IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI

MISCELLANEOUS CIVIL CAUSE NO. 7 OF 2020

In the Matter of an Application for Leave to apply for an order of Prohibition, Certiorari and Mandamus

AND

In the Matter of Compounding offence for grazing in the park by Christopher Mahende for Tanzania National Parks of the 24th September, 2020.

BETWEEN

CHEAVO JUMA MSHANA ..... APPLICANT

AND

BOARD OF TRUSTEE OF TANZANIA
NATIONAL PARKS ..... 1ST RESPONDENT
HONOURABLE ATTORNEY GENERAL ..... 2ND RESPONDENT

CHRISTOPHER MAHENDE ..... 3RD RESPONDENT

8th December, 2020 & 18th February, 2021

RULING

MKAPA, J.

The applicant is seeking leave to apply for orders of Certiorari, Prohibition and Mandamus against the first, second and third respondents. This application by way of Chamber summons is brought under **section 17, 18 (1) and 19 of the Law Reform (Fatal Accidents and Miscellaneous Provision) Act**, Cap 310, R.E. 2002 and **Rules 5 and 6 of the Law Reform (Fatal**

Accidents and Miscellaneous Provision) (Judicial Review and Procedures and Fees) **Rules**, 2014 (GN No. 324 of 2014). The application is brought under certificate of urgency and is supported by the affidavit sworn by the applicant. The application was opposed by the 1st and 2nd respondents through counter affidavit sworn by Mr. Peter J. Musetti learned state attorney.

When the application was set for hearing the applicant was represented by Emmanuel Anthony learned advocate, while the 1st & 2nd respondents were jointly represented by Mr. Peter Musetti, learned state attorney. The third respondent did not submit on this application. By parties consent the application was heard by way of written submissions.

Submitting in support of the application Mr. Emmanuel submitted that the 1st respondent confined applicant's herds of cattle on the offence of grazing in the Park. The 3rd respondent issued the applicant with a compounding receipt for him to pay a fine of Shillings Four Million and Four Hundred Thousand (4,400,000/=). The applicant paid the fine and the herds of cattle were handed over back to him. Mr. Emmanuel challenges the whole process of impounding the herds of cattle, and payment of fine to the effect that, the whole process was tainted with irregularities, unreasonableness and irrationality coupled with lack of proof as to whether the compounding officer was

legally vested with powers to compound. Supporting his argument he cited the provisions of **section 20A (1) of The National Parks Act**, Cap 282, R.E. 2002 which requires that between issuance of the receipt for the compounding offence and handover, there has to be an admission in writing by the applicant in order to justify the respondent's acts. The section also provides for a fine not exceeding shillings 100,000/=. Furthering his argument Mr. Emmanuel contended that no admission was made by the applicant and further that the fine which was imposed was unjustifiably excessive.

Supporting his contention Mr. Emmanuel cited the decision in the case of **R.V.T.R.C Exp National Federation of Self Employed and Small Business Ltd (1982) A.C. 617** which laid down criteria for granting leave for judicial review that;

1. The applicant must demonstrate that there is an arguable case, thus a ground for seeking judicial review exists,
2. The applicant has to show sufficient interest in the matter to which the application relates,
3. The applicant has acted promptly,
4. The applicant has to show that there is no alternative remedy available.

Mr. Emmanuel went on explaining that, the applicant has demonstrated an arguable case as the herd of cattle were compounded without justification and more so, the penalty imposed had no legal foundation. He added that, the respondents' counter affidavit did not state whether the 3rd respondent was the authorised officer in writing, whether the applicant did admit in writing on the alleged offence and lastly, whether there was justification in imposing the fine amounting shillings. 4,400,000/= instead of shillings. 100,000/= as required by the law. On the 2nd criteria the learned counsel submitted that applicant's interest has been acknowledged by the respondent vide 3rd paragraph of their counter affidavit.

As regards to the 3rd criteria, it was Mr. Emmanuel's view that the applicant did file the application promptly within six months as required by law since the herd of cattle were compounded on 24th September, 2020 and the instant application was filed on 29th September, 2020. Lastly, on the issue of alternative remedy, the learned counsel submitted that, the applicant had no alternative remedy as he had no other avenue to challenge the 1st respondent's action and further that the applicant was charged, convicted and fined without being accorded the right to be heard or his statement being recorded as required by the law.

Finally, the learned counsel highlighted the fact that, during pendency of this application the applicant did pay the fine and was handed over his herds of cattle though this does not meant that this application has been overtaken by event as the whole procedure from compounding till recovery of cattle was tainted with illegalities thus the applicant deserves this court's intervention.

