IN THE HIGH COURT OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

(CORAM: MJEMMAS, TEEMBA, & TWAIB, J.J.J.)

MISC. CIVIL CAUSE NO. 18 OF 2015

IN THE MATTER OF THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA, CAP 2 (R.E. 2002)

AND

IN THE MATTER OF THE BASIC RIGHTS AND DUTIES ENFORCEMENT ACT, CAP 3 (R.E. 2002)

AND

IN THE MATTER OF THE JUDICATURE AND APPLICATION OF LAWS ACT, CAP 358 (R.E. 2002)

AND

IN THE MATTER OF THE PUBLIC LEADERSHIP CODE OF ETHICS ACT, CAP 398 (R.E. 2002)

AND

IN THE MATTER OF THE ETHICS TRIBUNAL

BETWEEN

HON. ANDREW JOHN CHENGE ..... PETITIONER

AND

1. **THE PUBLIC LEADERS' ETHICS SECRETARIAT ..... 1ST RESPONDENT**
2. **THE TANZANIA PUBLIC LEADERS' ETHICS TRIBUNAL ..... 2ND RESPONDENT**
3. **THE HON. ATTORNEY GENERAL ..... 3RD RESPONDENT**

Dates of Submissions: 03/06/2015
Date of Ruling: 26/06/2015

RULING

Twaib, J.

Hon. Andrew John Chenge, Member of Parliament for Bariadi West, Simiyu Region, has petitioned this Court for certain constitutional remedies, under sections 4, 5 and 6 (a) – (f) of the Basic Rights and Duties Enforcement Act, Cap 3 (R.E. 2002) and Rule 4 of the Basic Rights and Duties Enforcement (Practice and Procedure) Rules, 2014, GN 304 of 2014.

Going by his pleadings, the facts that prompted him to file the petition are lengthy. However, we will only set out the facts material for the purposes of this ruling, which relate to preliminary points of objection raised by the Attorney General on behalf of the respondents. Those facts are as under.

In or about May 2014, the Prime Minister of the United Republic informed the National Assembly that the Government had tasked the Controller and Auditor General ("CAG") to conduct an audit of an account at the Bank of Tanzania known as the Tegeta Escrow Account. He also informed the National Assembly that the Government had directed the Prevention and Combating of Corruption Bureau to conduct investigations with regards to the withdrawal of moneys deposited into the Tegeta Escrow Account by the Tanzania Electric Supply Co. (TANESCO) and the Government.

Upon receiving the CAG Report, the Prime Minister handed it over to the Speaker of the National Assembly, who forwarded it to the Public Accounts Committee ("PAC") for analysis and recommendations. The PAC prepared its own Report. Both Reports mention the petitioner as one of the

individuals who were paid some money allegedly withdrawn from the Tegeta Escrow Account.

The Report of the PAC was scheduled for tabling before the National Assembly in the afternoon of 26th November 2014. However, in the morning of that day, the Speaker was served with a Drawn Order given the day before by this Court in Misc. Civil Cause No. 50 of 2014, filed by Independent Power Tanzania Ltd. ("IPTL") and Pan African Power Solutions Ltd. ("PAP") against the Hon. Prime Minister & Others (among them the Attorney General, the Speaker of the National Assembly and the Chairman of the PAC). The Drawn Order included an interim order in the following words:

> *"Meanwhile the status quo to be maintained pending the hearing and determination of this application inter-partes."*

When called upon to offer their respective opinions on the above order, both the Speaker and the Minister for Constitutional Affairs and Justice told the National Assembly that the phrase "*status quo* to be maintained" meant that the Assembly was to proceed with its business as scheduled, namely, that the PAC's Report should be tabled and discussions thereon should proceed. The petitioner's view on the effect of the said order is different. He opines that the interim order had restrained the House from proceeding with the tabling of the PAC Report and discussions thereon, and that by proceeding with that schedule, the House had infringed the said order.

Hence, following the Speaker's and the Minister's concurring opinions, the then Chairman of the PAC, Hon. Zitto Zuberi Kabwe, MP, was allowed to table his Committee's Report. The House discussed it and made certain resolutions, some of which were adverse to the petitioner. According to the

petitioner, the effect of the alleged infringement of the Court Order was to render whatever was deliberated upon by the National Assembly as regards the CAG and the PAC Reports from that point onwards and the resultant resolutions a nullity, because the deliberations and resolutions were tainted with what he terms "material irregularity/illegality". The illegality exists, he insists, even though the application that led to the order was subsequently dismissed by the Court. This is the first ground upon which the petition is based. The second ground is that neither the CAG, the PAC, nor the National Assembly, afforded him any right to be heard before reaching the impugned conclusions and resolutions.

