

**IN THE HIGH COURT OF TANZANIA  
TABORA DISTRICT REGISTRY  
AT TABORA**

**MISC. CIVIL APPLICATION NO. 52 OF 2018  
(Arising from Miscellaneous Civil Appeal No. 32 of 2017, Misc.  
Civil Application No. 16 of 2016, Civil Application No. 5 of 2016  
and the original Civil Case No. 25 of 2015 of the High Court of  
Tanzania at Tabora)**

**MARCO TLUWAY MALLANGE..... APPLICANT**

**VERSUS**

**PRINCIPAL SECRETARY MINISTRY  
OF DEFENCE AND NATIONAL SERVICE.....FIRST RESPONDENT  
THE ATTORNEY GENERAL.....SECOND RESPONDENT  
THE CHIEF DEFENCE FORCES OF  
THE TANZANIA PEOPLES DEFENCE FORCE..THIRD RESPONDENT  
THE COMMANDING OFFICER  
25KJ MILAMBO.....FOURTH RESPONDENT**

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**RULING**  
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Date of Last Order: 21/08/2020

Date of Delivery: 13/11/2020

**AMOUR S. KHAMIS, J:**

Marco Tluway Mallange filed an application for extension of time within which to apply for leave to file judicial review for the orders of mandamus against the actions, decision and non - compliance by the Tanzania Peoples Defence Forces, the third respondent herein.

The application was filed by way of chamber summons under Section 14 (1) of the Law of Limitation Act, Cap 89 R.E 2002 and Section 95 of the Civil Procedure Code, Cap 33 R.E 2002.

The respondents filed a joint counter affidavit sworn by Rwegira Deusdedit, a state attorney and a separate notice of preliminary objection on two grounds, namely:

1. That this application is bad in law since this Court has no jurisdiction to extend time for causes of actions which are time barred.
2. That Honourable Court is not properly moved to determine this application since the applicant has moved the Court under non applicable law on account of Section 17 (1) and 19 (1) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap 310.

When the application was fixed for hearing, Mr. Xavery Ndalahwa, learned state attorney assisted by Mr. Auson Makanjo, legal officer with the Ministry of Defence, appeared for the respondents.

The applicant appeared in person through video conference.

The preliminary objections were ordered to proceed by way of written submissions and a schedule for the submissions was set.

For no apparent reasons, none of the parties filed the submissions to date.

I am aware of the legal position that this Court has adopted in a series of cases for parties who defaulted to file submissions in accordance with its orders.

Generally the Court has ruled that failure to file written submissions is a manifestation of failure to prosecute the case.

That position was clearly stated in **FREDRICK A.M MUTAFURWA V CRDB 1996 LTD & OTHERS, LAND CASE NO. 146 OF 2004** (unreported), wherein Rugazia, J (as he then was) held that:

*"Times out of number this court has held that the practice of filing submissions is tantamount to a hearing and, therefore, failure to file the submissions has been likened to non appearance or want of prosecution..."*

In **MS OLYMPIO KOWERO V EDITOR OF THE EXPRESS & THREE OTHERS, CIVIL CASE NO. 176 Of 2005** (unreported), Kalegeya, J (as he then was) ruled that:

*"Legally, where a party fails to file written submissions in compliance with a scheduled order, the consequences similar to those of failure to appear and prosecute or defend, as the case may be, come into play. In the circumstances, the Plaintiff is taken to have failed to prosecute the*

*preliminary objection which stand dismissed accordingly"*

I am also conscious of this Court's duty to uphold the overriding objectives of the Civil Procedure Code as given in Section 3A of **THE CIVIL PROCEDURE CODE, CAP 33 R.E 2019** which is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes.

With a view to attaining the just determination of the proceedings and timely disposal of the proceedings, I have opted to address the preliminary objection raised.

