AN EXPLORATION OF LEGAL, POLITICAL, ECONOMIC AND SOCIAL CHALLENGES FACING INDIVIDUALS IN THE EXERCISE OF PURSUING JUDICIAL REVIEW IN TANZANIA

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ABSTRACT

The applicants for judicial review in Tanzania face both legal, political social and economic factors which contribute to the failure of some other people to pursue judicial review applications once affected by *ultra vires* decisions, omissions or acts of the public authorities. This paper deals with an exploration of legal, political, economic and social challenges facing individuals in the exercise of pursuing judicial review in Tanzania. The reason for the study is based on the fact that there are few cases of judicial review knock the doors of the court of law for the redress and those few cases reach the court fail in the preliminary stages for technical grounds.

The study focuses on the effectiveness of law and procedure relating to the application for judicial review before and after the establishment of the Law Reform (Fatal Accident and Miscellaneous Provisions (Judicial Review Procedures and Fees) Rules, 2014, Government Notice No. 324 published on 5/9/2014. The study analyses the procedure for the application for judicial review to see whether the present law and procedure for the application of judicial review creates enough and conducive environment for the victims of the arbitral administrative decisions to easily pursue for the remedies founded on judicial review.

It was observed that there is ample evidence to support that laws and procedures of applications for prerogative remedies in the legal system of Tanzania is the issue, that such is complicated and has a lot of technicalities.

INTRODUCTION

Judicial review is a specialized remedy in public law by which the High Court exercises a supervisory jurisdiction over inferior courts, tribunals or other public bodies to satisfy itself on the illegality; irrationality; and procedural impropriety of their decisions.[i] The primary function of the Administrative law is to put the powers of the government within the legal bounds of their powers to protect the citizens against the abuse. It is observed that the laws which the government authorities are authorized to protect and implement are complex, uncertain and easily to forget, therefore abuse of powers is something inevitable in the administration process. It is important that law should provide a means to check these powers. Judicial review remedies in Tanzania through the orders of certiorari, mandamus and prohibition are remedies available to citizens created by law and the Constitution of the United Republic of Tanzania of 1977 (herein after referred as "the Constitution") which jurisdiction is vested in the High Court of Tanzania.[ii]

It has been observed that before the year 2014 there was no specific procedural law which regulated proceedings for the application of judicial review in the country. Therefore applications for judicial review got its authorities from various pieces of legislation including but not limited to section 2 of the Judicature and Application of Laws Act,[iii] section 95 of the Civil Procedure Act[iv] section 17 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act[v] and Article 30 (3) and (4) of the Constitution[vi] which confers right to sue to individuals and the inherent powers of the High Court. It was until 2014 when the Law Reform (Fatal Accident and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014 were established to deal with all applications for judicial review in Tanzania.

THE LEGAL REGIME FOR JUDICIAL REVIEW

Common Law and Equity

Before the enactment of the Law Reform (Fatal Accident and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014, applicable laws for the applications for judicial review were generally derived from the Received Laws, that is to say; common law, equity and statutes of General Applications. The applicable laws were those laws which were

in force in England before 22 July, 1920, the Reception date. The principles which were carried on by the received laws, were developed from English and Wales customs, practice and political situations of that time. Courts in Tanzania were forced to follow principles established by English Courts under the principle of *stare decisis.* In the case of *John Mwombeki Byombalirwa*[vii] the following insight is given that;

> *"In Tanzania no rules of procedure have been made by the Chief Justice as he is empowered so to do under s.18(1) of the Law Reform (Fatal Accidents and Misc. Provisions) Ordinance (Amendment) Act No. 55 of 1968. We follow the common laws developed and expounded by the case-law in England and our Tanzania judges."*

The application of Common Law and Equity caused a lot of difficulties to applicants of judicial review for the reason that they were not written laws (codified) but were principles which were developed by judges in the course of delivering judgments and became common in England and Wales. Therefore reliance of these laws was something difficult and its procedure was not certain. Since the laws were not codified applications for judicial review were made under the gist of trial and error. That means application for judicial review were made blindly and their results were not predictable until such time when the matter is interpreted by the judges during the delivery of judgments.

The application of statutes

Apart from the application of the common law and Equity other laws which were applicable in the applications for judicial review were the Law Reform (Fatal Accident) Act,[viii] The Judicature and Applications of Laws Act and the Constitution of the United Republic of Tanzania, 1977. Under section 17 of the Law Reform (Fatal Accident and Miscellaneous Provisions) Act, allowed the Chief Justice to make rules of procedure for the application of judicial review.

