IN THE HIGH COURT OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 47 OF 2019

EDWARD GWIMO	)	
IDD BALOZI	)	**APPLICANTS**
JAMILA MGALUSI and 97 Others	)	

VERSUS

THE CHAIRMAN INDUSTRIAL

COURT OF TANZANIA.....1st RESPONDENT

THE ATTORENY GENERAL.....2nd RESPONDENT

TANZANIA BREWERIES LTD.....3rd RESPONDENT

RULING

27/02/2020 & 23/03/2020

Masoud, J.

Having obtained leave of this court to file the present application for leave to apply for judicial review out of time, the applicants filed this application under the appropriate provisions of the law. The application was by chamber summons supported by the statements of facts and affidavits sworn, affirmed and signed by Edward Gwimo, Iddi Balozi, and Jamila Mgalosi. The application was opposed by a counter-affidavit and statement in reply of the first and second respondent.

There was also a notice of preliminary objection. The only point argued was to the effect that the applicants did not have cause of action against

the first and second respondents. In the course of arguing this point the counsel for the first and second respondent ingeniously canvassed on the issue whether the matter at stake could properly be dealt with by way of judicial review as opposed to appealing to this court presided over by a full bench.

In relation to this issue, Mr Yohana Marco, learned State Attorney for the respondents sought the support of section 27(1C) of the Industrial Court of Tanzania Act, Cap. 60 as amended by the Written Laws (Miscellaneous Amendments) Act No. 11 of 2003 in a bid to have the court answer the issue in the negative. The provisions reads and I quote:

> *Subject to the provision of this section, every award and decision of the Court shall be called in question on any grounds in which case the matter shall be heard and determined by a full bench of the High Court.*

To show that the appeal was the only appropriate remedy available to the applicant, the court was told by Mr Yohana Marco, learned State Attorney, that the applicants were seeking to challenge an adjudicatory, (and not an administrative) decision of the Industrial Court of Tanzania delivered on 2006 after the coming into force of the above amendments which introduced the avenue of appeal to the High Court sitting as a full bench.

There was not much from Mr Barnabas Lugua, learned Advocate for the applicants. Firstly, he complained on the way the objections were raised and argued which do not squarely conform to the lack of cause of action. Secondly, he told the court that the import of the phrase "subject to the

provisions of this section, every award or decision of the court shall be called in question on any ground...." of section 27(1C) did not mean that "any decision shall be appealed against but it allowed the decision or award to be allowed on any ground."

According to Mr Lugua, the applicants were challenging the decision of the Industrial Court of Tanzania on ground of the actions of the Chairman of the Industrial Court of Tanzania which are ultra-vires his statutory powers. They were therefore properly seeking to challenge the decision by way of judicial review.

I was taken through a brief history of the amendment to see the argument in its proper context. My attention was equally drawn to some authorities that relate to the issue at stake. The cases were **Jumuiya ya Wafanyakazi vs Shinyanga Region Cooperative Union** [1997]TLR 200 in relation to situations in which judicial review was appropriate remedy; **OTTU (On behalf of P.P. Magasha) vs Attorney General and Another** [1997]TLR 30 in relation to the background that led to the amendments referred to herein above; and **Pavisa Enterprises vs the Minister for Labour Youths Development & Sports and Another**, Misc. Civil Cause No. 65 of 2003, HC Dar in which this court declined to entertain an application for judicial review as the applicant ought to have resorted to appeal.

Much as I agree with the reasoning of the learned State Attorney, I think the issue whether the application for judicial review cannot lie in the circumstances would in the present case largely depend on the grounds

which the applicants intend to invoke in his intended application for prerogative orders if leave is granted. Thus, determining whether the applicants ought to have preferred an appeal against the disputed decisions would in the circumstances of this case necessarily depend on the nature of the grounds which the applicants want to invoke in their intended application for judicial review once leave is granted.

