

TANZANIA / JUDGMENT

MCA 18473 2024 KASSIM MAYOLI VS DAWASA pdf

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IN THE HIGH COURT OF TANZANIA (DAR ES SALAAM SUB-REGISTRY) AT DAR ES SALAAM
MISC. CIVIL CAUSE NO. 18473 OF 2024 IN THE MATTER OF AN APPLICATION FOR LEAVE TO
APPLY FOR ORDERS OF CERTIORARI AND MANDAMUS BETWEEN KASSIM MWINSHEHE
MAYOLI..... APPLICANT AND DAR ES SALAAM WATER SUPPLY AND
SANITATION AUTHORITY.....1ST RESPONDENT PUBLIC SERVICE
COMMISSION2ND RESPONDENT THE PRESIDENT OF THE UNITED
REPUBLIC OF TANZANIA.....3RD RESPONDENT THE ATTORNEY
GENERAL.....4TH RESPONDENT

RULING

16th October & 19th November, 2024 BWEGOGGE, J.: Invoking the provisions of section 2(3) of the Judicature and Application of Laws Act [Cap. 358 R.E 2019]; section 19(1) and (3) of The Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, (CAP 310 R.E 2019); 1 and rules 5(1), 5(2)(a)(b)(c (d), 5(3) and 7(1) (5) of The Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, [GN No. 324 of 2014], the applicant herein above named has instituted an application herein praying for the orders, inter- alia:-

- a) That this Court be pleased to grant leave to the applicant to file an application for prerogative orders of;
 - i. Certiorari to quash the decision of the second respondent, contained in a letter with Ref No. CAD. 14/26/024'A/31 dated 06th day of March, 2024 titled UAMUZI WA TUME KUHUSU MAOMBI YAKO YA KUKATA RUFAA NJE YA MUDA BAADA YA KUONDOA SHAURI LAKO MAHAKAMANI KUPINGA ADHABU YA KUACHISHWA KAZI (Annexure G to the Affidavit) and letter with Ref No. CAB.30/536/PF.716/11 dated 20/04/2022 titled UAMUZI WA RUFAA YAKO KUPINGA UAMUZI WA TUME YA UTUMISHI WA UMMA (Annexure D to the affidavit).
 - ii. M andam us to compel the 1st respondent to immediately reinstate the applicant in the service as an Assistant Technician - Civil I.

- b) Payment of arrears of salaries and all dues owing to the applicant from the date of termination to the date of reinstatement. The application herein for orders mentioned herein above is supported by the statement and affidavit of the applicant aforementioned. 2 In tandem with filing counter affidavit, the respondents raised a preliminary objection on points of law as follows:
1. That the application is untenable in law as it falls short of the prerequisite conditions for judicial review for failure to exhaust available remedies.
 2. That the application is untenable in law as it falls short of the prerequisite conditions for judicial review for lacking a decision which is final and conclusive. The applicant herein was employed by the 1st respondent way back in January, 1990. He was terminated from employment on 20th December 2019 for misconduct. Being aggrieved by the decision of the disciplinary authority, the applicant referred the matter to the Public Service Commission whereas, on 20th December 2024, the Commission dismissed the appeal for being filed out of the prescribed time and confirmed the decision of the disciplinary authority. Still dissatisfied, the applicant appealed to the president. Likewise, the president dismissed the appeal for want of merit and confirmed the impugned decision of the disciplinary authority. Undaunted, the applicant knocked on the door of this court by filing an application for an extension of time to file an application for leave to apply for prerogative orders. On 31st May, 2023, the applicant was granted 30 days to file the application for leave. The applicant duly filed Miscellaneous 3 Civil Cause No.27 of 2023 applying for orders of certiorari and mandamus. However, the applicant withdrew the application and yet again lodged an application for extension of time to the 2nd respondent. The application was likewise dismissed. Hence, the applicant preferred the 2nd application herein for leave to file the application for prerogative orders. The preliminary objections preferred by the respondents were argued by Mr. Mathew Fuko, learned state attorney; and the submission in reply thereto was made by Mr. Christopher Singer, learned advocate. In substantiating the 1st limb of the preliminary objection, Mr Fuko argued that the applicant has not exhausted available remedies. That the provision of section 25 (1) of the Public Service Act read together with regulations 60(2) and (4) of the Public Service Regulations [GN. No.444 of 2022] provides mechanisms for any person aggrieved by the decision of disciplinary authority with respect to dismissal, among others, to appeal to the Public Service Commission. Further, if the party likewise, aggrieved by the decision of the Public Service Commission has an avail to appeal to the president whose decision is final and conclusive. Thus, the attorney asserted, the aggrieved party must exhaust all the remedies provided for under the relevant Act and the Regulations made thereunder before resorting to Judicial review. 4 In tandem with the above, Mr Fuko argued that in the instant application, the applicant is challenging the impugned decision of the 2nd respondent herein with reference No.CAD.14/26/024 "A"/31 dated 06th March, 2024, which dismissed his application for extension of time for lack of merit. Therefore, the applicant has an avenue to appeal to the president whose decision is final and conclusive before resorting to this Court to seek the remedy of prerogative orders or judicial review. The counsel insisted that it is trite law that

where there is a right of appeal, such appeal has to be pursued first before resorting to Judicial Review. The counsel referred cases of Michael David Nungu vs. Institute of Finance Management (Civil Appeal No. 170 of 2020) [2023] TZCA 17612; Parin A. A. Jaffer and Another vs. Abdularasul Ahmed Jaffer and Two Others [1996] TLR 110; and Abadia Salehe vs. Dodoma Wine Co. Ltd, [1990] TLR 113 to bolster his point. Based on the above premises, the attorney asserted that the essence of exhausting local remedies is to have a final decision for which this Court may interfere by way of judicial review. Therefore, failure to exhaust local remedies on the part of the applicant renders the application before this Court incompetent. Hence, the counsel concluded that the only remedy available in this case is to strike out this application with costs. 5 Pertaining to the second limb of the preliminary objection the attorney argued that the application herein lacks a decision which is final, and capable of being challenged before this court. That the applicant is challenging the decision of the 2nd respondent which is not final. That regulation 60 (4) of the Public Service Regulations, 2022, affords an avenue to the public servant who is aggrieved with the decision of the 2nd respondent (Public Service Commission) to appeal to the president. Thus, the applicant ought to have appealed against the decision of the 2nd respondent to the president to challenge the impugned decision, not instituting the matter at hand. Hence, the application herein is prematurely instituted. The attorney referred the case of Joshua Nassari vs. The Speaker of the National Assembly of the United Republic of Tanzania & Attorney General, Misc. Civil Cause No. 22 of 2019, HC (Unreported), to buttress his point. The attorney summed up his submission by reiterating that the instant application is misconceived and incompetent before this Court and prayed this court to strike out the matter herein with costs. In reply, Mr Singa briefly contended that the applicant has preferred this application for leave to institute an application for prerogative writ having exhausted all remedies available to him in compliance with regulation 60 6

- (4) of the Public Service Regulations. The counsel referred the mind of this court to the decision of the 2nd respondent titled: “Uamuzi Wa Tume Kuhusu Maombi yako ya Kukata Rufaa Nje ya Muda Baada ya Kuondoa Shauri Lako Mahakamani Kupinga Adhabu ya Kuachishwa Kazi” vide reference number CAD. 14/26/024 “A”/31 dated 06 March, 2024; and the decision of the president vide reference number CAB. 30/536/PF.716 of 20/04/2022 which blessed the decision of the 2nd respondent terminating the applicant from public employment as proof that the applicant had exhausted available remedies before taking this application. Based on the above premise, the applicant’s counsel concluded that objections raised herein by the respondents have no substance and intended to waste precious time of the court. He prayed this court to overrule the objections. The question to be resolved by this court is whether the preliminary objections raised by respondents herein are merited. Unarguably, as rightly submitted by the respondent’s counsel, the applicant in the application of like nature is obliged to exhaust local remedies before seeking the remedy of prerogative orders/judicial review. And where the law provides the right to appeal, such right has to be invoked first before resorting to judicial review [Michael David Nungu 7 vs. Institute of Finance Management (supra); Parin A. A. Jaffer and Another vs. Abdularasul Ahmed Jaffer and Two

Others (supra); and Abadia Salehe vs. Dodoma Wine Co. Ltd (supra)]. The above principle is implicit under the provisions of section 25 (1) of the Public Service Act read together with regulation 60(2) and (4) of the Public Service Regulations which provides mechanisms for any person aggrieved by the decision of disciplinary authority in respect to dismissal, among others. The remedies provided forth thereof afford the public servant who is not amused with the decision of the disciplinary committee to appeal to the Public Service Commission. Further, if the party is likewise dissatisfied with the decision of the Public Service Commission has remedy of appeal to the president, whose decision is final and conclusive. Now, the pertinent question arising herein is whether the applicant herein exhausted the remedies available to him before instituting an application herein for leave to file judicial review. In answering this question, I would scrutinize the record constituting the pleadings filed by the applicant herein. It is apparent on the record annexed to the pleadings filed by the applicant that on 27/08/2019 the applicant was served with a notice issued by the Chief Administrator (1st respondent) in respect of the intended disciplinary action for the alleged misconduct (corruption). The 8 notice was attached with charges on which the applicant was required to make defence. Also, it is apparent on the record that on 20/12/2019 vide a letter with Ref. No. DAWASA/DA/PF/2252/75 the applicant was informed of the decision of the disciplinary committee in that he was dismissed from public employment. It is likewise gleaned from the record constituting the annexure of the pleadings filed hereto by the applicant in that on 24/12/2020, the 2nd respondent vide correspondence with Ref. Na. CAC.22/104/01/90 informed the applicant that his appeal to the 2nd respondent against the decision of the 1st respondent was dismissed for being filed out of the prescribed period without good cause. Finally, it is gleaned from the record of the document annexed to the pleadings filed by the applicant that the Permanent Secretary, President's Office, vide letter with Ref: No. CAB. 30/536/PF. 716/11 dated 20/04/2022 informed the applicant that his appeal against the decisions of both the disciplinary committee and 1st respondent to the president was dismissed on merit and the decision of the disciplinary committee was confirmed/upheld. 9 Thus, based on the record above revisited, I am constrained to agree with the applicant in that he had exhausted all the remedies provided forth by the law before resorting to Judicial review. It is obvious that the respondents relied on the later decision of the 1st respondent which rejected the application for extension of time within which the applicant would file the intended appeal against the decision of the disciplinary committee as provided forth by the law. The question arising herein is whether there was any decision to be appealed against. I have directed my mind to the correspondence of the 1st respondent dated 06th March, 2024 vide Ref. Na. CAD. 14/26/024 Ä"/31. The 2nd respondent, with no uncertain terms, informed the applicant that its previous decision to dismiss the applicant's appeal based on the ground of time limitation was appealed to the president. And, the president, notwithstanding agreeing that the applicant filed the appeal beyond the prescribed time, yet proceeded to determine the appeal on merit. It was found that the charges made by the disciplinary committee of the first instance were proved beyond doubt in that the applicant solicited and received corrupt money to the tune of TZS 7, 500, 000/= contrary to the ethics of public service and tarnished the image of his employer. Hence, the

decision of the disciplinary committee was confirmed and, or upheld. 10 Based on the foregoing, it is obvious that the second action to the 2nd respondent was doomed to be abortive for being incompetent. Hence, the respondents cannot be heard in that the applicant was supposed to exercise his right of appeal to the president. Unarguably, the later application to the 2nd respondent was misconceived. Thus, I find the 1st limb of the preliminary objection raised by the respondent devoid of substance. Likewise, the discussion above disposes of the 2nd limb of the objections thereof. Given the foregoing, I find the objections advanced by the respondents bereft of merit. I hereby overrule the same in their entirety. I so rule. DATED in DAR ES SALAAM this 19th November, 2024. O. F. BWEGOGGE JUDGE 11

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