IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA SUB-REGISTRY)

AT MWANZA

MISC. CIVIL CAUSE NO. 10 OF 2021

MATHIAS MUNDEBA MASAGA.....1ST APPLICANT
EMMANUEL MATHIAS.....2ND APPLICANT
CHARLES LUSANA.....3RD APPLICANT
SAFARI CHARLES.....4TH APPLICANT
SAMADALI BUSENAE.....5TH APPLICANT
JOHN MWINAMIRA.....6TH APPLICANT
SATO PAULO.....7TH APPLICANT
JOSEPH LUSANA.....8TH APPLICANT
LEAH LUBALA.....9TH APPLICANT
STEPHANIA MTOBELA MAIGA.....10TH APPLICANT
MISOJI CHARLES.....11TH APPLICANT
PAULO MATHIAS.....12TH APPLICANT
TATU FELESIANI .....13TH APPLICANT
MAKOYE ELIAS.....14TH APPLICANT
MARTHA KASAMWA.....15TH APPLICANT
RENATUS DEUS.....16TH APPLICANT
COSMAS PAULO KASUBI.....17TH APPLICANT

VERSUS

NYAKATO VILLAGE COUNCIL.....1ST RESPONDENT
PASHCAL BUJASHI KANYASHIALLY.....2ND RESPONDENT
SENGEREMA DISTRICT COUNCIL.....3RD RESPONDENT
THE ATTORNEY GENERAL.....4TH RESPONDENT
WILFRED JOSEPH BIDYANGUZE (Administrator of
The estate of the late JOSEPH BIDYANGUZE).....5TH RESPONDENT

R U L I N G

2nd August & 12th September, 2022

DYANSOBERA, J.:

This is an application filed under Sections 17 (1),(2),(3) and 18 (1) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act,

[Cap. 310 R.E.2019] and Section 2 (3) of the Judicature and Application of Laws Act [Cap. 358 R.E.2019], Section 95 of the Civil Procedure Act [Cap. 33 R.E.2019] and Rule 5 (1), (2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Procedure and Fees) Rules, 2014, GN No. 324 of 2014 (hereinafter referred to as the Rules) whereby the applicants are praying to be heard on the following orders:-

a) That this Honourable Court be pleased to grant leave to allow the applicants to file an application for judicial review for prerogative orders of *certiorari* and *mandamus* against the respondents.

b) Costs of the application be borne by the respondents.

c) Any other reliefs that this Honourable Court may deem fit to grant in favour of the applicants.

The application has been supported by a statement of the claim drawn and filed by Mr. Bernard Otieno, learned Counsel for the applicants and a verifying affidavit sworn by the same Advocate.

At the time of hearing this application, the applicants were represented by learned advocate Mr. Vian Mbuya from Himiza Social Justice while the 1st, 3rd, 4th and 5th respondents enjoyed legal services of

Mr. Serapian Matiku, learned State Attorney. For the 2nd respondent, stood Mr. Katemi, learned Advocate.

A summary of facts according to the Statement of Claim and the verifying Affidavit is that sometime in 1998, Joseph Bidyanguze, the deceased, bought the suit land measuring fifteen (15) acres, located at Mwamatome Hamlet, Nyakato Village, Tabaruka Ward within the District of Sengerema District in Mwanza Region. The vendor was Bujashi Kanyashi at a price of TZS One Hundred and Ninety Thousand Only (190,000/=). After the purchase of the said suit land, the deceased disappeared without any trace making twenty-three years now from his disappearance as a result the suit land was left idle without being developed for that period of time.

The 1st respondent, as a trustee of the village land decided to take possession of the suit land. Following that move by the 1st respondent, the applicants villagers (citizens) of Mwamatome Hamlet decided to develop the suit land by initiating a construction of a public secondary school. After the decision was reached to develop the said piece of land for construction of the said school, ironically the 1st respondent reported that the owner of the land had been found and that the 1st respondent was no longer interested in the property. That he made this move without engaging the

applicants and the village assembly to decide on the matter. It is the applicants' argument that the decision of the 1st respondent was misleading since it is believed that the purchaser of the suit land had died a long time ago without leaving a survivor as the person who appears to claim ownership of the suit land is not the heir of the original purchaser/owner as no document were shown to prove relationship with the purchaser.

