

TANZANIA / JUDGMENT

phinas abamwesiga kalokola vs his his excellence the president of the united republic of tanzania and 2 others 2021 tzhc 5520 29 july 2021

COURT
TZHCDECIDED
29 July 2021

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE DISTRICT REGISTRY AT
MWANZA MISCELLANEOUS CIVIL CAUSE NO. 06 OF 2020 PHINIAS ABAMWESIGA KA LO KO
LA..... APPLICANT VERSUS HIS EXCELLENCY THE PRESIDENT OF THE UNITED
REPUBLIC OF TANZANIA..... 1stRESPONDEN THE ATTORNEY
GENERAL..... 2ndRESPONDEN THE DISTRICT EXECUTIVE
DIRECTOR OF BUKOMBE DISTRICT COUNCIL..... 3rdRESPONDEN

RULING

Date of Last order: 09/07/2021 Date of Judgement: 29/07/2021 F. K. MANYANDA, J. This Ruling is in respect of a preliminary objection to the hearing of application which is made under section 17(2) of the Law Reforms (Fatal Accidents and Miscellaneous Provisions) Act, [Cap. 310 R. E. 2002] and Rule 8(l)(a) and (b), (2) and (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014, GN. No. 324 of 2014 and pursuant to the Ruling of this Court (Hon. Tiganga, J.) The application is for orders that: - Page 1 of 16

1. This Court be pleased to grant an order of certiorari to remove and quash the decision of the 1st Respondent dated 24/09/2018 and communicated to the 3rd Respondent and the Applicant which reversed the decision by the Public Service Commission and affirmed the 3rd Respondent's decision.
2. This Court to grant an order of mandamus compelling the 3rd Respondent to implement the decision of the Public Service Commission dated 27/12/2017 for reinstatement of the Applicant to his employment and pay his rights. The application is by way of chamber summons supported with an affidavit and a statement of facts. The Respondents filed a counter affidavit and raised an objection to the hearing of the application. Before I go into the nitty-gritty of the objection, let me narrate the facts, albeit in a nutshell. Page 2 of 16 The Applicant was an employee of the 3rd Respondent as supplies officer since 1998 to 18/05/2017 when he was dismissed from his employment. He appealed to the Public Service

Commission which partly allowed his appeal in that he was reinstated to his employment but in reduce rank from grade I to grade II. Aggrieved by the Public Service Commission, the 3rd Respondent appealed to the 1st Respondent; who not only reversed the Public Service Commission, but also revived and convicted the Applicant with a charge which he was not convicted with by the 3rd Respondent. The Applicant chose to come to this Court by filing a judicial review application registered as Misc. Civil Cause No. 09 of 2019 after obtaining the requisite leave which was granted by Honourable Rumanyika, J. in Misc. Civil Cause No. 03 of 2019 on 04/06/2019. The application No. 09 of 2019 was struck out by Honourable Mdemu, J. for been legally incompetent on 04/10/2019. The Applicant successfully applied for extension of time before Honourable Tiganga, J. to file the current application on 29/09/2020. Page 3 of 16 Consequently, he filed the instant application. As explained above, the application hit a preliminary objection on three points of law namely: -

1. That the application is unmaintainable for instituting the same against the 1st Respondent.
2. The application is bad in law for want of leave to institute the same. The Respondents prayed for the application to be strike out. The Respondent after been prompted with the said preliminary objection he too raised a counter objection raising three points of law namely:-
 1. That, the contents of paragraphs 4,5,6,7,8,9,10,11,12,13, and 14 contain hearsay evidence averred by the Respondents who are not the deponents of the counter affidavit;
 2. That, the verification clause is fatally defective for wrong verifying that the contents of paragraphs 4,5,6,7,8,9,10,11,12,13, and 14, Page 4 of 16 which contain hearsay evidence, are true to the best knowledge of the deponent Lameck Merumba.
 3. The Respondent's counter affidavit is fatally defective because it contains a jurat which does not indicate whether the deponent Lameck Merumba is personally known to the Commissioner who administered the Oath, or was identified to the Commissioner by a person who is personally known to the Commissioner. At the hearing, Mr. Mathias Mashauri, learned Advocate, represented the Applicant and Ms. Subira Mwandambo and Sabina Yongo, learned State Attorneys, represented all the three Respondents. Ms. Mwandambo submitted that they raised an objection on two points of law as explained above. Arguing in support of the 1st point of law, she stated that the Application has not followed the law as far as the application involves the President of the United Republic of Tanzania. She went on that following the amendments introduced by the Written Laws (Miscellaneous Amendments) (No. 03) of 2020 published on 19/06/2020 to the Presidential Affairs Act, [Cap. 9 R. E. 2019] by virtue of section 49(1) now it is prohibited to sue a sitting President. Such a suit, if so preferred, Page 5 of 16 is only supposed to be brought against the Attorney General, the President is not to be made a party. It was the Attorney's contention that the Application was filed on 05/10/2020 while the law was already in force. Therefore, Applicant has sued a wrong party. She was of views that, the President should be struck out, once removed the application becomes unmaintainable because the 2nd and 3rd Respondents are not liable, because the complaint emanates from an appeal which it was

not an act of the 2nd, and 3rd Respondents. She prayed the same to be dismissed in its entirety. As regard to the second point of law in the objection, Ms. Mwandambo argued that the instant application is bad in law for want of leave. She stated that the Applicant once filed a similar application which was registered as Misc. Civil Cause No. 09 of 2019 which was struck out by Honourable Mdemu, J. on 04/10/2019 for been legally incompetent. She Page 6 of 16 added that, the application preceded leave a which was granted by Honourable Rumanyika, J in Misc. Civil Application No. 03 of 2019. Ms, Mwandambo argued further that after the previous application was struck out, the Applicant applied for extension of time to file a fresh application for judicial review not extension of time to file fresh application for leave. Then the Applicant filed the instant application instead of filing application for leave so that he can proceed with filing the instant application. In her views the leave granted by Honourable Rumanyika, J. died with the application which was struck out by Honourable Mdemu, J. The Applicant ought to obtain a new leave. On his side Mr. Mashauri submitted in opposition to the first point of objection arguing that the Applicant is challenging a decision of the President as a quasi-judicial body as the application is for prerogative order under section 17(2) of the Law Reforms (Fatal Accident and Miscellaneous Provisions Act, [Cap. 310 R. E. 2002] and Rule 8 of GN. No. 324 of 2014; it is not against the President in his personal capacity. He was of the views Page 7 of 16 that the Regulation 60(5) of the Public Service Regulations and section 25(l)(d) of the Public Service, Act, the President is the final appellate quasi-judicial body. The learned Counsel contended that since the decision of the 1st Respondent was given before coming into force of the amendments, then the application properly includes the 1st Respondent as a party because the law cannot act retrospectively. He cited the case of V.G. Chavda vs Director of Immigration of Service and others [1995] TLR 125 where it was held that any of the bodies of the Government may be challenged in judicial review. He contended that the President's quasi-judicial acts may be challenged as well. As regard to the second point Mr. Mashauri argued that the leave granted previously in respect of the application which was struck out, operates to cover the instant application also; he prayed the objection be overruled. Page 8 of 16 Mr. Mashauri did not argue in respect of his preliminary objection against the objection by the Respondents because neither the law nor the practice in our jurisdiction allows him to raise a preliminary objection against an existing preliminary. In the case of Jubilee Insurance Co. (T) Ltd vs Zilly Badi Mruma, Misc. Commercial Cause No. 107 of it was held inter alia that: - "It is a trite law in this jurisdiction that once a preliminary objection has been raised, any cause of action pre-empting the same is not allowed". The High Court, Commercial Division (Honourable Dr. Nangela, J.) in another case of Wellworth Hotels and Lodges Ltd vs. East Africa Canvas Company Ltd and 4 others, Misc. Commercial Cause No. 05 of 2020 (unreported) he stated that: - "In principle, therefore, it is not appropriate to preempt one preliminary objection by a preliminary objection. In my view the above position, the best course to take is to allow the earlier filed preliminary objection to be determined and if it fails to carry the day, then the Court will afterwards consider the next filed preliminary objection." Page 9 of 16 The authority in Wellworth Hotels and Lodges Ltd case (supra) followed a decision in Mugeta Torokoko and Another vs. Ministry of Lands, Housing and Human Settlement and 2 others,

Civil No. 12 of 2019 of the High Court (Kahyoza, J.) which cited the case of Method Kimomogoro vs. Board of Trustees of TANAPA, Civil Application No. 01 of 2005 where Court of Appeal stated that: - "This Court has said in a number of times that it will not tolerate the practice of an advocate trying to preempt a preliminary objection either by raising another preliminary objection or trying to rectify the error complained of." Let me now determine the first point of objection. It has been argued by the Respondents' Counsel that following coming into force of the written Laws (Miscellaneous Amendments) (No. 3) Act, No. 6 of 2020 which amended the Laws Reform (Fatal Accidents and Miscellaneous Provisions) Act, all the actions against the President are to be brought against the Attorney General. The Applicant's Counsel argued that the application has been properly brought against the President because the action complaint of was done by the President as a quasi-judicial body not in his personal capacity. I have read the provisions of section 37 of Act No. Page 10 of 16 6 of 2020 and found that it is true, the same amended the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, [Cap. 310 R. E 2019] by adding a new section 18A which reads: - "18A Notwithstanding any provision to the contrary, leave of application for orders under section 18 or any suit under this Act for any act or omission by the President, Vice President, Prime Minister, Speaker, Deputy Speaker or Chief Justice shall be sought or brought against the Attorney General. "(Emphasis mine). My understanding of this provision of law is that it has not prohibited actions to be brought against the office of the President as a quasi-judicial body, but has directed that such actions should be brought against the Attorney General. This means the President is no longer required to be made a party in a case, but it is the Attorney General. A similar amendment was made by Section 49 of Act No. 06 of 2020 by introducing subsection (1) to section 7 of the Presidential Affairs Act which reads: - "7(1) Notwithstanding any provisions to the Contrary, proceedings against an act or omission by the President other than those referred to in section 6 shall be brought against the Attorney General." Page 11 of 16 -h The introduced provision is clear that all proceedings against an act or omission by the President are required to be brought against the Attorney General with effect from the date Act No. 06 of 2020 came into force. The said Act came into force on its publication date, which is 17/06/2020. The actions which are exempted from section 7(1) above are those concerning proceedings under section 6 of the Presidential Affairs Act. [Cap. 9 R. E. 2002]. The said proceedings are those referred to sub article

- (2) of Article 46 of the Constitution of the United Republic of Tanzania, 1977 which provides for Civil Proceedings to be instituted against the President in his person before he took office or after his retirement. The instant matter concern proceedings which have been brought against the President as a quasi-judicial body, the same falls under section 7(1) of the Presidential Affairs Acts. I have reproduced the said provision above. It obviously prohibits proceedings of any nature to be brought against the President acts or omissions but the same are supposed to be brought against the Attorney General. Page 12 of 16 It follows therefore that, just as for applications of leave for judicial review against the acts or omissions by the President which are required to be brought against the Attorney General under section 18A of Cap 310. Proceedings other than those under section 6, against the

President are required to be brought against the Attorney General. I agree with the State Attorney for the argument that the President is wrongly made a party in the instant matter. As to the remedy, the authority in the case of Andrea Martin Msamba vs The Village Executive Officer Ndiwili Village DC Civil Appeal No. 07 of 2020 (unreported) where a respondent was wrongly sued, this Court (Hon. Matogolo, J.) held the suit was incompetent before the Court, it could not be dismissed but struck out. The Honourable Judge followed the authority in the case of Director General NSSF vs Consolata Mwakisu, No. 329 of 2017 [2018 TZCA] "It stated that proper position is to dismiss only competent application, those which suffer from material defects are to be struck out." Page 13 of 16 In the instant matter the proper remedy is to strike out the application because the same is incompetent for suing a wrong party. Now having disposed the first point of objection, let me deal with the second point of objection. It has been argued by the State Attorney that the instant Application is bad for want of leave because the leave granted previously was used up in an application which was struck out by Hon. Mdemu, J. The Counsel for the Applicant contends that the same leave is usable in the instant application. This should not detain me. Rule 5(1) of the GN No. 324 of 2014 mandatorily require that any person intending to make an application for judicial review must obtain leave, prior. When the Applicant obtained leave on 04/06/2019 he made Application No. 09 of 2019 which ended up by been struck out on 04/10/2019. After Application No. 09 of 2019 been struck out, the Applicant was at liberty to make "a fresh application". It was optional to him. Page 14 of 16 My understanding of the law is that "a fresh application" has to follow the same process as a fresh one by seeking a fresh leave as well. This position of the law is not new in our jurisdiction. In the case of William Shija vs. Fortunatus Masha [1997] TLR 213 the Court of Appeal held inter alia that:- "Appiicant was correct in contending that when the appeal had been struck out the notice of appeal was also struck out in that situation, if a party still wished to appeal, a fresh application had to be filed in the High Court seeking extension of time in which to give notice to appeal". As it can be gleaned, even if the authority in William Shija's case (supra) dealt with a notice of appeal, that matter is similar to the instant application because both matters are preceded with a notice, it is "a leave" in our instant matter while it is "a notice of appeal" in the William Shija's case. By analogous reasoning, the striking of an appeal rendered the notice of appeal also struck out and since nothing was left in Court, the applicant was advised, if he wished to file a fresh appeal, he had to file a fresh Page 15 of 16 notice of appeal. Similarly, in the instant matter, the Applicant, if he wished to file a fresh application for review, could only do so after successfully obtaining a fresh leave of the High Court. Therefore, the striking out of the application for judicial review also rendered the leave struck out, nothing was left in Court, the applicant, if he so wished, he had to seek for leave a fresh. The Applicant instead of seeking leave, he sought for extension of time within which to file for judicial review; which had no leave to support it. I agree with the State Attorney arguments that this application is incompetent and unmaintainable in law for want of leave to apply for judicial review as required by rule 5 of GN. No. 324 of 2014. In the upshot, for reasons stated above, I find the application for judicial review as incompetent. Consequently, I do hereby strike it out. No

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