IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: OTHMAN, C.J., MSOFFE, J.A. And JUMA, J.A.)

CIVIL APPEAL NO. 79 OF 2012

EMMA BAYO ..... APPELLANT

VERSUS

1. **THE MINISTER FOR LABOUR AND YOUTHS DEVELOPMENT**
2. **THE ATTORNEY GENERAL**
3. **TANZANIA POSTS CORPORATION**

..... RESPONDENTS

(Appeal from the decision of the High Court of Tanzania at Arusha)

(Sambo, J.)

dated the 20th day of February, 2009

in

Misc. Civil Application No. 16 of 2003

.....

JUDGMENT OF THE COURT

22nd & 25th March, 2013

JUMA, J.A.:

In Miscellaneous Civil Application No. 16 of 2003, EMMA BAYO the appellant herein, had applied before the High Court of Tanzania at Arusha for leave to file an application for prerogative orders of *certiorari* and *mandamus* against the MINISTER FOR LABOUR, SPORTS AND YOUTH DEVELOPMENT (the

1st respondent herein), THE ATTORNEY GENERAL (the 2nd respondent herein) and TANZANIA POSTS CORPORATION (the 3rd respondent herein). Had her request for leave been granted by the High Court, the appellant would have obtained for the following reliefs:-

> *1) An order of Certiorari to move the High Court of Tanzania to quash the decision of the 1st respondent, dated 17th August, 2002; and*
>
> *2) An order for Mandamus to compel and direct the 1st respondent to act according to law and appreciate the decision of Arusha Conciliatory Board to reinstate the appellant herein to the employment of the 3rd respondent.*

But her request for leave was denied. In a Ruling dismissing the application which the High Court (Sambo, J.) delivered on 20th February, 2009, the appellant was informed that she had not presented before the High Court sufficient reasons to convince the trial court into granting the reliefs which the appellant had sought. Being aggrieved, the appellant would now like this Court to quash the decision of the High Court. She has lodged in this appeal a memorandum of appeal containing the following four grounds:-

1. *That, the Honourable Judge erred in law and in fact by considering the merit of the case in an application for leave to file an application for prerogative orders of certiorari and mandamus and consequently prejudiced the Appellant's intended application.*
2. *That, the Honourable Judge erred in law and in fact in holding that no principle of natural [justice] was ever violated by the first Respondent.*
3. *That, the Honourable Judge misdirected himself by considering extraneous matters and consequently arrived at a wrong and unjust decision.*
4. *That, the Hon. Judge erred in law and in fact in holding that the Appellant did not present sufficient reasons to convince the High Court to grant the relief(s) sought in the application.*

Before we examine the merits of the four grounds of appeal, it is important first to look back and appreciate the context from which this appeal arose. From 9/2/1988 till 31/12/1999 when her services were terminated, the appellant was employed by the 3rd respondent, TANZANIA POSTS CORPORATION. The essentially employment-related dispute between her and

the 3rd respondent was first referred to the Arusha Conciliatory Board, which directed her reinstatement albeit at a lower grade of employment. This decision of the Conciliatory Board to reinstate the appellant did not go down well with her employer, the 3rd respondent.

The 3rd respondent referred the dispute to the 1st respondent herein, who is the Minister responsible for employment matters. On 17/8/2002 the Minister overturned the decision of the Arusha Conciliatory Board and ordered the termination of the appellant's employment. Because the decision of the Minister was in law not subject of any further appeal, the appellant decided to seek the prerogative powers of the High Court to challenge her termination. She had to first apply for the leave of the High Court before applying for the prerogative orders of *certiorari* and *mandamus*. As we observed earlier, the appellant's application for that leave of the High Court was dismissed, prompting this appeal.

During the hearing of the present appeal, the appellant was represented by learned Advocate, Mr. John Materu. Mr. Abdallah Chavula learned State Attorney appeared for the 1st and 2nd respondents, while Mr. Philemon Mujumba, learned Advocate appeared for the 3rd respondent. Mr. Materu basically adopted

the contents of the written submissions which he had filed on 21st September, 2012.

The first ground of appeal and the written submissions thereon centres on the contention that while considering an application for leave before applying for prerogative orders of *certiorari* and *mandamus*, the High Court went beyond the confines of the application before him and delved into, and considered the merit of the main application for prerogative orders which the appellant would have applied had she been granted leave. Mr. Materu also made an interesting submission, suggesting that if we read the decision of the High Court, we will find out that the appellant had in fact made out an arguable case to be granted leave and that this Court on appeal should proceed to grant the appellant this leave to allow her to proceed to the second stage of filing her main application for prerogative orders of *Certiorari* and *Mandamus*. On this proposition Mr. Materu urged us to seek persuasion from the decision by the Court of Appeal of Kenya in **NJUGUNA V MINISTER FOR AGRICULTURE [2000] EA 184**.

Mr. Chavula, the learned State Attorney did not oppose the appeal. He first magnanimously conceded the first ground of appeal. Mr. Chavula submitted that since the application before the High Court was only seeking the leave, it was not proper for the High Court to determine the main application for prerogative orders on merit. Mr. Chavula drew support from the same decision of the Court

of Appeal of Kenya in **NJUGUNA V MINISTER FOR AGRICULTURE** *(supra)*, which Mr. Materu had relied to persuade us. According to Mr. Chavula, the High Court was not expected to decide on the main application for prerogative orders but what it needed to do at the stage of leave was to satisfy itself (without examining the matter in depth) whether the appellant had an arguable case that the reliefs might be granted on the hearing of the substantive application. In addition, the learned State Attorney submitted that had the Judge found the application for leave wanting, the only order he could give was to strike out the application for leave instead of dismissing it as he did.