Application for judicial review contain several pre-conditions for the same to be dealt with the court. It is a pre-condition for the applicant of judicial review to file first an application for leave to file an application for judicial review. The applicant cannot successfully file an application for judicial review if in fact he did not obtain leave of the court to allow him file an application for orders. The requirement of leave to file an application for orders of certiorari,

mandamus and prohibition was recognized to be confusing. Before the enactment of G.N. No. 324 of 2014 the High Court had a confusing stand on the pre-requisite of leave. In the case of *Republic Ex-parte Peter Shirima Vs. Kamati ya Ulinzi na Usalama, Wilaya ya Singida & 2 Others,*[ix] the court insisted that the practice of seeking leave to apply for judicial review has been part of our procedural law by reason of long use.

However in another case of *Mohamed Vs. Regional CID Officer, Mbeya*,[x] the applicant filed an application for judicial review without first having obtained leave to file the same. The issue before the court was whether leave was necessary before filing an application for judicial review. Mwakibete J. as he then was, rule that the urgency of the matter the subject of this application cannot be overemphasized that surely the circumstances demanded that the application is heard with dispatch on its merits. As the result the court ruled that the application was one of the cases properly crying for dispensation of the alleged leave. Therefore the court by use of its inherent powers ordered that leave to file the application for judicial review to be dispensed with.

The effect of the two case above of *Re-Exparte and Mohamed* shows different approaches on the requirement of leave before the institution of proceedings for prerogative orders. Where the first case shows that such requirement of leave is necessary, the later shows that such requirement may be dispensed with if the applicant establishes urgency of the matter and the court uses its inherent powers.

The problem we see from the absence of enactment of procedural rule before the GN. No. 324 of 2014 were established was the confusion on the requirement of leave before filing the application for prerogative orders though later it was confirmed that leave was a necessary step towards filing application for judicial review. In the case of *Sunlodges (T) Ltd Vs. The Minister for Lands, Housing and Human Settlement Development & 3 Others,*[xi] the court stated that "an application for judicial review (certiorari, mandamus, prohibition) is a two stages process". The first or threshold stage is where an applicant has to seek and obtain a, leave or permission to apply for judicial review. At this stage the court does not require extensive arguments or submissions on an application for leave, and the court is not expected to go in the depth of the matter. "In *Hans Wolfgang Golcher v General Manager of Morogoro Canvas Mill Ltd*[xii], Maina, J." (as he then was) held that in all applications for prerogative orders leave must be

sought and obtained before the application for any prerogative order is made and heard. As it stands now, leave to file an application for judicial review is not only a necessary step but also a mandatory requirement.

The Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and fees) Rules, 2014

In the year 2014, the Chief Justice of Tanzania made rules of procedure namely the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and fees) Rules, 2014.[xiii] Unfortunately these rule only codified the same procedural rules developed from the received laws developed from Common Law, Equity and Statutes of General Application. The application for judicial review contains two main stages namely the stage of leave and the stage of the main application. In the rules the procedures for the application for leave are provided for under rules 4 – 7 and the main application is governed by rule 8 – 17 of the Rules. In the case of *Attorney General Vs Wilfred Onyango @ Dadii and 11 others*,[xiv] the Court of Appeal made it clear that the application for leave to apply for the orders of certiorari, mandamus, and prohibition is not a separate and distinct process from the application for judicial review but is a necessary step to an application for the orders. The purpose for this "step" is to give the court an indication that an applicant has "sufficient interest in applying for the orders".

- **Requirement of Leave to file Application for Orders**

The requirements for leave was made mandatory under rule 5(1) of the Rules.[xv] To make the application for leave more complicated, rule 5(1)(a-d) of the Rules[xvi] made it mandatory that an application must be made in chambers and accompanied with statement providing for names and description of the applicant, the relief sought, the grounds on which the relief is sought and affidavit verifying the facts relied on. The time limits for filing an application for leave to file an application for the orders is provided under rule 6 of the rule to be six months from the date of the impugned proceedings, act or omission to which the application for leave relates.

The application for leave to file application for judicial review has to be heard and determined within 14 days from the date of filing the same as provided for under rule 5 (4) of the Rules.[xvii] However practically courts have not managed to hear and determine application for leave within the prescribed time of 14 days. Reasons for such failure are clearly apparent that courts

are enjoined to act judiciously and for the interest of justice. The judge is allowed to determine the application for leave *ex parte* under rule 7 (1) and without hearing the application but for the interest of justice it desirable that the court hears the application *inter-partes* under the proviso to rule 5 (6) read together with rule 7 (2) of the Rules.[xviii] When the court rules to hear and determine the application for leave *inter-partes* rules of Civil Procedure comes in under rule 17 of the Rules which give an opportunity the respondent to file Counter Affidavit and reply to the statement of application within 14 days. That alone prevents the application for leave to be hear and determined within 14 days.

