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

05/10/2023 & 01/11/2023

KAGOMBA, J

The applicant herein has applied for judicial review against the decision of the 1st respondent who transferred him to the 3rd respondent thereby ending his employment with the 2nd respondent. Being aggrieved, he seeks the following specific 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 him 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 said transfer and direct that the applicant be reinstated to his former position at the 2nd respondent's working station without any loss of his remuneration until compliance to the law has been ensured before any other transfer is contemplated 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;

The applicant also prays for any order as this court deems fit to grant as well as the costs of the application.

The application, which is accompanied with applicant's statement and his own affidavit, is preferred under the provision of section 17(2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, 2019 [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.

The respondents filed a joint statement in reply as well as a joint counter affidavit sworn by Aveline M. Ilahuka, Legal Officer of the 1st respondent. They also raised two points of preliminary objection, the first of

which is already disposed of by the court while the second one will be considered and determined alongside other issues in this Ruling.

The pending point of preliminary objection is to the effect that the application is premature before the court, hence incompetent. The contention is that by virtue of section 32A of the Public Service Act, [Cap 298 R.E 2019] (Hereinafter the "Public Service Act"), the applicant, being a public servant, was supposed to exhaust all remedies available under the said Act before knocking the doors of this court. When submitting on the objection, the legal counsel for both sides, appeared to encroach on the very substance of this application. To avert possibility of prejudice, the court ordered hearing of this application to proceed, aiming at determining both the pending objection and issues arising from this application jointly in this Ruling.

On the date of hearing, Mr. Camilius Ruhinda, learned Principal State Attorney, appeared for the respondents accompanied by Mses. Adelida Masaua, Adeline Kweka and Amina Natepe, all learned State Attorneys. The applicant, who was also present, enjoyed the legal services of Mr. Isaac Tasinga, learned Advocate.

The factual setting, as narrated by Mr. Tasinga, is that in 2007 the applicant was employed by the 2nd respondent as a Tutorial Assistant. In 2011 he was granted permission to study a Master degree course at

University of Dar es Salaam. Towards the end of his course, he was promoted to the position of Assistant Lecturer only to be demoted in April, 2017 back to Tutorial Assistant. The demotion was said to be in compliance with a newly introduced Harmonized Scheme of Service for Academic Staff in Public Universities and Constituent Collages of December, 2014 (Hereinafter "the Harmonized Scheme"), which had set a condition that for one to be retained as a member of academic staff, he had to attain or have a degree with a GPA of not less than 4.0. Whether this condition was applicable to the applicant is one of the matters in dispute.

It's the contention of Mr. Tasinga that the said condition of a higher GPA was inapplicable to those under the "In-service" category such as the applicant, who were only required to have a Master degree. Nevertheless, in November, 2020 the applicant was recategorized from Academic Staff to Administrative cadre, a decision which he challenged, firstly at the Commission for Mediation and Arbitration (CMA) which couldn't determine the same for want of jurisdiction, and later to the High Court of Tanzania at Morogoro vide Labour Revision No. 15 of 2022.

While the said labour dispute was still *sub judice*, the applicant was served with a transfer letter dated 25th March, 2022 authored by the 1st respondent transferring him to the 3rd respondent to be a Senior ICT Officer

Grade I. Apart from considering himself unfit for this new office on account of lacking necessary ICT expertise, the applicant is unhappy with being paid a lower salary than what he used to earn in his previous employment. He also asserts that being a statistician, his cadre doesn't exist in his new employer's schemes of service, hence he is made to receive salary without producing. It is these facts which spurred the filing of this application.

According to Mr. Tasinga, the applicant's main areas of complaints include respondent's disregard to his status as an "in-service" employee to whom the GPA condition in the Harmonized scheme did not apply; disregard to the pending labour dispute; the apparent demotion effect on applicant's remuneration and rank; denial of hearing in determining that the applicant lacked criteria for being retained as a member of academic staff, and being transferred without his prior consent as required by law.

Mr. Tasinga cited the case of **Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation**, All ER [1947] 74 (sic) and **Sinai Mirumbe & Another vs. Muhere Chacha** [1990] TLR 54 on the test of unreasonableness of public-body decision. Based on the above grounds, learned counsel prayed the court to grant the application in its entirety.

Ms. Adelida Masaua, learned State Attorney, was the first to react in opposition. She submitted that the applicant was promoted before it was

later discovered that he didn't possess a Master degree. She categorically opposed the assertion that the applicant was eligible to be retained as a member of academic staff. According to her, for the applicant to be eligible for retention under the in-service category, he ought to possess the required entry qualification, including a GPA of 4 points or above.