The petitioner further asserts that subsequently and, as result of the National Assembly resolutions ("the resolutions"), the 1st respondent, the Ethics Secretariat, initiated proceedings in the Public Leaders Ethics Tribunal (the 2nd respondent). At the Tribunal, the petitioner challenged the institution of the proceedings, claiming that the same resulted from illegal resolutions of the National Assembly, which illegality affected the validity of the proceedings before the Tribunal. The petitioner thus sees a direct connection between the resolutions and the proceedings commenced against him at the Tribunal because, in his view, it was the National Assembly resolutions that prompted the Secretariat to initiate the proceedings. It is his case that had the Prime Minister and the Speaker obeyed the Court order, the proceedings against him before the Ethics Tribunal would not have been instituted.

Before the Tribunal, the petitioner raised objections against the proceedings, stating that the matter was pending before this court and that there was a Court order restraining the proceedings, which emanate from the National Assembly Resolutions. The Tribunal dismissed the objection. Dissatisfied with that decision, the petitioner has come to this Court by way

of the present petition. He claims that there have been infringements of his rights under article 13 (4), 13 (6) (b) and (d) of the Constitution, and seeks orders of this Court in the following terms:

a) A declaration that the complaint initiated by the Secretariat for Tanzania Public Leaders Ethics Commission and proceeded with by the Tanzania Public Leaders Ethics Tribunal is null and void for being tainted with material irregularity/illegality;

b) A declaration that the proceedings of the National Assembly and the resolutions complained of in this petition were irregular, improper, illegal thus null and void;

c) A declaration that the petitioner's constitutional and natural justice rights were violated and will be deemed to have continued being violated by the respondents until the date when another compelling restraint order is issued by this Court and obeyed by the respondents;

d) An order that the conclusions and recommendations of the CAG and PAC reports in so far as they concern the petitioner are incorrect and were arrived at without affording the petitioner any hearing;

e) A declaration that the Hon. Speaker of the National Assembly of Tanzania, the Hon. Prime Minister of the United Republic of Tanzania and the Hon. Attorney General failed in their duties of upholding and ensuring that the Constitution and the rule of law are respected and were in breach thereof;

f) An order of permanent injunction restraining the Secretariat for Tanzania Public Leaders Ethics Commission and the Tanzania Public Leaders Ethics Tribunal from continuing with and or contemplate

instituting any ethical complaint against the petitioner in respect of the matters that formed the basis of the CAG and PAC Reports.

Upon being served with a copy of the petition and its annexures, the respondents, all of whom are represented by the Office of the Attorney General, have raised five points of preliminary objection. These are:

1. That the Court has no jurisdiction to entertain this matter as the petition contravenes the provisions of article 100 (1) of the Constitution of the United Republic of Tanzania.

2. The petition is incurably defective for containing opinions, prayers and arguments contrary to section 6 (e) of the Basic Rights and Duties Enforcement Act, Cap 3.

3. The petition is incompetent and bad in law for contravening the provisions of section 8 (2) of the Basic Rights and Duties Enforcement Act, Cap 3.

4. The petitioner lacks cause of action against the 1st, 2nd and 3rd respondents.

5. The petition is vague, frivolous and vexatious for being contrary to the Basic Rights and Duties Enforcement Act, Cap 3.

Appearing in Court to argue the preliminary objections were Mr. Gabriel Malata, learned Principal State Attorney, who was assisted by Ms. Alesia Mbuya, learned Principal State Attorney, Mr. R. Kilanga and Mr. A. Mrisha, both learned Senior State Attorneys. Mr. Cuthbert Tenga and Mr. Michael Ngalo, learned advocates, appeared for the petitioner.

In resolving the various issues arising from the preliminary objections, we would begin with a discussion of the first, third and fourth grounds, which we feel are fundamental and inter-linked.

