

**IN THE HIGH COURT OF TANZANIA**

**(MAIN REGISTRY)**

**AT DAR ES SALAAM**

**MISCELLANEOUS CAUSE NO. 1 OF 2023**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO  
APPLY FOR ORDER OF CERTIORARI AND MANDAMUS**

*BETWEEN*

**TRANSWORD AVIATION LIMITED ----- APPLICANT**

*AND*

**TANZANIA CIVL AVIATION LIMITED -- 1<sup>ST</sup>RESPONDENT**

**THE ATTORNEY GENERAL ----- 2<sup>ND</sup> RESPONDENT**

**R U L I N G**

*Date of Last Order: 23/02/2023*

*Date pf Ruling: 16/03/2023*

**MGONYA, J.**

While countering to the Applicant's application of leave to file Prerogative Orders, the Respondents herein filed notice of preliminary objection as follows:

***That the application is untenable in law as the court is functus officio to determine the same since this the Applicant is illegally bound by the***

***ruling and drawn order of this court delivered on 14<sup>th</sup> December, 2022 by honorable Judge Moshi, and the same is yet to be challenged by the applicant.***

The Preliminary point of objection was disposed off orally where by the Applicant was represented by **Peter Madeleka**, learned Advocate, the Respondents herein were represented by **Mr. Erick Rumisha** learned State Attorney and **Ms. Patricia Chenga**, learned State Attorney.

At the beginning of hearing of this matter, on its outset, Mr Rumisha, learned State Attorney outlined the points of preliminary objection raised before this court in the **Misc. Cause No.1 of 2023** which was before Honorable Moshi, J which were as follows:

1. That the application is untenable in law for suing non existing legal Entity;
2. The application is purely incompetent as the Applicant has failed to exhaust available alternative remedies;
3. That the application is purely bad in law for contravening **Article 13(6) (a) of the Constitution of the United Republic of Tanzania; and**

4. That the application is incompetent for want of company authorization to sanction MOHAMED MAJID as an officer of the company to sue on behalf of the company.

The learned State Attorney submitted further that all the points of objection pointed above were heard and finally determined on **4<sup>th</sup> December, 2022** and the ruling was delivered on respect of all points of Preliminary objections whereas all four points were sustained and the application was struck out. That in the said Ruling, at page 8, 9, 10, up to 15 the court agreed to the submissions of the Respondent with regard to the point of objection above.

He further stated that, instead of appealing against the said Ruling, on 10<sup>th</sup> January, 2024 the Applicant filed before this court, **Miscl. Cause No.1 of 2023**, the instant application in which he complied with the condition of suing the legal existing entity and accompanying this application with a company resolution. Thus complying with the 1<sup>st</sup> and 4<sup>th</sup> preliminary objections only.

Mr. Rumisha elaborated that the Applicant did not comply with other two points of objection/condition of exhausting available remedies and joining necessary party so that they can be granted right to be heard as guaranteed by the Article **13 (6) (a) of the Constitution of United Republic of Tanzania** as it was

directed in the ruling of the **Miscellaneous Cause No. 23 of 2022**. That according to **Article 13 (6) (a)**, the Applicant was supposed to join as some of the relief sought in paragraph 13 (now is 14) of the attached statement touches the interest of the parties which are joined as parties herein namely **Zanzibar Airport Authority (ZZA), Abeid Amani Kurume International Airport and DNATA** as was held by this court in **Miscellaneous Cause No. 23 of 2022**.

That, in the said ruling required the Applicant, before filing the instant application, to exhaust local remedies **under section 55 of the Tanzania Civil Aviation Act** which requires the Applicant before filing the application, to refer the matter to TCCA as can be seen **at page 13 and 14** of the said ruling.

The learned Counsel insisted that **the Miscl. Application no. 53 of 2022** resulting into the said ruling is the same as the instant application therefore this court is ***functus official*** in aspect of granting leave to the Applicant to file an application for Judicial Review. That the Applicant has not pleaded anything in the affidavit on how he complied with the remaining two points of objection.

