**THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**[IN THE DISTRICT REGISTRY OF ARUSHA]**

**AT ARUSHA**

**MISC. CIVIL APPLICATION NO. 53 OF 2022**

*(In the matter of an application for leave to apply for prerogative orders of Certiorari and Mandamus for discontinuation from studies)*

*BETWEEN*

**SUNDAY CURTHBERT MASSAWE..... APPLICANT**

**AND**

**INSTITUTE OF ACCOUNTANCY ARUSHA.....1ST RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL .....2ND RESPONDENT**

**RULING**

14th & 29th November, 2022

**TIGANGA, J.**

This application has been brought within the requirement of the provisions of rules 5(1), (2) and 7(5) of the Law Reform (Fatal Accident and Miscellaneous Provisions) Judicial Review Procedure and Fees) Rules, 2014 (G.N No. 324 of 2014). The application intends to seek leave for the applicant to apply for judicial review. The intended application is hinged on prerogative orders of Mandamus and Certiorari and it has been taken at the instances of a chamber summons, supported by the affidavit sworn by the applicant, Sunday Curthbert

Massawe. The application was opposed by the trio respondents through their joint counter affidavit.

Appreciating the brief background, the following tale will suffice the need. The applicant was a student and a president of the Students Organisation at the Institute of Accountancy Arusha herein to be referred to as "IAA". He was accused together with other students of flouting the Institute's Rules and Regulations governing examination. According to annexure SCM3 attached to the application, the notice was given to the students on the alleged unscrupulous acts involving some of the examinees during supplementary exams. They were accused of examination cheating to be specific. Upon scrutiny, the Examination Irregularity Committee found the applicant a culprit on the alleged misconduct and therefore discontinued him from studies forthwith.

The decision aggrieved the applicant who on 8th November, 2021 appealed against the decision of the Examination Irregularity Committee to the Academic Appeals Committee. This is in accordance with the letter attached to the application as SCM 7. Unfortunately to the applicant, the Academic Appeals Committee upheld the findings reached by the subordinate body. Further, the applicant was aggrieved with the decision and therefore sought to apply for judicial review before this

Court. As a matter of law, the tilting can only be resolved by the court upon being the applicant sought and granted the leave. As a result, therefore, this application was lodged.

As part of the opposition strategy by the respondents, at first, two preliminary objections were raised through the notice of objection. Later on, the additional one point was added by the respondents to make a total number of preliminary objections points raised to be three. The three points raised as objection were written as follows:

1. The application is incompetent and bad in law for contravening with rule 5(2)(a), (b) and (c) of the Law Reform (Fatal Accidents and Miscellaneous Provisions (Judicial Review Procedure and Fees) Rules, 2014.

2. The affidavit of the applicant is incurably defective as it contains hearsay and false information.

While the additional point of preliminary objection reads:

3. The application is premature, untenable (sic) bad in law for not exhausting available remedies.

As a matter of procedure and law, when preliminary objections have been raised mut be disposed of first before going to the merit of

the matter. Thus, I called upon the parties to submit on the raised objections. In my opinion I think, the issues calling for determination of this court are two namely; **one,** is this application competent, **two,** what is the remedy available in case, the first issue has been negatively responded?

At hearing, Mr. Mkama Musalama, learned State Attorney appeared for the trio respondents whereas, Ms. Sarah S. Lawena represented the applicant. In support of the preliminary objection, Mr. Musalama on the first preliminary objection contended that, according to rule 5(2)(b) and (c) of the Law Reform (Fatal Accident and Miscellaneous Provisions (Judicial Review procedure and Fees) Rules, 2014 requires the application for leave to apply for judicial review to be accompanied by a statement providing for the names and descriptions of the applicant, the relief sought and the ground on which the relief is sought.

He intimated that, the reason for so requiring is apparent, according to rule 8(1)(a) if at all, the leave is granted, the grounds set forth in the statement for an application for leave shall be equally used during application for judicial review. Mr. Msalama went further submitting that, the grounds under which the relief is sought are either

illegality, irrational, bias, unreasonableness and breach of natural justice specifically the right to be heard. He said, those grounds were not stated by the applicant in his statement failure of which renders the application for leave incompetent. Fortifying on the submission, he cited the case of **Emmanuel S. Stephen versus The President of the United Republic of Tanzania and 4 Others,** Misc. Civil Application No. 12 of 2019 (unreported).

