

**IN THE HIGH COURT OF TANZANIA  
DODOMA DISTRICT REGISTRY  
AT DODOMA**

**MISC. CIVIL CAUSE NO. 22 OF 2019**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO  
APPLY FOR THE PREROGATIVE ORDERS OF CERTIORARI**

**AND**

**IN THE MATTER OF THE DECISION BY THE SPEAKER OF  
THE NATIONAL ASSEMBLY OF THE UNITED REPUBLIC OF  
TANZANIA OF UNSEATING THE APPLICANT FROM HIS  
POSITION AS A MEMBER OF THE NATIONAL ASSEMBLY**

**AND**

**IN THE MATTER OF THE DECISION BY THE SPEAKER OF  
THE NATIONAL ASSEMBLY OF THE UNITED REPUBLIC OF  
TANZANIA TO INFORM THE NATIONAL ELECTORAL  
COMMISSION THAT THE APPLICANT'S CONSTITUENCY OF  
ARUMERU EAST IS VACANT.**

**BETWEEN**

**JOSHUA SAMWEL NASSARI.....APPLICANT**

**VERSUS**

**THE SPEAKER OF THE NATIONAL  
ASSEMBLY OF THE UNITED REPUBLIC OF  
TANZANIA.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

### **RULING**

**Date of RULING- 29/03/2019**

**Mansoor, J:**

This is an application made ex parte by Hon. Joshua Samwel Nassari "the Applicant" for Leave to file Judicial Review. The Application was made under section 18 (1) and 19 (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap 310 R: E 2002 and Rule 5 (1) and 5 (2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014, G.N no. 324 of 2014 for the following orders:-

- a) That this Honorable Court be pleased to grant Leave to the Applicant herein to file an application for Certiorari to quash and set aside the decision of the Speaker of the

National Assembly of the United Republic of Tanzania to unseat the Applicant as a Member of the National Assembly for Arumeru East Constituency.

The Applicant prayed for costs and any other orders that this court may deem just and fit to grant.

The application was supported by a statement of the Applicant dated 18<sup>th</sup> March, 2019 and a Verifying Affidavit sworn by the Applicant on 17<sup>th</sup> March, 2019.

Rules 5 (2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014 requires that the application made *ex parte* be determined within 14 days from the date it was filed in court.

The Court however, did not determine the application *ex parte*, and allowed the respondents to file counter affidavit and statements in reply, and ordered for hearing inter-parties before the grant of leave.

The case of the Applicant is set out in both the Statement of Facts and Verifying Affidavit. The Applicant herein is the elected Member of Parliament representing Arumeru East Constituency, for Chama Cha Demokrasia na Maendeleo "CHADEMA". It is stated in the affidavit filed by Mr. Pius Thaddeus Mboya, the Acting Director of Legal Services Department in the office of the National Assembly of Tanzania that the Applicant did not attend the 12<sup>th</sup> Meeting of the National Assembly scheduled from 4<sup>th</sup> September to 14<sup>th</sup> September 2018. The Applicant also did not attend the 13<sup>th</sup> Meeting of the National Assembly scheduled on 6<sup>th</sup> November to 16<sup>th</sup> November 2018, and he did not attend the 14<sup>th</sup> Meeting of the National Assembly which was scheduled from 29<sup>th</sup> January 2019 till 9<sup>th</sup> February, 2019. That the Applicant never requested for permission neither was he issued with the written permission by the Speaker excusing him from attending the National Assembly Meetings.

On the other hand, the Applicant in his affidavit claims that he participated in the sittings of the Standing Committee

of Land, Natural Resources and Tourism of the 12<sup>th</sup> session in August, 2018 (see paragraph 3 of the Applicant's affidavit). He also avers in paragraph 4 of his affidavit that he did not attend the 13<sup>th</sup> Meeting held on 6<sup>th</sup> November to 16<sup>th</sup> November 2018 as he travelled to the United States of America to attend to his sick wife who was admitted for medical treatment due to pregnancy complications. At paragraph 5 of his affidavit, the Applicant states that on 27<sup>th</sup> January 2019, his wife delivered a baby, and he was still at the United States of America, and so he did not attend the 14<sup>th</sup> Meeting of the National Assembly which commenced on 29<sup>th</sup> January 2019. At paragraph 6 of the applicant's affidavit, the applicant avers that on 31<sup>st</sup> January 2019, he wrote a letter to the Speaker of the National Assembly, the 1<sup>st</sup> Respondent herein notifying him that he could not attend the 14<sup>th</sup> Meeting as he was nursing his wife. He said the Speaker did not respond. He annexed this letter to his affidavit as Annexure HK3. He then saw a Press Release on 14<sup>th</sup> March 2019 titled "TAARIFA KWA UMMA" (annexure HK 4 to his affidavit) that he was no longer a Member of the National

