

**IN THE HIGH COURT OF TANZANIA
(MAIN REGISTRY)**

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 37 OF 2019

HAMIS BABU BALLY.....APPLICANT

VERSUS

**THE JUDICIAL OFFICERS
ETHICS COMMITTEE.....1st RESPONDENT**

THE CHIEF COURT ADMINISTRATOR.....2nd RESPONDENT

THE JUDICIAL SERVICE COMMISSION.....3rd RESPONDENT

HONOURABLE ATTORNEY GENERAL.....4th RESPONDENT

RULING

02 & 03/03/2020

Masoud, J.

This ruling relates to an application for leave to appeal to the Court of Appeal of Tanzania. The intended appeal is against the whole of the decision of this court in Miscellaneous Civil Application No. 11 of 2017 dated 22/09/2017 as per Hon. Dyansobera J. The instant application was *inter alia* brought under section 5(1)(c) of the Appellate Jurisdiction Act [cap.141 R.E 2002] and rules 45(a) and 47 of the Tanzania Court of Appeal Rules, 2009 GN No. 368 of 2009 as amended.

The application was supported by the affidavit of the applicant's counsel, one, Dr Lucas Kamanija. It was countered by the respondents who filed counter-affidavit through Mr Daniel Nyakiha, learned State Attorney.

The prayer for the order for leave to appeal set out in the chamber summons is hinged on the following grounds of complaints. Firstly, that the court did not properly interpret the law governing application for leave to apply for prerogative orders. Secondly, the court erred when it ruled on the merits the contentious facts, evidence and grounds on which the reliefs were sought. The grounds upon which the application was based were, violation of the right to fair hearing, bias/discrimination; irrationality; and ultra vires/illegality. In so doing, the court treated the application for leave as an application for judicial review. And thirdly, the court failed to exercise its discretion judicially when it failed to rule that there were contentious facts, evidence and grounds fit for consideration on merit by way of judicial review.

The affidavit in support of the application has it that the applicant intended appeal is against the above mentioned decision of this court in Misc. Civil Application No. 11 of 2017. The affidavit has it further that the

applicant's allegation in the said Misc. Civil Application No. 11 of 2017 was that he was dismissed by the second and third respondents from his job (i.e Resident Magistrate) without being heard and the complained decision was thus irrational. The affidavit showed that the above allegation by the applicant was disputed by the respondents' counter affidavit and statement in reply filed in relation to the said Misc. Civil Application No. 11 of 2017.

It was also shown in the affidavit in support of the present application that the other allegation of the applicant in the said Misc. Civil Application No. 11 of 2017 which was disputed by the respondents in their counter affidavit was that the inquiry proceedings by the second and third respondent was characterized by bias/discrimination against the applicant and was ultra vires/illegal.

The affidavit in support of the present application added that this court in the said Misc. Civil Application No. 11 of 2017 ruled at the stage of the application for leave to apply for prerogative orders that the applicant failed to prove his allegations against the respondents, namely, violation of the right to fair hearing; bias/discrimination; irrationality; and ultra vires/illegality.

According to the affidavit in support of this application, the applicant is aggrieved by the decision in Misc. Civil Application No. 11 of 2017 which was made at the leave stage accusing him of failing to prove his allegations against the respondents. The applicant has thus lodged a notice of appeal to the Court of Appeal to challenge the illegality of the decision.

The respondents' counter-affidavit which was sworn by Mr Daniel Nyakiha, learned State Attorney, mainly noted all averments in the affidavit save the contents of paragraph 16 of the applicant's affidavit which were denied. The contents of paragraph 16 of the affidavit were in relation to the counsel for the applicant deposing the affidavit in support of the prayers/reliefs sought in the chamber summons. Having denied the contents of such paragraph, the deponent of the counter affidavit further stated that the affidavit did not identify reasons which necessitate this court to grant the leave.

It was maintained in the counter affidavit that the decision in Misc. Civil Application No. 11 of 2017 was meritorious as the applicant failed to

prove his allegations against the respondents on violation of the right to fair hearing; bias/discrimination; irrationality; and ultra vires/illegality.

