THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB – REGISTRY

AT MBEYA

MISCELLANEOUS CIVIL CAUSE NO. 1 OF 2019

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

AND

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

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

BETWEEN

LEGAL AND HUMAN RIGHT CENTRE .....APPLICANT

VERSUS

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 hearing: 18/4/2024

Date of ruling: 16/5/2024

NONGWA, J.

This is an application for judicial review by way of certiorari to quash and declare the provisions of the Non - Governmental Organizations

(Amendments) Regulations, 2018 published on 19th October 2018 in Government Notice No. 609 of 2018 to have been promulgated in excess of powers, being unreasonably, arbitrarily and ambiguous.

The application is made by Legal and Human Rights Centre a voluntary and human rights interested civil society organization duly registered as a charitable entity under the Companies Act [Cap. 212 R.E.2002], the applicant. On the other hand, the 1st respondent is a ministry charged with overseeing all matters touching health, community development, gender, elderly and children. The 2nd respondent is charged with duty of registering, deregistering and monitoring non - governmental organizations in the country and the 3rd respondent is the chief advisory of all legal matters to the government.

The application is made under the provisions of section 2(3) of the Judicature and Application of Laws Act, Cap. 358, sections 18(1) and 19(3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap. 310 and rule 5(1)(2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014, GN. No. 324 of 2014. Grounds for the prayers sought are contained in the affidavit sworn by Felista Mauya, the director of Empowerment and Accountability and the statement that accompanies it.

The court on 19th day of June, 2020 ordered the application to be disposed by way of written submission. In reply written submission, state

attorney raised objection on competence of paragraph 6 of the affidavit, that sub-paragraphs were not verified. The court sustained the objection and struck out the application. The applicant appealed, the Court of Appeal on 14th day of December, 2023 upheld the appeal and remitted the file back for hearing on merit.

When the application came for hearing on 18th April, 2024, the applicant was represented by Mr. Jebra Kambole, learned counsel whereas for the respondents appeared Mr. Joseph Tibaijuka, state attorney from the officer of Solicitor General. Mr. Jebra adopted written submission filed earlier on 1st July, 2020, so is the state attorney's reply written submission dated 17th July, 2020 save from paragraph 2 of page 6 to 7 of the reply written submission.

In his submission, Mr. Jebra prefaced the background leading to this application, however it will not be paraphrased here. Submitting in the application counsel started with conditions to be met before the court can grant leave for prerogative orders. Citing the book by **D.B. Chipeta J.** titled **Administrative Law in Tanzania, a Case Digest**, 2009 published by Mkuki na Nyota Publishers in which the author lists matters for consideration to be **one,** whether the facts contained in the affidavit in support of the application, if true, would constitute reasonable ground for the form of reliefs sought. **Two**, whether the applicant has a sufficient interest in the matter to which the intended application relates; **three,**

whether on the facts the application will raise arguable or *prima facie* case. **Four,** whether the applicant has not been guilty of dilatoriness; and **five,** 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.

Counsel for the applicant also cited the case of **Emma Bayo vs The Minister for Labour and Youths Development & Others**, Civil Appeal No. 79 of 2012 [2013] TZCA 190 (TANZLII) in which the court stated;

> *'... that 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 a judicial review of the decision of a tribunal subordinate to the High Court. 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/appellant herein.'*

Applying the above principles to his application, counsel for the applicant submitted that, the applicant is challenging the acts of the 1st

respondent to pass the Non-Governmental Organisations (Amendment) Regulation, 2018 G.N. No. 609 of 2018 contrary to rules of natural justice. Also, that regulation 12 and 13 are unreasonable, arbitrary and ambiguous.

It was further submitted that the grounds upon which the acts of the 1st respondent are challenged is well explained in the affidavit of the Felista Mauya which according to Mr. Jebra establishes conditions for grant of leave for judicial review. Counsel referred to para 2 of the affidavit which show the interest the applicant has in the matter.