The above named procedural restraint is not the only reason but the other one is the requirement of summoning the Attorney General in an application for leave as required by section 18 of the Law Reform (Fatal Accidents and Miscellaneous) Act.[xix] If the attorney General appears in response to the summons then the court is prevented to hear the application *ex parte*. Therefore the Attorney General will need to respond to the application something which will also take another time of 14 days to counter the application. According to the judges observations it has been observed that in practice it has been difficult for the court to implement the provision of the proviso to rule 5 (6) of the Rules to hear and determine the application of leave within 14 days from the date of filing the application.

The ruling granting or refusing an application for leave to file an application for orders is an interlocutory order. In criminal case the order refusing or grating an application for leave to file an application for judicial review is not appealable to the Court of Appeal. This position was stated in the case of *Attorney General Vs Wilfred Onyango @ Dadii and 11 others*,[xx] where the Court of Appeal of Tanzania observed that:

> *"The view that the stage at which leave is sought to apply for the orders is merely preliminary or interlocutory has been underscored by Court of Appeal in two recent decisions: see Karibu Textile Mills Limited v New Mbeya Textile Mills Limited and 3 Others, Civil Application No. 27 of 2006 where Court of Appeal considered whether it could revise a decision in an application for leave to apply for the orders. The Court of Appeal decided that such a decision was interlocutory because it did not finally and conclusively determine*

> *the rights of the parties and, therefore, it was not subject to revision by the Court of Appeal."*

However, in civil cases the order granting or refusing an application for leave is appealable to the Court of Appeal of Tanzania under section 5 (1) (c) of the Appellate Jurisdiction Act[xxi] upon leave of the court. This position was cemented also in the same case of *Attorney General Vs Wilfred Onyango @ Dadii and 11 others*[xxii] when the court observed:

> *"Although in Tanzania, as per the Senate of University of Dar es Salaam case supra, it was stated that a decision at the leave stage is appealable with leave under section 5 (1) (c) of the Appellate Jurisdiction Act, 1979, the same thing could not be said of this criminal appeal because there is no equivalent of subsection (1) (c) of section 5, which deals with civil appeals"*

What we gather from the position of law put in the case of *Wilfred Onyango* above is that until now the law relating to judicial review is still confusing in respect of appeals to the court of Appeal from an order granting or refusing application for leave so far as criminal or civil cases are concern. It is apparent that no appeal or revision is available if the appeal or revision before the Court of Appeal emanates from an order granting or refusing an application of leave to file an application for judicial review of a criminal case. Whereas, if the order which is the subject matter of appeal or revision before the Court of Appeal refusing or granting leave for judicial review emanates from a civil case an avenue for challenging it is available upon leave of the court under section 5(1)(c) of the Appellate Jurisdiction Act.[xxiii] This stand was put clear in *Wilfred Onyango's case* (supra) that;

> *"Although in Tanzania, as per the Senate of University of Dar es Salaam case supra, it was stated that a decision at the leave stage is appealable with leave under section 5 (1) (c) of the Appellate Jurisdiction Act, 1979, the same thing could not be said of this criminal appeal because there is no equivalent of subsection (1) (c) of section 5, which deals with civil appeals."*

The effect of appeal or revision which contravene the proper application of law or procedure when a party exercises the right of appeal or revision against the decision of the High Court granting or refusing leave to file application for orders the appeal or revision is struck out. In the case of *Tanzania Standard (Newspaper) Limited Vs. The Honourable Minister for Labour Employment and Youths & 2 Others*,[xxiv] the appeal was struck out because the appellant used improper section to appeal to the Court of Appeal. In this case the appellant appealed against an order refusing him leave to apply for orders of certiorari, mandamus and prohibition as he appealed against that order as a matter of right as if it was an order refusing to grant the orders. Section 17 of the Law Reform (Fatal Accidents, Miscellaneous Provisions) Act enables a party aggrieved by the order granting or dismissing application for orders of certiorari, mandamus and prohibition to appeal to the court of appeal as a matter of right, that is, without first obtaining leave of the court. To the contrary, the appellant in the case of Tanzania Standard (Newspaper) Ltd (Supra) appealed to the court of appeal without first obtaining leave of the court using section 17 of the Law Reform (Fatal Accidents…) Act instead of section 5(1)(c) of the Appellate Jurisdiction Act.[xxv]

- **The Main Application for Orders**

After the court having granted leave for the filing of the application for judicial review, the applicant is duty bound to institute the main application for judicial review within 14 days counting from the date of the order as provide for under rule 8 (1) (b) of the Rules.[xxvi] Other requirements are that the application must be filed by way of chamber summons supported by an affidavit signed by the applicant in person or his representative and the statement in respect of which leave was granted. Before the applicant files an application for judicial review must consider more than five things as stated in various case laws. Some of these conditions are expressly provided for under rules 4 and 6 of the Rules[xxvii] In the case of *John Mwombeki Byombalirwa v the Regional Commissioner and Regional Police Commander*[xxviii] the trial judge named five condition to be considered by the applicant before he pursues for judicial review namely:

  - The applicant must have demanded the performance and the respondent must have refused to perform.

