CRIMINAL APPEAL NO. 276 OF 2006- COURT OF APPEAL OF TANZANIA AT ARUSHA-	**ATTORNEY GENERAL Vs. 1. WILFRED ONYANGO MGANYI @ DADII; 2. PETER GIKURA MBURU @ KAMAU; 3. JIMMY MAINA NJOROGE @ ORDINARY; 4. PATRICK MUTHEE MURIITHI @ MUSEVU; 5. SIMON GITHINJI KARIUKI; 6. BONIFACE MWANGI MBURU; 7. DAVID NGUGI MBURU @ DOVI; 8. MICHAEL MBANYA WATHIGO @ MIKE 9. JOHN OTHIAMBO ODONGO; 10. GABRIEL KUNGU KARIUKI; 11. SIMON NDUNGU KIAMBUTHI @ KENEN; 12. PETER MAHERA KARIBA- (Appeal from the Ruling of the High Court of Tanzania At Moshi)-<u>Misc. Criminal Application No. 7 of 2006</u>- (<u>Mkwawa, J.</u>)-**	Whether an Order for a grant for leave to the respondents to apply for the orders of *Certiorari* and Prohibition is appealable. -An application for leave to apply for the orders merely ends in an interim or interlocutory decision.- -Application for Leave is the first distinct stage where leave of the court is sought so that a party can apply for the orders of *certiorari, mandamus* and prohibition. If leave is refused, that is the end of the matter and an aggrieved party may wish to appeal against such refusal. -If, however, the leave to apply for the orders is granted, then the applicant proceeds to the next stage. If a person is aggrieved by the

		order granting leave, he should as well be able to appeal against the order. **-** The orders sought after leave has been obtained may or may not be granted by the High Court. In either case, an aggrieved party may wish to appeal to the Court of Appeal. In terms of Section 17 of Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap. 310 High Court no longer issues ***prerogative writs of mandamus, prohibition and certiorari***- High

		Court is vested with jurisdiction to issue the **Orders** of *mandamus*, prohibition and *certiorari*. Section 17 of Cap. 310 also provides for a right of appeal by an aggrieved party where an application for the orders is either granted or refused. It does not deal with applications for leave to apply for the orders. -That being the position, section 17 (5) cannot be cited as the authority for a right to appeal against the grant or refusal of leave to apply for the orders. The application for leave to apply for the orders of *certiorari, mandamus, 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"*. 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. Section 17 (5) of Cap 310 is invoked only if a final decision in an application for the orders has been given: See **Senate of University of Dar es Salaam** v **Edmund Amin Mwasaga and 4 Others, Civil Appeal No. 83 of 1999.** **The question of leave to appeal does not arise in a criminal appeal-** Although decision at the leave stage is appelable 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: See **Senate of**

		University of Dar es Salaam v **Edmund Amin Mwasaga and 4 Others, Civil Appeal No. 83 of 1999.** The appeal is ordered to be struck out as incompetent

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MROSO, J.A., KAJI, J.A. And RUTAKANGWA, J.A.)

CRIMINAL APPEAL NO. 276 OF 2006

THE ATTORNEY GENERAL ..... APPELLANT

VERSUS

1. WILFRED ONYANGO MGANYI @ DADII
2. PETER GIKURA MBURU @ KAMAU
3. JIMMY MAINA NJOROGE @ ORDINARY
4. PATRICK MUTHEE MURIITHI @ MUSEVU
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8. MICHAEL MBANYA WATHIGO @ MIKE
9. JOHN OTHIAMBO ODONGO
10. GABRIEL KUNGU KARIUKI
11. SIMON NDUNGU KIAMBUTHI @ KENEN
12. PETER MAHERA KARIBA

..... RESPONDENTS

(Appeal from the Ruling of the High Court of Tanzania
At Moshi)

(Mkwawa, J.)

