

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA**

MISC. CIVIL APPLICATION NO. 113 OF 2022

**THE REGISTRED TRUSTEE OF KARATU
VILLAGE WATER SUPPLY (KAVIWASU)APPLICANT**

VERSUS

**KARATU URBAN WATER SUPPLY & SEWERAGE
AUTHORITY (KARUWASA) 1ST RESPONDENT
PERMANENT SECRETARY MINISTRY
OF WATER AND IRRIGATION.....2ND RESPONDENT
MINISTRE MINISTRY OF WATER & IRRIGATION3RD RESPONDENT
THE ATTORNEY GENERAL4TH RESPONDENT
STEPHEN JAMES SIAY 5TH RESPONDENT**

RULING

14/09/2022 & 11/10/2022

KAMUZORA, J.

Under a certificate of urgency the Applicant brought this application seeking for the following: -

- 1) That, this court be pleased to issue an order of interim temporary mareva injunction to restrain the Respondents, their agents, servants, assignees or whomsoever acting through them from continuing interfering the operation of the Applicant as*

independent body and from continuing with the process of transferring all the assets of the Applicant, money in the bank accounts of the Applicant, and landed properties into the name of the 1st Respondent pending Maturity of the notice of intention to sue issued under the provision of law, the filing, hearing and determination of the main suit/judicial review to be filed before this Court.

2) The 5th Respondent be ordered and directed to return the sign boards which bears the name of the Applicant in the registered office and maintain the office of the Applicant as independent office from the 1st Respondent.

3) An order be made to direct the maintenance of the status quo

4) Costs of the suits and any other order this court may deem fit.

The application was brought under section 2(3) of the Judicature and Application of Laws Act, Cap 358 R.E 2019, Section 95 of the Civil Procedure Code Cap. 33 R.E 2019 and supported by an affidavit deposed by Emmanuel Nade Tango, one of the registered trustees and the appointed chairman of the Applicant. The application was opposed by the Respondents through counter affidavits deposed by Simon Said Nkanyemka for the 1st to 4th Respondents and Stephen James Siay for the 5th Respondent. The counsel for the 1st to 4th Respondent also filed notice of preliminary objection which states that,

1) That, this ordinary court has no jurisdiction to entertain and adjudicate this application.

2) The application is incompetent and bad in law as it has already been overtaken by event.

When the matter was called for hearing, the Applicant was ably represented by Mr. Qamara Valerian and Mr. Samwel S Welwe, both learned advocates while the 1st, 2nd, 3rd and 4th Respondents were represented by Mr. Peter Musetti, Senior State Attorney and the 5th Respondent enjoyed the service of Mr. Bonaventure Nicolaus Bonaventure, learned advocate. As a matter of practice, the preliminary points of objection were to be determined ahead of the application but, in order to serve court's precious time and that of the parties, it was agreed that both hearing of the application and the preliminary objection proceeded simultaneously and by way of written submissions. This court will therefore deliberate on the points of objection and if sustained, it will refrain from determining the application and if not then, will proceed on determining the merit of the application. During the hearing of the Preliminary objection both parties filed their submissions as scheduled save for the rejoinder submission from the Respondents.

Submitting in support of the first preliminary objection the counsel for the Respondent submitted that, the reliefs sought by the Applicant

intend to challenge the administrative actions of the 3rd Respondent pending the maturity of the notice on intention issued against the Respondents. That, mareva injunction can only be relevant if the intended suit is an ordinary civil suit but not where the intention is to challenge an administrative action. That, the application arises from action of the 3rd Respondent done through his Ministerial powers which can only be challenged through judicial review in this court. That, the application made can only be issued if the Applicant had sought leave to file for judicial review against the administrative action of the 3rd Respondent.

The Respondent's counsel further submitted that, this court lacks jurisdiction as a mareva injunction can only be issued in ordinary suit. To buttress his submission the counsel cited the case of **Elieza Mtemi & 12 others Vs. Attorney General**, Civil Appeal No. 177 of 2018 CAT at Arusha and Rule 5(6) and 7(5) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial review Procedure and fees) Rules, 2014.

