IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CAUSE NO. 22 OF 2023

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

AND

IN THE MATTER TO CHALLENGE THE APPOINTMENT OF JUDGE BENHAJJ SHAABAN MASOUD (2ND RESPONDENT) BY HONOURABLE PRESIDENT OF UNITED REPUBLIC OF TANZANIA TO BE THE JUSTICE OF COURT OF APPEAL AS BEING ARBITRARY, UNFAIR AND IN VIOLATION OF CONSTITUTION OF UNITED REPUBLIC OF TANZANIA

BETWEEN

ALEXANDER J. BARUNGUZA..... APPLICANT

AND

THE HONOURABLE ATTORNEY GENERAL..... 1ST RESPONDENT

HON. JUDGE BENHAJJ SHAABAN MASOUD ..... 2ND RESPONDENT

RULING

5th, & 9th June, 2023

ISMAIL, J.

Alexander J. Barunguza, who has described himself as a holder of a bachelor of law degree and a student of the Law School of Tanzania, has come calling with guns blazing. Moving the Court under a certificate of urgency, the applicant has signaled his intention to commence proceedings for prerogative orders of *certiorari* and *mandamus*. While the former intends to quash and annul the decision to appoint the 2nd respondent to serve as the justice of the Court of Appeal of Tanzania, the latter is aimed at compelling the 1st respondent to suspend the 2nd respondent from office, and appoint a tribunal that will launch an investigation into allegations of violation of human rights and ethical conducts.

Acknowledging that his quest for justice through this course of action requires leave as a prelude to the next stage, the applicant has instituted the present application. He has invoked the provisions of section 2 (3) of the Judicature and Application of Laws Act, Cap. 358, sections 18 (1) and 19 (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap. 310 and rule 5 (1), (4), (5) and 7 (1), (2), (5) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014, GN. No. 324 of 2014 (Rules). Grounds for the prayers sought are contained in the affidavit sworn in support of the application and the statement that accompanies it. Reasons for his decision to found an

action against the respondents are pleaded in paragraphs 9 and 10 of the affidavit and paragraph 3 of the statement. They are as follows:

(i) That there are allegations of violation of human rights and the law governing ethics of public leaders. These allegations are against the 2nd respondent;

(ii) That there is still a pending case against the 2nd respondent (Miscellaneous Cause No. 1 of 2023); and

(iii) That the appointment of the 2nd respondent to serve as the Justice of the Court of Appeal of Tanzania was not done in consultation with the Chief Justice, as required by the Constitution of the United Republic of Tanzania.

The application has encountered a formidable challenge from the respondents, whose conduct of the proceedings is done through the Office of the Solicitor General. In the joint statement in reply and counter-affidavit, sworn by Mr. Hangi Chang'a, the applicant's quest for leave has been challenged. The respondents have taken the view that allegations of violation of human rights and good governance are the subject matter of Miscellaneous Cause No. 1 of 2023 which is yet to be determined. This means that such allegations are unproven. The respondents further averred that appointment of the 2nd respondent was done in accordance with the

Constitution of the United Republic of Tanzania. On the right to access to justice, the respondents took the view that such right can only be exercised in accordance with the law.

Hearing of the application was through the parties' oral representations and it pitted the applicant, who was not represented, against Mr. Charles Mtae, learned State Attorney from the Office of the Solicitor General.

The applicant began his submission by requesting to adopt the contents of his application and the accompanying documents as part of his submission. He argued that he has been able to establish a prima facie case and that this was clear from the statement.

On whether the application is timeous, his contention is that the same is within the time prescription. Submitting on whether he derives sufficient interest in the matter, the applicant's answer is in the affirmative because appointment and service as a justice of appeal is a matter of public interest, and that any citizen can challenge the appointment.

Turning on to the 2nd respondent, the argument by the applicant is that there is a constitutional case that he instituted against the former, accusing him of violating the Constitution, and that he had already moved the President of the United Republic of Tanzania, urging her to take action against the 2nd respondent for what he accuses him of. He contended that

copies of the letters were served on the Chief Justice, Chief Court Administrator, Registrar of the High Court, Solicitor General and others. In the applicant's view, the possible consequence of the pending constitutional case is to have the 2nd respondent's appointment nullified, and this will affect the cases the conduct of which he will have taken part.

