

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

MISC CIVIL APPLICATION No. 33 OF 2018

**In the Matter of an Application by HERY ZEPHRYRINE KITAMBWA for
Prerogative Order of Certiorari**

HENRY ZEPHRYNE KITAMBWA.....APPLICANT

And

THE PRESIDENT

OF THE UNITED REPUBLIC OF TANZANIA.....1st RESPONDENT

ATTORNEY GENERAL.....2nd RESPONDENT

NATIONAL AUDIT OFFICE.....3rd RESPONDENT

RULING

5th July – 19th December, 2019

J. A. De-Mello, J;

The Applicant former employee of the **Attorney General's Office** and later on secondment to the **National Audit Office**, has moved this Court under **section 17(2)** and, **19(3)** of the **Law Reform (Fatal Accidents and Miscellaneous Provision) Act Cap. 310 RE 2002** as amended; and, **Rule 8 (1) (a) & (b), 8 (2), 8(3)** of the **Law Reform (Fatal Accidents and Miscellaneous Provisions, Judicial Review Procedure and Fees) Rules GN No. 324 of 2014** for;

(i) That this Honorable Court be pleased to grant to the Applicant for the Order of Certiorari, that is to

Respondent but ended up with the 3rd Respondent on secondment. He has even sued the **President of the United Republic of Tanzania** too being the final appellate body in that endeavour. It is his further submissions that, while serving the 3rd Respondent, his tenure came to an abrupt end on the 20th of February, 2017 following charges of **Embezzlement of Public Funds** amounting to **TShs. 123,300,000/=**. He was finally terminated by the same **3rd Respondent's** disciplinary authority. He appealed, the being dissatisfied, to the Public Service Commission, which in turn dismissed the same on the 25th of October, 2017. The basis of his Application is as observed above, particularly on **Error of Law**, the Applicant is of a firm view that, the holding by the 3rd Respondent was null and void having contravened Regulation 47(10) of the **Public Service Regulation, GN. No. 168 of 2003**. With this, it is apparent that, the **1st Respondent** did not address all the grounds of Appeal, notwithstanding that, some of misconduct had never been charged against the Applicant. With regard to **Failure to Act Judicially**, he brought on board a fact that, the decision by **Public Service Commission** was not signed, but, worse even, having not addressed the nine grounds of Appeal but, one only. On **Unreasonableness** he repeats the already said on the misconducts that have not been charged. The cases of **Sanai Mirumbe & Another vs. Muhere Chacha, (CA) at Mwanza, [1990]**, has been referred to in view of highlighting the powers this Court is bestowed with, in dealing with such anomalies. Beside all along

requests to be furnished with copies of key documents for the said misconduct allegations, nothing was forthcoming from the **3rd Respondent**. Instead he was 'bombarded' with **Notice of Intention to Institute Disciplinary Proceedings** accompanied with a 'Charge'. This being the position, he ended up interrogated for inquiry proceedings at the **Ministry of Home Affairs** under **Police Supervision**. A dismissal letter followed on the **20th of February 2017** containing two (2) charges with six offences but not the additional charge. On Appeal, the Public Service Commission sternly confirmed one of the four offences which the Applicant was never charged off. He even was denied his right to be heard, he asserts. In gross manifestation of violations, Counsel states failure of the **3rd Respondent** to share to the Applicant a copy of representation in writing to the Appellate body within **14 days** as required by **Regulation 61(3)** of the **Public Service Commission** (supra). The entire handling of the Applicants matter at all levels was violative of **Article 13 (6)** of the **Constitution** of the **United Republic of Tanzania of 1977** as amended from time to time, as the hearing if any, was unfair and, illegal, he believes. This was gross breach of procedure, worse more, when the hearing commenced eighty two (82) days after serving him the charges which the case of **Sanai Murumbe (supra)** had condemned. Not even what the Respondent alleges on their Counter Affidavit that, time for extension was granted as the **sixty (60)** days had already lapsed and, as such in contravention with Regulation ~~47~~**(10)** of **GN. (supra)**. Addressing

