

IN THE HIGH COURT OF TANZANIA

AT ARUSHA

MISCELLANEOUS CIVIL CAUSE NO 9 OF 2004

In the matter of an application by NARCIS R. MBARARA

And

In the matter of a decision by the Minister for Regional

Administration and Local Government

And

In the matter of Application for Leave to apply for Orders of Certiorari

Between

NARCIS R. MBARARAAPPLICANT

And

1. HON MINISTER FOR REGIONAL

ADMINISTRATION AND LOCAL

GOVERNMENT 1ST RESPONDENT

2. THE MUNICIPAL COUNCIL ARUSHA2ND RESPONDENT

3. THE HON ATTORNEY GENERAL3RD RESPONDENT

RULING

8th December, 2006 – 14th February, 2008

R.SHEIKH, J

The applicant NARCIS R. MBARARA is by this application seeking leave of this court to file an application for an order of certiorari to quash the decision of the Minister for Regional

certiorari to quash the decision of the Minister for Regional Administration and Local Government made on April 2004. The respondents have resisted the application by counter-affidavits. The respondents have also taken objection to the application on the following grounds:-

1. The application is incompetent because it has been filed before the applicant has exhausted all the remedies to him. The applicant has failed to comply with the provisions of Government Notice No. 397 of 2000.
2. The application is incompetent because it is supported by an affidavit which is bad in law.

In his submission on the first ground of objection Mr Mzikila learned State Attorney contended that an Order of certiorari is a discretionary remedy issued to quash a decision of a public authority where among others there is no right of appeal that in the instant matter the applicant had a right of appeal to the president under the provisions of G.N No 397 of 2000. Mr. Mzikila argued that as the applicant did not exercise his right to appeal to the president, this application is untenable in law, an application for certiorari not being an alternative to an appeal.

Regarding the second ground of objection Mr. Mzikila has submitted that the affidavit supporting the application is incurably defective as paragraphs 8, 9 and thereof contain legal arguments and conclusions.

In response to the first ground of objection learned counsel for the applicant (Imboru Chambers) has submitted that G.N No 397 of 2000 is no longer in force, that the G.N. was made under 33 A of the Local Government Service Commission Act No. 10 of 1982, which was repealed by the Public Service Act No 8 of 2002 (under S.35 (c) thereof). Learned counsel argued as parent Act under which G.N No 397 of 2000 was made was repealed, and as there is no saving provision of the rule in the new Act, G.N 397 which is a subsidiary legislation must be deemed to be repealed and no longer in force. It was argued that with the coming into force of Act No 8 of 2002 the applicant had no right of appeal under G.N. No 397, inter alia on the second ground of objection learned counsel maintained that the alleged legal arguments and conclusions are no more than material propositions of law by the applicant.

I have carefully considered the respective submissions by both learned counsel and examined the provisions of the law relied upon by the objecting counsel in ground one. It is not disputed S.35 of the public service Act No. 8 of 2002 repealed act No 10 of 2000. The question is was G.N. 397 also repealed with the repeal of the main act under which it was made? Indeed as submitted by the learned State Attorney contrary to protestations made on behalf of the applicant, there is a savings provision in the new Act, i.e act no 8 of 2002 by virtue where of G.N No 397 of 2000 was saved and continues to be in force. S.36-(1) of act no 8 /2002 (cap 298 R.E. 2002) provides:-

“(1) notwithstanding the repeal of the Acts specified in section 35 –

(a) subsidiary legislation made under the Act repealed by this section shall continued in force until revoked or replaced by appropriate authority;”

Apparently, as submitted, by the learned State Attorney the Minister responsible for Local Government who is the appropriate authority has to date neither revoked nor replaced G.N. No 397/2000. I

cannot therefore but agree with Mr. Mzikila that the provisions of G.N 397 are served by S.36 (1) (a) of Act No 8 of 2002 and that G.N No 397 of 2000 is still in farce and non compliance with the appeal procedure/remedy provided under regulation 63(1) (a) providing for a right to appeal is a material omission which makes this application for leave to seek certiorari premature and incompetent.(See the case of SANAI MURUMBE V. MUHERE CHACHA (1990) T.L.R. 54). For Section 33 (1) (b) of Cap 1 R.E. 2002 provides that where an Act repeals and re-enacts an Act, any subsidiary legislation made under the repealed Act shall so far as it is consistent with the repealing Act, continue in operation as if made under the repealing Act, for the avoidance of doubts.

As regards the second ground objection upon carefully examining the paragraphs objected to I agree with counsel for the applicant that there are no legal arguments or conclusions in paras 8,9 and 10.

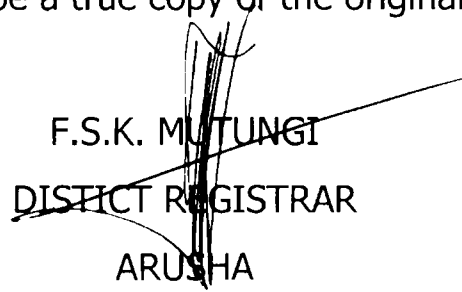
In the event ground one of the objections succeeds while ground two is overruled. Accordingly the application is being incompetent is struck out. I make no order as to costs.

Sgd,
R. SHEIKH
JUDGE
6/01/2008

Ruling delivered this 14/02/2008 in the presence of Mr. Kimomogoro learned counsel for the applicant and Mr. Mzikila learned State Attorney for the 1st and 3rd respondents, and Mariam, B/C, in the absence of the 2nd respondent.

Sgd.
R.SHEIKH
JUDGE
14/02/2008

I hereby certify this to be a true copy of the original.


F.S.K. MUTUNGI
DISTRICT REGISTRAR
ARUSHA
12/8/2008