IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM MAIN REGISTRY)
AT DAR ES SALAAM

(CORAM: MWARIJA, MUJULIZI, & TWAIB, J.J.J.)

MISC. CIVIL CAUSE NO. 31 OF 2014

In the matter of an application for leave to apply for the Declaratory Orders against the on-going Constituent Assembly

And

In the matter of the Constitutional Review Act, No. 8 of 2011 & No. 2 of 2012, Cap. 83 of the Revised Laws of Tanzania [as amended from time to time]

And

In the matter of the interpretation of section 25 of the Constitutional Review Act, No. 8 of 2011 and No. 2 of 2012, Cap 83—Revised Edition, 2014 of the Laws of Tanzania [as amended from time to time] on the powers of the Constituent Assembly

BETWEEN

TANGANYIKA LAW SOCIETY ..... APPLICANT

AND

THE ATTORNEY GENERAL ..... RESPONDENT

Dates of Submissions: 18/09/2014
Date of Ruling: 22/09/2014

RULING

Twaib, J.

Before us is an application by the Tanganyika Law Society ("the Applicant") against the Attorney General of the United Republic of Tanzania ("the Respondent"), containing prayers for leave to apply for the prerogative orders of

declaration, *mandamus* and injunction. Prayer (a) in the chamber summons is merely a summary of prayers (b), (c), (d) and (e). Stripped of all legalism, the application would be for leave to apply for the following principal orders:

b) A declaratory order that the composition of the Constituent Assembly is irregular and unconstitutional and it vitiates the power and right of Tanzanians in making their own constitution;

c) A declaratory order that the Constituent Assembly acted irregularly by amending the standing orders of the Constituent Assembly so that the voting process circumvents the procedure provided for by law, of voting for one provision after another;

d) An order of injunction to suspend continuation of the meetings of the Constituent Assembly pending compliance with the proper constitution making process with maximum participation, representation and the wishes of Tanzania;

e) An order of *mandamus* to compel the Attorney General of the United Republic of Tanzania to table a Bill in the Parliament of the United Republic of Tanzania to amend the Constitutional Review Act, Cap 83 (as amended from time to time) in order to remove all irregularities as may be pronounced by this Court to ensure the maximum participation, representation and obedience to the wishes of all citizens of Tanzania.

The remaining prayer is the common omnibus prayer for "any other order or orders as the Court may deem just and equitable to grant".

The application has been brought under section 2 (3) of the Judicature and Application of Laws Act [Cap 358, R.E. 2002]; Sections 19 (2) and 19 (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act [Cap 310, R.E. 2002] and "any other enabling provisions of the laws". The evidence in support of the application is contained in the affidavit of the Applicant's Principal Officer, Mr. Charles R.B. Rwechungura. Mr. Gabriel Pascal Malata, learned Principal State Attorney, has sworn a counter affidavit opposing the application.

The hearing of this matter brought out several issues. In order to fully grasp them all, and to facilitate a focused discussion, we will set them out at this early point and in the order we propose to follow in determining them. They would read as follows:

1. Whether this matter is justiciable in this Court, given that the same seeks for orders that will necessarily, in their execution, involve the Government of Zanzibar, which is not a party to these proceedings.

2. Whether this application is tenable, given the fact that it seeks for orders touching upon the application of the Constitutional Review Act, which applies in both parts of the United Republic, while the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act (under which it has been brought), applies only in Tanzania Mainland and not in Zanzibar.

3. If the application is justiciable and tenable, what is the test for the grant of leave to apply for the prerogative orders that are being sought herein and what matters should be considered?

4. Whether leave should be granted for the Applicant to file an application for an order of *mandamus* against the Respondent. To determine this issue, we will need to answer two sub-issues:

    a) Whether it is necessary for the Applicant to raise, at this leave stage, all issues that he intends to rely upon in the actual application;

    b) If the answer to sub-issue (a) is in the affirmative, whether there has been an implied demand by the Applicant to the Respondent to perform a public duty, which demand has been refused, to entitle the Applicant to be granted leave to apply for *mandamus* that will compel the performance of that duty.