Replying on that ground, Ms. Sara consented that, the applicant's statement does not have the relief sought despite the fact that it features the grounds on which the relief is sought. She also said that, the names and descriptions of the applicant are clearly stated in the statement.

However, despite the statement being missing the relief sought, Ms. Sara submitted that the application is saved by Rule 7(3)(a) of the Law Reform (Fatal Accident and Miscellaneous Provisions (Judicial Review Procedure and Fees) Rules, 2014 whereby the Judge has been conferred discretionary power to order for amendment of the statement for the interest of justice. To hummer on the nail, she cited the case of **Halima James Mdee and 18 Others versus The Board of Trustees of Chama Cha Demokrasia na Maendeleo (CHADEMA)**

**and 2 Others,** Misc. Application No. 16 of 2022 HC at DSM (unreported). Lastly, the Advocate prayed this court to invoke the provisions of Section 3A and 3B of the Civil Procedure Code, [ Cap. 33 RE 2019] to order for the amendment of the statement for compliance of the law.

On the issue of names and descriptions of the applicant, I think need not detain me much. I say so because, the statement made by the applicant which was presented for filing in court on 29th April, 2022, indicates the names of the applicant and descriptions as to who he is. In its 1st paragraph, the statement is written:

> *"I am Sunday Curthbert Massawe, I was a student at the Institute of Accountancy Arusha, pursuing Bachelor Degree in Computer Science (ICT) with admission No. BCS/0065/2019. I was also the president of the student government within the Institute of Accountancy Arusha (IAASO) from the academic year December 2020 to November 2021."*

The quoted percept clearly indicates the names and descriptions of the applicant. The question as to whether the descriptions are sufficient or otherwise is not among the calls which this court has been invited to determine. However, the provisions of the law that is rule 5(2)(a) of the

Law Reform (Fatal Accident and Miscellaneous Provisions (Judicial Review procedure and Fees) Rules, 2014 does not require the applicant to state sufficient descriptions but merely descriptions and the name of the applicant. For easy of reference, it provides as hereunder quoted:

> *(2) An application for leave under sub-rule (1)*
>
> *shall be made ex parte to a judge in chambers and be accompanied by-*
>
> *(a)**a statement providing for the name and de- scription of the applicant**;*
>
> *(b)the relief sought;*
>
> *(c)the grounds on which the relief is sought; and*
>
> (d) *affidavits verifying the facts relied on."*
> (Emphasis added)

Reading between the lines of the above quoted provisions of the law, it is crystal clear that nowhere this court can be moved in order to determine that the names and descriptions of the applicant were not given in the statement. They were, and that makes it sufficient in accordance with the law.

On the same limb, the relief sought is equally challenged by Mr. Msalama that it was not stated in the applicant's statement

accompanying the application for leave. Ms. Sara contended that, that the relief was stated in the statement. However, she neither stated nor indicated such relief featured in the applicant's statement in her submission for the court to test its likelihood.

I have taken time to read the statement presented by the applicant in order to satisfy on the intimated irregularity. The last two paragraphs of the said statement provide:

> *I have agreed to take further steps to secure my right to be able to return to (sic) college and continue my studies, although so far (sic) I have wasted a lot of time and resources to help me in college, if it is a government loan, but more study time and costs use (sic) them in seeking my right. (sic)*
>
> *My application to the court as I believe it is an important and equitable instrument in administering justice, My (sic) belief is that I will receive my justice in a timely manner, (sic) to further help me finish my academic year on time, as well as get all my (sic) other merits.*

In my settled view, these two paragraphs which to some extent state something about the court and the alike do not represent relief(s).

They stand as a conclusion to what has been alluded to above in the statement.

In judicial review, more often than times, the reliefs sought are either Mandamus, Certiorari and Prohibition. Neither of these reliefs appears in the statement made by the applicant. Thus, that is to say, the statement was made in misapprehension of the law as put herein above.