She threw blame on the applicant for delaying his studies, adding that by the time the Harmonized Scheme came into operation in 2014, he was yet to complete his studies and couldn't submit his transcripts until in 2020, and did so without prior extension of time by his employer.

Learned Attorney is also unconvinced by applicant's claim of salary disadvantage. She submitted that those who were promoted and later demoted for lacking requisite qualifications, retained their personal salaries.

Regarding the assertion that the transfer to the 3rd respondent has unreasonably rendered the applicant idle, the response is that he was transferred based on his Bachelor degree in Computer Science which qualifies him to be employed as Senior ICT Officer, and his salary reflects that position.

On his side, Mr. Ruhinda replied on the claim of illegality of the transfer decision. He submitted that the Chief Secretary has legal authority to determine the mobility of public servants. He referred the court to the

provisions of the Public Services Act, particularly sections 4(3)(e) and 6A(3)(d); regulation 106(1)(2) & (6), and 108 of the Public Service Regulations, 2022 (GN No. 444 of 24/6/2022) (Hereinafter "the New Public Service Regulations") as well as the Standing Orders for the Public Service, 2009 (Hereinafter "the Standing Orders"). He was emphatic that under section 6A of the Public Service Act, a public servant may be transferred for purpose of improving the efficiency of the scheme.

To further avert any fear of illegality in the impugned transfer, Mr. Ruhinda elaborated that Order D1 of the Standing Orders allows delegation of powers from the Chief Secretary to the 1st Respondent, hence the decision of the 1st respondent was duly taken under the law.

Mr. Ruhinda contended that judicial review could lie against the impugned decision if the same was final and conclusive. In his views, the applicant could still engage either the 1st respondent to reconsider the decision or appeal to the Chief Secretary or the Public Service Commission (Hereinafter "PSC"), adding that the latter could give appropriate directives to the 1st respondent pursuant to the provision of section 10(1)(d) of the Public Service Act and regulation 73(2) of the New Public Service Regulations.

Learned Principle State Attorney also cited the provision of Article 35 of the Constitution of the United Republic of Tanzania, 1977 (as amended) for a contention that under that provision the President is empowered to set aside decisions of the 1st respondent herein. His main contention simply stated is that the applicant could only engage this court after the final decisions were made under the cited provisions of the law. He prayed for the application to be dismissed.

In his rejoinder, Mr. Tasinga, by and large, reiterated his submission in chief emphasizing that the gist of the matter is the transfer of his client. He added that when the impugned decision was made on 25th March, 2022, the New Public Service Regulation had not come into operation as it was published on 24th June,2022. It was GN No. 168 of 2003 which is applicable.

Having read the above submissions as well as the submissions made in respect of the pending point of the preliminary objection, and after considering what is contained in the parties' respective affidavit and counter affidavit, the following four issues pop up for determination:

One; whether the application is premature before the court for not exhausting available alternative remedies, hence incompetent.

Two; whether the decision of the 1st respondent to transfer the applicant to the 3rd respondent is tainted with illegality.

Three; whether the application meets the legal requirement for orders of *certiorari* and *mandamus* to issue, and;

Four; whether the applicant is entitled to the other reliefs sought in the chamber application.

The first issue primarily addresses the pending second limb of the preliminary objection as already intimated above. Contrasting arguments have been raised by the learned counsel for both sides. While Mr. Ruhinda is of the view that the applicant had a load of remedies available to exhaust before knocking the doors of this court, his counterpart's views are, firstly, that the remedies referred by Mr. Ruhinda relate to disciplinary proceedings under the Public Service Act and its Regulations, while this matter arises from transfer. Secondly, appealing to the PSC or Chief Secretary would be against the rules of natural justice, particularly the rule against bias, as both PSC and the Chief Secretary are under the President's Office, which is presumed to have made the impugned decision.

In determining the first issue, the general position of the law need be stated, and in doing so I shall not reinvent the wheel. In **Parin A.A Jaffar & Another vs. Abdulrasul Ahmed Jaffar and Two Others** [1996] T.L.R 110, this court stated:

> "*Where the law provides extra-judicial machinery alongside a judicial one for resolving a certain cause, the*

extra-judicial machinery should, in general, be exhausted before recourse is had to the judicial process".

The above position was also stated in an English case of **R. v. Inland Revenue Commissioner ex p. Preston** [1985] A.C 835, at 852 as per Lord Templeman, that "*Judicial review should not be granted where an alternative remedy is available*". Therefore, this is the general rule.

