THE UNITED REPUBLIC OF TANZANIA

(JUDICIARY)

THE HIGH COURT

(MUSOMA SUB REGISTRY AT MUSOMA)

Misc. CIVIL APPLICATION No. 31 OF 2023

Ex. F.8347 MAGNUS MACHONA NKOMOLA ..... APPLICANT

Versus

1. THE INSPECTOR GENERAL OF POLICE
2 THE ATTORNEY GENERAL } **..... RESPONDENTS**

RULING

07.11.2023 & 01.12.2023
Mtulya, J.:

Ex. F.8347 Magnus Machona Nkomola (the applicant) was police officer ranked Constable duly employed by the **Tanzania Police Force** (the police) under the authority of the **Inspector General of Police** (the first respondent) and was stationed at **Musoma Central Police Station.** Sometimes in 2016, he was alleged for soliciting bribe, aiding a prisoner to escape and absenteeism from his duty station.

Following the allegations, he was arraigned and prosecuted in the **District Court of Musoma at Musoma** (the District Court) in **Criminal Case No. 124 of 2016** (the case) and accordingly acquitted. Subsequent to his acquittal, he was marshalled in disciplinary procedures of the police and finally was terminated from his duties. The decision had aggrieved the applicant hence

approached this court in different occasions and lodged **Civil Case No. 6 of 2020** (the case) and **Civil Case No. 16 of 2022** (the civil case). However, the dual cases were not resolved to the finality, as they had legal faults. The applicant is still vigilant for want of his complaint be heard at this court, but found himself out of statutory time to file judicial review as per requirement of the traditional procedure of protesting administrative bodies' decisions (see: **Inspector General of Police & Attorney General v. Ex. B. 8356 Sgnt. Sylvester Nyanda**, Civil Appeal No. 369 of 2018).

In order to comply with the law in lodging a judicial review, the applicant had brought in this court **Misc. Civil Application No. 31 of 2023** (the application) on 10th July 2023 praying this court to*: to extend time to allow the applicant to file an application for judicial review after the expiry of the requisite statutory time*. The application was scheduled for hearing on 30th August 2023.

However, the respondents protested hearing of the application for the reason displayed in their counter affidavit that: *this court lacks jurisdiction to determine the application as no leave has been granted by this court for judicial review*. This court then had ordered the parties to appear on 7th November 2023 to register relevant materials for and against the point of protest. On the indicated day, the applicant had appeared in person without any legal

representation whereas the respondent had called **Ms. Neema Mwaipyana** and **Mr. Anesius Kamugisha**, learned State Attorneys to argue the point. According to Ms. Neema the applicant was required by the law to file enlargement of time to file leave for judicial review as directed by Rule 5 (1) of the **Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014** (the Rules). In her opinion, Ms. Neema thinks that an application for judicial review cannot be registered before leave is sought and granted by this court.

In that case, according to her, the first step is to seek leave and second filing of the judicial review hence the applicant cannot pray for the second step whereas the status of the first step is unknown. Finally, Ms. Neema submitted that as per pleadings in the chamber summons and affidavit, this court has no jurisdiction to resolve the instant application.

Replying the protest of the respondents, the applicant submitted that it was just a typing error which had caused the slip of the word leave. According to the applicant, the chamber summons and affidavit may be amended to insert the word leave to accommodate the complaint brought by the respondents. In support of the move the applicant had cited the precedent of this court in **Mwajuma Mtunzi v. Janeth Nichorus**, Misc. Civil Application No.

197 of 2015 where the words *Main Registry* were substituted by the word *Dar Es Salaam* and that no harm was caused to the respondent. In rejoining her submission, Ms. Neema insisted that parties are bound by their pleadings and the applicant had prayed for enlargement of time to file judicial review and not enlargement of time to file leave for judicial review. According to her, this court cannot change the prayer registered by the applicant as that goes to the root of the matter and may prejudice the respondents.

Regarding the precedent of this court in **Mwajuma Mtunzi v. Janeth Nichorus** (supra), Ms. Neema stated that the complaint does not go to the root of the matter, whereas the instant application was brought prematurely and changes on the prayer would prejudice the respondents, and in any case, it was brought as an afterthought to circumvent the already registered point of protest.

I have had an opportunity to peruse the present application, the Rules, the precedent in **Mwajuma Mtunzi v. Janeth Nichorus** (supra), and the law regulating points of preliminary objection. The prayer in the instant application shows that: *this Honorable court be pleased to extend time to allow the applicant to file an application for judicial review after the expiry of the requisite statutory time.* Rule 5(1) of the Rules provides that: *an application for judicial review shall not be made unless a leave to file such application has*

been granted by the court in accordance to the Rules. From the two indicated statement in the prayer and enactment, it is obvious that application for leave seeking for judicial review starts before registration of the judicial review. In the instant application, record is silent on the status of leave. It is fortunate that the applicant is aware of the indicated Rule 5 (1) of the Rules and does not protest the enactment of the law. However, he thinks that an amendment to insert the word leave in his prayer may remedy the complaint of the respondents via decision of this court in **Mwajuma Mtunzi v. Janeth Nichorus** (supra).

