

IN THE HIGH COURT OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CAUSE NO. 12 OF 2022

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

AND

**IN THE MATTER TO CHALLENGE THE APPEAL PROCEDURES USED
BY RESPONDENTS AGAINST THE APPLICANT AS BEING
UNREASONABLE, UNFAIR AND IN VIOLATION OF PRINCIPLE OF
NATURAL JUSTICE**

BETWEEN

ALEXANDER J. BARUNGUZA.....APPLICANT

AND

LAW SCHOOL OF TANZANIA.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

Date of Last Order: 13/6/2022

Date of Ruling: 24/6/2022

BEFORE: S.C. MOSHI, J.

The respondent via a notice of preliminary objection challenged the competency of the application which is made under rule 5(1), (4), (5) and (6) of the Law Reform (Fatal Accidents and Miscellaneous Provisions)

(Judicial Review Procedure and Fees) Rules, 2014 GN 324 of 2019. The applicant prayed for leave to file a judicial review seeking for orders of certiorari, mandamus and Prohibition challenging appeal procedures indorsed by respondents against the applicant being unreasonable, unfair and in violation of principles of natural justice, thus:

a) That, an order of certiorari to quash and annul the decision made by the first respondent through Internal examiners, Practical Legal Training Independent Reviewers and confirmed by Governing Board with respect to the appeal made by the applicant for unfair marking of a subject namely Advocacy Skills with the Course Code LS 101 and Legal Aid and Human Rights Advocacy with the Course Code LS 110,

ON THE GROUND :-

- i) THAT, the appeal was handed unfairly in the absence of the applicant who was likely to be affected by such decision which has violated the rules of natural justice.
- ii) THAT, the rules and procedures applied to determine the appeal against the applicant were not availed to the applicant regardless of frequent request including writing a letter to the principal to request them.

- iii) THAT, the rules and procedures used to determine the appeal against applicant were unconstitutional, unreasonable, unfair and in violation of principles of natural justice

- b) That an order of prohibition be directed to the first respondent, a public institution, restraining him from enforcing rules and procedures which governed the appeal, ON THE GROUND THAT: -
 - i) That continuation of enforcement of such rules and procedures as afore stated is arbitrary, unreasonable and inconsistent with the constitution of United Republic of Tanzania.
 - ii) The respondent be prohibited from exercising powers which are in violation of the principals of Natural Justice.

- c) That, an order of mandamus to compel the first respondent, to provide to the applicant rules and procedures applied in governing his appeal together with marking schemes, answer scripts and details or particulars of the Independent Reviewers for LS 101 and LS 110 for both first sitting and supplementary examinations. And Applicant's appeal be heard by another independent body to be

appointed by the court or any other relevant authority, ON THE

GROUND THAT: -

- i. That the rules and procedures applied by first respondent directly affected the applicant by infringing his right to fair marking and hearing of his appeal.
- ii. That the answer scripts and marking schemes being provided to the applicant would cure the doubts of whether the marking was fair or not as the constitution of the United Republic of Tanzania requires active participation and fair hearing when the rights and duties of any person are determined.
- iii) That to avoid biasness, the court or any other relevant authority to appoint another independent Reviewers or body to fairly hear the appeal.

However, upon being served with notice of this application, as indicated earlier, the respondent filed a notice of preliminary objection on two points of law that;

- 1. The application is hopelessly time barred it has been filed in contravention of rule 6 of Law Reform (Fatal Accidents and*

Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, GN 324 of 2014.

2. The court has no jurisdiction to grant the relief sought in paragraph 3(b) of the Chamber Summons as the said relief can only be granted by the High Court seating as the Constitutional court.

At the hearing of the preliminary objection, the applicant appeared in person, while the respondent was represented by Mr. Charles Mtae, State Attorney.

