

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

MISCELLANEOUS COMM. CAUSE NO. 27 OF 2005

RESOLUTE TANZANIA LIMITED.....APPLICANT
AND
COMMISSIONER GENERAL
TANZANIA REVENUE AUTHORITY.....RESPONDENT

R U L I N G

KIMARO,J.

Date for hearing 31/08/2005

Ruling on 2/09/2005

There is an application before this court seeking for stay of a restraint order issued on 23rd August, 2005 by the Commissioner for VAT pending final determination of the applicant's appeal filed before the Tax Revenue Appeals Board. The appeal was filed on 25th August, 2005. There are two grounds for filing the application. The first one is that there is a point of law involved for consideration by the Board, namely whether the Applicant is liable to pay stamp duty in the absence of a stamp duty assessment. The other ground is that the decision of the Commissioner of VAT to demand stamp duty from a mere agent, the Respondent, without following the laid down procedure was null and void.

The application is supported by an affidavit of Dr. Alex Thomas Nguluma, Counsel from Maajar, Rwechungura, Nguluma & Makani Advocates who are representing the Applicant.

An immediate response by Mr. Teemba for the respondent is a preliminary objection that this court has no jurisdiction because the dispute which is involved is of a civil nature involving tax matters. The court was told that Section 7 of the Tax Revenue Appeals Act, 2000 ousts the jurisdiction of this court.

Before going to the arguments advanced by the Counsel who appeared in this application, I consider a brief summary of the facts being necessary for purposes of showing how the Applicant came to this court. The facts are extracted from the affidavit of Dr. Nguluma. Mr. Teemba has not filed any counter affidavit. He preferred the preliminary objection by way of a notice.

The Respondent issued a Restraint Order against the Applicant's Account by a letter to the National Microfinance Bank at Nzega, dated 23rd August, 2005 for payment of an amount of USD 260929.69 to the Commissioner for Domestic Revenue in Tabora being collection of stamp duty from the Applicant, the latter serving as an agent of the Respondent for stamp duty purposes in respect of

two foreign companies; that is Goudhurst Properties Limited and Resources Manpower Limited, both of Australia.

The Applicant was dissatisfied with the Notice of Agency which required the Applicant to act as an agent regarding Goudhurst Property Limited and Resources Manpower Limited pursuant to Section 77 of the Stamp Duty Act 1972, as well as the Restraint Order. An appeal has been filed at the Tax Revenue Appeals Board challenging the validity of the Notices of Agency as well as the restraint order.

It was in this background that the present application was filed before this court. The application has been filed under Order XXXIX Rule 5(2), (3) and (4) together with Section 68(e) and 95 of the Civil Procedure Code 1966.

In support of the preliminary objection, Mr. Teemba submitted that Section 7 of Tax Revenue Appeals Act – Cap. 408 confers exclusive jurisdiction on civil matters related to tax to the Tax Appeals Board. He said since this is the position of the law, this court has no jurisdiction to deal with the application before this court. He referred to the decisions of this court in **Moustafa Khatan and another V Tanzania Revenue Authority** (Commercial Case No.64 of 2002)(Unreported) and **Dimon Tanzania Ltd V Commissioner General Tanzania Ltd & two Others** Misc. Civil Cause No.107 of

2002 (High Court) (Unreported) to support his objection. Mr. Teemba wondered what prompted Dr. Nguluma to come before this court while the Applicant has already filed the appeal before the Tax Appeals Board and the law is exhaustive to cover the application which is before this court. Relying on the case of **Attorney General V Lohay Akoonay and Joseph Lohay** [1995] TLR 8,. Mr. Teemba said this court can only entertain this application if the Applicant could satisfy this court that no appropriate remedy is available in the special forum.

Dr. Nguluma in reply submitted that he is fully aware that exclusive jurisdiction on civil matters involving tax is vested with the Tax Appeals Board. He also admitted that he is fully aware of the decisions of this court which have been cited by Mr. Teemba. However, he said the application is not contesting tax matters. Dr. Nguluma requested this court to take note of the unique nature of the application before it. The unique nature of the application as submitted by Dr. Nguluma is that the Respondent has taken certain steps against the Applicant before taking the necessary legal procedure to enable the Applicant to defend itself against those steps under the established legal machinery. The consequences of the Respondent's steps against the Applicant are devastating to the business of the Applicant. Dr. Nguluma said he could not go the Tax Appeals Board for temporary protection because it does not seem to have power to grant temporary orders. He prayed that the

preliminary objection be overruled and the application be heard on merit as that is the only way which will allow the court to get the details which prompted the filing of the application in this court.