5. Whether leave should be granted to the Applicant to apply for the orders of declaration and injunction.

6. To what reliefs are the parties entitled?

Mr. George Masaju, learned Deputy Attorney General, appeared before us assisted by Mr. Malata and Ms. Sylvia Matiku, learned Principal and Senior State Attorneys respectively. The Applicant was represented by learned advocates Mr. Mpale Mpoki, assisted by Mr. Fulgence Massawe.

At this point, we wish to register our appreciation to counsel who appeared before us in this matter for their industry and resourcefulness in handling the matter and in assisting us in determining the various issues arising therefrom.

The first two issues, which are by nature of preliminary significance, were introduced by Mr. Masaju in his reply submissions. They are inter-linked and, in effect, as the learned Deputy Attorney General noted, touch upon the jurisdiction of this Court to determine this case. He reminded the Court that the application has been made under the Fatal Accidents (Miscellaneous Provisions) Act, Cap 310, which is applicable only in Mainland Tanzania. Secondly, the law that the Applicant is seeking to be amended, namely, the Constitutional Review Act, Cap 83 (R.E. 2014) applies in both the Mainland and Tanzania Zanzibar. He cited the provisions of sections 2, 5, 6 (2), 15 (1) and (2), 22 (1), (2) and (4), 23 (2), 26 (2) and 28A (1) and (2) as specifically and mandatorily requiring the involvement of the Government of Zanzibar.

Mr. Masaju gave the example of a situation where the President of the United Republic wishes to exercise powers under the Act and is enjoined to consult the President of Zanzibar. He wondered as to what would be the implication if this Court makes orders sought in this case. To further buttress his argument, Mr. Masaju referred the Court to the decision in **Seif Sharif Hamad v. Serikali ya Mapinduzi ya Zanzibar** (1998) TLR 48, where the Court of Appeal (speaking through Ramadhani J.A., as he then was) held that the High Court and Courts

sub-ordinate thereto are not union matters. Counsel further maintained that the Tanganyika Law Society operates in the Mainland, while Zanzibar has its own Bar association, the Zanzibar Law Society. There is nothing to indicate that the Applicant involved the latter, he said, and pointed out that the Government of Zanzibar has not been made a party to this case.

Mr. Masaju summed up with a warning to the effect that considering all these factors, a constitutional crisis may result, if the orders sought are granted, as they will touch upon the interests of the Revolutionary Government of Zanzibar. He was thus of the opinion that the Applicant must have joined the Attorney General of Zanzibar, as the application cannot be determined without giving the Government of Zanzibar the right to be heard. As it stands, therefore, the application is neither tenable nor justiciable. Mr. Masaju added that the Applicant has not challenged the constitutionality of the Constitutional Review Act, and thus cannot challenge it in these proceedings. Counsel cited the case of **Mtikila v Attorney General**, where Lugakingira J said (at p. 56) that:

> *"Courts are not authorised to make disembodied pronouncements on serious and cloudy issues of constitutional policy without battle lines being properly drawn."*

We agree, as already intimated above, that this is an important matter relating to the process of constitution-making in which our country is currently engaged. We are however unsure as to whether we can call it "a constitutional matter" as the learned Deputy Attorney General would want us to, since it has not been brought under the Constitution. Be that as it may, however, there is a truism in Justice Lugakingira's statement and, given the significance of the matter at hand, that statement is apt and relevant. We accept as a correct position of the law.