It is Mr. Malata's contention that, in as much as the petition is aimed at challenging the resolutions of the National Assembly which were made in the exercise of the Assembly's powers under article 63 (2) of the Constitution, the same is proscribed by article 100 (1) of the Constitution. The two Reports were prepared under the Assembly's directives, he said, and the resolutions followed debates in the National Assembly. Counsel thus pleaded with the Court not to entertain the petition, because the proceedings and resolutions constituted parliamentary debates and opinions that enjoy the privileges provided for in article 100 (1) of the Constitution. Citing this Court's ruling in **The Legal and Human Rights Centre & Another v Hon. Mizengo Pinda**, Misc. Civil Cause No. 24 of 2013 (unreported), Mr. Malata argued that these privileges are absolute and cannot be interfered with by any organ outside the National Assembly, including Courts of law.

The gist of the third ground is that the petitioner's claim that he was denied the right to be heard could be pursued through avenues other than a constitutional petition such as the present. The learned Principal State Attorney cited section 8 (2) of the Basic Rights and Duties Enforcement Act, which he says prohibits this Court from exercising its powers under the Act if the petitioner has alternative remedies under other laws. Section 8 (1) (a) provides for the original jurisdiction of this Court "to hear and determine any application made by any person in pursuance of section 4". Subsection (2) states:

> *(2) The High Court shall not exercise its powers under this section if it is satisfied that adequate means of redress for the contravention*

alleged are or have been available to the person concerned under any other law, or that the application is merely frivolous or vexatious.

Hence, Mr. Malata's submission on the third point, if we have understood him well, is that apart from the general lack of jurisdiction, we would still be precluded from entertaining the petition because the petitioner had other means of challenging the proceedings and resolutions of the National Assembly. Learned counsel argued that rule 68 of the Parliamentary Standing Orders (*Kanuni za Kudumu za Bunge*), allows the petitioner, being an MP, to challenge any act of the National Assembly that he felt was violative of his rights. Counsel further contended that the petitioner could have proceeded by way of judicial review if he felt that he was denied a right to be heard, a natural justice right that is recognized as a ground for judicial review.

The learned Principal State Attorney mentioned that alternative remedies are available under the Judicature and Application of Laws Act, Cap 358, the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap 310 and the Standing Orders. To buttress his argument, he cited the cases of **Sanai Murumbe & Anor v Muhere Chacha** [1990] TLR 54, **Athumani Kungubaya & Ors v PSRC & TTCL**, Civil Appeal No. 56 of 2007, **TCC Ltd. v Fair Competition Commission & AG**, Misc. Civil Cause No. 31 of 2010, at p. 34 and **Elizabeth Steven & Anor v Attorney General** [2006] TLR 404.

The fourth ground of preliminary objection relates to the petitioner's cause of action against the respondents. It is Mr. Malata's considered view that the first, second and third respondents "have nothing to do with the resolutions of the National Assembly, the CAG Report or the PAC Report". He said that the 1st and 2nd respondents are not acting under the instructions of the National Assembly. The proceedings in the Tribunal

were initiated under article 132 (1) and (4) of the Constitution and the Public Leadership Code of Ethics Act. He thus concluded that the petition is misconceived.

Mr. Malata further submitted that even if the 1st and 2nd respondents' action was prompted by the resolutions, there is nothing in the Public Leadership Code of Ethics Act that prohibits the two organs from so acting. He referred the Court to section 18 (2) (b) and (c) of the Act, and concluded by saying that if there is no cause of action against the 1st and 2nd respondents, there can be no cause of action against the Attorney General (the 3rd respondent), who has been joined only as a necessary party.

At this juncture, we do not think we should belabor the point as to whether the 1st respondent was moved by the National Assembly resolutions to initiate proceedings against the petitioner. That is an allegation that the petitioner affirms and the respondents deny. So, as Mr. Ngalo submitted, it is a question of fact. It is now settled law in our jurisprudence, and we need not cite any authority for saying it, that such a question cannot form the basis of a preliminary objection.

Even though Mr. Ngalo uses this proposition as a general response to all points of preliminary objection, we hope we would be able to demonstrate, as we go along, that the same cannot be said about the first, third and fourth points of preliminary objection, which are based on facts that are essentially not disputed. Responding to Mr. Malata's submissions, Mr. Ngalo began by setting out certain constitutional principles which he considers relevant to the matter at hand as laid down in a string of Court decisions in our jurisdiction. The first case he cited was **Mwalimu Paul Muhozya v Attorney General** [1996] TLR 130. Though in that case, this Court (Samatta, JK, as he then was), ultimately agreed with the Attorney General

that the Court has no jurisdiction to restrain the President of the United Republic from discharging his executive duties, it set out certain constitutional principles that we still hold trite to date.

