

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA
MISCELLANEOUS CIVIL CAUSE NO. 9 OF 2022
IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS
OF CERTIORARI AND PROHIBITION
AND
IN THE MATTER OF LAW REFORM (FATAL ACCIDENTS AND MISCELLANEOUS
PROVISIONS) ACT, CAP 310 AS AMENDED IN 2019
AND
IN THE MATTER OF APPLICATION TO CHALLENGE THE PROMULGATION OF
THE WILDLIFE CONSERVATION (POLOLETI GAME CONTROL AREA)
(DECLARATION) ORDER, GN NUMBER 421 OF 2022
BETWEEN
NDALAMIA PARTARETO TAIWAP.....1ST APPLICANT
LATANG'AMWAKI NDWATI.....2ND APPLICANT
MEGWERI MOKINGA MAKO.....3RD APPLICANT
EZEKIEL SUMARE KUMARI.....4TH APPLICANT
LATAJEWO LANGEU SAYORI.....5TH APPLICANT
VERSUS
THE MINISTER OF NATURAL RESOURCES AND
TOURISM.....1ST RESPONDENT
THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

8/11/2022 & 16/11/2022

GWAE, J

The applicants herein, Maasai by tribe and residents of Loliondo Division, Ngorongoro District in Arusha Region have filed this application for leave to apply for orders of Certiorari and Prohibition against the

Minister of Natural Resources and Tourism (hereinafter to be referred to as the 1st and 2nd respondent respectively).

This application before the court is brought by way of chamber summons under the provisions of section 2 (3) of the Judicature and application of Laws Act, Cap 358, Revised Edition, 2002, section 18 (1) and 19 (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap 310, R. E, 2019 and Rule 5 (1) and (2) of the Law Reform Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and fees) Rules, 2014. Statements and the affidavits of the applicants have accompanied the application.

In this application, the applicants are seeking leave of this court to apply for an order of certiorari to quash and declare the Wildlife Conservation (Pololeti Game Control Area) (Declaration) Order, 2022 (GN 421 of 2022) to have been promulgated wrongly on grounds of illegality, irrationality, unreasonableness, violation of principal of natural justice and procedural impropriety. The applicants are also intending to apply for an order of prohibition to prohibit the 1st respondent from removing the applicants in the demarcated area constituting the purported Pololeti Game Control Area.

On 8th November 2022 when this matter was called on for hearing, the following advocates duly represented the applicants; Mr. Mpale Mpoki,

assisted by Mr. Jebra Kambole and Joseph Moses Oleshangay whilst Mr. Peter Musetti, Senior State Attorney and Mr. Benedicto Kiiza (Legal officer) represented the respondents.

Submitting in support of the application, Mr. Mpoki stated that, the basis of the applicant's application is for the applicants to be granted leave to apply for certiorari and prohibition with regard to the Government Notice No. 421 of 2022 published on 17th June 2022 which, according to him it was wrongly and irrationally issued by the Minister. More so, the learned counsel submitted that, the principles of natural justice were not observed.

The applicants' advocate submitted further that, in granting this application the following elements must be closely ascertained by the court, **firstly**, that, the applicants are interested in the intended judicial review, **secondly**, that, there is arguable case to be determined by this court and **thirdly**, whether, the application has been brought within six (6) months' statutory period.

Buttressing his arguments on the above essential elements, Mr. Mpoki cited the famous decision of the Court of Appeal of Tanzania in **Emma Bayo vs. The Minister for Labour and Youth Development & two others**, Civil Appeal No. 79 of 2012 (unreported-CAT). Basing on

the cited jurisprudence, the applicants' counsel urged this court to ascertain the documents filed before it as doing otherwise, the court might be dealing with the intended application for judicial review.

Supporting his argument, Mr. Mpoki cited the decisions of this court in the following cases; **Legal and Human Right Center vs. The Minister for Finance and Planning & 2 others**, Misc. Cause No. 11 of 2021 (unreported), **Tancan Mining Company Ltd vs Minister for Minerals & 2 others**, Misc. Civil Application No. 2 of 2020 (unreported). Mr. Mpoki also made a reference to the foreign jurisprudence in the following cases, **Republic vs. Inland Revenue Commissioners and National Federation of Self – Employed and Small Businesses Ltd** [1982] AC 617, **Kikonda Butema Farms Ltd vs. The Inspector Gen. of Government**, Civil Appeal No. 35 of 2002 (Court of Appeal of Uganda) and **Uganda Cotton Klub LTd vs. Cotton Development Organisation**, HCT-00-CC-MC-0023-2006, (unreported-H.C, Commercial Court at Kampala).

