IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[MAIN REGISTRY]

AT DODOMA

MISCELLANEOUS CIVIL CAUSE NO. 12602 OF 2024

IN THE MATTER OF NON-GOVERNMENTAL ORGANIZATIONS' ACT, [CAP. 56 R. E. 2019]

IN THE MATTER OF KANUNI ZA UCHAGUZI WA BARAZA LA TAIFA LA MASHIRIKA YASIYO YA KISERIKALI [GN NO. 95 OF 2016]

IN THE MATTER OF ONGOING ELECTIONS OF THE NATIONAL COUNCIL FOR NON-GOVERNMENTAL ORGANIZATIONS

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

BETWEEN

ODERO CHARLES ODERO...APPLICANT

VERSUS

NATIONAL COUNCIL FOR NON-GOVERNMENTAL ORGANIZATIONS .... 1ST RESPONDENT

NON-GOVERNMENTAL ORGANIZATIONS COORDINATION BOARD... 2ND RESPONDENT

ATTORNEY GENERAL ....3RD RESPONDENT

RULING

03/06/2024 & 04/06/2024
MANYANDA, J.:

In this matter Mr. Odero Charles Odero, the Applicant, is applying for leave to lodge an application for judicial review against the Respondents, namely, the National Council for Non-Governmental Organizations, Non-Governmental

Organizations Coordination Board and the Attorney General, here after referred to as the 1st, 2nd and 3rd Respondents, respectively. The Applicant is intending to file a judicial review application for orders of Mandamus; Certiorari and Prohibition to question the legality of the Second Respondent's mandate in supervising, coordinating and conducting the ongoing elections of the First Respondent through its committee entitled Kamati ya Mpito ya Kuratibu Uchaguzi wa Baraza la Taifa la Mashirika Yasiyo ya Kiserikali.

When the matter was called on for necessary orders on 03/06/2024, the Applicant was represented by Mr. John Seka, learned Advocate, and the Respondents enjoyed representation services of Messrs Edwin Joshua Webiro and Faki Shaweji, learned State Attorneys.

Mr. Seka informed this Court that he had served the Respondents, and, given the facts about the ongoing election process this application for leave to file an application for judicial review, this application is under certificate of urgency and asked this Court to treat the same as such. He added that usually, an application of this nature proceeds ex-parte in terms of Rule 7(1) of the Law Reform (Fatal Accidents and Miscellaneous Provisions)(Judicial Review Procedure and Fees) Rules, 2014, GN No. 324 of 2014, hereafter referred to as "the Rules".

He was of the view that this Court can grant an application for leave without even hearing the parties. In that context he sought direction from this Court whether to hear ex-parte or inter partes.

On his side, Mr. Webiro, for the Respondents, admitted that they were served with the application as well as the notice of date of mention, but it was not accompanied with a certificate of urgency indicating that this matter is of urgency. He was of the view that the same be treated as normal application. Hence, he asked this Court for a period of seven (7) days to file a counter affidavit and reply statement. With regard to ex-parte hearing, he referred this Court to the provisions of section 18(1) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, [Cap. 310 R. E. 2019] and submitted that where leave for application for judicial review is sought against the Government, the Court is required to have the Attorney General to appear as a party, hence the prayer that this application can proceed ex-parte, lacks legal justification.

Rejoining Mr. Seka did not oppose the prayer by the Respondents to file a counter affidavit but requested for a shorter period. As regard to none filing of a notice of certificate of urgency, he stated that nowadays documents are filed online, hence the requirement of filing a certificate of urgency has been embedded into the Court's system.

Moreover, insisting on urgency, he stated that the 1st Respondent is currently undertaking an election process of the 2nd Respondent in a manner that appears to be tainted with illegalities. He was of the view that if more time is granted this matter may be overtaken by events as very soon the process of election of regional leaders of the 2nd Respondent will be undertaken following completion of the election process of district leaders which was concluded on Friday.

Then, he made an alternative prayer that if the time requested by the Respondents is granted, an interim relief in terms of Rule 7(5) of the Rules be granted staying the electoral process temporarily until the application for leave is heard inter- parties.

Seeing new issues raised by Mr. Seka in rejoinder, this Court invited Mr. Webiro to reply, who stated that they are not in a position to access the documents in the Court's system and that is why the applicant is duty bound to serve the Respondents with hard copies of the documents after filing them online. That, if the notice of urgency was lodged in the system online as alleged, then, the Applicant had a duty of serving them with the notice in the same manner as he did for other documents.

With regard to the alternative relief under Rule 7(5) he submitted that the prayer was misplaced because it was not raised in the Chamber Summons and in the affidavit, there are no facts supporting the interim relief sought. He was of the view that the alternative prayer was a mere statement from the bar, as such this Court cannot act on it.

To bolster his point on this position of law, he referred this Court to the case of **Resomary Stella Chambe Jairo vs. David Kitundu Jairo,** Civil Reference No. 06 of 2018, [2021] TZCA 442 (2 September 2021) and reiterate his prayers that this Court do decline from granting interim relief and have the matter heard inter parties after filing of the counter affidavit and reply statement.

Mr. Seka was given another chance to rejoin as far as the case cited by Mr. Webiro. He distinguished the case on grounds that in that case there were no facts

bearing circumstances for issuance of interim orders while in the instant matter the circumstances are contained in the affidavit.

As gleanable from the records, this matter was filed as an ex- parte application for leave to file an application for judicial review. As rightly argued by Mr. Seka, for the Applicant, and supported by the Mr. Webiro, for the Respondents, this Court is empowered to grant an application for leave even without hearing the applicant, or, hear him or her ex-parte; provided, it is satisfied that the application meets the conditions for issuance of leave.

