

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

COMMERCIAL CASE NO. 10 OF 2004

**MARIE STOPES TANZANIA LIMITED.....PLAINTIFF
VERSUS
THE COMMISSIONER GENERAL
TANZANIA REVENUE AUTHORITY.....1ST DEFENDANT
THE COMMISSIONER OF INCOME TAX.....2ND DEFENDANT**

R U L I N G

KALEGEYA, J:

The Defendants are challenging the jurisdiction of this Court to entertain the suit.

The Plaintiff is a non – governmental Organisation incorporated as a Company Limited by guarantee under the Companies Ordinance, Cap. 212. Under the Tanzania Revenue Act, No. 11 of 1995, the 1st Defendant is responsible for the administration and enforcement of revenue laws and also is responsible for day to day operations as well as the management of the funds, property and business of Tanzania Revenue Authority. The 2nd Defendant is responsible under the Income Tax Act, 1973, for, among others, the assessment, collection and recovery of taxes.

The Defendants' preliminary objection is contained in the following wording:-

“Pursuant to section 7 of the Tax Revenue Appeal Act No. 15 of 2000, High Court has no legal jurisdiction to hear and determine the suit.”

What led to this state of affairs?

On 28/1/2004, the Plaintiff was assessed and demanded to pay corporate tax in the sum of shs.77,625,000. The Plaintiff contested the action insisting that it was exempted from paying tax. The Defendants instituted recovery measures in terms of s. 108 of the Income Tax Act, attracting the institution of the present suit by Plaintiff, praying for orders as follows:

- “(a) A declaratory order that the 1st and 2nd Defendants jointly and severally acted wrongly in refusing to recognize the Plaintiff as a charitable organization.*
- (b) A declaratory order that the Plaintiff is and has always been a charitable organization.*
- (c) A declaration that the Plaintiff is entitled to restoration of the wrongful appropriated funds to the bank accounts of the Plaintiff Company in order to restore operations of the Plaintiff Company.*
- (d) The Defendants be ordered to pay the costs of this suit.*
- (e) Any other orders and reliefs that the Honourable Court may deem fit to grant.”*

Dr. Luoga, Advocate, appeared for the Plaintiff while Mr. Songoro, Advocate, appeared for the Defendants.

Section 7 of Act No. 15 of 2000 whose interpretation is being contested provides as under:-

“The Board shall, subject to section 12 have sole original jurisdiction in all proceedings of a civil nature in respect of disputes arising from revenue Laws administered by the Tanzania Revenue Authority” (emphasis added).

Mr. Songoro for the Defendants, in support of their preliminary objection, making reference to **Tanzania Breweries Company Ltd vs Tanzania Revenue Authority, Commercial Case No. 260 of 2002; Lancia & Co. Ltd vs Tanzania Revenue Authority, High Court Civil Case No. 256 of 2001; Jeje Industries Ltd vs Commissioner for Sales Tax/Vat – Commercial Case No. 36 of 2002 and Mohsin Somji vs Commissioner for Customs and Excise and Another, Commercial Case No. 287 of 2001**, argued,

“...the dispute in the pending suit was triggered by an assessment of corporate tax, defendants demand of the tax assessed and the agency notices to recover the tax as annexed to the Plaint and the Plaintiff’s claim that they are exempt from payment of income tax. This is purely a dispute of civil nature arising from tax laws administered by Tanzania Revenue Authority. Such dispute ought to have been pursued by way of an appeal to the Tax Revenue Appeals Board in terms of section 7 and 16 of the tax Revenue Appeals Act No. 15 of 2000 read together with section 5A of the Tanzania Revenue Authority Act, No. 11 of 1995 and s. 7 (1) of the Civil Procedure Code, 1966.”