The respondent submitted on the first limb of preliminary objection that the application is time barred as it has been filed in contravention of Rule 6 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014, GN. 324 of 2014. He said that, on 28 September, 2021 the decision was made by first respondent through Internal Examiners, Practical Legal Training Independent Reviewers and confirmed by Governing Board with respect to the appeal made by the applicant who wanted to verify if the marking was unfair and if there were no any computation errors in respect of two subjects; Advocacy Skills with Course Code LS 101 and Legal Aid and Human Rights Advocacy with Course Code LS 110. He contended that, in accordance with Rule 6 of the Law

Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, GN 324 of 2014. The application was supposed to be filed within six months from 28 September, 2021; hence time ended on 28th February, 2022. However, the present application was filed on 28th April, 2022. Therefore, the application is out of time for more than a month and there is no any application for extension of time. In this regard he cited the case of **Hezron M. Nyachiya vs Tanzania Union of Industrial and Commercial** workers & another, Civil App. 79 of 2001, Court of Appeal (Unreported) which was referred in the case of **Emmanuel Bakundukize and others vs Aloysius Benedicto Rutaiwa** Land Case Appeal No.26 of 2020 before **Mtulya, J.**

On the second limb of preliminary objection, the counsel for the respondent submitted that the court has no Jurisdiction to grant prayers sought in paragraph 3 (b) of the chamber summons. It can only be determined by the High court sitting as a constitutional court and not a court sitting as a judicial review court. He said that, constitutional cases are brought under Basic Rights & Duties Enforcement Act, in support of his argument, he cited the case **Sylvanus Kigomba & 4 others vs Mult Choice Tanzania Ltd & Others**, (HC) Miscellaneous Cause No.3 of 2018.

He finally prayed this application to be dismissed without costs.

In reply, the applicant submitted on the 1st preliminary objection which relates to time limitation that, the decision was made on 28th September, 2021, therefore six months expired on 28th March, 2022 and not 28th February, 2022. He said that, the application is made in accordance with rule six of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, GN No. 324 of 2014.

He gave a back ground account of the matter that, after the decision which was made on 7th October, 2021, he wrote a letter requesting for verification of the decision if it were genuine and authentic because it had no stamp of the institute. On same date, he wrote another letter requesting for his exam transcript for supplementary and the appeal corrections for verification per rule 15 (7) of Law School of Tanzania (students' performance assessments and awards) by laws 2011. So as to verify whether the marking in appeal and supplementary examination was fair and if there were no computation errors. The request for verification of results was denied by 1st respondent through a letter dated 2nd November, 2021, and the letter requesting whether the result was authentic and genuine was replied by a letter dated 24/11/2021; hence counting from 24th November, 2021 when

the 1st respondent replied, six months ends on 24th May, 2022. Therefore, the application is within time. He contended that, even if we were to count from 2nd day of November, 2021, which the respondent refused to provide transcript, marking schemes and details of independent reviewers in appeal and supplementary examinations for verification, six months expired on 2nd May, 2022. He said that, it was submitted in accordance with rule 21 of the Judicature and Application of Laws (Electronic filing Rules of 2018); it was submitted on 24 March 2022 at 19:27.04 hours and admitted on 24 March 2022 at 21.21.21 as shown in a copy of print out item number 8. In relation to this contention, he cited the case of **Alexander J. Barunguza vs Law School of Tanzania and Attorney General** at Page 3 and the case of **Mohamed Hashil vs NMB Ltd** Revision No.106 of 2020, High Court Labour Division (unreported). He proposed that, the decision is persuasive since there's a leave sought to prohibit the continuation of enforcement of the impugned rules governing the appeal which affects the applicant then the period of limitation runs from every moment as long as the impugned rules continue to affect the applicant as per section of the Law of Limitation Acts, Cap. 89 R.E. 2019.

Regarding the second point of preliminary objection which concerns the nature of relief sought in paragraph 3, whether it contains constitutional issues or not, he said that, the prayer speaks for itself, and it doesn't contain any constitutional issue so as to require the court to sit as a constitutional court, per s. 17 (2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions Act Cap. 310 R.E. 2019.

