

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

MISC. CIVIL CAUSE NO. 20 OF 2021

**IN THE MATTER OF ARTICLE 108 (2) OF THE CONSTITUTION OF
THE UNITED REPUBLIC OF TANZANIA, 1977 AS AMENDED
AND**

**IN THE MATTER OF ARTICLE 59B OF THE CONSTITUTION OF
THE UNITED REPUBLIC OF TANZANIA, 1977 AS AMENDED
AND**

**IN THE MATTER OF SECTION 8 OF THE NATIONAL
PROSECUTION SERVICES ACT**

AND

**IN THE MATTER OF INTERROGATING POWERS OF THE DIRECTOR OF PUBLIC
PROSECUTIONS TO INSTITUTE CRIMINAL PROSECUTION BASED ON
INCOMPLETE AND OR ONGOING CRIMINAL INVESTIGATIONS**

BETWEEN

ODERO CHARLES ODERO.....PETITIONER

AND

**DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT
ATTORNEY GENERAL2ND RESPONDENT**

RULING

21 Sept. & 17 Nov, 2021

MGETTA, J:

This ruling is in respect of preliminary objections, the notice of which was filed by the respondents namely Director of Public Prosecutions (the 1st respondent) and the Attorney General (the 2nd respondent), complaining that:

1. This court has no jurisdiction to grant the prayers sought by the petitioner;
2. The petition is incompetent and bad in law for want of affidavit in compliance with **section 4(2) of the Basic Rights and Duties Enforcement Act, Cap 3** as amended (henceforth Cap. 3).
3. The petition is incompetent and bad in law for failure to exhaust local remedies, thus contravening **section 8(2) of Cap. 3**.
4. The petition is bad in law for want of compliance with mandatory provisions of **sections 4, 5 and 6 of Cap. 3**.
5. The petition is frivolous, vexatious and an abuse of court processes, thus contravening **section 8 (2) of Cap. 3**.
6. The petitioner had no cause of action and *locus standi*, thus contravening **articles 26 (2) and 30(3) of the Constitution of the United Republic of Tanzania, 1977** as amended (henceforth the constitution) and **section 4 (3) of Cap. 3**.

When the preliminary objections were called on for hearing, Mr. John Seka, the learned advocate appeared for Mr. Odero Charles Odero, the petitioner; while, both the respondents enjoyed legal service of Mr. Hangi Chang'a, the learned Principal state attorney and Ms. Vivian Method, the

learned Senior state attorneys. It was agreed that the preliminary objections be argued by way of written submissions, which were promptly filed as scheduled.

First and foremost, it should be understood that the petitioner had earlier on petitioned to this court under the provisions of **article 108 (2) of the Constitution** read together with **section 2(3) of the Judicature and Application of Laws Act, Cap 358** (henceforth JALA) challenging the use of powers bestowed upon the 1st respondent under **article 59 B of the Constitution**. However, it seems that preliminary objections raised by the respondents suggest that the petitioner is entirely wrong to invoke **article 108 (2) of the Constitution** as enabling provision to challenge such powers; and, that the petition ought to be brought under **articles 26(2) and 30(3) of the Constitution** read together with the provisions of **Cap 3**. It is from that short sharp observation in the written submissions filed by both sides and the records of this petition that have lead me choose to argue and determine generally all the raised preliminary objections as hereunder.

In his written submission, Mr. Seka stated that as far as the parliament of Tanzania has not yet enacted law prescribing procedures to be invoked to bring matters on constitution provisions other than the provisions of **articles**

12 to 29 of the Constitution whose violations are challengeable through **Cap.3**, he decided to invoke the provision of **article 108(2) of the Constitution** which vests the High Court with inherent jurisdiction to institute this petition to challenge the use of powers given under **article 59 B of the constitution** which is not covered under the provisions of **Cap. 3**. For ease of reference, **article 108 (2) of the constitution** reads:

"Where this Constitution or any other law does not expressly provide that any specified matter shall first be heard by a court specified for that purpose, then the High Court shall have jurisdiction to hear every matter of such type. Similarly, the High Court shall have jurisdiction to deal with any matter which, according to legal traditions obtained in Tanzania, is ordinarily dealt with by a High Court."