Sections 17 and 19 (1) of **THE LAW REFORM (FATAL ACCIDENTS AND MISCELLANEOUS PROVISIONS) ACT, CAP 310 R.E 2019** are relevant for the purposes of this application. They read that:

*"17 (1) The High Court shall not, whether in the exercise of its civil or criminal jurisdiction, issue any of the prerogative writs of mandamus, prohibition or certiorari.*

*(2) In any case where the High Court would but for subsection (1) have had jurisdiction to order the issue of a writ of mandamus requiring any act to be done or a writ of prohibition prohibiting any proceedings or matter, or a writ of certiorari removing any proceedings or matter into the High Court for any purpose, the Court may make an order requiring the act*

to be done or prohibiting or removing the proceedings or matter, as the case may be.

3) No return shall be made to any such order and no pleadings in prohibition shall be allowed, but the order shall be final, subject to the right of appeal therefrom conferred by subsection (5).

4) In any written law, references to any writ of mandamus, prohibition or certiorari shall be construed as references to the corresponding order and references to the issue or award of any such writ shall be construed as references to the making of the corresponding order.

5) Any person aggrieved by an order made under this section may appeal therefrom to the Court of Appeal.

19 (1) The Chief Justice may make rules of Court prescribing the procedure and the fees payable or documents to be filed or issued in cases where an order referred to in subsection (2) of section 17 is sought.”

An order of mandamus is a command issued by the High Court ordering the performance of a public legal duty.

The definition was exhaustively covered in **HALSBURY’S LAWS OF ENGLAND, THIRD EDITION VOL. 2** at page 84, thus:

“The order of mandamus is an order of most extensive remedial nature, and is in form, a command

*issuing from the High Court of justice, directed to any person, corporation, or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his nature of a public duty. Its purpose is to supply defects of justice.....”*

Addressing itself to the rules stated under the existing Section 19 (1) of **CAP 310 R.E 2019** (ibid), the Court of Appeal in **MARCAINA ESTABLISHMENTS V THE COMMISSIONER OF INCOME TAX AND SIX OTHERS, CIVIL APPEAL NO. 14 OF 1995** (unreported) held that:

*“.....It may be necessary to point out here that as the Chief Justice has not made rules to govern these proceedings, the High Court has been following the procedure obtained in England. A party first makes an application for leave to apply for prerogative orders. After leave has been granted, the party then proceeds to file an application for prerogative orders.....”*

In **ALFRED LAKARU V TOWN DIRECTOR (1980) TLR 326**, this Court observed that the jurisdiction of the high Court to make orders for mandamus or any other prerogative writs is given under Section 2(2) of the Judicature and Application of Laws Act.

Section 2 (1) and (2) of **THE JUDICATURE AND APPLICATION OF LAWS ACT, CAP 358 R.E 2019** provides that:

*“2 (1) Save as provided hereinafter or in any other written law, expressed, the High Court shall have full jurisdiction in civil and criminal matters.*

*(2) For the avoidance of doubt it is hereby declared that the jurisdiction of the High Court shall extend to the territorial waters.”*

Section 2 (3) of **THE JUDICATURE AND APPLICATION OF LAWS ACT** (supra) provides that the jurisdiction of the High Court shall be exercised in conformity with the written laws which are in force in Tanzania.

In view of the express wording of Section 17 (1) of **THE LAW REFORM (FATAL ACCIDENTS AND MISCELLANEOUS PROVISIONS) ACT** (supra), I am inclined to find that the present application is not properly before this Court.

In the circumstances, the application is hereby struck out with no order for costs. It is so ordered.



A handwritten signature in blue ink, appearing to read "Amour S. Khamis", is written over the printed name and title.

**AMOUR S. KHAMIS**  
**JUDGE**  
**13/11/2020**

**COURT:**

Ruling Delivered this 13<sup>th</sup> day of November 2020 in the presence of Mr. Egidi Mkolwe, State Attorney the Respondents and the Applicant in person.



**B.R. NYAKI**  
**DEPUTY REGISTRAR**  
**13/11/2020**

**Court:** Right of appeal explained fully.



**B.R. NYAKI**  
**DEPUTY REGISTRAR**  
**13/11/2020**

