

IN THE HIGH COURT OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

MISC CIVIL CAUSE No. 13 OF 2019

**IN THE MATTER OF THE CONSTITUTION OF THE UNITED
REPUBLIC OF TANZANIA, 1977, AS AMENDED FROM TIME TO
TIME [CAP. 2 R.E 2002]**

AND

**IN THE MATTER OF BASIC RIGHTS AND DUTIES ENFORCEMENT
ACT (CAP 3 R.E 2002)**

AND

**IN THE MATTER OF A PETITION TO CHALLENGE THE
CONTITUTIONALITY OF SECTIONS 43, 44, 45, AND 46 OF THE
POLICE FORCE AND AUXILIARY SERVICES ACT (CAP 322 RE
2002)**

BETWEEN

FORTUNATA NTWALE ----- APPLICANT

AND

THE ATTORNEY GENERAL ----- RESPONDENT

RULING



30th April, & 17 July, 2020

TIGANGA, J

By originating summons made under Articles 26(2) and 30 (4) of the Constitution of the United Republic of Tanzania 1977, section 4 and 8 of the Basic Rights and Duties Enforcement Act (Cap 3 RE 2002) and Rule 4 of the Basic Rights and Duties Enforcement (practice and Procedure) Rules 2014. The applicant filed this Misc. Civil Cause petitioning for this court to declare that;

- a) The provisions of section 43, 44, 45 and 46 of the Police Force and Auxiliary services Act Cap 322 R.E 2002, are unconstitutional for offending the provision of Article 13 (6) (a), 18, 20 (1), 21(2) and Article 29 (1) of the constitution of the United Republic of Tanzania, 1997 as Amended.
- b) That the provisions of section 43, 44, 45, and 46 of the Police Forces and Auxiliary Services Act [Cap 322 R.E 2002] be declared unconstitutional and expunged from the statute book immediately without giving time to the government to amend as it will allow continuation of human Rights violation.

In that originating summons the grounds of the petition are that, the said provisions which give powers to the officers in charge of the station to stop the public meeting without hearing the applicant is contravening the right to a fair hearing and right to be heard as provided for under the constitution of the united Republic of Tanzania, 1977 as amended.



Further to that, the grounds under which the powers can be exercised by the officer in charge are too wide and the grounds are unclear vague and too subjective thus contravening the right to fair hearing, right to be heard, freedom of expression, rights to association and peaceful assembly, right to participate in public affairs of the country and the right to enjoy fundamental human right as provided for under the constitution of the United Republic of Tanzania of 1977 as amended.

Furthermore, that S. 43 (3) and (4) of the impugned Act which allows the appeal to the Minister, whose decision on the matter shall be final, contravenes right to a fair hearing, right to be heard and right to appeal as provided under the constitution of the United Republic of Tanzania of 1977 as amended.

Also that the said impugned provisions, which criminalise the acts of the person who fails to obey the order of the officer in charge, without the key elements of the offence thus contravening the right to a fair hearing, right to be heard, freedom of expression right to association and peaceably assembly, right to participate in public affairs or the country and right to enjoy the fundamental human right as provided under the constitution of the United Republic of Tanzania of 1977 as amended.

The specific provisions or Articles of the constitution, alleged to have been violated by the impugned provision of the law are, Article 13 (6) (a) which provides for right to fair hearing and right to be heard, Article 13 (6) (a), 18, 20(1), 21 and 29 (2) of the constitution of the United Republic of Tanzania of 1977, which provides for, right to a fair hearing, right to be



heard, freedom of expression right to association and peaceful assembly, right to participate in public affairs of the country and the right to enjoy fundamental Human Right.


The originating summons was supported by an Affidavit of Fortunata Ntwale, the applicant which deposed the facts relied upon by the applicant.

The petition was countered by the respondent, by filing the counter affidavit of Subira Mwandambo, learned State Attorney from the office of Solicitor General Mwanza. The respondents also filed the Notice of Preliminary Objection that the petition is bad in law for being res judicata. It was also countered by the reply to the petition which in essence, disputed all the declaratory orders, the ground of petition, and specific articles allegedly violated.

As a matter of procedure, the preliminary objection was heard first, where by the leave of the court, the same was argued by way of written submissions.

The schedule of filing submission was that the respondent files submission in chief on or before 16/04/2020, reply was supposed to be filed in seven days from the date of service of the submission in chief, rejoinder if any to be filed in seven days from the date of the reply, and ruling was supposed to be delivered on 22/05/2020.

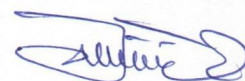
From the records before me, only the Respondent complied by filing the submission in chief on time on 16/04/2020. However, after the counsel for the respondent had filed the submission in chief she, for the reasons



beyond her control, did not manage to serve the petitioner on time, the petitioner was on 22/05/2020 granted extension of time to file his reply to the submission in chief which he filed on 05/06/2020. Miss. Subira Mwandambo, State Attorney, in submission in chief which was brief submitted that the application is bad in law as there has been a similar case decided by this court (Dar - es Salaam Main Registry), relating to similar provisions of the law, which the applicant thinks are unconstitutional. Since the same has already been decided, the matter at hand becomes res - judicata. As envisaged by section 9 of the Civil Procedure Code Act Cap 33 RE 2002).

