THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

MISCELLANEOUS CIVIL CAUSE NO. 01 OF 2019

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI

AND

IN THE MATTER OF THE LAW REFORM (FATAL ACCIDENTS AND MISCELLANEOUS PROVISIONS) ACT, CAP 310 [R.E. 2002]

AND

IN THE MATTER OF AN APPLICATION TO CHALLENGE PROVISIONS OF THE NON-GOVERNMENTAL ORGANISATIONS (AMENDMENTS) REGULATIONS, 2018

BETWEEN

LEGAL AND HUMAN RIGHTS CENTRE.....APPLICANT

AND

THE MINISTER FOR HEALTH, COMMUNITY DEVELOPMENT, GENDER, ELDERLY AND CHILDREN.....1ST RESPONDENT

THE REGISTRAR OF NON-GOVERNMENTAL ORGANISATIONS.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

Date of Last Order: 05/08/2020
Date of Ruling : 07/10/2020

MONGELLA, J.

This application is filed under section 2 (3) of the Judicature and Application of Laws Act, (Cap 358 R.E. 2002); section 18 (1) and 19 (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap 310 R.E. 2002 and Rule 5 (1) and (2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act (Judicial Review Procedure and Fees) Rules, 2014. In this application, the applicant seeks to be granted leave to file an application for certiorari to quash and declare the provisions of the Non-Governmental Organisations (Amendments) Regulations, 2018 GN No. 609 published on 19th October 2018 to have been promulgated in excess of powers, being unreasonable, arbitrary and ambiguous. The application is supported by the sworn affidavit of one Felista Mauya. The application was argued by written submissions timely filed in this court by both parties.

Mr. Jebra Kambole, learned advocate who represented the applicant started by providing brief facts leading to the application at hand. He submitted that on 19th October 2018, the 1st respondent being the Minister charged with duties of overseeing matters of health, community development, gender, elderly and children, published in the government gazette the Non-Governmental Organisations (Amendments) Regulations, 2018. He said that the said Regulations *inter alia* charges non-governmental organisations with an obligation to disclose to the public, the registrar, the council, the board and other stakeholders within fourteen days from the date of completion of fund raising activities, sources of funds obtained, expenditure of fund or resources obtained, purpose of fund or resources obtained and activities to be carried from

fund or resources obtained. He said further that, under Regulation 13 of the said Regulations, the non-governmental organisations that obtain fund exceeding twenty million shillings are obliged to publish bi-annually the fund received and its expenditure in a wide circulated newspaper and other media channels which are easily accessible by the targeted beneficiaries, cause the contracts or agreements entered with the donor or person who grants the said fund to be submitted to the treasury and the registrar not later than 10 days from the date of entering the said contract or agreement for approval.

Given the brief facts as presented above, Mr. Kambole went on to submit on the gist of the application. Referring to the book by D.B Chipeta titled "**Administrative Law in Tanzania, A Digest of Cases**" 2009, Mkuki na Nyota Publishers, at page 1; he submitted that it is a settled principle of law that for an application for leave to file an application for judicial review to be granted, the applicant must satisfy the court on the following:

> *"(1) Whether the facts contained in the affidavit in support of the application, if true, would constitute a reasonable ground for the form of reliefs sought; (2) whether the applicant has sufficient interest in the matter to which the intended application relates; (3) whether on the facts, the application will raise an arguable or prima facie case; (4) whether the applicant has not been guilty of dilatoriness; and (5) whether there is no other speedy and effective remedy available to the applicant and, if such alternative remedy is available, whether prima facie, judicial review is a better way of obtaining the relief sought."*

He further referred to the case of ***Emma Bayo v. The Minister for Labour and Youth Development and Others***, Civil Appeal No. 79 of 2012 (CAT at Arusha, unreported) in which it was held:

> *"The stage of leave serves several important screening purposes. It is at the stage of leave where the High Court satisfies itself that the applicant for leave has made out any arguable case to justify the filing of the main application. At the stage of leave the High Court is also required to consider whether the applicant is within the six months limitation period within which to seek judicial review ... At the leave stage is where the applicant shows that he or she has sufficient interest to be allowed to bring the main application. These are the preliminary matters which the High Court sitting to determine the appellant's application for leave should have considered while exercising its judicial discretion to either grant or not to grant leave to the applicant..."*

