IN THE HIGH COURT OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

MISC CIVIL CAUSE No. 06 OF 2019

IN THE MATTER OF AN APPLICATION FOR THE PRELOGATIVE ORDER OF CERTIORARY

AND

IN THE MATTER OF THE LAW REFORM (FATAL ACCIDENT AND MISCELLANEOUS PROVISIONS ACT (CAP 318 R.E 2002)

AND

IN THE MATTER OF THE DECISION/AWARD OF THE HON. MINISTER FOR STATE, POLICIES, PARLIAMENTARY AFFAIRS, LABOUR, EMPLOYMENT YOUTH AND THE DISABLED

BETWEEN

M/S OLAM (T) LIMITED ---------- APPLICANT

AND

1. LEONARD MAGESA ---------- 1ST RESPONDENT

2. HON. MINISTER FOR STATE, POLICIES, PARLIAMENTARY AFFAIRS, LABOUR, EMPLOYMENT, YOUTH AND DISABLED -------- 2ND RESPONDENT

3. THE HON. ATTORNEY GENERAL ---------- 3RD RESPONDENT

RULING

29th April & 15th July, 2020

TIGANGA, J

In this application, the applicant moved this court under section 17 (2), 18 (1) of the Law Reform (Fatal Accidents and Miscellaneous provision as amended (Cap 310 Re 20002) and Order XLIII Rule 2 of (Cap 33 RE 2002), as to per the court order dated 25th April, 2019 Hon. Rumanyika, J.

The order sought is basically one which is certiorari to quash the decision of the 2nd Respondent herein after referred to as a minister. The other order is that, this being the Labour matter, the costs of the application be shelved.

The application was by chamber summons, supported by two documents namely, an affidavit sworn by Cosmas Sollo the applicant accountant dully authorized to do so, and the statement of the applicant.

In the statement, the reliefs sought are three namely that; an order for certiorari be granted against the 2nd respondent's order in favour of the 1st respondent be quashed, and an order that the applicant had already paid the terminal benefit be made.

The grounds of the application are;

i. That the decision by the 2nd respondent was arbitrary and contrary to the rules of natural justice.
ii. That the decision was irrational, i.e unreasonable and unfair.

iii. That the decision was tainted with procedural impropriety.

iv. That the decision violated the provision of Article 13 (6) (a) of the constitution of the United Republic of Tanzania 1977 as amended.

The affidavit put forth the historical back ground of the dispute between the applicant and the 1st respondent. Needless to reiterate every detail of the affidavit, a summary I will make will, in my opinion serve purpose.

Briefly, the background of the matter as contained in the affidavit and other record shows that the 1st respondent was employed by the applicant. Sometime in the year 2000, his employment was terminated, and following that termination he was paid his terminal benefits.

Dissatisfied, he referred the matter to the Principal Labour Officer for Mwanza who upon failure to settle the matter referred the matter to court via Employment Cause No. 53 of 2000 - Mwanza District Court. At the same time the respondent lodged an appeal to the 2nd respondent against the decision of the Conciliation Board, by the 1st respondent. The dispute referred to the District Court was struck out for want of jurisdiction.

While the matter was pending before the 2nd respondent the (Minister), the 1st respondent lodged an appeal before the High Court against the decision of the District Court via Civil Appeal No. 40/2000. On 10/05/2001, the 1st respondent withdrew the appeal from High Court, before filing the case High Court, Civil Case No. 19/2001 which was also dismissed on 27/08/2001 before Masanche, J, for being res - judicata.

Aggrieved by the decision, the 1st respondent appealed to the Court of Appeal before the same was dismissed on 23rd day of February 2005 for being time barred.

Due to that dismissal of the appeal by the Court of Appeal, the 1st respondent filed Misc. Civil Application No. 17/2005 asking for extension of time to file Notice of Appeal out of time, that, was also dismissed by Hon. Mchome, J for want of sufficient reason for failure to file the notice in time.

