

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(CORAM: NSEKELA, J.A., KIMARO, J.A., And MBAROUK, J.A.)

CRIMINAL APPEAL NO. 353 OF 2008

1. WILFRED ONYANGO NGANYI @DADII 2. PETER GIKURA MBULU @ KAMAU 3. JIMMY MAINA NJOROGI @ ORDINARY 4. PATRICK MUTHEE MUTIITHI @ MUSEYU 5. SIMON GITHINJI KARIUKI 6. BONIFACE MWANGI MBURU @ BONCHE 7. DAVID NGUGI MBURU @ DAVI 8. MICHAEL MBANYA WATHIGO @ MIKE 9. GABRIEL KUNGU KARIUKI 10. SIMON NDUNGU KAMBUTHI @ KENEN		 APPELLANTS
VERSUS		

1. INSPECTOR GENERAL OF POLICE 2. THE DIRECTOR OF IMMIGRATION 3. THE R/MAGISTRATE MOSHI (D2) 4. THE R/MAGISTRATE MOSHI (D8)		RESPONDENTS
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(Appeal from Ruling of the High Court of Tanzania
at Moshi)

(Mackanja, J.)

dated the 26th day of November, 2008
in

Criminal Appeal No. 16 of 2006

JUDGMENT OF THE COURT

11th & 18th February, 2011

MBAROUK, J.A.:

Before us in an appeal filed by the above named ten appellants
against the decision of the High Court (Mackanja, J.) at Moshi in Criminal

Application No. 16 of 2006 where they sought for prerogative orders of certiorari and prohibition. The application before the High Court was made under section 2(3) of the Judicature and Application of Laws Act, Cap. 358 R.E. 2002; section 17(2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap. 310 R.E. 2002, section 391 of the Criminal Procedure Act, Cap. 20 R.E. 2002.

Briefly stated, the appellants at the High Court sought for the following prerogative orders and other orders, namely:-

- (a) an order to stay criminal proceedings in Moshi District Court Criminal Cases No. 647 of 2005, No. 2 of 2006 and committal proceedings in Preliminary Inquiry P.1) No.26 of 2006 which are pending before the Resident Magistrate, Moshi (Diary No. 8), who has been cited as the fourth respondent.
- (b) an order of *certiorari* to quash an order of the third respondent, that is to say, the Resident Magistrate Moshi (Diary No.2) committing the respective applicants in P.I. NO. 26 of 2005 for

trial before the High Court; an order of *certiorari* to quash the illegal and unlawful actions of the first and the second respondents, that is the Inspector-General of police and the Director of Immigration Services, and all the criminal charges and prosecutions in the aforementioned four criminal cases, which are grounded on the patently illegal and unlawful actions of the said first and second respondents;

- (c) an order of prohibition, to prohibit the third and the fourth respondents from hearing, or in any other way determining all or any of the aforesaid four criminal case and or charges;
- (d) an order for the immediate release of the applicants;
- (e) from custody and for the restoration of their passports, unused air tickets (Maputo – Nairobi), Kenyan identity cards, international certificates of vaccination, ATM cards, frequent

flier cards, US \$29,047, Kenya shillings 28,000.00, four mobile phones, three golden rings, wrist watches and shoes; and

- (f) the customary prayer for any other order this Court may deem just and fit to grant.

Their application was dismissed in its totality. Undaunted, this appeal has been preferred.

Before hearing the appeal, Mr. Edwin Kakolaki, learned Senior State Attorney representing the respondents lodged a Notice of Preliminary Objection under Rule 4(2) of the Court of Appeal Rules, 2009. The notice of preliminary objection contained the following two grounds:

- (1) That, the appeal is incompetent as there is a substantial part of the record missing to enable this Honourable Court to hear and determine the appeal fairly.

- (2) That, the appeal is unfounded in law for the whole proceedings of the lower Court are nullity for non-compliance of the procedure.

In the course of hearing the preliminary objection, Mr. Kakolaki who was assisted by Mr. Juma Ramadhani, learned Senior State Attorney, abandoned the second ground of objection. As to their first ground of objection, Mr. Kakolaki, the learned Senior State Attorney for the respondents submitted that, the record of appeal in this appeal is incomplete, because no proceedings and ruling on the issue of leave to apply for the orders sought is to be found any where in the record of appeal.