- The respondent as a public officer must have a public duty to perform imposed by statute or any other law but it is a duty owed as well to the individual citizen.
- The public duty imposed should be of an imperative nature and not a discretionary one.
- The applicant must have a *locus standi*, that is, he must have sufficient interest in the matter he is applying for.
- There should be no other appropriate remedy available to the applicant.

Another requirement is that the applicant of judicial review must have exhausted all the available local remedies. These local remedies include appeals, review or revision in the respective institution. This was clearly stated in the case of *Hon. Halima James Mdee & 2 Others v Hon. Job Yustino Ndugai, The Speaker of the National Assembly of the United Republic of Tanzania & 2 Others,*[xxix] where it was held correctly that the court cannot grant remedies sought under judicial review where the party applying for such remedies has not exhausted statutory remedy available.

The applicant must make sure that the only available remedy present on the matter is judicial review that there is no other legal remedy that the applicant can pursue to remedy the situation like issue of contract or tort. If it appears that such a matter can be resolved by way of a normal civil case and the applicant comes for judicial review, then judicial review must fail. This view is also similar to the one held by Maina, J. (as he then was) in *Hans Wolfgang Golcher v General Manager of Morogoro Canvas Mill Limited 1987*[xxx] where it was held that prerogative orders cannot be granted 'where there is some other legal remedy available.

It is also imperative that the applicant must demonstrate in his affidavit sufficient interest in the matter to which application for judicial review relates. Demonstration of sufficient interest has the meaning that *locus standi* under rule 4 of the Rules.[xxxi] This is one of the few conditions which were provided in the Rules.[xxxii]

Though the above name things/conditions are so important to be considered by the applicant before he files an application for judicial review, they are not provided neither in the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act,[xxxiii] the Principle Act, nor in the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and

fees) Rules, 2014,[xxxiv] the Rules; except for the condition of showing sufficient interest on the matter which is provided for under rule 4 of the Rules.

Leaving the issue of time limits which is provided for under rule 6 and the importance of showing sufficient interest on the matter under rule 4 of the Rules, other conditions to be considered by the applicant before making the application for judicial review were not codified when the rule were made in 2014 despite their effects in the application for judicial review. As we have seen above that failure of the applicant to demonstrate in the affidavit the above named conditions the reliefs of judicial review fail or rejected. Taking consideration of their effects in the application for judicial review they ought to have be specifically spelt in the respective statutes not only to be followed by the judicial review applicants but to know them in advance.

CHALLENGES

Political Resistance Towards Application for Judicial Review

Judicial review application in Tanzania faced a great resistance from the TANU government after Tanzania attained independence in the year 1961. The resistance came when the TANU government did not want to entrench principles of Human Rights in the constitution of the country. Principles of Human Rights were not provided in the Independent Constitution of 1961, the Republican Constitution of 1962 nor in the Interim Constitution of 1965. The same move went on when the Constitution of the United Republic of Tanzania of 1977 was enacted in 1977. The independent leaders feared challenges from what they called enemies of independent who would use the provisions of human rights to frustrate the new government.[xxxv] With the 5th Constitution amendment of 1984, the Bills of Rights were at the first time entrenched in the Constitution of the United Republic of Tanzania, 1977 which application was suspended for five years up to the year 1992.

The practice of the government to resist the applications for judicial review is not direct but the government uses various tactics to discourage citizens from challenging the government. In most case the government uses her legal institutions like police, regulatory authorities and sometimes courts.

- **Police arrest**

The police have been used to arrest and accuse those people who have been challenging the government to having committed a crime and sometimes without any trial. Prof. Luhangisa in his dissertation Paper explains a scenario in which one magistrate of Shinyanga District Court was arrested after having granted bail to one Joseph Kassela Bantu in the case of *Republic Vs. Joseph Kassela Bantu.*[xxxvi]

In another scenario, recently on August 13, 2023 one of the big challenger of the DP World contract between the government of Tanzania and Dubai Dr. Wibroad Peter Slaa was arrested while at home at Mbwen area, Kawe Dar-es-salaam accused of treason. The arrest of the challenger of the government are intended to close their mouth to take more actions on the subject matter. Therefore arrest has been used to threaten applicants to refrain from further taking action to challenge the arbitrary actions of the public authorities.

