IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MAIN REGISTRY

AT DAR ES SALAAM

MISCELLANEOUS CAUSE NO. 35 OF 2022

IN THE MATTER OF AN APPLICATION FOR PREROGATIVE ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF THE DECISION OF THE PRESIDENT OF THE UNITED REPUBLIC OF TANZANIA ON TERMINATION OF THE APPLICANT

BETWEEN

YUSUFU SELEMANI KILEO.....APPLICANT

AND

ATTORNEY GENERAL.....RESPONDENT

RULING

12/12/2022 & 03/03/2023

MZUNA, J.:

The Applicant Yusufu Selemani Kileo was the employee of Ministry of Education and Culture now Ministry of Education, Science and Technology as a teacher. In 2005 was reallocated as the curriculum developer. In 2015 was appointed as the Director of Educational Materials Design and Development. The Applicant was involved in the process of writing books for primary and secondary schools. 44 books' contents were unfortunately alleged to have typographical errors. Its distribution was stopped. The Applicant was held accountable for the loss caused and was terminated

by the Appointments, Disciplinary and Staff Development Committee. Aggrieved, by the decision of the committee, he appealed before the Public Service Commission. However, the Commission upheld the decision of the committee, which in its ultimate result, aggrieved the applicant and decided to appeal to the President of the United Republic of Tanzania. The President upheld the decision of the Commission on 20th December 2021. This ultimately gave rise to the instant application.

The application is by way of chamber summons supported by sworn affidavit of the applicant. The Applicant's prayer before this court is for prerogative order of certiorari to quash the decision of the President of the United Republic of Tanzania on his termination and prerogative order of mandamus compelling the President of the United Republic of Tanzania to reinstate the Applicant as a Senior Curriculum Developer.

Hearing of the application proceeded by way of written submissions. Both parties had representation. Mr. Richard Clement, the learned counsel advocated for the applicant whereas Ms. Adelaida Masauwa, the learned State Attorney appeared for the respondent. Mr. Richard adopted the applicant's affidavit to form part of his submissions and abandoned ground 16 (b) and (f) and proceeded to submit on four grounds namely; 16 (a), (c), (d) and (e).

I propose to dispose the raised grounds seriatim as presented. The question relevant for the first ground is *whether the President disregarded the fact that the Appointments, Disciplinary and Staff Development Committee and Council of Tanzania Institute of Education acted beyond their powers or authority (ultra vires)?*

Arguing in support of this ground, Mr. Richard defined disciplinary authority as defined under regulation 3 of the Public Service Regulation, 2003 GN. No .444 of 2022. Regulation 35 of the Public Service Regulation, 2003 which provides for disciplinary authorities to wit the Council of Tanzania Institute of Education and Appointments, Disciplinary and Staff Development Committee are not listed. Therefore, they had no powers to terminate the Applicant.

Besides, Mr. Richard submitted that the applicant was relieved from the office contrary to item 11.2 of the Public Service Disciplinary Code of Good Practice, 2007, GN No. 53 of 2007 which requires the relive not to exceed 3 months. In circumstances, the disciplinary authority had to seek extension of time from the Permanent Secretary.

Mr. Richard raised the issue of regulation that the regulations are still in use by Tanzania Institute of Education. That, the regulations were approved by the Minister of Finance vide the letter with reference number

TYC/TR/P/10/3/28/19 of 15th April 2011 directing the Director General of Tanzania Institute of Education to have effect from 01st July, 2011. Therefore, Tanzania Institute of Education had no powers to relieve the Applicant from duties.

It is Mr. Richard's prayer for this Honourable Court to quash the decision of the President of the United Republic of Tanzania and order proper procedure to be followed by relevant authorities.

Responding, Ms. Adelaida Ernest adopted the contents of the counter affidavit to the amended affidavit and the statement in reply filed on 13th October 2022. She urged the court to see the term disciplinary authority as defined under section 3 of the Public Service Act, 2002.

It entails that the authority to take disciplinary action is vested under the Constitution, the Public Service Act and its regulations or any other law. Ms. Adelaida proceeded that the disciplinary powers articulated in the Public Service Act are not the only disciplinary authorities. However, under Section 6(2) (e) and 13 of **the Tanzania Institute of Education Act, Cap 142,** the Council has the authority to hire and fire any staff member or, any officer of the institute as per section 48(1) (a) of the Interpretation of Law Act, Cap 1. Therefore, Section 8 of **Tanzania Institute of Education Act**, establishes the Appointment and Disciplinary Staff

Development Committee which is legally delegated the disciplinary authority. That being the case, it was her view that the Council and the Committee did not act beyond their authority but acted within the ambit of the Tanzania Institute of education Act and not under the Public Service Act and its regulations.

