

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MAIN REGISTRY)
AT DAR ES SALAAM**

MISCELLANEOUS CIVIL CAUSE No. 27367 OF 2023

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

AND

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW TO CHALLENGE
THE DECISION OF THE PRESIDENT OF THE UNITED REPUBLIC OF TANZANIA
IN HER APPELLATE AUTHORITY FOR CONFIRMING THE DECISION OF THE
PUBLIC SERVICE COMMISSION WHICH CONFIRMED THE DECISION OF
TANZANIA PORTS AUTHORITY WHICH DISMISSED THE APPLICANT FROM
EMPLOYMENT.**

BETWEEN

PROTUS JOSEPH MUSHI APPLICANT

VERSUS

**THE CHIEF SECRETARY 1ST RESPONDENT
PUBLIC SERVICE COMMISSION 2ND RESPONDENT
TANZANIA PORTS AUTHORITY 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT**

RULING

22/03/2024 & 28/03/2024

MANYANDA, J.:

This is an application for leave to apply for judicial review filed by way of a Chamber Summons under the provisions of sections 18 and 19 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, [Cap. 310 R. E. 2019), and Rule 5 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014, GN No. 324 of 2014.



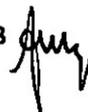
The Applicant is moving this Court for leave to apply for orders of *certiorari* and *mandamus* based on the main ground that the constitutional right to be heard or the fair hearing was violated. He gave grounds of the said violations according to the grounds deponed in his affidavit as being paragraphs 11 (a) failure to be supplied with investigation report, (b) attended by a partial committee comprising of members from his employer, (c) short notice of appearing for hearing before the Disciplinary Committee, (d) denial of opportunity to put mitigating factors and signing of the inquiry form, (e) failure to be supplied with the Committee minutes and denial of commenting on it; and 15(i) and (ii) the Public Service Commission creating a new charge and condemning him unheard.

The application is supported with a Statement giving the grounds upon which leave is sought and an affidavit verifying the same. It is countered by a joint counter affidavit by the Respondent.

At the hearing, the Applicant appeared in person unrepresented while was represented by Ms. Lilian Mirumbe, State Attorney, represented all the Respondents.

The background of this matter may be summarized from the records as follows: -

The applicant was employed by the Third Respondent, the Tanzania Ports Authority, he fell in squabbles between him and his employer over certificates that ended in his being charged with disciplinary offences



ultimately led to his dismissal from employment. He unsuccessfully appealed to the Public Service Commission and later to the President's Office. He has come to this Court in his attempt to assail the decisions of the First, Second and Third Respondent. By way of judicial review. However, as the law prohibits filing of an application for judicial review directly without obtaining leave of this Court prior, he has come to this Court with his application.

Hearing, with leave of this Court was conducted by way of written submissions. Protus Joseph Mushi, the Applicant drafted and filed his submissions personally and, Lilian Mirumbe, State Attorney did so for the Respondents.

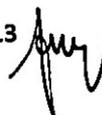
Submitting in support of the application, Mushi submitted on each point seriatim. After adopting the affidavit and statement of facts, Mushi submitted that the main ground of the applicant's application is that the constitutional right to be heard or the fair hearing was violated as indicated under paragraph 11 (a) to (e) and 15 (i) & (ii) of the Applicant's affidavit. That, the first ground is found under paragraph 11 (a) of the affidavit that was not supplied with Investigation Report (denial of access to vital documents), denying my right of fair hearing thereof. According to the Applicant, this act was in violation of Regulation 36 of the Public Service Regulations, GN No 168 of 2003 which was applicable during the disciplinary proceedings which took place in 2018. The current Regulation



has the same provisions under Regulation 36 of GN No. 444 of 2022. According to the Applicant, it is mandatory for the employee to be supplied with the investigation report per the Court of Appeal of Tanzania cases of **Enza Zadeni Africa Limited vs. Edwin Kasena**, Civil Appeal No. 427 of 2021 and **Severo Mutegeki and another vs. Mamlaka ya Maji Safi na Usafi wa Mazingira Mjini Dodoma (DUWASA)**, Civil Appeal No. 343 of 2019

The second complaint is comprised in Paragraph 11(b) of the Affidavit that the Disciplinary Committee was not impartial for having some members from the Employer (3rd Respondent). The Applicant argued that it is a requirement of the law that the disciplinary authority or the employer should not himself be a member of the Committee in order to avoid breach of the principle of natural justice and fairness as provided by Clauses 8.5 and 17.0 of the Public Service Disciplinary Code of Good Practice, GN No 53 of 2007. That there were members of the employer in the Disciplinary Committee, hence there was impartiality.

