

TANZANIA / JUDGMENT

TITO CESY

COURT
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1 April 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA DAR ES SALAAM SUB-REGISTRY AT DAR ES SALAAM MISCELLANEOUS CIVIL APPLICATION NO. 7121 OF 2024 IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR PREROGATIVE ORDERS OF MANDAMUS AND IN THE MATTER OF THE LAW REFORM (FATAL ACCIDENTS MISCELLANEOUS PROVISIONS) ACT, CAP 310 [R.E 2019] AND IN THE MATTER OF THE RAILWAYS ACT, 2002, THE PUBLIC SERVICES ACT, CAP 170 [R.E 2019], THE PUBLIC SERVICE STANDING ORDERS, 2009 AND THE RAHCO SERVICE REGULATIONS, 2011 AND 1 IN THE MATTER OF AN APPLICATION FOR MANDAMUS TO COMPEL THE DIRECTOR GENERAL OF TANZANIA RAILWAYS CORPORATION AND THE PERMANENT SECRETARY MINISTRY OF WORKS, TRANSPORT AND COMMUNICATION TO PAY THE APPLICANT HIS LEGALLY DESERVED TERMINAL BENEFITS AS PER THE LAW. BETWEEN BENHADARD MBARUKU TITO.....APPLICANT AND DIRECTOR GENERAL, TANZANIA RAILWAYS CORPORATION..... 1STRESPONDENT THE PERMANENT SECRETARY, MINISTRY OF WORKS TRANSPORT AND COMMUNICATION...2NDRESPONDENT THE HONORABLE ATTORNEY GENERAL..... 3RDRESPONDENT 2

RULING

Date of last order: 3-12-2025 Date of Ruling: 6-3-2025 B.K.PHILLIP,J The applicant herein lodged this application under the provisions of Section 18(1)and 19(3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, [CAP 31, R.E 2002], and Rules 5(1), 5(2)(a), 5(2) (b), 5(2) (c), and 5 (2)(d) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014, praying for the following orders;

- a) That, this Honorable court be pleased to grant leave to the Applicant to apply for an order of mandamus compelling the 1 st Respondent and 2nd Respondent to;
- i. Pay the Applicant his deserved terminal benefits provided for under the law to the tune of Tshs 2,098,665,000/= (Two Billion, Ninety Eighty Million, Six Hundred and Sixty-Five Thousand 3 Shillings Only) as retirement benefits as well as subsistence allowance from the date of his retirement to 31 st March, 2024; the breakdown of which is provided for in the Affidavit in support of this Application. ii. Payment of a subsistence allowance at Tshs 875,000/= (Eight Hundred and Seventy Five Thousand Shillings Only) per day from 1st April

2024 to the day the Applicant is repatriated. This allowance covers him, his wife and three children. iii. Inform the Applicant's pension fund that he has completed his services and thus he is eligible to his pension from the date of retirement; and take all other necessary steps legally required of them to make sure the Applicant is paid his deserved pension. iv. Give the Applicant his certificate of service.

- b) Costs to be borne by the Respondents.
- c) Any other Order or Orders that this Honorable Court may deem just and equitable to grant. 4 Upon being served with the application, the learned State Attorney, Ms. Grace Lupondo, who appears for the respondents, raised the following points of preliminary objection;
 - i) This Court has no jurisdiction to entertain this labour matter for the applicant's failure to exhaust the available local remedies provided under Sections 86 and 88(b) (ii) of the Employment and Labour Relations Act [Cap. 366 R.E 2019]. ii) In the alternative and without prejudice to the first point of law, the Application is time barred for being filed out of 6 months' time provided for under Rule 6 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, G.N No. 324 of 2014. The learned Advocate Jeremiah Mtobesya appeared for the applicant. The points of preliminary objection were disposed of through written

submissions.

I will start dealing with the second point of preliminary objection since it is common knowledge that the courts of law cannot entertain a matter filed out of time without the leave of the court. Therefore, it is paramount to establish that the case is not time-barred before dealing with any other arguments concerning the case. If the case is filed out of time, any proceedings conducted by the court are null and void. Submitting the 2nd point of preliminary objection, the learned State Attorney Lupondo submitted the following. This Court is not vested with jurisdiction to determine whether this application has been filed beyond the prescribed time of six months provided under the law. To cement his argument, he cited the provision of Rule 6 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, G.N No. 324 of 2014, which provides as follows: "The leave to apply for judicial review shall not be granted unless the application for leave is made within six months after the date of the proceedings, act or omission to which the application for leave relates. She argued that the above quoted provision is mandatory because it uses the word "shall". She pointed out that according to Section 53(2) of The Interpretation of Laws Act [CAP 1 R.E 2019], which provides that if the word "shall" is used under any written law, it means the function so conferred must be performed. 6 Expounding on this point, Ms. Lupondo submitted that the application at hand emanates from the alleged act of the 1st respondent which was communicated to the applicant through a letter with Ref. No. DG/00040 dated 15th October 2021 attached in the affidavit in support of the application as Annex "A". Counting from 15th October 2021, six months lapsed on 14th April 2022. This Application was filed on 03rd April 2024 which is almost 2 years beyond the lapsed six months' time prescribed under the law lapsed, hence time barred. Moreover, Ms. Lupondo