In the rejoinder Mr. Richard reiterated his submissions in chief. He maintained that the Council and the Committee acted ultra vires. That the Applicant was relieved on 16th May 2017 pursuant to section 6(1)(b) of the Public Service Act and Regulations 37 of the Public Service Regulations. He was again relieved on 18th October 2018 per regulation 48(6) and (8) of the public Service Regulation and regulation F 38 of the Public Service Standing Order. He submitted further that their arguments do not conform with their pleadings.

In regard to the powers to hire and fire of the Disciplinary authorities i.e the Council and the Appointments, Disciplinary and Staff Development Committee which terminated the Applicant, they are not recognized as disciplinary authority under Regulation 3 of the Public Service Regulation. It reads;

"Disciplinary Authority means any person or authority vested with powers under part V of these regulations to take disciplinary measures against any

public servant and includes any person to whom those powers have been delegated."

The applicant was hired by the Tanzania Institute of Education but not an appointee of the Council therefore this provision does not apply for the termination of employment. The appointees of the Council are the Director, Deputy Director, executive Secretary and the administrative and academic members of the staff. He proceeded further that there is a difference between an employee and the appointee. Therefore, the issue of relieve exceeding 3 months is a procedural irregularity and it is not a new issue.

In regard to Tanzania Institute of Education Staff regulations, 2011 Mr. Richard submitted that the respondents did not dispute the content of the regulations but its enforceability. Mr. Richard based his submission on the letter dated 29th February 2016 directing the applicant to act on the position of the Director of educational Material design and Development. Moreover, the letter with reference number TYC/TR/P/103/2/19 of 15th April, 2011 which forms part of the regulation is recognized even on the preamble. The letter was addressed to Director General of Tanzania Institute of Education directing the regulations to have effect from 1st July 2011.

Reading from the above submissions relevant for the first ground it is argued that the President disregarded that the Appointments, Disciplinary Committee and Council of Tanzania Institute of Education acted *ultra vires* to terminate the applicant.

The applicant challenges his dismissal by the Tanzania Institute of Education Council and the Appointment, Disciplinary and Development Staff Committee. That they had no powers to terminate him since they are not listed as the disciplinary authorities under Section 3 of the Public Service Act Cap 298 RE 2019. The respondent sternly disputed that the Council and the Appointment, Disciplinary and Development Staff Committee acted within their powers.

On account of the above submissions, this court has the following to say, the term "disciplinary authority" is defined under section 3 of the Public Service Regulations, 2022 to mean:-

> *"any person or authority vested with powers under these Regulations to take disciplinary measures against any public servant and includes any person to whom those powers have been delegated".*

Section 5(1) of the Tanzania Institute of Education Act, Cap 142 of 2002 establishes the Council which has powers under section 8 (1) to establish Boards and Committees of members of the Boards which have

powers to decide any matter except powers which the council may not exercise without the prior consent of the Minister.

Moreover, procedure to remove a public servant from public office is well articulated under section 24 of the Public Service Act which vests powers to the President to terminate the Public Servant for public interest as may be provided in the Regulations. Regulation 9(2) (3) of the **Teachers Service Commission Regulations,** GN No. 308 of 2016 directs the procedure to be followed in terminating a public servant as provided for in the **Public service Act**. In the case of **Ezekiah Oluochi v The Permanent Secretary, President's Office Public Service Management and 4 Others,** Civil Appeal No. 140 of 2018, the Court of Appeal sitting at Dar es salaam at page 24 held that the dismissal should be reached upon disciplinary proceedings being conducted. In the instant application, the disciplinary proceedings were conducted which led to his dismissal.

Mr. Richard raised issue of enforceability of the Tanzania Institute of Education Staff Regulations, 2011 regulations that they are enforced by virtue of the letter with reference number TYC/TR/P/103/2/19 of 15th April, 2011 which forms part of the regulation recognized even on the preamble.

I am of the settled view that, the enforceability of TIES Regulations of 2011 cannot be substantiated merely for being mentioned in preamble as preamble does not form part of the law. However, for regulations to take effect it must be Gazetted. Moreover, the Minister defined under section 2 of the Tanzania Institute of Education Act, refers to Minister responsible for National Education and not the Minister of Finance. This argument lacks legal basis. It is bound to fail.