Arguing in support of the second point of preliminary objection, it is the submission by the counsel for the Respondent that, the Applicant's

prayer is not maintainable as already overtaken by event basing on the reasons that;

- i) The Ministerial order has already been duly effected and the operation of the Applicant are already being managed and supervised by the 1st Respondent under the Ministry of Water as the authority responsible for provision of water supply and sanitation.
- ii) The Applicant sign boards have already been demolished and the offices are already taken over by the 1st Respondent's Office operating under auspices of the 1st Respondent under the Ministry of Water the 2nd Respondent.

The counsel for the Respondent cemented his submission with the case of **Yusto Levilian Kaijage Vs. Abdi Msangama**, Land Revision No 7 of 2022 (Unreported), **Seleman Zahoro & 2others Vs. Faisal Ahmed (legal representative of the deceased Ahmed Abdul)**. The Respondent prays for the application to be dismissed with costs.

Contesting the preliminary objection, the counsel for the Applicant stated that, the application was properly before this court and the court has jurisdiction to entertain the same. That, this application is made

under section 2 (13) of the Judicature and Application of Laws Act, Cap 358 RE 2019 and it is preferred so because the circumstances under this application is not covered under the provision of Order XXXVII Rule 1 of the Civil Procedure Code [Cap 33 R.E 2019]. That, where the code is silent, the High Court has usually applied the relevant rules of common law statute of general application in force in England on 22nd July 1920 and supported his submission with the case of **Abdallah M Maliki & 545 others Vs. Attorney General & Another**, Misc. Land Application No 119 of 2017 (Unreported) and **Edward Epimark Lasway t/A Lasway Truck 2 Others Vs. National Bank of Commerce**, Misc. Commercial Application no 156 of 2019, HC at DSM (Unreported).

On the argument that the application arises from the action of the 3rd Respondent through Ministerial power the Applicant submitted that, there are no valid ministerial order to challenge at this stage as the Applicant aims at restraining enforcement of ultra vires orders of the 3rd Respondent until such a time the circumstances allow the filing of an application for judicial review. He added that, the order of the 3rd Respondent to merge the Applicant and the 1st Respondent are beyond the powers given under the water Supply and Sanitation Act, 2019 Water Supply and Sanitation (Clustering of Water Authorities Regulation)

GN No 826 of 2019. That, the Applicant is a registered independent organization which has acquired a status of Community water Organisation and the 1st Respondent is a Water authority within the meaning of GN No. 826. He was of the view that, under the above statute the minister can only merge between one water authority and another in order to archive commercial viability as per section 36 of the Water Supply and Sanitation Act 2019 as per Regulation 3 and 6 of GN No. 826. That, merging/clustering of a community water organization can only be done between one community organization and another community Organization as provided under section 36 of the Water Supply and Sanitation Act 2019.

Responding to the argument that interim relief can be issued if the Applicant had sought leave of the court to file judicial review against the administrative actions of the 3rd Respondent, the Applicant replied that, the same was misconceived in law and will be faced with an objection as it has been prematurely preferred. He insisted that, pursuant to the chamber application and the supporting affidavit, the application is sought pending the intended suit which is basically the judicial review. That, an application for judicial review has to be proceeded by an application for leave to file a judicial review and for the same to be

allowed, one has to exhaust all other remedies. The Applicant's counsel was not in agreement with the Learned State Attorney that, the only pre-requisite for judicial review is application for leave. That, Applicant must obtain the legal standing to institute judicial review because there are existing other legal impediments. He explained that, as far as the judicial review is concerned, legal impediment is exhausting other available remedies and as per paragraphs 19 and 20 of the affidavit the Applicant have officially complained to the minister as a way of exhausting available local remedy. He backed the above argument with the provision of Regulation 14 of Water Supply Regulation GN No. 828 of 2019.

