

IN THE HIGH THE UNITED REPUBLIC OF TANZANIA

BUKOBA SUB-REGISTRY

AT BUKOBA

MISC. CIVIL CAUSE NO.02 OF 2023

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF
CERTIORARI AND MANDAMUS**

AND

IN THE MATTER OF PUBLIC SERVICE ACT CAP 298 R.E 2019

AND

**IN THE MATTER OF THE LAW REFORM (FATAL ACCIDENTS AND
MISCELLANEOUS PROVISIONS) ACT, CAP 310 R.E 2002**

AND

**IN THE MATTER OF THE LAW REFORM (FATAL ACCIDENTS AND
MISCELLANEOUS PROVISIONS) JUDICIAL REVIEW PROCEDURE AND FEES)
RULES, G.N NO.324 OF 2014**

AND

**IN THE MATTER OF THE DECISION OF AN ORDER OF DEPARTURE ISSUED BY
IMMIGRATION DEPARTMENT ON 12TH DECEMBER 2019**

AND

IN THE MATTER OF VIOLATION OF PRINCIPLES OF NATURAL JUSTICE

BETWEEN

SADOCK PAUL BARWONGEZA.....APPLICANT

AND

MULEBA DISTRICT COUNCIL.....1ST RESPONDENT

THE ATTORNEY GENERAL2ND RESPONDENT

RULING

26/03/2024 & 28/03/2024
E. L. NGIGWANA, J.

The applicant herein above has filed the instant application praying for this court to grant leave to apply for prerogative orders of certiorari and mandamus against the decision which aggrieved him. However, as per chamber summons, it is not clear whether he was aggrieved by the decision of the President's office dated 25/04/2023 which quashed and set aside the decision of the Public Service Commission and upholding the 1st respondent's decision in which the applicant's employment was terminated or whether he was aggrieved by the order of departure issued by Immigration Department on 12/12/2019.

After being assigned to preside over this matter, I exercised my discretion under Rule 5 (6) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Judicial Review and Fees) Rules, 2014 by directing that the application be served to the respondents for hearing inter-parties.

Upon being served with a copy of the application, the respondents through Mr. Gerald Njoka, learned State Attorney from the office of the Solicitor General at Bukoba, filed a counter affidavit, reply to the statement of facts together with a notice of preliminary objection (PO) raising three points of objection as follows:-

- 1. That, this application is defective for being accompanied by an affidavit against which is the chamber summons.*
- 2. The matter is bad in law and misuse of court process as confusing for challenging the decision of the President and that of the Immigration Officer in the same application.*
- 3. The statement of the applicant is defective for having a defective verification.*

It is trite law that where an objection on point of law is raised, the same must be disposed of first before going into the merit of the matter. The same approach has been taken in this application and the Preliminary objections were argued orally.

At the hearing, the applicant was represented by Mr. Scarius Bukagile, learned advocate while the respondents were represented by Mr. Nestory Lutambi learned State Attorney from the office of the Solicitor General at Bukoba.

On the first limb of preliminary objection on point of law, the learned State Attorney argued that it was clearly stated in the chamber summons that this application is supported by the affidavit of **Virginia Rukanda Mafuko** but the affidavit supporting the same was the affidavit of **Sadock Paul Barwongeza** , meaning the chamber

summons and supporting affidavit are not compatible, therefore; Rule 5 (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Judicial Review and Fees) Rules, 2014 has been offended. According to Mr. Lutambi, the only available remedy is to strike out this application.

On the 2nd limb of preliminary objection, Mr. Lutambi submitted that it is not clear whether the applicant is seeking leave to apply for prerogative orders of certiorari and mandamus against the decision of the President's office or the decision of the Immigration Department. He added that the heading of the chamber summons reads "**In the matter of the decision of an order of departure issued by Immigration Department 12th December 2019**" while the prayer sought is **leave to apply for prerogative orders of certiorari and mandamus against the decision of the President' office dated 25/04/2023**. According to Mr. Lutambi, the heading of the application must tally with the substance of the application. He further submitted that, following the pointed out confusion, the matter deserves to be struck out.

