

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(MAIN REGISTRY)
AT DAR ES SALAAM
MISCELLANEOUS CAUSE NO. 59 OF 2022

IN THE MATTER OF APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF
CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF CHALLENGING THE DECISION OF THE PERMANENT SECRETARY
PRESIDENT'S OFFICE, PUBLIC SERVICE MANAGEMENT AND GOOD GOVERNANCE
OF TRANSFERRING THE APPLICANT WITHOUT CONSIDERATION TO HIS EMPLOYMENT
POSITION
BETWEEN

IDDI HARUNI.....APPLICANT

VERSUS

THE PERMANENT SECRETARY PRESIDENT'S OFFICE,
PUBLIC SERVICE MANAGEMENT AND
GOOD GOVERNANCE.....1ST RESPONDENT
MZUMBE UNIVERSITY.....2ND RESPONDENT
TANZANIA FOREST RESEARCH INSTITUTE.....3RD RESPONDENT
THE ATTORNEY GENERAL.....4th RESPONDENT

RULING

Date of Hearing: 09/05/2023
Date of Ruling : 15/05/2023

MONGELLA, J.

The application at hand is preferred under section 2 (1) and (3) of the
Judicature and Application of Laws Act, Cap 358 R.E. 2019; section 18 (1)



and 19 (1) (2) (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap 310 R.E. 2019; and Rule 5 (1), (2) and (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules 2014. It is supported by the affidavit of Iddi Haruni, 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 so as to file an application for certiorari to quash and set aside the decision of the 1st Respondent of transferring the Applicant from the academic staff of 2nd Respondent through his letter with Ref. CA 87/271/01/51 dated 25 March 2022 which was received by the Applicant on 27 March 2022 based on allegations which was legally unfounded reasons and without regards as to procedures and qualifications related to the employment of the Applicant and then to transfer him to the employment of the 3rd Respondent. (sic)*

- (ii) *That this Honourable Court be pleased to grant leave on the part of the Applicant herein so as to file an Application for mandamus to compel the 1st Respondent to act according to the law and allow the Applicant to continue with his former employment at 2nd Respondent or with other employer of the status and nature of the 2nd Respondent. (sic)*



- (iii) *That this Honourable Court be pleased to grant leave on the part of the Applicant herein so as to file an Application for prohibition to prohibit the respondents from interfering with the Applicants employment based on illegal grounds. (sic)*

The application was argued orally whereby all parties were represented by learned counsels. The applicant was represented by Mr. Isaack Tasinga, learned advocate and the respondents were represented by Ms. Leonia Maneno and Ms. Aveline Ilahuka, learned state attorneys.

In his submission, Mr. Tasinga gave the background to the dispute as depicted in the applicant's supporting affidavit, which he also considered to be manifesting the arguable issues to warrant grant of leave to file judicial review. He said that the applicant was employed by the 2nd respondent in the rank of "tutorial assistant" in 2007. That, the applicant thereafter, requested to pursue a Masters' programme at the University of Dar es Salaam and was permitted accordingly. He thus joined the Masters programme while still employed by the 2nd respondent in the rank of "tutorial assistant." The Masters degree programme, he pursued, was unclassified. While about to complete his studies there happened a change in academic credentials system for university lecturers whereby a "Harmonised Scheme of Service for Academic Staff in Public Universities and Constituent Colleges" was created. Among other things, it put a qualification of a G.P.A. of 4.0 out of 5.0 in a Masters degree, for one to be employed in the rank of Assistant Lecturer.



In compliance with the new scheme of service, the 2nd respondent made a re-arrangement/re-categorisation of his employees, including the applicant. With respect to the applicant, a letter was written to him with Ref. No. MU/PCF/1819/30 titled "*Re-Categorisation from Academic Staff to the Cadre of Administrative Staff.*" The letter gave rise to a dispute between the applicant and the 2nd respondent. The applicant challenged the 2nd respondent in the Commission for Mediation and Arbitration (CMA) on the grounds that:

One, that the 2nd respondent failed to interpret the harmonization scheme not to cover employees who were already in service, including the applicant. That, he was to be promoted by having a Master degree regardless of the G.P.A. as that was the previous qualification and he had acquired the Master degree by the time the letter was written to him.

