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

MISCELLANEOUS CAUSE NO. 16 OF 2022

HALIMA JAMES MDEE.....1ST APPLICANT
GRACE VICTOR TENDEGA.....2ND APPLICANT
ESTHER NICHOLAUS MATIKO.....3RD APPLICANT
ESTER AMOS BULAYA.....4TH APPLICANT
AGNESTA LAMBERT KAIZA.....5TH APPLICANT
ANATROPIA THEONEST.....6TH APPLICANT
ASYA MWADINI MOHAMED.....7TH APPLICANT
CECILIA DANIEL PARESSO.....8TH APPLICANT
CONCHESTA LEONCE RWAMLAZA.....9TH APPLICANT
FELISTER DEOGRATIUS NJAU.....10TH APPLICANT
HAWA S. MWAIFUNGA.....11TH APPLICANT
JESCA DAVID KISHOA.....12TH APPLICANT
KUNTI YUSUPH MAJALA.....13TH APPLICANT
NAGHENJWA LIVINGSTONE KABOYOKA.....14TH APPLICANT
NUSRAT SHAABAN HANJE.....15TH APPLICANT
SALOME MAKAMBA.....16TH APPLICANT
SOPHIA HEBRON MWAKAGENDA.....17TH APPLICANT
STELLA SIMON FIYAO.....18TH APPLICANT
TUNZA ISSA MALAPO.....19TH APPLICANT

VERSUS

THE BOARD OF TRUSTEES OF CHAMA CHA DEMOKRASIA NA MAENDELEO (CHADEMA).....1STRESPONDENT
THE NATIONAL ELECTION COMMISSION 2NDRESPONDENT
THE ATTORNEY GENERAL.....3RDRESPONDENT

RULING

13 & 22 June 2022

MGETTA, J:

On 12th May, 2022, this application for leave to apply for judicial review was brought by way of chamber summons supported by affidavits and accompanied with applicants' joint statement. The application is brought against the Board of Trustees of Chama cha Demokrasia na Maendeleo (hereinafter referred interchangeably by its acronym as CHADEMA and or as the 1st respondent); the National Election Commission (hereinafter referred interchangeably by its acronym as NEC and or as the 2nd respondent); and, the Attorney General (the 3rd respondent). If leave is granted, the applicants intend to apply for prerogative orders of Certiorari and Mandamus against the whole process and decision passed on 11th May, 2022 by 1st respondent's General Council for allegedly expelling them from membership of CHADEMA.

In reply, CHADEMA appeared through its advocates equipped with a set of seven preliminary objections challenging the application that was brought by the applicants. Thus, in this ruling, I have endeavored to determine them. For the sake of clarity, I would like to reproduce the seven preliminary objections as hereunder:

1. That the Application is time barred. It emanates from 1st Respondent's Central Committee's decision passed on 27/11/2020 which is more than 6 months, vide: **Rule 6 of the Law Reforms (Fatal Accidents and Miscellaneous provisions) (Judicial Review Procedure and Fees) Rules of 2014** (henceforth 2014 Rules).
2. That this Court lacks jurisdiction in terms of **Article 74 (12) of the Constitution of the United Republic of Tanzania** as amended from time to time (henceforth the Constitution) to investigate NEC.
3. That there is no valid Statement to support the application in terms of **Rule 5 (2) (a) of 2014 Rules**.
4. That the affidavits are fatally defective for the following reasons:
    (i) The verifications are defective as their contents thereof are not based wholly on belief contrary to **Order XIX Rule 3 of the Civil Procedure Code, Cap 33** (henceforth Cap.33)

(ii) The affidavits are signed by applicants' Advocates; thereby defeating the requirement that they be deposed and signed by deponents only.

5. That this Court lacks jurisdiction to hear this application against the 1st respondent because it is not a Public Body or Authority amenable to judicial review.
6. That the application is frivolous, vexatious and an abuse of court process.
7. That, the applicants have sued a nonexistent party namely "The Board of Trustees of Chama cha Demokrasia na Maendeleo (CHADEMA), instead of the statutory Registered Trustees of Chama Cha Demokrasia na Maendeleo (CHADEMA).

