IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA SUB REGISTRY

AT IRINGA

MISC. CIVIL APPLICATION NO. 03 OF 2023

CAROLINE LUCAS MWAKABUNGU..APPLICANT

VERSUS

REGIONAL COMMISSIONER OF IRINGA .... 1ST RESPONDENT

PERMANENT SECRETARY REGIONAL AND

LOCAL GOVERNMENT AUTHORITIES ....2ND RESPONDENT

THE ATTORNEY GENERAL ....3RD RESPONDENT

SOLICITOR GENERAL .... 4TH RESPONDENT

RULING

Date of Last Order: 13.03.2023

Date of Judgment: 31.03.2023

A.E. Mwipopo, J.

The counsel for the respondent namely Mr. Bryson Ngulo, State Attorney, filed a notice of preliminary on two points of law in this application for Mareva Injunction filed by Ms. Caroline Mwakabungu, the applicant herein. The applicant moved this court under a certificate of urgency for declaratory order restraining the Regional Commissioner of Iringa, the 1st respondent herein, or any person acting under his authority

from implementing the Regional Commissioner order for the applicant to vacate and surrender documents and management of Kampuni ya Uchukuzi na Biashara Iringa Limited pending maturity of the 90 days' notice of intention to sue in order to institute legal proceedings. The application is made under section 2(3) of Judicature and Application of Laws Act Cap. 358 of 2002 and section 95 of The Civil Procedure Code Cap 33 R.E 2019. It was made by chamber summons supported by an affidavit sworn by the applicant namely Caroline Lucas Mwakabungu. The two points of preliminary objection raised by respondents were as follows:-

1. *That, the whole application is bad in law, hence this honourable Court has no Jurisdiction to entertain it.*
2. *That, the applicant's affidavit is incurably defective for want of dates on the Jurat of attestation.*

The court fixed a date for hearing of the P.O. On the hearing date, the applicant was represented by Mr. Omary Hatibu and Mpeli Mwakabungu, learned Advocates, whereas, respondents were represented by Mr. Bryson Ngulo, learned State Attorney. The Court invited the parties to address it on the preliminary points raised.

Mr. Ngulo abandoned the second point of preliminary objection and submitted on the first point of preliminary objection only. It was his

submission that the applicant filed interim injunction (mareva) seeks the status quo be maintained pending the notice to sue the Regional Commissioner to mature. In paragraph 9 of the applicant's affidavit, it was stated that the applicant is praying for temporary injunction against the order of the Iringa Regional Commissioner for the applicant to handle over the office and documents within 48 hours to the new management. It was deposed in paragraph 10 of the applicant's affidavit that the notice to sue was attached to the affidavit as annexure CLM-6. Reading paragraph 6 of the annexure CLM-6 (notice to sue) it shows that applicant is challenging the administrative order of the Regional Commissioner for the applicant to handle the office to a new management of Kampuni ya Uchukuzi na Biashara Iringa Limited. The said order is ultra vires as Regional Commissioner has no power to interfere with affairs of a private company.

The counsel was of the view that the said matter is not a normal suit, but a judicial review of administrative action. He went on further arguing that, Rule 5(1) and (6) of Law Review (Fatal Accidents) Rules provides that the person who want to review administrative action have to apply for leave to file judicial review in the High Court. For that reason, the notice to

sue on this application has no purpose in such circumstances. The leave itself is a stay.

To cement his argument, he cited the cases of **Registered Trustee of Karatu village water supply (Kaviwasu) vs. Karatu Urban Water Supply and Sawerage Authority (KARUWASA) and 4 others**, Misc. Civil Application No. 113 of 2022, High Court of Tanzania, Arusha Registry, at Arusha, (unreported) at page 16 where the court held that granting mareva injunction to a party who intends to bring unmaintainable application is beyond the court's jurisdiction.

