

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO.19 OF 2009

**In the Matter of an Application by Islam Saleh Nahdi Ltd for Orders of
Certiorari, Mandamus and Prohibition**

AND

**In the Matter of the Judicature and Application of Laws Act (Cap 358
R.E. 2002)**

**In the Matter of the Law Reform (Fatal Accidents and Miscellaneous
Provisions)(Amendment) Act No.58 of 1968 (Cap.310 R.E. 2002)**

**In the Matter of the Decision of the Commissioner General, Tanzania
Revenue Authority and Commissioner for Customs and Excise**

AND

**In the Matter of an Application for Leave to Apply for Prerogative Orders
of Certiorari, Mandamus and Prohibition**

BETWEEN

ISLAM SALEH NAHDI LTD APPLICANT

VERSUS

THE COMMISSIONER GENERAL

TANZANIA REVENUE AUTHORITY.....1ST RESPONDENT

THE COMMISSIONER FOR CUSTOMS

AND EXCISE.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

Date of last order: 12/10/2009

Date of final submissions: 14/09/2009

Date of ruling: 14/12/2009

RULING

MAKARAMBA, J.:

On the 28th day of May 2009 the Applicant filed in this Court an application by way of Chamber Summons seeking among others for an order that this Court be pleased to issue prerogative orders of certiorari, mandamus and prohibition to remove into this Court and quash the decision of the 1st and 2nd Respondents dated 16th February, 2005 and 23rd day of February, 2005 (seizure notice and forfeiture order) and restore the vehicles with registration No. T 660 ABF and trailer bearing No. T130 ABF to the applicant company.

The Chamber Summons has been taken at the instance of Kinguji and Company Advocates and is supported by the affidavit of Talal Islam Saleh, the Director of the Applicant's Company, together with attached statement.

The application has been preferred under section 2(2) of the Judicature and Application of Laws Act (Cap 358 R.E. 2002), section 17(2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions)(Amendment) Act No.58 of 1968 (Cap.310 R.E. 2002, section 68(c) and section 95 of the Civil Procedure Code, [Cap.33 R.E. 2002 and any other enabling provisions of the law.

On the 10th day of August, 2009, the 3rd Respondent raised a preliminary objection on a point of law that the application is fatally defective for being prematurely before this Court. On the 29th day of September, 2009 the 1st and 2nd Respondents also raised preliminary objection on points of law:

- 1. That the application is bad in law for want of the enabling provisions of the law under which it has been brought.*
- 2. That alternatively, the application is bad in law for citing wrong provisions of the law under which it has been purportedly brought.*
- 3. That the application is improperly before this Honourable Court because there exist an appropriate alternative forum to adjudicate upon and redress the applicant's grievances.*

The preliminary objection by consent of Counsel was disposed of by way of written submissions.

A brief background to this application is quite in order. From the affidavit of Talal Islam Saleh, the Applicant, we gather that apparently the Applicant's motor vehicle with registration No.T660 ABF and a trailer bearing No. T 130 ABF, the subject matter of this application, were seized following a seizure notice which was issued by custom officers at the Tunduma customs post. It would appear that the said vehicle and trailer were on their way from Ndola where they had plied to from Dar es Salaam to deliver a cargo of diesel oil. An inspection of the vehicles by customs officials at the Tunduma customs post revealed 10 boxes/cartons containing contraband of top lemon lotion in the cabin bed of the vehicle. A forfeiture order for the vehicle and its trailer was issued by the Commissioner for Customs and Excise, the 2nd Respondent herein, on the

23rd day of February 2005. The said vehicle and its trailer are still lying at the Malawi Cargo, Mbeya.

In a bid to secure the release of the vehicle and the trailer, the applicant filed a case in the Tax Revenue Appeals Board, Appeal No.2 of 2005 at Mbeya. This was dismissed by the Board on the grounds of lack of jurisdiction by the Board. Undeterred, the applicant filed yet another Application No.19 of 2007 by the Tax Revenue Appeals Tribunal, which on the 16th day of October, 2007, it was struck out. The applicant has now come before this Court, seeking for prerogative orders of certiorari, mandamus and prohibition to remove into this Court and quash the decision of the 1st and 2nd Respondents dated 16th February, 2005 and 23rd day of February, 2005 (seizure notice and forfeiture order) and restore the vehicles with registration No. T 660 ABF and trailer bearing No. T130 ABF to the applicant company. This application has met with preliminary objections on points of law from the Respondents, which I now turn to.

The journey in search of justice undertaken by the Applicant started before the Tax Revenue Appeals Board at Mbeya in Customs & Excise Tax Appeal No.2 of 2005 between Islam Saleh Nahdi Ltd vs. Commissioner General. In a decision delivered on 02/05/2007, the Appeal was found to have been incompetently before the Board because the Board lacked jurisdiction to determine it. It was accordingly dismissed. In Application No.19 of 2007 in the Tax Revenue Appeals Tribunal at Dar es Salaam between Islam Saleh Nahdi Ltd and Commissioner General, which was application for leave to appeal out of time against the judgment and orders of Tax Revenue Appeals Board in the Customs and Excise Tax Appeals

No.2 of 2005 dated 2nd May 2007, failed because no notice of intention to appeal was issued in time in accordance with Rule 4(1) and the provisions of the Tax Revenue Appeals Act, 2000.

