IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CAUSE NO. 27 OF 2022

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF *CERTIORARI, MANDAMUS* AND PROHIBITION

AND

IN THE MATTER OF THE DECISION OF CHAMA CHA DEMOKRASIA NA MAENDELEO (CHADEMA) EXPELLING THE APPLICANTS FROM THE 1ST RESPONDENT

BETWEEN

HALIMA JAMES MDEE..... 1ST APPLICANT

GRACE VICTOR TENDEGA..... 2ND APPLICANT

ESTHER NICHOLAS 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

AND

THE REGISTERED TRUSTEES OF CHAMA CHA DEMOKRASIA NA MAENDELEO (CHADEMA)..... 1ST RESPONDENT

NATIONAL ELECTORAL COMMISSION.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL..... 3RD RESPONDENT

RULING

6th, & 8th July, 2022

ISMAIL, J.

This application has been taken at the instance of estranged members of Chama cha Demokrasia na Maendeleo (CHADEMA). They are sitting Members of Parliament on the Party's ticket, pursuant to a nomination that is a subject of a fierce disputation by the 1st respondent.

The contention is that their party membership was stripped off by the Central Committee that sat on 27th November, 2020, a decision which was confirmed by the meeting of the Governing Council that met on 11th May, 2022.

The applicants' consternation is that, both of the decisions of 1st respondent's organs are shrouded in wanton irregularities and illegalities, in that, they trampled on the principles of natural justice. The alleged slipups

are considered to constitute a mammoth breach of constitutional rights as enshrined in Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 (as amended from time to time – URT Constitution).

Feeling profoundly affronted at having been treated unjustly, the applicants have resorted to a court action, and the preferred route is to challenge regularity or otherwise of the decision, by way of judicial review.

As a prelude to preference of the application for prerogative orders, leave of the Court must be sought and granted, and the instant application is such step. It is simply a sifting process through which the applicants' quest is put to test with a view to gauging if the impending challenge has what it takes to be given a 'clean bill of health'. If not, the same falls through and the door is 'slammed' on the applicants. If it does, the door is left wide open and the applicants are given a nod to move onto the substantive part of their complaint.

The application has been preferred under the provisions of sections 17 (2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap 310 R.E: 2019; Rules 5 (1), (2), (3), (6) and 7 (1) and (5) of Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014, GN. No. 324 of 2014; and Section 2 (1) and (3) of

the Judicature and Application of Laws Act, Cap 358 R.E: 2019. Accompanying the application are the applicants' statements and counter-affidavits in which grounds for the prayer sought are pleaded. The application is also accompanied by assorted documents, including copies of the letters of their expulsion from the Party.

The application has encountered a formidable challenge from the 1st respondent. Through a counter-affidavit, jointly sworn by registered trustees, the applicants' contentions have been played down. The deponents of the counter-affidavit are valiantly opposed to the contention that the applicants' right to be heard was violated or that their ejection from the party was irregular or illegal. While maintaining that the decisions of the 1st respondent's organs are unblemished, the deponents took the view that the application ought not to see the light of the day as no arguable case has been presented.

The 2nd and 3rd respondents are not opposed to the application. They have, in fact, expressed their unwavering support to the applicants' quest for leave.

When the application came up for hearing, the applicants were represented by Messrs Ipilinga Panya, Aliko Mwamanenge, Edson Kilatu,

Emmanuel Ukashu and Ms. Matinde Waisaka, learned counsel. The 1st respondent enlisted the services of Messrs Peter Kibatala, Jonathan Mndeme, John Mallya, Selemani Matauka, Michael Lugila and Hekima Mwasipu, all learned advocates. The 2nd and 3rd respondents enjoyed the usual services of the Office of the Solicitor General, represented by Messrs Stanley Kalokola, Eligh Rumisha, Ayoub Sanga and Boaz Msoffe, learned State Attorneys.

Setting the ball rolling was Mr. Panya, who began by stating the provisions under which the present application has been filed. He also submitted that the application is supported by affidavits of each of the 19 applicants, setting out grounds on which the prayer for leave is premised. There are also assorted documents annexed to the supporting affidavits which, together with the affidavits, were adopted to form part of the submissions by the counsel for the applicants.

