IN THE HIGH COURT OF TANZANIA
(MAIN REGISTRY)
AT DAR ES SALAAM

MISCELLANEOUS CAUSE NO. 11 OF 2021

IN THE MATTER OF APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE NATIONAL PAYMENTS SYSTEM ACT CAP 437 AS AMENDED BY ACT NO 3 OF 2021

AND

IN THE MATTER OF THE NATIONAL PAYMENTS SYSTEM (ELECTRONIC MOBILE MONEY TRANSFER AND WITHDRAWAL TRANSCTIONS LEVY) REGULATIONS, GN 496A OF 2021

BETWEEN

LEGAL AND HUMAN RIGHTS CENTRE.....APPLICANT

AND

THE MINISTER FOR FINANCE AND PLANNING.....1ST RESPONDENT
THE MINISTER FOR COMMUNICATION AND INFORMATION TECHNOLOGY.....2ND RESPONDENT
THE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

16 August & 8 September, 2021

MGETTA, J:

Upon filing chamber summons by the applicant, Legal and Human Rights Center, under **section 2(3) of the Judicature and Application of Laws Act, CAP. 358** (henceforth Cap 358), **Sections 18(1) and 19(3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions)**

Act, CAP 310 (henceforth Cap 310) and **rule 5(1) and (2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules 2014**, (henceforth the 2014 Rules) seeking for leave of court to apply for Judicial review; and, after the Minister for Finance and Planning (1st respondent), the Minister for Communication and Information Technology (2nd respondent), and the Attorney General (3rd respondent) having been duly served, along with filing counter affidavit and reply to statement, they also filed a Notice of preliminary objections, the subject matter of this ruling, complaining and I quote that:

1. The application and the prayers sought are bad and untenable in law for want of decision to amenable by way of Judicial Review.
2. The application is bad in law for want of legal authorization to institute the same.
3. The application is fatally defective for want of cause of action.

As stated herein above, under certificate of urgency on 27/7/2021 the applicant applied for leave of court to apply for order of certiorari to quash the promulgation of the **National Payment Systems (Electronic Mobile Money Transfer and Withdrawal Transactions Levy) Regulations, 2021,** GN No 496A published by the 1st respondent on 30/6/2021

(henceforth the Regulations 2021); and, for order of prohibition to restrain the 1st and 2nd respondents from acting in any way of the operation of the Regulations 2021 pending hearing and determination of the application for substantive orders. The application is accompanied by the affidavit sworn by applicant's Executive Director and by a statement.

In brief, traditionally, application for leave of court or judicial permission to apply for judicial review is made *exparte* to a judge in chambers who may hear the applicant or proceed without hearing him, and then grant or refuse to grant leave, as the case may be. It is a legal requirement that the applicant will only apply for orders of certiorari, mandumus and prohibition after leave is granted to him. Such application for leave must be heard and determined within 14 days from the date the application for leave was filed. However, in Tanzania where a leave is sought in any civil matter against the Government institution, it becomes mandatory that the Attorney General be joined and summoned to appear as a party to court proceedings. When the Attorney General is involved, then the application for leave should be heard *inter-partes*, and determination of it within 14 days from the date the application was filed is also disrupted. Thus, the introduction of **section 18(1)** to **Cap 310** removes the right to hear

the applicant *exparte* as it is in the present application where the Attorney General was made a party.

Now, when the preliminary objections were called on for hearing, Mr. Gabriel Malata, the learned Solicitor General, together with Mr. Erigh Rumisha and Stanley Mahenge, both learned state attorneys, appeared for the respondents. The applicant enjoyed a legal service of Mr. Mpale Mpoki, the learned advocate.

As I deal with preliminary objections in this ruling, I should make it clear from the outset that, in order for me to remain in a safe zone, I restate the principle made in the land mark case of **Mukisa Biscuits Manufacturing Ltd. V. West End Distributors Ltd**, [1969]1 EA 696 which defines what a preliminary objection is and also provides when it can be raised and when it should not be raised. In order an objection to be considered as preliminary objection, it must be on pure point of law and not on facts which needs ascertainment by production of evidence. For ease of reference, I quote the position set out in Mukisa Biscuits case as hereunder:

> *"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."*

As stated earlier, I would be restricted to the preliminary objections only as propounded in Mukisa Biscuits case to avoid entering into the area of facts requiring ascertainment by production of evidence or entering into the merits or demerits of the application. With that guideline in mind, I now move to deal with the raised preliminary objections, one after another.

