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

MISCELLANEOUS CAUSE NO. 29 OF 2022

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

SALAAMAN HEALTH SERVICES ..... APPLICANT

VERSUS

TANZANIA INSUARANCE REGURATORY AUTHORITY.....1ST RESPONDENT
THE ATTORNEY GENERAL.....2ND RESPONDENT
BAGHAYO ABDALLAH SAQWARE.....3RD RESPONDENT
ZAKARI MUYENGI.....4TH RESPONDENT

RULING

25 July & 12 Aug 2022
MGETTA, J:

On 28/6/2022, through a legal service of Juma Nassoro, the applicant, Salaaman Health Services filed a chamber summons made under **section 2(3) of the Judicature and Application of Laws Act Cap. 358**; **section 19 (1) and (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act Cap 310**; and, **rules 5(1), (2), (5) and (6) and 7 (1) and (5) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014.** The applicant is seeking for a leave to apply for prerogative orders of certiorari to quash the decision of the 1st respondent contained in the letter of 24/3/2022 and of prohibition to prohibit and restraining the 1st respondent from interfering with the

applicant business and affairs and its autonomy, cohesion and rights. The application is supported by an affidavit affirmed by Aisha Rashid Mchome and also accompanied by the statement.

Responding to the chamber summons, amongst the documents filed by the respondents namely Tanzania Insurance Regulatory Authority (1st respondent), the Attorney General (2nd respondent), one Baghayo Abdallah Saqware (3rd respondent) and one Zakaria Muyengi (4th respondent), include two notices of preliminary objections both stating that:

1. The application is untenable in law for lack of a decision which is subject to judicial Review.

2. In alternative to objection number 1 above, the application is untenable in law for failure to exhaust the available remedy under the Insurance Act and its regulations.

3. That the application is untenable in law for failure to disclose the cause of action against the 3rd and 4th respondents.

4. That the application is untenable in law for being supported with defective affidavit containing hearsay, argument, opinion and conclusion.

5. That the application is untenable in law for being supported by defective affidavit with defective jurat of attestation

As a cardinal principle, whenever preliminary objection is raised, the main application has to be stayed to allow the determination of the raised preliminary objection first. At the hearing of the preliminary objections, Mr. Juma Nassoro and Ms. Fauzia Ajoki, both learned advocates appeared for the applicant. The 1st and 2nd respondents were represented by Mr. Ayoub Sanga assisted by Mr. Mathew Fuko, both learned state attorneys and Mr.Okoka Mgavilenzi, the learned senior State Attorney; while, the 3rd and 4th respondents were represented by Mr. Mlyambelele Ng'weli, the learned advocate.

When the preliminary objections were called on for hearing, the counsel for the respondents dropped the 5th preliminary objection, and remained with the 1st to 4th preliminary objections. Mr Mlyambelele and Mr. Ayoub had similar submissions.

Arguing for the 1st preliminary objection, Mr. Ayoub submitted that a letter relied to be a decision which was annexed to the affidavit as annexture 'D' was not a decision. For an order of certiorari to issue there must be a decision made by an administrative body. Looking at the letter, he submitted that such letter was not a decision, but rather a directive to government and private institutions which, if it was responded by them,

then the Commissioner would have made a decision. He referred this court to the case of **Tanzania Electrric Supply Compny LTD Versus the Attorney General and Three Others,** Misc. Civil Application 54 of 2019. (High Court) (Main Registry) (DSM) at pages 5 and 6.

In response to the 1st preliminary objection, Mr. Nassoro submitted that such objection does not have qualities to be considered as preliminary objection because the same goes to the root of the application. It requires evidence as to whether annexure "D" is a decision or not, the issue which should be dealt with at the hearing of the application for review and not at this stage of applying for leave. Determining that issue at this stage would amount determining the application for judicial review prematurely.