Mr. Mujumba, relying on the written submissions which he had filed earlier, at first opposed the appeal by supporting the way the trial Judge had considered the merits of the main application at the stage of leave. But later, the learned Advocate was convinced that at the stage of leave the High Court was not supposed to go into the merits of the main application for prerogative orders.

From the submissions of the learned counsel for the parties, it is clear the main issue calling for our determination, is whether it was proper for the High Court to determine the merit of the main application at the first stage of leave. The Chamber Summons application which the appellant filed in the High Court on 26th February 2003 was for grant of leave to apply for orders of *Certiorari* and *Mandamus*. The learned counsel are in agreement that the procedure pertaining

in Tanzania when applying for prerogative orders is through two stages of distinct applications for leave and later for main application. The appellant is right to contend that she went to the High Court in pursuance of leave which is the first stage of an application for prerogative orders and the High Court should not have decided the main application at the first stage of application.

Although both Mr. Materu and Mr. Chavula have placed reliance on the decision of the Court of Appeal of Kenya, **NJUGUNA V MINISTER FOR AGRICULTURE** *(supra);* it is now an established part of the procedural law of Tanzania that a person applying for prerogative orders in the High Court must first apply for leave, which if granted will be followed by a subsequent main application for the prerogative orders. We restated this established procedural law in CRIMINAL APPEAL NO. 276 OF 2006, **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** (CAT-unreported); where we said that an application for leave to apply for the prerogative orders is simply a

prerequisite to an application for these orders. We also emphasized the two-stage application for prerogative orders by quoting **The Halsbury's Laws of England**, 14th Edition, in paragraph 568:-

> ***"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".***

We also respectfully agree with both Mr. Materu and Mr. Chavula that the stage of leave serves several important screening purposes. It is at the stage of leave 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 a tribunal subordinate to the High Court. At the leave stage is where the applicant shows that he or she has sufficient interest to be allowed to bring the main application. These are the preliminary matters which the High Court sitting to determine the appellant's application for leave should have considered while exercising its judicial discretion to either grant or not to grant leave to the applicant/appellant herein.

We cannot but emphasize our restatement of the law in **ATTORNEY GENERAL VS. 1. WILFRED ONYANGO MGANYI @ DADII & 11 others (supra)** to the effect that an **"application for leave 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"*.**

It is quite apparent from its Ruling that was delivered on 20/2/2009; the High Court though ostensibly considering an application for leave, all the same went on and considered the main application. We agree with the two learned counsel that the High Court went beyond what was expected of the trial court at the stage/step of the application for leave. This overstepping is clear in the Ruling of the High Court on page 131 of the record of this appeal, where the trial Judge is making a decision on the merit of the main application for prerogative orders:

> *"The reason given by the Honourable Minister is that the charges and or allegations against the applicant had been proved as against her. This is a concrete reason, arrived after weighing the reports or evidence presented before him in that respect. Under no*

circumstances can we hold that he did not assign reasons for his decision. Given the circumstances, no principle of natural justice was ever violated by the honourable minister."

At the stage of leave, the trial Judge should not have gone into the question whether the Minister violated the principles of natural justice for purposes quashing his decision under the prerogative orders of the High Court. All considered, we find merit in Ground 1 of the appeal.

Before concluding, we propose to address ourselves at the invitation which Mr. Chavula made in his submissions that we should make a finding that the appellant herein did not in the first place properly move the High Court to hear her application for leave to apply for prerogative orders. The learned Principal State Attorney submitted that in seeking leave to apply for the orders of *Certiorari* and *Mandamus*, the appellant cited ***Section 2 (2) of the JUDICATURE AND APPLICATION OF LAWS ACT, Cap. 453, Sections 17-(2) and 15A of the LAW REFORM (FATAL ACCIDENTS AND MISCELLANEOUS PROVISIONS) ORDINANCE, Act No. 55 of 1968 as amended by Act No. 27 of 1991 and any other enabling provisions.*** Mr. Chavula submitted that section 15A which the appellant cited has never existed and as a result the High Court could not have been moved by that citation. The

learned State Attorney volunteered an advice that the appellant should have applied for leave under sections 18 and 19 (3) of the LAW REFORM (FATAL ACCIDENTS AND MISCELLANEOUS PROVISIONS) ORDINANCE, Act No. 55 of 1968 as amended by Act No. 27 of 1991.

With due respect, we shall not take up Mr. Chavula's invitation to determine the question whether the application for leave was by citation of applicable laws, properly before the High Court. We think that since the High Court delved into the merit of the main application for prerogative orders, we are not in a position to say that an application for leave was heard on the basis of a wrong citation of the applicable provisions of the law. The question whether the High Court was properly moved is a matter that can best be taken up at the High Court itself because it is one of the issues that are determinable at first step/stage when considering an application for leave to apply for prerogative orders.

For the reasons given above, we shall allow the appeal, quash and set aside the Judge's Ruling and Drawn Order both dated 20th February 2009 and remit the matter back to the High Court to hear and determine afresh before a different judge, an application for leave to apply for prerogative orders of *Certiorari* and *Mandamus*. We shall make no orders at to costs. It is so ordered.

DATED at ARUSHA this 23rd day of March, 2013.

M.C. OTHMAN
CHIEF JUSTICE

J.H. MSOFFE
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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

Z.A. Maruma
DEPUTY REGISTRAR
COURT OF APPEAL