

IN THE HIGH COURT OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CAUSE NO. 42 OF 2022

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

AND

**IN THE MATTER OF THE NATIONAL PAYMENTS SYSTEM ACT CAP
437 AS AMMENDED BY ACT NO 5 OF 2022**

AND

**IN THE MATTER OF THE NATIONAL PAYMENT SYSTEMS
(ELECTRONIC MONEY TRANSACTION LEVY) REGULATIONS GN
NO. 478V OF 2022**

BETWEEN

LEGAL AND HUMAN RIGHTS CENTRE.....APPLICANT

VERSUS

HON. MINISTER FOR FINANCE AND PLANNING...1ST RESPONDENT

HON. MINISTER COMMUNICATION

AND INFORMATION TECHNOLOGY.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

RULING

Last date of order: 04/10/2022

Date of Ruling: 18/10/2022

BEFORE: S.C. MOSHI

This application is made under Section 2 (3) of the judicature and Application of Laws Act, [Cap 358 R.E 2019], Section 18(1) and 19(3) of 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 of 2014. The applicant is seeking leave to file an application for judicial review, and he is praying for the following orders: -

1. *The Honourable Court be pleased to grant leave to the applicant to apply for orders of **certiorari** to quash the promulgation of GN No. 478V Published by the 1st Respondent herein on the 1st July 2022 purporting to introduce a levy on electronic money transactions.*
2. *The Honourable Court be pleased to grant leave to the applicant to apply for orders of **prohibition** to restrain the 1st and 2nd Respondent from acting in any way of the operation of the Government Notice mentioned above pending the hearing and determination of the application for substantive orders.*
3. *Costs of this application*
4. *Any other order/orders which the Honourable Court shall deem fit to grant in favour of the applicant.*

During hearing of the application, the applicant was represented by Mr. Mpale Mpoki, Learned Advocate, and he was assisted by Mr. Melkizedeck Joackim and Ms. Imma Ambonisye learned Advocates, while the 1st, 2nd, and 3rd respondents were all represented by Mr. Hangi Chang'a Principal State Attorney and Stanley Kalokola, learned state attorney.

Submitting in support of the application Mr. Mpoki contended inter alia that the applicant seeks leave from this court to apply for order of certiorari so that promulgation of GN 478 V Published on 1/7/2022 by the 1st

respondent herein which introduced a levy on Electronic Money Transactions can be quashed.

Secondly that, the applicant also applies for leave to apply for orders of prohibition to restrain the 1st and 2nd Respondents from acting in any way on the operation of the GN in question pending hearing and determination of substantive orders. He said that, we are supposed to be guided by the principle that the court's duty is just to look at the pleadings before it and see if there's an arguable case. He argued that, prima facie, there's an arguable case as can be seen in the affidavit, counter affidavit and reply to counter affidavit. He however, pointed out that the problem has been partially solved by the respondents.

He submitted that the reasons for an application for leave is to save and to ensure that matters that come to court are matters that are worthy to come to court; to eliminate frivolous, vexatious or hopeless cases. This application is not frivolous vexatious nor hopeless case.

He said that, the application has been brought within the time provided by law. The promulgation was made on 1st July and this application was filed on the 28th day of August, so it falls within six (6) months.

He contended that, the applicant has sufficient grounds for the application for leave to file prerogative orders as shown in paragraphs 3 & 4 of the affidavit, it is clearly shown that the GN affects the applicant's interest, in this respect he cited the case of **Emma Bayo vs. The Minister for Labour and Youths Development**, Civil Appeal No. 79 of 2012, court of Appeal of Tanzania, at page 8, 2nd paragraph where the Court of Appeal stated the

principles guiding grant of leave to file an application for prerogative orders as follows:

1. There should be an arguable case
2. The application must be made within six months period, and
3. The applicant has an interest in the main application.