In response, Dr. Luoga for the Plaintiff started by distinguishing the decisions cited, thus,

“...Defendant’s contention is wrong in fact and their interpretation of the law is misdirected. The cited authorities...are distinguishable from the instant suit as all cases cited were not dealing with declaratory orders in respect of which only the courts of law have jurisdiction to entertain. All the cited authorities arose out of the tax revenue laws administered by the TRA”

The Plaintiff’s argument is three pronged – first, that this is not a “civil dispute” arising from revenue laws administered by TRA; secondly, that this is just a declaratory suit, “special proceedings in respect of which jurisdiction is restricted to courts of law and there is no way quasi – judicial body, such as the Tax Revenue Appeals Board, ...is empowered to entertain them”, thirdly, that even if it is found that the said section 7 is applicable, the present matter has special circumstances that make it maintainable in this court.

Having made reference to the **Black’s Law Dictionary** and **Vidyadhar Girdharal Chavda vs The Director of Immigration Services and others [1995] TLR 125** regarding the meaning of the term “Civil Proceedings”, and **Matalinga & others vs A.G. [1972] E.A. 518** and **Halsbury’s Laws of England, 4th Ed. Vol. 37, para.252, note 1**, on what a declaratory relief is and guidelines in determining the same, Dr. Luoga went on: (let the very words used paint it all)

“..... it is our humble submission that the orders sought, **are sought as a public remedy and not a private relief and private enforcement of right. It is therefore not a suit of civil nature** intended by the parliament to be covered under section 7 of the Act cited above. The orders sought are to the effect of establishing the Plaintiff's charitable status as provided for under the law and **the court's decision on this matter will affect the rights of many charitable organization** which have been incorporated as companies limited by guarantee. The issue arising out of this matter does not arise out of the Defendant's administration of the revenue laws, but rather, it centers on the conflicting interpretation and application of the laws relating to the status of the Plaintiff.....the Plaintiff's claims are not based on the assessment of taxes by TRA or any of its officers.....the dispute is centred on the wrongful interpretation by the Defendants of the status of the main objects clause in the Memorandum of Association. Unless the said clause is properly construed the Plaintiff will not have any rights as a charitable organization, particularly when dealing with the Defendants. This uncertainty can be cleared through a declaratory suit and Section 7 (2) of the Civil Procedure Code, 1966, is very clear that the fact that a consequential relief is claimed as a result of the declaratory orders issued is not a bar to the institution of a declaratory suit.....

The Plaintiff did not contest any assessment raised by the TRA because of uncertainty of its status. The assessment in respect of

which the Defendants have collected tax was not objected to and the Plaintiffs still cannot lodge any objection to assessments to be raised unless and until its status as a charitable organization is declared. The fact that upon declaration a refund of the tax will ensue does not disqualify it from being a declaratory suit.....

*.....The Board does not have jurisdiction to entertain declaratory suits because it is not a court vested with the discretionary authority to deal with **public law remedies** based on points of law. The Plaintiff herein is seeking to get a proper interpretation of its status by instituting a declaratory suit. The terms “proceedings of a civil nature” in the said section should be construed to mean proceedings of a civil nature in the course of the High Court’s exercise of general civil jurisdiction and not in the exercise of discretionary jurisdiction that is inherent in its powers in dispensing justice. This is a power exclusively vested to the Courts as provided by Section 7 (2) of the Civil Procedure Code, 1966. The Tax Revenue Appeals Board is not a court, as section 3 of the Civil Procedure Code, 1966 defines the court to be the High Court and courts subordinate thereto. The Board therefore is not vested with jurisdiction to try and determine rights of subjects arising out of improper interpretation of the laws. It is only the courts as defined under our laws that are vested with the duty of interpreting the laws.”*
(emphasis mine)

I will start with the distinction sought to be made by Plaintiff between “civil proceedings” and “declaratory suits”. With respect, I have failed to comprehend what is being urged.

In my considered view, declaratory proceedings are civil proceedings. The **Black’s Law Dictionary** whose interpretative assistance is sought by Dr. Luoga does not support the proposition advanced.

