

TANZANIA / JUDGMENT

north mara gold mine limited vs minister of state vice presidents office union environmenta and another 2024 tzhc 742 7 march 2024

COURT
TZHCDECIDED
7 March 2024

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IN THE HIGH COURT OF TANZANIA (MAIN REGISTRY) ? AT PAR ES SALAAM MISCELLANEOUS CAUSE NO. 31 OF 2023 IN THE MATTER OF APPLICATION FOR LEAVE TO APPLY FOR PREROGATIVE ORDERS OF CERTIORARI AGAINST THE RESPONDENTS AND IN THE MATTER OF DECISIONS GIVEN ON 31st JANUARY 2023 BY THE MINISTER OF STATE, VICE PRESIDENT'S OFFICE (UNION AND ENVIRONMENT) AS CONTAINED IN THE LETTER WITH REF.NO.CJA.78/310/01/04 BETWEEN NORTH MARA GOLDMINE LIMITED..... APPLICANT VERSUS MINISTER OF STATE VICE PRESIDENT'S OFFICE (UNION AND ENVIRONMENT)..... 1CT RESPONDENT THE ATTORNEY GENERAL OF THE UNITED REPUBLIC OF TANZANIA..... 2ND RESPONDENT

RULING

14th Nov.2023 & 7th March, 2024. DYANSOBERA, J.: This is an application for leave to apply for prerogative order of certiorari to quash and set aside the decision of the 1st respondent contained in the letter Ref. No. CJA.78/310/01/04 given on 31st January, 2023. The application has been preferred by way of the chamber summons supported by the statement of facts and the verifying affidavit sworn on 26th July, 2023 by i Melkiory Ngido, the applicant's authorised officer. The said legal documents have set out the grounds for leave to apply for judicial review. On 18th August, 2023, the respondents opposed the application by filing their joint counter affidavit as well as joint statement in reply. The hearing of this application was conducted by oral submissions whereby Dr. Wilbert Kapinga, learned Advocate, represented the applicant. For the respondents, stood Ms. Grace Lupondo, learned State Attorney. Submitting in support of the application, learned Counsel for the applicant, after adopting the statement of facts and the affidavit verifying those facts as part of his submission, contended that the essence of this application is three-fold. One, the applicant was not accorded by the 1st respondent the constitutional right of being heard before issuing the impugned decision; a violation of Article 13 (6) (a) of the Constitution of the United Republic of Tanzania [CAP. 2 R.E.2019]. Two, the decision given by the 1st respondent was unjust and illegally given in that the 1st respondent is not authorised by law to issue funds penalties and three, the decision is prejudicial for failure to take into account the gravity of the offence and evidence given by the NEMC prior to issuing it hence in contravention of the

