

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

MISCELLANEOUS CAUSE NO. 13 OF 2022

OTILIA NYAMWIZA RUTASHOBYA APPLICANT

VERSUS

CHIEF SECRETARY 1ST RESPONDENT

PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

PERMANENT SECRETARY

PRESIDENT'S OFFICE AND GOOD GOVERNANCE.....3RD RESPONDENT

NATIONAL INSTITUTE OF TRANSPORT.....4TH RESPONDENT

NATIONAL ART COUNCIL.....5TH RESPONDENT

HON ATTORNEY GENERAL.....6TH RESPONDENT

RULING

25/7/2022 & 2/8/2022

MZUNA, J.:

The applicant, above mentioned sought for leave to file prerogative orders of certiorari and mandamus after she was not promoted and paid her salaries due as Legal Officer 1 effective from 1st May 2016.

Currently she is working with the University of Dar es salaam. She learnt that BASATA where she was formerly seconded, has terminated and erased the Applicant from Human Capital System (LAWSON). Katibu

Mkuu instructed the Applicant to go back to BASATA but denied her salary arrears.

The applicant referred the matter to Tume, the second respondent, after being aggrieved by the whole situation. Nevertheless, the same failed to act upon her complaints which necessitated the applicant to refer the matter to Katibu Mkuu Kiongozi, the 1st respondent who maintained the same position.

The applicant has now approached this court for leave to file application for prerogative orders of Certiorari and Mandamus against the respondents. Before hearing could proceed, Ms Adelaida Masaua, the learned State Attorney for the respondents, raised a preliminary point of objection on point of law that:

The Application is untenable in law as there is no decision, order, or proceedings to be challenged.

The main issue is whether the application by the above mentioned applicant for leave is valid in law?

Submitting on the preliminary objection, Ms Adelaida Masaua, averred that as per paragraph 12,18, and 19 of the Applicant's affidavit, the applicant referred the matter to Katibu Mkuu Kiongozi and the response was issued on 5th July 2021, but no where does

the applicant mention that the respondent issued the decision, order, and proceedings leading to a belief that her interests may adversely be affected leading to an application for judicial review.

That, clarification letter issued by the 4th respondent to the applicant was done in exercise of power conferred by the law and it can not be said to be a final and conclusive order, proceedings, and or decision capable of being reviewed by this honourable court. There is no decision attached to the application apart from clarification letters **(Otilia 4,7 & 8)**. For that reason, the respondent is of the view that this application fall short of the pre requisite for seeking leave to apply for judicial review. The case of **Pavisa Enterprises Vs the Minister for Labour Youth Development and Sports & Another**, Misc. Civil Cause No. 65 of 2003, High Court Dar es salaam (Unreported) was cited.

The respondent added that the applicant's salary based on Legal Officer II and not Legal Officer I was provided by the 4th respondent due to the fact that the 4th respondent had no scheme of service with a legal officer's job code. To cement the submission, the learned State Attorney cited a case of **Hafidhi Shamte and 4 Others Versus DPP and 2 Others**, Misc. Civil Cause No. 29 of 2018, High court Main Registry (Unreported) and prayed the application to be dismissed with costs.

Responding to the submission from the respondents, the applicant strongly denied the allegation that there is no decision to be reviewed by this court which is a misdirection. She went on saying that there are several decisions made referring to annexure **Otilia 8** in applicant's affidavit saying the 1st respondent agreed with the 2nd respondent's decision. She gave an official translation of the word UAMUZI to mean DECISION that the 5th July 2021 letter with reference No. CAB.30/536/PF.655/3 and the 2nd Respondent's letter dated 11th November 2019 with reference No. CCA.63/228/01/2 (Otilia 4) carries the decision that can be subjected to judicial review by virtue of section 17(2), (3) and (4) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act Cap 310 R.E. 2002.

Further the applicant submitted that the preliminary objection contains facts which requires ascertainment of production of evidence or entering in the merits of the application.

The applicant has distinguished cases cited by the learned State Attorney that in the case of **PAVISA** (supra) the applicant failed to show whether the Minister acted in excess or abuse of powers. As for the case of **Hafidhi Shamte** (Supra) it is irrelevant on the reason that letters in

the case at hand give reason for the decision that the court can review and ascertain reasonableness, justifiability and legality.

In her rejoinder submission, Ms Adelaida maintained her submission in chief and said that the objection on point of law is based on law and not fact citing **Mukisa Biscuits Manufacturing Co. LTD vs West End Distributors Ltd** [1969] EA 696.

She further said that in annexure Otilia 8 the translated word UAMUZI in its context does not imply to mean challengeable decision as required by the provision of Rule 4 of the Law Reform (Fatal Accident and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014 and that the case of **PAVISA Enterprises** (supra) provides for prerequisites for application for judicial review.

I have considered the rival submission by both parties and I wish to stress that this is an application for leave to file application for prerogative orders of certiorari and mandamus. It is stated in the case of **Emma Bayo Versus the Minister or Labour and Youths Development and 2 Others**, Civil Appeal No. 79 of 2012 (Unreported) that:-

"it is now an established part of the procedural law of Tanzania that a person applying for prerogative orders in the High Court

must first apply for leave, which if granted will be followed by a subsequent main application for the prerogative orders.”

Now the respondent has raised objection that ***the Application is untenable in law as there is no decision, order, or proceedings to be challenged.***

Factors to consider in an application of this nature for leave before application for judicial review are stated in the case of **Emu Bayo** (supra) and **Halima James Mdee and 15 others vs The Registered Trustees of Chama cha Demokrasia na Maendeleo (CHADEMA)**, Miscellaneous Cause No. 27 of 2022 (Unreported) which includes existence of arguable case, sufficient interests and exhaustion of available local remedy as well as whether the application is made within six months.

Looking at the nature of the preliminary objection, the respondents are challenging this application that there is no challengeable decision such that there can be an arguable case for this court to grant leave to file application for judicial review. The affidavit supporting the application particularly paragraph 20 sets out a ground for this application. The applicant is clearly challenging the act of the 3rd respondent in refusing to sign appropriate employment cadre of Senior Legal Officer II and

denial of being paid salary arrears by the 4th and 5th respondents as well as 2nd respondent failure to exercise its powers while 1st respondent failed to give reason for its findings.

In my view, the question whether or not there is a decision, order, or proceedings to be reviewed by this court has to be adjudicated in the main application for judicial review and not at the leave stage. Doing so at this stage will pre-empt the main application. This court should not confine itself on the outcome of the application as suggested by the respondent instead should consider whether the prerequisite conditions for application for prerogative orders as stated in the above cited cases do exist.

The raised PO if I may hasten to add as well submitted by the applicant goes to deal with production of evidence as there are "facts to be ascertained" which is not the gist of preliminary objection in view of the decision in the case of **Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd** (Supra). What this court has to do is only believe that "*the factual depositions in the affidavit would have been presumed to be true*", See the case of **Cosmas Mwaifwani v. The Minister for Health, Community Development, Gender, The**

Elderly and Children and Two Others, Civil Appeal No. 312 of 2019
CAT at Dar es Salaam (Unreported), page 9.

In the circumstances and for the reason stated above I find this preliminary objection on point of law to have no merit hence overruled. Hearing of the application for leave to file application for prerogative orders of Certiorari and Mandamus to proceed on merits.

The raised preliminary objection stands dismissed with no order as to costs.



M.G. MZUNA,
JUDGE.
02/08/2022.