THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CAUSE NO. 12 OF 2023

TAHER H. MUCCADAM.....APPLICANT

VERSUS

DIRECTOR, URBAN & RURAL PLANNING, MINISTRY OF LANDS,

HOUSING AND URBAN DEVELOPMENT .....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

Date of Hearing: 05/05/2023
Date of Ruling : 12/05/2023

MONGELLA, J.

This is an application for prerogative orders, to wit, certiorari, against the decision made by the 1st respondent suspending a building permit issued to the applicant by Ilala Municipal Council, a planning authority. The application at hand is brought under **section 2 (3) of the Judicature and Application of Laws Act, Cap 358 R.E. 2019; section 18 (1) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap 310 R.E. 2019**; and **Rule 8 (1) (2) and (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, G.N. No. 324 of 2014**, after obtaining leave from this court vide Miscellaneous Civil Application No. 556 of 2022. It is supported by the affidavit of Taher Hussein Muccadam, the applicant herein. The following orders are therefore sought in the application:

i. *That this Hon. Court be pleased to quash the decision of the 1st respondent suspending building permit no. 1046 issued to the applicant to construct over plot no. 1006/1 Upanga, Ilala Municipality.*

ii. *Costs of the application.*

The background to the dispute as depicted from the applicant's supporting affidavit and oral submission is as follows: The dispute dates back to 2009 and concerns Plot No. 1006/1 Upanga within Ilala Municipal Council. Plot No. 1006/1 (the plot in dispute) was part of Plot No. 1006 Upanga, previously jointly owned by one Shantaben Patel and one Nilaben Patel. The two sold the plot to the applicant in the year 2000. Ownership of the plot by the said Shantaben and Nilaben was revoked and the plot declared an open space. This led to institution of Civil Case No. 70 of 2004, which was resolved by settlement out of court leading to withdrawal of the suit. In the settlement, it was agreed that the plot be sub-divided into two plots.

Then the applicant filed Land Case No. 107 of 2006 in this court (Land Division), upon seeing that the implementation of the agreement was not being effected. Another settlement was again reached thereby giving result to Plot No. 1006/1 and 1006/2. That, Plot No. 1006/1 was for commercial/residential purposes and Plot No. 1006/2 was for car park/open space. Plot No. 1006/1 was allocated to the applicant through letter of offer Ref. no. AR/ILA/UPA/1024, dated 12th November 2009 (annexture TM-1).

After making the necessary payments, the applicant was issued Letter of Offer with Land Office no. 3972204 and Ref. no. AR/ILA/UPA/1024 (annexture TM-12), which was duly signed by the Commissioner for Lands. Upon completion of the re-survey process and allocation of the plot to the applicant, he prepared the architectural and engineering drawings and submitted them to Ilala Municipality. The same were approved and the applicant was issued with building permit with no. 1046 dated 27th October 2010 (annexture TM-14). However, the permit was suspended by the 1st respondent, hence the application at hand.

The 1st respondent's decision is challenged on the following grounds: One, that he acted illegality as he gave no reasons for the cancellation; and two, that no right to be heard was accorded to the applicant. In his submission, the applicant, who happens to be an advocate and fended for himself, argued that despite the 1st respondent being fully aware of the facts pertaining to the applicant's ownership of Plot No. 1006/1 Upanga and that in terms of **sub section 7 para 5 (k) of the Urban Planning Act, 2007**; Ilala Municipality, as a Planning Authority, was empowered to grant a planning consent to the applicant and did so by adhering to laws and procedures; he unlawfully and illegally suspended the building permit without giving him any reasonable or probable cause and without giving him the opportunity to be heard.

He argued that the 1st respondent suspended the building permit in terms of **section 54 of the Urban Planning Act, 2007**, which provides:

"The Director may disallow any planning consent granted by the planning authority under the Act, and shall submit to the planning authority the rationale or reasons of the refusal."

