IN THE HIGH COURT OF TANZANIA

TABORA SUB REGISTRY

AT TABORA

MISC. CIVIL CAUSE NO.3 0F 2021

IN THE MATTER OF THE APPLICATION BY ENOCK SILVANUS AKEYO FOR LEAVE TO APPLY FOR ORDERS OF CERTORARI AND MANDAMUS

IN THE MATTER OF THE DECISION OF URAMBO DISTRICT COUNCIL, PUBLIC SERVICE COMMISSION AND CHIEF SECRETARY TO ILLEGALLY TERMINATE THE APPLICANT'S EMPLYOMENT BASING ON OFFENCES NOT COMMITED AND DENIAL OF THE RIGHT TO BE HEARD.

BETWEEN

ENOCK SILVANUS AKEYO.....APPLICANT

VERSUS

URAMBO DISTRICT COUNCIL.....1ST RESPONDENT

PUBLIC SERVICE COMMISSION .....2ND RESPONDENT

CHIEF SECRETARY.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

RULING

Date of Last Order: 01/11/2022

Date of Delivery: 03/03/2023

AMOUR S. KHAMIS, J.

This is an application by Enock Silvanus Akeyo for leave to file an application for orders of *certiorari* and *mandamus* to quash the order of termination of his employment by the Chief Secretary, the 3rd respondent herein, dated 25/05/2021 allegedly for being illegal, as it affirmed decisions of the Urambo District Council and the Public Service Commission, the first and second respondents herein.

The application was brought through a Statement accompanied by Chamber Summons made under S. 17(2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act [Cap 301, R.E 2019], Rule 5(1)(2) and (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules 2014 G.N No. 324 of 2014 and S. 2(1) of the Judicature and Application of Laws Act, Cap 358 R.E 2019. An affidavit sworn by Enock Silvanus, the applicant herein, supported the application.

Briefly stated the factual background giving rise to the present applicant is as follows: The applicant was employed by Urambo District Council as Livestock Officer I until on 01/02/2018 when his employment was terminated for absence from work for 167 days, poor progress in studies, giving false statement about being in final stages of studies whereas he was actually suspended, and receiving salary without working for 10 months from the day of suspension from studies.

Dissatisfied with termination done by the Urambo District Council, Enock Silvanus Akeyo unsuccessfully appealed to the Public Service Commission which upheld decision of the District Council.

Aggrieved with decision of the Public Service Commission, Enock Silvanus Akeyo appealed to the Chief Secretary, the 3rd respondent herein, who confirmed decisions of the Public Service Commission and the Urambo District Council.

Disgruntled, the applicant lodged this application for leave to file an application for orders of *certiorari* and *mandamus* to quash an order for termination of his employment given by the 3rd respondent on 25/05/2021.

Before me, the applicant enjoyed legal services of Mr. Vincent Masalu, learned advocate while the respondents were jointly represented by Mr. Lameck Merumba, learned Senior State Attorney.

The respondent's counter affidavit was accompanied by a preliminary objection which was canvassed by way of written submissions. Both sides complied to the timeline set by the Court.

The 1st respondent's preliminary objections were grounded on five (5) points. However, two objections were abandoned and thus, parties' submissions focused on the remaining three (3) grounds, namely:

i) That the application is bad in law as it contravenes Rule 5(2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, G.N No. 324 of 2014.

ii) That the application is bad in law as it contravenes Rule 5(3) of the Law Reform (Fatal Accidents and Miscellaneous

Provisions) (Judicial Review Procedure and Fees) Rules, G.N No. 324 of 2014.

iii) That the application is bad in law as it contravenes Section 6(2) of the Government Proceedings Act, Cap 5.

On the first objection, Mr. Merumba contended that it is a mandatory requirement of law that the application for leave be made *exparte*, as provided for in Rule 5(2) of GN. 324 of 2014. He argued that in the instant application, the applicant made an inter parte application which contravenes the Rule.

On the second objection, Mr. Merumba stated that the Rules set a standard form which must be adhered to if one intends to make an application for leave to file judicial review as provided for under Rule 5(3), that is Form A in the First Schedule to the Rules whose title reads: "Chamber Summons (Ex-parte)". He contended that the applicant's application contravenes the said Rule as title of the application reads "Chamber Summons" without the word ex-parte.

On the third point of objection, he submitted that the application contravenes S. 6(2) of Cap 5 which requires that prior to institution of proceedings against the government, a party who wishes to do so must serve a 90 days' notice of intention to sue and copies of such notice be served on the Attorney General and Solicitor General.

Mr. Merumba further contended that, under S. 16(4) of the same law, the word government includes local government. He

contended also that the applicant neither issued a notice nor made any service of the copies thereof to the Attorney General and Solicitor General. He therefore prayed for dismissal of the application.

Responding on the first and second grounds of objection, Mr. Vincent Masalu submitted that this application does not contravene Rule 5(2) (3) of GN. 324 of 2014 because the second proviso to Rule 5(6) relates to discretion of this Court to entertain an application inter parties where both respondents are given a right to be heard. He argued that making the application interparties does not make it bad in law.

On the third point of objection, Mr. Masalu contended that this application is not a fresh suit and has been through different government departments. He said the first notice was issued at the initial stages of the applicant's dispute and there is no requirement for a 90 days' notice on the Attorney General at the time of applying for judicial review.

Mr. Masalu invoked the overriding objective principle as provided for under S. 3B of Cap 141 R.E 2019 and contended that, the objection raised do not go to the root of the case rather delays the whole process of dispensing justice.

