IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY FOR MBEYA

AT MBEYA

MISC CIVIL APPLICTION NO.12 OF 2019

EMMANUEL S.STEPHEN .....APPLICANT

VERSUS

1) THE PRESIDENT OF THE UNITED REPUBLICOF TANZANIA

2) THE CHIEF SECRETARY PRESIDENT'S OFFICE

3) TEACHERS SEVICE COMMISSION

4) MBEYA DISTRICT COUNSEL .....RESPONDENTS

5) THE ATTORNERY GENERAL

RULING

Date of last Order: 29.05.2020

Date of Ruling: 17.06.2020

DR. MAMBI, J.

This ruling emanates from the preliminary objection raised by the respondents. The applicant EMMANUEL S. STEPHEN filed an application for Judicial Review against the decision of the respondents. The applicant made his application under Section 2(1) and (3) of the Judicature and Applications of laws Act, Cap 358

[R.E.2002] and Rule 5 (1) of the Fatal Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure Fees) Rules, 2014.He prayed this court to proceed with application *experte* but due to the nature of this matter this court ordered all parties to be summoned and the matter be determined *inter-party.*

In his application, the applicant sought leave of this court to apply for prerogative orders of mandamus, prohibition and certiorari against the decision of the 1st, 2Nd and 3rd respondents for being terminated from his employment without legal procedures. The applicant in his application advanced grounds which are reproduced as follows;

i. That on 13/11/2015 the applicant received a letter from the 4th respondent indicating intention to suspend him from payment of salary without being charged and removed from pay roll by the 4th respondent in November, 2015.
ii. That on 16th November, 2015 the applicant wrote a reply letter to the 4th respondent but the 4th respondent proceed to remove him from pay roll effective from November, 2015.
iii. That on 29th December, 2015 as a teacher of Ilungu Secondary School, the applicant received a call from Headmaster of the school informing him that, he was required to visit the office of District Education Officer on 30th December, 2015 for official issues.
iv. That on 30th December, 2015 when the applicant visited the office he was surprised to find the 3rd respondent disciplinary

committee at District level to read charges for being absent against him and required the applicant was required to respond on the said charges at the same time.

v. That since the applicant was not served with summons to appear before the disciplinary committee, he was not prepared for defense as he was as well not served with charge sheet.

vi. That since the committee didn't consider the applicant's prayer, he requested them to respond on the charges and made his defense in writing where he condemned them for suspending him from pay roll prior to the decision of disciplinary committee as required by law.

vii. That without color of right and considering the applicant's defense that, the procedures was not followed on charges against him and on 13/12/2017 he received a copy of letter of termination from the 3rd respondent on the charge of absenteeism from work station

viii. That on 14/02/2017 the applicant lodged his appeal to the Public Service Committee against the decision of the 3rd respondent and claimed against the unfair procedure used by the 3rd respondent in its decision of termination

ix. That surprisingly while the applicant waiting for the decision of appellate body that is Public Service Commission, on 19th January, 2018 he received a letter of a decision of his appeal from the 3rd respondent confirming its own decision while he lodged his appeal to the Public Service Commission.

x. That on 12th February, 2018 the applicant lodged an appeal against the said decision to the 1st respondent that is President of United Republic of Tanzania claiming the unfair procedure used to terminate the applicant from the work by the lower bodies unfortunately on 3rd November, 2018 he received a letter from the office of the President of United Republic of Tanzania by 2nd respondent confirming the decisions of lower bodies.

In his reply to the application failed by the applicant, the respondent through his learned State Attorney Mr.Rogers raised a preliminary objection that the matter has been prematurely brought before this court the preliminary objections on the following points:

1) The application is incompetent and bad in law for being hopelessly time bared
2) The application is incompetent and bad in law for being preferred under wrong provision of the law
3) The application is incompetent for being vague and general and lack of reliefs on judicial review

Addressing the points of the preliminary objection, the respondents through the Learned State Attorney Mr.Rogers submitted that the application by the applicant is incompetent since it was filled out of the time required by the law. He referred Rule 6 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and fees) Rules 2014. That Rule provides that;

"The leave to apply for judicial review shall not be granted unless the application for leave is made within six months after the date of

the proceedings, act or omission to which the application for leave relates".

