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

MISCELLANEOUS CAUSE NO. 3 OF 2021

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

AND

IN THE MATTER OF THE DECISION OF NATIONAL EXECUTIVE COUNCIL OF THE LOCAL GOVERNMENT WORKERS UNION (TALGWU) (BARAZA KUU LA CHAMA CHA WAFANYAKAZI WA SERIKALI ZA MITAA) DATED 26TH JANUARY, 2021

BETWEEN

OBADIA G. MWAKASITU ..... APPLICANT

AND

THE TANZANIA LOCAL GOVERNMENT WORKERS UNION (TALGWU) ..... RESPONDENT

Date of Last Oder: 22/07/2021

Date of Ruling: 27/08/2021

RULING

FELESHI, J.K.:

This ruling emanates from an application made by the applicant on 30th day of March, 2021 by way of chamber summons in terms of Rule 5(1) and (2)(a), (b), (c), (d) and (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014 for the following orders in relief, that is: -

(a) The Court may be pleased to grant leave to the applicant to apply for the writ of *certiorari* quashing the decision of the National Executive Council of the respondent, Tanzania Local Government Workers Union (TALGWU) (Baraza Kuu la Chama cha Wafanyakazi wa Serikali za Mitaa) dated 26th January, 2021 which decision dismissed/removed the applicant from his position of Deputy General Secretary (Naibu Katibu Mkuu) of TALGWU;

(b) The Court be pleased to grant leave to the applicant to apply for the issue of a writ of *mandamus* against the respondent compelling the same to comply with the proper procedures involving disciplinary actions against its members as laid down under its Constitution and Regulations made;

(c) Costs; and

(d) Any other reliefs as the Court may deem just and fit to grant.

The preferred chamber summons was supported by both statement and affidavit of the applicant. The applicant averred that, on 24th August, 2016, he was elevated to the post of Deputy Secretary General of TALGWU vide a letter dated 1st September, 2016, the position he served until on 21st October, 2019 when he was served with a letter from TALGWU suspending him from that position to pave way for some alleged disciplinary investigations.

That, while on suspension, he received a notice from TALGWU informing him of an investigative inquiry that was set to investigate him over the alleged misconducts. The notice was accompanied by a "vague charge sheet" comprising of six counts. The applicant was required to enter his defence within 21 days from the date of service, which he complied with.

On 29/12/2020, he was served with summons by TALGWU for a disciplinary hearing scheduled on 6th day of January, 2021 at Serene Beach Resort, Dar es Salaam. On 26th January, 2021, TALGWU entered verdict to the effect of terminating him from the said position. According to the applicant, the panel that determined the matter was biased as it comprised some of the investigative committee members.

It is from the above the applicant alleges that the procedures and entire processes to have been tainted with spite, ill motive and in breach of the principles of natural justice. The controverted transgressions read:-

(i) "The members forming the investigative committee were the same who constituted the disciplinary committee. This resulted into bias to Mr. Obadia contrary to principles of natural justice and the requirements of regulation 32(5) (a) of the Kanuni za Utumishi wa Chama Cha

Wafanyakazi wa Serikali za Mitaa Tanzania, Toleo la 2018 (Henceforth, the Regulations).

(ii) The investigative committee acted *ultra vires* when it conducted its investigation beyond the time limited by the regulations, in particular, regulation 32(12).

(iii) The National Executive Council had no authority to terminate Mr. Obadia from his position. It acted *ultra vires* contrary to article 4.3(ii) of the TALGWU Constitution."

Mr. Twaha Mtengera, advocate, encountered the applicant's allegations by deposing a counter affidavit for the respondent which was filed in court on 18th day of May, 2021 by Milestone Attorneys (Advocates) through Mr. Daniel Bushele John, advocate. Paragraphs 8, 9, 10 and 11 of the counter-affidavit referring to regulations 27(2) and 32(5) and article 4.3(ii) of 2018 and 2016 of TALGWU Regulations and Constitution respectively specifically, are to the effect that in suspending and terminating the applicant from his position the respondent did not breach the principles of natural justice.

