

**IN THE HIGH COURT OF TANZANIA  
DAR ES SALAAM MAIN REGISTRY  
AT DAR ES SALAAM**

**MISCELLANEOUS CAUSE NO. 38 OF 2023**

**IN THE MATTER OF APPLICATION FOR PREROGATIVE ORDERS OF  
MANDAMUS AND CERTIORARI**

**BETWEEN**

**SAMWEL YOHANA YORAM.....APPLICANT**

**AND**

**BAGAMOYO DISTRICT COUNCIL.....1<sup>ST</sup> RESPONDENT**

**TEACHERS SERVICES COMMISSION**

**BAGAMOYO DISTRICT COMMISSION.....2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

25<sup>th</sup> October & 20 November, 2023

**JUDGMENT**

**CHUMA, J:**

The instant application is centered on judicial review whereby SAMWEL YOHANA YORAM (hereunder shall be referred to as the applicant) is seeking for this Honourable court to issue the prerogative orders in terms of certiorari and mandamus against the decision issued by the respondents. Principally, the applicant among other things prays for this court to quash the decision made by the 2<sup>nd</sup> respondent on 2/3/2021 which dismissed the applicant's employment; to order and direct BAGAMOYO DISTRICT COUNCIL and TEACHERS SERVICES COMMISSION

BAGAMOYO DISTRICT COMMISSION (the 1<sup>st</sup> and 2<sup>nd</sup> respondent respectively) to reengage and remit the applicant into his employment at Venege Secondary School; this court to direct payment of outstanding salary and other benefits from the date of the dismissal; this court to grant the order of compensation and general damages as a result of the alleged dismissal which was unprocedural as well as the costs to be borne by the respondents.

The application is made by the chamber summons under sections 17 (2) and 18 (1) of the Law Reform (Fatal Accident and Miscellaneous Provision) Act [Cap. 310 R: E 2019] and Rules 5 (1), (2) (a) (b) (c) (d) and 8 (1) (a) of the Law Reform (Fatal Accident and Miscellaneous Provision) (In Judicial Review Procedure and Fees) Rules 2014 GN 324. The application is supported by the affidavit sworn by the applicant. Thus, before venturing on the merits of the matter at hand, it is more appropriate to narrate the facts leading to the matter. According to the affidavit, it is alleged that on 5<sup>th</sup> May 2015, the applicant was employed by the 1<sup>st</sup> respondent. He was stationed at Zinga Secondary School. However, on 14<sup>th</sup> July 2020 and 21 July 2020, the applicant unsuccessfully contested to be a member of Parliament in the initial stages through Chama cha Mapinduzi (CCM). The applicant alleged that from July 2020

to February 2021 the 1<sup>st</sup> respondent did not pay his monthly salary and the applicant was not officially notified of the same. He was later directed by the Head Master of Kerege Secondary School to undergo the leave without payment. On 4/12/2020 the applicant received the charges against him from the 2<sup>nd</sup> respondent. The charges were on two issues, One; contesting for political position, and two; disobedience of employer's order. Again, on 29/1/2021 the applicant received a summons to attend before the investigative committee held at Kerege Secondary School. The task was held to be done on 10/2/2021. Upon the completion of the investigatory processes, on 2/3/2021 the applicant's employment was terminated since he was supplied a termination letter from the 2<sup>nd</sup> respondent to that effect. The applicant was aggrieved by the said decision, however, he unsuccessfully appealed against the said decision. Thus, the applicant has now knocked on the door of the court seeking the above-mentioned reliefs.

On the other side, the respondents through their joint counter affidavit sworn by Ms. Jackline Benedict Kavishe, legal officer of the 1<sup>st</sup> respondent strongly opposed the application. The respondents insisted that it was proper for the public servant to undergo the leave without payment when he wished to contest in political position. The respondents

further alleged that the applicant was properly handled as far as the principles of natural justice are concerned since he was fully notified by being supplied the summons to appear in the investigation committee as well and was given the right to be heard. As regards the alleged missing salaries, the respondents alleged that the same was done as a result of the directives from the permanent secretary of the president's office that a public servant who needs to contest in political position should take unpaid leave. Therefore, during that period, the applicant was not entitled to be paid the salary.

When this application was scheduled for hearing, the applicant appeared in person and represented himself whereas, Ms. Magdalena Mwakabungu (SA) and Josephine Chitongozi Legal Officer from the 2<sup>nd</sup> respondent appeared on behalf of the respondents.