Mr. Mpoki adopted Mr. Rwechungura's affidavit as part of his submissions in arguing the merits of his client's case. He began with what he termed "a caution" to the Court about what is at issue at this stage, where not the actual application for prerogative reliefs, but only leave to file the same is being sought. The

beginning of his submissions provides us with a convenient starting point for the determination of this matter. He observed:

> *"We are only knocking the doors of the Court to be allowed to pray for the orders sought. We are doing so following the reception clause. We do not have any specific procedures. In England, the criterion was that these applications were ex parte. The Attorney General has been summoned because of the Government Proceedings Act."*

Responding to the contention that the Law Reform (Fatal Accidents and Miscellaneous) Provisions Act is not a Union-wide legislation and thus cannot be applied to an action where the provisions of the Constitutional Review Act, which applies to both parts of the Union, are at issue, Mr. Mpoki said that they used the former law because it states in section 1 (2) that the Act "shall bind the Republic", which means that it applies in the Mainland as well as in Zanzibar. It was his further submission that the High Court of the United Republic has powers to question any law that is enacted by the Union Parliament. That means, that this Court has jurisdiction even in matters concerning the Attorney General of Zanzibar. He argued that once an order is made compelling the Attorney General for the Act's amendment, and the Respondent has to comply with it, the same procedure that was followed in the enactment of the impugned legislation will be followed in having it amended.

Is this application tenable, given that it is brought under a law that is not pan-territorial (in the sense that it does not apply in Zanzibar), and the orders sought will, if granted, involve the Government of Zanzibar in their execution as they concern a pan-territorial Act, namely, the Constitutional Review Act.

The learned Deputy Attorney General has urged this Court not to entertain the application. His submissions are attractive and compelling. However, he has not pointed out any legal provision that specifically removes the powers of this Court to exercise jurisdiction in an application for prerogative orders or, for that matter, in the interpretation and application of a law that applies in both the

Mainland and Zanzibar. We have ourselves tried hard, within the constraints of time in which we have had to work on this matter, but have not been able to find any such law. Indeed, what we have found adds credence to the argument by Mr. Mpoki that this Court has powers to question (and, we would add, interpret and apply) any law that is enacted by the Parliament of the United Republic.

This Court is a creature of the Constitution of the United Republic of Tanzania, 1977. It is established under article 108 (1) of that Constitution. Sub-article (2) of article 108 provides for the unlimited original jurisdiction of this Court. It stipulates as follows [emphasis ours]:

> *"(2)* ***Iwapo Katiba hii au Sheria nyingine yoyote haikutamka wazi*** *kwamba shauri la aina iliyotajwa mahsusi litasikilizwa kwanza katika Mahakama ya ngazi iliyotajwa mahsusi kwa ajili hiyo,* ***basi Mahakama Kuu itakuwa na mamlaka ya kusikiliza kila shauri la aina hiyo****. Hali kadhalika, Mahakama Kuu itakuwa na uwezo wa kutekeleza shughuli yoyote ambayo kwa mujibu wa mila za kisheria zinazotumika Tanzania, shughuli ya aina hiyo kwa kawaida hutekelezwa na Mahakama Kuu."*

The English version reads as follows:

> *"(2)* ***If this Constitution or any other law does not expressly provide*** *that any specified matter shall first be heard by a court specified for that purpose,* ***then the High Court shall have jurisdiction to hear every matter of such type****. Similarly, the High Court shall have jurisdiction to deal with any matter which, according to legal traditions obtaining in Tanzania, is ordinarily dealt with by a High Court."*

The above provision grants this Court the powers to hear and determine any matter which the law does not prescribe as falling under the jurisdiction of any other Court as a Court of first instance.

Under what circumstances would laws enacted by the Union Parliament extend to Zanzibar? Mr. Mpoki explains that he used the Fatal Accidents (Miscellaneous

Provisions) Act because section 1 of the Act states that the Act binds "the Republic".

With respect, we think that that is not enough. But, we have a different reason for agreeing with Mr. Mpoki that we do have the requisite jurisdiction. The applicant has cited the Act only for purposes of showing the relevant law under which the application is made. It lays down rules of procedure that this Court has to follow when exercising its jurisdiction. That procedure applies in this Court, and it matters not whether the Act is applicable only in the Mainland or extends to Zanzibar. Holding otherwise would have meant, by analogy, that every time the Court needs to apply a foreign law, it would have to apply a procedure applicable in the relevant country, or decline to exercise jurisdiction.

