THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CAUSE NO. 03 OF 2023

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

AND

IN THE MATTER OF THE LAW REFORM (FATAL ACCIDENTS MISCELLANEOUS PROVISIONS) ACT, CAP 310 R.E. 2019; THE PUBLIC SERVICE ACT, CAP 298 R.E. 2019, AND THE PUBLIC SERVICE REGULATIONS OF 2003

AND

IN THE MATTER OF AN APPLICATION TO CHALLENGE THE DECISION OF THE PRESIDENT OF THE UNITED REPUBLIC OF TANZANIA TO UNPROCEDURALLY MAKE/FORCE THE APPLICANT TO RETIRE FROM PUBLIC SERVICE, DATED 15TH AUGUST 2022

BETWEEN

KOMANYA ERICK KITWALA.....APPLICANT

AND

THE PERMANENT SECRETARY, PUBLIC SERVICE MANAGEMENT AND GOOD GOVERNANCE.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

BOARD OF TRUSTEES OF THE PUBLIC SERVICE SOCIAL SECURITY FUND.....3RD RESPONDENT

RULING

Date of Hearing: 11/05/2023
Date of Ruling : 23/05/2023

MONGELLA, J.

The application at hand is preferred under section 18 (1) and 19 (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap 310 R.E. 2019; and Rule 5 (1), (2) (a), (b), (c) and (d); (3) (4) and (6) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules 2014. It is supported by the affidavit of Komanya Erick Kitwala, the applicant herein. In the application the following orders are sought:

(i) *That, this Honourable Court be pleased to grant leave to the Applicant herein to file an application for certiorari to call for, quash and set aside the decision by the President of the United Republic of Tanzania, for being made ultra vires, against rules of natural justice and embarrassing to the Applicant.*

(ii) *That, this Honourable Court be pleased to grant leave to the Applicant herein to file an application for mandamus to compel the 1st Respondent to reinstate the Applicant into his employment before he was appointed to the position of District Commissioner, and that he be paid all his salary arrears and other emoluments from 28th June 2021 to the date of his reinstatement.*

(iii) *That, this Honourable Court be pleased to grant leave to the Applicant herein to file an application for a declaratory order directing the 3rd Respondent to reinstate the Applicant to his former position.*

(iv) *Costs be borne by the Respondent.*

(v) *Any other Order or Orders that this Honourable Court may deem just and equitable to grant.*

The application was argued orally whereby all parties were represented by learned counsels. The applicant was represented by Mr. Jeremia Mtobesya, learned advocate, and the respondents were represented by Ms. Selina Kapange, learned state attorney. Along with the counter affidavit, the respondents had filed a notice of preliminary objection containing two points, to wit:

(i) *The Applicant has no cause of action against the 3rd Respondent; in the alternative,*

(ii) *The Applicant has wrongly sued the 1st and 3rd Respondents as regards the provisions of section 17 (2) and 18A of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap 310 RE 2019, as amended.*

The case at hand was placed under special session. Given the situation and for purposes of saving time it was agreed that the preliminary objection be argued along with the application for leave to file judicial review. Thus, the learned counsels argued first on the preliminary objection, then on the application.

Ms. Kapange argued first, on the preliminary objection, whereby she started by dropping the second point of preliminary objection. Arguing on the first point, she contended that the applicant has no cause of action against the 3rd respondent. Explaining the point further, she said that it is on face of record that the applicant has not raised any facts constituting cause of action against the 3rd respondent. Considering the prayer in the chamber summons, she argued that the applicant has involved the 3rd respondent in a declaratory order, which is not among reliefs granted in judicial review. She had the view that the same is contrary to **section 17 of the Law Reform (Fatal Accident and Miscellaneous Provisions) Act**, which is provides for only three prerogative remedies, being: certiorari, mandamus, and prohibition.

Ms. Kapange further argued that the 3rd respondent has no powers to reinstate the applicant to his former position as prayed in the chamber summons. In support of her argument, she referred the case of ***Joshua Samweri Nassari vs. The Speaker of the National Assembly of the Republic of Tanzania***, Misc. Civil Cause No. 22 of 2019, in which the application was struck out by the court after considering that the applicant has no cause of action against the Speaker or the Attorney General. She considered the circumstances in this decision similar to the ones in the application at hand whereby she claimed that no act or omission has been done by the 3rd respondent to render grant of orders of certiorari and mandamus against him. She thus prayed for the application to be struck out.