Starting with the term “civil action”, **Black’s Law Dictionary, 6th Edition, Page 245**, has the following:

“Action brought to enforce, redress, or protect private rights. In general, all types of actions other than criminal proceedings.....

.....The term includes all actions, both those formerly known as equitable actions and those known as legal actions, or, in other phraseology, both suits in equity and actions at law.....

In the great majority of states which have adopted rules or codes of civil procedure as patterned on the Federal Rules of Civil Procedure, there is only one form of action known as a “civil action.” The former distinctions between actions at law and suits in equity, and the separate forms of those actions and suits, have been abolished.....”

while the word “proceeding” is defined as:-

“In a general sense, the form and manner of conducting juridical business before a court or judicial officer. Regular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of judgment. Terms also refers to administrative proceedings before agencies, tribunals, bureau, or the like.

An act which is done by the authority or direction of the court, agency, or tribunal, express or implied; an act necessary to be done in order to obtain a given end; a prescribed mode of action for carrying into effect a legal right. All the steps or measures adopted in the prosecution or defense of an action.....

The word may be used synonymously with “action” or “suit” to describe the entire course of an action at law or suit in equity from the issuance of the writ or filing of the complaint until the entry of a final judgment, or may be used to describe any act done by authority of a court of law and every step required to be taken in any cause by either party. The proceedings of a suit embrace all matters that occur in its progress judicially.

Term “proceeding” may refer not only to a complete remedy but also to a mere procedural step that is part of a larger action or special proceeding.....

.....A “proceeding” includes action and special proceedings before judicial tribunals as well as proceedings pending before quasi-judicial officers and boards,.....

.....

In a more particular sense, any application to a court of justice, however made, for aid in the enforcement of rights, for relief, for redress of injuries, for damages, or for any remedial object.

“Proceeding” means any action, hearing, investigation, inquest, or inquiry (whether conducted by a court, administrative agency, hearing officer, arbitrator, legislative body, or any other person authorized by law) in which, pursuant to law, testimony can be compelled to be given.....”

The definitions above given are so wide in ambit such that the distinction sought to be made by Dr. Luoga, if it existed at all, is totally extinct. Thus, the proceedings at hand are of civil nature, declaratory orders sought notwithstanding.

Next is whether the same arises from the administration of revenue laws by TRA. Again, I don’t hesitate to answer this question positively. I don’t see the difference between challenging a particular assessed amount and an over – all dispute that a particular personality is exempted from paying tax. The Applicant/Defendant urges, very strongly, that so long as what is launched is the latter, it would not be touching the administration of revenue laws! I fail to see how one can separate the two. Whether one is disputing the assessed amount or whether he is claiming exemption from paying tax, he would be relying on revenue laws. On one hand, the Plaintiff is saying,

“the Defendants have wrongly assessed me as I am not a tax payer under the law, I am exempted”,

on the other hand, Defendants while conceding that the Plaintiff is a charitable organization insist that under the law its activities make it liable to pay tax. Clearly, the dispute is centred on interpretation of revenue laws.

And, contrary to the Plaintiff's assertion, the issue is not whether charitable organizations are exempt from paying tax but rather whether this charitable Organization's activities are exempt from tax.

S. 14 (1) of the Income Tax Act, 1973 (Act 33 of 1973 as amended from time to time) provides:

"Notwithstanding anything in Part II, the income specified in the First Schedule which accrued in or was derived from the United Republic or such other State as may be so specified, shall be exempt from tax to the extent so specified."

The First schedule referred to, then categorises exemptions. These include:

- "1. So much of the income of any person as is expressly exempted from income tax by or under the provisions of any written law for the time being in force, to the extent provided by such written law.*
2.
3.
4.

