

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

MISCELLANEOUS APPLICATION NO.32 OF 2018

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

AND

**IN THE MATTER OF CONTRAVENTION OF THE RULES OF NATURAL
JUSTICE**

**AND IN THE MATTER OF AN APPLICATION BY COSMAS MWAIFWANI
CHALLENGING THE LEGALITY OF THE DECISION OF THE MINISTER FOR
HEALTH, COMMUNITY DEVELOPMENT, GENDER, THE ELDERLY AND
CHILDREN CONFIRMING THE DECISION OF THE MEDICAL STORES
DEPARTMENT BOARD OF TRUSTEES TERMINATING THE APPLICANT FROM
EMPLOYMENT**

BETWEEN

COSMAS MWAIFWANIAPPELLANT

VERSUS

**THE MINISTER FOR HEALTH, COMMUNITY
DEVELOPMENT, THE ELDERLY**

AND CHILDREN.....1ST RESPONDENT

THE MEDICAL STORES DEPARTMENT

BOARD OF TRUSTEES2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

6/10/2022 & 28/10/2022

MZUNA, J.:

This is an application for leave to file judicial review of certiorari, mandamus and prohibition. It has been filed by Cosmas Mwaifwani, the applicant herein against the above mentioned respondents. The application is by chamber summons supported by a sworn affidavit by the applicant, his statement as well as a reply to both the counter affidavit and reply statement. There is a counter affidavit and reply statement opposing the application.

Brief background to this application shows, the applicant was employed by the respondent since 2003 as a Customer Service Manager. In 2004 he was promoted to the post of Director of Customer Service and Sales and later as Director of customer Services and Zonal Operations. From 2012 to 2015 he was appointed as Acting Director General.

His termination on 08/07/2016 was after his suspension. It came about after there was an accusation of misappropriation of Public fund. He appeared before the Enquiry committee for disciplinary charges which was also along with a criminal charge preferred against him. The disciplinary committee found him guilty. He then preferred an appeal which was dragged for so long as the appellate body was a bit confusing. The appeal before the Public Service Commission was unsuccessful just like his further appeal before the President. It was dismissed for same

reasons that the proper disciplinary appellate authority was the 1st respondent not otherwise.

It is noteworthy mentioning that this matter was earlier on dismissed at the preliminary objection stage allegedly that it was filed out of time. The Court of Appeal remitted it back for reconsideration as there are contentious points which can best be determined on merits, vides Civil Appeal No. 312 of 2019 (unreported) P. 9.

Based on the foregoing facts, the applicant is now calling on this court to grant leave so as to:- *(i) File an application for an order of certiorari to quash the decision by the 1st respondent dated 10th October, 2016 which confirmed the 2nd respondent's termination of the Applicant's employment; (ii) File an application for an order of Mandamus directed to the Respondent to compel it to reinstate the applicant to his employment with full salaries paid arrears from the date of disengagement; (iii) File an application for an order of prohibition to issue against the 1st and 2nd respondents from in any way proceeding against the Applicant other than as by law provided; (iv) Costs of this application, and; (iv) Any other reliefs.*

Hearing of the application proceeded by way of written submissions. Both parties had representation. Mr. Mohamed Tibanyendera, the learned

counsel appeared for the applicant whereas Ms. Joyce Senkondo Yonazi, the learned State Attorney appeared for the respondent.

The main issue is whether there are reasonable grounds upon which leave can be granted?

Grounds for judicial review are stated under paragraphs 31 to 36 of the applicant's affidavit, to mention but few, that:- The Enquiry Committee formed by the second respondent was chaired by a biased Chairperson who was appointed by the 1st respondent, who instigated the whole problem leading to his arrest and termination. That the appellate body which was formed by the 1st respondent was biased because the 1st respondent is the one who instigated the whole dispute by reporting to the mass media. He was as well denied right of appeal on time. That the Enquiry committee was conducted and concluded at the time when criminal case was still pending.