Mr. Panya submitted that in applications like this, the applicant has to prove a number of key issues all of which must demonstrate the existence of an arguable case. He argued that the applicant must also demonstrate sufficient interest; promptness in taking the action; demonstration of local remedy and lack of adequate alternative remedy.

Mr. Panya pointed out to yet another key condition. This is the demonstration of the fact that the application is against a public body or a private body discharging public duties. The learned advocate implored the Court to be inspired by its own decision in, ***Cheavo Juma Mshana v. Board of Trustees of Tanzania National Parks & 2 Others,*** HC-Misc. Civil Application No. 7 of 2020 (unreported).

Regarding sufficient interest, the contention by Mr. Panya is that the applicants have sufficient and demonstrable interest in the impending matter and that, leafing through the affidavits (specifically paragraphs 2, 11, 15, 19 and 20), such interests are easily deducible. Pushing the argument further, the learned advocate contended that the applicants have been personally affected by the 1st respondent's Governing Council, whose decision, delivered on 11th May, 2022, ordered expulsion of the applicants from the party. The argument is that the said decision was taken without any regard to the due process, and without affording the applicants the right to be heard. It is a decision that touches on their interest as sitting members of parliament.

Turning on the second condition, the view held by the learned advocate is that paragraphs 18, 20 and 23 of the applicants' respective

affidavits aver that, whereas the impugned decision was made on 11th May, 2022, the instant application was filed 42 days later. This, he argued, was within the six-month period set by law. Mr. Panya argued that this is an admirable demonstration of promptness.

For his part, Mr. Mwamanenge, another of the applicants' legal counsel, dwelt on the issue of whether there is an arguable case. On this, learned counsel reiterated the principles distilled from the ***Cheavo Juma Mshana' case*** (supra), wherein it was held that leave can only be granted if the applicant is able to demonstrate that there is an arguable case. In his contention, such conclusion can only be drawn from the material available in Court but without delving into the depth of the matter. He argued that this is known, in the legal parlance, as a *prima facie* case. In his view, the applicants have done enough to meet this requirement, if the contents of the chamber summons, grounds and reliefs sought as contained in the statement, are anything to go by.

Mr. Mwamanenge took the view that the applicant's main contention is twofold. ***One***, that they were condemned unheard; and ***two***, that there was lack of impartiality in the decision making process within the 1st respondent's disciplinary organs. He also contended that there is a mammoth

pressure to have the 2nd and 3rd respondents declare their seats vacant, and that prohibition was a necessary remedy, as shown in paragraphs 13 and 14 of the Statement.

On the alleged lack of impartiality, the contention is that members of the Central Committee who sat to determine the matter on 27th November, 2020, also sat on the Governing Council on 11th May, 2022, at which the applicants' fate was sealed. He argued that, irrespective of whether the said members and organs form part of the Party's constitution, their conduct was a fiasco that they would not put up with. He concluded by submitting that the applicants have demonstrated interest under rule 4 of the Rules and that a *prima facie* case had been shown.

Weighing in for the applicants was Mr. Kilatu, whose submission was intended to address the question as to whether the 1st respondent's decisions were actions taken in performance of a public duty. He prefaced his arguments by stating that, ordinarily, reliefs sought by the applicants are available where the decisions sought to be impugned involve public bodies or, in rarity of the cases, where private bodies make decisions which qualify as public functions. He contended that political parties are public bodies, and

the reason is that Article 3 (2) of the URT Constitution provides that Tanzania is a multiparty democracy that recognizes plurality of the parties.

The learned advocate argued that political parties, as defined by section 6A (2) of the Political Parties Act, Cap. 258 R.E. 2019, are regulated institutions that must adhere to the Constitution and the ideals of good governance, democracy, gender and social inclusion. He argued that no other institution enjoys similar rights. This means, he contended, political parties are regulated by law.

Mr. Kilatu further contended that section 6C (5) of Cap. 258 provides conditions on how a person can be expelled from a party, and that the emphasis is that, in such cases, the due process of the law must be adhered to. It is why plurality was introduced, the essence being to cure the mischief of having members of a party expelled without giving them an opportunity to challenge the decision through the available means. He was of the view that the spirit in the cited law is in sync with Article 13 (6) of the URT Constitution. In the counsel's view, this is the reason for treating political parties as public entities.

