IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA AT ARUSHA

MISC. CIVIL APPLICATION NO.88 OF 2021

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

IN THE MATTER OF CHALLENGING THE DISMISSAL OF ORARO ERASTO KAMUNGU AND ERNEST FRANK SELEMANI BY THE INSPECTOR GENERAL OF POLICE WITHOUT BEING ACCORDED RIGHT TO BE HEARD

BETWEEN

ORATO ERASTO KAMUNGU.....1ST APPLICANT

ERNEST FRANK SELEMANI .....2ND APPLICANT

AND

THE INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

Date of last Order:14-9-2022

Date of Ruling: 13-10-2022

B.K.PHILLIP, J

The applicants herein in moved this Court under the provisions of Rule 5(1) ,(2), (a) (b)(c) (d) and (3) of the Law Reform (Fatal Accidents and

Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2004, praying for the following orders;

i) The Honourable Court be pleased to grant leave for the applicants to file application for judicial Review against the decision of the Inspector General of Police dated 5th day of October 2020, which was against the principle of natural justice as he did not accord the applicants the right to be heard.

ii) Costs of the application be provided.

iii) Any other order the Court deems fit and just to grant to the applicants.

The application is supported by a joint statement made by the applicants together with a joint affidavit sworn by the applicants verifying the facts relied upon in this application. The respondents filed a joint reply to the statement made by the applicants and a counter affidavit in opposition to the application

A brief background to this application is worthy it in order to appreciate the coming discussion. The applicants herein were employed as police officers till 31st day of December 2017, when they were arrested and arraigned at the Police Court Martial of the offence of misconduct .The case was heard on merit and on 27th of January , 2018 the Court Martial delivered its judgment in which it found applicants guilty of misconduct. What followed was their dismissal. Thereafter they were arraigned before the District Court of Longido at Longido of three offences vide Criminal Case No. 7 of 2018, to wit; Aids or abet another

person in committing offence Contrary to section 45 (i) (p) (2) of the Immigration Act Cap 54 R.E. 2016, Transporting illegal immigrants Contrary to section 46 (1) (c) of the Immigration Act Cap 54 R.E.2016 and Facilitating in anyway the smuggling of immigrants into the United Republic or to a foreign country Contrary to section 46 (1) (e) of the Immigration Act , Cap 54 , R.E 2016 .The case was heard and on 29th October 2019, the Court ruled out that the applicants had no case to answer. Thus, they were acquitted. Thereafter, in December 2019 they filed their appeal against the decision of the Police Court Martial to the Inspector General of Police (Henceforth "The IGP") on the ground that there was no sufficient evidence adduced at the Court Martial to justify their dismissal. On 7th October 2020, they were availed with the decision of the IGP in which he upheld the decision of the Police Court Martial.Upon receiving the decision of the IGP , the applicants lodged the instant application.

Back to the application in hand, the learned advocate Sabato Ngongo appeared for the applicant whereas the learned State Attorney, Zamaradi Johanes appeared for the respondents.The application was heard by way of written submissions.

Mr. Sabato started his submission by giving a brief background to this matter which I do not need to repeat it since I have narrated the same at the beginning of this applicatio.He went on submitting as follows; that this Court is vested with discretionary powers to grant the orders sought by the applicants in this application. The issues which have to

be taken into consideration by the Court in determination of an application for leave to file an application for review are :-

i) Whether there is a *prima facie* case or arguable case

ii) Whether the application was filed promptly, within 6 months from the time the dispute arose.

iii) Whether the applicant has interests in the said matter.

He cited the case of **Mwlm Ezekiah Tom Olouch Vs Mwanasheria Mkuu wa Serikali , Misc Civil Application No. 10 of 2022** (unreported), to bolster his arguments. Mr. Sabato contended that the term " *prima facie* case" was defined by this Court (Hon. Ismail, J) in the case of **Halima James Mdee and 15 others Vs The Registered Trustee of Chama Cha Demokrasia na Maendeleo CHADEMA and 2 others , Misc Cause No.27 of 2022**, in which this Court said the following;

".. prima facie case is cause of action or defence that is sufficiently established by a party's evidence to justify a verdict in his or her favour ,provided such evidence is not rebutted by the other party..."

