IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM MAIN REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 26 OF 2012

GERVAS SHAYO AND CHARLES JACKSON ..... APPLICANTS

VERSUS

MUHIMBILI UNIVERSITY OF HEALTH

AND ALLIED SCIENCES ..... RESPONDENT

RULING

F. Twaib, J:

The Applicants, Gervas Shayo and Charles Jackson, have filed the present application for leave to apply for orders of *certiorari* against the decision of the Muhimbili University of Health and Allied Sciences. Until 15th December, 2011, the Applicants were students in the Respondent University. On 15th December 2011, they were suspended from studies on grounds that they took part if planning, organising and executing unlawful acts, in contravention of the University By-Laws.

By notice filed on 3rd December, 2012, the Respondent raised three points of preliminary objection. Mr. Donatus Nungu, learned counsel, represents the Respondent in these proceedings, while Mr. Peter Kibatala acts for the Applicants. They orally argued before me in advancing their clients' respective positions.

For purposes of convenience, I will deal with the three points of preliminary objection in reverse order, starting with the third, then the second, and finishing with the first.

In the third point of preliminary objection, Respondent's counsel avers that the joint affidavit in support of the application is defective for containing matters of law, which runs contrary to the provisions of **Order 19 rule (3) (1) of the Civil Procedure**

Code, Cap 33. Counsel specifically mentioned paragraphs 8, 9 and 10 of the said affidavit. The Applicants' counsel's reply was to the effect that the said averments are factual and not legal, and that, therefore, the preliminary objection is without merit.

I have read the impugned paragraphs, and I am inclined to agree with Mr. Kibatala that their contents are factual and not legal. Though there are references to the law in those paragraphs, those references are merely incidental. The substance and purpose of paragraphs 8 and 9 are definitely factual, while paragraph 10 relates to an advice on matters of law that the Applicants received from their advocate. This form of averment is, in my view, quite proper in law and does not infringe upon the provisions of **Order 19 rule (3) (1) of the CPC**. I would overrule the third point of preliminary objection.

The second point of preliminary objection is that the application is incompetent for joining the 2nd Applicant, Charles Jackson, because he did not follow the appeal procedure provided for in **Part VI of the MUHAS Students' By-Laws, 2010**. Counsel Nungu has argued, correctly, that the an order for judicial review can only be granted where the Applicant has exhausted all available remedies. This position was laid down in the case of *Njake Enterprises & Oil Transport Ltd. v EWURA*, Commercial Case No. 3 of 2010 and my own decision in **Michael Thomas Nyungi v EWURA & Another** Misc. **Civil Cause No. 28 of 2011.**

The issue is whether, in this case, there was still a remedy available to the 2nd Appellant before coming to this Court for judicial review.

Let me point out, from the outset, that an affirmative answer to this issue would not render the whole application incompetent. It can only mean that the 2nd Applicant is removed from the proceedings, leaving the 1st Applicant to proceed with his application.

In resisting this point of preliminary objection, learned counsel Kibatala cited the Court of Appeal decision in *John Mwombeki v RPC, Bukoba* (1986) TLR 73, at 88 and 89, where Mwalusanya, J. held, among others things, that "the Court has discretionary powers to determine in each individual case whether the alternative remedy is available to the aggrieved party is in fact a remedy or an illusion."

Learned counsel argued that annexure TMA-4 to the Applicants' joint affidavit is so conclusive in its contents and designed in such a way that any supposed alternative remedy would be an illusion. With respect, I agree. Annexure TMA-4 is the letter by

which the Applicants were informed of their expulsion from studies by the Respondent. One clearly gathers from it that the decision was not made by the Disciplinary Authority of MUHAS, which can be challenged by way of an appeal pursuant to **regulation 21.0 (i) of the MUHAS By-Laws**, 2010, upon which Mr. Nungu relied. The regulation states:

> An appeal by an aggrieved party against a decision of the Disciplinary Authority shall lie with the Appeals Committee as provided under section 32 (1) (b) of the MUHAS Charter and rules, 2007."

