IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE MWANZA DISTRICT REGISTRY

AT MWANZA

MISCELLANEOUS CAUSE NO. 151 OF 2020

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

AND

IN THE MATTER OF AN APPLICATION FOR EXTENSION OF TIME TO FILE AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI

AND

IN THE MATTER OF THE DECISION BY THE BOARD OF PAMBA SECONDARY SCHOOL AND THE DECISION BY THE PERMANENT SECRETARY MINISTRY OF EDUCATION

BETWEEN

JULIUS PHILIBERT SHADRACK ..... APPLICANT

AND

THE BOARD OF PAMBA SECONDARY SCHOOL ..... 1ST RESPONDENT

PERMANENT SECRETARY
MINISTRY OF EDUCATION ..... 2ND RESPONDENT

ATTORNEY GENERAL ..... 3RD RESPONDENT

RULING

13th July, & 4th August, 2021

ISMAIL, J.

This is an application for twin orders, namely; extension of time to file a judicial review; and grant of leave to apply for a prerogative order of *certiorari*, to bring and quash the decision of the respondent to discontinue the applicant's studies. The decision sought to be impugned was made by the Head Master of Pamba Secondary School in which the applicant was a student. At the time of expulsion, the applicant was a form two student. The decision was arrived on 5th July, 2018, and communicated to him on 9th July, 2018. The allegation leading to the applicant's expulsion is the applicant's poor disciplinary record and boycotting of a punishment given by members of staff in the school.

The application has been preferred under the provisions of section 17(1), (2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap. 310 R.E. 2002 (now 2019), section 2(1) of the Judicature and Application of Laws Act, Cap. 358 R.E. 2002 (now 2019); and Rule 8 (1) and (2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure Fees) Rules, 2014, GN. NO.324 of 2014. Supporting the application is the applicant's own affidavit. It sets out grounds

upon which the application is based. The contention in the affidavit is that the applicant was not afforded a fair hearing and the due process of the law, including being allowed to have a representative during the hearing, or calling witnesses and impeaching the testimony of the witnesses who would be called to testify against him. He also decried the manner in which the investigation was carried out. With respect to the delay in filing the application, the applicant contended that pursuit of a legal service was the reason for his delay.

In the joint counter-affidavit sworn by Joseph Richard Vungwa, the respondents have valiantly denied the applicant's averments. The deponent contended that the applicant's bad behavior was the reason for his expulsion. With regards to the delay, the respondent's view is that, looking for a legal officer has never been a good cause for extending time or granting leave to file an application for judicial review. The respondents argued that the delay of 379 days from the date of the final decision to the filing of the instant application has not been accounted for.

When the matter came up for hearing on 13th July, 2021, the applicant appeared in person, unrepresented, while the respondents were represented by Ms. Subira Mwandambo and Sabina Yombo, both state attorneys. The applicant began by praying to adopt the contents of his affidavit. He

submitted that he was late in preferring the instant application, the ground being that he was trying to secure the services of an advocate. He further contended that a copy of the ruling that struck out his application was supplied late, meaning that the delayed supply had an impact on all subsequent actions.

With regards to his application for leave, the applicant argued that he was denied his constitutional right to education since the 1st respondent did not afford him an opportunity to be heard, contrary to the requirements of the Education Act. He argued that the decision was a unilateral affair that did not consider his position. The applicant further argued that his complaint was not addressed by the Ministry of Education, as the said letter made reference to a non-existent communication, while his complaint was sent in March, 2019. He prayed that the application be granted.

Ms. Mwandambo sought to rely on the respondent's joint counter-affidavit as part of her submission. On extension of time, her contention is that the reason given is not sound enough to amount to a sufficient cause. She argued that sourcing legal services is not a ground for allowing an extension of time, asserting that the applicant had to be mindful of the time frame set for filing the application for leave. She contended that the applicant had to account for each day of delay and prove that he was prevented from

doing so by a sufficient cause. The counsel relied on the decision in ***Tropical Air Tanzania Ltd v. Godson Eliona Moshi***, CAT-Civil Application No. 9 of 2017 (unreported).

The respondent's counsel further argued that the application is omnibus as it has combined two distinct prayers and different procedures, making it untenable. She prayed that the application be struck out.

With respect to the right to be heard, Ms. Mwandambo submitted that the contention is pre-mature, noting that the conditions for granting an application for judicial review are set out in the case of ***Sinai Murumbe & Another v. Muhere Chacha*** [1990] TLR 54. The counsel added that the talk of a judicial review is not yet ripe. She prayed that the application be dismissed with costs.

In his rejoinder, the applicant insisted that he had advanced sound reasons for the delay and that the same are sufficient. He submitted that he did not have any other alternative than enlisting a legal aid assistance from the Tanganyika Law Society, as he did not have any means to source the service of a lawyer other than though the legal aid. He also argued that it is true that he did not have a copy of the ruling early enough, and that there is no way he would prepare another application without the ruling.

