IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB REGISTRY

AT ARUSHA

MISC. CIVIL APPLICATION NO. 114 OF 2022

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION AGAINST THE DECISION OF THE 1ST RESPODENT TO REMOVE THE APPLICANT FROM THE OFFICE AS CHAIRPERSON OF SAWE STREET BABATI DISTRICT WITHIN MANYARA REGION

AND

IN THE MATTER OF THE LAW REFORM (FATAL ACCIDENT AND MISCELLANEOUS PROVISIONS) ACT [CAP 310 R.E 2019]

BETWEEN

MICHAEL JOHN ..... APPLICANT

VERSUS

LAZARO JACOB TWANGE (THE DISTRICT COMMISSIONER OF BABARI DISTRICT) ..... 1ST RESPONDENT

THE ATTORNEY GENERAL .....2ND RESPONDENT

RULING

28th April & 23rd May 2023

KAMUZORA, J.

Under a certificate of urgence the Applicant brought an application before this court seeking for orders that;

1) This Honorable court be pleased to grant order of certiorari to quash and declare the decision of the District Commissioner to remove the Applicant from the Office and his responsibilities as a chairman of Sawe Street as excessive powers, unreasonable, arbitrary, ambiguous and procedural impropriety.
2) This Honorable court be pleased to grant order of mandamus to compel 1st Respondent to allow Applicant to continue with his leadership as a chairman accordingly.
3) This Honorable court be pleased to grant order of prohibition against the 1st Respondent from continuing to restrict the Applicant to perform his duty as Chairman respectively.

The application was brought under section 17, 18(1) and 19(3) of the Law Reform (Fatal Accident and Miscellaneous provisions) Act [CAP 310 R. E 2019] and Rule 8 of the Law reform (Fatal Accident and Miscellaneous Provisions) (Judicial review Procedure and Fees) Rules, 2014. The application was supported by an affidavit deponed by the Applicant himself and opposed by the Respondents through a counter affidavit deponed by Msalla Hassan Msalla, the Babati Division Officer duly employed by the Office of Babati District Administrative Secretary

(DAS). The Respondents also filed a notice of preliminary objections on point of law that;

1) *The Application is bad in law and premature for contravening rule 5(1) of the Law Reform (Fatal Accidents and Miscellaneous Provision (Judicial Review Procedures and Fees) Rule, 2014.*
2) *The Application is bad in law for contravening with rule 9 (1) of the Law Reform (Fatal Accidents and Miscellaneous Provisions (Judicial review Procedure and Fees) Rule, 2014.*
3) *The Application is incompetent and bad in law for failure to attach a copy of the decision made by the 1st Respondent.*

During hearing of the preliminary objection, the Applicant appeared in person with no legal representation and the Respondents were dully represented by Mr. Leyan Mbise and Mr. Mkama Msalama both learned State Attorney.

Arguing in support of the 1st preliminary point of objection Mr. Msalama submitted that, leave of the court is an important aspect in an application for judicial review. That, application for review cannot be filed in court where there is no leave of the court. He referred this application as premature and illegal contravening Rule 5(1) of the Rules for the Applicant's failure to attached a copy of ruling granting him leave

to file a judicial review. That, the above rule uses the word 'shall' to impose a mandatory requirement of law. To support his submission, Mr. Msalama cited the case of **Hans Wolfgang Golcer Vs. General Manager of Morogoro Canvas Mill Limited** [1987] TLR 78. **Alfred Lakaru Vs. Town Director (Arusha)** [1980] TLR 326.

Submitting for the 2nd objection Mr. Msalama argued that the application contravenes Rule 9(1) of the Law Reform (Fatal Accidents and Miscellaneous Provision (Judicial review Procedure and Fees) Rules, 2014 which requires a copy of the application to be served to the Respondent within 7 days upon filing an application for judicial review in court. Pointing at the current application, he submitted that the same was filed on 09/08/2022 and the registrar acknowledged receiving and admitting the same on 6/9/2022 but a copy was served to the Respondents on 5/12/2022 after the lapse of 59 days. That, since the rule uses the word 'shall' and under section 53(2) of the Interpretation of Laws Act, Cap. 1 R.E 2019 the word 'shall' connotates the obligation to comply to what is prescribed by the law. To cement on this argument Mr. Msalama cited the case of **Ebeneza Kimaro and 16 others Vs. Hamisi Walii and 4 others,** Misc. Civil Cause No 16 of 2021 HC at Arusha.

