**IN THE COURT OF APPEAL OF TANZANIA**
**AT TANGA**

**(CORAM: LUBUVA, J.A., MUNUO, J.A., And NSEKELA, J.A.)**

**CIVIL APPEAL NO. 91 OF 2003**

**BETWEEN**

**21ST CENTURY FOOD AND PACKAGING LTD. ..... APPELLANT**

**AND**

**1. TANZANIA SUGAR PRODUCERS ASSOCIATION.....1ST RESPONDENT**
**2. THE MINISTRY OF FINANCE OF THE TANZANIA GOVERNMENT.....2ND RESPONDENT**
**3. THE HON. ATTORNEY GENERAL.....3RD RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania – Commercial Division at Dar es Salaam)**

**(Kalegeya, J.)**

**dated the 6th day of November, 2003**
**in**
**Commercial Case No. 85 of 2003**

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**JUDGMENT OF THE COURT**

**LUBUVA, J.A.:**

This appeal arises from the decision of the High Court, Commercial Division (Kalegeya, J.) dismissing the appellant's application for leave to be joined as a co-defendant in Civil Case No. 85 of 2003. In the High Court, Commercial Division, the first respondent in this appeal, Tanzania Sugar Producers Association, had

instituted a suit against the second and third respondents, the Ministry of Finance and the Attorney General respectively, challenging the government's tax remission granted to the appellant for the importation of 7,000 tons of refined industrial sugar. The tax remission was published in the Government Notice No. 68 of 28.3.2003.

The gravamen of the complaint by the first respondent was that the tax remission granted to the appellant would result in unfair competition with other local sugar producers in the country. The first respondent also claimed that while enjoying such tax remission, the appellant had also applied to the Sugar Board of Tanzania for the importation of another 36,000 tones of refined industrial sugar which it was further alleged, would frustrate the government policy of promoting and protecting local sugar industry.

Consequently, as already observed, the first respondent instituted the suit seeking the following reliefs: First, a permanent injunction to restrain the second respondent from issuing tax remission to any person for the importation of refined industrial

sugar. Second, a declaration that any tax remission issued by the second respondent for the importation of refined industrial sugar null and void.

As the appellant was not made a party to the proceedings in the suit but was touched in one way or the other in the reliefs sought, leave to be joined as a co-defendant in the suit was sought. Invoking the provisions of Order 1 Rule 10 (2) of the Civil Procedure Code, the learned trial judge was settled in his view that the applicant, the appellant in this appeal, was neither a necessary nor a proper party in the proceedings in Civil Case No. 85 of 2003. The application was dismissed. Being dissatisfied, the appellant has instituted this appeal.

At the hearing of the appeal, Dr. Lamwai, learned counsel, appeared for the appellant, Mrs. Kashonda and M/S Mnguto, learned advocates, represented the first respondent and for the second and third respondents, Mr. Kamba, learned Principal State Attorney, appeared. Initially, Dr. Lamwai had filed four grounds of appeal,

however, at the commencement of hearing of the appeal, he opted to abandon ground four. He therefore argued the following grounds:

1. The Learned Judge erred in law and in fact in holding that the orders in Miscellaneous Civil Case No. 114 of 2002 would not be affected by any order which would be given in Commercial Case No. 85 of 2003;

2. That the Learned Judge erred in law and in fact in holding that the Appellant would not be affected by any order passed in Commercial Case No. 85 of 2003 while it was clear from the record that the Appellant was one of the importers of white sugar as industrial sugar;

3. That the Learned Judge erred in law and in fact in holding that the Appellant had no interest in Commercial Case No. 85 of 2003 worth making it a party in the suit, while there was a subsisting

order of temporary injunction which specifically ordered the 2nd Respondent not to issue a tax exemption order in favour of the Appellant;

Arguing these grounds together, Dr. Lamwai vigorously criticized the learned trial judge in dismissing the application. First, he said it was erroneous on the part of the trial judge to hold this view because from the record and the circumstances of the case, it was abundantly shown that the appellant was a necessary and proper party to be joined in the proceedings. For instance, he said in paragraphs 8, 9, 10, 11 and 12 of the plaint, the appellant featured extensively in the pleadings. According to Dr. Lamwai, in these paragraphs, the plaintiff, the first respondent in this appeal, is central in the complaint raised by the first respondent. The complaint is that the remission of tax for the importation of the consignment of 7,000 and 36,000 tons of refined industrial sugar by the appellant not only would adversely affect fair trade competition but also would not promote and protect local sugar production in the country. Nonetheless, Dr. Lamwai stressed, the appellant was not made a

party to the proceedings in which he could be heard. In that situation, the appellant was a necessary and proper party in the proceedings, Dr. Lamwai urged.

