IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL CAUSE NO. 06 OF 2018
IN THE MATTER OF THE CONSTITUION OF THE UNITED REPUBLIC OF TANZANIA 1977 AS AMENDED FROM TIME TO TIME [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 A PETITION TO CHALLENGE THE PROVISIONS OF SECTIONS 9 (1), 10(1), 10(2) AND (3) OF THE NATIONAL ELECTIONS ACT [CAP. 343 R.E 2010] AS BEING UNCONTITUTIONAL
BETWEEN

BOB CHACHA WANGWE.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT
THE NATIONAL ELECTORAL COMMISSON..... 2ND RESPONDENT
THE DIRECTOR OF ELECTIONS .....3RD RESPONDENT

04/06&04/07/2018

RULING

MWANDAMBO, J

The Petitioner has sought to invoke the provisions of sections 4 and 5 of the Basic Right and Duties Enforcement Act, Cap 3 [R.E 2002], Rule 4 of the Basic Rights and Duties Enforcement (Practice and Procedure) Rules, 2014 and Articles 26 (2) (and 30(3) of the Constitution of the United Republic of Tanzania 1977 (as amended) for declaratory orders in relation to sections 9 and 10 (1), (2), (3) of the National Elections Act, which are claimed to be unconstitutional. The Petitioner has done so by way of an originating summons supported by his own affidavit acting through Ms. Fatma Karume, learned Advocate of IMMMA Advocate. The Respondents who act through the Attorney General (1st Respondent) resist the

petition by way of a reply containing a notice of preliminary objections challenging the competence of the petition on three grounds which are the subject of this ruling.

According to the Respondents the petition is incompetent on the grounds namely:-

1. *It contravenes section 8 (2) of the Basic Rights and Duties Enforcement Act, Cap 3 [R.E 2002].*
2. *It is an abuse of the process of the Court for being frivolous and vexatious.*
3. *The affidavit accompanying the originating summons is incompetent for contravening the provisions of Order XIX rule 3 of the Civil Procedure Code Cap 33 [R.E 2002] and section 8 of the Notaries Public and Commissioners for Oaths Act, Cap 12 [R.E 2002].*

In pursuance of section 10 (1) of Cap 3, petitions under it are determined by three judges of this Court except where the determination is whether the petition is frivolous, vexatious or otherwise not fit for hearing in which case a single judge is empowered to make that determination. The second preliminary objection challenges the competence of the petition for being frivolous and vexatious on the one hand and that the petitioner has adequate means of redress for the contravention alleged within the context of section 8 (2) of Cap 3. The third ground falls into the category of cases where the petition is otherwise not fit for hearing by the Court and so I am called upon to make determinations in each of the grounds before the petition is determined on merits subject to the outcome of the preliminary objections.

By consent, the learned counsel filed their written submissions for and against the preliminary objections. The Respondents were ably represented by Ms. Alesia Mbuya, learned Principal State Attorney whose submissions were countered with equal force by Ms. Fatma Karume, learned Advocate. I am deeply indebted to both of them for their energy and industry expended in canvassing the issues before this

Court. Whilst I cannot promise to deal with each of the points made in their submissions, I guarantee to touch on the substance of their submissions and authorities placed before me as best as I can. With the foregoing preliminary matters I now turn to the discussion on the submissions in each of the grounds.

The first ground is essentially that the Court is barred from hearing the petition as per section 8 (2) of Cap 3 because the petitioner has adequate means of redress under the law. Ms. Alesia Mbuya, learned Principal State Attorney combined her submissions with the second ground equally premised on s8 (2) of Cap 3 which faults the petition for being frivolous and vexatious. The essence of the learned Principal State Attorney's submissions on ground two is that the petitioner's complaints in the petition amplified by the affidavit are incongruent with sections 10 (1) and (2) of the National Elections Act, Cap 343 [R.E 2015] on the one hand but also section 9 of the National Elections Act Cap 343 [R.E 2010] cited in the originating summons does not exist in the statute book having been repealed by the National Elections (Amendment) Act, No. 6 of 1992.