On the third limb of preliminary objection, Mr. Lutambi submitted that the statement of facts is defective for having a defective verification. He added that the applicant who as per paragraph 1, is a peasant but

verified paragraphs 1, 2, 3, 4, 6 and 7 to the effect that all what he stated in the said paragraphs are true to best of his knowledge. Mr. Lutambi added that paragraphs 4 talks about illegality and Ultra-Vires of the decision while paragraph 5 talks about contravention of the principles of natural justice. According to Mr. Lutambi, it cannot be said that those fact are in the knowledge of the applicant who is a normal peasant. He added that the statement contravened Order VI rule 15 (2) and (3) of the Civil Procedure Code, [Cap.33 R.E 2019] and remedy is to expunge paragraphs 4 and 5.

In reply to the 1st and 2nd limbs of preliminary objections, Mr. Scarious submitted that reading the chamber application as whole, it is clear that the applicant is Sadock Paul Barwongeza, and the affidavit and the statement of facts supporting the application were sworn by the applicant Sadock Paul Bwarongeza. He acknowledged that the chamber summons read; "this application is brought at the instance of the Applicant **and is supported by the statement and affidavit of Virginia Rukunda Mafuko...**". According to him, the name of **Virginia Rukunda Mafuko**, was erroneously written therein. He went on submitting that since the error does not go to the root of the matter, it is curable.

He also added that, even the respondents' counter affidavit and notice of preliminary objection are not free from typographical errors, thus the principle that he who goes for equity must go with clean hands should not be forgotten. He went on submitting that the reliefs sought as per chamber summons are very clear therefore the alleged confusion does not exist.

Replying on the third limb of preliminary objection, Mr. Bukagile submitted that the applicant verified paragraphs 4 and 5 because the facts are in his personal knowledge therefore, the applicant's statement has not contravened Order VI rule 15 (2) and (3) of the Civil Procedure Code, [Cap.33 R.E 2019] .

The learned counsel ended up his submission urging this court to seek guidance from the case of **Yakobo Magoiga Gichere versus Penina Yusuph**, Civil Appeal No.55 of 2017 CAT at Mwanza, where the Court emphasized that courts should deal with cases justly, and to have regard to substantive justice as opposed to procedural technicalities, Article 107 A (2) (e) of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time, which requires the court to dispense justice without being tied up with technicalities which may obstruct dispensation of justice, and section 95 of the Civil Procedure Code,

[Cap.33 R.E 2019] which provides that; nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

In his rejoinder submission, Mr. Lutambi argued that Article 107 A (2) (e) of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time, Section 95 of the Civil Procedure Code, [Cap 33 R.E 2019] and the case of Yakobo Magoiga Kichere (Supra) cannot cure the pointed out anomalies in the matter at hand.

I have carefully considered the rival oral submissions made by both parties in line with the preliminary objections. As far as the first limb of preliminary objection is concerned, the issue for determination is whether the applicant's application contravened Rule 5 (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Judicial Review and Fees) Rules, 2014. The same provides that;

*"An application for leave **shall** be substantially in the **Form A** set out in the First Schedule to these Rules and shall be signed by or on behalf of the applicant"*

It was stated in the chamber summons that the application is supported by the affidavit of **Virginia Rukunda Mafuko**. However, the affidavit supporting the application was deposed by **Sadock Paul Bwarongeza**.

It is very unfortunate that Mr. Bukagile did not submit on whether the herein above rule was contravened or otherwise prayed to the court to allow the applicant to make amendments. He simply rushed to submit that the anomaly is curable. He ought to have first conceded that Rule 5 (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Judicial Review and Fees) Rules, 2014 was offended by the applicant.

It is mandatory that the application for leave must be in the prescribed form to wit; Form A. Since the application was not brought in the said **prescribed form**, I find the first limb of objection meritorious.

On the second limb of preliminary objection, I shake hands with Mr. Lutambi that reading the heading of the chamber summons, the applicant is praying for this court to grant leave to apply for prerogative orders of certiorari and mandamus against **the order of departure issued by the Immigration Department on 12 December, 2019**, at the same time, the orders sought were coached as follows

- (a) This Honourable court be pleased to grant leave to the Applicant to file an application for order

- (i) ***Certiorari*** to quash the decision of the President's office which upheld the decision of Muleba District Council at the applicant's absence the order which dismissed the applicant from employment
- (ii) ***Mandamus*** to compel the President's office to summon the applicant and hear the matter inter- parties so as to meet the interest of justice.
- (iii) Costs of the application be provided for.
- (b) Any other relief (s) the court may deem fit and just to grant.

