IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CAUSE NO. 23 OF 2023

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION BY IDDI HARUNI, THE APPLICANT HEREIN

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

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

29/08/2023 & 12/09/2023

KAGOMBA, J

The applicant came before this court to challenge, by way of judicial review, the decision of the 1st respondent to transfer him from his previous employment with the 2nd respondent to the 3rd respondent. He prays for the following reliefs:

i. An order of *certiorari* to quash and remove from records the decision of the 1st respondent dated 25th March, 2022 vide her letter with Ref. No. CA.87/271/01/51 which transferred the applicant to the 3rd respondent without observing the law and procedure;

ii. An order of *mandamus* to compel and direct the 1st respondent to exercise her discretion in compliance with the law as well as to function within principles of rule of law and good governance;

iii. An order of prohibition to restrain the 1st respondent to interfere with the employment of the applicant with the 2nd respondent unless compliance to the relevant laws is ensured;

iv. To order the 1st respondent to reverse the transfer of the applicant from the current employment at the 3rd respondent's working station and direct him back to his former position at the 2nd respondent's working station without any loss of his remuneration as it was with the 2nd respondent until compliance to the law has been ensured before transfer of the applicant to any other working station within the public service of United Republic of Tanzania including to the 3rd respondent;

v. To order the 1st respondent to pay general damages suffered by the applicant as may be assessed by the court;

vi. Any order as this court deems fit to grant, and

vii. Costs of the application.

The applicant's application is preferred under the provision of section 17(2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, [Cap 310 R.E 2019] and rule 8(1) (a),(b), (2), (3), (4) and (5) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014 ("GN No. 324 of 2014"). It is accompanied with applicant's statement and a supporting affidavit sworn by the applicant himself.

The respondents opposed the application by filing a counter affidavit sworn by Aveline M. Ilahuka, Legal Officer of the 1st respondent, together with a joint statement. The respondents also filed a notice of preliminary objection raising therein the following two points of law: -

1. The application is unmaintainable for being time barred contrary to rule 8 of GN 324 of 2014.
2. The application is premature hence incompetent before this court contrary to section 32A of the Public Service Act, [Cap 298 R.E 2019].

When the preliminary objection was called on for hearing, Mr. Camilius Ruhinda, Principal State Attorney, appeared for the respondents whereas the applicant was represented by Mr. Isaac Tasinga, learned Advocate.

Submitting on the first limb of the objection, Mr. Ruhinda argued that the applicant was supposed to lodge his application within 14 days from when leave to file for judicial review was granted to him, as provided by rule 8 of GN 324 of 2014. He urged the court to dismiss the application for being time barred, citing the case of **Mohamed Suleiman Ghona vs Mahmoud Mwemus Chotikungu**, Civil Application No. 179/01 of 2020, to back up his contention.

On the second limb of the objection, Mr. Ruhinda submitted that by virtue of section 32A of the Public Service Act, [Cap 298 R.E 2019] ("Public Service Act"), the applicant, being a public servant, was supposed to exhaust all remedies available under the Public Service Act before knocking the doors of this court.

Mr. Ruhinda's argued that the Public Service Act has established a Public Service Commission under section 9 functions of which, as listed under section 10, includes hearing and determination of appeals from the decision of executives as is the case with the decision of the 1st respondent herein. In this connection, learned Attorney contends that the applicant was supposed to appeal to the Commission as per section 10(1)(d) of the Public Service Act.

He further submitted that the decision of the 1st respondent could as well be challenged through the Chief Secretary and the President of United Republic of Tanzania. He cited the provision of standing order D.1 of the Standing Orders for the Public Service, 2009 which empowers the Chief Secretary to determine terms and conditions of service for all public servants, who can also delegate such powers to Permanent Secretary. Based on these arguments, Mr. Ruhinda urged this court to strike out the application for being incompetent.

The learned Attorney also pressed for costs arguing that, despite of the matter being a labour dispute, the applicant has brought up several frivolous applications causing the respondents to incur costs which have to be recovered from the applicant.

In his reply, Mr. Tasinga found the first limb of the objection wanting in qualification to be termed as a preliminary objection on point of law as, according to him, it requires evidence. His main contention is that the application was filed timely but electronically, proof of which is within the record of the court.

Learned counsel contends that the application was admitted in the system on 24th May, 2023 when the court fees were also paid. It is his view that the application is not time-barred since the law under rule 21(1) of the Judicature and Application of Laws (Electronic Filing) Rules, 2018 clearly

states that a document shall be considered to have been filed on the date it has been submitted through the electronic filing system.

According to Mr. Tasinga, it wouldn't be right to reckon the time duration from 30th May, 2023 when the physical documents were filed since there was prior electronic filing. To support his contention, he cites the case of **Kaji Hamis Abdalla vs the Republic**, Misc. Criminal Application No. 27 of 2021, High Court, Musoma.

On the second limb of the objection, the counsel finds no flaws in the manner the application has been brought to this court, bearing in mind the nature of the dispute. He contends that since the letter which initiated this dispute was from the President's office where the final authority lies, taking the dispute to the Civil Service Commission would be against the rules of natural justice, particularly the rule against bias.

