IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MAIN REGISTRY)

AT DODOMA

MISCELLANEOUS CIVIL CAUSE NO. 7529 OF 2024

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

AND

THE MATTER OF THE LAW REFORM (FATAL ACCIDENTS MISCELLANEOUS PROVISION) ACT CAP. 310 R. E. 2019

AND

IN THE MATTER OF THE LAW REFORM (FATAL ACCIDENTS MISCELLANEOUS PROVISION) (JUDICIAL REVIEW AND FEES) RULES, GN. NO 324 OF 2014

AND

IN THE MATTER OF AN APPLICATION TO CHALLENGE THE DECISION OF THE JUDICIAL SERVICE COMMISSION DATED 07/12/2023 PURPORTING TO REMOVE THE APPLICANTS HEREIN FROM SERVICE IN THE PUBLIC INTEREST

AND

ITS REFUSAL TO PAY TERMINAL BENEFITS AND SALARY ARREARS FOR BEING IRRATIONAL, ILLEGAL AND MADE WITHOUT OBSERVANCE OF DUE PROCESS.

BETWEEN

BAGENI OKEYA ELIJAH..... 1ST APPLICANT

THOMAS WA YOGA OCHUODHO..... 2ND APPLICANT

NYASIGE KAJANJA NYAMWAGA ..... 3RD APPLICANT

AND

THE JUDICIAL SERVICE COMMISSION.....1ST RESPONDENT

THE CHIEF COURT ADMINISTRATOR..... 2ND RESPONDENT

THE ATTORNEY GENERAL..... 3RD RESPONDENT

RULING

MANYANDA, J.:

Bageni Okeya Elijah, Thomas Wayoga Ochuodho and Nyasige Kajanja Nyamwaga, hereafter referred to as "the 1st, 2nd and 3rd Applicant" respectively, or in their collective status simply as "the Applicants" have filed in this Court an application under Sections 18(1) and 19(3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, [Cap. 310 R. E. 2019] and Rules 5(1) and (2)(a), (b), (c) and (d), and (6), of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014, GN No. 324 of 2014.

The application is brought by way of a Chamber Summons accompanied with an affidavit jointly sworn by the Applicants and statement of facts which contain the reliefs sought as listed in the Chamber Summons. The Chamber Summons bears, the following prayers: -

a) *That the honourable Court be pleased to grant leave to the applicants herein to file an application for judicial review praying for certiorari to call for, quash and set aside the decision of the 1st respondent dated 07/12/2023 removing the applicants from*

service purportedly in the public interest for being irrational, illegal and tainted with procedural impropriety for failure to follow the law.

b) *That the honourable Court be pleased to grant leave to the applicants herein to file an application for judicial review praying for mandamus to compel the 1st respondent to pay the applicants all terminal benefits including but not limited to salary arrears it owed the applicants prior to the purported removal dating back from 18/01/2018 to 07/12/2023, repatriation costs and subsistence allowance.*

c) *That the Honourable Court be pleased to grant leave to the applicants herein to file an application for judicial review praying for mandamus to compel the 1st respondent to reinstate the applicants to their positions.*

d) *Costs of the application be borne by the respondents.*

e) *Any other relief(s) that this Court may deem fit, just and equitable.*

It is opposed by the Respondents namely, the Judicial Service Commission, the Chief Court Administrator and the Attorney General, hereafter referred to as the 1st, 2nd and 3rd Respondent, respectively, or in their collective status simply as "the Respondents" who filed a joint

counter affidavit affirmed by one Alesia Mbuya, the Deputy Secretary, of the First Respondent and a reply statement of facts.

Briefly, let me state the background of this matter as gleaned from the affidavittal pleadings, albeit in a nut shell. That, the applicants were employees of the 1st Respondent as judicial officers in posts of magistrate and served as such in various placed in Tanzania. In the course of their employment some criminal allegations concerning corrupt conducts were levelled against them which culminated into criminal proceedings being instituted in courts of law. During pendency of the said criminal proceedings, the Applicants were interdicted and relieved of duties.

On divers dates between 2012 and 2016, the criminal proceedings against the Applicants were terminated in their favour. Albeit, interdictions remained unuplifted until on 19th January 2018 when the Applicants were terminated from employment on public interests. It happened that between 2016 and 2023, during pendency of the allegations against the Applicants some advice was given to the 1st Respondent's employee about integrity and non-tolerance to corruption; a warning was given that dismissal from employment would ensue regardless of acquittal from criminal charges in courts.