Considering the provision as above, the applicant contended that, to the moment, 12 years have almost elapsed and no rationale has been given, despite the fact that the 1st respondent is very aware that there is a decision of the court, of the Permanent Secretary-Ministry for Lands, and of the Commissioner for Lands, who are superior to him. He had the view that the decision of the 1st respondent cannot override the decision of the Permanent Secretary and Commissioner for Lands.

Regarding the complaint on the right to be heard, he contended that the 1st respondent acted without according him the right to be heard, thus acted unfairly, unreasonably and with no probable cause. He argued that though the powers given to the 1st respondent, under section 54 of the Urban Planning Act, are discretional, he is still required to give reasons to the planning authority for disallowing the planning consent. He said that in the 1st respondent's letter, it was stated that the Ministry has received complaints regarding construction on Plot No. 1006/01, which was meant for car park. He challenged the reason on the ground that the plot demarcated for car park was Plot No. 1006/2 and not Plot No. 1006/1.

He added that the letter did not disclose the names or identity of the complainant. He reiterated his earlier submission that the plot was sub divided resulting into creation of two plots being, Plot No. 1006/1 and Plot No. 1006/2, which is the subject matter of the application. Considering the events, he had the view that the 1st respondent's decision to suspend the

building permit was done in bad faith as the truth was not told by the Director (the 1st respondent). He argued further that the 1st respondent, in the letter, further stated that the suspension will be operative until he issues further directives after resolving the controversy termed in Kiswahili language as "*utata.*" However, he said, twelve years have passed and no further directives have been issued to resolve the alleged controversy.

He had the stance that the state of affairs is fictitious as there exists two plots, one for car park and one for development, that is, construction of a commercial and residential 10 storey building. That, the latter is Plot No. 1006/1 as directed by the Ministry of Lands through the Permanent Secretary and the Commissioner for Lands.

Presenting the legal foundation on his application he first referred to **Halsbury's Law of England, Administrative Law, Vol. 1** which states that:

> *"If a repository of a power exceeds its authority of which a power is exercised without lawful authority; a purported exercise of power, may be pronounced invalid. The lawful exercise of a statutory power pre-supposes compliance not only with the substance, formal and procedural conditions laid down for its performance, but also with implied requirements governing the exercise of the discretion. All statutory powers must be exercised in good faith and for the purpose of which they were granted. The repository of the power must have regard to the relevant consideration and not allow itself to be influenced by a relevant consideration. It must act fairly and reasonably."*

He further cited the case of ***Council of Civil Service Union & Others vs. The Minister of Civil Service*** (1984) 3 All ER 935, which placed conditions under

which an administrative action can be challenged by judicial review. He mentioned three conditions being: one, Illegality: whereby the decision-making authority has been guilty of an error of law, such as, by purporting to exercise a power it does not possess. Two, Irrationality: whereby the decision-making authority has acted so unreasonably that no reasonable authority would have made the decision. Three, Procedural impropriety: whereby the decision-making authority has failed in his duty to act fairly.

Specifically on orders of certiorari, he cited the case of ***Sanai Murumbe & Another vs. Muhere Chacha*** [1990] TLR 54 in which the Court of Appeal (CAT) held that an order of certiorari is one issued by the High Court to quash proceedings and decision of a subordinate court or Tribunal or any public authority, where, among other, there is no right of appeal. That, the High Court is entitled to investigate the proceedings of a lower court or Tribunal or any public authority where the same (i) has taken into account matters it ought not to have taken into account; (ii) has not taken into account matters which it ought to have taken into account; (iii) where the body lacked or acted in excess of its jurisdiction; (iv) has arrived at a conclusion which is so unreasonable, that no reasonable authority could ever come to it; (v) has violated rules of natural justice; and (vi) there is illegality of procedure.

He as well referred the case of ***M/S Olam Tanzania Limited vs. Leonard Magesa & 2 Others***, Misc. Civil Cause No. 6 of 2019 (HC at Mwanza), which states that: for the court to exercise its powers to issue an order of certiorari, it must be established that the decision was arbitrary and contrary to natural justice.

