

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

MISC. CIVIL CASE NO. 25 OF 2003

TANZANIA SUGAR PRODUCERS  
ASSOCIATION.....PLAINTIFF/APPLICANT

VERSUS

THE MINISTRY OF FINANCE OF  
THE UNITED REPUBLIC  
OF TANZANIA.....1<sup>ST</sup> DEFENDANT/RESPONDENT

THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT/RESPONDENT

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R U L I N G

KALEGEYA, J:

In response to the applicant's chamber summons, which, among others, prays for an order:-

- 6,210/-
- "1. That this *Honourable Court* be pleased to grant a temporary injunction restraining the 1<sup>st</sup> Respondent from issuing tax remissions in respect of any refined sugar to be imported in the country to 21<sup>st</sup> Century Packaging Company Limited pending the expiry of the statutory notice."

the Respondents raised preliminary objections that:

- "(i) the application for temporary injunction has been made prematurely and therefore legally incompetent in that there

*is no pending matter/suit before the Court upon which the said application is pegged;*

- (ii) the application is bad in law for it contravenes the provisions of Order XXXVII r (2) of the Civil Procedure Code, 1966 as amended by GN. No. 376 of 1968 which prohibit grant of injunctive orders against the Government;*
- (iii) pursuant to what is stated in paragraphs (i) & (ii) above, the defendants/respondents would pray for dismissal of the application with costs."*

Submitting in support of the preliminary objections, Mr. Kamba, State Attorney, impressed that an application for temporary injunction cannot issue unless there is a pending matter before the court. He made reference to **Ibrahim v Ngaiza [1971] HCD 249 and Mulla, The Code of Civil Procedure, 12<sup>th</sup> Edition, Page 1003.**

Turning to the 2<sup>nd</sup> preliminary objection, Mr. Kamba argued that with the changes introduced by GN 376 of 1968, and which modified Rules 1 and 2 of O. XXXVII CPC, temporary injunction cannot issue against the Government and nor should an application thereof be entertained where the Attorney General is a party, the only remedy being for the court to issue a declaratory order in respect of parties' rights. He specifically makes reference to **The Government Proceedings (Procedure) Rules, 1968.**

Responding, Ms. Kashonda, Advocate, of Kato, Kashonda and Mnguto (Advocates) argued that the court has been vested with inherent powers under S. 2 of the Judicature and Application of Laws Ord. Cap. 453 to ensure the ends of justice in all civil matters and as supplemented by S. 95 of The Civil Procedure Code, 1966 and concluded,

*"...court may at any time dispense with the requirement of the pending matter/suit by invoking its inherent powers so as to ensure that justice is done to the parties".*

They insisted that the application was filed after issuance of the 90 days statutory notice as required under the Government Proceedings Act and that it is precisely the ineffectiveness of the notice as a barrage to Respondent's possible issuance of the contested tax remission in between that they have filed the application.

On the 2<sup>nd</sup> leg of the preliminary objection, they argue, making reference to the book entitled **Mareva Injunction and Related Orders** by **Mark Hoyle, LLP 3<sup>rd</sup> Edition; V.G. Chavda vs The Director of Emigration Services and others [1995] TLR 125; M.V. Home Office [1993] 3 WLR 433**, that there is no doubt that the court has power to grant an interlocutory injunction even against a government, its Ministers and officials in their official capacity provided there is an arguable claim and good case.

On statute law, they submitted,

*".....this position of the law allowing temporary injunction being issued against the government and its officials in our Jurisdiction is governed by the Government Proceedings Act No. 16 of 1967 as amended by Act No. 30 of 1994 (section 3 of Act No. 30/94). The amendment of section 11 of the Act No. 16/1967 is to the effect that now a relief sought against the Government by way of injunction may be awarded by the court. This is a consequence of the deletion of the proviso to section 11 previously appeared on the amended section 11 of Act No. 16/1967. Thus we humbly submit that your Honourable Court can give a temporary injunction restraining the 1<sup>st</sup> Respondent from issuing tax remissions in respect of any refined sugar to be imported in the country by the 21<sup>st</sup> Century Packaging Food Company Limited."*

I should from the outset observe that the matter is wrongly entitled. The Respondents cannot be addressed as Defendants because so far there is no suit as such between the parties.

That said however, the main question is whether there are exceptions to the general legal principle that an injunction cannot issue where there is no main suit between the parties.