In addition, there are many statutes which apply in both parts of the Union which have been the subject of Court proceedings in this Court. Examples are many, but we will mention four: The Political Parties Act, Cap. 225, The Elections Act, Cap 343 (R.E. 2002), The Tanzania Revenue Authority Act, Cap 399 (R.E. 2006) and the Tax Revenue Appeals Act, Cap 408 (R.E. 2006). All four apply in both parts of the United Republic, and have provisions that require the involvement of the Government of Zanzibar. Would it then be correct to suggest that this Court cannot entertain any matter that would entail an inquiry into the application of the above-mentioned laws? Then there is the basic law of the land, the Constitution of the United Republic of 1977. Do we not have jurisdiction to interpret the Constitution? Our answer to both these questions is in the affirmative.

Mr. Masaju had another arsenal to support his argument: that the High Court is not a union matter; that the Tanganyika Law Society is for the Mainland, and Zanzibar has its own Bar association, the Zanzibar Law Society, which the Applicant has apparently not involved; and that the Government of Zanzibar is not a party to these proceedings. It is true that this Court is not among matters of the Union listed in the Schedule to the 1977 Constitution: See **Seif Sharif**

Hamad's Case *(supra)*. However, with respect, we fail to see the reasoning behind the perceived necessity of the involvement of the Zanzibar Law Society for the jurisdiction of this Court to exist.

Neither do we see such necessity with regard to the involvement of the Government of Zanzibar. In our ruling of 17th September 2014, we granted the Applicant's prayer and removed all references to the Attorney General of Zanzibar because he was not a party to the case though considering the nature of the case and the reliefs claimed, he would be a necessary party. However, though his exclusion may amount to misjoinder, it is not fatal. We are fortified in this view by Order 1 rule 9 of the First Schedule to the Civil Procedure Code, Cap 33, which states:

> *"No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the right and interests of the parties actually before it."*

Hence, we are not convinced that the application is untenable due to the non-joinder of the Attorney General of Zanzibar. The law enjoins us to proceed to hear and determine the rights and interests of the parties actually before us. Issues of difficulties in the execution of the Court's orders, if any, can be determined upon hearing of the substantive application on merit.

However, we have already found that this Court has power to interpret, apply and determine the validity of any law that has been enacted by the Parliament of the United Republic, unless that power has been expressly ousted by the Constitution or other legislation. No such law has been cited to us, and we have ourselves found none. As it has often been stated, the Court must always be jealous of its jurisdiction. We take cognizance of the fact that we sit in the High Court of the United Republic, a creature of the Constitution, with powers vested in it by the Constitution. It is a Court of record with unlimited original civil and criminal jurisdiction. Only very clear ouster provisions can take away that jurisdiction.

If Mr. Masaju's proposition, that we lack jurisdiction is correct, it would mean that there is no forum in this country where a citizen can refer a matter relating to the interpretation or the proper application of the Constitutional Review Act. The next obvious question would then be: If we do not have jurisdiction, who has? We would reach a point where, when a dispute arising from the Constitutional Review Act cannot be resolved through administrative or other means and litigation becomes necessary, a citizen would come to a dead-end. That would render the law unworkable, as nobody can do anything about it.

