IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MAIN REGISTRY)

AT DODOMA

MISCELLANEOUS CIVIL CAUSE NO. 5361 OF 2024

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

BETWEEN

SULEIMAN R. BAKAR .....APPLICANT

VERSUS

THE CHIEF SECRETARY.....1ST RESPONDENT

THE GOVERNING BODY OF THE COLLEGE OF BUSINESS EDUCATION.....2ND RESPONDENT

THE ATTORNEY GENERAL..... 3RD RESPONDENT

RULING

17/05/2024 & 07/06/2024

MANYANDA, J.:

Suleiman R. Bakar, the Applicant, is moving this Court under sections 17(2) and 19(2), (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, [Cap. 310 R. E. 2019], Rule 5(1), (2)(a), (b), (c) and (d), and 7(1) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014 (G.N. No. 324 of 2014). He is moving it for leave to file a judicial review case against the Respondents namely, **Chief Secretary**, **Governing Body of the College of Business Education** and the

Attorney General, hereafter referred to as the 1st, 2nd and 3rd Respondents, respectively.

The application is made by way of a chamber summons supported by an affidavit which verify the facts stated in the statement of fact. The Respondents did not contest the application as they did not file any counter affidavit.

A short background below demonstrating a long journey the Applicant has gone in seeking for his rights as gleaned from the facts deponed in the affidavit is as follows: -

The Applicant was employed by the 2nd Respondent with effect from August, 2004 as an Assistant Lecturer, whereas, his employment was terminated after conclusion of disciplinary hearing process on 23/6/2017 following allegations of arriving 30 minutes late to invigilate examinations in Block E venue on 9/2/2017. He referred the dispute to the Commission for Mediation and Arbitration (CMA) on 29/6/2017, but the same was on 24/11/2017 struck out with leave to refile on grounds that he wrongly impleaded the 2nd Respondent as College for Business Education, instead of **Governing Body of the College of Business Education**.

He reinstituted the dispute on 4/12/2017 using a proper name, however, on 13/4/2018 was struck out again for want of jurisdiction

after the CMA sustaining an objection that it had no jurisdiction to entertain the dispute on reasons that the 2nd Respondent being a public institution, its employees are public servants hence, not subject to the CMA. He assailed the CMA ruling by way of revision to the High Court which on 29/9/2020 reversed it and referred the dispute back to the Commission to proceed with hearing.

However, amidst hearing, on 29/4/2022 the same dispute was dismissed by the CMA for want of jurisdiction, following the Court of Appeal of Tanzania delivering its considered judgement in **Tanzania Posts corporation versus Dominic Kilangi,** Civil Appeal No. 12 of 2022 dated 28/3/2022 to the effect that a public corporation/body corporate is a public institution hence her employees are public servants not subject to the CMA, hence, he was supposed to refer his dispute to the Public Service Commission.

As the Applicant was already out of the prescribed time to refer his appeal to the Public Service Commission, he on 20/6/2022 submitted to the Public Service Commission an application for extension of time, which in his opinion, the Commission in its decision dated 28/2/2023, failed to determine the application instead it blamed him for sending the dispute to the CMA, High Court, then to the Court of Appeal, contrary to what he had applied for.

He was aggrieved by the Commission's decision hence; he drafted his appeal to the 1st Respondent on 19/07/2023 which, according to him, he submitted it and was received on 21/7/2023. However, the 1st Respondent alleged, through her later dated 12/9/2023, to have received his appeal on 23/08/2023, therefore out of 45 days prescribed time being 33 days late, thereby dismissing his appeal.

He is intending to file judicial review case for orders of certiorari and mandamus challenge the decision of the 1st Respondent.

Hearing, with leave of this Court, was conducted by way of written submissions, while the submissions for the Applicant were drawn and filed by Ms. Stella Simkoko, learned Advocate. The Respondents basing on points of law, filed submissions in service of Mr. Erigh Rumisha, State Attorney.

In judicial review cases, it is a mandatory legal requirement for the applicant to obtain leave of this Court prior to filing of application for prerogative orders. This is per the provisions 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 which reads as follows: -

"5(1) An application for judicial review shall not be made unless a leave to file such application has been granted by the court in accordance with these Rules."

