IN THE HIGH COURT OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISC. CAUSE NO. 45 OF 2023

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR PREROGATIVE ORDERS OF CERTIORARI AND MANDAMUS AGAINST THE REFUSAL BY THE NATIONAL IDENTIFICATION PARTICULARS

AND

IN THE MATTER FOR SUING FOR RELATED TORTS

BETWEEN

FREDRICK ANTHONY MBOMA.....APPLICANT

VERSUS

NIDA.....1st RESPONDENT

THE ATTORNEY GENERAL.....2nd RESPONDENT

RULING

Date of Last Order: 05/12/2023.

Date of Ruling: 15/12/2023.

E.E. KAKOLAKI, J.

This is an application for leave to apply for prerogative orders of *certiorari* and *mandamus* against the refusal by the National Identification Authority (NIDA) to change the applicant's particulars in the national identity card, an order for joining the Judicial Review case with a claim for damages for related

torts and costs of the matter. It is preferred under certificate of urgency in terms of the provisions of rules 5(1-3) and 17 of the Law Reform (Fatal Accidents and miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014, supported with applicant's statement and affidavit.

When served with the application the respondents filed their reply to the applicant's statement and joint counter affidavit strenuously resisting merits of the application. Subsequent to that, they raised preliminary objections on point of law challenging competency of the application on two grounds that:

1. The Application is incompetent for being filed prematurely as the applicant has not exhausted the available statutory remedy provided under Rule 11(1) of the Registration and Identification of Persons General Regulations, 2014.
2. That the application is incompetent for want of decision of the Minister for Home Affairs as the final authority.

The respondents are thus moving the Court to strike out the application in its entirety with costs.

Briefly the applicant unsuccessfully applied to the 1st respondent for change of his particulars in the National identity card as the changes would assist him to effect conveyance of registered land in plot No. 501 located at

Chalinze to his name (possession). Aggrieved with the said decision and in compliance with the requirement of the law, he appealed to the Minister for Internal Affairs by lodging two different letters dated 28/06/2023 and 02/08/2023 without any response to date, the result of which he preferred the present application seeking for leave to apply for prerogative orders of certiorari and mandamus against the decision of the 1st respondent. And further that, he be allowed to join the related tort claims in the Judicial Review application.

As a matter of practice the raised preliminary objections were to be heard first and in that course the applicant appeared in person while both respondents enjoyed the service of Mr. Francis Wisdom, learned State Attorney. By consent parties craved for leave of the Court which was cordially granted for them to be heard in written form and both sides adhered to the filing schedule orders.

In his submission in chief regarding to the raised objections, Mr. Wisdom argued both grounds conjunctively stating that, the application is prematurely preferred hence incompetent as the applicant has not exhausted the available statutory remedy provided under Rule 11(1) of the Registration and Identification of Persons General Regulations, 2014, GN.

No. 271 (the Regulations) which allows him to appeal to the Minister against the decision of 1st respondent. He contended that, as averred in paragraphs 9 and 12 of his affidavit, appellant's appeal pending before the Minister challenging 1st respondent's decision is yet to be determined, thus this application is incompetent as extra-judicial machinery should be exhausted first before recourse is taken to the judicial process. In addition he argued that, it is improper to pursue judicial process where an appeal right is not exhausted and relied on a number of decisions including **Michael David Nungu versus Institute of Finance Management,** Civil appeal no. 170 of 2020 and **Parin A. A Jaffer and others versus Abdalah Ahmed Jaffer and two others** [1996] TLR 110 where it was emphasized that, local remedies should be exhausted first before going to judicial review.

It was Mr. Wisdom's submission that, since the appeal to the Minister is yet to be determined, lodging this application in court is an abuse of court process as the applicant is driving two horses at the same time in contravention of the law as it was stated in the case of **Hector Sequiraa v. Serengeti Breweries limited,** Civil application No. 395/18 of 2019 (unreported) where it was held that: *the law does not allow riding two horses at the same time because it amounts to an abuse of court process*. He said

it would be different if there was no given right of appeal by the law to the applicant against the decision sought to be challenged through judicial review. He relied on the case of **Sanai Murumbe and another vs. Muhere Chacha** [1990] TLR 54 where it was held that:

> *"An order of certiorari is one issued by the High court to quash the proceedings of and decision of a subordinate court or tribunal or public authority where among others there is no right of appeal."*

In view of the above submissions Mr. Wisdom invited this Court to strike out the application with costs as the application is misconceived and incompetent before it.