the **illegality of the decision**, the Applicant, observes another violation on which the **Public Service Commission** conducted and, concluded the Appeal after the expiry of **ninenty (90) days** as provided by **Regulation 62(2)** (supra). This abuse translated into non compliance with time limit prescribed by law, which tantamounts to lack of jurisdiction. Cases of **Ahmed Mbonde vs. Director Bulk Building Contractor, Revision No. 214 of 2008, Labour Division of the HC, Igunga Cotton Ltd. vs. Godfrey Ndihi Mwandu, Revision No. 26 of 2009 Labour Division of the HC** in support of his contention. The **1st Respondent** comes into picture as the final Appellate Authority under **section 60(5) of GN** (supra) but, according to records it was decided by delegation to one **H. Lugembe** on behalf of **Chief Secretary**, neither a President nor Chief Secretary herself. This violated the principle of “**Delegatus Non Potest Delegare**” that no mandate was in place, for the two to delegate as they did. Again, the allegation that, the Applicant was an employee of the **3rd Respondent** was a misconception considering the fact that his affiliation with the 3rd Respondent was purely on secondment basis and, nothing less nothing more, in line with **section 16(2) of the Attorney General Discharge of Duties Act**. He opposes the contents and position held in letter **Ref. No. CB. 178/311/01/'AA'/144 OSG-1** as deponed in the Counter Affidavit suggesting it to be considering his transfer to the **3rd Respondent** was in line with **section16 (2) (b)** it being a duty station only. The attachment, was, an afterthought and a surprise

with a view of denying the Applicant his rights, he believes. To fortify this, he attached letters **Ref. No. AGCC/PF.2004/23 & AGCC/S.70/AG/1** dated the **19th September 2013** and **11th March 2015**, respectively, to water down the alleged transfer of the **30th of October 2014** and, the Promotion on the **1st of April 2015** by the **2nd Respondent** contradicts the fact that, he was no longer the Attorney General employee. Irrespective of this only fact, the letter in the Counter Affidavit had a lot of defects ranging from his **job levels, lack of signature** and, by large **non submission** of the same to the addressee himself the Applicant until seen in the Counter Affidavit during hearing. It is all fake he concludes. Cases of **Stella Temu vs. TRA Civil Appeal No. 72 of 2002** was referred in support of **secondment** as opposed to **transfer**. All this said, it is the Applicant's prayer that this is a right case in which **Prerogative Orders for Certiorari** can be granted by quashing the decisions of the **Judicial Bodies** that acted illegally.

Opposing the Application, **State Counsel Abubakar Mrisha** submits that, the Applicant has misconceived the interpretation of **Regulation 47(10)** of the **Public Service Reg.** (supra) the inquiry is supposed to be commenced as it actually did, by serving him the charge on the **17/10/2016** whose sixty (60) days lapsed on the **17/12/2016**. The inquiry took off on the **13/12/2016** and, it is by virtue of that **Regulation 47(11)** for accomplishing within **sixty (60)** days. i.e the, 13/02/2017. It was timely, he suggests. With regard the decision of the **1st Respondent** and, which was

communicated to the Applicant on the **11th January, 2018** and hence final, being satisfied that there was sufficient proof for the charges levied against the Applicant, he confirmed the dismissal. Nothing on record to the allegation of delegating powers, but **H. Lugembe** was one communicating on behalf of the **Chief Secretary**. It was '**Misuse of Public Funds c/s 9 of the Public Finance Act** as amended in **2004** and, the **Public Service Act No. 8 of 2002** and **Regulation 65 (1)** that, the Applicant stood charged and, hence convicted and, sentenced. With reference to **failure to act judiciously**, Counsel terms this as mere bare foot on which the Applicant attempts to mislead the Court following failure to substantiating further, as to how this happened but, even the sitting of **17th to 21st March 2017** and, **24th to 27th 2017** session in which the **Public Service Commission** turned down the Applicant Appeal for lack of merit. The final findings was from the President on the 26/12/2017 as communicated to the Applicant on the 11th January 2018 confirming dismissal. A record of members who convened and determined the Appeal is in place in the event the Applicant wishes to peruse and, will find it duly signed. On **unreasonableness**, it is Counsel's contention that, and taking into account absence of evidence that the President disregarded his evidence, this was not pleaded in the Applicant's Affidavit to now have avenue at this juncture, as was observed in the case of **James Funke Gwagilo vs. AG [2004] TLR 161** and, that, of **Madam Mary Sylvanus Qorro vs. Edith Donath Kweka, Civil Appeal**