In his oral submission in support of the application, the applicant prayed to adopt his affidavit and to form part of the submission. The applicant reiterated what he had narrated in the affidavit. He however insisted that the process of his termination by the disciplinary committee was not in compliance with the principle of right to be heard which is stipulated in the constitution of the United Republic of Tanzania, 1977 as amended from time to time under Article 13 (6) (a). The applicant insisted

that the said disciplinary meeting was tainted with procedural illegality leading to unfair termination.

Further, the applicant alleged that the respondent did not suspend him pending investigation instead they stopped his monthly salary. Thus, the disciplinary committee violated **section 37 (2) of the Employment and Labour Relation Act [Act No. 6 of 2007]** and referred this Court the case of **Richard Werema Versus TANESCO, Revision No. 4 of 2018 (HC Labour Division-TBR) (Unreported), National Bank of Commerce versus Mwinyishehe Mussa, Revisional Application No. 393 of 2019 (HC-Labour Division-DSM) (Unreported)** to support his stance of unfair termination and denial right to be heard. In the end, he prayed the application be granted with costs.

In response to what has been submitted and presented by the applicant, Ms. Magdalena Mwakabungu learned State Attorney on behalf of the respondents firstly prayed to adopt the counter affidavit so that the same be part of her submission. She thereafter referred this court to sections 31 and 32 of the Public Services Act, 2019 which require the applicant to exhaust all the local remedies available before seeking other avenues regarding employment-related matters. More so, she argued that

in terms of section 34A of the said Act, in case of any dispute between the parties herein, the said Act has to prevail.

However, on the matter at hand, she submitted that there is no dispute that the applicant requested to participate in political affairs under CCM on 14/7/2020 but the directives from the permanent secretary of the President's Office of Public Service Management and Good Governance required the applicant to take unpaid leave. However, according to her the applicant failed to comply with the said directives and thereafter continued to work therein, thus the respondent initiated disciplinary proceedings against the applicant in which all procedures were followed including affording him the right to be heard. She thereafter prayed the matter at hand be dismissed with costs.

In his rejoinder, the applicant maintained his position as submitted earlier. He thereafter prayed the application be granted with costs.

After summarizing the submissions from both parties as well as upon my objective perusal of the entire court records I find the crucial issue is whether the application for prerogative orders of certiorari and mandamus has merits or otherwise. However, before going into the merits of the application, upon going through the entire court records and submissions for or against the application, I have noted the following facts

to be undisputed. **One;** the applicant was employed as a Teacher in Bagamoyo from 5.5.2015. **Two;** while the applicant was under the said employment, he however, on 14<sup>th</sup> July 2020 and 21 July 2020 unsuccessfully contested to be a member of Parliament in the initial stages through Chama cha Mapinduzi (CCM). **Three;** following the said election process, the applicant was later subjected to disciplinary proceedings, and later on he was terminated from his employment. At this juncture, the applicant challenges the procedure deployed by the respondents for being tainted with procedural irregularities while the respondents support the whole process hence this ruling.

Starting with the sought prerogative orders of certiorari and mandamus, it is trite law that the same can be granted upon court discretion to meet the justice of the particular case for being the more appropriate remedy. This was also emphasized in the case of **Adecon Fisheries (T) Ltd Versus Director of Fisheries and Other [1996] T.L.R 352** on pages 359 and 362 whereby Hon. Justice Kaji (as he then was) had this to say;

*'...before going into the merits or demerits of these prayers, I must make it clear that it is a well-known principle of law that granting a prerogative order is a discretion of the court and that the court will only*

*do so if that is the only remedy to meet the justice of that case...when law allows discretion then that discretion must be exercised with a judicial mind. It must be exercised based on fairness and justice. It must not be exercised with bias or discriminatory mind.'*

Specifically, for an order of certiorari to be granted, the law is also well settled since the said remedy is merely issued at the court's discretion. That is, the same will be issued by quashing a determination for excess or lack of jurisdiction or error of law on the face of record or **breach of rules of natural justice** or where the determination was procured by fraud, collusion, or perjury. **See; The Assistance Registrar of Buildings Versus Fredrick G. Kibwana [1987] TLR 84**

Guided by the above legal positions and upon going through the entire court records, I find the application for certiorari has no merits. I say so because the applicant merely alleged without sufficient proof among other things to have been denied the right to be heard before his termination. However, the evidence from the record indicates that, after the applicant unsuccessfully applied for the political post under the CCM from 14-21 July 2020 without following the laid procedures stipulated for the public servant who wishes to participate in the political post, he was eventually terminated from his employment in accordance to the law. The



