IN THE HIGH COURT OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CIVIL CAUSE NO. 14 OF 2018

In the Matter of an Application for Leave to apply for Orders of Certiorari and Mandamus

AND

In the Matter of an Application to Challenge the Decision of the Judicial Service Commission Removing the Applicants from Employment as Magistrates in the Public Interest

BETWEEN

BAGENI OKEYA ELIJAH .... 1ST APPLICANT

THOMAS WAYOGA OCHUODHO .... 2ND APPLICANT

NYASIGE KAJANJA NYAMWAGA .... 3RD APPLICANT

ANDREW HOSTA SIWALE .... 4TH APPLICANT

AND

THE JUDICIAL SERVICE COMMISSION .... 1ST RESPONDENT

THE CHIEF COURT ADMINISTRATOR .... 2ND RESPONDENT

THE ATTORNEY GENERAL .... 3RD RESPONDENT

Date of last Order: 06/07/2018
Date of Ruling: 20/07/2018

RULING

I. ARUFANI, J

The applicants filed in this court the application for leave to apply for prerogative orders of Certiorari and Mandamus against the respondents mentioned hereinabove. The application is made under section 18 (1) of the Law Reform (fatal Accident and Miscellaneous Provisions Act, Cap 310, R.E 2002 (Hereinafter referred to as Cap 310) and Rule 5 (1) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014 (Hereinafter referred to as the Rules). The application is supported by supplementary affidavit sworn by the applicants and their statements. The respondents resisted the application by filing the counter affidavits sworn by Miss Neisha Shao, learned State Attorney.

The facts of the case as can be grasped from the supplementary affidavit of the applicants and counter affidavit of the respondents and oral submissions from both sides are to the effect that, the first and third applicants were employed by the first respondent, Judicial Service Commission in 2012 and 2007 respectively as Resident Magistrates. While the second respondent was employed by the first respondent in 2010 as a Primary Court

Magistrate, the fourth respondent was employed in 1990 as a Registry Assistant and in 2010 he was promoted to the post of a Primary Court Magistrate.

All the applicants were interdict on divers date after being charged with criminal offences for being suspected to have involved in corrupt practices. The first and third applicants were acquitted from the charge were facing in 2016 and the second and fourth applicants were acquitted in 2014. On January, 2018 all the applicants were served with letters from the first respondent requiring them to appear before the commission on 17th day of January, 2018 to discuss about their employment.

The applicants said that, after going to the said meeting there was no any discussion which was held but were asked their names and where were coming from and told the purpose of the meeting was to inform them they had been removed from their employment on public interest. They said to have been told to return to their station to wait the letters of removing them from their employment. The applicants said to have received letters from the second respondent dated 19th day of January, 2018 which informed them the first respondent had removed them from their employment on public interest with effect from 18th day of January, 2018.

The applicants told the court that, they were aggrieved by the decision of the first respondent which was communicated to them by the second respondent as were not informed what public interest was being served to the extent of causing their employment to be terminated. The applicants stated in their oral submission that, they were aggrieved by the decision of the first respondent to remove them from their employment while they had committed no any disciplinary offence. They also said there is no any disciplinary charge laid against them and required to answer the same.

The first applicant submitted that, they have come to this court to seek for leave to apply for prerogative orders of certiorari and mandamus after going through the Judiciary Administration Act, No. 4 of 20011 and find it is not providing for the procedure of appeal for a Judicial Officer who has been retired from the employment but is providing for procedure of appeal for a Public officer only. He said that, article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 is giving them right of appeal against the decision of the first respondent which terminated their employment.

The first applicant said the decision of the first respondent contain illegality, irrationality and procedural impropriate which as

stated in the case of **Sanai Murumbe and Another V. Muhere Chacha** [1990] TLR 54 are the grounds for granting leave to apply for prerogative orders. He said the decision to retire them from their employment made by the first respondent was arrived with bad motive and bad intention as they were called to talk about their employment but were informed they had been terminated from their employment.

He argued that, section 35 (2) of the **Judiciary Administration Act,** No.4 of 2011 and Regulation 22 (1) of the **Judicial Service (General, termination of Service and Disciplinary) Regulations**, GN No. 660 of 1998 provides for procedure to be followed in case of dismissal or removal of a public officer or judicial officer from his employment. He said the above laws requires before removing or retiring a Judicial Officer or Public Officer from his employment a written charge to be prepared and served to an employee and the employee to be given an opportunity to answer the same. He said the above procedure was not followed as they were only served with letters informing them they had been retired from their employment on public interest.

Principally the rest of the applicants adopted the submission of the first applicant save for the fourth applicant who referred the court to the case of **Itika Keta Mwakisambwa V. Mara**

Cooperative Union (1984) limited [1993] TLR 206 where it was stated that, judicial review is supposed to be sought where there is no alternative avenue. He also referred the court to the case of **Simon Manyaki V. Institute of Finance Management** [1984] TLR 304 where it was stated that, before a person's right is taken he must be given right to be heard. All of the applicants prayed the application to be granted.