On the 1st preliminary objection, Mr. Malata submitted that there is no decision amenable by way of judicial review. What the applicant wants to challenge is the regulations made by the Minister for Finance and Planning. He posed a question whether such regulations could be challenged by way of judicial review. According to him the answer should be No.

He referred to **section 4 of Interpretation of Laws Act** (henceforth CAP 1) which defines the words *written law* and added that written law means Act of parliament and regulations made thereunder. **Section 46 A (2) of the National Payment System Act, Cap 437** (henceforth Cap 437) as amended by **Finance Act, No. 3 of 2021** is an Act of parliament

which empowered the Minister for Finance and Planning to make the regulations introducing newly mobile transactions levy.

Having given that power by Act of Parliament, the 1st respondent after consultation with the 2nd respondent as the law requires made the Regulations 2021 which the applicant wants to challenge by way of judicial review. According to Mr. Malata, Regulations 2021 are part and parcel of written law which cannot be challenged by way of judicial review. Both the Act of Parliament and Regulations 2021 do not fall under the ambit of **section 19(3) of CAP 310** and cannot therefore be challenged by judicial review, but only by way of filing a Constitutional petition. What are to be challenged by judicial review as provided under **section 19(3) of CAP 310** includes decision, judgment, an order, decree, conviction or proceedings for purposes of being quashed.

He lamented that the only way of challenging the laws is through by prescribed way. He supported his submission by the case of **Centre for Strategies Litigation Limited & Another versus The Attorney General and two others;** Misc. Civil Application No. 31 of 2019 (DSM) (High Court) (unreported) and concluded that the present application for

leave is nonstarter, frivolous, vexatious and abuse of the court process of the highest order. Therefore, leave should not be granted.

In reply, Mr. Mpoki, the learned advocate started by saying that this is a court of law guided by law. The judicial review in Tanzania is rooted from common law by virtue of **section 2(3) of Cap. 358**. What is before the court is an application for leave to apply for judicial review against the Regulations 2021 made by the 1st respondent in the course of exercising his legislative power delegated to him by the Act of Parliament, **Cap 437**. He submitted that as far as separation of power is concerned, the parliament enacts principal legislation on big things and small things are left to be tackled by those empowered by the principal legislation by way of making subsidiary legislation, such as the present Regulations 2021. If subsidiary legislation goes against the principal legislation or infringes other people rights, then it is challenged. One of the ways of challenging it is by way of judicial review. He supported his argument by persuasive cases of **R.V Secretary of State for Health** [1992] 1 All ER. P. 212 and the case of **R.V. Secretary of State for Social Services** [1986] 1 All ER. 164 whereby the association of Metropolitan Authorities were granted leave to apply for judicial review to quash the Housing Benefits Amendment (No. 4)

Regulations 1984 made by secretary of State for Social Services under the Social Security and Housing Benefits Act, 1982. Thus, if subsidiary legislation has problems, it is amenable to judicial review.

He said he is alive that if one wants to challenge the principal legislation, one of the proper actions to take is to petition the Constitutional court. For example, he submitted, the decision made in the case of **Centre for Strategies Litigation Limited & Another** (Magoiga, J) (supra) relates to challenging the constitutionality of the principal legislation. It is therefore distinguishable from this application whereby the applicant is seeking for leave to challenge subsidiary legislation. He therefore asked this court to dismiss the preliminary objection.