The laerned State Attorney argued that while the decision was made by the respondents on 23rd October 2018, the applicant filed his application on 29th day of April 2019, after six months contrary to the law. He averred that the application at this court was time bared. Addressing the second point of the preliminary objection, the Learned State Attorney Mr.Rogers submitted the applicant has not properly moved this court by writing the wrong provision of the law that is Section 2(1) and (3) of the Judicature and Application of Laws Act, Cap [358 R.E 2002]. He argued that this law has nothing to do with orders of certiorari. He was of the view that the provision cited by the applicant is only applicable where there is lacuna on specific legal issue such orders being sought by the applicant. He refereed the decision of the court in ***Bunda District Council v Virian Tanzania LTD [2000] TLR 385. PG 388*** *where his lordship* Hon Nsekela, J as he then observed that;

"Inherent jurisdiction must be exercised subject to the rule that if the Code does contain specific provisions which would meet the necessities of the case in question such provisions should be followed and the inherent jurisdiction should not be involved. It is only when there is no clear provision in the Civil Procedure that inherent jurisdiction can be invoked"

Mr.Rogers further submitted that the applicant failed to adhere to the relevant provisions of the law that is Rule 4, 5 (2) (a), (b), (c), 5(3), 5(6), 6 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014 and section 17 (1), (2) of the Law Reform (Fatal Accidents and

Miscellaneous Provisions) Act, Cap 310 [R. E 2019]. The Learned State Attorney was of the view that non citation of the proper provisions of the law renders the application incompetent and should be struck out. He refereed the decision of the court in ***China Henan International Cooperation Group v Salvand K. A. Rwegasira***, Civil Reference No. 22 of 2005 (Unreported) CAT at DSM, page 6 as refereed in***Aloyce Mselle v The Consolidated Holding Corporation***, *Civil Application No. 11 of 2002.*

The Learned State Attorney further submitted that the application has no proper name of the applicant under the statement contrary to Rule 5 (2) (a) of GN No. 324 of 2014.He refereed the decision of the court in ***The Registered Trustees of Democratic Party v The Registrar of Political Parties and another***, Misc Cause No. 92 of 2017, (Unreported) where his lordship Hon., Wambali, as he then was observed that;

> *"It must be insisted that a statement is the most important document in an application for leave and the application for judicial review once the applicant is granted leave. It is in this regard that Form A to the first schedule which must be substantially complied with states categorically at the bottom that "The application is brought at the instance of .... And is supported by the statement of the applicant and the affidavit of ....." . It follows that failure to state the name and description of the applicant categorically in the statement renders the statement defective."*

In response, the applicant through his learned, the applicant briefly submitted that the preliminary objection has no merit since the application was brought in time in line with the provision of Rule of

the Law Reform(Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and fees) Rules, 2014. The applicant learned Counsel contended that the Respondents' written submission in support of preliminary objection on point of law is nugatory and frivolous since the applicant filed his application within the required time that is six months after the decision was made. Addressing the point on citation of the wrong provision of the law, the applicant through his learned Counsel submitted that the learned State Attorney for the respondents misdirected himself by believing that the application was brought under wrong provision of the law. He argued that the applicant rightly cited stating that the applicant cited wrong provision of the law while the application was brought under proper provision of the law that is Section 2(2) of the Judicature and Application of Laws Act (JALA) Cap 358[R.E 2002]. He was of the view that, this provision enjoins the High Court with inherent powers to grant prerogative remedies. He refereed the decision of the court in ***ALLIANCE ONE TOBACCO TANZANIA LTD AND ANOTHER VS MWAJUMA HAMIS (MISC. CIVIL APPLICATION NO. 803 OF 2018.***

I have thoroughly gone and considered the submissions and argument by both parties including the documents. In my considered view, the main issue here is whether this application is time bared. The respondent in his first point of the preliminary objection has submitted that the application was filed out of time contrary Rule 6 of the Law Reform (Fatal Accidents and Miscellaneous Provisions)

