IN THE HIGH COURT OF TANZANIA
AT ARUSHA

MISC. CRIMINAL CAUSE NO. 1 OF 2008
(originating from HC Appl. for granted order of Certiorari and Mandamus-
Appl. No. 10 of 2008.)

WARIAELI NDESHILIO MAFIE ..... APPLICANT

- Versus –

1. THE HONOURABLE CURRENT
SUCCEEDING RESIDENT MAGISTRATE
WHO PRESIDED OVER PROCEEDINGS
RULINGS AND ORDERS vide DISTRIC ... ... 1ST RESPONDENT
COURT OF ARUSHA AT ARUSHA
CRIMINAL CASE NO.583 OF 2003

2. THE ATTORNEY GENERAL... ... ... 2ND RESPONDENT

15th October, & 4th December, 2008

RULING

Before Mmilla, B.M.;J

This ruling is a result of a preliminary objection raised by learned state attorney Mr. Ngole for the respondents in Misc. Criminal Cause No.4 of 2008. In that application Mr. Makange, learned counsel for the applicant is seeking this court's indulgence to grant him prerogative orders of certiorari and mandamus to respectively quash the undated ruling prepared by the erstwhile Resident Magistrate

S.S.Komba but delivered on 13.3.2007 by the succeeding Resident Magistrate B. N. Mashabara together with all subsequent proceedings, rulings and orders up to and including on 24.7.2007 arising out of the District Court at Arusha Criminal Case No. 583 of 2003. He is asking this court to compel the first respondent hereto to conduct the proceedings in that regard in accordance with the law and procedure. The preliminary objection raised by Mr. Ngole is two fold that:-

(i) The decision/ruling subject to the judicial review was mere interlocutory order;

(ii) That the applicant had alternative remedy, that is appeal or revision which was not exhausted.

He has asked this court to strike out this application for lack of merits. The preliminary objection is being disposed of by way of written submissions.

The submission by Mr. Ngole in respect of the first ground is that the decision or ruling which is the subject of judicial review was a mere interlocutory decision because the main case is still pending in the lower court waiting for finalization of the instant application for review. He has submitted that to him this is mockery of, and is an abuse of justice because the move has caused unnecessary delay in the case. Reference was made to the case of **Yohana Nyakibali and 22 others vs. The Director of Public Prosecutions, Criminal Reference No.1 of 2006 (CAT), Mbeya Registry (unreported).** It has also been submitted by Mr. Ngole that because the applicant has not exhausted the other available forums, it cannot be said the matter is properly before the court. In his opinion, the applicant had opportunity to file an appeal. He referred this court to the American case of **Robert L. Cutting, Re 94 US 14** which is to the effect that such a remedy is available to a party who has no other alternative remedy. He also cited the case of **Muktary Saya v. The Hon. Resident Magistrate assigned to the District Court of Arusha and another, Misc. Criminal Application No.16 of 2008 (unreported)** to show that a premature move does not stand a chance in court. Other authorities relied

upon were the cases of **Alfred Lakaru v. Town Director Arusha (1980) T.L.R. 326** and **John Mwombeki Byombalilwa v. The Regional Police Commander, Bukoba (1986) T.L.R. 73.** Relying on **Hulsbury's Laws of England (3rd Ed. Vol.2) at page 84,** Mr. Ngole has submitted that in both these cases the courts of law laid down the conditions precedent for issuance of orders for mandamus. The court has also been enjoined to see the works of **Justice C. K. Thakker (Takwani)** in his book titled **"Lectures on Administrative".** In view of this, Mr. Ngole has asked this court to allow the preliminary objection he has advanced.

On the other hand, convinced that his learned friend has dealt with the two grounds of preliminary objection contemporaneously and as one, it has occurred to the learned counsel for the applicant Mr. Makange that two pertinent issues have emerged thereof. The issues he formulated are:-

(a) Whether the existence of a right of appeal is a bar to an application for judicial review remedies of certiorari and mandamus by the High Court.

(b) Whether an interlocutory order by a subordinate court is immunized from judicial review proceedings by the High Court by way of remedies of certiorari and mandamus in view of statutory restrictions created by the Parliament vide Act No.25 of 2002.

Citing the case of **John Mwombeki Byombalilwa (supra),** learned counsel Makange has submitted, and I agree with him, that judicial review is an important weapon in the hands of a judge, and that rules relating to the law on prerogative orders are not immutable and fixed but they are on the move to meet changing conditions.

