

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

MISCELLANEOUS CAUSE NO. 13 OF 2021

**IN THE MATTER OF APPLICATION FOR LEAVE TO PURSUE
MANDAMUS**

AND

**IN THE MATTER OF THE DECISION OF THE GAMING BOARD OF
TANZANIA OF 25TH MAY, 2021**

BETWEEN

ALLY HAMIS KHATIBU.....APPLICANT

AND

**THE GAMING BOARD OF TANZANIA.....1ST RESPONDENT
PREMIER BETTING ENTERTAINMENT**

AFRICA LIMITED.....2ND RESPONDENT

RULING

12 & 26 August, 2021

MGETTA, J:

The ruling is in respect of the preliminary objections, the notice of which was earlier filed by Jacqueline Kinyasi, the learned State Attorney, representing the Gaming Board of Tanzania (henceforth the 1st respondent) and by Mr. Pascal Mshanga, the learned advocate for the Premier Betting Entertainment Africa limited (henceforth the 2nd respondent), that:

1. The application is fatally defective for non joinder of the Attorney General as necessary party.

2. The application is incurably defective for want of statement contrary to **rule 5 (2) (a) of the Law Reform (Fatal Accidents and Miscellaneous Provisions)(Judicial Review Procedure and Fees) Rules, 2014** (henceforth the **2014 Rules**).
3. The application is frivolous, vexatious and abuse of court process as the duty which the 1st respondent is sought to be compelled has already been discharged, thus it is *functus officio*.
4. The application is hopelessly time barred.

Earlier on, Ally Hamisi Khatibu, the applicant through a legal services of Selemani M. Matauka and George K. Mwiga, both learned advocates, did file a chamber summons made under the provisions of **section 17(2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap 310** and **Rules 4 & 5 (1) (2) (a), (b), (c) and (d) of 2014 Rules** seeking for a leave to apply for judicial review. The application is accompanied by an affirmed affidavit verifying the facts relied upon.

Now going back to the preliminary objections, the subject matter of this ruling, the notices of which were filed along with the filing of counter affidavits by the counsel representing their respective clients, the

respondents, I ordered hearing to proceed *viva voce*. Ms. Jacqueline Kinyesi, the learned State Attorney being assisted by Leonia Maneno and Anneny Nahumu, both learned State Attorneys appearing for the 1st respondent, did drop the 1st preliminary objection and continued to argue for the 2nd and 3rd preliminary objections; while, Mr. Pascal Mshanga, the learned advocate appearing for the 2nd respondent argued for the 4th preliminary objection. The applicant enjoyed legal services of Mr. Seleman Matauka and George Mwiga, both learned advocates.

As regards to the 2nd preliminary objection, Ms. Jacqueline submitted that the application is not accompanied by statement in compliance with mandatory requirement provided for under **rule 5(2) (a) of 2014 Rules**. To strengthen her submission, she cited the decision of this court in *Shauri la Maombi Na. 05 of 2021* whereby the applicant, Krisant Amani Mwaipungu withdrew his application similar to this one after finding himself without including the statement to his application for leave. His request was granted and the application was marked withdrawn.

In reply, Mr. George insisted that their chamber summons is accompanied by the statement. According to him what constitutes a statement in this application is the words appearing on the top of the words Chamber Summons. For easy of reference, I quote them as hereunder:

"In the matter of the decision by the Gaming Board Dated 25th May 2021 in which the Gaming Board refused to perform its statutory duty and failure to determine the claim by Ally Hamisi Khatibu for payment of money by premier Betting Entertainment Africa Limited platform after placing and winning a sports Betting for different Premier league Football match prediction" sic

According to him the above quotation is a statement. It is ridiculous on the learned advocate, Mr. George. However, he has demonstrated the level of his understanding on what statement is all about or how it looks like and where it is supposed to be placed to the chamber summons. Either, he does not read the law or he completely failed to comprehend what **rule 5(2) (a)** is providing for. For easy of reference, **rule 5(2) (a) of 2014 Rules** reads thus:

5. (2) An application for leave under sub-rule (1) shall be made ex parte to a judge in chambers and be accompanied by-

- (a) a statement providing for the name and description of the applicant;*
- (b) the relief sought;*
- (c) the grounds on which the relief is sought; and*
- (d)"*

With due respect, the learned advocates for the applicant ought to understand that at a level of seeking for leave to apply for judicial review, the statement providing for name and description of the applicant, the relief sought and the grounds on which the relief is sought must be accompanied to the chamber summons. Failure to have statement to such application renders the application incompetent. I thus find the application incurably defective. The 2nd preliminary objection is accordingly upheld.

As to the 3rd preliminary objection, Ms. Jacqueline submitted that the 1st respondent is *functus officio* as it has already discharged its duty since 15/11/2019. Thus, the present matter is frivolous and vexatious as the matter has already been over taken by event.

Responding to the 3rd preliminary objection, Mr. Selemani submitted that the 3rd preliminary objection could not meet the test of preliminary objection as provided in the case of **Mukisa Biscuits Manufacturing Ltd. V. West End Distributors Ltd**, [1969]1 EA 696. He submitted that the 1st respondent has not yet made any decision. That, the issue of overtaken by event could be one of the controversy issues that need production of evidence. He fortified his submission by citing to me the case of **Tuico (on behalf of its members) V. The Chairman of Industrial Court of Tanzania & Another**; Civil Application No. 517/18 of 2017 (CA) (DSM) (unreported). He submitted further that what Ms.