When the application was called on for hearing of the raised preliminary objections, six learned advocates namely Mr. Aliko Mwamanenge, Edson Kilatu, Panya Ipilinga, Ferdinand Makole, Emanuel Ukashu and Matinde Waisaku appeared for all applicants; while, three learned advocates namely Peter Kibatala, Jeremia Mtobesya and Dickson Matata, appeared and represented the 1st respondent; and, the 2nd and 3rd respondents enjoyed a legal service of the Solicitor General, Mr. Gabriel

Malata, assisted by three learned State Attorneys namely Stanley Kalokola, Ayoub Sanga and Debora Mcharo.

Before hearing has began, after a short engagement with me, counsel for the 1st respondent dropped the 1st preliminary objection from the list of the above-stated preliminary objections. Through their respective counsel, parties therefore addressed me with regard to the remaining six preliminary objections as hereunder.

In regard to the 2nd Preliminary objection, it was a complaint by Mr. Mtobesya, the learned advocate for the 1st respondent that this court lacks jurisdiction to investigate NEC pursuant to **article 74 (12) of the Constitution**. He supported his argument with the decision in the case of **Miza Bakari Haji and 9 Others Versus The Registered Trustees of the Civic United Front (CUF) & 14 Others**; Misc. Civil Application No. 479 of 2017 (HC) (DSM) (unreported) in which NEC was one of the respondents.

Responding to the above submission, Mr. Aliko submitted that **article 74 (12) of the Constitution** presupposes that NEC has already performed public duties. If NEC had already acted in pursuant to the provision of **article 78 (3) & (4) of the Constitution**, obviously, it could not be interfered or

investigated by the court. After all, the applicants do not ask for inquiry of what NEC had done. He said further that the case of **Miza Bakari Haji** (supra) is distinguishable from the present application because it was stated at page 3 of the decision that NEC had already chosen the Members of Parliament, but in the present application NEC has not yet done anything. Hence, he asked me to overrule this preliminary.

First and foremost, I wish to emphasize that the case of **Miza Bakari Case** (supra) cited by Mr. Mtobesya is inapplicable here as in the said case the 2nd respondent was executing his Constitutional mandate conferred by **article 74(6) (b) of the Constitution**. Further in that case the 2nd respondent had already acted (pronounced the 6th -13th respondents in that case as Members of the Parliament). But in the present case, no act has been made by the 2nd respondent.

However, while understanding that judicial review is not for contemplative actions, at this stage of application for leave, I consider this issue as not a pure point of law. It need more explanation or evidence from the applicants first why they lodged complaints against NEC and then the respondent will reply, before the court decide to determine it. I thus find this preliminary objection without merit. It is accordingly overruled.

I now move to the 3rd preliminary objection. Mr. Kibatala, the learned advocate for the 1st respondent complained that there is no valid statement in support of the application. He said one of the important documents to accompany the application for leave is a valid statement. The joint statement accompanying the application is not valid because, **one** it is signed by each applicant as well two applicants' advocates; **two**, it contained verifications of 19 applicants who purport to verify affidavits and not their joint statement. As a result, there is a misconnection between the joint statement and the verifications. **Three**, the statement does not give the description of the applicants contrary to **rule 5 (2) (a) of 2014 Rules**. To cement his argument, he referred this court to the decision in the case of **Emmanuel S. Stephen Versus The President of the United Republic of Tanzania and Four Others**; Misc Civil Application No. 12 of 2019 (HC) (Mbeya) (unreported).

Responding to Mr. Kibatala's submission, Mr. Aliko the learned advocate for applicants said that they complied with **rule 5 (2) (a) of the 2014 Rules**, by providing the names and description of the applicants who are natural persons. He cited paragraph 3 of their joint statement which shows the descriptions of the applicants that they are Members of Parliament

of the United Republic of Tanzania sponsored by CHADEMA. He added that since that requirement was met, then the joint statement is valid.

In line with Mr. Aliko's submission, Mr. Panya the learned advocate for applicants admitted that it is true that the applicants verified "affidavits" and not the joint statement, but that would not invalidate the entire statement. To him that is a mere defect which requires rectification.

In his reply, Mr. Kibatala reiterated his submission in chief and added that there is no dispute that the statement is signed by the applicants' advocates and that the applicants counsel just made clarification of what contained in the joint statement. They did not oppose and or shaken his submission. He therefore insisted that the joint statement does not comply with the law. Hence, it is incurably defective. Thus, in order not to open *pandoras box*, this court has to strike it out.