**Public Service Circular No. 1 of 2015** specifically in paragraph 4.1 requires the public servant who wishes to contest for the post in politics to issue a formal notice to his relevant authority and, thereafter the applicant to seek unpaid leave so that he can participate in the said political process. However, in the instant matter, the applicant did not comply with the said directives. For that reason, the respondents thereafter dully charged the applicant by issuing him with the charge over disciplinary action. The charge was dated on 3.12.2020. Later on, the applicant was notified to appear before the investigation (inquiry) committee to defend himself or otherwise. The notice was issued on 29.1.2021 and the hearing was scheduled and took place on 10.2.2021. In my settled view, the said preliminary investigation conducted against the applicant was proper as far as **Regulation 10.0 of GN. No. 53 of 2007 (The Public Service Disciplinary Code of Good Practice)** as well as **Rules 16 and 19 (1) (2) and (3) of the Teachers' Service Commission Regulations of 2016, GN No. 308 of 2016** are concerned. It was therefore proper in the matter at hand the disciplinary authority upon receiving the record from the investigatory committee concluded that the findings have some basis under **Regulation 10.4 of GN. No. 53 of 2007** that is why the evidence from the record reveals that the 1<sup>st</sup> and 2<sup>nd</sup> respondent upon considering the report of the inquiry

committee decided to terminate the applicant's employment from 2.3.2021. This was also in line with **Rule 19 (6) and (8) of the Teachers' Service Commission Regulations (supra)**. In its totality of the circumstances and sequence of events of the matter as elaborated above, I find the 1<sup>st</sup> and 2<sup>nd</sup> respondents correctly charged the applicant and there is no cognate evidence to suggest that the applicant was denied his natural justice be it right to be heard as he has been alleging. Therefore, I find no sufficient reason to fault the subsequent decision of the 1<sup>st</sup> and 2<sup>nd</sup> respondent to terminate the applicant from his employment.

Before I pen off, I find it appropriate to determine the issue of the appellant's salary arrears. The issue has been raised by the applicant in the application and the same appeared to have been conceded by the respondent during the hearing of the matter. According to paragraph 4 of the application, it states as follows;

*'4. That, the 1<sup>st</sup> Respondent didn't pay my monthly salaries from July 2020 up to February 2021 without any justifiable official information/ reasons regardless that I was still working within those mentioned months, which is attached and marked as annexure 'C''*

Although, in the counter affidavit the respondents strongly disputed the above allegation and tasked the applicant to prove accordingly. However, at the hearing of the matter, the respondents through Ms. Magdalena Mwakabungu the learned State Attorney came up with a different story. This is what she had submitted before the court and I quote;

*'...but his salary arrears prior to his termination will be paid and is in progress, though the applicant never commanded anything on it. **As of now, the applicant (sic) has paid his due. He has paid Tshs. 3,178,240 on 17.10.2023...**'* [Emphasis is mine]

However, the applicant in his rejoinder did not comment anything on the above submission, though the applicant in his submission in chief submitted that, the 1<sup>st</sup> respondent stopped paying his salary from July 2020 to February 2021. Be as it may, I am of the settled view that the 1<sup>st</sup> respondent stopped paying the salary to the applicant from July 2020 to February 2021, a fact which is also not disputed by both parties. This is because, as pointed above the applicant did not dispute the allegation that he was paid **Tshs. 3,178,240** on 17.10.2023 as a result of his salary arrears, again I am of the settled view that the applicant has fully received the said amount of money. Furthermore, the evidence from the records

as indicated above reveals that the applicant was demanding eight months' salary as arrears (from July 2020 to February 2021). This in my view indicates that the 1<sup>st</sup> respondent is fully aware that the applicant is still demanding unpaid salary arrears. In view thereof, the applicant deserves to be paid the remaining salary arrears from the 1<sup>st</sup> respondent.

All said and done, in its totality, I find the application of certiorari has no merits. The same is hereby dismissed with no order to costs. However, the application for mandamus is hereby granted to the above-stated extent of the unpaid salary arrears. Therefore, the appellant is entitled to be paid the outstanding salary arrears from the 1<sup>st</sup> respondent.

It is so ordered.



A handwritten signature in black ink, appearing to read "W.M. Chuma", is written over a horizontal line.

**W.M. CHUMA**

**JUDGE**

**20/11/2023**