

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

MISC. CIVIL CAUSE NO. 21 OF 2021

**IN THE MATTER OF THE CONSTITUTION OF THE UNITED REPUBLIC
OF TANZANIA, 1977, CAP 2 AS AMENDED**

AND

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

AND

**IN THE MATTER OF BASIC RIGHTS AND DUTIES ENFORCEMENT
(PRACTICE AND PROCEDURE) RULES G.N NO. 304 OF 2014**

AND

**IN THE MATTER OF PETITION UNDER THE PROVISIONS OF
SECTION 131 OF THE CRIMINAL PROCEDURE ACT CAP 20, R.E 2019
AND SECTION 29(1), (2) AND (3) OF THE ECONOMIC AND
ORGANIZED CRIMES CONTROL ACT, CAP. 200, RE 2019 TO THE
EFFECT THAT THE PETITIONER'S CONSTITUTIONAL RIGHTS
WERE VIOLATED BY THE RESPONDENTS**

BETWEEN

FREEMAN AIKAEL MBOWE.....PETITIONER

VERSUS

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT
THE INSPECTOR GENERAL OF POLICE (IGP).....2ND RESPONDENT
THE ATTORNEY GENERAL.....3RD RESPONDENT**

RULING

30 August & 23 Sept, 2021

MGETTA, J:

This ruling is in respect of preliminary objections, the notice of which was filed by the respondents namely the Director of Public Prosecutions, Inspector General of Police (IGP) and Attorney General, complaining that:

1. The petition is fatally defective for contravening the provisions of sections 4(5) and 8 (2) of the Basic Rights and Duties Enforcement Act, Cap. 3 as amended because the petitioner has alternative means of redress or remedy;
2. The petition is *res subjudice*;
3. The petition is bad in law for non joinder of a necessary party;
4. The petition is untenable for being frivolous, vexatious and an abuse of court process.

When the case was called on for hearing of preliminary objections, Mr. Peter Kibatala, the learned advocate assisted by Mr. Gaston Ngaihi, Seleman Matauka, Nashon Mchunga, Sisty Aloyce and Michael Lugina, all learned advocates, appeared representing the petitioner, Mr. Freeman Aikael Mbowe; while, Mr. Hangi Chang'a, Mussa Ibrahimu Mbura and Deodatus Nyoni, all the learned Principal State Attorneys assisted by Vivian Method, the learned Senior State Attorney appeared representing the respondents.

Earlier on, the petitioner filed a petition by way of originating summons made under **Article 30(3) of the Constitution of the United Republic of Tanzania** (henceforth the Constitution), **sections 4 and 5 of the Basic Rights and Duties Enforcement Act, Cap 3** (henceforth Cap. 3) and **rule 4 of the Basic Rights and Duties**

Enforcement (Practice and Procedure) Rules of 2014 (henceforth the Basic Rights Rules) alleging violation of his rights as enshrined under **Article 13(3) & (6) (a), (b) and (d) of the Constitution; section 131 of the Criminal Procedure Act, Cap. 20** (henceforth the CPA), and **section 29 (1)(2) and (3) of the Economic and Organized Crimes Control Act, Cap 200** (henceforth Cap. 200), after he was arrested on 21/7/2021 in Mwanza and subsequently on 26/7/2021 arraigned at the Resident Magistrates Court of Dar Es Salaam at Kisutu Court (henceforth Kisutu Court). He thus prayed, *inter alia*, for declaratory orders that the respondents have indeed violated the above mentioned provisions of the law. When such allegations were served upon the respondents, they strongly opposed them by raising preliminary objections, which are subject matter of this ruling.