Mr. Kilatu further argued that, looking at the objectives of a political party, as enshrined in section 3 of Cap. 258, it is realized that a political party

is a public entity. He argued, in the alternative, that even if the same was a private entity, it would still qualify for judicial review because of the public function test. He took the view that decisions of both of the 1st respondent's organs were in the course of discharging public duties. These duties qualify as public functions and, therefore, amenable to judicial review. To buttress his contention, Mr. Kilatu referred me to the decision of the Court in ***James G. Kusaga v. Sebastian Kolowa Memorial University Council College***, HC-Civil Application No. 56 of 2020 (unreported), in which it was held that the college council carried out a public function.

The last hat in the ring was thrown by Mr. Ukashu who submitted, laconically, that in the instant case, all the internal remedies have been exhausted by the applicants and that the decision of the Governing Council represented the final of the applicants' efforts. He submitted that the imperative requirement to have an applicant of leave exhaust all internal remedies was enunciated in the case of ***Shah Vershi & Co Ltd v. Transport Licencing Board*** [1971] EA 289.

Mr. Ukashu argued that, the fact that the applicants exhausted all internal remedies has been deponed in paragraphs 21 and 24 of the applicants' affidavits. He asserted that, in the circumstances of this case, no

alternative remedy, other than a judicial review, is available. He urged the Court to hold that the applicants have procedural and substantive issues which cannot be addressed other than by way of judicial review.

Mr. Kibatala took the mantle on behalf of his colleagues in the 1st respondent's legal team. He began his onslaught by praying to adopt the 1st respondent's counter-affidavit and the answer to the Statement. He restated the underlying principle with respect to applications for leave, by stating that leave is a sifting mechanism which is intended to ensure that only deserving complaints get past this hurdle. While noting that grant of leave is in the Court's discretion, the learned advocate reminded the Court that, exercise of such discretion must be judicious, and that the criteria for grant of leave are as stated by counsel for the applicants. He, however, faulted his counterpart for skipping an essential fact that judicial review has several reliefs and that each of the said reliefs has their own distinct criteria.

Regarding an arguable case, Mr. Kibatala conceded that the applicants have an interest. He was quick to submit, however, that an arguable case is gauged through the court's investigation into the matter. This, he contended, is done by looking at the evidence submitted through sworn depositions. This takes more than a cursory glance at the evidence.

While warning the Court against the danger of embarking on a rubber stamping spree, Mr. Kibatala argued that demonstration of an arguable case must be done alongside other criteria, and that if the latter miss out the arguable case flies out of the window. One of such criteria is the question of time prescription for preference of the application. The contention by Mr. Kibatala is that, in this case, the decision that changed the applicants' status is that of the Central Committee, issued on 27th November, 2020, and not the decision of the Governing Council which is merely a confirmation of the position taken by the Central Committee. Reckoning from that date, the contention by the learned advocate is that the application is time barred.

Heading off any possible contention that the applicants were awaiting the outcome of their appeal to the Governing Council, Mr. Kibatala referred me to several decisions which held that presence of an appeal or right thereof, or pursuit of extra-judicial measures cannot be a defence to the time bar. These decisions are: ***Republic ex-parte Peter Shirima v. Kamati ya Ulinzi na Usalama, Wilaya ya Singida & 2 Others*** [1983] T.L.R. 375; ***Dar es Salaam Motor Transport Co. Ltd v. Transport Licensing Authority of Tanganyika & Another*** [1959] EA 403; ***M/s Fidahussein & Co. Ltd v. Tanzania Harbours Authority***, CAT-Civil Appeal No. 60 of

1999; ***Charles Marwa Wambura v. National Bank of Commerce***, CAT-Civil Application No. 5 of 2007; and ***Almachius Alchard Kilaja v. Chief Court Administrator & 2 Others***, HC-Misc. Civil Cause No. 5 of 2018 (all unreported).