Environmental Management Act of 2004. On the issues which have to be addressed at the leave stage, Counsel for the applicant contended that this application has been made within time limits set out under rule 6 of Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014, Government Notice No. 324 of 2014 published on 5th September, 2014 ('The Rules') that is within six months of the making of the decision. According to him, the impugned decision was issued on 31.1.2023 and the present application was 2 filed on 27.7.2023. In support of this argument, reliance was placed on the case of *Emma Bayo v. The Minister for Labour and Youth Development and 2 others*, Civil Appeal No. 79 of 2012. With respect to establishing sufficient interest or a standing in the matter, it was argued on part of the applicant that the impugned decision resulted into the applicant being required to pay a hefty penalty of one billion shillings which penalty was averse to the applicant's business operations. Further, learned Counsel argued, the applicant was not accorded with the right to be heard which is critical to propriety of the decision being given. In buttressing his argument, learned Counsel for the applicant referred this court to the case of *African Explosive Tanzania Limited v. Minister of Labour and Another*, Civil Application No. 27 of 2007. Respecting the issue whether the applicant has failed to exhaust alternative remedy, counsel for the applicant submitted that the law envisages such remedy as provided for under Section 95 of the Environmental Management Act, No. 20 of 2004 which states that any person aggrieved by the decision of the kind given by the 1st respondent may appeal to the Environmental Appeals Tribunal and further that Sections 204 and 205 of the same Act provide for the establishment of the tribunal as an appellate body for grievances against the decision of the 1st respondent. Counsel for the applicant was, however, quick to point out that, to date, such tribunal has not been established which means that no alternative remedy exists and, therefore, the applicant has no remedy for him to exhaust before seeking recourse of judicial review. Carrying further his argument, counsel for the applicant pointed out that even if such remedy was available, the court would still have power to 3 exercise its discretion to entertain this application as it has been established by courts that the existence of available remedy is not a bar to file a prerogative orders application. In advancing this argument, Dr. Kapinga placed reliance on the cases of *Tanzania Electric Supply Company v. Hon. Attorney General and 3 others*, Wise. Civil Application No. 54 of 2019 and *Chalinze Cement Co. Ltd and Another v. the Registrar of Companies and Another*, Civil Cause No. 30 of 2023. In conclusion, the applicant's counsel urged this court to find that the conditions for the grant of leave have been met. Opposing this submission by counsel for the applicant, Ms Grace Lupondo, the learned State Attorney, adopting the respondents' counter affidavit and a statement in reply filed on 18th August, 2023 to form part of her submission, was in agreement with the principles set out in the *Emma Bayo* case (*supra*) on the three conditions that must be established for the court to grant leave to apply for judicial review and maintained that at leave stage, the court exercises its discretion and looks into whether those conditions have been satisfied. The learned State Attorney did not dispute that this application was filed in time. She pointed out that, according to the documents filed by the applicant in support of the application, only two reasons and not four as counsel for the applicant wanted the court to believe, have been advanced upon which this judicial review should be pegged. She clarified that one of the reasons is that the 1st respondent had no power to issue fine and two, the applicant was not afforded the right to be

heard. According to her, the arguments that the decision of the 1st respondent contravened the Environmental Management Act and that the decision did not take into account the gravity and evidence given, were not impleaded in the filed documents. On the issue of availability of the alternative remedy and whether failure to exhaust available remedy is a bar to judicial review, it was submitted on part of the respondents that the applicant has failed to prove that the Environmental Appeal Tribunal established under section 95 of the Act has not been set up and further that basing on the cited cases, it is upon the court after being satisfied from the facts and circumstances of the case to rule whether or not the alternative remedy is a bar to judicial remedy. On whether the applicant has sufficient interest and an arguable case, the learned State Attorney was of the considered view that the applicant was given the right to be heard and pointed out the circumstances which prove that fact. She elaborated that the applicant admitted that there was full cooperation with NEMC investigation. Further that, after the decision, the applicant wrote a letter to the 1st respondent reciting what the decision was all about and the applicant expressed his respect to the decision though requesting the 1st respondent to consider the overall size of the fine and that the applicant was committed to comply. Furthermore, there was a schedule for payment and the applicant started to pay, she pressed. The learned State Attorney sought this court to distinguish the cases cited by Counsel for the applicant from the facts and circumstances of this case and urged this court to dismiss the application for failure to meet the establishment of the locus standi, exhausting the available remedies and having an arguable case. She gained ground that this application should be dismissed with costs. 5 In a brief rejoinder, counsel for the applicant invited this court to consider that the applicant has both sufficient interest and an arguable case insisting that when respecting the decision of the 1st respondent, the applicant was acting under protest reserving all her legal rights including the right to apply for judicial review. After a careful consideration of the filed documents and after taking into account the oral submissions of the learned counsel for the parties, as well as the case laws, the issue calling for consideration and determination is whether the applicant has met the touchstone for the grant of leave to apply for judicial review. It is trite that the grant or refusal to grant the leave for applying for prerogative orders is in the discretion of the Court but a discretion which must be exercised reasonably, judiciously and on sound legal principles. It is the practice that the preliminary matters which the High Court should consider when exercising its discretion to grant or to refuse to grant leave; put differently, the principles applicable in applications for leave to file prerogative orders were succinctly propounded by the Court of Appeal in the often cited case of *Emma Bayo v. the Minister for Labour and Youths Development, the Attorney General and Tanzania Posts Corporation: Civil Appeal No. 79 of 2012 (CAT)* in the following terms: - . the stage of leave serves several important screening purposes: It is at the stage 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 the six months limitation period within which to seek a judicial review of the decision of the tribunal subordinate to the High Court. At the leave stage is where the applicant shows that he has sufficient interest to be allowed to bring the main application.' In the application under consideration, it has been submitted by the learned State Attorney for the respondents that though the applicant has filed this application in