He further referred to the case of ***TANCAN Mining Company Ltd. v. Minister for Minerals, the Mining Commission, and the Attorney General***, Misc. Civil Application No. 2 of 2020 in which this Court (Masoud, J.) considered the decision in **Emma Bayo** (supra). In this case the court held"

> *"... This issue necessarily invites the court to consider whether the applicant has shown by facts in the affidavit that verifying the statement of facts that his interests have been or will be adversely affected unless the court intervenes by prerogative orders."*

In an endeavour to convince this court to grant the application for leave, Mr. Kambole went further to address on whether the applicant's application meets the criteria set out in the above cited authorities. On

whether the application advances an arguable case, he submitted that the affidavit submitted by one Felista Mauya in support of the application establishes an arguable case justifying the filing of the main case. He contended that the affidavit in support of the application states that the Regulations are amenable for judicial review on the ground that:

> *"(a) while making the Regulations the 1st respondent acted in excess of his powers; ultra vires; (b) the powers of the 1st respondent require consultation with stakeholders but he/she failed to do so; (c) the 1st respondent has made rules for matters without following due process under the law; (d) the Regulations are illegal as they interfere with personal privacy by instructing disclosure; (e) the Regulations are unreasonable for requiring non-governmental organisations to publish bi-annually all fund received and expenditure in the wide circulated newspaper; (f) the Regulations provide for criminal penalties for a person who contravenes the provisions of the Regulations without the room of appeal; (g) the Regulations contravene the rules of natural justice as they do not provide procedure to be followed before imposing sanctions; (h) the Regulations impose sanctions for those who contravene without first being heard; (i) the Regulations give power to the authorities to be the judges and prosecutors in their own cause; (j) the Regulations are illegal, unreasonable, arbitrary and ambiguous, having been made in excess of the powers provided by law."*

Mr. Kambole was of the position that from the facts deponed in the supporting affidavit as enumerated above, the applicant has established an arguable case for the court to grant the relief sought.

Regarding whether the applicant has a sufficient interest in the matter, Mr. Kambole was certain that the applicant has sufficient interest. He argued

that under paragraph 2 of the supporting affidavit it is stated that the applicant is a voluntary and human rights-interested civil society organisation duly registered as a charitable entity under the Companies Act, Chapter 212 of the Revised Laws of the United Republic of Tanzania with the certificate of compliance under Non-Governmental Organisations Act, 2002 whose registered office is in Dar es Salaam, Tanzania. He added that the applicant annexed the certificate of compliance as "annexture NR-1" which shows that the applicant is bound by the Non-Governmental Act, 2002 and the impugned Non-Governmental Organisations (Amendments) Regulations, 2018, G.N. No. 609 of 2018. With these facts, Mr. Kambole was of the stance that the applicant has sufficiently demonstrated her interests on the application. He further added that the respondents in their counter affidavit have not disputed the interest of the applicant in the matter.

On whether the applicant is within time limit of six months, Mr. Kambole argued that the applicant is not guilty of dilatoriness. He submitted that the application at hand was filed within time as provided under Rule 6 of the Law Reform (Fatal Accident and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014 which require the application for leave to file an application for judicial review to be filed within six months to which the act or omission the application for leave relates.

Lastly, Mr. Kambole addressed the issue on whether there is no any other speedy and effective remedy available to the applicant and, if such alternative remedy is available, whether, prima facie, judicial review is a better way of obtaining the relief sought. On this, he submitted that the

applicant has no other means of seeking redress to challenge the impugned Regulations. He contended that the impugned Regulations were made by the 1st respondent in her administrative capacity thus the only means to obtain redress is through an application for judicial review, hence this application. With this submission he prayed for the application to be granted.