In the case at hand, the decision was not made by the Disciplinary Authority. It was made by the Council of the University. The Counsil's decisions are not appellable to any other person or body within MUHAS—certainly not the Appeals Committee under **regulation 21.1 (i)**. For this reason, I agree with counsel for the Applicants that there was no viable alternative for any of the Applicants to challenge the decision within the framework of the MUHAS Charter or the Students By-Laws. I would dismiss the second point of preliminary objection.

I will now move to determine the first point of preliminary objection. It is to the effect that the application is incompetent for failure to join the Government. Learned counsel for the Respondent opines that this a mandatory requirement under **section 18 (1) and (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act**, Cap 310. Respondent's counsel has strongly resisted this point. He argued that MUHAS is a corporate body under **section (4) (2) of the MUHAS Charter**. Under it, MUHAS has powers of suing and being sued.

This means, assuming that Mr. Kibatala is right, that it means MUHAS is subject to the rules of certiorari. He thus thinks that there is no need of joining the Attorney General, since the University is "not the Government of the United Republic."

Section 18 (1) of Cap 310 provides:

> "Where leave for application for an order of mandamus, prohibition or certiorari is sought in any civil matter against the Government, the court shall order that the Attorney-General be summoned to appear as a party to those proceedings; save that if the Attorney-General does not appear before the court on the date

specified in the summons, the court may direct that the application be heard ex parte."

Does the word "Government" in the above provision include an entity such as the Respondent herein? This question necessitates an interpretation of the word in the context of relevant law. I will begin with **Section 18 (3) of Cap 310**, which states:

> "For the purposes of this section the term "Government" includes a public officer and any office in the service of the United Republic established by or under any written law."

The term "public office" is not defined in Cap 310. Resort to other relevant laws is thus necessary. One such law is the **Attorney General (Discharge of Duties) Act**, 2005. It provides for the discharge of duties and exercise of powers of the Attorney General with other public offices and officers. **Section 3 of the Act** defines "public service", for the purpose of the discharge of duties of the Attorney General, the service in a Ministry of the Government, Government Departments or Government Agencies.

From its establishing instrument (the Charter) and the law under which the Charter was made and adopted (**the Universities Act, 2005**), MUHAS is not a Government Ministry or Department. Is it a Government Agency?

A Government Agency is a legal term that has been specifically defined under section 3 of the **Executive Agencies Act, Cap 245**. It is to be established under **section 245 of that Act** by the Minister responsible for the sector in which it is established. MUHAS, as far as this Court can tell and/or take judicial notice of, is a University established under the provisions of the **Universities Act**. More specifically, it was established by an order of the President of the United Republic under powers bestowed upon him by **section 25 (2) of the Universities Act, 2005**. It cannot, therefore, be considered a Government Agency so as to fall under the term "government agency".

However, under the **Interpretation of Laws Act, Cap 1**, "public office" or "public department" includes every officer or department invested with or performing duties of a public nature, whether under the immediate control of the President or not, and includes an officer or department under the control of a local authority, the Community (presumably the East African Community) or a public corporation. A public corporation

is defined as "a body corporate established by or under any written law, other than the Companies Act, and includes a corporation sole so established".

Having traversed all these legal provisions, I am of the considered view that MUHAS, being a corporate body under the sole ownership of the Government and the immediate control of the President, qualifies as a public corporation in terms of section 4 of the **Interpretation of Laws Act**, Cap 1 and, indeed, **section 18 (1) and (3) of Cap 310**.

In the circumstances, therefore, MUHAS it is covered by **section 18 (1) of Cap 310**. All that the provision requires in an application such as the present is for the Court to "order that the Attorney General be summoned to appear as a party to the proceedings". With due respect to Mr. Nungu, this does not render the proceedings incompetent. In fact, the duty is imposed upon the Court to make such an order.

Consequently, the first point of preliminary objection is partly allowed to the extent that an order is hereby issued for the Applicants to amend their pleadings accordingly so that the Attorney General may be summoned to appear as a party to these proceedings, in terms of **section 18 (1) of Cap 310**.

It is so ordered.

DATED AND DELIVERED in Court this 16th day of July 2013.

F. Twaib

Judge