In reply Miss Neisha Shao, learned State Attorney who represented the respondents in this Matter prayed the court to adopt the counter affidavit of the respondents. She referred the court to a book titled **Judicial Remedies on Public Law** by Cleves Lewis, Published in 1992 by Sweet and Maxwell which explains the essence of leave is to prevent the time of the court from being wasted by busybodies with misguided or trivial complaints of administrative errors and to remove the uncertainty in which public authorities might be left.

She stated that, the factors to be considered before granting leave to apply for prerogative orders includes; presence of an arguable case, the application must be made without delay and where there is no alternative remedies. She said the applicants have failed to show there as an arguable case as were given chance of fair hearing before the first respondent and the decision made

by the first respondent was communicated to them. She said the Commission had a substantive reason to retire the applicants from their employment as were charged with criminal offences. She said although the applicants were acquitted from their respective criminal charges but the first respondent had power to charge them with the disciplinary charges under the aforementioned Regulations and retire them from their employment.

The learned State Attorney argued further that, as stated in the book titled **Judicial Remedies on Public Law** (Supra) the applicants were supposed to state if there is alternative remedy and if there is, they have used the same and if not why do they think the judicial review is the appropriate forum for them. She said failure to disclose those facts may cause the court to refuse to grant the leave sought. She said the applicants have neither stated in their affidavits nor in the submissions if there is an alternative remedy.

She argued that, as the applicants were employees of the Judiciary they could have gone to the Commission for Mediation and Arbitration as section 2 of the Employment and Labour Relations Act is not excluding the employees of the Judiciary to take their disputes to the Commission for Mediation and Arbitration (Hereinafter referred to as the CMA). Alternatively they were

required to state in their affidavit why they opted to come to this court to seek for judicial review. It is from the above reasons the learned State Attorney prayed the application of the applicants to be dismissed with costs.

In their rejoinder the first applicant stated that, as they have stated in their submission in chief their services was being governed by the Judiciary Administration Act and its Regulations of 1998 there is no any room for a Judicial Officer to apply for any other remedy after the termination of his or her employment. He said that, even if it will be said they would have gone to the CMA but that is not a bar for them to apply for leave to apply for the prerogative orders. To bolster his argument he referred the court to the case of **Alfred Lakamu V. Town Director of Arusha**, Misc. Commercial Cause No. 19 of 2015 (Unreported) which is said Hon. Mwambegele, J (as he then was) stated that, availability of another remedy is not a bar for granting leave to apply for prerogative orders.

The first applicant referred the court to the case of **Hans Wolfgang Golcher V. General Manager, Morogoro Canvas Mill Ltd,** [1987] TLR 78 where it was stated that, each case is supposed to be determined on its own merit. He said in their case they are intending to challenge violation of their constitutional

rights and violation of the natural justice which are the circumstances caused them to come to this court. He also referred the court to the case of the **Republic Ex-parte Peter Shirima V. Kamati ya Ulinzi na Usalama, Wilaya ya Singida, the Area Commissioner and the Attorney General** [1983] TLR 375 where it was stated that, judicial review should not be denied because of the existence of other remedy.

Coming to the argument that the applicants have no arguable case they have submitted that, they have an arguable case as the procedures laid down in the Judiciary Administration Act and its Regulations of 1998 were not complied with when their employment was being terminated. They said there is no disciplinary charge which was prepared for them and given chance to reply to the same. At the end they prayed the court to disregard the submission of the learned State Attorney and granted their application.

Having heard the argument from both sides the court has found proper to state at this stage that, the applicants have managed to establish without dispute that, they were employees of the Judiciary and their employment was terminated on 18th day of January, 2018 on public interest. The issue is whether they are entitled to be granted leave to apply for the prerogative orders to

challenge the decision of their employer to terminate their employment.

The court has found as the applicants are seeking for leave of the court to apply for prerogative orders of certiorari and mandamus, some of the important factors the court is required to take into consideration in determining the matter is as submitted by the learned State Attorney that, they includes the applicants to show they have an arguable case and there is no other remedy and if there is other remedy why was not used. The court has also found as stated in the book titled **Judicial Remedies in Public Law** (Supra) cited by the learned State Attorney the court is also required to see if the applicants have locus standi or interest in the matter and if the application for leave was made promptly or without delay.

The above stated factors for granting leave to apply for prerogative orders being of certiorari, mandamus or prohibition are similar to the factors stated by the Court of Appeal of Tanzania in the case of **Emma Bayo V. The Minister for Labour & Youths Development and Others**, Civil Appeal No. 79 of 2012 where the court stated that:-

"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."