Thus, considering the circumstances of this case and the interest of substantive justice, I think the above issue is one that can best be resorted to when dealing with the present application on merits. I find it safe for such reason to overrule the objection at this stage of considering the preliminary issues. The same, in my considered view, goes for the objection relating to whether the first and second respondents were properly impleaded which I think is a matter that can best be dealt with on the merits of the application; regard being had to the interests of substantive justice and the requirement of the law that the Attorney General should be summoned as a party where a party is seeking leave to apply for judicial review.

Having disposed of the preliminary issues as above shown, it is prime time to embark on the merit of the application. As the application is for leave to apply for judicial review, this court is bound by the restatement of the position of law in **Emma Bayo vs the Minister for Labour and Youth Development and Others** Civil Appeal No. 77 of 2012, CAT Arusha (unreported). The restatement has it that:

> *...the stage of leave serves several important screening purposes. It is at the stage of leave where the High Court*

satisfies itseif 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.[Emphasis supplied].

My consideration that this was intended to be an application for leave is based on the enabling provisions cited by the applicants in their chamber summons. These are, among other things, rule 5(1)&(2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedures and Fees) Rules, 2014. The said chamber summons has the following prayers and I quote:

"1. This court be pleased to grant leave to the applicants above named to file an application for prerogative orders of certiorari to call for the decision of Mwipopo J. dated 12th May 2008 as well as the proceedings and record of the Industrial Court of Tanzania in Trade Dispute No. 144 of 2006 and Reference No. 406 of 2008 and review the said decision and reverse and nullify it.

2. This court be pleased to grant leave to the applicant to make an application for orders of mandamus to compel the 3rd respondent to pay the applicants repatriation costs and allowances according to the voluntary agreement which was in force when the services of the applicants were terminated.

However, in the statement of facts accompanying the application, the applicants stated what they are intending to apply in this court once leave is granted. The same were crafted in the following terms:

4. Reliefs Sought
4.1Leave to file an application for orders of certiorari to call for then record, decision and proceedings of the Industrial Court of Tanzania in Trade Dispute No. 144 of 2006 and Reference No. 406 of 2008 especially the decisions of the Panel of E. L. K. Mwipopo J. Chairman, C.E.R. William, Vice Chairman, and E. J. Mkasimongwa, Vice Chairman dated 18th September, 2009 and the decision and orders and reverse or make any benefitting order as it shall be found to be just.
4.2 Leave to file an application for orders of mandamus that the 3rd respondent be compelled to pay repatriation allowances and actual costs of transporting luggage (three tones) to their places of domicile as well as subsistence allowances as required by the law pending the said payments

Although the reliefs in the chamber summons and the statement look the same, they are different in some material respects. The differences raise an issue as to whether the applicants are certain and clear as to what they will want this court to do in an application for judicial review if the leave is granted. The nature of the prayers also raise an issue as to the decision or decisions, or proceedings that the applicants would want to challenge.

The confusion is so obvious that it caught the eyes of Mr Yohana Marco, the learned State Attorney who prepared the written submissions in reply for the first and second respondents. The learned State Attorney in particular contended that the prayers made by the applicants in their written submissions in chief do not match the prayers quoted herein above. The learned State Attorney associated the confusion to abuse by the applicants of court process as the submissions seek to achieve what cannot be granted at the leave stage.

In the written submissions the applicants are asking the court to grant the orders of certiorari and nullify the decisions of the panel and allow revision to be heard by a panel of judges which reliefs are likewise confusing and are at variance with the above quoted conflicting reliefs. The relevant part of the submissions reads thus:

> *Basing on the above said and the law it is our humble submission that:*
>
> *1. you allow this application for certiorari and nullify the decision of the panel as well as and allow revision to be heard by a panel of judges as per the low for the time being in force.*
>
> *2. In the alternative this court invokes it powers of mandamus and orders that the applicants be paid costs of transporting their luggage to their pace of domicile and subsistence allowance for the period between 30th April 1999 until payment in full.*