Guided by the above provision, I hold that the Appointments, Disciplinary and Staff Development Committee and council of Tanzania Institute of Education acted within their powers (authority) to terminate the Applicant. They have such powers to do so. I say so because under section 48 (1) (a) of the Interpretation of Laws Act, Cap 1 of the Revised Laws, it clearly states that:-

"48. (1) Where a written law confers a power or imposes a duty upon a person to make an appointment to an office or position, including an acting appointment, the person having such power or duty shall also have the power–

(a) to remove or suspend a person so appointed to an office or position, and to re-appoint or reinstate, any person appointed in exercise of such power or duty..."

Therefore, this ground is devoid of merits.

There is a point which was raised on the issue of time limitation on relieving the applicant. That he was relieved from duty after exceeding 3 months without an extension of time from the Permanent Secretary. This point was strongly objected by the learned State Attorney as it is not pleaded in the amended affidavit. Ms. Adelaide submitted that the applicant raised new issues not raised in the pleadings contrary to the principle laid down in **Martin Fredrick Rajab v Ilemela Municipal Council and Another,** Civil Appeal No. 197 of 2019, CAT (unreported) at page 15 that parties are bound by their pleadings. Ms. Adelaida submitted further that this requirement of not relieving the employee more than three months without leave from the Permanent Secretary is not provided for under the Public Service Act or the Regulations. The requirement of extension arises only when one is interdicted and does not apply to relieve of employees as per regulation 37 and 38. Item 11.2 of the Public Service Disciplinary Code of Good practice, is a soft law does not impose any obligations. In the circumstances, if there is contradiction of time in relieving the employee, the regulation will prevail. She therefore, prayed for the court to disregard this issue.

It is submitted further that, submissions are explanation of evidence tendered. They must contain arguments on the applicable law and not

intended to substitute the evidence, see **Gulf Concrete & Cement Products Co. Ltd v. DB Shaprya & Co Ltd**, Civil Appeal No. 88 of 2019 CAT (unreported). The Applicant raised a new issue in the letter addressed to the Director General with reference No. TYC/TR/P/10/3/28/19 dated 15th April 2011 directing the said regulation to have effect from 01st July 2011. It is a submission from a bar.

In the rejoinder, the applicant said that the said letter addressed to the Director General with reference No. TYC/TR/P/10/3/28/19 dated 15th April 2011 is part of the regulations recognized even in the preamble and it is found at page (viii) of the regulations. That it was addressed to the Director General of Tanzania Institute of Education directing the regulations to have effect from 01 July, 2011. That, it could not be pleaded in the affidavit because he cannot plead law therein.

Reading from the above submissions, I tend to agree with Ms. Adelaida the learned State Attorney that the said letter was raised from the bar. Merely because it is recognized in the preamble cannot make it to be part of the law. Similarly issue of limitation was raised as an afterthought. It is a settled principle that parties cannot advance new grounds at anytime they feel to do so otherwise litigation will not come to an end *"except when legal ingenuity is exhausted" see,* **Yazidi Kassim**

t/a Yazidi Auto Electric Repairs v. The Hon Attorney General, Civil Application No. 354/04 of 2019, CAT at Bukoba (unreported) page 19.

So, the argument on the Applicant's relieve from office duty that it was made after expiry of the set time was raised from the bar and not in his affidavit. Parties are bound by their pleadings.

I revert to the **second ground** relevant for ground 16 (c) of the applicant's statement. The main issue is *whether there was a failure by the President to give reasons for the decision?*

Essentially, Mr Richard consolidated ground 16(c) and (d) to augment his argument that the President in upholding the decision of the Public Service Commission, disregarded the Applicant's grounds of appeal without stating reasons. That, the Applicant was armed with 19 grounds of appeal to the Public Service Commission but none of the grounds were addressed in its decision. That, no reasons were given for his termination. On account of the above reason, the Public Service Commission being the first appellate body had violated the Applicant's right to be heard.

Furthermore, that the eight grounds raised before the President of the United Republic of Tanzania were as well not considered. It is submitted further that, the President of the United Republic of Tanzania denied the applicant his right to be heard as enshrined under Article 13(6)

(a) of the Constitution of the United Republic of Tanzania of 1977. Mr. Richard referred to the case of **Salum Njwete @Salum @ Scorpion v Republic**, Criminal Appeal No. 182 of 2019 (unreported) and asked the court to declare the decision "null and void."

