

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

**MISC. CIVIL CAUSE NO. 24 OF 2019**

**ONESMO OLENGURUMWA.....PETITIONER**

**VERSUS**

**MINISTER OF STATE IN THE PRESIDENT'S  
OFFICE, REGIONAL ADMINISTRATION AND  
LOCAL GOVERNMENT.....1<sup>st</sup> RESPONDENT**

**ATTORNEY GENERAL.....2<sup>nd</sup> RESPONDENT**

**RULING**

*28/10/2019 -19/11/2019*

**Masoud, J.**

This petition was filed by one, Onesmo Olungurumwa. It questions the constitutionality of sections 39(1)&(2)(b) of the Local Government Elections Act, cap. 292 RE 2002, regulations 14(b) of GN No. 371 of 2019, regulation 15(b) of GN No. 372 of 2019, regulation 15(b) of GN No. 373 of 2019, and regulation 15(b) of 374, made under the Local Government Elections Act (supra). The impugned provisions are questioned against the provisions of article 12(2), 13(2), 13(4), 21(1) and 29(1) of the Constitution of the United Republic of Tanzania as amended from time to time.

Two preliminary points of objection were raised and argued by the respondents against the petition. The first point was about the defect in the petitioner's affidavit for reasons of violation of Order XIX, rule 3 of the Civil Procedure Code cap. 33 and containing unverified paragraphs. And the second point was about the petition being incompetent for contravening section 6(d) & (e) of the Basic Rights and Duties Enforcement Act cap. 3 (BRADEA). The above points reflect adjustments made by the counsel for the respondents to the list of preliminary points of objection shortly before the commencement of the hearing of the objection.

During the hearing of the above points of objection, the petitioner was represented by Mr John Seka, learned Advocate. On the other hand, the respondents were represented by Mr P. Lukosi, Principal State Attorney, who was assisted by Mr L. Malunde, Principal State Attorney, Ms P. Mndendemi, State Attorney, Mr. Y. Marco, State Attorney, and Mr. S. Kalokola, State Attorney.

Extensive submissions supported by authorities were made for and against the points of objection. The submissions are on the record. I will not labour on reproducing them here, save to the extent necessary in disposing of the issues as to, firstly, whether the affidavit is indeed

incurably defective and hence renders the petition incompetent; and secondly, whether the petition violated section 6(d)&(e) of the BRADEA and hence incompetent.

In respect of the first issue, it was said and quickly conceded that the paragraph 5 and 6 of the petitioner's affidavit were not verified, it was also said that paragraph 7 and 8 contained arguments and conclusions, and that paragraph 3 contained falsehood which makes the affidavit incurably defective and hence the petition having no legs to stand on. The respondents' counsel urged the court to expunge the relevant paragraphs and because the remaining paragraphs would not suffice to sustain the petition and because of the inherent falsehood, the petition should be struck out for being incompetent.

On the respective arguments, reliance was made by the respondents on **Uganda v Commissioner of Prisons ex parte Matovu** [1966] E.A 514; **Salima Vuai Fom v Registrar of Cooperative Societies and Three others** [1995] TLR 75; **Ignazio Messina vs Willow Investments SPRL**, Civil Application No. 21 of 2001; and **Kidodi Sugar Estate and 5 Others vs Tanga Petroleum Co. Ltd**, Civil Application No. 110 of 2009; **Mandorosi Village Council and Others vs Tanzania Breweries Ltd and Others**, Civil Appeal No. 66 of 2017;

and **Martin Kumalija and 117 Others vs Iron and Steel Ltd**, Civil Application No. 70/18 of 2018. The authorities were all duly considered by this court in relation to the relevant arguments that were advanced.

Arguing on the second issue, the court was told that the petition is couched in a manner that disregards the mandatory requirements of section 6(d)&(e) of the BRADEA. Compliance with the relevant provisions was said to be necessary as it saves to inform the court and respondents the basic rights which are alleged to have been violated and the facts in relation to the alleged violation. The court was urged to find that the consequence of the failure to comply with the above requirements makes the petition incurably defective and ought therefore to be struck out. There was no case law which was cited in support.