I have on several occasions stated and insisted that preliminary objections must meet the test of a famous case of **Mukisa Biscuits Manufacturing Ltd. Versus West End Distributors Ltd**, [1969]1 EA 696 which defines what a preliminary objection is and also provides when it can be raised and when it should not be raised. Mukisa Biscuit case has now been part and parcel of jurisprudence of this country that an objection to be termed as real preliminary objection must be on a pure

point of law and not of fact. For ease of reference, I quote the position set out in Mukisa Biscuits case as hereunder:

*"A preliminary objection is in the nature of what used to be a **demurrer**. It raises a **pure point of law** which is argued on the assumption that all the facts pleaded by the other side are correct. **It cannot be raised if any fact has to be ascertained** or if what is sought is the exercise of judicial discretion."*

Thus in this ruling, I will be guided by the principles laid down in that Mukisa Biscuits case.

I begin with the 1st objection. In his written submission, Mr. Mussa Ibrahim Mbura, the learned Principal State Attorney, stated that the petitioner is challenging the acts and/or omissions by the respondents in relation to his arrest and arraignment at Kisumu court on the grounds given and the reliefs prayed, which according to him, are not capable of being adjudicated under **Cap. 3** because the petitioner has other alternative means of redress as per the requirement of **sections 4(5) and 8(2) of cap 3**.

He submitted further that the petitioner's allegations can be addressed at the criminal trial court since they are in respect of mistreatment while arrested, in custody, during search and in respect of

failure to access his lawyers and failure to be notified in writing of the charge against him. Hence, he has a legal redress in respect of his allegations under **section 169 of the CPA** which provides that noncompliance with the provisions of the CPA or any other law, has the consequences on the admission of evidence in relation to the offences he stands charged. Therefore, he submitted, the petitioner should first seek intervention of the Criminal trial court before invoking the jurisdiction of this court under **Cap. 3**.

To fortify his submission, he cited to me the case of **Jayantkumar Chandubai Patel @ Jeetu Patel & 3 others Versus the Attorney General and 2 Others**; Misc. Civil Case No. 30 of 2009 (HC) (DSM) (unreported). He finally stated that this court has no jurisdiction to address the petitioner's allegations as the same would be dealt with in High Court Corruption and Economic Crimes Division (henceforth criminal trial court) where he stands charged with Economic Case No. 16 Of 2021.

In reply, Mr. Peter Kibatala, the learned advocate for the petitioner submitted that the objection is meritless because **section 169 of the CPA** is clearly designed to cater for exclusion or rejection of evidence illegally obtained. This is not the basis of the petitioner. What the petitioner wants is that while he was arrested, put in custody and during arraignment at Kisumu court, there was violation of his constitutionally

guaranteed rights, which are also duly reflected in specific statutes. Hence, he submitted, the objection raised is misconceived and stems from confusion of Criminal procedure. He submitted that the petitioner's allegations are wholly different and cannot be held to be amenable to the specific, restricted and specialized provision of **section 169 of the CPA**.

In the same vein, he submitted there is nothing in **section 29(1) of CAP 200** that offers any alternative remedy where an accused is brought before a court after having been remanded beyond the statutory limit of 48 hours. Equally, he insisted, no remedy for deplorable remand conditions, neither is there for denial of amenities during such remand. He also said the case of **Jayantkumar Chandubai @ Jeetu Patel** (supra) is wholly distinguishable from the application in hand. He finally submitted that the 1st preliminary objection be overruled with costs.

In dealing with the 1st preliminary objection, I have first observed that it is not in dispute that before this court the petitioner is seeking for declaratory orders on the constitutionality of the alleged acts and or omissions of the respondents. Mr. Mussa submitted that so long as the Criminal trial court which has commenced to hear Economic Case No 16 of 2021, this court lacks jurisdiction to hear matters which are more or less similar to prayers which might properly be addressed at the criminal trial court. The 1st preliminary objection is rooted from Economic Case No

16 of 2021 which is still pending at the criminal trial court. In connection to that, **section 4(5) of Cap 3** as amended by **section 7 (b) of Written Laws (Miscellaneous Amendments)(3) Act No 6 of 2020**, provides and for ease of reference, I quote it as hereunder:

"4. (5) A petitioner shall, prior to seeking redress under this Act, exhaust all available remedies under any other written laws".