Mr. Mpoki went on submitting on the ground of time limitation by stating that, the application at hand has been filed within time as the said Government Notice was published on 17/06/2022 whereas this application has been filed on 14/09/2022. Therefore, in his view, this application is within the prescribed time.

Mr. Jebra accompanying Mr. Mpoki went on submitting that, in this application there is a patently arguable case as the applicants alleged that, they were not consulted and that, procedures were not followed as opposed to the respondents' assertions contained in their affidavits and statements with effect that, there was consultation and observance of procedure. Therefore, it was his view that, there are contentious issues between the parties.

The respondents through the legal service of Mr. Msetti opposed the application and according to him, the respondents do not dispute the fact that, the applicants' application was vividly filed within time save grounds on Applicants' interests and whether there is arguable case in the intended application.

In the ground of interest and arguable case, the respondent's counsel argued that the applicants have no interest and there is no arguable case since the area in question Pololeti, Game Reserve is a public land as revealed by GN. No. 604 of 2022 appended to the respondents' affidavits.

Mr. Msetti also sought the court's scrutiny of the application in order to avoid unnecessary applications. Embracing his argument, the learned counsel for both respondents referred this court to the decision in

Registered Trustees of Sunni of Jamaat vs. Registrar of societies and another, Miscellaneous Cause No. 24 of 202 (unreported-H.CT) and **Alfred vs. Town Director (Arusha)** (1980) TLR at page No. 327 where six conditions were promulgated in order for an application of this nature to be granted, these are;

1. Application must be made within six months after the act or omission to which application for relief relates
2. Demonstration of sufficient interest for the matter
3. The impugned decision, action or omission must be exercised of public law
4. Leave lies only where there is no alternative remedy
5. There must be possibility of enforcement
6. The application must be made in good faith and there must be a prima facie case (Triable issues)

The learned counsel for the respondents went on submitting that, the application at hand has not been brought in good faith as paragraphs 13, 14 and 15 have defamed the respondents. Therefore, he prayed for this application be dismissed due to absence of arguable case, interests and good faith.

In their rejoinder, Mr. Mpoki and Mr. Jebra submitted that according to the applicants' application there is an arguable case and that, the applicants are interested persons and if at all, the respondent is of the

view that, the application has been brought in bad faith the same ought to have been pleaded into their counter affidavits. Mr. Jebra added that according to the parties' pleadings it is clear that there are contentious issues to be determined by this court after the grant of leave.

Having examined the parties' statements and their affidavits as well as oral submissions advanced by the parties' learned counsel; I have observed that, the applicants' application was duly filed on 14th day of September 2022 whereas the impugned GN was published on 17th June 2022. It follows therefore, the applicants' application was filed pursuant to section 19 (2) (3) of Cap 310 (supra) as rightly argued by both parties that is, before lapse of six (6) months' period after the publication of impugned Government Notice No. 421 of 2022 subject of Judicial Review if leave is granted as sought.

Therefore, the contentious issues to be determined by this court are; whether the applicants have sufficient interests and whether there is an arguable case fit for determination by this court. In the cited case of **Emma Bayo** (supra), the Court of Appeal of Tanzania inculcated that, preliminary matters to be determined by this court while determining an application for leave to apply for prerogative orders, among others, the applicant must show that, he or she has sufficient interest to be permitted

to bring the main application. For easy of reference parts of the holding in Emma's case are hereby reproduced;

"It is at this stage of leave where the High Court satisfies itself that, the applicant for leave has made out an arguable case to justify the filling of the main application.....At the leave stage is where the applicant shows that he/she has sufficient interest to be allowed to bring the main application."

In Emma's case, the Court of Appeal also issued a prohibitive order to this court from dealing with or discussing the merit or otherwise of the intended application for judicial review instead of the application before it for leave, it went on stating;

"At the stage of leave, the trial judge should not have gone into the question whether the Minister violated the principles of natural justice for purposes quashing his decision under the prerogative orders of the High Court."

See also the decision in the cited case of **Kikonda Butema Farms, (supra)** where the Court of Appeal of Uganda insisted that;

"The trial judge is enjoined to look at the statement of facts, the accompanying affidavit and any annexure that might be attached to the application before granting leave. It is not necessary at that stage to consider whether the applicant would succeed or not. The applicant has to present such facts that would satisfy court that prima facie case exists for leave to be granted."