Assembly for Arumeru East Constituency and that the Electoral Commission was accordingly informed of the vacancy. The Applicant seeks to challenge the decision of the Speaker of the National Assembly to unseat him from being a Member of the National Assembly as he was not given an opportunity to be heard.

The Application was opposed by way of Replying Affidavit sworn by Mr. Pius Thadeus Mboya, the Acting Director of Legal Services Department in the office of the National Assembly on 26<sup>th</sup> March, 2019 and joint Reply statements by both the respondents. Ms. Alesia Mbuya, the Principal State Attorney in the office of the Solicitor General filed a Notice of Preliminary Objections raising objections against the application. She raised three objections that:

1. The application is incompetent and unmaintainable as it falls short of the prerequisite conditions for seeking leave for judicial review;

2. That the application is incompetent and bad in law for contravening the provisions of Section 7 of the Notaries Public and Commissioner for Oaths Act, Cap 12 R:E 2002;
3. That, the application is misconceived, incompetent and bad in law as the Applicant has no cause of action against the respondents.

Miss Alesia Mbuya, the Principal State Attorney who was being assisted by Mr. Masunga Kamihanda, the State Attorney and Mr. Pius Mboya also the Principal State Attorney argued extensively on all the three objections.

Arguing on the 2<sup>nd</sup> limb of objection on violation of Section 7 of the Notaries Public and Commissioner for Oaths, the Learned State Attorneys for the Respondents pointed out that while the Applicant is represented by three Advocates i.e. Advocate Hekima Mwasipu, Advocate Jonathan Wilfred Mndeme and Advocate Fred Kalonga as shown in the Coram of 20 March 2019, the affidavit verifying the statement signed by the Applicant herein and the Commissioner for Oaths who

had administered the oath of the applicant in that affidavit was Advocate Jonathan Wilfred Mndeme. The Commissioner for Oaths, Advocate Jonathan Wilfred Mndeme did not appear in Court on 27<sup>th</sup> March 2019 when the preliminary objections were being heard and he did not indicate to court as to why he did not appear or whether or not he has withdrawn from representing the applicant. It is clear from the Affidavit of the Applicant on record that the Commissioner for Oaths, Mr. Jonathan Wilfred Mndeme had administered the oath regard to the affidavit verifying the Statement on 17<sup>th</sup> March 2019; On the bedrock of provisions of Notaries Public and Commissioner for Oaths Act, Cap 12 R:E 2002, it is urged by the learned State Attorneys that the persons who have the authority under Cap 12 are the persons empowered to administer oath or receive solemn affirmation for the affidavits used in the proceeding before the Court and are banned to represent the party in such proceedings. Learned State Attorneys has commended to Court the decision in the case of **Calico Textile Industries Limited vs. Zenon Investment Ltd & 2**



Others , Misc. Civil Cause No. 10 of 1998 (unreported ) in which Judge Mackanja (as he then was) discussed the restrictions imposed by Notaries Public and Commissioner for Oaths Ordinance, Cap 12 to exercise the powers of a Commissioner for Oaths and at the same time representing a party in the same proceedings, and the affidavit which was notarized by Advocate Mndeme who also appeared as the counsel for the Applicant rendered that affidavit defective. The learned State Attorneys urged the Court to strike out the affidavit and the entire application for being defective. Apart from the above, learned State Attorneys have invited the Court's attention to the decision rendered by the Court of Appeal of Tanzania in the case of **Darusi Gidahosi Vs. R Criminal Application No. 1 of 2011** (unreported) where the affidavit which was in violation of section 8 of the Notaries Public and Commissioner for Oaths Act, Cap 12 RE 2002 as amended by section 47 of the Written Laws (Miscellaneous Amendments) Act No. 2 of 2016 was held to be incurably defective, thus struck out, and the Court of Appeal also struck out the application as the application was

not supported by any affidavit. It is canvassed by the State Attorneys that the view expressed by the High Court in **Calico Textile Case** (supra) and **Darusi Gidahosi Case** (supra) runs counter to the present case, and Section 7 of the Notaries and Commissioner for Oaths Act in unequivocal and categorical terms banned the Commissioner for Oaths who administered the oath or received solemn affirmation in the case of affidavit for any purpose, or for purposes of the proceedings in the court to represent a party in the proceedings. This section provide as follows:

“No Commissioner for Oaths shall exercise any of his powers as a commissioner for oaths in any proceedings or matter in which he is advocate to the parties to proceedings or matter in which he is interested.”

Learned Counsels for the Applicant Mr. Hekima Mwasipu and Mr. Fred Kalonga vehemently countered the arguments presented by the State Attorneys citing a decision in the case of **David W.L Read and Others vs. the National Agricultural**

**Corporation and others, Civil Case No. 51 of 1997**, (unreported) at page 4 in which Hon Judge E HK Rutakangwa while quoting the words of Hon Mroso J in **Shahin Limited**, he said:

"I understand the ban in section 7 cited above refer to a situation in which after a proceeding of a matter is before the court, an advocate exercise his powers of Commissioner for Oaths knowing that he is an advocate for a party in the proceedings and (sic) matter. The section does not impose a ban on an advocate in respect of all proceedings, past present and future, in which he was or will be an advocate..."

Thus Leaned counsels for the Applicant submitted that the Affidavit of the Applicant was attested on 17<sup>th</sup> March 2019 and the application was filed in Court on 18<sup>th</sup> March 2019, and section 7 does not ban Advocate Mndeme in the present proceedings. Advocate Kalonga for the Applicant distinguished the facts of Calico Textile case stating that in that case the affidavit of Mr. Nimrod Mkono who was an Advocate

for a party in the proceedings was found defective since it was attested by Mrs. Ngalomba who was an employee of TDFL, and that TDFL had interest in the case.

The affidavit of the Applicant in this case was sworn to by the Applicant Mr. Joshua Samwel Nassari and notarized by Advocate Mndeme as the Commissioner for Oaths for the purpose of the present proceeding before the High Court. The Commissioner for Oaths is entitled to administer the oath and get affidavits sworn for the purpose of filing before the High Court. I agree that an Advocate as the Commissioner for Oaths may administer oath or affirmation in respect of any affidavit to be used in any judicial proceedings, that is, any proceeding before any Court but once he acts as the Commissioner for Oaths in the proceedings he cannot turn around and represent the same party in the same proceedings in which he attested the affidavit since the affidavit is not a mere typed format, to be signed and attested as an empty formality. An affidavit is a solemn and voluntary declaration or

statement of facts in writing, relating to matters in question or at issue, and sworn or affirmed and signed by the deponent before a person or officer duly authorized to administer such oath or affirmation. An affidavit constitutes evidence, where so provided or agreed. In the present case the affidavit of the Applicant forms part of the present proceedings, the affidavits of the Applicant is a substitute for oral evidence of the Applicant. The Court is required to determine this present application and make orders, acting on the affidavit of the applicant which was attested by Advocate Mndeme. The decision in the case of **David W L Read** (supra) cited by the Learned Advocates for the Applicant stated that Section 7 does not impose a ban on an advocate in respect of all proceedings past, present and future, in which he will be or he was an advocate. The affidavit in which Advocate Mndeme attested will be used as evidence in the present application, and so Advocate Mndeme might be required by the Court to appear as a witness as the affidavit he witnessed constitutes the evidence on which the application is founded. I agree with

the holding of the Case of **Calico Textile** that section 7 creates a ban to the advocate who acted as the Commissioner for Oaths to represent the applicant in the proceedings. Thus as held in the case of **Calico Textile**, the affidavit which violates the provisions of section 7 is held to be fatally defective and nothing can be done that will save it. Similarly in this case, the affidavit of the Applicant which is violative of section 7 of the Notaries Public and Commissioner for Oaths Act, Cap 12 R: E 2002, this means that the application at hand was not verified by the Affidavit of the Applicant, and this again is a violation of Rule 5(2) (d) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap 310, which requires an application for leave to be accompanied by affidavits verifying the facts relied on. The absence of an affidavit verifying the facts stated in the statement renders the application incomplete, hence incompetent. The second objection raised by the State Attorneys representing the respondents is therefore upheld. I would have stricken out the application on this objection only as the application is

defective, however find it incumbent to determine the merits of the objections raised as they are important in the determination of this application.