Those principles are: that the Court will not be deterred from a conclusion because of a regret as to its consequences; that it is wrong for a Court of law to be anxious to avoid treading on executive toes (for our purposes, the same could be said about treading on *legislative* toes); that a constitution is a living instrument which must be construed in light of present day conditions; that the complexities of our society must be taken into account while interpreting the constitution; that a workable constitution is a priceless asset to any country; that the balance of power between the three arms of Government, namely, the Executive, the Legislature and the Judiciary and the relationship of the Courts to the other two branches, must be carefully maintained.

Mr. Ngalo also cited the cases of **Attorney General v Lohay Akunay** [1985] TLR 80; **Julius Ishengoma Francis Ndyanabo v Attorney General** [2004] TLR 29; and **Rev. Christopher Mtikila v Attorney General** [1995] TLR 31. He, however, did not tell us what principles set down by these cases that he wanted us to consider and in what context.

On the third ground of preliminary objection, Mr. Ngalo submitted that the intention under section 8 (2) of Cap 3 is to bar other matters of a civil and criminal nature which could be dealt with by other Courts. It does not bar matters involving constitutional rights, and it is not necessary that a petitioner should exhaust those other remedies before invoking Cap 3. He distinguished **Elizabeth Stephen** in that it involved issues of customs and traditions, while this petition is about issues of constitutional importance. Even **TCC v Fair Competition Commission** was also distinguishable, he

contended, but fell short of saying how he would distinguish it from the present case. Indeed, we see no such distinction.

On the possibility of the petitioner pursuing his rights through the Standing Orders, Mr. Ngalo referred us to the case of **N.I.N. Munuo Nguni v Judge in Charge, Arusha Zone & Anor** [1998] TLR 464 and [2004] TLR. He submitted that the procedure provided for in the Standing Orders cannot provide an effective remedy to his client. He winded up his submissions by tackling ground four of the preliminary objections, maintaining that the petitioner has a cause of action against all the respondents. He pointed out paragraphs 19, 20, 21, 22, 23.1, 23.2, 23.3, 23.4, 23.5, 23.10, 23.11 and 23.13 as disclosing a cause of action against the 1st and 2nd respondents and paragraphs 15, 24, 25 and 26 as against the 3rd respondent.

Mr. Malata's rejoinder on the principles in **Mwalimu Paul Muhozya** was that the decision has been overtaken by events, following the subsequent enactment of the Basic Rights and Duties Enforcement Act and the decisions that came thereafter. He specifically mentioned the cases of **Athumani Kungubaya, TCC v PSRC**, and **LHRC v Hon. Mizengo Pinda**, to which we have already referred. He submitted that before the new Act, the rule as to alternative remedy was not strict, but this changed under section 8 (2) of the Act. **Muhozya's case**, he said, was about separation of powers, and that following the rule in **Jumuiya ya Wafanyakazi Tanzania (JUWATA) v Kiwanda cha Uchapishaji cha Taifa (KIUTA)** [1998] TLR 196, this Court is bound to follow the Court of Appeal decision in **Athumani Kungubaya,** regardless of its correctness.

We agree that by the application of rules of precedent, we are so bound. But every case has to be taken within its own circumstances, and this case is peculiar in many respects.

Further, relying on **Citibank v. TTCL**, Mr. Malata contended that the mere fact that a case has constitutional significance is not a licence for disregarding procedural rules. However, with due respect, counsel should note that this is not a procedural matter. Whether or not there is an effective alternative remedy is not a mere matter of procedure. It is a substantive matter that determines whether or not a Court of law can exercise jurisdiction over a dispute—a critical question that defines the forum in which any particular matter is to be instituted.

