

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
DISTRICT REGISTRY OF ARUSHA
AT ARUSHA**

MISCELLANEOUS CAUSE NO. 56 OF 2022.

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDER OF
CERTIORARI**

AND

IN THE MATTER OF THE VETERINARY ACT, 2003

AND

**IN THE MATTER OF THE VETERINARY ACT (DUTIES AND POWERS OF
INSPECTORS) REGULATIONS, 2004**

AND

**IN THE MATTER OF THE VETERINARY (FEES AND OTHER CHARGES)
REGULATIONS, 2015 (GN. NO.278 OF 2015)**

AND

**IN THE MATTER OF THE DECISION OF CLOSING THE VETERINARY FACILITY
CENTRE/SHOP**

BETWEEN

LAWRENCE SURUMBU TARAAPPLICANT

AND

GOODLUCK BEDA NDAWEKA.....1ST RESPONDENT

**REGISTRAR OF THE VETERINARY COUNCIL OF
TANZANIA.....2ND RESPONDENT**

ATTORNEY GENERAL.....3RD RESPONDENT

RULING

Date of last Order:7-10-2022

Date of Ruling:17-11-2022

B.K.PHILLIP,J

This is an application for the leave to apply for judicial review brought under section 17 (2) of the Law Reform (Fatal Accidents and

Miscellaneous Provision) Act Cap 310 R.E 2019 and Rule 5 (1) and (2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and fees) Rules of 2014.

The application is supported by an affidavit sworn by the applicant. Mr. Peter J. Musseti, senior state attorney swore and filed a counter affidavit in opposition to the application for the 2nd and 3rd respondents. In addition the learned State Attorney raised the following points of preliminary objection;

- i) That the application is hopeless time barred.
- ii) That the application is pre-mature for the applicant failure to exhaust available remedy as provided under section 47 of the Veterinary Act No. 16 of 2003.
- iii) That the applicant is suing wrong persons (None existing party) contrary to section 3 (1) and (2) (c) of the Veterinary Act. Act No.16 of 2003.

The aforementioned points of preliminary objections were argued viva voce. At the hearing the applicant and the 1st respondent appeared in person, unrepresented. The learned State Attorney Mukama Musalama appeared for the 2nd and 3rd respondent. Mr. Mukama started his submission by withdrawing 1st point of preliminary objection and same was marked as withdrawn as prayed. Submitting for the 2nd point of preliminary objections, Mr. Mukama argued that this application has been filed prematurely on the ground that pursuant to section 47 (1) of the Veterinary Act, No. 16 of 2003, the applicant after receiving the decision of the Veterinary Council of Tanzania (

Henceforth " the VCT") was supposed to appeal to the Minister responsible for livestock. (Henceforth " the Minister"). He contended that so long as the law provides for an extra judicial machinery the applicant is duty bound to exhaust the procedure stipulated in the law before resorting to seeking any remedy in Court. He maintained that this application is improperly filed in Court. It has to be struck out. To support his position he cited the case of **Julius Burchard Rweyongeza Vs University of Dar es salaam and two others, Revision No. 136 of 2020**, (unreported). He was emphatic that the applicant intends to challenge the decision of the VCT made through the 2nd respondent following the orders issued by the 1st respondent while exercising his powers under Rule 8(1) of the Veterinary Act (Duties and Powers of Inspectors) Regulations GN.No.22 of 2004, (Henceforth "Regulations GN.No.22 of 2004")

With regard to third point of preliminary objection Mr. Musalama submitted that section 3 (1) and (2) (c) of the Veterinary Act provides that the VCT is a legal entity. It can sue and be sued. He insisted that the proper party in this application is the VCT not the 1st and 2nd respondent, since the impugned decision was made by the VCT. The orders the applicant is complaining about were issued by the 1st and 2nd respondent in the course of their employment while discharging their official duties on behalf of the VCT. Mr. Musalama contended that suing the proper parties is crucial since in absence of proper parties whatever order made by the court will be inexecutable. To fortify his argument he cited the case of **CRDB Bank PLC (Formerly CRDB (1996) Ltd Vs George Mathew Kilindu, Civil Appeal No. 110 of 2017**, (unreported) he referred this Court to page 11 and 12 of the

judgment. Mr. Mukama prayed this application to be struck out with costs.