Mr. Mpale Mpoki contended further that, a Prima facie case can be obtained by just looking at the pleadings; the court is not supposed to go on merits. In support of his argument, he cited the case of **Emma Bayo (supra)**; at Page 10 para 2, **Legal and Human Right Centre vs. The Minister of Finance and Planning & 2 others**. Misc. Cause No. 11/2021 on Pages 6 & 7 and the case of **Inland Revenue Commissioner and National Federation of self-employed and Small Business Ltd.** [1981] 2 All ER 93 on Page 7. He said that, the need to consider whether the case is frivolous or vexatious, was discussed in a Kenyan case of **Republic vs. Country Council of Kwale & another ex parte Kondo & 57 others, HC**, P. 3 paragraph 4, and that, the case of **Regina vs. Industrial Disputes Tribunal**, Supreme Court of Judicature of Jamaica, Claim No. 2009 HVC 04798, page 16 & 17 para 55, 57 & 58; discusses the requirement to consider if there is an arguable case. He argued that, therefore strict proof can only be made after being granted leave.

He said that, the indication by 1st respondent, that there are problems in the GN, as shown in paragraph 5 of the reply to the counter affidavit, is the fact that the Minister admits that there is a problem, and the Minister is

working on it to rectify the unfairness, unreasonableness, and arbitrariness of the legislation. However, the proper way to rectify it is to apply for prerogative orders in court.

He said that, the speech made by the Minister dated 20th September 2022, annexure A in Reply to counter affidavit led to the amendment of the GN. However, the amendment did not address the core problem before us. Therefore, the applicant prays for leave before this court to be granted so he can apply for orders of certiorari and prohibition as prayed.

In reply Mr. Kalokola, agreed that, at this stage of application for leave the court is not required to go to the merits of the application. However, in exercise its discretion the court is duty bound to scrutinize the application to satisfy itself as to whether the applicant has demonstrated cumulatively that there's an arguable case, whether the application has been brought within six months, whether he has demonstrated sufficient interest which will warrant leave, whether the applicant has no alternative remedy, and whether the application is not frivolous and vexatious.

He conceded that the application is not frivolous or vexatious, that it is brought within time, and that the applicant had no alternative remedy. He however argued that, the application fails two tests; the first one being whether there is an arguable case and the second test, the need to show sufficient interest.

On the first issue, whether there's an arguable case; he said that the applicant's advocate cited the 1st respondent's conduct of amending the GN. He argued that, the conduct of parties out of the pleading cannot be

determinant of an arguable case as it is not pleaded, he cited the case of **Regina vs. Industrial district Tribunal (supra)**. On page 17 para 57 to page 18. He contended that, it's not enough to say that the law is ultra vires, the affidavit must show how the said expression constitutes an arguable case with realistic prospects. Paragraph 3 introduces that the applicant possesses a mobile phone number that transacts the transaction, but he did not show the problem. Likewise, paragraph 4, introduces applicant's account number but does not show the arguable facts relating to impugned legislation.

On the 2nd issue; he said that, there are no material facts showing that the applicant has sufficient interest. In this respect he cited the case of **Emma Bayo (supra)** on page 8. He said that, sufficient interest is different from interest. He referred to **Black's Law Dictionary, 8th Edition** by Brian Garner at P. 1474 where "sufficient" has been defined thus:

***"Sufficient"** means adequate of such quality, number, force, or value as is necessary purpose...*

He suggested that, the applicant had to demonstrate clearly and show interest, how the promulgation had affected him. However, the affidavit does not demonstrate the interest of the applicant, and how he will be prejudiced. He referred to the case of **Regina & Industrial dispute tribunal**, para 15 of Pages 17 & 18.

He lastly, submitted that grant of leave is discretionary, but the discretion must be exercised judiciously; that the same must be guided by the law. He prayed that the application be dismissed for lack of merit.