The counsel for the Applicant further submitted that, *mareva* injunction is not specifically for ordinary suit but also for other suits but the mandatory requirement is that, there must be a legal impediment which has to be fulfilled first as a way of obtaining the legal standing of instituting the suit. He supported his submission with the case of **Leonard Net Logistics Company Limited Vs. Tanzania Commercial Bank Limited & 3 others**, Misc. Civil Application No 585 of 2021. Other cases; **Lausa Alfian Salim and 106 others Vs. Minister for Lands, housing and Urban Development and**

National Housing Cooperation, (1994) TLR 237, **Parin A. Jafar and another Vs. Abdulsual Ahmed Jafar and two others**, (1996) TLR 110 and **Joshua Nassary Vs. Speaker if the National Assembly of the United Republic of Tanzania and another**, Misc. Civil Cause No. 22 of 2019 to support the argument that an application for judicial review to exhaust all available local remedies.

The Applicant counsel was of the view that the cited case of **Elieza Zacharia and 12 others Vs. Attorney General**, Civil Appeal No. 177/2018 CAT at Arusha is distinguishable from the present situation. He maintained that, this application intends to restrain the ultra vires orders of the 3rd Respondent and this court is with full jurisdiction to grant mareva injunction pending the exhausting of all local remedies before the judicial review is filed in this court.

Responding on the 2nd point of preliminary objection the counsel for the Applicant argued that, whether the minister's decision has already been executed is a point of fact to be ascertained during the hearing of the Application hence cannot be argued as a preliminary objection. To cement on this the counsel cited the case of **Mukisa Biscuits Manufacturing Company Limited Vs. West End Distributors Limited** (1969) EA 696. He insisted that, the said minister order on

merging alleged executed was not attached taking into consideration that the same has to be gazetted.

Regarding the claim that the sign board has already been demolished and the office had been taken over he stated that, the Applicant's property is dully transferred after presenting the transfer deed to the relevant authorities for registration. That, in the counter affidavit the Respondent attached no proof showing that the transfer has been effected at the office of the assistance registrar. That, the same applies to the money in bank and the motor vehicles hence the application is not overtaken by event. The Applicant's counsel referred this court to the decision of Court of Appeal in the case of **the Soitsambu Village Council Vs. Tanzania Breweries limited and Tanzania Conservation Limited**, Civil Appeal No 105 of 2011(Unreported). The Applicant thus prays for preliminary objections to be dismiss with costs.

Upon going through the submissions by the counsel for the parties in respect of the preliminary points of objection, the pertinent issue that needs the determination by this court is whether the preliminary objection as raised by the Respondents are of merit.

Starting with the first point of preliminary objection, it is the claim by the Respondents that the application has been overtaken by event as the Ministerial order has already been fully effected and the Applicant's sign boards have already been demolished and the office taken over by the 1st Respondent. In opposition the Applicant contends that, the objection does not fit to be a point of law as it is a point of facts to be ascertained during the hearing of the application.

It is a settled principle that, a preliminary point of objection must be based on point of law and not facts. This is also the holding of the court in the famous case of **Mukisa Biscuit Co Ltd Vs. West End Distributors Limited** (supra) where the following criteria were set for a legal objection to qualify as preliminary point.

".... a preliminary objection consists of point of law which has been pleaded or which arise by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration".

At page 70 the court went further and held that,

*"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. **It cannot be raised if any fact has to be ascertained** or if what is sought is the exercise of judicial discretion".*

In digesting the criteria set by Mukisa Case and putting the same into the case at hand, I am of the firm view that, the issue as to whether the Ministerial order has been effected and or whether the operation of the Applicant has been managed and supervised by the 1st Respondent are all matters of facts that needs a detailed explanation and evidence to prove hence cannot be termed as points of law fit to be raised as preliminary point of objection. That being said, the first preliminary objection is devoid of merit and the same is hereby overruled.

Turning to the second point of objection, it is the Respondent's contention that, this court has no jurisdiction to determine this application because, mareva injunction can only be granted if the Applicant intend to file an ordinary suit and not where the Applicant intend to challenge an administrative action which ought to be challenged by way of judicial review. The Applicant insisted that, this

application is properly filed and the court is vested with jurisdiction to determine the same.

This application is brought under section 2(3) of the Judicature and Application of Laws Act, Cap 358 R.E 2019, Section 95 of the Civil Procedure Code Cap. 33 R.E 2019. These are provisions on the jurisdiction and inherent powers of the High Court and application of written laws, the common law, the doctrines of equity and the statutes of general application in force in England where the statutes are silent on certain matter. It is the Applicant's contention referring the case of **Abdallah Maliki** (supra) that, since the circumstance of this case does not fall under the provision of Order XXXVII Rule 1 of the CPC, the provision under the JALA and section 95 of the CPC serve the purpose.