Generally, indeed an injunction cannot issue where there is no pending main suit. The logic behind this is not hard to trace. By issuing an injunction the court would be directing,

*“Respondent, you are barred from doing so and so till the controversy between you and Applicant is determined”.*

Now, how would the controversy be decided if the requisite forum has not been set? And, the forum is set by institution of an action. If an action has not been instituted various militating factors would come to the fore and they include the following. The court will have very limited facts at its disposal to assist it in determining whether indeed there is a controversy worth the name between the parties and which would attract an interlocutory order. That aside however (depending on facts of the particular case, an Applicant may, in certain situations, manage to gather sufficient evidence at this stage) the dangers loam on another aspect. Although an injunction has by law a life – span (at most, 12 months – O. XXXVII, Rule 3 CPC as amended by GN 508 of 1991), in that limited time, a shrewd applicant, after securing one, may enlish disaster upon the Respondent by tactically exercising inaction – that is, by not filing an action. In my view, it is principally the avoidance of this state of affairs that O. XXXVII CPC envisages issuance of a temporary injunction where there is a pending suit. And it is not without cause that the Applicants’ Counsel have avoided mentioning O. XXXVII CPC in their chamber summons. Instead they have cited S. 2 of The Judicature and Application of Laws Ord.

The above said however, I should hastily state that the issue is not surfacing in courts for the first time. **In Misc. Civil Cause No. 117/1996, Nicholas Nere Lekule vs The Independent Power (T) Ltd and The Attorney General and Misc. Civil Cause No. 42 of 1998,**

**Tanganyika Game Fishing and Photographic Ltd versus The Director of Wildlife, The Attorney General and Muanauta and Company (T) Ltd**, my brothers, Kaji and Katiti, JJ respectively, held that the court has jurisdiction to issue an interim order where there is no suit pending.

I am on all fours with the reasoning of my brother judges.

In England, orders of injunction where there is no suit are what has come to be known as **Mareva** injunctions. The terminology has its roots in the name of one of the parties to the action in which the matter was detailedly analysed – (**Mareva Compania Naviera S.A v International Bulk Carriers S A [1980] 1 All E.R 213**). Therein the court conceded that in England the orders were sparingly issued under S. 25 (8) of The Judicature Act 1873. This was subsequently transferred to S. 45 of The Supreme Court of Judicature (Consolidation) Act, 1925. The relevant provision states:-

*“ A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just and convenient”.*

My brother Kaji, J, having painted the above had the following to say, and to which I subscribe,

*“Since courts in England used to issue injunction orders before institution of the main suit under S. 25 (8) of the Judicature Act*

*1873, and since that Act was in force in England on 22/7/1920 and would appear to have been of general application in England at that time, I am satisfied that under S. 2 (2) of the Judicature and Application of Laws Ordinance Cap 453, in a proper case this court can grant such an order notwithstanding its peculiar name of Mareva. Suffice to call it an interim injunction order before institution of the main suit.*

*Even if the practice would not have been so in England before 22/7/1920 I would still hold that where the ends of justice are in jeopardy or where the abuse of the process of the court is imminent, this court can use its inherent powers under S. 95 of the Civil Procedure Code 1966 by issuing an injunction order before the institution of the main suit in order to arrest such an impending danger/situation. Also this court enjoys similar powers under S. 2 (1) of the Judicature and Application of Laws Ordinance Cap 453."*

Expressing similar views with support from the experience of India on provisions which are in pari materia with our O. XXXVII and S. 95, CPC Katiti, J, in **Tanganyika Game** case had the following:

*"...first the Code of Civil Procedure does not profess to be exhaustive, as to the circumstances in which a temporary injunction can issue, and second, the court has in herent power to act ex debito Jusitital to do real justice, under the Judicature and Application of Laws Cap 453 which could well be cited as the*

source of power. Vindicating the above view, perhaps persuasively, is the case of, **MANOHAR LAL vs SETH HIRALAL AIR 1962 SC 527** at page 532 in which the Judge made the following pertinent observations:

*“.....the courts have inherent Jurisdiction to issue temporary injunctions, in circumstances which are not covered, by the provisions of Order XXXIX CPC. There is no such expression in Section 94, which expressly prohibits the issue of a temporary injunction in circumstance, not covered under by Order XXXIX, or by any rules made under the Code. It is well settled, that the provisions of the Code are not exhaustive, for the simple reason, that the legislature is incapable of contemplating all the possible circumstance, which may arise in future litigation, and consequently for providing the procedure for them. The effect of the expression “if it is so described” is only this, that, when the rules prescribe the circumstances, in which temporary injunction can be issued, ordinarily the court is not to use its inherent powers, to make the necessary orders, in the interests of justice, but it is merely to see whether the circumstances of the case, bring it within the prescribed rule. If the provisions of section 94, were not in the code, the court could still issue temporary injunctions, but it could do that, in the exercise of its inherent Jurisdiction. No party has right to insist on the court’s exercising that Jurisdiction and the court exercises its inherent Jurisdiction, only when*



*it considers it absolutely necessary for the ends of Justice to do so. It is the incidence of the exercise of the power of the court, to issue temporary injunction that the provisions of section 94 of the Code have their effect, and not in taking away the right of the court to exercise its inherent powers."*

*It should therefore be settled law that the court has the inherent power to issue a temporary injunction order for circumstances not covered by ORDER XXXVII of the Code."*

The absurdity of holding otherwise is exemplified by the present situation where governments lay unlimited webs of protections by imposing conditions before being put to task by any individual who feels aggrieved. A 90 days period before instituting an action is so long a time such that in a fitting situation, if the governments' action complained about is actuated by malice, the danger/loss/injury will have long been committed with disastrous consequences to a citizen and which may be irreparable or not monetary wise compensatable. I should hastily add however, for reasons I have already discussed, that orders under this avenue should sparingly be made.

