

IN THE HIGH COURT OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL CAUSE NO. 24 OF 2021.

JORAM MEAGIE LUKUMAY PETITIONER

VERSUS

MINISTER OF CONSTITUTIONAL AND

LEGAL AFFAIRS 1ST RESPONDENT

HONORABLE ATTORNEY GENERAL 2ND RESPONDENT

RULING.

Date of Last Order: 25/10/2021

Date of Ruling: 17/11/2021

MARUMA, J.:

The petitioner herein filed this petition before this court praying for the declaration that;

1. The provision of section 44 (1) of the Law of Limitation Act (Cap 89 R.E 2019) are unconstitutional for offending the provisions of Article 12(1) and 13 (1)(2)(3) (4) 13 (6)(a) and 26(1) of the constitution of the united Republic of Tanzania of 1977 as amended from time to time.

2. That the provision of section 44(1) of the Law of Limitation Act (Cap 89 R.E 2019) be declared unconstitutional and expunged from the statute and the power therein be restored/remitted to the court.
3. Each party to bear its own costs.

In reply to the petition, the respondents raised preliminary objection on the point of law that;

- i. The petitioner has not exhausted available adequate means of redress contrary to section 8 (2) of the Basic Rights and Duties Enforcement Act (Practice and Procedure) Rules 2014.
- ii. The petitioner is frivolous and vexatious.

Ms. Jackline Kinyasi, State Attorney appeared for the respondent while Mr. Melchzedek Amani appeared for the Petitioner and the matter was heard *viva voce*.

The ground of submission opened by Ms. Kinyasi who submitted that the petitioner contravened the provisions of section 8 (2) of BRADEA also rule 4 (5) of the rules which makes mandatory for one before approaching this court should absorb all available remedies. According to affidavit of Joram Meagie Lukumay under paragraph 18 and affidavit of admissibility at paragraph 15, the petitioner states his grievances that, that he is challenging the power of the Minister of Constitutional and Legal

Affairs. She went on saying that, the power could be challenged by the way of judicial review. Therefore, before approaching this court the petitioner had alternative remedy. She cited a case of **Flex Msele TLR 2002** at page 437 which expound inherent powers of the high court in exercising jurisdiction over the proceedings and decisions of the inferior tribunal, authorities and bodies or persons with the performance. The petitioner had an option for certiorari and mandamus for the court to compel the Minister. She called this court to revisit Misc. cause no. 31 of 2010, **Tanzania Cigarette Company vs the Fair competition Commission and another** and the case of **Jama Yusuph Vs Minister of Home Affairs**, [1990] TLR at page 80.

As for the second preliminary objection, Ms Jackline submitted that the term frivolous and vexatious cannot be found in the statutes but defined by the case law. She cited the case of **Ado Shaibu vs The Honourable John Pombe Magufuli (The president of the United Republic of Tanzania) and 2 others**, where the court adopted the meaning of frivolous and vexatious from a case of **Wangai vs Mugamba and Another** [2003] 2 EA 474,481, frivolous means without substance, groundless or fanciful; while vexatious is where the petition lacks bona fide cause and is hopeless or offensive and tends to cause the opposite party unnecessarily and expenses. Thus, as the petitioner has alternative

remedy, the petition lacks bona fide cause unnecessary and expenses to the respondents.

Further, the Respondent prayed for this court to struck out the petition basing on the fact that as the preliminary objection are of pure point of law and fits the requirements as stated in the case of **Mukisa Biscuits and Ali Shabani and 48 others vs TANROADS Agency (TANROADS)** Civil Application No. 261 of 2021 and prayed this court to uphold the two objections and struck out this petition.

Responding to the submission by the respondent, Mr. Amani Joachim that the submission by the counsel for the respondents tends to delay the genuine substance of the petition. He went on saying that the petitioner is not challenging the power of Minister or action taken by the Minister against the petitioner rather challenging the constitutionality of section 44(1) of the law of limitation Act that granted power to the Minister to extend time. Since provision in the petition is derived from the main statute which is the Law of limitation Act Cap 789 R.E. 2019, only challenged by the way of constitution petition. He cited the case of **Jebra Kambole vs The Attorney General, Misc. Civil Cause No. 27 of 2017** and said that judicial review cannot determine the validity and constitutionality of these provisions but rather the action of the commissioner when applying the Act.