In rebuttal, relying on the provision of section 11 of the Veterinary Act, the applicant argued the the inspector has no power to close a veterinary shop. He contended that Rule 9 (f) of GN.No.22 of 2004 provides that after closing a veterinary shop the inspector has to institute a criminal case against the owner of the shop. He went on submitting that this case is unique since the 1st respondent closed his veterinary shop contrary to the law and acceptable legal procedures. He referred this Court to item 4 in the schedule to the Veterinary Act to bolster his arguments. He maintained that the decision of the VCT has to be made in a meeting and in this matter no meeting was convened to deliberate on his complaints. He added that pursuant to Regulation 10 (3) of The Veterinary (Procedure for Inspection of Veterinary Facilities) Regulations, GN No.388 of 2005 the inspector was supposed to recommend to the VCT the action to be taken against him and not to close the Veterinary shop. The applicant was emphatic that his complaints are not against the decision of the VCT as there is none. He distinguished the case of **Julius Burchard** (supra) from the instant application on the reason that this application is based on the Veterinary Act and his complaints cannot be dealt with by the Minister since he has no powers to deal with decisions made in contravention of law and acceptable legal procedure. To support his position, he cited the case of **Management of Hotel Africana Vs JUWATA (1988) TLR 105.**

Moreover, the applicant contended that the failure to appeal against decision reached administratively does not bar him from filing a judicial review. To cement his argument, he cited the cases of **Republic Ex-parte Peter Shirima Vs Kamati ya Ulinzi na Usalama, Wilaya ya Singida, the Area Commissioner and Attorney General (1983) TLR 375** and **Tropex Ltd and Another Vs Commissioner of Income Tax and others (1996) TLR 390**.

In response to the 3rd point of preliminary objection the applicant referred this Court to Rule 17 of the Law Reform (Fatal Accident and Miscellaneous Provision) (Judicial Review Fees) Rules of 2014 and Order 1 Rule 9 of Civil Procedure Code which provides that a suit cannot be defeated by non-joinder of parties. He further added that the case of **CRDB** (supra) is irrelevant since the issue here has nothing to do with a mistake on the names of the respondents. The issue here is non joinder of a necessary party. He insisted that even if there is none joinder or mis- joinder of the parties that cannot be reason to struck out this application. To support his position, he cited the case of **Abdi M. Kipoto Vs Chief Arthur Mtoi, Civil appeal No. 75 of 2017** (unreported). He insisted that this application is proper. He has sued 1st and 2nd respondent who arbitrarily decided to close his veterinary shop because no any meeting was held by the VCT to deliberate on the action taken by the 1st and 2nd respondent against him.

In rejoinder Mr. Musalama submitted that section 11 (2) (e) and 3 (c) of the Veterinary Act allows the inspector to issue prohibitor notice to the owner of a veterinary shop. That is why the 1st respondent issued prohibitor notice to the applicant. He insisted that the 1st respondent has

powers to close a veterinary shop and works under the instruction of VCT. He referred this Court to Regulation 9 (d) of GN.No. 222 of 2005 to support his argument. He was emphatic that the impugned decision, the subject of this application was made by the VCT since the inspector (1st respondent) issued the orders against the applicant on behalf to the VCT.

Moreover, he stated that the case of **Julius Burchard** (supra) is relevant because in that case the Court held that a party to a case is required to exhaust the extra-judicial machinery before resorting to judicial review. With regard to the case of **JUWATA** (supra) Mr. Musalama contended that statutory law prevails over the case law. Thus, this Court should be guided by the provisions of section 47 of the Veterinary Act. In addition he submitted that the case of **JUWATA** (supra) was pertaining to issues concern proper forum. Mr. Mukama also pointed out that the case of **Julius Burchard** (supra) is the most recent decision compared to all case cited in this matter. As a matter of practice this Court has to rely on the most recent decision, argued Mr. Mukama

With regard to the 3rd point of preliminary objection Mr. Mukama reiterated his submission in chief and added that Order 1 Rule 9 of CPC is irrelevant. The correct order is order 1 rule 10 (2) of CPC which provides the position of the law on the misjoinder and non-joinder of parties. It was Mr. Mukama's contention that item 4 in the schedule to the Veterinary Act does not cover the decisions or orders made by the inspector. He argued that the applicant has not made any prayer in his

submission and this Court cannot make orders not requested or prayed for.