time, she has not only failed to exhaust an alternative remedy but also has failed to establish that she has sufficient interest in the matter as well as establishing an arguable case. Her grounds to support that argument have been demonstrated as indicated hereinabove. On his part, the applicant's advocate has strenuously contended that he has established all the conditions required for the court to grant judicial review. Let me start with the issue of exhausting available remedy. This issue was first raised by the learned State Attorney as a preliminary objection but it was overruled on account that it was not a pure point of law as it required evidence. It has now resurfaced. Both the learned State Attorney and the Advocate are at one that the law provides alternative remedy under section 95 of the Act in the following terms: -

95. -Any person who is aggrieved by the decision of the Minister to approve or disapprove an Environmental Impact Statement may appeal to the Environmental Appeals Tribunal'. The law is also clear that the Environmental Appeals Tribunal is established under Section 204 (1) of the Act. There is no dispute that the applicant was aggrieved by the decision of the 1st respondent given 7 on 31st January, 2023 and, therefore, she was supposed to appeal to the Environmental Appeals Tribunal. However, it is the argument of the applicants learned Counsel that the Tribunal in question has not been set up and is not operational that is why she has come to this court. She has proved this assertion in the affidavit, paragraph 15 in particular, sworn by Melkiory Ngido on 26th July, 2023 that: 'The decisions of the first respondent are appealable to the Environmental Appeals Tribunal (Tribunal) presided over by a judge of the High Court. However, the Tribunal has not been set up since the Act was passed in 2004, therefore, there is no alternative remedy available to the applicant save for the proceedings before this Honourable Court for prerogative order of certiorari against the decision of the first respondent as contained in the letter dated 31 January, 2033 cited at paragraph 2 above'. The respondents' reaction to the above averment is reflected at paragraph 15 of their counter affidavit sworn by Jacqueline Issac Nyantori, the Senior Officer of the respondent, as follows: '15. That, the contents of paragraph 15 of the applicant's affidavit are noted to the extent that the decisions of the 1st respondent are appealable to the Environmental Appeals Tribunal (Tribunal) presided over by a judge of the High Court, the rest of the facts are vehemently denied.' In her submission, the learned State Attorney debunked the argument by counsel for the applicant that such remedy (the Tribunal) is not operational. She contends that the applicant has failed to prove to the satisfaction of the court that the Tribunal has not been set up; the burden 8 the applicant was supposed to discharge as required under sections 110 and 111 of the Evidence Act [CAP 6 R.E.2019]. She stressed that the applicant has failed to submit any document as evidence to prove that she made efforts to appeal to the Tribunal but that the appeal became ineffective. In her view, a bare statement is not enough particularly where it was not from the applicant's own knowledge. Counsel for the applicant maintained that though the alternative remedy has been provided for by the law, the same is not operational. Having considered the affidavit evidence and the rival arguments, I am satisfied that the applicant has proved to the satisfaction of the court that the said Tribunal as an alternative remedy is not currently operational. This is clear from paragraph 15 of the applicant's affidavit reproduced above.