After reading the submissions by the counsel for both sides, I agree with Ms. Simkoko on what is to be done by this Court in application for leave. That, it is as explained in the famous case of **Emma Bayo vs. the Minister for Labour and Youths Development and 2 Others,** Civil Appeal No. 79 of 2012 where the Court of Appeal of Tanzania stated as follows: -

"We also respectfully agree with both Mr. Materu and Mr. Chavula that 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.*** *At the stage of leave the High Court is also required to consider* ***whether the applicant is within the six months limitation period*** *within which to seek a judicial review of the decision of a tribunal subordinate to the High Court. At the leave stage is where the Applicant shows that* ***he or she has sufficient interest*** *to be allowed to bring the main application... ."* (emphasis added)

I further agree with her on additional ground added by an English case of **R.V.T.R.C Exp National Federation of Self Employed and Small Business Ltd** (1982) A.C. 617 cited with approval by this Court, Hon. Mkapa, J. in the case in **Cheavo Juma Mshana versus Board of Trustee of Tanzania National Parks and Two Others,** Misc. Civil Cause No. 7 of 2020, that the Applicant has to show that there is no alternative remedy available. This condition was also well discussed by this Court in the case of **Halima James Mdee and 18 Others vs The Registered Trustees of Chama cha Demokrasia na Maendeleo (CHADEMA) and 2 Others,** Misc. Cause No. 27 of 2022, the Court held that grant of leave may be refused "if there is some other remedy, judicial or non 4 judicial, which is available to the applicant for review, and which is more appropriate'

Equally, I also agree with Mr. Erigh Rumisha that the "no alternative remedy principle" is not without exceptions, this Court may disregard the fact that an alternative remedy has existed where: -

1) it is not effective, per **Pavisa Enterprises vs. The Minister for Labour Youth Developments & Sports and Attorney General**, Misc. Civil Cause No. 65 of 2003;
2) there are allegations of an infringement of fundamental rights per **Tropex Ltd and another vs Commissioner of Income Tax**

and others [1996] TLR 390; in which the provisions of section 34 of the then Income Tax Act, were held inconvenient, unbeneficial and ineffectual as the prerogative remedies for not providing right to appeal compared to the provisions of sections 91 and 93 of the same Act;

3) the impugned order has been made in violation of the principles of natural justice per **Leah C Warioba Vs Attorney-General and another,** Civil Cause 93 of 1999, High Court of Tanzania at Dar Es Salaam (2000) (unreported); or

4) there is a complete lack of jurisdiction in any officer or authority to take the impugned action. **Leah C. Warioba Vs Attorney-General and another (supra)**.

Furthermore, the principle of 'good faith' that it is important for the applicant to ensure that the court is not misled by making a 'full and frank' discloser of all material particulars in dispute per **Josiah Balthazar Baisi and 138 others vs Attorney-General and others** [1998] TLR 331.

I also, agree with the argument by Ms. Simkoko and per the case of **Pavisa Enterprises vs. The Minister for Labour Youth Developments & Sports and Attorney General**, Misc. Civil Cause No. 65 of 2003 that these criteria have to be established cumulatively.

A question that follows is whether this application meets all the conditions listed above. The counsel for the Applicant answers this question in affirmative while the State Attorney for the Respondents basing on legal arguments, answers it in negative.

Starting with the first condition whether there is an arguable case to justify the filing of the main application. It was submitted by Ms. Simkoko for the Applicant that the Applicant had submitted his appeal to the President against the decision of the Public Service Commission on 21/7/2023, through his despatch book, which was signed on 21/7/2023 by the receiving officer, but the Chief Secretary alleged that his appeal was time barred after been received on 23/8/2023. Therefore, the decision which the Applicant is aggrieved with is the one given on 12/9/2023 that the appeal to the President was time barred but which he contends was received on 21/7/2023 as stated at paragraph 16 of the Supplementary affidavit.

The State Attorney argued that the question of whether the Applicant's appeal before the 1st Respondent was time barred or not is a factual finding and it is not a matter to be subjected to judicial review. That, this Court is not required to review evidence submitted to the public body whose decision is subject to inquiry, in this matter, the 1st Respondent and reach a different opinion. It was his view that is not the

arguable cases to be subjected for Judicial review to warrant leave sought.

I am aware with the principle of law on yard sticks guiding this Court in its discretion in granting leave to file judicial review. I stated in the case of **Bartazary Bosco Mahai vs. Tanganyika Law Society and Another,** Miscellaneous Civil Cause No. 27673 of 2023 [2024] TZHC 1348 (29 March 2024) that in applications for leave, this Court is limited from delving into the nitty gritty of the contentious issues but just to find out if they exist.