The same finding also goes to the grounds under which the relief(s) is sought. Ms. Sara is disputing this irregularity. However, she does not show the alleged grounds. Mr. Msalama maintained his position that the grounds were not included in the statement contrary to the law. He has gone ahead stating those he considers to be grounds for judicial review.

On my part, I would like to be guided by the decision in the case of **Pendo Masai versus The Minister for Labour and Youths Development and 2 Others,** Civil Appeal No. 34 of 2019 CAT at Mwanza (unreported). In this case the Court of Appeal of Tanzania observed the grounds for judicial review as follows:

> *"...the impugned decision can only be examined upon any of the grounds succinctly stated by this Court in*

***Sanai Murumbe & Another v. Muhere Chacha*** *[1990] TLR 54 as follows:*

> *"**One,** that the subordinate court or tribunal or public authority has taken into account matters which it ought not to have taken into account. **Two,** that the court or tribunal or public authority has not taken into account matters which it ought to have taken into account. **Three,** lack or excess of jurisdiction by the lower court. **Four,** that the conclusion arrived at is so unreasonable that no reasonable authority could ever come to it. **Five,** rules of natural justice have been violated. **Six,** illegality of procedure or decision. (**Associated Provincial Picture Houses, Ltd. v Wednesbury Corp.** [1947] 2 All ER. 680 and **Council of Civil Service Unions v Minister for the Civil Service** [1984] 3 All ER. 935). "*

Looking at all those grounds, none of them is appearing in the applicant's statement. That is to say, the statement was made without considering such important part and requirement of the law. Therefore, it is in fault. Thus, this first preliminary objection is partly sustained and partly overruled to the extent indicated herein above.

The second preliminary objection is on the incurable affidavit. Mr. Msalama said, the affidavit contains hearsay and false information. On hearsay information he referred the court to paragraphs 2, 5, 6 and 7 of the affidavit sworn by the applicant. Substantiating the said hearsay information in paragraph 5 he said, the applicant said that, upon return to the institute he heard another student saying that one Emmanuel L. Tarimo sat in the said examination with the identity card carrying the information of the applicant without mentioning the student who gave such information. Also, that, at paragraph 7 he mentions the office of Registrar without affidavit from that office. To buttress his submission, he cited the case of **Sabena Technics Dar Limited versus Michael J. Luwuzu**, Civil Application No. 451/18 of 2020 CAT at DSM (unreported) which *inter alia* ruled that, if an affidavit mentions another person, that other person must swear an affidavit to prove the information allegedly said by him, short of that the information becomes hearsay.

On paragraphs 2 and 6 of the challenged affidavit, Mr. Msalama contended that, it contains untrue information. The said information is referred to annexure SCM3 attached to the affidavit. That the applicant stated that he is a student of the 1st respondent while knowing that he

was expelled from studies since 4th November, 2021. Also, that in paragraph 6 the applicant stated that on 4th October he found on the notice board a notice that he had been discontinued from studies while it is not so stating.

That the notice was to inform the mentioned therein students to appear to the Registrar's office on 5th October, 2021. He said further that the notice was to show how the respondent was disappointed by unscrupulous acts by some students. To him he believes in the said notice there is no any paragraph stating on the discontinuation from studies by the respondent.

Cementing on it, Mr. Msalama cited Order XIX rule 3(1) of the Civil Procedure Code (supra) where the law says that, affidavit shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applicants on which statements of his belief may be admitted. Also, he supported the argument by the cases of **Ignazio Messina versus Willow Investment SPRL.**, Civil Application No. 21 of 2021 CAT at DSM and **Kidodi Sugar Estate and 5 Others versus Tanga Petroleum Co. Ltd**, Civil Application No. 110 of 2009, CAT at DSM (both unreported) where it was observed that, an affidavit which is tainted with untruth is not affidavit at all and cannot be

relied upon to support an application. That, false evidence cannot be acted upon to resolve any issue because the falsehood goes to the root of the application for the applicant being dishonest.