Besides, since it is the 1st respondent, through the learned State Attorney, who asserts that such Tribunal is in existence and operation, it was her duty to prove that those facts exist for, it is the cherished maxim that *ei qui affirmat non ei qui negat incumbit probatio*. This, I think, is the gist of the provisions of Sections 110 and 111 of the Evidence Act. In other words, since it is the respondents who have access or control of the missing evidence, the evidential burden rested on them to prove that the Tribunal in question is currently operational more so, because the evidential burden shifts depending on the state of evidence. This, the respondents have not discharged. Even if, for the sake of argument, the available remedy were established and operational, it has been the position of this court that the availability of alternative remedies per se, would not bar an applicant to access the High Court by way of judicial review. A case in point is that of *Bin Johar General Trading LLC v. the Commissioner General, 9 Tanzania Revenue Authority and 2 others*, Misc. Commercial Case No. 24 of 2006, in an application for leave to apply for prerogative orders, it was observed that: - 'In obvious cases the court may also examine whether the Applicant has exhausted particularly alternative statutory remedies. But it has frequently been held by this court that the availability of alternative remedies per se, would not bar access to the application for prerogative orders.' After all, the respondents, through the learned State Attorney, have not suggested that the available remedy, if at all it exists and is operative, is speedy, effective and adequate. I find the respondents' argument that the applicant has not exhausted the available alternative remedy holding no water. Has the applicant established an arguable case? I think the answer must be in the positive. While the learned State Attorney argues that the applicant has failed to establish that she has any arguable case in that the applicant was given the right to be heard and elaborated on the circumstances which prove that fact and went further telling this court that the applicant failed to justify how he was affected in that the applicant's complaint that the penalty of *Ibn/-* affected the applicant's business operations has not been proved, Counsel for the applicant maintained that when respecting the decision of the 1st respondent, the applicant was acting under protest reserving all her legal rights including the right to apply for judicial review. ¹⁰ I think the applicant is right. As far as the test of potential arguability is concerned, it is the consideration whether the materials before the court disclose matters which might, on further consideration, demonstrate an arguable case for the grant of the relief claimed. At the leave stage, it is not necessary to prove an arguable case. Besides, arguability cannot be judged in vacuum, that is, without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application and normally is proved in the substantive application not at the leave stage. It will be recalled that this test has been adopted and applied by our courts in decided cases. For instance, Hon. Kalegeya, J. (as he then was) in *Miscellaneous Civil Cause No. 144 of 1993 (High Court at Dar es Salaam) between Workers of Tanganyika Textile Industries Ltd v. the Registrar of the Industrial Court of Tanzania and others*, when dealing with an application for leave for orders of *certiorari* and *mandamus*, had this to say: - 'I should out rightly point that seeking leave to file an application for prerogative orders requires the applicant to merely raise arguable points. He is not required to prove the alleged errors for, that proof would only be required, during

hearing of the main application if leave is granted. Regard being had to the statement and the attached supporting document'. This position was endorsed by the Court of Appeal in Emma Bayo case (supra), whereby, speaking through his Lordship Juma, J.A. (as he then was before he was elevated as a Chief Justice), at p. 9 of the judgment, was emphatic that the High Court exercising judicial discretion in determining issue of leave, should not indulge itself in considering the main application as doing so is to go "beyond what was expected of the trial court at the li stage/step of application for leave'. The Court described such conduct as "overstepping" on the main application. In this case, I am satisfied that the applicant has managed to provide the materials before the court disclosing matters which might, on further consideration during the substantive application for judicial review, demonstrate an arguable case for the grant of the relief claimed. With regard to the issue of the applicant having sufficient interest in the matter, there is no dispute that the applicant was aggrieved by the decision of the 1st respondent given on 31st January, 2023 and, therefore, she a constitutional right to come to this court way of judicial review taking into account that the Tribunal, as an alternative remedy, is not only inoperative but also, cannot a bar to the applicant accessing this court by way of judicial review. For the foregoing reasons, I find this application world-beating and, in consequence, I grant leave to the applicant to file a substantive application for judicial review. Costs shall abide in the substantive application. ahsobera DGE 2024 This ruling is delivered under my hand and the seal of this Court on this 7th day of March, 2024 in the presence of Mr. Mohammedzamen Nazarali, learned Counsel for the applicant but in the absence of the respondents.

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