Regarding the 3<sup>rd</sup> objection that the Applicant has no cause of action against the respondents, this Court holds that the 1<sup>st</sup> respondent, the Speaker of the National Assembly of Tanzania is sued for issuing a decision to unseat the Applicant as a Member of the National Assembly for Arumeru East Constituency. The State Attorney argues that there was no decision made by the Speaker to warrant the interference of the Court by way of Judicial Review and that Article 71 (1) (c) of the constitution provides that when members are elected or nominated, they are expected to take their seats in the meetings of the Parliament and attend its proceedings unless they are constrained to remain absent due to unavoidable reasons. The Constitution provides that if for a period of three consecutive meetings a Member of Parliament is without permission of the Speaker absent from three consecutive

meetings thereof, the Speaker may declare his seat vacant.

This Article reads:

Article 71.<sup>o</sup>-(1) A Member of Parliament shall cease to be Member of Parliament and shall vacate his seat in the National Assembly upon the occurrence of any of the following matters:

(a) .....

(b) .....

(c) Where a Member of Parliament fails to attend three consecutive meetings of the National Assembly without the permission of the Speaker;

Again Order 146 (2) of the Parliamentary Standing Order states as follows:



"146 (1) kuhudhuria vikao vya Bunge na kamati zake ni wajibu wa kwanza wa kila mbunge.

(2) Mbunge yeyote atakayeshindwa kuhudhuria Mikutano ya Bunge mitatu mfululizo bila ruhusa ya Spika iliyotolewa kwa maandishi, atapoteza ubunge wake kwa mujibu wa ibara ya 71 (1) (c) ya Katiba na Spika ataiarifu Tume ya Uchaguzi.

During the 12<sup>th</sup> Meeting of the National Assembly, 13<sup>th</sup> Meeting and 14<sup>th</sup> Meeting of the National Assembly, the applicant was abroad nursing his wife. He said he had informed the Speaker via an email of 31<sup>st</sup> March 2019, this is when the 3<sup>rd</sup> Meeting was being held, and he received no response from the office of the Speaker. The Applicant said he also did not receive any warning from the Speaker for his failure to attend half the days of the 12<sup>th</sup> meeting, or 13<sup>th</sup> meeting or 14<sup>th</sup> meeting, and this is a requirement under Rule 146 (3) of the Standing Orders

146 (3) Mbunge atakapokosa kuhudhuria nusu ya vikao vya  
Mkutano mmoja bila ya sababu ya msingi atapewa  
onyo

On coming back he was shocked to see Taarifa Kwa Umma dated 14<sup>th</sup> March 2019 which states that the Speaker have notified Hon Judge Semistocles Kaijage, the Chairman of the National Election Commission that the seat for Arumeru East Constituency is vacant. The State Attorneys argued that the Speaker was simply complying with the provisions of Order 146 (2) of the Parliamentary Standing Orders by informing the Chairman of the National Election Commission that the seat for Arumeru Constituency is vacant since the Applicant herein has been disqualified under Article 71 (1) (c) of the Constitution of the United Republic of Tanzania. The State Attorneys argues that the Speaker has not made any decision worth being challenged by the High Court by way of Judicial Review. It is undisputed facts that the Applicant did not submit an application for leave of absence for the 12<sup>th</sup> Meeting held in

September 2018 or the 13<sup>th</sup> Meeting held in November 2019, and that he submitted the application for leave of absence on 31<sup>st</sup> January 2019 when the 14<sup>th</sup> Meeting was on going and that he had automatically lost his membership of the Parliament under Article 71 (1) (c) of the Constitution of the United Republic of Tanzania. The Applicant states that the Public Notice "Taarifa kwa Umma" is the decision made by the Speaker and that decision can be challenged by the High Court by way of certiorari. In fact the Applicant filed this present application seeking to quash annexure HK4 to his affidavit which is a communication by the office of the Speaker to the Public.

In the application, and in the statement of the applicant, the fact that he did not attend the three consecutive meetings of the parliament is not disputed. The case of the applicant is that he had sought for permission for his absence and that he had in fact given a written request for leave of absence via email dated 31<sup>st</sup> January 2019. The first respondent's counter

states that there was no permission sought or communication by applicant prior to the meetings.