No. 102 of 102 in embracing the cardinal principle of law for Parties bound by pleadings. However, the Applicant opted not to expound this in his written submissions and, which the President having satisfied himself on the **Public Service** findings dismissed the Appeal and. communicated to the Applicant as already observed. Making reference to **section 8** of the **Public Service Act No. 8 of 2002** as amended by **Act No. 1 of 2018 Regulation 107(1)** of the **Public Service Regulation, Regulation 13** of the **Public Service Scheme**, and, **section D.55** of the **Standing Order**, of the **Public Service of 2003** vests the **Chief Secretary** with the administration and, dictation of, as a Principal Assistant. This then leads to the **Permanent Secretary Establishment** under **section 8 (3) (f)** of the **Public Service Act**, vesting the duty, in ensuring labour mobility of employees transfers from one department to another, one locality to another, all in Public interest. In cause of the above, the transfer of the Applicant to the **3rd Respondent** was properly effected. This, then made the 3rd Respondent his employer and disciplinary authority by virtue of **section 6 (b)** of the **Government Circular to Public Servants No. 1 of 1978**, in which the Applicant conceded. The case of **Stella Temu (supra)** referred by the Applicant is distinguishable from the facts of this Application, Counsel observes, following non confirmation during Stella's probation period. Same are the findings in the case of **Sanai Murumbe (supra)** another mis-fit for this case, he notes. In absence of either party registering acceptance and or decline

towards the other, the employment became lawful rendering the Applicant an employee of the **3rd Respondent**. The disciplinary proceeding then lied with the **3rd Respondent** as opposed to the **2nd** and, whose hearing was conducted fairly and, in accordance with the law, Counsel concluded. He firmly prayed for dismissal of the Application and, with costs.

Nothing emerging could be gathered from the Applicants rejoinder other than emphasizing on the case of **Sanai Murumbe (supra)** for **Certiorari** to issue even when only one of the grounds exists. He brought to light a new law under the **Public Service Act section 23 (1) (2)** stipulating powers for dismissing **Public Servants**. It is his submissions that, this was not complied to and, hence illegal. He also referred some of the matters not disputed, faulted or contradicted by Counsel for the Respondents. He insisted the two cases that of **Sanai Murumbe** and, **Stella Temu (supra)** to be relevant and, questioned the conduct of the **Deputy Attorney General** in promoting him while serving the **3rd Respondent** if true not his employee. Maybe, before I address this Application, a thorough perusal from the file record, revealing some pertinent documents which can shed light of some of the facts supporting this Application. On the **13/12/2018**, this same **Applicant Henry Zephrine Kitambwa** did lodge **Miscellaneous Civil Application No. 18 of 2018** applying for **Leave** to file for **Prerogative Orders of Certiorari** to quash the decision of the **1st Respondent** dated the **26th of December, 2017**, confirming dismissal from the **3rd**

Respondent. Having given the Application its due weight, the presiding **Honorable Judge Mruke** and based on all the three (3) principles underlying **Prerogative Orders** of **Certiorari** i.e. **Prima Facie case, Locus Standi** and **Timely**, granted **Leave** to file his Application. It is from this that, we all are present now faced with hearing by way of written submission from both sides for determination by Court . In that same perusal there is letter **Ref; DPC.2192/17 dated 13/9/206** termed **KUJIELEZA KWA KUJIPATIA FEDHA ZA SERIKALI KWA NJIA YA UDANGANYIFU** signed by **Prof. J. Assad**, Letter dated the **21, Septemba, 2016**, termed, **MAELEZO JUU TUHUMA ZA KUJIPATIA FEDHA ZA SERIKALI KWA NJIA YA UDANGANYIFU**, a response from the Applicant, demanding right to be heard as well as copies of documents relating to the allegations, (collectively marked as **exhibit. HK-1**), **NOTICE Ref; No. DPC.2192/17b** with appendices to include, charge Sheet under Regulation 44 (3) and its particulars, together with the **Applicant's Statement of Defence, Intended for Disciplinary proceedings** dated the **17th October, 2016** from same **Prof. Assad**, (collectively **exhibit HK-2**), Letter dated the **18 Oktoba 2016 Ref; DPC. 2192/18A** termed **KUSIMAMISHWA KAZI KUPISHA UCHUNGUZI** by Prof. Assad, (**exhibit. HK-3**), Letter dated the **30 Desemba 2016** termed, **WITO KUHUDHURIA KWENYE KAMATI YA UCHUNGUZI – KANUNI YA 47(1) (3) YA KANUNI ZA UTUMISHI WA UMMA 2003** by **MWENYEKITI KAMATI YA**