Now, as correctly submitted by Mr. Malata, I am alive that **section 4 Cap 1** defines written law to include principal legislation and subsidiary legislation. For ease of reference the section reads:

> *"written law" means all Acts for the time being in force and all subsidiary legislation for the time being in force, and includes the Acts of the Community and all applied laws"*

For the purposes of this ruling, one of the difference here is who enacts Acts and who makes subsidiary legislation and if there is any problem with the Act or the subsidiary legislation, where the aggrieved person should go to challenges it. It is crystal clear that the Parliament have powers derived from the Constitution of the United Republic of Tanzania to enact principal legislations; if one wants to challenge the Act of parliament has to petition Constitutional court to make such problem good. That's **one**. **Two**, due to techniques of various matters dealt by the Government, some legislative powers have been delegated by the Parliament to the executives within the permissible limits to make delegated legislations which sometimes referred to as subsidiary legislation, subordinate or secondary legislation, over small things. In the course of preparing this ruling, I happened to lay my hands on the book titled: **Public Law in East Africa**; LawAfrica Publishing (U) Ltd, 2009 by Ssekaana Musa at page 189 where delegated legislation is define as:

> *"laws made by subordinate legislative body under the authority of a statutory power. An item of delegated legislation is an instrument made by a person or body*

(the delegate) under the legislative power conferred by the Act (the enabling Act)"

In the same vein, **section 4 of Cap 1** refers to subsidiary legislation to mean:

"any order, proclamation, rule, rule of court, regulation, notice, by-law or instrument made under any Act or other lawful authority"

These are made in a form of statutory instrument which is gazetted. In a democratic country like Tanzania, delegated legislation does not fall beyond the scope of judicial review whereby a court of law can decide on the validity of such delegated legislation. They are administrative actions in nature. For example, in case of possible abuse of legislative power by executive authorities, such power may be subjected to judicial control, legislative control or other controls. In the course of exercise of his administrative actions delegated to him by the **National Payment System Act, Cap 437** (the Act of Parliament), 1st respondent made the Regulations 2021 which the applicant is seeking leave of court to challenge by way of judicial review.

I am totally in agreement with Mr. Malata's submission that the Regulations 2021 sought to be challenged does not fall under the ambit of

section 19(3) of Cap 310 as it is not a judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, but it is delegated legislation. At this juncture, I should pose a question. If delegated legislation has any problem where should one goes to fix such a problem. It is my conviction that, if I may recall my administrative law lectures, there should be judicial control over delegated legislations. By virtue of **section 2(3) of Cap 358** which was brought by common law on 22/7/1920, reception clause, this court have inherent powers to issue prerogative orders not only to what is provided under **section 19 (3) of Cap 310** but also to administrative actions by virtue **section 17(2),(3) & (4) of Cap 310.**

I thus conclude that as stated earlier the parliament derives its powers from the Constitution to enact Acts of Parliament; while, the executive authorities have administrative powers to make regulations, rules, etc, which powers are derived from a specific Act of Parliament. Thus, if a person finds that an Act of parliament has any problem, he could challenge it by petitioning Constitutional court; while, if one finds aggrieved or that a regulation or rule made by executive authority has problem, he could challenge it by way of judicial review. Hence, the 1st preliminary objection fails.

I now move to the second preliminary objection. Mr. Malata submitted that the applicant is a legal entity which applied for leave as legal entity. It is trite law, he said, that a legal entity or any suit instituted by legal entity must be preceded by Board resolution from that legal entity. To fortify his argument, he cited the case of **Ursino Palms Estate Limited versus Kyela valley Foods Ltd and two others;** Civil Application No. 28 of 2014 (DSM) (CA) (unreported). He added that the court was supposed to be availed with a copy of Board Resolution sanctioning the filing of this application. In absence of any authorisation from the applicant, then the application should not have been brought in its names but rather in the names of Anna Aloys Henga on her individual capacity. He supported his submission by the case of **Boundary Hill Lodge Ltd. Versus the International Finance Corporation & 2 others;** Civil Case No. 19 of 2012 (HC) (Arusha) (unreported) whereby the same issue was raised and the court did upheld on the same ground. He also referred me to the case of **Luwaita Amcos Limited versus Tanzania Coffee Board & Another**; Civil Case No. 11 of 2019 (HC) (Moshi) (unreported).

