

**IN THE HIGH COURT FOR ZANZIBAR  
AT TUNGUU  
CIVIL APPLICATION NO 40 OF 2023  
(FROM PETITION NO 01 of 2023)**

**QUALITY MEATS AND  
BAVERAGE SUPPLIES LTD (QMB)       .....       APPLICANT**

Vs

**ATTORNEY GENERAL  
OF ZANZIBAR GOVERNMENT       ...       1<sup>st</sup> RESPONDENT  
TANZANIA REVENUE AUTHORITY ...       2<sup>ND</sup> RESPONDENT**

**RULING OF THE COURT**

28/06/2023 & 11/07/2023

**KAZI, J.:**

The applicant is a business entity. It deals with selling various products within the municipality of Unguja and with liquor importation in Zanzibar. The 1<sup>st</sup> respondent is the Attorney General of Zanzibar, while the 2<sup>nd</sup> respondent is Tanzania Revenue Authority.

Enjoying the service of Rosemary B. Nyandwi, learned advocate from Zanlegal Advocates chamber, the applicant moved this Court through Chamber Summons filed under a certificate of urgency made under sections 70(1)(c)(e) and 129 of **the Civil Procedure Decree**, Chapter 8 of the Revised Laws of

Zanzibar and Order XVIII rule 3 and Order XLIV Rules 1 (a) & 2 (1) of **the Civil Procedure Rules** Cap 8 of the Laws of Zanzibar and Section 3(1)(a) of **the High Court Act** No. 02 of 1985, Laws of Zanzibar.

This application was filed along with Petition No. 01 of 2023 (the main suit), in which the petitioner is seeking the following reliefs: -

- i) The Provision of Section 33 (1)(a) (b)(c)(d), (2) and (3) of **the Liquor Act** No. 9 of 2020 of the laws of Zanzibar is unconstitutional.
- ii) This Court be pleased to uphold Section 43(1) and (2)(a) (b)(c)(d)(e) of **the Fair Competition and Fair Consumer Protection Act** No.5 of 2018 of the Laws of Zanzibar.
- iii) In Alternative, this Court be pleased to direct that all individuals who have suffered and have been injured by the anti-competitive legal provision be granted legal relief under the inherent powers of the Court pending the re-enactment or amendment on respect of the Liquor Act to incorporate a fair legal provision which logical, reasonable and maintainable.

- iv) Any other relief or order which this Honorable Court may seem deem and just and equitable to grant.

Subsequent to the main suit, the applicant sought the following orders: -

- i) The Court to issue a temporary interlocutory order of injunction to restrain the Respondents or any other Government or Private institution(s) from auctioning or disposing of the applicant's containers with numbers  
GLDU9681396, TGHU3323811, MEDU3254378,  
MEDU6385031, MEDU1178751, MSDU1036585,  
MRSU3366129, FCIU3267670, MSCU3883780,  
CMAU6520241, TRHU1599947, MSDU1541123,  
TCLU7310140, APZU3410754, TCKU2792546,  
MRKU9182213, TEMU5858600, CAIU2739481,  
BEAU2780053, TCLU3099364, FCIU2916332,  
TGHU0660547, TCLU2547633 and MWMU6414153  
(henceforth applicant's containers), pending the hearing and determination of the main suit.
- ii) The Provision of Section 33 (1)(a) (b)(c)(d), (2) and (3) of the Liquor Act No. 9 of 2020 of the laws of Zanzibar is unconstitutional.

- iii) This Court be pleased to uphold Section 43(1) and (2)(a) (b)(c)(d)(e) of the Fair Competition and Fair Consumer Protection Act No.5 of 2018 of the Laws of Zanzibar.
- iv) In Alternative, this Court be pleased to direct that all individuals who have suffered and have been injured by the anti-competitive legal provision be granted legal relief under inherent powers of the Court pending the re-enactment or amendment on respect of the Liquor Act to incorporate a fair legal provision which logical, reasonable and maintainable.
- v) Any other relief or order which this Honorable Court may seem deem and just and equitable to grant.

