

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA**

AT MUSOMA

MISCL. CRIMINAL APPLICATION NO. 18 OF 2021

*(Arising from the proceedings of the District Court of Bunda at Bunda in
Economic Case No. 2 of 2021)*

- 1. ROBERT ANTONY @ BONGE 1ST APPLICANT**
2. KEFA IPARAPARA @ YEYEYE JACOB 2ND APPLICANT
3. MSAFIRI ANTONY 3RD APPLICANT
4. MABULA MANYANGU @ SAGUDA 4TH APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

RULING

24th and 24th March, 2021

KISANYA, J.:

On 28th January, 2021, the applicants were arraigned before the District Court of Bunda for one economic offence namely, unlawfully possession of Government Trophies contrary to section 86(1) and (2)(b) of **the Wildlife Conservation Act, 2009** read together with paragraph 14 of the 1st Schedule to and section 57(1) and 60(2) of **the Economic and Organized Crime Control Act** [Cap. 200, R.E. 2019] (**the EOCCA**). It is alleged by the prosecution that, on 11th January, 2021, at Kabasa Village within Bunda District, the applicants were found in unlawful possession of Government trophies to wit, one lion skin valued at Tanzania shillings **11,363,100**, the property of the

United Republic of Tanzania without a permit from the Director of Wildlife. Since the value of property (Government trophies) involved in the pending case is more than ten million shillings, the applicants have filed the present application for bail pending trial.

The application has been preferred under section 148 of **the Criminal Procedure Act** [Cap. 20, R.E 2019] (**the CPA**). It was made by way of chamber summons and supported by an affidavit sworn by all applicants.

At the hearing of this matter the applicants appeared through a video link connected from Bunda Prison. On the other side, Mr. Nimrod Byamungu, learned State Attorney entered appearance for the respondent/ Republic.

At the very outset, the Court, *suo moto*, asked the parties to address the following issues pertaining to the competence of this application:

1. Whether the Court has been properly moved to determine the application for bail pending appeal.
2. Whether the Chamber Summons were drafted with a qualified person and in accordance with section 44 of **the Advocates Act** [Cap. 341, R.E. 2019].

Since the issues raised by the Court were premised on point of law, the applicants had nothing to submit. They contended that the Chambers Summons

and Affidavit were drawn by one Boniface Waryoba Magabe, whom they referred to as an advocate. The applicants went on to submit that, they were not aware as to whether the application was incompetent for failure to cite the proper law. They asked me to consider and determine the application on merit.

Mr. Byamungu responded that the application was incompetent. He argued that the Court has not been moved properly to determine the application. His argument was based on the reason that, since the offence subject to this application is economic offence, the application ought to have been made under **the EOCCA** and not **the CPA** cited by the applicants. Mr. Byamungu submitted further that pursuant to section 28 of **the EOCCA**, other laws do not apply if the matter is provided in **the EOCCA**. He was of the view that, the **EOCCA** has relevant provisions for bail pending trial.

As regards the pleadings filed by the applicants, the learned State Attorney submitted that the Chamber Summons and affidavit contravened the law because the person who prepared the same did not endorse his name and address. He was of the view that there is a possibility that the said instruments were drawn by an unqualified person. For the foregoing, Mr. Byamungu urged me to strike the pleadings and the application for being incompetent.

In their rejoinder submissions, the applicants prayed to amend the application.

I have considered the application, the arguments of both parties and the law. I will first consider whether this Court has been moved properly to determine the application. The law is settled that, non-citation or wrong citation of provisions of law renders the application incompetent. This stance has been taken by the Court of Appeal in many cases. See for instance the case of **Hussein Mgonja vs The Trustees Tanzania Episcopal Conference**, Civil Revision No. 2 of 2002, CAT at Arusha, (unreported) where it was held that:

"If a party cites the wrong provisions of the law the matter becomes incompetent as the Court will not have been properly moved."

Similar position was held in **Bahadir Sharif Rashid and 2 Others v. Mansour Sharif Rashid and another**, Civil Application No. 127 of 2006, CAT at Dar es Salaam (Unreported) and **Chama cha Walimu Tanzania vs. Attorney General**, Civil Application No. 151 of 2008, CAT at Dar es Salaam (unreported).

As alluded herein, the applicants stand charged with economic offence. The legislation applicable for bail pending trial is **the EOCCA** and not **the CPA** cited in the Chamber Summons. It is **the EOCCA** which empower this Court to hear and determine application for bail pending trial in respect of economic offence. Furthermore, the bail conditions are set out in the **EOCCA**. Therefore, I agree with Mr. Byamungu that, the **CPA** cannot apply. It applies where the relevant

procedure is not provided for in the **EOCCA**. This is pursuant to section 28 of the **EOCCA**.

I am aware that the Court is required to uphold substantive justice without being carried out by the rule of technicalities (overriding objective). However, this principle cannot be applied blindly. It does not compel the courts to disregard procedural rule. In **Chama cha Walimu** (supra), the Court of Appeal further held, among others that, wrong or non-citation of the enabling law is not a procedural and technical matter. In the circumstances, I find this application incompetent for non- citation of applicable law.

Even if I was to consider the principle of overriding objective, there is another issue on this application. This is in relation to the Chamber Summons and Affidavit filed by the applicants. The person who drafted and filed the said instruments is not known. The applicants told the Court that the said instruments were drawn by Boniface Waryoba Magabe. The 1st applicant referred him as an advocate while the other applicants were not aware of his capacity.

It turned out that the name of Boniface Waryoba Magabe does not appear in Tanzania Management System (TAMS) which list the practicing and non-practicing advocates. Therefore, he is unqualified person. Being unqualified person, he was duty bound under section 44 (1) of **the Advocates Act** (supra)

to endorse or cause to be endorsed on the chamber summons and affidavit his name and address. The consequence of failure to endorse the name and address of the drawer is provided for under section 44(2) of the **Advocates Act** which reads:

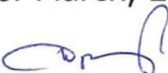
"It shall not be lawful for any registering authority to accept or recognise any instrument unless it purports to bear the name of the person who prepared it endorsed thereon."

Therefore, since the chamber summons and accompanying affidavit in the application do not bear the name of Boniface Waryoba Magabe, who is alleged to prepare the same, they cannot be accepted or recognized by the Court. This is so when it is considered that, Boniface Waryoba Magabe is unqualified person because he does not feature in the official systems of practicing advocates.

Eventually, for the stated reason, the application is incompetent for non-citation of applicable law and being drawn by unqualified person contrary to the law. The law is settled that an incompetent matter cannot be amended. The proper recourse is to strike out the same. Thus, the application cannot be amended at this stage as prayed by the applicants. It is hereby struck out. The applicants are at liberty to file a fresh and competent application.

DATED at MUSOMA this 24th day of March, 2021.




E. S. Kisanya
JUDGE

COURT: Ruling delivered through video link, this 24th day of March, 2021, in the appearance of applicants and Mr. Nimrod Byamungu, learned State Attorney for the respondent.




E. S. Kisanya
JUDGE
24/03/2021