In reply, Mr. Mtobesya first conceded to Ms. Kapange's submission that the applicant is seeking for a declaratory order against the 3rd respondent

whereby he seeks for the 3rd respondent to be directed to reinstate him to his former position. However, he contended that the said prayer is not hanging as it is supported by facts in the supporting affidavit. In that respect, he specifically directed the court to paragraphs 3, 4, and 5 of the applicant's supporting affidavit. He said that in the said paragraphs, the applicant has shown that he, at some point, had employer-employee relationship. Then he was appointed District Commissioner (DC) and posted to Tabora district. Then his appointment as DC was revoked by the appointing authority. That, he wrote to the 2nd respondent requesting to be reinstated to his former position with the 3rd respondent.

Mr. Mtobesya considered the facts narrated above being sufficient to render this court to grant the declaratory order. He argued further that it is not uncommon to seek for declaratory orders in judicial review and there are authorities to that effect. He however had no authority to present to the court at that moment.

Mr. Mtobesya further countered the argument by Ms. Kapange's contention on tenability of the prayer for the applicant to be reinstated to his former position. He argued that the prayer on declaratory order shall come last after the case is decided on merits. In that respect, he contended that the same cannot be challenged as a point of law as it requires evidence. He said that the issue has been advanced prematurely and if the respondents indeed find an issue in the point, the same should be advanced during the hearing of the main application.

He as well responded to Ms. Kapange's prayer that the whole application be struck out upon the court making a finding that the applicant lacks cause of action against the 3rd respondent. He said that the order sought under paragraph (c) in the chamber summons against the 3rd respondent is a consequential order. That, it follows after the orders in paragraph (a) and (b) have been granted. In that respect, he contended that the 3rd respondent has been included in the case as a necessary party, thus the matter should be maintained and proceed to finality. Mr. Mtobesya had further view that an order to strike the whole suit shall be harsh. He thus urged the court that, in the event it finds that there is indeed no cause of action against the 3rd respondent then the proper recourse should be to discharge the 3rd respondent from the case and the matter be allowed to proceed on merits against the remaining parties.

He further distinguished the case of ***Joshua Samwel Nassari*** (supra) referred to by Ms. Kapange whereby he argued that in the said case, the reason for suing was to challenge the decision of the Speaker to remove him from Parliament after missing some sessions. That, what the court decided was that there was no cause of action as the Speaker just implemented the provisions of the law whereby facts were clear. That, the orders in that case were sought against an operation of the law. He found the case cited out of contest. He prayed for the court to overrule the preliminary objection.

In rejoinder, Ms. Kapange reiterated what she submitted in chief. She insisted that the 3rd respondent cannot reinstate the applicant and that the orders sought against him are declaratory and not grantable in judicial

review. She challenged Mr. Mtobesya for failure to present any authority in court in support of his argument.

I have considered the point of preliminary objection and the arguments by the learned counsels. In the argued point, the respondents claim that the applicant has no cause of action against the 3rd respondent on two main grounds. First, that the applicant has not shown anything done by the 3rd respondent for prerogative orders to be invoked against him; and second, that the order sought against the 3rd respondent is declaratory, not grantable in judicial review. Mr. Mtobesya, on the other hand, while conceding that the order sought is declaratory, argued that the same is a consequential order which is to be granted or not depending on the decision on the first and second prayers in the chamber summons.

The law under **section 17 of the Law Reform (Fatal Accident and Miscellaneous Provisions) Act, Cap 310 R.E. 2019**, stipulates the remedies in judicial review in clear terms. As argued by Ms. Kapange, to which I subscribe, the remedies under the law are the orders of certiorari, mandamus and prohibition. Mr. Mtobesya argued that there are authorities providing for declaratory orders in judicial review. He however never presented any. I have as well done my research and could not come across any authority of that sort in our jurisdiction.