Yet, it is a cardinal principle of law that it cannot be interpreted in such a way as to be rendered unworkable. In **Witney v. IRC** [1926] AC 52, it was held that a statute is designed to be workable and the interpretation thereof should be to secure that object—unless crucial omission or clear directions make that end untenable. The same position was taken in **Rye v. Minister for Lands NSW** (1954) All ER, where was held:

> *"It is our duty to make what we can on statutes, knowing that they are meant to be imperative and not inept. And nothing short of impossibility should allow a judge to declare a statute unworkable."*

Given this position and the provisions of the Constitution as discussed, we are, with due respect, of the firm view that this Court has jurisdiction to interpret the provisions of the Constitutional Review Act and to hear the application that is presently before us, using the procedure as provided for in Cap 310. To hold otherwise would be tantamount to reneging on our duty, bestowed upon us by articles 107A (1) and 108 (1) of the Constitution, as the ultimate authority to render justice and to interpret the laws of this country.

We would thus answer the first and second issues in the affirmative: this application is both justiciable in this Court and legally tenable, as the Court has the requisite jurisdiction to entertain it. That would also be consistent with the proper constitutional position of the Judiciary, and in keeping with the doctrine of separation of powers.

The third issue relates to the test to be applied when considering whether to grant leave for prerogative orders.

Mr. Mpoki opined that in England, there are two schools of thought as to what is at issue at this stage, and cited two English cases. However, it seems to us that both the cases he has cited hold the same view. In **Commissioner of Inland Revenue v. National Federation of Selfemployed and Small Businesses Ltd.** [1989] AC 614, Lord Diplock propounded the principle of the requirement of *prima facie* case. The second case cited by Mr. Mpoki is **Sharma v. Brown & the Director of Public Prosecutions** [2007] WLR 780, where a similar principle (that what is required is an arguable case or issues) was propounded.

It seems to us that Lord Diplock's principle in **Commissioner of Inland Revenue** *(supra)* has been accepted as laying down the correct position of English law on the subject. In Tanzania, the position is stronger because the leave stage (known in England as proceedings for order *nisi*) are not even *ex parte* as is the case in England. Section 18 of our Cap 310 obliges the Court to order that the Attorney General be summoned to appear in all proceedings for leave to apply for prerogative orders. Lord Diplock himself recognized the purpose of the order *nisi* stage as being to prevent the time of the court being wasted by "busybodies with misguided or trivial complaints of administrative error" and to remove the uncertainty which might otherwise exist about whether persons could safely proceed while proceedings for judicial review were pending.

Section 18 of Cap 310 must have been enacted to give the Attorney General an opportunity to be heard, and to assist the Court in determining the issues that may arise during the leave stage, thereby weeding out needless litigation.

What is a prima facie case? Mr. Malata has cited Ramanatha Aiyar's **Concise Law Dictionary**, 4th edition, which defines a *prima facie* case as:

"A case made out by sufficient testimony or one which is established by sufficient evidence and can be overthrown only by rebutting evidence adduced by the other side."

Mr. Malata also took us to **Black's Law Dictionary**, 8th edition, p. 1228, where the term is defined as: *"The establishment of legally required matter or presumption."* Mr. Mpoki dismissed this definition of *prima facie* case from the dictionaries, saying that it must have been in reference to criminal cases. Unfortunately for him, we are not convinced by this distinction. We think the definition applies to civil as well as to criminal cases. We would thus answer the third issue by saying that the test is whether the Applicant has made out a *prima facie* case, which deserves to be accorded a full hearing in the intended application for judicial review.

Having established the applicable test, the next question is whether the Applicant has made a *prima facie* case to entitle it to call upon the Court to exercise its discretion in granting leave for each of the orders sought. Mr. Mpoki urged the Court to find that the Applicant has established an arguable case. Apart from the averments in the affidavit of Mr. Rwechungura, Mr. Mpoki referred to the nature of the case, and pointed out that it will determine the fate of the country's Constitution and the way and manner in which the process is going. People are anxious, he said, to get the court's interpretation of the relevant law.