In the alternative, he submitted that if this court allows the annexure "D" to be argued at this stage, then he insisted that it is a decision which if left without being declared by way of judicial review of certiorari it will endanger the business of the applicant. He referred this court to the case of **Indo-Asian Estate Limited Versus Authorised Officer, Lindi Municipal Land Office & Three Others,** Misc. Land Cause No. 43 of 2014 (High Court Land Division) (DSM) (unreported) in which the court considered a notice as a decision as it steered up a revocation of right of occupancy. Hence, he submitted, the letter complained in this matter culminates to the 1st, 3rd and 4th respondents'

intention to have applicant's contract for medical provision with different health insurance Companies, terminated. He referred to paragraph 4 of annexure 'D' to insist that it is a decision.

I have seriously considered the 1st preliminary objection, and I am in agreement with the submission of Mr. Nassoro that dealing with it at this stage of application for leave will amount to going into the merits of the intended application, as it will require disposition of facts from both parties. It will also involve evidence from the parties to justify or unjustified that annexure D is a decision, hence offending the very cerebrated principles of Preliminary objection propounded in the cerebrated case of **Mukisa Biscuits Manufacturing Ltd. Versus West End Distributors Ltd,** [1969] 1 EA 696 which is to the effect among others that preliminary objection should only be grounded on matters of law and not facts. Therefore, the 1st preliminary objection is accordingly overruled.

As regard to the 2nd preliminary objection, Mr. Ayoub submitted that if there was a decision, then applicant was disqualified for applying judicial review as he has an alternative remedy under **section 126 (4) of the Insurance Act No. 10 of 2009.** He said that section provides for an alternative remedy of filing an appeal to the Insurance Appeal Tribunal against such decision. He referred this Court to the case of **TANESCO**

case (supra) which provides among others that where there is an alternative remedy, it must be exhausted first. Stressing on his argument, he referred also to the case of **[1996]** TLR 110 Pg 116**, Obadia School vs Dodoma wire company** [1990] TLR 113, **Expart Peter Shirima vs Kamat ya Ulinzi na Usalama** [1983] TLR 375.

In response to Mr. Ayoub's submission, Mr. Nassoro averred that for an appeal to be executed under **section 126(4) of the Insurance Act No. 10 of 2009**, such appeal must be preferred within one month from the date on which the decision was communicated to the applicant. But the letter (annexure "D") was not communicated to the applicant by the commissioner. Therefore, the applicant could not invoke the remedy in **section 126 (4) of the Insurance Act** to challenge such decision of the 1st respondent.

On this objection, I find the submission of Mr. Nassoro plausible. There is no dispute that the purported decision (annexure D) was not communicated to the applicant, and may be for good reason, which also requires production of evidence. Further, the applicant is not the addressee on the said letter therefore if at all is a decision, then the same was not communicated to him and is a stranger party to that decision. Hence, being guided by the principle of judgment in persona, it binds only

the addressor and addressee of annexure D. With that regard the 2nd preliminary objection is hereby overruled.

Regarding to the 3rd preliminary objection, Mr Ayoub argued that there is no connection between the 3rd and 4th respondents who were working with the 1st respondent. Therefore, they should be removed from this application for leave. In response, Mr. Nassoro submitted that paragraphs 7 and 8 of the affidavit connects good cause of action against the 1st, 3rd and 4th respondents. Even paragraph 3.0 (iii)(iv)(v)(vi) of the statement accompanied the chamber summons connects the 1st, 3rd and 4th respondents. That they are person who have been complained to have written the letter therefore they are proper parties to be joined and heard about the letter (annexure D).

At this stage, such preliminary objection does not fit in the ambit of the principles laid down in the **Mukisa case** as it requires production of evidence. Moreover, a person sued could not come out and ask why am I sued or choose to be sued. It is the applicant who will tell the court by production of evidence why he sued them. I agree with Mr. Nassoro's submission and proceed to find that this preliminary objection is not a pure point of law so to speak. It is therefore overruled.