On whether the 1st respondent is a public body, Mr. Kibatala's take is that CHADEMA is neither a public body nor does it exercise public function. He argued that parties are regulated but such regulation does not turn them into statutory bodies. He took the view that a body becomes a statutory body where it wields a compulsory power. In the learned counsel's contention, the contest on whether a political party is a public body or not was settled by a Canadian Court i.e. Ontario Superior Court of Justice, in ***Trost v. Conservative Party of Canada et al***, 144 O.R. (3d) 67, 2018 ONSC 2733. Mr. Kibatala contended that, in the said decision, the holding was that a political party is not a public body. He submitted that, in view of the decision of the Court of Appeal of Tanzania in ***The Attorney General v. Mugesi Anthony & 2 Others***, CAT- Criminal Appeal No. 220 of 2011 (unreported); and ***Felix Mselé v. Minister for Labour & Youth Development & 3 Others*** [2003] T.L.R. 437, courts in Tanzania can borrow a leaf from other

courts across the globe. He implored the Court to be inspired by the decision in ***Trost*** (supra).

Rebutting on the relationship between a party and its members, Mr. Kibatala had me hear that the relationship is quasi-contractual, one that is not amenable to judicial review. In view thereof, and that Article 3 (2) of the Constitution, cited by the applicants' counsel, is merely permissive of plurality of the parties. He also played down the significance of section 6 of Cap. 258, in respect of which he submitted that it was merely a policy statement of the country regarding multipartism and nothing else. Equating political parties to Non-Governmental Organisations, learned counsel argued that Cap. 258 contains regulatory provisions for the parties. He maintained that there are other alternatives to judicial review, one of which is the institution of a normal suit. The other one is to apply for fresh membership.

On the question of impartiality, Mr. Kibatala contended that the Central Committee was attended by 23 members while the Governing Council had 437 members. He argued that the composition is enshrined in Article 7.7.11 of the CHADEMA Constitution. He failed to see how a paltry 23 members would sway the decision of a whopping 414 other members of the Council. In any case, he argued, this is a known fact to the membership, including

the applicants, and that, in none of the documents have the applicants suggested that they requested for recusal of the members of the Central Committee from the Council proceedings.

Citing the decision in ***John Mwombeki Byombalirwa v. Regional Commissioner & Another*** [1986] T.L.R. 73, Mr. Kibatala argued that the Court must gauge if the affidavit and statement show that the applicants demanded any action. Learned counsel further argued that one of the prayers intended to be sought is that of prohibition. In his view, in the absence of any decision by the 2nd and 3rd respondents, the writ of prohibition, which is solely based on the third party action (pressure), cannot lie. He wondered why and on which ground the applicants contend that pressure was being exerted by CHADEMA, to force them out of their parliamentary seats.

On the promptness of the action, the argument is that there was none in the applicants' action, while regarding the ***Cheavo case***, Mr. Kibatala argued that the holding is in sync with his submission on the matter.

The 1st respondent was adamant that the appropriate remedy is institution of a normal suit.

Mr. Kaloloka featured on behalf of his colleagues in the defence team for 2nd and 3rd respondents. He began by reiterating reiterated his clients' position of no opposition to the application. He stressed that grant of leave is in the Court's discretion and that criteria for application of the discretion are known. With regards to time limit, the learned attorney argued that Rule 6 of the Rules is clear, and that the instant application is timeous as it has been filed within six months, counting from 11th May, 2022.

On whether there is an arguable case, Mr. Kalokola subscribed to the applicants' view that there is. He argued that the ground being that principles of natural justice were given a wide berth, holding that the 1st respondent's acts were a travesty of the cherished constitutional ideals provided for in Article 13 (6) (a) of the URT Constitution (supra). He bolstered his argument by citing the decision of the upper Bench in ***Mbeya Rukwa Autoparts & Transport Ltd v. Jestina Mwakyoma*** [2003] T.L.R. 251. It was his assertion that the question on whether this right was properly exercised is a matter whose time has not come.

Commenting on whether CHADEMA is a public body, learned Attorney submitted that, whilst he agrees that a political party is not a public body, he was in unanimity with the applicants' counsel that it performs public

duties or functions. This explains why it is entitled to subsidy from the Government. He also argued that there is a connection between political parties and the 2nd and 3rd respondents. This is through Article 78 of the URT Constitution.