Mr. Ngalo, however, was quick to concede that under article 100 (1) of the Constitution, the Courts do not have powers to deal with matters involving the proceedings, debates and opinions in the National Assembly. At this point, we will let Mr. Ngalo speak for himself:

> *It is our submission that under article 100 (1) of the Constitution, the Court has no jurisdiction to deal with matters involving the National Assembly. The article provides and guarantees the freedom of opinion, freedom of debate and freedom of procedure in the conduct of the business of the National Assembly.*

However, Mr. Ngalo thinks that the matters at issue in this petition can be subject to a judicial enquiry. In his words:

> *In the matter before us the petitioner is arguing that there are two Reports and one of those Reports is not part of the business of the National Assembly. That is the Report of the CAG. However, they were both submitted and discussed by the National Assembly. This Court has jurisdiction to inquire into whatever happened in the National Assembly with regard to those Reports. This is by virtue of article 100 (2) of the Constitution.*

For the proposition that sub-article (2) of article 100 affords the petitioner the avenue to come to this court, counsel referred us to the interpretation of the sub-article given by this court in **LHRC v Hon. Mizengo Pinda**. He also mentioned the existence of "several cases" pending in this Court involving the CAG Report and the Court Order for maintenance of the *status quo*, and yet the National Assembly proceeded to discuss the Report, as another factor weighing in favour of a judicial inquiry into the propriety of the proceedings in the House and its resolutions.

The first point of preliminary objection requires us to answer the question as to whether this Court has jurisdiction to entertain this petition, in view of the provisions of article 100 (1) of the Constitution. In answering that question, we are also required, given Mr. Ngalo's response to Mr. Malata's submissions, to answer the question as to whether the petition can survive the restrictions of sub-article (1) with a recourse to sub-article (2) of the same article 100.

It was argued on behalf of the respondents that the petition is prohibited by article 100 (1) of the Constitution, which states:

> *(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.*

It is clear to us that this petition falls squarely within the prohibitive provisions of the above sub-article. And, as held by this Court in **LHRC v Hon. Mizengo Pinda**, those provisions are absolute. Indeed, Mr. Ngalo readily accepted that legal position. However, he argued that this Court can entertain the petition pursuant article 100 (2) of the Constitution. Counsel Malata's response to this was that sub-article (2) does not apply to

this case because there is no MP who has been sued herein. Rather, it is an MP who has filed a case against Government authorities.

We are settled in our minds that Mr. Malata's argument on this point makes a lot of legal sense. What the petitioner is trying to do herein is to impugn the proceedings and decisions of the National Assembly so as to avert the actions taken by the Ethics Secretariat and the Ethics Tribunal. Neither the National Assembly itself, its Speaker nor its Clerk, is a party to these proceedings. The Ethics Secretariat cannot be expected to be in a position, whether legally or practically, to defend the National Assembly or any of its officers, for whatever it is alleged to have done, the joinder of the Attorney General herein, a necessary party, notwithstanding.

In **LHRC v Hon. Mizengo Pinda**, which has been referred to by both sides in this case, this Court held as follows (on page 18 of the typed ruling):

> *...[w]e 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 subscribe to this view, which is not disputed by any of the parties, and would hold that, in principle, the petitioner cannot challenge the proceedings in the National Assembly, unless he can show that, either they do not fall under sub-article (1) or, that they can be preserved by some other provision of the Constitution. Mr. Ngalo has submitted that the

petition actually falls under sub-article (2) of article 100, which, in terms of the decision in **LHRC v Mizengo Pinda**, is not absolute. We should point out at this juncture that, while adhering to the principle of harmonious interpretation of constitutional provisions, the decision in **LHRC v Pinda** does not view sub-article (2) the way Mr. Ngalo would like us to. The provision constitutes immunities from legal action that MPs enjoy. It allows a challenge to be mounted against an MP since, as this Court held in the case just cited, that the immunities were not absolute. The sub-article states:

> *"(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."*

This provision is further reinforced by section 5 of Cap 296, which also provides for similar immunities. However, given the wording in sub-article (2) as set out above, we do not think, with all due respect to Mr. Ngalo, that his attempt to seek recourse to this provision as an opening for his client's case from the strict application of sub-article (1) of article 100 can hold any water.

As Mr. Malata correctly intimated, sub-article (2) is not meant to allow MPs to sue any person, for whatever reason. We are of the considered opinion that the correct construction of the sub-article would reveal the purport that, unless the Constitution or other laws allows an action, MPs can invoke the sub-article as a defence to an action against them, be it civil or criminal, for anything said, done or brought up by them during proceedings in Parliament. In fact, the immunities therein complement the privileges

granted by sub-article (1) by offering protection for things done by MPs in the exercise of the freedoms granted by it.