- **Criminalization**

This tactic is used by the police force when it treats some conducts of the activist to challenge the arbitrary decisions of the government. In the circumstance, people found struggling to challenge the government actions are accused of having contravened certain criminal provisions. For example people who accuse the government to commit certain action they are condemned to seduce which is an offence under the Magazine Act. In the case of Bulyanhulu scandal where fifty miners were allegedly buried alive and caused their death, the act of the challengers of the government to call for further investigation was treated as sedition which is a criminal offence. In another scenario Tundu Antiphas Lissu, in 2017 he allegedly called president Magufuli a dictator and accused him of making government appointments based on favouritism and nepotism, he was consequently charged with the offence of using abusive language against the president Magufuli.[xxxvii]

- **Threatens**

It is reported that many people who happened to challenge the government are given threatening messages warning them not to continue challenging the government. Always those threatening messages came from unknown persons. Tundu Lissu few days before his horrible attack dated July, 2018 complained to the IGP that he was threatened of being attacked by

people not known. That has been common to many challengers of the government to claim to have been given threatening messages endangering their lives.

- **Criminal charges**

This is a technic used by the government to charge and prosecute criminal charge those people found challenging the government. Mr. Tundu Lissu, a lawyer of (LEAT) and Nchala Rugemelezi, the president of the Lawyers Environmental Team (LEAT) who identified the deaths of miners at Bulyanhulu area faced a charge of sedition against the government together with Mr. Augustino Lyatonga Mrema, leader of the opposition party of Tanzania Labour Party (TLP) who had asked for independent investigation into Bulyanhulu massacre. In this case fifty miners were allegedly buried alive during the eviction by force of thousands of miners from Bulyanhulu mining area to pave way to investors with license.

- **Disqualification/Waiver of position**

The above named scenario is not the only one but they are many others including the one recently happened concerning the status of Dr. Wilbroad Peter Slaa who was stripped of the status of being an ambassador. By statement issued by Director of Presidential Communications Ms Zuhura Yunus on Friday night stated President Samia Suluhu Hassan's decision to strip of Dr Slaa's diplomatic status was effective from the day of September 1, 2023.[xxxviii] This tactic is not the first one but in 2007 Prof. Costa Mahalu was tripped of his ambassador status before it was restored later after the court had cleared him of criminal charges which were leveled against him.

- **Expel from members of the party**

In Tanzania the ruling political party is the one which controls the government. Political positions like the president, members of the parliament and many other political positions are guaranteed a political party. Therefore, there are positions guaranteed by the ruling party CCM in Tanzania. As a faithful member of the party is not expected to challenge the government. Those who emerge to challenge the government are disqualifies from the party the act which eventually disqualifies the person from the position he is carrying. A good example is that of a former Speaker Job Ndugai who challenge the government to borrow money from outside the

country instead of using our own resources for our development and eventually expand the national debit. He was forced to resign his position as a speaker otherwise he was to be disqualified from the party.

In 2019 some prominent members of CCM namely Bernard Membe, January Makamba, Nape Mnauye and William Ngeleja were accused of defaming the party before the public when they challenged the government showing their dissatisfaction of what was going on in the country through a clip message which was circulating in the social media. Announcing the decision of the disciplinary committee of CCM on 28th February, 'Katibu mwenezi wa CCM' one Humphley Polepole announced that Bernard Membe was dismissed from the membership of his party.

- **Detention and abduction -**

Apart from Sometimes the victims of judicial review applications undergo unlawful or unnecessary detentions for the purpose of creating suffering to them. In the case of *Attorney General Vs. Lesinoi Ndeinai & Others*,[xxxix] the applicants were detained under the Preventive Detention Act, 1962. They accordingly challenged such detention before the High Court. One day before the delivery of a judgment which declared the detention under the Preventive Detention Act, 1962 was unlawful, the applicants were arrested now under the Deportation Ordinance. They were not released when the judgment declaring their detention unlawful. The government appealed against the order declaring the applicant's detention unlawful before the Court of appeal. Even when the CAT upheld the decision of the High Court the applicants were not released. In this case the government opted what Prof. Ruhangisa in his paper described it to be guerrilla tactic against courts decisions.

- **Denial Access to information**

This carried on by authorities to prohibit people including media and Human Right's activist groups from entering into or visiting the area where there is an arbitral event which is complained. The purpose of prohibiting people and media from entering the area is prevent the spread of the impugned event. In the case in which Mr. Tundu Lissu, a lawyer of (LEAT), Nchala Rugemelezi and Augustine Lyatonga Mrema were charged of seditious the cause of the case was the research conducted by LEAT on the Bulyanhulu massacre of August 1996, when

fifty miners were reported killed, during the eviction by force of thousands of miners from the Bulyanhulu area; this action was carried out in order to enable the Canadian owned conglomerate, Kahama Mining Company Ltd (KMCL) to take hold of the property. The miners were allegedly buried alive, after the entrances to the galleries in which they worked were bulldozed.[xl] Therefore Tundu Lissu and Lugemelezi were charged because they reported the deaths of the miners and Augustine Mrema was associated with the offence because he called for the further investigation of the event.

