

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA**  
**DISTRICT REGISTRY OF ARUSHA**  
**AT ARUSHA**  
**MISCELLANEOUS CAUSE NO 15 OF 2022.**  
**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS**  
**OF MANDAMUS AND CERTIORARI**  
**AND**  
**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW AGAINST**  
**THE DECISION OF THE TANZANIA ATOMIC ENERGY COMMISSION, THE**  
**PUBLIC SERVICE COMMISSION AND THE PRESIDENT OF THE UNITED**  
**REPUBLIC OF TANZANIA**  
**AND**  
**IN THE MATTER OF ABUSE OF QUAS-JUDICIAL POWERS**  
**AND**  
**IN THE MATTER OF WRONGFUL MISAPPLICATION OF THE LAW AND**  
**VIOLATION OF PRINCIPLE OF NATURAL JUSTICE.**

**BETWEEN**

**NAIMAN ABEL MCHOMVU .....APPLICANT**

**AND**

**TANZANIA ATOMIC ENERGY COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE CHIEF SECRETARY.....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL OF TANZANIA.....3<sup>RD</sup> RESPONDENT**

**RULING**

*Date of last order: 16-3-2023*

*Date of ruling: 20-4-2023*

**B.K.PHILLIP,J**

This ruling is in respect of an application for leave to apply for judicial review made under Rule 5 (1), (2) (a) (b) (c) (d), (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review

Procedure and fees) Rules, 2014, section 18 (1) of the Law Reform (Fatal accidents and Miscellaneous Provisions) Act, Cap. 310 R.E 2002 and section 2 (3) of the Judicature and Application of Laws Act Cap 358 R.E 2002.

The application is supported by an affidavit sworn by the applicant. Mr. Samwel Magera Kasori, the 1<sup>st</sup> Respondent's legal officer swore and filed a counter affidavit in opposition to the application. Mr. Switbert D. Rwegasira, learned advocate appeared for the applicant whereas the learned State Attorney Mkama Musalama appeared for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. This application was disposed of by way written submissions.

A brief background to this application is as follows; the applicant herein was employed by the 1<sup>st</sup> Respondent as chief accountant. He was accused and charged with two offences before the disciplinary committee, to wit; **One**, negligence occasioning loss to the employer, contrary to section F. 27(1) (L) of the Standing Orders for the Public Service of 2009 read together with Section 1: 3 (j) and paragraph 12 of the 3<sup>rd</sup> schedule of part A of the Tanzania Atomic Energy Commission Staff Regulations 2017 and Regulation 42 Paragraph 12 of the 1<sup>st</sup> schedule of part A of the Public Service Regulations, 2003 G.N No. 168 of 2003. **Two**, negligence in the performance of duties not endangering the safety of persons or property contrary to section F.27 (2) (e) of the Standing Orders for the Public Service 2009 read together with section 1:4 and paragraph 4 of the 3<sup>rd</sup> schedule of part B of the Tanzania Atomic Energy Commission Staff Regulations 2017 and Regulation 43 paragraph 5 of the 1<sup>st</sup> schedule of part B of the Public Service

Regulations, 2003 (G.N No.168 of 2003). He was found guilty of both offences and his employment was terminated on 11<sup>th</sup> January 2018. Aggrieved by the termination of his employment the applicant appealed to the Public Service Commission, (Henceforth "PSC"). The PSC upheld the decision of the disciplinary committee. Undaunted, the applicant lodged a second appeal to the President of the United Republic of Tanzania. His appeal did not sail through, thus he filed the instant application.

Back to the application at hand, Mr. Rwegasira's submission was to the effect that this application has merit. He pointed out three conditions which this court has to consider in the determination of an application of this nature, to wit;

- i) *The existence of an arguable case.*
- ii) *Whether the application has been filed in court within the time limit of six months.*
- iii) *Whether the applicant has shown that he /she has sufficient interest to be allowed to bring application.*

Mr. Rwegasira cited the case of **Emma Bayo Vs Minister for Labour and Youths Development and others, Civil Appeal No. 79 of 2012** (unreported) to buttress his arguments. Expounding on the prerequisite conditions for granting an application for leave to file an application for judicial review, Mr. Rwegasira argued that the applicant herein has stated in his affidavit that the President erred to uphold the findings of the PSC since he raised a complaint that he was not fully accorded his right to be heard.

