IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 12 OF 2007

In the Matter of an Application for leave to apply for the orders of **CERTIORARI** and **MANDAMUS** by FRANCIS KWILABYA STOLLA

BETWEEN

FRANCIS KWILABYA STOLLA .... APPLICANT

VERSUS

THE TANGANYIKA LAW SOCIETY ..... 1ST RESPONDENT
THE HON. ATTORNEY GENERAL ...... 2ND RESPONDENT

Date of final submission - 14/2/2008
Date of Ruling - 12/3/2008

RULING

MWARIJA, J.:

The applicant, Francis Kiwlabya Stolla has instituted this application for leave to apply for orders of Certiorari and Mandamus against the respondents, the Tanganyika Law Society and the Hon. Attorney General, hereinafter to be referred to as the 1st and 2nd respondents respectively. At the commencement of hearing, the 1st

respondent, through its Advocate, raised a preliminary objection which had two grounds:

(a) that the first respondent is not a public body or institution against which the public law remedies of Certiorari, Mandamus and prohibition can be applied for or issued.

(b) that the application has been overtaken by events hence untenable and amounts to an abuse of the court process.

The preliminary objection was argued by way of written submissions. Submitting on the first ground, the learned counsel for the 1st respondent argued that although the 1st respondent is established by statute, its form, nature and organizational structure is that of an ordinary Society of professional lawyers hence not a public, but a private body. He referred to the decisions of this Court in the cases of **Abdallah S. Likanoga & 24 others v. The Dar Es Salaam Regional Managing Committee of Tanzania Red Cross Society** Misc. Civil Case No. 37 of 1996, DSM District Registry (unreported) and **Amani Mwenegoha, Secretary General (ELCT)**

The Registered Trustees of the Lutheran Church in Tanzania & 3 others, Misc. Civil Case No. 8 of 2005, DSM District Registry (unreported). The decision in those cases is to the effect that unless the duty imposed on a body is public duty and the nature of its function is to exercise public law function, such body cannot be amendable to judicial review. Thus in the case of **Abdallah S. Likanoga** the duty imposed on Red Cross Society was not found to be a public duty and its nature was not to exercise a public law function. As to the case of **Amani Mwenegoha,** it was found that ELCT was not a statutory body performing any duties imposed on it by law.

Responding to the submissions, the applicant replied that the 1st respondent being a creature of statute is a statutory body and the nature of its function under S.4 of the Tanganyika Law Society Act, Cap. 307, R.E. 2002 (hereinafter referred to as "the Act") is public not private. He distinguished the decisions cited by the learned counsel for the respondent stating that such decisions concerned bodies which cannot be likened with the 1st respondent because,

Unlike the 1st respondent, the two bodies – Red Cross Society and ELCT were not created by statute and the nature of their functions is not public but private. The applicant further cited the case of **Senai Murumbe & Another v. Muhere Chacha** (1990) TLR 54 in emphasis that public bodies are subject to judicial review.

The 1st respondent's counsel in his rejoinder submissions conceded to the distinction of facts between the two bodies of Red Cross Society and ELCT and the 1st respondent. He submitted however that although it is correct that the 1st respondent is a creature of statute and its functions are public in nature, there is no provision in the Act establishing it which requires it to act judicially in reaching its decisions or that it is a quasi-judicial body. To use the learned counsel's own words:

> *". . . having distinguished the facts of the authorities we cited, learned counsel for the applicant did not however identify any single provision in the TLS or any other law*

which demonstrate that in making or reaching its decisions, TLS does so judicially or at least TLS is a quasi-judicial body irrespective of its being public in nature."

It was submitted further in rejoinder that the applicant did not demonstrate how the 1st respondent acted judicially in its meetings – Half Annual General Meeting and Annual General meeting. Further on the case of **Murumbe**, cited by the learned counsel for the applicant, the response by the learned counsel for the 1st respondent is that a body does not become a public body like a local government authorities and other government institutions from the only fact that it is created by statute. I understood the learned counsel here to attempt to expound his earlier view that a body becomes amanable to judicial review if in addition to it being a creature of statute must have a compelling provision of law to act judicially.

From the submissions by the parties, it is agreeable that the 1st respondent is a statutory body by virtue of its having created by the

Tanganyika Law Society Act, Cap. 307 R.E 2002. The parties agree further that it is a public body exercising a public law function by virtue of the provisions of section 4 of the Act. Despite that concensus that the 1st respondent's powers and duties are derived from statute and that its nature is that of performing a public functions, the respondent submits that there must be a provision in the creating statute which compels it to act judicially in its decisions.

I am unable to agree with the learned counsel for the 1st respondent on that proposition. To act judicially is an implicit requirement to be undertaken by bodies exercising public functions. The learned author Clive Lewis in the book **Judicial Remedies in Public Law**, Sweet & Maxwell, (Lon) (2000) at P. 11 states as follows;

> *"The fact that such body was created by statute or is exercising statutory powers is relevant because the courts normally regard this as* ***sufficient*** *to warrant treating the body as a public body and therefore*

amenable to judicial review" (emphasis is mine).

To be amenable to judicial review therefore, it is not a condition precedent that there must be a specific provision of law in the statute which establishes a public body.

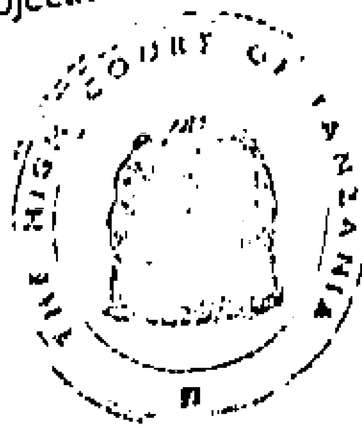
There was again another argument by the learned counsel for the 1st respondent that there has not been shown how the meetings of the 1st respondent can be said to have been conducted judicially. I will consider this point briefly lest I tramp into the danger of going into the merits of the application. In his application the applicant is complaining against his removal from chairmanship of one of the committees of the 1st respondent at the annual general meeting without being given an opportunity to be heard. Perusal of the Act reveals that there are rules which govern the meeting of the society (1st respondent) and therefore once the society has been found to be a statutory body exercising a public law function, breach of those rules may result into a judicial review. The position with regard to a

law Society in England is that since the [illegible] and regulatory functions conferred upon it by a statute, [illegible] to judicial review. The learned Author [illegible] above states;

> "*The Law Society, a body created by statute, has a large number of disciplinary and regulatory functions conferred upon it by statute and the exercise of these statutory powers is amenable to judicial review*"(p.9).

From the foregoing, I find that the 1st respondent, the Tanganyika Law Society is a Statutory body deriving its powers and duties from a statute. It is also a public body exercising a public law functions. Under those conditions it is amenable to judicial review. The first ground of the preliminary objection is therefore untenable. It is accordingly dismissed.

The second ground of the preliminary objection as stated earlier concerns the issue whether or not the application has been overtaken by events. The application referred to [illegible] application for grant of orders of Certiorari and Mandamus. [illegible] applicant must obtain leave before he files that application. [illegible] that application for leave that this ground of the preliminary objection has been raised. It is my considered view that such a point has been raised pre-maturely because it concerns reliefs which are to be sought in the intended application. Father, the point raised is contentious according to the parties' submissions and thus require more facts, hence cannot be decided in the preliminary objection. This ground therefore fails as well. In the end, the preliminary objection is hereby accordingly dismissed with costs.



A.G. MWARIJA

JUDGE

12/3/2008