dated the 1st day of June, 2006
in
Misc. Criminal Application No. 7 of 2006

RULING OF THE COURT

15 October & 30 November, 2007

MROSO, J.A.:

In Miscellaneous Criminal Application No. 7 of 2006 which was filed in the High Court at Moshi, the respondents sought leave of the High Court to apply for the Orders of *Certiorari* and Prohibition and also for an Order staying criminal proceedings in four criminal cases which were before the Court of Resident Magistrate, at Moshi. The High Court, Mkwawa, J, on 1st June, 2006 granted leave to the respondents to apply for the orders of *Certiorari* and Prohibition but declined to order stay of the proceedings in the Court of Resident Magistrate.

The Attorney General was aggrieved by that decision and lodged an appeal to this Court, which is Criminal Appeal No. 276 of 2006. But five days before the appeal came for hearing Mr. Loomu-Ojare, learned advocate for the respondents, lodged a Notice of Preliminary Objection under rule 100 of the Court of Appeal Rules, 1979, (the Rules). There are two grounds to the Notice. These are

first, that the appeal is incompetent as the impugned order against which the appeal was lodged is not appellable. **Second,** that even if the order were appellable, the appellant lacked *locus standi* to institute the appeal because he was not an aggrieved party/person. The second ground was abandoned.

Because of the Notice of Preliminary Objection we could not proceed to hear the appeal and we had to hear the preliminary objection first. So we heard Mr. Loomu-Ojare together with Mr. Mwale and Mr. Boniface, learned Senior State Attorney, who together with Mr. Massara, learned State Attorney, appeared for the appellant Attorney General. It will be noted that Rule 100 of the Rules was cited as the authority under which the Notice of Preliminary Objection was filed. The rule is in Part V of the Rules which deals with Civil Appeal Matters. But the appeal before the Court was filed and is listed as a criminal appeal. Unfortunately, this point was not raised by either Mr. Boniface or his colleague or even by the Court. So, its relevance or suitability was not discussed. That being the case, we think the best option in the circumstances is to discuss the merits or otherwise of the preliminary objection, because, at any rate, there is

no specific provision for raising such objection against a criminal appeal, although, usually, rule 3 (2) (a) of the Rules is resorted to as the fallback.

At issue before us is the question whether the appeal by the Attorney General was lodged under section 17 (5) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap. 310 of the Revised Edition, 2002, henceforth to be referred to only as Cap. 310, or that it is barred by paragraph (d) of section 5 (2) of the Appellate Jurisdiction Act, 1979 as amended by Act No. 25 of 2002, henceforth, the Act. Mr. Loomu-Ojare submitted that section 17 (5) of Cap. 310 did not apply. That provision relates to a final decision in an application for any of the orders of *mandamus*, prohibition and *certiorari*. It did not apply to a decision in an application for leave to apply for these orders. The application for leave to apply for the orders merely ends in an interim or interlocutory decision. On the other hand, Mr. Boniface argued that under section 17 of Cap. 310 there are two distinct and separate stages involved. The first distinct stage is the one in which leave of the court is sought so that a party can apply for the orders of *certiorari, mandamus* and prohibition. If

leave is refused, that is the end of the matter and an aggrieved party may wish to appeal against such refusal. If, however, the leave to apply for the orders is granted, then the applicant proceeds to the next stage. If a person is aggrieved by the order granting leave, he should as well be able to appeal against the order. The orders sought after leave has been obtained may or may not be granted by the High Court. In either case, an aggrieved party may wish to appeal to the Court of Appeal. Mr. Boniface submitted that section 17 (5) of Cap. 310, therefore, applied in the case of the appeal which the Attorney General preferred against the order of the High Court granting leave to the respondents to apply for the prerogative orders.

We think it is instructive to quote here the whole of section 17 of Cap. 310 which reads as follows –

> "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) 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 proceeding 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 proceeding 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, any 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."
> (Our emphasis).