From the foregoing, the learned Principal State Attorney submits that the petition lacks basis to quality it to be determined by this Court as required by section 8 (1) read together with 4 of Cap 3. To fortify her submission, the learned Principal State Attorney drew the Court's attention to a decision of this Court in **John Paul Mhozya V. The Registered Trustees of Chama Cha Mapinduzi and the Attorney General,** Civil Case No. 6 of 2010 (unreported) in which the Court found the petition wanting on account of non-citation of a specific provision under Cap 3 and for having been preferred under an inapplicable law. Similarly, the Court was referred to **Athuman Kungubaya 482 Others V. Presidential Parastatal Sector Reform Commission Tanzania Telecommunications Co. Ltd,** CAT Civil Appeal No. 56 of 2006 (unreported) in which the Court of Appeal upheld a decision of this Court which found an appeal before it incompetent because the Appellants

had no statutory right of appeal from the defunct Industrial Court of Tanzania to this Court.

With regard to availability of adequate means of redress, the learned Principal State Attorney anchored her argument on **Elizabeth Stephen & Another V. Attorney General** [2006] TLR 404 which discussed the impact of section 8 (2) of Cap 3 that is to say; discouraging litigants from bringing petitions for challenging the constitutionality of statutory provisions except those dealing with matters of public importance. According to the learned Principal State Attorney, even assuming the grievances complained of in the petition and the affidavit fell under existing provisions in the statute book, the same have not met the threshold under section 8 (2) of Cap 3 in that they all fall into the category in which the petitioner has adequate means of redress by challenging the election results where there is evidence of noncompliance with any of the cited provisions. The learned Principal State Attorney argues further that apart from challenging election results for noncompliance with any of the provisions of the National Elections Act, there are other administrative safe guards for revoking the appointment of returning officers where the National Election Commission (NEC) is satisfied that any of the appointed returning officers is incapable of performing his duties,

According to Ms. Mbuya, the said safeguards are provided for under Regulation 12 of the National Elections (Presidential and Parliamentary Elections) Regulations 2015 (GN No. 307 of 2015). To cement her argument on this point, the learned Principal State Attorney called to her aid **Tanzania Cigarette Company Ltd V. The Fair Competition Commission and Attorney General,** High Court Misc. Civil Cause No. 31 of 2010 (unreported) in which this Court underscored the law under section 8 (2) of Cap 3 requiring litigants to exhaust other lawful available remedies before resorting to instituting constitutional petitions under the Cap 3. On the basis of the foregoing, the learned Principal State Attorney urged the Court to hold that the petition is misconceived for failing to satisfy the preconditions set out

under section 8 (2) of cap 3 that is to say, it is not merely vexatious or frivolous or that the petitioner has no other remedy under the relevant law.

In reply Ms. Fatma Karume, learned Advocate for the Respondent took the view that the preliminary objections are misconceived and ought to be dismissed. With regard to the specific sections forming the basis of the petitioner's ground of complaint, the learned Advocate made a historical legislative development of the National Elections Act, 1985 revealing several amendments of sections 9 and 10 in particular as a result of which reference to section 9 (1) of the National Elections Act, Cap 343 R.E 2010 instead of Cap 343 R.E 2009 was a mere typographical error attributed to the published revision which was never gazette by the Attorney General. It was the learned Advocate's submissions that section 9 and 10 under National Elections Act Cap 343 R.E 2009 were used when filing the petition was reproduced in the National Elections Act, Cap 343 R.E 2015 which meant that the said provisions still exist in the statute book having great impact on the petitioner's constitutional rights.

The learned Advocate argued that challenging the citations in the petition was inappropriate in so far as the Attorney General has similarly made reference to National Elections Act Cap 343 R.E 2010 instead of Cap 343 R.E 2015 he published on the authority of section 4 of the Law Revisions Act, Cap 4 R.E 2002 and so the objection should be dismissed. Otherwise, the learned Advocate conceded the erroneous reference to wrongly revised edition and prayed leave to amend the petition. To the extent of the sections unconsciously cited, he learned Advocate took the view that the mistakes in the reference to the section in the petition do not make the petition incompetent or frivolous for unlike the position in **John Paul Mhozya V. The Registered Trustees of CCM and the Attorney General** (supra) the complaint in the instant petition does not relate to citing wrong enabling provisions and so, if I understood her correctly the decision was not an authority for dismissing the petition.

The learned Advocate made an alternative submission on the same point contending that at any rate, the preliminary objection based on non-existence of the impugned provision did not qualify as an objection on a point of law discussed by Courts in several cases citing with approval **Mukisa Biscuits Manufacturing Co. Ltd V. West End Distributors Ltd** [1969] EA 696. On the other hand, the learned Advocate sought reliance from **Stanbic Bank Tanzania Ltd V. Kagera Sugar Limited,** Civil Application No. 57 of 2007 (unreported) for the proposition that should the Court find the provisions of law referred in the originating summons are incorrect, it should not strike out the petition but allow the petitioner to withdraw it with liberty to re-file to advance the principle of natural justice of right to be heard. With regard to adequate means of redress, the learned Advocate submitted that the sections forming the basis of the petitioner's complaint do not provide any redress to a party aggrieved by the said provisions which have no safe guards to ensure the independence of the Returning officers.

