INT THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

MISCELLANEOUS CIVIL CAUSE NO. 01 OF 2021

IN THE MATTER OF APPLICATION FOR ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF THE DECISION OF THE COMMISSIONER GENERAL OF IMMIGRATION SERVICES OF THE 17TH DAY OF SEPTEMBER, 2020

BETWEEN

CLETUS KENETH MWENDA ..... APPLICANT

COMMISSIONER GENEREAL OF TANZANIA IMMIGRATION SERVICES DEPARTMENT..... 1ST RESPONDENT

REGIONAL IMMIGRATION OFFICER OF TANZANIA IMMIGRATION SERVICES DEPARTMENT, MBEYA REGION ..... 2ND RESPONDENT

HONOURABLE ATTORNEY GENERAL ..... 3RD RESPONDENT

RULING

A.A. MBAGWA J,

This is a ruling in respect of points of preliminary objection raised by the respondents.

The applicant herein was employed by Tanzania Immigration Services Department at the rank of Immigration Corporal. In 2019 the applicant engaged himself in criminal acts as such, he with other thirteen persons were arraigned before the Court of the Resident Magistrate of Songwe in

Economic Case No. 5 of 2019. Subsequently, the applicant was found guilty and convicted through plea bargaining programme.

Following the applicant's conviction, the 1st respondent, in terms of regulation 27(3), served him with a notice of intention to terminate the applicant's employment (annexure CKM2). Later on, through a letter dated 17/09/2020 (annexure CKM3), the 2nd respondent, in terms of regulations 27(3), 37(9) and 52(I), terminated the applicant from employment.

The applicant was not satisfied with termination of his employment. He has thus come to this Court to seek a leave to apply for prerogative orders of mandamus and certiorari against the decision of the 2nd respondent. He filled the chamber summons made under section 2(1) and (3) of the Judicature and Application of Laws Act [Cap 358 R.E. 2002], Section 17(2) and 18(1) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act [Cap. 310 R.E. 2019] and Rules 5 and 6 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014 Government Notice No. 324 of 2014. The application is supported by affidavit and statement of the applicant.

The respondents raised two preliminary objections on point of law namely,

1. That, the applicant has not exhausted the available means of redress that contravene the provision of Regulation 58 of the Immigration Service (Administration) Regulations GN No. 473 of 2018.
2. That the applicant's statement in incurably defective for containing the defective verification clause.

When the matter was called for hearing of preliminary objections, the applicant was present and had representation of Kamru Habib assisted by Felix Kapinga, both learned advocates. The respondents enjoyed the

services of Rogers Francis, learned Senior State Attorney and Joseph Tibaijuka, learned State Attorney.

Submitted in support of the first preliminary objection, Mr. Francis said the applicant has not exhausted the available means of redress thus contravene the provision of Regulation 58 of the Immigration Service (Administration) Regulation GN No. 472 of 2018. He told the court that Regulation 58(13) requires and officer below the rank of Assistant Inspector where aggrieved by the decision of the Regional Immigration Officer to appeal in writing to the Commissioner General.

Mr. Rogers Francis submitted that the Applicant in this matter did not follow the requirement of Regulation 58(13). The learned State Attorney referred to the case of PARIN A. JAFFA & TWO OTHER vs ABDUL RASUL [1996] TLR 110, and said that Mapigano J, as he then was, held that where the legislature has established a special forum for dealing with a specific matter, court will not normally entertain the matter unless the aggrieved party can satisfy the court that no appropriate remedy is available in the special forum.

Mr. Francis continued to submit that the principle in the case of PARIN was further applied in ANDREW MICHAEL ULUNGI AND ANOTHER vs REGISTRAR OF COOPERATIVES & TWO OTHERS, MISC. CIVIL APPLICATION NO. 07 OF 2020 (Unreported), at page 16 and 17. Also, the learned Senior State Attorney relied on case of JEREMIAH MWANDI vs TANZANIA POSTS CORPORATION, LABOUR REVISION NO. 06 OF 2019, insisting that extra judicial process must be exhausted before a course is made to the judicial process.

In conclusion, Mr. Francis prayed the Court to strike out the application for failure to observe the requirement of Regulation 58(13).