In regard to the third ground, the Applicant submitted that the complaint is about 4 days which is a shorter time of less than 7 days to appear for disciplinary hearing which was to his detriment per paragraph 11(c) of the affidavit. According to him Clause 8.8 of the Public Service Disciplinary Code of Good Practice, GN No. 53 of 2007 provides for at least seven days' notice must be given before the hearing.



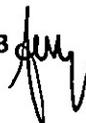
"The Committee conducting the inquiry shall give a notice of at least seven days before the hearing to the accused public servant notify him of the date, time and place at which the inquiry shall be held".

However, looking on the attachment marked as PJM-5 to the Applicant's Affidavit titled "NOTISI YA KUITWA KWENYE SHAURI" dated 25th July 2018 was served on the Applicant on 30th July, 2018 requiring him to appear before the disciplinary hearing on 03rd August, 2018, this was just four days only.

In Paragraph 11(d) of the Affidavit, the Applicant complained that he was not accorded with right to enter mitigating factors and signing of Inquiry Form per Appendix "B" to the GN No. 53 of 2007 contrary to Clause 16.10 GN No. 53 of 2007. That, the employer failed to fill in the Inquiry Form. In terms of Clause 25.3.2 of the same law provide that: -

"Failure to follow statutory procedures, which apply to all dismissal, means that the appellate authority shall find the decision automatically unfair".

The fifth complaint is embodied in Paragraph 11(e) of the Affidavit that he was not provided with copies of notes/minutes taken at the Disciplinary Committee hearing and not accorded opportunity to comment per Clause 19.1 (b) of GN No. 53 of 2007, which require the Committee to ensure that the employee and his representative are allowed to see any



statement made by witness or told very clearly exactly what they contain and comment on it.

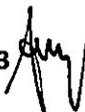
The Applicant's concern in ground six is about been charged with a new charge by the 2nd Respondent, the **Public Service Commission** as indicated in Paragraph 15(i) and (ii) of the impugned decision annexed to the Affidavit. It is his view that he was condemned unheard as far as the new disciplinary charge was condemned.

He prayed his application for leave to file judicial review be granted.

In her reply submissions, Ms. Mirumbe submitted that she was astonished on seeing that the Applicant did not submit on what is applied for in the chamber summons which is an application for leave.

According to the State Attorney, Rule 5(1) and (2) of the Law Reform (Fatal Accidents and Miscellaneous Provision) (Judicial Review Procedure and Fees) Rules 2014 and also the case of **Attorney General Vs. Wilfred Onyango Mganyi @Dadii and 11 others**, Criminal Appeal No. 276/2006 (CAT-unreported), quoting the Halsbury's Laws of England, 14th Edition, in Paragraph 568: -

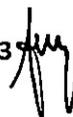
"Leave of the court is a necessary Pre- Condition to the making of an application for judicial review, and no application for judicial review may be made unless this leave has first been dully obtained."



The State Attorney, submitted further that the rationale for seeking leave for prerogative orders is 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 busybodies with misguided or trivial complaints of administrative errors; and third is to remove uncertainty in which public authorities may be left with such frivolous or groundless judicial review actions.

She added that before the court granting an application for leave there are some factors to be considered as stipulated in the case of **Alfred Lakaru vs. Town Director (Arusha)** [1980] TLR 326 and in the case of **Emma Bayo Vs, Minister for Labour and youth Development and others**, Civil Appeal No. 79 of 2012 which provide among others are follows;

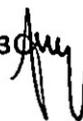
- i. The application must be made within six months after the act or omission to which the application for leave relates;
- ii. The applicant must disclose sufficient interests in the matter;
- iii. The impugned decision, action or omission must be in exercise of public law;
- iv. Leave lies only where there is no alternative remedy;
- v. There must be an arguable/ triable issue; and,
- vi. That the Application must be made in good faith.