Counteracting this objection Ms. Sara argued that on paragraph 2 of the applicant's affidavit, the applicant has stated something which he has knowledge on it. And that, so long as the matter is pending in court the applicant is still a student of IAA. On paragraph 5 Ms. Sara conceded that the information of the affidavit is from what the applicant heard to other students. However, she said the irregularity noticed does not injure the affidavit as a whole. On paragraphs 6 and 7 of the applicant's affidavit, Ms. Sara counterargued that the facts so deponed are based on the applicant's own knowledge. That, the affidavit does not contain false information as alleged by Mr. Msalama.

However, Ms, Sara was of the view that, where the Court finds the affidavit defective for being tainted with untrue and false information or consider the information hearsay, it should expunge the said paragraphs because the remaining paragraphs still supports the application with arguable grounds. To support her position, she cited the case of **Phantom Modern Transport (1985) Limited versus D.T. Dobie (Tanzania) Limited,** Civil reference No. 15 of 2001, CAT at DSM where

it was held that, if the defect in the affidavit is inconsequential the offensive paragraphs can be expunged or overlooked leaving the substantive parts of it intact so that the court can proceed to act upon. The same case added that if the substantive parts of the affidavit are defective, the affidavit cannot be amended in the sense of striking off the offensive parts and substantive thereof correct averments in the same affidavit. Thus, the Advocate explored the court to expunge the paragraphs, if at all, they are considered to be inconsequential to the application.

It is quite apparent that the affidavit sworn by the applicant is defective. This is agreeable to both parties because it contains unusual information be it false, untrue or hearsay. Thus, the issue is whether the defect is curable.

First of all, it is the principle of law that, whenever the affidavit mentions another person, that other person as well must swear an affidavit on the facts about him. Apart from the case of **Sabena Technics Dar Limited** (supra) cited by Mr. Msalama, the principle has taken a move forward and this time considered in the current case of **Cats Net Limited versus Tanzania Communication Regulatory Authority,** Civil Application No. 526/01 of 2020 where it was observed:

> ***"Two,*** *if really Mr. Kansara came to the Court and if having gone to the wrong venue he was directed and informed by a court staff that the hearing was being conducted at the High Court in Court Room No. 2 and also if upon getting at the High Court he was informed that the application had already been heard, as it is claimed by the applicant, then affidavits of the said court staff were necessary to supplement and support the assertion that he really came to Court. Short of that, his assertion is far from being believed and relied upon."*

As it is consensual to both Advocates, paragraph 5 of the applicant's affidavit mentions another student to be the source of information stated under such paragraph. Also, paragraph 7 mentions the information alleged to have been obtained from the Registrar's office. Guided by the above authorities it is imperatively demanding that, this court must declare that the applicant's affidavit is defective. In the above cited case law, the defect based on the above mentioned shortcomings was declared by the Court of Appeal to be incurable.

I am alive of the requirement of expungement of the paragraphs of the affidavit which are offensive and considered inconsequential as rightly submitted by Ms. Sara with the aid of the case of **Phantom Modern Transport (1985) Limited versus D.T. Dobie (Tanzania)**

**Limited** which was reiterated by the Court of Appeal in the case of **Jamal. S. Mkumba and Another versus Attorney General,** Civil Application No. 240/01 of 2019 CAT at DSM (unreported). However, as can be depicted from the record which is also agreeable by the Advocates in one way or another, paragraphs with irregularities are paragraph 2, 5, 6, and 7. These paragraphs carry in them the weight of evidence to be relied upon during hearing of the application of judicial review bearing in mind that the same affidavit will be used in the said application.

If the said paragraphs are expunged and or disregarded as suggested by Ms. Sara, there is a danger of uprooting the intended application. This is to say thus; the impugned paragraphs are substantial to the intended application. However, I am mindful of rule of 7(3)(a) the Law reform (Fatal Accidents and Miscellaneous Provisions (supra) and the case of this Court of **Halima James Mdee and 18 others versus Chama cha Demokrasia na Maaendeleo Chadema** (supra) cited by the counsel for the applicant. These (provision and case law) notwithstanding, the power of this Court to order for amendment of the application and continue with the hearing on merit, the defects alluded

to above in the instant matter cannot be saved by that discretional mandate.