Miss Subira Mwandambo submitted that the provisions sought to be declared unconstitutional were a subject of discussion and decisions in the case of **Francis Muhingirwa Gratwa and others Vs Attorney General**, Consolidated Miscellaneous Civil Causes No. 4 and 8, both of 2018, with its judgment delivered on 18th day of March 2020, where it was held that,

"in the afore view of the findings and to answer the 2nd issue, it is the position of the court that, the provisions of section 43, 44, 45 and 46 of the Police Force and Auxiliary Services Act (supra) and section 11 of the Political Parties Act (supra) are Constitutional and do not allow the violation of human rights. As such, there are no good reasons for expunging the same provisions from the statutes".



Miss Subira Mwandambo, submitted that the doctrine of res judicata as provided under section 9 of the Civil Procedure Code (Supra) as interpreted in the case of **Fikiri Liganga and Another vs Attorney General and Another**, Misc. Civil Cause No. 5 of 2017 in which this court had opportunity of discussing at length the doctrine of res judicata and how the same may be applied in the case like this. She submitted that, this court proceed to find this matter to be res judicata and dismiss it.

Mr. Reginald Martin, learned counsel for the applicant, submitted in reply that, the doctrine of res judicata as provided under section 9 of the Civil Procedure Code (supra). He submitted that, the facts that similar matters in respect of similar provisions have been decided by another court, does not automatically make the matter a res judicata. He argued that this is due to the fact that the very same petition might be challenging the same provision with different line of argument which is quite distinguishable with previous line of arguments in a decided matter. That as the matter has not gone to the merits; it is difficult as of now to know the line of arguments which will be used and adopted by the applicant in this petition, therefore this matter cannot be called *res judicata*. As to hold the matter to be res judicata at this stage will be denying the petitioner the right to be heard.

He further submitted that the preliminary objection falls short of the requirement of the principle in the case of **Mukisa Biscuit Company Limited vs West End Distributors Ltd** (1969) E.A 696 which requires the objection to base on pure point of law. In that line of argument, he also cited the case of **National Insurance Corporation of (T) Limited**,



Parastatal Sector Reform Commission vs Shengena Limited Civil
Application No. 20 Of 2007 (CA) unreported.

He submitted that the petition before this court is different from the one heard and determined in the previous petitions, the two are therefore distinguishable. Further to that, he submitted that for one to ascertain whether these are similar or not, one had to hear the arguments advanced by the petitioner, since it requires ascertaining the facts and arguments then the preliminary objection raised could not suffice the requirement of the law. He submitted in conclusion that the preliminary objection raised is devoid of merit, hence it be dismissed. That marked the end of the arguments by both parties hence this ruling.

Now from the point of objection raised and the argument advanced for and against the objection, I find the issue for determination to be one which is whether this petition is res judicata. It is the law that res judicata is a statutory principle which is provided under section 9 of the Civil Procedure Code [Cap. 33 R.E 2019], for purposes of easy reference this provision is hereby reproduced.

"Section 9,

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit



or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.

Explanation I: The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II: For the purposes of this section, the competence of a court shall be determined irrespective of any provisions as to a right of appeal from the decision of such court.

Explanation III: The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV: Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V: Any relief claimed in the plaint which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation VI: Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested

in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

From the provision above in order for the case to be res judicata, there should be four elements proved as follows;

- (i) The whole case or an issue therein which is before the court for determination is proved to have been directly and substantially in issue or has been directly and substantially in issue in a former suit
- (ii) That former suit must be between the same parties or between parties under whom they or any of them claim litigating under the same title,
- (iii) That the court must be a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised,
- (iv) That in that former suit, the matter in question has been heard and finally decided by such former court.

There is no dispute the matter in this case which is the constitutionality of the provisions of section 43, 44, 45 and 46 of the Police Force and Auxiliary services Act Cap 322 RE 2002 was also directly and substantive in issue in the case of **Francis Muhingirwa Gratwa and others Vs Attorney General**, Consolidated Miscellaneous Civil Causes No. 4 and 8, both of 2018. There is also no dispute that, the former case was filed and decided by the court of competent jurisdiction that is the High Court of Tanzania –Main Registry. Also that, the matter was decided



to its finality by a court of competent jurisdiction by its judgment dated on 18/03/2020. The only issue is whether the former suit was between the same parties as in this suit or between parties under whom they or any of them claim litigating under the same title?

In both cases the petitioners are different but respondent is the Attorney General. However although the petitioner in this petition does not expressly state that he is suing in his personal capacity or for others, but the type of the cases he instituted is what is called public interest litigation cases as opposed to traditional private litigation cases. In the case of **Fikiri Liganga and Another vs Attorney General and Another**, Misc. Civil Cause No. 5 of 2017 this court had opportunity of discussing at length what public interest litigation is.