Having heard the submission made by the parties, the Court's duty, at this stage of the proceedings, is to determine:

(i) *Whether the application is defective on account of it being omnibus;*

(ii) *Whether sufficient cause has been adduced to warrant a grant of extension of time to apply for leave;*

(iii) *Whether leave should be granted for applying for prerogative order of certiorari.*

I will begin with the disquieting issue raised in the respondents' counter-affidavit, and the featured prominently in the course of the respondents' oral submissions. The contention by the respondents is that the prayers in the application are distinct and, therefore, omnibus. My entry point to this issue is the excerpt from the decision of the Court in ***Gibson Petro v. Veneranda Bachunya***, HC-Civil Revision No. 10 of 2018 (MZA, unreported), wherein the following observation was made (at pp. 7 and 8):

> *"Let me start by setting the record straight, that the law is quite settled and clear in our legal system, that combination of several prayers in one application is not an abhorrent practice, especially where the prayers, as both counsel unanimously agree, are related and they can be dealt with through the same provisions of the law or by the same piece of legislation. This position was enunciated in* ***Tanzania Knitwear Ltd v. Shamshu Esmail*** *[1989] TLR 48. The*

*principle was cemented in **MIC Tanzania** (supra). The rationale for this is, as correctly submitted by the counsel for the applicant, to tame needless multiplicity of applications which are time consuming and resource guzzlers.*

However, where an application contains two or more prayers which are diametrically opposed to each other; and/or where the governing provisions of the law are different, time frames for applications are different; and where considerations to be taken into account in determining them are different, such application is said to be omnibus and, therefore, incompetent."

The message that is distilled from the quoted passage is that, unless the prayers sought are diametrically opposed to each other; and/or the governing provisions of the law are different, time frames for applications are different; and considerations to be taken into account in determining them are different, combination of two or more prayers in an application is allowed. Reverting back to our application, the question is whether prayers sought in the instant application are a perfect fit for combination.

In my hastened view, the answer to this question is in the negative. I shall explain. The prayers sought are different in context, requiring different timeframes in their determination, as different considerations in their

resolution as the governing provisions of the law are. In an application for extension of time, the applicant's duty entails satisfying the Court on whether the delay was due to sufficient cause, and accounting for each day of delay. This is different in the case of applying for leave to apply for prerogative orders requires that the applicant must establish the ***"there is a substantial or serious question to be investigated"*** (See: Mapigano J., in ***Kahama Gold Mines & 2 Others v. Minister for Energy & Minerals,*** HC-Misc. Civil Cause No. 127 of 1999 -unreported). This means that the Court must be satisfied that a prima facie case is evident, and the application for the prerogative orders has a probability of success. The Court's only task in the latter is that the evidence brought before it is neither skimpy nor vague, and that the grounds for judicial review are real and not mere theoretical possibilities.

The foregoing position is emboldened by the Court of Appeal's decisions in ***Ally Chamani v. Karagwe District Council & Columbus Paul*** CAT-Civil Application No. 411 of 2017 (Bukoba-unreported); ***C.L. Rutagatina v. The Advocates Committee & Another***, CAT-Civil Application No. 98 of 2010 (DSM-unreported; and ***Gibson Petro*** (supra). In ***Ally Chamani*** (supra), it was held:

"After having dispassionately examined the notice of motion and the reliefs sought by the applicant, I agree with Mr. Kabunga together with the applicant's concession that the application is not properly before the Court because of being omnibus. I say so because, it seeks three distinct reliefs which are ***one****, extension of time to give a notice of appeal against the High Court decision;* ***two****, extension of time to file an application for leave to appeal to the Court of Appeal;* ***three****, leave to appeal to the Court of Appeal. This application goes contrary to the spirit of Rules 44-66 which govern applications as they each provide for a distinct application according to the type or category of relief sought."*

In consequence, I take the view that the application the application is suffering from an abhorrent misjoinder of prayers that renders is omnibus, that makes it liable to striking out.

Assuming that the application is not omnibus as alleged by the respondents. I would still hold that the prayer for extension of time fails, and here is why. It is well known that extension of time within which to apply for certain orders is predicated on the applicant advancing sufficient cause for extending time. This would involve meeting one or all of the conditions set in the landmark decision of the Court of Appeal in ***Lyamuya Construction***

Company Limited v. Board of Trustees of YWCA, CAT-Civil Application No. 2 of 2010 (unreported). These are:

> *"(a) The applicant must account for all the period of delay.*
> *(b) The delay should not be inordinate.*
> *(c) The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action he intends to take.*
> *(d) If the Court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as illegality of the decision sought to be challenged."*

In drawing the conclusion on whether such conditions have been met involves glancing through an affidavit that supports the application, it being evidence, unlike the parties' submissions which are *generally meant to reflect the general features of a party's case and are elaborations or explanations on evidence already tendered.* (See: ***The Registered Trustees of Archdiocese of Dar es Salaam v. Chairman Bunju Village Government and Others***, CAT-Civil Application No. 147 of 2006 (unreported)).

The applicant's reason for the delay as picked from the affidavit is twofold. One, that he was trying to enlist the services of an advocate. The

other is that he was following up a copy of the ruling that dismissed his application. With respect to the latter, this contention is flawed, knowing that the ruling did not have any bearing on the instant application, meaning that its absence would not impede the applicant's plan to institute a fresh application. This explains why the same has not been referred to or attached to the application. In any case, there is no information on when exactly the same was applied for and furnished to applicant.

With regards to sourcing a lawyer, my settled view is that such pursuit would not constitute a good or sufficient reason for extending time. The applicant was under obligation to ensure that pursuit of such service considers time prescription for taking a certain action within a certain timeframe. In this case, the delay took 90 days, and it is inexplicable that it would take all that long to source a lawyer.

I take the view that the applicant has failed the duty of accounting for each day of delay, to warrant exercise of the Court's discretion to grant the application. Having failed to do that, the Court's decision to accede to that application would mean walking against the grain, set out in ***KIG Bar Grocery & Restaurant Ltd v. Gabaraki & Another*** (1972) E.A. 503 wherein it was held that ***"... no court will aid a man to drive from his own wrong."***

In view thereof, I am not convinced that the application has not met the threshold set for extension of time. Accordingly, the said application is dismissed. No order as to costs.

It is so ordered.

DATED **at MWANZA** this 04th day of August, 2021.

M.K. ISMAIL

JUDGE