

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT DODOMA

MISCELLANEOUS CAUSE NO. 66/2017

IN THE MATTER OF AN APPLICATION FOR ORDERS OF
CERTIORARI

IN THE MATTER OF THE PUBLIC SERVICE ACT, CAP 248 OF
THE REVISED LAWS OF TANZANIA

AND

IN THE MATTER OF THE TEACHERS SERVICE COMMISSION
ACT, CAP 448 OF THE REVISED LAWS OF TANZANIA

AND

IN THE MATTER OF DECISION BY THE DODOMA MUNICIPAL
DIRECTOR TO SUSPEND INDEFINATELY THE APPLICATION
FROM PUBLIC SERVICE

BETWEEN

SAMSON K.MKOTYA.....APPLICANT

VERSUS

DODOMA MUNICIPAL DIRECTOR.....1ST RESPONDENT
THE ATTORNEY GENERAL.2ND RESPONDENT

RULING

Date of Last Order: 10.08.2021

Date of Ruling: 16.08.2021

Dr. A.J. Mambi, J.

This is an application filed by **SAMSON K.MKOTYA** for an order of
Certiorari. The applicant in this matter has filled his application for

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Order of Certiorari under Section 17 (12) and Section 19(1) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap 310 [R.E. 2019], and Rule 8 (1) (a) (b) and (3) of the Law Reform (Fatal Accident and miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014]. The applicant sought for one prerogative order namely Certiorari. The applicant has sought Certiorari order to move this court for the purposes of quashing the decision of the Dodoma Municipal Director who suspended the applicant from the job and salaries on 14th September 2017.

The applicant was granted leave of this court in Miscellaneous Civil Application No.62 of 2017 to apply for the orders of certiorari and against the first respondent. Having obtained the leave, the applicant has filled his application for an order of certiorari. During hearing, the applicant was represented by The learned counsel Mr. Kaionga while the respondents were represented by Ms. Neema Mwaipana and Mr. Musa (the learned State Attorneys) and Lumbando (Municipal Solicitor).

The learned counsel for the applicant stated his submission by adopting the applicant affidavit. He briefly submitted that they are the grounds on application for certiorari order is based on the following statements;

(1)the applicant was condemned and punished unheard

(2) The decision against the applicant was biased

(3) The decision to punish the applicant was unreasonable

The learned Counsel submitted that the applicant has been a public servant as the teacher since 2008 and he has been being promoted several times. He contended that the Municipal Director had no power suspend the applicant from employment that is why the applicant is seeking an order of certiorari to this court.

In response, the respondents' State Attorneys submitted that the application before this has no merit since it has been improperly filed. The State Attorneys argued that the suspension letter by the Municipal Director was proper and it was in line with Rule 2(3) of the Tanzania Teachers Commission Regulations. They argued that since the Municipal Director suspected that the applicant had committed acts that had criminal element that is why he wrote suspension letter with reasons pending criminal investigation from the Prevention and Combustion of Corruptions (PCCB). They averred that the charge against the applicant issued by the Municipal Director against the applicant involved disciplinary that related to criminal. They were of the view that since the suspension letter was not final, the applicant was not required to bring the matter to this

court at this stage. They argued that the applicant was required to lodge his complaint to the Public Service Commission. They refuted the decision of the court in **Assistant Registrar of Buildings Vs Freddy 1984 TLR**.

I have considerably gone through the application by the applicant and submission from both parties. In my considered view the main issue is whether the application is proper before this court and whether the grounds for an order of certiorari has merit.

Before addressing these issues I wish to briefly highlight the meaning of both orders, how are they sought and against whom. Generally, *certiorari* is a writ seeking judicial review whereby it is issued by a superior court, directing an inferior court, tribunal, or other public authority to send the record of a proceeding for review. The underlying policy is that all inferior courts and authorities have only limited jurisdiction or powers and must be kept within their legal bounds. Under the common law the High Court has inherent powers to issue prerogative remedies, which includes the writ of mandamus and certiorari. This position is cemented under our law that is the Judicature and Application of Laws Act (JALA). See also **Alfred Lakaru v. Town Director (Arusha) [1980] TLR 326** and

***Tanzania Dairies Ltd V Chairman, Arusha Conciliation Board
and Isaack Kirangi [1994] TLR 33 (HC).***

It is well settled principle that the courts may review an administrative decision like the decision of the Municipal Director in our case on substantive grounds. In this regard the court will analyze the substantive decision on a standard of reasonableness or correctness, the latter, of course, being the more stringent. This means in our case this court need to determine whether he had such power of making decision and if he has done the court will among others look at the reasonableness and correctness of such decision. Generally, most applications for judicial review seek to challenge the decision made by the tribunal or decision maker on the basis that the decision was procedurally unfair or outside the scope of the decision maker's statutory authority.

Before the court granting prerogative orders such as certiorari and mandamus, the court will need to ask the question that; was there a Decision?. Of course, there must be a decision for the courts to review. This may seem like common-sense, but it must be remembered that the courts will only review a decision of a public

body that is administrative. This means that the decision must have an effect on the “legal rights, powers, and duties among others.