It is a common practice of the government authorities to prevent people and media to visit the areas where there is an allegation abuse of law in the area as it appears now in Nondo area in Shinyanga district where the government has announced eviction of people who have trespassed the Forest Reserved Area of Nindo. The visit of this area for purposes of research is upon permission of the District Authorities of Shinyanga, failure of which the visitor commits an offence.

The experience shows that if the visitor contravenes the restriction put by the state authorities visits the area or conducts research and publishes it, he is consequently condemned a criminal and may be charged of the common offence of sedition. The good example is the case of Bulyanhulu area where Mr. Tundu Lissu and Nshala Lugemelezi conducted a research in which they discovered the killing of about fifty miners who were buried alive and made a report on that. Later Mr. Augustino Lyatonga Mrema complained in public of the killing and requested for further international investigation. On April 2002, legal proceedings were instituted against Mr. Nshala Rugemeleza, Chairman of the Lawyers' Environmental Action Team (LEAT) and LEAT lawyer Mr. Tundu Lissu, for "publication with seditious intent" as per the Newspaper Act, 1976.[xli] Mr. Rugemeleza and Mr. Lissu were charged, along with Mr. Augustine Mrema, Chairman of the Tanzanian Labour Party (TLP), in connection with their statements of November 2001 demanding an independent inquiry into the Bulyanhulu massacre of August 1996, during which fifty miners were allegedly killed or buried alive during the forced eviction of thousands of miners in the Bulyanhulu mining area.[xlii]

Social Resistance towards Applications for Judicial Review

Judicial review in Tanzania is mostly affected by social altitude of the people based on the historical point of view. As a matter of fact, Africans particularly many societies of Tanzania their style of life was based on respect obedience and royalty to leaders or elders. All the time

the society was built to be royal to the authorities with no altitude of resistance or challenge to the authorities. The altitude of challenging was regarded by the society as disobedience to the leaders thus developed the habit of fear on the part of individuals to rise a finger against any decision of the public authority.

- **Fear of the Authority**

In the cause of interrogation of various people who have been affected by arbitral actions of the government authorities, they have explained their concern that they fear to quarrel with the government. A good example is that of the Indigenous people of Mwakitolyo village who were forced to leave their farms to pave way to people with licence to conduct mining without first giving them adequate compensation as required by the law. They failed to sue the government which gave the land to those investors for fear to be blamed that they discouraged investment in the country.

Judicial review tends to challenge the decisions of the authorities. In Shinyanga region it has been observed that the fear to be dealt with by the government authorities have been the cause of their failure to pursue for judicial review. One interviewee at Tinde Village complained that he was discriminated by his society commonly known as 'kutulija' as he failed to pay two heads of cows as fined, he and his wife were ordered to pay by the village leaders as disturbance for the people who responded to an alarm raised by the wife during a fight. When they were aggrieved by the fine, they decided to file an application to challenge the fine of two heads of cows done by the village leader. When the case was pending in court the village leader announced rejection of that family from the society. The word 'Kutulija' in Sukuma tribe has the meaning to disassociate a person from sharing anything with the community around him.

- **To Support the Effort of the Government**

There emerged recently a very new altitude of the society especially the society of political opposition parties who were front line to challenge the public authorities of their altitude to arbitrary treat citizens contrary to the law to declare in public their willingness to leave opposition side and join the ruling party claiming that they were supporting the effort of the government in power which was commonly termed "Kuunga Mkono Juhudi za Serikali." It appeared in some scenarios people who were leaders in the opposition side were resigning their position like the position of a member of parliament or a Ward Council and join the ruling party

in which they are reappointed to contest for the same posit by the ruling party. When they are re-elected in the same post, they became no more challenger of the arbitrary actions of the public authorities.

This altitude has been argued to be both social and political restraint towards applications of judicial review in the country. It is opined that this was the tactic of the public authorities to culminate opponents of the public administration by giving them certain positions in the government like regional and district commissioners, regional and district Administrative Secretaries, Executive Directors as well as Ambassador in various countries of the world. As they were made part of the public authorities, they found themselves unable to challenge their own government.

Economic Challenges in the Application of Judicial Review

An application for judicial review is not an easy tusk; that it involves the use of one's resources, time consuming and many other costs. For a person to pursue for the remedies he must have cleared his minds properly by being able to bear all the load of the case as discussed here under.