I am of the opinion that **section 4(5) of Cap 3** above quoted presupposes that this court assumes jurisdiction to hear application of this nature only after all available remedies under any other written laws have been exhausted. It therefore provides at what time this court would exercise its jurisdiction, which is, of course after the petitioner has exhausted other available remedies such as that provided under CPA, etc.

At the moment there are criminal proceedings going on at Criminal trial court where the present petitioner is charged with the offences from which the reliefs or orders sought in this case have originated. I am of the view that the petitioner may take the opportunity to raise his allegations over there. Therefrom, this court would be clothed with jurisdiction after he has exhausted that the respondents have acted in a manner that is calculated to interfere with proper administration of Criminal justice or dispersion of Criminal justice. In the circumstances I am satisfied

therefore that this court lacks jurisdiction to entertain the allegations lodged by the petitioner who could equally present such allegations to be addressed by the present Criminal trial court. My finding would properly be supported by the provision of **section 8 (2) of Cap 3** which is quoted hereunder that:

"8. (2) The High Court shall not exercise its powers under this section if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law, or that the application is merely frivolous or vexatious".

I now feel I would certainly be interfering with what is going on in criminal trial court which, to my conviction, is a correct forum to address the issues raised by the petitioner. I thus find the application to be misplaced before this court which lacks jurisdiction until and when such alternative remedy is addressed before the criminal trial court that at his arrest and arraignment at Kisumu court, he was not given the right to meet his advocates, that he was let to sleep on the concrete floor without amenities, etc., otherwise I would consider this application frivolous and vexatious as properly emphasized in the case of **Tanzania Cigarette Company Limited versus the Fair Competition Commission and**

Another; Misc. Civil Cause No. 32 of 2010 (HC) (DSM) (unreported) in which this court observed that:

"In our interpretation, subsection (2) of section 8 suggests that recourse to provisions of the Basic Rights and Duties Enforcement Act is not to be resorted to where there are other adequate means of redress available to a potential petitioner."

This court again in that case of Tanzania cigarette Company Ltd (supra) at page 30 observed that:

"It is our further opinion that where a petitioner had an adequate means of statutory redress but opted to file a constitutional petition, the resulting petition falls under the rubric of frivolous or vexations....."

Without much ado, I find this preliminary objection with merit and is accordingly upheld.

As regard to the 2nd preliminary objection, that the petition is *res subjudice*, Mr. Mussa submitted that in determining this matter would amount to contravention of the principle of *res subjudice* since this application is connected to Economic Case No 16 of 2021 which is pending before the High Court Corruption and Economic Crimes Division which is vested with powers to address the petitioner's allegations in the cause of

the proceedings. In that context, Mr. Mussa submitted that the petitioner's allegations will be considered by the Criminal trial court. Thus, according to him this Civil Application and that Economic Case No. 16 of 2021 are the same and similar. Hence the principle of *res subjudice* as provided under **section 8 of the Civil Procedure Code** (henceforth the CPC) would correctly apply.

In reply, Mr. Kibatala strongly opposed and briefly submitted that **section 8 of the CPC** could not successfully be relied upon by the respondents as *res subjudice* operates between two pending suits, and not two cases: one being a criminal and the other, a civil. He added that Economic Case No. 16 of 2021 cannot be said that it is a suit within the meaning of **Order IV rule 1 (1) of the CPC**. Thus, he concluded, a criminal case is not a suit. The preliminary objection should therefore fail.

Now, while finding that the 2nd objection is not on pure point of law falling under Mukisa Biscuit case principle, and thus it cannot amount to preliminary objection in real sense, I am totally in agreement with Mr. Kibatala that **section 8 of the CPC** cited by Mr. Mussa operates between two suits. Hence, Economic Case No. 16 of 2021 is not a suit, as submitted by Mr. Kibatala. For ease of reference, **section 8 of CPC** is quoted hereunder that:

"8. No court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other court in Tanzania having jurisdiction to grant the relief claimed".