The application is supported by an affidavit sworn by Nagavasu Goteti, an applicant's representative duly authorised.

In a nutshell, the background of this application can be narrated as follows; the applicant instituted a Constitutional Petition No. 01 of 2023 challenging the constitutionality of sections 33 (1)(a) (b)(c)(d), (2) and (3) of **the Liquor Act** No. 9 of 2020 of the laws of Zanzibar claiming to be anti-competitive as they imposed restrictions to several liquor importers to import liquor in Zanzibar. It was deponed in the founding affidavit that the applicant, before the expiry of its

annual license, made arrangements to order its products earlier to avoid a delay of products and a risk of disappointing its consumers. It did that as it had always been granted with the said license by the authority responsible for granting a liquor importation license. He deponed further that it was unfortunate that in the year 2020, the law regulating the liquor and the liquor business in Zanzibar was repealed and replaced with a new one which restricted the number of liquor importers to only three. By the time the new law was enacted, the applicant had already ordered the containers of liquor products. Upon the arrival of the applicant's containers, the applicant's liquor importation license was expired, and his efforts to renew it from the Liquor Licensing Board proved futile on the ground that the new law had already been in force and the applicant's application could not be granted. It was deponed further that while the applicant tried to rescue its containers to avoid any irreparable loss it might suffer, the Zanzibar Liquor Board ordered the applicant to pay a fine of Tsh. Ten Million (TZS 10,000,000.00) for each container detained at the Zanzibar Sea Port. Afterwards, the applicant was informed by the 2<sup>nd</sup> respondent of the possibility of its containers being auctioned at the Government auction. As the applicant finds itself on the edge, it decided to institute, by way of petition, the suit mentioned earlier along with this application.

On 18<sup>th</sup> May 2023, when this application was called for the necessary orders, the 1<sup>st</sup> respondent was represented by Ms Sarah Khatau, learned State Attorney, while Mrs. Fatma Hassan, learned State Attorney represented the 2<sup>nd</sup> respondent. Both respondents were successfully granted leave to file their Counter affidavit on the same date. Despite such leave, they have not filed any counter affidavit to this application for reasons best known for themselves. It should be noted, therefore, that the effect of a failure to counter by way of the counter affidavit the averments contained in the founding affidavit is that the facts deposed to therein prevail as remained uncontested and are to be relied upon by the Court. The justification for this settled principle of the law derived from the rule of evidence that the burden of proof lies on the person who would fail if no evidence at all were given on either side; **See** Section 118 of **the Evidence Act**, 2016.

With the respondents' omission to counter the affidavit, their rights to respond to this application on factual issues are forfeited. However, they are still entitled to contest on the matter of law.

By order of the Court, the application was heard by way of written submissions whereby Mr. Omar Mmadi Mwarab, learned

advocate, prepared and filed a submission in chief for the applicant, while the submission in reply for the 1<sup>st</sup> respondents was prepared and filed by Ms. Sarah Abdallah Khatau, learned State Attorney, and that of 2<sup>nd</sup> respondent was prepared and filed by Maryam M. Ali, learned State Attorney.

Surprisingly, without prior notice or leave of the Court, the respondents raised several preliminary points of law during the application hearing in their reply to the applicant's submission in chief. This practice of raising preliminary objections during the hearing of the application without notice or leave of the Court is an unprecedented practice which should be discouraged by the Court. Thus, a party should not be allowed to take his opponent by surprise during the hearing of the application by raising a preliminary objection. I am well aware that the law is silent on how a preliminary objection should be raised, but as a matter of practice, a party who wishes to advance a preliminary point of objection must give notice before the application is scheduled for the hearing. Its essence is to prevent surprise and ensure a fair hearing. This position was underscored in the authority of **Commissioner General (T.R.A.) vs Pan African Energy T Ltd** (Civil Application No 206 of 2016) 2017 TZCA 157 (9 May 2017) when the Court of Appeal of Tanzania observed that: -

