

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

MISC. CIVIL APPLICATION NO. 52 OF 2020

**IN THE MATTER OF APPLICATION FOR LEAVE TO APPLY FOR ORDERS
OF MANDAMUS/CERTIORARI/PROHIBITION BY ELIA MWAMAFUPA
AND TEN OTHERS**

AND

**IN THE MATTER OF THE LAW REFORM (FATAL ACCIDENT AND
MISCELLANEOUS PROVISIONS) ACT, CAP. 310 R.E 2019**

AND

**IN THE MATTER OF APPLICATION FOR REAVE TO APPLY FOR JUDICIAL
REVIEW AGAINST THE DECISION OF THE REGISTERED TRUSTEES OF
BAPTIST CHURCH TANZANIA**

BETWEEN

**1. ELIA MWAMAFUPA
2. GADSON MWAKIFUMBWA
3. TREZIA SEBA
4. ASUBISYI LUVANDA
5. DAUD MWAMBALASWA
6. JUDITH GADSON
7. ATUGANILE MWAIJALA
8. HEZRON MWANDALIMA
9. BRUNO GEORGE
10. TABIA KAFUJE
11. DYUKE MWAITENDA**

.....APPLICANTS

VERSUS

**THE REGISTERED TRUSTEES OF
BAPTIST CHURCH-TANZANIA..... RESPONDENT**

RULING

Date of last order: 04.08.2021

Date of Ruling: 10.09.2021

EBRAHIM, J.

The applicants herein above have filed the instant application praying for this court to grant leave to apply for Judicial Review for an order of prohibition to restrain the respondent (THE REGISTERED TRUSTEES OF BAPTIST CHURCH-TANZANIA) from interfering or removing names of the Applicants from the Register of Makwale Baptist followers. They also prayed for costs. The respondent upon being served with a copy of the application, filed a notice of preliminary objection (PO) raising five points of objection as follow:

- i. That this honorable court has been wrongly moved by citing wrong provisions of law.
- ii. That this honorable court has no jurisdiction to hear and determine religious faith and private law remedies.
- iii. That this court has no jurisdiction to hear or grant the reliefs prayed by the Petitioners on the basis that issues (if any)

pertaining to faith and membership are to be resolved internally within the registered institution.

- iv. That in the alternative to the first preliminary objection, the petition is an abuse of the court process made to circumvent Land Application No. 10 of 2020 in the District Land and Housing Tribunal of Kyela at Kyela.
- v. That the petition is null and void ab initio as the same has been made by non-existent Advocate.

At the hearing of the preliminary objection, the applicants were represented by Mr. Ezekiel Mwampaka, learned advocate while the respondent was advocate for by Mr. Kuboja Gamba, also learned advocate.

Submitting in support of the preliminary objection counsel for the respondent firstly argued the second limb of the preliminary objection, that this court has no jurisdiction to entertain private law remedies. He contended that writ for judicial review intended to be applied by the applicants are not available against a private body. That they are available against a public body, hence the application is a misconception of law. To substantiate his contention, he cited the case of **Rev. Dr. John Makene & Others vs**

The Registered Trustees of the Evangelistic Assemblies of God Tanzania (EAGT), Misc. Civil Cause No. 22 of 2017 High Court of Tanzania, at Dar es Salaam. (unreported).

Further, counsel for the respondent argued the 3rd limb of the preliminary objection that the applicants who were believers of the respondent's church were supposed to challenge the decision of the respondent by way of appeal to the registrar of societies than instituting this application. He also argued that for a person to make an application of this nature is firstly required to exhaust all available remedies. To buttress his contention, he cited the cases of **Tanga Cement Public Ltd Co. vs The Fair Competition Commission, Misc. Civil Application No. 188 of 2017 HCT at Dar es Salaam** and **Johnston Mwakilolo vs. The Chairman of the Board of Medical Stores Department & Others, Misc. Civil Application No. 30 of 2020, HCT at Dar es Salaam** (both unreported). The respondent's counsel therefore urged this court to sustain the preliminary objection and dismiss the application with costs.

In response regarding the 2nd limb of the preliminary objection, the applicant's counsel contended that this court has jurisdiction over the application since the respondent is a public body

incorporated under public law and is under the Registrar of Societies. He distinguished the case of **Rev. John Makene** (supra) that, in that case the issue was about the provision of the Constitution under which the application was preferred than in this case where the application has been preferred under the **Judicature and Application of Laws Act, Cap. 358 R.E. 2019** (JALA) and under the **Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap. 310 R.E 2019** and the rules thereto.

The applicant's counsel also cited the case of **The Republic Ex-Parte Peter Shirima vs Kamati ya Ulinzi na Usalama, Wilaya ya Singida, & Others [1983] TLR 375** to indicate that judicial review is the discretion of this court.

As to the third limb of the preliminary objection counsel for the applicant argued that the constitution i.e KATIBA YA KANISA LA BAPTIST TANZANIA under which the respondent is established does not provide as to where an aggrieved party can refer his/her grievances. He further argued that even if the constitution would have been providing for the same, this court is not prevented from entertaining the application since it is within its discretionary powers.

He thus prayed for this court to overrule the objection and matter be heard on merits.

In determining the raised points of preliminary objection, I shall consider the 2nd and 3rd limbs of the objections as argued by the parties. Starting with the 2nd limb of the preliminary objection, the concept of judicial review was observed in the case of **John Mwombeki Byombalirwa v. The Regional Commissioner and Regional Police Commander, Bukoba** [1986] TLR 73 where it was stated that:

*"Judicial review is an important weapon in the hands of judges of this country by which an ordinary citizen can challenge **oppressive administrative action** and judicial review by means of prerogative orders (certiorari, prohibition and mandamus) is one of those effective ways employed to **challenge administrative action**"*
(bold emphasis added).