Kiswahili version of the Constitution reads that:

*" Iwapo **Katiba** hii au **Sheria** nyingine yoyote **haikutamka wazi** kwamba shauri la aina iliyotajwa mahsusi litasikilizwa kwanza katika Mahakama ya ngazi iliyotajwa mahsusi kwa ajili hiyo, basi Mahakama Kuu itakuwa na*

mamlaka ya kusikiliza kila shauri la aina hiyo, hali kadhalika, Mahakama Kuu itakuwa na uwezo wa kutekeleza shughuli yoyote ambayo kwa mujibu wa mila za kisheria zinazotumika Tanzania shughuli ya aina hiyo kwa kawaida hutekelezwa na Mahakama Kuu."

He also submitted that in absence of prescribed statutory procedure in Tanzania, the petitioner has a right to resort to the procedure provided under common law as well the practice and procedure used by the court of justice in England. That's why he has also invoked the provision of **section 2 (3) of JALA** to support the above quoted article. For ease of reference **section 2(3) of JALA** is quoted in *extenso* as hereunder:

"(3) Subject to the provisions of this Act, the jurisdiction of the High Court shall be exercised in conformity with the written laws which are in force in Tanzania on the date on which this Act comes into operation (including the laws applied by this Act) or which may hereafter be applied or enacted and, subject thereto and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, the doctrines of equity

and the statutes of general application in force in England on the twenty-second day of July, 1920, and with the powers vested in and according to the procedure and practice observed by and before Courts of Justice and justices of the Peace in England according to their respective jurisdictions and authorities at that date, save in so far as the said common law, doctrines of equity and statutes of general application and the said powers, procedure and practice may, at any time before the date on which this Act comes into operation, have been modified, amended or replaced by other provision in lieu thereof by or under the authority of any Order of Her Majesty in Council, or by any Proclamation issued, or any Act or Acts passed in and for Tanzania, or may hereafter be modified, amended or replaced by other provision in lieu thereof by or under any such Act or Acts of the Parliament of Tanzania:

Provided always that, the said common law, doctrines of equity and statutes of general application shall be in force

in Tanzania only so far as the circumstances of Tanzania and its inhabitants permit, and subject to such qualifications as local circumstances may render necessary”.

As far as I understand, the only statutory procedure in existence in Tanzania to challenge the provisions of the Constitution is **Cap 3** which is intended to cater for **articles 12 to 29 of the Constitution**. This is clearly, specifically and expressly provided under **section 1(2) of Cap 3** and I quote the relevant section as hereunder:

"(2) This Act shall apply to Tanzania Zanzibar as well as to Mainland Tanzania in relation to all suit the causes of action which concern the provisions of sections 12 to 29 of the constitution"

Thus, it is obvious the above quoted provision excludes the applicability of **Cap 3** to challenge the use of powers provided under **article 59 B of the Constitution**, which of course, does not fall squarely under the provisions of **Cap.3**. In the circumstance, it is not correct procedure to invoke the provision of **Cap 3** to challenge the use of an article of the constitution which is not expressly covered under **Cap 3**. If it is inapplicable

to the present situation, it is therefore ridiculous for a person to rise and bring preliminary objection claiming that the provisions of inapplicable law are contravened.

In the same vein, the petitioner is seeking to challenge the use of powers under **article 59 B of the Constitution** through **article 108 (2) of the constitution** because this High Court has inherent powers and jurisdiction under the same article (108 (2)) to entertain matters whose procedures are not prescribed in any other statutory law, to wit **Cap 3**; and, by doing so this High Court would be applying the substance of common law under **section 2 (3) of JALA**.

I am therefore in agreement with Mr. Seka that there is no statutory law providing specific procedures under which the petitioner should come before this court and institute a constitutional case to challenge the use of powers bestowed upon the 1st respondent under **article 59 B of the Constitution**. Since, according to him **article 108 (2) of the Constitution** lays down clear procedure on what to do if one is aggrieved by the use of **article 59B of the Constitution** or any article of the Constitution, not covered under **Cap. 3**, I find that the petitioner has properly knocked the doors of this court.