Reading the applicants chamber summons and the statement of facts, it goes without saying that the application is confusing, as stated by the learned State Attorney.

I now turn to the third limb of preliminary objection. It is common ground that, from the provision of Order XIX Rule 3(1) of the Civil Procedure Code, [Cap.33 R.E 2019], an affidavit should be confined to facts which the deponent deposes of his own knowledge save for interlocutory applications on which statements of his belief may be admitted. This stance was stated in the case of **Uganda versus Commissioner of Prisons Ex parte, Matovu** (1966) E.A. 514 which was cited with approval by the Court of Appeal in **Chanha and Company Advocate versus Arunaben Chaggan**

Chhita Mistry and 2 Others, Civil Application No.25 of 2013 (unreported)

in which the then East African Court of Appeal held that:

"As a general rule of practice and procedure an affidavit for use in Court, being a substitute for oral evidence, should only contain statements of facts and the circumstances for which the witness deposes either of his own knowledge."

In the matter at hand, the statement supporting the application was verified by the applicant as follows;

*" I, **Sadock Paul Barwongeza** hereby verify that all what I have stated in paragraphs 1, 2, 3, 4, 5, 6 and 7 is true to the best of my knowledge"*

It was the argument of Mr. Lutambi that paragraphs 4 and 5 carry technical terms such as illegality, ultra- vires and violation of the principles of natural justice and since the applicant is a peasant, the said facts were not in his knowledge but in the knowledge of a lawyer.

Basically, Order XIX Rule 3(1) of the Civil Procedure Code, [Cap.33 R.E 2019 was compiled by the applicant. Being a person does not mean that the person is an illiterate. In my view, the alleged terms are not only known by lawyers, since they are normal English terms. It should be noted the objections should be raised on a pure point of law; it cannot

be raised if a fact has to be ascertained. Whether the applicant had the knowledge or not, is a fact which need to ascertained. With due respect, the learned State Attorney's submission in support of the 3rd limb of preliminary objection was misplaced.

Mr. Bukagile cited Article 107 A (2) (e) of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time, Section 95 of the Civil Procedure Code, [Cap 33 R.E 2019] and the case of Yakobo Magoiga Kichere (Supra) to show that the anomalies are curable. However, the Court of Appeal in the case of **Zuberi Mussa versus Shinyanga Town Council**, Civil Application No. 100 of 2004, Court of Appeal of Tanzania at Mwanza (unreported) made useful remarks on procedural laws. It observed that, even the provisions of Article 107A (2) (e) of the Constitution which prohibit courts from being overwhelmed by procedural technicalities did not mean that mandatory procedural rules should be disregarded. I agree also agree with Mr. Lutambi that section 95 of the CPC and the case Yakobo Magoiga Kichere (Supra) cannot rescue this application.

It is common understanding that the first stage to wit; leave stage to apply for prerogative remedies is instituted through a Chamber Summons Application supported by a Statement of grounds for seeking the relief

and a Verifying Affidavit. The purpose of this stage is to weed out frivolous and vexatious, hence leave stage is a procedural requirement and the court must be properly moved. See **Republic ex – parte Peter Shirima v. Kamati ya Ulinzi na Usalama, Wilaya ya Singida, the Area Commissioner and the Attorney General** [1983] TLR 375

In the matter at hand, the applicant had the duty to institute his application through a proper chamber summons supported by a clear Statement of grounds for seeking the relief and a Verifying Affidavit. Basically, the court's major function is to interpret the law and apply it to the particular case. As per the law, the application at hand cannot stand. All said and done, I hereby sustain the 1st and 2nd limbs of preliminary objections for being meritorious. Consequently, the application is struck out for being incompetent. I enter no as to costs. It is so ordered.

Dated at Bukoba this 28th day of March, 2024



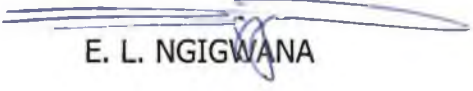
E. L. NGIGWANA

JUDGE

28/03/2024.

Ruling delivered this 28th day of March 2024 in the presence of the Applicant in person, Mr. Nestory Lutambi learned State Attorney for the Respondents, Hon. E.M. Kamaleki, Judge's Law Assistant and Mr. Respichius Renatus, B/C.




E. L. NGIGWANA

JUDGE

28/03/2024.