In reply to the second preliminary objection, Mr. Mpoki submitted that the application for leave was instituted by legal entity and it is not individual person. There are evidence as per the affidavit of Anna Aloys Henga. Thus,

he added, Mr. Malata has raised unfounded objection which does not amount to preliminary objection because it is a factual issue that requires to be ascertained.

In the case of **Mount Meru Flowers Tanzania Limited Versus Box Board Tanzania Limited**; Civil Appeal No. 260 of 2018 (Arusha) (CA) (unreported) it was stated that there is not preliminary objection if one needs to ascertain that the Board resolution is there or not. He added that there is no law and of course Mr. Malata has failed to mention any provision of law which provides that before instituting a case, there must be Board Resolution. In absence of the law providing specifically to that extent, then it cannot be said that the failure to attach Board resolution would give rise to preliminary objection. The Court of Appeal held in the case of **Karata Ernest and Others Versus The Attorney General**; Civil Revision No. 10 of 2010 (unreported)(CA) that preliminary objection must be pure point of law which cannot be raised if there is any fact to be ascertained in the course of deciding it.

He however admitted that it is true that an advocate to represent legal entity must be appointed by Board resolution. In this application, it is Ms. Anna Aloys Henga who was appointed to represent the applicant. Thus, the Court of Appeal decision in **Mount Meru Flowers Tanzania Ltd** (Supra) is

distinguishable from the present application because in that case it was the advocate who brought and signed the pleadings. She who brought and signed the pleadings is applicant's Executive Director. He went further that the decisions in **Luwaita Amcos Limited** (supra) and in **Boundary Hill Lodge Ltd** (supra) do not mention which law to be applicable. Thus the application before this court is different from the cited cases. Hence, he prayed that the preliminary objection that there is no authorisation be overruled for want of merit.

I have heard rival submissions of the counsel of both sides on whether the application is bad in law for want of legal authorization to institute this application. Unlike the advocate who needs authorization to represent a party to suit or application, the one who signed the pleadings on behalf of the applicant, the Voluntary and Human Rights Interested Civil Society Organization duly registered under the **Non-Governmental Organization Act, 2002** is its Executive Director, Anna Aloys Henga as per paragraphs 1 and 2 of her sworn affidavit.

The issue of Board resolution and authority to the applicant's Executive Director to lodge this application cannot be raised and argued as a preliminary objection because whether she has mandate to institute this

matter or not is a matter of evidence that cannot be disposed of by way of preliminary objection. Moreover, there is no statutory law which sets forth that when filing an application, a Board Resolution should be annexed to the chamber application. However, much as I am not bound by decisions of fellow judges of parallel jurisdiction in the cases cited herein, I thus find that the correct legal position is to the effect that the issue of existence or otherwise of a Board Resolution authorising institution of the application cannot be determined by way of preliminary objection as it is not pure point of law.

I further find that existence or nonexistence of a Board Resolution for instituting the application for leave clearly constitutes a point of fact which requires evidence to be adduced for proof by Anna Aloys Henga or someone else. (Vide: **Mwananchi Insurance Company Ltd Versus The commissioner For Insurance**; Misc. Commercial Cause No. 2 of 2016, (HC- Commercial Devision)(unreported). I thus agree that what was raised by Mr. Malata does not qualify to be a preliminary objection as principled in Mukisa Biscuits case. The Court of Appeal case of **Ursino Parms Estate Limited** (supra) cited by Mr. Malata is distinguishable from the application in hands as the holding of the Court of Appeal based on **rule 30(3) of**

Tanzania Court of Appeal Rules 2009, which is inapplicable in this court. (Vide: **PLASCO Versus Efam and Another**; Commercial case No. 60 of 2012, (HC –Commercial Division) (unreported) and **CRDB Bank Plc Versus Ardhi Plan Limited & 4 Others**; Commercial Case No. 90 of 2020 (HC –Commercial Division) (unreported). Finally, the 2nd preliminary objection does not succeed as it needs evidence to be proved.