Along with the said counter affidavit, the respondent through Mr. Daniel Bushele John, advocate, filed a Notice of Preliminary objection and raised the following points: -

1. *The application is supported by a defective affidavit which has an incurable jurat of attestation.*
2. *The application is hopeless for failure to follow the available remedy as per the laws of the land.*

On 24th May, 2021, represented by Mr. Ashiru Lugwisa and Emmanuel Mashamba, advocates of EMU Law Partners and Mr. Daniel Bushele John, advocate respectively, the parties were granted leave to argue both the raised points of objections and merits of the application by written submissions of which, as will be explained later, they partly complied with on 6th, 7th and 18th June, 2021.

On 26th June, 2021, one advocate Patrick Togi Kaheshi from Carmel Attorneys, a stranger to the proceedings, weirdly appeared in court for the respondent in the absence of Mr. Daniel Bushele John, advocate and purported to have had filed another set of preliminary points of objection on 24th day of June, 2021 comprising three (3) points in the matter Mr. Daniel Bushele John had already filed the written submission per the court order.

As no leave was granted to discharge Mr. Daniel Bushele John, advocate from the proceedings, the court ordered for his appearance on

22nd July, 2021 along with the principal officer of the respondent, one Richard Mohamed Mtima (General Manager of the respondent). Upon a brief inquiry conducted by the court on 22/7/2021 regarding the status of Mr. Daniel Bushele John advocate in the proceedings, the later was formally discharged from representing the respondent and leave was granted to Mr. Patrick Togi Kaheshi, advocate to replace him.

Regarding the notice of preliminary objection filed by Mr. Patrick Togi Kaheshi without leave of the court on 24th June, 2021 after the parties had already filed their written submissions on 6th, 7th and 18th June, 2021, I with respect, hold that, the same is worthless and amounts to an abuse of court processes. I hold so because, the position regarding case hearing by written submissions with its attendant effect in this country is clear, that is, it is as good as what obtains in *viva voce* hearing. I will for that matter not address Mr. Kaheshi's points of objection. This ruling is thus confined to written submissions filed pursuant to the order issued by the court on 24th May, 2021.

Now, arguing for the 1st point of objection, the respondent's counsel submitted that, the affidavit in support of the chamber summons is in

contravention of section 8 of the Oaths (Judicial Proceedings) and Statutory Declarations Act, [Cap.34 R.E.2002] and the schedule thereto. He argued that, the format of *jurat* of attestation did not comply with the requirements of the law.

To that effect and to buttress his submission, the learned counsel referred this court to its decision in **Hashim Jongo and 41 others vs. Attorney General and TRA,** High Court Miscellaneous Civil Appeal No. 41 of 2004, Dar es Salaam, unreported, where the appeal was struck out on similar point of law.

Regarding the preferred 2nd point of objection that the application is hopeless for failure to follow the available remedy as per the laws of the land, Mr. Daniel Bushele John, advocate, briefly submitted to the effect that, the applicant, being an employee to the respondent, ought to have channeled his grievances to the Commission for Mediation and Arbitration in terms of sections 12 and 14(1) (a) and (b) of the Labour Institutions Act, [Cap.300 R.E.2019].

Notably, the applicant's counsel filed no submission in response to the objections. Surprisingly, it was the respondent counsel again whose written submission he filed on 18th June, 2021 to oppose the merits of the

application introduced additional materials in part 2 in respect of his second limb of objection. As all this was done without leave of the court, I will disregard that part of his submission, for entertaining it will undoubtedly prejudice the adverse party.

Having gone through the Court record and the submission by the respondent's counsel in support of the preliminary points of objections, I shall now deliberate and dispose them accordingly.

