

IN THE HIGH COURT OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CIVIL CAUSE NO. 25 OF 2017

**In the matter of the Constitution of the United Republic of
Tanzania 1977, [CAP 2 R.E 2002]**

And

**In the matter of Basic Rights and Duties Enforcement Act, [Cap 3,
R.E 2002]**

And

**In the matter of a Petition to challenge Constitutionality of certain
Provisions of Terrorism Act, 2002 [Act No. 21 of 2002]**

BETWEEN

MSELEM ALI MSELEM 1ST PETITIONER
JAMAL NORDIN SWALEHE 2ND PETITIONER
NASSOR HAMAD ABDALLAH 3RD PETITIONER
HASSAN BAKARI SULEIMAN 4TH PETITIONER
ANTHANARI HUMUD AHMED 5TH PETITIONER
MOHAMED ISIHAKA SUSSUPH 6TH PETITIONER
ABDALLAH HASSAN @ JIBABA 7TH PETITIONER
HUSSEIN MOHAMED ALLY 8TH PETITIONER
JUMA SADAL JUMA 9TH PETITIONER
SAID KASSIM ALLY 10TH PETITIONER
HAMIS AMOUR SALUM 11TH PETITIONER

SAID AMOUR SALUM 12TH PETITIONER
ABUBAKAR ABDALLAH MNGODO 13TH PETITIONER
SALUM ALI SALUM 14TH PETITIONER
SALUM AMOUR SALUM 15TH PETITIONER
ALAWI OTHMAN AMIR 16TH PETITIONER
RASHID ALI NYANGE @ MAPALA 17TH PETITIONER
AMIR HAMIS JUMA 18TH PETITIONER
KASSIM SALUM NASSORO 19TH PETITIONER
SAID SHEHE SHARIFU 20TH PETITIONER
FARID HADI AHMED 21ST PETITIONER
ABDALLAH SAID ALI @ MDAWA 22ND PETITIONER

VERSUS

THE HONOURABLE ATTORNEY GENERAL RESPONDENT

Date of last: 20/6/2018

Date of Ruling: 17/08/2018

RULING

I. ARUFANI, J

The above named petitioners have preferred the present petition challenging the constitutionality of certain provisions of the Prevention of Terrorism Act, [Act No. 21 of 2002]. The petition is made under Article 26 (2) and 30 (3) of Constitution of the United Republic of Tanzania of 1977, Cap 2 R.E 2002 (hereinafter referred to as the Constitution), section 4 and 5 of the Basic Rights & Duties Enforcement Act, Cap 3, R.E 2002 (hereinafter referred to as Cap 3).

After being served with copy of the petition the respondent filed in this court a reply accompanied by a notice of preliminary objection containing the following points of law:

- i) The petition is incompetent for violating the provisions of Rule 4 of the Basic Rights and Duties Enforcement (Rules and Procedure) Rules, 2014.
- ii) The petition is defective for contravening the provisions of section 4 of the Basic Rights and Duties Enforcement Act, Cap 3 of the Laws.

When the matter came up for mention on 10th May, 2018 the petitioners were represented by Mr. Daimu Halfani, learned Advocate and the respondent was represented by Mr. Kabyemela Lushagala, learned State Attorney. The above learned counsel for the parties prayed and were allowed by the court to argue the raised points of preliminary objections by way of written submissions. The counsel for the parties were given time frame for filing the written submission and I commend both sides for filing their respective submission in court within the given time.

The learned State Attorney who was the first to file the respondent's written submission in court raised in their submission a third point of preliminary objection which reads as follows:-

- iii) The petition is fatally incompetent for contravening the provisions of Order VI Rule 15 (2) of the Civil Procedure Code [Cap 33 R.E 2002] for being verified by an incompetent party.

In his written submission however, the learned State Attorney opted to abandon the second point of preliminary objection and

argued the first and additional point he raised in his submission. He argued in relation to the first point of preliminary objection that, Rule 4 of the Basic Rights and Duties Enforcement (Rules and Procedure) Rules, 2014 (hereinafter referred to as the Rules) requires that, any proceeding intended to be instituted in the High Court relating to violation of basic rights guaranteed under the Constitution to be preferred by way originating summons.

He stated that Rule 4 of the Rules was specifically made to establish a proper procedure as per section 5 of Cap 3 for initiating in court any proceeding relating to violation of basic rights provided under Article 12 to 29 of the Constitution. He argued that the implication of Rule 4 is that, any constitutional petition to the High Court relating to violation of the basic rights is supposed to be made by way of originating summons supported by an affidavit which will state facts and reasons intended to be relied upon in explaining the alleged violation of the basic rights provided under the Constitution.

The learned State Attorney argued that, in the petition at hand the petitioners have not abided by the requirements of Rule 4 of the Rules as they have filed in this court a petition instead of filing originating summons together with an affidavit to support it. He submitted that, the respondent is well aware of the decision made by the Court of Appeal of Tanzania in the case of **Registrar of Societies and Two Others V. Baraza la Wanawake (BAWATA)**, Civil Appeal No. 82 of 1992 in which it was stated that proceedings for obtaining redress of violation of basic rights guaranteed under the Constitution may be initiated by way of petition or originating summons.