In such an endeavor, the court appreciated on the novelty of the concept and therefore had to go out of our jurisdiction to borrow leaf on the interpretation of the concept of public interest litigation as the new concept in public law. The court relied on **Forward Construction Co. & Others vs Prabhat Mandal Andheri & Others** [1986] AIR 391 which decided while interpreting section 11 of the Indian Code of Civil Procedure (which is in pari materia) to section 9 of the Tanzanian Civil Procedure Code) which recognizes the principle of res judicata. In this case the Supreme Court of India distinguished the traditional litigation from the Public interest litigation. The court held inter alia that;

"While public interest litigation is brought before the court not for the purpose of enforcing the right of one



individual against another, as happens in the case of ordinary litigation, it is intended to prosecute and vindicate public interest which demands that violation of constitutional or legal rights of a large number of people, who are poor, ignorant or socially and economically in disadvantaged position, should not go unnoticed and unredressed for that would be destructive of the rule of law.....Public interest litigation seeks to further relax the rule on locus standi" (emphasis added)

In discussing of explanation VI of section 11 of the code of India, which provides for explanation on the doctrine of res judicata the Supreme Court of India went on to say;

Where persons litigate bonafide in respect of public right or of private right claimed in common for themselves and others, all persons interested in such right shall, for the purpose of this section, be deemed to claim under the persons so litigating"

Further to that the court went ahead and referred to the case of the **State of Karnataka & Another vs All Indian Manufacturers Organisation and Others** AIR 2006 SC 186 where the court held *inter alia* that;

As a matter of fact, in public interest litigation, the petitioner is not agitating his individual rights but represents the public at large. As long as the litigation is bonafide, a judgment in a previous Public interest litigation would

be a judgment in rem, it binds the public at large and bars any member of the public from coming forward before the court and raising any connected issues or an issue which had been raised/should have been raised on an earlier occasion by way of a public interest litigation. (Emphasis added)

That being the case, and looking at the interpretation of section 11 and the conditions in explanation VI of that section of the Indian Code of Civil Procedure, it goes without saying that also our section 9 explanation VI of our Civil Procedure Code [Cap 33 R.E 2019] which provides;

"Explanation VI: Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating".

Is purely in *pari materia* with explanation VI of the code of India, what we lack is that ours has not been sufficiently interpreted by our court except in few cases including that of **Fikiri Liganga and Another vs Attorney General and Another** (supra).

In the case of **Attorney General vs Mugesu Anthony and 2 Others** Criminal Appeal No. 220 of 2011 the Court of Appeal allowed this Court to take inspiration of the experience from other jurisdictions which have adequately dealt with the concept. At page 34 of the judgment cited above, the Court of Appeal of Tanzania,

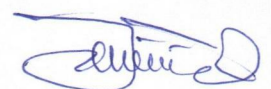


having been asked to seek inspiration from the South African decision, it held *inter alia* that;

"...Strictly speaking, Tanzanian courts are not bound by such decisions. However, it will not be wrong when dealing with matters arising from similar circumstances to seek inspiration or borrow leaf from decisions arising from similar legislations in identical circumstances around the world including South Africa, Australia, the United Kingdom etc, irrespective of the differences in legal system."

This concept of res judicata in the public interest litigation being a bit new therefore not sufficiently interpreted in our jurisdiction, it is proper to borrow leaf and seek inspiration on how our fellows in India have been interpreting the same concept.

Now, taking such inspiration, it suffices to find that, section 9 of the Civil Procedure Code which provides for res judicata, especially in its explanation VI, provides for public interest litigation. Under that doctrine, whoever institutes a suit or petition does not act for his individual personal interest, he acts for the interest of the general public, as the out come will not affect or benefit him personally in the exclusion of all other members of the public, but will affect or benefit the public as a whole. Good example is in this case if at all the impugned provisions are declared to be unconstitutional and expunged from the statute book, the effect will either benefit or affect the general public say even those who were not aware of the existence of the case under which the said provisions have been so declared.



That being the case, as the case of **Francis Muhingirwa Gratwa and Others vs Attorney General**, Consolidated Miscellaneous Civil Causes No. 4 and 8, both of 2018, the provisions of sections 43, 44, 45, and 46 of the Police Forces and Auxiliary Services Act [Cap 322 R.E 2002] were the subject discussion and decision. The same provisions were declared constitutional and that they do not allow the violation of human rights. That said, the petition at hand is nothing but res judicata as envisaged under section 9, explanation VI of the Civil Procedure Code [Cap 33 R.E 2019], the same is hereby dismissed for the reasons given.

It is accordingly so ordered.

DATED at MWANZA on 17th day of July, 2020



J. C. Tiganga

Judge

17/07/2020

Ruling delivered at Mwanza this 17th day of July, 2020 in the presence of Mr. Reginald Martin learned counsel for the applicant and Miss. Subira Mwandambo, learned State Attorney for the respondent the Attorney General on line through audio teleconference.



J. C. Tiganga

Judge

17/07/2020