I now turn to the 4th preliminary objection to which Mr. Ayoub

argued that the contents of the affidavit contravene **Order XIX Rule 3 of the Civil Procedure Code CAP 33** (henceforth Cap 33) as they contain argument, opinion, hearsay and conclusion. He specifically argued that paragraph 6 of the affidavit contains hearsay contrary to **Order XIX rule 3 of Cap 33** which requires the deponent to state facts which are within her own knowledge. That annexure 'D' to the affidavit was a confidential letter and was not addressed to the deponent. Therefore, the facts of the said letter could have not come from her own knowledge. The said paragraph has to be expunged from the affidavit. Being a paragraph on which this application is pegged, after being expunged, the application will remain with no leg to stand. He relied his argument to the case of **Halima James Mdee and 18 Others Versus The Board of Trustees of Chama cha Demokrasia na Maendeleo** (CHADEMA) **and Two Others**; Miscellaneous Cause No. 16 of 2022 (HC Main Registry) (DSM) (unreported) at pages 14,15, 16, and 17. He went further to attack the applicant's affidavit that paragraph 8 contains argument and conclusion by words like "irrational" and "unreasonable". That paragraph 9 of the affidavit contains opinion and conclusion by containing the words "in bad faith", and paragraph 7 contains hearsay and conclusion when the deponent implicated the 3rd respondent that annexure "D" was written in "command of the 3rd

respondent" as she was not the addressee of the said annexure. He insisted that all the offensive paragraphs be expunged.

In his response, Mr. Nassoro said that paragraph 6 of the applicant's affidavit contains all the requirement of the content of the affidavit. It does not contain hearsay, as hearsay is a report of words to a third person and nowhere in paragraph 6 of the affidavit the deponent reported to a third person. The deponent deponed the content of annexure "D" and she stated that it came from her own knowledge; therefore, it is not hearsay. She deponed the same to paragraph 7 as the deponent knew that the letter was written in the command of the 3rd respondent.

With regard to paragraph 8, he stated that the applicant used the words like "irrational" and "unreasonable" in the affidavit so as to establish that there is an arguable case as one of the requirements for a grant of leave. He insisted that the said paragraph does not contain argument as deponent knew that the letter is irrational and unreasonable. To buttress his argument, he referred this court to the case of **Cheavo Juma Mshana Versus Board of Trustees of Tanzania National Park & 2 Others;** Misc Civil Cause No. 7 of 2020 (HC)(Moshi)(unreported).

He submitted the cases cited by the counsel for the respondents are distinguishable from this application. For example, he added the case of **Halima Mdee (**supra) was struck out as the applicant sued a wrong party and had no valid statement to support the application.

Having the foregoing in mind, I would like to reproduce hereunder the complained paragraphs of the affidavit:

> 6. *That, in performance of my duties I came across with a letter from the 1st respondent signed by the 4th respondent addressed and copied to government departments, ministries and various insurance companies; putting the applicant on suspicious conduct and obtaining fraudulent advantage against insurance Companies. The 1st respondent letter requested the said institution and companies to suspend or terminate any existing contracts and further make a report to the 1st respondent and other respective government health organs for necessary actions.* ***Copy of the letter is a marked Annexure D****, to which it is craved leave of the court to refer as part of the affidavit*
> 7. *That, the letter which has adverse effect to the businesses of the Applicant* ***was written on command and directive of the 3rd respondent*** *and signed by the 4th respondent. And prior to the writing and circulation of the said letter, the*

applicant was not given chance for hearing by the 1st, 3rd and 4th respondents.