He concluded that, two rulings of this court emanating from the similar matter will lead to contradiction and conflicting

decision of the same court. To substantiate his submission, the Counsel referred this court to the case of VLC **TANZANIA LIMITED VS NATIONAL INSURANCE CORPORATION & OTHERS TLR 2003** at page 2012 and the case of **MARIA CHRYSOSTORM LWEKAMWA VS PLACID RECHARD LWEKAMA, CIVIL APPLICATION NO. 549/17 OF 2019** at page 13 quoting the case of **MOHAMED INTERPRISES**.

Conducting the learned State Attorney prayed this application be struck out so that the Applicant can go and comply with directives of **Miscl. Cause No. 23/2022** before filing another application.

In response, **Mr. Madeleka**, counsel for the Applicant, in the out set outlined before this court principles of the law governing preliminary objection which he derived from the case of **JAMES BURCHARD RUGEMALILA vs REPUBLIC Criminal Application No.59 of / 19 of 2017** starting from page 9.

He submitted that the notice of objection filed by the Respondent, did not referred to any provision of the law which was cited for the Applicant to observe. That as per the cited cases, Notice of Preliminary objection should cite the relevant provision which was violated which the Applicant must observe.

He prayed this court to dismiss the Preliminary Objection with cost.

Secondly, he alluded that the application of this nature are governed by **Law Reform Fatal Accident, Miscellaneous. Provision Act, Cap 310 and its Rules GN No. 324 of 2014.** Therefore at leave stage, this court has to confine itself on the conditions which are set out by the law and cases which are required to be observed by this court. He cited the case of ***ENGELBERT LUCAS CHELELE VS THE POLICE FORCE, IMMIGRATION PRISON SERVICE COMMISSION, Misc. Civil Cause No. 11 of 2022*** at page 8 and 9. The Counsel insisted that when this court is hearing this application it has to consider only whether this application has met the condition set forth in the above cited cases. That even if there are the preliminary objections has to direct itself to the above conditions. To stress out on his submission he referred to the case of ***LEGAL AND HUMAN RIGHT CENTER VS MINISTER FOR FINANCE PLANNING AND 2 OTHERS, MISCL CAUSE NO. 42 OF 2022 at page 9.***

While agreeing with the Counsel for the Respondents with the principal enumerated in the case of **MARIA LEKWAMA** that that the same court or the same Judge should not provide with conflicting decision on the same matter, Mr. Madeleka submitted

that the present matter is different from **Miscl Civil Case No. 63/ 2022** which was before Hon. Moshi, J as they bear different parties, that is **TRANSWORD AVIATION LTD** as Applicant and the **Board of Directors of TANZANIA CIVIL AVIATION AUTHORITY** as 1<sup>st</sup> Respondent and **THE ATTORNEY GENERAL** as 2<sup>nd</sup> Respondent. Whereas parties in this matter are **TRANSWORD AVIATION LTD** as the Applicant and **CIVIL AVIATION AUTHORITY** as the 1<sup>st</sup> Respondent and Attorney General as the 2<sup>nd</sup> Respondent. Therefore, he prayed before this court to find the objection with no merits.

With regard to the point of this court being *functus official* the Applicants Counsel submitted that this court does not become *functus official* in a matter which has not been heard and determined. He added that since **Miscl Civil Case No. 63/2022** is different with the present matter, this court cannot be *functus official*.

Further he averred that since **Miscl Civil Case no. 63/ 2022** was truck out and not dismissed, the striking out can not be a bar from to subsequent filing of this application. In conclusion he prayed this court to find the preliminary objection with no merits and proceed to dismiss it with cost.

Rejoining, Mr. Rumisha, reiterated his submission in chief that parties to this application are still bound by **Miscl. Civil**

**Case no. 63/ 2022**, that it is still a good law and it is a ruling delivered by this court. He agreed that the previous matter being struck out, does not bar the Applicant from refiling the matter, but has to be refiled with no mischief which caused it from being struck out.

He further rejoined that the case of **JAMES BURCHARD RUGEMALILA CHELELE & BAYO (Supra)** were also part of the submission in before Hon Moshi, J at page 9 and 10 of the ruling and have already been determined.

The learned State Attorney further insisted that since the two points of exhausting available remedies and suing proper parties has not been complied with by the applicant, the issue of competence of this application and jurisdiction of this court has to be addressed.