He referred the Court to section 15 of Cap 3 which empowers the Chief Justice of Tanzania after consultation with the Minister for legal affairs to make rules in respect of matters relating to practice and procedure of the High Court and the subordinate courts in relation to jurisdiction and powers conferred to the courts by Cap 3 and stated that, since the decision of the Court of Appeal in the case of **BAWATA** was made in 2000 and the Rules came into force in 2014 then the Rules were made after taking into account the requirements and orders established by both Cap 3 and the decision of the Court of Appeal in the case of **BAWATA**.

It is the submission of the learned State Attorney that, initiation of any petition in connection with operation of Cap 3 by way of originating summons is vital and any noncompliance with that requirement automatically renders the petition incompetent because of lack of affidavit to explain facts and reasons connected with the allegations of violation of basic rights. He referred the Court to the case of **Citibank Tanzania Limited V. Tanzania Telecommunication Co. Limited and 4 Others**, Civil Application No. 64 of 2003, CAT (unreported) where it was held that a mere fact that an issue is of constitutional significance is not a licence for disregarding procedural rules. At the end he prayed the first point of preliminary objection to be sustained.

The reply by the petitioners to the above submission of the respondent was prepared and filed in this Court by a team composed of Abubakari Salim, Juma Nassoro, Abdulfatah Al-bakry and Daimu Halfani, learned advocates. The advocates for the petitioners stated that, Cap 3 was enacted in 1994 and came into force on 27th day of January, 1995. They stated that, section 5 of

Cap 3 which requires any application to the High Court in pursuance of section 4 to be made by petition to be filed in appropriate Registry of the High Court by origination summons is vague and confusing because both petition and originating summons are originating processes.

The learned Advocates quoted a substantial part of the decision of the Court of Appeal in the case of **BAWATA** underscoring a point that under section 5 of Cap 3 a complainant may move the High Court by filing either a petition or originating summons. They also cited the case of **Federation of Mines Association of Tanzania and 2 Others V. African Gem Resources (AFGEM) and 7 others** [2003] TLR 294 where an objection that the petition was incompetent as it was not accompanied by origination summons was overruled on the basis of the decision made by the Court of Appeal in the case of **BAWATA**.

The learned counsel for the petitioners referred the Court to the cases of **Tanzania Breweries Limited V. Anthony Nyingi**, Civil Appeal No. 119 of 2014 and **Jumuiya ya Wafanyakazi Tanzania V. Kiwanda cha Uchapishaji cha Taifa** [1988] TLR 146 which emphasized on the requirement of the courts to adhere to the doctrine of stare decisis. They submitted that the correct position and meaning of section 5 of Cap 3 is that proceedings for violation of the provisions of Article 12 to 29 of the Constitution is commenced either by petition or originating summons and not both of them.

The learned counsel for the petitioners argued that Rules made by the Chief Justice under section 15 of Cap 3 in which Rule 4 requires any petition filed in accordance with the provisions of the

Act to be by way of originating summons is in conflict with the parent Act which allows the filing of either petition or originating summons. They argued that, the Chief Justice enacted Rule 4 by oversight because he might have not been aware of the position of the Parent Act after the decision in **BAWATA**.

It is the argument by the counsel for the petitioners that Rule 4 is void as it conflict, with section 5 of the Parent Act which is contrary to section 36 (1) of the Interpretation of Laws Act, Cap 1 R.E 2002 which states subsidiary legislation shall not be inconsistent with the provision of the written law under which it is made and if there is inconsistent it shall be void to the extent of any such inconsistency. They bolstered their argument by referring the court to the case of **Odinga and Others V. Nairobi City Council**, [1990-1994] EA 482 which held Rules of Court made under an Act cannot defeat or override the clear provisions of the Act. They concluded that thus the first preliminary objection is devoid of merit as the case at hand is properly initiated by petition as required by section 5 of Cap 3 read together with the decision in **BAWATA**.

I have carefully considered the submissions made by the counsel for the parties in relation to the first point of objection and after reading the provisions of the law cited in the counsel respective submissions I have come to the finding that the procedure for instituting a petition in the court to challenge violation of any basic rights contained in article 12 up to 29 of the Constitution is well provided for under sections 4 and 5 of Cap 3.

While section 4 of the Act gives right to any who person alleges that any provision of part III of the Constitution is being or is about

to be contravened in relation to him to apply to the High Court for redress in relation to the said violation, section 5 of the same law provides for the procedure to be followed in applying for the redress the petitioner want to be awarded by the court. For easy of reference the said provisions are reproduced hereunder:

"S. 4. Right to apply to High Court for redress

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.

S. 5. Application to be made by petition

An application to the High Court in pursuance of section 4 shall be made by petition to be filed in the appropriate Registry of the High Court by originating summons."

