IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB REGISTRY

AT ARUSHA

MISC. CIVIL APPLICATION NO. 178 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 AMMENDED IN 2019

IN THE MATTER OF APPLICATION TO CHALLENGE TANGAZO LA KUANZISHA PORI LA AKIBA PALOLETI (PALOLETI GAME RESERVE) (DECLARATION ORDER), 2022

BETWEEN

LATAN'GAMWAKI NDWATI.....1ST APPLICANT

EZEKIEL SUMARE KUMARI.....2ND APPLICANT

KILEO MBIRIKA.....3RD APPLICANT

NAMURU KITUPEI.....4TH APPLICANT

PHILEMON NGURUMAI.....5TH APPLICANT

NOKOREN TAOYIA.....6TH APPLICANT

METIAN TIKWA SEPENA.....7TH APPLCANT

SAITOTI PARMWAT.....8TH APPLICANT

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

RULING

23rd June & 22nd August, 2023

KAMUZORA, J.

This is an application for leave to file an application for prerogative orders of certiorari, mandamus and prohibition. The application was brought by way of chamber summons under the provisions of section 2 (3) of the Judicature and application of Laws Act, Cap 358 R.E 2002, section 18 (1) and 19(3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap 310 and Rule 5 (1) and (2) of the Law Reform Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and fees) Rules 2014. The application was also supported by Applicants' statement and the affidavits. The Applicants have four prayers before this court: -

1) Leave be granted for them to file application for certiorari to call for, examine, quash and declare that a declaration order of **Pori la Akiba Pololeti of 2002 (Pololeti Game Reserve Declaration Order) GN No. 604 of 2022** was promulgated illegally, irrationally and unreasonably and in violation of the principle of natural justice and procedural impropriety.
2) Leave to file application for prohibition to restrain the Respondent from evicting the Applicants from the land to which the declaration was issued without following legal procedures.

3) Leave to file application for mandamus to compel the Respondent to remove the beacons he had installed following the declaration which did not follow procedures.
4) Any other relief this court my find reasonable to grant depending to the circumstance of the case.

The grounds upon which the Applicants rely in filing the application for judicial review are set forth in the statement and affidavits of the Applicants. Basically, the Applicants intends to challenge the declaration by the President of the United Republic of Tanzania for the Pololeti Game reserve published as **"Tangazo la kuanzisha Pori la Akiba Pololeti, 2022 (Pololeti Game Reserve Declaration Order) G.N No. 604 of 2022".** It was contended by the Applicants that being residents in the affected villages, they are affected by the said declaration as they have been in permanent settlement in the said areas and the declaration was promulgated without consultation of the rightful holders of the relevant villages. That, at the time of making that declaration there was a pending case before this Court, Miscellaneous Civil Cause No. 9 of 2022 in which the Applicants challenged the declaration of the Minister of Natural Resources and Tourism that established the Game Reserve in the same area.

The application was argued orally and the Applicants were represented by a team of five counsel lead by Mpare Mpoki, senior counsel. Others were Mr. Joseph Moses Oleshangay, Mr. Jebra Kambore, Mr. Jeremia Mtobesya and Mr. Yonas Masiaya, all learned counsel. The Respondent on the other hand was dully represented by Mr. Peter J. Musetti, Principal State Attorney.

Mr. Jeremia Mtobesya was the first to kick the ball and had the following to say; that, the paramount issue to be considered by this court is whether the application contain a prima facie case. He submitted that, the Applicants' affidavits have established a prima facie case in the sense that all Applicants are residents of the area affected which are Malambo village, Oloirieni Village, Arashi village, Oloiri village, Lopolun village and Ololosokwani village. That, all these areas are within 1502 Square Kilometre covering 14 villages affected by the said declaration declaring the whole area as part of game reserve.

