

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MUGASHA, J. A., KENTE, J.A. And MASHAKA, J.A.:)

CIVIL APPEAL NO. 119 OF 2020

F.3329 CPL BUBERWA LEONARD MAGAYANE..... 1ST APPELLANT

F.8892 PC IMAN MTEGA ABIHADI.....2ND APPELLANT

VERSUS

MINISTER FOR HOME AFFAIRS.....1ST RESPONDENT

INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

**(Appeal from the Ruling of the High Court of Tanzania
at Mwanza)**

(Rumanyika, J.)

dated the 16th day of October, 2019

in

Misc. Civil Cause No. 12 of 2019

RULING OF THE COURT

10th & 11th July, 2023

MUGASHA, J.A.:

The appellants, **F.3329** Cpl Buberwa Leonard Magayane and F.8892 Pc Iman Mtega Abihadi, were employed by the Tanzania Police Force for about 11 and 17 years respectively until their termination on 21/3/2017 following allegations of misconduct occasioned by self-assignment of police duties at Nyamhongoro Petro area in Mwanza. The first appeal before the Inspector General of

Police, the 2nd respondent herein was not successful and they preferred an appeal to the Minister for Home Affairs, the 1st respondent seeking to demonstrate their innocence. However, the 1st respondent dismissed the appeal and this is what prompted the appellants to seek prerogative orders by way of judicial review before the High Court. Their application before the High Court was dismissed hence the present appeal.

Before the High Court, as a prerequisite, initially, vide in Misc. Civil Cause No. 7 of 2019 the appellants sought and obtained leave to file an application for prerogative orders of certiorari and mandamus against the 1st, 2nd respondents and the Regional Police Commander for Mwanza Region who throughout was not a party to this matter. As the Attorney General did not register any objection to the application for leave, the High Court Judge, Siyani, J., granted the appellants leave to seek prerogative order of certiorari.

Subsequently, vide Misc. Civil Cause No. 12 of 2019, the appellants applied for prerogative orders of certiorari and mandamus seeking to have the decisions of the 1st, 2nd respondents and the RPC Mwanza quashed and mandamus so as to compel the RPC Mwanza to reinstate them in the service of the Tanzania Police Force. However, the application was dismissed by Rumanyika, J., (as he then was)

who besides holding that the appeal was not competent, proceeded to determine the merits of application, hence the present appeal. In the Memorandum of Appeal, the appellants have fronted four grounds of complaint which we have opted not to reproduce on account of what is to be apparent in due course.

At the hearing, in appearance was Mr. Kassim Gilla, learned counsel for the appellants whereas for the respondents were Ms. Subira Mwandambo, learned Senior State Attorney, Ms. Lucy Kimaryo, Ms. Mariam Matovolwa and Mr. Francis Wisdom.

Before the hearing commenced, we wanted to satisfy ourselves on the propriety or otherwise of the application for leave to apply for prerogative orders and its effect on the substantive application to apply for orders of certiorari and mandamus.

Upon taking the floor, following a brief dialogue with the Court, the learned counsel for either parties submitted that, leave was wrongly granted and the substantive application for judicial review is vitiated. On this, it was pointed out that, the appellants' complaint that they were dismissed without being accorded a right to be heard cannot be ascertained without the charge, proceedings and the decision of the RPC Mwanza. In this regard, it was argued that, the High Court did not satisfy itself if the appellants had established a

prima facie case warranting the grant of leave to apply for prerogative orders of certiorari and mandamus. As such, it was argued that, there was no requisite leave to apply for the grant of prerogative orders. On the way forward, the Court was invited to invoke its revisional jurisdiction under section 4 (2) of the Appellate Jurisdiction Act [CAP 141 R.E 2022], to nullify the decision of the High Court which granted leave and the Ruling which dismissed the substantive application for judicial review so as to enable the appellants to initially, seek leave to apply orders of mandamus to compel the IGP to avail the appellants the impugned decision of the RPC Mwanza.