On his part, the respondent opposed the application. He submitted that application for leave is a necessary step towards an application for prerogative orders whereby its purpose is to give the court an indication that the applicant has sufficient interest in applying for the orders. To cement his point he made reference to **Halsbury's Laws of England, 14th Edition** paragraph 570 which states that:

> *"When dealing with an application for leave to apply for judicial review, the first and foremost consideration which the court must determine is whether the applicant has shown that he has sufficient interest in the matter to which the application relates."*

He further contended that it is clear from the chamber summons, affidavit and statement filed that leave to file application for prerogative orders is requested by the applicant. He referred to paragraph 2 of the affidavit whereby the applicant introduces herself as being a charitable civil society organisation and argued that that being the only paragraph relied upon by the applicant to show her interest in the application, it is not sufficient to explain how the applicant is affected or shall be affected by the impugned Regulations. To buttress his argument he referred to the case of ***Attorney General v. Wilfred Onyango Mganyi and 11 Others***,

Criminal Appeal No. 276 of 2006 (CAT at Arusha, unreported) whereby the Court insisted that the applicant must show that he has sufficient interest in the matter to which the application relates. He as well referred to the case of ***Godbless Jonathan Lema v. Musa Hamis Mkanga and 2 Others***, Civil Appeal No. 47 of 2012 (CAT at Arusha, unreported) in which it was held that *"in common law in order for one to succeed in an action, he must not only establish that his rights or interests were interfered with but must also show the injury he had suffered above the rest."* He was of the position that the applicant has failed to meet the test established in the case of ***Wilfred Onyango*** (supra).

The respondent further argued that going through ground 8.1, 8.2, 8.3, 8.4, 8.5, 8.6 and 9 of the applicant's statement, he has failed to comprehend as to what exactly the applicant is challenging. He contended that it is unclear as to whether the applicant is challenging the decision of the Minister to publish GN No. 609 of 2019 as being wrong or illegal. He added that the applicant says that the Minister did not follow the procedure thus arrived at a wrong decision and that the decision was incorrect. He was of the position that if that is the case then judicial review is not the best option for him. He further argued that the applicant has submitted on irrelevant matters and has touched nothing on the circumstances laid down in the case of ***Emma Bayo*** (supra). He was of the view that the applicant's submission centres on the facts in the sworn affidavit of one Felista Mauya and there is no explanation as to how the applicant has been affected by GN No. 609 of 2019.

Lastly, the respondent challenged the applicant's reliance on expunged paragraphs in the affidavit in support of the application following a ruling of this Court handed down on 19th June 2020 on preliminary objection. He submitted that in the said ruling this Court expunged paragraphs 6 (iv), (v), (ix) and (x) of the applicant's affidavit, thus relying on them to convince this court that he has an arguable case, the applicant is geared towards misleading the court. On these bases he urged the court to find that the applicant has failed to establish that there is an arguable case to be granted leave to apply for judicial review.

He further argued that upon reading the applicant's affidavit between the lines, he noted that paragraph 6 of the said affidavit was not properly verified thus defective for offending the provisions of Order XIX Rule 3 (1) of the Civil Procedure Code, Cap 33 R.E. 2019. He contended that the verification clause does not mention roman (i), (ii), (iii), (vi) (vii) and (viii), which remained after the rest were expunged. He was of the stance that the sub paragraphs ought to have been verified separately and not generally. To cement on his point he referred to the case of ***Mlela Ramadhani v. Mahona Butungulu***, Misc. Land Case No. 20 of 2019 (HC at Tabora, unreported). He was thus of the stance that the said paragraph ought to be expunged and once that is done the application at hand will have no legal feet to stand on.

To preempt the applicant, the respondent argued that the applicant might come up with the principle of overriding objective to convince this court that the defect in the verification clause on paragraph 6 is a normal slip of the pen. Citing the case of ***Mondolosi Village Council and 2 Others***

v. Tanzania Breweries Ltd and 4 Others, Civil Appeal No. 66 of 2017, he submitted that the overriding objective cannot be applied blindly against the mandatory provisions of the procedural law which go to the very foundation of the case. He further preempted the applicant by arguing that the applicant might come up with another argument that the defect on affidavit should not be entertained at this stage. On this he argued that the CAT observed on this issue in the case of ***Emma Bayo*** (supra) where it ruled that:

> *"The question whether the High Court was properly moved is a matter that can best be taken up at the High Court itself because it is one of the issues that are determinable at first step/stage when considering an application for leave to apply for prerogative orders."*

He concluded that this application depends on the facts deponed in the affidavit, thus a defective affidavit renders the application incompetent and deserves to be struck out with costs. However, before penning down, the respondent argued that obviously the applicant's counsel shall attempt to show the applicant's interest in his rejoinder. Citing the case of ***The Registered Trustees of the Archdiocese of Dar es Salaam v. The Chairman of Bunju Village Government and 4 Others***, Civil Appeal No. 147 of 2006 (CAT at DSM, unreported) he argued that a submission is not an evidence. Given his submission he prayed for the application to be dismissed with costs for lack of merit.