He prayed the point of Preliminary Objection advance be upheld and struck out the application so that Applicant can comply to the court direction in the **Miscl. Cause No, 63 of 2022**.

Having heard the contending arguments from both sides, and the pleading of the parties herein, I find it imperative before I go into depth of this application, determine whether this application is competent before this court after Applicant filing this application without the Applicant exhaustion available



remedies as it was directed by this court in **Miscl. Civil Cause No. 63/ 2022.**

Though **Mr. Madeleka**, learned counsel for the Applicant submitted that, at this stage this court should only look as to whether the Applicant has met the conditions for grant leave, with respect, I decline to agree with him as this court cannot go into the merits of the application if the application itself is incompetent or the court itself has no power to determine the said application before determining the advanced objection.

In the case of **JOHN IKLAND @ AYOUB vs Republic, CRIMINAL APPEAL NO. 196 OF 2014, CAT AT IRINGA**, reported Tanzlii while citing its decision in the case of **The DIRECTOR OF PUBLIC PROSECUTIONS V. ACP ABDALLA ZOMBE AND 8 OTHERS** the court at page 9 & 10 held that I quote:

*"... this Court always first makes a definite finding on whether or not the matter before it for determination is competently before it. This is simply because this Court and all courts have no jurisdiction be it statutory or inherent to entertain and determine any incompetent proceedings".*

I have gone through the Ruling in respect of **Miscl. Cause No. 63/ 2022**, which was before Hon Moshi J. At page 3 of the same, the Respondent herein raised four point of preliminary objections of which I don't need to reproduce as they have already been pointed out in this ruling.

In the said **Miscl. Cause No. 63/ 2022**, Mr. Madeleka did not answer on the above objections, and in the end **all were sustained** and **Miscl. Cause No. 63/ 2022** was struck out for that reason.

After the above matter was struck out, the Applicant filed this application having complied to the orders of this court by Moshi J, in **Miscl. Cause No. 63/ 2022** emanating from 1<sup>st</sup> and 4<sup>th</sup> point of Preliminary objection leaving their two points associated with the 2<sup>nd</sup> and 3<sup>rd</sup> objections as the applicant's affidavit is silent on whether he exhausted the alternative remedies available under **section 55 of the Tanzania Civil Aviation Act and the parties whom were supposed to be joined with were not joined**. Being silence through the Applicant's affidavit and its statement means, the requirements of the two objections were not complied with. The fact which was also missing submission in Applicant's where this point is missed. Therefore, this application was filed while the Applicant has not complied to the above provision.

However, objections number two and three were dealt with at length, by this court (Moshi J) in the **Misc Cause No. 63/ 2022** from page 9 to 13 of the said ruling.

At page 12 this Court observed that, I quote: -

*"All in all the submissions on these points were not answered by the Applicants advocate. On the other hand, **I find that the respondent's counsel submission is at the upper hand for obvious** reason that:-*

*1. N/A*

*2. In respect of the 2<sup>nd</sup> point of law; the Applicant has failed to exhaust the available remedies. The pleading with their annexures indicates that the matter is based on contractual issues, for instance paragraphs 5, 6, 7, 8, 9 and 10; they talk about contractual relationship between the Applicant and other parties. Also there is a Concession Agreement between the Applicant and Abeid Aman Karume International Airport (Annexure TAL- 3) which stipulates for a mode of disputes settlement at clause 17, it states that if the dispute arises in connection with the contract, it will be resolved through arbitration. It is therefore evident that, the application has an alternative remedy. In this respect see the case of **Parin***

*Jaffer (Supra) where the court said, " Thus 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"*

*3. On the third point of law, it is apparent that the Applicant has sued the Board of Directors of Tanzania Civil Aviation Authority. However, in the statement in support of the application at paragraph 13, she has sought relief against persons who are not parties to the case.....*

Then this court proceeded to sustain all point of abjection, and consequently striking out the application basing on the above quoted submission.

