IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISRTY)

AT TANGA

CIVIL APPLICATION NO. 56 OF 2020

IN THE MATTER OF AN APPLICATION FOR A WRIT OF PREROGATIVE ORDERS OF ***CERTIORARI*** AND ***MANDAMUS***

AND

IN THE MATTER OF THE DECISION OF THE SENATE OF SEBASTIAN KOLOWA MEMORIAL UNIVERSITY

BETWEEN

JAMES G. KUSAGA.....APPLICANT

AND

SEBASTIAN KOLOWA MEMORIAL UNIVERSITY

(SEKOMU).....RESPONDENT

RULING

Date of last order: 03/08/2021
Date of Ruling: 14/08/2021

AGATHO, J.:

The applicant James G. Kusaga is moving this Court to grant orders for certiorari to quash decision of the Respondent (Sebastian Kolowa Memorial University) to discontinue him from studies. The decision to discontinue him from studies was made in 2017 and the Application for leave to apply for judicial review and the Application for judicial review were made in 2020. Since the Application for leave to apply for judicial review was granted, this Court proceeded to determine

three things: 1st whether the Application for judicial review was filed on time? If yes, whether the Application for judicial review is with merit.

With regards to the first issue, the Court had to go through the records and ordered the parties' counsels to address on the issue. Since limitation of time is crucial, I took liberty of examining the records. I noted the following: that the leave to apply for judicial review was granted on 22/10/2020. Thereafter, the Application for judicial review was filed on 2/12/2020. The Applicant's counsel Noelina Bippa submitted that while the leave was granted on 22/10/2020 they obtained the copy of the ruling on 19/11/2020 as indicated by the Court stamp. They applied for copy of ruling on 23/10/2020 and they were given the copy of it on 19/11/2020. To them, the time of limitation started to run against them on 19/11/2020 because the Court supplied them with a copy of the ruling which is required to be attached with Application for judicial review. She submitted that had she been given time to supply the Court with the Court of Appeal of Tanzania authorities, she would have done so. The Respondent's counsel Ally Kimweri did not have much to say, instead he reminded the Court that the Application might have been time barred.

Since time of limitation is a point of law, I perused the judicial review rules as enshrined in The Law Reforms (Fatal Accidents and

Miscellaneous Provisions) (Judicial Review and Procedure and Fees) Rules, 2014 G.N.324 Published on 5/9/2014. These Rules provide under Rule 8(1) that:

> *"Where a leave to apply for judicial review has been granted, the application shall be made ...*
>
> *(b) within fourteen days from the day when the leave was granted."*

I asked myself when was the leave granted? In my view the leave was granted on 22/10/2020. Therefore, the submission of the counsel for the Applicant that time started to run from the date the copy of the ruling was supplied by the Court to them is not appealing. If anything, then the date on which the copy of the ruling was given and for it was late, then that Court's delay in supplying the copy of the ruling should have been the underlying reason for application for extension of time.

Be it as it may, the Court proceeded to determine the merit of the application for judicial review. But before doing so, another substantive issue crossed the mind of the Court. That is whether the decision of the Sebastian Kolowa Memorial University (SEKOMU) being a private entity or private University is amenable to judicial review. This is a fundamental question because it can dispose the matter before even looking at the substance of the application itself. My attempt to locate

the Court of Appeal of Tanzania (CAT) decision providing position as to whether the private body's decision is amenable to judicial review proved futile. However, I came across one CAT decision which defined circumstances in which judicial review may be done. In **Sanai Murumbe & Another v Muhere Chacha [1990] CAT, 10** where the CAT did so.

An order of certiorari is one issued by the High Court to quash the proceedings and the decision of a subordinate court or tribunal or a public authority where, among others, there is no right of appeal. Certiorari is provided for under Section 17, 18, and 19 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act [CAP 310 R.E. 2019]. In **Sanai Murumbe's case**, it was held inter alia that the High Court may investigate the proceedings of lower court or tribunal or public authority on the following grounds: one, apparent on record that the lower court or tribunal or public authority has considered matters which ought not to have considered. Two, that the court or tribunal or public authority has not considered matter which ought to have considered. Three, lack or excess of jurisdiction by the lower court. Four, that the conclusion arrived at is so unreasonable that no reasonable authority could ever come to it. Five, rules of natural justice have been violated. And six, illegality of procedure or decision.

