

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM MAIN REGISTRY)**

AT DAR ES SALAAM

MISC.CIVIL APPLICATION NO. 109 OF 2017

*(IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI,
MANDAMUS, AND PROHIBITION)*

*IN THE MATTER OF LAW REFORM (FATAL ACCIDENTS AND MISCELLANEOUS PROVISIONS
ACT CAP 310 R.E 2002;*

*IN THE MATTER OF THE BANNING OF RAIWA MWEMA NEWSPAPER ORDER ISSUED BY THE MINISTER
FOR INFORMATION, CULTURE, ARTS AND SPORTS ON THE 29TH SEPTEMBER, 2017 (ENTITLED IN
KISWAHILI YAH: KULIFUNGIA GAZETI LAKO KWA MUDA WA SIKU TISINI (90)*

IN THE MATTER OF MEDIA SERVICES ACT NO. 12 OF 2016

BETWEEN

RAIWA MWEMA COMPANY LIMITED.....APPLICANT

AND

**THE MINISTER FOR INFORMATION,
CULTURE, ARTS AND SPORTS.....1st RESPONDENT**

**THE DIRECTOR OF INFORMATION
SERVICES DEPARTMENT.....2nd RESPONDENT**

THE ATTORNEY GENERAL.....3rd RESPONDENT

RULING

The applicant has filed application for leave to file an application for orders of certiorari, mandamus, and prohibition against the decision of the 1st respondent of banning the publication,

distribution and selling of Raia Mwema News Paper. Respondent upon being served, filed notice of preliminary objection that;

- (i) The orders sought in the application has been overtaken by events.
- (ii) The applicant's affidavit filed on 12th February, 2018 is bad in law for being in contravention of laws of Tanzania.

On the date set for hearing of the preliminary objection, respondent counsel abandoned 2nd preliminary objection, and submitted on the first preliminary objection by way of written submission upon request and order of the court.

In short respondent submitted that Raia Mwema News Paper was banned for period of 90 days effective from 29 September, 2017, vide letter reference Number 1H/RN/824/50 annexure RM- 1 attached to applicant affidavit. From the letter, (90) days from the date of issuance of the order of the minister expired on 29 December, 2017. That being the case, order sought has been overtaken by events.

Respondent counsel insisted that, order sought by applicant, lacks leg to stand as the ministerial decision to ban the said newspaper is no longer in existence, because since January 2018, the newspaper was operating as usual. Respondent counsel,

requested the court not to waste court precious time to entertain an application for leave for prerogative orders, against the minister decision which is in existence, in operative, thus unenforceable and binds no one in law.

On the other hand, applicant counsel submitted that the points of preliminary objection, is geared at preventing the applicant from accessing the legal remedies sought, The orders sought by applicant are geared at:

- (a) Investigating the illegality of the banning order;
- (b) Quashing it in case if finds it illegal under the order of certiorari;
- (c) Issuing order of mandamus requiring the Respondents to respect the law when dealing with the applicant as the Media Services Act does not empower any of them to ban any newspaper; and
- (d) Issuing orders of prohibition barring the 1st and 2nd respondent from ever banning the Raia Mwama newspaper.

The applicant is seeking leave of the court to file an application for orders of certiorari, mandamus and prohibition against the decision of the 1st respondent to ban for 90 days the publication of Raia Mwema Newspaper as per the order in a letter entitled in Kiswahili " ***Kulifungia gazeti lako kwa muda wa siku tisini***

(90)” from September 2017. Reason was that reason for certiorari is that Minister does not have such powers and it is in violation of the cherished principles of natural justice. This issue is so critical and cannot be wished away under the “*veneer of being overtaken by events,*” lamented applicant counsel.

It was further argued that issuance of the said order led to the suspension of business of Raia Mwema for 90 days leading to a loss of business amounting to TZS 112 million. This loss has not been overtaken by event, it is real. This loss can only be made good if the legality of the said order is scrutinized and in case the court finds that it was illegally made, then the applicant could file a suit to demand recompense. It cannot do otherwise, hence the need for leave to file an application for prerogative orders, insisted applicant counsel.

Having heard both parties in brief, it is my opinion that, an illegal order cannot be overtaken by events if the application to set it aside (quash it) was filed within time. The leave is sought for three orders of certiorari to quash the impugned order, mandamus to compel the respondents to abide by the law, and prohibition to stop them to violate, in future, the rights of the applicant.

It has been held that whenever illegality of any order is at issue, the court is duty bound to investigate it even if one is out of time.

There are numerous authorities on the subject of illegality as sufficient reason for extending time within which the illegality is to be deliberated by the courts. In the case of **Tanesco and 2 Others Vs. Salim Kabora**, Civil Application No. 68 of 2015, (unreported), Mwangesi, JA stated:

It is to be noted that, in this last ground, the applicants are claiming that, there is illegality in the appeal that has been preferred by the respondent. When the question of illegality is at issue, the position of the court has normally been to give chance for the claimed illegality to be deliberated by the court, so extension of time has normally been granted.

And in the case of Principal Secretary, Ministry of defense and **National Service Vs. Devram Valambhia [1992] TLR 185**, the Court of Appeal held:

Where, as here, the point of law at issue is illegality or otherwise of the decision being challenged, that is "*sufficient reason*" within the meaning of Rule 8 (now Rule 10) of the rules for extending time.

Applicant intend to file judicial review, to the best of my understanding, relational behind judicial review is that, there shall

be nothing like absolute discretion in the hands of bodies performing public functions. Absolute power is anathema to the rule of law and naked and arbitrary exercise of power is bad in law. Even where power seems discretionary and uncontrollable, it will still be subject to judicial scrutiny to ensure its exercise is in full consonance with the law and the legitimate expectations of the subjects. However, application must be preceded by application for leave.

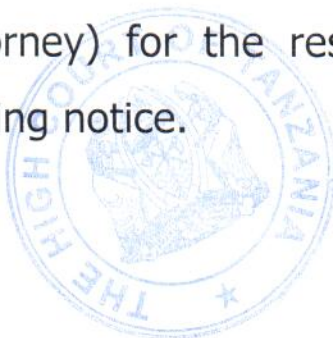
Applicant seeks leave to challenge illegality in an order of minister, it covers past, present and future. Thus application can not be said to be overtaken by events. Preliminary objection overruled. Hearing of the application for leave on 06th February, 2019.



Handwritten signature of Z.G. Muruke in blue ink.

Z.G. Muruke
JUDGE
13/12/2018

Ruling delivered in presence of the Selina Kapange (State Attorney) for the respondent and in the absence of applicant having notice.



Handwritten signature of Z.G. Muruke in blue ink.

Z.G. Muruke
JUDGE
13/12/2018