Learned counsel's other argument is that the matter "goes to the root of the principle of access to justice". Individuals who come to Court on the manner in which the affairs of the country is governed should not be denied access to the Court. It would thus be fair to allow them to come to Court. He referred the Court to the case of **Julius Ishengoma Francis Ndyanabo v. Attorney General** [2004] TLR 15, where Samatta CJ (as he then was), made the following statement, on which Mr. Mpoki relied for the proposition that access to justice is of cardinal importance. He stated:

"The legislative competence of Parliament is limited to the making of laws that are consistent with the Constitution and Parliament exceeded its powers by enacting section 111 (2) of the Elections Act, 1985 which is unconstitutional."

Mr. Mpoki's last point deserves to be addressed at the outset. That this is a serious matter touching upon an issue of fundamental importance in the affairs of our country is beyond question. It involves the on-going constitutional review process, which is intended, ultimately, to enable Tanzanians to give themselves a new Constitution in place of the current Constitution of the United Republic of Tanzania of 1977. We are also alive to the importance of access to justice and its availability to all our citizens. However, it is also trite that those matters must be pursued in a manner recognized by law. We have already ruled that it is the law of this country that whoever wants to be granted leave to invoke the prerogative powers of the Court must show that, *prima facie*, they do have an arguable issue or issues deserving the attention of the Court. Whether that burden has been discharged by the Applicant before us is the central question we are called upon to determine in this ruling.

This brings us to the fourth issue framed: whether leave to apply for *mandamus*, declaration and injunction can be granted. As Mr. Malata submitted, the evidence in a case such as this in is in the supporting affidavits. If the Court is satisfied that it establishes an arguable case, it has the discretion to grant leave. Counsel then invited the Court to look at the prayers, and expressed the view that there is no threat that calls for injunction, nor are there grounds to support the prayers for declaration and *mandamus*.

At this point, Mr. Malata re-introduced an issue which we declined to entertain in our earlier ruling on preliminary objections. We left it to be decided at this stage. The issue is whether or not the Applicant has shown that it has demanded the performance of what it wants the Court to compel the Respondent to do by an order of *mandamus*, and that the Respondent has refused to perform. Indeed, what the law expects is not only the existence of a public duty that requires

performance; it must be shown that there has been a demand for its performance, and a refusal to perform it. That is what was held in the case of **John Mwombeki Byombalirwa v The Regional Commissioner & the Regional Police Commander, Bukoba** [1986] TLR 73, cited to us by Mr. Malata. He maintained that nowhere in the affidavit filed in support of the application is this stated.

Mr. Malata also submitted that merely citing the law that the Applicant wants to be amended does not amount to evidence sufficient to compel the Attorney General to submit a Bill to Parliament to change that law. It would mean that the Applicant wants this Court to compel the Parliament to amend the law, something the Court cannot do. He referred us to the decision of the Indian Supreme Court in **Karihaiya Lal Sethia v. India** AIR [1998] SC 365. On injunction, Mr. Malata said that maximum participation of the people of Tanzania has already been done through the process of collecting people's views by the Constitutional Review Commission.

Mr. Mpoki said that the fact that the hearing of the application has taken a total of two and a half hours means that there are contestable issues. He maintained that the ingredients argued by counsel for the Respondent are premature, and should await the hearing of the actual application. He further distinguished the case of **John Mwombeki** *(supra)*, on the ground that the holding was made not during the leave stage, but during the application for *mandamus*.

Mr. Mpoki had two answers to the question as to whether there was a demand for the performance of the duty the Applicant wants to be performed. He contended that such a demand and its refusal can be implicit, and that paragraphs 16 to 18 of the supporting affidavit contain an implied demand to the Respondent, and an implied refusal by him, which meet the legal condition, and secondly, that if need be, they can add that evidence when they file the application for *mandamus* once leave has been granted.