Arguing in support of the 3rd objection, Mr. Msalama submitted that, the application is incompetent in law for failure to attach the decision of the 1st Respondent thus contravening Rule 4 of the Law reform (Fatal Accidents and Miscellaneous Provision (Judicial Review Procedures and Fees), Rules 2014. He added that, failure to attach the said decision makes this application incompetent as per the case of **Stephen Semba Vs. Leanard Obed Mlewa and 2 others**, Misc. Civil Cause No 66 of 2005, **Joshua Samwel Nasary Vs. The Speaker of the National Assembly and AG,** Misc. Civil Cause No 22 of 2019 HC at Dodoma (Unreported). Basing on the above submission, it is the Respondents' prayer that the application be dismissed with costs.

Responding to the preliminary objections, the Applicant started by urging this court to consider merit of the application rather than concentrating on technicalities of law for purpose of attaining justice. As for the 1st objection he prayed that this court should not be tied with technicalities rather it should consider if there were genuine reasons for his dismissal from his position as a chairman.

As for the 2nd objection, it is the Applicants submission that service to the 1st Respondent was done within two days from the date he collected the application documents from the court but they refused to

collect the same. That, he opted to send the copies to the State Attorney Office at Manyara. That, after the lapse of four days he went there and was informed that if the responsible person does not want to receive them the documents should be taken back to the court. That, summons was issued for the second time but the 1st Respondent refused to sign it and it was sent to the State Attorney office where it was received. It is the Applicant's argument that, the claim that the Respondents were not served on time is not correct as they were served but refused the service.

Responding to the 3rd objection, it is the claim by the Applicant that he attached a letter from the District Commissioner dated 12/7/2022 as Annexure A2 with the heading, *"Kuondolewa Madarakani Mwenyekiti wa Mtaa wa Sawe Kata ya Maisaka Halmashauri ya Mji wa Babati kwa Tiketi ya Chama cha Mapinduzi Ndugu Michael John".* It is the Applicant's prayer that all points of preliminary objection be dismissed and the application be determined on merit.

Upon a brief rejoinder Mr. Msalama insisted that ignorance of law has no excuse in law. That, since the Applicant has not attached the leave of this court to file application for review, review application is unmaintainable. He added that, there is no proof that the summons or

copies of application were refused as there is no affidavit to that effect. He maintained that, since the application was signed on 06/09/2022 it means that the same was ready for collection and it was the Applicant's duty to make follow up of the same and save to the Respondents within 7 days.

Mr. Msalama reiterated his submission in chief and referred this court to paragraph 2 of the statement in reply and paragraph 4 of the counter affidavit that the decision was made by the residents of Sawe and not the 1st Respondent. That, under annexure A2 the 1st Respondent was informing the regional authority that the residents of Sawe dismissed the Applicant from his position as Mtaa Chairman hence the Region authority has to take action to cover the gap. The Respondents therefore prays for the application to be dismissed with costs.

I have clearly considered submissions by the parties for and against the preliminary objections raised by the Respondents. The pertinent issue that needs the determination by this court is whether the preliminary objections raised by the Respondents are of merit.

Starting with the 1st point of objection it was contended that no leave was obtained by the Applicant before filing this application. The

requirement for leave to file judicial review is statutorily provided under the Law Reform (Fatal Accidents and Miscellaneous Provisions) Judicial review Procedure and Fees) Rules 2014, Rule 5(1), (6). For easy of reference the wordings of the said rule are hereunder quoted,

> *"5(1) An application for judicial review shall not be made unless a leave to file such application has been granted by the court in accordance with these Rules."*
>
> *5(6) "The grant of leave under this rule shall apply for an order of prohibition or an order of certiorari, if the Judge so directs, operate as a stay of the proceeding in question until the determination of the application, or ordered otherwise:*

Provided that where the circumstances require, the Judge may direct that the application be served for hearing inter-partes before the grant of such leave."

