

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

DAR ES SALAAM

MISCELLANEOUS LABOUR APPLICATION NO. 488 OF 2019

BETWEEN

ELIAS AUGUSTINE APPLICANT

VERSUS

CHIEF SECRETARY PRESIDENT'S OFFICE 1ST RESPONDENT

THE PUBLIC SERVICE COMMISSION 2ND RESPONDENT

THE SHINYANGA MUNICIPAL COUNCIL 3RD RESPONDENT

THE HON. ATTORNEY GENERAL 4TH RESPONDENT

JUDGEMENT

Date of Last Order: 26/03/2021

Date of Judgement: 16/04/2021

Aboud, J.

The applicant, **ELIAS AUGUSTINE** filed the present application praying for prerogative orders of Mandamus, Certiorari and prohibition against the decision of the 3rd respondent conforming the decision to terminate his employment. The application is made under Rule 8 (1) (a) (b), 8 (2), 8 (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014, section 2 (1) (2) (3) of the Judicature and Application of Laws Act (Cap. 358 R.E 2002), section 17 (2) and 19 (2) (3) of the

Law Reform (Fatal Accidents and Miscellaneous Provisions) Act Cap 310 R.E 2002, section 94 (1) (d) (f) (i) of the Employment and Labour Relations Act [CAP 366 R.E 2002], section 51, 52 (1) of the Labour Institutions Act, Act No. 7 of 2004, Rule 24 (1) 24 (2) (a) (b) (c) (d) (e) (f), 24 (3) (a) (b) (c) (d), 24 (11) (b) and 55 (1) & (2) of the Labour Court Rules, GN. No. 106 of 2007.

The applicant urged the court to grant the following orders:-

- i. An order of certiorari to remove in the High Court and quash decisions of the first, second and third respondents contained in letters with Ref. No. CAB.30/536/PF-197/12 dated 30/01/2018, PSC/CLGSD/ED.81/416/07/188 dated 16/12/2016 and SHY/MC/CPF.350/42 dated 28/02/2014 respectively.
- ii. An order of mandamus directing the respondents to recognize the applicant in employment with full remuneration in his position of Principal Land Officer Grade I from 28/02/2014 to the present day and the days to come until his employment is lawfully determined.
- iii. Any other order that may meet the good ends of justice.

Leave to file the present application was sought and granted by Hon. Mzuna, J. on 05/08/2019 in Misc. Labour Application No. 515 of 2018. The matter was argued by way of written submission. The applicant was represented by Mr. Gaudine Rwekaza, Pearsonal Representative while Mr. Charles Mtae, State Attorney appeared for the respondents.

Briefly, the applicant was employed in the capacity of Land Officer Grade III effective from 02/05/2000 on permanent and pensionable terms. That from 05/07/2010 to 03/09/2013 the applicant was working as a Principal Land Officer Grade I at Shinyanga Municipal Council. In his affidavit the applicant averred that, the first respondent is the Chief Executive Officer of the Public Service with the delegated powers of the President to hear and determine appeals from the decision made by the Public Service Commission (i.e the second respondent). The applicant stated that, the second respondent is his appellate authority while the third respondent is the authority which terminated him from public service.

The applicant averred that, from 05/07/2010 to 14/12/2016 he was working in the capacity of Principal Land Officer Grade I and In-charge of Land and Town Planning Department of the third

respondent. He added that, the fourth respondent was joined in the suit as the necessary party in any proceeding instituted against the Government of the United Republic of Tanzania.

The applicant further stated that, his Disciplinary Authority in the public service was the Municipal Director of Shinyanga Municipal Council, who served the applicant with the notice and disciplinary charges on 03/09/2013 in accordance with the Public service Regulations, 2003. The applicant stated that, the charges alleged he continued to sign Letters of Offer ("Barua za Toleo") after section 27 and 28 of the Land Act No. 4 of 1999 (here the Land Act) were repealed under the Mortgage Financing (Special Provisions) Act No. 17 of 2008 and was in complete disobedient of the directive issued by the Assistant Commissioner for Land of Lake Zone (H.I. Kitilya) with Ref. No. LD/LZ/33/04 dated 06/08/2009 attached to the application as Annextures A, B, C and D.