In rejoinder, Mr. Mpoki submitted among other things that, the law does not require the applicant to show prospects of success, that would entail deciding on the merits of the case; he again referred to the case of **Emma Bayo** (Supra). He also said that, the applicant's affidavit shows that, Act No. 5 of 2022, under part XXVI amends section 46 A, and that reading through the affidavit and the GN, it is shown how the applicant's interest has been affected. Again paragraph 5 of the affidavit, read together with paragraphs 3 and 4 shows the extent which the applicant has been affected. Paragraph 10, 11 and 12 of the affidavit of Anna Aloyce Henga explain why the GN is unconstitutional, ultra-vires, arbitrary, and unfair. Para 12 of the affidavit shows why the said law is ultra-vires whereas paragraph 8 stated that, the principle of ultra-vires applies. Again, in the statement, Para 7; (a) – (f) it is stated that the same is ultra-vires illegal, unconstitutional etc. They complain about the illegality and the way it was brought forward. He finally submitted that, that the application is meritorious, and prayed for leave to file an application for certiorari and prohibition to be granted.

I have gone through parties' submissions. I wish to point out at the outset that, judicial review is a process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals, and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties. Judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself. It would scrutinize the procedure adopted to arrive at the

decision to ascertain that it is in conformity with all the elements of fairness, reasonableness, and most of all its legality.

However, before applying for judicial review a party who wishes to do so is required to obtain court's leave. The aim of the application for leave before making a substantive application for prerogative orders is to initiate a screening process at an early stage for any application, which is frivolous, vexatious, or hopeless. This approach is stated in various cases, and they include: **Emma Bayo** (supra) at page 8, **R.V. Industrial Disputes Tribunal**, Supreme Court of Judicature of Jamaica, claim no. 2009 HVC 04798, **Republic of Kenya v. County Council of Kwale & another Ex parte Kondo & 57 Others**, HC at Mombasa February 2, 1998, **Legal and Human Rights Center v. The Minister of Finance and Planning and 2 Others**, Miscellaneous Cause No. 11 of 2021, HC-TZ, Main Registry and **Inland Revenue Commissioner and National Federation of Self Employed and Small Business Ltd** [1981] 2 All ER pg. 93; all these cases laid down criteria for granting leave for judicial review as follows:

- 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 i.e., within the prescribed period.*
- 4. The applicant has to show that there is no alternative remedy.*

Obviously, as stated in the submissions herein above, the grant or refusal to grant leave for applying for prerogative orders is in the discretion of the Court, however the same has to be exercised judiciously.

In the case at hand, there is no dispute that there is no alternative remedy which the applicant would have legally pursued to request for the reliefs which he is praying herein; it is also not disputed that the application is not frivolous or vexatious. Therefore, in making the decision, I will consider three issues, firstly, whether there is an arguable case, looking at the pleadings; the affidavit, counter affidavit and statement it is apparent that there is an arguable case. The applicant challenges the introduction of the levy under GN NO.478V of 2022 to be ultra vires the principal statute. He averred that the National Payment System Act is not vested with powers to create sources of revenue for the government through charging a levy on electronic money transaction by users of the said systems under National Payment Systems Act. This has been shown in paragraphs 6, 7, 8, 9, 10, 11 and 12 of applicant's affidavit.

Secondly, whether the applicant has sufficient interest, I am of the view that the applicant has successfully shown that he has sufficient interest as shown in paragraphs 3 & 4 of the affidavit, which show that the GN affects the applicant's interest. It is averred that; the applicant is a subscriber to the mobile telephone numbers collection number and wallet payment number Tigo account 25564000347 which she uses for various transaction including money transfer payment and withdrawal and that she holds an account at

CRDB Bank account number 01J1019907100 which she uses for various transactions including money transfer payment and withdrawal.

Thirdly, despite the fact that time limitation was not at issue between that parties, I thought it is imperative to illustrate the time lines herein; it is evident that the applicant lodged this application within six months; the legislation was promulgated on 1st July and this application was filed on the 28th day of August, so it is well within six (6) months period.

Before penning off, it is important to stress at this stage, as indicated earlier, that in an application for leave, the court is not supposed to go deeper into the main application for prerogative orders. Having analyzed the criteria to be fulfilled for the court to grant leave to apply for prerogative orders, in the affidavit as indicated herein above, I am satisfied that the applicant has made a case to be considered in an application for judicial review.

Basing on the aforesaid, I find that the application has merit, it is hereby granted accordingly, each party to bear its costs.

It is so ordered.




S.C. MOSHI

JUDGE

18/10/2022