UCHUNGUZI, one T. Aron. Letter dated the **20/1/2017** termed **MAELEZO MUHIMU YA MAJUMUISHO YA USHAHIDI WA SHAURI LA NIDHAMU MBELE YA KAMATI YA UCHUNGUZI** by the Applicant himself (collectively marked as **exhibit. HK-4**), Letter dated the **20 Februari, 2017 Kumb; NA.DPC.2192/27** termed, **UAMUZI WA SHAURI LA NIDHAMU** by Prof. Assad, holding the Applicant liable, terminated and, availing right to Appeal to **TUME YA UTUMISHI WA UMMA (exhibit HK-5)** Letter dated the **1/03/2017** to **Tume ya Utumishi wa Umma** termed, **RUFAA DHIDI YA MAAMUZI YA MWAJIRI WANGU YA KUNIFUKUZA KAZI KUANZIA TAREHE 20/2/2017 (exhibit HK-6)**, Letter dated the **25 Julai 2017 Kumb Na; PSC/CSD/CAC.22/90/01/63** termed; **UAMUZI WA TUME KUHUSU RUFAA YAKO KUPINGA ADHABU YA KUFUKUZWA KAZI** by Richard Odongo (**exhibit. HK-7**), Letter undated to **Tume ya Utumishi wa Umma** by the Applicant termed, **RUFAA YA BW. HENRY ZEPHYRINE KITAMBWA KWA MHE. RAIS KUPINGA UAMUZI WA TUME YA UTUMISHI WA UMMA** and Letter dated 28 Novemba 2017 Kumb. Na.

PSC/CSD/CAC.22/90/01A/4 from **TUME YA UTUMISHI WA UMMA** to the Applicant signed by one J.C. Mbisso (collectively marked as **exhibit. HK-8**), Letter dated the **9/10/2017 Kum. Na. LAB/KIT/PSC/17** from the Applicant to the **PRESIDENT OF THE URT** termed, **RUFAA YA KUPINGA ADHABU YA KUFUKUZWA KAZI**, Letter dated the **25 Oktoba 2017 Kumb. Na.**

CAB.30/536/PF,232/3 from **OFISI YA RAIS IKULU** to the Applicant acknowledging receipt of his letter dated the **9/10/2017** signed by one **H. Lugembe** (collectively marked **exhibit. HK-9**), Letter dated the **30 Oktoba 2017** from **Tume ya Utumishi wa Umma** to **KATIBU MKUU KIONGOZI**, termed, **RUFAA YA BW. HENRY ZEPHRYNE KITAMBWA KUPINGA UAMUZI WA TUME YA UTUMISHI WA UMMA** responding to letter from **Ofisi ya Rais** dated the **9 Oktoba 2017** submitting therewith proceedings of the appeal against the Applicant and, noting **un-signed Minutes** of meeting of **Tume Na. 1/2017/2018.(exhibit. HK 10)**, Letter dated the **11 Januari 2018 Kumb. Na. CAB.30/536/PF.232/13** from **OFISI YA RAIS** to the Applicant termed, **RUFAA KUPINGA UAMUZI WA TUME YA UTUMISHI WA UMMA** dismissing the Appeal in accordance with section 25(1) (c) of the **Public Service Act Cap. 298** read together with **Regulation 60 (5) of Public Service Regulation of 2003 (exhibit. 11)**, lastly, is **RULING** from **Miscellaneous Civil Application No. 18 of 2018** at **Dar Es Salaam Main Registry, HENRY ZEPHRYNE KITAMBWA vs. THE PRESIDENT of the URT, ATTORNEY GENERAL & NATIONAL AUDIT OFFICE** granting **LEAVE** to file **JUDICIAL REVIEW**. All the above has been retrieved from the Applicant's own documents annexed in his Application with nothing accompanying the Respondents Joint Statement in Reply as well as Counter Affidavit. I thank him for this. At this outset then let me reaffirm the decision of the Court in the case of **Sanai Mirumbe (supra)** which highlighted

the criterias for investigation by the High Court, in prerogative action such as the matter before me. Whereas, there is a compilation of all the necessary documents pertaining to all that what transpired from initial to the end, which in absence of the proceedings, seem to me sufficient for enhancing the decision of the President and, which I would not attempt to interfere for the following reasons;

