IN THE HIGH COURT OF TANZANIA
(MAIN REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL CAUSE NO. 16 OF 2019

MICHAEL DAVID NUNGU.....APPLICANT

VERSUS

THE INSTITUTE OF FINANCE MANAGEMENT.....RESPONDENT

RULING

11/03/2020 & 23/03/2020

Masoud, J.

The applicant was aggrieved by the decision of the respondent which was made against him on 06/04/1999. The said decision summarily dismissed the applicant from his employment with the respondent, having worked with her from 01/07/1988 to 06/04/1999. Prior to such dismissal, the applicant was a senior lecturer. The dismissal was a result of the applicant being found guilty of the following charges, namely,(i) victimizing a student contrary to rule 8.24(ii) of the IFM Staff Regulations and Conditions of Service, 1997; (ii) tempering with students mark contrary to rule 8.24(iii) of the said Regulations; (iii) dishonesty contrary to rule 8.8 of the Regulations; and (iv) fraudulently procuring an employment with the respondent contrary to sections 17 and 18 of the Law of Contract Ordinance cap. 433 of the Laws. The dismissal was consequent to proceedings against the applicant which were conducted by the Governing Council of the respondent following investigations into the charges levelled against the applicant.

Being aggrieved by the decision as he was, the applicant complained to the Labour Commissioner on 23/06/1999 about the decision which complaint saw the Commissioner on 08/01/2003 referring the complaint to the Industrial Court of Tanzania as an Inquiry No. 4 of 2003. After the completion of pleadings and the hearing, the Industrial Court of Tanzania in its judgment delivered by the Chairman of the Industrial Court, Hon. Mwipopo J. (as he then was) on 11/07/2003 dismissed the applicant's complaint but found the applicant guilty of only the first and second counts but not the third and fourth counts.

The applicant was not happy with the judgment of the Industrial Court. He therefore commenced revisional proceedings before the Industrial Court of Tanzania, which proceedings were presided over by Hon. Mwipopo J. as the Chairman of the court, Hon. Mipawa- Deputy Chairman, and Hon. Sambo- Deputy-Chairman. Apparently, the objection by the applicant through his counsel late Mr Magesa to have Hon. Mwipopo disqualify himself from the proceedings as he presided over the matter in Inquiry No. 4 of 2003 in the first instance was overruled on 22/06/2004. Amongst other reasons given was that the law required the Chairman of the Industrial Court to preside over such proceedings and not a Deputy Chairman. Subsequent to overruling the objection and hearing the parties, the Industrial Court in its revisional jurisdiction dismissed the revision of the applicant in its ruling delivered on 11/04/2005 and upheld the judgment of the Industrial court dated 11/07/2003 in Inquiry No. 4 of 2003. The appellant was once again dissatisfied with the decision and was determined to continue the battle for what he believed to be his rights.

Having obtained leave to file application for judicial review pursuant to the ruling of this court of 05/08/2006 as per Hon. Mlay J. (as he then was), the applicant filed the present application on 11/07/2019 to challenge the decision of the first respondent after obtaining extension of time in Misc. Civil Application No. 93 of 2019 as per Feleshi, JK. The present application was made under section 17(2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act cap. 310 R.E 2002, rules 8(1) (a) and (b) and 8(2) and 17 of the Law Reform (Fatal Accident and

Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules GN No. 324 of 2014.

Supported by an affidavit of the applicant verifying facts stated in the statement of facts signed by the applicant, the application implored this court to invoke its prerogative orders of certiorari and mandamus as follow. Firstly, an order of certiorari to quash the respective decisions of the Industrial Court in Revision Application No. 14 of 2003 dated 11/07/2003 and in Inquiry No. 4 of 2003 dated 11/04/2005 as well as the decision of the respondent dated 06/04/1999. And secondly, an order of mandamus to compel and direct that the applicant is still in the employment of the respondent as a Senior Lecturer and that he should be paid all his entitlements as a Senior Lecturer.

The grounds upon which the orders were being sought were detailed in paragraph 11(a),(b),(c),(d),(e), (f), (g), & (h) of the statement of facts as errors of law apparent on the face of the record. They were clearly hinged on the complaints about Hon. Mwipopo presiding over the revisional proceedings of the Industrial court of Tanzania which originated from the matter (i.e Inquiry No. 4 of 2003) he presided over before; the holding that the respondent was entitled to review examination results because of allegation of corruption raised against the applicant; the holding that regulation 43 of the Regulations on the conduct of Examinations violates Article 13(6)(a) of the Constitution of the United Republic of Tanzania; the holding that the complaint of P.C Kilomo of 10/10/1997 against examination results released on 04/09/1997 was not time barred; the holding that the respondent was not in error even if the complaint against examination results was made out of time; ignoring to consider marking scheme in determining marks to be awarded on the Examination script No. 154; holding that the applicant deliberately gave the complainant P.C. Kalomo 43% marks instead of holding that the applicant used his discretion in accordance to the answers given on the Examination Script No. 154 and the relevant marking scheme; and failing to hold that injustice was committed upon the applicant to punish him by removing him from his job because he awarded to the candidate failing marks.