It is in view of all that, that the applicant felt that leave should be granted to enable him file the substantive action. He buttressed his position by citing the decision in ***Komanya Eric Kitwala v. The permanent Secretary, Public Service Management and Good Governance & 2 Others***, HC-Miscellaneous Cause No. 3 of 2023 (unreported).

Mr. Mtae was not convinced that the application has met the requisite threshold for its grant. While praying to adopt the contents of the pleadings filed by the respondents, he acknowledged that the application was filed timeously. It was his contention that that is the only condition that had been fulfilled, making the application deficient of prerequisites for its grant. On the conditions governing grant of leave, learned State Attorney relied on the decision of the Court of Appeal of Tanzania in ***Emma Bayo v. The mInister for Labour and Youth Development & 2 Others***, CAT-Civil Appeal No. 79 of 2012; and the Court's decision in ***Halima James Mdee & 18 Others v. The Registered Trustees of Chama Cha Demokrasia na***

Maendeleo (Chadema) & 2 Others, HC-Miscelianeous Cause No.27 of 2022 (both unreported).

Dwelling on other conditions, Mr. Mtae argued that the applicant has not disclosed any sufficient interest that he has in the matter. He argued that issues relating to appointment of Justices of Appeal, their conduct, discipline and removal from office are enshrined in the Constitution, the relevant provision being Article 113 (2). Learned counsel was adamant that preference of the instant application is a testimony that the requisite procedure had not been followed, a clear indication that the applicant derives no interest.

On whether there is an arguable case, the view held by Mr. Mtae is that none exists, adding that the appointment of Justice of Appeal is not a decision that can be taken or challenged by way of judicial review. The respondents have taken the view that what is annexed to the application is a mere notice to the public but not the actual appointment of the 2nd respondent. In his view, that is not a decision that can be challenged, and on this, the Court's attention was drawn to its own decision in ***Saphia Said & Others v. The Prime Minister of the United Republic of Tanzania & 2 Others***, HC-Miscelianeous Application No. 55 of 2016 (unreported).

Mr. Mtae has also taken an exception to what he contends to be the applicant's inability to demonstrate that there no other alternative remedies on offer. He argued that his scrupulous review of paragraphs 4, 5 and 6 of the affidavit; and paragraph 3 of the statement, reveal that there is an alternative remedy. The remedy is in the form of Miscellaneous Cause No. 1 of 2023 which awaits disposal in this Court. Underscoring the significance of pursuit of other remedies, Mr. Mtae referred me to the decision of this Court in ***Obadia G. Mwakasitu v. The Tanzania Local Government Workers Union (TALGWU)***, HC-Miscellaneous Cause No. 3 of 2021 (unreported).

The respondents wound up their submission by imploring the Court to hold that there is no arguable case in the application. He urged the Court to be persuaded by its earlier position in the case of ***Charles Watena & 6 Others v. The Morogoro Regional Commissioner & 2 Others***, HC-Miscellaneous Civil Application No. 74 of 2016 (unreported).

The applicant's rejoinder began by a reiteration of what he submitted in chief and maintaining that sufficient interest is evident. He submitted that paragraphs 4, 7, 8, 9 and 10 clearly show the extent to which the appointment has irked him. He argued further that paragraph 7 makes reference to the letter that he addressed to the President on the 2nd respondent's conduct, and that the said letter is attached to the application.

He argued that, whilst paragraph 8 shows that his letter has not been replied to, paragraph 9 shows how the President acted differently subsequent to receipt of the letter.

The applicant maintained that the 2nd respondent's appointment skipped the crucial part of consultation with the Chief Justice which points to the fact there is an arguable case.

Regarding alternative remedies, the applicant's take is that the pending case is distinct from the instant application, and that the issues are also different. He argued that the pending case seeks to challenge what he considers to be a violation of the Constitution, a far detached contention from the instant application.

On whether there is a decision to be challenged, the applicant's contention is that, as long as the notice informs of the appointment then that is amenable to a challenge through judicial review.

With regards to cited cases, the applicant's view is that these are all distinguishable and without any bearing on what is at stake in the matter.