It is on the basis of the foregoing the learned Advocate distinguished **Stephen & Another V. Attorney General** (supra) as well as **Tanzania Cigarette Co. Ltd V. The Fair competition Commission & Attorney General (supra)** for being inapplicable to the instant petition in which the National Elections Act does not provide for adequate means of redress when the constitutionality of the specific provisions are being questioned. In the alternative, the learned Advocate argued that the existence of alternative means of redress was a matter of evidence which cannot be determined without looking at some evidence on the authority of **Mukisa Biscuits Manufacturing Company Ltd V. West End Distributors Ltd** (supra) and so the same should be dismissed.

Submitting in rejoinder the learned Principal State Attorney reiterated her arguments in chief and added; One, since the National Elections Act was revised vide Government Notice No. 329 of 2015 superseding all previous editions, the citation of Cap 343 R.E 2010 amounted to citing a non-existing law. Two, the

petitioner's Advocate has conceded citing wrong provisions of law and the only order the Court can make is to strike out the petition and not otherwise. Three, the National Elections Act, Cap 343 R.E 2015 provides adequate safeguards through petitions to nullify election results for any irregularity on any ground including disqualification of returning officers. On the other hand, independence of returning officers is guaranteed by section 74 (5) of cap 343 [R.E 2015]. Lastly, contrary to the petitioner's submission, the preliminary objection is premised on section of Cap 3 raising a point of law and the same was not disqualified by **Mukisa Biscuit's** case.

I find it instructive to deal with two arguments made in the alternative by Ms. Fatma Karume. The first is whether the preliminary objection qualifies to be as such in the light of the principle in Mukisa Biscuit's case and a host of cases decided from that principle. Luckily, there is no dispute on the application of the rule between counsel but whether the same applies to the points raised by the Respondents.

Having regard to the provisions of section 8 (2) of Cap 3 I am satisfied that the argument is less than convincing. I say so because the jurisdiction of this Court to determine petitions brought under cap 3 is circumscribed. The legislature in its imbued wisdom saw it fit to restrict the Court's jurisdiction to adjudicate petitions based on constitutional infringements in which a petitioner has adequate means of redress of those which are not vexatious or frivolous. By the legislature's wisdom, a determination on whether a petition is one which fits to be adjudicated by the Court was left to be dealt by a single judge and hence the enactment of section 10 (1) of cap 3.

It seems to me to be correct to say that logic and common sense would dictate that a determination whether a petition is one which the law has said it should not find its way to a panel of three judges pursuant to section 10 (1) of Cap 3, must be based on the facts in the petition itself and the reliefs sought. This is why the

Respondents have come in with preliminary objections arguing as they do that this is not a fit petition to be determined by the Court because not only the petitioner has adequate means of redress under the Nation Elections Act but also the petition is vexatious and frivolous. It follows thus that no amount of evidence will be required to determine the two points other than looking at the facts and the reliefs and so the rule in **Mukisa Biscuit's** case cannot be brought into in the like manner an ordinary Court will determine other preliminary objections say: Limitation of time or that the suit is res judicata. Those objections cannot be determined in an abstract but by reference to some facts to back up the argument. In the upshot, I hesitate to uphold the learned Advocate's argument and hold that the preliminary objections are not disqualified in any manner. Having so held, I will proceed to deal with the second alternative argument raised by Ms. Karume in the event I uphold the preliminary objections.

The learned Advocate has invited the Court to allow the petitioner to amend the petition instead of striking it out to uphold the principle of natural justice relying on **Stanbic Bank Tanzania Limited V. Kagera Sugar Limited,** Civil Application No. 57 of 2007 (unreported). That argument was made to cover all preliminary objections. The learned Advocate concedes that although the decisions she cited were made in applications where affidavits were held to be incompetent that rule should extend to other instances including incompetence of the petition on account of it being vexatious or frivolous or the petitioner being found to have adequate means of redress as per section 8 (2) of cap 3. The argument is, with respect an attractive one but legally untenable to the extent the learned Advocate invited me to follow the route taken in **Stanbic Bank Tanzania Limited V. Kagera Sugar Limited** (supra). In the first place, section 8 (2) of Cap 3 prohibits the Court from adjudicating petitions brought under section 4 thereof unless it is satisfied that the petitioner has no adequate means of redress or that the petition is not vexatious or frivolous. Once I am satisfied that the petitioner is not compliant with section 8 (2)