On his party, the counsel for the petitioner told the court that the current development in the case law inspired by the overriding objective principle would allow the court to permit an affidavit which has not been properly verified, as is the case with the petitioner's affidavit whose paragraph 5 and 6 are not verified, to be amended. The recent decision of the CAT in **Sanyou Service Station Ltd vs BP Tanzania Ltd**, Civil Application No. 185/17 of 2018 was cited to support this position.

Accordingly, the learned counsel for the petitioner invited the court to allow amendment to be effected to the affidavit.

The remaining points on the defects of the affidavit for reasons of being argumentative and conclusive and for containing falsehood were respectively disputed and the court was invited to closely look at the relevant paragraphs and resolve on whether they indeed contained arguments and conclusions. Replying in respect of the respondent's submission that the petitioner's affidavit is defective as its paragraph 3 contained falsehood, it was strongly argued that the point was a matter of fact and evidence which could best be disposed of at the hearing of the matter on merit. And further that even if the paragraph contained falsehood, the same would only have the effect of lowering the weight of the evidence.

In so far as the argument on the alleged failure of the petition to comply with section 6(d) and (e) of the BRADEA is concerned, the learned counsel for the respondent invited the court to see for itself how the petition and its supporting affidavit reflected the contents required by the provisions of section 6 of the BRADEA. A special emphasis was made that the gist of the provisions of section 6 of the BRADEA was to set out

contents that any petition must contain as opposed to prescribing a format which a litigant must religiously conform to.

I was specifically told that section 6(e) of the BRADEA which relates to a statement of acts to be relied on was complied with by the affidavit of the petitioner which accompanies the petition. In his view, the import of the affidavit is that it provides facts relied on in the petition.

On my part, I have considered the submissions on the preliminary points raised in relation to the relevant provisions of law and the decided cases of the CAT referred to me. I will tackle the issues arising from such submissions in the following manner.

In relation to the allegation as to the failure of the petition to conform to section 6(d) &(e) of the BRADEA, it is worthwhile to note that the general scheme of the BRADEA and the Basic Rights and Duties Enforcement Rules, 2014 (the Rules) made thereunder does not provide a specific format that a petitioner must conform to when petitioning the court against any allegation of constitutional violation. It is prudent to say that had it been important to prescribe the format which must be religiously adopted in any petition, the same would have been clearly prescribed as a schedule to the BRADEA or to the Rules made under the

BRADEA. Examples of such formats being provided as FORM A etc abound. I need not mention them here.

In the absence of such format, it is only section 6 of the BRADEA that one has to have regard to when drafting his petition. Of significance is that the petition so drafted must set out the name and address of the petitioner; the name and address of each person against whom redress is sought; the grounds upon which redress is sought; the specific sections in Part III of Chapter One of the Constitution which are the basis of the petition; particulars of the facts, but not the evidence to prove such facts, relied on; and the nature of the redress sought, as set out in the above provision.

The provisions of section 6(d) & ( e) of the BRADEA complained about by the respondents that they were not complied with in the present petition cater for the contents relating to the provisions of the Constitution alleged to be violated and contents relating to facts relied on in the petition. The question is whether the petition runs short of such contents. I have had to examine the petition in the light of section 6(d) & (e) of the BRADEA and rule 2(2) of the Rules which relates to demands of attaining substantive justice and realizing the basic rights and duties contained in the Constitution.

It is clear to me that the provisions of the Constitution allegedly violated by the impugned provisions are apparent on the petition. They are apparent from the first to the second page where the petitioner set out constitutional questions to be determined by the court. They are also evident in the second page of the petition in the section where the petitioner set out the grounds on the basis of which the petition is made so is at page three and four respectively on the declarations and orders sought. On this aspect, it is my firm view that the petition took into account the provision of section 6(d) of the BRADEA.

Moving to section 6(e) of the BRADEA whilst mindful of the holistic view of the petition, it did not take me long to grasp the facts forming the basis of the petitioner's quest for the constitutionality of the impugned provisions. Unless one expected an exclusive and clearly labelled part on the alleged facts which should not necessarily be the case in my view, I could easily grasp that the factual basis of the questions is the alleged discrimination on the basis of age. The other factual basis I could easily grasp is the allegation of absence of compliance exemptions, and objective and reasonable criteria justifying the discrimination.