He further submitted that the appellate court is bound to consider all grounds of appeal as it was clearly pointed out in **Mwajuma Bakari (administratix of the Late Bakari Mohamed) v. Julita Semgeni and Another,** Civil Appeal No. 71 of 2022. That the impugned decision is silent on the reasons. The case of **Francis Mtawa v. Christina Raja Lipanduka,** Civil Appeal No. 15 of 2020 (Unreported) was cited.

Concluding his submissions Mr. Richard prayed for this court to quash the decision of the President of the United Republic of Tanzania and declare it together with the decision of the Public Service Commission as a nullity for failure to address the applicant's grounds of appeal. The court should order proper procedure be followed by the relevant authority to determine the fate of employment of the Applicant.

In regard to ground 16(d) Ms. Adelaide submitted that all grounds were determined by both the Commission as seen in para 2.0 where the President after careful consideration gave reasons for the decision. That, there is no any defined format which requires the appellate bodies to

describe and narrate each ground of appeal as if in the court of law. Therefore, his claim has no legal basis.

In regard to the Applicant's right to be heard, that it was violated by the Public Service Commission and the President as the raised grounds were not heard, I hold that, the right to be heard is the fundamental right enshrined under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania. It reads:-

> *13. (6) To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles, namely:*
>
> *(a) When the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned.*

I have been urged to follow what was held in the case of **Salum Njwete @ Salum @ Scorpion v. R** (supra) where the Court of Appeal at page 10, cited with approval the case of **Nyakwama s/o Ondare @ Okware v. the Republic,** Criminal Appeal No. 507 of 2019 (unreported) where it was held that:-

> *"We therefore, agree with Mr. Byamungu that failure to consider appellant's grounds of appeal was a fatal irregularity rendering the first appeal court's judgment a nullity. In this regard, we wish to emphasize that though it is not the duty of the first appellate court to resolve the*

issues as framed by the trial court, yet it is expected and bound to address and resolve the complaints of the appellant in the grounds of appeal either separately or jointly depending on the circumstances of each appeal..."

The court after finding that some of the appeal grounds were not considered, proceeded to quash the proceedings and declared the appellate judgement null and void with an order of rehearing the appeal before another Judge.

I should say in a lucid manner, that the procedure of hearing cases before the court as opposed to that obtainable before the *quasi judicial* bodies is slightly different. The facts obtainable in the above cited case is therefore distinguishable. In the case of **Ally Linus and Eleven others v. Tanzania harbours Authority and Another,** [1998] TLR 5, the court quoted paragraph 147 of the Halsbury's Laws of England and held that:-

"Certiorari will issue to quash a determination for excess or lack of jurisdiction or error of law on the face of the record or breach of the rules of natural justice or where the determination was procured by fraud, collusion or perjury."

Again, at page 12, the court emphasized that this court exercises ***"its supervisory function to ensure that a tribunal or such body below acts in accordance with the Rule of Law."*** (Underscoring mine).

I have gone through the decision of both the Public Service Commission and the President of the United Republic of Tanzania, reasons to uphold the decision of the Applicant's termination were clearly stated. Part of the record/decision reads:-

> *"**Rais amepitia rufaa yako,** ametafakari kwa kina na amejiridhisha kuwa, Ushahidi wa vielelezo uliotumika kwenye rufaa yako umejitosheleza kuthibitisha unayo hatia ya makosa uliyoshitakiwa kinidhamu...kutokana na hatia hiyo, **Rais...amekataaa sababu za rufaa kuwa siyo za msingi."** (Emphasis mine).*

The above transcript clearly demonstrates that the appeal grounds were considered along with the tendered exhibits, save that such appeal grounds did not hold water. I therefore find no merit in this ground.

On the last ground, the main issue is *whether the decision of the President was irrational?* The applicant faulted the decision of the President to terminate him as being irrational for basing on the evaluation report of the Ministry of Education, Science and Technology which was declared by the CAG to have irregularities for not identifying text books which requires either approval with minor corrections or approval with conditions or rejection. Therefore, the Public Service Commission and the President did not take into account matters which ought to have been taken into account. The case of **Sanai Murumbe and Another v.**

Muher Chacha (1990) TLR 54 was cited in support. The CAG report revealed that the evaluation of text books was not adhered to in 2015, despite it was one of the tools of reference used by the inquiry committee.

Mr. Richard submitted that the CAG Report of February, 2022 mentioned by the respondent under paragraph 10 of the counter affidavit is irrelevant as the report relied by the applicant was the 2017/2018 CAG report delivered in 2019 and another report *Ukaguzi wa gharama za aina 44 za vitabu TET 2014-2017*. He insisted that the 2022 report is irrelevant in this case.