Mr. Sabato was of the view that the applicants have managed to establish the existence of a *prima facie* case in this matter because they were not accorded the right to be heard as enshrined in Article 13 (6) (a) of Constitution of the United Republic of Tanzania of 1977 as amended from time to time.The violation of the right to heard justifies nullification of every proceedings and whatever decision made without observing that a party has been accorded the right to be heard, argued Mr. Sabato. To cement his arguments he cited the case of **Ndesamburo**

Vs Attorney General (1977) TLR 137.He insisted that the decision of the IGP , the subject of this application , on the face of it shows clearly that the applicants were not heard because there is nowhere in that decision indicating that the applicants made any statement to defend their appeal. He referred this Court to paragraphs 10, 11 and 12 of the decision of the IGP annexed to this application .

Furthermore , Mr. Sabato submitted that this application was filed in Court on 13th January 2021 within 6 months from the date of the decision of the IGP as required under Rule 6 of the Law Reform Fatal Accident Miscellaneous Provision (Judicial Review Procedure & fees) ,Rules 2014.

With regard to the issue on whether or not the applicants have interest in this matter, Mr. Sabato's arguments were to the effect that a person can be termed to have interests in a matter if he/ she is going to be affected by the outcome of thereof.He maintained that in the instant application it is obvious that the applicants have interests in this matter because they are the ones affected by the decision of the IGP and terminated from their employment not anybody else. In conclusion, he prayed this application to be granted.

On other hand, Ms. Zamaradi, joined hands with Mr. Sabato on the position of the law as far as the procedure for seeking prerogative orders is concerned . She cited the case of **Emma Bayo Vs Minister for Labour and Youth Development and 2 others, Civil Appeal No.79 of 2012** (unreported), in which the Court said the following;

" Leave of the Court is necessary pre- condition to the making of an application for judicial review and no application for judicial review may be made unless this leave has first been duly obtained"

Similarly, Ms. Zamaradi was in one with Mr. Sabato that this Court has discretional powers to grant the leave to file an application for prerogative orders. However , she added that the Court's discretional powers have to be exercised judiciously. She was in agreement with Mr. Sabato that the condition to be taken into consideration by the Court while dealing with an application for leave to file application for judicial review are; existence of a *prima facie case* , that is, an arguable case, the application must be made without delay and the applicant must have sufficient interests in the case. She also added that there should be no alternative remedies available to the applicant. She cited the case of **Halima James Mdee and 18 others** (supra) **and Emma Bayo** (supra).

Furthermore, citing the case of **The Registered Trustee of Sunni Muslim Jamaat Vs the Registrar of Societies and the Attorney General, Miscellaneous Cause No.24 of 2021**, (unreported) Ms. Zamaradi argued that the process for applying for leave to apply for judicial review is intended to exclude or eliminate frivolous or vexatious applications to prevent abuse of the Court's process.

With regard to the merit of this application, Ms. Zamaradi contended that the applicants have failed to show that there is an arguable case because they were accorded the right to be heard at the Police Court Martial. Upon being served with the decision of the Court Martial they appealed to the IGP (1st respondent) to challenge that decision. The IGP dealt

with their appeal in accordance with the law and confirmed the decision of the Police Court Martial. She went on submitting that the applicants were given an opportunity for a fair hearing by the IGP and he communicated his decision to the applicant. Ms. Zamaradi cited the provisions of Regulation C.18 (3) of the Police Force Regulations 1995 R.E 2002 , to cement her arguments.

Furthermore, Ms. Zamaradi, argued that in determination of this application this Court has to consider whether or not the decision – making authority has exceeded its power ,violated rules of natural justice ,reached a decision which no reasonable man would have reached or otherwise abused its power. She cited the case of **Senai Murumbe and another Vs Muhere Chacha (1990) TLR 54**, to cement her argument. She maintained that in the instant application there was no any violation of natural justice.

It was Ms. Zamaradi's argument that the applicant have not established that they have sufficient interests in this matter. However, she conceded that this application has been filed within the time prescribed by the law, that is, six months from the date of the impugned decision.

In conclusion Ms. Zamaradi urged this Court not to grant this application.She insisted that the applicant's have failed to establish that there is a *prima facie* case. Mr. Sabato did not file any rejoinder to his submission in chief.