The applicant further alleged that, he strongly disputed the charges, however, the disciplinary authority held him liable and decided to demote him from the post of Principal Land Officer Grade I to Land Officer Grade II. Being dissatisfied by the decision of the Shinyanga Municipal Council the applicant appealed to the Public

Service Commission vide a letter dated 05/08/2014 which is attached to the application as Annexure N. he added that, the Public Service Commission (2nd respondent) through the letter No. PSC/LGSD/EB.81/416/07/188 varied the decision of the Disciplinary Authority and imposed a disciplinary penalty of summary dismissal from the public service with effect from 14/12/2016. The applicant further appealed to the first respondent who also confirmed the decision of the second respondent. On the basis of the above facts, the applicant moves the Court to determine the following issues: -

- i. Whether the applicant was denied a fair hearing substantively and procedurally by the Inquiry Committee and the respondents.
- ii. Whether the employment of the applicant was terminated by the respondents in complete breach of the principles of natural justice.
- iii. Whether the actions and inactions of the respondents affected the applicant's right to work.
- iv. Whether the first, second and third respondents failed to apply their mind to the evidence before them and made a

finding thereby failing to perform their duty under the Public Service Act, 2002 and the Public Service Regulations, 2003.

- v. Whether the third respondent's decision is invalid in law and it was unlawfully confirmed by the first and second respondents.
- vi. Whether the first, second and third respondents acted out of time prescribed by the Public Service Regulations, 2003.
- vii. Whether in the circumstances, the respondents had to consider the applicant is not guilty of the offence by virtue of Regulation 48 (6), (9) of the Public Service Regulations, 2003.

Arguing in support of the application Mr. Gaudine Rwekaza Mrugaruga for the applicant submitted that, during the course of inquiry the witness of disciplinary authority instead of producing the alleged signed Letters of Offer (Barua za Toleo) produced standard letters (Barua za Kawaida) which were signed and could still be signed by any land officer in Tanzania who has knowledge in land management and valuation after marking or establishing the limit of owners of un surveyed land (demarcation).

It was submitted that, the appointed members of the Inquiry Committee were not sufficiently skilled and competent to appreciate the issues involved in the dispute and comprehend the implications of the decision. He added that the members of the Inquiry Committee failed to differentiate letters of offer and standard letters. The Personal representative further argued that, the Inquiry Committee should have requested to be assisted in the conduct of the inquiry by public servants with necessary qualifications or experience (professional or technical) in the matter in issue which is in accordance with Regulation 46 (5) of the Public Service Regulations, 2003 GN. 168 of 2003. It was strongly submitted that, the applicant did not issue Letters of Offer contrary to Secular No. LD/LZ/33/04 issued on 06/08/2009, therefore the decision to terminate him was outrageous.

It was also submitted that, by the letter dated 09/10/2013 the Committee which conducted the inquiry notified the applicant of the date, time and place upon and at which the inquiry would be held with no permission to be represented by any public servant, advocate or representative of a trade union contrary to Rule 47 (3) (4) of GN. 168 of 2003 and item 4(4) of the Guidelines for Disciplinary

Procedures of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 of GN. 42 of 2007 (herein referred as GN. 42 of 2007). The personal representative went on to submit that, regulation 48 (1) of GN. 168 of 2003 requires the Committee conducting the inquiry to forward the record of the proceedings together with its report to the disciplinary authority.

The applicant's personal representative said, in the matter at hand the Committee forwarded the records and report to the Committee of Finance and Administration of Shinyanga Municipal Council as indicated in a letter with Ref No. SHY/MC/CPF.350/42 dated 31/01/2014. He added that, the purported punishment was awarded by the Counselors of Shinyanga Municipal Council on the recommendation of the Finance and Administration Committee contrary to regulation 48 (6) and 48 (9) of GN. 168 of 2003. Thus, the personal representative was of the view that, the decision to demote the applicant was made by the Counselors of Shinyanga Municipal Council on the recommendation of the Finance and Administration Committee without jurisdiction and before giving the applicant opportunity to be heard in defense and in mitigation, hence, was in breach of the principles of natural justice. The personal

representative added that, the decision of Counselors of the Shinyanga Municipal Council was given out of 90 days from the commencement of the inquiry proceedings on 02/10/2013 to 28/02/2014.

It was further submitted that, on appeal to the second respondent the disciplinary authority did not submit its representation in writing to the said Commission and served the copy to the applicant. On the circumstance the personal representative contended that, the applicant's appeal to the Commission was unopposed or the Commission received the documents on the back of the applicant contrary to Regulation 61(3) of GN. 168 of 2003. The personal representative went on to submit that, the second respondent did not ensure that, the appeal is concluded within 90 days in accordance with Regulation 62 (2) of GN. 168 of 2003. He stated that, the appeal was filed on 08/08/2014 and the decision was delivered on 20/01/2017 which was more than a year.

It was also submitted that, the issue of allocating land plots without consent of the land allocation Committee was raised by the second respondent without giving the applicant the right to respond thereto. The personal representative added that, the second

respondent found the applicant guilty of an offence of which he was not charged with by the disciplinary authority. In the premises the personal representative was of the view that, the first respondent confirmed a nullity decision and, that his decision was also delivered out of time counting from 01/09/2017 to 30/01/2018.