The State Attorney submitted that the Applicant meets conditions I to IV but not the other two conditions. She was of the view that the Applicant had to confine himself on whether he has fulfilled the condition required for grant of leave to file judicial review, and the court shall not delve into the merit of the application for leave.

Then, the State Attorney went on submitting on the two criteria starting with whether there is an arguable case. According to her, the Applicant submitted on complaints under paragraphs 11(a) to (e) and 15 (i) and (ii) of his affidavit mainly that he was denied of his constitutional rights instead of displaying whether he has an arguable case. Ms. Mirumbe, relying on the provisions of Regulation 44 (1), (2) and (4) of the Public Service Regulations GN No. 168 of 2003, was of the view that the same provide clearly that the Public Servant is entitled to be served with a charge accompanied with a notice and not investigation report. In the Applicant's affidavit there is no single paragraph which states that the Applicant was not served with the charge, implying he was given the same and the law did not have a requirement of serving him with the report.

Then, relying on the authority in the case of **Josiah Baltazar Baisi & 38 Others v Attorney General & Others** [1998] TLR at page 331, Ms. Mirumbe submitted on the condition of good faith by stating that the application at hand is made without good faith by claiming violation of



principle of natural justice while he enjoyed all the principles of natural justice during his termination.

The Applicant rejoined shortly basically reiterating his submissions in chief and added that apart from the Respondent's failure to disclose the bad faith other than assertion that he was given all the rights complained of, he was in fact not given such rights.

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 facts in the statement by the Applicant.

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 condition was more polished and, from it, there were born others as spelt out in the famous case decided by the Court of Appeal, namely, **Emma Bayo vs. Minister for Labour and Youth Development and Another vs. Attorney General and Another**, (supra) and **Alfred Lakaru vs. Town Director (Arusha) (supra)** cited by the State Attorney. To add more cases, there is a case decided by this Court (Hon. Kamuzora, J), the case of **Pavisa Enterprises vs. Minister**



for Labour, Youths Development and Sports and Another, Misc. Civil

Cause No. 65 of 2003 (unreported). The conditions are 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, all the conditions were not contended against by the parties, save for two conditions only, namely, whether a prima facie case has been establishment and whether the application is made in good faith.

Let me start with the issue whether a prima facie case has been establishment. It was a contention by the Applicant that is, he was denied rights which are guaranteed by the constitution and the applicable laws. He explained the rights and laws providing the same rights as demonstrated above. On the other hand, the State Attorney maintained that the rights were given to the Applicant. As it can be seen, apart from the evidential dispute, there is a legal dispute that the Applicant complains about violation of the law contending that he was not supplied with investigation



report. On her side, the State Attorney dismissed the complaint on reason that the law does not provide for the requirement of employer to supply the employee with the investigation report.

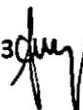
In my view these are contentious issues both evidential and legal on which the parties lock horns.

In applications for leave, just as the State Attorney rightly put, the rationale behind seeking leave for prerogative orders is 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 busybodies 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 groundless judicial review actions.

In sieving the applications, courts are not required to delve into the matters intended to be investigated by looking at the evidence, but they are to see only if the conditions do exist.

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."

As stated above, in this matter there are contentious issues both legal and evidential. Therefore, this Court is of the view that the Applicant has established a prima facie case.

As regard to the issue whether this application is brought in bad faith or otherwise as alleged by the State Attorney, the same issue is contentious because it is denied by the Applicant. For this Court to decide this issue, at this stage, it will have to delve into the evidence which is subject to examination during the main application. It is on the above reasons that I find the application has merit.



Consequently, I do hereby grant the same; the applicant is granted leave to file application for judicial review within the time prescribed by the law. No order as to costs. It is so ordered.

Dated at Dodoma this 02nd day of April, 2024

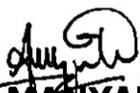



F. K. MANYANDA

JUDGE

Delivered at Dodoma this 02nd day of April, 2024 in presence of the parties by virtual court. Application granted; the applicant is granted leave to file application for judicial review within the time prescribed by the law. Right of appeal explained.




F. K. MANYANDA

JUDGE