Moreover, Mr. Rwegasira argued that this application was filed within time limit prescribed by the law for seeking leave for filing an application for judicial review for the orders for certiorari and mandamus. He pointed out that the applicant received the President's decision on 12<sup>th</sup> August 2022 and this application was filed on 8<sup>th</sup> October 2022. He added that the applicant being a public servant whose employment was terminated has sufficient interest in the matter and he has exhausted all remedies available to him. Now he is seeking the intervention of this court.

Furthermore, Mr. Rwegasira was of a strong view that the respondents' arguments in opposition to this application are misconceived because they are mainly concern with the merit of the main application for judicial review intended to be file by the applicant if leave to file the same is granted by this court. He insisted that the approach adopted by the respondents in tackling this application amounts to overstepping into the intended main application for judicial review which in law, it is not correct. To cement his argument, he cited the case of **Engelbert Lucas Chelele Vs The Police Force, Immigration and Prison Service Commission and Others, Misc. Application No.11 of 2022 at Dar es Salaam** (unreported). He insisted that the Court of Appeal in the case of **Emma Bayo** (supra) emphasized that an application for leave is the first step towards filing an application for judicial review. In conclusion of his submission Mr. Rwegasira prayed this application to be allowed.

In rebuttal, Mr. Musalama adopted the counter affidavit filed by the 1<sup>st</sup> respondent to form part of his submission. He contended that this

application has no merit and does not meet the conditions for granting the orders sought in this application. He pointed out that there are three reasons for seeking leave of this court before filing an application for judicial review, to wit; **one**, to filter out application that are groundless or hopeless at an early stage, **two**, to prevent the time of the court from being wasted by busybodies with misguided or trivial complaints of administrative errors and **three** to remove uncertainty in which public authorities may be burdened with frivolous or groundless application for judicial review. To bolster his argument, he cited the case of **Emmanuel Paul Mng'arwe Vs The Chief Court Administrator and 2 others, HC at Mwanza, Misc. Civil Cause No. 11 of 2019** (unreported).

Furthermore, Mr. Musalama contended that in considering whether or not to grant an application of this nature this court has to satisfy itself on the existence of the following conditions;

- i) The application must be made within six months from date of the act or omission in which the application for leave emanates from.*
- ii) The applicant must disclose sufficient interests in the matter.*
- iii) The impugned decision, action or omission must be in exercise of public law.*
- iv) Leave lies only where there is no alternative remedy.*
- v) There must be an arguable/triable issue.*
- vi) That the application must be made in good faith.*

He cited the case of **Alfred Lakaru Vs Town Director (Arusha) (1980) T.L.R.327** to bolster his argument. He went on submitting that in this application the applicant managed to meet only the first condition stated herein above. He contended that the applicant has failed to establish the existence of triable/arguable issues in this matter to move this court to grant the order sought in this application.

On what amounts to arguable issues, Mr. Musalama submitted that in order to establish the existence of arguable issues the applicant has to demonstrate that the decision complained of is tainted with illegality. To buttress his argument, he cited the case of **Emmanuel Paul Mng'arwe** (supra). He maintained that in his affidavit and statement the applicant has not demonstrated the existence of any triable/arguable issue instead he claimed that there was violation of the principles of natural justice without mention any specific principle of natural justice violated by 1<sup>st</sup> Respondent. Expounding on this point Mr. Musalama pointed out that there are two basic principles of natural justice which must be observed by any person or administrative authorities when making any decision as per Article 13 (6) (a) of the Constitution of the United Republic of Tanzania to wit; One, the rule on fair hearing ("*Audi Alteram Partem*") which requires that before an order is passed against a person, he/she should be given an opportunity to be heard, which means that no one should be condemned unheard. To constitute fair hearing there must be a notice of hearing, contended Mr. Musalama. Two, no one can be a judge in his own cause ("*nemo judex in causa sua*"). Relying on the aforesaid principles of natural justice Mr. Musalama contended that before the termination of the applicant's employment, the 1<sup>st</sup> respondent

complied with all the principles of natural justice. To bolster his argument he referred this court to the notice of hearing dated on 10<sup>th</sup> day of August 2018 annexed to the counter affidavit as annexure SG1. He was of the view that the said notice proves that the applicant was informed the date of hearing, time, place and right to be represented by an advocate or his trade union, and he was informed to bring witnesses or documents he intended to rely upon.

