

IN THE HIGH COURT OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CIVIL CAUSE NO. 3 OF 2022

**IN THE MATTER OF ARTICLE 108(2) OF THE CONSTITUTION OF THE UNITED
REPUBLIC OF TANZANIA**

**IN THE MATTER OF SECTION 2(3) OF THE JUDICATURE AND APPLICATION
OF LAWS ACT**

**IN THE MATTER OF ARTICLE 5(2) AND 64(5) OF THE CONSTITUTION OF THE
UNITED REPUBLIC OF TANZANIA**

IN THE MATTER OF SECTION 11(1)(C) OF THE NATIONAL ELECTIONS ACT

**IN THE MATTER OF CHALLENGING THE RESTRICTIONS IMPOSED ON
PRISONERS AND REMANDEES AWAITING TRIAL TO REGISTER AND VOTE IN
THE GENERAL ELECTIONS**

BETWEEN

**TITO ELIA MAGOTI.....FIRST PETITIONER
JOHN BONIFACE TULLA.....SECOND PETITIONER**

VERSUS

**NATIONAL ELECTRAL COMMISSION.....FIRST RESPONDENT
THE ATTORNEY GENERAL.....SECOND RESPONDENT
COMMISSION FOR HUMAN RIGHTS AND
GOOD GOVERNANCE.....THIRD RESPONDENT
TANZANIA PRISON SERVICE.....FOURTH RESPONDENT**

RULING

03/06/2022 & 10/06/2022

E. B. LUVANDA, J.

The respondents above mentioned raised preliminary objections via a notice embedded in reply to the petition, grounding that: one, the Honorable Court has no jurisdiction to entertain this matter; two, the petition is untenable in law for having being brought as a petition under the Constitution whilst the prayers sought falls under the ordinary suit seeking declaratory orders.

Arguing the first point, Ms Narindwa Sekimanga learned State Attorney for the respondents, submitted that this matter has not been brought under the Basic Rights and Duties Enforcement Act Cap 3 R.E. 2019 (hereinafter to be referred in short form as BRADEA), thus not falling within Articles 12 to 29 of the Constitution of the United Republic of Tanzania, hereinafter the Constitution. That all matters falling under the said Act must be brought as petition and determined by three judges of the High Court, citing section 10 of Cap 3 R.E. 2019 and rule 15(1) of the Basic Rights and Duties Enforcement (Practice and Procedure) Rules, 2014. That the present case has been brought under Article 108(2) of the Constitution and has been assigned to three judges namely Hon. Mgeta, Luvanda and Kisanya, JJJ. She submitted that the present case being not brought under BRADEA, the present panel of three judges sitting to determine the petition has no jurisdiction. According to the learned State Attorney, three judges of the High Court can only sit to determine matters under BRADEA section 10 and rule 15(1) supra;

an appeal from the Advocate Committee in terms of section 24A(1) of the Advocates Act; or when the Chief Justice direct the High Court to constitute a full bench to determine an appeal of the matters originating from primary court as per section 27(1) of the Magistrates Courts Act Cap 11 R.E. 2019. She submitted that the High Court does not sit as a full bench automatically even if the matter is brought under Article 108(2).

In opposition to the preliminary objection, Mr. John Seka learned Counsel for the petitioners, submitted that this Court has jurisdiction to entertain this matter since there is no law or procedure in Tanzania that has expressly provided for another forum other than the High Court to adjudicate constitutional petitions founded on provisions of the Constitutions other than Article 12 to 29 which are adjudicated under BRADEA. He cited section 2(3) of the Judicature and Application of Laws Act; **DPP vs Daudi Pete** (1993) TLR 22; **Odero Charles Odero vs Director of Public Prosecutions and Another**, Misc. Civil Cause 20 of 2021 [2021] TZHC 7388-Tanzlii, to support his proposition that this Court has inherent jurisdiction to entertain constitutional petition preferred under Article 108(2) of the Constitution. The learned Counsel submitted that it is a legal possibility that petitions touching on constitution provisions not covered by BRADEA can be heard by single judge; the provisions of Article 108(2) of the Constitution militates

against such a possibility since it requires the High Court to entertain and deal with matters under Article 108 (2) according to legal traditions obtaining in Tanzania. He submitted that legal traditions obtaining in Tanzania through BRADEA envisages a hearing of a constitutional petition by a panel of three judges.