In another the case of **Eliza Zacharia Mtemi and 12 others vs. AG and 3 Others**, Civil Appeal No. 177 of 2018, Court of Appeal of Tanzania, at Arusha, (unreported), it was held at page 14 that: -

> *"In the circumstances, we shall dismiss this appeal for mainly two reasons that are intertwined. First, for the suit being unmaintainable because it sought to question administrative actions of the government bodies through an ordinary court by a suit. Secondly, within the same suit, it sought to enforce constitutional rights of the appellants to protect public property by way of ordinary suit"*

It was his conclusion that, basing on the cited case laws this case has no leg to stand and they prayed for the court to dismiss it.

In his reply, Advocate Mwakabungu submitted that Section 2(3) of Judicature and Application of Laws Act allows this court to entertain matters where the Law is silent. To support his argument he referred this court to the case of **TANESCO vs. IPTL [2000] TLR 324.** It was his submission that this Court has power to grant interim injunction to be taken as temporary order to preserve the status quo pending filing of the main suit. This is for the purpose of serving and securing the applicant from the loss that the applicant may suffer.

He said that the basis of respondent's preliminary objection is the notice to sue which show that there is intention to sue on the order of the Regional Commissioner that the applicant has to handle the office and documents to the new management. This is the matter of private company. The Court may grant interim order in order to allow the applicant to file application for judicial review as it was held in the case of **Shaku Haji Othman Juma vs. A.G and Two Others [2000] TLR 49.** In this case, the High Court dismissed the case and directed the applicant to apply for mareva injunction pending his filing of judicial review. Thus, the

objection raised by the respondent is pre mature as the same predict the issue that will be instituted by the applicant. There is no application for judicial review yet before this court. The aim of mareva injunction is to preserve the parties from the injuries that may be suffered without interference of the court.

In a short rejoinder, Mr. Ngulo said that this court has jurisdiction to grant mareva injunction where the law is silent. However, the said power has to be exercised judicially depending on the nature of each suit. The requirement of issuing 90 days' notice is provided by Section 6(2) of Government Proceedings Act. The said Government Proceedings Act do apply in normal Civil Suit only. The presence of notice to sue shows that the applicant intends to file a normal suit against the order of the Regional Commissioner.

He distinguished the case of **TANESCO vs. IPTL, (supra),** cited by the counsel for the applicant that the nature of the case was different to this case. The TANESCO case was normal suit while the present case they are dealing with Mareva injunction.

Regarding the argument by the counsel for the applicant that the preliminary objection was brought pre-maturely, Mr. Ngulo submitted that

the applicant's affidavit speaks for itself that what is in dispute is administrative order of the Regional Commissioner. If the applicant intends to file normal suits, there is no other notice which was served to the respondent. Thus, the applicant doesn't intent to sue the Respondent in the normal suit. The notice to sue must contain the basis of the claim.

Having heard submissions by the learned Counsels representing the parties herein, the issue to be determined here is whether the preliminary objection raised has merits.

Mr. Ngulo objection based on the issue that this court cannot issue Mareva injunction as the applicant intent to challenge the administrative action by the Regional Commissioner. According to him, the applicant was required to file a judicial review and the same does not need a statutory 90 days' notice. Mr. Mwakabungu on his side was in a considered opinion that, this court has jurisdiction to issue this application and the preliminary objection was prematurely brought.

Mareva injunction is a common law remedy developed by the courts of England. In this jurisdiction, the court may grant such injunction under section 2 (3) of the Judicature and Application of Laws Act Cap. 358 R.E 2019 which allow the application of common law and equity in our

jurisdiction. Mareva injunction may be issued where the applicant cannot institute a case in a court of law because of an existing legal impediment. This was stated by this Court in the case of **Daudi Mkwaya Mwita vs. Butiama Municipal Council and Another,** Misc. Land Application No. 69 of 2020, High Court Musoma Registry, (unreported), where it was held that:-

> "*Mareva injunction cannot be applied or granted pending a suit. It is an application pending obtaining a legal standing to institute a suit. It may be issued where, the applicant cannot institute a law suit because of an existing legal impediment*"

I have read the contents of the application, the prayers thereto, the affidavit in support of the application, and the counter affidavit filed by the respondents and their respective annextures. The applicant is pursuing for interim injunction prior the institution of the suit. Paragraph (a) of certificate of urgency, paragraph 3 and 8 of the chamber summons, paragraph 10, 11 and 12 of the applicant's affidavit, and paragraph 6 of the notice to sue which is annexture CLM 6 of the affidavit reveals that the applicant has issued 90 days' notice of intention to sue the Iringa Regional Commissioner for acting ultra vires by giving order to the applicant to

handle the office and documents to the new management of the company, the order which intervenes the affairs of private company. It is obvious that the applicant is challenging administrative powers of the Regional Commissioner.