Equating a civil matter to criminal matter in the circumstance is a total misconception as well misleading. Admittedly, what is before this court is a civil matter and what is at Corruption and Economic Crimes Division is a criminal matter. In a similar vein, in this civil application, the culmination would be to grant or refuse to grant the reliefs/orders sought by the petitioner; while in Economic Case No. 16 of 2021, the culmination would be either acquittal or conviction. Thus, the principle of *res subjudice* cannot apply here.

As stated elsewhere herein, the 2nd objection cannot amount to a pure point of law. It is accordingly overruled.

As regard to the 3rd preliminary objection that the petition is bad in law for non joinder of necessary party, Mr. Mussa submitted that not only that the declaratory orders sought by the petitioner are against the

respondents but also against Kisutu court; while the latter is not a party to these proceedings. He submitted that the petitioner had brought several allegations leveled against Kisutu Court, specifically on the manner the charge sheet was read over and explained to him. It is therefore his contention that on such allegations and reliefs sought by the petitioner against Kisutu Court, definitely Kisutu Court becomes a necessary party that must be joined as a co respondent and be accorded a right to be heard. To buttress his submission, he cited the case of **Abdullatif Mohamed Hamis versus Mehboob Yusuf Osman and Another**; Civil Revision No. 6 of 2017 (CA) (unreported) where necessary party was defined to mean:

"A necessary party is one whose presence is indispensable to constitution of a suit and in whose absence no effective decree or order can be passed."

He submitted further that in that contention a failure to join Kisutu Court is fatal irregularity as no effective order can be passed in the absence of it.

On the other hand, he admitted that non joinder of parties cannot defeat a suit or an application. He however submitted there are circumstances where non joinder of a party renders an application or a suit unmaintainable. He cited to me the case of **Stanslaus Kalokola**

versus Tanzania Building Agency & Another; Civil Appeal No. 45 of 2018 (CA) (unreported) as page 12 where it was observed that:

"Our decision on this point is that there are non joinders that may render a suit unmaintainable and those that do not affect the substance of the matter, therefore inconsequential."

He concluded that this application is unmaintainable since the non joinder of Kisutu Court affects the substance of the matter. He insisted that it is a cardinal principle that a person whose rights and duties are being determined by the court must be given right to be heard. Since the present petition calls for determination of rights and duties of Kisutu Court, if not joining it as co respondent, would amount to denying it the right to be heard.

Responding to Mr. Mussa's submission on the 3rd objection, Mr. Kibatala said that what the petitioner sought are declaratory orders, **first** against the 1st and 2nd respondents; and **secondly**, those against the 1st and 2nd respondents together with the Kisutu Court who was acting on the behest of the 1st and 2nd respondents. He however submitted that since the petition has not yet been heard this court still has power within the meaning of the dicta in the case of **Abdullatif Mohamed Hamis**

versus Mehboub Yusuf Osman & Another at pp. 28, 29 to order that any necessary party be joined. Mr. Kibatala admitted that in his affidavit the petitioner mentioned Hon. Thomas Simba, the Principal Resident Magistrate, as the Judicial Officer who failed to comply with the duties provided under the provisions of **section 29 (1) of Cap. 200** in informing the petitioner of the charge he stood charged, availing him with relevant charge sheet and affording him an opportunity to have his lawyers present during arraignment.

As far as the 3rd preliminary objection is concerned, admittedly it is impracticable or illegal to join Hon. Simba PRM personally as a party to this petition. He was conducting preliminary hearing and then forwarded the file for trial at the High Court Corruption and Economic Crimes Division. Equally, it is untenable to join Kisutu Court which does not have legal personality as a party to this court as it is not suable entity in law. What I can say is that all what transpired at Kisutu Court was in the course of judicial proceedings of which, if the petitioner so wishes, could correctly be raised at the criminal trial court. After all, the Kisutu Court in law, is not a trial court for offences of such nature which the petitioner is standing charged.