Notably, with regard to the 1st point of objection on the competence of the *jurat* of attestation, essentially, I find what has been leveled as a concern before this Court in the raised preliminary objection is with regard to the format of the *jurat* of attestation, no more no less. The impugned attestation clause is couched in the following format: -

> "SWORN at Dar Es Salaam before me Gasper Mwakanyemba (Commissioner For Oaths) by the said **Obadia G. Mwakasitu** who has been identified to me by **Emmanuel Mashamba** who is personally known to me in my presence this 01st Day of March, 2021
>
> **Before me;**
>
> "Name: GASPER MWAKANYEMBA
> Signature: sgd
> Address: 32207 DSM
> Qualification: **Commissioner for Oaths"**

On the other hand, the sample format and substance of *jurat* of attestation prescribed in the Schedule under section 10 of the Oaths and Statutory Declaration Act, (supra) is quoted hereunder: -

> "This Declaration is made and subscribed
> By the said A. B. who is known to me
> Personally (or who has been identified to
> me by .....; the latter being known
> to me personally) this ..... day of .....
> .....
>
> (Signature, qualification and address of the
> person taking the declaration)"

I have had the advantage of closely comparing the impugned *jurat* of attestation above along with the prescribed sample format of *jurat* of attestation made under section 10 of the Oaths and Statutory Declaration, Act (supra) reproduced above. I think, with respect, that the only difference I can gather is the inclusion of words "Gasper Mwakanyemba (Commissioner For Oaths)" in the 2nd and 3rd lines of the applicant's *jurat* of attestation.

Admittedly, in view of the above, one cannot but agree with me that a mere inclusion of the phrase "Gasper Mwakanyemba (Commissioner for Oaths)" in the 2nd and 3rd lines of the applicant's *jurat* of attestation cannot

in any way dilute the substance of the deponent's affidavit under the laws governing affidavit. This is more so because, the *jurat* of attestation is immediately accompanied by sufficient details regarding the name, address and signature of the Commissioner of Oath who administered it.

I am also of the respectful view that the absence of other prescribed forms of oaths and affirmations and the manner in which the same may be made for different courts or for different classes of persons within the spirit of section 8 of the Oaths and Statutory Declaration, Act (supra) renders this point of objection non-meritorious for want of mantic and objectivity.

So, to this Court, by premising his objection to section 8 of the Act the learned counsel ought not to have argued noncompliance as to the prescribed format of *jurat* of attestation and argue it as a point of law whilst knowing there is no such format in existence under the provision. In other words, it could sound different if at all the very law/rules/regulations could have provided for such alleged non-complied with format/s.

In addition, I am contented that the inclusion of the phrase "Gasper Mwakanyemba (Commissioner for Oaths)" in the 2nd and 3rd lines of the applicant's *jurat* of attestation is a minor and harmless defect curable

under the "Overriding Principle" or "Oxygen Principle" whose object is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. The principle was introduced by the Written Laws (Miscellaneous Amendments) Act (No. 3) Act No. 8 of 2018 by amending amongst others, section 3 of the Civil Procedure Code, [Cap.33 R.E.2019] hence embracing the spirit of Article 107A(2)(e) of the Constitution of the United Republic of Tanzania, [Cap.2 R.E 2002].

It is therefore clear to me that, as long as the efficacy of affidavit as a case adjudication tool has never been questioned or doubted, it is thus a requirement of a party wishing to fault the competence of any presented affidavit to ensure that he has compelling objection ground which, if upheld, should be capable of vitiating the competence of the case before the court.

From the above discussion, I find the 1st raised point of objection is devoid of merits and the same is hereby overruled.

In respect of the 2nd point of preliminary objection that the application is hopeless for failure to follow the available remedy as per the laws, it is worth noting at the outset that, the court record has it in

Paragraph 2 of the applicant's affidavit and Annexture OGM-1, that the applicant merited the appointment to the post of Deputy Secretary General of TALGWU because he was "an employee" as a Land Officer stationed at Mkuranga in Coast Region.