The counsel for the respondent is saying that the proper remedy for the applicant was to file application for judicial review of the administrative action and not to follow the process of normal civil suit against the Government as she did. By filing a 90 days' notice to sue it means the applicant is intending to file suit under Government Proceedings Act which is a normal civil suit against the Government. I'm of the same position that administrative action of the persons charged with the performance of public acts and duties is challenged by way of judicial review and not normal civil suit against the Government.

Judicial review of administrative actions is inherent power of the High Court by which it exercised its supervisory jurisdiction over proceedings and decisions of inferior tribunals or other authorities, bodies or persons charges with the performance of public acts and duties. This was stated by this Court in the case of **Felix Mselle vs. Minister for Labour and Youth and three others [2002] TLR 437**. The High Court exercises this

power by means of prerogative orders (certiorari, prohibition and mandamus) as one of those effective ways employed to challenge administrative action as it was held in **John Mwombeki Byombariwa vs. Regional Commissioner, Kagera and Another**, High Court of Tanzania at Mwanza, Miscellaneous Civil Cause No 22 of 1986, delivered at Mwanza 28th March, 1987, (unreported).

The Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap. 310 R.E. 2019 provides in section 17 (1) that the High Court shall not issue any of the prerogative writs of mandamus, prohibition or certiorari in the exercise of its civil or criminal jurisdiction. Thus, the writs shall not be issued in normal civil and criminal suits. The same could be issued by the High Court where it has jurisdiction to issue those writs. The High Court has jurisdiction to issue those prerogative writs under section 2 (3) of Judicature and Application of Laws Act, Cap. 358 R.E. 2019 and section 95 of the Civil Procedure Code Act, Cap. 33 R.E. 2022. These provisions provides for inherent powers of the High Court by application of common law, doctrines of equity and statutes of general application in force in England where the statutes in our jurisdiction is silent.

The Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, G.N No. 324 of 2014 provides in rule 5(1) that an application for judicial review shall not be made unless a leave to file such application has been granted by the court. Rule 5 (6) provides that the granting of leave may operate as stay of proceeding in question until determination of the application if the Judge so direct. This means that by filing the application for leave, the applicant may also pray for stay of proceedings in question until determination of the application.

The applicant herein has filed this application while waiting for the 90 days' notice to sue the 1st respondent to mature. However, the forum taken by the applicant is not the proper one. He was supposed to file application for judicial review of administrative action of the 1st respondent. The Court of Appeal in the case of **Elieza Zacharia Mtemi and 12 Others vs. A.G. and 3 Others,** (supra), held at page 13 that:-

"It is, undoubtedly, settled that where the law provides for a special forum, ordinary Court should not entertain such matters."

In the case of **Daudi Mkwaya Mwita vs. Butiama Municipal Council and Another,** (supra), it was held that mareva injunction may be issued where the applicant cannot institute a law suit because of an

existing legal impediment. It is clear that there is no existing legal impediment to the applicant in this case to apply for judicial review at the moment. Allowing the application for Mareva Injuction to proceed with hearing while knowing that at the end of the day the applicant will end filing application for judicial review against the administrative action of the Regional Commissioner is not correct. Thus, allowing application for mareva injunction to proceed with hearing while knowing that the intended suit is not maintainable and it is not the good usage of the jurisdiction of this Court. The court has jurisdiction, but the same has to be utilised properly.

Therefore, the P.O. is sustained and the application is accordingly struck out. Under the circumstances of this case where the application is struck out for reason of being filed in a wrong Court, I'm refraining from awarding the cost. It is so ordered accordingly.

A.E. MWIPOPO

JUDGE

31.03.2023