Mr. Kakolaki further submitted that, a requirement of seeking for leave is a pre-requisite condition before hearing the application for an order of mandamus, prohibition or certiorari. He added that, there is no record showing that leave was sought and granted before

applying for those prerogative orders at the High Court. In support of his argument, Mr. Kakolaki cited to us the rulings of this court in the case of **The Attorney General V. Marwa s/o magori**, Criminal Appeal No. 95 of 1988 and **The Attorney General V. Wilfred Onyango Mganyi @ Dadii and Nine others**, Criminal Appeal No. 276 of 2006 (both unreported).

He said, this Court has a duty to enquire as to whether the procedure in filing such an application was followed or not. He added that, a pre-requisite stage of applying for leave is a necessary step to be followed in an application for prerogative orders. Mr. Kakolaki then urged us to find that, the record is incomplete.

On his part, Mr. Loomu Ojare, learned advocate for the appellants submitted that, the preliminary objection is misconceived. He contended that, Rule 71 (1) and (2) of the Court of Appeal Rules, 2009 is a provision which deal with what is to be contained in the

record of appeal and nothing has been violated. He said, he fails to see what other Court of Appeal Rule have been violated.

Mr. Ojare further submitted that, it is not necessary for the proceedings concerning leave applied to be included in the record of appeal, because as shown at page 429 of the record in the ruling of the Court in Criminal Appeal No. 276 of 2008, such leave was sought and granted.

Secondly; Mr. Ojare submitted that the respondents have not been prejudiced for the failure to include the proceedings of leave application in this matter.

He then urged us to allow the hearing of the appeal to proceed, taking into consideration that, the record is not prepared by the appellants but by the Court as this is a Criminal Appeal. He thus said, such failure is not their fault.

As pointed out earlier, this appeal is derived from an application seeking for the orders of certiorari and prohibition termed as prerogative orders made under the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap. 310 R.E. 2002 among other enabling provisions of the law mentioned therein. Such an application seeking for prerogative orders do not have its Rules of procedure as prescribed by section 19(1) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap. 310 R.E. 2002 which states that:

"The Chief Justice may make Rules of Court prescribing the procedure and fees payable or documents to be filed or issued in case where an order referred to in subsection (2) of Section 17 is sought".

In the absence of such Rules of Court, it is only the guidance from the decisions of courts which have become the practice in use when

applications for orders of certiorari, mandamus and prohibition are sought. For instance, in considering whether the issue of leave is necessary in applying for prerogative orders, the case of **The Republic ex parte Peter Shirima v. Kamati ya Ulinzi na Usalama Wilaya ya Singida and two others**, [1983] TLR 375 held:-

“The practice of seeking leave to apply for prerogative orders has become part of our procedural law by reasons of long user”.

Even in the instant case, at the High Court, the appellants sought for such leave as indicated in the decision of this Court in the case of **The Attorney General V. Wilfred Onyango Mganyi @ Dadii and nine others** (Supra) where it was stated that:

“In Miscellaneous Criminal Application NO. 7 of 2006 which was filed in the High Court at Moshi,

the respondents sought leave of the High to apply for the orders of certiorari and prohibition.....”

In the same case, this Court underscored a point that, the issue of seeking leave as not a distinct matter from the main application seeking for prerogative orders, where it was stated as follows:-

“In our view **it is misleading to consider, as Mr. Boniface argued, the application for leave to apply for the orders as a separate and distinct process from the application for judicial review.** It is necessary a step to an application for the orders”.

(Emphasis added)

The same case of **A. G. V. Kamati ya Ulinzi na Usalama, Wilaya ya Singida** (Supra) quoted with approval the **Halsbury’s Laws of England**, 14th Edition, paragraph 568 stated 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 first been duly obtained."

Mr. Juma, the learned Senior State Attorney added that according to Rule 71(2) of the Court of Appeal Rules, 2009, proceedings for leave ought to be part of the record as it is part and parcel of the process in applying for prerogative order, to which we agree with him.

Having established that application for leave to apply for prerogative orders is not a separate or distinct process from the application for judicial review, we agree with Mr. Kakolaki, and Mr. Juma, the learned Senior State Attorneys who represented the respondents that, the record of appeal is incomplete. The record of appeal ought also to have included the