

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPLICATION NO. 85 OF 2020

(Arising from Economic Case No. 16 of 2017 filed in the Resident Magistrate's
Court of Dar Es Salaam at Kisutu)

1. Jumanne s/o John Hamis

2. Joseph s/o Jeremiah Bucheck.....

APPLICANTS

VERSUS

THE REPUBLIC RESPONDENT

RULING

Date of Last Order: 11.05.2020

Date of Ruling: 05.06.2020

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 applicants are praying for bail in respect of Economic Case No. 16 of 20117 pending at the Resident Magistrate's Court of Dar Es Salaam at Kisutu. The chamber application is supported by a joint affidavit of Jumanne John Hamis and Joseph Jeremiah Bucheck, the applicants.

Brief background of this application as could be discerned from the appended affidavit and the charge sheet is that the applicants have been arraigned at the Resident Magistrate's Court at Dar Es Salaam at Kisutu charged with one count of unlawful possession of Government Trophies contrary to **section 86(1) and (2)(c) (ii) and Part 1 of the First Schedule of 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 that the applicant on 30th March 2017 at Chang'ombe Serengeti area within Temeke 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 08 pieces of elephant tusks valued at USD 45,000/- (TZS 100,215,000/-). They stated in their affidavit that since the offence they are charged with is bailable in this court; and bail is their constitutional right; this court should allow their application and set bonafide bail conditions.

Due to the prevailing pandemic of COVID 19, the appearance of the applicants was dispensed with at the 1st hearing date of 11.05.2020.

Upon being served with the copy of the application, the Republic raised a point of preliminary objection that this court is **functus officio** to entertain the application.

The court ordered the application to be argued by way of written submission and set a schedule thereat. Both parties filed their submission in adhered to the set schedule.

The applicant began by filing their submission and mainly prayed for bail and contended that there is no counter – affidavit to oppose their bail application. They stated also that they have not been granted bail before and they have reliable sureties who shall secure their attendance in court.

Responding to the submission by the applicants, the respondent also submitted in support of their objection that this Court has become functus officio to entertain the present bail application. Expounding their point of objection, Counsel for the Republic, Ms. Elizabeth Mkunde, learned State Attorney told the court that the applicants have been previously denied bail by this Court vide Miscellaneous Criminal Application No. 46 of 2019 before hon. Kulita, J. following the findings of the court that the certificate of DPP objecting bail was valid. She referred to the case of Court of Appeal of **Yusuf Ali Yusuf @ Shehe@ Mpemba & 5 Others V The Republic**, Criminal Appeal No. 81 of 2019 (unreported) which quoted with approval the principle laid down in the case of **Kamundi V R** (1973) EA that once the matter has been finally determined the court cannot re-open or alter its decision. To challenge the decision one has to appeal to the higher court. She thus prayed for the application to be dismissed.

In rejoinder, the applicants mainly complained that the point of objection has been raised out of time without first filing counter – affidavit. Therefore they urged the court not to consider the submissions by the respondent because it is un-procedural and would be unfair to them.

I must point out here that as alluded earlier, the applicants' appearance was dispensed with following the Corona pandemic. However they were served with summons and all orders of the court and relevant documents which is the reason why they managed to file their submissions and a rejoinder. Thus it is not correct to say that the point of objection raised by the respondent came as a surprise to them because they had an ample time to respond to it. More so both the notice of preliminary objection and counter affidavit were filed before this court on 7th May 2020 before the hearing date. Again being a point of law touching on the jurisdiction of this court, such objection can be raised at any stage of the proceedings. I therefore find the complaint by the applicants to have no basis. If they wished to reply they could respond on rejoinder or even ask for more time. Instead they chose to play a blame game.

I have carefully followed the rival submissions from both parties. Indisputably is the fact that the applicants are making this bail application before this Court for the second time. The fact that they chose not to disclose in their affidavit. The applicants had filed the similar application vide **Miscellaneous Economic Crimes Application Cause No. 46 of 2019 (annexure NPS to the Counter Affidavit)**, which

was dismissed by this court on 31.10.2019 (Hon. Kulita, J.). The basis of such dismissal was that the DPP's certificate had passed validity test in compliance with **section 36 (2) of the Economic and Organized Crime Control Act, Cap 200 RE 2002.**

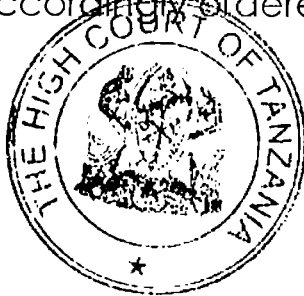
I associate myself with the holding of the cited case of the Court of Appeal of **Yusuf Ali Yusuf @Shehe@ Mpemba and 5 Other (supra)** on the principle that "*...a court becomes functus officio over a matter if **that court** has already heard and made final determination over the matter concerned*". Tailoring the above holding to our instant case, the phrase "**that court**" in our circumstances connotes the High Court. Again the Court of Appeal for Eastern Africa in the case of **Kamundi V R** (1973) EA 540 expounded further the scope of *functus officio* when it held that:

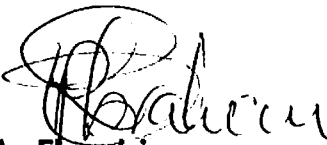
*"... A further question arises, when does a magistrate's court become functus officio and we agree with the reasoning in the Manchester City Recorder case that this case only be when the court disposes of a case by verdict of not guilty or by passing sentence or **making some orders finally disposing of the case**" (emphasis is mine).*

In the instant application, this court discussed and determined the issue of bail of the applicants to the finality on the existing certificate of the DPP.

That being the position therefore, I agree with the counsel for the Republic that this court is functus officio to entertain the instant application and I accordingly dismiss it.

Accordingly ordered




R.A. Ebrahim
Judge

Dar Es Salaam

05.06.2020