Prerogative orders are sought in challenge of actions or omissions by an administrative authority. In that respect, the applicant seeking for leave, has to show the acts or omissions done by the party sued. It is clear on record that the applicant has not stated any cause of action he has

against the 3rd respondent. What he claims from the 3rd respondent is the declaratory relief, but not connected to any acts or omissions by the 3rd respondent. The argument by Mr. Mtobesya that the declaratory order sought is consequential proves that the 3rd respondent has committed no error to be checked through judicial review. In the circumstances, I agree with the respondents that the applicant has no cause of action against the 3rd respondent. The point of objection is therefore sustained.

Ms. Kapange, in her submission, prayed for the whole application to be struck out for incompetence for including the 3rd respondent whom the applicant has no cause of action against. Mr. Mtobesya, in reply, found the order being so harsh and improper. He, instead, urged the court to proceed with the rest of the parties in the event it sustains the point of objection. I, in fact, agree with Mr. Mtobesya's view. The whole suit cannot collapse on account of the applicant having no cause of action against the 3rd respondent. Since the rest of the respondents have been properly sued, the matter shall proceed against the 1st and the 2nd respondents.

Having decided on the preliminary objection as hereinabove, I now move to determine the application for leave to file judicial review. With regard to this application, it was submitted by Mr. Mtobesya that authorities have it that the court granting leave has to make a finding that the applicant, in his pleadings, has shown a *prima-facie* case warranting the applicant to be heard in judicial review. Specifically, he referred the case of ***Re. Hirji Transport Services*** (1961) EALR 88. To substantiate that the applicant, in the case at hand, has established a *prima-facie* case, he referred to paragraph 6 of the applicant's statement, under which the grounds for

judicial review have been advanced, to wit: (i) *that the President of the United Republic of Tanzania did not give reasons for the decision;* (ii) *the decision is vague;* (iii) *the applicant was condemned un-heard;* (iv) *the President acted ultra-vires;* and (v) *the decision is embarrassing to the applicant in consideration of the variance between the heading and content vis-a-vis the provisions of the law invoked.*

Explaining the grounds, he said that: on the face of "annexture I," which is a copy of the impugned decision, there are no reasons provided for the decision. That, the decision does not state what constitutes the alleged "public interest" thus rendering the decision vague. With regard to the claim that the President acted ultra-vires, Mr. Mtobesya argued that the provisions of the law cited in "annexture I" provide for a different procedure rather than what is alleged to have removed the applicant from service. He said that the provision cited provides for removal and not retirement. He considered the two being different things and, in that respect, he had the view that the decision was entered ultra-vires.

In the same line, he contended that the decision is embarrassing against the applicant as the reason and heading in "annexture I" are on retirement, while the provisions used are on removal. Lastly, referring to the averments under paragraph 11 of the applicant's supporting affidavit, Mr. Mtobesya contended that the applicant was not formerly charged or called before a disciplinary hearing or any hearing for him to be heard. Mr. Mtobesya considered the grounds sufficiently establishing *prima-facie* case warranting the applicant to be heard for orders of certiorari and mandamus.

He further argued that ordinarily, an order for mandamus is issued where one has asked a public authority to discharge a duty and that authority has declined to discharge the duty. He said that in the application at hand, as shown under paragraphs, 8, 9, and 10 of the applicant's supporting affidavit, there were communications between the applicant and the 1st respondent whereby he had asked to be reinstated into his former employment. That, the applicant was told to wait, but later it was communicated to him that he had to take early retirement. That, the applicant asked for something and it was not done. In the premises, he had the view that the prerequisite for an order of mandamus to be issued exists.

With regard to the prayer for a declaratory order under paragraph (c) of the chamber summons, he argued that the same is a consequential order that would follow after the other orders are granted. He thus prayed for the orders sought in the applicant's chamber summons to be granted as prayed.