- **Fees for the Application**

The application for judicial review in Tanzania is not free of charge but it involves payment of filing fees which is always provided by law (rules). We have the Court Fees Rules, 2018[xliii] which is a general legislation which provides for filing fees in court. The amount of fees differs from action to action depending on the action or value of the property which is the subject matter of the action. The amount of fees are provided for in the First Schedule to the Rules. In case of an application for judicial review fees are paid twice. The applicant has to pay court fees when filing an application of leave to file an application for orders. If leave is granted within 14 days from the date leave was granted the applicant has to file the main application of which he has to pay another filing court fees.

Economically filing fees may be another discouraging factor for victims to file applications of judicial review. If the applicant has no money to pay fees he may apply to the registrar of the High Court for a waiver of fees. But this procedure is not clear in the law as the law does not prescribe ways to make the application for a waiver of fees to the Registrar of the High court. Therefore, these requirements make the law and procedure for making applications of judicial review cumbersome, complex and difficult to follow.

- **Advocates Costs**

As we have already discussed somewhere before in this research paper that law and procedures for the application of judicial review are complex and contains a lot of conditions for one to properly file it. Therefore it is not easy for a lay person to perform and follow. As the result there in a need for the applicant to employ a lawyer for assistance to make his application properly instituted in court. In the event the applicant will have to pay the lawyer instruction fees as prescribed in the Advocates Remuneration Order, 2015[xliv] which also increases the expenses of the application hence discouragement.

- **Time Taken**

It has been observed that the time taken for the determination of an application for judicial review has been long due to the exchange of pleadings among parties. Good example is the determination of an application of leave to file an application for orders should be heard and determined with 14 days from the date of filing. It is clear in rule 5 (4) of the Law Reform (Fatal Accidents …) Rules, 2014[xlv] that the court is directed to hear and determine the application within 14 days. Upon interrogation of the judges in respect of this fact it has been observed that in practice such a time has not been successfully complied too due to other procedural factors. One of the procedural factor is the requirement of summoning the Attorney General whose appearance makes the application inter-partes that requires the Attorney General to counter the application something which consumes another 14 days.

It appears that where the victims of the arbitrary actions of the public authorities are busy with other economic activities may not tolerate the longtime of engaging himself with the application for judicial review instead of engaging in economic activities.

- **Cost in Case of Failure**

It is a threatening situation when a person whose application has failed with cost. The failed applicant will have to pay the cost paid by the respondents to his or their advocates as the case may be, filing fees and any other cost to be determined by the Deputy Registrar of the High Court during the determination of the Bill of Cost. When a person thinks of paying cost in the event of the failure or refusal to grant the application, refrains from instituting judicial review proceedings in court. In several times courts have issued cost when dismissing application of

judicial review. In the case of *Pili Kisenga Vs. The Attorney General*[xlvi]Masoud J. when dismissing the application for judicial review ordered the applicant to pay cost. The reason behind the order for cost was given that although judicial review is a public matter but it was instituted by individual for persona interest not public interest.

PROPOSITION OF THE REFORM

As we have seen above, laws and procedures regulating applications for judicial review contain many shortfalls which makes them not exhaustive to cover all circumstances in the application for judicial review in Tanzania. Therefore, reforms of these laws is something inevitable.

i. Amendments of the Laws

There is a need for amendment of some laws relating to the application for judicial review. For the purpose of this dissertation, it is proposed to make amendment of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review and Fees) Rules, 2014,[xlvii] the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act and the Appellate Jurisdiction Act. There is a need to incorporate some important prerequisites for the grant of judicial review which are so crucial but not codified. As stated before, there is need to include a provision stating the need for the applicant to make sure that he has exhausted all statutory remedies before he files for judicial review or the provision stating that no application for judicial review is granted where the applicant has other available remedies on the matter. Other important rules are that which requires the applicant to do so in good faith and issues of public duty.

Further amendment should be done in the Rules to include the right of appeal of both orders refusing or granting application for leave and substantive application in both cases of the criminal and civil natures. Since an order granting or refusing an application of leave is an interlocutory order the Rules should state categorically that appeal should be done upon leave of the court. The important of obtaining leave of the court in respect of the interlocutory order especially for the applicant is to show the court that such an order has finally concluded the matter hence the right to appeal though is an interlocutory order.

According to the result of the interview of various legal fraternities it has been observed that the effect of the denial or grant of the application of leave to file an application for orders of

certiorari, mandamus and prohibition in criminal and civil cases are the same. Therefore the law is not clear when it allows an appeal against an order refusing or granting an application for leave to file application for orders in only the civil case[xlviii] and denying appeal against the same order in criminal cases.[xlix] Therefore there is a need for harmonization of the situation by making a provision which allow appeals on the order granting or refusing an application of leave to file an application for order in cases of a criminal nature in the same way as it is allowed in cases of Civil nature.