Ms. Adelaide on ground 16 (e) submitted that matters which ought not to have been taken into account by the President are to be apparent on the record and does not require the court to draw a long-drawn conclusion. It is submitted further that the guideline the applicant purports to be operative were not approved by the Minister as per requirement of item 1.6 of the guideline and that can be evidenced at paragraph 15, the 2nd paragraph. She maintained that his termination was justifiable as he acted negligently as a professional causing loss of tax payer's money. She prays that the application be dismissed for lack of merits.

This aspect I dare say, touches on the substantive part of the application. The application for mandamus and certiorari is provided for

under section 17 of the Reform (Fatal accidents and Miscellaneous Provisions) Act. It reads;

1. *The High Court shall not, whether in the exercise of its civil or criminal jurisdiction, issue any of the prerogative writs of mandamus, prohibition or certiorari.*
2. *In any case where the High Court would but for subsection (1) have had jurisdiction to order the issue of a writ of mandamus requiring any act to be done or a writ of prohibition prohibiting any proceedings or matter, or a writ of certiorari removing any proceedings or matter into the High Court for any purpose, the Court may make an order requiring the act to be done or prohibiting or removing the proceedings or matter, as the case may be.*
3. *No return shall be made to any such order and no pleadings in prohibition shall be allowed, but the order shall be final, subject to the right of appeal therefrom conferred by subsection (5).*
4. *In any written law, references to any writ of mandamus, prohibition or certiorari shall be construed as references to the corresponding order and references to the issue or award of any such writ shall be construed as references to the making of the corresponding order.*
5. *Any person aggrieved by an order made under this section may appeal therefrom to the Court of Appeal.*

For the application of judicial review to succeed, the following conditions must be met as well articulated in **Rahei Mbuya v. Minister for Labour and Youth Development and Another,** Civil Appeal No. 121 of 2005

(unreported) and **Sanai Murumbe and Another v Muhere Chacha** [1990] TLR 54;

> "*The High Court is entitled to investigate the proceedings of a lower court or tribunal or a public authority on any of the following grounds, apparent on the record.* ***One,*** *that the subordinate court or tribunal or public authority has taken into account matters which it ought not to have taken into account* ***Two,*** *that the court or tribunal or public authority has not taken into account matters which it ought to have taken into account.* ***Three,*** *lack or excess of jurisdiction by the lower court.* ***Four,*** *that the conclusion arrived at is so unreasonable that no reasonable authority could ever come to it.* ***Five,*** *rules of natural justice have been violated.* ***Six,*** *illegality of procedure or decision".*

The main task before me is to investigate on the illegality, irrationality and procedural impropriety of the decision making process which led to the termination of the applicant; See, **Council of Civil Service Unions v. Minister for Civil Service** [1985] A. C. 374 at 410 and **Chief Constable of North Wales Police v. Evans** [1982] 1 W. L. R. 1155 at page 1157.

Admittedly, the last ground centers on the issue as to whether the decision of the President was irrational for not considering the CAG report in relation to the evaluation report of the Ministry. I would refrain from going into the merits or otherwise of the decision as this is not an appeal court. It cannot review the decision. They ought to have challenged it on

account of illegality, or it is ultra vires and contrary to the law. Secondly, if it is tainted with irrationality in that the action or decision is unreasonable for lack of logic or of acceptable moral standards. Lastly if the decision is tainted with procedural impropriety, See the case of **Lausa Alfan Salum & 116 Others v. Minister for Lands Housing and Urban Development and National Housing Corporation** [1992] TLR 293 (HC), the position which I fully associate with.

The applicant was given right to be heard and his appeal was also considered. My close examination of the proceedings and decisions in view of the case of **Sanai Murumbe and Another v Muhere Chacha** (supra), shows there is no defect *"apparent on the record"* that is challengeable to warrant the grant of the orders sought. This court cannot review the evidence. Suffice to say that there is no decision which was made that do not conform to well established standard or is unreasonable or denial of right to be heard. I therefore find no merits in the last ground of appeal.

In conclusion, the application for certiorari and mandamus against the decision of the President of the United Republic of Tanzania to terminate the Applicant has no merit. The Application stands dismissed with no order as to costs.

Delivered at Dar es Salaam, this 3rd Day of March, 2023.

M. G. MZUNA,

JUDGE.