

**IN THE HIGH COURT OF TANZANIA
(MAIN REGISTRY)
AT DAR ES SALAAM
MISCELLANEOUS CIVIL CAUSE NO. 2 OF 2021**

**IN THE MATTER OF CONSTITUTION OF THE UNITED
REPUBLIC OF TANZANIA 1977 [CAP. 2 R.E 2008] AS
AMENDED FROM TIME TO TIME**

AND

**IN THE MATTER OF BASIC RIGHTS AND DUTIES
ENFORCEMENT ACT [CAP. 3 R.E. 2019]**

AND

**IN THE MATTER OF A PETITION TO CHALLENGE THE
DECISION OF TANZANIA CHIEF OF DEFENSE FORCES**

BETWEEN

MT 25624 CPT (RETIRED)

PHILIP SAMSON CHIGULU ----- PETITIONER

VERSUS

TANZANIA PEOPLE'S DEFENSE

FORCES ----- 1ST RESPONDENT

TANZANIA CHIEF OF DEFENSE

FORCES ----- 2ND RESPONDENT

ATTORNEY GENERAL ----- 3RD RESPONDENT

Date of last Order: 15/07/2021

Date of Ruling: 12/10/2021

R U L I N G

MGONYA, J.

Before this Court, is the Petitioner **MT. 25624 CPL (Retired) PHILIP SAMSON CHIGULU** challenging the Constitutionality of decision of releasing the Petitioner from services by Military services. The Petitioner herein was an employee of the Tanzania Peoples' Defense Force (TPDF) working as a store man for the 1st and 2nd Respondents.

The brief facts of this matter is that, in **1987** the Petitioner was released from the service by an early retirement after being found unsuitable for further service . He never challenged the decision of releasing him. Instead, he accepted his terminal benefits. It is this year after the lapse of about **33 years**, he is now filing this Constitutional Petition in this Honourable Court challenging the decision of the 1st and 2nd Respondents.

The Petitioner alleges that his right to employment has been violated by the Respondents. Further, he is praying for this Honourable Court to declare the act of the 1st and 2nd Respondents unconstitutional, re-engage him in the military service and to award him all the Military ranks up to the rank of Lieutenant Colonel.

In the cause of responding to the Petition, in the preliminary stage the Respondent herein raised six (6) points of Preliminary objections on the following points of law, namely:

- i. The Petition is fatally defective for contravening the provisions of section 4 of the Basic Rights and Duties Enforcement Act, Cap. 3 [R. E. 2019];*
- ii. The Petition is fatally defective for contravening the provisions of sections 4, 8 (2) and 8 (4) of the Basic Rights and Duties Enforcement Act, Cap. 3 [R. E. 2019] as the Petitioner have alternative means of redress or remedy;*
- iii. The Petition is untenable for being frivolous, vexatious and an abuse of Court processes;*
- iv. The Petition is incompetent and bad in law for contravening the provisions of section 5 and 6 of the Basic Rights and Duties Enforcement Act, Cap. 3 [R. E. 2019];*
- v. The reliefs sought by the Petitioner are untenable; and*
- vi. The Affidavit is defective for contravening the provisions of Order XIX Rule 3 of the Civil Procedure Code, Cap. 33 [R. E. 2019].*

In this petition, the Petitioner was representing himself while **MR. GALLUS LUPOGO** Learned State Attorney stood for

Respondents. With consent and order of the Court, the points of Preliminary objections were argued by way of written submissions.

Submitting in support of **first** and **second** grounds; it is the Respondents' concern that, the Petition is fatally defective for contravening the provisions of **sections 4 and 8 (2) and 8 (4) of the Basic Rights and Duties Enforcement Act, Cap. 3 [R. E. 2019]** as the Petitioner has alternative means of redress of remedy.

It was further submitted that, the established principle of law that the jurisdiction of the Court to entertain the Petition of this nature has to be in accordance with the provisions of **sections 4, 5 and 8 (2), (4) of the Basic Rights and Duties Enforcement Act, Cap. 3. [R. E. 2019]**. That, the jurisdiction is exercised when it is satisfied that the Petitioner has exhausted all available alternative means of redress through other forum in accordance with the Laws of the Land.