It is further argued on part of the applicants that it is believed that the son of the former seller Paschal Bujashi Kanyashi, the 2nd respondent is trying to illegally solicit the 1st respondent, who appears to agree, to take possession of the suit which his father legally sold a long time ago to the deceased purchaser. Finally, it is argued by learned Counsel for the applicants that the acts of the 1st respondent to try to misappropriate this public land is illegal and detrimental to the development of Nyakato Village as the applicants have already started to develop the suit land for construction of public secondary school.

The applicants are praying for, *inter alia*, an order of certiorari to quash the decision of Nyakato Village Council/ or Government to disown the said suit land and its land to transfer it to Paschal Bujashi Kanyasi, a son of the deceased seller and an order of *mandamus* by this Honourable

Court to compel the respondents to restore the ownership of the suit land as a village land for public use by the applicants.

The grounds upon the said reliefs are sought are that the 1st respondent in arriving at its decision did not take into account matters which they ought to have taken into account including calling for a village assembly of Nyakato Village to decide the matter, that the decision of the 1st respondent is *ultra vires* in essence it is not backed up by concrete evidence and supply by the village assembly of Nyakato village and that the applicants were never afforded any opportunity to decide on the plans to dispose of the suit land which was primarily in the ownership of the village government as part of the villagers composing the village assembly of Nyakato Village.

Submitting in support of the application, Counsel for the applicants, as part of his submission, adopted the affidavit which states and gives reasons for the application under consideration. He maintained that the owner of the suit land died without leaving any heir and that since the suit land was lying idle and to avert the children studying far off schools, causing them to drop out and others shirking the school, the villagers agreed to use the suit land for construction of school to aver the said hardships Mr. Vian contended that the village authority was

cooperative and agreed to the applicants' plan but that when the new leadership took over the administration, they raised resistance over the surrendering of the suit land and claimed that the owner had been found. The villagers raised the protest over the move of the new leadership hence this application for leave of applying for prerogative orders of *certiorari* and *mandamus*.

On the argument that the land belongs to the 5th respondent one Wilfred Joseph Bidyanguze, who is the administrator of the deceased, Counsel for the applicants disputes the authenticity of the contents of the said document and asserts that Form No. 4 is insufficient to prove that 5th respondent is the heir of the suit land.

Opposing the application, Mr. Sarapian Matiku adopted the counter affidavits filed by the 1st, 3rd and 4th respondents as part of his submission and contended that grant of leave is a condition precedent for the filing of application for prerogative orders. It is his argument that in granting the leave, the High Court has to satisfy itself that the criteria for the grant of such leave have been met. Referring this court to the case of **Cheavo Juma Mshana v. Board of Trustees of Tanzania National Parks and two others**, Miscellaneous Civil Cause No. 7 of 2020, learned State

court that the death of the owner is not disputed and that there is nothing indicating that the property is free. He informed this court that the 5th respondent is the owner.

Respecting the third criterion on applicants having shown to have acted promptly, Mr. Matiku contended that the applicants did not act promptly that is within six months. It was his further contention that the applicants' advocate has failed to show when the impugned decision was given by the District Council. In his view, the time has to be specified in order to ascertain whether or not the application is in time.

As regards the fourth criterion, learned State Attorney argued that the applicants have failed to demonstrate that no alternative remedy was available to them before resorting to judicial review remedy. He clarified that the applicants have admitted that this is a land dispute matter. Mr. Matiku argued that for a proper resolution of such a dispute there is a special and proper forum but that the applicants have decided to opt for judicial review instead of taking the land matter before the proper forum.