- 1. All charges and particulars of offence at the initial inquiry are known and clear (exhibit HK-2)**
- 2. The Employee was afforded right to be heard as shown from exhibit HK -4**
- 3. The ultimate findings ended up terminating the Applicant from service having satisfied itself to the facts and evidence before it.**
- 4. The absence of enquiry proceedings but submitted to the President's Office and which as stated in exhibit HK-6 not shared to Applicant, seems defective but not fatal, to the root of the matter as the same were ultimately submitted to the President. As said the Applicant could still request to peruse.**
- 5. The Applicant contention that he was not availed documents supporting the charges is lame considering a detailed in exbt HK-with detail of Imprest and amount of money issued, on specific dates, check advanced, activity to be done, amount spent and Remarks**

6. Evidence adduced and before the Inquiry and to which the Applicant duly appeared and responded to had on proved by standards set in Criminal offences that of Proof beyond reasonable doubt, this being a criminal offence. The accused and as highlighted by the Applicant himself in exhibit HK-4 (2of 2) comprised of Felista Kemilembe, Henry Kitambwa, Martin Semeya Semngindo and Daudi Mitumba Ayubu.

7. The decisions of the 3rd Respondent which resulted to TERMINATION, and appealed to the Public Service Commission and ultimately to the President was justified and right, him being his employer as evidenced by the Applicant himself in exhibit HK-6 Rufaa Dhidi ya Maamuzi ya MWAJIRI wangu Kunifukuza kazi. (emphasis underlined)

Prudence requires that parties are afforded opportunity to address the **Quasi Judicial** bodies of this like with the '**Audi Alteram Patern**' principle of natural justice as was observed in the case of **Mbeya – Rukwa Auto parts & Transport Ltd. vs. Jenista George Mwakyoma [2003] TLR 251** in which the English case of **Ridge vs. Baldwin [1964] AC 40** was relied upon in which the Court emphasized;

"In this country, natural justice is not merely a principle of common law; it has become a fundamental Constitutional right. Article 13 (6) (a) includes the right to be heard among attributes of equality before the law..."

I hasten to confirm that, this was glaring and quite vivid that due process had been in place without occasioning any miscarriage of justice to the Applicant.

With all this background, let us now albeit briefly refresh our memories as to what **Prerogative Orders of Certiorari for Judicial Review** is. The law on **Certiorari** is provided under **sections 17, 18, & 19 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance Cap. 360**. I am even keen and live to the circumstances and, the scope of jurisdiction of the High Court, under which **Prerogative order for Certiorari** may issue as was laid down in the case **Council of Civil Service Unions vs. Minister for Civil Service [1984] 3 ALL E.R 935** whereby five (5) Rules ought to be in place before the High Court quashes the proceedings and, the decisions of a **sub ordinate Court** or a **Tribunal** or a **Public Authority** but, only where there is **no right of Appeal**. The mandate on which the High Court operates is limited to investigating the proceedings on any of the following grounds, apparent on record. First, the subordinate organ has taken into account matters which ought not to be taken. Second, subordinate organ has not taken into account matters which ought to be taken. Thirdly, lack or excess of jurisdiction and fourthly, that the conclusion arrived at is unreasonable but lastly, rules of natural justice have been violated. I am even cognizant of the fact that my scope of investigation is not that of appeal. Looking at the entire proceedings in this Application, a I am in one with the 3rd

Respondent and as submitted by Counsel for the Respondent, that it took into account all matters which ought to be considered and left nothing out. The 3rd Respondent was acting within the scope of its jurisdiction under **sections 6(1) 10 (1) (e) 25 (1) (b) (b) of the Public Service Commission No. 8 of 2002 Cap. 298, Regulation 37, 45, 47 (1) (3) of the Public Service Regulation 2003**, and, cognizant of its employee who even himself admitting to appear, heard and defend himself, fully afforded his right to be heard as required by principles of natural justice, hence nothing unreasonable had been occasioned as alleged. My powers to interfere if any, is limited to that of judicial authority which is concerned and only concerned to ascertain whether the body or authority has contravened the law, and which I find none. This has been the stance as held in the case of **Anisminic Ltd, vs. Foreign Compensation Commission [1969] 1 ALL ER 208**. Much as I sympathize with the Applicant but, I am certain that the proceedings and findings of the 3rd Respondent, one which both the 2nd and 1st upheld, is in order and by law. The Application is hence dismissed without costs considering the long journey that the Applicant has traversed in quest of his rights and out of employment since 2016.


J . A. DE-MELLO

JUDGE

19/12/2019