The Respondents' concern is that the Petitioner has other alternative means of redress as the alleged act of the 1st and 2nd Respondents can be challenged through **Judicial Review** under the provisions of **Part VII of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap. 310, [R. E. 2019]**.

Mr. Lupogo argued further that this Court considers that the choice of forum is not obligatory rather a mandatory as the Court has demarcated its mandate depending on the claims. The case of ***EZEKIAH TOM OLUOCH VERSUS WINFRIDA G. RUTAHINDURWA AND 2 OTHERS, Misc.Civil Cause No.03 of 2020, High Court of the United Republic of Tanzania, at Dar es Salaam Main Registry (Unreported)*** was referred where the court had this to say:

"It is apparent that the Constitutional petitions and judicial review are not quite similar matters. Legally, Constitutional petitions fall in the broad category of cases of public interest which cover and above articles 12-29 of the Constitution. These appear evident in situation where article 26(2) is applied to protect the Constitution and legality, challenging the validity of the law which appears to be inconsistent with the constitution or legality of a decision or action that appears to be contrary to the Constitution or the law of the Land."

Moreover, it was submitted that, **section 8(4) of the Basic Rights and Duties Enforcement Act**, provides restriction to this Court to determine applications for prerogative orders. The same provides:

"..... the provisions of Part VII of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, which relate to the procedure for and the power of the High Court to issue prerogative orders, shall not apply for the purposes of obtaining redress in respect of matters covered by this Act"

The Respondents are of their view that, since the Petitioner has alternative means of redress, this Court is precluded to entertain this matter prematurely, as the Petitioner did not exhaust the machinery of **Judicial Review**, rendering the matter before the Court fatally defective and lacking in jurisdiction.

On the **3rd ground** that the petition is untenable for being frivolous, vexatious and an abuse of Court processes, the Respondent maintained that, the Petitioner ought to have been challenged by way of Judicial Review and not as Constitutional case. The case of **JAYANT KUMAR CHANDUBAL PATEL @ JEET PATEL AND 3 OTHERS V ATTORNEY GENERAL AND 2 OTHERS**, Miscellaneous Civil Case No.30 of 2009 (HC) (Unreported), was cited where it was observed that:

"....with hindsight of the restatement of law in A.G V. REV. CHRISTOPHER MTIKILA (supra)

case, the Court cannot therefore expand the jurisdiction of this Court so as to include the power to question how the DPP should exercise his Constitutional and Statutory duties."

The Respondents' Counsel further submitted that, the 2nd Respondent made such decision in accordance with the laws governing Military Service and followed all necessary procedures. Further, the Petitioner's disappearance for 33 years before approaching the Court shows that Petitioner did not have any valid claims against the Respondents. Further, confirming that the Petition is frivolous and vexatious. On the other hand, **Mr. Lupogo** averred that, on the serious note, the Court is not vested with power to order re-engagement nor to grant the relief sought by the Petitioner, hence holding this Petition is an abuse of Court process.

In the **4th ground**, the Respondents are of the view that the Petition is incompetent and bad in law for contravening the provisions of **sections 5 and 6 of the Basic Rights and Duties Enforcement Act, Cap. 3 [R. E. 2019]** of which provides necessary conditions on how a Constitutional Petition should be made. It has been stated that, plainly it provides for the documents which constitute

a Constitutional Petition which is Originating Summons and not both Petition and Originating Summons. Further, the content of the documents should not contain legal argument as Petitioner did. The failure to abide to the contents of the Petition is said to have made the Petition incompetent and bad in law.

In the **5th ground**, it is the Respondents' belief that the reliefs sought by the Petitioner are untenable, that in constitutional context, the jurisdiction of the Court to entertain the Petition and decide on the prayers is founded on the Petitioner's claim which has to be in accordance with the provisions of **sections 4 (1), 5 and 8 (2), (4) of the Basic Rights and Duties Enforcement Act, CAP. 3 [R. E. 2019]**, as amended by the **Act No. 3 of 2020**. Further that, the Petitioner's prayers were fit under jurisdiction of the High Court by way of judicial review and not by way of Constitutional redress which its purpose under the laws is to deal with matters of contravention and violation of provisions of **Article 12 to 29 of the Constitution of United Republic of Tanzania (1977)**. Reliefs sought were not within the jurisdiction of the Court.