Nevertheless, the High Court has progressively been allowing judicial review of the decisions of private bodies perhaps in the understanding that these bodies have undertaken public functions. These are visible in the decisions such as **Hilalius Anatory and Sospiter M. Mahumbi v The Hubert Kairuki Memorial University (HKMU), Misc. Civil Application No.1 of 2018, in High Court of Tanzania at Dar es salaam (unreported)**; and **Ruttu B. Jeremiah v The Registered Trustees of St. Augustine University of Tanzania and The Deputy Vice Chancellor for Academic Affairs of SAUT, Misc. Civil Cause No.06 of 2018, High Court of Tanzania at Mwanza (unreported)**. Indeed, the public functions exercised by these universities under the Universities Act and their Charter do not differ from the functions performed by public universities. Thus, if the decisions of public universities are amenable to judicial review the same will apply to private universities. The judicial review cases as for public universities and higher learning institutions are many **Simon Manyaki v Executive Committee and Council of the Institution of Institute of Financial Management (1984) TLR 304**, and **Exaud Abraham Tuni v the National Institute of Transport and the Attorney General, Misc. Civil Cause No. 20 of 2020, High Court of Tanzania at Dar es salaam (unreported)**. These institution's decisions on examination results are final. The

student may appeal against the examination results but the decisions by the University Senate in as far as examination results are concerned is final. The only remedy in such premises is judicial review which puts a check or control on legality, fairness, reasonableness of the decision. It is the exercise of public function that is being controlled.

Moreover, the law is dynamic as opposed to being static. There are recently policies and laws that recognise public private partnership. The decision of hybrid bodies that executed public private partnership function certainly may be amenable to judicial review.

The Civil Justice Bench Book, the Law Development Centre (LDC) 1st Edition, 2016 at page 340 attempts to define judicial review:

> *"Judicial Review is the process by which the High Court exercises its supervisory jurisdiction over proceedings and decisions over inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are engaged in the performance of public acts and duties. Those duties may affect the rights or liberties of the citizens. It is a matter within the ambit of the administrative law."*

Since judicial review emerged from Common Law, it is ideal to explore what is the status in the UK now. In UK the case of **R (Beer) v Hampshire Farmers' Market Ltd [2004] 1 WLR 233** it was held that by Dyson LJ that:

> *"the law has now been developed to the point where unless the source of power clearly provides the answer the question of whether the decision of a body is amenable to judicial review requires a careful consideration of the nature of the power and function that has been exercise to see whether the decision has a sufficient public element flavour or character to bring it within the purview of public law."*

But in 2018 a tide changed where the decision of UK's Court Appeal held that decision or power exercised by a private company are not amenable to judicial review. That position was given in the case of **Holmcroft Properties Ltd v KPMG LLP [2018] EWCA Civ. 2093**.

While the position in the UK has returned to the traditional normality, in Tanzania judicial review has not been reserved for the decisions of public authority only. Even private entities have been held to be amenable to judicial review in Tanzania. The test that has been used is said to be "public function" test. Was the decision rendered in performance of public function? Does the decision affect the public? It is

important to note that the test excludes private arrangement especially contractual related decisions. The situation where the judicial review has been done for decision rendered by private institutions has been taken in cases that relates to examination results related decisions in Higher Learning Institutions because the decisions are appealable to the Senate whose decisions is final. High Court has such stand in the decisions of **Hebert Kairuki Memorial University**, and other cases. Despite a good intention of developing such jurisprudence, admittedly the CAT has not provided a guidance on "public function test". In fact, the CAT in **Murumbe's case** uses a terminology "public authority" not public function. I am not going to delve in plethora of authorities as to what is "public authority." It suffices to mention that public function and public authority are dissimilar. While the innovation of extending juridical review to decisions rendered by private entities is appreciated, one can only hope that someday the CAT will provide guidance on this matter.

Having sketched the position of the law albeit scantly I proceed to examine the substance of the Application before this Court. During the hearing of the application the parties were ordered to argue the application by way of written submissions to which they complied. Looking at the affidavit, counter affidavit and the annextures as well as

the submissions and the law at large, and to reach its conclusion the court raised some points for determination. These are:

(1) Rights to be heard: Whether the TCU cancellation was written to vary the respondent's decision due to failure to give the applicant an opportunity to be heard.

(2) Right of appeal: Whether the applicant hard a right to appeal which he did not exercise after TCU cancellation of respondent University's decision to discontinue the applicant.