The decision of terminating their employment by the 1st Respondent bemused the Applicants who filed in this Court Miscellaneous Civil Cause No. 15 of 2018 for prerogative orders of certiorari and mandamus. On 07/09/2019, this Court granted the orders and quash the decision of the 1st Respondent that "retired" the applicants in the public interest, it also granted order of mandamus directing the 1st Respondents to act in accordance with the law.

An attempt by the 1st Respondent to assail the decision to the Court of Appeal proved futile, meanwhile interdiction remained unaltered until on 29/11/2023 when they were finally removed from service on public interest by the 1st Respondent after purportedly fulfilling the legal procedures as per directives of this Court.

The Applicants are disgruntled with the decision alleging violation of natural justice, impartiality, discriminatory treatments and no-payment of their terminal benefits, hence have come to this Court intending to challenge their removal on eleven (11) grounds of illegalities as contained in paragraph 4 of the Statement of Facts as follows: -

1. *The 1st respondent's decision dated 7/12/2023 removing the applicants from service in the public interest is illegal for being made without any cause;*
2. *The 1st respondent's decision was made in contravention of the mandatory provisions of the constitution for fair trial because the 1st respondent acted without neither appellate nor revisionary powers when it reopened and discussed the criminal cases the applicants stood charged and acquitted accordingly;*
3. *The 1st respondent's decision is illegal for being communicated to the applicants by one Alesia A. Mbuya purportedly on behalf of the 2nd respondent without power to do so, contrary to law;*
4. *The 1st respondent decision dated 7/12/2023 is illegal for failure to appreciate the applicants' entitlements [being] salary arrears and terminal benefits, repatriation costs and subsistence allowances which the applicants deserved to be paid immediately before or after the purported removal;*
5. *The 1st respondent's decision to remove the applicants from service purportedly in the public interest for the alleged "kitendo cha kufikishwa Mahakamani na kufunguliwa Shauri la Jinai, kinaikosesha jamii imani juu yako katika jukumu la kutoa haki" while reinstating one Andrew Hosta Siwale and many other judicial*

officers who faced similar issue was unjustifiable and unfair, thereby susceptible to attack for double standards, discrimination and favouritism contrary to law;

6. *The 1st respondent's decision is illegal for being made by members who were not impartial because the same members made earlier decision for premature retirement of the applicants, which decision was quashed by this court but the same members participated in making the subsequent decision arising from similar facts, thereby no justice was being seen to be done;*
7. *The 1st respondent's decision is equally illegal as it was a premeditated affair initiated by the 1st respondent itself way back in 2016 under the influence of its chairman followed by the subsequent disciplinary proceedings termed as "Haki ya Kusikilizwa" which was a mere sham;*
8. *The 1st respondent's decision is illegal for being made against the rule of natural justice because the decision stemmed from the complaint raised by the 1st respondent when it purported that the society lacked confidence in the applicants merely because they got arraigned to the court for criminal charges but eventually the same members prosecuted and adjudicated on the matter;*

9. *The 1st respondent's decision was reached in contravention of the due process following its failure to clearly disclose in its letter the nature and particulars of the known disciplinary offence or any other offence the applicants stood charged;*
10. *The 1st respondent's decision is irrational for being anchored on unreasonable and irrational assumptions namely, "kitendo cha kufikishwa Mahakamani na kufunguliwa Shauri la Jinai, kinaikosesha jamii imani juu yako kotika jukumu la kutoa haki", contrary to the country's constitution vesting powers in the judiciary as the only authority to administer justice; and*
11. *The 1st respondent's decision is illegal for being made in total contravention of the orders of this court in Miscellaneous Civil Cause No. 15/2018.*

Hearing of this application, with leave of this Court, was conducted by way of written submissions, the Applicants jointly drafted and filed the submissions in person unrepresented, and Mr. Daniel Nyakiha, State Attorney, did so for the Respondents.

In their submissions, the Applicants relied heavily on the authority 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 it was stated as follows: -

> *"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. We cannot but emphasize our restatement of the law in* ***Attorney General vs. Wilfred Onyango Mganyi @ Dadzi & 11 Others*** *(supra) to the effect that an "application for leave is a necessary step to an application for the orders. The purpose for this "step" is to give the court an indication that an applicant has "sufficient interest in applying for the orders".*

They argued that the present matter was timely lodged given that the decision to be challenged was passed on 7/12/2023 and this matter was lodged around April 2024. Two, they have demonstrated sufficient interest to warrant grant of the orders to be sought.

