IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CIVIL CAUSE NO. 49 OF 2023

BETWEEN

EX-WDR ARCADO SIMON RUGOHE.....APPLICANT

AND

THE COMMISSIONER GENERAL OF PRISONS.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

10th & 23rd November, 2023

KAGOMBA, J

In this application, the applicant seeks leave of this court to ultimately apply for judicial review, specifically an order of *mandamus* to compel the 1st respondent to supply him with a copy of decision to terminate the applicant's employment with the Prisons.

The applicant further prays for costs and any other orders this court may deem fit and just to grant.

The application which is made under the provision of rule 5(1) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014 ("GN No. 324 of 2014"), together with unspecified section of the Judicature and Application of Laws Act, [Cap 358 R.E 2019], is accompanied by applicant's statement and an affidavit sworn by the applicant himself.

The respondents oppose the application. To that end, they have filed a counter affidavit sworn by Felix Joseph Mwampasi, Principal Officer of the 1st respondent, together with a statement in reply. They have also filed a notice of preliminary objection raising the following two points of law: -

1. *That the application is incompetent for being out of time contrary to rule 6 of GN 324 of 2014.*

2. *The application is premature for applicant's failure to exhaust available remedy.*

During hearing of the preliminary objection, Ms. Nkamba Nshuda, learned State Attorney, appeared for the respondents while the applicant was represented by Mr. Mohamed Menyanga, learned Advocate.

Submitting on the first point of the objection, Ms. Nshuda's contention is simple. She argues that while the applicant clearly states in paragraph 3

of his affidavit that his employment was terminated by the 1st respondent on 26th August, 1998, the application has been filed after a lapse of 25 years contrary to rule 6 of GN No. 324 of 2014 which sets a limit of 6 months for an aggrieved party to seek leave to file for judicial review. Hence, she contends that this suit is time barred.

On the second point of the objection, she submitted that, having been terminated by the 1st respondent as averred in the affidavit, nowhere the affidavit shows that the applicant appealed against that decision. She contends further that the applicant ought to be aware of the appeal procedure as the same is stipulated in a letter from the Ministry of Home Affairs which is attached his affidavit, in which reference is made to regulation 37(4) of the Prisons Service Regulations, 1997 which states the procedure for appealing against the decision of the 1st respondent. She added that the said procedures require an aggrieved party to appeal within seven (7) days.

According to Ms. Nshuda, despite the fact this court has jurisdiction to hear this matter, the applicant was nevertheless required to exhaust available internal remedy by, firstly, filing his appeal before coming to the court. She argues that applicant's failure to exhaust available remedy implies

that the applicant has waived his right to appeal, and renders this application premature. She prays for dismissal of this application, with costs.

Replying to the first point of the preliminary objection, Mr. Menyanga conceded that the applicant averred that he was terminated on 26th August, 1998. He argued, however, that the applicant unsuccessfully pursued internal measures as shown in paragraph 6 of his affidavit, before landing in court on 12th October, 2023. He added that it was on 3rd May, 2023 when the applicant was officially given a reply that he cannot be availed with copies of the decision.

It is Mr. Menyanga's contention that it is upon obtaining the said copies of the decision that this court would be in a position to determine whether the matter is time barred. He cited the decision of the Court of Appeal in **F.3329 CPL Buberwa Leonard Magayane & Another vs Ministry of Home Affairs & 2 Others**, Civil Appeal No. 119 of 2020 to support his contention. He also cited the decision of this court (Hon. Kisanya, J) in **Ex-CPL Robert Mugisha Kasenene vs. The Commissioner of Prisons & Another**, Miscellaneous Civil Cause No. 60 of 2022 saying that the court could not determine whether a matter before it was time barred for lack of proof of the decision.

Based on the above reasons, learned counsel found the first objection unsupported.

On the second limb of the objection, the counsel is of the view that the circumstances stated above made it difficult for applicant to exhaust internal remedies. He argued that without a copy of the decision, it would be uncertain as to which point in the decision the applicant would be challenging. He argued that all along the applicant had been making effort to get copy of the decision in vain, adding that the said effort lasted up to May, 2023 when he was given the official reply.

Based on the above submission, he concluded that both points of objection lacked limbs to stand on. He prayed the court to dismiss the same, but without costs.

On rejoinder, Ms. Nshuda, firstly, reiterated her submission in chief. She added that the applicant was not an addressee of what is referred to by his counsel as a formal reply, and the said letter was not a decision on an appeal.

On the second limb of the objection, Ms. Nshuda rejoined that it was trite law that a person is required to exhaust local remedies before approaching higher forum for redress. She added that even the cases cited by her counterpart explained clearly, the need to exhaust local remedies.

Having considered the above rival submissions, the court has to determine whether the preliminary objections raised by the respondents have merits.

On the first point of objection, which impugns the application for being time-barred, Ms. Nshuda's contention is that the applicant knowing that he was terminated from employment since 26th August, 1998 he should have filed this application within the period of six (6) month form the said date to be compliant with rule 6 of GN No. 324 of 2014. Filing this application after expiry of the six months period makes it time barred. Indeed, this is what the cited provisions of the law requires, when it states:

> *"6. The leave to apply for judicial review shall not be granted unless the application for leave is made within six months after the date of the proceedings, act or omission to which the application for leave relates".*

However, it is an established principle of the law that each case has to be decided on its own set of facts and obtaining circumstances. (See **Athumani Rashid vs. Republic** (Criminal Appeal 110 of 2012) [2012] TZCA 143 (25 June 2012)). Applying this principle, I do not find it difficult to realize that despite the applicant deposing in his affidavit that he was terminated on 26th August, 1998, and even with the existence of the principle of law that parties are bound by their own pleadings, the court cannot

determine, with certainty, not only the date the applicant was terminated from employment but also whether he was terminated at all, under the circumstances of this case.