argued that the issue of time limitation touches the jurisdiction of the Court. She cited the cases of *Moto Matiko Maganga versus Ophir Energy Pic and 6 Others*, Civil Appeal No. 199 of 2021, *Tanzania Fish Processors Ltd v. Christopher Luhangula*, Civil Appeal No. 161/1994 (both unreported), and *Dr. Ally Shabhay vs. Tanga Bohora Jamaat* [1997] TLR 305, to cement his arguments. In conclusion of her submission, Ms. Lupondo implored this court to invoke 7 the provisions of section 3 of the Law of Limitation Act and dismiss the application. In rebuttal, Mr. Mtobesya argued the order of mandamus will issue to compel a public body to perform a public duty, where that public body would have failed or refused so to act. In other words, it is a remedy to check and control non-action on the part of a public body. He contended that as long as that duty remains unperformed, time does not run against the said non-action. Otherwise, it would be absurd to assert that a public body that refuses to act within six months will be excused from performing the duty under the pretext of time limitation; this will even defeat the very purpose for which the remedy seeks to serve. He went on to submit that unlike certiorari, which is predicated on a single wrong whose effect is continuing, mandamus is predicated on a continuing unlawful act. He insisted that Mandamus relies on the continuing wrong doctrine. An obligation to perform a public duty does not extinguish at the instance of six months of non-action. To hold otherwise will defeat the purpose of issuance of mandamus. He referred this court to the case of *Alicheraus Sepherine Mwesige Vs. To fortify his arguments, Tanzania Portland Cement Company Ltd*, Civil Case No. 8 12 of 2019, (unreported) to fortify his argument. Mr. Mtobesya maintained that a public body's non-action constitutes a wrongful act. Every continued non-action results in continuous injury. The respondent's failure to give the applicant his terminal benefits per the law creates a continuing wrongful act until when the respondent complies with the requirements. Further, Mr. Mtobesya faulted Ms. Lupondo for relying on a letter attached to the affidavit supporting this application dated 15th October 2021 to support her stance that this application was filed out of time. He contended that it is unprocedural at the preliminary stage to look into annexures attached to the pleadings because annexures are evidence, and it is trite law that evidence is only looked into when hearing the merits of the matter. He insisted that looking into such evidence to substantiate a preliminary objection was unprocedural at this stage. Moreover, Mr. Mtobesya submitted that the attached letters/ correspondences were not attached to establish accrual of cause of action as perceived by the respondents. He implored this Court to regard the said letters/correspondence as proof of a formal request for performance and not otherwise. He argued that the requirement for formal request to a 9 public body to perform a public duty has been subject to discussion in several cases tried before this Court, including the famous case of *John Mwombeki Byombalirwa Vs. The Regional Commissioner & Another*, [1986], T.L.R 73, in which the Court held that in applications for prerogative orders, the applicant has to demonstrate that he had demanded performance of a public duty and the respondent must have refused to perform. Relying on the case of *John Mwombeki Byombalirwa*, (supra), Mr. Mtobesya contended that an order of mandamus can issue even after two and a half years from the applicant's formal request for performance of a public duty by a public body. He beseeched this court to dismiss the point of preliminary objection. In rejoinder, Ms. Lupondo reiterated her submission in chief. She argued that the time limit for applications like the one in hand is well provided under the law. That is, it should be filed within