(3) Whether the applicant has exhausted all remedies?

Whether right to appeal was exercise? Yes, he was granted the right to be heard as he appealed against the discontinuation from studies in his semester exam results. The appeal was done through the applicant's letter dated 7th August 2017. He appealed to the senate chairperson in which the applicant opposed discontinuation decision. On 4th September 2017 the appeal results were out. The applicant's discontinuation was confirmed.

Whether missing information on the marks in the results SBL 2102 was fatal or prejudiced the applicant? Again, appeal should have been handled by appointing a third marker instead of having the examination committee sitting in a meeting and give recommendations. It is also not clear why subject/course SBL 2102 was not included in summation of

courses the applicant sat for examination. The candidate/applicant was never reinstated as the letter that if the appeal is allowed by the senate, then he will resit the referred to dated 14th August 2017 did not say he should resit, the exams rather it gave possibility exams. The applicant misread the letter. Why did examination committee in its recommendation included some courses for the 4th semester while candidate has not done that semester yet. Thus, is serious irregularity.

The TCU letter directed SEKOMU "to give the student benefit of doubt." How was the directive implemented? SEKOMU gave the student an opportunity to resit his exams. The records show that the Applicant failed all his resit exams and had cumulative results of 50%. Consequently, he was discontinued. This is apparent in the SEKOMU letter dated 19/6/2017 addressed to the Applicant. He appealed against that decision. The appeal was dismissed as per SEKOMU letter 4/9/2017.

As well submitted by the respondent's counsel, there is a distinction to be drawn between 2016 exam and appeal results, and 2017 exam and appeal. As for thee 2016 exam results and appeal, the process and results were recalled by TCU and the candidate was reinstated and allowed to continue with studies.

In 2017 the procedure and results handling were proper, and TCU was satisfied, and it advised the candidate to seek relief from other

avenues. This is visible in the TCU Letter addressed to the applicant. It means the decision and SEKOMU senate handling of the matter was proper and final. Had TCU and MOEST not satisfied they would have reversed the decision of SEKOMU exam results of 2017 just like they did in 2016. I am saying so because the same is found in the Applicant's reply to Counter Affidavit para 10 which recants the claim that TCU and MOEST were not satisfied with the SEKOMU handling of the applicant case and that is why they advised him to seek reliefs from other avenues. On the contrary TCU and MOEST were satisfied, and they had nothing to reverse because the procedure and the exam regulations of SEKOMU were observed, and there was no irregularity. It goes without saying that TCU is the regulator of universities and would not allow any University to contravene the law or violate the students' rights.

In 2017 the regulation (exam By Laws) is clear if the candidate fails in a repeat course he shall be discontinued. Therefore, since he failed many (five) repeat exam courses.

But discontinuation under SEKOMU Exam By Laws is not merely about GPA, rather it was done for failing repeating courses. SEKOMU Examination Regulations, under Regulation 7.15 (iii) and (vii) are the key. Where Regulation 7.15(iii) provides that a student who fails 50% is discontinued from studies. As for Regulation 7.15 (vii) states that a

student who fails in repeating courses shall be discontinued from studies. Then omission of SBL 2102 cannot rescue the situation. The reply to the Counter Affidavit under para 9 shows that the problem with SBL 2102 was rectified have C grade but were not added to supplementary GPA.

Moreover, I have noted that the Applicant has raised many issues in the submissions. These issues ought to be raised in the Affidavit first before their inclusion in the submissions.

For the reasons stated herein above, this Application lacks merit for the Respondent properly observed the law. The Applicant's right to be heard was not violated. Again, following the Tanzania Commission for Universities (TCU) decision to quash the SEKOMU proceedings and examination results for 2016, the students was reinstated, but he failed in the 2017 examination, and he exercised his right of appeal. In the end TCU and Ministry of Education, Science and Technology (MOEST) were satisfied with the way SEKOMU handled the applicant case in 2017. The Applicant failed on merits and exhausted his rights. There was no procedural irregularity as complained by the Applicant. It is for that reason TCU and MOEST advised him to look for other avenues where he could seek reliefs. Consequently, the application is dismissed with costs.

U. J. AGATHO

JUDGE

13/09/2021

Court: Ruling delivered on this 13th day of September 2021 in the presence of the Applicant and his advocate Noelina Bippa, and the Respondent's counsel Ally Kimweri.

U. J. AGATHO

JUDGE

13/09/2021