Admittedly, an affidavit duly sworn possesses evidential value. However, it cannot be taken as a foolproof of each and every fact in dispute. In this situation where the gist of the applicant's application is to seek leave so as eventually to apply for an order of *mandamus* to compel 1st respondent to avail copies of the said decision (if any), and given the applicant's averment, which has not been adequately rebutted, that the applicant was not given the documentary decision, the court lacks a solid basis to rule that this application is time barred.

In connection to the above, I agree with the position taken by my learned colleague Hon. Kisanya, J in **Ex-CPL Robert Mugisha Kasenene vs. The Commissioner of Prisons & Another** (supra) where he refrained from holding, *inter alia*, that an application before him was time barred, the reason being non-appending of the copy of the decision. (See page 9 of the typed Ruling). Hence, the learned counsel for the applicant was right in contending that without the documentary decision being availed, the court cannot establish whether the application is time barred.

The above position is reinforced by the decision of the Court of Appeal in **F.3329 CPL Buberwa Leonard Magayane & Another vs Ministry of Home Affairs & 2 Others (supra)** where absence of the decision of Regional Police Commander for Mwanza, in a case involving termination of employment of the appellants therein was deliberated, in determining whether the said appellants had established a prima facie case to warrant the granting of leave to apply for judicial review. The Court had this to say:

> *"**In the absence of the decision of the RPC** from which stemmed an appeal before the 2nd respondent, before the High Court, Siyani, J, although the Attorney General had no objection to the grant of the application, **there was no sufficient material upon which it could be ascertained if the appellants had established a prima facie case to warrant the grant of leave to apply for prerogative orders**. We say so because, as correctly submitted by the learned counsel for the parties, the appellants' complaints on dismissal without being afforded the right to be heard, **cannot be ascertained without recourse to the RPC's decision and the related charges and proceedings**. in the circumstances, the proper course open to the appellants was to apply for leave to seek an order of mandamus to compel the IGP who is the final disciplinary authority of the appellants to avail them the RPC's decision, the charge and the proceedings". [Emphasis added].*

The facts in the above cited case might be somewhat different from the facts in the instant application. However, the Court of Appeal enunciates that the presence of key documents, in this case the impugned decision, is crucial to ascertaining some facts in dispute. By extension, for the court to ascertain whether an application to impugn a decision of public officer or authority is time barred, a documentary copy of such a decision needs to be availed. In absence of such decision, the court cannot be in a position to ascertain the contested fact.

For the foregoing reasons, I find no merit in the first ground of objection, and the same is overruled.

Regarding whether the applicant had exhausted available remedies or not, as contended in the second limb of the objection, I think clarity is needed the nature of the application filed in the court. It should be clearly understood that the application lying in court is for leave to enable the applicant file for judicial review so as to ultimately obtain an order of mandamus compelling the 1st respondent to supply him a copy of the documentary decision concerning his termination from employment. The ultimate aim of the application is to get copy of the impugned decision. The complaint here is not the dismissal from employment but 1st respondent's refusal or neglecting to avail copy of the decision to the applicant.

Since the application is for leave to for file judicial review, there are four criteria to be considered by the court, which are; whether the applicant has an interest in the matter, whether he has established a prima facie case or has to be an arguable case, whether the application has been filed timeously and whether the applicant exhausted other available remedies.

On exhaustion of local remedies, which is the gist of the second objection, the focus should be whether the applicant took measure to request for a copy of the documentary decision and whether, if denied the same, he appealed to authorities above the 1st respondent for that particular purpose of being provided with copy of the decision and not against the dismissal decision itself. In his affidavit, the applicant states as follows;

> *"5. That, very surprisingly, the 1st respondent un procedural an (sic) without complying with the statutory requirement dismissed from my employment* ***without supplying to me documentary decision or judgment****".*
>
> *6. That, being dissatisfied with the decision reached by the 1st respondent I took Internal Local measures of appealing to the 1st respondent and several follow up and correspondents (sic) but unsuccessfully, thereafter appealing to the Ministry of Home Affairs whereas on 3rd day of May 2023 reached its decision.*

Copies of correspondents (sic) and decision reached forming part of this Affidavit attached herewith and marked annexure A.2"

I have carefully perused the affidavit of the applicant and its attachments. A few shortfalls appear glaringly. **One**; the said appeal to the Ministry of Home Affairs is not attached to the affidavit. This is crucial to ascertain whether the applicant was complaining about the 1st respondent's refusal to supply him with a copy of the documentary decision or he was appealed against his dismissal from employment. **Two;** the said annexure A. 2 does not refer to a complaint about non-supply of copy of decision rather it talks about the applicant's dismissal. **Three**, annexure A.2 which appears to be government communication is not addressed to the applicant, as rightly rejoined by Ms. Nshuda. Hence, it cannot be said to be the final decision on the local remedy to warrant the applicant to knock the door of this court.

For these reasons, I find merit in the second objection, and the same is sustained. Accordingly, the application is struck out for being premature before the court. No order as to costs.

Dated at **Dodoma** this 23rd day of November, 2023.

ABDI S. KAGOMBA

JUDGE