With the wording of the above cited provision, it is clear that before applying for an order of prohibition or certiorari, a party must obtain leave of the court. Leave is therefore a prerequisite requirement to be fulfilled before an application for review is filed in court. The Applicant herein is seeking for an order of certiorari and mandamus to compel the 1st Respondent to allow the Applicant to continue with his leadership as a chairman. In his affidavit in support of application, the Applicant addresses the court's powers in granting orders of certiorari, mandamus and prohibition but no paragraph indicating that leave was

sought and granted for the Applicant to file this application. There is no doubt that even during his submission on the preliminary objection, the Applicant impliedly admitted the absence of leave by urging the court to depart from legal technicalities and determine the application on merit. I therefore agree with the counsel for the Respondents that in the absence of leave, this application was filed prematurely hence, unmaintainable. That being said the 1st point of preliminary objection is of merit and it is hereby sustained.

The determination of the first point of objection on its own would suffice to dispose the whole appeal, but in a nutshell, I will respond to the remaining points of preliminary objections on points of law.

On the 2nd point of objection, the Respondent claims that the application contravenes the provision of Rule 9(1) of Law Reform (Fatal Accident and Miscellaneous Provision (Judicial review Procedure and Fees) Rule,2014. That, the Respondent was not served with the application within 7 days. Upon reading the provision of Rule 9(1) above, it uses the word "shall". For easy of reference the rule states,

> "9.(1)*The Applicant* ***shall within seven days*** *after filing the application, serve a copy of the application on the*

Respondent together with supporting documents specified under rule 8." Emphasis provided

With the wordings of the above provision, the law imposes a mandatory requirement to serve the application to the Respondent within 7 days. The court record revels that the application was received by this court on 29th day of August 2022. However, the record does not indicate the date the said application was served and received by the Respondent except for the summons that was endorsed with the respondent's stamp on 05th December 2022. For that matter, the case of **Ebeneza Kimaro** is distinguishable from the case at hand because, in that case there was proof of service of the application document which was out of prescribed time. But in this case, there is argument on the date of service and the issue on refusal of service was raised. Thus, whether the application was served to the Respondent on time or not, it is a question of evidence that cannot be determined at this stage hence the Preliminary objection fails to meet the thresholds stipulated in the case of **Mukisa Biscuits Manufacturing Co. Ltd Vs. West End Distributors LTD** (1969) E.A 696. The 2nd point of objection is devoid of merit hence, overruled.

The 3rd point of objection is that the application is bad in law for failure to attach the decision of the 1st Respondent contrary to Rule 4 of the Law Reform (Fatal Accident and Miscellaneous Provision (Judicial review Procedures and Fees) Rules 2014. The said Rule read: -

> *"4. 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 above rule requires a person whose interests have been adversely affected by any act or omission or matter to apply for judicial review. The rule does not impose the requirement to attach the said decision. However, such requirement was encompassed in case laws as argued by the counsel for the Respondents' referring cases of **Stephen Semba (supra)** and **Joshua Samwel Nasary (supra).**

In the current application the Applicant referred annexure A2 as decision he was challenging. Whether annexure A2 is the decision within the meaning of law, that is a matter that cannot be determined on preliminary objection. It is a matter to be adjudicated upon while determining application for leave to file judicial review or during determination of application for judicial review. Much as the Applicant referred annexure A2 as decision he intended to challenge, the claim

that the decision was not attached cannot stand. The 3rd point of objection is devoid of merit and it is overruled.

In the Upshot, this court finds merit in the first preliminary point of objection and uphold the same but overrule the 2nd and 3rd point of objection for being baseless. Having found merit in the first point of objection, this application is incompetent for being prematurely filed before the Applicant had obtained leave to file the same. I therefore proceed to strike out the entire application with costs.

Order accordingly,

DATED at **ARUSHA** this 23rd day of May 2023

D.C. KAMUZORA

JUDGE