He submitted that the decision to assign a panel of three judges was at most administrative and not judicial and administrative decision cannot find fault in the veracity of those submission save for the fact that no matter the number of judges that sit in a panel; the decision that comes out of it is usually a decision of the High Court and does not enjoy a special status for reason that the High Court sat with more than one judge.

In rejoinder, the learned State Attorney submitted that the legal traditions obtained in Tanzania in relation to the High Court is that, ordinarily a single judge sits when determining cases. That the High Court sits as a full bench on special circumstances as by operation of law or per directives of the Chief Justice as provided in the law and not otherwise. She aligned her proposition along the wording of Article 108(2) of the Constitution.

Principally, I have no problem with the contention that Article 108(2) of the Constitution cloth this Court with inherent and unlimited jurisdiction to hear any matter, constitution petition being inclusive. For appreciation, I

reproduce the letter to the said Article 108(2) of the Constitution (Swahili version) as hereunder,

'Iwapo Katiba hii au sheria nyingine yoyote haikutamka wazi kwamba shauri la aina iliyotajwa mahususi litasikilizwa kwanza katika Mahakama ya ngazi iliyotajwa mahususi 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'

This is also inferred under section 2(1) of the Judicature and Application of Laws Act, Cap 358 R.E. 2002, which provide, I quote,

'Save as provided hereinafter or in any other written law, expressed, the High Court shall have full jurisdiction in civil and criminal matters'

I was trying to buff up the argument of the learned Counsel for the petitioners as far as the jurisdiction of this Court is concerned.

However, that was not the argument on contention, the argument of the learned State Attorney was that this matter being constitution petition which does not fall under the scheme of BRADEA, was wrongly assigned to a panel of three judges of the High Court. Essentially there was no strong opposition from the learned Counsel for the petitioners apart from a segment of

argument that assignment is a mere administrative function or else no matter the number of judges that sit in a panel, the decision is that of the High Court and doesnot enjoy any special status.

I understand that at the Main Registry (or the Registry as officially named under rules 2 and 5 of The High Court Registries, Rules 2005 G.N. 96 of 2005), five types of cases are filed:

One, petition under BRADEA section 10 and rule 15(1) supra, which stipulate composition of three judges of the High Court to hear the petition;

Two, an appeal from the Advocate Committee under section 24A(1) of the Advocates Act, which composition is the full bench of the High Court of not less than three judges;

Three, Court-martial Appeal Court provide for a Quorum constituting three judges of the High Court under section C146(1),(2), (4) of the National Defence Act No. 24 of 1966;

Four, judicial review under Article 30(3) of the Constitution and section 17 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap 310 R.E. 2002, which technically fall under BRADEA by virtual of Article 30(4) of the Constitution which also fall under Part Three of Chapter One on the Constitution (see section 3 of BRADEA), therefore require three members of the bench;

Finally, constitution petition under Article 108(2) of the Constitution and section 2(3) of the Judicature and Application of Laws Act, which is silence regarding composition or constitution of quorum.

It is to be note that the list above is not as per the category of cases provided for in the register maintained at the Registry.

In view of the above, the learned Counsel for the petitioners invited the Court to invoke the analogy principal that since all matters filed in the Registry as depicted above, require a quorum of three members of the bench of the High Court, then constitution petition also should fall under that category, citing wordings under Article 108 (2) of the Constitution (English version) that it requires the High Court to deal with matters under this Article according to legal traditions obtained in Tanzania.

In my quotation above in respect of Article 108(2), I cited a Swahili version and it was by design. Because in Swahili version use a phrase "*kutekeleza shughull*" which does not correspond much with the English version which use a phrase "*deal with matters*".

TUKI English – Swahili Dictionary Third Edition, at page 205 define the word deal to mean "*shughulikia; jihusisha na*'

TUKI Kamunsi ya Kiswahili – Kiingereza (Swahili-English Dictionary Second Edition) at page 316 define the word “*tekeleza*” to mean “*implement, execute*”

Therefore, the phrase used in the Constitution English version doesn't envisage what was contemplated in the Swahili version. In other words, what is provided in Article 108(2) does not connote handling other cases (this case) in a like manner as provided for in the BRADEA, as suggested by the learned Counsel for the petitioners. To my view, the said provision was meant to execute other activities or business which according to legal traditions obtained in Tanzania are ordinarily executed by the High Court.

