THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

MISC. CIVIL APPLICATION NO. 44 OF 2019

OCTAVIAN RUGEREZI FRANCIS.....APPLICANT

VERSUS

THE PRESIDENT OF

THE UNITED REPUPLIC OF TANZANIA.....1ST RESPONDENT

THE CHIEF SECRETARY PRESIDENT'S OFFICE.....2ND RESPONDENT

TEACHERS SERVICE COMMISSION

MBARALI DISTRICT COUNCIL.....3RD RESPONDENT

TEACHERS' SERVICE COMMISSION.....4TH RESPONDENT

THE ATTORNEY GENERAL.....5TH RESPONDENT

RULING

Date of Last Order: 10/06/2020
Date of Ruling : 16/07/2020

MONGELLA, J.

The applicant herein filed an application under Rule 5 (1) (2) (a) (b) (c) and (d) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules of 2014. In the application he is seeking to be granted leave by this Court to apply for prerogative orders of mandamus, prohibition and certiorari against the decision of the 1st, 2nd and 3rd respondents terminating him from work without adhering to

legal and fair procedures. The respondents filed a preliminary objection containing three points to wit:

1. *The application is incompetent and bad in law for being hopelessly time barred.*

2. *The application is incompetent and bad in law for being preferred under wrong enabling provision of the law.*

3. *The court is not properly moved.*

The applicant enjoyed legal services of Mr. Paschal Msafiri, learned advocate while the respondent was represented by Mr. Francis Rogers, learned Senior State Attorney. The application was argued by written submissions filed by both counsels as per the scheduled orders.

In his submission, Mr. Rogers abandoned the 1st and 2nd points of preliminary objection and argued on the 3rd point only. He submitted that the applicant has moved this Court to grant the orders of mandamus, prohibition and certiorari under Rule 5 (1) (2) (a) (b) (c) and (d) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules of 2014. He argued that it is obvious that the applicant has skipped Rule 5 (3) of the same law and section 17 (1) & (2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap 310 R.E. 2019. He said that Rule 5 (3) provides that the application for judicial review must be substantially in Form A set out in the First Schedule to the Rules. He reproduced the provisions of section 17 (1) and (2) of the

Law Reform (Fatal Accidents and Miscellaneous Provisions) Act which states:

> *"17 (1) The High Court shall not, whether in the exercise of its civil or criminal jurisdiction, issue any of the prerogative writs of mandamus, prohibition or certiorari.*
>
> *(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."*

He argued that the above provision confers jurisdiction to the court to grant the orders sought. He argued that there is no doubt that Rule 5 (1) (2) (a) (b) (c) and (d) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules of 2014 have been complied with by the applicant, but there is nothing in law called judicial review as provided by Rule 5 cited above (sic). He was of the view that the orders sought must be specific, which is certiorari, mandamus or prohibition.

He argued further that the applicant is seeking for orders of certiorari, mandamus and prohibition, but in his chamber summons he has not cited section 17 (1) and (2) which enable the court to derive its powers to entertain the application. He cited the case of ***China Henan International Cooperation Group v. Salvand K. A. Rwegasira***, Civil Reference No. 22 of

2005 (CAT at DSM, unreported), ***Aloyce Mselle v. The Consolidated Holding Corporation***, Civil Application No. 11 of 2002 and that of ***Edward Bachwa & 3 Others v. The Attorney General & Another***, Civil Application No. 128 of 2006 (CAT at DSM, unreported) whereby in all these cases it was held that the wrong or non-citation of a proper enabling provision of the law renders the application incompetent.

Mr. Rogers argued further that Rule 5 (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules of 2014 provides that:

> *"An application for leave shall be substantially in the Form A set out in the first schedule to these Rules and shall be signed by or on behalf of the applicant."*

He argued that in compliance with Form A in the first schedule, the applicant's advocate recorded in the chamber summons that:

> *"This application is brought at the instance of* ***TANZANIA TEACHERS' UNION*** *and is supported by the statement and the affidavit of* ***OCTAVIAN R. FRANCIS****, the applicant herein together with other and further reasons as shall be adduced at the hearing thereof."*

He was of the opinion that what is quoted above is wrong as **Tanzania Teachers' Union** is not a party to the suit at hand. He further argued that there is no proper name and description of the applicant as required under Rule 5 (2) (a) of GN No. 324 of 2014. That, the applicant's statement has descriptions and physical address of respondent's only. To bolster his argument he cited the case of ***The Registered Trustees of Democratic***

Party v. The Registrar of Political Parties and Another, Misc. Cause No. 92 of 2017 (HC at DSM, unreported) in which it was held:

> *"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."*

Mr. Rogers concluded that given the defects in the applicant's application, the same deserves to be dismissed with costs.

In reply, Mr. Msafiri argued that the application is brought under a proper provision of the law as far as the purpose of the application is concerned. He was of the view that the respondent's counsel misdirected himself by arguing that the cited provisions of the law in the applicant's application do not properly move the court. He stated that the applicant seeks to be granted leave to file an application for judicial review as provided under Rule 5 (1) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules of 2014 which states:

> *"An application for judicial review shall not be made unless a leave to file such application has been granted by the Court in accordance with Rules..."*

Mr. Msafiri argued that the issues raised by the respondents' counsel contain matters which are to be complied with at the next stage when leave is granted. He said so arguing that what is before this Court is an application for leave to file judicial review and not an application for judicial review and the cited provisions of the law are the proper provisions to move this Court. He added that section 17 (1) and (2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act is applicable in moving the court in the application for judicial review which is not the application before this Court as we stand.