On the claim that he was not given the right to be heard, he referred to **Article 13 (6) (a) of the United Republic of Tanzania Constitution, Cap 2 R.E. 2019**, which provides for fair hearing. He as well referred decisions in the case of ***Mohamed Jawad Mrouch vs. Ministry of Home Affairs*** [1996] TLR 142; that of ***Shabibu Badi Mruma vs. Mzumbe University & Attorney General***, Misc. Cause No. 20 of 2020, which cited in approval the decision o ***Mbeya-Rukwa Autoparts & Transport Ltd. vs. Jestina Mwakyoma*** [2003] TLR 251. All these cases provide for the right to be heard before an arbitrary decision is entered.

The applicant further discussed the term "disallow" provided under section 54 of the Urban Planning Act. He argued that the term "disallow" does not include suspension and therefore the suspension of the building permit by the Director of Urban Planning was done illegally whereby he exercised powers not vested in him. That, the Director acted unfairly and committed a procedural irregularity by not according him the right to be heard before suspending his building permit.

He further challenged the 1st respondent's decision arguing that he took into consideration irrelevant matters, such as, unsubstantiated complaints against the construction activity carried on Plot No. 1006/1 and not Plot No. 1006/2 in disregard of the fact that the plot was subdivided into two plots, that is, one for car park and one for commercial/residential purposes, being construction of a 10-storey building by the applicant. In conclusion he prayed for the prayers advanced in the chamber summons to be granted, with costs.

The respondents, through their counsels, Mr. Thomas Mahushi and Ms. Kause Kilonzo, learned state attorneys, opposed the application. At first, they raised a legal point suggesting that the applicant had sued a wrong party, that is, the 1st respondent. They argued that in the title of the pleadings, the applicant titled the 1st respondent as "Director, Ministry of Lands, Housing and Urban Development, while the suspension letter dated 05.11.2010 clearly shows that the decision was made by the "Director of Urban Planning." Further they cited **section 6 of the Urban Planning Act** arguing that the provision gives mandate to the Director of Urban Planning to suspend building permits issued by planning authority in relevant municipals. They had the stance that the 1st respondent is not the Director of Urban Planning established under the law. The learned state attorneys further argued that the state of affairs shall render it difficult for the court orders to be executed.

With regard to the gist of the application, that is, an order of certiorari, they were first in total agreement of the principles settled in the case of ***Sanai Murumbe & Another*** (supra), cited by the applicant. However, they argued that the applicant, neither in his supporting affidavit nor statement nor oral submission, established any of the grounds for grant of order of certiorari listed in the said decision, particularly, that there is no right of appeal. They had that stance on the argument that the applicant, in his submission, highly concentrated on him being the owner of the disputed plot through a certificate of title after re-survey of the plot and that he was issued with a building permit by Ilala Municipality planning authority.

In essence, the learned state attorneys had no dispute with the applicant's assertions regarding re-survey of the plot and issuance of certificate of title and building permit. They admitted the facts being true.

However, they argued that the issue for determination is on the legality/correctness of the decision of the Director of Urban Planning in suspending the building permit, which was done in exercise of powers vested under **section 54 of the Urban Planning Act**. They said that the decision entered comes from an administrative authority issued under a specific law being; **section 55 (2) of the Local Government (Urban Authorities) Act, No. 8 of 1982** and **sections 28, 29, 31, 32, and 33 of the Urban Planning Act, 2007**. Considering that the decision was given under specific laws, they argued that the applicant failed to establish grounds to show that the decision of the Director had no any right of appeal or that there was no any other remedy against the decision. That, the applicant never stated anywhere that he pursued the remedies available or whether the available remedies had been blocked for him to be entitled to seek for an order of certiorari. They had the view that the High Court can only grant the order sought if satisfied that the remedies available had been blocked.