(Judicial Review Procedure and fees) Rules 2014, while the applicant Counsel briefly submitted that the application was filed within time. Before addressing the other point of preliminary objection I will first focus on the key legal point of time limitation which may determine whether this application can proceed or disposed of at this stage. The legal question that need to be answered at this time is whether the application was filed within or out of time. I have gone through the plaint and it is clear that the applicant filled his application on 29th day of April 2019, while the decision was made by the respondents on 23rd October 2018.This means that the applicant filed hid application after six months and seven days contrary to the provisions of the law which requires the applicant to file his application within six month. This in my view in the absence of sufficient reasons and grant of application for an extension of time makes an application incompetent for being time bared and no court would have tolerated to entertain an application of this kind. The applicant submission that his application is within the prescribed time by the law has no merit since the question of time limitation has nothing to do with legal technicalities.

In this regard, I wish to refer the relevant provision of the Law that is Rule 6 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and fees) Rules 2014 which provides that;

> *"The leave to apply for judicial review shall not be granted unless the application for leave is made* ***within six monthsafter the date of the proceedings****, act or omission to which the application for leave relates".*

Reading between the lines on the above provision it is clear that this court is bared from entertaining an application that is filed out of the time that is prescribed by the law. The interpretation of the word **"shall** "under the above the provision implies mandatory and not option and that is the legal position under section 53 of the Interpretation of Laws Act Cap 1 [R.E.2002].Indeed section 53 (2) of Cap 1 provides that

> *"Where in a written law the word "**shall**" is used in conferring a function, such word shall be interpreted to mean that the function so "conferred **must** be performed.*

In my view where the law requires one to file his application within six months and he decides to file after those days shows he was not serious and had no interest in his application. My reason is based on the fact that filling an application after six months without any justification is a long time. More specifically Rule 5 (1) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014 is to the effect that an application for judicial review cannot be made unless a leave to file such application has been granted by the court in accordance with the Rules.

Addressing the consequences of filing an application or appeal out of time the in ***TANZANIA DAIRIES LTD v CHAIRMAN, ARUSHA CONCILIATION BOARD AND ISAACK KIRANGI 1994 TLR 33 (HC).*** In this case the court observed that:

> *"Once the law puts a time limit to a cause of action, that limit cannot be waived even if the opposite party desists from raising the issue of limitation"*

Reference can also be made to the decision of the court of Appeal of Tanzania in ***The Director of Public Prosecutions v. ACP Abdalla Zombe and8 others*** Criminal Appeal No. 254 of 2009, CAT (unreported) where the court held that:

> *"this Court always first makes a definite finding on whether or not the matter before it for determination is competently before it. This is simply because this Court and all courts have no jurisdiction, be it statutory or inherent, to entertain and determine any incompetent proceedings."*

I therefore agree with the respondent that that the application was filed out of time limit required by the law. With due respect I find the first point of preliminary objection by the respondent has merit. Since my findings have revealed that the suit is time bared, I don't see any rationale for addressing the other point of preliminary objection by both parties. All in all the records clearly show that the application was not brought timeously before this court since it was brought beyond the legal requirements of six months. This means that the application is in any event hopelessly time-barred. Indeed there is no any order or ruling that show if the application was granted an application to file his application out of time. This also means that the applicant has never sought permission of this court to file his application out of time. Failure to do so, means the application at hand becomes invalid and fatally defective. This means that this court has not been properly moved by the applicant which renders that application incompetent. ***The Court in China Henan International Co-operation Group v Salvand K. A. Rwegasira***, Civil Reference No. 22 of 2005 (Unreported).

"Since this court is not properly moved, this application should not be entertained".

From my analysis and observations, I find the preliminary objection that the application is defective as raised by the respondent is meritorious and is accordingly upheld and sustained

From the above reasoning, I uphold the respondents' preliminary objection on the point of time limitation as raised by the respondents. In the view of aforesaid, this application is time bared and it is dismissed accordingly. I make no orders as to costs. It is so order. Right of appeal explained.

DR. A. J. MAMBI

JUDGE

17.06.2020

Ruling delivered in Chambers this 17th day of June, 2020 in presence of both parties.

DR. A. J. MAMBI

JUDGE

17.06.2020