He maintained that the arguments by the respondents are hollow, praying that the application be granted as prayed.

I have dispassionately reviewed the application, the respondents' counter-averments and the parties' oral submissions. I am now in a position

to embark on the disposal journey. The singular issue to be resolved is whether the application has met the threshold for its grant.

It is an established position that the parties are unanimous about, that granting of leave serves as an opening through which the applicant gets his journey on course, to challenging an impugned decision through judicial review. It is a condition precedent for grant of the prerogative orders and, in our case, for grant of writs of *certiorari* and *mandamus*. In our jurisdiction, this imperative requirement is catered for by the provisions of rule 5 (1) of the Rules whose substance is as reproduced hereunder:

> *"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."*

The prescription in the quoted excerpt cements what was otherwise a court practice which was yet to be promulgated into a statutory law. It was accentuated through various case laws. One of the notable decisions on the subject was a pronouncement by this Court in ***Republic Ex-parte Peter Shirima vs Kamati ya Ulinzi na Usalama, Wilaya ya Singida, The Area Commissioner and the AG*** [1983] T.L.R. 375, wherein was guided as follows:

"The practice of seeking leave to apply for prerogative orders has become part of our procedural law by reason of long user...."

It should be noted that introduction of the first phase of the proceedings that culminate in the grant or denial of leave serves as a condition precedent on a purpose. It is a mechanism of ensuring that the courts are not overwhelmed with matters instituted by people who do not have what it takes to institute them, or those that do not pass the test of eligible applications. Thus, borrowing the reasoning in the ***Halima James Mdee case*** (supra), the leave stage ***"serves as a sieve through which only eligible applications pass to the next stage unscathed."*** This is why, evolving from cases, criteria have been set for gauging the eligibility of applications for leave. This position was underscored in the splendid decision in ***Emma Bayo v. Minister for Labour & Youth Development & 2 Others*** (supra), in which the upper Bench guided at p. 8 as follows:

"We respectfully agree with both Mr. Materu and Mr. Chavula that the stage of leave serves several important screening purposes. It is at the stage of leave where the High Court satisfies itself that the applicant for leave has made out any arguable case to justify the filing of the main application. ***At the stage of leave the High Court is required to consider whether the***

applicant is within the six months limitation period within which to seek a judicial review of the decision of a tribunal subordinate to the High Court. At the leave stage is where the applicant shows that he or she has sufficient interest to be allowed to bring the main application. *These are preliminary matters which the High Court sitting to determine the appellant's application for leave should have considered while exercising its judicial discretion to either grant or not to grant leave to the applicant/appellant herein."* [Emphasis is added]

(See: ***Attorney General v. Wilfred Onyango Nganyi @ Dadii & 11 Others***, CAT-Criminal Appeal No. 276 of 2006 (unreported).

The key takeaways from the quoted excerpt are:

1. That leave is granted where the application is filed timeously;
2. That the applicant must demonstrate that there is an arguable case in the impending application for prerogative orders;
3. That the applicant must show sufficient interest in the impending application for prerogative orders;
4. That grant of leave is in the Court's exclusive discretion.

With respect to arguable case, the position is that an arguable case must be in the form of what is known, in legal parlance, as a *prima facie* case. It is a baseline or a minimum threshold required to convince the court

that the impending action carries with it some merit. It is a cause of action or defence that is able to sway the decision in one's favour.

Demonstration of sufficient interest by the applicant is also of mighty constitutional importance, and it takes into consideration the fact that the right to access to courts is not absolute. It is a right that is exercised by parties who derive interest in the matter in which they are involved, taking cognizance of the fact that, public law is not about rights. This principle was put in the right perspective by Sedley J, in ***R v. Somerset County Council & ARC Southern Ltd ex p Richard Dixon*** (1998) 75 P & CR 175. He propounded as follows:

> *"public law is not about rights, even though abuses of power might, and often do, invade private rights. Instead, public law is concerned with wrongs, particularly the misuse of power."*

The just quoted holding distils one important message. That an application for prerogative orders is not a meddlesome affair that can be intruded by everyone including those that engage in a "hit and hope affair", even where their interest in the matter is not evident or lies elsewhere. It is an exclusive zone for those who feel the true pinch of the wrongs complained about.