Be it stated here that when staying determination of the preliminary objection on exhaustion of alternative remedies, the court was mindful of some exceptions to the general rule, as stated in **Shah Vershi & Co. Ltd vs The Transport Licensing Board** [1971] E.A 289 that the Court may intervene even where a right of appeal existed if the alternative remedy was not speedy, effective and adequate. And, in the same line Prof. S.A de Smith stated at page 376 of his book "**Judicial Review of Administrative Action**", 3rd Edition, London, Stevens & Sons Limited, 1973 thus;

> "*The court ought not to refuse certiorari because of alternative remedies other than appeal unless it is clearly satisfied that those other remedies are more appropriate*".

Having allowed the hearing of this application to proceed, it has become apparent that the exception to the general rule in **Shah Vershi's** case (supra) does not apply in this case. The applicant has not been able to

show that he attempted to pursue the alternative remedy but found the process sluggish, ineffective or inadequate.

A review of the provisions of the Public Service Act reveals that there were, indeed, alternative remedies available to the applicant, and which, in my view, are more appropriate in the circumstances of this matter. I should state in the outset that while Mr. Ruhinda referred the court to the provision of Regulation 106(1), (2) and (6) of the New Public Service Regulations and section 10(1)(d) of the Public Service Act, for a contention that some alternative remedies existed thereunder, I take strong exception to the invocation of Regulation 106 and any other cited regulation in the New Public Service Regulations because, as correctly rejoined by Mr. Tasinga, these new regulations in GN NO. 444 of 2022 were yet to come into force when the transfer decision was made on 25th March, 2022. The New Public Service Regulations were published on 24th June, 2022 hence inapplicable to this case. Therefore, it is the Public Service Regulations, GN No. 186 of 2003 published on 20th June, 2003 which may apply in this matter.

However, as regard the remedy available under section 10(1)(d) of the Public Service Act, I fully agree with Mr. Ruhinda that this provision, which mentions one of the functions of the PSC as *"to receive and act on appeals*

from the decisions of other delegates and disciplinary authorities", is embedded with an alternative remedy, to wit; an appeal to PSC.

By using the conjunction "and" between the words "other delegates" and "disciplinary authorities", the cited provision distinguishes other delegates from disciplinary authorities. In essence, therefore, PSC can receive and act on matters not only arising from the disciplinary authorities but also non-disciplinary matters delt with by other delegates. Mr. Ruhinda was correct that in some instances the 1st respondent executes works delegated to him by the Chief Secretary, hence referred as a delegate too.

The collateral argument by Mr. Ruhinda, which this court also endorses, is that for the court to intervene in this matter, the impugned decision ought to be final and conclusive. Apparently, there was still room for the PSC, the Chief Secretary and even the President to intervene and possibly rescind the impugned decision. For example, section 4(3) (e) of the Public Service Act, recognizes that the Chief Secretary, and not the 1st respondent, is "*the highest authority in matters relating to labour mobility in the Service*". This means, the 1st respondent was not the final decision maker.

It is equally true that Article 35 (1) of the Constitution of the United Republic of Tanzania, as cited by Mr. Ruhinda places the President at the

helm of all executive functions, and such functions are executed by other executives on President's behalf. We hold the view that, unless otherwise provided by written law, delegation of government functions to other executives does not deprive the President of her powers to intervene in their decisions whenever necessary.

On the argument by Mr. Tasinga that the impugned decision is presumed to have been made by President's office hence the rules against bias would be infringed if the applicant was to appeal to PSC or Chief Secretary who are in the same office, I disagree. Firstly, much as there is an administrative set up known as "the President's Office", various executives thereunder have specific functions and authority under the law. It cannot be said that all executives in the President's office are homogenous in their functions, thinking and decisions. Secondly, the appeal mechanism is a creature of statute. For example, it is the provision of section 10(1) (d) of the Public Service Act, which opens up the appeal avenue to the PSC. Unless the applicant successfully challenges the constitutionality of, or other infringement caused by the said provision, the same shall remain valid and binding law.

Suffice it to say that the Parliament in its own wisdom and in exercise of its absolute legislative powers emphatically enacted under section 32A of the Public Service Act thus;

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

While it may be argued that this application is not purely based on labour laws, there should be no denying that this matter is labour-related, and the above provision indicates the intention of the legislature to have exhaustion of remedies under the said Act.

In final analysis, I agree with Mr. Ruhinda that this application is premature before the court and thus incompetent. The same is accordingly struck out for incompetence, with no order as to costs. Accordingly, the determination of the rest of the issues framed becomes inconsequential.

Dated at **Dodoma** this 1st day of November, 2023.

ABDI S. KAGOMBA

JUDGE