The rejoinder submissions of the applicants sought to clarify the confusion in the reliefs sought. In so doing in my view, the submissions ended up confusing the reliefs sought even further. This is apparent in the rejoinder submissions by the applicants' learned counsel which in part stated:

> *The wording of the application may confuse and be seen that we are seeking to challenge the decision of Mwipopo J., Chairman in consolidated Trade Enquires No. 1 of 2006 but in truth we are challenging the decision in Maombi ya Marejeo No. 60A which was determined on 18th September 2009. Of course in order to see whether the Chairman who determined the two Trade Enquires and the Revision is the same or not the files for the two consolidated trade Equires shall be called before the Panel of the High Court.*

The grounds upon which the above prayers were sought were stated in the statement of facts and affidavit of the applicants. They read as follow and I quote:

5. THE GROUNDS UPON WHICH THESE RELIEFS ARE SOUGHT ARE:

5.1It was not proper for His Lordship Mwipopo Judge to preside as the Chairman in the said Reference No. 406 of 2008 due to the fact that the decision in issue was determined by him.

5.2 That the Panel of the Industrial Court held that the award which was registered on the 14th day of May 1999 which had retrospective effect up to 1st May 1999 should bind the applicants who were terminated on the 30th April 1999 the period which is not covered by the order.

5.3 The panel of the Industrial Court of Tanzania interpreted the award altering the rights of the said employees to their detriment and took an unreasonable approach instead of taking analogy from the meaning adopted in other voluntary agreements in the same exercise of reducing the work force on operational grounds.

5.4 That it was the policy of the company to assess and pay the said costs of transporting luggage upto the place of domicile of the said employees upto their place of domicile. A copy of the Memorandum dated 13th November 1995 Marked EG3 is appended and the same shall be read as part of this affidavit.

5.5 That the decision is controversial and unreasonable as it states at one point that the luggage allowance is not enough to transport the employees to their place of domicile against the terms of the said exercise that the said employees shall be ferried to their place of domicile and in the same decision the Chairman states that the employees were paid enough funds for transportation.

5.6 That the decision was unfair due to the fact that all employees who were terminated either before or after the applicants were paid luggage allowances which was different from costs of transporting their said luggage to their places of domicile. Copies of the said voluntary agreements marked collectively EG4 annexed and shall be read as part of this statement.

5.7 That the panel of the industrial Court misdirected themselves when it held that the applicants abandoned their claims for other repatriation allowances such as subsistence while awaiting to be paid the said allowances

while in fact the evidence was given in that respect and the same is a statutory right following the right for repatriation.

The issue is whether the above grounds and the confusing and unclear reliefs sought by the applicant present an arguable case for the applicants to be granted leave to file application for judicial review. The submissions in chief of the applicant did not comprehensively address the above grounds as to how they present an arguable case; save the complaint about Hon. Mwipopo presiding over the original proceedings and revision proceedings in the Industrial Court of Tanzania in the dispute involving the applicants.

On the other hand, the learned State Attorney for the first and second respondents had it in a nutshell that the grounds upon which the confusing reliefs are sought do not at all present an arguable case mandating this court to grant the leave to file application for prerogative orders.

It was pointed out that apart from the confusing prayers which cannot be granted in judicial review, one of the decision which is complained about was a subject of revision by the Industrial Court of Tanzania in Reference No. 60A of 2008 as also stated in paragraph 5 of the applicants' affidavit.

On my part I have considered the grounds in relation to the application and the written submissions on the record. I have no doubt that the grounds involve matters of evidence requiring the court to review the merits of the decisions sought to be challenged as opposed to

entertaining its powers in judicial review. 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 of evidence in this case could, as argued by the learned State Attorney, only be done by this court in an appeal which could have been properly brought pursuant to the provisions of section 27(1C) of the then the Industrial Court of Tanzania Act cap. 60 as was amended by the Written Laws (Miscellaneous Amendments) Act No. 11 of 2002. The provision 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.