I am well alive on the principle behind the *mareva* injunction that, this court may issue an interim order even without a pending suit or where the Applicant is waiting maturity of statutory notice to file a suit. There are many cases to that effect, amongst others, is the case of **Registered Trustees of Calvary Assemblies of God (CAG) vs. Tanzania Steel Pipes Limited and 2 others**, Misc. Land case Application No 677/2019 HC Land Division at DSM (Unreported) where the court cited with approval the case of **Tanzania Sugar Producers**

Association vs. The Ministry of Finance of the United Republic of Tanzania and The Attorney General, Miscellaneous Civil Case No. 25 of 2003 (HC Commercial Division, Dar es Salaam) (unreported). In that case, the court explained clearly the genesis of such applications and held that, a court has jurisdiction to issue an interim order where there is no pending suit.

In the instant application, it is agreed by both parties that, mareva injunction is sought to restrain the Respondents from executing the ministerial order pending filing an application for purpose of challenging the Ministerial order of the 3rd Respondent. Now the question is whether mareva injunction can be issued where the intended matter to be filed in court is an application for review of the ministerial order. The Respondent contended that, this court has no jurisdiction to determine the application as the Applicant intends to file review application, which does not require a party to issue statutory notice like in ordinary suit but to seek for leave to file review.

In order to understand if mareva injunction can be granted against ministerial order, it become important to understand how the said ministerial order can be challenged in court. The Law Reform (Fatal Accidents and Miscellaneous Provisions) Judicial review Procedure and

Fees) Rules 2014, govern application for Judicial Review. Under Rule 5(1) and (6) the law provides,

"5(1) An application for judicial review shall not be made unless a leave to file such application has been granted by the court in accordance with these Rules."

5(6) "The grant of leave under this rule shall apply for an order of prohibition or an order of certiorari, if the Judge so directs, operate as a stay of the proceeding in question until the determination of the application, or ordered otherwise:

Provided that where the circumstances require, the Judge may direct that the application be served for hearing inter-partes before the grant of such leave."

The above provision is very clear that, whoever intends to file an application for review must obtain the leave of this court to so do. The provision also provides that, where such leave is granted and if directed by the Judge, it may operate as a stay of the proceeding in question until the determination of the application, or if ordered otherwise. The said provision does not call for issuance of statutory notice in order to file a review application.

Going through the instant application and facts deponed in the Applicant's affidavit, the Applicant intends to challenge verbal announcement of the 3rd Respondent which authorised other

Respondents to act and merge the Applicant and 1st Respondent. The Applicant seeks for restraints order against the Respondents from acting on the 3rd Respondent's order pending the filing of an application for judicial review before this suit. In considering Rule 5 cited above, and well explained above, the application for review cannot be filed before obtaining leave of this court.

The Applicant has only informed this court that the injunction is sought pending maturity of the notice of intention to sue issued under the law and pending hearing and determination of the matter which is referred herein as an application for Judicial review. The Applicant has not demonstrated if he had pursued for leave to file review. If no leave obtained, an application for review cannot be determine by this court. even if we assume that the notice was a requisite requirement, the Applicant has not even demonstrated if the notice is already issued. What is in records is a complaint letter to the minister, Annexure A-8 which in a plain meaning does not serve as a statutory notice. I reiterate that, much as the Applicant intends to challenge ministerial order by way of judicial review, in the absence of leave. The same cannot be filed. Thus, granting mareva injunction to a party who intends to bring

unmaintainable application is beyond the court's jurisdiction, I therefore sustain the 2nd point of objection.

Since the 2nd preliminary objection goes to the competence of the application, I will not then determine the merit of the application. I therefore strike out the application but in considering that the dispute is centred on the provision of water service which is the very necessary service to the community, I refrain from issuing orders for costs

DATED at ARUSHA this 11th day of October 2022




D.C. KAMUZORA

JUDGE