It was submitted that, it is understandable the powers of the President to make the final decisions were delegated to the Chief Secretary but in the matter at hand, the letter from the first respondent was signed by one H. Lugembe who is neither the President nor his delegate. It was further argued that, a delegate cannot delegate.

Furthermore, it was argued that the respondents acted ultra vires when they heard and decided on the references after the time provided by law expired. To fortify his argument, he cited section 46 of the Law of Limitation Act [CAP 89 R.E 22] and the case of **Tanzania Diaries Ltd V. Chairman of Arusha Conciliation Board** (1994) TLR 33. In the upshot he prayed for the orders mentioned above to be granted.

In response to the foregoing, Mr. Charles Mtae for the respondent submitted that the applicants' application is devoid of merit and adopted the contents of the respondents' counter affidavit to form part of his submission. As to the issue of the appointed members of the inquiry Committee he submitted that, the said members were competent and they had sufficient skills and knowledge to deal with the applicants matter as the Inquiry Committee. He added that, they need not to be experts in Land Management and Valuation to deal with a matter involving a Land Officer.

The Learned State Attorney went on to submit that, the members of the Inquiry Committee were legally appointed to act as such as evidenced by Annexure SG 1 referred to in paragraph 5 of the Respondents Counter Affidavit. He said, the Inquiry Committee consulted several officers including "Mkuu wa Idara ya Ardhi, Maliasili na Mipango Mji" as reflected at page 7 of the Report of the Inquiry Committee which is also marked as Annexure SG 3 referred to at paragraph 9 of the Respondents' counter affidavit.

It was further submitted that, even the forms that were issued illegally by the Applicant were tabled before the Inquiry Committee

and in his view they were not standards letters as suggested by the Applicant. The Learned State Attorney strongly submitted that, the forms in question were for ownership of plot of land. Moreover, it was submitted that, there is nowhere in record where the applicant denied that he never issued those forms contrary to the procedure. In the circumstance it was submitted that, it is obvious that the allegations leveled against the Applicant were valid and the decision of respective disciplinary authority was right and proper.

On the right to be represented it was submitted that, there is nowhere in the letter dated 09th October, 2020 (Annexure J to the Applicants' Affidavit) where the applicant was denied permission to be represented by any servant or advocate or a representative of a trade union contrary to the rules he cited. Furthermore, he said there is nowhere in the attached annexures where the applicant requested to be represented and the Inquiry Committee denied the said request.

The Learned Counsel went on to submit that, regulation 48 (6) of GN. No. 168 of 2003 is inapplicable in the circumstance at hand as it does not provide for matter of punishment as the Applicant suggests. He argued that, the said section provides for duty of the disciplinary authority after receipt of record of proceedings and

report. The duty which was duly fulfilled by the disciplinary authority as evidence by Annexure M (A letter with Ref. No. SHY/MC/CPF.350/42 dated 28/02/2014), hence there is no dispute the applicant was found guilty of the alleged offence, he submitted.

With regard to the punishment it was submitted that, the same was proper because by virtue of the provision of the Local Government Urban Authority Act, Cap 288 the Council through its Counselors is empowered to act as such. Therefore, the decision to demote the applicant and its respective punishment were proper and in accordance to the law.

Regarding the issue of the delay of the decision it was submitted that, the attached copies of applicant appeal does not indicate when it was filed despite the fact it bears the date of 05th August, 2014, a date which was also referred by the 2nd Respondent in her decision. He argued that, although section 62(2) of GN. 168 of 2003 set 90 days as time within which to conclude an appeal, the same provision also provides exception where the Appellate body may exceed the stipulated time like the circumstances in the applicant's appeal.

On the issue of delegation of the powers of the President it was submitted that, the letter from the first respondent signed by H. Lugembe is self sufficient and explanatory as it expressed the final decision of the President. He argued that, the law governing public service does not make it mandatory that every letter from the office of the Chief Secretary or any other public officer must be signed by the person who is holding that position. The Learned State Attorney added that, letters in many Public Offices are signed on behalf of the person holding such title. He submitted that, such an act is not fatal.

Regarding the allegation of delivering the decision out of time it was submitted that, section 46 of the Law of Limitation is inapplicable in the circumstance at hand because GN. No. 168 of 2003 itself has provided for time limit of such an action. To support his submission he cited section 46 of the Law of Limitation and the case of **Tanzania Diaries Ltd V. Chairman of Arusha Conciliation Board** (1994) TLR elaborate the holding 33. He therefore prayed for the application to be dismissed.

In rejoinder the applicant's representative reiterated his submission in chief.

I have considered the grounds of the application at hand and submissions by the parties the relevant laws. I will determine the issues raised by the applicant in the manner they have been raised as appeared above.