In other words, if we may be excused for using the metaphor, sub-article (2) is a defensive device, not one of attack. It is a protective shield, not an assault weapon. For that reason, and with all due respect to Mr. Ngalo, his gallant efforts to persuade us to apply it as allowing his client to bring an action in Court, must fail.

In the result, we feel disposed to partly accede to the first preliminary objection raised by the respondents, to the effect that this Court has no jurisdiction to entertain this matter as the petition contravenes the provisions of article 100 (1) of the Constitution, in so far as it seeks to challenge National Assembly resolutions and proceedings leading thereto. This Court cannot, therefore, grant the petitioner's prayers (b) and (e) of the petition, which directly touch upon those debates, opinions and resultant decisions.

In so holding, we are guided by the principle laid down in **Mwalimu Paul Muhozya's Case**, that the balance of power between the three arms of Government, the Executive, the Legislature and the Judiciary and the relationship of the Courts to the other two branches must be carefully maintained.

We do not agree with Mr. Malata that those principles no longer apply due to the enactment of the Basic Rights and Duties Enforcement Act. For one, the Act only provides for the procedure for enforcements of fundamental rights, while the principles in **Mwalimu Muhozya's Case** are substantive in quality and of general application. Unless there are specific statutory provisions to replace them, we consider those principles as well-founded, time-honoured and still good law, and that they should continue to guide

our Courts (at least the High Court and Courts sub-ordinate thereto) and all concerned in the construction, administration and application of the provisions of our Constitution.

We are also mindful of the petitioner's argument that the alleged act by the National Assembly of proceeding with the tabling and discussion of the CAG and the PAC Reports and the resultant resolutions could have been in violation of this Court's orders, and thus null and void, as the petitioner asserts. Perhaps, in an appropriate situation, it may be possible for the courts to inquire into parliamentary proceedings where its orders are alleged to have been infringed, but even if that was possible (and we are not suggesting that it is), it could only be done after the court has taken due account of the doctrine of separation of powers between the Judiciary and the Legislature. In our respectful opinion, this case falls short of that, especially because the order was an interim order in the nature of an injunction, from which the petitioner, not being a party to the case, cannot derive any benefit.

Whatever the petitioner wants to say about the connection between the National Assembly resolutions and the proceedings at the Ethics Tribunal are matters which he can raise as part of his defence before the Tribunal. It would be open to him to argue the point before the Tribunal, and see what the Tribunal will say. It is not our province in this case to discuss those matters. If, at the end of the proceedings before the Tribunal, the petitioner is aggrieved by its findings, it would be open to him to challenge them by way of judicial review or otherwise.

In any case, the means through which the Ethics Secretariat can be brought into action are virtually open-ended: the Secretariat has the powers, under section 18 (3) of Cap 398:

...to receive and entertain all allegations in respect of any public leader, whether oral or written from the members of public without inquiring as to the names and addresses of the person who has made the allegation.

In addition, the Tribunal has power, under subsection (4) of section 18, to initiate and to conduct any investigation in respect of breach of ethics prescribed under the Act. Hence, whether it is of any consequence that, in initiating the proceedings against the petitioner in the Ethics Tribunal the Secretariat was moved by the National Assembly resolutions or not is a question we would not venture into at this stage. There is a time and place for everything.

In the face of the complaint against him, what the petitioner is enjoined to do is to submit himself to the jurisdiction of the Tribunal and defend himself. That is the beauty of our law: It affords him the opportunity to defend himself against whatever allegations that are levelled against him. Even during or immediately after the Parliamentary debates, the petitioner had such an avenue: he could have invoked rule 68 of the Standing Orders and register his complaints with the Speaker, whereupon his grievances could be considered.

Mr. Ngalo did not deny that rule 68 was available to the petitioner. He only argued that his client would not have obtained an effective remedy if he followed that procedure. However, counsel did not say why that avenue would not have offered his client an effective relief. Here again, we agree with the third ground of preliminary objection, in that the petitioner could have invoked rule 68 if he wanted to challenge what was taking place in the National Assembly in relation to the CAG and the PAC Reports. As far as we can tell, he did not do so, even though he himself states that he was present in Parliament when the PAC Chairman was tabling his Committee's

Report. The wording of section 8 (2) of Basic Rights and Duties Enforcement Act is significant in this regard:

> *The High Court shall not exercise its powers under this section if it is satisfied that adequate means of redress for the contravention alleged* ***are or have been available*** *to the person concerned under any other law,...*

We have already found that rule 68 of the Standing Orders was available to the petitioner if he wished to challenge the proceedings in Parliament that led to the tabling of the PAC Report of the CAG Report, the discussions thereon, and the resolutions. Given the clear provisions of section 8 (2) just quoted, we are settled in our minds that his complaint against those acts by the Assembly, in this court, are misplaced.

