IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)
AT DAR ES SALAAM

MISCEALLANEOUS CRIMINAL APPLICATION NO. 1 OF 2022

PETER ERICK MRINA ..... APPLICANT

VERSUS

REPUBLIC ..... RESPONDENT

RULING

11th, & 25th April, 2022

ISMAIL, J.

Peter Erick Mrina, the applicant herein, was deported to Tanzania by the Government of the United States of America, in the belief that he was a Tanzanian citizen. The deportation was ordered on 6th April, 2019. Over a month later, on 14th May, 2019, the Minister for Home Affairs, under the powers conferred on him by section 27 of the Immigration Act [Cap. 54 R.E. 2019], issued a Deportation Order, ordering him out of the country. The Deportation Order was issued simultaneous with a Detention Order that consigned him to prison while conveyance to his place of departure was being awaited. Since then, the applicant has remained at Segerea

prison where he is incarcerated, waiting for implementation of the Deportation Order.

After 31 months of an indefinite wait, the applicant made a second attempt of seeking the Court's intervention and address the impasse. His first attempt was in the form of an application for *harbeas corpus* which was dismissed on 9th October, 2019. The instant application has an assortment of prayers, key among them are for his release from the prison where he has been languishing for 31 months; and for his conveyance back to the United States of America, his last place of abode before he was deported to Tanzania.

The application has been preferred under the provisions of sections 390 (1) (b) and 392 (1) (2) of the Criminal Procedure Act, Cap. 20 R.E. 2019 (CPA). It supported by the applicant's own affidavit setting out grounds on which the prayers are sought.

The application has encountered an opposition from the respondent who, besides filing counter-affidavits, she has raised a couple of preliminary objections which are to the effect:

(a) *That the application is bad in law for being supported by an affidavit which contains arguments and laws; and*

(b) *That the Court has no jurisdiction to grant the prayers sought.*

Hearing of the preliminary of the objections pitted the applicant, who fended for himself, unrepresented, against Ms. Nura Manja, learned State Attorney.

Submitting on the first limb of objection, Ms. Manja argued that paragraphs 4, 12, 13, 15 and 19 of the affidavit contain arguments instead of normal and concise depositions. This, she argued, is contrary to the law, and as was underscored in the decision of the Court ***in Frank Anastas Lui v. The Minister for Constitutional and Legal Affairs & Another***, HC-Criminal Revision No. 6 of 2019 (unreported). Relying on the landmark decision in ***Uganda v. Commissioner of Prisons, ex parte Matovu*** [1966] E.A. 514, the Court held that, since the affidavit is defective then the application it supported was incompetent. Ms. Manja urged the Court to follow the path taken in the cited decision and dismiss the application.

With regards to the second ground of objections, Ms. Manja submitted that the applicant made an application for *harbeas corpus* which was determined by the Court, through the decision of Hon. Masabo, J., handed down on 9th October, 2019. Ms. Manja further contended that, since the application seeks to challenge the order of the Minister, such challenge ought to have followed the procedure enshrined in Rule 5 (1) (2)

of the Law Reform (Fatal Accidents) and Miscellaneous Provisions Act, Cap. 310 R.E. 2019.

Overall, Ms. Manja urged the Court to strike out the application.

The applicant's reply to the first ground of objection was terse. He simply argued that he, being a layman, would not be expected to know the nitty-gritty requirements of the law on affidavits. He argued that the defect is not intentional, adding that the offending provisions may be expunged from the affidavit and leave the rest. He insisted that he is being detained indefinitely.

Regarding the second ground of objection, the applicant's contention is that his challenge is not against the order of the Minister. He argued that his complaint relates to the failure by the Immigration Department to comply with the Minister's order. He asserted that the Immigration Department has not shown that it attempted to deport him to his last place of abode. He distinguished the instant application from the application which was dismissed by the Court, arguing that the instant application falls under section 390 (1) (b) of the CPA.

The applicant further contended that the Minister's order gives the Court jurisdiction to challenge failure of its implementation, and that such jurisdiction is conferred on the Court under section 27 (5) of the

Immigration Act. On this, he urged the Court to be persuaded by the decision of ***Jennings v. Rodriguez***, 138 S. Ct. 830, 200L Ed 2d 122 (2018). He argued that the cited decision applies to matters of detention on the Minister's order.

He urged the Court to overrule the objections and order that the application be heard on its substance.

Ms. Manja did not have anything to rejoin, apart from maintaining that recourse in this matter is to apply rule 5 (1) (2), and that *harbeas corpus* is not an option in the circumstances.

I will start with the second objection which queries jurisdiction of the Court, in view of the fact that the application before me is for *harbeas corpus,* similar to what the Court heard and determined earlier on. In the respondent's view, the right course of action was to apply to challenge the Minister's order under the provisions of Cap. 310. The applicant maintains that he does not intend to challenge the order. All he asks for is that the Minister's order be implemented.

Looking at the application, there is no dispute that the provisions of section 390 (1) (b) of the CPA, quoted therein, deal with cases of *harbeas corpus*, a relief which was refused by the Court, rightly so, because the applicant's whereabouts were known and reasons for his detention had

also been established. A critical review of the prayers, however, reveals that none of the prayers sought relates to *harbeas corpus*, implying that this is a case of wrong citation of the enabling provisions of the law.