Having briefly explained the order of certiorari that have been sought by the applicant let me now revert to the key issues I have raised. As I said earlier submissions from the two parties (applicant and respondents) have raised two main issues which include:

Whether this application has been properly filed to this court or not and if yes, whether the Municipal director had power to suspend the applicant or not. If the answer is yes the other related issue is whether the decision of the 1st respondent contravened the Provisions of the Land. It is on the records that the Municipal Director issued a suspension letter to the applicant after suspecting him of committing an act that implied criminal offence under the Laws related to corruption. Having suspended the applicant, the Municipal Director referred the matter to PCCB. This means that the applicant was just suspended for a while pending investigation to be made by PCCB. The matter at hand raises almost two or three questions to be answered. Firstly, was the decision of the Municipal Director subject to judicial review by this court or not?. In other words, was the applicant correct in seeking an order for certiorari at

this court?. Secondly, were there any available remedies for the applicant before filing an application for judicial review in the court or not and if yes, did he exhaust all remedies?.

I have keenly gone through the laws that govern the disciplinary matters of teachers as public servant and found that there are other local remedies in which the applicant could sought such remedies before knocking the door at this court for judicial review. In my considered view the applicant was required to lodge his complaint to the Public Service Commission as provided by the Public Service Act and the Local Government Service Schemes Regulation (Regulation 25).

Indeed the producers governing disciplinary matter to public servants are clearly stipulated under the laws that regulates public servants. Thera are organs established and empowered by the statues to deal with disputes related to disciplinary matters basing on hierarchical ladder before one can go to the court for judicial review. For instance section 9 of the Public Service Act establishes an organ known as the Public Service Commission which deals with all appeals from the lower bodies such local government authorities and other public service organs that deals with disciplinary matters as adjudicatory authority. More specifically section 10 of the Act

provides for the function of the Commission and one of the function is to receive appeals from the decisions of other delegates and disciplinary authorities. For easy reference I wish to quote that that provision as follows;

“10.-(1) The functions of the Commission shall be

(a) to advise the President through the Public Service Department on the exercise of such of the functions conferred on the President by Article 36 of the Constitution, and sections 4(l) and 5(l) of this Act and in respect of the filling of such vacancies in the public service as the President may require; (b) to assist the President in relation to such matters relating to the Service as the President may require;

(c) to issue guidance, to monitor and to conduct merit based recruitment in the public service; (d) to facilitate the appointment to posts in the public service of -(i) officer grade or equivalent grade to director and commissioner grades; (ii) officer grade or its equivalent to a director of a council in a local government authority;

(iii) the rank of assistant inspector to the rank of commissioner in the immigration Service; (iv) the rank of assistant inspector to the rank of commissioner in the fire and rescue services;

(e) to receive and act on appeals from the decisions of other delegates and disciplinary authorities;

(f) to exercise any other functions which may be conferred upon it

under Part VI of this Act; (g) to facilitate, monitor and evaluate performance by officials in the Service to secure results oriented management; (h) to call upon all executives in the Service to account for their performance should the Commission be seized with evidence or complaints indicating mismanagement or non-performance of mission;

(i) to ensure that service schemes are formulated and implemented effectively, (j) to take measures in relation to any executive who fails to take action concerning public servants under him in accordance with the requirements of the law for the service”

Reading between the lines on the bolded paragraph that is section 10 (1) (a) that the proper forum for the applicant to exercise his right was first to lodge his appeal to the Public Service Commission under the Public Service Commission Act, Cap 298 (Section 10 (1) (e)(e) read together with the Teachers Commission Service Act and Regulations made under the two Acts. Additional section 25 of the Public Service Commission Act, Cap 298 specifically provides for the remedies and mechanisms for a public servant who has been aggrieved by the decision of the head of department like the Municipal Director in our case. That provision under 25.-(1) (b) provides that if the **Head of Independent Department or a Local**

Government Authority exercises disciplinary authority reduces the salary or **dismisses the public servant**, that public servant is required to appeal to the **Commission** against the decision of the disciplinary authority. For easy reference and to be more specific to our matter at hand, I wish to reproduce the whole provisions (section 25 of the Public Service Commission Act, Cap 298) which provides for remedies and mechanisms to public servants who are aggrieved by the decisions of the heads of the public service organs. That provisions which deals with appeal from various public services and head of those organs provides that:

“25.-(1) Where –

(a) the Chief Secretary exercises disciplinary authority in respect of a public servant who is an appointee of the President by reducing the rank other than reversion from the rank to which the public servant has been promoted or appointed on trial, or reduces the salary or dismisses that public servant, that public servant may appeal to the President against the decision of the disciplinary authority and the President shall consider the appeal and may confirm, vary or rescind the decision of that disciplinary authority;