In view of the official relationship the parties to this case enjoyed from 1/9/2016 to 26/1/2021 as revealed by annextures OGM-1 and OGM-5 of the applicant's affidavit respectively, it is explicit to me, with respect, that the issues before this Court are: one, whether in the light of sections 53(1)(a), (b)(i), (ii) &(c), 88(1)(a) and (b)(i) & (ii), 94(1) of the Employment and Labour Relations Act, [Cap.366 R.E.2019] on the one hand, and sections 12, 14(1) (a) and (b) of the Labour Institutions Act (supra), on the other, the applicant had exhausted the remedies available under the labour laws; and two, whether the instant application is properly before this Court.

There is no doubt whatsoever that the respondent is one of the registered organizations which in terms of section 4 of the Employment and Labour Relations Act (supra) include a registered trade union or registered employer's association and that there are, as exhibited by annextures TLG-2 and TLG-3 of the respondent's counter affidavit,

registered Rules and Constitution per section 48(1)(c) of the Employment and Labour Relations Act (supra) governing the employment affairs.

Besides, section 53(1) of the Employment and Labour Relations Act (supra) provides that where a federation or registered organization fails to comply with its constitution, the Registrar or member of the federation or registered organisation may apply to the Labour Court for any appropriate order including-setting aside any decision, agreement or election; requiring the organization or federation or any official thereof to comply with the constitution, take steps to rectify the failure to comply, and to restraining any person from any action not in compliance with the constitution.

It thus follows that, in case, whenever a dispute arises and one is aggrieved with the day-to-day operations of the respective trade union or organization covering issues of membership, removal from reigned posts, dismissal or else, to mention a few, he will then have in the first place to invoke the available internal remedies as provided for under the respective Constitution or governing rules and or bylaws.

In view of the above, it is worth noting that the position in Tanzania is akin to what is stated in Halsbury's Law of England (3rd Edn.) Vol.11 at

p.107, that the court will thus, as a general rule, and in the exercise of its discretion, refuse an order of *mandamus*, when there is an alternative specific remedy at law which is not less convenient, beneficial and effective.

And when a need arises for an aggrieved party to engage the court, I am inclined to the position arrived in the case of **Tanzania Local Government Workers Union (TALGWU), Koniphes B. Mahimbo and Hokelai G. Mpemba v. The Chief Secretary and Attorney General** Misc. Application No. 326 of 2013 (unreported) where it was stated at page 9 and 11 that: -

> *"The next important question I have to decide is whether or not; the petitioners had and have alternative remedy other than petitioning the Court under CAP 3. My answer is in the affirmative, I find that the petitioners had and have alternative redress, provided for in section 94(1) of the Employment and Labour Relations Act which empowers this Court, apart from its other powers, "to decide ... (f) Applications including-(i) a declaratory order in respect of any provisions of this Act or..."That indeed, is the relief the petitioners were basically seeking a declaratory order that the Circular and Standing order are in conflict with the Employment and Labour Relations Act and are unconstitutional.....To conclude, I reach a decision that this petition*

is not fit for hearing due to availability of statutory alternative remedy, which I find to be undisputedly effective."

In view of the foregoing, I am in agreement with the argument by the respondent's counsel that the applicant could have in the first place channeled the dispute to the Commission for Mediation and Arbitration in terms of sections 12 and 14(1) (a) and (b) of the Labour Institutions Act, (supra) for the same to be governed by the provisions set under the Employment and Labour Relations Act (supra). The application is thus hopeless for failure to follow the available remedy as per the laws.

Having disposed the 1st issue in the affirmative, for the sake of completeness of this Ruling, I will now dispose the issue whether the instant application is properly before this Court.

It is common ground that prerogative orders of *certiorari, mandamus* and *prohibition* as reliefs are available to persons whose interests have been or are prone to be adversely affected by any act or omission, proceedings or matter. Generally, applications for these writs seek to challenge misuse of public powers by administrative bodies and tribunals. At times, they are preferred at different time and levels even where there are, or there are not, in place reliefs granted by other *extra-judicial*

machineries like the Commission for Mediation and Arbitration in the instant matter.