It appears to us obvious that section 17 of Cap. 310 apart from prohibiting the High Court from issuing prerogative writs of *mandamus*, prohibition and *certiorari*, it provides for the jurisdiction of the High Court to issue the orders of *mandamus*, prohibition and *certiorari*, henceforth to be referred to only as the Orders.

It also provides for a right of appeal by an aggrieved party where an application for the orders is either granted or refused. It does not deal with applications for leave to apply for the orders. That being the position, section 17 (5) discussed above cannot be cited as the authority for a right to appeal against the grant or refusal of leave to apply for the orders. Subsection (5) of section 17 as quoted specifically refers to a person who is *"aggrieved by an order made under this section ……"*, meaning section 17.

An application for leave to apply for the orders is simply a prerequisite to an application for the orders. The purpose is well explained in **Halsbury's Laws of England**, 14th Edition, paragraph 568. Therein it is said:-

> "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".

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 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"*. Again, some light is thrown on this consideration by paragraph 570 of **Halsbury's Laws** in the edition already cited above. It says:-

> "570. When dealing with an application for leave to apply for judicial review, the first and foremost consideration which the court must determine is whether the applicant has shown that he has sufficient interest in the matter to which the application relates".

We think that is a correct view of the purpose for seeking leave to apply for the orders. The view that the stage at which leave is

sought to apply for the orders is merely preliminary or interlocutory has been underscored by this Court in two recent decisions. In **Karibu Textile Mills Limited** v **New Mbeya Textile Mills Limited and 3 Others,** Civil Application No. 27 of 2006 this Court considered whether it could revise a decision in an application for leave to apply for the orders. The Court 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.

Similarly, in the case of the **Senate of University of Dar es Salaam** v **Edmund Amin Mwasaga and 4 Others,** Civil Appeal No. 83 of 1999, it was held that section 17 (5) of Cap 310 is invoked only if a final decision in an application for the orders has been given. In that appeal the respondents had obtained *ex parte* leave to apply for the order of *certiorari* against the appellant. Having obtained leave, the respondents proceeded to apply for the order to quash a decision by the appellant to discontinue the respondents from studies at the University. But the appellant raised a preliminary objection to the application, arguing that the application was incompetent

because it was based on invalid *ex parte* proceedings. The objection was overruled. The appellant appealed to this Court. Mr. Magesa, counsel for the respondents, raised a preliminary objection to the appeal arguing that the appellant had no right of appeal under section 17 (5) of Cap 310 but should have obtained leave to appeal under section 5 (1) (c) of the Appellate Jurisdiction Act, 1979. The Court upheld the preliminary objection. It is said section 17 (5) of the Ordinance (what is now section 17 (5) of Cap. 310):-

> "To our minds, the orders that fall within the purview of section 17 (5) of the Ordinance are those which, as submitted by Mr. Magesa, finally determine an application for the prerogative orders of *certiorari* one way or the other. The orders which do not touch on the substantive matter provided for under section 17 (2) ….. are not covered under the provisions of subsection (5) of section 17 of the Ordinance".

Although in that decision section 5 (1) (c) of the Appellate Jurisdiction Act, 1979 featured to the effect that an aggrieved party in a decision prior to the granting of the Orders could appeal with

leave, the relevant point for emphasis here is that section 17 (5) of Cap 310 was not applicable at that stage because *"no final decision pertaining to the application (for the Orders) before the High Court had been made"*. At any rate, as we shall see later, that was before the amendment to section 5 (2) of the Appellate Jurisdiction Act, 1979 brought in paragraph (d) to that section.

In a Kenyan case cited to us – **Bivac International SA Bureau Veritas,** [2006] 1 EA 26 the High Court of Kenya considered the question whether a decision in an application for leave to apply for the Orders of *Certiorari, mandamus* and prohibition was appellable. The High Court said at page 28 of the report –

> "The Law Reform Act gives the right to appeal against the orders of *certiorari, mandamus* and prohibition. While the right to appeal is cherished, it is trite law that it is either specifically conferred by the Constitution or by statute and the right cannot therefore be implied or inferred".