He further submitted that, the area so declared was being used by the Applicants as their residence, grazing area, spiritual sites and cultural land. That, at the time the declaration was made, the Applicants were not consulted and they were forcefully evicted. Mr. Mtobesya formed a view that the Applicants' pleadings clearly shows that the Applicants have established a prima facie case to convince this court to

grant their prayer. That, it is not the first time for people to have approached this court and especially on the preliminary stages and this court had made it clear that a prima facie case must be established before the leave can be granted. He referred decisions in the cases of **The Republic Ex- Shirima Vs. Kamati ya Ulinzi na Usalama Wilaya ya Singida and 2 others**, (1983) TLR PG 375, specifically page 385 and **Emma Bayo Vs. Minister for Labour and Youths Development and 2 others**, Civil Appeal No. 78 of 2012 (unreported) CAT at Arusha, page 8. He insisted for this court to consider the pleadings and authorities and find that the Applicants were able to establish a prima facie case within the ambit of the law and grant this application.

In addition, Mr. Yonas Masiaya submitted that, the Applicants also pray for this court while granting leave to file substantive application, to issue an order to stay operation of GN No. 604 of 2022 which promulgated Poloriti Game Reserve. That, the Applicants should not be restricted from accessing and using the disputed land/area until final determination of intended application for judicial review. To support this prayer, he referred section 5 (6) of the Law Reform (Fatal Accident and Miscellaneous Provisions) (Judicial Review, Procedure and Fees) Rules of 2014. He added that similar order was issued by this court in the case of

Kera Komeyo Makeseni and 8 others Vs. Kilimanjaro Regional Commissioner and AG, Misc. Civil Cause No 1 of 2023 page 9, where, the court after granting leave for judicial review proceeded to order the stay of promulgated order by the Kilimanjaro RC until the final determination of the intended judicial review. He therefore prayed this court to be persuaded by its decision and stay the said GN. No. 604 of 2022 so that the Applicants and other inhabitants of the area can access the land for their survival.

Responding to the above submission Mr. Peter Musetti strongly opposed the application. He adopted the statement in reply together with the counter affidavit and submitted that, as per the case of **Emma Bayo**, the Applicants are supposed to establish a prima facie case, demonstrate sufficient interest and the application must be filed immediately without delay and the same has to be filed where there is no alternative remedy. That, this court in the case **Alfred Lukaru Vs. Town Director of Arusha**, [1980] TLR 294 added other grounds to be considered in granting leave where it held that the application must be made in good faith, demand for performance must precede the application and there must be a possibility of enforcement.

As with regard to prima facie case, Mr Msetti submitted that the Applicants have no prima facie case because GN No. 604 of 2022 is a

declaration by the President of the United Republic of Tanzania in considering the power vested to the president under section 14 (1) of the Wildlife Conservation Act. That, the declaration was not irrational or unreasonable as it was issued for the benefit of the country. That, the president as the owner of the land in the country made that declaration for the benefit of the country and it complied to the legal requirement. He was of the opinion that the claim that the declaration was irrational is not correct as it was not issued malafide. He pointed out that this court had already stated in different cases that application for leave intends for the court to filter out frivolous and vexatious applications. He referred the decisions in **Emmanuel Paul Mng'arwe Vs. The Chief Court Administrator and 2 others**, Misc. Civil Cause No. 11 of 2018, page 5 and 6, **The Legal and Human Rights Centre Vs. The Minister of Finance and Planning and 2 others**, Misc. Cause No 11 of 2021, page 3. He insisted referring the case of **Alfred Lakaru** (supra) that, the application must be brought in good faith. He urged this court to go through paragraphs 15, 16, 17 and 21 of the affidavits of the Applicants and see if they have any relation with the declaration to upgrade the area. Mr Musetti considered the purpose of this application as not in good faith and prayed for this the court finds that the Applicants were unable to show good faith in filing this application.

He insisted that all grounds must be met by the Applicants and in this matter, they failed to meet them thus, this court should not allow the application for leave.

As regard to the prayer for stay of declaration under section 5 (6) of the Rules, Mr. Musseti objected the prayer for the reasons that the case cited of **Kera Komeyo Makaseni** (supra) is distinguishable from the present case because in that case the Applicants were challenging the order of RC which is not publishable while in this case, the Applicants are challenging the GN which is published. That, in Kera Komeyo Makseni's case, the implementation of the order had not started different from this case where the implementation is already done. That, the said GN No. 604 of 2022, is already gazetted and it is already implemented thus there will be no purpose of staying something already implemented. He referred the case of **Philipo J Mwakibinga Vs. the University of Dodoma**, Misc. Cause No. 3 of 2015, which quoted the case of **Republic Vs. Electicity Joing Committee CO. (1920) Ltd,** Kenya, 1924 (1KB 17) in which the court explained as to when an order for certiorari and prohibition can be issued. He insisted that the GN which was declared is already enforced thus, it will be like issuing injunction while the house is already demolished. He concluded with a prayer that this court should not grant the application.

