IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MAIN REGISTRY

AT DAR ES SALAAM

MISCELLANEOUS CAUSE NO. 60 OF 2022

BETWEEN

EX-CPL ROBERT MUGISHA KASENENE ..... APPLICANT

AND

THE COMMISSIONER GENERAL OF PRISONS ..... 1ST RESPONDENT

THE ATTORNEY GENERAL ..... 2ND RESPONDENT

RULING

2nd and 21st February, 2023

KISANYA, J.:

The applicant, EX-CPL Robert Mugisha Kasene has, by chamber summons made under rules 5(1) and (2) of the Law Reform (Fatal Accidents and Miscellaneous Provision) (Judicial Review and Procedures and Fees) Rules, 2014 (henceforth "the Rules"), moved this Court seeking the following orders:

1. *That, this honourable Court may be pleased to grant an Order of Leave to file an application for Judicial Review of Prerogative Order for prayers of Certiorari and Mandamus to quash the original decision of dismissal order from employment reached in original dispute delivered on 15th November, 2021 and in appeal delivered on 15th September, 2022 by the 1st Respondent against*

the Applicant and compelling to re-instate in his former position of employment.

2. *Cost.*
3. *Any other Order(s) as this honourable Court deems fit and just to grant.*

Supporting the application is an affidavit deposed by the applicant, Ex- Cpl Robert Mugisha Kasenene. The respondents contested the application vide the affidavit deposed by Elias Evelius Mwendwa, a State Attorney employed in the Office of the Solicitor General. In addition, the respondents filed a notice of preliminary objection raising two points of points of law. However, during the hearing, the respondents dropped one point of objection and argued the following point of law:

1. *The application is hopelessly time barred hence contravening the requirement under section (sic) 6 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014.*

At the hearing, the applicant appeared in person and was represented by Mr. Mohamed Manyanga, learned Advocate. On the other side, the respondents had the legal services of Mr. Elias Mwendwa, learned State Attorney.

In addition to the objection raised by the respondents, I probed the parties to address the Court on whether the applicant had exhausted the remedy available under the law which regulate his employment.

Arguing the issue raise by the Court, Mr. Mwendwa submitted the decision of the Commissioner General of Prison (henceforth the CGP)) is final. His submission was grounded on the provision of rule 19(1) of the Prison Service Regulations. On that account, he was of the view that the applicant was not required to appeal to the Permanent Secretary, Ministry of Home Affairs.

As for the preliminary objection on time limitation, Mr. Mwendwa commenced his submission by restating the principle of law underscored in the case of **Madam Mary Silvanus Qorro vs Edith Donath Kweka**, Civil Appeal No. 102 of 2016 (unreported), that parties are bound by their own pleadings. Citing rule 6 of the Rules, the learned State Attorney argued that the time within which to apply for leave to file application for judicial review is six months from the date of impugned decision. He went on to point out that the impugned decision appended to the affidavit was delivered on 15th September, 2021. On that account, he was of the firm view that this application is time barred because it was filed in November, 2022. To expound his argument, the learned State Attorney cited the case

of **Emma Bayo vs Minister for Labour and Youth Development and Others**, Civil Appeal No. 79 of 2012 (unreported) where it was held that leave to apply for judicial review must be lodged within six months from the date of the decision to be challenged.

That said, Mr. Mwenda implored the Court to dismiss the application under section 3 of the Law of Limitation Act. He also prayed for the costs.

Replying on the issue raised by the Court, Mr. Manyanga submitted that the learned State Attorney has relied on regulation 19(1) of the Prison Service Regulations. He went on to submit that the applicant used the alternative remedy of referring the matter to the Permanent Secretary because regulation 37(4) of the Prisons Service Regulations does not provide for a mandatory requirement of appealing to the CGP. Therefore, he was of the firm view that the applicant exhausted the remedy.

With respect to the preliminary objection, the learned counsel submitted that the Permanent Secretary decision on the applicant's appeal was made on 19th September, 2022. It was therefore, his argument that the application is timeous because it was filed in November, 2022. For the foresaid reason, Mr. Manyanga prayed that the preliminary objection be overruled.

When Mr. Mwendwa rose to rejoin, he submitted that regulation 19(1) of the Prisons Service Regulation is clear that the final disciplinary authority to the officer of the rank of the applicant is the CGP or his delegate. It was his further argument that regulation 37(4) of the Prisons Service Regulations does not apply to the decision made by the Commissioner General or provide for lodging of complaint to the Permanent Secretary. He therefore reiterated his submission in chief that this application is time barred.