Finally, Mr. Kalokola subscribed to the contention that subsequent to 11th May, 2022, the applicants did not have any other alternative than through the instant application. On this, the learned attorney relied on the decision of the Court of Appeal in ***Emma Bayo v. Minister for Labour & Youth Development & 2 Others***, CAT-Civil Appeal No. 79 of 2012 (unreported) in which grounds for grant of leave were discussed.

The applicants' rejoinder was mainly a reiteration of what was submitted in the submissions in chief. I choose to skip it.

As I embark on the disposal journey, I feel that I have a debt of gratitude to pay to all sets of legal counsel for their splendid submissions and their conduct in the entirety of these proceedings. They exhibited industry, zeal and decorum of no mean repute. This is the conduct that should be emulated by other practitioners.

The parties' rival arguments distil one broad question for determination. This is whether this is a fit case in respect of which leave should be granted.

As unanimously submitted by counsel for all of the parties, grant of leave constitutes a prelude to and a prerequisite for application of prerogative orders of *certiorari, mandamus* and prohibition. It also serves a statutory requirement, as provided for under rule 5 (1) of GN. No. 324 of 2014. It states as hereunder:

> *"An application for judicial review shall not be made unless a leave to file such application has been granted by the court in accordance with these Rules."*

The cited provision is a codification of the position that was accentuated by this Court in ***Republic Ex-parte Peter Shirima vs Kamati ya Ulinzi na Usalama, Wilaya ya Singida, The Area Commissioner and the AG*** (supra), wherein it was held:

> *"The practice of seeking leave to apply for prerogative orders has become part of our procedural law by reason of long user...."*

While the grant of leave constitutes a condition precedent for preference of the substantive challenge against a decision that an applicant seeks to impugn, this stage serves as a sieve through which only eligible applications pass to the next stage unscathed. It is on that understanding, that the law has set key criteria against which applications for prerogative orders are gauged. Key among them is demonstration that the applicant of leave has sufficient interest in the orders sought to be applied (See: ***Attorney General v. Wilfred Onyango Nganyi @ Dadii & 11 Others***, CAT-Criminal Appeal No. 276 of 2006; and ***Emma Bayo v. Minister for Labour and Youth Development*** (supra).

It is worth of a note, that demonstration of sufficient interest is part of a widely the acknowledged reality that, though access to courts is rightly regarded as a matter of a constitutional importance, such access is not absolute. It is only reserved to claimants who have interest in a claim in respect of which leave is craved. The test of whether a claimant has sufficient interest is a question of both fact and law, having regard to all the circumstances of the case. Illustrating this principle further, Sedley J, held in ***R v. Somerset County Council & ARC Southern Ltd ex p Richard Dixon*** (1998) 75 P & CR 175, as hereunder:

"public law is not about rights, even though abuses of power might, and often do, invade private rights. Instead, public law is concerned with wrongs, particularly the misuse of power."

What comes out of this fabulous legal holding is that applications for judicial review should not be turned into a theatre where "meddlesome busybodies" poke their noses into matters at will, even where they derive no interest from them.

The most captivating position in this respect is gathered from an article, jointly authored by Alexander Fawke & Emma Kate Cooney, legal scholars and practitioners, posted on *www.linklaters.com*. They quoted the decision of the House of Lords in ***R v. Inland Revenue Commissioners ("IRC"), ex parte (1) National Federation of Self-Employed and (2) Small Businesses Ltd*** [1982] AC 617, wherein a claim was dismissed on the basis that the claimants lacked standing, and that the claim was without merit. The learned authors' submitted that the House of Lords came up with three key principles with respect to sufficient interest. These are reproduced as follows:

"1. generally, at the permission stage, an application should be refused for lack of standing only where "the applicant

has no interest whatsoever, and is a mere busybody". If, however, the case is arguable and there are no other discretionary bars to bringing it, permission should be granted and standing can be reconsidered in conjunction with merits at the substantive hearing;

2. the question of standing is one which goes to the Court's jurisdiction. This means that the parties cannot simply agree the point between them, and the Court can consider the point of its own motion, even if not raised by the parties; and

3. the question of sufficient interest is not merely a threshold issue. Even after passing the initial hurdle of establishing an interest in the subject matter, the question may still be relevant to the issue of what, if any, remedy should be granted. "

As stated earlier on, Mr. Kibatala has graciously conceded to the fact that the applicants derive sufficient interest from the matter they intend to litigate on. I subscribe to the counsel's unanimous view on the matter. The affidavits that support the application, together with the Statement and assorted documents attached thereto justify the undisputed conclusion that the applicants have surmounted this hurdle, by demonstrating their direct

and personal interest in the dispute. They cannot be considered to be meddlers in the matter.