Having heard the rival submissions, as the law requires, it is a mandatory requirement, couched by the mandatory word "shall", that, apart from being supported by affidavit, the application for leave and application for judicial review, once leave is granted, must be accompanied by a statement as provided for under **rule 5 (2) (a) of 2014 Rules**. For ease of reference, it is worth to quote **rule 5(2) (a) of 2014 Rules** as hereunder:

" (2) An application for leave shall be made exparte to a judge in chambers and be accompanied by –

(a) a statement providing for the name and description of the applicant."

In view of the aforesaid, it is a common ground that applicants' application is accompanied by their joint statement, signed by each one and by their advocates. Its verification clause indicates that the applicants did verify affidavits and not joint statement. According to the 1st respondent's counsel, it is that wrongly verified statement and signatures of the applicants' advocates therein that render the joint statement invalid as a result, there is a misconnection between the joint statement and the verifications.

To demonstrate what is complained of by the 1st respondent counsel, I hereunder quote the verification of the 1st applicant which read that:

"Halima James Mdee, do hereby verify that what is stated hereinabove in paragraphs.....of ***the affidavit*** *are true to the best of own knowledge."*

It is clearly and vividly shown in the above quoted verification that in a place of joint statement, they inserted "affidavit". What was verified therefore it was not the content of their joint statement, but rather of the

affidavit; whereas, the title of the document reads "applicants' joint statement". As their counsel did not resist, but rather conceded and further requested me to allow rectification of the errors. Pursuant to the principle of overriding objective provided under **sections 3A and 3B of Cap 33 as amended by section 6 of the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018**, I am constrained to agree with them. While upholding the 3rd preliminary objection, I do exercise the discretion of this court and proceed to give the applicants, if they so wish, an opportunity to rectify such short fall.

On the 1st limb of the 4th preliminary objection, Mr. Kibatala complained that the affidavits are fatally defective for the reasons that the verifications are defective in that they contain thereof matters not based wholly on belief contrary to **Order XIX rule 3 of Cap 33**. The affidavits contain facts which are not in the applicants' knowledge. He cited example of paragraphs 16,19 and 24 which contain arguments and opinions. Paragraph 20 contains opinion. This is repeated in paragraphs 21, 22, 23 and 25. Those paragraphs should be expunged and the affidavits declared defective. As a result, the application will remain unsupported. He cited the case of **Lalago Cotton Ginnery and Oil Mills Company Limited Versus Loans and Advance**

Realization Trust (LART); Civil Application No. 80 of 2020 (CA) (Dar es Salaam) (unreported) whereby the Court of Appeal discussed a valid affidavit and matters not allowed to go in the affidavit. If the affidavit contains opinions, arguments, etc, that affidavit should be declared defective. He also referred to the case of **Anatol Peter Rwebangira Versus The Principal Secretary Ministry of Defence and National Service and Another;** Civil Application No. 548/04 of 2018 (CA) (Bukoba) (unreported) where the court of Appeal discussed defective affidavit.

As regard to the 2nd limb of the 4th preliminary objection, Mt. Kibatala submitted that all the affidavits are signed by the applicants and their two advocates thereby defeating the requirement that it be deposed and signed by a deponent only. According to him that was wrong because he who swears or affirms an affidavit is the applicant who owns the affidavit and not his advocate who is not a deponent and therefore a stranger to the affidavit. Advocates' signatures in the affidavits signify or imply that they are also deponents owning the affidavits. In law such contents of such affidavits deposed and signed by advocates become hearsay to them as they were not proper persons ought to sign the affidavits. Thus, he added, the signatures of the advocates on the affidavits vitiate the validity of the affidavits; and

hence, they became defective. The court should not put them in consideration as it was stated in the case of **Rahel Kazimoto Versus Mwajabu Yusuf Mtambo**; Civil Application No. 10 of 2007 (Court of Appeal) (Dar es Salaam) (unreported) whereby the Court of Appeal stated that a defective affidavit cannot be acted upon.

Responding to the foregoing, Mr. Kilatu stated that Mr. Kibatala did not properly direct himself to the raised preliminary objection. He asserted that **section 10 of the Oaths and statutory Declarations Act, Cap 34** (henceforth Cap 34) prescribe the form how the affidavit should look like. He referred to the case of **Director of Public Prosecutions Versus Dodoli Kapufi & Another**; Criminal Application No. 11 of 2008 (CA) (DSM) (unreported) whereby the Court of Appeal laid down the essential ingredients of any valid affidavit to be as hereunder:

(i) the statement or declaration of facts, etc, by deponent;

(ii) a verification clause

(iii) a jurat, and

(iv) the signatures of the deponent and the person who in law is authorized either to administer the oath or to accept the affirmation."