In counter to the above the respondents argue that there is no arguable case. Further that he wrongly preferred his appeal to the Public service commission contrary to the provisions of Section 12 (a) of the Medical Stores Department instead of referring to the 1st respondent.

The applicable law to which this application relates is section 2(1) & (3) of the Judicature and Application of Laws Act Cap 358 RE 2002, Section

18(1) of the Law Reform (Fatal Accidents and Miscellaneous Provision) Act [Cap 310 RE 2002] and Rule 5(1), (2) (a), (b), (c), (d) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014.

Both counsels maintained their stance on factors to be considered before granting leave.

Mr. Tibayendera described injustice on the procedure used to dismiss him. It is the 1st respondent who raised the allegation of misappropriation of public fund against the applicant on the Mwananchi Newspaper of 16th February, 2016 of 1.5 billion Tshs, initiated the inquiry proceedings against him, charged the applicant with ten offences. It is the 1st respondent who directed the 2nd respondent to terminate the applicant. Therefore, there were a breach of principles of *Nemo Judex In causa Sua* and *Audi Alteram Parterm*.

Mr. Tibayendera challenged the composition of the Enquiry Committee that it included members with lower ranks than that of the applicant. Moreover, the Enquiry Committee chairman had interest as he Chaired the matter instigated by his boss, the 1st respondent. The decision of the 1st respondent to terminate the applicant was made in bad faith as the 1st respondent disregarding his appeal against the termination by the

Chief Secretary. The applicant was not availed the chance to present his witnesses before the Enquiry Committee.

Ms. Yonazi sternly resisted the application. She submitted that, the application is incompetent for failure to meet the prerequisite conditions to be met for leave to be granted set out in **Pavisa Enterprises v. The Minister for Labour Youth Development & Sports and Another** Misc. Civil Cause No. 65 of 2003 and **Cheavo Juma Mshana v. Board of Trustees of Tanzania National Parks and 2 Others**, Misc. Civil Cause No. 7 of 2020 at page 3. She insisted that there is no arguable case. The application should therefore be dismissed.

In his rejoinder submission, Mr. Tibayendera submitted that the purpose of leave pursuant to the case of **Republic v Land Disputes Tribunal Court Central Division & Another Ex parte Nzioka** [2006] 1EA 321(HCK) is act as a filter whose purpose is to weed out hopeless case at earliest possible time, thus saving the pressure on courts and needless expense to avoid malicious and futile claims to be weeded out or eliminated.

I thank the learned counsels for their painstaking submissions. Their submissions as well as the relevant documents supporting and opposing the application have been considered. It has been emphasized in

numerous cases including that of **Emma Bayo Vs. The Minister for Labour And Youths' Development and 2 Others**, Civil Appeal No. 79 of 2012, CAT (unreported) at page 8 that at leave stage this court must be satisfied on the following factors:-

- 1. Existence of Any arguable case;*
- 2. Whether the applicant is within the six months limitation period.*
- 3. Existence of sufficient interest in the matter.*

Reading the pleaded facts by the applicant, it is clear that the applicant has demonstrated that he has interest in the matter as he was affected, there is also an arguable case and therefore grounds for seeking judicial review exists, that the applicant has acted promptly (within the set time limit of six months) and; The applicant has shown that there is no alternative remedy which exist.

The argument advanced by the learned State Attorney on the absence of an arguable case for the grant of leave for judicial review, that before the Enquiry Committee he was given a fair hearing or that he opted to take wrong route in advancing his appeal and even the argument that he wrongly relied on a letter of 10th October, 2016, are matters which are contentious. They should be resolved during hearing of the main application for judicial review.

I am convinced that the application for leave is merited as discerned from his affidavit and statement. Application for leave is hereby granted as prayed for with no order as to costs.

DATED at DAR ES SALAAM this 28th October, 2022.

10/28/2022

X 

Signed by: M G MZUNA JUDGE