With all due respect to learned counsel, we are far from being convinced by his submission on this point. Mr. Mpoki presented to us Graham Aldous and John Alder, **Applications for Judicial Review: Law and Practice of the Crown Office,** 2nd ed., pp. 141-142, who write that once leave has been secured, even though the affidavit will later form the basis of the applicant's case, it is neither necessary nor desirable to overburden the supporting affidavit at the hearing of leave. The Court may allow further evidence. Much as this may be case, we are of the settled view that the affidavit used at the leave stage must of necessity itself suffice to prove a *prima facie* case. Whatever further evidence that may be introduced at the substantive stage can only supplement the original affidavit. The authors themselves point out that this may be for purposes of dealing with an affidavit of a respondent. The Applicant's burden of adducing enough facts to entitle it to the leave sought at this stage cannot be explained away by the averment, from the Bar, that the missing parts will be brought up when the substantive application is filed.

Hence, as to whether evidence of demand and refusal can be implied from paragraphs 16 to 18 of the affidavit, and to be fair to the Applicant, we would recite the paragraphs. Mr. Rwechungura states the following:

> *"16. That during the discussion of Chapter One and Six of the draft Constitution contrary to Draft Constitution which provided for a three-tier system of government a large cross section of members of the Constituent Assembly opted to challenge the very Draft Constitution and instead started deliberating on another form of Union which was not in the Draft Constitution.*
>
> *17. That as a result of this some members from the Constituent Assembly tried to explain that the debate should be conducted on the basis of the Draft Constitution and that it was wrong to discuss issues which were not submitted and tabled by the Chairman of the Constitutional Review Commission through a Draft Constitution.*

18. *That the Chairman and other members of the Constituent Assembly did not subscribe to the views of the group mentioned in paragraph 17 as a result of which some of these members decided to walk out in protest thereto."*

These statements are what learned counsel for the Applicant would have us believe that they constitute a demand from the Applicant requiring him to table a Bill in Parliament for the amendment of the Constitutional Review Act, which demand has been refused by the Respondent, necessitating the Applicant to apply to this Court for an order of *mandamus* compelling the Respondent to perform that duty. We must admit our complete inability to see how we could construe the deponent's words in paragraphs 16, 17 and 18 quoted above, as fulfilling the condition imposed by law. The most we can discern from counsel's submissions is an attempt to read into a totally different statement in the hope that the Court will somehow not call the bluff. Unfortunately, that attempt has not succeeded.

We thus do not find anything in the affidavit that would discharge the burden of proving, on *prima facie* basis, that there has been a demand for the performance of the public duty for which *mandamus* may lie, nor for that matter, a refusal to comply on the part of the Respondent. The Applicant has failed to prove that the prayer for mandamus may ultimately lie against the Respondent.

Mr. Mpoki further argued that they will have the right to introduce new evidence when they file the substantive application once leave is granted. As we have already seen, we are of the considered opinion that this line of argument is not convincing. We do not think that the Applicant is at liberty to choose only some of the issues and raise them at this stage, and leave others for later, especially when those other issues are so fundamental as to leave a whole prayer unsupported by crucial evidence.

There are two prayers for declaratory orders. We would not want to go into the merits of these prayers to avoid going beyond what is required at this stage.

Suffice it to say that we see some evidence sufficient to back up the two prayers in paragraphs 11 to 19 of the affidavit. At this stage, we do not look at the Respondent's counter affidavit. Injunction, on the other hand, is a consequential relief. It flows from the grant of other orders and, in the instant case, it may follow from a successful prosecution of the prayers for declaratory orders. For instance, if the Court declares that the composition of the Constituent Assembly is irregular and unconstitutional, as prayed for in prayers (b) and (c), an order of injunction might follow.

In view of the foregoing, we are satisfied that a *prima facie* case has been made out for the grant of leave for declaratory orders and injunction.

In the final analysis, we dismiss the application for leave to apply for mandamus, but grant leave to the Applicant to apply for declaratory orders and injunction in terms of prayers (b), (c) and (d) of the chamber summons. We make no order as to costs.

DATED at Dar es Salaam this 22nd day of September, 2014.

A.G. MWARIJA
JUDGE

A.K. MUJULIZI
JUDGE

F.A. TWAIB
JUDGE