He added that advocates' signatures on the affidavits does not mean that that advocates own the contents of the affidavits. In his submission he stated that the applicants did comply with the ingredients of affidavit as spelled out in the case of **Dodoli Kapufi** (supra). He also referred this court to **section 9 of Cap 34**, which provides that irregularity should not affect validity of an oath. He asked this court not to be bound by technicalities as provided for under **section 3A of Cap. 33**. He also referred this court to the case of **Sanyou Service Station Ltd Versus BP Tanzania Ltd (now PUMA Energy (T) Ltd)**; Civil Application No. 185/17 of 2018 (CA) (DSM) where an affidavit was found defective but His Lordship ordered the amendment of the affidavit to cure the defect.

In reply, Mr. Kibatala stated that the contents of the affidavit such as opinions, arguments etc. are not allowed and are against the law governing affidavit. The applicants counsel did not respond to the paragraphs of the affidavit which are offensive. Likewise, the advocates were not supposed to sign the affidavits because they did not own them. The applicants as deponents and who own the affidavits were the only persons supposed to sign the affidavits. Signing the affidavits by advocates offended the law which is very clear on this issue that another person who is not a deponent

is not allowed to sign an affidavit. In the present situation, both the applicants and their advocates did sign on the affidavits. Thus, advocates' signatures are not curable. The remedy available is to strike out the affidavits.

It is a trite law that there are matters which are not allowed to go in the affidavit. As this application is a civil in nature, I would like to invoke the provisions of **Order XIX Rule 3 (1) of Cap 33** which provides for what should be in the affidavit that:

> *"3.-(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted:*
>
> *Provided that, the grounds thereof are stated."*

I have to revisit also what was observed in the case of **Uganda Versus Commissioner of Prisons, exparte Matove** [1966] E.A. 514 at Page 520, which is still a good law on affidavits, 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 personal knowledge or from information which he believes to be true. Such an affidavit should not contain extraneous matter by way of objection or prayer or legal argument or conclusion."

Therefore, it goes without say that an affidavit which violates those precepts should be struck out. Likewise, in the case of Anatol Peter Rwebangira (supra), the Court of Appeal quoted the definition of affidavit relying on a **Taxmann's Law Dictionary**, D.P. Mittal at page 138 that affidavit in law is:

"..... a statement in the name of a person called deponent, by whom it is voluntary signed or sworn to or affirmed. It must be confined to such statements as the deponent is able of his own knowledge to prove but in certain cases may contain statements of information and belief with grounds thereon"

A quick look at the applicants' affidavit show that paragraph 16 contains words like "*the 1st respondent has issued a, malicious, illegal and*

ultravires.....". Paragraph 19 contains conclusions by having words like *unfounded, unreasonable, Irrational and unjustified;* paragraph 20 contains words like *Bias, ultravires* ; paragraphs 21 and 22 have words like *illegal* and *ultravires*; paragraph 23 contains the words like *ultravires* decision of the governing council. Thus, paragraphs 16, 19,20,21,22,23 and 24 of the applicants' affidavits have offended the provision of **Order XIX Rule 3 of Cap 33.**

In this regard, I agree with the submission of 1st respondent's counsel that due to the inclusion of opinions, argumentative, prayers and conclusion in the affidavits, the affidavits are rendered defective. I thus find, the 1st limb of the 4th preliminary objection meritorious. Pursuant to the decision in the case of **Mondorose Village Council and Another** (supra), I do hereby expunge those offensive paragraphs from the record.

As far as the 2nd limb of the 4th preliminary objection is concerned, with respect I agree with Mr. Kibatala, that an advocate cannot sign an affidavit as deponent for his client as he is not owner of the affidavit; on the other hand, he can swear or affirm an affidavit on matters which are in his personal knowledge only. But, a glance at the affidavits in support of the application for leave, I noticed that each applicant and the two applicants' advocates

signed immediately under the words *"DATED at DAR ES SALAAM on this 12th day of May, 2022".* To me that is not fatal as they did not sign at the place the deponent is supposed to sign. It is true that if the applicants and advocates could have signed affidavits as deponents, that would have rendered the affidavits incurably defective. That is not a case here. Actually, each applicant signed at a correct place as a deponent in compliance with the requirement of the law. Thus, the 2nd limb of the 4th preliminary objection has no legs to stand and is accordingly dismissed.