Speaking of the remedies available, they referred to **section 55 (1) (k) and (2) of the Urban Planning Act** contending that the provision provides for remedies where a planning consent/building permit has been disallowed. They said that the remedy provided under the said provision is for one to appeal to the District Land and Housing Tribunal. They maintained their argument that the applicant never pleaded in his application that he pursued the remedy available.

On the same line they challenged the applicant's assertion that there were correspondences. They argued that what the High Court looks at is whether procedures were offended because when investigating, the court is not entertaining an appeal, thus cannot deal with the substance of the matter. That, the court only resolves procedural defects and the applicant has failed to analyse the procedural defects.

They as well challenged the case of ***Mohamed Jawad*** (supra), cited by the applicant, on the argument that the said case is irrelevant to the application at hand as the applicant is not an immigrant. They further disputed the claim that the applicant was denied the right to be heard contending that there were other remedies available, as they demonstrated hereinabove.

In the alternative, however, they urged the court, in the event it finds procedural irregularities in the 1st respondent's decision, to issue an order of certiorari quashing the decision, but order the relevant authority to invoke proper procedures. In support of their argument, they referred the case of ***Ezekiah T Ulouch vs. Permanent Secretary-President's Office, Public Service Management & 4 Others***, Civil Appeal No. 140 of 2018 (CAT decision) in which, after finding that a decision was made by an irrelevant authority, it quashed the decision and ordered for the same to be made by a relevant authority. They concluded by praying for the court to dismiss the application, with costs, in the event it finds the same without merit.

The applicant rejoined briefly. He first addressed the issue advanced regarding the parties, that is, the 1st respondent. He averred that the same

was a typographical error and prayed for the court to record the same as appearing in the title of the application whereby it has been correctly drafted, for interest of justice.

He appreciated the fact that the respondents' counsels conceded to his assertion regarding ownership of Plot No. 1006/1, though countered the contents of paragraph 5 of the counter affidavit saying that the plot in dispute is Plot No. 1006/1 and not Plot No. 1006.

He further challenged the respondents' counsel's argument that for an order of certiorari to be granted, the right of appeal must not be available. On this, he argued that the decision cited gives a list that is not exhaustive as it talks of "*any of the grounds...*" He therefore added that the requirement on non-availability of the right of appeal is not the only ground and each case is to be decided in accordance with its own merits.

With regard to the terminology "*suspension*" used, he urged the court to do justice in consideration that the building permit has been withheld for 12 years.

After considering the applicant's supporting affidavit and statement showing the grounds for review, the respondents' counter affidavit and the parties' arguments in oral submission before this court, I wish first to resolve the issue advanced by the respondents' counsels regarding the title of the 1st respondent.

The record shows that the applicant titled the 1st respondent as "Director, Ministry of Lands, Housing and Urban Development. While the respondents' counsels argued that there is no such person in the Ministry and that the applicant has sued a wrong person, which shall render the execution impossible; the applicant on his part argued that the same is a typographical error and urged the court to rectify the same to resemble what was drafted in the title of the application.

After examining the documents filed for the application, I agree with the applicant that the same was an error. I am of that opinion in consideration of the title of the application which reads:

"IN THE MATTER FOR AN APPLICATION FOR ORDERS OF CERTIORARI
AND
IN THE MATTER OF ***THE DIRECTOR, URBAN & RURAL PLANNING, MINISTRY OF LANDS, HOUSING, URBAN DEVELOPMENT*** *DATED 5TH NOVEMBER 2010 TO SUSPEND THE BUILDING PERMIT NO. 1046 ISSUED TO THE APPLICANT TO CONSTRUCT ON PLOT NO. 1006/01 UPANGA, ILALA MUNICIPAL"*

In addition, the respondents' counsels, in their submission, admitted that the decision challenged was made by the Director of Urban and Rural Planning, as title above. In that respect I find that the mistake is curable under the overriding objective principle and therefore rule for rectification of the 1st respondent's title to read "**Director, Urban and Rural Planning, Ministry of Lands, Housing and Urban Development**" as reading in the title of the application. Accordingly, the changes have been reflected in this Ruling, as well.