The other equally important requirement in leave applications entails demonstration, by the applicant, of the existence of an arguable case, known as well, as a *prima facie* case. Significance of this condition need not be over emphasized, as decisions cited by parties, especially the ***Cheavo case*** (supra) have dealt with it sufficiently. In ***Workers of Tanganyika Textile Industries Ltd v. Registrar of The Industrial Court of Tanzania and Others,*** HC-Misc. Civil Cause No. 144 of 93 (unreported), the Court (Kalegeya, J., as he then was) held:

> *"I should out rightly point that seeking leave to file an application for prerogative orders requires the applicant to merely raise arguable points. He is not required to prove the alleged errors for, that proof would only be required, during hearing of the main application if leave is granted. Regard being had to the statement and the attached supporting document".*

In law, a *prima facie* case is referred to as **the establishment of a legally required rebuttable presumption**. In other words, a *prima facie* case is a cause of action or defense that is sufficiently established by a party's

evidence to justify a verdict in his or her favour, provided such evidence is not rebutted by the other party (See: *https://www.law.cornell.edu)*.

Mr. Mwamanenge has fervently contended that the applicants have done what it takes to demonstrate that an arguable case exists in the instant application and, by extension, the impending application. He cited part C of the Statements as the basis for his contention. Two of the stand out allegations by the applicants are: denial of the right to be heard; and lack of impartiality in the determination of the complaints that led to their ouster from the party. Mr. Kibatala is not persuaded that such ouster was bungled. He takes the view that, as long as the procedure adopted by the 1st respondent was free from any blemishes the alleged arguable case ceases to exist.

I have dispassionately reviewed the documents which founded this application. My particular attention is drawn to Part C of the Statement. The narration of the grounds laid and the reliefs sought convince me to hold the view that a *prima facie* case has been made out. The contentions such as conducting of a disciplinary process in violation of the disciplinary procedures; failure to afford the applicants an opportunity to appear and be heard on the allegations, are some of the contentions which bring up the

contention that the applicants' memberships were casted away through a process that drifted from the regularity set out in the procedures governing member's discipline.

While this is a mere allegation which requires proof, I take the view that it has done enough to demonstrate that there lies a bunch of issues which would require enlisting the Court's supervisory jurisdiction with a view to coming up with a finding on the veracity or otherwise of the applicants' contention. I am overly convinced, and without stating any absolutes, that the applicants have shown that a *prima facie* case exists in the impending application.

The contention by the applicant's counsel on the promptness of the action taken has attracted a barrage of criticism from Kibatala who has decried the applicants' lethargic approach to the matter. Reckoning the time from 27th November, 2020, the argument raised by Mr. Kibatala is that the six-month period spelt out in rule 6 of GN No. 324 of 2014 lapsed long before the instant application was instituted, rendering the application a tardy attempt that is inconsistent with the applicants' contention that the same was preferred promptly.

It is correct that applications seeking to challenge a decision through judicial review are to be preferred without any procrastination. They must be filed promptly and, by filing them promptly, it was intended that they should be instituted within six months as provided by rule 6. The parties' rival contentions appear to reside in the divergence on the date from which time should start counting. In my view, reckoning of time starts on the date on which the 1st respondent pronounced the decision that marked a finality of the internal process. In this case, the stroke that broke the camel's back was administered on 11th May, 2022. This is the date on which the Governing Council, the final appellate body, sat and dismissed the applicants' appeals, and upheld the decision to purge them. Before that, any action outside the 1st respondent's disciplinary handling ladders would be considered premature and untenable.

