IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM MAIN REGISTRY)
AT DAR ES SALAAM

MISCELLANEOUS CAUSE NO. 58 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF MANDAMUS AND CERTIORARI

AND

IN THE MATTER OF THE DECISION OF THE INSTITUTE OF TAX ADMINISTRATION DATED 3RD SEPTEMBER, 2020

BETWEEN

1. EVA ISSANGO ..... 1ST APPLICANT
2. PAUL MAMBO ..... 2ND APPLICANT

AND

1. THE INSTITUTE OF TAX ADMINISTRATION ..... 1ST RESPONDENT
2. ATTORNEY GENERAL ..... 2ND RESPONDENT

Date of Last Oder: 23/03/2021

Date of Ruling: 30/04/2021

RULING

FELESHI, J.K.:

This ruling has basis from an application made by way of chamber summons in terms of sections 17(1) and 18(1) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, vide G.N. No. 324 of 2014 for the following orders that: -

(a) *The Court be pleased to grant leave within which the applicant may apply for prerogative orders of certiorari and mandamus to quash the decision of the 1st respondent's Governing Council dated 03/09/2020 which discontinued the applicants from studies.*

(b) *This Court be pleased to compel the 1st respondent to allow the applicants to proceed with the 2nd semester of their last year of studies.*

(c) *The costs of the suit be borne by the respondents.*

The preferred chamber summons is supported by both statements and affidavits of the applicants to the effect that, the applicants were students pursuing their Bachelor degrees on Custom and Tax Management at the Institute of Tax Administration. That, on 18/12/2019, the applicants appeared for *viva voce* defences before the respective Council to defend their field reports and that despite scoring B+ they later discovered that their field reports were missing in the SARIS.

On 23/03/2020, the applicants were required vide telephone calls to go into the office the next day which they complied with, whereas on 24/03/2020 they appeared before the Examination Irregularity Committee.

The gist of the allegations leveled against the applicants was that the applicants copied the field reports subject for examination from each other.

The applicants averred that they made their defences in absence of formal charges and without been accorded opportunity to prepare their defence. On 07/05/2020, the Governing Council in its 132nd meeting, discontinued them from studies. On 18/05/2020, they preferred an appeal to the Rector as they were aggrieved but the same was dismissed on 09/07/2020 where the decision of the Governing Council was upheld.

On 15/07/2020, the applicants wrote a letter to the Rector requesting for review of the discontinuation decision in remedial who informed them on 03/09/2020 that their letter for review had been rejected. The applicants' grounds for the sought reliefs are that: -

a. *The decision to discontinue the applicants from studies was erroneously reached in breach of principles of justice and fair trial contrary to paragraph 17(a), (b) and (d) of part V of ITA Examination Regulations as the applicants were neither notified of the formal charges against them nor accorded them sufficient time to defend themselves before the ITA Examination Irregularity Committee.*

b. *The penalty imposed to the applicants was excessive on the reason that the applicants ought to have been charged with plagiarism contrary to paragraph 22(h) of ITA Examination Regulations in which a student who is found to have plagiarized in respect of the project report shall be considered to have failed the research project.*

c. *The applicants were not afforded the right to appeal.*

On 29/01/2021, Mr. Ayoub Sanga, a State Attorney from the Office of the Solicitor General preferred two points of preliminary objection, that: -

1. *The application is unmaintainable in law for being time barred contrary to rule 6 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, vide G.N. No. 324 of 2014.*
2. *The application is incompetent and untenable in law as it falls short of the prerequisite conditions for seeking leave for judicial review as there is no decision to review.*

On 09/02/2021, this Court scheduled a simultaneous hearing by way of written submissions of both the preliminary objections and the merits of the application where its order was duly complied with by the parties,

hence, this ruling. Notably, the respondents' counsel did not prefer a rejoinder submission to the raised preliminary objections for reasons never disclosed to the Court.

Starting with the 1st point of preliminary objection, Mr. Edwin Joshua Webiro, learned respondents' counsel submitted to the effect that, the application contravenes rule 6 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, vide G.N. No. 324 of 2014 that sets a time frame of six months to an aggrieved person to lodge an application for leave. The Solicitor General argued that, the application was filed on 30/12/2020 while it ought to be filed by 07/11/2020 as the faulted decision was entered on 07/05/2020.

Premised on **Yussuf Vuai Zyuma v. Mkuu wa Jeshi la Ulinzi TPDF and 2 Others,** Civil Application No. 15 of 2009 (Unreported) and **Tima Haji v. Amiri Mohamed and another,** Civil Revision No. 61 of 2003 amongst others, he urged for the application to be dismissed with costs for this Court lacking jurisdiction due to time limit.

In response, Mr. Cleophace James, learned counsel for the applicant submitted that, the application is within the prescribed time limit having been filed within six months from the date of proceedings, act or omission.

He argued that, the letter dated 03/09/2020 is the one that prompted filing of the present application. He added that, the applicants did not remain inaction, rather, they utilized all the available remedies until a decision was lastly made on 03/09/2020.

The applicant's counsel argued that, existence of right of appeal is a matter of fact which has to be ascertained through evidence. Regarding the 2nd point of objection, the applicant's counsel submitted that, the objection is untenable as the present approach is meritorious and appropriate remedy to aggrieved applicants. In result, the applicants' counsel urged for the preliminary objections to be overruled. As noted earlier, for undisclosed reasons, the Solicitor General did not file his rejoinder submission.

To this Court, after scrutinizing and considering the rival submissions by the learned friends, the following are the deliberations on the raised preliminary objections. The main issue is whether or not, the measures taken by the applicants from 07/05/2020 onwards regarding appeal and review were in purview of the available remedies for an aggrieved party, thus, setting the matter within truck before resorting into prerogative orders.