In fact, the most substantial point raised and argued by the State Attorneys is that, the disqualification of the applicant as a Member of Parliament is not the decision of the Speaker but an automatic operation of the supreme law of the land, the constitution, in so far as to the constitutional validity of Article 71 (1) (c) of the Constitution, the Applicant has come to the wrong forum suing a party who he has no cause of action against. That the Speaker was simply complying with the provisions of Order 146 (2) of the Parliamentary Standing Orders as well as Section 37 (3) of the National Elections Act.

The intention of the Constitution or in fact the legislature is that the elected members should be responsible to the Parliament. The Parliamentary Meetings are prescribed by the Constitution and the Parliamentary Standing Orders as scheduled with a provision for obtaining permission for absence. Article 71 of the Constitution deals with the

disqualification of members of Parliament, Sub-Clause (2) of Article 71 of the Constitution states that no person can be the member of Parliament if for a period of three consecutive meetings a member of Parliament is without permission of the Speaker absent from all meetings thereof, that the Speaker is not required to make any decision and disqualification takes place automatically since a member shall cease to hold the office on absenting himself for three consecutive meetings. There is no opportunity to a member to explain his or her absence before the disqualification takes place. In other words there is no pre-decision notice or hearing or consideration by the Speaker or the Parliament for disqualification.

Since the Speaker did not make any decision to disqualify the Applicant from being a member of Parliament and since his disqualification was automatic and in accordance with the provisions of Article 71 (1) (c ) of the Constitution of the United Republic of Tanzania, the Applicant has no cause of action against either the Speaker or the Attorney General as they

made no decision at all to disqualify him as a member of parliament but his disqualification was a result of the provision of the constitution. As to whether the applicant wants to test the validity of the provisions of Article 71 (1) (c) of the Constitution on the ground of reasonableness or arbitrariness or otherwise since there is automatic cessation of membership under that provision and that his disqualification is handed down to the member who has been disqualified without a notice or opportunity to be heard or a decision, the challenge to the provision of the Constitution whether the provision is unreasonable and arbitrary or that the provision is violative of principles of natural justice need to be dealt with by a proper forum. The applicant has no cause of action against the respondents and thus the 3<sup>rd</sup> limb of the preliminary objection is also upheld.

Regarding the first preliminary objection which states that the application is incompetent and unmaintainable as it falls short of the prerequisite conditions for seeking leave for judicial

review, I agree fully with the submissions of the State Attorneys who represented the respondents and the cases they referred to the Court. The gist of the application of the applicant is to challenge the decision of the Speaker to unseat him from his position as a Member of the National Assembly. The case **Hafidh Shamte and 4 others vs. the Director of Public Prosecution and 3 others, Miscellaneous Civil Cause No. 29 of 2018** (unreported), and the case of **Rehema Ally Kinyaka vs. Tanzania Institute of Accountancy, Miscellaneous Civil Application No. 21 of 2018** (unreported), referred to the Court by the State Attorneys in which it was held by the High Court of Tanzania that the application are rendered incompetent for want of a decision as the decision sought to be reviewed and quashed have not been attached to the application are relevant. The question to be determined is whether annexure HK4 annexed to the Applicant's affidavit is a decision by the Speaker of the National Assembly. HK4 is not a decision by the Speaker as this is only a public announcement or notice given by the Kitengo cha Mawasiliano Na uhusinao WA kimataifa in

the office of the Parliament. I do not see annexure HK4 as the decision of the Speaker worth to be challenged by way of judicial Review. Thus, the prerequisite for filing an application for leave to file an application for judicial review have not been met, thus making the application incompetent and unmaintainable. This objection is as well upheld.

On the course of arguing the preliminary objections the court observed that, if the applicant insists that annexure HK4 is the decision by the Speaker, then, is it not proper for the Applicant to file the present application without first exhausting the remedies available under the parliamentary standing orders. The State Attorneys insisted that there was no decision made by the Speaker, and if the Court will decide that the Public Notice issued " Taarifa kwa umma" is the decision by the Speaker then the Application is premature as the Applicant has failed to comply with what is stipulated under Order 5 Rule 4 of the Parliamentary Standing Orders reading as follows:



"Mbunge yeyote ambaye hajaridhika na uamuzi wa Spika, anaweza kuwasilisha sababu za kutoridhika kwake kwa katibu wa bunge ambaye atawasilisha malalamiko yake kwa Spika."