He further said that there is no alternative remedy for the constitutionality of section 44 (1) that can be made for judicial review as the said powers of the minister are within section 44 (1) of the law of Limitation Act which can be rectified through constitutional court. This is the nature of case where petitioner has no alternative redress as he explored all means to the end there isn't any appeal procedure. Therefore, the petitioner is completely stuck and is legally barred by the law which is provision of section 44 (1) from accessing justice. He should not be barred by section 8 (2) of the BRADEA to challenge the law that bar him from accessing justice. Provisions of section 8 (2) and 4(5) of BRADEA were not drafted to hold public interests' decisions but to separate the suit that the decisions will affect the whole society or bring the relief and the suit that affect individual only.

The counsel, distinguished the case of **Tanzania Cigarette Company** (supra) and said all the grounds raised none of them was challenging the law and could be remedied by the FCC. The Case of **Freeman Aikael Mbowe vs The DPP and 2 Others, Misc. Civil Cause No. 21 of 2021** where the prayer that were brought by the petitioner did not survive section 8(2) of BRADEA because all the complaints could be remedied through CPC.

On the second point of preliminary objection the learned state attorney submitted that, he supports the ratio decidendi in the case of Ally Shabani (supra) that no preliminary objection would be taken from the abstract without the reference plain from the pleadings or any other evidence. Without looking for any evidence, the petitioner is challenging section 44(1) of Limitation Act for contravening Article 13 of the constitution. The petitioner has an issue with the Government Agency (TANROADS) and he pray for extension of time to the Minister who is also the Government agency. He contended that there are certainly issues that needs facts for determination and at this point that cannot be done. Been guided by the case of **Mukisa Biscuits** (supra) he submitted that, it is now a settled argument that objection of frivolous and vexatious should not be used at the preliminary stage. He directed the court to the case of **Onesmo Olengurumwa vs Attorney General, Misc. cause no. 15 of 2019** that, the issue of frivolous and vexatious has exception and the case of **Ado Shaibu** can be distinguished from the present case as if the petition is too defective or if relief cannot be granted then at the Preliminary Objection stage the petition can be frivolous and vexatious. In the present case the petitioner pleaded lack of hearing and biasness of the Minister from the affidavit and annexures therein. The case of **SP Christopher Bageni vs Attorney General Misc. Civil Cause No. 1 of**

2021 the petition was dismissed for being frivolous and vexatious at PO stage. In conclusion, the counsel for the petitioner said petitioner has no means of redress and exhausted all the remedies hence he prays for the PO to be dismissed and the case be determined on merits.

In her rejoinder, the learned State Attorney insisted that the petitioner is challenging the constitutionality of the powers and not constitutionality of the act. In the case of **Kambole** (Supra) judicial review cannot challenge the law but the act. The challenge is on the power of the Minister which can be by the way of judicial review.

For the second preliminary objection it is the requirement of the law that, before the court going to the merit has to determine the question of jurisdiction. The present case lacks bona fide and intends to cause trouble to the other party since it has alternative remedy. This court has no need of going to the merits of the case unlike Olengurumwa's case where it was premature to determine it.

Having considered the arguments in support and against the preliminary objections. Starting with the first preliminary objection that the petitioner did not exhaust the available remedy before resorting to this court. The petitioner filed this petition under **Article 26(2)** of the Constitution of United Republic of Tanzania and **section 4 and 5** of the Basic Rights and Duties Enforcement Act, Cap 3 (BRADEA). Looking into

the wording of **section 8 (2) of Cap 3 of BRADEA**, this Court is prohibited from exercising its powers on matters brought under section 4 thereof unless it is satisfied that the petitioner has no adequate means of redress. Arguing this preliminary objection, the Counsel for the petitioner submitted that he is not challenging the power of Minister or action taken by the Minister against the petitioner rather challenging the constitutionality of section 44 (1) of the Law of Limitation Act, 89 R.E 2019 that granted power to the Minister to extend time.

Going by the application in hand the application is seek the orders of this to declare that:

1. The provision of section 44 (1) of the Law of Limitation Act (Cap 89 R.E 2019) are unconstitutional for offending the provisions of Article 12(1) and 13 (1)(2)(3) (4) 13 (6)(a) and 26(1) of the constitution of the united Republic of Tanzania of 1977 as amended from time to time.
2. That the provision of section 44 (1) of the Law of Limitation Act (Cap 89 R.E 2019) be declared unconstitutional and expunged from the statute and the power therein be restored/remitted to the court.