of Cap 3 I will have no option but to strike out the same as mandated by the law. On the other hand, the invitation to make good which is otherwise bad in the manner prayed cannot be entertained so as to preempt a preliminary objection raised by the Respondents. That position was underscored by the Court of Appeal in **The Board of Trustees of TANAPA V. Method Kimomogoro,** CAT (Arusha) Civil application No. 1 of 2005 (unreported) in which it frowned upon litigants and/or advocates raising preliminary objections over already existing objections or making applications with the purpose of rectifying defects complained of. In the circumstances, the invitation to rectify the defect (if any) can only mean circumventing the preliminary objections based on section 8 (2) of Cap 3 which cannot be entertained in the light of the decision referred to above. With the foregoing I now turn my attention to a discussion on the core of the preliminary objections.

It is common ground that the challenge by the learned Principal State Attorney is that the petition is bad in law and an abuse of the Court process for being frivolous and vexatious on the one hand and that the petitioner has adequate means of redress. The gravamen of the learned Principal State Attorneys submission is that he provisions alleged to be unconstitutional do not exist in the statute book. The sections forming the basis of the learned Principal State Attorney's arguments are section 9, 10 (1), 10 (2) and 10(3) of the National Election Act.

I have examined the submissions for and against the preliminary objections. There is no dispute any more that the sections complained of are either nonexistent in the statute book that is to say; the National Elections Act, Cap 343 [R.E 2015] or not supported by the grounds in the originating summons and the accompanying affidavit. As rightly submitted by the learned Principal State Attorney, section 9 was repealed by Act No. 6 of 1992 and so it cannot be a basis of any complaint in the petition. On the other hand, section 10(1), (2) and (3) cited in the chamber summons alleged to be violative of Articles 21 (1), (2) and 26(1) of the Constitution

The learned Advocate appears to plead ignorance of the existence of the National Elections Act, Cap 343 [R.E 2015] brought about by General Laws Revision Notice No. 339 of 2015 superseding all previous editions. It is the learned Advocate's submission that even the Attorney General himself the maker of GN No. 339 of 2015 made reference to a superseded edition of the same law and so he should not be allowed to benefit from his own errors. I must admit that the learned Advocate's argument is quite impressive but legally untenable. One, section 20 of the Interpretation of Laws Act, Cap 1 [R.E 2002] gives options in which a written law is to be cited one of which is by reference to the chapter number given to the Act in any revised edition of the laws (Section 20(1) (c) section 20 (3) of Cap 1 stipulates that citation of or reference to any written law shall in all cases be made according to the copy of such written law printed or purported to be printed by the Government printer. The position in the instant petition is, as seen earlier the petitioner's grievances are founded on a law which has long been superseded but worse still, the sections referred to have nothing to do with the basis of the petitioner's complaints adumbrated in the supporting affidavit. In my view that is what makes the petition frivolous in that what is complained of in the originating summons is not what the petitioner has intended to be the basis of his grievances. Whether the citation of the sections was out of an honest error could only be entertained in application for amendment before the Respondent challenged the

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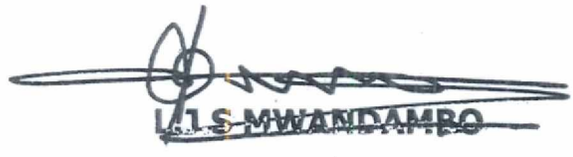
petition as they did. On the other hand if I were to consider allowing the petitioner to amend the petition I will not do so because the Attorney General himself made reference to a non-existing law because as the learned Advocate is aware, what is before me is not the Attorney General's petition but that of the petitioner. At any rate, it is trite that two wrongs do not make a right and so the Attorneys General's mistake cannot make the petitioner's error any better.

In the event I find merit in the Respondents' objection that the petition is frivolous to the extent indicated and I accordingly uphold it. Having so held I find it academic to discuss the rest of the grounds as the outcome on the point determined is sufficient to dispose of the petition. The petition is accordingly struck out. Each party shall bear his own costs. It is so ordered.

Dated at Dar es salaam this 4th day of July 2018



L.J.S MWANDAMBO

JUDGE

04/07/2018