **Part III of the Land Regulatory Authority (Review Procedure Rules, 2020 GN. No. 73)** (hereinafter, GN. No. 73). Ms. Selina submitted further that the Review Panel established under section 26 (1) of the LATRA Act is responsible for reviewing the decisions of the Management of the Authority and submit to the Board for determination. When a party is aggrieved by the decision of the Board has a right to appeal to the Fair Competition Tribunal (FCT), she submitted citing section 28(2) of the LATRA Act. The learned counsel submitted further that the functions of FCT are stipulated under section 85 of the Fair Competition Act, 2003. Ms. Selina observed that the plaintiff did not exhaust these remedies. She buttressed her position by citing the case of **Parin A A Jaffer & another vs. Abdulrasul Ahmed Jaffer & 2 others** [1996] TLR 110 and the case of **Ujenzi Solving Co.**

Ltd & another vs. Da es Salaam Water Sewage Corporation & another, Civil Case No. 70 of 2015 HC-DSM (unreported). She further referred this court to the decision in the case of **The Attorney General & another vs. Nassoro Athuman Gogo & 7 others**, Consolidated Civil Appeals No. 105 and 81 CAT- DSM (unreported) to underscore her view that where the statutes are plain and unambiguous, there is no need to resort to the rules of construction.

The plaintiff's counsel prefaced his response by arguing that the Pos were illegally raised because it was to be within the written statement of defence. In his view, the mode adopted by the defendants' counsel of raising the po contravened Order VIII Rule 2 of the Civil Procedure Code [Cap. 33 R.E 2019] (hereinafter the CPC). Guided by the case of **Kenya Commercial Bank (T) Ltd vs. Deata Limited and 6 others**, Commercial Case No. 65 of 2006 (unreported) he implored this court to find that the Pos is incompetent and struck them out.

On the merit of the Pos, Mr. Ngumbi argued that the principle that the plaintiff was first to exhaust the available remedies do not apply in this case. **Citing rule 9(1) of the LATRA (Review Procedure) Rules, 2020**, the learned counsel, pinned his argument on the reasons that the law required the plaintiff to apply for review when **one,** there

was a decision made by the Management of the Authority and **two,** he had received a record of a decision from the Management of the first defendant authority. He observed that the plaintiff's *locus standi* to apply for review and the reciprocal jurisdiction of review by the Authority are predicated upon the presence of a record of a decision from the management of the 1st defendant. In his view since, in this case, there was never decision made by the Management of the 1st defendant Authority and communicated to the plaintiff by any authorized officer, the route opted by him was proper and facts of this case do not fall withing the ambit of section 27 of the LATRA Act. In his further view cases of **Parin A A Jaffer & another** (supra) and **Ujenzi Solving Co. Ltd & another** (supra) are inapplicable.

On embarking on the disposal journey, let me start with issue of raising a Po in a separate sheet instead of raising it in the Written Statement of Defence (WSD). In his submission, the plaintiff's counsel complained that the Pos were improperly raised and contravened the requirements of Order VIII rule 2 of the CPC which provides as follows:

> *"The defendant must raise by his pleading all matters which show the suit not be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the*

opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality."

When reading between lines the foregoing provision, it is patently clear that preliminary objections, as a general rule, should be taken at the earliest stage of the proceedings, as that helps the litigants and the courts to save time and expenses associated with full trials. The exception to this rule is with respect to objections on jurisdiction and time limit which may be raised at any stage, including at the appellate stage. This position has been emphasized in numerous decisions. In **Betty Kassiri vs. Eastern and Southern African Management Institute (ESAMI)** [2000] TLR 478 it was held:

"A point of law, like this one, touching on the lack of jurisdiction by the court, which may have the effect of disposing of the suit or proceedings without involving trial or full hearing, if successfully argued, should be raised as soon as it becomes apparent either from the pleadings or from statutory (be it parent or subsidiary) law which, if upheld, might dispose of the case."

The objection in this case touches the jurisdiction of the Court at this juncture. The contention is that the same was raised in a separate

sheet not in the pleadings (WSD), meaning that this objection was sneaked clandestinely in the pleadings. While I fully agree with the essence of the plaintiff's complaint, it does not give me the impression or feeling that injustice was perpetrated against the plaintiff. This is so when a consideration is put to the fact that it was an objection that touched on jurisdiction of the court in respect of which the plaintiff was in the position of justifying that it was or not. However, it was not raised during the submission. It was raised prior and the court and the plaintiff were put to notice. In view thereof, the plaintiff had time to prepare himself and this is exhibited in submission. With respect, I do not agree with Mr. Ngumbi that the rule is to raise it in the WSD. However, the Po may be raised in a separate by a notice or by the Court *suo motto* especially when it touches the jurisdiction of the Court or limitation of time. My position is fortified by this Court's reasoning in **A/S Noremco Construction (NOREMCO) vs. Dar es Salaam Water and Sewerage Authority (DAWASA)**, HC-Comm. Case No. 47 of 2009 (unreported).

> *"Objections can be raised either in the written statement of defence or separately by a notice or even suo motto by the Court itself and particularly where they relate to jurisdiction or the limitation period. I do not therefore find anything*

objectionable in the manner in which the learned counsel for the Defendant has raised the preliminary objections by filing separate notices thereof instead of raising them in the written statement of defence. In that regard therefore the fact that the learned Counsel for the Plaintiff too has raised preliminary objections in the course of making submissions levels out any argument on impropriety of the notices by the Defendant."