The Applicants' counsel made detailed rejoinder. Starting with Yonas Masiaya, he submitted that on the argument by Mr. Msetti that the application was brought on bad faith. He argued that affidavits are evidence put into statements and in the counter affidavit, there is nowhere the Respondent have countered that there is bad faith. That, oral submission before the court is there only to support what is stated in the affidavit. He was of the view that since bad faith was not pleaded in the counter affidavit to counter the Applicant's affidavit, facts on bad faith should not be considered by the court in this application. He refereed the position of this court in the case of **Ndalamia Partareto Taiwap and 4 others Vs. The minister of Natural Resources and Tourism and AG**, Misc. Civil Cause No. 9 of 2022 HC, Arusha, page 11. He insisted that what was raised in the affidavit are factual matters which can be proved at the stage of substantive application.

He maintained the Applicants' prayer for stay of operation of GN No 604 of 2022 and insisted that the case of **Kera Komeyo Makisen** is relevant to the case at hand because the order which was being challenged in that case was issued on 02/12/2022 and the decision for stay was issued on 09/02/2023 almost three months later. That, the ruling was issued after the beacons were installed in the disputed area. He referred this court's unlimited jurisdiction/powers to stop government

authorities' actions which are prejudicial to any Applicant who seek for relief in this court. He was of the view that the damage which are going to be suffered by the Applicants and other inhabitants cannot wait for final determination of the matter unless this prayer is granted. He prayed to distinguish the case of **Philipo Mwakibinga Vs. UDOM** (supra) as the decision in that case was on substantive application while this case is on early stages for leave to file substantive application.

Mr. Jebra Kambore rejoined in response to the argument by the State Attorney that there are no triable issues. He submitted that while the Applicants claim that the declaration was irrational unreasonable, did not follow the required procedures, promulgated with malafide and did not consider rule of natural justice, the Respondent claim that the declaration was rational, reasonable and considered the procedure and was not malafide and considered rule of natural justice. It is the contention by counsel for the Applicant that those disputed matters are what is called triable issues. That, it is the duty of the court to determine those issues in the main application and not in the application for leave. He prayed to distinguish the case of **Alfred Lakaru Vs. Town Director** (supra) as it related to the substantive application and not application for leave. He insisted bad faith is not among the condition to be

considered at the stage of leave as the conditions are those set by the CAT in the case of **Emma Bayo.**

On the argument as to whether the Applicants have shown sufficient interest, Mr. Kambore submitted that from the affidavits of the Applicants and even the counter affidavit, there is no dispute that the Applicants are residents of those areas. That, the fact that they have pleaded to be residents of that area proves that at this preliminary stage they have shown to have interest in the matter. That, the Applicants are affected for not enjoying the land which they use as their residence and grazing area and at this stage they are just knocking the door of the court thus, leave be granted so that they can file their substantive application for determination.

Mr. Jeremia Mtobesya rejoined referring the case cited by Mr. Msetti when he was arguing on prayer for prohibition. He prayed for the case to be distinguished on the reason that Rule 5 (6) of the Rules refers to an interim order seeking to preserve the status quo pending the final decision but what was submitted by Mr. Mseti and the case cited refer to prohibition which is final and substantive order. He insisted for the court to consider Applicants prayer for stay as the provision for stay is conditional for the grant of leave.

On the prayer by Mr. Mseti to distinguish the decision of Makasen, Mr. Mtobesya submitted that, in bindingness of the decision there is vertical and horizontal bindingness. That, vertical bindingness is when the higher decision binds the courts below by rules of precedent and horizontal bindingness seeks to bring the consistencies of the decision of the same court. That, there must be reason for departure of the court from its decision. He insisted that, the reasoning by Mr. Mseti cannot make this court depart from its prior decision.