The State Attorneys argues therefore that the Applicant has initiated the judicial review prematurely. He ought to have exhausted the remedies available under Order 5 Rule 4 of the National Assembly Standing Orders before coming to Court.

I am in line with the arguments advanced by the State Attorneys that the Speaker did not make any decision, and if he did that decision was not brought to the attention of the Court, and Annexure HK 4 was simply a public announcement and not the decision by the Speaker. In any case if the Speaker has made any decision, which decision did not form part of the records, then the Applicant ought to have exhausted the remedies available in the Parliamentary Standing Orders before approaching the Court. This was discussed in a number of cases including the case **Parin A A**

**Jaffer and another vs. Abdularasul Ahmed Jaffer and 2 others,**  
**1996 TLR 110** at page 116 was referred. In this case, the Court said:

".....where the law provides extra judicial machinery alongside a judicial one for resolving a certain cause, the extra judicial machinery should, in general, be exhausted before recourse is made to the judicial process."

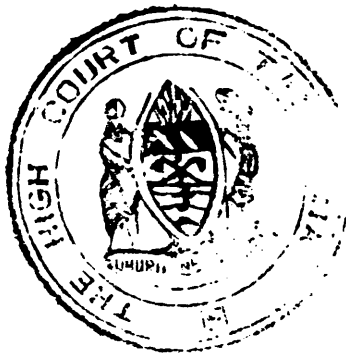
The argument by the Counsels for the Applicant that the applicant has no remedies available under Parliamentary Standing Order 5 Rule 4, as Rule 4 of Order 5 deals with enforcement<sup>o</sup> of the Orders "Kanuni", while the Meetings are ongoing not the enforcement of law or the Standing Orders, this argument is misplaced . They said Order 5 cannot be made to apply on the decisions of the Speaker of the National Assembly made under Order 146 (2) of the Standing Orders. The Counsels for the Applicant submitted that the provisions of Order 5 Rule 4 of the Standing Committee does not apply in the present case, and the only remedy available is to quash

the decision of the 1<sup>st</sup> Respondent and it is only this court that can give the applicant the remedies sought by way of judicial review.

I agree that, if there was any decision of the Speaker made of unseating the applicant as alleged, which decision was not brought to the attention of the Court, then the present Application is in violation of Order 5(4) of the Standing Orders since the Applicant were supposed to exhaust the remedies available under Order 5(4) of the Standing Orders. The Applicant should have presented his complaints to the Clerk of the National Assembly, who would have forwarded his complaints or grievances to the Speaker. If that was the decision of the Speaker made in the course of his capacity as the Speaker of the National Assembly, then the Applicant filed the present Application in violation of the Standing Orders (Order 5(4), and have disrupted the procedures available and applicable within the National Assembly, thus the present application have been filed prematurely.

Based on the above, all the preliminary objections raised  
by the respondents are upheld, hence the application is  
incompetent and unmaintainable, and it is dismissed, with  
costs.

DATED at DODOMA this 29<sup>th</sup> day of March, 2019.



  
**L. MANSOOR,**

**JUDGE**

**29<sup>TH</sup> MARCH, 2019**

**Date: 29/03/2019**

Coram: Hon. L. Mansoor, J.

Applicant : Fred Kalonga, Advocate,

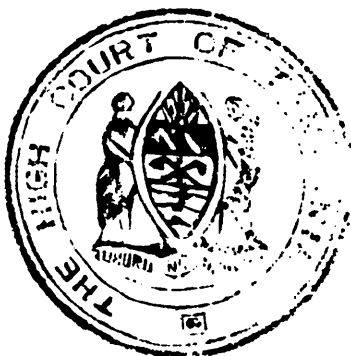
Applicant present.

1<sup>st</sup> Respondent } Alesia Mbuya, Principal State Attorney and  
2<sup>nd</sup> Respondent } Masunga Kamihanda, State Attorney ,

Pius Mboya Principal State Attorney .

RMA- R.A. Mahmud.

**Court:** Ruling delivered in the presence of the above coram.



  
**L. Mansoor**

**JUDGE**

**29/03/2019**