Regarding the first question he has posed, learned counsel Makange has submitted that there is a plethora of judicial authorities that the existence of a right of appeal is not a bar to an application for judicial review remedies of certiorari and mandamus by the High Court. He cited the cases of **Re an Application by Fazal Kassam (Mills) Ltd. (1960) E.A.** 1002

(T), **Shah Verse Denshi & Co. Ltd. v. The Transport Licencing Board** (1971) E.A. 287 (K) and **John Mwombeki Byombalilwa v. The Regional Commissioner & Another (supra)**. Counsel Makange has submitted that the above judicial authorities take a firm legal position that the existence of a right of appeal is only a factor to be taken into account in the exercise of the discretion and cannot be a bar to an application. He quoted Simpson, J. in **Shah Vershi's case** to have said that:-

> "The existence of an alternative remedy does not preclude the applicant from seeking relief by way of certiorari .... I am satisfied that the applicant is entitled to ask for an order of certiorari".

In view of this, learned counsel Makange has asked this court to overrule the second ground of preliminary objection.

As regards the second question posed, Mr. Makange has submitted that the statutory restrictions created by the Parliament vide Act No.25 of 2002 are in relation to

statutory rights of appeal, revision or review and not judicial review proceedings by the High Court which are exercisable by remedies of certiorari, mandamus and the like. He has submitted that there is nowhere under those statutory restrictions created by the Parliament under that Act wherein the words judicial review proceedings appear, therefore that an interlocutory order by a subordinate court is not immunized from judicial review proceedings by the High Court in exercise of its prerogative orders of certiorari, mandamus and the like. He capped it all that it is trite law that the inherent supervisory jurisdiction of the High Court over decision making body or power cannot be taken away by statute, and that the authorities cited by his learned friend are irrelevant. He therefore asked this court to overrule the first ground of preliminary objection too.

By way of a rejoinder, learned state attorney Ngole has insisted that by relying on the cases he cited on whether or not existence of the right of appeal is a bar to an application of judicial review, his learned friend is missing the point that such a fact is a conditional precedent in that it is a right supposed to be exhausted before one may opt for judicial

review proceedings for orders of certiorari and mandamus. To him, judicial review is not an alternative to the right of appeal. He relied on the previously cited case of **John Mwombeki Byombalilwa (supra)** in which it was held that there should be no other appropriate remedy available to the applicant.

He has submitted that on the basis of the case of **Yohana Nyalibali (supra),** the decision which is the subject of review in our present application is interlocutory and thus cannot be properly reviewed. This, he says, is contemplated by Act No.25 of 2002.

I feel that I should preamble my decision in this regard by an attempt to explain the nature of the remedies sought, also the policy thereof.

Certiorari and mandamus, like prohibition, are amongst the prerogative remedies which belong to the public law province. They constitute comprehensive remedies for control of all kinds of administrative and judicial acts. They ensure that public authorities carry out their duties, and that

inferior courts or tribunals keep within their proper jurisdiction. They are essentially remedies for ensuring efficiency and maintaining order in the hierarchy of courts, commissions and authorities of all kinds. The underlying policy is that all inferior courts and authorities have only limited jurisdiction or powers and must be kept within legal bounds. This concern reflects on the orderly administration of justice. They are discretionally remedies, which discretion must be exercised judiciary. In **Northern Tanzania Farmers Cooperative Society Limited v. W. H. Shelukindo (1978) L. R. T. 36,** the court stated that:-

> "Whenever the legislature entrusts to any body of persons other than the superior courts the power of imposing obligations on the individuals, the courts ought to control those bodies from exceeding, abusing or defaulting their statutory powers".

While certiorari and prohibition are remedies to control powers, mandamus is primarily a remedy for enforcing public duties. However, such inferior courts or other

authorities exercising judicial or quasi judicial functions have duty to act judiciary and observe the principles of natural justice when they determine questions affecting individual rights.

It is significant to point out at this stage that in our country, the law in this field is largely derived from the common law of England. Much of what we have in our jurisdiction is mainly judge made law, inconspicuously retaining the character of the law in England. This explains why even the procedure being followed in instituting applications of this kind is not dissimilar to that obtaining in England, including boundaries and restrictions or rather the scope. Having said this, let me now revert to the arguments for and against the preliminary objection. In doing this, I will follow the proposal given by learned counsel Makange which entail tackling the matter by resolving the two questions he formulated. I will deal first with the question whether the existence of a right of appeal is a bar to an application for judicial review remedies of certiorari and mandamus by the High Court.

It is clear that in the case of **John Mwombeki Byombalilwa (supra),** the court propounded five essential conditions which it said must be fulfilled for prerogative orders of certiorari and mandamus to issue, of which exhaustion of other available remedies is one. The court held that:-

> "(i) Five conditions must be proved in order for an order of mandamus to issue:
>
> (a) the applicant must have demanded performance and the respondents must have refused to perform;
>
> (b) the respondents as public officers must have a public duty to perform imposed on them by statute or any other law but it should not be a duty owed solely to the state but should be a duty owed as well to the individual citizen;
>
> (c) the public duty imposed should be of an imperative nature and not a discretionary one;

(d) the applicant must have a locus standi, that is he must have sufficient interest in the matter he is applying for;

(e) there should be no other appropriate remedy available to the applicant."