On the 10/08/2009, this Court upon oral application by the 3rd Respondent's Counsel, granted leave to the 3rd Respondent to file counter affidavit by or on 10/08/2009. However, for reasons which are entirely known to the 3rd Respondent, the counter affidavit was filed almost a month later, on 09/09/2009, and without the leave of this Court. As such it was to be treated as no counter affidavit filed as ordered and this Court proceeded to order that the 3rd Respondent to file his written submissions by or on 26/10/2009, the applicant by or on 10/11/2009 and rejoinder if any by or on 17/11/2009.

It is the submission of the learned Counsel for the 3rd Respondent that the application is fatally defective for being prematurely before this Court. It is the further submission of the learned Counsel for the 3rd Respondent that the fatal defect in the application arose from contravention by the Applicant of the order of Hon. Mruma, J., of this Court, dated 8th May, 2009. In his order, his Lordship Mruma, J., had granted leave extending the time within which the Applicant to file an application for leave to apply for prerogative orders to 29th May, 2009. His Lordship however, refused to grant leave to the Applicant to file application for prerogative orders, and urged the applicant to argue and give reasons as to why leave should be granted. It is the further submission of the learned that in view of the decision in **COCACOLA KWANZA LTD V CONCILIATION BOARD OF KINONDONI AND ATTORNEY GENERAL**, Misc. Civil Cause No.91 of 2006

(unreported) the applicant having failed to exercise his legal rights he cannot be allowed to come to court through the back door.

The learned Counsel for the Applicant in rejoinder submitted that the applicant complied with the order given by Justice A. R. Mruma on 8th May, 2009 having filed the Application on 28th day of May, 2009, bearing the following heading:

“And in the Matter of an application for leave to apply for prerogative Orders of Certiorari, Mandamus and Prohibition”

The learned Counsel for the Applicant submitted further that this Court should administer justice according to law only without being unduly constrained by rules of procedure and/or technical requirement as stipulated in Article 107A(2) of the Constitution of the United Republic of Tanzania. The learned Counsel for the Applicant prayed that the preliminary objection raised by the 3rd Respondent is misconceived and should be dismissed with costs. The learned Counsel for the Applicant prayed in the alternative that if the preliminary objection is upheld, the applicant be given time for leave to file the document as this Court may direct.

I would uphold the preliminary objection and strike out the application with costs. The reasons are straightforward. It is not in dispute at all that the heading of the application is for leave to apply for prerogative Orders of Certiorari, Mandamus and Prohibition. However, the order sought by the applicant has been rendered in the following terms:


“This Honourable Court may be pleased to issue prerogative orders of certiorari, mandamus and prohibition to remove into this Court and quash decision of the first and second respondents dated 16th February, 2005 and 23rd day of February, 2005 (seizure notice and forfeiture order) and restore the vehicles with registration No.T660 ABF and trailer bearing No.T130 ABF to the applicant company.”

The Application is therefore for orders for this Court to issue the prerogative orders. This, with due respect to the learned Counsel for the Applicant, cannot by any stretch of imagination be termed to be an application for leave to apply for the grant of prerogative orders. The procedure for applying for prerogative orders is crystal clear. An applicant has first to apply for leave to apply for prerogative orders. Upon being granted such leave by the Court then the applicant proceeds to apply for the orders. This is what the law of the land on prerogative orders requires. The legal requirement for an applicant to first seek leave of the Court before applying for grant of the prerogative orders goes to the root of the matter itself. It is not therefore a requirement which merely can be termed as a procedural technicality. In any event the very Constitution which in the same vein insists on courts of law not to be embroiled in procedural technicalities, enjoins them in administering justice to abide with, respect and apply the Constitution and laws of the land, which in this regard include laws governing substantive and procedural matters.

The learned Counsel for the Applicant cannot therefore be heard to implore upon this Court to brash aside such a strict procedural requirement which goes to the very root of the matter merely under the guise of administering justice without being unduly constrained by procedural

technicalities. Otherwise were it to be so it would make the administration of justice in this country highly unpredictable, with the result that parties would not be able to predict with certainty the outcome of their cases in courts of law. In circumstances of unpredictability and uncertainty of the law, social life would become unbearable and the rule of law will be set asunder thus paving the way for jungle life, none of us would wish.

In the event and for the reasons explained above, the preliminary objection is hereby upheld. The application is fatally defective for having been preferred prematurely before this court and accordingly I strike it out with costs. It is accordingly ordered.

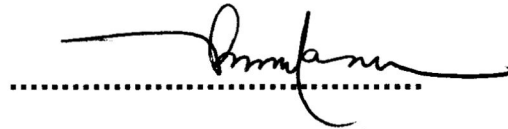
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R.V. MAKARAMBA

JUDGE

14/12/2009

Ruling delivered in Chambers this 14th day of December, 2009 in the presence of Mr. Islam Saleh Nahdi, the Applicant in person and in the absence of all three Respondents

A handwritten signature in black ink, appearing to read 'R.V. Makaramba', is written over a horizontal dotted line.

R.V. MAKARAMBA

JUDGE

14/12/2009