I have read the ruling in **Mwajuma Mtunzi v. Janeth Nichorus** (supra) on a complaint registered to protest counter affidavit which displayed *Main Registry* of this court instead of *Dar Es Salaam District Registry* of this court. According to the applicant in the precedent, the respondent had filed her counter affidavit in wrong registry of *Main Registry* instead of *Dar Es Salaam District Registry* which breaches Rule 2 of the High Court Rules, GN. No. 96 of 2005 hence the court in *Main Registry* has no jurisdiction to entertain the counter affidavit. After hearing of the parties on the point of law, this court had resolved at page 4 of the Ruling that:

> *...court may direct or orders removal of the words* ***Main Registry*** *and in its place insert the word* ***Dar***

Es Salaam District Registry. *Such correction may even be done by ink pen and will not cost a coin to any of the parties.*

In its reasoning, this court had invited section 3A of the **Civil Procedure Code [Cap. 33 R.E. 2022]** (the Code) and stated that: *facilitation of just, expeditious and proportionate of civil disputes cannot be achieved, if courts will be tied up with simple procedural technicalities, like an error in citing the registry...such an error is curable under section 3A (2) in giving effect to the overriding objective.*

In the present application, Ms. Neema thinks that the court cannot alter prayers brought by the parties in cases and doing so will breach the established principle that parties are bound by their pleadings whereas the applicant thinks that even prayers can be amended in chamber summons to fit different scenarios in accordance to the precedent in **Mwajuma Mtunzi v. Janeth Nichorus** (supra).

I am aware of the enactment in section 3A (1) of the Code on overriding objective and role of this court enacted in section 3A (2) and 3B (1) of the Code. I am also conversant of the decision **Mwajuma Mtunzi v. Janeth Nichorus** (supra) and the support of the move in a bundle of precedents (see: **Yakobo Magoiga Gichele**

v. Peninah Yusuph, Civil Appeal No. 55 of 2017; **Gasper Peter v. Mtwara Urban Water Supply Authority (MTUWASA)**, Civil Appeal No. 35 of 2017; and **Chenge Magwega Chenge v. Specioza Machubi**, Land Appeal No. 13 of 2023).

However, the question before this court is whether this court can insert a word *leave* in the applicant's prayer to change the meaning of the prayer from seeking enlargement of time to file judicial review to enlargement of time to file leave for judicial review. In other words, whether a change of applicant's prayer moves into the merit of the matter hence prejudicial to the respondents or a mere technicality which can be avoided in favor of the substantive justice.

In my considered opinion, I think, the amendment or insertion of the word *leave* in the applicant's prayer will not only change the prayer itself in the chamber summons, but will also invite amendment of the contents in the affidavit. It will change the whole course of the application which will also invite amendment in the counter affidavit. In brief, the prayer requests to change the course or root of the application.

The practice is discouraged by this court and Court of Appeal (see: **R.S.A. Limited v. HansPaul Automechs Limited &**

Govinderajan Senthil Kumai, Civil Appeal No. 179 of 2016 and **Director of Public Prosecution v. Labda Jumaa Bakari,** Criminal Appeal No. 45 of 2021). Even if the applicant's prayer is granted, that may be interpreted as pre-empting the registered point.

The available practice in this jurisdiction shows that once a point of law has been registered, any efforts to pre-empt the same must be discouraged. There is in place a large bundle of precedent on the subject (see: **R.S.A. Limited v. HansPaul Automechs Limited & Govinderajan Senthil Kumai,** Civil Appeal No. 179 of 2016; **Meet Singh Bhachu v. Gurmit Singh Bhachu,** Civil Application No. 144/2 of 2018; **Shahida Abdul Hassanal Kassam v. Mahedi Mohamed Gulamali Kanji,** Civil Application No. 42 of 1999; **Tanzania Spring Industries & Autoparts Ltd v. The Attorney General & 2 Others,** Civil Appeal No. 89 of 1998; **Method Kimomogoro v. Registered Trustees of TANAPA,** Civil Application No. 1 of 2005; **Godfrey Nzowa v. Seleman Kova & Tanzania Building Agency,** Civil Appeal No. 3 of 2014; **Mary John Mitchel v. Sylvester Magembe Cheyo & Others,** Civil Application No. 161 of 2008; and **Yazidi Kassim t/a Yazidi Auto Electric Repairs v. The Attorney General,** Civil Application No. 552/04 of 2018).

This court appreciates the principle of overriding objective and has encouraged the move in many times. However, the directives of the Court of Appeal have been that the overriding objective principle cannot be applied blindly against the mandatory provisions of the procedural law which goes to the very foundation of the case (see: **District Executive Director, Kilwa District Council v. Bogeta Engineering Company Limited**, Civil Appeal No. 37 of 2017; **Njake Enterprises Limited v. Blue Rock Limited and Another**, Civil Appeal No. 69 of 2017; and **Mariam Samburo v. Masoud Mohamed Joshi**, Civil Appeal No. 106 of 2016).

In the present application, I decline to invite and apply the overriding objective as against the law or to cure the displayed defect. This court is inferior to the Court of Appeal. It cannot change the root of the matter to breach the Court of Appeal directives. It is unfortunate to the applicant's prayer and hereby moved to strike out the application without costs. I do so after considering the nature, background of the matter and status of the applicant. The applicant is a lay person busy searching for justice in this court and has been facing want of mandatory procedural laws.

It is so ordered.

F. H. Mtulya

Judge

01.12.2023

This Ruling was pronounced in Chambers under the Seal of this court in the presence of the applicant, **Ex. F.8347 Magnus Machona Nkomola** and in the presence of **Ms. Neema Mwaipyana** and **Mr. Anesius Kamugisha**, learned State Attorneys for the respondents.

F. H. Mtulya

Judge

01.12.2023