Further to that, the Applicants argued that they owe the 1st Respondent salary arrears, among other benefits so their intention is to

make a prayer before this Court for mandamus to compel the said 1st Respondent to discharge its legal obligation to pay them those entitlements. They insisted that the respondents do not dispute that the 1st Respondent's earlier decision retiring them from service was quashed by this Court and that it is not disputed that prior to the impugned decision, they were under interdiction which means after the order of this Court's they reverted back to their position, that is being in a state of interdiction under employment with the entitlements entailing thereto. Therefore, they did not lose their entitlements, salaries inclusive.

They added that since the duty of paying them salaries as her employees, the 1st Respondent is legally duty bound to discharge it, but didn't do so for unknown reasons. The Applicants are of the view that this is a fit case an order of mandamus to issue to compel the first respondent to do what it ought to have done.

The second complaint by the Applicant is on legality and rationality of the first respondent's decision which it is their conviction that the 1st Respondent did not observe due process when she purported to terminate their service. Particularly in a letter purporting to call them to show cause captioned "haki ya kusikilizwa" through which they were only invited to respond to; *" .... kitendo cha kufikishwa Mahakamani na*

kufunguliwa Shauri la Jinai, kinaikosesha jamii imani juu yako katika jukumu la kutoa haki." literally means the act of being charged with criminal offences in court lowers public confidence on your justice delivery.

It was the Applicants' further view that no reasonable ground was disclosed in the purported show cause notice. They contend that intriguingly, while the purported show cause notice revealed the quoted complaint, the termination letter dated 7/12/2023 stated; *"Tume ... imejiridhisha kuwa matendo yako yanaondoa imani ya umma kwako hivyo hustahili kuendelea kuwa mtumishi wa Mahakama."* literally meaning that the Commission has satisfied herself that their conducts have removed public confidence in them, therefore they were no longer eligible to continue as a judiciary servant.

The gist of their complaint is that the alleged misconducts (matendo yako) ought to have been elaborated in the show cause notice for them to understand what exactly what was facing them in order to man sensible defence. It was their contention that failure to do so was tantamount to breach of due process.

Moreover, the Applicants submitted that it was wrong for the 1st Respondent to proceed on terminating their service despite their clean

criminal records. Further to that, there was discrimination and favouritism by reinstating Andrew Hosta Siwale who faced a saga akin to theirs. It was their view that the 1st Respondent acted with bias. Lastly, it was the complaint by the Applicants that it was wrong for the 1st Respondent to raise the allegations and proceeded to adjudicate on the matter herself, hence became a judge of her own deeds. In their view that amounted into a premeditated affair.

The State Attorney for the Respondents submitted that it is a requirement that in order for leave to be granted to the Applicant with purpose to be heard in his application of the prerogative order of certiorari and mandamus. That, the real question to be determined by this court is to establish as whether or not, the applicant has met the required minimum standard and has established a prima facie case to institute judicial review application of certiorari and mandamus to this court. He argued that that this court is guided by laws, rules and settled principles and it is a settled trite of law that for one to institute the judicial review application must have strong grounds and must meet the standard of triable issue stipulated in the law. He relied on English case of **R. Vs. T.R.C, Exp National Federation of Self Employed and**

Small Business Ltd [1982] A.C 617 in which Lord Diplock said at page 643 that: -

> *"The requirement of permission is designed to filter out applications which are groundless or hopeless at early stage. The purpose is to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints of administrative error and to remove the uncertainty in which public Authorities might be left."*

He was of the view that the quotation above is to the effect that groundless or hopeless application should be prevented at early stage in order to avoid wastage of precision court time. According to him, it is very important to ascertain conditions attached on issuing of leave before proceeding any further with this application. He listed the conditions that must be met in order for leave to be granted as following: -

i. The Applicant must have sufficient interest

ii. There must be an arguable case

iii. There must be a decision which is final

iv. The Applicant must have exhausted local remedies

Promptness, it must be filed within time

The State Attorney went on stating that in the jurisdiction of this land, the said criteria were propounded in the famous case of **Emma Bayo vs The Minister for Labour and Youth Development and Two Others**, Civil Appeal No. 79 of 2012,

He submitted on the conditions opposing the point raised by the Applicants that they owe salaries and other benefits. He argued that such allegations and claims do not fit in the application for judicial reviews but rather in civil and or labour claims. He was of the views that in the absence of strong triable issues court cannot issue leave to file a judicial review basing on such claims, this application is bound to fail.