Having considered the competing arguments of the learned counsel, it is my considered view that the preliminary objection and the issue raised by the Court can be determined by addressing the competence of this application.

Starting with the issue raised by the Court, it settled position that an application for prerogative orders cannot stand if the existing alternative has not been exhausted. Thus, as a general rule, the Court will not grant prerogative orders if the applicant has an alternative and convenient remedy under the law. This position was stated in case of **Republic Exparte Shirima** (supra), this Court cited with approval the case of **Re A.G.'s Application** [1958] E.A. 482, where it was held that:

"It is well-settled law that, where there is express legislation as to appeal, the prerogative, while not repealed (for that is difficult to conceive) cannot ordinarily be invoked unless and until the local substantive provisions have been fully exploited and found wanting in remedy. The ancient remedy of prerogative is from time to time superseded. In a sense it become obsolete".

The Court further held:

"ii) the existence of the right to appeal and even the existence of an appeal itself, is not necessarily a bar to the issuance of prerogative order; the matter is one of judicial discretion to be exercised by the court in the light of the circumstances of each particular case;

(iii) where an appeal has proved ineffective and the requisite grounds exist, the aggrieved party may seek for, and the court would be entitled to grant, relief by way of prerogative orders

Similar stance was taken **Parin A.A Jafar and Another vs Abdularasul Ahmad Jaffer and 2 Others** [1996] TLR 110, when this Court held that:

"*Where the law provides extra judicial machinery alongside a judicial one for resolving a certain cause, the extra judicial machinery should in general, be exhausted before recourse is made to the judicial process."*

In the light of the foregoing position, existence of alternative remedy does not bar grant of prerogative orders against the decision of the accounting officer if the alternative is not effective and convenient. I am fortified by the case of **Re: Fazal Kassam (Mills) Ltd. [1960]** E.A. 1002 referred to in **Republic Ex-parte Shirima** (supra), where it was held:

> *"... it is not the law that the court will always refuse mandamus when the applicant could have appealed. The matter is one of discretion, to be carefully and judicially exercised, the position being simply that as stated in Halsbury's Law of England (3rd Ed.) Vol. 11 at p. 107:*
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> > *`The court will, as a general rule, and in the exercise of its discretion, refuse an order of mandamus, when there is an alternative specific remedy at law which is not less convenient, beneficial and effective."*

In the instant application, the applicant deposed to have been employed and terminated by the 1st respondent. That being the case, his employment was governed and regulated by the Police Force and Prisons Service Commission Act, Cap. 241, R.E. 2002. Since the applicant was of the rank of Coplo, and thus, below the rank of Assistant Inspector, the powers of discipline against him is exercised by the CGI or his delegate as provided for under regulation 19 of the Prisons Service Regulations, 1998. Further to this, section 7(5) of Cap. 241 is to the effect that the final disciplinary authority of the applicant is the CGI.

Pursuant to paragraph 4 of the supporting affidavit and annexure 1 appended thereon, the applicant was disciplined by the CGP who terminated him from employment on 15th September, 2021. In terms of regulation 37(5) of Prisons Service Regulations, the remedy available to the applicant was to appeal to the CGP. The regulation further provides that the CGP may confirm or vary any finding or remit any punishment awarded and that in all such cases the decision of the Principal Commissioner shall be final.

Now, the chamber summons and paragraph 15 of the supporting affidavit suggest that the applicant appealed to the CGP (1st respondent). It is contended in the chamber summons that the said appeal was determined by the CGP on 15th September, 2022, while the affidavit shows that it was on 15th November, 2022. That being the case, I am satisfied that the applicant deposed to have exhausted the remedy set out under regulation 37(5) of the Prisons Service Regulations.

Moving on to the preliminary objection, rule 6 of the Rules provides that the time within which to lodge an application for leave to apply for judicial review is six months from the date of impugned decision. Since the applicant pleaded that his appeal was determined by the CGI on 15th September, 2022, this Court finds no basis of holding that the application is

not timeous. Considering further that the applicant has not appended the copy of decision made by the 1st applicant on 15th September, 2022 or 12th November, 2022, I am of the view that the issues whether he proved to have exhausted the remedy and whether the application is time barred or otherwise need evidence. Both issue cannot be determined at this stage.

In the result, the Court refrain from holding whether the applicant proved to have exhausted the remedy and whether the application is time barred. The said issues shall be determined after considering the evidence in support of the application. Each party shall bear its own costs.

DATED at DAR ES SALAAM this 21st day of February, 2023.

S.E. KISANYA
JUDGE