We have deliberately decided to scrutinize the application for leave because it is settled law that, an application for leave is a necessary step to an application for prerogative orders because the purpose of leave stage is to give the court an indication if the applicant has sufficient interest or has established a *prima facie* case to warrant the grant of leave to apply the prerogative orders. This was emphasized in the case of **ATTORNEY GENERAL VS WILFRED ONYANGO @ DADII AND 11 OTHERS**, Criminal Appeal No. 276 of 2008 (unreported) where relied on Halsbury's Laws of England, 14 Edition, paragraphs 568 and 570 as hereunder:

"Para 568: Leave of the court is necessary pre-condition to the making on an application for judicial review, and no application for judicial review may be made unless this leave has been duly obtained.

Para 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."

Before the High Court (Siyani, J.,) the appellants had sought leave to apply for prerogative orders against the 1st, 2nd and the Regional Police Commander for Mwanza as hereunder:

- a) *"That this honourable Court be pleased to grant leave to the Applicant to file an application for orders of:*
 - i. *Certiorari to quash and set aside the decisions of the 1st, respondent, 2nd respondent and the Regional Police Commander;*
 - ii. *Mandamus to compel and direct the 1st respondent, 2nd respondent and the Regional Police Commander to reinstate the Applicants into the Tanzania Police Force;*
- b) *Costs be provided for;*
- c) *Any other orders or reliefs that this Court may deem fit."*

In the affidavit accompanying the application for leave, the deposition included the following:

"Paragraph 9: *That, after the dismissal we requested to be supplied with copy of judgment and proceedings but the Regional Police Commander of Mwanza refused.*

Paragraph 10: *That after dismissal we promptly made several appeals orally and made close follow ups with the Regional Police Commander of Mwanza until we felt that, RPC does not act on oral appeals. So vide a letter dated 21/3/2017, we requested the 2nd respondent to supply us with the copy of judgment and proceedings so that we can appeal against Regional Police Commander's decision but also the Regional Police Commander remained silent and ignored to supply us with a copy hence we decided to formulate ground of what transpired in accordance with the circumstances of the case and what transpired in connection with the offence charged with...."*

Paragraph 11: *That after [being dissatisfied] with the decision of the Regional Police Commander without a copy of judgment and proceedings, we appealed to the 2nd respondent herein IGP, against the decisions of the Regional Police Commander*

challenging procedural impropriety and irregularities committed by the Regional Police Commander of Mwanza and forming the basis of his decisions.”

The question to be answered is whether the appellants had established prima facie case warranting the grant of leave to apply for judicial review. Before answering that question, we wish to point out that, it is crucial to point out the legal framework governing the disciplinary matters of the police and in particular the appellants. We are aware that, the disciplinary authorities and procedures in respect of police officers depending on the respective ranks, is regulated by the provisions of sections 4 to 9 of the Police Force and Prisons Service Commission Act [CAP 241 R.E.2002] and the Police Force Service Regulations G.N 161 of 1998. In terms of sections 7(6) and 8 (1) of the Police Force and Prisons Service Commission Act, no disciplinary proceedings shall be exercised against a Police or a Prisons Officer and punishment inflicted unless: **one**, a disciplinary charge is preferred against him; **two**, an inquiry is held into the charges; and **three**, he is afforded adequate opportunity to answer the charge. According to the provisions of section 7 (4) and (5) of the same Act, the Commission may delegate some of its disciplinary powers to the Inspector-General of Police who shall be the final

disciplinary authority in respect of a police officer below the rank of Assistant Inspector.

It is on record that, the appellants were junior officers or rather non-commissioned officers below the rank of the Assistant Inspector and the respective disciplinary authority, procedures, punishment and appeals are regulated by Regulations C7, C8 and C18 of the Police Force Service Regulations. While the Commanding Officer is the disciplinary authority, the Inspector General of Police is the appellate authority who shall have final decision on the disciplinary matter. Therefore, the appellants' appeal to the Minister was uncalled for.