He also having been not satisfied lodged the Notice of Appeal to challenge the Ruling of Hon. Mchome, J, which notice he has never withdrawn in accordance with the law. This means that, the 1st respondent was at the same time before two forum, before the Court and the 2nd Respondent (the Minister of Labour) fighting for the same reliefs.

According to the affidavit it is deposed that the 2nd respondent, did not notify the applicant of the presence of the appeal, and neither did the applicant had chance to respondent to the complaint by the 1st respondent.

That the applicant lodged High Court Miscellaneous Application No. 15/2005 asking for an order for certiorari which was granted on 20/02/2014 by my sister Hon. De Mello, J but the same was overturned by the Court of Appeal on 11/12/2015.

Following that decision of the Court of Appeal, the applicant subsequently re applied in Misc. Cause No. 02 of 2016 for leave to extend time to file an application for certiorari and grant for leave to apply for

certiorari which two orders were granted on 25/04/2019, hence this application.

In his counter affidavit, the 1st respondent vehemently disputed the application, in that he has never accepted any payment of terminal benefit that is why he instituted the complaint to the Labour Officer.

He deposed that the decision to refer the matter to the 2nd respondent is in accordance with the law as opposed to the allegation that it is an abuse of court process.

That the existence of the Notice of Appeal does not relate to the 2nd respondent's decision as the decision of the 2nd Respondent is not an alternative remedy. He also said the obligation to apply to struck out the Notice is of the applicant if he so wishes. Regarding the present application, he said that the court is *functus officio* as the Court of Appeal has already overruled the decision of this court on the issue at hand.

The 2nd and 3rd respondents also countered the application by first filing the Notice of Preliminary Objection, and later the Counter Affidavit. In the notice they were challenging the jurisdiction of the court. In the counter affidavit, Mr. Lameki Merumba, though noted the chronological facts of event, but said the presence of the notice does not in any way relate with the decision of the 2nd respondent as the same was purely administrative and the same can only be challenged by judicial review. Responding on paragraph 13 of the affidavit, he deposed that, the decision of the 2nd respondent is not per incurium as it has never been challenged in any way.

Responding to paragraph 14 of the affidavit he disputed its content and stated that, what was before the 2nd respondent was an appeal which no physical appearance was required? It was his averment that the 2nd respondent passed through the documents (record) and gave verdict.

By the order of the court, the application was argued by way of written submissions. In support of the grounds of application, Mr. Kisigiro, Advocate raised a complaint that the decision by the 2nd respondent did not afford an opportunity to the applicant of either to hear him or requires his documents. He submitted that the decision did not comply with the rule of natural justice. He cited the case of **Mohona vs University of Dar es Salaam** [1981] TLR 55. It was held in that case that the failure to summon the person against whom the decision needs to be revised by the minister results into miscarriage of justice.

He also cited the decision of **Aero Helicopter (T) Limited Vs F. N. Jansen** [1990] TLR 142.

It is his submission that denying the right to be heard caused the 2nd respondent to reach at incorrect decision by awarding something which had already been paid by the applicant. He concluded that point by submitting that, the decision by the 2nd respondent was arbitrary, contrary to the rules of natural Justice while again tainted with procedural impropriety hence occasioning the miscarriage of justice.

Further to that Mr. Kisigiro Adv submitted that, when the minister was proceeding to determine the appeal before him, there was a pending appeal before the Court of Appeal, that means, there were two appeal

running concurrently over the same cause of action. He submitted that, the notice was still pending when, the minister issued the order, and therefore the Minister was *functus officio* to entertain the matter. In buttress this position, he cited the case of **Aero Helicopter (T) Limited Vs F. W. Janson** (supra) which according to him was referred with approval by the Court of Appeal in Civil Application No. 94 of 2004 between **Sudi S. Ally Kipetion & 3 others Vs Bakari Ally Mwera**, where it was held that once a Notice of Appeal, is lodged to the Court of Appeal, the High Court or other Tribunal (s) is/are *functus officio* to the application.

Further to that while aware of the presence of the appeal, yet still the 1st respondent did not inform the Minister of the existence of the Appeal before the Court of appeal. Mr. Kisigiro learned counsel submitted in the end that the application be allowed.