6 months from the date of the act or omission complained of. In the application at hand, six (6) months have to be reckoned from 15 October 2021, which lapsed quite a long time ago. Moreover, Ms. Lupondo submitted that it is not true that in determining a 10 point of preliminary objection on time limit, the court is precluded from looking at the annexures. To cement her arguments, he referred this court to the case of Moto Matiko Maganga (supra), in which the Court said the following; “Going by the above authorities, it is clear that an objection on account of time limit is one of the preliminary objections which courts have held can be based on pure point of law which touches on the Jurisdiction of the court and whose determination does not require ascertainment of facts or evidence. To determine such an objection, the court needs only to look into the complaints and its annexures without any further facts or evidence to be ascertained in determining as to whether the suit is time-barred”. She contended that the case of John Mwombeki Byombalirwa (supra) is distinguishable from the facts of the application at hand because it was filed out of time. Having analyzed the rival arguments raised by Ms. Lupondo and Mr. Mtobesya, let me determine the merit of the point of preliminary objection. The application at hand is an application for leave to apply for judicial review for orders of mandamus. It is a common ground that the application at hand is made under the provisions of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, [CAP 31, RE 2002 and the Law Reform(Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and 11 Fees) Rules, 2014. The task of this court is, first, to determine whether or not there is a time limit for filing an application for leave for judicial review for seeking the prerogative orders of Mandamus. Secondly, whether or not this application is time barred. First, it is worth noting that a time limit for pursuing any legal right is always provided under either the law of the Limitation Act or other laws, depending on the matter in question. For the application at hand, the provisions of Rule 2 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, G.N. No. 324 of 2014 provide as follows; “ These Rules shall apply to the applications for the prerogative orders of Mandamus, Prohibition and certiorari” Whereas the provision of Rule 6 provides as follows; “The leave to apply for judicial review shall not be granted unless the application for leave is made within six months after the date of the proceedings, act or omission to which the application for leave relates. ” [emphasis is added] Reading the above-quoted provision of the law, it is obvious that there is a 12 time limit for applying for leave to apply for judicial review for the prerogative orders of certiorari, mandamus and prohibition. In the case of Emma Bayo Vs Minister for Labour and Youth Development and Others, Civil Application No.79 of 2012, (unreported) the court mentioned the conditions to be considered when dealing with an application for judicial review like the one at hand, to wit;

- i) The applicant must demonstrate that he has an arguable case. ii) The application must have been filed within six months from the date of the incident complained of. iii) The applicant must demonstrate sufficient interest in the issue intended to be reviewed. With due respect to Mr. Mtobesya, I disagree with his arguments that there is no time limit for applying for leave to file a judicial review for prerogative orders of Certiorari, mandamus, and prohibition. The case of John Mwombeki (supra) he relied upon in support of his argument is distinguishable from the facts of this application and cannot be applicable in this

application because, one, it was not an application for leave to file a judicial review for the prerogative orders of mandamus, certiorari and prohibition, but it was an application for prerogative order of Mandamus, thus the conditions for granting the leave were not discussed in that case. It is indicated in that judgment that the leave for applying for judicial review for the prerogative orders was granted by Munyera J, as he then was, in Misc Civil Cause No.14 of 1986. Two, nowhere in that judgment is it indicated that an application for leave to apply for prerogative orders has no time limit. Back to the facts of the application at hand, in paragraph 8 of the affidavit in support of this application it is stated that despite several follow-ups, the 1st and 2nd respondents refused to give the applicant his terminal benefits and letter dated on 15th October 2021 is annexed to the affidavit to substantiate the applicant's assertion aforesaid. At this juncture, let me point out that I agree with Ms. Lupondo that the facts the applicant swore show that the act complained of occurred in October 2021. In other words, the applicant's cause of action accrued in October 2021 when the 1st respondent's principal officer communicated with the applicant officially that he cannot pay him his terminal benefits and directed him to communicate with the permanent secretary of the Ministry of Works, Transport and Communication. It is apposite to point out here that parties are bound by their pleadings [See the case of Makori Wassaga Vs Mwanakombo and 14 others (1987) T.L.R.88] and that pleadings are always read together with the annexures if any. I am not inclined to agree with Mr. Mtobeya's stance that reading the annexures attached to the affidavit amounts to analyzing the evidence. Notably, a point of preliminary objection on time limit is a pure point of law that can be established by going through the pleadings and the annexures, if any, without analyzing the contents therein, but taking them as they are in literary meaning. The pleadings are read together with the annexures, if any. The position held by the court in the case of Matiko Maganga (supra) cited by Ms. Lupondo on reading the pleadings together with annexures is applicable here. With due respect to Mr. Mtobesya, the doctrine of continuous breach is not applicable in this case since the refusal to pay the applicant the terminal benefit he is claiming from the respondents is not a continuous action. It was done once and that is when the cause of action accrued. Mr. Mtobesya's contention that once a complaint delays applying for leave to apply for judicial review, there is no remedy is erroneous. To my understanding, the remedy for delay in taking the necessary legal steps timely is the extension of time that the court can grant upon adducing good reasons for the delay. Moreover, Rule 6 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, G.N. No. 324 of 2014, does not provide that an application filed out of time shall be dismissed. From the foregoing, I hereby uphold the second point of preliminary objection. Under the circumstances, I cannot determine the first point of preliminary objection, thus, I hereby strike out the application with costs. Dated at Dar es Salaam this 6th day of March 2025 B.K. PHILLIP JUDGE 16

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