In the present instance, the choice to apply for leave to file application for judicial review against the decisions of the defunct Industrial Court is not at all supported by the grounds that present an arguable case for judicial review. Rather, the application discloses grounds which indicate that the applicants are seeking to challenge the correctness of the decisions and want to use the power of this court in judicial review to review the decisions on their merits. In this respect, I think there is merit

in the argument by the learned State Attorney that the applicants should have timely taken the avenue of appealing which was the most appropriate in the circumstances.

The so called grounds are not consistent with principles upon which prerogative orders may issue as laid down by the Court of Appeal of Tanzania in **Sanai Murumbe vs Mhere Chacha** [1990] TLR 54. 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. I am content that the grounds raised do not fit in the guidelines stated above.

The only exception from the grounds upon which the applicants intended to apply for prerogative orders is the one that concerns violation of rules of natural justice which is alleged to have occurred when Hon. Mwipopo J. (as he then was) sat as the Chairman in two matters (original and reference) involving the applicants. In view of the confusion and lack of clarity in the prayers sought one cannot clearly comprehend the decisions which are complained about by the applicants and what exactly they intend in judicial review this court to do. I say so because the affidavit refer to consolidated judgment of Hon. Mwipopo J., Chairman delivered on 12/08/2018 while the chamber summons made reference to a decision of Hon. Mwipopo J. delivered on 12/05/2008. The case numbers which could have helped the court to untangle the confusion

were not stated. Furthermore, while the affidavit make reference to Reference No. 604 of 2008 which was also allegedly presided over by Hon. Mwipopo J., the Chamber summons refer to Reference No. 406 of 2008. This confusion alone suffices in my view to go to the root of the matter. While certiorari is geared at quashing a decision, the prayers are not clear on this as they infer reversion in the same vein.

The foregoing confusion notwithstanding, my understanding of the position of the law entitled the Chairman of the Industrial Court to preside over the proceedings. By its nature, the Industrial Court had only one Chairman who was a Judge of the High Court. The law was categorical that the Court consisted of the Chairman who must be appointed from amongst the Judges of the High Court. In view of this position of the law, I do not see merit on this ground in so far as Hon. Mwipopo J. (as he then was) did what was then required of him by the law.

The issue whether the applicants' interests in the matter were fully disclosed mindful of not only the three applicants who sought to bring this matter in representative capacity but also the said 97 others is equally critical. Mindful of the rival submissions given and the record, I was satisfied that the application is wanting if one goes by the provision of rule 4 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedures and Fees) Rules (supra).

The above provision of law requires a disclosure of interests by the applicants in an application like this. This is indeed one of the

requirements which the application must religiously comply with for a leave to file judicial review application to be granted. See, **Emma Bayo's case** (supra). The attached sheet of paper containing the list of the represented applicants was indeed not signed by all applicants as rightly submitted by the learned State Attorney, there was equally no notice shown issued to the represented applicants, and more so, there are also issues in relation to those who had since passed away and who are said to be represented by their respective administrators.

In all I am not satisfied that the application has shown arguable case and interests that each of the applicant has on the matter over and above the flat claim that they were employees of the third respondent. I am in the circumstances not prepared to grant the application.

In the upshot, I am satisfied that the application does not disclose an arguable case and sufficient interest to warrant the court to grant leave to the applicants to file an application for judicial review. For obvious reasons, I do not need to labour on other issues raised. The application is struck out with costs. Ordered accordingly.

Dated at Dar es Salaam this 23th day of March 2020.

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B. S. Masoud

Judge

Court

Ruling delivered on 23/03/2020 in the presence of the applicants in person and Mr Yohana Marco, State Attorney for the first and second respondents and Mr Victor Kikwasi, Advocate for the third respondent.

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Mwaseba, DR