

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MAIN REGISTRY)**

AT DAR ES SALAAM

MISCELLANEOUS CAUSE NO.19 OF 2023

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR
PREROGATIVE ORDERS OF CERTIORATI AND MANDAMUS BY
ASHA ABDI ADAM**

AND

**IN THE MATTER OF THE DECISION OF THE PRESIDENT OF THE
UNITED REPUBLIC OF TANZANIA OF 15TH DECEMBER, 2022**

BETWEEN

ASHA ABDI ADAM.....APPLICANT

AND

THE CHIEF SECRETARY PRESIDENT'S OFFICE.....1ST RESPONDENT

THE PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

THE KINONDONI MUNICIPAL COUNCIL.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

RULING

Date of Last Order: 30/06/2023

Date of Ruling: 13/07/2023

MARUMA, J.:

The application for leave is brought under section 17 of the Law Reform (Fatal Accident and Miscellaneous Provisions) Act, Cap 310 R.E 2019, rule 5(1), (2) (a), (b), (c) & (d), 5(3) and 5 (4) of the Law Reform (Fatal Accident and Miscellaneous Provisions) Act, Cap 310 R.E 2019 (Judicial Review Procedure and Fees) Rules, GN. No 324 of 2014 and Article

108 (2) of the constitution of the United Republic of Tanzania of 1977 seeking for leave for prerogative orders against the decisions of the 1st, 2nd and 3rd respondents for the following reliefs that;

1. This Court be pleased to grant the applicant to file an application for judicial review for orders of certiorari quashing the whole proceedings, findings and decisions of the 1st, 2nd and 3rd respondents herein for being tainted with serious procedural irregularities, illegalities and irrationality; that, no reasonable authority could have reached to those decisions.
2. This Court be pleased to grant the applicant to file an application for judicial review for an order of mandamus compelling the respondents to deal with the rights of the applicant by abiding to the laws and procedures governing a public servant as well as employment contract.

Before proceeding to the merit of the relief sought, it is important to highlight the context from which this application arose. The applicant was employed in 1984 by the 3rd Defendant as a nurse in the health sector at Dodoma Region with the qualification of standard seven level of education. Since then, the applicant worked in various dispensaries in different regions. On 13th June 2018 the applicant was requested by the 3rd respondent to submit her form four leaving certificate or certificate of secondary education examination before 20th June 2018 for assessment, failure of which she

would be subjected to removal from the government employee's payment list. On 19th June 2018 the applicant made a reply to the 3rd respondent through the letter informed that she has no such qualification as she possessed standard seven level of qualification. On 5th of July, 2018 the applicant was removed from the list of government payment payroll and her employment was terminated.

However, in the year 2006 the Government made a clarification on the Establishment Circular No.1 of 2004 to the effect that the servants employed before 20th May 2004 are not required to have a minimum academic qualification of form four education. On the 7th August, 2018 the 3rd respondent wrote a letter the Permanent Secretary, President's Office Public Service Management and Good Governance requested for the return of the applicant in the salary payment system, the request never responded to date.

On the 3rd July 2019 the 3rd respondent charged the applicant to answer the allegation of insubordination by the failure to submit certificate of secondary education examination based on the Open Performance Review and Appraisal (OPRAS) forms filled in the year 2007/2008, 2008/2009 and personal information forms which the applicant admitted to fill improperly that she possessed secondary education qualifications from Kibasila school knowing she had no such qualification. Disciplinary proceedings were conducted and on 11th December, 2019 the decision of

termination by the 3rd respondent was communicated to the applicant hence unsuccessful appeals resulted to this application.

The application is supported by chamber summons, statement of the applicant in support of application, applicant's affidavit, counter affidavit and statement in reply by the respondents together with a reply to the respondent's counter affidavit.

On the date set for hearing 30th June 2023 the parties had services of Ms. Eliaicha Ndowo, counsel for the applicant and Francis Wisdom, Benedicto Fungo and Mr. Steven Noel State Attorney's for the respondents but in the absence of the applicant.