(b) a Permanent Secretary, **Head of Independent Department**, Regional Administrative Secretary or **a Local Government Authority** exercises disciplinary authority as stipulated under subsection (1) and (2) of section 6 by reducing the rank of a public servant other than reversion from a rank to which the public servant had been promoted or appointed on trial, or reduces the salary or **dismisses the public servant, that public servant may appeal to the Commission against the decision of the disciplinary authority and the Commission may confirm, vary or rescind the decision of that disciplinary authority;**

(c) the Director of Immigration or the Commissioner of Fire and Rescue Services exercises disciplinary authority as stipulated under subsection (5)'of section 6 by reducing the rank of a public servant other than reversion from a rank to which the public servant had been promoted or appointed on trial or reduces the salary or dismisses the public servant, that public servant may appeal to the Commission against the decision of the disciplinary authority and the Commission may confirm, vary or rescind the decision of that disciplinary authority; (d) where a public servant or the disciplinary authority is aggrieved with the decision in (a), (b) and (c) shall appeal to the President whose decision shall be final;

(e) the President or the Commission varies or rescinds any decision of dismissing any public servant from the public service and substitutes any other decision of dismissing that public servant, the variation. or rescission shall have effect from the date of the original decision and the public servant shall unless sooner have ceased to be a public servant for any other cause, be deemed to have remained a public servant notwithstanding the original decision.

(2) The President may, in regulations made under section 20 provide for appeals in cases other than those provided for in section 23".

In my considered view the applicant has not exhausted other available local remedies under the Public Service Commission Act, Cap 298 and other related laws before filing his application for judicial review for an order of certiorari at the court. The simple interpretation of the above cited provisions of the law that is sections 10 (1) (a) and Section 25 (1) (b) of the Public Service Commission Act, Cap 298 is that, the applicant being a public servant was first required to exhaust other available remedies by lodging his appeal under that Act (Cap 218). In other words the proper forum for the applicant to exercise his right was first to lodge

his appeal to the Public Service Commission under the Public Service Commission Act.

In this regard, I entirely agree with the learned State Attorneys that that this application was prematurely brought in contravention of the provisions of the laws that requires the applicant to exhaust all available remedies before approaching the court.

Having found that the applicant wrongly prematurely filed his application to this court, the only remaining question before me will now be, whether there is any application before this court. As I observed and reasoned above, that since the applicant did not comply with the mandatory requirements of the law, it is as good as saying there is no application at this court. I wish to refer the decision of the court in ***Joseph Ntongwisangue another V. Principal Secretary Ministry of finance & another Civil Reference No.10 of 2005*** (unreported) where it was held that:

"... Experience shows that the litigations if not controlled by the court, may unnecessarily take a very long period and deny a party in the litigation enjoyment of rights granted by the court."

Reference can also be made to the decision of the court of Appeal of Tanzania in ***The Director of Public Prosecutions v. ACP Abdalla Zombe and 8 others*** Criminal Appeal No. 254 of 2009, CAT (unreported) where the court held that:

“this Court always first makes a definite finding on whether or not the matter before it for determination is competently before it. This is simply because this Court and all courts have no jurisdiction, be it statutory or inherent, to entertain and determine any incompetent proceedings.”

Reference can also be made to the decision of the court in ***Joseph Ntongwisangue another V. Principal Secretary Ministry of finance & another Civil Reference No.10 of 2005*** (unreported) where it was held that:

“in situation where the application proceeds to a hearing on merit and in such hearing the application is found to be not only incompetent but also lacking in merit, it must be dismissed. The rationale is simple. Experience shows that the litigations if not controlled by the court, may unnecessarily take a very long period and deny a party in the litigation enjoyment of rights granted by the court.

I highly subscribe with decision of the court of Appeal of Tanzania in ***The Director of Public Prosecutions v. ACP Abdalla Zombe***

and 8 others (supra) that this Court and all courts have no jurisdiction, be it statutory or inherent, to entertain and determine any incompetent proceedings. Similarly, there is no doubt that that the litigations of this kind if not controlled by this court, it will unnecessarily take a very long period and deny a party in the litigation enjoyment of rights granted by the court. See also **Joseph Ntongwisangue Vs. Principal Secretary Ministry (Supra)**.

From what I have observed, I am constrained to hold that the applicant before this court is fatally incompetent. From the reasons stated above, I am of the settled view that the application before this court is fatally incompetent. Since the application is incompetent I don't see any reasons for discussing the grounds or statements for the application that have been raised. I therefore hold that there is no any application before me in this court.

In the default of filing an application against decision of the first respondent in contravention of the provisions of the laws such as sections 10 (1) (a) and Section 25 (1) (b) of the Public Service Commission Act, Cap 298, the present application is certainly not proper before this Court. It is incompetent and should be dismissed, and I hold so.

Having held so, I do not think that this is a suitable case in which the prerogative Order of Certiorari can be issued at this stage. In the premises I dismiss this application. Parties to bear their own costs.



A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke, is written over the seal.

Dr. A. MAMBI

JUDGE

16/08/2021

Ruling delivered this day of 16th of August 2021 before all parties.



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Dr. A. MAMBI

JUDGE

16/08/2021

Right of appeal explained.



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Dr. A. MAMBI

JUDGE

16/08/2021