Having dispassionately analyzed the submissions made the parties let me proceed with the determination of the merit of the application.

I will start with the 3rd point of preliminary objection because it is imperative to determine whether the parties in this application are proper parties before dealing with issue on the propriety of the application. This point of preliminary objection is based on the provisions of section 3 (1) and (2) (c) of the Veterinary Act. Act No.16 of 2003. The same reads as follows;

Section 3(1) *"There is hereby established a Council to be known as the Veterinary Council of Tanzania*

(2) That Council shall be a body Corporate and shall

(a) N/A

(b) N/A

(c) sue and be sued and have all the rights and

Privileges of a natural person".

It is a common ground that the 2nd and 3rd respondent are government employees working with the VCT and that the VCT is legal entity capable of suing and being sued. Mr. Mukama's arguments were to the effect that the impugned decision was made by the 2nd respondent on behalf of the VCT. So, basically it is the decision of the VCT and any complaint against the decision of the VCT has to be made against VCT because it has legal personality not its employees. The applicant's response was to the effect that this case is unique on the reason that the impugned

decision was made in contravention of the law and procedure. There is no any decision made by the VCT which is worth the name that can be referred to the Minister, that is why he decided to file the application against the inspector who closed his veterinary shop (the 1st respondent) and the Registrar of VCT (the 2nd respondent) who confirmed the decision made by the 1st respondent.

From the foregoing, I am a settled legal opinion that at this preliminary stage this Court is not in a position to determine Mr. Mukama's contention that the impugned decision was made by the VCT through the 2nd respondent since the same requires this Court to involve itself in a critical analysis of the documentary evidence annexed to the application. In short, the matters raised by the both sides in the course of arguing the points of preliminary objections cannot be determined in a preliminary stage. They need to be decided during the determination of the merit of the application so that this court can be able to make reference to the documentary evidence annexed by the parties in the pleadings as well as make critical analysis of the same. Thus, this point of preliminary objection is not a pure point of law and does not qualify to be a point of preliminary objection because it involves matters of facts which require evidence to establish them. [See the case of **Mukisa Biscuits Manufacturing Ltd Vs West end Distributors Ltd (1969) E.A.696** and **Soitsambu Village Council Vs Tanzania Breweries Limited and Another , Civil Appeal No.105 of 2011 (unreported),**]

Coming to the remaining point of preliminary objection, Mr. Mukama's argument is straight forward, that is, the applicant was supposed to

appeal to the Minister before coming to Court pursuant to the provisions of section 47(1) of the Veterinary Act, which provides as follows;

Section 47 (1) *"Any person who is aggrieved **by any decision of the Council under this Act** , may at any time within three months after receiving the notice of the decision of the Council, **appeal to the Minister**".*

(Emphasis is added)

It is noteworthy that there is no any dispute on the position of the law , that where the law provides for extra judicial machinery the applicant has to exhaust the available remedy before resorting to filing any application in Court. However, as I have pointed out earlier in this Ruling the applicant contends that the impugned decision was not made by the VCT whereas Mr.Mukama maintained that the impugned decision was made by VCT through its registrar. So, the pertinent issue which arises here is whether the impugned decision was made by the VCT. Like, the 3rd point of preliminary objection, the determination of this point of preliminary objection needs evidence and cannot be determined at a preliminary stage. Thus, it is the finding of this Court that 2nd point of preliminary objection is not a pure point of law too.

In the upshot, the points of preliminary objections are hereby dismissed.

Dated this 17th day of November 2022




B.K.PHILLIP

JUDGE