On the argument that the order complained of in Masake's case was an oral order issued by RC as against this order issued by president which is published order Mr. Mtobesya submitted that that all these orders were issued by executive bodies. That, they are both affecting rights of the parties/Applicants thus, there is no any environment distinguishing these cases. That, since those orders are both affected peoples' rights, they are both subject and amenable under judicial review. He maintained that, substantially there is no material facts enough under the doctrine of consistence and certainty to make this court not to consider its decision.

On the point of bad faith Mr. Mtobesya added that what was submitted by Mr. Mseti on those paragraphs is like he wants this court to test the veracity of the facts by testing the fact establishing good faith

vis a vis those establishing bad faith. He was of the view that we have not reached at that stage and those argument may be raised later but not in this application at this stage. That, at this stage, you only assume that the facts are correct as they are and can help the court to determine the main application after issuing leave. He was of the view that determining those arguments at this stage will be like putting cart before the horse and we know, it cannot move.

On the case cited by Mr. Mseti, **Emmanuel Mng'arwe** and **LHRC** the Applicant's counsel agreed that the court at this stage has to scrutinise as scrutiny is basically and that is the purpose. It was his submission that if this court scrutinise all those facts, it will discover that the Applicants have prima facie case to go the next stage. That, since what was submitted by the Respondent is contrary to what the Applicants believe, that is where the issue for determination comes in. That, since the Applicants complained on the procedures, on not being consulted or involved and being forceful evicted, all these shows that there is a prima facie case or arguable case. He urged this court to find that the application before this court on the strength of the facts stated in the affidavit, annexures, statements and authorities, has merit and be granted.

I have considered the pleadings, parties detailed submissions, relevant laws and the cited authorities. It is clear that leave is the prerequisite to an application for certiorari, mandamus and prohibition, see Rule 5 of the Law Reform Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and fees) Rules 2014 and case of **Emma Bayo** (supra) at page 7 to 8. Leave is not an automatic right. The Court of Appeal have set out matters to be considered in determining application for leave. In the cited case of **Emma Bayo's case** the Court of Appeal of Tanzania discussed preliminary matters to be considered by the Court in determining an application for leave. At page 8 it was held;

> *"It is at this 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 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 preliminary matters which the High Court sitting to determine the Appellant's application for leave should*

consider while exercising its judicial discretion to either grant or not grant leave to the Applicant...."

Testing the above holding to this case, there is no dispute that this application was made within six months after the date of the declaration complained of. What is disputed whether the Applicants have made out any arguable case to justify the grant of leave and whether they have sufficient interest to be allowed to bring the main application.

It was argued by the counsel for the Respondent that the Applicants were unable to establish a prima facie case and demonstrate sufficient interest. I however find that the Applicants were able to demonstrate sufficient interest. From the pleadings and submissions by both parties, there is no dispute that the Applicants are residents of the areas referred in the declaration. I agree with the Applicants' counsel that, such fact proves that at this preliminary stage the Applicants have shown to have interest in the matter.

It was argued by Mr. Msetti referring the case of **Alfred Lukaru Vs. Town Director of Arusha** (supra) that, the application must be made in good faith, demand for performance must precede the application and there must be a possibility of enforcement. To him there was no possibility of enforcement as the declaration is already executed. I find this argument wanting because, as well pointed out by the

Applicants' counsel, the issue on whether the application was made in bad faith was not pleaded in the Respondent's counter affidavit. Thus, the same cannot be considered as sound reason in determining the application.

On the argument that there must be possibility for performance of the order requested for, it is in my view that such argument is unmaintainable. The issue on whether the order was issued and executed does not oust the court's jurisdiction in determining its legality. Therefore, that cannot be a reason to deny the Applicants leave to file substantive application.

It was further argued by the Respondent's counsel that the Applicants have no prima facie case because GN No. 604 of 2022 is a declaration by the President of the United Republic of Tanzania in considering the power vested to the president under section 14 (1) of the Wildlife Conservation Act. That, the declaration was not irrational or unreasonable as it was issued for the benefit of the country.