The application was opposed by the respondents. In the submission by Ms. Selina Kapange, learned state attorney, it was argued that the application has not met the necessary prerequisites. Explaining further, she contended that the applicant has failed to establish whether there is an arguable or *prima-facie* case. She referred the case of ***Pavisa Enterprises vs. Ministry of Labour, Youth Development and Sports & The Attorney General***, Misc. Civil Cause No. 65 of 2003, which provides for the said requirement. Ms. Kapange argued further that the applicant was aggrieved by the decision of the President, but the President clearly acted within the law as she has the power to remove public servants from office. To substantiate her point,

she referred to a number of provisions being: **Article 36 (1) and (2) of the United Republic of Tanzania Constitution**; **section 5 (1)** and **24 (1) of the Public Service Act, Cap 293** and **Regulation 29 (1) of the Public Service Regulations of 2003**; and **Order 40 (f) of the Public Service Standing Order, 2009.**

Ms. Kapange was convinced that the President acted within the law and acted fairly. She added that the President was not obliged to give any reasons for the decision and or subject the applicant to any disciplinary hearing.

In rejoinder, Mr. Mtobesya started by reacting on the case of ***Pavisa Enterprises*** (supra) cited by Ms. Kapange. He argued that it is not the requirement of the law that all grounds be established cumulatively. He had the opinion that even one ground can suffice to warrant grant of leave whereby the applicant managed to prove that there is an arguable case.

He further considered the arguments by Ms. Kapange to have been brought prematurely. He had that stance on the ground that the arguments advanced by her go to the merit of the main application and thus should be advanced when the matter reaches that stage. He thus urged the court not to find merit in the arguments by Ms. Kapange and grant the application.

I have considered the arguments by the learned counsels and gone through the contents of the supporting affidavit, statement, counter affidavit and answer to the statement. In granting leave to file judicial

review, the applicant is supposed to adhere to the conditions set out under the law. The Court of Appeal in the case of ***Emma Bayo vs. Minister for Labour and Youth Development & 2 Others***, Civil Appeal No. 79 of 2012, settled the conditions to be met for the application to be granted. It ruled that the court granting leave to apply for judicial review must:

(i) *Satisfy itself that the applicant has made an arguable case to justify filing of the main application.*

(ii) *Consider whether the applicant is within the six months' limitation period within which to seek judicial review of the impugned decision.*

(iii) *Determine whether the applicant showed sufficient interest to be allowed to file the main application.*

In the application at hand, I find that it is not disputed that the application has been filed within the six months required under the law and that the applicant has demonstrated interest in the matter. The contention lies with the condition for establishing a *prima-facie* case. Considering the application on its face of record, it is clear that the applicant seeks to challenge the decision of the President forcing him into early retirement by: first, invoking wrong legal provisions which embarrass the applicant; second, by not subjecting him to any form of hearing whereby he could be heard first before entering the decision; and third, for not according any reasons for the decision.

Ms. Kapange, in opposing the application, in fact, argued the main application, which I consider erroneous. She argued that the President was justified in her decision as she is sanctioned by the law whereby, she referred to a number of legal provisions to buttress her point. These were **Article 36 (1) and (2) of the United Republic of Tanzania Constitution**; **section 5 (1)** and **24 (1) of the Public Service Act, Cap 293** and **Regulation 29 (1) of the Public Service Regulations of 2003**; and **Order 40 (f) of the Public Service Standing Order, 2009**.

In considering whether there is an arguable case in an application for leave to file judicial review, the court is obliged to consider whether the applicant has raised arguable issues in establishing the irrationality, impropriety, or non-adherence to legal rules and procedures by the decision-making authority in reaching its decision. It is therefore irrelevant, at this stage, the issue whether the respondents have points to counter the issues advanced by the applicant as matters to be argued in the main application, or whether the applicant stands chances of succeeding or not in the main application. The court granting leave cannot address the merits of the arguments advanced by the parties in arguing the issues advanced to be establishing *prima-facie* case by the applicant. Doing so shall amount to deliberating on the main application which is not in the mandate of the court granting leave to file judicial review.

Considering the issues advanced by the applicant as establishing *prima-facie* case, particularly, on denial of the right to be heard, I find the application being proper, meritorious and adhered to the legal requirements for the grant of leave to apply for judicial review. I accordingly

, grant the leave. The applicant shall file the main application for judicial review within 14 days from the date of this Ruling. Costs to follow events.

Dated at Dar es Salaam this 23rd day of May 2023.

L. M. MONGELLA

JUDGE