The amendment of the Appellate Jurisdiction Act[l] is proposed to amend section 6 which deal with appeals of criminal cases should contain a provision impair material with section 5 (2) of AJA to include appeals to the court of Appeal on interlocutory orders upon leave of the court. This amendment will serve the purpose of the party aggrieved by the order granting or refusing application for leave of a criminal nature to appeal to the court.

CONCLUSION

The application of the existing laws and procedure for the application of judicial review faced both legal, political, social and economic factors which make people fail to pursue for judicial review when affected by arbitrary actions or omissions of the public authorities. Much has to be done to make sure that the available laws and procedures regulating applications for judicial review are well known to people, friendly and attracts victims to apply. The amendments of the law to include provisions which state conditions for the application for judicial review in a clear term is done the law regulating applications for judicial review should contains clear provisions for a party aggrieves by any order refusing an application for leave or an order refusing or granting an application for orders in both civil and criminal cases get an opportunity to appeal to the Court of Appeal of Tanzania. It doesn't matter whether such a right of appeal is a matter of right or upon obtaining leave of the court, the important thing is that there should be a provision in the rules which regulates applications for judicial which confers a right of appeal to the court of appeal other than using other laws to pursue of the appeal if aggrieved by any of the above mentioned orders.

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ENDNOTES

[i] RAMADHANI A. (2009). Judicial Review of Administrative Action as the Primary Vehicle for the Protection of Human Rights and the Rule of Law. [A paper presented to the Southern African Chief Justices Conference, at Kasane, Botswana].
[ii] *Ibid.*.
[iii] Cap. 358 of the laws.
[iv] Cap 33 of the Laws, R.E 2019.
[v] *Op Cit.*
[vi] The Constitution of the United Republic of Tanzania, 1977 as amended
[vii] Op.Cit
[viii] Cap. 310 of the Laws, Revised from time to time.
[ix] [1983]TLR 375 (HC).
[x] Mic. Criminal Cause No. 29 of 1978 HC at Mbeya (Unreported).
[xi] Misc. Land Cause No. 6 of 2011 (unreported) at page 4).
[xii] [1987] TLR 78.
[xiii] G.N. No. 324 published on 5/9/2014.
[xiv] *Op Cit.*
[xv] *Ibid.*
[xvi] *Ibid*.
[xvii] *Ibid.*
[xviii] *Ibid*.
[xix] Cap. 310 R.E. 2019.
[xx] Op Cit.
[xxi] Cap 141 of the Laws.
[xxii] *Op Cit.*
[xxiii] *Op Cit*.
[xxiv] Civil Appeal No. 46 of 2016 CAT at Dsm (Unreported).
[xxv] *Op Cit.*
[xxvi] *Op Cit.*
[xxvii] *Op cit.*
[xxviii][1986] TLR 72 (HC Bukoba).
[xxix] Misc. Civil Application No. 27 of 2017 HC at Dodoma (Unreported).
[xxx] [1987] TLR 78 (HC).
[xxxi] The Law Reform (Fatal Accidents Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014.
[xxxii] *Ibid*.
[xxxiii] *Op Cit*.
[xxxiv] *Op Cit*.

[xxxv] Proposals for the Republic Paper No. 01 of 1992 cited by M.K.B. Wambali on his Article titled "The Doctrine of the Rule of Law and the functioning of the Government of Tanzania p. 125.
[xxxvi] (1970) HCD No. 170.
[xxxvii] See The East Africa Newspaper dated 26th July, 2017 with the heading; "Tanzanian's Tundu Lissu charged with abusing President."
[xxxviii] See a letter addressed to the public by Director of Presidential Communications Ms Zuhura Yunus dated 1st September, 2023.
[xxxix]Criminal Appeal No. 52 of 1978 CAT at Arusha (Unreported).
[xl] The Observatory, (2001), 'Tanzania: Judicial proceedings against the Lawyers' Environmental Action Team (LEAT): The Observatory for the Protection of Human Rights Defenders, a program of FIDH and OMCT, a Requests for URGENT intervention in the situation in Tanzania.
[xli]*Ibid.*
[xlii] *Ibid.*
[xliii] Government Notice No. 247 published on 01/06/2018.
[xliv] Government Notice No. 264 published on 17th July, 2015.
[xlv] *Op Cit.*`
[xlvi] *Op Cit.*
[xlvii] Government Notice No. 324, Published on 5/9/2014.
[xlviii] S 5 (2) of Cap. 141, R.E 2019.
[xlix] See the case of Wilfred Onyango Mgonyi (*Supra*).
[l] *Op Cit.*