The above disposes the first preliminary objection. It stands dismissed.

We turn to the 2<sup>nd</sup> objection. Indeed, vide GN 376 of 1968, made under S. 20 of The Government Proceedings Act (Act 16 of 1967), an

amendment was made to O. XXXVII, Rule 2 CPC by adding a proviso as follows:-

*“ Provided that no application shall be made for a temporary injunction where the defendant is the Attorney General but, in such case, the Plaintiff may apply to the court for an order declaratory of the parties rights ”.*

Apart from the obvious that the application is not brought under the said O. XXXVII, I must confess and express my views that the above wording creates and paints the government as a Martian giant overlooking its helpless Earthean subjects. This would be incompatible with all tenets of government's accountability to the very people who provide the power that is being wielded. Again, I will do no more than quoting the very sound findings of Samatta, J.K. (as he then was) in **V.G. Chavda vs The Director of Immigration Services and another [1995] TLR 125 at 133 – 4** and Katiti J, in **Tanganyika Arms case**.

His Lordship the J.K. (as he then was) after analyzing detailedly the English position on powers of the courts in situations where governments tend to reduce them by use of protective enactments, when stating the position of the law in our jurisdiction, made the following conclusion:

*“Except to autocrats, it must be intolerable that, in a democratic society like ours, courts should be impotent to grant a temporary injunction in favor of an individual who complains of unwarranted or oppressive use of statutory powers by a government minister or*

*official. It should be made perfectly clear, I think that this Court can halt the bulldozer of the State before it squashes the right of an individual, company or society”.*

*while Katiti, J. in the other case, observed:*

*“...the Government, should strictly act, within the four walls of the law. The Pakistan Supreme Court, was plainly at, it, when the case of, **PAKISTAN vs MOHAMMAD A. HAYAT PLD 1962 SC 28 at page 30**, it was holding, that mandamus lies against the Government of Pakistan, made the following observation:*

*“The Government is a creature of law, with limited and defined powers. Its acts in relation to the citizens, of the state, they are subject to scrutiny and control of the courts, ...Even a civil court of lowest Jurisdiction, can issue an injunction to the Government, to perform the duties, imposed on it by Law.”*

*Considering the position in this country, it is inescapable to say that, - 1 - the Government is not only a creature of our Constitution, see Articles but -2- too, like every person, the Government has the duty to observe, and abide by the Constitution, and the Law of the United Republic, and -3- every person has a right to take legal action to, ensure the protection of the Constitution, and the Laws of the land, - see Article 26 of the Constitution. It follows inevitably, in my view, that an a injunction, as a public law*

*remedy may be issued even as an interlocutory injunction, to secure immediate interim protection of the citizens/applicants rights, if a strong prima facie case, can be shown, until the legality of the decision, under challenge has been determined – also see M vs HOME OFFICE (1994) 1 AC. 377 in which an application for Judicial review, injunctions, including interim injunctions, were held to be available even against the Ministers of the Crown. It is therefore here and now settled, that, where anybody's rights, are threatened to be transgressed, by the Government, the same has no shield, or immunity against injunctions at all."*

While I fully adopt the above views, I should reiterate that the amendment notwithstanding, S. 95 of The CPC would provide cure, in a fitting situation. It provides,

*"Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court".*

The 2<sup>nd</sup> objection, as was the case with the 1<sup>st</sup> objection, stands dismissed.

**L.B. KALEGEYA**  
**JUDGE**

Delivered in the presence of Mrs. Kashonda.

**L.B. KALEGEYA**

**JUDGE**

**2/9/2003**

**Mrs. Kashonda**: We have now filed the main suit as the statutory notice has now expired. We have filed CC.85/2003. We pray that this matter be consolidated with the said CC 85/2003 – that is, in respect of the application for temporary injunction. We also pray for an early hearing date. The other case, CC 85/2003, comes up for mention on 8/9/2003. I pray that the current chamber application be fixed for hearing on that particular day.

- Order**: (i) Prayer to consolidate Misc. Civil Cause No. 25 of 2003 and CC 85 of 2003 is granted.
- (ii) Hearing of the chamber application for injunction on 8/9/2003.
- (iii) The Respondents to be served with a copy of the ruling.

**L.B. KALEGEYA**

**JUDGE**

**2/9/2003**

2,855 WORDS

Certify that this is a true and correct  
original of the judge's order.  
.....  
Registrar  
Commercial Court  
Dar es Salaam  
2/9/03