Jacqueline has submitted is just a story on what transpired in respect of the dispute and therefore that should not be preliminary objection.

I am very aware that it is a trite law that preliminary objection must be pure point of law and not fact or mixed law and facts. This position is clearly demonstrated in the famous case of Mukisa (*supra*) where it was *inter alia* held that:

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

As we are still at the stage of seeking for leave, I am convinced by Mr. Selemani's submission that what have been submitted by Ms. Jacqueline in the circumstances of this application, does not amount to pure point of law as there are facts, that she raised that need to be ascertained by production of evidence at the time of hearing of the application on merit. Thus, I accordingly dismiss the 3rd preliminary objection.

As regards to the 4th preliminary objection, Mr. Pascal, the learned advocate for the 2nd respondent, submitted that the application is hopelessly time barred because it was filed on 3/8/2021 after the expiry

of six months from the date of the proceedings to which the application for leave relates. According to paragraphs 4,5,6 & 7 of the applicant's affidavit, it is indicated that the cause of action arose way back in the year 2017 when the 2nd respondent did not honour and denied him the payment of TZS 235,000,000/= after having won football match prediction. He complained to the 1st respondent who instead of taking action, resorted to conducting mediation which also failed. He decided to institute a suit against the 2nd respondent before this court in Civil Case No. 201 of 2017, i.e. Ally Hamis Hatibu versus Premier Betting Entertainment Africa Ltd, which was on 13/6/2019 dismissed by this court for want of jurisdiction to entertain it. He added that after that dismissal order, the applicant made several attempts of forum shopping by lodging applications which also failed.

He finally prayed that the application be dismissed by virtue of **section 3 of the Law of Limitation Act** for being time barred. He fortified his position by the decision in the case of **East African Development Bank V. Blueline Enterprises Limited**; Civil Appeal No. 101 of 2002 (CA) (DSM) (unreported) and the case of **MM WorldWide Trading Company Limited & 2 Others V. National Bank of Commerce Limited**; Civil Appeal No. 258 of 2017 (CA) (DSM)

(unreported) which emphasized that the remedy available for the suit found time barred is to dismiss it.

In response, Mr. Seleman, the learned advocate for the applicant just said that time limitation is not a pure point of law. His learned friend had just given a story of what had transpired over the dispute. He also submitted that the cited cases have no any weight and are distinguishable from this application. At the same time, he agreed it is true that **rule 6 of 2014 Rules** provides for time limit within which one could lodge an application for leave. However, according to him cause of action arose on 25/5/2021 as per annexure 6 to the affidavit. He added that according to **the Gaming Board Regulations of 2013**, the 1st respondent had to determine the dispute and not to mediate. It gave its last decision on 25/5/2021 and it was that day the cause of action arose. The applicant was aggrieved by that decision and on 3/8/2021 he filed this application seeking for a leave to apply for judicial review. He therefore prayed that the 4th preliminary objection be dismissed.

I have considered the submissions of both Mr. Pascal and Mr. Seleman on whether or not the application before me is time barred. What I noticed is that **one** the 2nd respondent made its decision refusing to pay the applicant TZs 235,000,000/= after he had participated and won football matches prediction on 4/6/2017; **two**, as per paragraph 5 of the

applicant's affidavit on 7/6/2017 the applicant referred the matter to the 1st respondent complaining that the 2nd respondent refused to pay him. In paragraph 7 of the affidavit, it is stated that instead of making a decision the 1st respondent resorted to conducting mediation, a procedure that, he stated, was contrary to what was expected. In my view, to conduct mediation connotes also a decision made by the 2nd respondent; and, **three** it is also on the record that upon several demand but in vain, he resorted to institute a Civil Case No. 201 of 2017 which was finally dismissed by this court for want of jurisdiction.

All the above indicated that the decision complained of was made in the year 2017 and not 2021. It is therefore the year 2017 when the cause of action arose. Admittedly application for leave to apply for judicial review must be made within six months. This is provided under **rule 6 of 2014 Rules** which is reproduced hereunder for easy of reference:

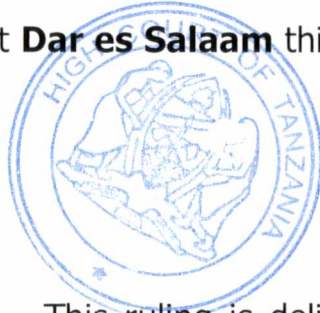
*"6. The leave to apply for judicial review shall not be granted unless the application for leave is made within **six months** after the date of the proceedings, act or omission to which the application for leave relates"*

By and large, for reasons given herein above, I do accordingly uphold the 2nd preliminary objection that the application is incurably

defective for want of statement and the 4th preliminary objection that the application is hopelessly time barred. I accordingly dismiss the application with costs.

It is accordingly ordered.

Dated at Dar es Salaam this 26th day of August, 2018.




J.S. MGETTA
JUDGE

COURT: This ruling is delivered today this 26th August, 2021 in the presence of Ms. Kause Kilonzo assisted by Mr. anneny Nahumu, both learned state attorneys for the 1st respondent, in the presence of Pascal Mshanga, the learned advocate for the 2nd respondent and in the presence of Mr. Seleman Matauka, the learned advocate for the applicant.


J.S. MGETTA
JUDGE
26/8/2021