The last, preliminary objection is on exhaustion of local remedies. Mr. Msalama contended that, it was not proper for the applicant to file this application before exhausting local remedies available. He said, under regulation 26 of the Assessment of Student's performance Regulations, 2020 provides for local remedies to be exhausted in the circumstance of the matter at hand. He quoted the said provisions as follows:

> *"All cases arising out of these Regulations shall be heard and determined by the organs stipulated in these Regulations and decisions of this of the Governing Council shall be final and conclusive."*

To bolster on it, he cited the case of **Julius Burchard Rweyongeza versus University of Dar es salaam and 2 Others,** Revision No. 136 of 2020 HC labour Division (unreported).

Responding on this objection, Ms. Sara contended that reading the said provision cited by Mr. Msalama does not stipulate procedures for reaching to the Governing Council. That even reading section 5(1) of the Institute of Accountancy Arusha Act,1990 which established the

Governing Council and the schedule to the Act only provides for the composition, quorum and so forth. However, nowhere the procedure for the party who is aggrieved by the decision of the subordinate bodies should reach to the council, she said. That the law providing the machinery of despute resolution should also provide the procedure on how the machineries could be reached. Otherwise, it remains obsolete and should not be allowed to bar the rights of individuals.

Ms. Sara Distinguished the case of **Julius Burchard Rweyongeza versus University of Dar es salaam and 2 Others** (supra) in the circumstance of this application. She said, in the cited case procedures for reaching the established disputes resolution mechanisms by the aggrieved party are clear and unambiguous unlike the provisions of regulation 26 of the Assessment of the Student's Performance Regulations, 2020.

In his submission, Mr. Msalama did not dispute the contention by Ms. Sara that the cited regulation 26 of the Student's Performance Regulations (supra) is mute on the procedure on how the aggrieved party should refer the appeal to the Governing Council. Also, I have perused the decision of the Academic Appeals Committee if at all stands as such, dated 4th December, 2021. Despite the fact that the committee

informed the applicant that his appeal was not successful it did not give him the remedy available in order to challenge the rendered decision.

This, in my view was irregular. The committee was legally duty bound to inform the applicant where to refer his grievances after being despaired with the decision. Rights of the individuals cannot be easily closed. There must be a certain established procedure for reaching to good end of justice, which in fact must be duly explained to the parties. Where no such explanation is made then, the always available remedy is an application for judicial review for the court to look into the matter pertaining the decision made by the administrative bodies.

The Court of Appeal of Tanzania being confronted with the situation akin to the instant in the case of **Bayport Financial Services (T) Limited versus Cresence Mwandele,** Civil Appeal No. 19 of 2017 at Mbeya (unreported) had the following observations:

> *"In addition to the foregoing, the appellant failed to tell the Court to whom the respondent was supposed to appeal. Although the respondent acknowledged that he was aware of the appeal process, there was no policy mechanism, or regulations in place on how one could exercise such right. See also a similar situation in the decision of the High Court of Tanzania in the case of*

***MUCOBA Bank PLC Ltd*** *(supra) where the respondent referred the complaint to the CMA after having not been informed where to appeal against the decision of the disciplinary committee. The court in that case stated that, the respondent did not err to have referred the dispute to the CMA. The instant case is thus distinguishable from the cited persuasive decision of* ***Rev. Jonathan M. Mwamboza*** *(supra). This is because in that case the appeal machinery was vividly explained in the Diocese Constitution. It was provided that, the decision to disrobe the complainant was made by the Pastoral Council and the appeal lay to the Executive Council and then to the Synod. Unlike in that case no one explained the appeal process within the appellant's institution. This ground is therefore devoid of merit."*

For the above reasoning and basing on the authorities cited and quoted herein above, I am inclined to hold that this preliminary on the third and last point of objection must fail and therefore overruled as such.

That said and done, basing on the findings in the 1st and 2nd preliminary objection the application is hereby strike out for the reasons given. Taking into account the nature of the application and the sensitivity of the same as far as the academic and professional carrier of

the applicant is concern, I find it to be in the interest of justice to strike out the application at hand with leave to refile within 21 days upon rectification of the above pointed out shortcomings. Therefore, the applicant is at liberty to reinstitute a fresh application if he so wishes within the period stated herein above.

It is accordingly ordered.

**DATED** at **ARUSHA** on this 29th day of November 2022.


**J.C. TIGANGA**

**JUDGE**