Two, that the 2nd respondent gave himself powers not vested to him when he calculated the applicant's G.P.A. and found that the applicant had a G.P.A. of 3.45 while the applicant had joined a Master degree programme that was unclassified, that is, does not indicate pass marks. That, by doing that he moved the applicant to administrative staff from academic staff.

Mr. Tasinga continued to argue that the matter at the CMA was struck out following a Court of Appeal decision that the CMA had no jurisdiction to entertain labour disputes involving public servants. The applicant however, appealed to the High Court, Morogoro Registry challenging the CMA order of striking out the matter before it. The revision is still pending at the High Court to-date. However, while the matter is still pending in the High Court,



the 1st respondent transferred the applicant from the 2nd respondent to the 3rd respondent, hence the application at hand.

In this application, the applicant, in accordance with Mr. Tasinga's submission, challenges the 1st respondent's decision for being illegal. He argued so saying that the applicant is a statistician by profession but was transferred to the position of Information Technology (IT) officer. Referring to **Regulation 107 (2) of the Public Service Regulations of 2003**, he argued that the provision prohibits transfer of a public servant with different terms and conditions without his consent. He contended that the transfer of the applicant was done without his consent. Mr. Tasinga was convinced that these facts have raised a prima facie case warranting the grant of leave to file judicial review.

Regarding other requirements for grant of judicial review, he argued that the applicant has interest in the case as he personally suffered. That, he was transferred and his salary reduced. As to the requirement of time, he submitted that the application has been filed within six months as required under the law. In the premises, he prayed for the leave to be granted as sought.

The respondents' counsels first started by echoing the legal requirements in grant of leave to file judicial review as settled in the case of **Emma Bayo vs. Minister for Labour & Youth Development & 2 Others**, Civil Appeal No. 79 of 2012, whereby they said that four conditions have to be met, being: **one**, the applicant must have sufficient interest in the matter; **two**, that there must be an arguable case; **three**, that there must be a decision which is



final; and **four**, that the application must be within time. In essence they had no issues with the condition regarding time as they conceded that the application has been filed within time.

With regard to the first condition, the learned counsels contended that there is nowhere in the applicant's affidavit demonstrated that the applicant has interest in the case to be allowed to file the main application.

As to the 2nd condition regarding demonstration of arguable case, the learned counsels contended that the 1st respondent is the custodian of employment laws, rules and regulations relating to public sector. They had the stance that the transfer of the applicant from the 2nd respondent to the 3rd respondent was a normal transfer in public service. That, his first degree was on computer science rendering the transfer correct. They added that the applicant was employed as Tutorial Assistant by Mzumbe University using the University's scheme of service and at that time all universities had different schemes. That the situation brought inconsistencies among universities, which led different stake holders, including universities, to come up with a harmonised scheme. That, the harmonization rendered creation of new entry qualifications and those who never qualified were given the opportunity to go for further studies.

With regard to the applicant, they argued that after the time elapsed, the applicant never submitted any certificate to qualify in the new scheme. That, after 5 years Mzumbe University requested the University of Dar es Salaam for the applicant's results whereby the results were sent showing that he obtained a G.P.A. of 3.3, which did not qualify in the new scheme.



In that respect, the learned state attorneys had the stance that the applicant failed to meet the 2nd criteria, on demonstrating arguable case.

As to the 3rd criteria on the decision challenged being final; the learned counsels had the contention that the applicant lacks a decision which is subject to judicial review. They had the said view on the ground that "re-categorisation" letter or letter of transfer does not amount to "decision." In support of their stance, they referred the case of **Joshua Samwel Nassari vs. Speaker of National Assembly**, Misc. Civil Cause No. 22 of 2019 (HC at Dodoma). They argued that there was no hearing leading to a decision.