It is true that the application filed by Dr. Nguluma has not requested this court to determine on the legality of the Agency notice nor that of the restraint order. The application seeks for an order for stay of the restraint order. However, a question which would arise is who issued the restrain order and what is it related to? The answer to the question is found in the application itself. The order which is sought to be stayed was issued by the Commissioner of VAT and it relates to stamp duty. The above answer is a pointer that the matter falls under section 7 of the Tax Revenue Appeals Act because it arose out of the Stamp Duty Act, which is one of the revenue laws administered by the respondent. (See Section 5(1)(a) of the Tanzania Revenue Authority Act – Cap 399 and the First Schedule – Item 6).

This is also a matter which has been admitted by Dr. Nguluma that an appeal has already been filed at the Tax Appeals Board. This court therefore has no jurisdiction. Dr. Nguluma said the decisions cited are not binding on me. It is true they are decisions made by My Brother Judges but they are explicit on the position of the law. I share their views. There is no reason for me to depart from the decisions. See also the decision of Massati, J in **Sunday Sanga T/A ITUMBA**

TRADING COMPANY VS TANZANIA REVENUE AUTHORITY

Commercial Case No.26 of 2005 (Unreported).

From Dr. Nguluma's submission, he came to this court to ensure that his client is being protected while the appeal is being pursued in the Tax Appeals Board. He said it does not appear that the Board has got powers to grant temporary reliefs. I think Dr. Nguluma is wrong. Part IV of the Tax Revenue Act, 2000 Cap 408 deals with appeals generally. The Applicant is contesting the legality of the stamp duty and it would not like to pay the amount in the restraint order before the appeal is heard and determined. This is taken care of by Section 16(6) of the Tax Revenue Act, 2000. That provision confers discretion on the Commissioner General to allow an aggrieved tax payer not to pay the tax which is being contested where there is uncertainty as to the question of law or fact. This is the machinery which Dr. Nguluma has to make use of because it caters for the relief which is being sought in this court.

According to the case of **Akonaay** (supra),

" courts would not normally entertain a matter for which a special forum has been established unless the aggrieved party can satisfy the court that no appropriate remedy is available in the special forum."

As demonstrated above the relief which the applicant is praying for is available in the law setting up the machinery for dispute settlement on matters of tax arising out of the laws administered by the respondent. There is therefore no justification for bringing the application into this court.

Lastly, let me comment on the provisions under which the application has been preferred. Order XXXIX of the Civil Procedure Code 1966 is concerned with appeals from original decrees. Section 2 of the Civil Procedure Code, 1966 defines court as well as decree. Court means the High Court and the Court of Resident Magistrate and District Court presided over by a Civil Magistrate:

A decree means; "the final expression of an adjudication which, so far as the court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may either be preliminary or final...."

Order XXXIX rule 5(2), (3) and (4) is concerned with stay of execution of decrees issued by the Court of Resident Magistrate and the District Court. That stay can only be granted if the appeal is to be heard by the High Court and not by any other machinery.

The application before this court seeks to stay a restraint order issued by the Commissioner for VAT. The restraint order does not fall within the ambit of what is envisaged by the provisions under which the application has been preferred. There is no provision in the Tax Revenue Act, 2000 which allows the kind of application filed by Dr. Nguluma to be entertained by the High Court under the provision which this application has been preferred. In the case of **Sea Saigon Shipping Limited Vs Mohamed Enterprises (T) Limited** Civil Appeal No.37 of 2005 (Unreported) the Court of Appeal reiterated what it said in **Citibank Tanzanian Ltd V Tanzania Telecommunication Company Limited and Others** Civil Application No.64 of 2003 (Unreported) and **the National Bank of Commerce V Sadrudin Meghji** Civil Application No.20 of 1997 (Unreported). In all the three cases, the Court of Appeal held that failure to cite proper provision of the law renders the application incompetent. The application before this court is incompetent because the proper provisions allowing the filing of this application has not been cited.

The preliminary objection is upheld on the reasons given above. The application is truck out with costs.

N.P.KIMARO,

JUDGE

01/09/2005

Date: 02/09/2005

Coram: Hon. N.P.Kimaro, Judge.

For the Applicant – Mrs. Makani.

For the Respondent – Mr. Teemba.

CC: R. Mtey.

Court: Ruling delivered today.

Order: The preliminary objection is upheld and the application is struck out with costs.

N.P.KIMARO,

JUDGE

2/09/2005

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I Certify that this is a true and correct
copy of the original Order Judgment Rulling
Sign Mw. Kimaro
Registrar Commercial Court Dsm.
Date 2/9/05