On the first issue the applicant wants this Court to determine whether the applicant was denied a fair hearing substantively and procedurally by the Inquiry Committee and the respondents. It is on record the applicant was terminated for continuing to sign Letters of Offer (Barua za Toleo) without having authority thereto. The applicant's representative contended that, the witness of the disciplinary Inquiry instead of producing the alleged signed Letters of Offer (Barua za Toleo) they produced standard letters (Barua za Kawaida) which were being and still signed by any Land Officer in Tanzania with knowledge in land management. The respondents on their part firmly stated that the applicant continued to sign the letters in question contrary to the directives issued by the Assistant Commissioner for Land of the Lake Zone (Mr. H.I. Kitilya). For easy of reference I find it pertinent to reproduce the directive of the Assistant Commissioner for Land of the Lake Zone issued on 06/08/2009:-

Mkurugenzi Mtendaji (W),
Wilaya ya Bukombe,
S.L.P 2,..
BUKOMBE.

YAH: MWONGOZO WA UTEKELEZAJI WA MABADILIKO YA
SHERIA YA ARDHI JUU YA UTOAJI WA MILIKI ZA
ARDHI BILA YA BARUA ZA TOLEO (LETTERS OF
OFFER).

Husikeni na somo tajwa hapo juu

Sheria ya Ardhi Na. 4 ya mwaka 1999 imekuwa ikifanyiwa marekebisho pindi hitaji linapojitokeza. Aidha marekebisho ya hivi karibuni ni yale yaliyoletwa na sheria ijulikanayo kama "MORTGAGE FINANCING (SPECIAL PROVISIONS) ACT" Na. 17 ya mwaka 2008. Kwa mujibu wa marekebisho hayo, matungu ya 27 na 28 ya sheria ya Ardhi yanayohusu Barua za Toleo yamelutwa.

Hiyo Barua hizo za Toleo kwa sasa hazitatolwa tona kwa waombaji viwanja/mishamba. Pamoja na Barua hii naambatanisha mwongozo wa utekelezaji wa mabadiliko ya sheria ya Ardhi kwa ajili ya rejea na utekelezaji.



H.U. KITILYA

KAMISHNA MSAIDIZI WA ARDHI

KANDA YA ZIWA.

Nakala: KAMISHNA WA ARDHI,

S.L.P. 9230,

DAR ES SALAAM.

ANNEXTURE B

12/8/09

JAMHURI YA MUUNGANO WA TANZANIA
WIZARA YA ARDHI, NYUMBA NA MAENDELEO YA MAKAZI

Akwani ya Simu "ARDHI"
Simu: 022 2121241-9
Makao Makuu)
Simu 028 2501200 (Mwanza)



Ofisi ya Kamishna,
Msaidizi wa Ardhi,
Kanda ya Ziwa,
S.L.P 668,
Mwanza.

Tafadhali unapojibu taja;
Kumb. Na. LD/LZ/33/04

06/08/2009

Ofisi ya Mkurugenzi wa Manispaa,
Manispaa ya Shinyanga,
S.L.P 28.
SHINYANGA.

Mkurugenzi Mtendaji (W),
Wilaya ya Kishapu,
S.L.P 1288,
KISHAPU.

Mkurugenzi Mtendaji (W),
Wilaya ya Meatu,
S.L.P 44,
MEATU

Mkurugenzi Mtendaji (W),
Wilaya ya Kahama,
S.L.P 50,
KAHAMA.

Mkurugenzi Mtendaji (W), ✓
Wilaya ya Maswa,
S.L.P 170,
MASWA.

Mkurugenzi Mtendaji (W),
Wilaya ya Bariadi,
S.L.P 109,
BARIADI.

Mhsa Ardhi
Ima witebelezi
12/8/09

Taken care
21/8/2009

What I have gathered from the relevant letter above is that, the applicant and his fellows were restricted from signing Letters of Offer after the amendment of section 27 and 28 of the Land Act. The applicant strongly contended that, the documents which he signed were not letters of offer but they were standard letters which are still signed by any Land officer. For clarity I reproduce the authorized letter of offer.

Labour Court IV

Land Form No. 20

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

LETTER OF OFFER OF RIGHT OF OCCUPANCY
[Under Section 27]

REF:

TO:

Sir/Gentlemen/Madam,

RE: PLOT NO. BLOCK

LOCATION

AREA OF THE PLOT

Your application for a Long Term Right of Occupancy (later in this letter called "the Right") over this plot has been approved. The terms and conditions of the Right are as follows:

1.
 - (i) Term years from
 - (ii) Rent per year which is revisable
 - (iii) User: The land shall used for as defined in the Town and Country Planning (Use classes) Regulations, 1960 Only one main building/dwelling house together with the usual and necessary outbuildings shall be built. Commercial use shall not include the sale of vehicle fuels.
 - (iv)
 - (a) Building to be impermanent materials
 - (b) Building plans to be submitted to the within six months from the commencement of the Right
 - (c) Building construction to begin within six months after approval of the plans
 - (d) Building to be completed within months from the commencement of the Right.
 - (v) Further you must pay fees, charges etc and refund any contribution in lieu of
 - (vi) You shall be responsible for the protection of all Beacons on the land throughout the term of the Right. Missing Beacons will have to be re-established at any time at your expenses as assessed by the Director of Surveys and Mapping.
2. The following information is required by me:-
 - (a) Your full name(s) in block letters. Requests to have the Certificate of Occupancy issued in the name of a person or person other than the offeree shall not be entertained.
 - (b) Name of spouse(s)
 - (c) Your full residential address, giving the house number, name of street and your post office box number telephone, fax (if any) and your business address.

(d) Whether you wish to hold the Right individually or as joint occupiers or as occupiers in common. If it is occupancy in common, indicate the share to be taken by each of you.

3. The amount payable on acceptance of the offer is:

Premium
Fees for Certificate of Occupancy
Registration fees
Survey fees
Deed plans fees
Stamp Duty on certificate & duplicate
Land Rent from To
.....

4. The amount shown above should be paid to the Commissioner for Lands or Authorized Officers. The original exchequer receipts so obtained should then be sent to me with the information requested above.

5. This offer shall remain open for a period of thirty days from the date of its receipt by you. Unless payments are made and receipts are returned to me within thirty (30) days this offer shall lapse.

Yours faithfully,

Name:

Signature:

COMMISSIONER FOR LANDS/AUTHORIZED OFFICER

Date:

Copy to: The Land Officer/Commissioner for Lands

.....
.....

ACCEPTANCE:

6. I/WE hereby accept the offer of right of occupancy on the terms and conditions contained HEREIN, this day of 20.....

Name(s)

Signature/Seal

Photo:



Pec

Official Stamp




For the purpose of enabling this Court to make comparison between the authorized letter of offer as reproduced above and the

one claimed to be standard letter issued by the applicant I also find it relevant to reproduce one of the alleged standard letter signed by the applicant:-

EL ANNEXTURE "L"
HALMASHAURI YA MANISPAA YA SHINYANGA

Simu. 028-2763213
028-2762534
Fax: 028-2763750
E-mail: municipalshy@yahoo.com



Ofisi ya Mkurugenzi wa Manispaa,
S.L.P. 28,
SHINYANGA.

Kumb. Na. SH 2763213 Tarehe: 03/11/2011

Ndugu, MORUJEJI SEDEKA KIHONYE
S.L.P. 28
SHINYANGA


CAUTION
SHINYANGA MUNICIPAL COUNCIL

YAH: FOMU YA KUPEWA KIWANJA
KIWANJA Na. 2763 KITALU G.G. (HD)
SHINYANGA MANISPAA

tafadhali kukujulisha kuwa umepewa kiwanja kilichotafwa hapo juu kwa masharti yafuatayo:-

1. Muda wa kumiliki kiwanja ni mwaka hadi mwaka kuanzia 01/10/2011
2. Utakitumia kiwanja kwa MAKAZI PEKEE
3. Kodi ya kiwanja kwa mwaka Tshs. 4500.00
4. UTALIPA MALIPO YAFUATAYO:-
 - (a) Malipo mengineyo Tshs.
 - (b) Kodi ya kiwanja kwa kipindi 01/10/2011 hadi 30/06/2012 Tshs. 4500.00 ✓
 - (c) Ushuru wa serikali Tshs. 320.00
 - Gharama ya Hati Tshs. 500.00
 - JUMLA Tshs. 5320.00

alipo yote yafanyike ndani ya siku saba (wiki moja) tokea tarehe ya barua hii, ada ya tarehe hiyo kupita barua hii haitatambuliwa.


AFISA ARDHI MTEULE
MANISPAA YA SHINYANGA

rekubali masharti yaliyotolewa na niko tayari kuanza ujenzi ndani ya mwaka mmoja nzia tarehe ya barua hii.

hi yangu Ndugu Seudeka Tarehe 03/11/2011

ipo yote yaliipwa kwa stakabadhi (exchequer Receipts)

43223700 J. Rent ya tarehe 03/11/2011

43224767 RICE ya tarehe 03/11/2011

43224767 S/buty ya tarehe 03/11/2011

I have carefully read the letters reproduced above. It is true that the letter signed by the applicant is not clearly indicated as Land Form No. 20 or 21 which are the letters of offer as submitted by the

applicant's representative. However, looking on the contents of the two documents reproduced above, in my view they are not distinguishable as they all do confer a person the right of occupancy over a piece of land. Therefore, the applicant's allegation that he issued standard letters instead of letters of offer is immaterial. In my view, the fact that the applicant conferred a right of occupancy to the so called addressee of the standard letter while knowing he was restricted to do such an act was a valid reason to terminate him from his employment.