Need to establish sufficient interest has been given a boost in an article co-authored by Alexander Fawke & Emma Kate Cooney, legal scholars and practitioners, posted on *www.linklaters.com*. The duo relied on the decision of the House of Lords in the landmark case of ***R v. Inland Revenue Commissioners ("IRC"), ex parte (1) National Federation of Self-Employed and (2) Small Businesses Ltd*** [1982] AC 617, in which three key principles were enunciated to constitute sufficient interest. It was held:

> *"1. generally, at the permission stage, an application should be refused for lack of standing only where "the applicant has no interest whatsoever, and is a mere busybody". If, however, the case is arguable and there are no other discretionary bars to bringing it, permission should be granted and standing can be reconsidered in conjunction with merits at the substantive hearing;*
>
> *2. the question of standing is one which goes to the Court's jurisdiction. This means that the parties cannot simply agree the point between them, and the Court can consider the point of its own motion, even if not raised by the parties; and*
>
> *3. the question of sufficient interest is not merely a threshold issue. Even after passing the initial hurdle of establishing an interest in the subject matter, the question*

may still be relevant to the issue of what, if any, remedy should be granted. "

In the instant case, both parties are in unison that the application filed on 26th May, 2023 was instituted within the six-month time prescription. I subscribe to this joint position and take a conviction that the application is perfectly timeous.

With regards to existence of the *prima facie* case, the view held by the applicant is that existence of a constitutional case in which acts of violation of the Constitution; alleged indulgence in unethical conduct; and the alleged lack of consultation with the Chief Justice, are two of the issues that have precipitated the action taken by the applicant. These, in his opinion, are matters that amount to an arguable case worth pursuing to the next stage of the judicial review. None of these reasons convince the respondents, taking into account what Mr. Mtae considers as lack of a decision against which the impending action intends to correct.

As I move to determine this segment, I am not oblivious to the fact that determination of a *prima facie* case at the leave stage is not akin to or should be taken as a platform for proving the existence of errors complained about. This is an issue which would be dealt during the hearing of the substantive application. In matters like the instant application, existence of a *prima facie* case is gathered from the accompanying statement and such

other documents attached to the application (See: ***Workers of Tanganyika Textile Industries Ltd v. Registrar of the Industrial Court of Tanzania and Others***, HC-Miscellaneous Cause No. 144 of 1993 (unreported)).

A critical review of the reasons constituting the basis for the prayer of leave, as found in paragraph 3 of the statement and the averments in the supporting affidavit, are not only measly as to constitute the basis for action, but also acutely blunt such that it would be considered, even remotely, to amount to a *prima facie* case. The contention of abuse of human rights and/or indulgence in unethical conduct are nothing better than mere allegations which have not been proved or adjudicated upon. They are, at best, grievances that await a set of factual account which may not necessarily bring us to the conclusion of culpability against the 2nd respondent. So sketchy, as well, is the contention that the Chief Justice was not involved in the process that settled on the 2nd respondent as an appointee to the position of the Justice of Appeal. Evidence to that effect ought to have been sworn or affirmed depositions from either the President or the Chief Justice, or their handlers. This would prove that the latter's input in the appointment was not sought. In my view, absence of any semblance of evidence to that effect renders this contention a folly that cannot be

allowed to see the light of the day, lest the Court is dragged into a petty speculative mission.

Overall, the available material does not convey any sense of feeling that serious issues exist as to call for the Court's supervisory jurisdiction and come up with a finding which supports the contention that a *prima facie* case exists. I take the view that the applicant has failed the test as far as this criterion is concerned.

Conclusion of the foregoing point takes me to the next stage which is equally crucial. This queries the applicant's interest in the matter, and whether such interest is sufficient. The disputants have "squared off" on this issue. The contention by the applicant is that his interest in the matter resides in the fact that appointment of the Justice of Appeal is a matter that attracts public interest, his inclusive. The view held by the respondents is that none has been demonstrated.

