IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

MISC. CIVIL APPLICATION NO. 86 OF 2020

MASESA MAFAJA MASHAURI .....APPLICANT

VERSUS

THE LAW SCHOOL OF TANZANIA ..... RESPONDENT

RULING

28/5/2021 & 9/7/2021

ROBERT, J:-

The Applicant, Masesa Mafaja Mashauri, moved this Court to grant him leave to apply for orders of Certiorari, Mandamus and Prohibition against the Respondents, the **Law School of Tanzania** and **the Hon. Solicitor General**. The application is supported by an affidavit sworn by the Applicant.

Prior to the hearing of this application, the Court had to deal with a Notice of Preliminary Objection raised by the counsel for the first Respondent to the effect that:

1. *The court has no jurisdiction to entertain the matter.*
2. *The application is bad in law and a futile venture for failure to join the Attorney General.*

3. *The application is bad in law for joining the solicitor General.*
4. *The application is bad in law for containing multiple and inconsistent prayers.*

As a matter of practice, I invited parties to address the court on the points of objection raised before proceeding with the hearing of the application, in case objections are not sustained. At the hearing of the preliminary objection, the Applicant appeared in person without representation whereas the Respondents were under the services of **Mr. Mkama Msalama,** State Attorney and Mr. **Edward Chuwa**, learned counsel for the first and second Respondents respectively. At the request of parties, the Court ordered parties to proceed with hearing by way of written submissions.

Highlighting on the first ground of objection which is centred on the jurisdiction of this Court to entertain this matter, Mr. Chuwa submitted that, whereas this Court is vested with powers of judicial review over administrative bodies, such power is subject to certain limitations. In exercising judicial review, the court cannot act as a court of appeal, the party invoking powers of judicial reviews has to exhaust all remedies available to him by law since judicial review is a remedy where there is none.

He made reference to the book titled "Lectures on Administrative Law" by C.K. Takwani, 3rd Edition at page 239 where the author stated that:

"The duty of the Court is to confine itself to the question of legality. It has to consider whether a decision-making authority exceeded its powers, committed an error of law, violated rules of natural justice, reached a decision which no reasonable man would have reached or otherwise abused its powers... The parameters of judicial review must be clearly defined and never exceeded. If the authority has faltered in its wisdom, the court cannot act as a super auditor".

He submitted that, in the present application, the Applicant was aggrieved by the decision of the first Respondent specifically with regards to issues of examination and marking where the procedure is laid down and the right of appeal is given. The Applicant having been aggrieved by the results ought to have exhausted the remedies availed to him by law before invoking powers of this court for judicial review. Thus, he maintained that this court has no jurisdiction to entertain this application.

Submitting further, he proposed to argue the 2nd and 3rd grounds of objection together because the two grounds revolve around the non-joinder of the Attorney General on the one hand and the misjoinder of the Solicitor General on the other hand.

He argued that, the power of judicial review is vested in the High Court by virtue of Article 30 (3) of the Constitution of the United Republic of Tanzania and section 17 of **the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act**, Cap. 310 (R.E 2002).

He stated that, Section 18 (1) of Cap 310 mandatorily requires the Attorney General to be joined and appear as a party in applications for leave to apply for prerogative orders such as the present application. The section reads as follows;

> "Where leave for application for an order of mandamus, prohibition or certiorari is sought in any civil matter against the Government, the court shall order that the Attorney -General be summoned to appear as a party to those proceedings; save that if the Attorney General does not appear before the court on the date specified in the summons, the court may direct that the application be heard ex parte."

On the basis of the provisions above, he submitted that this application is not maintainable in law for contravening mandatory provision of the law by failing to join the Attorney General. He argued that, the Applicant joined the Solicitor General as the second Respondent instead of joining the Attorney General which is a fatal misdirection on the part of the Applicant. He clarified that, the Solicitor General only appears in court as a representative of the Attorney and

not as a party to the proceedings (see The **Office of the Attorney General (Discharge of Duties) Act**, No. 2 of 2018). For that reason, this application is not maintainable in law.

With regard to the last ground, Mr. Chuwa submitted that, the application is bad in law for containing multiple and inconsistent prayers. He argued that, the orders of certiorari, mandamus and prohibition sought by the Applicant against the results published by the first Respondent have the effect of quashing a decision, compelling the making of a decision and prohibiting the making of a decision. He submitted that the orders sought are bad in law because this Court cannot issue a quashing order and a compelling order as well as a prohibiting order all at once in respect of the same decision.

Responding to the points of preliminary objection raised by the first Respondent, the Applicant opted not to proceed with this application and prayed to withdraw his application without costs. The first Respondent did not file her rejoinder submissions. However, this Court is inclined to reject the Applicant's prayer to withdraw his application at this stage for a simple reason that withdrawing the application after the Notice of Preliminary Objection has been raised and argued by the first Respondent will have the effect of forestalling the

decision on objections raised by the Respondent. Having said that, I will now proceed to determine the points of objection raised by the first Respondent.

On the first point of objection, Mr. Chuwa submitted that this Court has no jurisdiction to entertain this matter. He faulted the Applicant for filing this application without exhausting the remedies availed by the law governing the first Respondent on issues of examinations and marking which provides for the procedure and the right of appeal to an aggrieved party. However, this Court finds that, as an objection on a point of law, the submissions by the learned counsel on this point are not fortified by any particular provision(s) of law detailing the procedure to be followed by a party aggrieved by the results given by the first Respondent as an administrative body which the Applicant ought to have followed. The first Respondent cannot contest the competence of a matter and the jurisdiction of the court by relying on a point of law which is not clearly articulated for the Court to make a determination. Accordingly, I find the first point of objection to be lacking in merit.

On the second and third grounds, I agree with Mr. Chuwa that, section 18 of the Law Reform (Fatal Accidents and Miscellaneous

Provisions) Act, Cap. 310 (R.E.2002) requires the Attorney General to be joined and to appear as a party in applications for leave to apply for prerogative orders against the Government such as the current application. I also agree that, while the Solicitor General may appear in Court on behalf of the Attorney General, the act of joining the Solicitor General instead of the Attorney General does not meet the requirement of section 18 of the Act which requires the Attorney General to be joined as a party. However, failure to join the Attorney General under section 18 of the Act cannot be a ground for dismissal of an application. The Court can cure this by ordering that the Attorney General be joined as a party to the proceedings where leave for application for prerogative orders is sought in any civil matter against the Government. This point of objection is therefore not sustained.

On the last point, I do agree with Mr. Chuwa that this application is bad in law for containing multiple and inconsistent prayers. As rightly submitted by the learned counsel, the remedies of certiorari, mandamus and prohibition sought to be applied for by the Applicant against the results of an examination published by the first Respondent are inconsistent and not grantable as they seek inconsistent orders of quashing a decision, compelling the making of a decision and prohibiting

the making of a decision all at once which, in the circumstances of this matter, are not maintainable. I therefore find merit in this ground of objection.

In the premises of the above observation, I hereby uphold the last point of preliminary objection raised by the Respondent and proceed to dismiss this application for being incompetent. I make no order as to costs.

It is so ordered.

K.N.ROBERT
JUDGE
9/7/2021