In the case of **Shah Vershi and Co. Ltd v. The Transport Licensing Board** [1971] E.A 289 the erstwhile East African Court of Appeal, held at page 294 to the effect that: -

> *"Ordinarily, the High Court will decline to interfere until the aggrieved party has exhausted his statutory remedy.... But this is a rule of policy, convenience, and discretion, rather than a rule of law. In other words, the existence of a right of appeal is a factor to be taken into account: it does not bar the remedy (of certiorari), especially where the alternative is not speedy effective and adequate... I am of the view that neither the existence of a right of appeal nor the filing of an appeal deprives the company of its right to ask for certiorari".*

The above decision was followed in **Republic Ex Parte Peter Shirima v. Kamati ya Ulinzi na Usalama, Wilaya ya Singida, the Area Commissioner and the Attorney General,** [1983] T.L.R 375 where at p.383 the court underscored that in exercising its judicial discretion in issuing prerogative orders the court is obliged to consider the circumstances of each particular case.

The common circumstances considered by the court include, but not limited to- whether the facts contained in the affidavit in support of the application, if true, would constitute reasonable ground for the form of relief sought; whether the applicant has sufficient interest in the matter to which the intended application relates; whether on the facts the application will raise an arguable *prima facie* case; whether the applicant has not been guilty of dilatoriness; and, whether there is no other speedy and effective remedy available to the applicant and, if such alternative remedy is available, whether, *prima facie*, judicial review is a better way of obtaining the relief sought.

In the case of **Parin A.A.Jaffer and Another v. Abdulrasul Ahmed Jaffer and two others** [1996] TLR 110, this Court (Mapigano,J. as he then was) had the following reasoning on the factor of alternative remedy:

> *"Circumstances may be easily envisaged where the exclusion of the High Court from the exercise of original jurisdiction in the matter would palpably be injudicious and preposterous. I would point to one such circumstance in particular. Consider a situation where a person imputes deliberate faulty to the Registrar in relation to an entry in the register, it would*

undoubtedly be a serious anomaly if the law were to lay down that he should still go to the Registrar for remedy...Thus where the Law provides extra-judicial machinery alongside a judicial one for resolving a certain cause, the extra-judicial machinery should, in general, be exhausted before recourse is had to the judicial process".

In **Mirambo Limited vs. Commissioner General, Tanzania Revenue Authority and Attorney General of The United Republic of Tanzania**, Miscellaneous Civil Application No. 57 Of 2020, The High Court of Tanzania (Dar Es Salaam Main Registry), unreported, the Court dealt with a situation where the respondents had for over one year deliberately not responded on legal actions commenced by the applicant. In its ruling overruling the preliminary objection filed by the respondents' counsel to pave way for the institution of judicial review proceedings, the court held: -

"Therefore, where allegations of illegalities and abuse of administrative powers are mounted against any specific administrative body or tribunal vested with legal mandate to dispense justice as it has been alleged in the instant application, a resort by the aggrieved party to this Court in deserving matters for judicial review is inevitable for it to hear and determine the complained of illegalities or abuse of

powers by the administrative body or tribunal on merit."[Emphasis supplied]

Now, as in view of the discussion held above, I have not been able to establish what difficulty, if any, entitled the applicant not to exhaust the remedy available under the Labour Laws and, or qualifying him and this court to entertain this application, I am of unfeigned conclusion that, the instant application is not properly before this Court.

From the above in unison, this Court after overruling the 1st point of objection, sustains the 2nd point of objection which, I find, cannot be vitiated by the overriding objective principle. For that matter, the application is hereby struck out with no order as to costs.

It is so ordered.

DATED at DAR ES SALAAM this 27th day of August, 2021

E.M. FELESHI
JAJI KIONGOZI (J.K.)

COURT:

Ruling delivered this 27th day of August, 2021 in the presence of Messrs Ashiru Lugwisa and Emmanuel Mashamba, learned advocates for the applicant and Mr. Patrick Kaheshi, learned advocate for the Respondent.

E.M. FELESHI
JAJI KIONGOZI (J.K.)
27.08.2021