Nevertheless, this issue should not detain me much as it is not objection which could be considered as a preliminary objection. It is a

factual issue which needs the production of evidence. Going into the detail will make me to enter into merits or demerits of the application. It is on this contention, I find the 3rd preliminary objection, not a pure point of law so to speak. As a result, it is accordingly overruled.

On the 4th preliminary objection that the petition is untenable for being frivolous, vexatious and abuse of court process, Mr. Mussa submitted that **section 8(2) of Cap 3** precludes the Court from determining a matter which is frivolous or vexatious. He cited the case of **Ado Shaibu v. Honourable John Pombe Joseph Magufuli (The President of the United Republic of Tanzania) and 2 Others**; Misc. Civil Cause No. 29 of 2018 (unreported) at page 32 where this court found that **section 8 (2) of Cap 3** does not vest jurisdiction to this court on frivolous or vexatious application.

Mr. Kibatala just briefly responded that the 4th objection does not amount to preliminary objection. He stated that Ado Shaibu case is distinguishable from the present application that it was decided on the basis of the fact that the petition challenged the appointment of Mr. Aderlardus Kilangi as Attorney General which the Court held to be frivolous, vexatious and abuse of the Court process in the premises that it was an exercise of presidential power of appointment. He thus submitted, it is not applicable in this application.

I agree that this court is not vested with jurisdiction to entertain frivolous or vexatious applications. I also agree with this court elaboration on which amounts to frivolous or vexatious petition in the case of Ado Shaibu (supra) in which it was stated that:

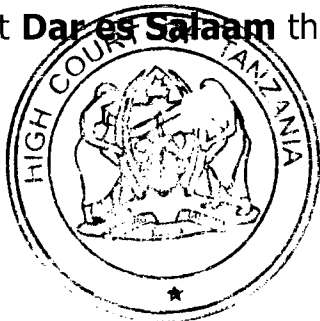
"Discerning from the decision of Wangai v. Muganda and Another (2013) 2 EA 474,418 the petition is said to be frivolous when it is without substance, groundless or fanciful and vexatious when it lacks bonafide claim, it is hopeless or offensive and to cause the opposite party unnecessarily anxiety, trouble and expenses."

However, my concern is how a court of law can decide that this matter is frivolous or vexatious without first according the parties an opportunity to be heard, to adduce evidence. There is a need of adducing evidence from both sides and then one could correctly decide that indeed the matter is frivolous and/or vexatious. Thus, I find the objection raises factual issue which is not pure point of law as the same need ascertainment. Hence, the 4th preliminary objection is accordingly dismissed.

In the upshot, except the 1st preliminary objection, the 2nd, 3rd and 4th preliminary objections are accordingly overruled; and on the strength of the finding of the 1st preliminary objection which concerns with jurisdiction of this court, I accordingly dismiss this application in its entirety. No order as to costs.

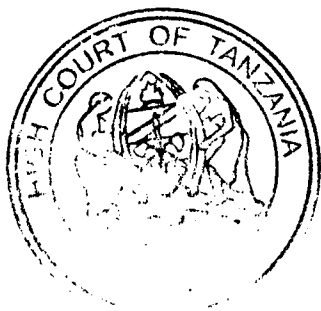
It is so ordered.

Dated at Dar es Salaam this 23rd day of September, 2021.




J.S. MGETTA
JUDGE

COURT: This ruling is delivered today this 23rd September, 2021 in the presence of Mr. Peter Kibatala and Mr. Sisty Aloyce, both learned advocates for the applicant and in the presence of Mr. Hangi Chang'a, the learned principal state attorney assisted by Ms. Vivian Method, the learned senior state attorney and Nalindwa Sekimanga, the learned state attorney, all for the respondents.




J.S. MGETTA
JUDGE
23/9/2021