

IN THE HIGH COURT OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CAUSE NO. 48 OF 2022

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

**AND IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY
FOR ORDERS OF CERTIORARI TO QUASH THE PRESIDENT'S
DECISION DATED 26TH MARCH 2022 WHICH QUASHED THE
DECISION OF THE PUBLIC SERVICE COMMISSION DATED 27TH
APRIL 2021 WHICH CONFIRMED THE DECISION OF
DISCIPLINARY AUTHORITY DATED 07TH SEPTEMBER, 2020
WHICH ORDERED DEDUCTION OF SALARY BY 15% FOR THREE
YEARS; AND SUBSTITUTED THE SAME WITH DISMISSAL**

BETWEEN

CAPT WINSTON JANUARIUS MWASSA.....APPLICANT

AND

THE CHIEF SECRETARY..... 1ST RESPONDENT

DAR ES SALAAM MARITIME INSTITUTE (DMI)... 2ND RESPONDENT

THE ATTORNEY GENERAL..... 3RD RESPONDENT

RULING

Date of Last Order: 01/11/2022

Date of Ruling: 23/12/2022

Before: S.C. MOSHI, J

This ruling is pursuant to an application which is made under rule 5 (1), 2 (a)-(d), (3) and 7 (1) and (2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions (Judicial Review Procedure and Fees) Rules, 2014 (G.N.No.324 of 2014); Section 17 (2) and 19 (2) and (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act.

The applicant is praying the court to grant the following orders: -

- i. This Honourable Court be pleased to grant leave to the Applicant to apply for orders of certiorari to quash the President's decision dated 26th March, 2022 communicated to the applicant on 20th April, 2022 which quashed the decision of the Public Service Commission which confirmed the decision of the Disciplinary Commission which ordered the deduction of salary by 15 % for three years and enhanced the same by substituting it with dismissal from employment.
- ii. Costs of this application.
- iii. Any other order as the court shall deem fit to grant.

The application is supported by the applicant's affidavit as well as applicant's statement of facts. On the other hand, the respondents filed a counter affidavit and a reply statement.

At the hearing of the application the applicant was represented by Mr. Othiambo Kobas, advocate whereas the respondents were represented by Mr. Ayub Sanga, State Attorney and Mr. Mathew Fuko, State Attorney. The application was heard *viva voce*.

Mr. othiambo submitted *inter alia* that, in cases of Judicial Review the court is supposed to consider three crucial issues:

1. Whether the applicant has sufficient interest on the matter
2. Whether the applicant has made an arguable or *prima facie* case before the court,
3. Whether the application has been brought within the required time.

In this regard he cited the case of **Cheavo Juma Mshana vs. Board of Trustees of Tanzania National Parks & 2 others**, Misc. Civil Cause No. 7/2020, High court at Moshi, at page 7. He said that, the present application has been filed within the required time limit. The president's decision was issued on 20/4/2022, and the current Application was filed on 15/9/2022; hence it is well within the required six months.

He also submitted that, the applicant has demonstrated sufficient interest on the matter and that he has shown that he has an arguable case. Being the then employee of the 2nd respondent he was given permission to go for studies and while on studies the practical part of the studies, he was disciplinary charged for being absent from work without permission of his employer. Consequently, without being afforded a right to be heard by his disciplinary authority he was found guilty and he was penalized reduction of 15% of his salary for three years, he appealed to the commission, i.e; the public service commission and requested to be present during the hearing of the Application so he could expound further on the grounds of appeal. His request was not adhered to, the commission continued to hear the appeal in his absence and confirmed the decision of the disciplinary committee. The applicant appealed further to the president where her excellence the president heard his appeal without giving him a right to expound on the appeal. Her excellence the president enhanced the punishment meted by the disciplinary authority and enhanced by the commission by ordering a substitution of dismissal from employment instead of reduction of 15% of the salary for 3 years without giving the applicant a right to be heard.

He submitted further that, at paragraph (a) of (iii) the applicant stated that, the duration of the course & course content to which he was permitted to go for training also covered practical training.