In his reply the applicant urged the court to dismiss the objections with costs on the ground that, the law under rule 11(1) of the Regulation doesn't compel the Minister for Internal Affairs to act on his appeal within specified time and further that, appeal by the aggrieved party to the Minister is a mere option which he pursued without response hence not bound to await for Minister's decision to prefer this application. He cited to the Court the case of **Aidan Fredrick Lwanga Eyakuze Vs. Commissioner General of Tanzania Immigration Service Department and 2 Others**, Civil Appeal No. 13 of 2020 [CAT-unreported) where the High Court decision striking out

appellant's application for Judicial Review on the ground of being premature was set aside as there was lacuna on the time limitation for the 1st respondent to finalise investigation and make decision before the application for judicial review is preferred by the applicant. The High Court case of **Juma Fakhi Vs. Commissioner General of Immigration & 3 others**, Misc. Civil Cause No. 2 of 2022 (HC-unreported) was also cited to support his submission where the court observed that:

> *"More so, the applicant has no other effective remedy which he can legally exercise except an application for review to the court*".

Basing on the above cited decisions it was applicant's argument that, since there was no response from the Minister on his filed appeal his only remaining effective remedy is the application for judicial review. He distinguished the cited cases of **Michael David** (supra) and **Parin A.A Jaffer** (supra) from his case stating that, on his side he exercised the right of appealing to the Minister but the later never responded back. He also distinguished the case of **Hector Sequiraa** (supra) on the issue of riding two horses at a time stating that, in that case the applicant had filed two applications in the same court while facts of his case are different as his appeal was preferred through administrative process while the present

application is a judicial process (court). Lastly he, distinguished the case of **Sanai Marumbe** (supra) stating that, the same is irrelevant since in that case the applicant did not file the appeal as there was no that right or option while in this case, applicant exercised his right of appeal in which the administrative authority is not obliged to determine the said appeal. The Court was therefore prayed to dismiss the grounds of objection for want of merit instead allow the applicant to amend the pleading by impleading the Minister, order the minister to reply to his appeal by setting to him the deadline and proceed to determine the application depending on Minister's reply and lastly waive costs as the law's failure to explicitly oblige the Minister to determine his appeal forced him to file this application.

In his rejoinder Mr. Wisdom reiterated his submission in chief and argued in response that, while in agreement with the applicant that the law does not compel the Minister to do anything on his appeal, that does not give him an automatic right to abandon his appeal as he could have wrote the Minister reminding him to determine his appeal and supply him the decision failure of which he would be now entitled to seek leave of the Court to apply for Mandamus order to compel the Minister to determine the said appeal. In support of his stance the Court was referred to the case of **John Mwombeki**

Byombalirwa Vs. The Regional Commissioner & The Regional Police Commander, **Bukoba** [1987] TLR 73, providing for condition under which application for Mandamus could be preferred. He distinguished the case of **Aidan Fredrick Lwanga Eyakuze** (supra) cited by the applicant stating that in the present case there is a pending appeal before the Minister while in that case there was a pending investigation. He also challenged applicant's prayer for amendment of the application to implead the Minister on the ground that, the prayer is a pre-emption of respondent's preliminary objection which its effect is to render the application incompetent hence deserve to be struck out as it was held in the case of **Standard Chartered Bank Vs. VIP Engineering & Marketing Limited**, Civil Application No. 222 of 2016 (CAT-unreported). On account of the above submission the Court was therefore pressed to find merit on the raised objections and proceed to struck out the application with costs.

I have carefully considered both parties' fighting submission and accord it with the deserving weight. I have equally thoroughly visited applicant's statement and affidavit in support of the application as well as the laws under consideration. The issue for consideration therefore is whether this

application is incompetent for applicant's failure to exhaust available remedy before its filing.

The trite law in which both parties are in agreement with is that, where there is available remedy for justice recourse such as appeal, a party has to exhaust it first before resorting to judicial review process. This settled position of the law was expounded in the case of **Michael David Nungu** (supra) whereby the Court of Appeal at page 14 observed thus:

> *"We are of the view that, the process of judicial review though open for anyone feeling aggrieved,* ***one has to properly consider pursuing the remedy especially where there are other available avenues for justice recourse, such as an appeal****." (Emphasis supplied)*

Similarly in **Parin A. A. Jaffer and Others** (supra) the Court had this to say:

> *"Where the law provides extra-judicial machinery alongside a judicial one for resolving a certain dispute,* ***the extra-judicial machinery should in general be exhausted before recourse is had to the judicial process****." (Emphasis added)*