I have noted the applicant's submission that the issue of allocating land plots without consent was raised by the second respondent suo motu. The record reveals that at the Inquiry Committee the applicant was charged with signing of different letters of offer contrary to the directive letter with Ref. No. LD/LZ/33/04 of 06/08/2009 quoted above. This is evidenced by the charge sheet served to the applicant as it is reflected hereunder: -

HATI YA MASHTAKA (CHARGE SHEET)

(Kanuni 42)

Kujihusisha na vitendo nje ya majukumu yako ya kazi na kusababisha hitilafu ukiwa kama Mtumishi wa Umma Kinyume na Kanuni za Utumishi wa Umma 2003. Kanuni Na 42 Sehemu ya sita (6) ya Jedwali la kwanza.


MAELEZO YA TUHUMA/ MASHTAKA:

- (i) Kuidhinisha Fomu ya kupewa kiwanja, Kiwanja Na. 2963 Kitalu 'GG' (HD) Kitangili, Shinyanga Manispaa, wakati ukifahamu kuwa huna mamlaka ya kufanya hivyo ni kinyume na Waraka Kumb. Na. LD/LZ/33/04 wa tarehe 06 Agosti, 2009.
- (ii) Kuidhinisha Fomu ya kupewa kiwanja, kiwanja Na 506/1 kitalu 'GG' (HD), Kitangili, Shinyanga Manispaa wakati ukifahamu kuwa huna mamlaka ya kufanya hivyo na pia ni kinyume na Waraka Kumb. Na. LD/LZ/33/04 wa tarehe 06 Agosti, 2009.
- (iii) Kuidhinisha Fomu ya kupewa kiwanja, kiwanja Na. 1018 kitalu 'W' (HD) Mazinge Manispaa ya Shinyanga wakati ukifahamu kuwa huna mamlaka ya kufanya hivyo na ni kinyume na Waraka Kumb. Na. LD/LZ/33/04 wa tarehe 06 Agosti, 2009.
- (iv) Kuidhinisha Fomu ya kupewa kiwanja, kiwanja Na. 759A, Kitalu 'EE' Majengo mapya Shinyanga wakati ukifahamu kuwa huna mamlaka ya kufanya hivyo na ni kinyume na Waraka Kumb. Na. LD/LZ/33/04 wa tarehe 06 Agosti, 2009.

Tarehe: 30.08.2013.....


Mkurugenzi wa Manispaa
SHINYANGA
WAKURUGENZI WA MANISPAAN
SHINYANGA




As discussed above the forms signed by the applicant granted the right of occupancy to the persons addressed thereto. Therefore, in my view such an act generally can also be termed as allocation of lands without having authority to do so as stated by the second respondent. Under such circumstance I do not find any new issue raised by the second respondent which would have necessitated the

second respondent to call the applicant to defend himself. It is my observation that, what the second respondent did was only to examine the records and in his findings he revised the decision of the third respondent without altering the charges of the applicant as they are mentioned in the charge sheet.

On the basis of the above analysis, I find no hesitation to say the Inquiry Committee proved the allegation levelled against the applicant as it is evidenced by the Inquiry Committee report (Annexure SG-3) reflecting that, investigation was done and sufficient evidence were tendered to prove the applicant's misconduct. On that account, I find the third respondent as the Disciplinary Authority of the applicant was right to demote the applicant after the allegation against him was proved. It is also my findings that, the second respondent was correct to summarily dismiss the applicant from his employment after considering the weight of evidence presented at the disciplinary authority. Likely, the first respondent was also correct to confirm the decision of the second respondent basing on the evidence presented.

On the procedural aspect the applicant is claiming that the members of the Inquiry Committee were not sufficiently skilled. The

criteria for selection of the members of the Inquiry Committee are provided under Regulation 46 of GN. 168 of 2003. The relevant provision is to the effect that:-

'Regulation 46 - No public servant shall be appointed a member of an Inquiry Committee unless he is:-

- (a) In the Senior Grade and above.*
- (b) Of a rank higher than the rank held by the accused public servant:-*

(2) N/A

(3) N/A

(4) In appointing members of the Inquiry Committee, the disciplinary authority concerned shall ensure that it consists of both men and women.

(5) Where the Committee is of the opinion that it will be desirable for them to be assisted in the conduct of the inquiry by persons who may be more conversant with any professional or technical matter likely to arise in the course of proceedings they may request the disciplinary authority to assign not more than two public servants with the necessary qualifications or

experience to assist them, and disciplinary authority shall comply with any such requests’.