Regarding the issue of defective statement for not having the name and description of the applicant, Mr. Msafiri argued that the intention of that requirement under Rule 5 (2) (a) of GN No. 324 of 2014 is to identify the applicant. He said that the applicant is a member of the Trade Union, that is, Tanzania Teachers' Trade Union, which has legal mandate to represent its members in courts of law. Thus it is for this reason that the application for leave is brought at the instance of Tanzania Teachers' Trade Union. He further sought refuge in the overriding objective principle by citing a decision of this Court (Mlyambina, J) in ***Alliance One Tobacco Tanzania Limited & Hamisi Shoni v. Mwajuma Hamisi (as Administratix of the Estate of Philemon R. Kilenyi) & Heritage Insurance Company (T) Limited***, Misc. Civil Application No. 803 of 2018. He said that in this case it was held:

> *"It is the current law of the land that courts should uphold overriding objective principle and disregard minor irregularities and unnecessary technicalities so as to abide with the need to achieve substantive justice... Indeed, upholding the preliminary objection will cause wastage of time and resources to both litigants and the court,*

multiplication of unnecessary cases, and overburdening litigants with unnecessary cost. Upholding the same objection will not solve the dispute of the parties. Indeed, the court will be used as vehicle of miscarriage of justice at the expense of legal technicalities."

He concluded by urging the court to dismiss the preliminary objection with costs and grant the reliefs sought.

I have considered the rival submissions from both counsels and read the documents filed by the applicant in this application. I shall deal with the issues as follows:

Mr. Rogers argued that the application is defective for non-inclusion of Rule 5 (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules of 2014 and section 17 (1) & (2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap 310 R.E. 2019. I shall start with non-inclusion of section 17 (1) & (2) of Cap 310. This provision states:

"17 (1) The High Court shall not, whether in the exercise of its civil or criminal jurisdiction, issue any of the prerogative writs of mandamus, prohibition or certiorari.

(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."

The above provision provides for the powers of the High Court in granting prerogative writs of mandamus, certiorari and prohibition. It does not provide for the procedure to be invoked in the application for leave like the one at hand. Considering this provision, I agree with Mr. Msafiri that the respondent's preliminary objection has been prematurely raised because section 17 (1) & (2) as presented above is applicable in an application for judicial review where the applicant has already obtained leave to file the said application. At this stage this point lacks merit.

Rule 5 (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules of 2014 provides that:

"An application for leave shall be substantially in the Form A set out in the first schedule to these Rules and shall be signed by or on behalf of the applicant."

This provision is relevant to an application for leave to file an application for judicial review. The provision however provides the form in which application should take; of which was complied with by the applicant by filing Form A set out in the first schedule of the Rules. In my view, I agree with Mr. Msafiri that the non-inclusion of this provision as an enabling provision is not an incurable defect. The same can be cured under the overriding objective principle by inserting the provision. I therefore overrule this point.

In a point I failed to comprehend well, Mr. Rogers argued that the applicant has applied for judicial review while there is nothing in law called judicial review provided under Rule 5 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules of 2014. He contended that the orders sought must be specific, which are certiorari, mandamus and prohibition. Like I said I failed to comprehend this argument by Mr. Rogers because Rule 5 provides for application for judicial review. The applicant in his chamber application stated that he is seeking to be granted leave to apply for prerogative orders of mandamus, prohibition and certiorari against the decision of the 1st – 3rd respondents terminating him from work. These prerogative orders are issued through judicial review. I thus find this argument misconceived and need not detain me more.

Mr. Rogers further contended that the description of the applicant was not provided and the application is brought at the instance of **Tanzania Teachers' Union** who is not a party in this application. Mr. Msafiri challenged this argument contending that the aim of providing the description is to introduce the applicant. He said that the applicant herein is a member of the **Tanzania Teachers' Union** which is a trade union representing him. It undisputed that the aim of providing the description is to introduce the applicant. However, it does not mean that this requirement is optional and cannot have adverse consequences if skipped. Rule 5 (2) (a) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules of 2014, categorically states:

"5 (2) An application for leave under sub-rule (1) shall be made ex parte to a judge in chambers and be accompanied by:

(a) Statement providing for the name and description of the applicant."

Considering the above provision, it is clear that it is mandatory for the applicant to specify in the statement accompanying his application his name and description which includes the address. Since the application has been filed at the instance of the Tanzania Teachers' Union, it was imperative for the connection between the applicant and the Tanzania Teachers' Union to be shown. In my view, this would be shown in the description of the applicant whereby he would state that he is a member of the trade union and provide the address for service. As stated in the case of ***The Registered Trustees of Democratic Party v. The Registrar of Political Parties and Another*** (supra) a statement is an important document in the application for leave and the application for judicial review once the leave is granted. It therefore has to contain all the legal requirements set out under the law. For failure to include the name and description of the applicant, the statement becomes incurably defective.

Having observed as above I sustain this particular point of preliminary objection and struck out the applicant's application with costs.

Dated at Mbeya on this 16th day of July 2020

L. M. MONGELLA

JUDGE

Court: Ruling delivered in Mbeya in Chambers on this 16th day of July 2020 in the presence of the applicant and Mr. Joseph Tibaijuka, learned State Attorney for the respondents.

L. M. MONGELLA

JUDGE