Replying to the submission in chief, the 1st Respondent urged this court not to grant the order of *certiorari* as there is no decision to be quashed by this court. This is because, the order of the Minister had already been implemented by the applicant, this because the Minister upheld the decision of the Board which decided that the 1st respondent was properly terminated, and so was supposed to be paid his terminal benefit, which the applicant had already done.

According to him, quashing the decision of the minister will mean also to quash what has already been paid by the applicant. The other reason as to why the order for certiorari be refused is the facts that there is alternative remedy which would have been taken by the applicant just

like to appeal or filing of a suit. He cited the authority in the case of **Obadiah Salehe vs Dodoma Wine Company Limited**, [1990] TLR 113 and the case of **Moris Onyango vs. Customs Department, Mbeya** [1990] TLR 150.

He further submitted that the availability of the alternative remedy is only matter to be considered by the court on hearing application for certiorari, he cited the case of **John Byombalirwa Vs The Regional Commissioner & Regional Police Commander,** [1986] TLR 73.

He submitted that after the Minister had issued his order, the applicant would have notified the minister that he had already implemented the payment of terminal benefit. He in the end asked the application to be dismissed.

While replying to the submission in chief for the 2nd and 3rd respondents Mr. Merumba submitted that the applicant was supposed to prove all four grounds of application, he was supposed to do so in the affidavit and in the submission. In this application the applicant did not prove the said grounds.

Responding to the complaint that the applicant was condemned un heard, he submitted that what was before the Minister was the appeal which can be heard without the attendance of the parties.

Further to that, there is also no evidence submitted to show that the applicant was denied the right to hearing to justify the quashing of the order.

He cited the case of **Sanai Murumbe and Another Vs Muhere Chacha** (1990) T.L.R. 54 in which it was held inter alia that,

i. An order of certiorari is one issue by the High court to quash the proceedings of and decision of a subordinate court of tribunal or public authority where, among other there is no right of appeal.
ii. The High Court is entitled to investigate the proceedings of lower courts or tribunals or public authorities on any of the following ground apparent on record.
    a. Taking into account matters which it ought not to have taken into account.
    b. Not taking into account matters which it ought to have taken into account.
    c. Lack or excess of jurisdiction.
    d. Conclusion arrived at is so unreasonable that no reasonable authority could ever come to it.
    e. Rules of natural justice have been violated.
    f. Illegality of procedure or decision.

He urged the court to be guided by the above decision.

In rejoinder the applicant, submitted that, the allegation that the applicant had already implemented the decision before, does not reflect what the applicant believe, as he had already filed execution proceedings before the court claiming Tshs. 217,720,000/= in Misc. Execution Application No. 07/2018 which was filed after the decision of the Minister.

He submitted that the 2nd respondent did not in his order bless the payment effected by the applicant, but ordered the applicant to pay.

Last is that if the application will not be granted, the applicant will be condemned to pay twice.

Rejoining the submission by the 2nd & 3rd respondents, he submitted that the decision that he pays all the terminal benefit to the second respondent was per in curium because it did not consider that he had already been paid.

He also submitted that the 1st respondent, while aware of the presence of the appeal did not inform the 2nd respondent that there was an appeal.

He submitted by insistence that the right to be heard was denied to him as he did not even know what the 1st respondent was complaining about before the 2nd respondent. He finally submitted that since his constitutional right under Article 13 (6) (a) of the constitution of Tanzania of 1977, as amended which provide for the right to fair hearing. He prayed the application to be allowed the order of certiorari be granted quashing the decision of the minister.

That marked the submissions by both parties, now having summarized at length the contents of affidavits and submissions by the parties. It is I think important to make reference to section 17 (2) and 18 (1) of the Law reform Fatal Accidents and Misc provisions Act (Cap 310 RE (2002) as amended which provides.