Arguing for the 5th preliminary objection, Mr. Mtobesya submitted that the 1st respondent is not a public body or authority which is not amenable to judicial review. It is a private body with private arrangement whereby members of the party agree to meet and prepare or perform their own private matters. It does not concern with public issues. He however agreed that judicial review can only lie to the 1st respondent provided that it was discharging public duties. He argued that the 1st respondent was not performing public duties when it expelled the applicants from being it members. To substantiate his arguments, he referred to the decision in the case of **Roychan Abraham Versus State of U.P. & Three Others**; Writ

A NO. 63708 of 2014 Allahabad High Court, India. He added that the 1st respondent was not performing public duties.

The 1st respondent's counsel went further insisting that what is before this court is a private body without power to deal with public functions. He referred to the case of **Alhaji A J Mungula Versus Baraza Kuu la Waislam wa Tanzania** [1997] TLR 50 where it was said that Bakwata was not performing public functions. The court warns itself that it should not interfere with domestic issues. Mr. Mtobesya added that the mandate of the 1st respondent is restricted to **section 21 (1) of the Political Parties Act** (henceforth Cap 258), ie to manage the properties etc and not to public functions.

In response, Mr. Kilatu stated that judicial review primarily was meant for public bodies. But now, private bodies performing public functions are also amenable to judicial review; hence, this court has jurisdiction to entertain this matter. However, he submitted that a political party is not a private enterprises or entity. He referred to **Article 3 (1) of the Constitution** and to the provisions of **Cap 258** which he submitted regulates activities of a political party. Assuming the 1st respondent is a private entity, Mr. Kilatu referred me to the case of **Roychan Abrahim**

(supra) and added that affairs touching a political party are things that automatically have public interests. He stated paragraph 30 of the decision in **Roychan Case** (supra) talks about private person to be amenable to judicial review. He insisted that judicial review applies to the 1st respondent.

In a rejoinder, Mr. Mtobesya stated that ordinarily, judicial review is issued against public bodies. It can be extended to private body which are performing public functions. Certiorari does not lie to private body. However, mandamus can lie to a private body. There are circumstances where private body can be amenable to judicial review in respect of matters enlisted under **section 6 A (5) of Cap 258**, but not to domestic relationship of a political party. **Cap 258** does regulate conducts of domestic affairs of a political party. Referring to **Alhaj Mungula case** (supra), he urged this court not to enter into domestic relationship of political party by way of judicial review. The functions of CHADEMA is not public, but private functions. Those functions are regulatory. He however added that a member of a political party is not restricted or barred to come to court if aggrieved, but not by way of judicial review. He asked this court to uphold the 5th preliminary objection.

I have very carefully listened the rival submissions of the counsel for their respective parties and come to the conclusion that this would be one of the arguable issues. If I may be excused I may say and I am saying that I will not spend much time on this issue because, as I will demonstrate later hereinafter, the first respondent has no legal capacity to sue or being sued. So whether it is public body or private body performing public functions is not an issue at the present. However, their rival arguments indicate that there is an argued issue if the applicants are granted with leave; and, that it will be very well conversed if they will be granted with leave. The 5th preliminary objection is accordingly overruled.

I now move to the 6th preliminary objection. On this objection, Mr. Mtobesya complained that the application for leave is frivolous, vexatious and abuse of the court process because the 1st respondent is not amenable to judicial review. If the application for leave is granted, the applicants intend to apply for judicial review against the 1st respondent which is not a public body. It is a private body which was not performing public functions. The application was therefore brought without seriousness. To support his arguments, he referred to the Indian case of **Roychan Abraham case** (supra) that the prerogative orders can be issued to the body performing

public duties. He also referred to another Indian case of **Sri Pradip Dutta Versus Union of India & Five Others**; WP (c) No. 2685 of 2006; Gauhatt High Court, India; and case of **John Mwombeki Byombalirwa Versus The Regional Commissioner & Another** [1986] TLR 73 which provided for prerequisite conditions to be established before an order of mandamus is issued. On the strength of his submission, he concluded that the application for leave is frivolous, vexations and abuse of court process. It should be struck out.