In the matter at hand the Inquiry Committee was chaired by Mr. Rubanzibwa Projectus, Assistant Regional Administrative Secretary assisted by Mr. Elly Jesse Mlaki, Regional Urban Planning Officer and Ms. Isabela Chilumba, Managing Director, USHETU. The applicant's contention on the composition of the Inquiry Committee is on what is provided under Regulation 46 (5) quoted above. The applicant wants this Court to fault the third respondent's decision because the members of the Inquiry Committee were not skilled enough as required in the relevant provision above. In my view, the relevant provision does not give a mandatory requirement of the Inquiry Committee to be assisted by public servant (s) with necessary qualifications or experience in any matter before it as the applicant would want this Court to believe.

In my understanding of the provision of Regulation 46 (5) of GN. 168 of 2003, the Inquiry Committee will only be assisted by someone with the professional qualities required in the circumstances where it is desirable and necessary to do so. With due respect to the applicant's representative submission, in the matter at hand I did not

find any technical matter which would have necessitated the Inquiry Committee to be assisted by a professional experienced public servant as submitted by the applicant. Thus, I find the applicant's allegation that the members of the Inquiry Committee were not skilled is baseless and devoid of merit.

On the basis of the above discussion, I have no hesitation to say that the applicant's termination was fair both substantively and procedurally as analyzed above. Therefore, the first ground raised by the applicant has no merit.

The second issue is whether the employment of the applicant was terminated by the respondents in complete breach of the principles of natural justice. On this issue the applicant alleged that, the Inquiry Committee did not permit him to be represented by any public servant, Advocate or a Representative from a Trade Union contrary to Rule 47 (3) (4) of GN. 168 of 2003. On the other hand the respondents strongly opposed such allegation and submitted that the relevant notice did not prohibit the applicant to bring or call the intended representatives. For the sake of clarity I reproduce the Notice in question:-

Kumb. Na. SHY/MC/CPF.350/41

09 Oktoba, 2013

Elias Augustine,
Mkuu wa Idara
ya Ardhi na mallasili,
S.L.P 28,
Shinyanga.

K.K. Mkurugenzi wa Manispaa,
S.L.P 28,
Shinyanga.

*Amesitua Sababu
huhurika
afili
09/10/2013.*
Mkurugenzi wa Manispaa
Shinyanga

YAH: WITO MBELE YA KAMATI KWA MAHOJIANO

Kwa mujibu wa kanuni ya 4(a) ya kanuni za utumishi wa Umma toleo la 2003, unatakiwa kuhudhuria mbele ya kamati ya uchunguzi tarehe 11/10/2013 ili kupata nafasi ya kupitia ushahidi na vielelezo vinavyohusiana na kesi yako.

Shughuli hiyo itafanyika Ofisi ya Mkuu wa Mkoa Chumba Na 106 kuanzia saa 6.00 asubuhi, tarehe 11/10/2013.

[Signature]
Rubanzibwa P.R.M
Mwenyekiti
Kamati ya uchunguzi.

For easy of reference I hereunder quote the disputed provision alleged to be infringed by the Inquiry Committee which is to the effect that:-

'Regulation 47 -(1) The Committee conducting the inquiry shall notify the accused public servant of the day, date, time and place upon and at which the inquiry shall be held.

(2) the public servant shall have a right to be present, examine witness and be heard at the

inquiry unless the accused public servant shows reasonable cause for his failure to be present or to send a representative at the inquiry. Provided that failure by the accused public servant to be present or represented at the inquiry shall not vitiate the proceedings unless the accused public servant shows reasonable cause or his failure to be presented or represented.

(3) the Committee conducting the Inquiry may permit the accused public servant and the disciplinary authority to be represented by any public servant or advocate or a representative of a trade union.' (Emphasis added).

In line of the provisions cited above, it is my understanding that the accused public servant is required to be present in person in the Inquiry Committee. He/she will only be allowed to send a representative in the circumstance where he/she personally fails to appear. In the matter at hand the record reveals that the applicant appeared in person at the Inquiry Committee, there is no any evidence in the record to prove that the applicant prayed to be represented by any public servant or advocate or a representative of

a trade union and, that he was denied such an opportunity as claimed in this Court. The fact that the relevant regulation gives discretion to the Inquiry Committee, it means the applicant was to move such committee to allow him to bring any representative as prescribed.

On the above premises it is my view that, the applicant's allegation of the denied right to be represented at the Inquiry Committee lacks legal stance. Furthermore, as evidenced by Annexure SG-4 on record the applicant dully appeared at the Inquiry Committee and he was given an opportunity to cross examine witnesses and to examine the evidence adduced thereto. On the basis of the above analysis, I have no hesitation to say that the right to be heard as one of the principles of natural justice was totally afforded to the applicant in the matter at hand. It has to be noted that not all rights can be enjoyed automatically but they need to be grabbed by asked from the proper forum (s). So, in this case where the applicant had knowledge of the availability of such right he would have requested or asked to have representation and, when denied that would have been a good reason to blame the relevant committee for infringement of his fundamental right to be heard.

