

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPLICATION NO.71 OF 2020

(Arising from Economic Case No. 43 of 2017 filed in the Resident Magistrate's Court of Dar Es Salaam at Kisutu)

Mohamed Yahaya Mohamed..... APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

RULING

Date of Last Order: 01.04.2020

Date of Ruling: 08.05.2020

Ebrahim, J:

This is an application for bail pending trial made under **Section 29(4) (d) and 36(1) of the Economic and Organised Crimes Control Act, Cap. 200 R.E 2002 (the Act)**. The applicant is praying for bail in respect of Economic Case No. 43 of 20117 pending at the Resident Magistrate's

Courtof Dar Es Salaam at Kisutu. The chamber application is supported by an affidavit of Mohamed Yahaya Mohamed @ Laizer, the applicant.

Brief background of this application as could be discerned from the appended affidavit and the charge sheet is that the applicant and five other accused persons who are not parties to this application have been arraigned at the Resident Magistrate's Court at Dar Es Salaam at Kisutu charged with two counts of unlawful possession of Government Trophies contrary to **section 86(1) and (2)(c) (iii) and Part 1 of the Schedule to the Wildlife Conservation Act, No. 5 of 2009 read together with paragraph 14 of the First Schedule to, and section 57(1) of the Economic and Organized Crime Control Act, Cap 200 RE 2002.**

It is alleged on the **1st count** that the applicant on 17th August 2017 at **Mbezi Beach area** within Kinondoni District, Dar Es Salaam region were found in possession of Government Trophies the property of the United Republic of Tanzania without permit from the Director of Wildlife, to wit 21 pieces of elephant tusks valued at USD 196,000/- (TZS 437,190,000/-). It is alleged further on the **second count** that on the same date i.e. 17th August 2017 at Mbagala Chamazi without permit, the applicant was found in possession of seven (7) pieces of elephant tusks valued at USD 90,000/-

(TZS 201,780,000/-), the property of the United Republic of Tanzania. The cumulative value of the subject matter is Tshs. 638,970,000/-.

On 01.04.2020 this court ordered the application to be argued by way of written submission and set a schedule thereof.

The applicant averred in his submission that in terms of **sections 3(1), 29(4)(d) and 36(1) of EOCCA, Cap 200 RE 2002**, it is this court which has jurisdiction to grant bail on economic cases whose value exceeds TZS 10,000,000/-. He urged the court to grant bail on the reasons that the applicant is ready to fulfill bail conditions to be set by the court; and he is a good law abiding citizen. He stated further that the other co-accused have already been granted bail on 08.10.2019 by Hon. Ngwala, J vide Criminal Application No. 103 of 2019. The applicant further talked about the issue of jurisdiction to distribute deceased estate of which I can see that it has been put out of context and I accordingly ignore it.

Mr. Hakimu Msemo while taking cognizance of the fact that the applicant is amongst the accused persons in Economic Case No. 43 of 2017; vigorously contested the instant application on the basis that this court has become ***functus officio***. He contended that the applicant had

already made a similar application through **Miscellaneous Economic Crimes Application No. 14 of 2018 at the High Court of Tanzania**, The Corruption and Economic Crimes Division at Dar Es Salaam (Unreported – annexure SHM1). He submitted further that in the above cited case, Matogolo J, delivered ruling on 11.04.2018 where he struck out the application in terms of **section 36(2) of the Economic and Organized Crimes Control Act, Cap 200 RE 2002** on the basis that there was a valid certificate by the Director of Public Prosecution (DPP) objecting bail. The learned State Attorney further referred to **section 36(3)** of the Act which provides for the effectiveness of the certificate issued by DPP under **subsection (2)** of the Act unless the proceedings are concluded or it is withdrawn. He further referred to the case of **Yusuf Ali Yusuf @ Shehe @ Mpemba & 5 Others Vs The Republic**, Criminal Appeal No. 81 of 2019, CAT (Unreported) on the impropriety of the applicant to lodge a similar bail application at the High Court whilst the validity of the DPP certificate has already been determined. He distinguished the application for bail granted by Ngwala J on the basis that each case is decided on its merits and circumstances. He urged the court to dismiss the application on the basis that it has no legs to stand.

Rejoining, the applicant addressed at length the invalidity of the case of **Attorney General V Jeremiah Mtobesya**, Civil Appeal No.65 of 2016 in denying bail under **section 148(4) of the Criminal Procedure Act, CAP 20 RE 2002** that the said provision is in parimateria with **section 36(2) of EOCCA** hence having the same effect. He rejoined further and challenged the abrogation of the presumption of innocence guaranteed under **Article 13(6)(b) of the Constitution** and right to bail under **Article 15(2) of the Constitution**. He contended that the principle of *functus officio* is not applicable under the present circumstances. To cement his arguments he cited the cases of **Hassan Othman Hassan V Republic**, Criminal Appeal No. 193 of 2014 (CAT); and **Antonia Zakaria Wambura & Timothy Daniel Kilumile V Republic**, Misc. Economic Cause No. 01 of 2018.