As rightly submitted by the learned State Attorney to compose a panel is not an automatic by merely filing the matter at the Registry. There must be express provision warranting constitution of a panel. In other words, composing a panel cannot be taken as a fashion for each and every case filed at the Registry. There must be threshold upon which determination of whether to constitute a panel or not can be made. To be precisely, we cannot be going on with a normal practice which is not backed up by any law.

The argument of the learned State Attorney that the Chief Justice can direct the High Court to constitute a full bench to determine any matter, to my view that proposition is valid only to the extent that the Honorable Chief

Justice can exercise his discretion where there is a specific legislation or provision of the law warranting that course. Example section 27(1) of the Magistrates Courts Act Cap 11 R.E. 2019 (cited by the learned State Attorney); section 370(1) of the Criminal Procedure Act, Cap 20 R.E. 2019; rule 18(1) of the National Elections (Election Petition) Rules G.N. No. 782 of 2020. Under these provisions the Honorable Chief Justice can direct a particular or specific case to be heard by more than one judge of the High Court in the circumstances where the Chief Justice is of the opinion that the matter is likely to raise complicated question of law or fact.

In the instant petition, there is no express provision of the law or under the Constitution which call for composition of the panel to adjudicate constitution petition brought under the provision of Article 108(2).

In terms of section 5 of the Judicature and Application of Laws Act, with marginal note powers of a single judge of the High Court, it provide,

'Subject to any written law to the contrary, a judge of the High Court may exercise all or any part of the jurisdiction of, and all or any powers and authorities conferred on, the High Court'

That said, I hold that a single judge of the High Court has jurisdiction and powers to adjudicate over matters filed under Article 108(2) of the Constitution and section 2(3) of the Judicature and Application of Laws Act.

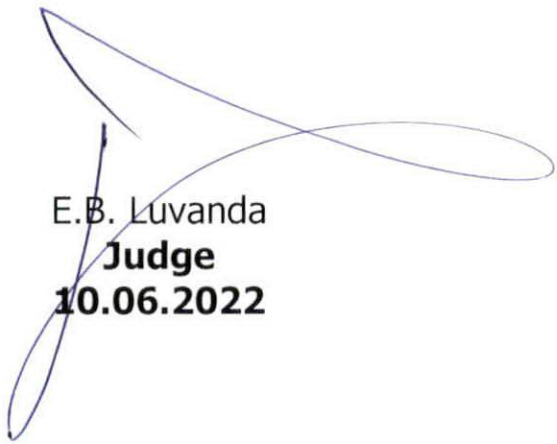
Regarding the second limb of objection which goes that the petition is untenable in law for seeking declaratory orders which are ordinarily sought under normal suit. In the submission in support of this point, the learned State Attorney, attacked reliefs sought by the petitioners specifically paragraph seven, where the petitioners seek for general damages; paragraph eight, where the petitioners are praying for the High Court to compel the first respondent to table the National Election Act to the Parliament for amendment; paragraph nine, where the petitioners are seeking an order to compel the first respondent to enact regulations providing for voting stations and procedures regulating casting of votes for prisoners; paragraph ten, where the petitioners are praying for an order to compel the first respondent to furnish affidavit setting out the manner in which the orders of the court will be complied with after judgment has been delivered; paragraph eleven, where the petitioners are praying that the third respondent be ordered to monitor further compliance of the court orders.

To my view the learned State Attorney might be correct to say that reliefs which are ordinarily sought in matters of this nature where one alleges infringement of a certain right as a result of a crafted law or any act by the parliament, ordinarily prayers sought or made are to declare the said

infringing provision or act, unconstitutional. Now as much the learned State Attorney is faulting paragraphs number seven, eight, nine, ten, and eleven only, meaning that the rest a total of eight paragraphs were not challenged. I therefore share the same view with the learned Counsel for the petitioners, that this ground can conveniently be dealt with alongside the merit of the petition.

So, to sum it up, I sustain the first limb of objection to the extent that a single judge of the High Court has jurisdiction and powers to adjudicate over matters filed under Article 108(2) of the Constitution and section 2(3) of the Judicature and Application of Laws Act.

I do not make any order as to costs as the matter is in the nature of public interest litigation.



E.B. Luvanda
Judge
10.06.2022