I fully associate myself with finding of this court. From the discussion above, I see no merit in Mr. Ngumbi's complaint.

I labored to read, digest and compare the rival arguments by counsels. The issue that cries for determination is whether the plaintiff exhausted the available remedies before filing the present suit to this court. As the alleged, this suit emanates from the decision of LATRA to seize the plaintiff's motor vehicle. The task imposed on this Court is to determine whether the mechanism of resolving disputes of this nature were complied with.

Before that, I wish to restate the principles guiding the exhaustion of the administrative mechanism before resorting to Court which have been emphasized in various decisions of the Court and the Court of Appeal.

The legal position is now settled that where the law provides for extrajudicial machinery in resolving a certain cause alongside with judicial one, the extrajudicial machinery must be exhausted first before recourse is had to the judicial process unless the aggrieved party can satisfy the court that no appropriate remedy is available in the special forum. The general rule is stated in the case of **Parin A A Jaffer & another** (supra)

> *"...where the Law provides extra-judicial machinery alongside a judicial one for resolving a certain cause, the extra-judicial machinery should, in general, be exhausted before recourse is had to the judicial process."*

In **Attorney General vs. Lohay Akonay and Joseph Lohay** [1995] TLR 80 (CA) at page 96 it was held:

> *"Courts would not normally entertain a matter for which a special forum has been established, unless the aggrieved party can satisfy the court that no appropriate remedy is available in the special forum."*

Similar position was taken in the case of **Salim K. Mndende vs. Vodacom Tanzania Ltd and TCRA,** Civil Case No. 18 of 2015 that:

"It is trite law that where a person seeks legal recourse, the said person must exhaust all available mechanism."

In the present case the plaintiff is complaining that the 1st defendant unlawfully seized his motor vehicle duly licensed to carry and transport passengers through Mbeya – Kyela route. The 1st defendant's decision of seizing unlawful his motor vehicle aggrieved him. Ms. Selina argues that instead of filing his grievances with this court, he had to apply for review to the Management of the Authority under section 27 (1) of the LATRA Act which provides as follows:

"27-(1) Any person aggrieved by any decision made by the Authority may, within fourteen days after receipt of the decision, apply to the Authority for it to review the decision."

It is clear from the foregoing provision that a specific mechanism for attending the plaintiff's grievance against the decision of the 1st defendant to seize his motor vehicle is put in place. The procedure is clearly laid down. After recognizing that his motor vehicle was unlawfully seized, the plaintiff had fourteen days to apply for review.

If what Mr. Ngumbi is saying is true that **Rule 9(1) of the LATRA (Review Procedure) Rules, 2020**, requires the plaintiff to

apply for review when there was a decision made by the Management of the Authority and must have received a record of a decision from the Management of the first defendant authority, he ought to prove that these conditions embedded in Rule 9(1) of the LATRA (Review Procedure) Rules, 2020, were not met by the 1st respondent. Also, Mr. Ngumbi has not demonstrated that prior opting to come to this court, the plaintiff made a request of the record of the decision and was not supplied with the same or that it was not available at all. The principle enunciated in **Lohay Akonay Case** (supra) is that the aggrieved of the decision can file the case to court because its jurisdiction is not ousted but should satisfy the court that no appropriate remedy is available that forum. In this case, lack of record of decision, is not a proof that the remedy would not be available in the special forum. I am therefore in agreement with Ms. Selina argument on this aspect since the plaintiff was aggrieved by the decision of the 1st defendant to detain his motor vehicle, he had first to go for review.

In view of the clear language of section 27 (1) of LATRA Act, it seems to me rather absurd for the plaintiff's counsel to argue that the plaintiff's *locus standi* to apply for review and the reciprocal jurisdiction of review by the Authority are predicated upon the presence of a record

of a decision from the management of the 1st defendant and that since, in this case, there was never decision made by the Management of the 1st defendant Authority and communicated to the plaintiff by any authorized officer, the plaintiff had automatic right to overlook the clear legal procedures. There is, in my opinion, good sense and indeed sounding purpose for the legislature to establish such a forum including to enhance efficiency, timely determination of complainants with a view of building confidence to the business community, safety in transportation industry and consumers of the services.

Having examined the law very closely in light of the submissions by parties' counsel, I am behooved to agree with the defendants' counsel that the plaintiff's offended the law for failing to first exhaust the available mechanism of dispute resolution by applying for review to the Authority.

This, then, goes as far as affecting the jurisdiction of this Court which is not a proper forum. As argued by Ms. Selina, the plaintiff's grievance ought to have been lodged to the appropriate forum established specifically for dealing with people aggrieved by the decision of the Authority. The Authority has all mandates to receive applications, as this one, investigate and make an award according to law. Quite

clearly the LATRA Act has an inbuilt appellate procedure to whoever is dissatisfied with board's decision to the FCT.

In the upshot, I find and hold that the Pos raised succeed and declare this suit is incompetent. I accordingly struck it out with costs.

Dated at **MBEYA** this **18th** day of **August, 2022**

J. M. KARAYEMAHA
JUDGE