The above provisions of the law and specifically section 5 states clearly that the application seeking redress under section 4 of Cap 3 is required to be made by a petition by originating summons. In the matter before me the petitioners have filed a petition instead of originating summons complaining that several provisions of the Prevention of Terrorism Act, 2002 [Act No. 21 2002] contravene the provisions of the Constitution as they violate the fundamental rights and freedom of people, suppress the rule of law and the due process of the law and encourage abuse of power and authority. The petitioners are praying the court to declare those provisions unconstitutional and order the Government to observe, protect and

preserve the rights and freedoms guaranteed under the Constitution.

Having closely considered the counsel submission regarding the mode of filing an application of this nature I think it is misleading and confusing because both petition and originating summons are originating processes. I say so because the provisions of section 5 states clearly that the application of this nature is supposed to be filed in court by way of originating summons and not by way of petition.

I have carefully read the case of **BAWATA** which the counsel for the petitioners argued that the Court of Appeal stated therein that an application of this nature can be initiated by either petition or originating summons and find it is true that is what was so stated. The Court of Appeal said at page seven of the decision that:-

"In the light of the foregoing we are inclined to agree with Prof. Shivji that, the two procedures of petition and originating summons provided under section 5 of the Act are to be used as alternative processes for commencing proceedings of human rights violations. A complainant may move the High Court by filing either a petition or originating summons."

However, despite the interpretation of section 5 of Cap 3 made by the Court of Appeal of Tanzania in the case of **BAWATA** as quoted hereinabove and followed by this court in the case of **Federation of Mines Association of Tanzania** cited in the submission of the counsel for the petitioners and other cases but as rightly argued by the learned State Attorney on 29th day of August, 2014 his Lordship the Honourable Chief Justice of Tanzania

while acting under the powers conferred to him by section 15 of Cap 3 promulgated the Rules of procedure to be applied with a view to advancing and realizing the basic rights and duties contained in the Constitution.

Rule 4 of the Rules provides clearly that any petition filed in accordance with the provisions of the Act (Cap. 3) shall be by way of originating summons. I have read carefully the wordings of this Rule together with that of section 5 of Cap 3 which the counsel for the petitioners submitted are in conflict but failed to see any conflict in the said provisions of the law. To the contrary I have found both of them are directing the application of this nature to be made by way of originating summons and not by petition.

It is my view that the Rules promulgated by his Lordship the Honourable Chief Justice cleared the confusion which the counsel for the petitioners have alluded to in relation to section 5 of Cap 3 in relation to the appropriate procedure to be followed when a person wishes to apply for redress against violation of basic rights enshrined under Part III of the Constitution. The provision states clearly that the application shall be made by way of originating summons. To accept the submission by the counsel for the petitioners that a complainant of violation of basic rights and duties enshrined in the Constitution can apply for redress either by petition or originating summons is to my view prone to creating more confusion as the complainant will not know which appropriate procedure between the two should be used when seeking redress arising from violation of the basic rights and duties provided under the Constitution.

We have also considered the argument by the counsel for the petitioners that under the doctrine of stare decisis as laid in the cases of **Tanzania Breweries Limited** and **Jumuiya ya**

been overruled by a new statute. Since the Rules made by his Lordship the Honourable Chief Justice came into force after the cases which established principle that an application for redress relating to violation of basic rights provided under the Constitution can be made either by petition or originating summons then the position of the law stated in the relied cases cannot be followed as there is now a law which provides for the proper procedure of initiating the matter which is by way of originating summons.

The court has also found as correctly argued by the learned State Attorney and provided under Rule 4 of the Rules, the originating summons is a proper and correct procedure to deal with question of law like the one the petitioners are seeking from this court. The above finding of this court is getting support from the book titled **Odgers Principles of Pleadings and Practice**, 21 Edition referred in the case of **Mwalagaya V. Bandali** [1976 – 1985] 1 EA 339 where it was stated at page 319 - 320 of the cited book that:-

"Originating summons procedure is primarily designed to deal with questions of law or discretion arising upon facts substantially not in dispute, and indeed, where there is any choice in the matter, it is wrong to bring proceedings

by originating summons if it is known that the facts are disputed”.

Since in the instant proceeding the petitioners are seeking for interpretation of certain provisions of the Prevention of Terrorism Act and declare them unconstitutional and there is no any fact which is in dispute it is my view that the appropriate procedure to be followed is to initiate the proceeding by way of originating summons as required by rule 4 of the Rules and not to file a petition in the court as it was done by the petitioners.

In totality of all what I have stated herein above the court has found as the matter at hand was initiated by petition instead of originating summons provided under Rule 4 of the Rules then the first point of objection raised by the respondent in this matter has merit and deserve to be sustained. Upon arriving to the said finding, there is no need of dealing with the point of preliminary objections raised in the submission of the respondent as it will be for academic exercise only and not for benefit of making the court to determine the matter on merit. In the premises the petition is hereby struck out for being incompetent before the court. I make no order as to costs. Order accordingly.

Dated at Dar es Salaam this 17th day of August, 2018.



I. Arufani

Judge

17/08/2018