COTWO (T) OTTU UNION AND ANOTHER *v.* HONOURABLE IDDISIMBA MINISTER OF INDUSTRIES AND TRADE AND OTHERS

COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM

(Kisanga, J.A.)

CIVIL APPLICATION No. 40 OF 2000

(From the Ruling of the High Court of Tanzania at Dar es Salaam, Katiti, J., dated 25 May 2000, in Miscellaneous Civil Appeal No. 100 of 1999)

Civil Practice and Procedure – Preliminary objection – Meaning and tests of what constitutes a preliminary objection.

This was an application for temporary injunction pending appeal. The applicants sought an order to restrain the first respondent from renewing or issuing shipping agency business licences to private entities. The first respondents lodged a preliminary objection on the ground that many of the applications for shipping agency business licences had already been renewed or issued. The applicants argued that the preliminary objection was incompetent because it failed to meet the tests for a preliminary objection.

Held: (i) A preliminary objection should raise a point of law which is based on ascertained facts, not on a fact which has not been ascertained and, if sustained, a preliminary objection should be capable of disposing of the case;

(ii) The preliminary objection in this case is based on some facts which are not ascertained and, even if sustained, the objection cannot dispose of the matter; as such it fails to met the laid down tests for a preliminary jurisdiction.

Objection overruled

Case referred to:

1) *Mukisa Biscuit Manufacturing Company v. West End Distributors Ltd* [1969] EA

Professor Shivji, for the Applicants

Mr Kamba, for the first and second Respondent

Mr EF Kapinga, for the 6 other Respondents

RULING

(Dated 30 June 2000)

Kisanga, J.A.: The applicants in this case filed in the High Court an application for leave to apply for prerogative orders of prohibition and *mandamus*. They at the same time applied for temporary injunctions pending the hearing of the main application. The High Court dismissed the application for temporary injunctions. The applicants appealed against the dismissal and filed this Notice of Motion under certificate of urgency, seeking, *inter alia*, temporary injunctions, pending the hearing of that appeal, restraining the first respondent (the Minister of Industries and Trade) to renew/issue shipping agency business licences to private entities. In an amended Notice of Motion the applicants further applied for orders of temporary mandatory injunctions commanding the Minister to withdraw any licences renewed/issued to private entities after 25 May 2000. The applicants are represented by Professor I Shivji, Advocate, while Mr Kamba, Principal State Attorney appears for the respondents Attorney General and the Minister for Industries and Trade. The remaining six respondents are represented by Mr EF Kapinga, Advocate.

Following the filing of the Notice of Motion by the applicants the Attorney General, on behalf of himself and the Minister of Industries and Trade, lodged a preliminary objection, the essence of which was that the application for temporary injunctions had been overtaken by the event in that shipping agency business licences which were the subject matter of the injunctions applied for have already been renewed/issued.

In a counter-affidavit to the Notice of Motion, Mr Kamba avers that following the High Court ruling on 25 May 2000 dismissing the application for temporary injunctions, the Minister for Industries and Trade proceeded to renew shipping agency business licences and or to issue new ones to private entities. It would appear that until the date of that ruling, i.e. 25 May 2000 there was an order of the High Court temporarily restraining the Minister to renew/issue such licences, but that with the dismissal of the application that order accordingly lapsed. Mr Kamba, therefore, contended that after the said High Court ruling on 25 May 2000 there was nothing to prevent or restrain the Minister from performing his statutory function of renewing/issuing the licences. In a schedule accompanying his counter-affidavit, Mr Kamba listed some twenty private entities to which the Minister had issued or granted renewal of business licences between 25 May 2000 and 13 June 2000. Mr Kamba added that he would not know how many more licences have been issued/renewed after 13 June 2000 although he was aware that there were many applications pending consideration by the Minister. The thrust of Mr Kamba's submission is that the application for temporary injunctions to restrain the Minister from renewing/issuing the licences is overtaken by the event because the subject matter of the restraint is no longer there. Counsel further objected to the application on the ground that the order being sought will affect third parties, for example, the applicants for the licences who are not parties to this proceeding. And that would be wrong because it would amount to condemning such third parties unheard.

