

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MAIN REGISTRY

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO.44 OF 2022

**IN THE MATTER OF AN APPLICATION BY JOHNSTON MWAKALITOLO FOR
LEAVE TO APPLY FOR PREROGATIVE ORDERS OF CERTIORARI,
MANDAMUS & PROHIBITION**

AND

IN THE MATTER OF CONTRAVENTION OF RULE OF NATURAL JUSTICE

AND

**IN THE MATTER OF AN APPLICATION BY JOHNSTON MWAKALITOLO
CHALLENGING THE LEGALITY OF DECISION OF THE CHIEF SECRETARY,
PRESIDENT'S OFFICE STATE HOUSE, CONFIRMING THE DECISION OF THE
SECRETARY, PUBLIC SERVICE COMMISSION AND CHAIRPERSON OF THE
BOARD OF TRUSTEES OF MEDICAL STORES DEPARTMENT WHICH
CONFIRMED THE DECISION OF THE DIRECTOR GENERAL OF MEDICAL
STORES DEPARTMENT UNFAIRLY TERMINATING THE APPLICANT FROM
EMPLOYMENT**

BETWEEN

**JOHNSTON
MWAKALITOLO.....APPLICANT**

AND

THE DIRECTOR GENERAL

MEDICAL STORES DEPARTMENT.....1ST RESPONDENT

CHAIRPERSON OF THE BOARD OF TRUSTEES OF

MEDICAL STORES DEPARTMENT.....2ND RESPONDENT

SECRETARY, PUBLIC SERVICE COMMISSION3RD RESPONDENT

THE CHIEF SECRETARY,

PRESIDENT'S OFFICE, STATE HOUSE.....4TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....5TH RESPONDENT

RULING

4/10/2022 & 28/10/2022

MZUNA, J.:

Mr. Johnston Mwakalitolo, the applicant herein, moved this court seeking for leave to file prerogative orders of certiorari and mandamus. The application is supported with an affidavit sworn by the applicant and statement of facts.

Brief background story to this application is that the applicant was the employee of the Medical Stores Department, the 1st respondent herein as Administrative Officer since 17th February 2003 and later promoted to the post of Administrative Manager in 2005. Sometimes on diverse years between 2014, 2017 and 2018 he was promoted to the post of Acting Director General, Director of Human Resources and Administration. Then on 8th July 2019 he was demoted as Principal Administrative Officer, Dar es Salaam zone under the Zonal Manager allegedly due to “deteriorating performance” in the administration unit.

His demotion was said to be attributed by lack of minimum required qualifications for the post of Administrative Manager, Master’s Degree so to speak, which he did not possess. He appealed to the Chairperson of the MSD Board of Trustees where the matter was then referred to a sub-

committee of the Board of Trustees. He was served with seven charges while in the process of awaiting his appeal process.

After filing his defence, he was summoned to attend at the disciplinary hearing before the Inquiry Committee. Then he was served with a notice of termination without being availed with the results from Chairperson of the Finance and Administration sub-committee of the Board of Trustees on his demotion complaint.

He then lodged his appeal to the 2nd respondent which however was frustrated not to be heard after the 1st respondent had notified the second respondent that the appeal lodged before the 1st respondent was out of time so they should not entertain his appeal, something which he says was erroneous.

He then lodged his complaint to the third respondent on unfair demotion and unfair termination of his employment. He was advised to lodge his complaint afresh which he did. The outcome was that his appeal was lodged out of time.

Aggrieved, he lodged an appeal to the 4th respondent who determined the appeal without considering the relevant documents supporting the appeal and therefore committed the same error that the appeal was preferred out of time. The applicant feels aggrieved by the

said decisions because they are tainted with apparent errors on the face of the record, hence the present application.

On account of the above facts, he seeks for this court to issue **One**, Certiorari to move this court to quash the decision of the 1st respondent of 11th November, 2019 where it terminated the employment of the applicant herein, without establishing the reasons given for termination and without adhering to substantive procedure for termination; **Two** Mandamus, directed to the 1st respondent to compel it to reinstate the Applicant to his former employment position, without loss of his entitlements from the date of unlawful termination.

When the application was called on for hearing, which proceeded orally, both parties had representation. Mr. Adam Mwambene, advocated for the applicant, whereas Ms. Magdalena Mwakambungu, State Attorney represented the 1st respondent. On the other hand, Mr. Eric Rumisha, State Attorney and Mr. Hussein Mzee, Principal State Attorney appeared for the 2nd, 3rd, 4th and 5th respondents.

The only issue for determination is whether the Applicant has demonstrated sufficient grounds warranting to grant leave.

Mr. Mwambene submitted that the applicant challenges his demotion and termination from his employment that it was illegal. He

listed factors which gives effect to this application that they exist like that the application had been preferred within the prescribed time of six months as per the law, the applicant has interest in the matter as he is aggrieved by the decision of the 1st, 2nd, 3rd & 4th respondent which contravened the law and principle of natural justice. That he was denied right to be heard which has occasioned an injustice on the part of the applicant. Lastly that the application for the order of certiorari and mandamus is the only remedy available for the applicant to pursue his right as he has exhausted all the available remedies.

In reply thereto, Mr. Rumisha objected the application. He relied on the case of **Pavisa Enterprises v. The Minister for Labour, Youths' Development & Sports & Another**, Misc. Civil Cause No. 65 of 2003, HC (Unreported) at page 8 to emphasis four factors to be considered before granting leave namely; presence of an arguable case, sufficient interest, he acted promptly and there is no alternative remedy.