Mr. Madeleka, Counsel for the Applicant has not disputed noncompliance to the requirements of the raised objection number 2 and 3 above when he filed this matter. He only justified his omission by stating that those points are not derived from the law, and this court, at this stage should confine itself on scrutinizing grounds of granting leave and not settling preliminary objections. With respect, I differ with that view as by doing so will lead to this court to wasting its precious time dealing with matters which are incompetent before exercising its powers

which has not being conferred to by the law or rule of procedures.

As for the present matter, the two points being already determined by this court in the case cited above. by my fellow Judge of the High Court (Moshi, J) I find that my hands are ***functus officio*** to deal with the same Preliminary objections which were already determined by my Colleague in the similar matter against the parties herein which has not been complied with. This obvious may lead to this same court providing with conflicting decisions, and is against the rule of good practice and professional conduct in which I am not ready to be dragged into as it is settled principle by in our jurisdiction. In the case of ***MOHAMED ENTERPRISES (T) LIMITED VD MASOUD MOHAMED NASSER (CIVIL APPLICATION 33 OF 2012) [2012] TZCA 67 (23 AUGUST 2012)***; published in [www.tanzlii.go.tz](http://www.tanzlii.go.tz) in which a Judge of the this Court in exercising his discretion, set aside the Consent Decree and restored the original suit which was dismissed by his colleague of the same court Hon Mwarija J, of the Court of Appeal at page 17 to 18 stated that; I quote:

*"The facts before us however, clearly establish that Civil Case No. 124 of 2011 had been finally determined, a deed of settlement filed in court and a decree entered*

against the Respondent herein. Thereafter, therefore, the High Court became **functus officio** in so far as this matter was concerned. **Both..... and .....JJ were not competent to handle the subsequent application. Although there is no statutory law (to the best of our knowledge) which bars one Judge from setting aside a decision of a fellow judge of competent jurisdiction, rules of practice, prudence and professional conduct impose such restrictions. A Judge of the High Court in our jurisdiction is or should know and respect that code of conduct. Failure to do so is to open up a pandemonium of unprofessionalism, nitherto unknown in this jurisdiction."**

Further in case **of LEOPOLD MUTEMBEI vs PRINCIPAL ASSISTANT REGISTRAR OF TITLES, MINISTRY OF LANDS, HOUSING AND URBAN DEVELOPMENT & ANOTHER, CIVIL APPEAL NO. 57 OF 2017, CAT at MWANZA** was held that, at page 13 & 14:

*"We thus find justification in the appellant's criticism that the said conclusion by the learned trial judge conflicted with his predecessor's ruling that the appellant had a cause of action. There **is no doubt***

***that the learned trial Judge slipped into error by making a pronouncement on a matter that had been conclusively determined by his predecessor. We think he was *functus officio* on the question at hand - see, Mohamed Enterprises (T) Limited v. Masoud Mohamed Nasser, Civil Application No. 33 of 2012” (emphasis added)***

Therefore, being guided by the holdings of the above cited cases, and by considering that the 2<sup>nd</sup> and 3<sup>rd</sup> preliminary objections were not complied by the Applicant before filling this application, I find that this application is incompetent before this court as not all the mischief found in the said application (**Miscl. Cause No. 63/ 2022**) were complied by the Applicant herein and this court is ***functus official*** to determine them again.

Having all said, **this application is struck out with cost**, and the Applicant herein is ordered to rectify the mischief pointed out in the Ruling delivered by this court in **Miscl. Cause No. 63/ 2022** or opt for another recourse as it pleases or if he sees it fit before filing this application.

It is so ordered.



**L. E. MGONYA**

**JUDGE**

**16/3/2023**



**Date: 16/03/2023**

Coram: Hon. B.T. Maziku, DR

For the Applicant: Peter Madeleka Advocate

For the 1<sup>st</sup> Respondent: } Massa Kitaka for Rumisha State

For the 2<sup>nd</sup> Respondent: } Attorney

CC: M.G. Kanyagha

**Court:**

Ruling delivered on 16/03/2023 before Hon. B.T. Maziku Deputy Registrar in Chamber in presence of Massa Kitaka State Attorney holding brief for Rumisha for the Respondents and in presence of Peter Madeleka for the Applicant.



**L. E. MGONYA**

**JUDGE**

**16/3/2023**