The application was opposed by the respondent by filing a counter affidavit and a statement in reply affirmed and signed by one, Hassan Hatib Semkiwa, a Principal Officer of the respondent. Opposing the application, the respondent had it that, granting of the application would open a floodgate of litigation to the detriment of the respondent, and would amount to unusual act given the time that has since elapsed following the dismissal and the fact that the applicant had already been paid his benefits; the respondent came to a firm conclusion that the student was maliciously victimized based on not only the NBAA report but also all facts and evidence tendered in the proceedings that led to the dismissal of the applicant; the decision of the Industrial court was also based on such facts and evidence; the applicant refused to defend himself before the governing counsel and that the applicant was lawfully removed from the service. In all, the grounds were disputed and it was contended that they were not only confusing and irrelevant but also not meritorious as grounds of judicial review. The grounds could not therefore enable the court to grant the orders sought.

The hearing of this application was done by filing written submissions in accordance with the schedule set by the court which was dutifully complied with. The applicant was unrepresented, but he had his written submissions prepared gratis by Dr Lucas Kamanija, learned Advocate. On the other hand, the respondent which is a public institution was represented by Mr James Evarister, Advocate and Legal Secretary for the respondent. I scrutinized the submissions in relation to the prayers in the chamber summons and respective averments in the affidavit and statements by both parties. I was clear that the entire submissions of the parities herein were to some extent reflective of the affidavits and statements on the record. I will need not reproduce them in their entirety.

As I was on the preparations of composing my decision, I noted that the record raised some issues which were not addressed by either of the submissions of the parties on the record. The record included the copy of the order granting leave to the applicant to file application for judicial review and the fact that the present

application was brought among other things under rule 8(1)(a) of the Law Reform (Fatal Accident and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules (supra). The issues were about; (i) whether the application was brought by an affidavit and statement in respect of which leave was granted as is required by rule 8(1)(a) of the Law Reform (Fatal Accident and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules (supra) under which this application was brought; (ii) whether the application is against the same parties in relation to whom the leave was granted and; (iii) if the above issue(s) are/is in the affirmative whether the application is competent. I thank the applicant and Mr James Everister for agreeing to address me on the issues by way of written submissions of which they did and their respective submissions are now on the record.

The applicant branded the issues as arising from preliminary objections raised by the court in disguise. They ought not to have been raised by the court when it was due to deliver its decision and when the parties were not at issue on the competence of the application. On the first issue, the applicant maintained that the issue should be discarded as it does not raise a pure point of law. On the part of the respondent, the argument was that there was no leave to file the present application as the leave which was issued in 2006 had expired many years ago. All considered, I agree with the applicant that the issue is one of mixed law and facts, and couldnot at this stage be properly and fairly dealt without evidence. It is instructive also to note that the applicant cited rule 8(1)(a) as amongst the provisions under which the application was made and the chamber summons was clear that the application was supported by the affidavit and the statement in respect of which leave was granted. This should in the circumstances suffices to dispose of the issue in the favour of the applicant and for the interests of substantive justice.

On the second issue, both parties were in agreement that the present application was not against the same parties in relation to whom the leave was granted in 2006 as in the present application the Attorney General was not made a party. However, by virtue of the authority of **Mecaiana Establishments (Vaduz) vs The Commissioner of Income Tax and Six Others**, Civil Appeal No. 14 of 1995

(unreported) cited by the applicant, it was argued that once leave is granted, there is no requirement of summoning the Attorney General as a party. In the light of this authority, I am of the view that the failure of the applicant to implead the Attorney General in the present application was not fatal and could not therefore render the application incompetent. I am mindful that the respondent was duly impleaded and represented by a learned counsel who is also a public officer working with the respondent as a Legal Secretary. As to the last issue, I am in view of the forgoing of a finding that the application is competent before the court.

My scrutiny of the submissions of the parties made it apparent that both parties are in agreement that the applicant was charged with and found guilty of all complaints and that prior to the decision a hearing was held that involved the applicant and the respondent. However, they part company with each other with regard to whether there are errors of law apparent on the face of record as alleged (i.e grounds) which entitle the court to exercise its discretion to grant the prerogative orders sought. The basis of this application lies on the grounds upon which the orders are being sought. It also hinges on the facts constituting the grounds which must be verified by the affidavit of the applicant.