It is glaring here that, the appellants herein had clearly shown in the application for leave their intention to challenge the decision of the RPC, Mwanza which dismissed them from the service of the Tanzania Police Force and a subject of the appeal before the 2nd respondent. However, although the decision was not availed to the appellants, despite several efforts, the appellants could not exercise meaningfully their right of appeal which is against the respective right as enshrined under article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977.

In the absence of the decision of the RPC from which stemmed an appeal before the 2nd respondent, before the High Court, Siyani,

J., although the Attorney General had no objection to the grant of the application, there was no sufficient material upon which it could be ascertained if the appellants had established a *prima facie* case to warrant the grant of leave to apply for prerogative orders. We say so because, as correctly submitted by the learned counsel for the parties, the appellants' complaint on dismissal without being afforded the right to be heard, cannot be ascertained without recourse to RPC's decision and the related charge and proceedings. In the circumstances, the proper course open to the appellants was to apply for leave to seek an order of mandamus to compel the IGP who is the final disciplinary authority of the appellants to avail them the RPC's decision, the charge and the proceedings. This is regardless of non-joinder or otherwise of the RPC because it is the IGP who is the overall in charge of the entire Tanzania Police Force.

Having considered that the 2nd respondent, IGP is the overall in charge of the Police and final disciplinary authority of the appellants and before whom an appeal was pursued by the appellants, he stands out to be in possession of the decisions of the RPC or else can require the RPC to avail the impugned decision to the appellants. In the circumstances, since leave was wrongly granted by Siyani, J, the subsequent application to apply for prerogative orders against the 1st

and 2nd respondents and the RPC Mwanza had no legs to stand on as it was not being preceded by a valid leave. This was a serious omission and we have gathered that it was acknowledged by Rumanyika, J, (as he then was) in the substantive application for prerogative orders as reflected at page 162 and 163 of the record of appeal as hereunder:

"According to the applicant's joint affidavit, the genesis of it all is that the 21/3/2017 RPC dismissing the applicants from the Police Force Service, as admitted by them, no copy of the impugned decision, proceedings or something was attached. Without the records therefore, the court could not be in a position to appreciate where, and how is it that the RPC went wrong for the court to fault one. The RPC may have, for reasons known to himself just refused to supply applicants with the copies. But it was incumbent upon the parties if anything and to start with [applying] for order of mandamus for the court [to compel] the RPC [to] release the copies.....It follows therefore that there is no way that the 1st two appellate respondents by way of judicial review should have been faulted without seeing the original impugned proceedings and

decision in the case of SANAI Murumbe and John Mwombeki Byombalirwa. Suffices the point to dispose of the entire incompetent application.”

[Emphasis supplied]

In the light of the bolded expressions, having noted that the RPC’s decision was missing, the learned Judge ought to have ended there and strike out the application for being incompetent. However, with respect, he wrongly determined the merits of the incompetent application and proceeded dismissed it. This was irregular and uncalled for because with the incompetent application there was nothing before the learned High Court Judge warranting the dismissal. See: **NGONI MATENGO CO-OPERATIVE MARKETING UNION LTD VS ALIMAHOMED OSMAN** [1959] 1 EA 577.

In the premises, the defective leave to apply prerogative orders vitiated the substantive application and it cannot be spared. Thus, we nullify the Ruling granting leave to apply for prerogative orders in Misc. Civil Cause No. 7 of 2019 and Ruling in Misc. Civil Cause No. 12 of 2019 the substantive application for prerogative orders. On the way forward, we agree with the learned counsel for either side we invoke our revisional power under section 4 (2) of the AJA to quash and set aside the respective decisions and the resulting orders. If the

appellants so wish, they may within 90 days of this order, initially, apply for leave to seek an order of mandamus so as to compel the IGP, the 2nd respondent to avail them with a copy of the decision of the RPC.

DATED at MWANZA this 11th day of July, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

This Ruling delivered this 11th day of July, 2023 in the presence of Mr. Kassim Gilla, learned counsel for the Appellants and Ms. Subira Mwandambo, learned Senior State Attorney for the respondents, is hereby certified as a true copy of the original.




J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL