IN THE HIGH COURT OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

(CORAM: JUNDU, JK, MWARIJA, J AND TWAIB, J.)

Misc. Civil Cause No. 24 of 2013

LEGAL AND HUMAN RIGHTS CENTRE ..... 1ST PETITIONER

TANGANYIKA LAW SOCIETY ..... 2ND PETITIONER

Versus

HON. MIZENGO PINDA ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

Date of last order: 18/2/2014

Date of ruling: 6/6/2014

RULING

JUNDU, JK:

The dispute that has given rise to the present petition emanates from a statement allegedly made by the Prime Minister of the United Republic of Tanzania, Honourable Mizengo Kayanza Peter Pinda (hereinafter referred to as the "Prime Minister" or "the 1st respondent") while addressing a session of the National Assembly at Dodoma on 20th June, 2013. The petitioners, Legal and Human Rights Centre and the Tanganyika Law Society, are challenging part of the Prime Minister's statement, made during a weekly session of the Assembly called *"maswali na majibu ya papo kwa papo kwa Mheshimiwa Waziri Mkuu".* The Prime Minister is alleged to have said

the following words in response to a question from a Member of Parliament:

> *"...ukifanya fujo umeambiwa usifanye hiki ukaamua kukaidi utapigwa tu... nami nasema muwapige tu kwa sababu hamna namna nyingine kwa maana tumechoka..."*

The petitioners have provided a literal translation of this statement, which runs thus:

> *"If you cause disturbance, having been told not to do this, if you decide to be obstinate, you only have to be beaten up... and I am saying you should keep on beating them because we don't have any other means ..."*

The petitioners are aggrieved by this statement, and are challenging it on grounds, among others, that it contravenes certain provisions of the Constitution of the United Republic of Tanzania, 1977, which prohibit violation of the right to life and seek to protect the rule of law and the right to fair hearing. They maintain that the statement supports and encourages abuse of power by the Police, degrading and inhuman acts and torture, and would create an environment for future abuse of Human Rights generally. The provisions of the Constitution referred to by the petitioners are articles 12 (2), 13 and 14. The statement further appears to the petitioners to be capable of being taken to be an order from the Prime Minister directing Police Officers and other coercive organs of

the State to use un-proportional, excessive and unreasonable force against people in order to maintain obedience. The petitioners have jointly and collectively made several prayers, ostensibly asking the Court to declare the said statement unconstitutional. They have also included prayers seeking a declaration to the effect that article 100 (1) of the Constitution and section 5 of the Parliamentary Immunities, Powers and Privileges Act are contrary to the provisions of article 13 (2) of the Constitution.

In opposition to the petition, learned State Attorneys who represented the respondents have raised five points of preliminary objection on points of law, namely, that:

1. The petition is bad in law for contravening the provisions of the Constitution of the United Republic of Tanzania, 1977 [Cap. 2 R.E. 2002] and the Parliamentary Immunities, Powers and Privileges Act [Cap. 296 R.E. 2002].

2. The petition is fatally defective for contravening:

   i. Order VI rule 3, of the Civil Procedure Code [Cap. 33 R.E. 2002] and section 6 (e) of the Basic Rights and Duties Enforcement Act [Cap. 3 R.E. 2002].

   ii. Order XXVIII rule 1 of the Civil Procedure Code [Cap. 33 R.E. 2002].

3. The petition is vague, embarrassing, frivolous and vexatious for being contrary to the Civil Procedure Code [Cap. 33 R.E. 2002], the Basic Rights and Duties Enforcement Act [Cap. 3

R.E. 2002], and utmost abuse of legal process contrary to the Constitution of the United Republic of Tanzania, 1977 [Cap. 2, R.E. 2002] and the Parliamentary Immunities, Powers and Privileges Act [Cap. 296 R.E. 2002].

4. The petitioners and the persons listed in annexure P3 have no *locus standi* to the petition for intervention in the parliamentary business made in the house.

5. The prayers sought by the petitioners are untenable on account of being contrary to the basic principles of law.

During the hearing, the petitioners were represented by a team of learned counsel led by Mr. Mpale Mpoki. Others were Mr. Francis Stolla, Mr. Fulgence Massawe, Mr. Peter Kibatala, Mr. Harold Sungusia and Mr. Jeremiah Mtobesya. The respondents' team of learned counsel was led by the Deputy Attorney General, Mr. George Masaju, who was assisted by Mr. Gabriel Malata, Ms Sarah Mwaipopo and Ms Aloysia Mbuya, all Principal State Attorneys in the Attorney General's Chambers. We wish to express our appreciation to all counsel for their industriousness in research and preparation, and the able manner in which they presented their arguments.

We will begin by considering the first and fifth points of preliminary objection together. The first point of preliminary objection states that the petition is bad in law for contravening the provisions of the Constitution of the United Republic of Tanzania, 1977 (hereinafter referred to as "the Constitution") and the Parliamentary

Immunities, Powers and Privileges Act [hereinafter referred to as "Cap. 296"]. The essence of the fifth point of the preliminary objection is that, this court has no jurisdiction to grant prayer (b) and (g) of the petition. As we shall see in the course of this ruling, these points give rise to issues that necessitate a look at the point raised in ground 4 of the preliminary objection relating to the petitioners' *locus standi*. We will therefore set out the arguments in relation to ground 4 before determining both grounds consecutively.

Mr. Masaju, the Deputy Attorney General, addressed the Court on grounds Nos. 1 and 5 of the preliminary objection. He submitted to the effect that the petition is bad in law for contravening the Constitution and Cap. 296. He mentioned the specific provisions of the Constitution that the petition violates as being sub articles (1) and (2) of article 100. They read as follows:

> *"(1) Kutakuwa na uhuru wa mawazo, majadiliano na utaratibu katika Bunge, na uhuru huo hautavunjwa wala kuhojiwa na chombo chochote katika Jamhuri ya Muungano, au katika mahakama au mahali penginepo nje ya Bunge.*
>
> *(2) Bila ya kuathiri Katiba hii au masharti ya sheria nyingine yoyote inayohusika, Mbunge yeyote hatashtakiwa au kufunguliwa shauri la madai mahakamani kutokana na jambo lolote alilolisema au kulifanya ndani ya Bunge au alilolileta Bungeni kwa njia ya maombi, muswada, hoja au vinginevyo."*

The above provision provides for freedom of thought, deliberations and procedure in the National Assembly, which shall not be

questioned by any organ in the United Republic or a Court or any other place out of the National Assembly. Mr. Masaju stated that the basis of this dispute relates to something that was said by a Member of Parliament (hereinafter called "MP" or "MPs" for plural) in Parliament during parliamentary proceedings. He said that rule 71 (4) (c) of the Parliamentary Standing Orders made on 19th April 2013 ("*Kanuni za Kudumu za Bunge*", henceforth "the Standing Orders") prohibits questioning any organ outside Parliament of anything done in Parliament by an MP.

The learned counsel further argued that this is not the first time that this question has arisen. He cited the case of ***Augustine Lyatonga Mrema v. The Speaker of the National Assembly & Attorney General*** [1999] TLR 206, in which Katiti J (as he then was) was called upon to interpret article 100 (1) of the Constitution. His Lordship held:

> *"... actually complying with Art 100 (1) of the Constitution that proceedings in parliament shall not be inquired into by a court of law, such disciplinary action within the house, falls within the house, and the court's jurisdiction is ousted, as Article 100(1) loudly says."*

Katiti, J. thus concluded:

> *"In obedience to Article 100 (1) of the Constitution, I shall declare that this court has no jurisdiction to hear the petition and therefore the application is*

unmaintainable, and I shall not by illegal force break into that parliamentary castle."

Mr. Masaju also invited this Court to follow the Court of Appeal decision in **Attorney General v. Rev. Christopher Mtikila,** Civil Appeal No. 45 of 2009 [(unreported), hereinafter referred to as **"Mtikila (2)"**], which also recognised the Court's limitation and held that :

"Where there are such express provisions ousting jurisdiction, the court observes them and refrains from adjudicating."

The learned Deputy Attorney General went further and submitted that the Standing Orders 73 and 71 lay down the procedure for adjudicating over matters that take place in Parliament, and therefore an aggrieved party has a remedy. Again relying on **Mtikila (2),** he submitted that where there is a remedy, the Court would not interfere, unless the existence of the remedy depends on it.

Indeed, it was the holding of the Court of Appeal in **Mtikila (2),** that if a remedy is available to the applicant under some other legislative provisions or some other basis, whether legal or factual, the Court will usually decline to determine whether in addition, a breach of a declaration of rights has occurred or may occur, preferring instead to let the complaining party pursue their interests by following the other procedure. Mr. Masaju also cited the case of **Attorney General v. W.K. Butambala** [1993] TLR 46 as his authority for this proposition. He concluded by submitting that this

matter is not justiciable in this Court given the provisions of article 100 (1) and (2) of the Constitution, section 5 of Cap. 296 and rules 71 and 73 of the Standing Orders, 2013.

Mr. Masaju also used the *ratio* in **Mtikila (2)** to support the fifth ground of preliminary objection, which proposes that this Court has no jurisdiction to invoke one constitutional provision to invalidate another constitutional provision as the petitioners want us to do in respect of article 100 (1) of the Constitution. Mr. Masaju wants us to apply the *ratio* in **Mtikila (2)** and dismiss prayer (b) in the petition, which challenges the constitutionality of article 100 (1) of the Constitution. It was ruled in **Mtikila (2)** that the doctrine of basic structure or fundamental principles does not apply to our Constitution and that no one provision can be construed as fundamental as against another. Hence, he submitted, we would be going against the *ratio* in **Mtikila (2)** if we embarked upon determining whether article 100 (1) of the Constitution contravenes other provisions of the Constitution as the petitioners want us to do if we were to entertain prayer (b) in the petition. Mr. Masaju prayed that the petition be dismissed.

On the other hand, Mr. Mpoki, lead counsel for the petitioners, vehemently opposed this proposition. He sought support from the well-settled principle that there has to be a clear separation of powers between the three organs of the State, namely, the Judiciary, the Legislature and the Executive and that under the doctrine of "*checks and balances*" the Judiciary is empowered to exercise

judicial review functions against the Legislature and the Executive. He further argued that under the provisions of the Basic Rights and Duties Enforcement Act, Cap. 3 R.E 2002 (hereinafter referred to as Cap. 3) the Court is given powers to intervene in cases where there is a clear and likely violation of fundamental rights. Under that Act, he said, an individual has been given *locus standi* to ask for redress in the High Court. On the provisions of article 100 (1) and (2), Mr. Mpoki submitted that the so-called immunity is not absolute; rather, it is qualified by the wording of sub-article (2), to the effect that such immunity shall be subject to the Constitution and other laws. Learned counsel Mpoki responded to the submissions on section 5 of Cap. 296 by arguing that a person who relies on the immunity provided for under that section has to show that the words spoken or acts done, were spoken or done *bona fide* on the ground that the Parliament in its wisdom did not intend that immunity to be unlimited. He thus contended that whether the words spoken were *bona fide* or not was a question of fact, which needs evidence. It cannot therefore be the subject of a preliminary objection. He expressed the view that the immunity granted thereby is not absolute, given the provisions of article 100 (2) of the Constitution.

With regards to the case of **Augustine Lyatonga Mrema v Speaker of the National Assembly** *(supra)*, relied upon by Mr. Masaju, Mr. Mpoki submitted that the case is distinguishable since it involved disciplinary measures taken by the Speaker of the National Assembly as against an MP, where a clear procedure for the

presentation of grievances is provided for in the Standing Orders. That was why the Court ruled that it could not question the Speaker's act. Counsel insisted that the petition seeks to prevent the likely violation of fundamental rights as a result of the 1st respondent's statement. He cited the decisions in Indians case concerning a similar situation. In ***Raja Ram Pal v Hon. Speaker, Lok Sabha and Others,*** Writ Petition (Civil) 1 of 2006, (http://indiankanoon.org/doc/1459279/), a decision of the Supreme Court of India, it was held that *"The High Court has power to question acts notwithstanding the immunity" (*at page 121, clause g). Mr. Mpoki also relied on the case of **Vijayakant v Tamil Nandu Legislative Assembly**, Writ Petition No. 4149 of 2012 (http://indiankanoon.org/doc/16905780/), another Indian decision which affirmed the position in **Raja's Case**. He further cited the Court of Appeal of Tanzania decision in **Attorney General and 2 others v Aman Walid Kabourou** [1996] TLR 156 in which the Court, per Nyalali, CJ (as he then was) held, among others things, as follows:

> *"The High Court of this country has a supervisory jurisdiction to inquire into the legality of anything done or made by a public authority, and this jurisdiction includes the power to inquire into the legality of an official proclamation by the Electoral Commission (tamko rasmi)."*

Mr. Mpoki was thus of the view that what is contained in section 5 of Cap. 296 and article 100(1) of the Constitution amounts

to an ouster clause. In this regard, he referred the Court to the case of **Anisminic Ltd v Foreign Compensation Board** [1969] AC 147 where it was held that the Court could not be stopped to inquire into a decision given as a result of a nullity or illegality. He was thus of the opinion that this Court has the power to inquire into the legality of the 1st respondent's statement and prayed that the preliminary objection be dismissed.

In his rejoinder, Mr. Masaju began by responding to Mr. Mpoki's submission on what is a preliminary objection. He cited the cases of **Citibank (T) Ltd v TTCL and Others,** Civil Appeal No. 64 of 2003 (CA-DSM, unreported) and **COTWU (T) OTTU Union and Another v Hon Idd Simba and Others** [2002] TLR 88, in which it was held that:

> *"A preliminary objection should raise a point of law which is based on ascertained facts, not on a fact which has not been ascertained and, if sustained, a preliminary objection should be capable of disposing of the case"*

He was of the view that, on the basis of his submissions and authorities cited, this Court should not entertain the petition filed by the petitioners.

Having gone through the arguments of both parties, the question that presents itself for the Court's determination is whether the petition currently before us contravenes article 100 (1) and (2) of the Constitution, section 5 of Cap. 296 and rules 71 and 73 of the Standing Orders. However, before we embark on determining that

question, we feel the need to set out the arguments on ground No. 4 of the preliminary objection, since it also relates to the interpretation and application of rules 71 and 73 of the Standing Orders, which have been touched upon by Mr. Masaju in his submissions, and which, as we hope we shall be able to demonstrate, it is pertinent to determine, given the issues emanating from the arguments on the first and fifth points of objection. This will enable us to determine the three points one after another.

As we have seen, the tug of war between the two opposing sides in this case arises from a statement made by the 1st respondent during a Parliamentary session. The respondents have strongly argued that MPs enjoy immunity in terms of article 100 (1) and (2) of the Constitution and section 5 of Cap. 296, while the petitioners have vehemently objected, on the reason that the immunity is not absolute but qualified.

Mr. Mpoki's submissions on what is a preliminary objection can be briefly disposed of. The issue can now be considered to have been well settled by case law in this country. We thus need not be detained by it, except to say that our Courts have followed the rule in **Mukisa Biscuit Manufacturing Company Ltd. v West End Distributors Ltd.** (1969) EA 696 as applied with approval in several cases, including those cited to us by Mr. Masaju. See also: **Hezron Nyachiya vs Tanzania Union of Industrial and Commercial Workers & Another,** Civil Appeal No. 79 of 2001 (C.A-DSM, unreported), and **Shahida Abdul Hassanali Kasam v. Mahed**

Mohamed Gulamali Kanji, Civil Application No. 42 of 1999 (unreported)**.**

The position of the law is that the purpose of preliminary objection is to enable the Court to decide on the point of law based on ascertained facts that give rise to a pure point of law, which can be disposed of without the need for any further evidence. As for the case at hand, the points of objection raised in grounds No. 1, 4 and 5 seek for orders to the effect that this Court has no jurisdiction to entertain the matter, and that the petitioners have no *locus standi* to bring such action to this Court. Those are indeed matters purely of law that have been raised herein. The issues are whether this Court's jurisdiction is ousted by the provisions of article 100 of the Constitution and Section 5 of Cap. 296, and whether the petitioners have *locus standi* to bring this petition.

For a better appreciation of the issues, it is important to explain the terms "privileges" and "immunities", as used in respect of article 100 of the Constitution and section 5 of Cap. 296. Although in the Parliamentary vocabulary the words "privilege" and "immunity" sometimes appear to be used synonymously, they in fact carry different connotations. It is therefore important to explain, albeit briefly, that there is a clear distinction between the two words. Parliamentary privilege refers to certain specified rights which MPs are entitled to enjoy, such as the freedom of speech and debate inside Parliament [article 100 (1)], while parliamentary immunity refers to a set of specified exemptions from the ordinary laws of the

land, such as immunity from legal proceedings for words spoken in Parliament and immunity from criminal or civil proceedings (article 100 (2) and section 5 of Cap. 296). Section 5 of Cap. 296 states that:-

> *"No civil or criminal proceedings may be instituted against any member for words spoken before, or written in a report to the Assembly or a committee, or by reason of any matter or thing brought by him therein by petition, bill, or motion or otherwise or for words spoken or act done in bona fide pursuance of a decision or proceeding of the Assembly or a committee".*

It is to be noted that Cap. 296 is an Act of Parliament and is, therefore, subject to the Constitution. It is also to be noted that article 100 (2) of the Constitution contains similar provisions as those in section 5 of Cap. 296 quoted above. However, as we have already seen, the sub-article subjects itself to the Constitution and other laws. It would thus be correct to argue that section 5 of Cap. 296 is one such law. However, that argument cannot be advanced to support the proposition that section 5 of Cap. 296 has removed the subjectivity of article 100 (2) to other provisions of the Constitution. Section 5 must be read to be consistent with article 100 (2). It is thus our respectful view that the constitutionality of article 100 (2) of the Constitution can be the subject of a constitutional challenge in this Court and the same can be said of section 5 of Cap. 296, which is only an Act of Parliament and, like any other Act of Parliament, it can be challenged by way of judicial review of legislative action.

At this point, a look at the decision of the Court of Appeal in **Mtikila (2)** is apposite. We are alive to the rationale behind the immunities granted to MPs while in the House. They seek to secure the independence of the members of the Legislative Assembly in deliberating over matters before it. However, we agree with Mr. Mpoki that, given the wording of article 100 (2) of the Constitution, that freedom is not absolute. It can be challenged, where appropriate, under other provisions of the same Constitution.

Parliamentary privileges and immunities have had a long history in the common law world. They can be traced back to Article 9 of the English Bill of Rights of 1689, which was intended to protect MPs from possible intervention by the other branches of the Government, i.e. the Crown or the Executive, or indeed the Courts of law. In England, the principle is expressed in absolute terms. The English case of **Burdett v Abbot** (1811) 3 E.R. 1289) and **Stockdale v Hansard** (1839) 112 E.R. 1112 emphasized that "the jurisdiction of the Houses over their own members, and their right to impose discipline within their walls, is absolute and exclusive." The position was also restated more recently in the Australian case of **R. v Murphy** (1986) 64 A.L.R 498. In that case, Article 9 of the English Bill of Rights 1689 which is applicable in Australia by virtue of s. 49 of the Australian Constitution, was interpreted by the Supreme Court of New South Wales. The Court's interpretation was that, the article prohibits the institution against a member of parliament, of any legal

proceedings having the effect of preventing freedom of speech in Parliament or punishing him or her for exercising such freedom.

That is the position in England and Australia, but it is not unique. Such privilege is also recognized in other jurisdictions. It has been justified on the reasoning that it is important to remove all worries that may interfere with MPs' freedom of thought, speech and debate while in Parliament. J. P. Maignoit in his book, "*Parliamentary Privilege in Canada"* Q.C. Mc-Gill Queen's University Press 1977, makes the following observation [at p. 12 of the 2nd edition]:

> *"Parliamentary privilege is a fundamental right which is necessary for the exercise by parliament of its constitutional functions. In any constitutionally governed country, the privileges, immunities and powers of its Legislature, as a body as well as the rights and immunities of its members, are matters of primary importance."*

Back home in Tanzania, we have clear constitutional and statutory provisions that provide for privileges and immunities for MPs. We also have provisions in the form of Standing Orders which regulate the conduct of affairs in Parliament and lay down procedures for channeling grievances in regard to what an MP does during proceedings in the National Assembly. The constitutional provision (article 100 (2), however, as we have seen, is not absolute. It is possible, under our law, to institute proceedings challenging MP's acts and/or omissions while in Parliament, notwithstanding the immunity. Hence, Tanzanian law does not absolutely prevent the

possibility of proceedings being instituted against an MP. Article 100 of the Constitution has provided the principle and criterion for such challenges. Cap. 296 and the Standing Orders have laid down the procedure for, and conditions under which, remedies may be sought in pursuance of such rights.

In the present case, that the petitioners have attached the list of individuals who were contemplating to follow rule 71 route. However, it would appear, they later abandoned it. In Annexture P–3 to the Petition, the petitioners have attached a list of more than 2,000 individuals who they say were in support of instituting proceedings against the 1st respondent by petitioning the Speaker of the National Assembly. The list of individuals was therefore a step following the procedure provided for by rule 71 (1) (c) of the Standing Orders. We do not know why they abandoned that procedure midway, and instead decided to challenge the 1st respondent's statement by way of a constitutional petition. We can only guess that, perhaps, upon a closer look at rule 71 of the Standing Orders, they realised that they could not do so, as the rule expressly excludes them, being juristic persons, from following that path.

We would also wish to add that, we find the first ground of preliminary objection untenable in as much as it seeks to use the same article 100 to strike down a petition that contains amongst its reliefs, a prayer (prayer b) which seeks for an order of this Court declaring article 100 (1) unconstitutional. It would appear to us that

once such a prayer exists, in the absence of any other reason that may render the petition unmaintainable, it cannot be used as the basis for a preliminary objection, since it will itself be subject to the Court's determination upon hearing on merit.

In view of our foregoing analysis of the law, we may now conclude by saying that we partly agree with the first point of the preliminary objection in so far as it relates to sub article (1) of article 100 of the Constitution: The Parliamentary privileges of freedom of thought and debate granted by the sub-article are absolute and cannot be challenged anywhere outside Parliament. Under the sub article, this Court cannot interfere with the freedom of opinion and debate in the National Assembly. The Courts (or any other person outside Parliament) are precluded from interfering with that freedom.

We, however, respectfully agree with the petitioners that the immunitites granted to MPs by article 100 (2) of the Constitution are not absolute. They are subject to other provisions of the Constitution and other laws. While we appreciate Mr. Masaju's contention that the decision of the Court of Appeal in **Mtikila (2)** was that the Constitution has to be given a harmonious interpretation and that the various articles, therefore, should be considered equal in their force in law, **Mtikila (2)** does not apply to the case at hand because article 100 (2) has subjected itself to other provisions of the Constitution and even to ordinary law. Hence, it is possible to test the validity or constitutionality of article 100 (2) against other articles of the Constitution. The totality of this finding is therefore to the effect

that the parliamentary priviliges provided for in article 100 (1) are absolute and cannot be questioned in any forum outside the National Assembly. However, the immunities provided for by sub-article (2) of article 100 are not. It is thus possible, circumstances permitting and pursuant to the procedures laid down by law, for a party whose rights have been infringed, are being infringed or are about to be infringed by a statement made by an MP in Parliament, to challenge that statement.

The issue then is: Is this case one of those in which one could properly challenge the impugned statement made by the 1st respondent in Parliament on 20th June 2013? We are of the respectful view, on the basis of our holdings thus far, that the answer to this question is in the affirmative.

However, since this right must be exercised according to principles of law, and subject to procedures laid down by law, the next question is whether it was open to the petitioners to bring this constitutional action to Court to challenge the 1st respondent's statement. This question would take us to ground No. 4 of the preliminary objection, which raises the issue of the petitioner's *locus standi*.

Submitting on this ground, Ms Sarah Mwaipopo, learned Principal State Attorney on behalf of the respondents, argued to the effect that, the petitioners and persons listed in annexure P-3 have no *locus standi* to petition for the Court's intervention in parliamentary business conducted in the House. She based her

arguments on rule 71(1) (c) of the Standing Orders, which prohibits a company, corporation or an institution to challenge matters said or done in Parliament. Rule 71 stipulates:

> *"71.-(1) Bila ya kuathiri masharti ya Ibara ya 100 na 101 ya Katiba, mtu yeyote asiye Mbunge ambaye atajisikia kuwa amepata athari hasi kutokana na kauli au maneno au shutuma zilizotolewa Bungeni kumhusu yeye binafsi, anaweza kupeleka malalamiko pamoja na maelezo yake ya kujitetea kwa Spika:-*
>
> *(a) [not relevant]*
>
> *(b) [not relevant]*
>
> *(c) Yawe yamewasilishwa na mtu binafsi ambaye ni raia wa Tanzania na hayajawasilishwa na au kwa niaba ya Kampuni, Shirika au Taasisi;*

It was Ms. Mwaipopo's submission that rule 71(1) (c) restricts the right to challenge MPs' statements or acts only to individuals and not corporate bodies or juristic persons like the petitioners. Hence, as bodies corporate, both petitioners have no right to challenge such statements or acts.

Replying to this argument, Mr. Sungusia for the respondents argued that article 30 (3) of the Constitution gives an individual the right to bring a matter to the High Court where he feels that his basic right has been contravened, when a basic right is being contravened or when a basic right is likely to be contravened.

With regards to the issue of *locus standi*, the learned counsel referred us to the decision in **Rev. Christopher Mtikila v Attorney**

General [1995] TLR 31 [hereinafter **Mtikila (1)**] in which this Court held, among other things, that in the context of constitutional litigation any person regardless of his/her personal interest in the matter has the right to bring matters to court. Indeed, in that case, Lugakingira, J. (as he then was), interpreted the provisions of article 26 (2) of the Constitution as:

> *"...an independent and additional source of standing according to which personal interest is not necessary in order to institute proceedings; the article is tailored for the community and it enacts into the Constitution of Tanzania the doctrine of public interest litigation."*

Counsel Sungusia further cited the case of **Lujuna Shubi Balonzi v the Registered Trustees of Chama cha Mapinduzi** [1996] TLR 203 in which Samatta, J.K. (as he then was) held that the rule of *locus standi* in so far as it relates to human rights litigation, must be wide. Mr. Sungusia was also of the view that since as juristic persons the petitioners could not have invoked the procedure set out in rule 71 of the Standing Orders, the only remedy available to them was to come to Court by way of a constitutional petition, which in his view, they are allowed to do under article 30 (3) of the Constitution.

With respect, we think that this proposition is not supported by the said article because, by their own pleadings in the petition and supporting affidavits, the petitioners are not the ones whose rights are likely to be infringed, which would have brought the matter under article 30 (3) of the Constitution. Rather, it is individuals, as we shall

soon see. We think that the petitioners' standing is provided for by article 26 (2) of the Constitution, and as well-articulated by Lugakingira J. **in Mtikila (1)**. There is no similar wording in article 30 (3). However, it seems clear to us that the rights in article 26 (2) can only be pursued in accordance with the law. The sub-article states:

> *"(2) Kila mtu ana haki,* ***kwa kufuata utaratibu uliowekwa na sheria****, kuchukua hatua za kisheria kuhakikisha hifadhi ya Katiba na sheria za nchi."* [emphasis ours]

Hence, while every person (a term which includes juristic persons) is entitled to institute proceedings for the protection of the Constitution and of legality, such right must be pursued according to procedures laid down by law. Whether that is the case herein is a question we shall return to in due course.

It is clear to us that rule 71(1) (c) of the Standing Orders expressly shuts out juristic persons such as the present petitioners to challenge anything said by an MP during parliamentary proceedings by following the procedure provided for in that rule. Hence, Mr. Sungusia's argument that as corporate bodies, the Petitioners could not have followed that avenue is quite valid. However, one needs only to look at the pleadings to realise that the nature of the infringement contemplated is such that it cannot be committed against the Petitioners who are juristic persons. Torture, inhuman and degrading treatment or a breach of human dignity and security of the person by way of physical violence (which is basis of the

petitioners' grievance) can only be committed against an individual (a natural person, as opposed to a corporate body), since the latter only exists in legal fiction and not in flesh and blood. Hence, the law as we have endeavoured to explain provides only for persons whose rights are alleged to have been breached or to be in danger of being breached. These individuals have an avenue. Rule 71 (1) (c) of the Standing Orders allows them to take their grievances to the Speaker, and thereby institute legal proceedings against the 1st respondent and, if successful, obtain a remedy. According to rule 71(1) (c), they alone and personally could do that, and not through the petitioners or any other person or persons.

Mr. Sungusia has argued that the Standing Orders do not give the petitioners who are both corporates the right to challenge any comments made in the House of the Parliament and so, for that reason, the only way they could do so was by coming to Court. However, in this particular instance, it is not the petitioners' rights that are at issue, but the rights of individuals, such as those listed in Annexure P-3.

The issue then is whether the petitioners could come to court to plead on behalf of those individuals. We think, with respect, that they cannot. We agree with Lukakingira, J. in **Mtikila (1)** that when it comes to human rights issues, under article 26 (2) of the Constitution, not only the party directly affected by the alleged infringement can institute proceedings in Court. Any person who has interest in the protection of the Constitution and legality can do so.

That would give the petitioners herein *locus standi* to challenge the 1st respondent's statement. As Mr. Sungusia contended, since they have no right to employ the procedure set out in rule 71 of the Standing Orders, their remedy cannot be found in that rule. That would leave it open to them to institute proceedings in Court, in accordance with the provisions of section 4 of Cap. 3. However, the wording of section 4 is significant. It provides for the enforcement of human rights in the following terms:

> *"If any person alleges that any of the provisions of sections 12 to 29 of the Constitution has been, is being or is likely to be contravened* ***in relation to him****, he may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the High Court for redress."* [emphasis ours]

This section caters for enforcement of article 30 (3) of the Constitution. It clearly states that the only person who can institute proceedings under Cap. 3 is a person who alleges that any of the provisions of articles 12 to 29 of the Constitution has been, or is likely to be contravened **in relation to him***.* The petitioners should, therefore, have shown in their pleadings, that they are the direct victims or potential victims of the impugned statement. The petitioners herein do not claim to belong to this group of persons in relation to the statement uttered by the 1st respondent.

Indeed, as already stated, they cannot do so since, as juristic persons, the alleged infringement cannot be committed **in relation**

to them. The petitioners' allegations are in general terms, and they are litigating on behalf of individuals, which would bring the matter into the realm of public interest litigation under article 26 (2) of the Constitution. As such, section 4 of Cap. 3, and therefore the entire Act, does not cover them in the context of this particular petition. Matters would have been different if the alleged violation of fundamental Human Rights touched upon the petitioners' own interests, such as, for instance, the petitioners' corporate rights to exist as juristic persons, or to execute the aims and objectives of their respective constitutive instruments. That is obviously not the case herein.

Hence, with due respect to learned counsel for the petitioners who appear to hold the view that section 4 of Cap. 3 extends to a party who is not affected by the alleged infringement, the said section does not cover the petitioners. Furthermore, **Mtikila (1)** was handed down on 24th October 1994. Cap. 3, on the other hand, came into force on 27th January 1995. We cannot speculate as to the reasons why the Legislature, in its wisdom, did not provide for situations falling under article 26 (2) of the Constitution, given Lugakingira J's ruling in **Mtikila (1).** What is clear, however, is that a person who seeks to invoke that sub-article cannot do so under section 4 of Cap. 3, as the petitioners have done in this case. Article 26 (2) can only come into play once operationalised. That is the essence of the phrase "*kwa kufuata utaratibu uliowekwa na sheria*" in that sub-article. However, Cap. 3 did not do so. The Petitioners themselves did

not even attempt to rely on it. They neither cite it in their petition as one of the enabling provisions, nor did they refer to it in their submissions. Instead, they cited and relied on article 30 (3) which, as we have seen, is inapplicable. In fact, even if they cited article 26 (2), the same does not cover them, as we have endeavoured to explain.

In the final analysis, therefore, we would summarise our findings in respect of the three points of preliminary objection discussed herein, as follows:

1. Article 100 (1) of the Constitution is absolute and the privileges granted thereby cannot be challenged anywhere outside the National Assembly, by any organ in the United Republic, including a Court of law.

2. Article 100 (2) of the Constitution is not absolute. It is subject to other provisions of the Constitution and other laws. Hence, its consitutionality can be challenged in a Court of Law. The *ratio* in **Mtikila (2)** is distinguishable in the sense that ariticle 100 (2) has subjected itself to other provisions of the Constitution and other laws.

3. The immunities enjoyed by MPs under article 100 (2) of the Constitution are not absolute. They can be challenged by individuals pursuant to rule 71 of the Standing Orders and by corporate persons by other means available at law, including a constitutional petition.

4. Under section 4 of Cap. 3, the petitioners herein have no *locus standi* to insitute the present petition because the nature of the injury complained of cannot be suffered by juristic, legal or corporate bodies but by individuals, who have a remedy under rule 71 of the Standing Orders. Any individual who desired to take action against the 1st respondent's utterances had the opportunity of doing so under that rule.

5. As corporate bodies, the petitioners could not invoke rule 71 of the Standing Orders. Had their complaints herein been in relation to themselves and not others, it would have been open for them to invoke section 4 of Cap. 3 and file a constitutional petition pursuant to artcile 30 of the Constitution. However, since the relevant provision covering their situation would have been article 26 (2) of the Constitution (which they have not cited), and the procedure under section 4 of Cap. 3 does not apply to public interest litigation, they have no *locus standi* to institute this case.

In view of the above, therefore, we would partly sustain the first point of preliminary objection [in respect of article 100 (1), but not article 100 (2)]. We would also sustain the fourth and fifth points in their entirety. We hold that while this Court has powers to inquire into the exercise of parliamentary immunities in appropriate cases, this is not one of such cases, as the petitioners are not covered by the provisions of section 4 of Cap. 3.

Having held as we have done, we see no need of engaging ourselves in what would be a purely academic exercise of determining the other points of preliminary objection raised by the respondents. Consequently, we order that the petition be, and is hereby, struck out. Costs are within the Court's discretion, though they usually follow the event. However, as the case falls within the category of public interest litigation, we would refrain from making any order as to costs.

DATED at Dar es Salaam this 6th day of June, 2014.

F.A.R. JUNDU

JAJI KIONGOZI

A.G. MWARIJA

JUDGE

F.A. TWAIB

JUDGE

I certify that this is a true copy of the original.

(B.M. Mwingwa)

REGISTRAR