Coming to the gist of the application at hand; the applicant, as prayed in the chamber summons, is seeking for an order of certiorari to quash the decision of the 1st respondent suspending building permit no. 1046 issued to the applicant to construct over Plot No. 1006/1 Upanga, Ilala Municipality. In granting the order of certiorari, the court does not deal with the merit of the substance of the challenged decision, but rather on the irregularities in reaching the decision. That is, procedural irregularities, such as, acting without jurisdiction or infringement of natural justice. This has been settled in a number of authorities. In ***M/S Olam (T) Limited vs. Leonard Magesa & 2 Others*** (supra), it was held:

> *"... for this court to exercise its powers to issue an order for certiorari against the decision of the 2nd respondent, it must be established that the decision was arbitrary and contrary to the rules of natural justice. It must also be proved that, the decision was irrational, i.e., unreasonable and unfair, or that it was tainted with procedural impropriety and, or it violated the provisions of Art. 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977, as amended."*

The conditions for granting an order of certiorari have also been provided in a number of cases. The conditions do not necessitate that there must not be available any right of appeal, as argued by the learned state attorneys. The list is not absolute and, in the premises, each case is to be decided on its own circumstances. For instance, the case of ***Sanai Murumbe & Another vs. Muhere Chacha*** (supra) listed six conditions being:

> *"... **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; and six, illegality of procedure or decision."*

See also: ***Ezekiah T. Ulouch vs. The Permanent Secretary, President's Office, Public Service Management & 4 Others*** (supra). Further, the Court of Appeal in the case of ***Rahel Mbuya vs. Minister for Labour and Youth Development & The Attorney General***, Civil Appel No. 121 of 2005 (CAT at DSM, found at www.tanzlii.go.tz), while quoting in approval a decision from the Supreme Court of India in the case of ***Hari Vishnu Kamath vs. Ahmed Ishague***, AIR 1955 SC 233 stated that:

"(i) 'Certiorari' will be issued for correcting errors of jurisdiction as when an inferior court or tribunal acts without jurisdiction or in excess of it, or fails to exercise it.

(ii) 'Certiorari' will also be issued when the court or tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or violates the principles of natural justice.

(ii) The court issuing a writ of 'certiorari' acts in the exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the court will not review findings of fact reached by the inferior court or tribunal, even if they be erroneous. This is on the principle that a court which has jurisdiction to decide wrong as well as right, and when the legislature does not choose to confer a right of appeal against that decision, it would be defeating its purpose and policy, if a superior court were to rehear the case on the evidence, and substitute its own findings in certiorari."

(iv) A writ of 'certiorari' could be issued to correct an error of law. But it is essential that it should be something more than a mere error; it must be one which must be on the face of the record."

After consulting the legal regime, the question to be answered is whether the application at hand is fit for grant of the order of certiorari as sought. When challenging the application, the learned state attorneys argued that the applicant has not met the criteria settled under the law for judicial review. That, instead, he dwelled on showing how he rightfully owns the plot in dispute. With due respect, I find that they failed to grasp the submission by the applicant. By the nature of the matter, it was imperative to provide the background to the dispute before advancing the prayers for prerogative orders. That is in fact what he did. In connection to the order of certiorari, his ground of seeking the same was basically pegged on denial on the right to be heard and to be given reasons for the disallowance as required under the law. As to giving of reasons, he relied on **section 54 of the Urban Planning Act** which states:

"The Director may, disallow any planning consent granted by the planning authority under this Act and ***shall submit to the planning authority the reasons for refusal.***"

I have gone through "**annexture TM-15**" which is the letter from the Director of Urban Planning on the disallowance of the planning consent, addressed to the Director of Ilala Municipality and copied to the applicant. In the letter, the reasons were given to the effect that there were complaints before him regarding Plot No. 1006/1 being developed while the same was

demarcated for car park. In my considered view, the reason given was sufficient and thus find the claim lacking merit.