The learned State Attorney strenuously faulted the resorted into rights of appeal and review by the applicants on argument that the same were out of the available remedies cementing that a decision of the Governing Council is as such final. This Court is in agreement with the learned State Attorney's argument that time limitation is among factors which drain away jurisdiction of any court of law. But hurriedly, this Court is also certain that issues of law are governed by laws, rules and regulations.

Notably, the learned Solicitor General did not point out any law, by law, rule or even regulation that prescribes that the decision by the Governing Council is final and that whoever is aggrieved should seek remedy through courts of law. This issue, as correctly pointed out by the learned advocate for the applicants, needs to be substantiated by evidence. Therefore, according to the decision in **Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd** [1969] E.A. 696 which held that a Preliminary Objection should be on a pure point of law, the same cannot be disposed at this stage.

In view of the foregoing, the 1st point of preliminary objection lacks merits and it is herby overruled though upon grant of leave, the same can

be revived since, as aforesaid, issues of time limitation are crucial in vesting jurisdiction to courts of law. Since the learned State Attorney did not account for the 2nd point of objection, this Court finds it inappropriate to dwell on it for such failure or overlook so to speak by the respondents, can be figured as an abandonment of the same. The same is thus overruled for want of substantiation.

Having disposed of the raised preliminary objections, resort is now made to merits of the application. Regarding merits, the applicant's learned counsel submitted that, the leveled applicants' grievances are arguable, having been preferred within 6 months with the applicants having sufficient interest in the intended application for judicial review as required and made clear by the Court of Appeal in **Emma Bayo v. the Minister for Labour and Youth Development and Others,** Civil Appeal No. 79 of 2012, (Arusha Registry), (Unreported) for that is what is required at this leave stage.

The intended application for judicial review is with regard to erroneous breach of principles of natural justice and fair trial contrary to paragraph 17(a)(b) and (d) of part V of the ITA Examination Regulations.

He argued that, no formal charges were made against the applicants for they were summoned over phone calls adding that, the notices did not prove service.

In reply, Mr. Ayoub Sanga, learned State Attorney for the respondents submitted that, being aggrieved by the decision of the Governing Council, instead of challenging the same before courts, the applicant preferred an appeal and later a review to the Rector who informed them that the decision of the Governing Council was final. He argued that, the applicants failed to show sufficient cause for grant of the sought leave.

In rejoinder, the applicants' counsel cited to this Court the case of **Republic Ex Parte Peter Shirima v. Kamati ya Ulinzi na Usalama, Wilava ya Singida, the Area Commissioner and the Attorney General,** [1983] T.L.R 375 where the Court held that: -

> *"The existence of the right to appeal and even the existence of an appeal itself, is not necessarily a bar to the issuance of prerogative order, the matter is of judicial discretion to be exercised by the Court in the light of the circumstances of each particular case".*

Besides, it is a settled position of the law in purview of the Court of Appeal in **Sanai Murumbe and Another v. Muhere Chacha,** [1990] T.L.R 54 that, in exercising judicial review, the following aspects have to be at stake, failure to take into account matters which ought to have been taken into account, taking into account matters which ought not to have been taken into account, lack or excessive jurisdiction, unreasonable conclusions, breach of rules of natural justice and illegality of procedure.

Furthermore, before granting leave, one has to clearly establish that the application for leave was made within six months period of time. Such position was made clear by the Court of Appeal in **Hezron Nyachiya v. Tanzania Union of Industrial and Commercial Workers and Organization of Tanzania Workers Union,** Civil Appeal No. 79 of 2001, (Dar es Salaam Registry), (Unreported) where the time for an application for leave for prerogative orders was declared to be six (6) months. But for the reasons accounted for earlier, that issue of time limitation has been deferred to be dealt with later, if the respondents will so wish, considering the already given reasons.

To this Court in resort to the merits of the application, as such, is the applicants' outcry that they were not accorded: **one,** fair opportunity to be

heard; and **two,** that they were not so properly summoned for them to prepare and in the end result, make a plausible defence. This Court thus finds the complained of irregularities (regardless of their truthfulness or rather merits determinable in the very application for the sought for prerogative orders, if any), falling within the well and sound established principles of law as set by in the cited cases of **Republic Ex Parte Peter Shirima v. Kamati ya Ulinzi na Usalama, Wilaya ya Singida, the Area Commissioner and the Attorney General** (supra) **and Sanai Murumbe and Another v. Muhere Chacha** (supra).

Furthermore, the above traversed areas for prerogative orders hinge and bring home an arguable case as set forth by the Court of Appeal in the earlier cited case of **Emma Bayo v. the Minister for Labour and Youths Development and 2 Others** (supra) which this Court full subscribes to it. To this Court, issues of discontinuation from studies by the applicants on allegations of examination malpractices cannot at any fours be said to be insufficient as argued by the learned State Attorney.

It is from the above analysis in a nutshell that this Court finds merits in the present application for leave to file an application for prerogative orders of *certiorari* and *mandamus*. Thus, the same is hereby granted.

However, considering the circumstances of the matter at hand, parties are ordered to shoulder for their own costs.

It is so ordered.

DATED at DAR ES SALAAM this 30th day of April, 2021

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E.M. FELESHI
PRINCIPAL JUDGE (J.K.)

COURT:

Ruling delivered this 30th day of April, 2021 in presence of Mr. Cleofas James, learned advocate for the applicant and Mr. Ayoub Sanga, learned State Attorney for the Respondents.

M.J. CHABA
SENIOR DEPUTY REGISTRAR
30/04/2021