I have carefully followed the rival submissions from both parties. Indisputably is the fact that the applicant is making application for bail before this Court for the second time. He had filed the similar application vide **Miscellaneous Economic Crimes Application Case No. 14 of 2018**, at the Corruption and Economic Crimes Division of the High Court Dar Es Salaam which was accordingly struck out by Matogolo, J.

The applicant has submitted at lengthy the effect of DPP's certificate and how the same has been rendered invalid through the harmonization principle with **Mtobesya's case** (supra).

I must point out at the outset here that the issue for this court's determination is not whether the DPP's certificate in general is valid or not in terms of its constitutionality or otherwise but whether the effect of hon. Matogolo's, J decision to struck out the similar application has the effect to declare this court functus officio to determine the matter of bail again.

When this court struck out the similar application for bail, it based its decision on the DPP's certificate filed under **Section 36(2) of the EOCCA** opposing the grant of bail to the applicant. In view of the cited law, this court ultimately made the following decision:

*"But provided that there is a certificate filed by the DPP under **Section 36(2) of the Act**, stating that the safety and interests of the Republic are likely to be prejudiced if the applicant is granted bail, and as far as this Court has found the said **certificate valid** after met validity test. This Court therefore cannot disregard the said certificate and continue with hearing of the bail application for purpose of granting bail to the applicants or otherwise. The application is hereby struck out"* (emphasis is added).

Reading through the above decision of the Economic Court which has concurrent jurisdiction with this Court (High Court); the Economic Court made a conclusive determination of the **validity** of the filed DPP's certificate and eventually made the decision of not entertaining the application for bail.

The question now comes, would the decision to **struck out** the application have an effect of rendering this court "**functus officio**" to determine the similar application? One would argue that since the application was struck out then the applicant would not be stopped from bringing the application again. However, that would depend on the purpose of the order Vis á Vis the spirit of the law that steered the court to stop entertaining the matter.

At this juncture, I would wish to reproduce the provisions of **section 36(2) and (3)** of EOCCA:

36.-(1) After a person is charged but before he is convicted by the Court, the Court may on its own motion or upon an application made by the accused person, subject to the following provisions of this section, admit the accused person to bail.

(2) Notwithstanding anything in this section contained no person shall be admitted to bail pending trial, if the Director of Public Prosecutions certifies that it is likely that the safety or interests of the Republic would thereby be prejudiced.

(3) A certificate issued by the Director of Public Prosecutions under subsection (2) shall take effect from the date it is fixed in court or notified to the officer in charge of a police station, and

shall remain in effect until the proceedings concerned are concluded or the Director of Public Prosecutions withdraws it".(emphasis added)

My reading and understanding of **subsection (3) of the Act** connotes that once the court has validated the DPP's certificate and has not provided any conditions to be applicable to the validity of the certificate including applicable time. Thus, the said certificate shall remain operative until the determination of the proceedings or withdrawn by the DPP.

It is in view of the above approach that in taking the purposive approach of the interpretation of the law, the struck out order of this court under the prevailing circumstances in the instant case would not give a leeway for the applicant to file a fresh application in the same court unless the matter has been determined or the certificate has been withdrawn which is not the case here. Thus the struck out order of hon. Matogolo conclusively determined the validity of the DPP's certificate hence making his decision of refusing to adjudicate on the matter by this court final and conclusive unless otherwise the certificate is withdrawn, a matter is concluded or there is a different order from the superior court.

The appellant among other cases cited referred to the Court of Appeal Case of **Hassan Othman Hassan @ Hasanoo (Supra)** which declared

this court not to be **functus officio** to entertain the application for bail for the second time. However, the circumstances of the cited case differs tremendously with the instant case because in that case, this Court rejected to consider bail for the second time while the case that was subject for the refusal of bail at first instance had already been conclusively determined and the accused was acquitted on the charge. Nevertheless, in our instant case, the matter is still pending and the validity of the DPP's certificate as determined by this court has neither been contested and finally invalidated nor withdrawn.

It is from the above background, I agree with the Counsel for the Republic that this Court is functus officio to entertain this matter again following the position of the law discussed above. Accordingly, I dismiss the application.

Accordingly ordered



A handwritten signature in black ink, appearing to read 'R.A. Ebrahim'.

R.A. Ebrahim
Judge

Dar Es Salaam

08.05.2020