Submitting on the grounds of the application Ms. Eliaicha Ndowo stated that the application for leave for the applicant to file an application for judicial review resulted from the decision by the 1st respondent, delivered on 2nd December 2022 making reference to annexure AA-1. The gist of the application is in regard to the applicant's employment with standard 7 level in the year 1984. Clarifying further, she submitted that the applicant developed her carrier between 1990 – 2018 through various courses though there was no requirement for that. However, on 13th June 2018 she was required to submit the certificate of secondary education by the 3rd respondent knowing that she was not qualified for such qualification. She submitted that the applicant was given seven days to submit her certificate and replied on 19th June 2018 that she don't have such qualification referring

(AA-5). On 5th July 2018 the applicant was removed from the list of the government employee payroll as a public service and dismissed from her employment referred to letter dated 7th August 2018 by 3rd respondent (annexure AA-6). She added that notwithstanding the letter from the President's office sought the returned of the applicant to the payment list, to date the applicant is not in the payment list. One year later after the applicant termination the charge of insubordination to the employer was prepared against her on 30th July 2018 and the notice was served on 30th July 2019. The applicant's counsel submitted further that, the termination and removal of the applicant without serving her with a charge is contrary to the regulations 37 and 44 the Public Service Regulations, GN No. 168 of 2003 and Article 23 of the URT constitution which provides for the right for remuneration while the respondents were enjoying the applicant service. Establishing the conditions to qualify for the requested application for leave, she referred the decision the case of **Emma Bayo vs The Minister for Labour and Two Others**, Civil Appeal No. 79 of 2012 which referred cases provide prerequisite conditions in granting an application for leave. She demonstrated how the three prerequisite conditions were met by the applicant and requested the Court to find the application with merit and grant the leave sought for the applicant to file an application for judicial review.

Responding to the submission made by the applicant, Ms. Caroline Lyimo, State Attorney, started by adopting the respondent's counter affidavit and statement in reply to form part of the respondent's submission. She further stated that it is a trite law that before granting of the application for leave certain criteria must be fulfilled as laid down in the case of **Emma Bayo** (Supra). She submitted that it was not in dispute that the applicant has interest in matter and she is within time of six months. She submitted that the respondent's argument is that, the applicant has no arguable case sufficient to grant leave sought. Clarifying further that, the applicant was not terminated for not having form IV qualification but for the failure to submit certificate pertaining to her qualification to the employee that warrant an offence of insubordination. She based her argument on annexures OSG -02 collectively - copies of OPRAS forms and personal information forms filled by applicant that she possess secondary education qualification, OSG-3 - disciplinary proceedings dated 11th September, 2019 and notice thereof, AA5 - a letter dated 19th June 2018 requested the applicant to submit certificate for secondary education. She concluded that the application before this Court is without merit and be dismissed with costs made reference to the case of **Republic vs. Land Dispute Tribunal Central Division and Another, 2006** EALR.

In her rejoinder, Ms. Ndowo insisted on the grounds submitted in chief and prayed for the application be granted.

Determining this application, this Court should direct itself on the prerequisite conditions to test whether the application is qualified for the leave for reliefs sought. Going through the submissions and arguments made by the counsels represented the parties in support and against the application, the two pre conditions were not disputed save for the condition on whether there is an arguable case or prima facie case to justify the granting of leave for application for judicial review as strongly disputed by the counsel for the respondents.

Considering this condition, I have to warn myself that the purpose of the application of this nature is to filter and satisfy that, there is an arguable case to justify the grant for leave as it was laid down in the case of **Emma Bayo** (supra) at page 8 in the 2nd paragraphs where the Court of Appeal stated that,

"..We also respectfully agree with the counsel that the stage of leave serve important screening purpose where the Court satisfied itself that the application for leave has made out any arguable case to justify the filling of the main application..."