Responding to Mr. Mtobesya's submission, Mr. Kilatu first asked himself what is the yardstick to consider that the application is frivolous, vexatious and abuse of court process. He referred to the case of **Mukisa Biscuits Manufacturing Ltd. V. West End Distributors Ltd**, [1969]1 EA 696 where it was emphasized that in order a matter to qualify as preliminary objection that matter must not require evidence to be adduced and assessed by the court. He also referred to the case of **Yoran Lwehabura Bashange Versus The Chairman of National Electoral Commission & Another**; Misc. Civil Cause No. 19 of 2021 (HC) (DSM Main Registry) (unreported) where this court dismissed the raised preliminary objection after it was found

that it did not involve a pure point of law. Mr. Kilatu at the end requested this court to dismiss the 6th preliminary objection.

In determining this preliminary objection, I would first wish to know what the terminologies of frivolous and vexatious are all about. In that endeavour I came across a persuasive Kenyan case of **Kiama Wangai Versus John N. Mugambi & Anther** [2012] eKLR or [2013] 2 EA 474. The court found that:

> *"A matter is frivolous if (i) it has no substance; or (ii) it is fanciful; or (iii) where a party is trifling with the court; or (iv) when to put up a defence would be wasting court's time; (v) when it is not capable of reasoned argument"*

In **Kiama Wangai case** (supra), the kenyan court also found that a matter is said to be vexatious when:

> *"(i) it has no foundation; or (ii) it has no chance of succeeding; or (iii) the defence (pleading) is brought merely for purposes of annoyance; or (v) it is brought so that the party's pleading should have some fanciful advantage; or (v) where it can really lead to no possible*

good; or (vi) it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense".

Furthermore, in a **Longman Dictionary of Contemporary English**; the Pitman Press, 1st edn, 1979 by Paul Procter (Ed) the word frivolous (adj) means 1. *not serious; silly; useless;* 2. *unable to take important matters seriously; liking to spend time in light useless pleasures.* While, the word vexatious (adj) means *displeasing; troublesome.*

Having all the above in mind, I am of the view that those words should not be taken casually by courts of law at the expanse of the litigants. As argued by Mr. Kilatu one could not take the issue of whether this application is frivolous, vexatious or abuse of court process without having heard the applicants first. I thus consider this preliminary objection as not pure point of law. It requires production of evidence and then one could judge whether the application is frivolous, vexatious or abuse of court process. Once evidence is required, then such objection becomes not preliminary objection on point of law and not on facts, to meet the principle that was laid down in **Mukisa Biscuits case** which defines what a preliminary objection is and also provides when it can be raised and when it should not be raised. For

ease of reference, I quote the position set out in **Mukisa Biscuits case** as hereunder:

> *"A preliminary objection is in the nature of what used to be a* ***demurrer****. It raises a* ***pure point of law*** *which is argued on the assumption that all the facts pleaded by the other side are correct.* ***It cannot be raised if any fact has to be ascertained*** *or if what is sought is the exercise of judicial discretion."*

From the foregoing I am at once in agreement with Mr. Kilatu that the raised objection has no merit. I do overrule it accordingly.

As regard to the 7th preliminary objection, Mr. Kibatala submitted that the applicants have sued a nonexistent party namely the Board of Trustees of Chama cha Demokrasia na Maendeleo (CHADEMA), instead of the Registered Trustees of Chama cha Demokrasia na Maendeleo (CHADEMA). He submitted that according to **section 21(2) of Cap 258** (henceforth Cap 258), after registration a political party appoints board of trustees which shall be incorporated under the **Trustees' Incorporation Act, Cap 318** (henceforth Cap 318). **Section 6(2) of Cap 318** provides that upon board of Trustee being incorporated, it becomes a body corporate and shall include

the words "Registered Trustees". The Word used is "shall" meaning mandatory. It is the Registered Trustees of a party which has power to sue and be sued. He referred to the case of **Ilela Village Council Versus Ansaar Muslim Youth Centre and Another;** Civil Appeal No. 317 of 2019 (CA) (Iringa) (unreported) where the Court of Appeal insisted that what should be sued in that case was the Registered Trustees of Ansaar Muslim Youth Center. He also referred this court to the case of **Jung Hwan Kim and Another Versus Tanzania Presbyterian Church;** Civil Case No. 98 of 2019 where my learned brother, Hon E.E. Kakolaki, J uphold the raised preliminary objection on the ground that to proceed to hear the suit in which one of its party is non existing would amount to deciding a matter against no person before the court. He found the suit incompetent and proceeded to strike it out.