In the case of **Director of Public Prosecutions versus Daud Pete** [1993] TLR 22 as cited by Mr. Seka, the Court of Appeal stated that where there is no prescribed procedural law to institute a suit challenging an article of the Constitution, the petitioner can rely on the provisions of **article 108 (2) of the Constitution**. It was held *inter alia* that:

"... High Court has unlimited inherent original jurisdiction to adjudicate upon any legal matter unless there is express statutory provision to the contrary."

He also cited the case of **Paul Revocatus Kaunda versus Speaker of National Assembly and others**; Miscellaneous Civil Cause No. 10 of 2020 (High Court)(DSM)(unreported) whereby this court faced with more or less similar situation where **Article 71 (1) (f) of the Constitution** was complained of. This court confirmed that **section 1 (2) of Cap. 3** clearly carter only for causes of action emanating from the provision of **articles 12 to 29 of the Constitution**. It does not carter for causes of action concerning with the provisions of **article 59B of the Constitution** as it was similar situation in the case of **Paul Kaunda case** (supra) whereby this court decided that **Cap 3** did not apply to causes of action concerning the

provisions of **article 71 of the Constitution**. I quote the relevant part in

Paul Kaunda case (supra):

"The provision of section 1(2) of the BRADEA which provides for the application of the law is clear and unambiguous. It does not, in our view, need interpretation. It is to the effect that, the procedure therein the applicable to cause of action emanating from the provisions of articles 12 to 29 of the Constitution. This is in line with article 30(3) of the Constitution".

From the wordings, it is crystal clear that both **articles 30 (3) and 108 (2) of the Constitution** sufficiently confer original and inherent original jurisdictions upon the High Court to entertain constitutional proceedings. As it is presently, the use of **article 30 (3)** as discerned from its wording, presupposes the existence of statutory procedural law to follow as **Cap 3**; while the invocation of **article 108 (2)** is resorted to where there is no statutory law providing for procedures to follow.

In the same vein, **articles 26 (2) and 30 (3) of the Constitution** do not apply in this situation. For ease of reference **article 26 (2)** reads:

"(2) Kila mtu ana haki, kwa kufuata utaratibu uliowekwa na sheria, kuchukua hatua za kisheria kuhakikisha hifadhi ya Katiba na sheria za nchi."

For ease of reference **article 30 (3) of the Constitution** reads as hereunder:

"(3) Mtu yeyote anayedai kuwa sharti lolote katika Sehemu hii ya Sura hii au katika sheria yoyote inayohusu haki yake au wajibu kwake, limevunjwa, linavunjwa au inaelekea litavunjwa na mtu yeyote popote katika Jamhuri ya Muungano, anaweza kufungua shauri katika Mahakama Kuu."

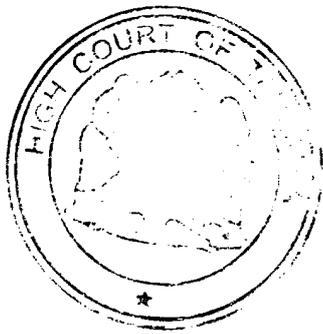
By and large, the petition intends to challenge the constitutionality of the practice by the 1st respondent to file criminal cases without waiting the completion of gathering the evidence, which in practice, he will tell the court, is against the dictates of **article 59B of the Constitution**. Without going around the bush, I find that this court has jurisdiction to hear and determine this petition.

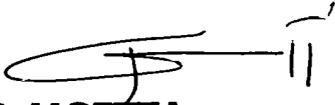
For reasons given herein above, I find that all preliminary objections raised by the respondents should fail because they concern the provisions of

Cap 3 which do not apply to the present situation. I do accordingly dismiss them. Costs to follow the event.

It is so ordered.

Date at Dar es Salaam this 17th day of November, 2021.




J.S. MGETTA

JUDGE