I agree that the president of the country has powers to make any declaration pertaining land for the benefit of the country. But the issue whether the president's declaration was either rational or justified is not an issue that can be determined at leave stage rather during determination of the substantive application. In the case of **Legal and**

Human Right Center Vs. The Minister for Finance and Planning and 2 others, Misc. Cause No. 11 of 2021, the High Court of Tanzania sitting at DSM subscribed to the holding in the case of **Njuguna Vs. Minister for Agricultural** [2000] 1 EA 184 where it was held inter alia that;

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

In the case of **Kikonda Butema Farms, Ltd vs The Inspector Gen. of Government,** Civil Appeal No. 35 of 2002, the Court of Appeal of Uganda had similar holding that;

> *"The trial judge is enjoined to look at the statement of facts, the accompanying affidavit and any annexture 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."*

As well pointed out by counsel for both parties, this court is invited in this application to filter out if the Applicants have arguable case for purpose of avoiding frivolous and vexatious applications. This court

cannot therefore deliberate on legality and or reasonableness of the declaration. In **Emma Bayo** (supra) the Court of Appeal at page 10 insisted on the need for the High Court to avoid overstepping into the merit of the intended application for judicial review while dealing with application for leave. It was held: -

> *"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."*

Thus, the argument by the Respondent's counsel that the declaration was not irrational and was for benefit of country is premature and cannot be discussed at this stage of leave application.

On the argument by the Respondent's counsel that paragraphs 15, 16, 17 and 21 of Applicants' affidavit have no any relation with the declaration to upgrade the area, I find the same wanting. The fact deponed in those paragraphs refers to the subsequent conduct after the declaration was made. The Applicants verified those facts as facts which came into their knowledge. Thus, the same cannot be used to suggest that this application was not brought in good faith.

In considering the circumstance in the present application this court finds that, the Applicants were able to demonstrate that the

declaration was made through G.N No. 604 of 2022 establishing the Pololeti Game Reserve, and that the Applicants are among the individuals who are inhabitants of the areas covered in the said declaration. The Applicants are challenging the declaration for being promulgated without considering the rules of natural justice. Thus, without going into depth of the issues, this court finds the above facts as sufficiently establishing that the Applicants have interest and arguable case that need to be determined in the substantive application. The Applicants therefore deserve chance to file substantive application for determination of those issues.

As regard to the prayer for stay of operation of GN No. 604 of 2022, declaration under section 5 (6) of the Rules, I am not convinced with the reasoning by Mr. Musseti the case cited of **Kera Komeyo Makaseni** (supra) is distinguishable. Like the matter at hand, the Applicants in Kera's case were also seeking for leave to file for orders of certiorari and prohibition. The fact that the Applicants in that other case were challenging the order of RC which is not publishable does not make any difference from the present matter whether the declaration by the president is being challenged. As well pointed out by the counsel for the Applicants, both are orders from government officials which can be challenged by way of judicial review. The fact that the declaration is

published does not exempt it from being challenged by way of judicial review. Again, the fact that the order had already implemented does not oust the court's jurisdiction in looking into its legality. However, the case of **Philipo J Mwakibinga Vs. the University of Dodoma**, (supra) that was cited by the counsel for the Respondent is distinguishable to the application at hand. Unlike the present case where parties are seeking for leave, the court in Phillipo Mwakabinga's case dealt with substantive application for certiorari and prohibition and discussed the circumstances under which the orders could be issued.

I therefore find that the Applicants' prayer for an order of stay of the operations of the declaration awardable. This court having considered the nature of declaration which touches the Applicants' interests on the promulgated area and being guided by Rule 5 (6) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Judicial Review Procedure and Fees) Rules, 2014, find it imperative to grant the prayer in the interest of justice.

In the upshot, this court find this application to have merit and accordingly, grant the application. Leave is granted for the Applicants to file application for certiorari, mandamus and prohibition within the period prescribed by the law. Further to that, the operations of the declaration order of **Pori la Akiba Pololeti of 2022 (Pololeti Game**

Reserve Declaration Order) GN No. 604 of 2022, should be stayed until final determination of the main application for certiorari, prohibition and mandamus. In considering the nature of this matter which has public interest, no order for costs is made.

DATED at **ARUSHA** this 22nd day of August 2023

D.C. KAMUZORA

JUDGE