Mr. Kibatala further submitted that suing a wrong party is a basic issue to which the court should not condone. He referred this court to the case of **Martin D. Kumalija & 117 Others Versus Iron and Steel Ltd;** Civil Application No. 70/18 of 2018 (CA) (DSM) (unreported) whereby the Court of Appeal stated that the principle of overriding objective is there to facilitate the just, expeditious, proportionate and affordable resolution of disputes;

but it will not help a party circumvent the mandatory rules of the court. Mr. Kibatala insisted that the raised preliminary objection should not be ignored by the court of law simply because there is overriding objective. The court should apply the law as it is and not otherwise. He finally referred this court to the case of **Mondorosi Village Council and Two Others Versus Tanzania Breweries Limited and 4 Others**; Civil Appeal No. 66 of 2017 (CA) (Arusha) (unreported) where the Court of Appeal found that the overriding objective principle cannot be applied blindly against the mandatory provisions of the procedural law which go to the very foundation of the case.

In response, Mr. Kilatu submitted that the 1st respondent is a proper and existing party. He insisted that Mr. Kibatala's submission have no legal basis as the law have changed. He submitted **section 76 of the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2019** (henceforth Act No 9 of 2019) does exempt the applicability of the **Cap 318** and **Cap 258** to the term Trust. **Section 1A (f) added to Cap 318** by **section 76 of Act No. 9 of 2019** does exempt a political party with the requirement of Trustee Incorporation Act. For that purpose, **section 6(2) of Cap. 318** have no valid at all. He added that according to **section 21 (2) of Cap 258,**

a political Party is required to form a Board of Trustees, and not Registered Trustees. Hence, it is proper to sue the Board of Trustees which is properly sued as 1st respondent in this application. That's why the 1st respondent's counsel has appeared to defend it, otherwise they could not have appeared.

However, at the end the counsel for the applicants admitted that if the court finds that there is a mistake to sue the Board of Trustees of CHADEMA, then that mistake is curable as it is not fatal. The applicants be allowed to make rectification. He referred to the case of **Chang Qing International Investment Limited Versus TOL Gas Limited;** Civil Application No. 299 of 2016, (CA) (DSM) (unreported) which, according to Mr. Aliko, have similar facts with the present application. But when I read it, I found dissimilarities as the Hon. Justice of Appeal allowed the counsel in that case to correct the error by properly spelling the name of the respondent. Then, he ordered the matter to proceed on its merit. However, Mr. Aliko concluded that the words "Registered Trustees" be inserted as 1st respondent as it pleases this court.

In rejoinder, Mr. Kibatala stated that **section 21(2) of Cap 258** and **sections 6 and 8 of Cap 318** have not yet been amended. Those provisions are still intact. Even if there were amendments, the cases of **Ilela Village Council** (supra) was decided after such amendment, but still the

Court of Appeal insisted that they must sue in the name of Registered Trustees. The decision of the Court of Appeal are binding to this court, he said. However, he added, the advocates for the applicants have not cited any decision to support their arguments. They just submitted from the bar.

Adding to Mr. kibatala's rejoinder, Mr. Mtobesya said that **section 76 of Act No. 9 of 2019** does not remove a political party from having its board of trustees incorporated. He blended the submission of the applicants' counsel as totally misleading submissions without legs to stand.

Now, if I would like to take the line of argument of applicants' counsel into consideration, I may say and I am saying that it is not true that **Act no. 9 of 2019** does exempt the applicability of **Cap 318** and **Cap 258** from compulsory incorporation of the board of trustees. What the amendment provided is to add **section 1A** immediately after **section 1 of Cap 318** interpreting the word "Trust" and not otherwise. Thus, **Act no 9 of 2019** did not affect in any way the provisions of **Cap 318** as regards to compulsory incorporation. **Sections 6(2) and 8 of Cap 318** are still valid as they were not affected by the enactment of **Act No 9 of 2019**.