In the case cited by both counsel for the parties, the case of **Emma Bayo (supra)** the Court of Appeal of Tanzania stated as follows: -

> *"At the stage of leave, the trial judge should not have gone into the question whether the Minister violated the principles of natural justice for the purposes of quashing his decision under the prerogative orders of the High Court."*

Also, in the case of **Latan'gamwaki Ndwati and 7 Others vs. the Attorney General,** Misc. Civil Application No. 178 of 2022, this Court, Hon. Kamuzora, J. at page 17, quoted with approval what was

stated in a Ugandan case of **Kikonda Butema Farms Ltd vs. The Inspector General of Police**, Civil Appeal No. 35 of 2002, as follows: -

> *"The trial judge is enjoined to look at the statement of facts, the accompanying affidavit and any annexure that might be attached to the application before granting leave. It is not necessary at that stage to consider whether the Applicant would succeed or not. The Applicant has to present such facts that would satisfy [the] court that [a] prima facie case exists for leave to be granted."*

In this matter, from the argument by the parties, the controversy is centered on the date of receipt of the Applicant's appeal by the 1st Respondent. The State Attorney says that is a matter of evidence not subject to judicial review.

Guidance on powers of this Court in judicial review were conspicuously spelt out by this Court in the famous case of **Sanai Murumbe vs Muhere Chacha** [1990] TLR 54 whereby it laid down guiding principles upon which order of certiorari can be issued namely: -

i. Taking into account matters which it ought not to have taken into account;
ii. Not taking into account matters which it ought to have taken into account;
iii. Lack or excess of jurisdiction;

iv. Conclusion arrived at, is so unreasonable that no reasonable authority could ever come to it;

v. Rules of natural justice have been violated; and

vi. Illegality of procedure or decision.

It follows therefore that this Court is endowed with a wide range of powers in order for it to correct the otherwise arbitrary or glary illegal or impropriety decisions by public bodies. In this matter, whether the 1st Respondent took into consideration matters it ought not to take and vice versa, whether the conclusion arrived at was unreasonable or otherwise or that it was illegal decision, all are matters of this Court to decide, but not in this stage of leave; it is on the stage of judicial review.

Based on this reason, I answer the question whether the Applicant has an arguable issue in affirmative.

The State Attorney for the Respondents added that much as the application was tabled out of time, the Applicant had a remedy for applying extension of time by providing the reasonable reasons for extension of time. I failed to understand where this argument comes from. I say so because there is neither law cited nor verified facts. Moreover, as explained above, these are matters of judicial review.

The second condition is w*hether the application has been brought within the limitation period of six months*. It was argued for the

Applicant that the application has been brought within the statutory time limit of six months because the 1st Respondent's decision that the appeal was time barred was communicated to the Applicant in January, 2024 and this application filed on 11/3/2024. The State Attorney argued that in absence of proof that the Applicant received the impugned decision on January, 2024, this Application is time barred being filed out of time because there is no proof of receiving the decision demonstrated in the Affidavit but there is mere submission from the bar by the Applicant's counsel.

In her rejoinder, the counsel for the Applicant clarified that whether reckoning the time from date of the impugned decision or from receipt of the said decision, the application is within time.

In my view, this part of controversy is a matter of mathematical calculus. Reckoning of time per section 19(2) of the Law of Limitation Act, [Cap 89 R. E. 2019] excludes the day on which the decision or order complained of in appeal time limit. It reads: -

> *"19(2)* ***In computing the period of limitation prescribed for an appeal,*** *an application for leave to appeal, or an application for review of judgment,* ***the day on which the judgment complained of was delivered".***

Although the word used in the provision of law is "judgement" in my view, the word "judgement" for the purposes of appeals can be extended to include "decision" and "order". The reason is that an appeal can emanate from an order or decision as it is in this matter.

Now, if the days are counted excluding 12th day of September, 2023, a day on which the 1st Respondent delivered the impugned decision, there are 18 days in September, 2023, followed by 31 days of October, 30 days in November and 31 days of December, 2023. This makes 110 days for 2023. Then, there are 31 for January, 2024, add 29 days of February and, since this application was filed on 11/03/2024, add 10 days of March, 2024 makes a total of 70 days for 2024. In total there are 110 plus 70 days, thus 180 days. The law under Rule 6 puts a limit of six (6) months within which to make an application for leave to apply for judicial review. It reads as follows: -

> *"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."*

The six months have a total of 180 days whereas the words "within six months", makes the 180th day inclusive. Therefore, with due respect to the State Attorney, I agree with the counsel for the Applicant that this

application was filed on the last day of the time limit, well within the prescribed time.