The High Court was saying here that there was no appeal, whether as of right or by leave, following a decision in an application for leave to apply for the Orders. The rationale, according to that court was:

> "Because the application for leave was determined by the court on a *prima facie* basis, the intended appeal is literally asking the Court of Appeal to assume original jurisdiction and finally determine the matter without the matter proceeding to the second stage for hearing by the High Court on merit."

Of course, in Kenya *"The appropriate procedure for the challenging of leave which has already been granted is to apply under the inherent jurisdiction of the Court (High Court), to the judge who granted leave, to set it aside."* See **Njuguna** v **Minister for Agriculture,** [2002] 1 EA 184 at page 185, stated *Per Curiam*.

Although in Tanzania, per the **Senate of University of Dar es Salaam** case supra, it was stated that a decision at the leave stage is appellable 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, in section 6 which relates to criminal appeals to the Court of Appeal. So, the question of leave to appeal does not arise in a criminal appeal.

Having reached that position we wish to discuss very briefly if, as argued by Mr. Loomu-Ojare, the appeal was also barred by section 5 (2) (d) of the Appellate Jurisdiction Act, 1979 as amended by Act No. 25 of 2002. He cited the **Karibu Textile Mills** case as authority. On the other hand, Mr. Boniface maintains that paragraph (d) of section 5 (2) of the Act as well as the **Karibu Textile Mills Limited** do not affect the appeal. He cited the **Senate of University of Dar es Salaam** case as supporting his argument. He reasoned that if it is accepted that refusal to grant leave to apply for the Orders is appellable, on the same parity of reasoning, a party who feels aggrieved by the grant of leave should also be able to appeal.

If we begin with the last point which was argued by Mr. Boniface, we think, as already indicated in this ruling, the **Senate of University of Dar es Salaam** case is distinguishable from the intended appeal.

Section 5 of the Act refers to appeals in civil cases. Paragraph (c) of section 5 (1) therefore comes into play where leave is required before an appeal can be lodged in a civil matter other than those under subsection (1) (a) and (b) of the section. However, the appeal which the Attorney General intended to pursue in this case relates to a criminal matter and as mentioned elsewhere earlier in this ruling, it does not come under section 5 (1) (c) of the Act.

With respect we do not agree that section 5 (2) (d) of the Act and the **Karibu Textile Mills Limited** case are irrelevant in this controversy. Paragraph (d) of section 5 (2) of the Act, as amended by Act No. 25 of 2002, applies to all appeals or applications for revision, whether criminal or civil, which are interlocutory or preliminary in nature. Appeals or revision in such cases are barred unless such decisions have the effect *"of finally determining the criminal charge or suit"*. The reason, as we have had occasion to say

before in **Mahendrakumar Govindji Mohamani t/a Anchor Enterprises** v **Tata Holdings (T) Limited and Another**, CAT Civil Application No. 50 of 2002 (unreported):-

> "….. is to stop the irresponsible practice by which a party could stall the progress of a case by engaging in endless appeals against interlocutory decisions or orders".

This Court in the **Karibu Textile Mills Limited** case discussed exhaustively and ruled that an application for leave to apply for the orders of *certiorari, mandamus* and prohibition is an interlocutory proceeding and that an appeal against such a decision would offend paragraph (d) of section 5 (2) of the Act. We do not find any need to repeat that discussion here. Suffice it to point out that like the application for revision in the **Karibu Textile Mills Limited** case, the Attorney General's appeal is barred by section 5 (2) (d) of the Act.

We wish to conclude this ruling by upholding the preliminary objection by Mr. Loomu-Ojare and strike out the appeal as incompetent. It is so ordered.

DATED at DAR ES SALAAM this 20th day of November, 2007.

J. A. MROSO
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(F. L. K. WAMBALI)
SENIOR DEPUTY REGISTRAR