After according the parties' submissions due consideration, I shall start with the legal point raised by the respondent concerning defective verification clause in the applicant's affidavit. Even though the issue has

been raised at this particular stage whereby parties are arguing the case by written submissions, it is my opinion that this Court is still empowered to entertain the same. This is because the point raised is a purely legal point and the law is already settled to the effect that a legal issue can be raised at any stage either by the parties or by the court *suo motu* provided the parties are accorded the opportunity to address the court on the same. See: See: ***Hassani Ally Sandali v. Asha Ally***, Civil Appeal No. No. 246 of 2019 (CAT at Mtwara, unreported) and ***Oil Com Tanzania Ltd v. Christopher Letson Mgalla***, Land Case No. 29 of 2015 (HC at Mbeya, unreported). It is unfortunate however that the applicant opted not to file a rejoinder in response of the issues and arguments advanced by the respondent in his reply submission. As far as this situation is concerned, it is my observation that the applicant opted to forfeit his right to address the court on this issue as he was served with the respondent's submission and had ample time to file his rejoinder.

The applicant has argued that paragraph 6 of the affidavit in support of the applicant's application which contains sub paragraphs was not properly verified. I have gone through the applicant's affidavit and I agree with the respondent that the deponent did not verify the sub paragraphs under paragraph 6. In a number of cases this Court has been of the settled position that a general verification clause by the deponent is not allowed under the law and thus has considered such verification as rendering the affidavit defective. See: ***Mlela Ramadhani*** (supra), cited by the respondent; and ***National Institute of Transport v. Twambilile Mwakaje***, Revision No. 906 of 2019.

In saving the application, the current trend adopted by the courts has been to expunge the offensive paragraphs where in the eyes of the court the remaining paragraphs can still hold the application. See for instance: ***Stanbic Bank Tanzania Limited v. Kagera Sugar Limited***, Civil Application No. 57 of 2007; Phantom ***Modern Transport (1985) Limited v. D. T. Dobie (Tanzania) Limited***, Civil References Nos. 15 of 2001 and 3 of 2002. ***Peter Lucas v. Pili Hussein & Another***, Misc. Civil Application No. 33 of 2003 and that of ***MMG Gold Ltd v. Heartz Tanzania Limited***, Misc. Commercial Cause No. 118 of 2015.

In the matter at hand however, the facts constituting the cause of action for seeking leave to apply for judicial review are mainly contained under the impugned paragraph 6 in the applicant's affidavit. It follows therefore that, as argued by the respondent, if paragraph 6 is expunged the applicant's application shall have no strong legs to stand upon in pursuing the application at hand. This is because the said facts, as argued by Mr. Kambole in his submission in chief, present the arguable case on judicial review. Even the interest in the case that the applicant claims to have, has to be connected to the facts constituting the cause of action, which are presented under paragraph 6 (I to viii) of the affidavit.

I am alive at a recent decision whereby the Court of Appeal allowed the applicant to amend an affidavit with a defective verification clause so that he can file one which is properly verified. See: ***Sanyou Services Station Ltd. v. BP Tanzania Ltd. (Now PUMA Energy (T) Ltd***, Civil Application No. 185/17 of 2018. However, I am afraid the same cannot be done at this particular stage whereby the court is composing its ruling on the main

application. Under the circumstances, I am left with no choice than to strike out the application with costs.

Dated at Mbeya on this 07th day of October 2020.

L. M. MONGELLA

JUDGE

Court: Ruling delivered in Mbeya through virtual court on this 07th day of October 2020 in the presence of Mr. Amani Joachim, learned Advocate for the applicant and Mr. Joseph Tibaijuka, learned State Attorney for the respondent.

L. M. MONGELLA

JUDGE