IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CAUSE NO. 49 OF 2023

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW AS FOR ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION BY PERE MUGANDA THE APPLICANT HEREIN

AND

IN THE MATTER OF CHALLENGING THE DECISION OF THE PRESIDENT OF THE UNITED REPUBLIC OF TANZANIA IN HER APPELLATE AUTHORITY FOR CONFIRMING THE DECISION OF PUBLIC SERVICE COMMISSION WHICH CONFIRMED THE DECISION OF SIHA DISTRICT COUNCIL WHICH RESULTED IN DISMISSAL OF THE APPLICANT FROM EMPLOYMENT

BETWEEN

PERE MUGANDA.....APPLICANT

AND

THE CHIEF SECRETARY.....1ST RESPONDENT

SIHA DISTRICT COUNCIL.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

RULING

20th & 30th November 2023

KAGOMBA, J.

The applicant filed this application under section 17(2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, [Cap 310 R.E

2019] ("CAP 310") and rule 8(1)(a)(b), (2), (3), (4) & (5) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014 ("GN 324 of 2014") seeking for the following reliefs;

1. An order of *certiorari* to quash and remove from records the decision of the 1st respondent on behalf of the President which confirmed the decision of the Public Service Commission which upheld the decision of the 2nd Respondent.
2. An order of *mandamus* to compel the respondents to act according to the requirements of the laws, outstanding principles of natural justice and constitutional rights of the applicant.
3. Declaration that the applicant was supposed to retire according to the requirements of the law and not by way of dismissal.
4. An order that the applicant be given retirement entitlements as described in the affidavit in support of the application.
5. An order for payment to the applicant of general damages of Tsh. 50,000,000/= or as may be assessed by this court due to the hardships experienced by him for not being repatriated to his recruitment place.
6. Any order as this court may deem fit to grant.
7. Costs of this application.

However, the application has encountered a notice of preliminary objection from the respondents which is based on the following point of law;

The application is untenable and incompetent in law for contravening rule 8 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, GN No. 324 of 2014. (Henceforth "GN No. 324 of 2014").

During hearing Mr. Isaac Nassor Tasinga, learned advocate appeared for the applicant whereas Mr. Boaz Msoffe, learned State Attorney appeared for the respondents.

Submitting on the objection, the learned State Attorney contented that paragraph (a) of subsection (1) of section 8 of GN 324 of 2014 imposes an obligation to the applicant who has been granted leave, to file an application for prerogative orders that reflects the leave granted to him.

It is his contention that the applicant was supposed to file the same chamber summons, affidavit and statement which were used in the application for leave, i.e Misc. Civil Cause No. 40 of 2023. He argues that by filing a different chamber summons, affidavit and statement, the applicant was bringing in a new matter, not related to the leave, thereby contravening the cited provision of the law.

To expound his contention, he argued that while the leave was granted for filing an application for the orders of *certiorari*, *mandamus,* prohibition

and any other order, in the judicial review application the applicant prays for seven reliefs contrary to the leave granted to him.

It is his further contention that while the affidavit that supported leave application had 27 paragraphs, the affidavit supporting judicial review has 44 paragraphs, signifying that a new case has been filed contrary to the prescription of the leave.

The learned State Attorney cited **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd** [1969]1 EA 696 and **Moto Matiko Mabanga vs Ophir Energy Plc & Others**, Civil Appeal No. 119 of 2021, CAT, Dodoma, for a contention that the court may look at the pleadings and its attachments in determining the preliminary objection. He rested his case by praying the court to struck out the application.

Replying, Mr. Tasinga prayed the court to disregard the preliminary objection for non-specification of subsection (1)(a) of rule 8 of GN No. 324 of 2014 in the notice of the preliminary objection, bearing in mind that the cited rule 8 is composed of five (5) subsections.

Without prejudice to his prayer above, he submitted that his counterpart had misinterpreted the provision of rule 8(1)(a) of GN 324 of 2014, arguing that the application for leave is distinct from an application for

judicial review, hence it is not mandatory for the applicant to reproduce the affidavit and statement used during leave application.

As for variations in the number and types of prayers, learned Advocate conceded that some of them were not included in the application for the leave. However, he was quick to justify that variation by arguing that, what appears to be varied is covered by the prayer for "any other orders which the court may wish to grant", that was made during leave application. He also considered the added reliefs as incidental prayers made with a view to avoid the applicant coming to the court over and over again.

In winding up his reply, the learned advocate prayed the court to dismiss the preliminary objection and allow hearing of the main application on merit.

In his rejoinder, Mr. Msoffe countered his counterpart's claim of being taken by surprise. He contended that he specified, during his submission in chief, the said sub-rule (1) (a) of rule 8 as the provision that had been contravened. According to him, if Mr. Tasinga was taken by surprise as he alleges, he could have asked the court to grant him time enlargement to prepare his reply, instead of urging the court to disregard the point of objection raised.

As for the contention that the additional prayers which were not covered by leave application are incidental prayers, Mr. Msoffe does not buy that view, as he finds the added prayers unrelated to those made during leave application. He wound up his rejoinder by maintaining his submission in chief and pressed for the application to be struck out.

Having summarized submissions made by counsel for both sides, the main issue for determination is whether the preliminary objection raised by the respondents has merit.

Before embarking on determination of the main issue, I find it compelling to consider the complaint by Mr. Tasinga that the objection has taken him by surprise for not being specific as to which one of the five subrules under rule 8 of GN No. 324 of 2014 the application is alleged to have contravened. It is not disputed that in the notice of preliminary objection no subrule was mentioned. However, it is true as per records that when Mr. Msoffe was submitting, he became more specific by stating that the application had contravened rule 8(1)(a) of the said GN No. 324 of 2014. The bottom line here is whether the applicant has been prejudiced under such circumstances.