Mr. Kibatala has attempted to enlist the assistance of the holding in ***Republic Ex-parte Peter Shirima vs Kamati ya Ulinzi na Usalama, Wilaya ya Singida, The Area Commissioner and the AG*** (supra), to contend that nothing prevented the applicants from launching a challenge as the existence of the appeal is not a bar to issuance of prerogative orders. With profound respect to learned counsel, this position is specious, if not

lop-sided. To get the import of my contention, it behooves me to reproduce part of the holding in that case. It was held:

> *"The existence of the right to appeal and even the existence of an appeal itself, is not necessarily a bar to the issuance of prerogative orders, the matter is one of judicial discretion to be exercised by the court in the light of the circumstances of each particular case.*
>
> *Where an appeal has proved ineffective and the requisite grounds exist, the aggrieved party may seek for, and the court would be entitled to grant, relief by way of prerogative orders".*

The message gathered from the quoted excerpt is that a court would not be prevented from making a decision on an application for prerogative orders merely because there is a pending appeal, or simply because the applicant has the right of appeal that he has not exercised. It does not compel the applicant - in our case the applicants - from instituting an application for prerogative orders, where exhaustion of the internal disciplinary process, a key condition for that action, is yet to be realised.

In sum, I hold the view that the applicants have demonstrated promptness in their action, and the contention that the application is time-barred is misconceived. I reject it out of hand.

The other battleground area touches on the applicants' contention that political parties are either public institutions or, better still, they are private entities but their actions are of a public nature. A lot has been submitted by the learned counsel for the applicants and those of the 2nd and 3rd respondents. Both sets of the learned practitioners sought a solace from the provisions of the URT Constitution and Cap. 258, and the fact that some of these political parties guzzle subsidies drawn from the Exchequer. These contentions have been valiantly scoffed by the 1st respondent. The argument by the learned advocate is that political parties are quasi-contractual bodies which are self-regulating, and are exclusively members' clubs. The ***Trost case*** comes in handy for the 1st respondent.

I propose to spend some time traversing a little wide, trying to bring up the contention that the law has morphed and adopted a more liberal approach. The position, as it currently obtains, is to the effect that political parties' actions are now considered to have the same effect as those of public authorities. They are, also amenable to judicial review.

In the decision in ***National Development Bank v. Thothe*** [1994] 1 B.L.R 98 at 104, the Court of Appeal of Botswana, adopted the extended definition of a public authority, as defined in Butterworth's, Words and

Phrases legally defined, 2nd ed., vol. 4.at p. 217, wherein public authority was defined in the following words:

> *"A public authority is a body not necessarily a county council, municipal corporation or other local authority which has public or statutory duties to perform and which performs its duties and carries out its instructions for the benefit of the public and not for private profit. Such an authority is not precluded from making a profit for the general public, but commercial undertakings acting for profit and trading corporations making profits for their corporations are not public authorities even if conducting undertakings of public utility."*

Mindful of the fledging nature of the old dispensation, the Right Hon. Sir Harry Woolf urged that the following postulation should be the guiding consideration. In his article, The "Judicial Review, a Possible Programme for Reform," 37 P. L. (1992), at p. 239, he said:

> *"... a body should be subject to judicial review if it exercises authority over a person or body in such a manner as to cause material prejudice to that person or body."*

Similarly, in his scholarly piece, B. Maripe, a Senior Lecturer in Law, University of Botswana published an article titled: ***Judicial Review and the***

Public Private Body Dichotomy: An Appraisal of Developing Trends., and the following scintillating commentary was made:

> *"where the exercise of authority is not regular, judicial review must be open to the aggrieved party, whether the decision making body is characterised as public or private. The nature of the decision (one that causes material prejudice; the threshold depicted by the use of the term "material," appears to denote such prejudice that is not fanciful, but significant to warrant the court's intervention; an implicit reference to the de minimis rule), should suffice to subject the decision to a process of judicial review."*

This, then, invites the discussion as to the general characteristics that need to be interrogated in a determination of whether a body is public or not. In the cited decision of ***National Development Bank v. Thothe*** (supra), the Court accepted the criteria set down in the definition as a guide in the determination of which body is to be regarded as a public authority. The said Court was guided by the commentaries made by H.W.R. Wade and C. F. Forsyth, Administrative Law, 7th ed., Oxford, Clarendon Press (1994), pp. 659-667. It was guided that, the traditional tests used would be to inquire into the following:

(a) the nature of the body (that is, how it is created or constituted);

(b) the source of its powers (whether they derive from statute or some other source);

(c) whether it falls under the control of a recognised public authority;

(d) whether public money is one of the body's sources of funding;

(e) whether it is exercising some "governmental" function; and

(f) whether its actions, decisions or its field of operation has implications for the public."