Counsel for the applicant went on to submit that the application was filed within six months of the impugned acts of the 1st respondent. On whether there was no other remedy, Mr. Jebra stated that the only means to challenge enactment of the regulation made by the 1st respondent in her administrative capacity is by way of judicial review. Thus prayed the application be granted.

In reply, the state attorney submitted that application for leave is a necessary step for prerogative order, referring to the explanation of the term "step" found in the **Halsbury's Laws of England,** 14th Edition paragraph 570 in which it is stated 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.'

The state attorney submitted that the grounds relied by the applicant is only found in paragraph 2 of the affidavit and there was no any paragraph showing how is or will be affected by the impugned amendments. The state attorney cited the case of **Attorney General vs Wilfred Onyango Mganyi & 11 Others,** Criminal Appeal No. 276 of 2006 (unreported) in which the court insisted that the applicant must show he has sufficient interest in the matter to which the application relates.

Further submission from the state attorney was that the application for leave was not filed under pretext of public interest under Article 26(2) of the Constitution of the United Republic of Tanzania. The court was referred to the case of **Godbless Jonathan Lema vs Mussa Hamisi Mkanga & Others,** Civil Appeal No. 47 of 2012. State attorney stated that they failed to comprehend what the applicant was challenging, that is whether the decision of the minister was wrong or illegal. According to the state attorney, counsel for the applicant only repeated what is contained in the affidavit without giving explanations as to how the applicant will be affected by the decision. It was also submitted that part of paragraphs which were expunged was referred in the submission.

In conclusion, the state attorney submitted that there was no any arguable case on which the court could grant the application, thus prayed the application to be dismissed with costs.

Having considered the application documents together with the those filed by the respondents, the only issue for determination is whether the application has merits. It is an established position and parties are unanimous that granting of leave serves as an opening through which the applicant gets his journey on course, to challenging an impugned decision through judicial review. This is echoed by the provisions of rule 5 (1) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014 (the Rules) whose substance is as reproduced hereunder;

> *'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 these Rules.'*

It should be noted that introduction of the first phase of the proceedings that culminate in the grant or denial of leave serves as a condition precedent on a purpose. Application of leave for prerogative order serves a mechanism of ensuring that the courts are not overwhelmed with matters instituted by people who do not have what it takes to institute them, or those that do not pass the test of eligible

applications. This is why, evolving from cases, criteria have been set for gauging the eligibility of applications for leave. See **Emma Bayo** (supra).

In the case of **Attorney General vs Wilfred Onyango Nganyi @ Dadii & 11 Others**, Criminal Appeal No. 276 of 2006 (unreported) the following conditions were set **one,** that leave is granted where the application is filed timeously; **two,** that the applicant must demonstrate that there is an arguable case in the impending application for prerogative orders; **three,** that the applicant must show sufficient interest in the impending application for prerogative orders; and **four,** that grant of leave is in the Court's exclusive discretion.

In this application it has not been disputed by the respondents that the application was not timeously filed and indeed the impugned regulation was published on 19th day of October 2018 and this application filed on 14th day of March 2019 well within six months provided by rule 6 of the Rules. The first condition is fulfilled.

It seems the state attorney had a worry with interest of the applicant in the matter, when he submitted that the application has not been filed under public interest litigation. It is noted and I take judicial note that the applicant is the non-government organization dully registered under our Laws as supplemented by a certificate of compliance deponed and attached under paragraph 2 of the affidavit in support of the application. Leave is sought in order to challenge the amendment made by the 1st

respondent to the Non-Governmental Organisation Regulation, the law under which the applicant was registered and has to comply with in her day-to-day activities. I am moved by illustration of Sedley J, in this principle in **R v. Somerset County Council & ARC Southern Ltd ex p Richard Dixon** (1998) 75 P & CR 175, cited in the case of **Halima James Mdee & Others vs Registered Trustees of Chama Cha Demokrasia Na Maendeleo (CHADEMA) & Others**, Misc. Cause No. 27 of 2022 [2022] TZHC 10476 (TANZLII) that;