I would say the style taken by the petitioner in drafting the petition by way of originating summons is such that the facts forming the basis of the matter are envisaged in every part of the petition although there is clearly no single part exclusively reserved for and styled as statement of facts relied upon as the respondents would have expected. As long as the facts are to me apparent in the petition, I cannot fault the petition simply because it did not lump together the facts under a specific title styled as statement of facts relied on by the petitioner. I would as such dismiss the point on non-compliance with section 6(d)&(e) of the BRADEA for it is devoid of merit.

As to the contents of paragraphs 7 and 8 which were alleged to contain arguments and conclusions, the argument advanced in support of the point did not demonstrate in detail and clear terms how and why I should find that the paragraphs contain arguments and conclusions. Neither was I told why the paragraphs alleged to contain conclusions should be truck out for just such reason if indeed they contained conclusions. It was seemingly left to the court, I would say, to explore and make appropriate finding in favour of the respondents' objection. My thorough consideration of the paragraphs left me with no doubt that they are mere statements that are expected from any petitioner in a

constitutional petition where some provisions of law are challenged. With respect, I find no basis upon which to find merit on the point raised against the affidavit. I accordingly dismiss it.

The petitioner's counsel conceded right away that paragraph 5 and 6 were indeed not verified. However, the learned counsel invited the court to allow the petitioner to amend the affidavit. He relied on the recent position of law reflected in **Sanyou Service Station Ltd vs BP Tanzania Ltd** (supra) which is consistent with the principle of overriding objective.

Having considered the relevant provisions in the light of the affidavit as a whole, I was convinced that it is prudent in the circumstances to expunge the relevant paragraphs as opposed to ordering amendment as prayed by the counsel for the petitioner. I was after all convinced that even when the relevant paragraphs are expunged, the remaining paragraphs in the affidavit would suffice to support the petition.

On the argument that paragraph three of the petitioner's affidavit contained falsehood which rendered the whole affidavit incurably defective and hence the petition having no legs to stand on, I was not convinced that the incorrect citation of the statutes in the relevant

paragraphs of the affidavit constituted the type of falsehood envisioned in **Ignazio Messina** (supra) and **Kidodi Sugar Estate and Five Others** (supra) cited by the counsel for the respondent which goes to the root of the matter. In my view, the above cases are distinguishable from the circumstances of present petition.

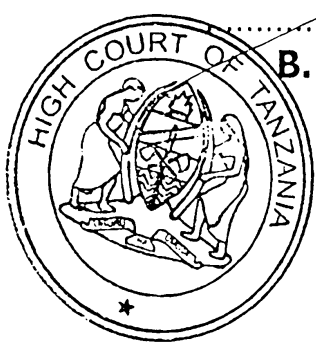
The foregoing notwithstanding, I can also see a point in the argument of the petitioner's counsel that the nature of the objection at issue raises a question of fact which can best be dealt with at the hearing of the matter on merit. This would equally suffice in my considered opinion to decline allowing the objection on the alleged falsehood at this stage.

On the other hand, my understanding of the arguments of the counsel for the respondents on the alleged falsehood is that the respondents do not dispute the mandate that is vested by the law to the first respondent. Rather, the dispute is on the allegation of citation of incorrect pieces of legislation. All said on this point, I would in the circumstances, equally find against the respondents. This preliminary point equally fails.

In fine, I would as I hereby do so dismiss the preliminary points of objection for lack of merit, save for the first preliminary point which is

partly allowed with the only consequence of expunging the fifth and sixth paragraphs of the affidavit of the petitioner which were not verified. Each party would in the circumstance bears own costs. I order accordingly.

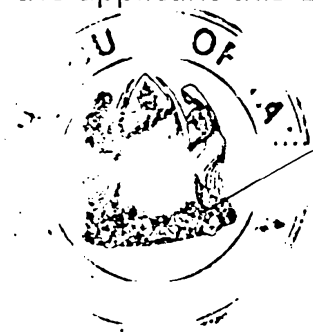
Dated at Dar es Salaam this 19<sup>th</sup> day of November 2019.



*gms*  
**B. S. Masoud**  
**JUDGE**

**Court:**

Ruling is hereby delivered in the presence of Mr V. Tango, PSA, assisted by Mr. L. Malunde, PSA, Mr S. Kalokola, SA, and Mr A. Kimia, SA for the respondents, and Ms Modesta Francis, Advocate holding Mr John Seka's brief for the applicant this 19/11/2019.



*gms*  
**B. S. Masoud**  
**JUDGE**  
**19/11/2019**