From the above, the issue now is whether the Registered Trustee of Baptist Church – Tanzania, is a public body subject to judicial review. Counsel for the applicants was of the views that the

respondent is the public body since it was established under the laws of the land. With due respect to the Counsel for the applicants, the meaning of the public body is construed by looking at the functions or services performed by that body. For example, **section 3 of the Public Service Act, 2002 defines public service office to mean;** a paid public office in the United Republic charged with the formulation of Government policy and delivery of public services or any office declared by or under any other written law to be a public service office. Under that context, public body is a creature of statute.

In other words a public body cannot become a party in any civil proceedings without involving the Attorney General. This is the reason **section 18 (1) of Cap. 310** under which the applicants preferred this application requires this court to summon the Attorney General when an application of this nature is made.

Therefore, I agree with the counsel for the respondent that the respondent herein is not a public body but rather a private body. Moreover, for a body to be a subject of judicial review it should be established that the said body was performing quasi – judicial functions or that it was engaged in discharge of public

function: see the case of **Alhaji J. Mungula v. Baraza Kuu la Waislam wa Tanzania (BAKWATA) [1997] TLR 50**. In that case, the applicant applied for judicial review on the ground that he was removed from the office without being afforded any opportunity to be heard before the action was taken. Mr. Mkoba who was the counsel for the applicant argued that; though Bakwata is a private body, there is a time when it discharges a public function. When this court was determining the issue as to whether BAKWATA was a body that was subject to judicial review, it had this to say:

"It is wrong for Mr. Mkoba to contend that Bakwata discharges public functions. Mr. Mkoba would have this Court accept, but I cannot, that Bakwata officiates marriage ceremonies and that it is legally charged with the function of conciliating matrimonial difficulties. Mr. Mkoba seems to be unaware that the statute has been amended. Even supposing that Bakwata were still performing such functions, I would still hold that judicial review would be confined to the decision of Bakwata which pertain to such legal functions, and that there would

be nothing which would sufficiently bring its decision on matters respecting the domestic relationship between it and its officers within the reach of judicial review.

In these circumstances I felt bound to conclude that this application is misconceived."

From the above there, I am of the firm stance that the Registered Trustee of Baptist Church –Tanzania, is not a public body subject to judicial review.

I would have ended here, however, shall consider the 3rd limb of preliminary, albeit briefly. In that regard, counsel for the respondent contended that the applicants rushed to this court without exhausting internal remedies given by the constitution of the respondent's Church (i.e KATIBA YA KANISA LA BAPTIST TANZANIA). The applicants' counsel opposed this contention on the ground that the constitution does not give such a lee way. He also contended that even where there was such a leeway, this court has discretion to determine the matter. The respondent's counsel availed me with the said constitution. On reading it, I found that it gives the mechanism on how to resolve disputes

between and among the community of the church. Under **Article 166 (1), (2) (3)** it is clear that the intention of the community was that before any dispute within the community is instituted in court of law by the community or the members or any of its member, is shall firstly take all steps in resolving the dispute internally. Specifically, **Article 166 (1)** stipulates that anyone who wants to institute a dispute in court of law should first obtain consent of the church. It is my position that, it would be such endorsement that would signify that efforts to settle the dispute within the community have been duly undertaken but they have proved futile.

It is also in my concerted view that such internal mechanisms in resolving disputes within religious organization like the one at hand or in any other organization are highly encouraged in our laws. This was observed in the case of **Parin A. Jafar and Another vs. Abdulsual Ahmed Jafari and Two Others [1996] TLR 110** where it was held that where the law provides for extra judicial machinery to resolve the dispute then the applicant has to exhaust those available remedies. This observation was also held in the case of **Joshua Nassary vs. Speaker of the National**

Assembly of the United Republic of Tanzania and Another, Miscellaneous Civil Cause No. 22 of 2019, High Court of Tanzania at Dodoma, (unreported).

Nevertheless, the dispute between the parties at issue is civil in nature. In civil proceedings parties are at liberty to compromise their rights, and courts are enjoined to respect their settlements as long as they do not offend any law or public interest/policy see the guidance by the Court of Appeal of Tanzania in the case of **Ibrahim Said Msabaha vs. Lutter Symphorian Nelson and the Attorney General, Civil Appeal No.4 of 1997, Court of Appeal of Tanzania, at Dar es Salaam (unreported).**

Again, the practice of resolving disputes out of court does not intend to oust the jurisdiction of courts. Rather, it is meant to contribute towards just and efficacious resolution of disputes. Under such circumstance, I concur with the counsel for the respondent that the application at hand was prematurely filed since the applicants did not firstly resort to internal remedies available after being aggrieved by the decision of the respondent.

Owing to the reasons above, I hereby uphold both 2nd and 3rd limbs of preliminary objection. Consequently, I dismiss out this application with costs.

Accordingly ordered.



Mbeya

10.09.2021

A handwritten signature in blue ink, appearing to read "R.A. Ebrahim", written over a horizontal line.

R.A. Ebrahim

JUDGE

Date: 10.09.2021.

Coram: P. D. Ntumo – PRM, Ag-DR.

Appellant: Absent.

For the Appellant: Absent.

Respondent: Present, Rev. Issa Mwasinyanga.

For the Respondent: Mr. Kelvin Kuboja, Advocate.

B/C: P. Nundwe.

Court: Ruling delivered in open chambers in the presence of the Respondent (Rev. Issa Mwasinyanga) and his advocate, Mr. Kelvin Kuboja this 10th day of September, 2021.



P.D. Ntumo - PRM

Ag- Deputy Registrar

10/09/2021