In the **6th ground**, the Respondents are of the view that the affidavit is defective for contravening the provisions of **Order XIX Rule 3 of the Civil Procedure**

Code, Cap. 33 [R. E. 2019]. It is submitted that, the affidavit in support of the Petition sworn by the petitioner is incurable defective for containing prayers, conclusions and legal argument contrary to the law. The Counsel referred this Court to the case of **UGANDA V. COMMISSIONER OF PRISONS, EX PARTE MATOVU [1966] 1 EA 514**, which provides rule of practice and procedure on affidavit, where the same stated that:

"...as a general rule of practice and procedure, an affidavit for use in court being a substitute for oral evidence, should only contain statements of facts and circumstances to which the witness deposes either of his own knowledge or from Information which he believes to be true. Such an affidavit should not contain extraneous matters by way of objections or prayer or legal argument or conclusion."

From the above it has been stated that, the requirement of affidavits is a mandatory and has to be complied with the legal requirements in **Civil Procedure Code, 2019**.

Thus, it is the Respondents call upon this Court to expunge the petition for being contrary to the mandatory

provisions of rule of practice, and therefore is incurably defective and untenable in law for contravening the provisions of the laws.

The Petitioner in replying the Respondents' written submissions on points of preliminary objection, submitted that points of objections 1 up to 6 were not true to the fact that filed by the incurable defective Notice on preliminary objections and regarding the incompetence and illegality to the eyes of law. That incompetence and illegality in the in the filing a Notice of preliminary objection at the wrong name of the Court and second Respondents' names were wrong cited.

Further, the Petitioner submitted that the Respondents' Counsel prepared and filed the incurable defective Notice of Preliminary Objections, for failure to cite the proper name of the Court and place of this Court **at Dar es Salaam** as directed by the **Order VII rule 1(a) of the Civil Procedure Code, (supra)**. He submitted that, the Respondents' Counsel cited:

**"IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA
(MAIN REGISTRY)**

Instead of filing the same to this Court by citing the proper names and place of this Court as:

IN THE HIGH COURT OF TANZANIA
IN THE MAIN REGISTRY
AT DAR ES SALAAM"

Also the petitioner maintained that, the Respondents' Counsel misdirect to cite the names of second respondent **TANZANIA CHIEF OF DEFENCE FORCES** instead of **CHIEF OF DEFENCE FORCES FOR TANZANIA PEOPLE'S FORCES** as correct citation. The Petitioner further attacking the respondent's written submission that added nothing to the Court, and therefore the Respondents have no any legal preliminary objections and written submission to object the Petitioner's Petition before this Court.

The Petitioner prayed this Court to dismiss the points of preliminary objection and written submission by the Respondent for being incurable defective, and filed to the unknown names and place of this Court and to order the Respondents to pay the **Tsh. 500,000,000/=** as compensation to the **Petitioner**.

This Court before determining the advanced points of preliminary objection by the Respondents, I have to point out from the very beginning that in the cause of replying the points raised, I have noted that the Petitioner instead of responding or contradicting the objections raised, he

dealt with other new issues of misplacement of words and spellings.

From the above, it is translated that the Petitioner did not file his reply. However, for the interest of Justice and satisfaction to the petitioner, I will briefly reply his concerns accordingly.

In determining the first point of objection as to whether the petition was fatally defective for contravening the provisions of **sections 4, 8(2) and 8(4) of the Basic Rights and Duties Enforcement Act, Cap 3 R.E 2019** as the petitioner have alternative means of redress or remedy, I have the following:

The Petitioner challenged the decision of 1st and 2nd Respondents to release him from the services and awarding an early retirement and in effect prays the act to be declared **unconstitutional**. The Respondent's Counsel resisted that the petitioner had other alternative means of redress and can be challenged through Judicial Review.