Mr. Katemi who was representing the 2nd defendant, joined hands with the legal stand taken by the learned State Attorney that the applicants had to fulfil the legal requirements as stipulated by the court

but that they have failed to meet any of them and commended the learned State Attorney on his extensive elaboration of the said criteria.

Responding, the 5th respondent stated that he is the heir of the deceased's estate and that he has been appointed administrator of the deceased's estate.

In his brief rejoinder, Mr. Vian Mbuya maintained that the land was vacant. He refuted the allegations that the applicants want to construct a private school. As to acting promptly, Mr. Vian argued that there was a preliminary objection which was raised and decided. He is of the view that we should not go back to what was already decided. Counsel for the applicants argued that there is no evidence to prove ownership of the suit land by the 5th respondent.

As the chamber summons shows, the applicants are asking for the leave of this court to file an application for prerogative orders of *Certiorari* and *Mandamus.* In making this application, the applicants are in essence complying with the legal requirements under Rule 5 (1) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Procedure and Fees) Rules, 2014. Elucidating on this legal requirement, the Court of Appeal of Tanzania in **Emma Bayo v. the Minister for Labour and Youths Development, the Attorney General and**

Tanzania Posts Corporation: Civil Appeal No. 79 of 2012 (CAT)) had this to observe: -

"it is now an established part of the procedural law of Tanzania that a person applying for prerogative orders in the High Court must first apply for leave, which if granted will be followed by a subsequent main application for the prerogative orders....."

It is also provided under sub-rule (2) of rule 5 that 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 applicant;

b) The relief sought;

c) The grounds on which the relief is sought; and

d) Affidavits verifying the facts relied on

As the record clearly shows, the ex parte chamber summons is accompanied by the statement providing the names and description of the applicants, the relief sought, the grounds on which the reliefs are sought and the affidavit verifying the facts relied on. The applicant has therefore, successfully complied with the requirements under sub-rule (2) of rule 5.

According to rule 6 of the Rules, leave has to be granted subject to the application being made within six months after the date of the proceedings, act or omission to which the application for leave relates.

It is disputed whether the applicants have conformed to the provisions of rule 6 of the Rules particularly where it is not stated when the impugned decision was given.

As rightly argued by Mr. Serapian Matiku, time when the said decision was given was of essence so as to ascertain if the present application was filed promptly, that is within sixty days. In dismissing the respondents' preliminary objection, I held that whether or not this application is in time was not a question of law only but a mixed question of law and fact and therefore could not be determined at the stage of preliminary objection. However, neither the applicants' statement of the claim, their joint affidavit nor the submission of their learned Counsel, resolve this crucial criterion. Nowhere is it stated when the impugned decision was given. In the absence of specific time or even the production of the said decision, it is difficult to gauge whether this application is within six months.

The argument by learned Counsel for the applicants in the 10th paragraph of the Statement of Claim that after the decision was reached

to develop the said piece of land for construction of the said school, ironically the 1st respondent reported that the owner of the land had been found and that the 1st respondent was no longer interested in the property without engaging the applicants and the village assembly to decide on the matter does not assist the applicants. With those facts, it cannot be safely ruled that the application was made promptly.

Admittedly, judicial review is the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties. Judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself. It would scrutinise the procedure adopted to arrive at the decision to ascertain that it is in conformity with all the elements of fairness, reasonableness and most of all its legality. So, the availability of the said decision was of paramount important.

As rightly pointed out by learned Senior State Attorney, the reason for obtaining leave before making a substantive application for prerogative orders is a screen test. The purpose of the requirement for leave is to

operate as a screening process to eliminate at an early stage any application, which is frivolous, vexatious or hopeless. This approach was echoed by the Court of Appeal of Tanzania in **Emma Bayo**'s case (supra) where at p. 8 the Court observed:

> *'We also respectfully agree with both Mr. Materu and Mr. Chavula that the stage of leave serves several important screening purposes. It is at the stage 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 a judicial review of the decision of the tribunal subordinate to the High Court. At the leave stage is where the applicant shows that he has sufficient interest to be allowed to bring the main application'*

It should be recalled that the grant or refusal to grant leave for applying for prerogative orders is in the discretion of the Court. In tackling the issues, I posed earlier on, I undertake to be guided by these matters as stipulated by the Court of Appeal in the above case but without being oblivious of the obvious fact that I am dealing only with an application for leave and not a substantive application for prerogative orders.