Another judicial jurisprudence is that of **Njuguna vs. Minister for Agricultural** [2000] 1EA 184 cited with approval in the case of **Legal and Human Right Center v. The Minister for Finance and Planning and two others** (supra), it was held inter alia that;

"The test as to whether leave should be granted to the applicant for judicial review is whether without examining the matter in depth there is an arguable case that the reliefs might be granted on the hearing of the substantive application."

Examining the applicants' statements especially paragraph 6 where there are grounds for the application for example the applicants' complaints that, *there was breach of principles of natural justice, alleged acts of the 1st respondent of taking the land said to have been in occupation and used for sustainable activities by the inhabitants including the present applicants. Also as homes, pasture land and spiritual sites* read together with paragraphs 15, 16, 17 and 18 of each applicant's affidavit. Similarly, having examined the respondents' statements in reply to the applicants' grounds for the sought leave with effect that, *the Pololeti Game Controlled Area did not extend to the village land and that, the area in controversy was neither inhabited nor used for cultural and spiritual purposes* (See paragraph 3 (1) (3) of the respondents' statements in reply). Therefore, in my considered view, the pleadings filed by the

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the pleadings filed by the parties clearly demonstrate existence of contentious issues between them. The contentious issues which, in my increasingly view, are determinable by the court once the sought leave is granted. Consequently, the court is satisfied that, as of now, the applicants have satisfactorily exhibited sufficient interests and arguable case.

I am also of the view that, the invitation by Mr. Msetti to ascertain the subsequent publication of Government Notice on 14th day of October 2022 relating to the said Pololeti Game Controlled Area is not tenable at this stage. I am holding so for an obvious reason that, by examining such appended document (GN. No. 604 of 2022) issued after the impugned GN. No.421 amounts to overstepping the power so vested to the court in the application for leave to apply for judicial review. It is my firm opinion, that, the respondents' concerns on whether, *the area at hand was/is public land or not, and or whether the impugned Government Notice No. 421 of 2022 published on 17th day of June 2022 is superseded by the Government Notice. No. 604 of 2022 published on 14th day of October 2022 or not*, are discussable by the court in substantive application and not this application.

It is common ground that, this court is prohibited from dealing with applications of this nature in depth. Nonetheless, it is requirement of the

law to ascertain if the application meets the required standards before granting or dismissing an application for leave to apply for prerogative (See judicial jurisprudence in **Emma Bayo vs. The Minister for Labour and Youth Development & two others** (supra) and **Kikonda Butema Farms Ltd vs. The Inspector Gen. of Government** (supra), **Cheavo Juma Mshana v. Board of Trustee of Tanzania Nation Park**, Misc. Civil Cause No. 7 of 2020 (unreported H.C at Moshi) and **Isaya Denis Chawinga vs. Commissioner** General of Immigration and Hon. Attorney General, Miscellaneous Cause No. 50 of 2020 (unreported-H.C at Dar es salaam).

Regarding the issue of alleged applicants' bad faith in filing this application, I have looked at the respondents' affidavits and observed that, there is no such assertion contained therein save during oral submission by the respondents' learned counsel as rightly argued by Mr. Mpoki.

As a matter of practice and procedure, an affidavit being a substitute for oral evidence used in court, the same cannot be also substituted by oral written submission (see the case of **Phantom Modern Transport (1985) Ltd Versus D. T. Dobie (Tanzania) Limited**, Civil References No. 15 of 2001 and 3 of 2002 (unreported-CAT). It follows that, the respondents were expected to raise such concern in their affidavits duly

filed in court. Submission either oral or written does not constitute any piece of evidence to be relied by a court of law but the same is used as guidance to the court during composition of either ruling or judgment. My finding is fortified by an instructive decision of the Court of Appeal of Tanzania in **Registered Trustees of the Archdiocese of Dar es Salaam vs. The Chairman, Bunju Village Government & 11 Others**, Civil Appeal No. 147 of 2006 (Unreported) where it was stated;


"Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence

In the upshot, the applicants' application is merited, the same is granted accordingly. The applicants shall file their intended application within **fourteen (14)** days from the date of delivery of this ruling. Costs of this application shall abide an outcome of the intended main application.

It is so ordered.

DATED at ARUSHA this 15th day of November, 2022




M. R. GWAE
JUDGE