Further he argued on the basis for grant of judicial review basing on the case of **John Mwombeki Byombalirwa vs. The Regional Commissioner and Regional Police Commander, Bukoba** [1986] TLR 73 in which His Lordship Mwalusanya J, opined at Page 75 as follows: -

> *"Judicial Review is an important weapon in the hands of judges of this country by which an ordinary citizen can challenge oppressive administrative action and judicial review by means of prerogative orders (certiorari, prohibition and mandamus) is one of those effective ways employed to challenge administrative action,* ***It is my***

conviction that the courts should not be eager to relinquish their judicial review function simply because they are called upon to exercise it in relation to weighty matters of state, equally however it is important to realize that judicial review is not the same thing as substitution of the court's opinion on the merits for the opinion of the person or body to whom a discretionary decision a making power has been committed."

The State Attorney concluded that the Applicants had miserably failed to establish the conditions for grant of leave, the application be dismissed.

Those were the parties' submissions. Having considered the said submissions and the pleadings, I find that the main issue is whether this application has merits to allow this Court grant the prayers in the Chamber Summons on the grounds stated in the statement of facts by the Applicants.

This been an application for leave, the guidance is as laid down in the English case of **Re-Hirji Transport Services** [1961] All ER 88 where the condition for grant of leave was stated to be establishment of a prima facie case. In Tanzania the conditions were pronounced in the famous case decided by the Court of Appeal of Tanzania, the case of

Emma Bayo vs. Minister for Labour and Youth Development and Another vs. Attorney General and Another, (supra) and cited by both parties and in the case of **Alfred Lakaru vs. Town Director** (Arusha) [1980] TLR 326. To add more cases, there is a case decided by this Court, the case of **Pavisa Enterprises vs. Minister for Labour, Youths Development and Sports and Another, Misc. Civil Cause No. 65 of 2003** (unreported) and 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-judicial, which is available to the applicant for review, and which is more appropriate. 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 as per **Josiah**

Balthazar Baisi and 138 others vs Attorney General and others [1998] TLR 331. Having considered all cases mentioned above, therefore there are six conditions to be considered before grating leave to file judicial review as follows: -

1. Applicant have sufficient interest in the matter;

2. There must be arguable or prima facie case;

3. There must be a decision over the matter made by a public body;

4. There must be exhaustion of the remedies;

5. The matter must have been brought within time limit of six months.

6. That the Application must be made in good faith.

In the matter at hand, as seen from the submissions, the parties don't dispute on the conditions about time limit, existence of interest, existence of a decision by a public body and absence of alternative remedy. However, they lock horns on conditions of existence of arguable or prima facie case which goes with good faith of the Applicants.

It was a contention by the Applicants and not disputed by the State Attorney that the Applicants were charged and prosecuted in the

different courts of law with offences of corruption and acquitted. That during the pendency of the criminal cases, the Applicants were interdicted during which they were eligible to their salaries. Further, that despite their acquittal, the 1st Respondent did not reinstate them. Hence, the Applicants, together with their colleague one Andrew Hosta Siwale, not a party to these proceedings filed in this Court Misc. Civil Cause No. 15 of 2018 known as **Bageni Okeya Elijah & Others vs Judicial Service Commission & Others**, found at [2019] TZHC 245 (7 January 2019) praying for an order of certiorari to quash the decision of the 1st respondent that "retired" them public interest and order of mandamus was issued only to the 1st Respondent directing her to act in accordance with the law.

Then, it was submitted by the Applicants that while they were waiting to be reinstated and acquire other benefit in the employment but suddenly were given letters demanding them to write their defence as to why they should not be retired on public interest. They were summoned to enter defence before the commission. After the process, only Andrew Hosta Siwale was reinstated, the Applicants herein were unsuccessful with no reasons revealed to them.

Therefore, the applicants see the decision as bias based on favourism and discriminatory. It is their complaints also that they were not given opportunity to be heard because, the invitation letters did not disclose what was intended against them as the said letters contained an unelaborated word "*matendo yako*". That they did not know the kind, nature and magnitude of the allegations, hence could not be in a better position to man their defence.

Moreover, the Applicants complain about denial of their entitlements of salaries and other benefits because the position reverted to their position prior to termination after this Court quashing the 1st Respondent's decision to retire them on public interest.

On the other hand, the State Attorney maintained that the Applicants instituted this case in this court which lacks jurisdiction on the prima facie case as the claims falls under civil or labour case.