While the questions raised above may not entirely fit in our situation, they, in their generality, bring a serious persuasion that decisions made by political parties, and their field of operations have implications to and for the public. It is also true that part of their funding is drawn from the public coffers. In my fortified view, the general rule is that actions of political parties can be put to scrutiny through judicial review, and that the decision in ***Trost case*** constitutes an exception to the widely acknowledged position across the Commonwealth countries. I hold the view that the 1st respondent's decisions in the Central Committee and upheld by the Governing Council

were public in nature and liable to questioning through a judicial review process.

There is also a nagging question of alternative remedies. The view held by the counsel for the applicants is that the preferred route is the only feasible course of action, whilst the 1st respondent routes for preference of a normal suit.

It is a trite position that, one reason why the remedy, in this case grant of leave, may be refused is if there is some other remedy, judicial or non-judicial, which is available to the applicant for review, and which is equally or more appropriate (See: S.A. de Smith, Judicial Review of Administrative Action, 4th ed., London, Stevens, 1980 at p. 457). The alternative remedy may be in the form of statutory right of appeal or a contractual right to review or appeal. Guided by this general position the question is, is a normal suit a suitable and available remedy?

The answer to this question is NO! In a case like this, where the gravamen of the applicants' complaint is the alleged breach of the principles of natural justice, taking the proposed way would defy the existence of these common law writs which are especially intended to tame excesses allegedly committed by bodies that are vested with powers of determining people's

rights. Normal suits would not be a suitable tool through which the regularity or otherwise of the procedural aspects and the substance of the impugned decision would be scrutinized.

Discounted, as well, is the proposal or contention that seeking a new membership is also a potent alternative in the circumstances. In my conviction, it would serve as an alternative or even the only available remedy if the applicants acknowledged that they had a culpable role in the violation that led to their purging. In the absence of such confession, by the applicants, and contentment with the decision, the proposal of having that as a remedy falls by the wayside. It is an argument that lacks the necessary cutting edge, and I am unable to be persuaded that it would serve the purpose.

Before I pen off, it feels apt to drop a line or two on Mr. Kibatala's contention with respect to the propriety of applying for the writ of prohibition in the circumstances of this case. Not oblivious of the fact that merits of the said argument ought to await the next stage of the applicants' expedition, I take that learned counsel's argument raises a pertinent question on the competence of the application.

Mr. Kibatala's exquisite argument relates to the role that a writ of prohibition plays, taking cognizance of the fact that no orders have been issued by the 2nd and 3rd respondents. While this may be, as stated earlier on, a subject for another day, especially at the stage of determining the merits of the matter, I need to drift away from the learned advocate's postulation in this respect. I do so with the aid of a persuasive decision of the Court of Appeal of Kenya in ***Kenya National Examinations Council v. Republic Ex parte Geoffrey Gathenji Njoroge & Others,*** Civil Appeal No. 266 of 1996 (CAK) [1997] eKLR. Expressing the role played by the writ of prohibition, it was held, *inter alia*, as follows:

> *"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which*

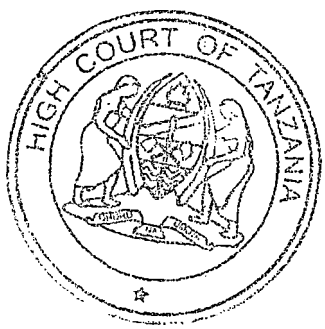
forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...."

Based on the foregoing, I find nothing untoward in the applicants' inclusion of prohibition as one of the prayers to be sought in the next phase of the proceedings. Grant or refusal of the prayer will depend on strength or otherwise of the arguments during the hearing.

In the upshot of all this, I take the view that the application has met the threshold for its grant. Consequently, this Court grants leave for filing an application for prerogative orders of *certiorari, mandamus* and prohibition. Costs to be in the cause.

Order accordingly.

DATED at **DAR ES SALAAM** this 8th day of July, 2022.



M.K. ISMAIL

JUDGE

08/07/2022