Secondly, Dr. Lamwai submitted that the appellant's rights accruing from Government Notice No. 68 of 28/3/2003 regarding 7,000 tons of Industrial Sugar had not been concluded in Miscellaneous Civil Cause No. 114 of 2002 as urged by the second and third respondents. On the contrary, Dr. Lamwai countered, the appellants rights under Government Notice No. 68 of 28.3.2003, which were confirmed in Miscellaneous Civil Cause No. 114 of 2003, would be affected by the decision sought in Civil Case No. 85 of 2003. For this reason, the appellant was therefore an interested and proper party in Civil Case No. 85 of 2003, he insisted.

Thirdly, Dr. Lamwai said that the trial judge correctly set out the position of the law under the provisions of Order I Rule 10 (2) of the Civil Procedure Code 1966, the equivalent of which was commented by the distinguished Indian author, Mulla in The Code of Civil Procedure, 16th Edition, Vol. II pages 1567 – 8. However, Dr.

Lamwai further submitted that the judge misapplied the law as extracted in the passage from the learned author. Had the learned trial judge properly construed and applied the law to the circumstances of the case, he would have found that the appellant was a proper party to be joined as a co-defendant.

In turn, Mrs. Kashonda and M/s Mnguto, learned advocates for the first respondent, responded to these submissions. Mrs. Kashonda said that the trial judge's correct finding that the appellant was not a necessary party in Civil Case No. 85 of 2003 cannot be assailed for the following reasons: First, the appellant's interests realized in Civil Cause No. 114 of 2002, are separate and distinct from those involved in Civil Case No. 85 of 2003. Therefore, there was no basis for the claim that the appellant was a necessary party. Furthermore, she said the consignment of 7,000 tons of industrial sugar, subject of the Government Notice No. 68 of 28.3.2003 concerned a previous transaction which was different from the 36,000 tons consignment for the year 2003. On this ground, Mrs. Kashonda maintained that there was no ground for joining the appellant as a party in Civil Case No. 85 of 2003. Like the learned trial judge, she was of the firm view

that even if the appellant was not joined as a party, its interests would be taken care of by the Attorney General, the Principal Legal Adviser to the government who would leave no stone unturned. On her part, M/S Mnguto, learned counsel, also addressed the Court. Essentially, she reiterated the submissions by Mrs. Kashonda.

For the second respondent, Ministry of Finance and the third respondent, the Attorney General, Mr. Kamba, learned Principal State Attorney, made two pertinent observations: First, that there were two transactions undertaken by the appellant which involved tax remission for the importation of sugar. The first transaction whose tax remission was gazetted in Government Notice No. 68 of 28/3/2003 had nothing to do with Civil Case No. 85 of 2003. The second transaction related to a future prospective importation of 36,000 tons of industrial sugar by the appellant which was touched upon in Civil Case No. 85 of 2003. With regard to this transaction, Mr. Kamba conceded that as the orders sought in Civil Case No. 85 of 2003, were directly linked with the appellant which was not made a party in the suit, it was fair and just that the appellant should have been made a party. Secondly, he said the granting of tax remission

is not as of right on the part of the appellant, it is a matter of discretion on the part of the second respondent's officials concerned.

The determination of this appeal turns on a narrow scope, namely whether the appellant was a necessary party to be joined in the suit, in Civil Case No. 85 of 2003. It is common ground that the question of joining a party or otherwise to the proceedings is a matter of applying the applicable law. In the case of Tanzania, the procedural law is set out under the provisions of Order 1 Rule 10 (2) of the Civil Procedure Code, 1966. To this, the learned judge directed his mind. It provides:

> "10. – (2) *The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant,* ***or whose presence before the court may be necessary in order to***

***enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."*** *(emphasis added)*

In an effort to construe the law, and as stated by Dr. Lamwai, learned counsel for the appellant, the learned judge correctly set out the legal position as elaborated by the distinguished author, Mulla in The Code of Civil Procedure, 16th Edition, Vol. II, pages 1567 – 8. Quite extensively, the judge extracted and relied on the learned author's commentary on the provision of the Indian Code of Civil Procedure, the equivalent of Order I Rule 10 (2) of the Civil Procedure Code, 1966. Applying Mulla's (supra) commentary, to the instant case, the learned judge as indicated earlier, was of the firm view that the appellant was not neither a necessary nor a proper party. Having regard to the circumstances of the case as a whole, we pause to consider whether that was a proper application of the law. Dr. Lamwai, was quick to respond that the judge misapplied the

law while on the other M/S Kashonda and Mnguto, held the contrary view.

This issue has engaged our minds considerably. In resolving it, we shall briefly examine some aspects of the facts which we think, are generally not seriously disputed. From the plaint, the core base of the suit, by the first respondent against the second and third respondents, it is apparent that the appellant is abundantly referred to. Centrally, what is averred in the plaint relates to the tax remission granted for the importation of industrial sugar in which the appellant was one of the beneficiaries. This is evident from paragraph 8, 9, 10, 11 and 12 of the plaint. Therefore, in these circumstances, the question falling for consideration is whether the learned judge in his decision considered the averment in the plaint touching on the appellant.