He, on the other line of his argument, said that, even if the prayer or relief sought contained a constitutional issue, still this court has jurisdiction to grant, the prayers sought in the said paragraphs because the Attorney General is a party to the case as it is required under section 18 (2) of the Law Reform Fatal Accidents and Miscellaneous Provisions (Supra). He said that, the issue of constitutionality is found only on one of the grounds in paragraph 3(b) of the chamber summons, which it is premature to discuss it at this very stage, because it's intended to be addressed and explained during the merits of the main case, he said that, addressing it at this stage, the court would be going to the merits of the application and merits of application for leave. He cited the case of **Legal Human Right Centre vs Minister for Finance and Planning, Minister of Information & Communication and Technology & Attorney General** Miscellaneous

Cause No. 11 of 2021 at page six, **DR. Jean-Bosco Ngendahimana vs University of Dar es Salaam**, Civil Appeal No. 304 of 2017. CAT (unreported) at page 10 and **East India Commercial Company vs Collectory Customs**, AIR (1962) Acc 1863.

He lastly, blamed the respondents for having raised improper preliminary objection, he said that, the conduct should be stopped as that kind of practice is unnecessary and wastes precious time of the court. In support of this argument, he cited the case of **Jackline Jonathan Mkonyi & Another vs Gausa property Ltd**, Case No. 320/2020, Court of Appeal, (unreported)

In Rejoinder on 1st point, Mr. Charles Mtae submitted that, it's true that the decision was issued on 28th September 2021. The time elapsed on 28th march, 2022, this is not disputed. From 28th, March 2022 to 28th April 2022. There's a span of a month as the applicant submitted that he filed the application online on 24 March 2022, according to Rule 21 of electronic filing Rules (supra); the document is considered to be filed in court. However, in **Land Case Appeal No.26 of 2020 (supra)**, the court referred to a Court of Appeal decision where the Court of Appeal said that, the date of filing an

application is the date of filing the fees and not on the date of receipt of the document. This is still good Law. The court of appeal case was decided before coming of the law on electronic filing, hence, the issue is whether the applicant may file an application on line, and remain with it as long as he can. We argue that the date of filing is when he filed the case physically on 28 April 2022 as opposed to date of filing online.

On 2nd preliminary objection, Mr Charles Mtae said that the applicant admitted that there is a constitutional issue, and he referred to Section 18 (2) of Cap. 310 (Supra), and that the prayer is in proper place whereby he referred to section 18 (2) which concerns interpretation of the constitution of basic freedoms. However, the case is not about the interpretation of the constitution, it's true that the prayer has been misplaced. That S. 18 (2) provides that Attorney General to be summoned as a party. This does not apply to the circumstances of this case.

In the end, he prayed the court to dismiss the application.

I have considered the submissions, the relevant laws and the record.

I will discuss the preliminary objection on the two points of law separately as presented, starting with the first point.

Inevitably, the time limit of instituting a case, starts to run on the date when a cause of action took place, that is the right of action accrues on the date on which the cause of action arises, see section 5 of the **Law of Limitation Act**, Cap. 89 R.E.2019. In the case at hand the cause of action is based on the impugned decision which was handed down on 28/09/2021; hence time to institute a proceeding starts to run on 28/09/2021. It is therefore obvious that, it is not correct to compute time for filing the application at hand from the dates which were suggested by the applicant, that is from the date when the letter requesting whether the result was authentic and genuine or from the date of response letter which is dated 24/11/2021; or counting from 2nd day of November, 2021, which is the date that the respondent refused to provide transcript, marking schemes and details of independent reviewers in appeal and supplementary examinations for verification.

The present application is lodged under rule 5(1), (4), (5) and (6) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014 GN 324 of 2019 (The rules). Rule six of the Rules mandates for time limit which an application for leave should be brought, and it reads as hereunder quoted: -

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

It is not disputed that, the application was filed electronically, a copy of print out for submitting the application shows that the same was filed in court and registered electronically on 2022-03-24 at 21:21:29, however, the fees were paid on 2022-04-28 08:54:57 when the documents were physically filed. The issue which arose in the course of submission is which of the two dates is the filing date i.e. the date of submitting the application electronically or the date of filing it physically, the date which the necessary fee was paid? Admittedly, this is one of the grey areas which need to be looked into. The applicant submitted that the filing date is the date of submission of the documents electronically, therefore the six months expires on 28/03/2022, and since he filed the case electronically on 24/03/2022 at 19:27 hours the application was filed in time. He relied on Rule 21(1) of the Judicature and Application of Laws (Electronic filling) Rules, 2018 which provides that:-

'A document shall be considered to have been filed if it is submitted through the electronic filing system before midnight, East African time, on the date it is submitted, unless specific time is set by the court or it is rejected.'