Equally, as also rightly argued by Mr. Webiro, where leave sought in an application involves the Government, the law requires summoning of the Attorney General, before the same is granted unless he defaults entering appearance. Section 18(1) reads as follows:

> *"18(1) Where leave for application for an order of mandamus, prohibition or certiorari is sought in any civil matter against the Government,* ***the court shall order that the Attorney-General be summoned to appear as a party to those proceedings;*** *save that if the Attorney-General does not appear before the court on the date specified in the summons, the court may direct that the application be heard ex parte."*
> (emphasis added)

The totality of all of these is that, where, in an application for leave to lodge application for orders of certiorari, prohibition and mandamus, in judicial review, the Government is involved, the Attorney General must be summoned as a party, regardless whether the application is to be heard ex-parte or inter-partes.

In my view, the Attorney General, in circumstances of such applications, becomes entitled to be heard, hence, this Court on 31/05/2024 ordered summonses to be issued to both parties to appear before it on 03/06/2024, in the spirit of according opportunity to the Respondents to be heard.

In order to utilize the afforded opportunity of being heard, the State Attorney asked for a period of time of seven (7) days to file a counter affidavit and reply statement. Which in essence, Mr. Seka did not object other than praying for a shorter period of time.

In alternative, in case a longer period is preferred, Mr. Seka asked for an interim order staying the election process be granted. The reason been that the application is under urgency. This was vehemently opposed by Mr. Webiro on reason that there is no sign that this application is under certificate of urgency as no notice to that effect was filed. Mr. Seka replied that the notice is embedded in the system.

As it can be seen, the counsel are at the position that the Respondents be given time to file a counter affidavit and reply statement. However, they lock horns on the length of time for the Respondents to do so. Mr. Seka's view is that if the time of seven days requested is granted, it is too long such that this application might be overtaken by events because the ongoing election process will be concluded in the course of hearing or else a temporary stay order be issued.

The first question to be asked in order to resolve the controversy is whether this application is brought under certificate of urgency. It is admitted by both counsel that no hard copy notice was filed online in court and also formerly served to the Respondents. Mr. Seka alleges that the notice is embedded in the Court

system. Mr. Webiro argues that the Court file in the Court system is not accessible to them, hence the Applicant was duty bound to serve them with hard copies of the notice just as he did to other documents.

In my considered view, the answer is found in the Digital Case File of the Electronic Case Management System abbreviated as "e-CMS". The Digital Case File in the e-CMS has replaced wholesomely the then hard copy file used to keep records of the case in court before the judiciary going full electronic. This means, all documents used in opening a case, the replies thereof and any subsequent documents intended to used in that have to be filed online and seen in the Digital File for the court to access and use in determining the concerned case. Where, a document is missing in the Digital Case File, then such document is assumed, and in my view, I say, it becomes a missing document, as good as non-filed document.

In this case, the documents which Mr. Seka mentioned to have filed are the Chamber Summons, Affidavit and Statement of Facts. There is no document called "Notice of Certificate of Urgency". He relies on an "embedded notice."

I have inspected the Digital Case File available in this matter and could not apprehend any document called "Notice of Certificate of Urgency". I could not also see any "embedded notice" in the Digital Case File. Even if it is said that there is any notice, but hidden, then a question would be whether such a standard notice can cater for circumstances of all the cases. A question which, right away, is answered in negative.

In law, the purpose of a "Notice of Certificate of Urgency" is not only to inform the court the urgency nature of the matter before it, but also, to provide materials on which, in the opinion of the party concerned, the Court may exercise its discretion in treating such a matter with extra urgency. It is therefore, expected that a document carrying such a notice to be included in the Digital Case File.

It follows therefore, with due respect to Mr. Seka who relies on an "embedded notice", which as I have said above that, in this matter there is no document called "Notice of Certificate of Urgency" contained in the Digital Case File, it can safely be held that there is no document telling the reasons for treating this matter as of urgency.

I say so because Mr. Seka could not even tell when and where the elections have been done and concluded at the district level, what was the pace in terms of time spent. Also, when and where the same elections are being carried out at regional level, what is the process immanence in terms of time, whether or not will go beyond the lapse of 14 days fixed under Rule 5(4) of the Rules for disposal of this matter.

Mr. Seka argued also that the reasons are contained in the affidavit. The answer might be yes, but the same are subject to rebuttal. Moreover, the law requires specificity through a special notice to be issued in order to avoid speculations and its hard copy be served onto the adverse party in the same way other documents are served.

I have read the case of **Rosemary Stella Chambe Jairo (supra)** and found, as rightly argued by Mr. Seka, is distinguishable as it dealt with arguments made by a counsel countering facts sworn in an affidavit without affidavit in reply, in this matter, the dispute is about exposure of factors for urgency, which need presence of a notice.

Having found that there is no basis for treating this matter as urgent, I come to the direction requested by the counsel for Applicant which I do hereby give as follows:

1) Basing on reasons stated above, a prayer for grant of interim stay, is declined;
2) A prayer for seven (7) days time for the Respondent is partly allowed, pursuant to Rule 5(4) of the Rules, that an application for leave is required to be heard and determined within 14 days from the date the application was made, I grant four days for the Respondent to file their counter affidavit and reply statement, that is, the same to be filed on or before 10/06/2024; and
3) The case to come for necessary order(s) on 10/06/2024 at 11:00 a.m.

Dated at **Dodoma** this 04th day of June, 2024.

F. K. MANYANDA

JUDGE

Delivered at Dodoma this 04th day of June, 2024 in the presence of the parties by virtual court.

F. K. MANYANDA

JUDGE