He referred to the case of **ZELLA ADAM ABRAHAM & 2 OTHERS V. ATTORNEY GENERAL & 6 OTHERS, CONSOLIDATED CIVIL REVISION NO. 1,3 & 4 OF 2016** (unreported) wherein the Court of Appeal held that:

"...justice can only be done in substance and not by impeding it with mere technical procedural irregularities that occasion no miscarriage of justice..."

The Court of Appeal further held that:

"...not all procedural irregularities can be ignored. Some can be, others, such as those irregularities which go to the root of the matter cannot be ignored..."

He urged this Court to dismiss the preliminary objection with costs and grant reliefs sought.

I have considered the rival submissions from both counsel and read the documents filed by the opposing parties in this application. I have also taken note of the abandoned points of preliminary objection.

On the first and second point of objection, Mr. Merumba contended that the application for leave to seek judicial review is made exparte but the applicant filed an inter parte application, and that the application should be in a standard form as provided for in the First Schedule to the Rules. According to him this application contravenes Rule 5(2)(3).

Records show that, the applicant filed a chamber summons without the word "exparte" as provided for under Rule 5(2). In my view, this alone does not bar this Court from entertaining the application so long as the Attorney General was made a party therein. Section 18(1) of Cap 310 reads:

"Where leave for application for an order of mandamus, prohibition or certiorari is sought in any civil matter against the Government, the Court shall order that the Attorney-General be summoned to appear as a party to those proceedings; save that if the Attorney-General does not appear before the Court on the date specified in the summons, the Court may direct that the application be heard ex parte."

In my view, joining the Attorney General as a party to the application for leave to file judicial review and omitting to use the word "exparte" on title of the Chamber Summons by itself does not cause any miscarriage of justice on part of the respondents because Section 18(1) of Cap 310 anticipates the Attorney General to appear and express his position on the application.

On the third point of objection, in as far as 90 days' notice to the Attorney General is concerned, I should point out here that the aim of seeking leave to file an application for orders of *certiorari* and *mandamus* is to filter unnecessary applications against administrative bodies, as opposed to normal suits. Rule 6 of GN. No 324 of 2014 is very clear, that there is no requirement for a 90 days' notice to sue the Attorney General. The Rule states:

"The leave to apply for judicial review shall not be granted unless the application for leave is made within six months after the date of the proceedings, act or omission to which the application for leave relates."

I should add here that, this issue is not virgin. In **MECAIANA ESTABLISHMENTS (VADUZ) V. THE COMMISSIONER OF TAX INCOME AND 6 OTHERS, CIVIL APPEAL NO. 14 OF 1995 (unreported)**, the Court of Appeal addressed a similar question and held that:

> *"From the clear and unambiguous words of that Section [to wit S. 17(1) of the Law Reform (Fatal Accident and Miscellaneous Provision) Ordinance], the requirement to summon the Attorney General as a party in proceedings for prerogative orders is when leave for application to institute those proceedings is sought. Thus after leave has been granted to institute those proceedings, then there is no requirement for summoning the Attorney General as a party."*

Regarding 90 days notice on the Attorney General before filing an application for leave, the Court of Appeal held that:

> *".... Government proceedings, on the other hand, have to be instituted by or against the Attorney General. That is the clear provision of Section 9 of the Government Proceedings Act, 1967. Since application for prerogative orders can be proceeded against any party, not necessarily the Attorney General, as we have seen above, then they are not in the nature of the Government Proceedings which must be against or by the Attorney General only."*

Further to that, in the case of **LILIAN ELIETH NGEDU V. THE NATIONAL INSTITUTE OF TRANSPORT AND THE ATTORNEY**

GENERAL, MISC. CIVIL APPLICATION NO. 14 OF 2021 (unreported) at page 6 (unreported) this Court observed that:

> *"As for what I can consider ignorance of law, instead of applying for leave on 17/03/2020 she issued 90 days' notice of intention to sue. There is no law providing for that requirement in cases relating to judicial review."*

In the circumstances, I have no iota of doubt to hold as I hereby do, that the requirement for issuance of 90 days' notice to the Attorney General or any government officer prior to filing of an application for leave to apply for *certiorari* or *mandamus* does not exist.

In the upshot, the preliminary objections filed by the first respondent are hereby dismissed.

Having examined the statement, affidavit in support of the application sworn by Enock Silvanus Akeyo and a counter affidavit sworn by Moses M. Mhagama, legal counsel with Urambo District Council, I am satisfied that the applicant has shown arguable issues to be determined by this Court.

I am fully aware that at this stage of proceedings, the applicant is not required to prove merits of the alleged errors or otherwise and the Court should have regard to the statement and attached supporting documents only.

In so holding, I am fortified by the decision of this Court (Kalegeya, J as he then was) in **WORKERS OF TANGANYIKA**

TEXTILE INDUSTRIES LTD V. REGISTRAR OF THE INDUSTRIAL COURT OF TANZANIA & OTHERS, MISC. CIVIL APPLICATION NO. 144 OF 1993 (unreported).

For the aforestated reasons, this application is hereby granted with no order for costs.

It is so ordered.

AMOUR S. KHAMIS

JUDGE

3/3/2023

ORDER

Ruling delivered in Chamber in presence of Ms. Mariam Matovolwa, State Attorney for the 2nd, 3rd and 4th respondents, Mr. Amosi Gahise holding brief of Mr. Moses Mhagama, advocate for the first respondent and Ms. Hendrica Qorro, advocate for the applicant who is also present in Court.

Right of Appeal explained.

THE HIGH COURT OF TANZANIA

AMOUR S. KHAMIS

JUDGE

3/3/2023