By being led by the above stated factors the court has carefully going through the supplementary affidavits of the applicants and statement supporting the chamber summons and

the counter affidavit of the respondents and after considering the arguments and submissions made to this court by both sides it has found there is no dispute that the factor of the application to be filed in the court without delay was well complied with. The court has arrived to the above finding after seeing the letters of retiring the applicants from their employment was written on 18th day of January, 2018 and the application at hand was filed in this court on 6th day of April, 2018 which is well within six months provided under Rule 6 of the Rules.

The court has also found there is no dispute that the applicants have locus standi or interest in the matter at hand because they were terminated from their employment which has direct effect to their daily lives. Under that circumstances it cannot be said the applicants have no locus standi or interest in the matter. Coming to the issue of arguable case the court has considered the submission of the learned State Attorney that the applicants have no arguable case but failed to comprehend her argument properly. She did not make sufficient elaboration in her argument as to why she was arguing the applicants have no arguable case.

To the contrary the court has found the applicants stated clearly that they are intending to apply for prerogative orders against the termination of their employment which they alleged

was done contrary to the law. To the view of this court that is enough to establish they have arguable case which can be entertain by the court to determine if their termination was done in accordance with the law. The court has considered the learned State Attorney's argument that the termination of the applicants was done in accordance with the law as were called before the Commission, heard and notified the decision of the Commission and find that argument should wait mature consideration in the substantive application if leave to file the substantive application will be granted.

The court has arrived to the above finding after seeing it is not required to go into details of the matter at this stage of application for leave. This is getting support from the Kenyan decision made in the case of **Njuguna V. Minister for Agriculture** [2000] 1 EA 184 where it was stated that:-

> *"The test as to whether leave should be granted to an applicant for judicial review is whether, without examining the matter in any depth, there is an arguable case that the reliefs might be granted on the hearing of the substantive application."*

Since the applicants are arguing termination of their employment was made contrary to the law as there is no disciplinary charge which was place before them by the Commission and required to make their defence before being terminated from their employment which to their view is contrary to the law and principle of natural justice, the court has found that is enough to establish they have an arguable case which can be entertained by the court in the substantive application if it will be filed in court after the leave being granted.

With regards to the factor of having an alternative forum or avenue the court has gone through the Judiciary Administration Act, No 4 of 2011 and the Judicial Service (General, Termination of Services and Disciplinary) Regulations, No 660 of 1998 cited in the submissions of the applicants and find as rightly argued by the applicants they are not providing for where a judicial officer whose employment has been terminated should take his grievances if he or she was not satisfied by the decision to terminate his or her employment.

Having find the said laws are not stating where an aggrieved Judicial Officer should take his or her grievances the court has considered the argument of the learned State Attorney that, the applicants had an alternative avenue as they could have gone to

the CMA and find that, it is true that the applicants who were employees of the Judiciary are not exempted from taking their dispute to the CMA. The court find section 2 (1) of the Employment and Labour Relations Act, No. 6 of 2004 states and listed the Institutions which are exempted from using the aforementioned law to find the solution of their dispute and the employees of the Judiciary are not among the employees who are exempted from taking their dispute to the Commission.

However, the requirements of having an alternative forum or avenue where applicants could have taken their grievances requires the alternative remedy to be convenient and feasible. This was said so in the case of **Abadiah Selehe V. Dodoma Wine Company Limited**, [1990] TLR 113 where it was held inter alia that, as a general rule the court will refuse to issue the prerogative orders if there is another convenient and feasible remedy within the reach of the applicant. The court has considered the submission of the applicants that they are intending to challenge violation of their constitutional rights and violation of their natural justice and find the avenue of the CMA is not convenient and feasible for determination of the said issues.

Even if the CMA would have power to entertain the applicants' grievances but as state in the case of **Republic Ex-parte Peter**

Shirima (Supra) that is not necessarily a bar to grant leave for the applicants to apply for prerogative orders they want to seek from the court. The court stated inter alia in the said case that:-

> *"The existence of the right to appeal and even the existence of an appeal itself, is not necessarily a bar to the issuance of prerogative order; the matter is one of judicial discretion to be exercised by the court in the light of the circumstances of each particular case"*

Therefore though the court was not supplied with the copy of the decision stated to have been made by Hon. Mwambegele, J (As he then was) in the case of **Alfred Lakamu** (Supra) which the first applicant said he stated therein that, availability of another remedy is not a bar for granting leave to apply for prerogative orders but the position stated in the case of **Republic Ex-parte Peter Shirima** is enough to make this court to find still the applicants can be granted leave to apply for prerogative orders which are grantable at the discretion of the court.

In the strength of all what has been stated hereinabove the court has found the applicants have managed to satisfy the court

order as to costs.

Dated at Dar es Salaam this 20th day of July, 2018

I. ARUFANI
JUDGE
20/07/2018

COURT.

Ruling delivered today 20th day of July, 2015 in the presence of the first applicant in person and in the absence of the applicants but in the presence of Miss Grace Lupondo, Learned State Attorney for all respondents. Right of appeal is fully explained to the parties.

I. ARUFANI
JUDGE
20/07/2018