The learned counsel added that; if the applicant was to refer the dispute to the Commission, ultimately its appeal would go to the President from whose office the dispute arose. He finds no rationale for the decision made by President's office to be taken to subordinate authorities, and holds the view that under the circumstances, judicial review remains a preferable mode to challenge the 1st respondent's decision.

As regards the contention that the applicant could root his grievances to the Chief Secretary, learned counsel finds that doing so would offend rules

of natural justice. He argues that since the Chief Secretary delegates his duties to the Permanent Secretary, in strict legal sense the Permanent Secretary would be exercising Chief Secretary's duties on behalf of the President, thereby creating a viscous scenario.

On the other hand, while Mr. Tasinga is in agreement with Mr. Ruhinda that the applicant is a public servant, he takes a very strong exception to the suggestion that all disputes involving public servants must be routed through the Public Service Commission. He argues that the provisions of Public Service Act may not be applicable to the applicant who is from an independent institution with its own governing law. The disciplinary authority of the 2nd respondent is the board whose appeals are not covered in the Public Service Act.

On the applicability of the provision of section 25(1)(b) of the Public Service Act, learned counsel argues that the same does not include appeals by public servants arising from decisions of "boards" but "departments". He contends further that the word "department" as defined under the Public Service Regulation GN 168 of 2003 ends with identified entities within an organizational structure, hence the applicant's matter is excluded in terms of its institutional framework.

Learned counsel was not short of arguments to save his client from necessity of exhausting the remedies under the Public Service Act. He also

argued that the dispute at hand is not covered by the said Act because it does not arise from disciplinary action, but from a transfer. To cement this contention, he referred the court to regulation 60(3) of GN 168 of 2003 with an argument that all matters thereunder against which an appeal can be preferred are concerned with disciplinary actions, implying that discontent arising from transfer is not provided for. He therefore, reiterated his position that it was right for the applicant to lodge this application for judicial review.

He could not end his submission without taking a swipe at the legality of the Standing Order for the Public Service, item D1 as cited by Mr. Ruhinda. Mr. Tasinga disregards it for not forming part of the law, arguing that its promulgation by the Permanent Secretary- Establishment was done without any lawful authority. He expounds that section 35(1) of the Public Service Act empowers the Minister to make such regulations and not the Permanent Secretary. For that reason, he urges the court to disregard the submissions of his counterpart based on the said Standing Order.

With regard to costs, Mr. Tasinga urged this court to disregard the prayer for costs for lack of proof on the extent to which this application is frivolous as contended by Mr. Ruhinda.

On rejoinder, Mr. Ruhinda firmly reiterated his submission in chief while contending that the Permanent Secretary – Establishment is duly empowered under section 35(5) of the Public Service Act to promulgate the

Standing Orders for the Public Service. He rejoined that the attack made by the counsel for the applicant is misplaced.

Rejoining on the first limb of objection, Mr. Ruhinda was of the view that it was incumbent upon his counterpart to produce to the court a proof to substantiate his contention that the application was filed within the prescribed time of 14 days. He reiterated his prayer that this application be dismissed if the first point of objection is sustained or be struck out if the second point of objection is sustained.

Having considered the above rival submissions, this court has to determine the merit of each point of the preliminary objection raised by the respondents so as to decide on the prayers made to the court.

On the first point of preliminary objection, which impugns the application for being time-barred, the counsel for the applicant expressed his concern that the same doesn't qualify to be termed as preliminary objection on point of law because it requires evidence to prove it. He must have been considered the position of the law that a preliminary objection shall be on pure point of law without a need to adduce evidence as per **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696.** The sub-issue therefore is whether the first limb of preliminary objection on time bar is on a pure point of law.

To answer this contention, I find guidance in the holding of the Court of Appeal in **Ali Shabani and 48 Others V. Tanzania National Road Agency (TANROADS) and Another**, Civil Appeal No. 261 of 2020, CAT, Tanga, where it stated that;

> *"It is clear that an objection as it were on account of time bar is one of the preliminary objections which courts have held to be based on pure point of law whose determination does not require ascertainment of facts or evidence. At any rate, we hold the view that no preliminary objection will be taken from abstracts without reference to some facts plain on the pleadings which must be looked at without reference examination of any other evidence".*

The above cited position makes it clear that an objection on time bar, as is the case in the instant matter, is regarded to be a pure point of law. However, that position may not fully explain the circumstances of this instant matter where pleadings were filed electronically as per rule 8 of the of the Judicature and Application of Laws (Electronic Filing) Rules, 2018 G.N 148 of 2018 ("Electronic Filing Rules") on a date different from the date shown on physical copies served upon the respondent. Under such circumstances, reference to the court's electronic system may be unavoidable in order to ascertain the actual date the application was filed in court. This looks to me to be transitory legacy as the court migrates from manual operations to full automation.

To determine if the application is time barred, in this case, the court has to make reference to the electronic system of filing in relation to the law governing the electronic filing on one hand, and the law providing for time limitation on the other.