At the centre of the dispute between the two parties herein is the decision which dismissed the applicant from his employment as a Resident Magistrate. The applicant is aggrieved by the decision. He wants to challenge the decision by judicial review. He applied for leave to file application for judicial review. The application for leave to file application for judicial review was dismissed as the court was satisfied that the allegations were not proved in the verifying affidavit supporting the application for leave to apply for prerogative orders.

The respondents' learned State Attorney in his counter affidavit is of the view that the court was entitled to dismiss the matter for the failure of the applicant to prove the allegations raised. On the contrary, the applicant's counsel is arguing that the court erred by improperly interpreting the law governing granting of application for leave to apply for judicial review; erred in deciding the merits of the allegation at the leave stage and failed to act judicially to find that there was a fit case for judicial review.

On the rival submissions of Dr Lucas Kamaninja, learned counsel for the applicant and Mr Daniel Nyakiha, learned State Attorney for the respondents, the emerging issue is on whether the affidavit in support of the application discloses contentious grounds upon which the application for leave to appeal is being sought.

While Dr Kamanija argued that the grounds were clearly set out in the chamber summons in paragraphs (a)(i),(ii)&(iii) and in paragraphs 10,11 &16 of the affidavit, Mr Nyakiha maintained that the applicant's affidavit did not at all identify any ground upon which the intended appeal would have been based. The learned State Attorney muted on the grounds which were hinged on the prayers in the chamber summons as they also link with paragraph 10, 11 and 16 of the affidavit. Paragraph 11 of the affidavit is categorical on the alleged illegality of the impugned decision.

Dr Kamanija referred the court to **Saidi Ramadhani Mnyanga vs Abdallah Salehe** [1996] TLR 74; **Simon Kabaka Daniel vs Mwita Marwa Nyan'ganyi nd 11 Others** [1989]TLR 64; and **Lazaro Mabinza vs General Manager, Mbeya Cement Co. Ltd** Civil Application No. 1 of 1998; and **Citibank (T) Ltd vs TTCL and Others** Misc. Comm. Application No. 6 of 2003. On the part of Mr Nyakiha, he

relied on **Gaudencia Mzungu vs The IDM Mzumbe**, Civil Application No. 94 of 1999, which was cited with approval in **Rev. Saddock Yakobo Mlongecha vs Registered Trustees of PEFA Kigoma**, Civil Application No. 12 of 2016 CAT Dar (unreported). Looking at the authorities as a whole, I am clear that they all insist on the principle of law requiring the existence of prima facie grounds meriting an appeal to the Court of Appeal


Looking at the affidavit and the counter affidavit on the record two conflicting positions are maintained by the applicant and the respondents which raise an issue as to whether the court was justified at the stage of the application for leave to apply for prerogative orders to dismiss the application for leave on the reason of the applicant's failure to prove the grounds on which the intended application for prerogative orders was sought.

On my part, I think the foregoing raises issues which call for determination of the court of appeal and which also disclose prima facie grounds meriting an appeal to the Court of Appeal. The issues necessarily revolve around the grounds set forth in the chamber summons as they relate to the affidavit, to wit, whether the court

properly interpreted and apply the law governing application for leave to apply for judicial review; whether the court dealt with Misc. Civil Application No. 11 of 2017 as if it were application for prerogative orders, and whether the court improperly exercised its discretion in refusing to grant leave.

In the result and for the foregoing reasons, I would as I hereby do so grant the application with costs.

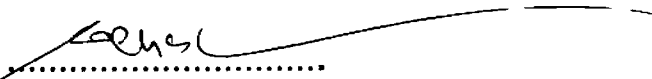
It is so ordered.


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B. S. Masoud
Judge
03/03/2020

COURT

Ruling delivered in the presence of Ms N. Sekimanga, SA assisted by Peace Mpamgo, L/O for the 3rd Respondents and Ms N. Sekimanga holding Dr Lucas Kamanija's brief for the applicant this 03/03/2020.




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B. S. Masoud
Judge
03/03/2020