Professor Shivji filed a preliminary objection to Mr Kamba's preliminary objection. However, after brief exchanges in court he conceded that the points raised the so called preliminary objection to a preliminary objection could adequately be dealt with in the normal manner. He could properly raise the points in his reply to Mr Kamba's submission and should it be necessary in the interest of justice he could seek leave of the court to have the last word after Mr Kamba's response to the reply. For this reason, Professor Shivji did not argue

his preliminary objection as such but replied generally to Mr Kamba's submissions, and the need for him to seek leave to have the last word after Mr Kamba's response did not arise. The thrust of his argument is that the preliminary objection is incompetent and that in law it is not a preliminary objection at all because it is based on matters which are contested and also because if it were to be sustained, it could not dispose of the applicant's Notice of Motion. In support of this argument he cited the decision of the Court of Appeal for East Africa in *Mukisa Biscuit Manufacturing Company Ltd v. West End Distributors Ltd* (1) where the court considered what constitutes a preliminary objection. The court said, at page 700 DE:

> ...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

And farther down at page 701B the court again said:

> A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

Professor Shivji's view is that the so called preliminary objection in the instant case does not meet the test as laid down in the above quoted case. Mr Kamba vigorously contended that it does and went on to marshall arguments which I shall not refer to in this ruling, not out of disrespect to the learned Principal State Attorney but because in my view they are relevant as answers or replies to the actual application for temporary injunctions which is not under consideration here.

I shall now turn to examine the extent to which the preliminary objection in the instant case meets the test laid down in *Mukisa Biscuit Manufacturing Company Ltd* case (1)above. The objection

asserts that the application for temporary injunction restraining the Minister to renew/issue the licences has been overtaken by the event in that the licences have already been renewed/issued. Having regard to the first leg of the rule, I think that the objection cannot be said to raise a point of law which is based on ascertained facts. It is true that Mr Kamba has exhibited a list of twenty private entities in respect of which licences have been issued/renewed by the Minister. But the question is: Is this all that the Minister intends to do? Is he minded to issue/renew any more others?

The preliminary objection is silent on that. And yet it is apparent that the Minister's exercise is not limited to renewing/issuing just twenty licences; he is minded to renew/issue more. Because as pointed out earlier in this ruling Mr Kamba disclosed that many more applications for licences were pending before the Minister for his consideration. So that there is real likelihood of the Minister issuing/renewing more licences to private entities over and above those twenty exhibited in this proceeding. Thus the preliminary objection is based on a fact which has not been ascertained. It is based on a limited number of licences renewed/issued in favour of twenty entities only while it says nothing about those licences which were or are in the process of being renewed/issued. The applicants are saying that their prayer for temporary injunctions relates to the renewing/issuing of licences by the Minister not only in favour of the twenty entities exhibited here but in favour of any others which the Minister was or is minded to consider. In these circumstances, therefore, it seems to me that the objection fails to meet the first leg of the test in *Mukisa Biscuit Manufacturing Company Ltd* case that the objection must raise a point of law based on ascertained facts. The objection does not extend to the unascertained number of licences which the Minister is indeed to renew/issue over and above those granted to the twenty entities exhibited in this proceeding.

The objection is even more inadequate to meet the second leg of the test that the preliminary objection if sustained should dispose of the matter. Admittedly in *Mukisa Biscuit Manufacturing Company*

Ltd case(1) this test was considered in relation to a suit, but I think that the principle may apply equally to an application like the one at hand. As we have already seen, the assertion in the objection that the subject matter of the injunctions no longer exists applies only to the licences renewed/issued in favour of the twenty entities. But the application is not limited to those twenty only. It applies to any other licences which the Minister intended or intends to renew/issue. So that even if, for the sake of argument, the preliminary objection were sustained, it could not dispose of the application for injunctions in relation to those licences which were or are in the process of being renewed/issued in favour of entities other than the twenty exhibited herein.

Furthermore the amended Notice of Motion asks for temporary mandatory injunctions commanding the Minister to withdraw any licences issued/renewed after 25 May 2000, and it is admitted that the Minster did issue/renew licences after that date. Yet the preliminary objection is completely silent on this and, once again if for the sake of argument the preliminary objection were sustained, it could not dispose of this aspect of the application.

In the upshot I find that the purported preliminary objection fails to meet the test laid down in the *Mukisa Biscuit Manufacturing Company Ltd* case(1) referred to above. I agree with Professor Shivji that the objection is incompetent and it is accordingly overruled. Costs shall abide the outcome of the application which is to proceed to hearing.