With respect to wrong citation of the enabling provision of the law, the law is clear. With the advent of Court of Appeal (Amendment) Rules, 2019, rule 48 (1) of the Court of Appeal Rules, 2009 has now lowered the severity of the consequence of wrong or non-citation of the enabling provision of the law in an application. The proviso to the amended rule provides as follows:

> *"Provided that where an application omits to cite any specific provision of the law or cites a wrong provision, but the jurisdiction to grant the order exists, the irregularity or omission can be ignored and the court may order that the correct law be inserted."*

In this Court, this new position was underscored in the case of ***Sisi kwa Sisi Panel Beating & Enterprises Ltd. v. Bodi ya Wadhamini Jimbo Kuu Mwanza***, HC-Misc. Civil Application No. 13 of 2021 (unreported), in which it was held:

> *"In the instant matter, the citation of Order 6 (1) and (2) is, without any doubt, an erroneous indulgence by the applicant, as the proper enabling provision for extension of*

time is Order 8 (1) and (2) .... This is the provision that vests jurisdiction in the Court to grant an extension of time. But as the applicant did that, the affidavit of Julius Mushobozi, sworn in support of the application, contains averments which reveal what the applicant intended the Court to grant. In my view, such facts support the grant of what is prayed in the chamber summons. A combination of existence of the Court's jurisdiction through Order 8 (1) and (2), and the facts in support of the application bring me to the conclusion that the Court has been properly moved and the application is in the right footing. This reduces the wrong citation to a trifling and harmless misstep that can be cured by an amendment, the same way the upper Bench did when it was faced with a similar situation in ***Beatrice Mbilinyi v. Ahmed Mabkhut Shabiby****, CAT-Civil Application No. 475/01 of 2020 (unreported)."*

See also: ***Dangote Cement Limited v. NSK Oil and Gas Limited***, HC-Misc. Comm. Case No. 8 of 2020; and ***Tobacco Tanzania Limited & Another v. Mwajuma Hamis & Another***, HC-Misc. Civil Application No. 803 of 2018 (both unreported).

Taking a cue from the cited decisions, I hold the view that the confusion surrounding the wrong citation of the application can be cured by allowing the applicant to effect an amendment to his application by

inserting the appropriate enabling provision of the law. This, therefore, concludes the objection in the applicant's favour. I overrule it.

Turning on to the first limb of objections, the contention is that some clauses in the supporting affidavit are offensive of the law on affidavits. The applicant has conceded to this anomaly, citing ignorance as the basis the flaws. I agree that the cited provisions are anomalous and working contrary to what the law on affidavits provides. That affidavits should be free of hearsay, legal arguments and objections, is a known position and it has been accentuated in many a decision, all of which follow the path cleared by ***Uganda v. Commissioner of Prisons, ex parte Matovu*** (supra). Thus, in ***Mustapha Raphael v. East African Gold Mines Ltd,*** CAT-Civil Application No.40 of 1998 (unreported), the Court of Appeal of Tanzania held:

> *"An affidavit is not a kind of superior evidence. It is simply a written statement on oath. It has to be factual and free from extraneous matter such as hearsay, legal arguments, objections, prayers and conclusions. See the case of Uganda vs Commissioner of Prisons, ex-parte Matovu [1966] EA 514".*

The applicant has urged the Court to consider expunging the offending clauses of the application and leave the rest unscathed. The view

held by Ms. Manja is that the entire affidavit must collapse, essentially meaning the application supported by the affidavit must also die. Looking at the nature of the defects pointed out by the respondent, my unflustered view is that this is a classic case in which discretion of the Court may be invoked and have the affidavit amended in order to 'weed' out the anomalous parts of the affidavit. Such amendment will, in my considered view, help to meet ends of justice and allow for consideration of the substantive justice.

Regarding the amendment, the form of amendment is as was considered in the Court of Appeal's decision in ***Phantom Modern Transport (1985) Limited v. D.T. Dobie (Tanzania) Limited***, CAT-Civil References No. 15 of 2001and 3 of 2005 (unreported), wherein it was held:

> *"Where defects in an affidavit are inconsequential, those defective paragraphs can be expunged or overlooked, leaving the substantive parts of it intact so that the court can proceed to act on it. If however, substantive parts of an affidavit are defective, it cannot be amended in the sense of striking off the offensive parts and substituting thereof correct averments in the same affidavit. But where the court is minded to allow the deponent to remedy the defect, it may allow him or her to file fresh affidavit*

containing correct averments. What in effect it means is that a fresh affidavit is substituted for the defective one to that extent one may possibly say that the original affidavit is being "amended".

It means that the amendment will entail filing of a fresh affidavit to substitute the defective affidavit. Noting that an amendment was also ordered in respect of the enabling provisions of the law, the amendment will also entail rectifying the provisions of the law cited in the application. I order, therefore, that the amendment be effected within 14 days from the date hereof.

It is so ordered.

DATED at **DAR ES SALAAM** this 25th day of April, 2022.

M.K. ISMAIL
JUDGE
25/04/2022