However, this is not what transpires in the affidavit of Petitioner as it read in **paragraph 18 of the affidavit and paragraph 15** of affidavit of

admissibility sworn by Joram Meagie Lukumay, the petitioner. Paragraph 15 pleaded that;

"That, I am challenging the Constitutionality of Powers of the Minister of Constitution and Legal Affairs in consultation with Attorney General as provided under section 44 (1) of the Law of Limitation Act vis a vis the achievement of equality before the law and the basic principle of fair hearing."

Paragraph 18 pleaded that:

"That, I make this affidavit in support of admissibility of my petition pursuant to provisions of the Basic Right and Duties Enforcement Act as amended."

It is trite law and it has been stated in **Nico Insurance (T) Limited Versus Philip Paul Owoya and 2 others, Civil Appeal No. 151 Of 2017** *that the parties to a suit are bound by their pleadings.*

From the above pleadings which invited the preliminary objection that, the petitioner is challenging the power of the Minister of Constitutional and Legal Affairs. Looking into the two pleadings as stated therein, from the petitioner's own wording in affidavits, it is plainly interpreted that he is to challenge the power of Minister or action taken by the Minister against the petitioner. His argument that the application is to challenge the provision of section 44 (1) of the Law of Limitation Act (Cap 89 R.E

2019) for being unconstitutional for offending the provisions of Article 12(1) and 13 (1)(2)(3) (4) 13 (6)(a) and 26(1) of the constitution of the united Republic of Tanzania of 1977 is defected by the pleadings in the affidavit to support the petition. Also, the petitioner failed to demonstrate how he exhausted all available remedies before coming to this court as cited by the learned Counsel for the respondent 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), the Court held that, *"It is not proper for the Applicant, to file the application without first exhausting the remedies available."* Also, the case of **Jonatas Mgendela Vs. Inspector General of Police and Two Others**, Miscellaneous Civil Application No. 24 of 2019, High Court of Tanzania, Main District Registry, at Dar Es Salaam, where the Court struck out the Application for failure of the Applicant to exhaust available internal remedies.

Basing on above authorities, and considered the pleadings in paragraph 15 and 18 of am of the considered view that the petitioner had to access the available remedies before approaching this court. This is supported by his own submission that this is the nature of case where petitioner has no alternative redress as he explored all means to the end

there isn't any appeal procedure. Therefore, the petitioner is completely stuck and is legally barred by the law which is provision of section 44(1) from accessing justice. He should not be barred by section 8(2) of the BRADEA to challenge the law that bar him from accessing justice.

However, he failed to show how he exhausted other remedies available as he pleaded in paragraph 18 of the affidavit, so to come to this constitutional court. I also agree with him that, judicial review cannot determine the validity and constitutionality of these provisions but rather the action of the commissioner when applying the Act. However, the petition is a cocktail one based on the two pleadings. There is no doubt that what was being sought by petitioner in the originating summons has no relationship with what he pleaded in the affidavit to the extent that in affidavit the petitioner is challenging powers of the minister, which ought to be done by way of judicial review.

To the extent of the findings on the first preliminary objection, I don't think there is a need to go to the second objection. The same is sustained as it renders the petition being incompetent before the court and is accordingly struck out. Let the applicant exhaust the available remedies for challenging powers of Minister of constitution and Legal Affairs before approaching constitutional court.

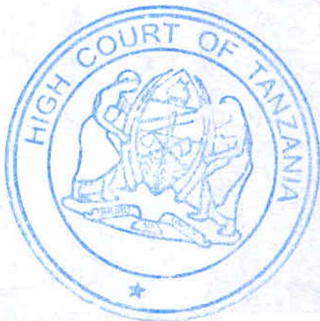
Ordered accordingly.



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**Z.A.Maruma,
JUDGE
17/11/2021.**

Ruling delivered in the presence of Mr. Amani Joackim, Advocate
For the petitioner and respondents and Mr. Emmanuel Daniel Bakari, State
Attorney for 1st & 2nd Respondents.



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**Z.A.Maruma,
JUDGE
17/11/2021.**