Now what is the statutory position. According to **Section 21 (1) of Cap 258** after it obtains a certificate of full registration, a political party shall

appoint a board of trustees to manage the properties and any business or investment of the party. S**ection 21(2) of Cap 258** provides for mandatory requirement that a board of trustees of a political party must be incorporated. For ease of reference, I quote it as hereunder:

> *"(2) Every board of trustees shall be duly incorporated under the Trustees Incorporation Act and every political party shall not later than sixty days from the date of full registration submit to the Registrar-*
>
> *(a) the names and addresses of the members of the board of trustees; and*
>
> *(b) a copy of the certificate of incorporation"*

It is categorically clear in the above quoted provisions of the law that the requirement of a political party to have its board of trustees incorporated under **Cap 318** immediately after its full registration as a political party, is mandatory as couched in mandatory term.

It is therefore a trite law that board of trustees is compulsorily incorporated under **section 6(2) of Cap 318**. Upon incorporation, the board of trustees shall be granted with a certificate of incorporation and shall

become a body corporate which shall include the words "Registered Trustees". For ease of reference, **section 6(2) of Cap 318** reads:

> *"(2) The name of every body corporate created under this Act shall include the words "Registered Trustees"*

By virtual of **section 8 (1) of Cap 318**, that body corporate shall have perpetual succession and common seal and shall have also power to sue and be sued in such corporate name with the words "Registered Trustees". For ease of reference, **section 8 (1) of Cap 318** is quoted hereunder:

> *"(1) Upon the grant of a certificate under subsection (1) of section 5 the trustee or trustees shall become a body corporate by the name described in the certificate, and shall have -*
>
> *(a) Perpetual succession and a common seal;*
>
> (b) *Power to sue and be sued in such corporate name;"*

From the above legal analysis, I find that the submissions by Mr. Kibatala have legal basis because the 1st respondent sued herein has no legal personality. Likewise, it has no legal capacity to be sued.

Assuming, I proceed with the matter against the 1st respondent and the applicants win the case, I think, it would be difficult if not impossible to enforce the award. Again, if it refuses to comply with the court order, it would be legally impossible to compel it.

In view of that observation, I am constrained to state that the applicants have sued a nonexistent party in law. It is only the Registered Trustees of CHADEMA which have the capacity and legal personality as well a proper party to be sued. With due respect, I find the submission by applicants' counsel on this issue to be totally misleading worthy not consideration at all. With regard to the findings herein, I proceed to uphold the 7th preliminary objection; as a result, I do accordingly find the present application for leave incompetent.

Having so found, the next issue to consider is what the remedy for incompetent application. The counsel for the applicants said the defect of not to include the words Registered Trustees is minor that can be cured by allowing the applicants to insert the words Registered Trustees. To me I find it to be a serious omission whose available remedy is to strike it out. This remedy is well spelt in the case of **MIC Tanzania Limited Versus Minister**

for Labour and Youth Development & Another; Civil Appeal No 103 of 2004 (CA) (unreported) where the court of Appeal held that:

> *"After all, it is now trite law once an appeal or application is found to be incompetent, the only option is to strike it out....."*

Form the above legal analysis of the matters before me, what I can conclude is that what have been shown in this application is procedural irregularities, some are excusable, but some cannot be excusable because they are serious procedural irregularities as they go to the very root of the application.

In line with the foregoing findings, I may conclude and I am concluding that the 2nd, the 2nd limb to the 4th preliminary objection, the 5th and the 6th preliminary objections are found without merit. I do dismiss them accordingly. As regards to the 3rd and 7th preliminary objections, I found them meritorious, and I proceed to uphold them accordingly.

In sum, on the strength of the preliminary objections I found meritorious, this application for leave to apply for judicial review is accordingly struck out. Each party has to bear its own costs.

It is so ordered.

Dated at **Dar es Salaam** this 22nd day of June, 2022.

J.S. MGETTA

JUDGE

COURT: This ruling is delivered today this 22nd day of June, 2022 in the presence of Mr. Aliko Mwamanenge, Mr. George Mwalali, Mr. Ipilinga Panya, Mr. Edson Kilatu, Mr. Emmanuel Ukashu and Ms. Matinde Waisaka, all the learned advocates for the applicants; in the presence of Mr. Peter Kibatala, Mr. Dickson Matata, Mr. Selemani Matauka and Mr. Nashon Nkhungu, all the learned advocates for the 1st respondent; and, Mr. Stanley Kalokola, Mr. Eligh Rumisha, Mr. Ayoub Sanga and Ms. Leonia Maneno, all the learned State Attorneys for the respondents.

J.S. MGETTA
JUDGE
22/6/2022