Surely, this authority militates in favour of the submission of the learned state attorney Mr. Ngole.

I also had opportunity to read the cases of **Re- an Application by Fazal Kassam (Mills) Ltd. (supra) and Shah Versi Denshi & Co. Ltd. (supra).** In both these cases however, the courts gave the impression that existence of right of appeal is not a bar to an application for judicial review remedies of certiorari and mandamus by the High Court. It was held in the former case of **Fazal (supra)** that:-

"(iii) the applicants were not precluded from seeking relief by way of mandamus even though they had a right of appeal to the Minister against the respondent's refusal to issue them with a coffee exporter's licence and

> it would be a judicial exercise of the discretion vested in the court to allow the applicants to pursue their remedy by way of mandamus".

A similar position was expressed in the latter case of **Shah Versi (supra).** In that case, the court held that:-

> "(i) the applicant had a right to apply for certiorari not withstanding the existence of a right of appeal".

The holdings in the two cases cited above on this point are on the same footing with the scholarly views of **H.W.R. Wade & C.F. Forsyth, Administrative Law, Eighth Edition, Oxford University Press** who, in the cause of their discussion in respect of prerogative remedies stated on pages 691 and 692 that:-

> "In principle there ought to be no categorical rule requiring the exhaustion of administrative remedies before judicial review can be granted. A vital aspect of the rule is that illegal administrative action can be

> challenged in the court as soon as it is taken or threatened. There should be no need first to pursue any administrative procedure or appeal in order to see whether the action will in the end be taken or not. An administrative appeal on the merits of the case is something quite different from judicial determination of the legality of the whole matter. This is merely to restate the essential difference between review and appeal.... The only qualification is that there may occasionally be special reasons which induce the court to withhold discretionary remedies where the more suitable procedure is appeal, for example where the appeal is in progress, or the object is to raise a test case on a point of law".

In view of the propositions in the above cited authorities to which I subscribe, I hold the view that it is not the law that the court will always refuse mandamus when the applicant could have appealed, so that I depart from the proposition in

John Mwombeki Byombalilwa's case (supra). For the reasons I have attempted to give, I answer the first formulated issue in the positive that the existence of a right to appeal is not a bar to an application for judicial review remedies of certiorari and mandamus by the High Court.

The second question posed is whether an interlocutory order by a subordinate court is immunized from judicial review proceedings by the High Court by way of remedies of certiorari and mandamus in view of the statutory restrictions by the Parliament vide Act No.25 of 2002.

Although learned counsel for the parties did not mention the specific provisions under Act No.25 of 2002 which they are referring to, I have no doubt that they had in mind the provisions of sections 79(2) of the Civil Procedure Code and 43 of the Magistrates' Courts Act both of which were amended by the said Act No. 25 of 2002. In both cases, the amendments were intended to convey the message that an application for revision or appeal cannot be made in respect of any preliminary or interlocutory decision or order of the

court unless such decision or order has the effect of finally determining the suit.

As far as our instant matter is concerned, I subscribe to the views of learned counsel Makange that there is nowhere under the above cited provisions indicating statutory restrictions created by the Parliament concerning the aspect of judicial review proceedings, therefore that an interlocutory order by a subordinate court is not immunized from judicial review proceedings by the High Court in exercise of its prerogative orders of certiorari, mandamus and the like. I also agree with him that the inherent supervisory jurisdiction of the High Court over decision making body or power cannot be taken away by any statute, and that the authorities cited by his learned friend are not relevant. This ground too fails.

In view of what I have said in this ruling, both preliminary points lack merits and are hereby overruled.

(Sgd)
Mmilla, B. M.
Judge
4.12.2008

Date: 4/12/ 2008

Coram: B. M. K. Mmilla, J.

For the Applicant: Absent.

For the 1st Respondent: Mr. Ngole, SA

For the 2nd Respondent

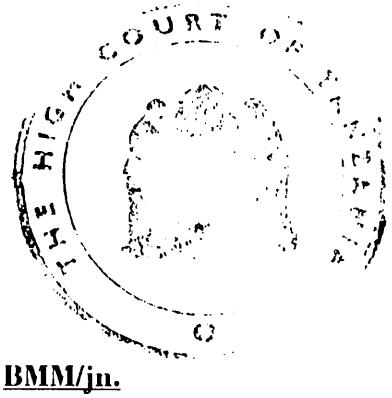
B/c: Shila.

Court: Ruling delivered this 4th day of December, 2008 in the presence of learned counsel Ngole for the respondent but in the absence of learned counsel Makange for the applicant.

AT ARUSHA.

(Sgd)
Mmilla, B.M.
Judge
4.12.2008

I certify that this is a true copy of the original.



F. S. K. MUTUNGI
DISTRICT REGISTRAR
ARUSHA
4/12/08

BMM/jn.