Starting with the time limitation, it is clear under the provision of rule 8(1)(b) of GN 324 of 2014 that the application for judicial review has to be made within 14 days. It states;

> *"8(1) Where a leave to apply for judicial review has been granted* ***the application shall be made-***
>
> *a) N/A*
>
> *b)* ***Within fourteen days from the day of the leave was granted****." [Emphasis added]*

Since in the instant case leave was granted on 15th May 2023, the period of fourteen days prescribed by law to file application expired on 29th May 2023. However, the physical copies of the application bear a stamp dated 30th May, 2023 for which the contention of time bar understandably arises. However, to appreciate the complete position of the law on this matter, the provision of rule 21(1) of the Electronic Filing Rules comes into play. It states as follows: -

> *"21-(1) A document shall be considered to have been filed if it is submitted through the electronic filing system before midnight, East African time, on the date it is*

submitted, unless a specific time is set by the court or it is rejected."

Going by this provision, on 24th May 2023 which is the date the applicant submitted this application via electronic filing system, as submitted by the learned advocate for the applicant, is the date of filing. It is paradoxical that while such a date required to be supported by proof of electronic filing, the counsel seeks excuse from the principle that a preliminary objection needs no proof. In view of the fact that an objection based on time bar fits the bill of a preliminary objection on pure point of law, and bearing the fact that the learned counsel was served with notice of the preliminary objection in advance, I agree with Mr. Ruhinda that the counsel for the applicant had a duty to assist the court with proof of electronic filing, him being an officer of the court, in the first place.

The duty to prove also arises from the fact that the learned counsel desired the court to rule that the application was filed in time. The law under section 110(1) of the Evidence Act, [Cap 6 R.E 2022] is clear that whoever desires the Court to decide in his favour on existence of a fact he assert to exist, he has to prove its existence. This means the applicant's counsel was supposed to prove his assertion that the application was filed timely via electronic filing system. He could have shown a printout of filing on the said

date. He opted for mere words of the mouth, risking a dismissal of his client's case.

However, for the interest of justice and because it is not an arguable fact that documents are filed in court electronically, I checked the physical documents filed by the applicant together with the Judiciary's Online Registration System (JSDS) to establish whether this application was electronically filed within time. The finding is that the applicant's documents were submitted in the system on 24th May, 2023 at 16:07:14 hrs while the physical documents were presented for filing on 30th May 2023. In terms of rule 21(1) of the Electronic Filing Rules, this application was filed on 24th May 2023, which is within the 14-days' time from the date leave was granted.

The filing of the documents cannot be detached from the provision of rule 3 and rule 5(1) of the Court Fees Rules, 2018 [G.N 247 of 2018] under which a document is considered filed in court when court fees are paid. The Electronic Filling Rules and the Court Fees Rules have to be read together for proper identification of filing date. I held this similar view in the case of **Msafiri Omary Sadala vs Salima Mohamed and Another**, Misc Civil Application No. 10 of 2022, High Court, Dodoma while citing the case of **Maliselino B. Mbipi vs Ostina Martine Hyera**, Misc. Civil Application No. 8 of 2022, High Court Songea where my learned brother Mlyambina,J laboured expertly to elaborate this legal position.

In my widened inquiry, the exchequer receipt also showed that the payment was effected on 26th May 2023, evidently within the 14-days' time, which were to expire on 29th May 2023 as explained above. Since the court fees were paid on 26th May, 2023 after the electronic filing was done on 24th May, 2023, the date of payment of court fees is considered to be the date of filing.

Based on the above onerous affirmance of facts, it's my finding that this application was filed within prescribed time. Therefore, the first point of objection is overruled.

I however find it opportune to remark that court registries have a duty to improve the marking of filing dates on filed documents. With improvisation of registry stamps, the on-line and physical filing dates, as well as dates of payment of court fees can be vividly shown on the face of the filed documents to avoid wastage of time and resources of the court and parties in determination of objections like this which eventually turns out to be inconsequential.

With regard to the second point of objection that the application is premature hence incompetent before this court contrary to section 32A of the Public Service Act, [Cap 298 R.E 2019], I have keenly examined the submissions made by both learned minds on the position of the law in this

aspect. The cited provision of the Act on which the second point of objection is beaconed provides as follows:

> *"32A. A public servant shall, prior to seeking remedies provided for in labour laws, exhaust all remedies as provided for under this Act".*

It is my considered view that determination of this point of objection may lead to a premature disposal of the main application itself, thereby prejudicing the parties. For this reason, and in the interest of justice, I reserve my determination of the point for now. The same shall be considered and determined jointly with the main application.

In final analysis, the first preliminary objection raised by the respondents is overruled, while the second point of objection is reserved for determination alongside the main application. Since there was cogent reason for the respondent to believe that the application is time barred while it is not, I find no reason to make any order as to costs.

Dated at **Dodoma** this 12th day of September, 2023.

THE HIGH COURT TANZANIA

ABDI S. KAGOMBA

JUDGE