He also relied on the case of **Mohamed Hashil vs National Microfinance Bank Ltd (Supra)** and **Alexander J. Barunguza vs Law School of Tanzania and Attorney General (Supra)**.

On the other hand, Mr. Charles Mtae did not dispute that the expiry date for filing the instant application was 28/03/2022 and that the appellant filed the application online on 24/03/2022 and he filed it physically and paid requisite fees on 28/04/2022. He however suggested that, the law recognizes the date of filing a case to be the date of payment of necessary court fees. He referred to the case of **Hezron Nyachiya vs. Tanzania Union of Industrial and Commercial Workers (Supra)** which was referred to in the case of **Emmanuel Nakundize and Others Vs. Aloysius Benedicto Rutaihwa (supra)**.

As indicated earlier that, there is no simple answer, in **Emmanuel Nakundize and Others Vs. Aloysius Benedicto Rutaihwa (Supra)** Mtulya, J. at page 5 he *inter alia* pointed out that: -

"It is unfortunate that both Rule 21 of the Electronic Filing Rules and Rule 3 of the Court Fees are silent on the nexus of the electronic filing of documents and date of payment of court fees and presentation of the conventional or manual documents for filing in court as part of cherishing both introduction of new science and taking on board the traditional rules of filing cases in our courts."

I wish to be persuaded and be guided by the decision in **Emmanuel Nakundize and Others Vs. Aloysius Benedicto Rutaihwa (Supra)** in this case the Ho. Judge discussed at lengthy the need to harmonize the relevant laws. In reaching at the decision the Judge relied on the court of appeal directives in the case of **John Chuwa V. Antony Ciza** [1992] TLR 233 in which among other things it was held that a document is deemed to be filed in court when payment of court fee is complete. In the same vein, it is my view that, **John Chuwa V. Antony Ciza (Supra)** is still good law. Again, it is my view that, the act of filing the case electronically and

neglecting it without paying necessary court fees was not envisaged by the rules, actually the conduct defeats the spirit of the law. This is so for the reason that, procedurally a case cannot proceed to next stages unless prerequisite fees have been dully paid.

In this case the applicant filed the document electronically timely, however, a month elapsed before he paid the requisite fees and before he filed hard copies, unfortunately by then time for filing the application had already expired, thirty days had passed. It is therefore apparent that the application was filed out of time.

Having discussed as I did, I uphold the First point of objection.

The second ground of preliminary objection is to the effect that this court has no jurisdiction to grant the relief sought in paragraph 3(b) of the Chamber Summons as the said relief can only be granted by the High Court sitting as the Constitutional court. The impugned paragraph reads that: -

*"an order of prohibition be directed to the first respondent a public institution restraining him from enforcing rules and procedures which governed the appeal. **On THAT GROUND THAT:-***

- i. That the continuation of enforcement of such rules and procedure as afore stated is arbitrary, unreasonable and inconsistent with the constitution of the united Republic of Tanzania;*
- ii. The respondent be prohibited from exercising powers which are in violation of the principle of natural justice"*

It is obvious that the applicant in this prayer is intending to challenge the constitutionality of the rules and procedures which governs the Law school in appeal. Indeed, this prayer is untenable in this court, and it is misconceived as it cannot be obtained in the application for prerogative orders. This relief can be obtained under the **Basic Rights and Duties Enforcement Act** [CAP. 3 R.E. 2019] before the High court sitting as a constitutional court.

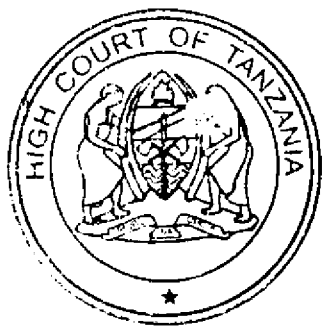
That said, the second preliminary point of objection is also sustained.

The remedy for a case which is time barred is dismissal.

Consequently, for the aforesaid reasons, the application is hereby dismissed accordingly for being filed out of the time limit which has been prescribed by law.

Each Party to bear its own costs.

It is so ordered.




S.C. MOSHI

JUDGE

24/06/2022