I have examined the said provision of rule 8 and found it to be relatively short, with no more than thirty-five short and unambiguous words.

Fortunately, this provision does not look to be new to Mr. Tasinga. He applied the very same provision when he was drawing the applicant's application which is made under the same rule 8(1) (a) of GN No. 324 of 2014, among other provisions of the law. I am therefore of the firm view that the learned advocate is conversant with rule 8(1) (a) of GN No. 324 of 2014 and was able to follow the submission on the preliminary objection raised.

Furthermore, as correctly argued by Mr. Msoffe, if Mr. Tasinga seriously needed more time for preparation before replying, he could have raised it for the court to consider. Applying the legal principle that each case has to be decided according to its own set of facts and obtaining circumstances, I hold that, under the circumstances of this application above stated, the applicant is not prejudiced. For this reason, the prayer by Mr. Tasinga not to entertain this application is disregarded.

Turning to the main issue, in determining whether the preliminary objection has merits, reproduction of the provision of rule 8(1)(a) of GN 324 of 2014 which is said to have been contravened is imperative. It reads;

> *"8 (1) where a leave to apply for judicial review has been granted, the application shall be made-*
>
> *a) by way of chamber summons* ***supported by an affidavit and the statement in respect of which leave was granted****;"*
>
> *[Emphasis added].*

With plain interpretation of the above provision of the law, I agree with the learned State Attorney that the applicant having been granted leave to file an application for judicial review, his application should have reflected the averments in respect of which the leave was granted and not otherwise. The words; "***in respect of which leave was granted***" should not be considered as unnecessary verbiage. Rather, these words do convey a significant legal guidance as to what should be brought up in court during judicial review. It is my opinion that the effect of the quoted words is to limit the substance of the complaint to what the court was told about during leave application. Hence, any new grievances and prayers not envisaged during the granting of leave, must be rejected in judicial review.

In emphasizing the above position, FORM B which is the format of the Chamber Summons for an application for judicial review carries the same context, as it provides that;

> *"LET THE PARTIES appear before Honorable .....sitting in chambers, on the .....day of..... 20 at 8:30 in the forenoon or sooner thereafter, when the applicant/counsel for the applicant may be heard on an application for the following orders:*
>
> *(a).....*
>
> *(b).....*
>
> *(c) .....*

This application is brought at the instance of .....
and is supported by the affidavit of .....and the statement in ***respect of which leave was granted****."*

[Emphasis added].

In the case of **M/S Regimanuel Gray (T) Ltd vs Mrs. Mwajabu Mrisho Kitundu and 99 Others**, Civil Appeal No. 152 of 2021, CAT, Dar es Salaam, the Court of Appeal demonstrated the necessity of giving a plain interpretation to any provision of the law. The Court of Appeal observed;

> *"It is elementary that the meaning of a statutory provision must, in the first instance, be sought in the language in which the statute is framed, and if that is plain the function of the courts is to enforce it according to its terms."*

The Oxford Online dictionary defines the phrase "in respect of" to mean "regarding; concerning; pertaining to; with reference to". In plain meaning, the phrase "***in respect of which leave was granted***" when used in the context of sub-rule (1) of the said rule 8 may be interpreted to mean that the affidavit and statement supporting the application for judicial review should pertain to what was stated in the Chamber summons, affidavit and statement made during leave application, and should not advance new matters.

In the case of **Emma Bayo vs The Minister for Labour and Youth Development and Others**, Civil Appeal No. 79 of 2012, CAT at Arusha, one of the essence of an application for leave to file for judicial review is said to be the screening of what goes into the court for judicial review. The Court of Appeal stated:

> "*...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****."*
>
> [Emphasis Added]

Undoubtedly, in screening the leave application to know whether an applicant has made out an arguable case, the court will also consider whether the case being so made out and its attendant prayers are fit matters for judicial review or not. Hence, my take from rule 8(1) (a) of GN No.324 of 2014 is that any matter, averment or prayer which bypasses the filtering process set thereunder contravenes the law and shall not be entertained during judicial review.

In the chamber summons filed during leave application, the applicant advanced only three substantive reliefs of *certiorari, mandamus* and prohibition, given that the prayer for "any other orders" which he also made, is discretionary. To the contrary, in the instant application there are five

substantive prayers, only two of which are in respect of the leave granted to the applicant. Under such circumstance, the application for judicial review was filed in contravention of rule 8(1) (a) of GN No. 324 of 2014.

From the foregoing deliberation, therefore, the contention by Mr. Tasinga that the other orders sought are incidental prayers is unsupported by law as the same were not presented for screening during leave application. The said incidental prayers cannot be sheltered in "the other orders which the court shall deem fit to grant", the reason being, such other orders are discretionary.

Before winding up, I would wish to state that the law does not oblige an applicant for leave to file for judicial review to use the same chamber summons, affidavit and statement in both leave and judicial review, as Mr. Msoffe appeared to propound. With respect to him, this is a misdirection. The applications for leave and judicial review cannot be a replica of each other. The same are made under different provisions of the law, carry different prayers, and each has its own format with FORM A, for leave application and FORM B is for judicial review application.

In my view, the law requires the applicant to build his case for judicial review based on the facts and grounds substantially the same as what was averred during leave application, without introducing newly unscreened substance. This is the import of rule 8(1)(a) of GN No. 324 of 2014 which

the applicant has failed to adhere to, and for which the preliminary objection raised picks its merits.

In the end, as I find merit in the preliminary objection raised by the respondents, the main issue is answered in the affirmative. Accordingly, the application is hereby struck out. No order as to costs.

Ordered accordingly.

Dated at **Dodoma** and delivered virtually this 30th day of November, 2023.

ABDI S. KAGOMBA

JUDGE