With regard to the right to be heard, the learned state attorneys argued that the same was accorded to the applicant under the law whereby they relied on **section 55 (1) (k) of the Urban Planning Act** which directs the person aggrieved by disallowance of consent to appeal to the District Land and Housing Tribunal. They in fact challenged the applicant for not showing that there was no right of appeal against the decision or that the right of appeal was blocked. That the applicant never invoked the remedy under **section 55 (1) (k) of the Urban Planning Act.** For ease of reference, the provision states:

> *"55 (1) Any person who shall be aggrieved by:*
>
> *(k) disallowance of consent*
>
> *May appeal to the District Land and Housing Tribunal within forty-five days from the date of the notification or publication of the decision."*

The provision as it goes above, is not mandatory. It gives the aggrieved party the discretion to appeal to the District Land and Housing Tribunal (DLHT). Besides, in my considered view, challenging the decision in the DLHT can be possible if the applicant wishes to challenge the decision on merits based on facts/evidence. In the matter at hand, the applicant complains of not being accorded the right to be heard by the 1st respondent before reaching his decision, which is one of the considerations to be taken into account on judicial review. The court on judicial review, as stated in the

authorities cited hereinabove, cannot deal with merits of the decision based on facts/evidence. The court considers procedural irregularities, something which cannot be dealt with by the DLHT. I thus find the application properly filed before this court.

The learned state attorneys, in fact never disputed the applicant's claims that he was not accorded the right to be heard. That, he was just served with the letter containing the decision. It is trite law that the right to be heard is sacrosanct and its infringement renders the decision issued defective. See: ***Hassan Kibasa vs. Angelesia Chang'a***, Civil Application No. 405/13 of 2018 (CAT at Iringa, found at www.tanzlii.go.tz), in which the Court of Appeal while revisiting its previous decision in the case of ***Abbas Sherally & Another vs. Abdul S.H.M. Fazalboy***, Civil Application No. 33 of 2002 (unreported) had the following to say:

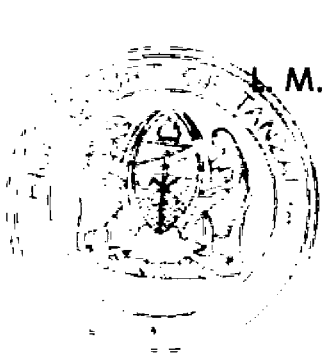
> *"The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."*

See also: ***OTTU on Behalf of P.L. Assenga and 109 Others vs. AMI (Tanzania) Ltd.***, Civil Application No. 44 of 2012 (unreported); ***National Housing Corporation vs. Tanzania Shoe Company and Others*** [1995] TLR 251; and ***Director of Public Prosecutions vs. Sabinis Inyasi Tesha and Another*** [1993] TLR 237.

In the matter at hand, the decision to disallow the planning consent affected the applicant. In that respect, the 1st respondent ought to have accorded him the right to be heard so as to properly resolve the complaints allegedly placed before him rendering the disallowance of the planning consent. I find that the failure to accord the applicant the right to be heard led to the holding of the planning consent for 12 years with no further directives or resolution of the complaints as promised in the letter of disallowance, as complained by the applicant.

In respect of my observation, as hereinabove, I find the decision to disallow the planning consent issued to the applicant by Ilala Municipal Council "the planning authority" being procedurally irregular for not according the applicant the fundamental right to be heard before an adverse action was taken against him. In the premises, the decision to disallow the planning consent, as proclaimed in the letter dated 5th November 2010 from the Director, of Urban Planning in the Ministry of Lands, Housing and Urban Planning, is hereby quashed. In the event the 1st respondent wishes to re-enter such decision, he shall follow due process by according the applicant his right to be heard before entering the decision. Costs shall be paid by the respondents.

Dated at Dar es Salaam on this 12th day of May 2023.



L. M. MONGELLA

JUDGE