In reply, Mr. Mussetti submitted that, the criteria for granting leave for judicial review as submitted by the applicant are also underscored in the case of **Emma Bayo V Minister for Labour and Youth Development & 2 others**, Civil Appeal No. 79 of 2012, CAT at Arusha. However, the same have to be applied cumulatively as it was held in the case of **Pavisa Enterprises V The Minister for Labour Youth Developments & Sports and Attorney General**, Misc. Civil Cause No. 65 of 2003. Mr. Musseti challenged the applicant's allegations that, respondents' acts were generally tainted with illegalities, irrationality and unreasonability but failed to elaborate on the same. Thus, it was the respondent's view the fact that, the applicant has failed to show the arguable case worth granting leave for judicial review.

Regarding the 2nd criteria, Mr. Mussetti challenged the applicant for failure to disclose in his affidavit any alternative remedies including exhausting all local remedies prior to applying for

Judicial review. To support his contention, the learned state Attorney cited the case of **Abadiah Salehe V. Dodoma Wine Company Limited** (1990) TLR 113.

He finally submitted that, the applicant erroneously introduced new criteria to the effect that he had no alternative remedy, something which is not reflected in his affidavit. He thus prayed for the court to dismiss this application in its entirety with costs.

Having considered the competing arguments for and against the application, I think the only question for determination is whether this application qualifies the test of granting leave for prerogative orders.

The law is settled to the effect that an application for prerogative orders in the High Court must be preceded with application for leave, which if granted will be followed by the main application for the prerogative orders. This position was underscored by Court of Appeal in, **Attorney General V. Wilfred Onyango Mganyi @ Dadii and 11 Others,** Criminal Appeal No. 276 of 2006 (unreported). Furthermore **The Halsbury's Laws of England**, 14th Edition, in paragraph 568 provides the following;

> *"Leave of the court is a necessary pre-condition to the making of an application for judicial review, and no application for judicial review may be made unless this leave has been first duly obtained."*

It is worth noting that at the hearing of the application for leave, the High Court satisfies itself as to whether the applicant has made any arguable case to justify the filing of the main application. More so, the Court is required to consider whether the applicant is within the six months limitation period and further that whether the applicant has shown sufficient interest to warrant the grant for leave. This process enables the court to exclude frivolous or vexatious applications which *prima facie* appear to be an abuse of the process of the court and ensure that the applicant is only allowed to proceed to substantive hearing upon satisfaction by the Court that there is a fit case for further consideration. This position is fortified in the case of **Republic V Land Dispute Tribunal Court Central Division and Another** [2006] 1 EA 321, where it was held

....leave should be granted, if on the material available the court considers, without going into the matter in depth, that there is an arguable case for granting leave and that leave stage is a filter whose purpose is to weed out hopeless cases at earliest possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralysed for months because of pending court action which might turn out to be unmeritorious.

In the light of the above it is plain clear that the grant of leave to commence judicial review proceedings is not a mere formality

and that leave is not granted as a matter of course rather the applicant has to disclose the existence of *prima facie* grounds for the grant of judicial review reliefs. In **Re Harji Transport Services** (1961) EA 88, the Court had this to say;

"*The ground must at its face value, be based on the facts as averred by the applicant in the verifying affidavit and must prove not only that the applicant has sufficient interest in the matter, but also that he has an arguable case for grant of leave*". Paragraph 570 of the **Halsbury's Laws of England**, 14th is elaborative on the requirement for the applicant to have sufficient interest when applying for leave for judicial review as follows:

> *"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.*

On what amounts to *prima facie* case, the High Court of Kenya in the decision which I consider highly persuasive to wit; **Republic V Director General of Directorate of Criminal Investigation and Another**, Misc. Application No. 535 of 2016 (unreported) had the following to say at page 5.

> *"A prima facie case in my view, is made out when the applicant's case if true may justify the grant of the order of judicial review. Where the facts disclosed,*

even if true, cannot possibly justify the grant of judicial review remedies, a prima facie case for the purpose of judicial review cannot be said to have been made out."

In the instant application the facts in the applicant's affidavit and submission thereof speaks for themselves to the effect that after the 1st respondent compounded applicant's herds of cattle, the applicant managed to recover the same after paying excessive amount of fine contrary to what is required by the law. Even the respondents' counter affidavit did not dispute these facts only that they challenged the fact that the applicant's claims were too general. My view, is as mentioned earlier, the facts contained in the applicants' affidavits speaks for themselves and if true, would justify the grant of the intended judicial remedies. It is undisputed the fact that the applicant's herd of cattle were compounded, he was fined and upon payment of fine the herd of cattle were returned back to him while there was no formal applicant's statement admitting the offence, hence I am satisfied that the applicant has demonstrated sufficient interests, and arguable case. As to whether the respondent's actions were unreasonable, irrational, and ambiguous the same are not matters for determination at this stage. Suffice it to say that the applicant has made out a case, *prima facie* to warrant him leave to file the substantive application for prerogative orders.

Consequently, I hereby grant the applicant leave to apply for an order of *Prohibition, Certiorari and Mandamus* to challenge the respondents' acts. With no order as to costs.

It is so ordered.

Dated and Delivered at Moshi this 18th day of February, 2021.

S.B. MKAPA
JUDGE
18/02/2021