IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CAUSE NO. 35 OF 2006

IN THE MATTER OF AN APPLICATION FOR THE ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION;
AND
IN THE MATTER OF THE EXERCISE OF QUASI-JUDICIAL POWERS UNDER THE EAST AFRICAN COMMUNITY CUSTOMS MANAGEMENT ACT, 2004 IN EXCESS OF JURISDICTION;
AND
IN THE MATTER OF ACTING ULTRA VIRES STATUTORY POWERS;
AND
IN THE MATTER OF THE EXERCISE OF STATUTORY POWERS FOR
IMPROPER MOTIVES;
AND
IN THE MATTER OF ABUSE OF QUASI-JUDICIAL POWERS;
AND
IN THE MATTER OF FETTERED ACCESS TO JUDICIAL REMEDIES;
AND
IN THE MATTER OF WRONGFUL MISAPPLICATION OF THE LAW AND CONTRAVENTION OF THE RULES OF NATURAL JUSTICE;
AND
IN THE MATTER OF IMPROPER EXERCISE OF DISCRETIONARY EXTRA JUDICIAL POWERS;

BETWEEN
BIN JOHAR GENERAL TRADING LLC.... APPLICANT
VERSUS
THE COMMISSIONER GENERAL
TANZANIA REVENUE AUTHORITY .....1ST RESPONDENT

THE COMMISSIONER FOR CUSTOMS.....2ND RESPONDENT
THE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

MJASIRI, J.

This is an application by BIN JOHAR GENERAL TRADING LLC for the orders of certiorari, mandamus and prohibition against the Commissioner General Tanzania Revenue Authority, first Respondent; the Commissioner for Customs, second Respondent and the Attorney General, third Respondent. The application arises from an order made by the second Respondent to seize a consignment of 5,975,64 metric tons of diesel on board Mt Olympique Pride.

The Applicant contracted Enoch Supply and Trading LLC and MT Olympique Pride a tanker ship to ferry diesel gas oil for GBP Tanzania Limited in Tanga and to another merchant based in Somalia.

According to the Applicant the portion of the gas oil belonging to GBP (T) Ltd was discharged at Tanga Port and all custom requirements were complied with. The vessel was cleared by customs and clearance documents were given to the Master of the Ship. The ship was then ordered not to leave the Port by the first and second Respondents. A notice of seizure for the ship and its cargo was issued.

The Applicant also stated that no charges were made against the master of the ship. However charges were preferred against an officer of the Dar es Salaam Marine Services Company Limited who is unknown to the company for making false documents and conveying uncustomed goods. The said officer of Marine Services Limited though not an agent of the Applicant company signed a request to have the above offences compounded.

According to the Respondents the ship was stopped from sailing because the master of the ship had contravened the law by failure to furnish a full report of the cargo therein to the proper officer, showing separately goods which are in transit, transshipment and any goods for re-exportation. According to the first Respondent the protestations against the orders should have been made to first and second Respondents but no such protestations were made. The ship's agent admitted committing the offence and the said offence was compounded.

The Applicant is represented by Professor Luoga and the Respondent is represented by Mr. Beleko. The Attorney General did not file a counter affidavit and/or written submission. Hearing of the Application proceeded by way of written submissions. I am indeed grateful to both Counsels for the well Researched presentations.

The orders for mandamus, certiorari and prohibition are discretionary remedies. As a general rule the court will refuse to issue the order if there is another convenient and feasible remedy within the reach of the applicant.

In ***Abadiah Salehe V Dodoma Wine Company Limited*** 1990 TLR 113 (HC) Masanche J cited the decision of Samatta J (as he then was) in the case of ***Moris Onyango V The Senior Investigating Officer Customs Department Mbeya*** in Criminal application No.25 of 1981 wherein he stated as under:

> *"It is an entirely correct preposition to say that an order of mandamus is a discretionary remedy. The order is not one's right and it is not issued as a matter of course. The purpose of the order is to supply defects of justice. It will therefore issue where there is no specific legal remedy for enforcing the specific legal right claimed or where, although there is an alternative legal remedy, such mode of redress is considered by the court to be less convenient, beneficial and effectual. As a general rule the court will refuse to issue the order if there is another convenient or feasible remedy within the reach of the applicant."*

In PREM's Law of Writs in India, England and America (2nd Edition) at page 385 it was stated as under:

> *"Mandamus does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of mandamus against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in interference by the Judicial department with the management of the executive department of the government. The courts will not intervene to compel action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory."*

In ***Chotely Lal V State of Uttar Pradesh*** (1951), 38 A.I.R. 228 it was stated as under:

> *"Mandamus is neither a writ of course nor a writ of right but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory duty or legal duty to do something or not to do something; the duty itself being imperative in nature."*

The issue of certiorari is purely discretionary and the rule is that certiorari should only be granted where no other suitable remedy exists. A writ of certiorari is not granted merely because the decision is erroneous. The superior court cannot convert itself into a court of appeal and examine for itself the correctness of the decision impugned in respect of a matter entirely within jurisdiction unless the record disclosed an error apparent on its face or an irregularity in the procedure which goes contrary to the principles of natural justice ***Veerappa Pillai V Raman Raman Ltd*** [1951] SCR 583, AIR 1952 SC 192.

Professor Luoga submitted that the court would issue the orders applied for if the following circumstances are present:

> *"(a) Respondent had taken into account matters which they ought not to have taken into account.*
>
> *(b) The Respondents did not take into account matters which they ought to have taken into account.*
>
> *(c) The Respondents were in lack of excess jurisdiction.*

(d) *The conclusion arrived at is so unreasonable that no reasonable authority could ever come to it.*

(e) *The rules of natural justice have been violated.*

(f) *There is illegality of procedure or decision.*

I have suffered great anxiety, and tried hard to understand why the Applicant has not made any protestations to the Respondents on the actions taken by the Respondents.

It has not been brought to the attention of the court any objections made or any attempt to protest against the actions of the first and second Respondents given that the main argument raised by the Applicant is that the seizure order was wrongly made in view of the fact that the Captain was not charged with committing any offence. One would reasonably have expected that an attempt would have been made by the Applicant to sort out the matter administratively.

Section 218 of the East African Community Customs Management Act, 2004 provides as under:

> *"Where anything has been seized under this Act then the Council may, whether or not the thing has been condemned, direct that the thing be released and*

restored to the person from whom it was seized or to the owner, upon such conditions as the Council may deem fit."

No attempt has been made by the applicant to take advantage of the provisions of this section.

In carefully assessing the application before the court and the position presented by both parties, I am of t he view that the applicant should have taken action against the seizure order. Even if the Respondents action were unfounded as long as the seizure order affected the applicant, it would seem strange that no move was made prior to the application filed in court.

In view of what has been stated hereinabove I am left with no other option but to dismiss the application with costs. It is so ordered.

Sauda Mjasiri

Judge

February 14, 2007

Delivered in Chambers this 15th day of February 2007 in the presence of Mr. Laswai, Advocate for the Applicant and in the presence of Mr. Beleko, Advocate for the first and second Respondent and in the absence of the Attorney General this 15th day of February 2007.

Sauda Mjasiri

Judge

February 15, 2007

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