

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE MWANZA DISTRICT REGISTRY

AT MWANZA

MISCELLANEOUS CAUSE NO. 95 OF 2019

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS
OF MANDAMUS**

BETWEEN

TESHA RWIZA MURSHID 1ST APPLICANT

ABUBAKAR SELEMANI OMARI 2ND APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS (DPP) 1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATION (DCI) 2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 3RD RESPONDENT

Date of the last Order: 25/03/2020

Date of Ruling: 01/01/2020

RULING

ISMAIL, J.

Before me is an application for grant of leave which will allow the applicants to file an application for prerogative orders of

Mandamus, to compel and 1st and 2nd respondents to complete investigation and proceed with conducting and prosecute the matter admitted as Preliminary Inquiry No. 31 of 2014 which is pending against the applicants in the District Court of Bukombe at Ushirombo.

The application has been preferred under the provisions of **section 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) (Judicial Review Procedure Fees) Rules, 2014, GN. NO.324 of 2014. The application is supported by an affidavit affirmed jointly by TESHARWIZA MURSHID and ABUBAKAR SELEMAN OMARI, the applicants herein, and it sets out grounds upon which the application is based.

Facts constituting the basis for this application are gathered from the supporting affidavit and the Statement and briefly are as follows:

On 25th September, 2014, a Preliminary Inquiry No. 31 of 2014 was instituted in the District Court of Bukombe at Ushirombo, in respect of a murder allegation that allegedly occurred on 6th September, 2014, at Ushirombo Police Station. Suspects of the said

incident included the applicants who were joined in the inquiry subsequent to its filing. The accused, including the applicants, were sent to a remand prison in Kahama, where they still languish. The complaint is that for in excess of five years since the applicants' arraignment in court, investigation in respect of the allegations has not been completed, if ever conducted. During the time, the applicants have not been allowed to appear in court, notwithstanding the fact that the case is called for mention fortnightly. It is further alleged that the applicants' continued incarceration, which has inflicted serious mental and physical injury on them, is a result of the 1st and 2nd respondents' failure or abdication of their statutory duties which would see investigation completed and the applicants arraigned in court and protest their innocence, or it would see the 1st and 2nd respondents terminate the investigation and withdraw the pending inquiry and set the applicants at liberty.

The applicants contend that the 1st and 2nd respondents have failed or refused to carry out their statutory duties or abusing the process of the law using legitimate means of the legal process for illegitimate ends. It is in view thereof that the applicants are applying

for leave which will allow them to apply for prerogative orders which will compel the respondents to perform their statutory duties of investigating the allegations and make a decision on whether the applicants and/or other suspects are culpable of the alleged murder.

When the matter came up for hearing on 25th March, 2020, the applicants were represented by Mr. Ubaidi Hamidu, learned advocate. Praying to adopt the applicants' joint affidavit, Mr. Hamidu submitted that the application is intended to move this Court to grant leave which will enable the applicants to apply for a prerogative order of Mandamus, to compel the 1st and 2nd respondents to finalize investigation of the allegations facing the applicants in order to enable them stand a trial in court in respect of Preliminary Inquiry No. 31 of 2014, which has remained pending for more than 5 years. The counsel submitted that for all that time, the applicants have only been brought to court twice. These were occasions on which other suspects were joined in the Inquiry. Mr. Hamidu contended that, as a result, the 1st and 2nd respondents have failed to accord the applicants the opportunity to be served justice. Describing the 1st and 2nd respondents' roles, Mr. Hamidu

submitted that the 2nd respondent is charged with the duty of conducting investigations into any criminal wrong doing, in order to enable the DPP to carry out prosecution of offenders. His contention is that the 2nd respondent has failed to fulfil his obligations, while the 1st respondent who has powers of discharging the suspects if he is of the view that there is no sufficient evidence to support the charges, has let the applicants to languish in custody while their wrong doing has not been proved. Arguing that the applicants' only hope is this Court, the learned counsel urged me to grant leave as prayed.

Having heard the submission made by the counsel for the applicants, the Court's duty, at this stage of the proceedings, is to determine if ***"there is a substantial or serious question to be investigated"*** (Mapigano J., in ***Kahama Gold Mines & 2 Others v. Minister for Energy & Minerals***, HC-Misc. Civil Cause No. 127 of 1999 - unreported). This question arises from a realization of the fact that the Court has a duty, in an application for leave, to prevent a wasteful use of judicial time. This is done by *"weeding out frivolous or vexatious and perhaps those, on the face of it, that do not exhibit good faith or ex facie are an abuse of the legal process"* (See Article by Prof. Issa G. Shivji, ***Developments in Judicial Review in Mainland***

Tanzania; <https://www.scribd.co>). In other words, an applicant of leave to file an application for prerogative orders has to establish a prima facie case and that the application for the prerogative orders has a probability of success. Thus, while the threshold is not high at the leave stage, it is well-established that the evidence before the Court cannot be skimpy or vague. The applicant must show, at the leave stage, that the grounds for judicial review are real as opposed to theoretical possibilities.