> *'Public law is not about rights, even though abuses of power might, and often do, invade private rights. Instead, public law is concerned with wrongs, particularly the misuse of power.'*

Having reproduced the above passage, in **Halima James Mdee & Others'** case, **Ismail, J**. (as he then was) held that;

> *'What comes out of this fabulous legal holding is that applications for judicial review should not be turned into a theatre where "meddlesome busybodies" poke their noses into matters at will, even where they derive no interest from them.'*

In this application, there is no suggestions that the applicant is and indeed is not a meddler. As opposed to many common actions filed in courts by the applicant, this time has direct interest in the matter.

The above holding, gives chance to advance to the determination if *prima facie* case is established by the applicant. The phrase *prima facie*

or arguable case should not be taken as a platform for proving the existence of errors complained about. This is an issue which would be dealt during the hearing of the substantive application. In **Workers of Tanganyika Textile Industries Ltd vs Registrar of The Industrial Court of Tanzania and Others**, HC-Misc. Civil Cause No. 144 of 93 (unreported), the Court (Kalegeya, J., as he then was) held that;

> *'I should out rightly point that seeking leave to file an application for prerogative orders requires the applicant to merely raise arguable points. He is not required to prove the alleged errors for, that proof would only be required, during hearing of the main application if leave is granted. Regard being had to the statement and the attached supporting document.'*

The existence of a *prima facie* case is gathered from the accompanying statement and such other documents attached to the application. In this application while counsel for the applicant submitted that they had made up the case against the respondents worth for judicial review, the state attorney had a different view. First, state attorney complained that reference was made to expunged paragraph of the affidavit. In essence records reveal that paragraph 6(iv)(v)(ix) and (x) is the one which was expunged for being offensive, and the court ruled that the remaining was capable of supporting the application. In the submission at page 5 the whole paragraph 6 of the affidavit is reproduced including the expunged paragraph, this time itemized as d, e, i and j. I

therefore, find merit in the complaint by the state attorney only to the extent of items mentioned above.

Now in the affidavit under paragraph 5 it is complained that in the amendments the 1st respondent is mandated to impose criminal sanction without adhering to principles of natural justice of right to be heard, that the 1st respondent exceeded powers in making the amendment, that stake holders were not consulted, that in making the rules and amendment the 1st respondent did not follow due process under the law and that when the criminal sanction is imposed there is no room for appeal. These complaints are found under para 6(i)(ii)(iii)(vi)(vii) and (viii) of the affidavit sworn by Felista Mauya. In the statement the applicant is attacking regulation 12 and 13 as being offensive in the sense that are vague, illegal unreasonable and ambiguous and for which leave is sought so that they can be quashed.

In reply the state attorney through counter affidavit of Mark Mulwambo, it is averred that all were done without any infringement of the law and everything is in the order. Similarly, in the reply to statement the respondents just negated what was stated by the applicant.

Flowing from the above, to decide who is right between the two-contending party, in my view demonstrates that there is arguable issue which should go for a next step in which the court will have full power to rule for either party after full hearing and consideration of the raised

complaints, that is the raised questions needs to be investigated through a judicial review process. With that nodding, the applicant has managed to establish that there is *prima facie* case which calls for investigation by way of judicial review.

Consequently, I grant leave that will enable the applicant to institute an application for a prerogative order of certiorari against the respondents in accordance with rule 8 of the Rules. Each party has to bear its own costs.

DATED and DELIVERED at MBEYA this 16th day of May 2024

V.M. NONGWA

JUDGE

16/05/2024

Ruling delivered this 16th day of May 2024 in presence of Mr. Michael Fyumagwa, State Attorney and absence of the applicant.

V.M. NONGWA

JUDGE