Quoted:

> *"(2) In any case where the High Court would but for subsection (1) have had jurisdiction to order the issue of a writ of mandamus requiring any act to be done or a writ of prohibition prohibiting any proceedings or matter, or a writ of certiorari removing any proceedings or matter into the High Court for any purpose, the court may make an order requiring the act to be done or prohibiting or removing the proceedings or matter, as the case may be".*

"Section 18(1) 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".*

From the foregoing, these provisions empowers this court to make an order of certiorari where it has been proved that the act or decision of public body or authority, discharging public function. The traditional grounds of judicial review have been ultra vires, error of law on the face of the record and natural justice. While the modern classification comprises the grounds propounded by Lord Diplock in **Council for Civil Service**

Union and Minister for Civil Service [1985] AC 374, which are; **illegality, irrationality, and procedural impropriety.**

As earlier on pointed out, at page 9 above for this court to exercise its powers to issue an order for certiorari against the decision of the 2nd respondent it must be established that the decision was arbitrary and contrary to the rules of natural justice. It must also be proved that, the decision was irrational, i.e unreasonable and unfair, or that it was tainted with procedural impropriety and, or it violated the provision of Article 13 (6) (a) of the Constitution of the United Republic of Tanzania 1977 as amended.

In this case, there is no dispute that the 2nd respondent decided the appeal lodged by the 1st respondent, basing only on the materials submitted to him by the 1st respondent, the evidence is clear that he neither called the applicant to appear and counter what was submitted by the 1st respondent nor require him to submit his documents to be examined along with those submitted by the 1st respondent.

It is a trite law that, every court or tribunal or public authorities mandated to decide on the right, obligation or liability of the people must, afford those likely to be affected by its decision an opportunity to be heard. It is a principle that, non affording the parties the opportunity to be heard is a clear violation not only of the principle of natural justice but also the constitutional right as enshrined under the constitution of the United Republic of Tanzania 1977 article 13 (6) (a).

In the case of **Mbeya - Rukwa Autoparts and Transport Limited Vs Jestina George Mwakyoma,** (2003) TLR 251, in which the English case of **Ridge vs Baldwin** (1964) A.C 40 was relied upon, the Court of appeal of Tanzania Emphasized that;

> *" in this country natural Justice is not merely a principle of common law; it has become a fundamental constructional Right Article 13 (6) (a) includes the right to be heard among the attributes of equality before the law"*

In the case of Tenelec Limited vs. The Commissioner General, Tanzania Revenue Authority, Civil Appeal No. 20 of 2018, CAT - Dodoma, it was held *inter alia* that;

> *"The right of a party to be heard before the adverse action or decision is taken against such a party is a basic constitutional duty and that any violation of which nullifies the entire proceedings;"*

In this matter, it was a constitutional duty of the 2nd respondent to make sure that before deciding on the complaint submitted to him by the 1st Respondent to afford the applicant an opportunity to be heard, either by causing him summoned to appear before him or cause him to submit his defence in writings after serving him with the complaint submitted by the 1st Respondent. Failure to do so tainted his decision, and made it to be issued in a serious violation of the constitutional right of hearing. It is in the circumstance amenable for judicial review, in particular, the order of certiorari to quash it.

I thus grant the application, an order of certiorari is hereby issued as prayed, the decision of the 2nd respondent, which is impugned in this application is quashed, as prayed.

After quashing such an order, in the normal course of the matter, I would have ended here. However, for future use, I find it pertinent albeit briefly to say a word on the 1st respondent behavior. As pointed out, the 1st respondent has been before two different forums namely the Court of Appeal and the Minister pursuing for the rights which stems from the same cause of action. This is called forum shopping and it has adverse effect in the administration of justice.

It is more likely to cause two conflicting decisions of the two competent authorities, which is likely to cause the decision collision between the Judiciary and the Executive.

This behaviour should be condemned. the 1st Respondent, and other peoples of his like, are advised to use only one forum at a time to avoid the danger which I have pointed out above. This is said without prejudice to what I have decided in the substantive part of this ruling.

It is so ordered.

DATED at **MWANZA,** this 14th day of July, 2020.

J. C. Tiganga
Judge
14/07/2020

Ruling delivered in the presence of the parties' representatives on line, via teleconference.

J. C. Tiganga
Judge
14/07/2020