In addition to the above, Mr. Musalama contended that the proceedings of the disciplinary committee which are annexed to the respondent's counter affidavit as annex SG1 revealed that before the hearing the case the applicant and his fellow accused who are not party to this application, were reminded by the disciplinary committee of their right to bring witnesses and cross examine the employers' witnesses. In the whole process which led to the termination of the applicant's employment there was no any kind of bias and the applicant did not state any element of bias in his affidavit. He insisted that applicant was accorded his right to be heard but denied himself that right by not responding to the notice he was given, hence there was no any violation of the principles of natural justice.

With regard to the condition on the existence of a *prima facie* case, Mr. Musalama contended that the applicant has failed to establish the existence of a *prima facie* case which is a prerequisite condition for granting a leave to apply for judicial review. It was Mr. Musalama's argument that in his affidavit the applicant failed to disclose any illegality and /or point out the specific principle of natural justice

allegedly violated by the 1<sup>st</sup> Respondent in the process which led to termination of his employment.

Also, it was Mr. Musalama's argument that this application has not been made in good faith because the applicant is claiming that there were violations of principles of natural justice while he enjoyed all his rights, leaving alone the fact that in his affidavit he did not state any specific principle of natural justice which was violated by the 1<sup>st</sup> respondent. To support his position, he cited the case of **Josiah Baltazar Baisi and 38 others Vs Attorney General and others (1998) TLR 331.**

Mr. Musalama concluded his submission by insisting that applicant failed to meet the prerequisite conditions for granting the leave sought in this application. He prayed for the dismissal of this application with costs.

In rejoinder Mr. Rwegasira reiterated his submission in chief and added that in his submission Mr. Mukama wrongly overstepped into intended main application for judicial review. He cited the case of **Emma Bayo** (Supra), to cement his arguments. He concluded his rejoinder by insisting that the conditions for granting the leave sought in this application have been met.

Having dispassionately analyzed the competing arguments made Mr. Mukama and Mr. Rwegasira as well as perused the court's records, I am of a settled opinion that the issue for determination in this application is whether or not the applicant has met all the prerequisite conditions for this court to grant the orders sought in this application.



In the case of **Emma Bayo** (supra) the Court of Appeal enumerated three major conditions which should be considered when the court is exercising its judicial discretion to either grant or not to grant leave to the applicant to file an application for judicial review, to wit;

- i) *Whether the application for leave has made out any arguable case to justify the filing of the main application.*
- ii) *Whether the application is within six months limitation period within which a party can seek for leave for judicial review.*
- iii) *Whether the applicant has shown that he or she has sufficient interest to be allowed to bring the main application.*

Upon going through the applicant's affidavit and statement in support of this application I found out that the applicant managed to demonstrate the existence of an arguable case. In his affidavit in support of this application the applicant deposed that during the hearing of the case before the disciplinary committee the principles of natural justice were not adhered to the letter. Mr. Musalama's argument that the applicant was given notice of hearing and reminded by the disciplinary authority his right to bring witnesses is misconceived and prematurely made at this stage. The discussion on whether or not the applicant was accorded the right to be heard and the principles of natural justice were adhered to the letter has to be determined in the main application if leave will be granted by this court not at this stage. Likewise, Mr. Musalama's argument that the applicant has not stated the specific principle of natural justice which was contravened in the proceedings before the disciplinary committee cannot be entertained at this stage or else this court will be overstepping to issues which are

supposed to be dealt with in the application for the judicial.[see the case of **Emma Bayo** (supra)].

Coming to the issue on whether the application has been filed in court in time, there is no dispute that this application has been filed within the time limit of six months prescribed by the law. I am also satisfied that the applicant has shown that he has sufficient interest to be allowed to bring the main application since he was personally affected by the termination of his employment and has exhausted all available remedies, thus he has no alternative remedy apart from an application for judicial review.

In fine, it is the finding of this court that this application has merit. The prayer for leave to file the application for judicial review is hereby granted. Each part will bear his own costs.

Dated this 20<sup>th</sup> day of April 2023



**B.K.PHILLIP**

**JUDGE**