IN THE HIGH COURT OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 22 OF 2022

BETWEEN

ELIAS ZACHARIAH MAGUTTAH.....APPLICANT

VERSUS

TANZANIA INSTITUTE OF EDUCATION.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

Date of last order: 27/10/2022

Date of the ruling: 10/11/2022

BEFORE: S.C. Moshi, J.

The respondent through a notice of preliminary objection challenges the competency of the application which is made under Section 2 (3) of the Judicature and Application of Laws Act, Cap. 358 R.E 2019; Sections 19(3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap. 310 RE 2019, Rule 5(1), 5(2), (a),(b),(c), and (d) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and fees) Rules, 2014 and Section 95 of the Civil Procedure Code, Cap. 33 RE

2019) in which the applicant is seeking leave to file an application for judicial review for orders of certiorari and mandamus.

The objection taken is as quoted hereunder: -

> *"The Application is bad in law as the same contravenes Rule 5 (2) (a) (b) and (c) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014, G.N. No. 324 of 2014".*

During hearing of the application, the Applicant was represented by Mr. Desdery Ndibalema, Learned Advocate, while the Respondents were represented by Ms. Selina Kapange, Learned State Attorney. The application was disposed of by way of oral submissions.

Ms. Selina submitted inter alia that on 3/10/2022 the applicant filed an application for Judicial Review praying for orders of certiorari and mandamus to quash the president's decision to terminate his services. They were served with a Chamber Summons supported by an affidavit on 07/10/2022. The court allowed them to file a counter affidavit within two days. While preparing the papers they discovered that the applicant's application was filed contrary to Rule 5 (2) (a) (b) and (c) of the Law

Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review and Fees) Rules, 2014 [GN No. 324].

Ms. Selina, submitted further that, however the rules were not complied with as upon perusal of the court record, they learned that the applicant's statement was missing. She argued that, the effect of failure to accompany the statement to the application, renders the application incompetent; to cement her submission, she cited the case of **Isaya Joseph Chalinga vs. Commissioner General of Immigration Services & Attorney General,** Misc. Civil Cause No. 6/2021 in which the Judge struck out an application that was not accompanied by the statement.

She contended that, the requirement to file a statement is mandatory. The provisions are couched in mandatory term since the word **shall** is used. In this regard she referred to section 53 (2) of **Interpretation of Laws Act,** Cap. 1. She argued that, the statement presented in court was not properly before the Court. First, it is not signed by the Court clerk. Secondly, the copy in their file is not complete, it ended at verification part. She lastly, prayed that the application be struck out.

In reply, Mr. Ndibalema submitted that, the applicant herein filed an application for leave for prerogative orders on 3rd October 2022. The

application was accompanied by the statement as required under the Law Reform (Fatal Accident & Miscellaneous Provisions) (Judicial Review) Rules. He said that, the said rule, sets a mandatory requirement for an application to be accompanied by a statement. The application before this court was accompanied by the statement as required by the rules. It was served to Respondents on 7th October 2022. First of all, the perusal was not done, there is no evidence that the Counsel for the respondent conducted a search in the court record, the practice is for them to write a letter requesting perusal but there is no such letter that has been submitted. Even if it was done, then it was not done thoroughly.

He contended that, today the statement was seen in the court file and in the respondent's file although she alleges that there is no last page, however, the applicant is not responsible for the filing system of the Court files, and likewise for the State Attorney's file. He argued that, since the document was seen in the file, the objection is overtaken by events. He distinguished the case of **Isaya Joseph (supra)** as in **Isaya Josegh's case,** the applicant never filed a statement. He prayed that; the Preliminary objection should be dismissed for devoid of merits.

He however admitted that the statement is there but there is no signature of the registry officer. He however, said that, it is not applicant's fault because it is registry's duty to receive the documents, in support of his argument he cited the case of **21st Century Food and Packaging Ltd. Vs. Tanzania Sugar Producer' Association & 2 others (2005) TLR 2.**

In the end, he said that, the omission is not fatal, and he proposed that, the same can be cured under the principle of overriding objective which was introduced to do away with technicalities. The court may even order the Registry officer to sign the statement for purposes of dispensing justice and insert what is missing, the 1st page of the statement. He cited the case of **Dangote Cement Ltd vs. NSK Oil & Gas Ltd, Misc. Commercial Application No. 8 of 2020,** at pages 17 - 20.

In a rejoinder Ms. Selina submitted that the case of **Dangote Cement Ltd (Supra)** is distinguishable from this application as in that case there was an omission of the provision in the chamber summons. She argued that failure to attach the statement is fatal. The oxygen Principle cannot apply to a mandatory requirement that must be complied with.

I have considered the parties submissions, the relevant laws and the pleadings as a whole. There is no dispute that an application for judicial review must be accompanied by a statement, see Rule 5 (2) (a) (b) and (c) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review and Fees) Rules, 2014 [G.N. No. 324] of 2014.

It is also common ground that, the requirement to accompany the statement to the application is mandatory, the requirement is couched in mandatory terms, and it reads thus:

> *"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;*
>
> *(d) affidavit verifying the facts relied on".*

See section 53 (2) of the **Interpretation of Laws Act,** Cap.1, interpretes the word shall, and it reads thus:

> *"Where in a written law the word "shall" is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed."*

Therefore, the requirement for an application to be accompanied by a statement is mandatory. Failure to attach a statement renders the application incompetent.

It is apparent on the face of record, that the statement which is in record is not properly filed. It is not endorsed by a registry officer to acknowledge receipt of the same. Similarly, this is the position even for a copy which was served to the respondent; worse still the last page is missing from a copy which was served on the respondents. Indeed, the application cannot stand, see the case of **Isaya Joseph** (Supra).

In the circumstances of this particular case, it is my view that, the overriding principle cannot be applied because firstly, a mandatory requirement was violated, and secondly, the proposition that the registry officer may be allowed to sign, involves certifying a date which the statement was received, which so far is unknown, see the case of **Mondorosi Village Council & 2**

Others vs. Tanzania Breweries Limited & 4 Others; Civil Appeal No. 66 of 2017, Court of Appeal sitting at Arusha (unreported), where the court held inter alia at pages 14 to 15 that:

> *"Regarding the overriding objective principle, we are of the considered view that, the same cannot be applied blindly against the mandatory provisions of the procedural law which go to the very foundation of the case."*

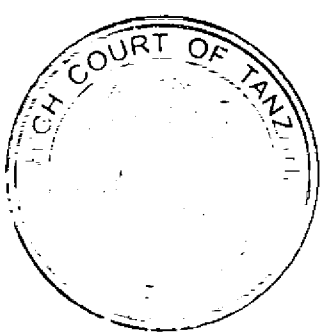
Evidently, the case of **Dangote Cement Ltd vs. NSK Oil & Gas Ltd (Supra)** is distinguishable from the case at hand.

That said and done, and basing on the aforesaid, I sustain the preliminary objection on point of law as presented.

Consequently, the application is struck out accordingly.

Each party will carry its own costs.

It is so ordered.



S.C. MOSHI

JUDGE

10/11/2022