Analysing, the facts on this issue, starting with the chamber summons and affidavit in support of the application. The applicant under paragraph 10 established that her employment was terminated on 5th July 2018 and she was removed from the list of salary payment of the public servant for the offence of insubordination by the 3rd respondent without being charged

referring the decision of the 3rd respondent annexure AA-1. She also testified that the 3rd respondent on 7th August 2018 wrote a letter to the Permanent Secretary, President's Office public Services Management and Good Governance requested the return of the Applicant to salary payment list, the request never effected made reference to annexure AA-6. She further testified in paragraph 11 that on 3rd July, 2019 the 3rd respondent prepared a charge and notice was served on 30th July, 2019 to answer allegation of insubordination to the 3rd Respondent by failure to submit form four leaving certificate or certificate of secondary education examination the qualification which she was not employed with. In the same paragraph 11 of the affidavit the applicant revealed that in responding the charge, she admitted that the OPRAS forms and personal data forms were improperly filled as she have standard seven qualification which she was employed with. In paragraph 14 the applicant testified that after the removal from the list of government salary payment, the 3rd respondent continued to enjoy her services without pay from 5th July 2018 to 11th December 2019 when the decision of termination was communicated to the applicant. She claimed that the procedures and decisions subject to the application for judicial review as it was argued by her counsel in her submission that are contrary to the principle of natural justice as they are attaining procedure irregularities by contravening the regulations 34 and 37 of the Public Service Regulations of 2003 by GN No. 168 of 2003. Also, unreasonable decisions which do not

corresponding to the punishment granted for an offence of insubordination as the applicant was charged rather than the criminal liability if any for improperly filling of OPRAS forms. These facts were strongly argued by the respondents in their statement in reply as reflected in paragraphs 3, 4 and 6 that the decision by the 3rd respondent was not attained with any irregularities nor irrational as the applicant was properly served with the notice within 14 days to present her statement of defence made reference to annexure OSG1 and her termination was procured fairly as the applicant admitted that her personal information form and OPRAS reveal to possess secondary education qualifications while in actual sense she did not referring to annexure OSG2 despite of being aware that the requirement of qualifications of secondary certificate is not for the public servants employed beyond May 2004 like her employment which was in 1984 as it is reflected in paragraph 6 in her affidavit.

Being in mind that this stage is the first stage to the application for prerogative orders, without going deed to the issues to be dealt in the second stage. I have to direct myself on the discretion of this court either to grant the leave or not upon being satisfied that the three tests are passed for the requested leave to be granted. As it is reflected in the affidavit and submissions made by both parties as stated above. I agree with both counsel that, the two prerequisite conditions in respect of time limitation were met as the application was filed within the period of six

months and the applicant has interest over the subject matter as her employment was terminated.

However, scrutinizing the grounds to establish existence of arguable case to warrant the leave sought. I am of the view that the applicant has failed to establish a prima facie case to be determined in the second application for prerogative orders. This is said so based on the facts in the applicant's affidavit which on the face of facts, it is clearly indicated that there is either mixing the concepts of issues subject to judicial review to test the exercise of jurisdiction by the respondents or violation of the rules of natural justice, or the applicant has misdirected herself to the issues which can be addressed by other available remedies as it was suggested in paragraph C. III (4) of the statement of the applicant.

In that finding and considering the purpose of judicial review that, it is not a question of a mere procedure or a question of substantive justice but it is a question of want of jurisdiction over the disputed decision as it was in the case of **The Republic ex parte Shirima vs Kamati ya Ulinzi na Usalama, Wilaya ya Singida, The Area Commissioner and the Attorney General**, [1983] TLR 375 before Lugakingira, J. Where it was held that;

"... As far as I am of the aware of certiorari, as with prohibition may issue where an inferior tribunal has wrongly assumed jurisdiction or

exceeded jurisdiction in discharge of judicial function. It was not suggested, even remotely, that Area Commissioner or the Kamati ya Ulinzi na Usalama acted as such tribunals or that they did so without or in excess of jurisdiction...”

Relating the stand above to the application at hand, there is no such allegation established concerning jurisdiction of the respondent's so to establish a *prima facie* case to warrant reliefs sought. On that basis, it is the finding of this Court that in the absence of those facts, is sufficient to demonstrate that the application has no merit and is accordingly struck out with no orders as to costs.



Z.A. Maruma

Judge

Ruling delivered today 13th of July 2023 in the presence of Ms. Ndowo, the applicant's counsel and Ms. C. Lyimo, State Attorney for the respondent.



Z.A. Maruma

Judge

13/7/2023