8. *That the reasons relied by the 1st, 3rd and 4th respondents for writing and circulating the complained letter Annexure D,* ***are irrational*** *and* ***unreasonable*** *and the applicant's businesses has been seriously interfered, damaged and the applicant's capacity to pay salaries and provide medical services to the innocent patients and general operations has been paralysed by the 1st,3rd, 4th respondents' letter Annexure D.*
9. *That it is my belief that the letter was written in a confidential manner* ***in a bad faith*** *against the applicant, intended to deny the applicant access to the letter with no apparent reasons.*

And the verification reads, I quote as hereunder:

> *"I, Aisha Rashid Mchome, being the human resources manager of* the *applicant, hereby verify that, what is stated above in 1,2,3,4,5,6,7 and 8* ***is true to my knowledge****, and what is stated in paragraph 9 is true based on my belief on the ground stated therein and I verily believe to be true."*

I have carefully scrutinised the complained paragraph above and found that, as to paragraph 6, there is no such fault of being hearsay as averred by Mr Ayoub. The deponent has reproduced the content of annexure "D" which was in her domain and the respondents has not

disputed as to its authenticity. Further, the deponent verified that the contents paragraph 6 is from her own knowledge. Therefore, towards that end, paragraph 6 has no hearsay information.

With regard to paragraph 7 of the affidavit, I agree that it contains hearsay as the information that annexure D was written in command and directives of the 3rd respondent could have not been accessed by the deponent without being received from the third party as she was not present at the time the said annexure D was composed.

The words like "irrational" and "unreasonable" as highlighted in paragraph 8 above and others like "bad faith" "deny the applicant access to the letter with no apparent reasons" appearing in paragraph 9 verifies that those paragraphs contains conclusions, arguments and opinion, and therefore offend **Order XIX Rule 3 (1) of Cap 33** and the very established principles of the content of affidavit enumerated in litany of cases such as **Uganda Versus Commisioner of Prisons, ex parte MATOVU** (1966) EA 514, **Phantom Modern Transport (1985) Limited Versus D.T Dobie (Tanzania) Limited;** Civil References No. 19 of 2001 and 3 of 2002 (CA) (unreported), **Stanbic Bank Tanzania Limited Versus Kagera Sugar Limited**; Civil Application No. 57 of 2007 (CA)(unreported); **Alex Dotto Massaba**

Versus the Attorney General & Three Others; Miscellaneous Civil Cause No. 30 of 2019 (CA) at page 14, **DPP Versus Dodoli Kapufi & Another;** Criminal Application No. 11 of 2008 (CA); **Anatol Peter Rwebangira Versus The Principle Secretary Ministry of Defence and National Service and Another;** Civil Application No.548/04 of 2018 (CA) (Bukoba) (unreported) to mention a few.

Therefore, paragraphs 7,8 and 9 of the affidavit are offending and therefore by subscribing to the case of **Rustamali Shivji Karim Merani Versus Kamal Bhushan Joshi;** (Civil Application 80 of 2009) [2012] TZCA 237 (27 February 2012); reported in *www.tanzlii.go.tz* in which at pages 5 and 6 the court cited with approval the cases of **export Matovu** (supra) and **Phantom Modern Transport** (supra), I accordingly expunge them from the affidavit.

Now the question is whether or not the remaining paragraphs suffice the survival of this application. I have scrutinized the remaining paragraphs of the affidavit and found that paragraphs 1,2,3,4,5 and 6 of the affidavit contain sufficient substance to support the application. Being guided by case laws as cited above and overriding objective reflected under **Article 1O7A (2) (a) of the Constitution of the United Republic of Tanzania** as well **section 3A of Cap 33**, I find

justice crying louder calling this court to proceed with the hearing of the application for leave without the offending paragraphs as pointed herein above. Each party to bear its own costs.

It is so ordered.

Dated at **Dar es Salaam** this 12th day of August, 2022.

J.S. MGETTA
JUDGE

COURT: This ruling is delivered today this 12th day of August, 2022 in the presence of Mr. Juma Nassoro, the learned advocate for the applicant and in the presence of Mr. Mathew Fuko, the learned state attorney assisted by Mr. Okoka Mgevilenzi, the learned principal state attorney for the 1st and 2nd respondents, and Mr. Mlyambelele Ng'weli, the learned advocate for the 3rd and 4th respondents.

J.S. MGETTA
JUDGE
12/8/2022