With respect to the second point of preliminary objection, Mr. Joseph Tibaijuka told the Court that the applicant's statement is incurably defective for containing defective verification clause. He said that the issue of verification clause is governed by Civil Procedure Code [Cap. 33 R.E.2019] under Order VI Rule 15 which provides for a mandatory requirement of every pleading to be verified by a party. Mr. Tibaijuka was opined that verification should specify the numbered paragraph of the pleadings. He continued to submit that, in the statement supporting an application, the applicant omitted to verify paragraph 5a, b and c and 6a, b,c,d and e. Tibaijuka cited the case of MLELA RAMADHANI vs MAHONA BUTUNGULU, MISCELLANEOUS LAND CASE APPLICATION NO. 20 OF 2019, (Unreported) at page 5 and told the Court that it was held that the subparagraph ought to be verified separately and not generally. Further, Mr. Tibaijuka relied on the case of NATIONAL INSTITUTE OF TRANSPORT vs TWAMBILILE MWAKAJE, REVISION NO. 906 OF 2019 (UNREPORTED) at page 6 and submitted that the Court insisted on the requirement to verify sub paragraphs. Lastly, Tibaijuka referred this Court to the case of RHODA MWASIFIGA vs THE MANAGER NBC BANK AND THREE OTHERS, MISC. LAND APPLICATION NO. 65 OF 2017 at page 7 where the Court quoted with approval the decision in MANTRAC TANZANIA LTD vs RAYMOND COSTA to the effect that affidavit intended to be used in judicial proceedings should, among other things, be properly verified.

Mr. Tibaijuka was of the views that Affidavit and statement are both pleadings which need to be verified according to Civil Procedure Code.

Since the applicant omitted to verify the said sub paragraphs, the same should be expunged, Tibaijuka submitted.

In rebuttal, Mr. Kamru Habib dismissed both preliminary points of objection on the ground that they are devoid of merits.

Responding to the first preliminary objection on exhausting the available remedy, Mr. Habib said that it is a settled law that the applicant will be compelled to exhaust the available remedies if such remedies are speedy, effective and adequate. He cited a number of authorities to that effect. The case of MIRAMBO LIMITED vs COMMISSIONER REVENUE TANZANIA REVENUE AUTHORITY, MISCELLANEOUS CIVIL APPLICATION NO. 57 OF 2020, unreported at page 15, **Obadiah Selehe vs Dodoma Wine Co. Ltd** [1990] T.L.R 113 and Shah and Co. Ltd vs the Transport Licensing Board [1971] E.A 289 and said the Court held that on case by-case basis and where the need arises, the Court may inquire into complained acts amounting to illegalities.

With respect to the present application, Mr. Habib conceded that it is true that Regulation 58(1) of GN. No. 473 of 2018 gives the applicant the right of appeal and it is permissive that he may. He further submitted that Regulation 58(13) is applicable to the applicant since he was an officer of the rank below the Assistant Inspector thus his appeal lies to the Commissioner General. However, he was of the view that an appeal to the Commissioner General was not convenient, feasible, effective and adequate remedy on the part of the applicant.

The learned applicant's counsel referred to paragraph 6 of the affidavit in support of the chamber summons where the applicant avers that the 1st respondent namely, Commissioner General served him with a notice dated

23rd October, 2019 (annexure **CKM2)** informing him her intention to terminate his employment. It was therefore the counsel's submission that by this letter, the Commissioner General had already made the decision to terminate the applicant. As such, requiring the applicant to appeal to the Commissioner General was tantamount to blessing the rule of ***nemo judex in causa suo*** meaning that no man shall be a judge in his own cause, Mr. Habib submitted

Further, the applicant's counsel referred the Court to the case of BAYPORT FINANCIAL SERVICES (T) LIMITED vs CRESENCE MWANDELE, CIVIL APPEAL NO. 19 OF 2017 (unreported). He said that the principle enunciated here is that the disciplinary authority must inform the employee the right to appeal. He lamented that in this case the applicant was not informed of this right to appeal as per annexure CKM3. He thus prayed the Court to overrule the first preliminary objection.

Mr. Felix Kapinga, learned advocate replied the second preliminary objection in respect of defective verification in the statement. He told the Court that there are two schools of thought. Mr. Kapinga said that the first school of thought is to the effect that failure to verify some paragraphs is fatal and renders the affidavit or statement incurably defective whereas the second school of thought is that failure to verify subparagraphs in paragraphs is not fatal since subparagraphs fall within the main paragraph. In respect of the second position, Mr. Kapinga cited the case of **FERDNAND NSAKUZI vs DIRECTOR GENERAL OF PCCB, REVISION NO. 07 OF 2018** at page 5 from paragraph 3, where the High Court held that verification of paragraph also entails subparagraphs. Another authority cited by Mr. Kapinga was the case of WILLIAM BENEDICTOR vs PLATNUM CREDIT LIMITED, LABOUR REVIOSN NO. 34 OF 2019, at

page 5 paragraph 3, wherein Tiganga J, ruled that once a paragraph is verified, the subparagraph is inclusive. Further, Kapinga said that Order 6 Rule 15 (2) of the Civil Procedure Code talks of paragraph and not sub paragraphs

In view of the above, Mr. Kapinga submitted that by virtue of the second school of thought, the point of preliminary objection is devoid of merits.

In addition, Mr. Kapinga cited the case of SANYOU SERVICE STATION LTD vs BP TANZANIA LTD (Now PUMA ENERGY (T) LTD, CIVIL APPLICATION NO. 185/17 OF 2018 at page 10 paragraph 2 where Kitusi, J.A. held that non verifying of some paragraphs does not warrant striking out rather an order for amendments in order to cure the defects.