The other remaining issues for consideration are first, whether the applicants have made any arguable case to justify the filing of the main

application, second, whether the applicants have shown sufficient interest in the matter to which the application relates and third, whether the applicants have shown that there is no alternative remedy available.

As far as the second criterion is concerned, in the statement, the applicants are claiming the reliefs of *certiorari* and *mandamus* on the grounds set out under paragraph 19 of the statement. The grounds upon the said reliefs are sought are that the 1st respondent, in arriving at its decision, did not take into account matters which they ought to have taken into account including calling for a village assembly of Nyakato Village to decide the matter, that the decision of the 1st respondent is *ultra vires* in essence it is not backed up by concrete evidence and supply by the village assembly of Nyakato village and that the applicants were never afforded any opportunity to decide on the plans to dispose of the suit land which was primarily in the ownership of the village government as part of the villagers composing the village assembly of Nyakato Village.

Understandably, the applicants were duty bound to prove these allegations in the affidavit verifying the facts relied on. It is trite that the **supporting affidavit** must set out all the facts relied on, including any relevant evidence. Specific averments necessary to disclose an arguable

case that there is a serious flaw in the decision-making process or that the decision maker did not take into account matters which they ought to have taken into account including calling for a village assembly of Nyakato Village to decide the matter, that the decision of the 1st respondent is *ultra vires* in essence it is not backed up by concrete evidence and supply by the village assembly of Nyakato village and that the applicants were never afforded any opportunity to decide on the plans to dispose of the suit land which was primarily in the ownership of the village government as part of the villagers composing the village assembly of Nyakato Village. Similarly, it is not enough to establish an arguable case to aver that a decision is arbitrary and *ultra vires* or unjustified without specifying why the decision deserves those qualifications. In other words, the applicants' verifying affidavit does not reveal that the decision – maker did not understand correctly the law that regulated its decision-making power and did not give effect to it.

As far as the third issue is concerned, the legal right must exist and the duties perfomed by the respondents must be public. As the facsts reveal, the applicants have failed to show sufficient interest in the matter to which the application relates.

The last criterion is whether the applicants have shown that there is no alternative remedy available. As rightly pointed out by Counsel for the respondents and admitted by Counsel for the applicants, this is a land dispute matter. Mr. Matiku argued that for a proper resolution of such a dispute there is a special and proper forum but that the applicants have decided to opt for judicial review instead of taking the land matter before the proper forum.

With respect I agree with the learned State Attorned and Counsel for the 2nd respondent. In this case, the main issues seem to be the establishment of who the right owner of the suit land was and whether the applicants acquired good title in the suit land. In other words, only a proper forum has to determine the legality of the transfer of ownership of the suit property from the previous owner to the subsequent owner (s). There is no doubt that only a competent court prescribed by law for such purpose is vested with jurisdiction to determine those issues. The High Court exercising its powers of judicial review, is not in my view, the proper forum.

Having analyzed the criteria to be fulfilled for the court to grant leave to apply for prerogative orders, on the affidavit verifying the facts

relied on, I am not satisfied that the applicant has made out a case fit for further consideration.

The upshot of this is that I order that this application be dismissed. Each part to bear its own costs.

Order accordingly.

W. P. Dyansobera
Judge
12.9.2022

This ruling is delivered under my hand and the seal of this Court on this 12th day of September, 2022 in the presence of Mr. Dionis Lubamba, holding brief Advocate Otieno Bernard for the Applicants and holding brief Mr. Sarapian Matiku, Advocate for 1st, 3rd and 4th respondents and the 5th respondent is also present.

THE HIGH COURT OF TANZANIA
UHURU NA UMOJA
MWANZA

W. P. Dyansobera
Judge