It will be recalled that the petitioner has relied on the fact that the tabling of the PAC Report, the deliberations and resolutions that followed in the National Assembly were in contravention of a Court Interim Order. That contravention, he maintains, tainted them with illegalities, hence a fit question for judicial enquiry. This contention could have been considered if the petitioner was a beneficiary of that order. He was not. The order was akin to a judgment *in rem*, not *in personum*, and could only be relied upon by a party to the case. He thus cannot rely on the Order in Misc. Civil Cause No. 50 of 2014 to avoid the jurisdiction of the Ethics Tribunal.

A judgment in *rem* is a judgment (or order for our purposes) that touches on a particular subject matter. In the case of **The National Bank of Commerce v Dar es Salaam Education and Office Stationery** (1995) TLR 272, it was held by the Court of Appeal (Omar J.A.) that:

"A judgment in rem, I conceive to be an adjudication pronounced (as indeed the name denotes) upon the status of some particular subject matter, by a tribunal having competent authority for that purpose."

In that case, the High Court had issued a temporary injunction against a stranger to the suit. The Court of Appeal agreed with the proposition that such an order cannot be issued against a stranger to the suit. Along the same vein, therefore, the 1st and 2nd respondents cannot be bound by that order.

The Court of Appeal reasoned that "equity acts in *personum* not in *rem*." Conversely, much as a stranger to a suit cannot be bound by a temporary injunction, it being an equitable principle that does not attach to the *rem* but rather the *personum*, so can't a stranger claim to benefit from such an order. The petitioner herein is trying to get the benefit of an injunctive order that was given in a case in which he was not a party and neither were the proper parties herein (the 1st and 2nd respondents). Unfortunately for him, rules of equity, as restated by the Court of Appeal in **NBC's Case**, do not allow that eventuality. That means that the respondents' fourth point of preliminary objection, asserting lack of cause of action against the respondents, is valid, and it is thus upheld.

With these findings, we hope we have adequately demonstrated (without having to discuss the second and fifth grounds of preliminary objection, which would now be merely moot), that the circumstances are such that we are not in a position to exercise jurisdiction and/or grant the prayers sought by the petitioner in this case, as none of the prayers in the petition can be granted by this Court—neither jointly nor severally. The culmination of all the foregoing is, therefore, as follows:

1. This court lacks the requisite jurisdiction to inquire into the propriety and/or legality of the proceedings and resolutions of the National Assembly the petitioner seeks to challenge herein and/or the manner in which its members handled the said proceedings. Hence, prayers (b), (c) and (d) cannot be granted. Likewise, in so far as prayer (a) relies on a connection between the proceedings before the Ethics Tribunal and the National Assembly resolutions that followed the Reports of the CAG and the PAC, the same cannot be granted either;

2. The petitioner had alternative remedies under rule 68 of the Standing Orders. Hence, again, prayers (b), (c) (d), (e) and (f) cannot be granted, in view of section 8(2) of the Basic Rights and Duties Act, Cap 3 of the Laws;

3. The petitioner, being a stranger to the Order of the Court for maintenance of the *status quo,* cannot derive benefits therefrom. Neither can the 1st and 2nd respondents, strangers thereto as well, be bound by that order. Hence, the declaratory orders prayed for in prayers (b) (c), (d) (e) and (f) of the petition cannot, for this further reason, be granted; and

4. Prayer (e), wherein the petitioner seeks a permanent injunction restraining the 1st and 2nd respondents from continuing with the ethical complaint against him, is merely consequential to the prayers preceding it. It cannot stand in isolation. It thus falls together with the other prayers.

The overall result, therefore, is that the entire petition is legally unsustainable. It is struck out with costs.

DATED at Dar es Salaam this 26th day of June, 2015.

G.J.K. MJEMMAS

JUDGE

R.A. TEEMBA

JUDGE

F.A. TWAIB

JUDGE

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

_____

REGISTRAR/DEPUTY REGISTRAR