As gathered from the application for leave, the provisions that enable it are **section 19 (3)** of Cap. 310 and **Rule 5 (1)** of the Judicial Review Procedure and Fees Rules, 2014. For ease of reference, I find it apposite to quote them in their verbatim form as follow

"19 (3) In the case of an application for an order to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed under any Act, and where the proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the Court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."

"5(1) An application for judicial review shall not be made unless a leave to file such application has been granted by the court in accordance with the Rules.

(2) An application for leave under sub rule (1) shall be made ex-parte to a judge in chambers and be accompanied by:

- (a) A statement providing for the name and description of the appellant;*
- (b) The relief sought;*
- (c) The grounds on which the relief is sought;*
- (d) Affidavit verifying the facts relied on.*

These provisions highlight the fact that grant of leave is a condition precedent for preference of an application for prerogative orders. The question is, as posed above, whether a prima facie case has been established. This question is answered by looking at the affidavit that supports the application. A dispassionate review of the 15-paragraph affidavit contains grounds on which the application for leave is premised. It is this affidavit from which it is gathered that the applicants have been in remand custody since 6th September, 2014 and that during the time, the applicants have not been able to get past the inquiry stage in their quest for justice. They have also averred that during that five year stay in custody, they have not been taken to court despite the fact that their case is called for orders fortnightly.

Of most significance are paragraphs 11 through to 14 of the said affidavit which reveal the basis for their contention. They read as follows:

- "11. That, the 1st and 2nd Respondents have failed for more than four years to investigate the Applicants' alleged offences of murder of three officers alleged to have been committed at Ushirombo police station.*
- 12. That, the Applicants had demanded the 1st and 2nd Respondents to perform their duties, function and obligation to complete the investigation and prosecution as per the demand letter received by the respondents on 1st August, 2019 annexed herewith and marked B to form part of the present application.*
- 13. That, the 1st and 2nd Respondents have not heeded to the applicants' demands by performing their respective and collective statutory powers, duties and functions which has necessitated the institution of the present application.*
- 14. That, the Applicants continue to suffer incarceration and their health conditions are deteriorating."*

From the foregoing averments, it is clear that the application is neither vexatious nor is it frivolous. It reveals what I consider to be a substantial and serious question which needs to be investigated through a judicial review process.

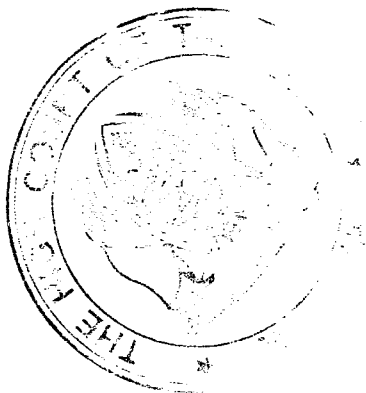
The manner in which the applicants have been allegedly treated, and the respondents' alleged knee-jerk reaction to the applicants' persistent calls, serve to establish a *prima facie* case

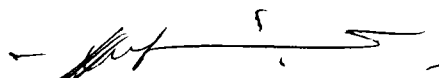
which convinces me that the application for the prerogative orders has a probability of success. The deposition in the joint affidavit constitutes sufficient evidence that there are issues which can be resolved through the intended application for judicial review.

Consequently, I grant leave that will enable the applicants to institute an application for a prerogative order of mandamus against the respondents.

It is so ordered.

DATED at **MWANZA** this 1st day of April, 2020.




M.K. ISMAIL
JUDGE

Date: 01/04/2020

Coram: Hon. M. K. Ismail, J

Applicant: Mr. Kelvin, Advocate for Mr. Abubakar, Advocate

Respondent: Absent

B/C: Leonard

Mr. Kelvin:

My Lord, the matter is for ruling. I am under instructions to receive the ruling.

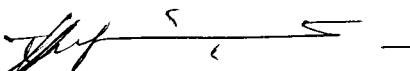
Sgd: M. K. Ismail
JUDGE
01.04.2020

Court:

Ruling delivered in chamber, in the presence of Mr. Kelvin Mutatina, learned Counsel for the Applicants and in the presence of Mr. Leonard B/C, this 01st day of April, 2020.

At Mwanza
01.04.2020




M. K. Ismail
JUDGE