I subscribe to the view held by Mr. Mtae and that is what the factual settings in this case tell. The attraction of wide public interest in a matter cannot be the basis for contending that an individual within the public has direct individual interest enough to propel him into action through court proceedings. They are not enough, either, to prove the existence of the principle of "proximity of the decision to the claimant". This principle requires

that a claimant who challenges a decision which interferes directly with their personal right should have a standing to bring a claim for judicial review (See: ***R v. Attorney General, ex-parte ICI Plc*** [1987] 1 C.M.L.R. 72). Nothing, bordering on individual adverse effect, has been exhibited by the applicant, as a result of this appointment, as to justify the jitters expressed by him.

It is my conclusion that sufficient interest is a big miss in the applicant's quest to move the Court to grant leave to file the impending application for prerogative orders.

Another battle ground in this application resides in the question on whether an alternative remedy exists. The contention by the respondents is that the applicant had an alternative remedy that he would pursue, instead of his pursuit through the instant proceedings. The alternative remedy singled out by the respondents is the pending case (Miscellaneous Cause No. 1 of 2023) in which issues pertaining the 2nd respondent's conduct have been put to challenge. The applicant sees no correlation between the prayers in the pending case and the prospective action for prerogative orders. In his contention, these two matters are distinct and detached from one another.

It has been stated, variously and continually, that leave may be refused where it is established other remedies, whether judicial or non-judicial, exist

and are on offer. The condition precedent, however, is that the available remedy should be equally or more appropriate, and should not be less convenient, beneficial and effective. This resounding view was underscored in the case of ***Tanzania Local Government Workers Union (TALGWU) & 2 Others v. The Chief Secretary & Another***, HC-Miscellaneous Application No. 326 of 2013 (unreported). This Court held:

> *"The next important question I have to decide is whether or not; the petitioners had and have alternative remedy other than petitioning the Court under CAP 3. My answer is in the affirmative, I find that the petitioners had and have alternative redress, provided for in section 94 (1) of the Employment and Labour Relations Act which empowers this Court, apart from its other powers, to decide ... (f) applications including – (i) a declaratory order in respect of any provisions of this Act or ... that indeed, is the relief the petitioners were basically seeking a declaratory order that the Circular and Standing order are in conflict with the Employment and Labour Relations Act and are unconstitutional.... To conclude,* ***I reach a decision that this petition is not fit for hearing due to availability of statutory alternative remedy, which I find to be undisputedly effective.*** *"*[Emphasis added]

As stated earlier, on the applicant has launched a multi-pronged approach which is intended to impress upon the 2nd respondent's appointing

authority that the latter is unfit to continue holding the position that he was occupying then. This was done by way of the pending case, and through a correspondence addressed to the President, the 1st respondent and other players. He has even gone further to demand that the 2nd respondent should be suspended as he awaits the constitution of a panel that will investigate the alleged wrongdoing. The supporting affidavit and the statement filed by the applicant support the applicant's concession. The applicant has gone further to state, in his oral submission, that he expects that one of the possible resultant consequences of the efforts he has so far employed is to have the 2nd respondent stripped of his powers and render the decisions that he was involved in a nullity. This is the clearest indication that there are other remedies in pursuit, and that, though dissimilar to writs that issue under the chosen course of action, such remedies are ***equally or more appropriate, and should not be less convenient, beneficial and effective.***

It is my unflustered view that the instant application presents a claim whose outcome can be achieved through ongoing efforts that the applicant has already put in motion and are awaiting their conclusion. Undoubtedly, the remedies are equally or more appropriate, less convenient, beneficial and effective.

There has been a divergence of views on whether the appointment of the 2nd respondent, as communicated through the public notice issued by the State House, is a decision that is challengeable through the writs of *certiorari* and *mandamus*. While the question is pertinent and its resolution is a mouthwatering prospect that the parties would want to look forward to, my settled view is that the answer would advance nobody's cause, given the fact that the contest has been settled through resolution of issues that preceded this nagging question. It is for that reason that I consider that dwelling on it is an act of flexing of the muscles for nothing. I choose to shrug it off.

It is in view of the foregoing, that I hold that the application lacks the necessary cutting edge for its grant, and it follows that the same should fall through. Accordingly, the application is hereby dismissed. Each party to bear own costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 9th day of June, 2023.

M.K. ISMAIL

JUDGE

09/06/2023