Thus, in the alternative, Mr. Kapinga prayed for amendment of the affidavit.

In a brief rejoinder, Mr. Tibaijuka, with regard to inadequacy and efficiency of the available remedy submitted that the case of Mirambo relied on by the applicant was distinguishable. He said that in Mirambo case the main issue was illegality and abuse of administrative powers. Tibaijuka referred to page 12 of Mirambo case and said that it was on illegality and abuse of administrative powers. He told the Court that applicant wrote to the Commissioner General of TRA but he remained quiet. Tibaijuka argued that in the instant case no where the applicant wrote to the Commissioner General.

Tibaijuka insisted that the applicant never attempted to appeal to the Commissioner General of Immigration whereas annexure CKM2 of the applicant's affidavit was merely an intention to terminate not termination as explained by the applicant's counsel. He clarified that the applicant was terminated by the Regional Immigration Officer so he had an avenue to appeal to the Commissioner General as provided under Regulation 58(13) of the Immigration Services (Administration) Regulations 2018 GN No. 473

of 2018. Since the Commissioner General was not the one who terminated the applicant, it was his view that the appeal to the Commissioner General would be effective and adequate.

Commenting on case of BAYPORT FINANCIAL SERVICES (T) LIMITED vs CRESENCE MWANDELE, CIVIL APPEAL NO. 19 OF 2017 cited by the applicant's counsel, Mr. Tibaijuka said that at page 12, the respondent was advised to appeal within five days if aggrieved by the decision of disciplinary committee but he was not informed where to appeal. He said that in the instant case, the Regulations provide for procedures to be taken once aggrieved by the decision and the appeal process is well explained under Regulation 58.

With respect to the second point of preliminary objection, it was Mr. Tibaijuka's rejoinder that the applicant's counsel knows the importance of verifying the paragraphs and sub paragraphs that is why at the end of his submission he made alternative prayer of amendment. However, Mr. Tibaijuka faulted the applicant's counsel on the ground that he he directed his submission on the affidavit instead of statement. Further, Tibaijuka said that the applicant's counsel did not mention any sub paragraphs which are not verified. In consequences the applicant's counsel prayed for amendment of affidavit instead of statement

Tibaijuka submitted that in the SANYOU SERVICE STATION LTD vs BP TANZANIA LTD (Now PUMA ENERGY (T) LTD, CIVIL APPLICATION NO. 185/17 OF 2018 at page 11, the Court of Appeal ordered amendment of affidavit to rectify the verification clause with costs and this was to show the importance of verification.

He concluded his submission with a prayer to strike out the application with costs.

I have had an ample occasion to scrutinize the application documents, submissions by the counsels and the authorities cited.

Commencing with the first preliminary objection, the respondents' argument is that the application is misconceived and therefore incompetent in that the applicant had an appeal remedy under Regulation 58(13) of the Regulations but he did not invoke it. The applicant's counsels admit existence of appeal remedy available under Regulation 58(13) but argue that the appeal remedy, in the instant case, was ineffective and inadequate. The reason for the applicant's contention is that it is the same Commissioner General of Immigration who had earlier on issued the applicant with a notice of intention to terminate his employment. Thus, according to the applicant, appealing to the 1st respondent would be a nugatory exercise. Both in the affidavit and submissions, the applicant does not plead ignorance of the existence of the appeal remedy under Regulation 58 (13) of the Regulations rather he has consistently insisted that the available remedy was useless in the circumstances of the case.

It is a settled position that prerogative orders can be invoked only where there are no other available remedies. See the cases of

In this case it is undisputed that the applicant had an avenue to challenge his termination by appealing to the Commissioner General of Immigration but did not pursue it. In the applicant's affidavit and statement, there is nowhere indicated that the appellant attempted to appeal to no avail. The applicant simply relied on the perceived fear. In the case of Mirambo Limited, the applicant made several strides to have his matter attended but there was inaction on the part of the decision-making body. In that regard the case of Mirambo is distinguished from the present application as in the instant case the applicant made no any endevours.

In the circumstances, I agree with the respondent that the application is misconceived as the applicant did not exhaust the available means of redress provided under Regulation 58(13). As such, I hereby uphold the first preliminary objection.

Since the first preliminary objection suffices to dispose of the matter, I find no compelling reasons to delve into the second preliminary objection.

On all this account, I find substance in the first preliminary objection hence sustain it. Consequently, the application is hereby struck out. Since the genesis of dispute in this application is industrial in nature, I order no costs.

It is so ordered

The right to appeal is explained

A.A. Mbagwa
Judge
10/12/2021

Ruling has been delivered in the presence of Hilda Mbele Advocate for the applicant and in absence of the respondent this 10th day of December, 2021.

A.A. Mbagwa
Judge
10/12/2021