In the statement of facts of the applicant which supported the application the grounds upon which the prerogative orders of certiorari and mandamus were being sought were stated in paragraph 11(a),(b),(c),(d),(e), (f), (g), & (h). However, it was only ground 11(a)(i)&(ii) whose facts were verified by the applicant's affidavit. The rest of the grounds 11 (b), (c), (d), (e), (f), (g), & (h) were not in any way reflected and/or verified in the affidavit. Literally, there is no basis upon which such grounds which were not verified by the applicant's affidavit can be considered in determining whether the prerogative orders sought can in the circumstances issue.

Even if the above grounds were properly so verified, they could not by their nature support the orders sought since they do not fall within the purview of the grounds for the issuance of prerogative orders. With such grounds, the applicant is challenging the correctness of the decisions of the Industrial Court of Tanzania in

Revision Application No. 14 of 2003, and in Inquiry No. 4 of 2003 as well as the decision of the respondent dismissing him from employment and intends by the order of certiorari, to ask this court to review the said decisions on their merits.

By their very nature, such grounds (paragraph 11(b)-(h)) reflected matters of evidence which means that by considering them, the court will necessarily review the evidence contrary to the powers of this court in judicial review. I think the counsel for the respondent had this in mind when he contended that the decisions could not be challenged by judicial review but by way of an appeal. To drive home this point on the grounds upon which the prerogative orders are sought, the unverified contents of paragraph (b)-(h) of the statement of facts alleged to contain errors of law apparent on the face of the record (i. the grounds) speak for themselves herein below:

> *11(b) .....it was an error of law apparent on the face of the record for the court to hold and decide that:*
>
> *(i)Because of the allegations of corruption which were raised against the applicant, then the management and or the respondent Governing Council (Baraza) was entitled to review the examination results, which had been finally passed by the academic Development Committee (ADC).*
>
> *(ii)Regulation 43 of the Regulations on the conduct of Examination violates Article 13(6)(a) of the Constitution of the United Republic of Tanzania.*
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> *11(c) In the alternative to ground 11(b)(ii) above, it was an error of law apparent on the face of the record, for the court to decide that the above mentioned regulation violates the provisions of the Constitution....without this court being a High Court and without having summoned the Attorney General to appear as a party to the said proceedings.*
>
> *11(d) It was an error of law apparent on the face of the record for the court to hold that the complaint of P.C Kalomo of 10/10/1997 against the examination results, which were released on 4/9/1997, was not time barred.*
>
> *11(e) It was an error of law apparent on the face of the record for the court to hold that even if the complaint against the examination results was presented out of time the respondent management or governing council (Baraza) did not commit any error to entertain it out of time.*

11(f) It was an error of law apparent on the face of the record for the court to ignore the marking scheme in determining the marks to be awarded to an examiner on each question on the Examination Script No. 154.

11(g) It was an error of law apparent on the face of the record for the court to hold that the applicant, deliberately, gave the complainant P.C Kalomo 43%marks, instead of holding that the Applicant used his discretion, in accordance to answers given on the Examination Script No. 154 and the marking scheme thereof.
11(h) It was an error of law apparent on the face of the record for the court to fail to hold that injustice was committed upon the applicant to punish him by removing him from his job as Senior Lecturer simply because he had awarded failing marks to student in an examination

In the case of **John Byambalirwa vs The Regional Commissioner and Regional Police Commander**, Bukoba, [1986]TLR 73, 75 (Mwalusanya J.) stated:

Judicial review is an important weapon in the hands of the judges of this country by which an ordinary citizen can challenge an oppressive administrative action. And judicial review by means of prerogative orders (certiorari, prohibition and mandamus) is one of those effective ways employed to challenge administrative action. It is my conviction that the courts should not be too eager to relinquish their judicial review function simply because they are called upon to exercise it in relation to weighty matters of state. Equally however it is important to realise that judicial review is not the same thing as substitution of the court's opinion on the merits for the opinion of the person or body to whom a discretionary decision-making power has been committed. [Emphasis is mine].

Review and evaluation of evidence in this case could have only been done by this court in an appeal. I understand that the Industrial Court of Tanzania Act (now repealed) provided room for a party to appeal from the decision of the Industrial Court of Tanzania against every award and decision of the Court to the full bench of the High Court.