The 3rd preliminary objection is that the application is fatally defective for want of cause of action. Mr. Malata submitted that a person is said to have cause of action when another person has infringed his right. The applicant must demonstrate that she had the right, which right the respondents have infringed, as a result she suffered material loss or any other loss. He cited to me the case of **Mashado Lodge Ltd. & 2 Others versus Board of Trustees of Tanganyika National Park t/a TANAPA** [2002] TLR P. 319. He referred me to the holding of the decision adding that he had seen none of what amounts to right which have been infringed by promulgation of the Regulations 2021. The 1st respondent had discharged his constitutional and legal duty for searching for revenue to finance the intended projects. Thus, he did not infringe the right of the applicant to the extent of entitling him to have judicial review remedy.

Mr. Malata invited me to take into consideration what were decided in the case of **Legal and Human Rights Centre and 5 Others versus The Minister for information culture, Arts and Ports & 2 Others**; Misc. Civil Application No. 12 of 2018 (Mtwara) (HC) (unreported). He added that the court will also consider the issue of *locus standi* because cause of action dictates *locus standi*, the underlying principle from which this preliminary objection is rooted. The issue of *locus standi* have been found legal foundation through the case of **John Mwambeki Byombalirwa versus The Regional commissioner and Regional Police Commander, Bukoba** [1986] TLR 73 (HC). He referred me to the holding where it was stated that the applicant should show sufficient interest in the matter.

Mr. Mpoki responded by submitting that the cause of action in judicial review is found under **rule 4 of 2014 Rules**. This should be read together with paragraphs 1 and 3 of Anna Aloys Henga's affidavit. There are telephone number that are used by the deponent i.e. the applicant have the phones which were affected. That is where the interest comes in. The deponent was affected by noncompliance with the procedures by 1st respondent who made the Regulations 2021. He prays that the application should not be dismissed as the preliminary objection raised have no merit.

I am alive that in determining whether there is a disclosure of cause of action or not will take me determining the merits or demerits of the application for leave. With due respect to the learned counsel's submissions, it seems they want to take me there, the direction that I am not ready to go. In order to determining the objection on cause of action, evidence would be needed because there is a dispute as to facts in this application that needs to be decided upon production of evidence. I find that I could not discuss this objection without glancing at **rule 4 of 2014 Rules** which say and I quote as hereunder:

> *"4. A person whose interests have been or believes will be adversely affected by any act or omission, proceeding or matter, may apply for judicial review".*

That means that to prove application for leave, the applicant has to show that his interests have been or that he believes will be adversely affected by any act or omission, proceeding or matter. In essence, in order a person to be granted a leave to apply for judicial review must show personal interests. In order to look and find such personal interests, I have to go through the pleadings. By doing so I would be going to the merits or demerits of the application for leave. I do not intend to prejudice the

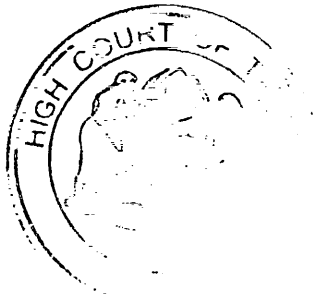
application for leave in one way or the other. As a result, I find that the 3rd objection is not a pure point of law so to speak, but rather an issue that will be ascertained by production of evidence.

For reasons given herein above, I am satisfied that the preliminary objections raised do not qualify the test in Mukisa Biscuits case. It is in this vein that I proceed to dismiss the raised preliminary objections.

I now invite the parties to this application for leave to make their respective submissions on whether leave to apply for judicial review to challenge the **National Payment Systems (Electronic Mobile Money Transfer and Withdrawal Transactions Levy)** Regulations, 2021, GN No 496A published by the 1st respondent on 30/6/2021, should be granted or refused. In the circumstances of this case, each party has to bear its own costs.

It is so ordered.

Dated at **Dar es Salaam** this 8th day of September, 2021.



J.S. MGETTA

JUDGE

COURT: This ruling is delivered today this 8th September, 2021 in the presence of Mr. Stephen Mwakibolwa assisted by Amani Melchzedeck, both learned advocates for the applicant and in the presence of Mr. Erigh Rumisha assisted by Mr. Stanley Kalokola, both learned state attorneys for the respondents.

J.S. MGETTA
JUDGE
8/9/2021