In the present matter it is undisputed fact that, the law regulating the procedure for challenging the decision of the NIDA in which the applicant

seeks leave of the Court to apply for prerogative orders to challenge it is rule 11(1) of the Regulations which is providing thus:

> *"Where a registration officer refuses an application under these Regulations, he shall give to the applicant a written statement in prescribed form setting out in the first schedule the grounds of his refusal, and any applicant aggrieved by his refusal and **may**, within thirty days after receipt of that statement, **appeal against such refusal to the Minister**." [emphasis added]*

From the above exposition of the law, I am at one with both parties that the wording of the provision states in unambiguous terms that, the aggrieved party to NIDA's decision refusing grant of his application has an option to appeal to the Minister as the used word in the provision is "**may**". The word "**may**" was given interpretation by this Court in **R Vs. Said s/o Adam @said and 10 others**, Criminal session case no. 168 of 2022 (HC-unreported) where the Court had the following observation to make:

> *"Note that the word used is '**may**' and not 'shall' meaning that it **is permissive in the sense that it is not mandatory** that all proceedings concerning corruption and economic cases under the Act should be heard and determined by the said Court." [Emphasis added]*

Despite the fact that the word '"may" is permissive, I disagree and therefore not endorsing both parties' submission that the law does not compel the Minister to render his decision on applicant's appeal from the decision by the 1st respondent as once the law bestows any function or duty to a certain person or authority even without specifying the time within which the same should be discharged, such function or duty must be performed otherwise that person or authority can be subjected prerogative orders to compel him to perform such duty or render that decision. In this matter there is no dispute that, the applicant being aggrieved with the 1st respondent's decision refusing to grant his application, before resorting to prerogative orders and in exercise of the available remedy in terms of the provisions of rule 11(1) of the Regulations vide his letter dated 28/06/2023, appealed to the Minister the appeal which was followed by the reminder letter of 02/08/2023. It is also uncontroverted fact that, before the applicant could get Minister's response or compel him to determine his appeal and supply him with the decision reached, filed the present application.

The law under rule 4 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014 Government Notice No. 314, 2014 (the Rules) provides for procedure to be followed by

the party believing to be affected by any act or omission of any person or authority in decision making. The provision of rule 4 of the Rules reads:

> "*A person whose interests have been or believes will be adversely affected by* ***any act or omission****, proceeding or matter, may apply for judicial review" [emphasis added]*

Applying the above provision of the law into the facts of this matter, since the applicant herein opted to appeal to the Minister in a bid to exhaust the available legal remedies under the Regulations No. 271, the Minister who allegedly either delayed or refused to determine his appeal as his administrative action, I am persuaded that the only available remedy for him was to apply for prerogative orders such mandamus compelling him to determine his appeal. See the case of **John Mwombeki Byombalirwa** (supra)**,** where the Court of Appeal observed that:

> *"And judicial review by means of prerogative orders (certiorari, prohibition and mandamus) is one of those effective ways employed to challenge administrative action".*

In this matter however there is no evidence indicating that, the applicant seriously pursued the said appeal to its finality before preferring the present application. Since he abrogated his duty by challenging 1st respondent's

decision by way of Judicial Review in which its appeal is still pending before the Minister, on the pretext that the law does not oblige Minister to determine the same, I endorse Mr. Wisdom's proposition that this application is prematurely preferred and therefore incompetent before the Court. I so hold as any attempt by this Court to allow the applicant to pursue this application is tantamount to blessing him to ride two horses at the same time and therefore inviting the danger of having two conflicting decisions both directed to the 1st respondent in case the Minister determines applicant's appeal.

Regarding applicant's prayer for orders of amendment of the application to implead the Minister, setting deadline and compelling the Minister to reply applicant's appeal pending before him and determination of the application after Minister's reply or disposal of appellant's appeal, I find the same to be untenable as correctly stated by Mr. Wisdom, since granting the prayed orders is tantamount to blessing filing and determination of a fresh application for Judicial Review against undetermined appeal by the applicant before the Minister, in the course of determination of preliminary objections, something which this Court is not prepared to do.

In the premises and for the assigned reasons, I find the raised preliminary objections merited and therefore proceed to struck out the application with costs for want of competence.

It is so ordered.

Dated at Dar es Salaam this 15th December, 2023.

E.E. KAKOLAKI

JUDGE

15/12/2023

The Ruling has been delivered at Dodoma today on 15th day of December, 2023, remotely by video in the presence both parties.

Right of Appeal explained.

E.E. KAKOLAKI

JUDGE

15/12/2023