5. *Subject to section 29 of this Act the income of an institution, body of person, or irrevocable trust, of a public character established solely for the purposes of the relief of the poverty or distress of the public, or for the advancement of religion or education in so far as the Commissioner is satisfied that such income is to be expended either within the United Republic or in circumstances in which the expenditure of such income is for purposes which result to the benefit of the residents of the United Republic:*

Provided that any such income which consists of gains or profits from a business shall not be exempt from tax unless such gains or profits are applied solely to such purposes and either –

- (i) such business is carried on in the course of the actual execution of such purposes, or*
- (ii) the work in connection with such business is mainly carried on by beneficiaries under such purposes.”*
(emphasis mine)

Clearly, para.5 above quoted shows that charitable organizations are generally exempted from taxes but have to satisfy the Commissioner that their income falls within the exempted parameters. Thus, when there is a tussle between the Commissioner and any such institution as is the case here, that would purely be a civil dispute involving revenue laws which are administered by the Defendants and not otherwise, and in terms of s. 7 of The Tax Revenue Appeals Act, 2000, this court’s jurisdiction is ousted as per decisions of this Court – TBL, JEJE and SOMJI cases as well as

LANCIA case decided by the High Court general Registry and referred to by Defendants. The Legislature purposely used the word “sole” to exclude original Court’s jurisdiction. In trying to circumvent this, Dr. Luoga made reference to **Halsbury’s Law of England, 4th Edition, Vol. 1, para. 185, page 171**, wherein it is stated:

“...the jurisdiction of the court is not ousted by a statutory remedy which ...in fact affords no remedy to the plaintiff for the wrong of which he complains; nor is it ousted where the statutory remedy is otherwise inappropriate to cover the matter of which complaint is made or where a question of law is raised on which it would be advantageous to obtain an authoritative ruling from a superior court, particularly where that question relates to the scope of pre-existing legal rights encroached upon by the operation of a statute.”

The above quoted notwithstanding, we have the guidance of our highest Court of the Land, the Court of Appeal in **Attorney General v Lohay Akonaay and Joseph Lohay [1995] TLR 80 at 96**

“...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”.

Now, what the Plaintiffs are seeking, that is, whether they are liable to pay tax is very much within the Board’s powers as it is vested with jurisdiction to consider an appeal by a person who is challenging the Commissioner’s assessment/decision. In here, the Commissioner under

para.5 of the First schedule is “satisfied” and has made a decision that the Plaintiffs are not exempted from paying tax. That decision is appealable to the Board. That is where the Plaintiffs should knock.

Before concluding, I should touch the Plaintiff’s orchestrated argument that the action at hand is for a public remedy/relief, simply for declaratory orders, which would assist other charitable organizations.

Firstly, it is wrong to draw in other charitable organizations because, as I have already observed, the law recognizes that generally charitable organizations are exempted from paying tax. That apart, each organization has its own memorandum of Association with its particular objects clauses. It is not therefore correct to say that the Commissioner will have uniform interpretation and assessment of the object clauses of all charitable organization. It is possible that it is only the Plaintiffs’ objects clauses and activities that, in the eyes of the Commissioner, are offensive.

Secondly, with respect, even if their argument was to be upheld, it would not assist them. Why? Once it is so held as urged, this Court would not have jurisdiction as the suit would not fall under any of the 11 categories enumerated under Rule 2 of the High Court Registries Rules, 1984 as amended by the High Court registries (Amendment) Rules, 1999 (GN.141/99) defining what a commercial case is nor can it be captured under the opening wording thereto (“Commercial case” means a civil case involving a matter considered to be of Commercial significance, **including but not limited to...**”) as there would be nothing commercial in the action.

The proper forum versed with jurisdiction would be the High Court of Tanzania, general Registry.

In conclusion, for reasons canvassed, the preliminary objection being meritorious it is upheld. The suit is accordingly struck out.

L.B. KALEGEYA
JUDGE

Delivered

L.B. KALEGEYA
JUDGE

7/5/2004

3,045 words

I Certify that this is a true and correct
of the original order Judgement Rulling
Sign *[Signature]*
Registrar Commercial Court Dsm.
Date 7/5/04