The third, fourth and the fifth issues have been answered in the issued discussed above.

On the sixth issue the applicant is alleging that the decision of the first and second respondents were delivered out of the prescribed time. He strongly contending that Regulation 62 (2) of GN. 168 of 2003 was not complied with. The relevant provision provides as follows:-

*'Regulation 62 (2) - Notwithstanding the provisions of sub-regulation (1) of this Regulation, the appellant authority may determine the appeal in the absence of the appellate and in any case, unless exceptional circumstances exists, **the appellate authority shall ensure that every appeal is concluded within ninety days from the date of receipt of representations made under sub-regulation (3) of Regulation 61.**'*

[Emphasis is mine].

The provision cited above is self-explanatory that, in certain circumstances the decision of the appellate authority may be delivered out of the 90 days prescribed by the law. Nonetheless, even

if it is mandatory for the appeal to be concluded within 90 days and the second respondent exceeded such period does that ground suffice to quash the whole proceedings thereto? In my view the answer is no. The relevance of the provision above is to limit the appellate authority to deliver its decision timely to enable the accused public servant to know the fate of his/her employment.

Another question to be asked is whether there was any injustice occasioned to the applicant due to the delay of the decision of the appellate authority? The answer from the record is no because the applicant did not substantiate any injustice he had as a result of the alleged delay. Even if the Court would have to nullify the decision of the second respondent due to the delay of the decision in my view that will not do any justice to the applicant. It is the general principle that, justice delayed is justice denied. If the matter would be ordered to restart afresh in the appellate authority there would be more delays. On the basis of the above, I find no justifiable reason to quash the second respondent's decision on that ground.

Lastly the applicant wants this Court to fault the first respondent's decision on the reason that his letter was signed by unauthorized person. It is a well settled law that the final disciplinary

authority of the public servants other than those appointed by the President is the Chief Secretary. The office of the Chief Secretary is established under section 4 (1) of the Public Service Act which is to the effect that:-

'4 (1) - There shall be the Chief Secretary appointed by the President who shall be the chief executive officer of the Service.

(2) The Chief Secretary shall be the head of the Public Service and the Secretary to the Cabinet.

(3) The Chief Secretary shall, as head of the Service, provide leadership, direction and image to the Service and shall:

(a) ensure that public servants in the Service are trained, motivated, efficient and effectively performing, and the Service is free of corruption and other unethical tendencies;

(b) improve public accountability by promoting focus on result, service quality and customer satisfaction in public Service performance;

(c) be responsible for confirmation of public servants appointed by the President;

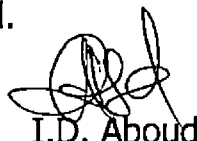
(d) be a disciplinary authority in respect of public servants appointed by the President.

(4) In addition to functions specified by the provisions of subsection (3), the Chief Secretary shall be the highest ranking disciplinary authority in the service and may, in that capacity, in relation to any servant exercise all or any of the powers delegated to a disciplinary authority'.

Therefore, on the basis of the above discussion it is my view that, the person who signed the letter on behalf of the Chief Secretary, Mr. H. Lugeme, he did that as an officer of the office of the Chief Secretary. It has to be noted that the office of the Chief Secretary as a head of public service cannot be manned by him alone as an individual and he cannot sign or deal with all issues concerning public service and public servants personally. It is an established principle that, in the public service any authorized person by the one in authority can administratively perform the function of such authority. It is illogical to consider that the Chief Secretary as an individual can perform all the administrative activities and duties including disciplinary matters personally. In my view that will never work or be practical in any results oriented administration and good

governance. That is the rationale of having number of other management teams and supporting staffs or those specifically authorized by law to perform certain duties and responsibilities of the Chief Secretary who can act on his behalf. I reiterate that, in the administration of public service it is not strange for any officer and a particular authority like in this case the Chief Secretary to assign any officer under him to sign administrative communication to other offices or to the public servant. It has to be noted that, the entire process of disciplinary proceeding up to the appellate level before it found its way in this Court was just administrative disciplinary mechanism and not adversarial one. Therefore, the applicant's submission to that effect has no legal stand.

In the result, as it is found that both respondents exercised their jurisdiction properly as vested by the law without breaching the principles of natural justice, I find the applicant has failed to move the court to grant the prerogative orders of certiorari and mandamus as prayed. Thus, the application has no merit and it is dismissed accordingly. It is so ordered.



I.D. Aboud

JUDGE

16/04/2021