In his brief rejoinder, Mr. Tasinga addressed mainly two points. First, regards the argument that there is no arguable case demonstrated by the applicant. He argued that the applicant has demonstrated sufficient arguable case and prayed for the court to go through the record and make decision.

Second, concerns the argument that there is no decision to be subjected to judicial review. In his view, the letter of transfer "annexture Iddi-8" amounts to a decision to be subjected to judicial review. In the same line he had the stance that the applicant has shown his interest in the case in his supporting affidavit and submission.

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. I, first of all, agree with the learned state attorneys that in granting leave to file judicial review, the applicant is



supposed to adhere to the conditions set out under the law. **Rule 4 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules of 2014** provides for the kind of persons entitled to apply for judicial review. It states:

"A person whose interests have been or believes will be adversely affected by any act or omission, proceeding or matter, may apply for judicial review."

The Court of Appeal in the case of **Emma Bayo vs. Minister for Labour and Youth Development & 2 Others**, (supra) cited by the learned state attorneys, sets out the conditions to be met for the application to be granted. In the said case the Court of Appeal held 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, it is not disputed that the application has been filed within the six months required under the law. The contention lies with other conditions.



Starting with the condition that the applicant has to demonstrate interest in the case. The learned state attorneys contended that the applicant has failed to show that he has an interest in the case. Considering **Rule 4 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules of 2014** the person whose interests have been or believes that his interests shall be adversely affected by any act, omission, proceeding or matter can file for judicial review. One shows interest in a case by showing how he has or shall be affected by the actions of the administrative authority. The applicant, in my view, has sufficiently demonstrated how the act of the 1st respondent in transferring him from the 2nd respondent to the 3rd respondent without considering his expertise shall adversely affect him and his career in academics. It does not need rocket science to depict the interest of the applicant in the case at hand, from his supporting affidavit and submission by his counsel.

The learned state attorneys further argued that there is no decision to be subjected to judicial review. In their view, a decision is only entered after conducting a hearing. I find this a total misconception on their part. The law under **Rule 4 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Judicial Review Procedure and Fees Rules of 2014** clearly states of any act, omission, proceeding, or matter. This, in my view, is not confined on decisions entered after conducting a hearing. Besides, it is not in every dispute between an employer and an employee that a hearing must be conducted. Other disputes, like the one at hand does not involve disciplinary issues, thus it is a misconception to think that the same must pass through a hearing first or that if no hearing has been conducted, judicial review cannot be filed. It is clear from the record that the applicant wishes



to challenge the act of the 1st respondent transferring him to another institution on a non-academic post and on an area not of his expertise. In my view therefore, a decision to be challenged on judicial review exists.

Lastly and most important is on demonstration of an arguable case. From the record, the applicant clearly challenges the act of the 1st respondent for being illegal. In the submission by Mr. Tasinga, it was argued that the 1st respondent acted in contravention of **Regulation 107 (2) of the Public Service Regulations of 2003**, which prohibits transfer of a public servant with different terms and conditions without his consent. This, in my view, connotes procedural irregularity. The learned state attorneys spent a lot of time justifying the transfer of the applicant by the 1st respondent. I find no relevance of recapitulating what they argued because, with due respect, the learned counsels wasted their energy arguing points which ought to be advanced in the main application.

In application for leave to file judicial review, in consideration of whether there is an arguable case, what is considered by the court is whether the applicant has raised arguable issues in establishing the irrationality, propriety, adherence to legal rules and procedures by the decision-making authority in reaching its decision. Whether the respondents have points to counter the issues advanced or whether the applicant stands chances of succeeding or not, is not relevant at this stage. The court granting leave cannot dwell into deliberating on the merits of the arguments advanced by the parties in arguing the issues advanced. Doing so shall amount to deliberating on the main application which is not in the mandate on the court granting leave to file judicial review.



In the premises, 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 15th day of May 2023.


L. M. MONGELLA

JUDGE