On the point of availability of alternative remedy under the laws, **sections 17, 18 and 19 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap. 310 [R. E. 2019]**, as approved in the case of ***EZEKIAH TOM ULUOCH VERSUS THE PERMANENT SECRETARY PRESIDENT'S OFFICE***

PUBLIC SERVICE MANAGEMENT & 4 OTHERS, Civil Appeal No. 140 of 2018- Court of Appeal in Dar es Salaam (Unreported) stated that:

"As regards the second ground as to whether there were other judicial remedies available to challenge the decision of the 1st Respondent, our answer is that the route taken by the appellant to file judicial review in the High Court was proper one. Section 17, 18 and of the Act, gives the High Court mandate to entertain matters of judicial review"

In this case, as the Petitioner was aggrieved against the decision of the 1st Respondent to forcefully termination from the army before right time of retirement, undoubtedly, this claim is suggesting the engagement of **Judicial Review** procedures and not **Constitutional cause**.

It is true that, this Court has such jurisdiction to entertain the same to the requirement that if the Court satisfied that parties has exhausted all available alternative means of redress from other forums like lower courts, tribunals and other public authorities. The Judicial Review is provided under the provisions of **Part VII of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap. 310. R. E. 2019.**

The law under such Part VII of the Act, demands Judicial Review is for Court monitoring the administrative actions and powers and the procedures of the authority of the state. **Section 8(2) and (4) of the Basic Rights and Duties Enforcement Act, Cap. 3, (R.E. 2002)** bars this Court to determine applications for prerogative orders. The same provides:

"..... the provisions of Part VII of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, which relate to the procedure for and the power of the High Court to issue prerogative orders, shall not apply for the purposes of obtaining redress in respect of matters covered by this Act"

From the above provisions, is obvious this Court gains its power after being satisfied that parties exhausted all other means of redress from other Administrative bodies or courts of law.

The Petitioner failed to challenge his claims to the right forum. Under the circumstances, this Court finds that **it has no jurisdiction under the Statute to entertain the Constitutional Petition while other avenues of redress have not been exhausted and can be availed before the Court by way of Judicial Review.**

As promised earlier, that despite the fact that the Petitioner has introduced new factors to the Respondents submission in chief, I hereby proceed to answer the Petitioner's concern as hereunder.

As to the omission of words in citation, names of parties and spellings misplacement like 1st Respondent, "at Dar es Salaam" in the name of court, and the omitted words in the petition at page 1, it is this Court's concern that the omission and misplacement of spelling and words as indicated herein are not fatal as they are mere clerical or arithmetical error which are curable under the principle of overriding objective under the provision of **sections 3A and 3B of the Civil Procedure Code, Cap 33 [R. E. 2019]**. The document can not be termed fatal because the identity of the case is clearly revealed by its case number, parties and the court where the same was filed.

As this Court have come to the conclusion that it has no jurisdiction to entertain the Petition at hand, there is no need of further determining other points of Preliminary Objection as by this single point of Jurisdiction is enough to dispose of this matter.

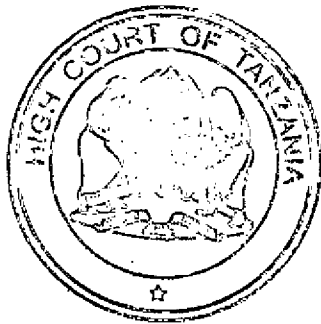
It is from here that I join hands with Counsel for the Respondents, that the **Petition herein is improperly filed**

before this Court as Constitutional Court hence the same has no Jurisdiction.

In the event therefore from all that has been said above, the point of preliminary objection on JURISDICTION is sustained and the Petition is accordingly dismissed for lack of JURISDICTION.

I make no order as to costs.

It is so ordered.



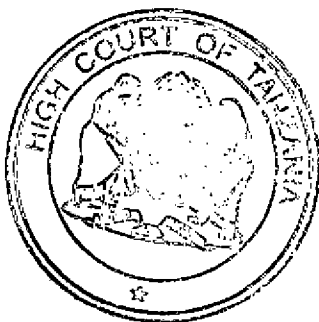
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L. E. MGONYA

JUDGE

12/10/2021

Court: Ruling delivered in chamber in presence of the Petitioner, Mr. Galus Lupogo State Attorney for the Respondents, and M. G. Kanyagah, CC.



A handwritten signature in black ink, appearing to read "Mgonya", is written over the printed name.

L. E. MGONYA

JUDGE

12/10/2021