The above grounds are therefore found to be irrelevant in this application. This is so because they are not only unverified by the affidavit of the applicant but also they invite this court to review the evidence contrary to its powers in judicial review as

restated by the Court of Appeal of Tanzania in **Sanai Murumbe vs Mhere Chacha** [1990] TLR 54. It is instructive that **Sanai Murumbe's case** laid down guiding principles upon which order of certiorari can issue. They are; taking into account matters which it ought not to have taken into account; not taking into account matters which it ought to have taken into account; lack or excess of jurisdiction; Conclusion arrived at is so unreasonable that no reasonable authority could ever come to it; rules of natural justice have been violated; and Illegality of procedure or decision. None of the above fits into the guidelines for reasons stated above.

There were other complaints which were only averred in the affidavit, but were not at all reflected in any of the averments or grounds stated in the statement of facts of the applicant. They included the allegation that there was further investigations undertaken by the respondent against the applicant, and the allegation that the applicant was not given investigation report by the respondent, and further and better particulars of amended charges. There was therefore no basis for considering these allegations which also in my view relate to evidence and hence review of evidence contrary to the powers of this court in judicial review.

Turning to the first ground contained in paragraph 11(a)(i)&(ii) of the statement of facts, it is clear that it was based on violation of rules of natural justice which according to the applicant were violated by having Hon. Mwipopo J. (as he then was) sitting as the Chairman in Revision Application No. 14 of 2003 although he had presided the original proceedings in Inquiry No. 4 of 2003. The ground reads as follow:

> *11(a) It was an error of law apparent on the face of the record for the court to proceed to hear the revisional application, presided over by the same chairman who had presided over the original industrial dispute, as by doing so the court:*
> *(i) Breached the provisions of section 27(1A) of the Industrial Court, 1967*
> *(ii)Breached one of the principles of natural justice, which is against bias.*

The provision of section 27(1A) which was exhaustively discussed by the Industrial Court in the objection raised by the then counsel for the applicant read as thus:

27(1).....
(1A) The Court shall, when exercising jurisdiction under subsection (1) be properly constituted if it is presided over by the Chairman sitting with two Deputy Chairmen and two assessors, all different from those who sat on the court when it heard first heard the dispute.

The record is clear that Hon. Mwipopo J. (as he then was) who was then the Chairman of the Industrial Court of Tanzania presided over the Inquiry No. 4 of 2003 and determined it on 11/07/2003. Furthermore, the record is clear that the said Chairman of the Industrial Court also presided over the Court when hearing the Revision Application No. 14 of 2003 (Original Inquiry No. 4 of 2003). When the objection was raised against Hon. Mwipopo chairing the revision proceedings, and the Industrial Court was accordingly addressed on the objection, it is on the record that the Industrial Court in declining to uphold the objection expounded in great detail on the import of the above provision having regard to the other provisions of the Act.

It was the Industrial Court's view which view I find to be correct that the correct construction of the provision meant that it was the Chairman of the Industrial Court who must preside the proceedings. By its nature, the Industrial Court had only one Chairman who was a Judge of the High Court. More so, section 16(1)(a) as was also rightly discussed by the Industrial Court (as per Mwipopo J. Chairman) was categorical that "the Court [the Industrial Court of Tanzania] shall consist of the Chairman who shall be appointed.... from amongst the Judges of the High Court." From the foregoing, I do not see merit on this ground in so far as Hon. Mwipopo J., Chairman (as he then was) did what was stipulated by the law which was then in force.

Having disposed of the above issues, I must consider the issue whether the applicant has made out a case for orders of certiorari to issue for the decisions stated in the chamber summons to be removed into this court for the purpose of being quashed. Since all the grounds were devoid of merit for reasons already stated, it goes without saying that none of the grounds upon which the orders of certiorari were sought can

stand. Consistent with this finding, the order of mandamus cannot in the circumstances issue.

In the end and for the reasons given above, I do not find merit in the application. I would therefore as I hereby do so refrain from granting the orders of certiorari and mandamus sought by the applicant in this application. The application is thus dismissed. Considering the circumstances of the matter, I will not make any order as to costs.

I order accordingly.

Dated at Dar es Salaam this 23rd day of March, 2020

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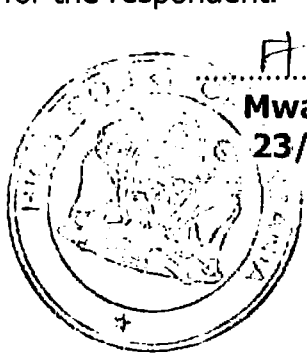
B. S. Masoud

Judge

Court

Ruling delivered on 23/03/2020 in the presence of the applicant and Mr James Everister, counsel for the respondent.



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Mwaseba, DR
23/03/2020