From a cursory glance through the record and the ruling in particular, it is at once apparent that the learned judge did not take into account what was averred in the plaint. It is to be observed that

in the plaint, the prayers sought by the plaintiff, the first respondent in this appeal, seeks a permanent injunction to restrain the second respondent, Ministry of Finance from issuing tax remission for the importation of industrial sugar. Furthermore, a declaration is also sought that the issuance of tax remission by the second respondent for the importation of industrial sugar is null and void. This is an aspect in which the court is called upon to resolve one way or the other in Civil Case No. 85 of 2003.

There is no gainsaying that it is an aspect which directly affect the interests of the appellant. In that situation, we think it would be in the interest of justice that the appellant is given an opportunity of being heard in order to enable the court to settle the issues raised in the suit. To do so, we also think that not only would this accord with the spirit of the provisions of Rule 10 (2) of Order 1 of the Civil Procedure Code but would also be in conformity with the principles of natural justice i.e. according an opportunity to a party to be heard in a matter which directly affects the party.

In this case, while the learned judge concedes that the appellant would adversely be affected in its interest if the government is restrained as sought in the suit from issuing tax exemption, with respect, he takes too narrow a view of the application of the extracted paragraphs from Mulla (supra). Had the learned judge taken a broad view of the principles set out in Mulla (supra) on the relevant section of the Indian Code of Civil Procedure which as stated earlier is in *pari materia* with Order 1 Rule 10 (2) of the Civil Procedure Code, 1966 of Tanzania, we think he would have come to a different conclusion.

On a proper construction of Order I Rule 10 (2) of the Civil Procedure Code and application of the guiding principles as discerned from Mulla's commentaries to the facts of the case, we are increasingly of the view that the appellant's presence before the court was necessary in Civil Case No. 85 of 2003. In our view, the appellant's presence in court in this case would enable the court to effectually and completely adjudicate upon the issues raised in the suit regarding tax exemption of imported industrial sugar. All the

more so, where, as in this case, the appellant centrally featured in the plaint and had applied to be joined in the suit.

Then there was the learned judge's line of argument that the appellant's interest in the case pertains to other interests and not existing legal interest in which case, Rule 10 (2) of Order 1 does not come to play. While it is common ground that the first consignment of 7,000 tons of imported industrial sugar subject of Government Notice No. 68 of 28/3/2003 for which tax remission had been granted, the second consignment of 36,000 tons was yet to be imported in future. Dismissing the applicant's application the learned judge held that the applicant was not a necessary party because the interest involved pertained to the future.

We need not be delayed in this point. As already indicated, one of the reliefs sought in Civil Case No. 85 of 2003 was a declaration that any issuance of tax remission for the importation of industrial sugar is null and void. From this order, it appears to us that no fine distinction could be made between existing and future legal interests. If the order is granted and the remission is declared

null and void, both the existing interests as well as the others based on the exemption may well be affected. In that situation, either way, the applicant would be affected and hence an interested and necessary party in the suit. It is our view therefore that this was no ground for the learned judge to hold that the appellant was not a necessary and proper party to be joined in the suit.

Next we wish to comment briefly on the learned judge's casual observation that even if the appellant was not joined as a party, it would be ably represented in the suit by the Attorney General. This point was also reiterated by Mrs. Kashonda supported by M/S Mnguto, learned counsel. It is common knowledge that the Attorney General as Principal Legal Adviser to the government, ordinarily represents government ministries, departments or other government agencies. In this case, he represented the second and third respondents. Apart from these, we can see no basis for the appellant, a private agency being represented by the Attorney General.

In any case, in this case, as correctly stated by Mr. Kamba, learned Principal State Attorney, from the pleadings, the issues raised in relation to the tax remission are better suited to be answered or clarified by the appellant. With respect, we are in agreement with the learned Principal State Attorney on this submission. This is for the obvious reason that the Attorney General would in our view, competently represent the views of the government on behalf of the second and third respondents with regard to the government policy on the sugar industry and the procedure followed in granting tax remission. Otherwise, we are unable to see how the Attorney General can hazard any views on behalf of the appellant regarding the adverse effect on the appellant if tax remission was not granted. For this reason, we find no merit in the claim that the Attorney General would leave no stone unturned in representing the appellant.

For the foregoing reasons, we allow the appeal and set aside the High Court decision dismissing the appellant's application to be joined as a party to the suit in Civil Case No. 85 of 2003. The matter is remitted to the High Court with direction to proceed with the

hearing of the case from the stage reached on 6.11.2003 after joining the appellant as a party to the proceedings.

Costs granted to the appellant.

DATED at DAR ES SALAAM this 14th day of April, 2004.

D. Z. LUBUVA

**JUSTICE OF APPEAL**

E. N. MUNUO

**JUSTICE OF APPEAL**

H. R. NSEKELA

**JUSTICE OF APPEAL**

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

( S. A. N. WAMBURA )

**SENIOR DEPUTY REGISTRAR**