

TANZANIA / JUDGMENT

omary shaban nyambu vs chief of defence force 2others 2024 tzhc 472 21 february 2024

COURT
TZHCDECIDED
21 February 2024

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IN THE HIGH COURT OF TANZANIA (DAR ES SALAAM MAIN REGISTRY) AT PAR ES SALAAM
MISCELLANEOUS APPLICATION NO. 35 CF 64 OF 2023 IN THE MATTER OF AN APPLICATION FOR
LEAVE TO LODGE AN APPLICATION FOR ORDERS OF CERTIORARI, MANDAMUS AND
PROHIBITION AND IN THE MATTER OF THE DECISION OF THE CHIEF OF DEFENCE FORCES
OF THE TANZANIA PEOPLE'S DEFENCE FORCES OF TERMINATING THE EMPLOYMENT OF
APPLICANT WITH THE TANZANIA PEOPLE'S DEFENCE FORCES (TPDF) ON 13th APRIL, 1994
AND IN THE MATTER OF DENIAL OF THE RESPONDENTS TO PROVIDE ADEQUATE
INFORMATION TO THE APPLICANT REGARDING THE REASONS FOR HIS TERMINATION FROM
EMPLOYMENT WITH THE TANZANIA PEOPLE'S DEFENCE FORCES (TPDF) BETWEEN OMARY
SHABAN NYAMBU.....APPLICANT AND CHIEF OF THE DEFENCE
FORCE.....1st RESPONDENT PERMANENT SECRETARY, MINISTRY OF
DEFENCE.....2nd RESPONDENT HONOURABLE ATTORNEY GENERAL..... 3rd
RESPONDENT

RULING

14th Nov., 2023 & 21st Febr., 2024 DYANSOBERA, J.: This ruling is on a preliminary objection taken to the application for leave to apply for prerogative orders of certiorari, mandamus and prohibition against the decision of the 1st respondent herein. The preliminary objection is on the following ground: - The application is incompetent and bad in law for being premature as the applicant has failed to exhaust the remedies available under the National Defence Act, [Cap. 192 R.E.2002]. The preliminary objection was canvassed by way of written submissions whereby Ms Pauline Mdendemi, learned State Attorney, represented the respondents and argued in support of the preliminary objection. The applicant paddled his own canoe. It is common cause that the applicant was employed by the 1st respondent way back on the 1st January, 1979 with number MT 24723 LCpI. On 13th day of April, 1994, his employment contract was terminated on medical grounds. Aggrieved by the termination, the applicant filed a Constitution Petition (Misc. Civil Cause No. 15 of 2013) at the High Court of Tanzania but the same action was struck out for failure to exhaust other available remedies before resorting to filing the Constitution Petition. His Civil

Appeal No. 105 of 2015 filed before the Court of Appeal was also struck out on technical grounds. In 2023 the applicant filed an application for extension of time vide Misc. Civil Application No. 06 of 2023 so that he applied for leave for prerogative orders of certiorari, mandamus and prohibition; the application was granted hence this application against which the present preliminary objection has been raised. Supporting the preliminary objection, the learned State Attorney contended that the applicant was a military man (soldier) employed by the 31st respondent. His contract of employment was governed by the National Defence Act [Cap. 192 R.E.2002] and the Defence Forces Regulations and Orders which she terms as "specific law". It is the argument of the learned State Attorney that the settled legal principle is that the specific law should first be invoked before the general law is resorted to. Referring this court to Regulation 12 item 2 which deals with Grievances and Complaints, Ms Pauline Mdendemi contends that Item 12.26 of the Defence Force Regulations provides for redress of grievances and has set a machinery system to be followed from the bottom up to the high level when a man or officer in military service feels that he has suffered any personal oppression, injustices or other ill-treatment. It is complained on part of the respondents that the applicant has not complied with the above requirement which, to the learned State Attorney, is a specific law; instead, the same application has decided to resort to the general law hence denying this court the jurisdiction to entertain this action. It is further argued on part of the respondents that such position was emphasized in the cases of PC Sunday Simon Mwaikwila v. Inspector General of Police and Another, Civil Case No. 29 of 2017 and Henry Mwisongo v. Chief Defence Force and 2 others, Misc. Civil Application No. 28 of 2020. On his part, the applicant points out that the preliminary objection is baseless. He argues that, apart from the failure by the learned State Attorney to cite that specific law, there is no provision in the cited law which ousts jurisdiction of the court to deal with the case at hand and grant leave to the applicant. It is further submitted on his part that the issue of this court lacking jurisdiction is an afterthought as it was not raised as a point of preliminary objection. With regard to the applicant's previous Constitution Petition he had filed in court; the applicant invites this court to take into account that the court in that matter advised him to resort to judicial review by filing an application for a writ of certiorari under the law; the fact he is intending to do in case leave is granted. He maintains that his termination was not accompanied with reasons as he was not supplied with the medical report confirming his mental illness and that he was not given a right to be heard. Respecting exhausting available remedies, the applicant, admitting that officers and men of Defence Forces are entitled to seek redress from superior authorities in respect of grievances arising out of personal oppression, injustices or other treatment, submits that he attempted to seek redress not only to the superior authorities but also to the highest authorities of the Defence Forces and that his concern was levelled to the Chief of Defence Forces and the Minister responsible for the National Defence but his grievances were not heeded by those authorities. As to the two case laws cited by the learned State Attorney, the applicant argues that the same are inapplicable to the circumstances of this case and, therefore, distinguishable. I have considered the arguments in support and in opposition of the preliminary objection. It is my finding that the preliminary objection raised is not a pure point of law. It is trite that that to be sustained as a preliminary objection, the point taken must be true and pure point of law predicated on ascertained and undisputed fact. Indeed, the Court of Appeal

5 in *Hezron M. Nyachiya v. Tanzania Union of Industrial and Commercial Workers and another*, Civil Appeal No.79 of 2001 citing the words of Sir Charles Newbold P. in the case of *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd* (1969) EA 696 observed that, "A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion". In the case under consideration, apart from the fact that the exhaustion of available remedies is not a statutory requirement under the National Defence Act, the issue whether or not the applicant has exhausted remedies available under the said Act presupposes the determination of two issues. One, whether the National Defence Act [CAP 192 R.E.2002] provides for remedies which have to be exhausted before an aggrieved party like the applicant resorts to a court of law by way of judicial review and, two, whether or not the applicant has exhausted the remedies. These issues do not encapsulate precise true and pure points of law predicated on ascertained facts; rather, they are facts which require substantive arguments. Besides, as observed by the Court of Appeal in *Shahida Abdul Hassanali Kasam v. Mahed Mohamed Gulamali Kanji*, Civil Appeal No. 42 of 1999 (unreported), 6 "The aim of a preliminary objection is to save the time of the court and of the parties by not going into the merits of an application because there is a point of law that will dispose of the matter summary". In the present case, the existence or availability of alternative remedy cannot be a bar to the applicant to access this High Court by way of judicial review. This position has been echoed in various cases. For instance, in the case of *Bin Johar General Trading LLC v. the Commissioner General, Tanzania Revenue Authority and 2 others*, Misc. Commercial Case No. 24 of 2006, in an application for leave to apply for prerogative orders, it was observed that: - 'In obvious cases the court may also examine whether the Applicant has exhausted particularly alternative statutory remedies. But it has frequently been held by this court that the availability of alternative remedies per se, would not bar access to the application for prerogative orders.' Same position was adopted by Hon. Lugakingira, J (as he then was) in the case of *R. Ex parte Peter Shirima vs Kamati ya Ulinzi na Usalama Wilaya ya Singida* [1983] TLR 375 that: - '...from the totality of these authorities, that the existence of the right of appeal and even the existence of an appeal itself, is not necessarily a bar to the issue of prerogative orders. The matter is one of the judicial discretions to be exercised by the court in the light of the circumstances of each particular case. Where an Appeal has proved an ineffective and the requisite grounds exist, the aggrieved party may seek and court would entitle grant relief by way of prerogative orders'. With this legal position expounded by courts, it is clear that the failure by the applicant to exhaust available remedies neither ousts court's jurisdiction nor fetters the court's discretion from entertaining an application for judicial review, leave alone an application for leave to apply for judicial review. In the end result and for the reasons given, I am satisfied that the preliminary objection lacks any merit. I, accordingly, overrule and dismiss it. Costs to abide by the outcome of the application. The application for leave to apply for judicial review shall be heard on merit. Order accordingly. * p 21.2.2024 This ruling is delivered under my hand and the seal of this Court on this 21st day of February, 2024 in the presence of the applicant in person and in the presence of Ms Pauline Mdendemi, learned State Attorney for the three W.P. Dyansobera

JUDGE

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