He also submitted that at item iii (b) of para 22 the applicant has demonstrated that the inquiry committee was improperly composed because it was formed by the disciplinary authority which composed of members who were from the employer institution contrary to R. 8 (5) of the Public Service Disciplinary Code of Good Conduct, GN 53/2007; the GN requires the secretary and members of the committee to be appointed from outside the organization i.e. 2nd respondent, but two of the members who are Eng. Fortunata Kakwaya and Dr. Wilfred Johnson were, and are still employees of the 2nd respondent. He said that, also Paragraph 22 (iii) (c) the applicant demonstrated that he was heard by 'Kamati ya Ajira na Nidhamu ya Chuo cha Bahari Dar es Salaam' [DMI] while that committee is not his disciplinary authority. His disciplinary authority per R. 35 (2) (c) of public Service Regulations, 2003 is the Head of the institution. So, the applicant complains that he was not heard by his disciplinary authority who's the head of the institution, and at paragraph 22 (iii) (d) the applicant has complained that he was not given a right to be heard by all three disciplinary authorities. Again at paragraph 22 (iii) (e) the applicant complained that when he was summoned to appear before his disciplinary authority, he requested to be availed with the inquiry report, the employer, the head of the institute didn't adhere to his request.

He argued that, in the respondent's response, in the counter affidavit as well as in the reply Statement the respondents gave a blanket denial, they

did not particularize their response to the applicant's claim of denial to appear before the disciplinary authorities to expound on his appeal. They did not deny that the two members, were employees of 2nd respondent. On the complaint by the applicant regarding his charges being brought before improper disciplinary authority, the respondent did not counter, they did not state what exactly is the disciplinary authority, instead they gave a generalized answer. He argued that the applicant has successfully demonstrated an arguable case, and in that end, he referred to the case of **Republic V. Land Dispute Tribunal Court Central Division and Another**, 2006 V I E A at P. 321 which is quoted with approval in the case of **Cheavo Juma Mshana** (supra), **Re Harji Transport Services** (1961) E A 88 and the case of **Republic V. Director General of Directorate of Criminal Investigational and another**

Mr. Ayub reply started by challenging the submission relating to paragraph 18 to 22 of the statement of facts, that they have not been verified in the affidavit. However, I agree with Mr. Othiambo that the facts have been dully verified at paragraph 20 of the affidavit.

Regarding the substantive part of the application, Mr. Sanga did not dispute that the applicant has sufficient interest, that he has no other alternative remedy and the fact that he acted promptly. He however, said that, the issue is whether he has an arguable case, that he was denied a right to be heard. He contended that, there has to be a prima facie case, he supported his argument by the case of **Emma Bayo vs. The Minister for Labour and Youths Development & 2 others**, Civil Application No. 79/2012 CAT at Page 8. He said that, as held in the case of **Republic vs. Land Dispute**

Tribunal Court (supra) the purpose of leave is to filter hopeless cases at earliest time. He argued that in the instant case, there is no premafacie case. The applicant's claim that he was not given a right to be heard is misconceived and unfounded in law because according to para 18 of applicant's affidavit after being aggrieved by the public service commission he appealed to the president vide letter dated 20/6/2021 (Annexure P) and the President replied on 20/4/2022 vide annexure Q. Therefore, he was given a right to be heard in consonance with S. 25 of the Public Service Act, Cap. 298 read together with Reg. 60 of the Public Service Regulations of 2003. The law doesn't require a person to be called, the president, considers the record.

He ended by submitting that, the applicant has not demonstrated any arguable case.

I have considered the submissions and the relevant laws. The issues to be determined by court when granting leave have been propounded through various case laws, the issues include:

- (1) *Whether the applicant has sufficient interest on the matter*
- (2) *Whether the applicant has made an arguable or prima facie case before the court,*
- (3) *Whether the application has been brought within the required time.*
- (4) *Whether the applicant has no alternative remedy.*

There is no dispute that the applicant has sufficient interest in the matter, again there is no dispute that the application was filed within time, and there is no dispute that the applicant has no alternative remedy. The issue is whether he has shown that there is an arguable case. In answering this issue, I 'm guided by the case of **Emma Bayo** (Supra). This stage is a screening stage. The court is not required to indulge into the merits of the case. Upon scrutiny of the pleadings, I find that Paragraph 22 of the statement illustrates an arguable case. The facts have been verified in paragraphs 19 and 20 of the affidavit.

That said, I grant leave to the applicant to apply for orders of certiorari.

Each party to bear its own costs.




Sgd. S.C. Moshi

Judge

23/12/2022