*"We made it clear that there is no specific rule concerning preliminary objections to applications filed in the Court. .... We were also satisfied that a preliminary objection to an application is, procedurally, similar to a preliminary objection to an appeal, and must therefore be made before the hearing of the application begins."*

The Court of Appeal afterwards went on stating that: -

*"It may not be irrelevant to state here that the applicant, as stated by Mr. Bhojani, has surprised the opposite party and the court by raising such a "preliminary objection" without prior notice. It is elementary law that litigation should be conducted fairly, openly and without surprises. In Hon. B.P. Mramba v. Leons S. Ngalai & the Attorney General [1986] TLR 182, we made reference to Halsbury's Laws of England, 4th Edition, Vol. 36, paragraph 38, and underlined:*

*"The function of particulars is to carry into operation the overriding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly and without surprises, and incidentally to reduce costs".*



*On this point, we find it irresistible to associate ourselves with the persuasive decision of the High Court of Kenya (Mbogholi and Kuloba, JJ.) in Juma and others v. Attorney-General [2003] 2 EA 461, wherein it was stated at p. 467:*

*"Justice is better served when the element of surprise is eliminated from the trial and the parties are prepared to address issues on the basis of complete information of the case to be met".*

*For the avoidance of doubt, we are aware that the foregoing authorities were dealing with surprises in the course of trial. However, we are certain in our minds that the principle is applicable to the situation at hand as well. The course taken by Mr. Malata, is therefore an unfortunate undertaking not worth emulating, for it is not a recipe for a fair and expeditious trial. If anything, it is a recipe for the opposite. We think this sufficiently explains why we refused Mr. Malata's prayer to address us on the point before arguing the preliminary objection".*

I am guided by the above-quoted authority, and on the strength of it, I will refrain from entertaining the preliminary objection raised by the respondents for lack of prior notice.

Reverting to the merit of the application, the applicant commenced by reciting the enabling provisions cited in the chamber summons and adopted the founding affidavit and its annexures to be part of his submission.

He then submitted that the application's primary purpose is to protect the applicant against injury by violating its rights for which it could not be adequately compensated in damages. He added that, under modern practice, it suffices to say that there are only three tests or questions the Court can ask: (i) is there a serious question to be tried? (ii) if so, will damages be adequate compensation for temporary inconveniences? and (iii) if damages will be inadequate compensation, in whose favour is the balance of convenience?

In elaborating on those tests, he started with the first condition of whether there is a serious question to be tried. According to the applicant, and while citing **American Cyanamid Co vs Ethicon Ltd** [1975] 1 All ER 503, **Biubwa Said Suleiman vs Peoples Bank of Zanzibar Ltd & 3 Others**, Civil Case No. 31 of 2005, H.C.Z. (Unreported), and **Atilio vs Mbowe** (1969)

HCD 284, what is contained in the main suit raises various triable issues. These include whether Article 25A (1) of **the Constitution of Zanzibar** of 1984, as amended from time to time, is being breached or is about to be infringed. He added that in line with that, the applicant is challenging the constitutionality of Section 33 (1) (a)(b) (c)(d), (2) and (3) of **the Liquor Act** No. 9 of 2020 of the Laws of Zanzibar. He contended that due to the breach of the Constitution, its liquor in the containers was detained by the 2<sup>nd</sup> respondent, and they are at risk of being distorted as the same are perishable goods and have been in high temperatures at the Zanzibar Sea Port for a long time. He argued further that there is a triable issue due to the fact that the respondents have seized the applicant's twenty-four containers at the Sea Port, and they have the intention to sell them at a public auction which will obviously be sold at a loss compared to the sale of the actual price of the current market value, and that makes the grant of this application to be of extremely essence. Therefore, he maintained that the main suit is not frivolous or vexation and has so many triable issues.