That the affidavit and statement of the applicant do not demonstrate an arguable case as the impugned decision is out of time. That he received the decision from the 2nd respondent on 31st March, 2020 and filed his appeal to the 3rd respondent on 20th April, 2020 after a lapse

of 45 days pursuant to Regulation 61(1) of the Public Service Regulations of 2003. Hence, the appeal was dismissed for being time barred.

He urged the court to rely on the pleadings of the parties in an application of this nature, citing the case of **Legal and Human Rights Centre & 5 Others v. The Minister for Information, Culture, Arts and Sports & 2 Others**, Misc. Civil Application No. 12 of 2018, High Court at Mtwara (Unreported) at page 11. He sees no arguable case because his appeal was dismissed for being out of time counting from the date he received the letter to the date he filed the appeal. This court is not seized with jurisdiction to deal with a time barred application under the pretext of illegality.

He even went further to say that the applicant had other alternative remedies which he did not exhaust including the remedy to file an application for extension of time. He made reference to the case of **Parin Jaffer & Others v. Abdulrasul Ahmed Jaffer & 2 Others** [1996] TLR 110, 116. That there must be finality to litigation as it is clearly articulated in **Steven Masato Wasira v. Joseph Sinde Warioba & AG** [1999] TLR 332-3.

On the issue of alleged illegality pleaded under paragraph 10 of the affidavit, he says it had not been verified because only paragraphs 1-7 of

the statement and affidavit had been verified. He described the allegation of time bar before the Public Service Commission as a statement from the bar citing the case of **Morand Rutakyamirwa v. Petro Joseph** [1990] TLR 49-50.

In rejoinder submission, Mr. Mwambene reiterated his submission and insisted that the allegation that the appeal was time barred is based on wrong assumption because the Board Chairperson received a letter on 27th December, 2019 which was within 45 days and therefore within time. The 2nd respondent did not call upon the applicant to defend his case. He decided the matter relying on the false information that the appeal was out of time.

He insisted that the application meets the required conditions for the grant of leave. On the issue of time limitation, he said that it is a point of law which ought to have been raised as a preliminary objection early so that both parties had a chance to submit.

Having heard the above submissions, I have this to say on the allegation that issue of illegality arises from unverified paragraphs. I agree with the applicant that it ought to have been raised as preliminary point of objection so that both parties had a chance to submit. In view of the decision in the case of **Jamal S. Mkumba & Another v. Attorney**

General, Civil Application No 240/01 of 2019, CAT (Unreported) at page 15 to 16, this court could have ordered for an amendment had the respondent raised it before. This omission cannot deny this court its mandate to act based on the overriding objective principle. More so because the raised point, do not dispose of the matter. Above all, there is no any prejudice on the part of the respondent.

Again there was an argument that the applicant ought to have applied for extension of time as the matter was dismissed for being out of time. Issue of filing the appeal whether within time or out of time is indeed contentious. The applicant says he was not given chance to be heard. Surely this point cannot be resolved at leave stage where in view of the case of **Legal and Human Rights Centre & 5 Others v. The Minister for Information, Culture, Arts and Sports & 2 Others**, (supra) page 11, the position which entirely agree with, pleaded facts are presumed as true. If I may hasten to add, a counter affidavit, should not be filed with the intention of preempting the main application or make hearing at leave stage and main application a double hearing based on the same facts.

In this regard, when the court deals with application of this nature, it must refrain from going deep into the matter at hand. This is well

demonstrated in the case of **Republic v Land Disputes Tribunal Court Central Division & Another Ex parte Nzioka** [2006] 1EA 321 (HCK).

See also, the case of **Cosmas Mwaifwani V. The Minister for Health, Community Development, Gender, the Eldery and Children & Two Others**, Civil Appeal No. 312 of 2019, CAT (unreported) at page 9.

It is correct to say that whether the applicant was denied right to be heard on the pretext that the appeal was out of time is “seriously contentious”. It should be heard during hearing of the main application not at leave stage which under the law can proceed ex parte on assumption that the pleaded facts are presumed to be true.

I revert to the final point on granting leave. The application has been preferred under section 2(1) & (2) of the Judicature and Application of Laws Act, [Cap 358 RE 2019], Section 18(1) of the Law Reform (Fatal Accidents and Miscellaneous Provision) Act [Cap 310 RE 2019, Rule 5(1) (2) (a) (b), (c), (d) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Judicial Review Procedure and Fees) Rules, 2014.

Upon perusing the pleaded facts, I am convinced that the applicant has sufficient interest in the instant matter because both parties are in consensus that the applicant was demoted then terminated by the 1st respondent. He was removed from his position as the Administrative

Manager and appealed before the Chairperson of the Board of Trustees of Medical Stores. Second, he filed his application well within time of six months as prescribed by law. More so that there is an arguable case. Lastly, there is no any other alternative available remedy.

In this regard, I am convinced that he has satisfied the required conditions for the grant of leave as well stated in the case of **Pavisa Enterprises v. The Minister for Labour, Youths' Development & Sports & Another**, (supra) and the case 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.

To this end, I allow the application. Leave to file application for certiorari and mandamus is granted. No order as to costs.

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

10/28/2022

X 

Signed by: M G MZUNA JUDGE