Having analyzed the submission made by the learned advocate for the applicant and the learned State Attorney, I have noted that there is no

dispute that this court is vested with discretional powers to grant leave for filing an application for prerogative Orders. As submitted by both sides, the criteria to be considered by the Court in exercising the aforesaid discretional powers includes the following;

i) Whether there is a *prima facie* case or arguable case
ii) Whether the application was filed promptly, within 6 months from the time the dispute arose.
iii) Whether the applicant has interests in the said matter.

From the foregoing, my task in this application is to determine on whether the applicants have met the criteria stated herein above. Upon perusing the pleadings and the documents annexed thereto, I have noted that it is not disputed that the applicants were accorded opportunity to be heard before the Police Court Martial. The applicants' concern is that they were not accorded the right to appear and defend their appeal before the IGP. In my opinion the pertinent question that arises here is; what is the procedure in the dealing with appeals from the Police Court Martial. In other words, how was the IGP supposed to deal with the applicant's appeal?. As correctly submitted by Ms. Zamaradi, the relevant provisions of law on the procedure for handling appeals from the Police Court Martial is provided in the Police Force Service Regulations 1995,[R.E 2002] in particular Regulation C.18(3) (4).For clarity and ease of reference let me reproduce the same hereunder;

C.18 (3) " *Any non-commissioned officer or constable aggrieved by any findings of an appropriate tribunal or any award of an appropriate tribunal or a Commanding Officer*

may, within seven days of the notification to him thereof , appeal to the Inspector General in writing and ***the Inspector General may confirm or vary any findings of the appropriate tribunal or substitute thereof any finding at which the appropriate tribunal or Commanding Officer could have arrived upon the evidence, including any additional evidence the Inspector General****, in his discretion, admits at the hearing of the appeal, and may confirm or remit any punishment imposed by the appropriate tribunal or a Commanding Officer or may substitute thereof any punishment which the tribunal or such officer could have imposed , and all such cases the decision of the Inspector General shall be final.*

(4) Where the ***Inspector General hears any evidence on appeal, he shall give the appellant an opportunity of being present and putting questions to any witnesses so heard"***

(Emphasis is added)

According to the provisions of the law quoted herein above, I am of a settled opinion that the applicants have failed to establish the existence of an arguable case concerning the way the IGP handled their appeal because the law states clearly that the IGP is supposed to either confirm the punishment imposed by the appropriate tribunal or vary it by relying on the evidence adduced before the appropriate tribunal or commanding officer. When the IGP decides to take any additional evidence then, he has to give the appellant opportunity of being present and cross examine any witnesses so heard. To my understanding, what is envisaged in the above quoted provision of the law is that if the IGP does not take additional evidence then, there is no legal requirement for the appellant to be present when he is dealing with the appeal. In this application the appellants have not stated that the IGP did take additional evidence or

that his decision is based on additional evidence. Under the circumstances , I am of a settled opinion that the applicant have failed to establish the existence of an arguable case. I am alive that the right to be heard is fundamental. However, it is my settled legal opinion that the same has to be exercised in accordance with the acceptable legal procedures and the relevant law. And if the problem is the legal procedure stipulated in the law then, the remedy cannot be an application for judicial review like the one in hand. What I am trying to demonstrate here is that the applicants' appeal before the IGP was properly adjudicated as per the law (Police Force Services Regulations 1995,[R.E 2002]).Therefore, this application is frivolous.

I am inclined to agree with Ms. Zamaradi and Mr. Sabato that the application has been filed within the time prescribed by the law, that is with six (6) months from the date of the impugned decision . Also, I do not have query with applicants' interests in this matter. However, since the three conditions required to be considered by this Court for granting this application stipulated earlier in this ruling have to co-exist, I find this application lacking merit.

In addition, as correctly submitted by Ms. Zamaradi, the application for leave for filing an application for judicial review is a process which is aimed at eliminating frivolous or vexatious. In the case of **The Registered Trustee of Sunni Muslim Jamaat (supra) ,** this court (Hon J.S.Mgetta, J) had this to say on the reason behind the requirement for seeking leave before applying for judicial review;

" The application for leave is a process intended to enable the court to eliminate and exclude frivolous or vexatious applications which would appear to be an abuse of the Court process and to ensure that the applicant is only allowed to proceed to file judicial review whereby the Court is satisfied that there is a fit case for further consideration"

In the upshot, this application is dismissed. Each party will bear his own costs.

Dated this 13th day of October 2022

B.K.PHILLIP

JUDGE