The next condition is *whether the Applicant has demonstrated that there is no alternative remedy available*. Ms. Simkoko for the Applicant has submitted that the impugned decision is final according to section 25(1)(c) of the Public Service Act, [Cap 298 R. E. 2019] the decision of the President is final. On the other hand, Mr. Erigh Rumisha submitted that the Applicant had alternative remedy by applying extension of time before the 1st Respondent opportunity which he failed to utilize.

I have read the provisions of 25(1)(c) of the Public Service Act, the same is very conspicuous clear that the decision of the President in referral disciplinary matters related to public servants from the Office of the Chief Secretary, in case of presidential appointees or Public Service Commission in respect of the other public servants is final. It provides as follows: -

> *"25(1) Where: -*
> *(a) the Chief Secretary exercises disciplinary authority in respect of a public servant who is an appointee of the President by reducing the rank other than reversion from the rank to which the public servant has been promoted or appointed on trial, or reduces the salary or dismisses that public servant, that public servant may appeal to the*

President against the decision of the disciplinary authority and the President shall consider the appeal and may confirm, vary or rescind the decision of that disciplinary authority;

(b) a Permanent Secretary, Head of an Independent Department, Regional Administrative Secretary or a local government authority exercises disciplinary authority as stipulated under section 6 by reducing the rank of a public servant other than reversion from a rank to which the public servant had been promoted or appointed on trial, or reduces the salary or dismisses the public servant, that public servant may appeal to the Commission against the decision of the disciplinary authority and the Commission may confirm, vary or rescind the decision of that disciplinary authority;

(c) a public servant or the disciplinary authority is aggrieved with the decision in (a) and (b) that public servant or disciplinary authority shall appeal to the President, whose decision shall be final;

(d) the President or the Commission varies or rescinds any decision of dismissing any public servant from the public service and substitutes any other decision of dismissing that public servant, the variation or rescission shall have effect from the date of the original decision and the public servant shall unless sooner having ceased to be a public servant for any other cause, be deemed to have

remained a public servant notwithstanding the original decision. (emphasis added)

As it can seen from the provision, the way is couched using the word "shall", which connotes mandatory, with due respect to Mr. Erigh Rumisha, I agree with Ms. Simkoko that the impugned decision is final, there is no alternative remedy, else the provision would have said so.

This takes me to the next condition *whether the Applicant acted with faith.* It was argued by Mr. Erigh Rumisha that there is concealment of facts concerning reception of a dispatch book alleged used by the Applicant to submit his appeal to the 1st Respondent as to whether it was received. This issue is based on affidavit sworn by the Applicant which is controverted by the Respondents who chose not to file a counter affidavit through which they could have revealed the alleged concealed facts, if at all there are concealed facts. Absence of a counter affidavit renders the submissions bare assertions from the bar on which courts of law do not act upon. A relevant case on point here is that of **Rosemary Stella Chambe Jairo vs. David Kitundu Jairo,** Civil Reference No. 06 of 2018, [2021] TZCA 442 (2 September 2021) at page 9 where the Court of Appeal of Tanzania stated as follows: -

"Now, an affidavit in reply being a substitute of oral evidence ought to be sworn if a part intends to counter any fact deponed in an affidavit in support

unless the point is legal, then even without an affidavit in reply, that point can be addressed. In the present situation, respondent's submissions were in response to what was deponed in the affidavit sworn by Ms. Rwechungura elucidating what transpired, but without any affidavit in reply to that effect. ***The respondent's submission under the circumstances was akin to the testimony from the bar, practice abhorred and discouraged by the Court,*** *as illustrated in the two cases cited above. We can say without any doubt that all the facts deponed were not disputed as there was nothing countered."* (emphasis added)

In the upshot, for reasons stated above, I find this application has passed the conditions precedent to grant of leave. Consequently, I do hereby grant leave to the Applicant to file the application for prerogative orders of certiorari and mandamus as prayed within the prescribed period by the law. Order accordingly.

Dated at Dodoma this 07th day of June, 2024.

HIGH COURT OF TANZANIA

F. K. MANYANDA

JUDGE

Delivered at Dodoma this 07th day of June, 2024 in the presence of the parties via virtual court. Right of Appeal explained to the parties.

F. K. MANYANDA

JUDGE