Submitting on the second test that if the damages be adequate compensation for the temporary inconvenience while relying on **Kibo Match Group L.T.D. vs H. S. Impex L.T.D.** [2001]

T.L.R. 152, he submitted that if the applicant's containers are disposed of or sold, then the applicant shall suffer irreparable loss from the fact that the said containers are of sentimental value to the applicant and the products in them are serious investments of the applicant which enable her to live and cover its basic and standard needs. He further stated that the applicant would suffer irreparable loss from the fact that it will not be able to do business, it will lose its income and profits as the products in the said containers are business properties and if disposed or any injurious acts are done to them, the applicant's property rights will be lost and will render the final decision to be nugatory as the properties will already be lost. He cited **Philemon Joseph Chacha & Others vs South African Airways (PROP) L.T.D & Others (NUMBER 1)** [2002] TLR 246, to support his submission. To conclude his submission regarding the second test, the learned advocate stated that the applicant, in paragraph 19 of the affidavit, has shown that it will suffer irreparable loss if the respondents and their agents are allowed to continue with the designs of either auctioning the applicants' containers or continue keeping them in high temperature at the Sea Port and the only way the applicant can protect the products in the said containers is by the Court to grant this application.

Regarding the third condition on the balance of convenience, the learned advocate argued that the applicant had shown the Court through paragraph 19 of the affidavit that the balance of convenience is on her side as the products in the said containers are perishable goods.

In conclusion, the applicant argued that the facts and circumstances of the main suit and application favoured the applicant for the grant of orders sought, keeping in mind that the respondent did not dispute the application through an affidavit. Thus, he prays for the orders as prayed in the Chamber Summons.

Opposing the application, the learned State Attorney for the 1<sup>st</sup> respondent, in her reply, instead of submitting on the matter of law since she did not contest the factual issues as indicated herein earlier, she keeps opposing what the applicant pleaded. Therefore, her submission will be disregarded. Relatedly, the submission from the learned State Attorney for the 2<sup>nd</sup> respondent will be considered with the same restriction. To a large extent, her submission on the merit of the application contest factual issues, which I will not consider. Moreover, she raised the issue of the jurisdiction of the Court in opposing the application. According to the 2<sup>nd</sup> respondent, this application

relates to tax disputes and this Court is not clothed with jurisdiction to determine tax-related disputes. To buttress her position, she cited **The Hon Attorney General of the United Republic of Tanzania v Africa Network For Animal Welfare (ANAW) (EACJ)**, Civil Appeal No. 8 of 1995 (unreported), **Richard Rukambura v Issac Ntwa Mwakapila & Another** (C.A.T.) Civil Appeal No. 3 of 2004 (unreported), and **Norwood v Renfield**, 34 C 329 as quoted in **Angella Amudo & Secretary General of East Africa Community**, Appeal No. 4 of 2004 (EACJ). Further, to support the same point, she cited **Federal Hotel SDN BHD v National Union of Hotel Bar & Restaurant Workers** (1983) 1 MLJ 175 on page 178.

The applicant, in his rejoinder, contended that the applicant's claim is based on the constitutionality of anti-competitive of legal provisions hence this Court have proper jurisdiction to hear and determine this application.

I have carefully considered the applicant's affidavit, written submissions by the parties, and all authorities cited. In my determination, I will start by resolving the issue concerning the jurisdiction of this Court. It is worth saying that this is an interlocutory application whereby the applicant, in essence,

prays for an order for an injunction to restrain the 2<sup>nd</sup> respondent from selling its containers by Government auction and for an order of selling the same by the Court Broker on a market value and the proceed of the sale to be deposited to the Court's account pending the determination of the main suit. Also, it is noteworthy that under section 70 (1) (c) (e) of **the Civil Procedure Rules**, this Court is empowered to make any order to prevent the ends of justice from being defeated, and Order XLIV rules 1 (a) & 2 (1) of **the Civil Procedure Decree**, this Court is empowered, by order, to grant a temporary injunction. Section 70 (1) (c) (e) provides as follows:

-

*"In order to prevent the ends of justice from being defeated the Court may-*

*(a) ..... N/A*

*(b) ..... N/A*

*(c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold;*

*(d) ..... N/A*

- (e) *make such other interlocutory orders as may appear to the Court to be just and convenient."*

Whereas Order XLIV rules 1 (a) & 2 (1) provide: -

*"1. Where in any suit it is proved by affidavit or otherwise-*

- (a) *that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit or suffering loss of value by reason of its continued use by any party to the suit, or wrongly sold in execution of a decree; or*

- (b) *..... N/A*

*the Court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, loss in value, removal or disposition of the property as the Court thinks fit, until the disposal of the suit or until further orders.*

*2 - (1) In any suit for restraining the defendant from committing a Injunction to restrain repetition*



*or continuance of breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right".*

Therefore, based on the above excerpts, this Court has powers to hear and determine this application. Thus, the concern raised by the 2<sup>nd</sup> respondent regarding this Court jurisdiction is unjustifiable. Besides, the issue of jurisdiction was raised prematurely, as to my considered opinion, this issue of whether the matter is tax-related, or a constitutional petition needed to be raised in the main suit rather than to this interlocutory application. With the greatest respect, therefore, I advise the learned State Attorney for the 2<sup>nd</sup> respondent, if she so wishes, to spare it until the main suit is set into motion.

Next, the issue that awaits my determination is whether the applicant successfully established conditions for the Court to grant the prayer sought. The conditions the applicant must fulfil for the Court to issue an order of temporary injunction are stipulated in the case of **Mbowe** (supra). First, it must be established that there is a serious question to be tried on the facts alleged and the probability that the plaintiff will be entitled to the relief prayed. In his affidavit and written submission, the applicant demonstrated the nature of the main suit, *to wit*, the constitutional petition challenging the constitutionality of the liquor legislation provision that restricts fair competition and how the anti-competitive legislation injures the applicant and other individuals. As I have mentioned before, the respondents did not contest this fact.

I have thoroughly gone through the applicant's affidavit and Petition No. 1 of 2023, and I am convinced, as correctly argued by the applicant, that there is a serious triable constitutional issue which needs Court's determination.

The second condition is regarding irreparable loss. I had an opportunity of perusing the uncontested founding affidavit. In paragraphs 11, 17, 19 and 20, the applicant has clearly demonstrated the nature of the goods detained, which are

perishable, and the loss he might incur, which is irreparable. Therefore, it is apparent that the Court's interference is needed under the circumstances; otherwise, the applicant will likely suffer irreparable loss.

The last condition concerns the balance of convenience. It is so evident that the applicant will likely suffer tremendous hardship if this application is rejected than will be suffered by the respondents from granting the same.


In the upshot, the order of injunction is issued in favour of the applicant, restraining the respondents or any other Government or Private institution(s) from auctioning or disposing of the applicant's containers.

Furthermore, in order to prevent the ends of justice from being defeated, the applicant's containers with numbers GLDU9681396, TGHU3323811, MEDU3254378, MEDU6385031, MEDU1178751, MSDU1036585, MRSU3366129, FCIU3267670, MSCU3883780, CMAU6520241, TRHU1599947, MSDU1541123, TCLU7310140, APZU3410754, TCKU2792546, MRKU9182213, TEMU5858600, CAIU2739481, BEAU2780053, TCLU3099364, FCIU2916332, TGHU0660547, TCLU2547633 and MWMU6414153 are hereby attached by order of this Court and

kept under the custody of the Court Broker. Subsequently, pending the determination of Petition No 01 of 2023, the Court Broker is ordered to sell on market value all the goods (liquor) in the applicant's containers and to deposit the proceed of sale, excluding taxes and charges, to the Court's deposit account. The applicant and 2<sup>nd</sup> respondent are ordered to oversee all processes of the sale to ensure the smooth execution of the Court's order.

Costs in the cause.

Dated at Tunguu, Zanzibar this 11<sup>th</sup> July 2023.



**G. J. KAZI**  
**JUDGE**  
**11/07/2023**