As it can be seen, the Applicants' complaint is two limbed, one is about non payment of the salaries and benefits they contend are entitled, these claims are contained particularly in paragraphs 31, 32 and 33 as well as in paragraphs 3 and 4 of the Statement Facts.

Two, as gleaned from their joint affidavit in particular paragraphs 19, 20, 21, 22, 23, 24, 36, 37, 40, 41, and 42 the Applicant display their

grievances about the process of retiring them on public interest as being against the dictates of natural justice for being illegal, irrational and discriminatory, tainted with bias and favourism. The same decision, being handed by the same accuser acting as a judge of its own deeds. These complaints are borne out by the statement of facts in ground 6, 7, 8, 9, 10 and 11 as appearing in Paragraph 4 of the Statement of Facts. The State Attorney did not challenge these facts, instead he concentrated with the facts bearing entitlements of salaries and other unpaid benefits.

I agree with the position of the law on criteria for grant of leave to apply for prerogative orders as spelt in the cases cited by both parties, in particular the famous case of **Emma Bayo (supra).**

The rationale behind seeking leave for prerogative orders is per the case of **John Mwombeki Byombalirwa (supra)** in three categories, namely; first is to filter out applications that are groundless or hopeless at an early stage, second is prevent the time of the court being wasted by busy bodies with misguided or trivial complaints of administrative errors; and three is to remove uncertainty in which public authorities may be left with such frivolous or ground less judicial review actions.

In sieving the applications, courts are not required to delve into the matters intended to be investigated by this Court in the main application by looking at the evidence, but they are to see only if the conditions for grant of leave do exist. What is considered by the court is whether the applicant has raised arguable issues in establishing the irrationality, propriety, adherence to legal rules and procedures by the decision-making authority in reaching its decision and whether the respondents have points to counter the issues advanced. Questions of whether the applicant stands chances of succeeding or not, is not relevant at this stage.

The court cannot dwell into deliberating on the merits of the arguments advanced by the parties as doing so shall amount to deliberating on the main application which is not in the mandate on the court when dealing with leave to file judicial review.

I am fortified by the holding in the case of **Emma Bayo (supra)** where 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 (unreported) this Court, Hon. Kamuzora, J. at page 17, quoted with approval what was stated in the 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 the matter at hand, I agree with the State Attorney that labour related claims may need a different forum, however, there are fundamental claim about illegality, none adherence to principles of natural justice issues of unreasonability and irrationality of the decision, issues of discriminatory bias and favourism. Deciding these issues at this stage, I in my conviction is improper, it will tantamount to decide the main application, an act abhorred by the courts.

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.

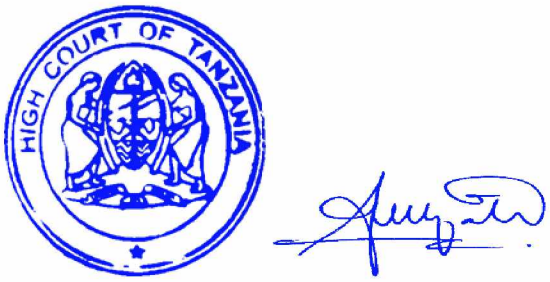
As it can be seen, among the criteria this Court can exercise its powers in judicial review include acts complained of by the applicants as explained above.

In the premises, for reasons stated above, I find the application being proper, meritorious and meets the legal requirements for the grant of leave to apply for judicial review.

I accordingly grant the leave. The Applicants shall file the main application for judicial review within 14 days from the date of this

Ruling. I make no order as to costs bearing the nature of the. Order accordingly.

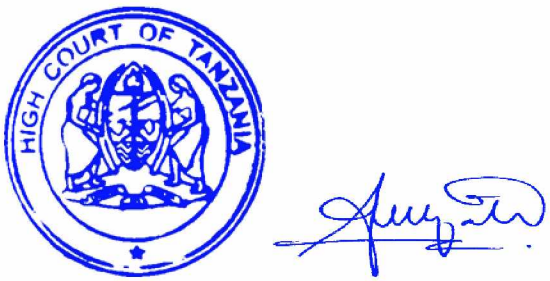
Dated at Dodoma this 18th day of June, 2024



F. K. MANYANDA, J

JUDGE

Delivered at Dodoma this 18th day of June 2024 in the presence of all the parties via virtual court. Right of appeal explained to the parties.



F. K. MANYANDA, J.

JUDGE