

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF DAR ES SALAAM**

AT DAR ES SALAAM

MISC. CRIMINAL APPLICATION NO. 227 OF 2021

SEMERE TEWELDE APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

RULING

25th & 27th April, 2022

KISANYA, J.:

This omnibus application is made under sections 390 (1) (a) and 391(1) and (2) of the Criminal Procedure Act, Cap. 20, R.E. 2002 as amended by section 24 of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2011.

The following orders are being sought in the chamber summons:

- 1. That, this Honourable Court be pleased to give direction to the respondent that Semere Tewelde be brought up before the Court to be dealt with according to the laws of the land.*
- 2. That, this Honourable Court of justice be pleased to determine the continued indefinite detention of the applicant in Segerea and issue of writ of habeas corpus for the Republic to release him with his refugee status card.*
- 3. That, this Honourable Court of justice be pleased to fix a reasonable time for him to be released to UNHCR with his*

refugee status card or proceed with a process to seek asylum.

4. That this Honourable Court of justice be pleased to grant any relief it may deem fit to grant.

The chamber summons is supported by the affidavits of Semere Tewelde who happens to be the applicant, and Boniface Macharia Kinyanjui. The latter introduced himself as a Senior Protection Officer of the Office of the United Nations High Commissioner for Refugees (UNHCR) at the Representation Office in Dar es Salaam.

The factual background of the incident leading to this application is gleaned from the supporting affidavits. The applicant's affidavit discloses that he is a citizen of Eritrea and diacon of Othodox Church. On 10th June, 2009, he fled to Sudan because other Othodox Church's leaders were being prosecuted by the Government of Eritrea. Upon entering Sudan, the applicant was granted asylum status.

On 12th November, 2017, the applicant was forced to run from South Sudan to Uganda due civil war. He then left Uganda to Tanzania on 14th November, 2017 on the account that the issue of Eritrean Othodox Church was also in Uganda. He was arrested at Chanika on 17th November, 2017 and handed over to Immigration Officers. It is alleged that his refugee status card

was taken by the immigration officers. Thereafter, the applicant was charged with the offence of unlawful presence in Tanzania. After a full trial, he was sentenced as charged and sentenced to six months imprisonment. He served and completed his sentence on 4th June, 2018. The applicant claims that he was forced to file the present application because the Immigration Officers abandoned him in the prison and failed to release him to Refugee Camp or any designated bodies.

In response, the respondent through the National Prosecutions Service opposed the application by filing a counter affidavit sworn by Angel Nchalla, learned Senior State Attorney. It was deposed, among others, that upon completion of sentence, the Minister of Home Affairs issued the detention order and deportation order. In addition to the counter affidavit, the Respondent raised a preliminary objection on the following points of law;-

- 1. That, the application is premature before this honourable court.*
- 2. That the application is bad in law for being supported by affidavit which contains arguments and laws.*
- 3. That the court had not been properly moved.*

When the matter was called on for hearing, the applicant appeared in person. He was also represented by Richard Kimaro, learned advocate. On the other hand, the respondent was represented by Ms. Angel Nchalla, learned

Senior State Attorney. Apart from the points of law raised by the respondent, parties were asked to address the Court on whether this omnibus application is competent before this Court.

Starting with the first point of objection, Ms. Nchalla submitted that the application is premature because the relevant organs were working on his request for refugee status. She further contended that the applicant was in the process of being summoned to appear before the National Eligibility Committee (NEC) which is responsible to recommend person suitable to be granted refugee status.

On the second point of objection, the learned Senior State Attorney submitted that paragraphs 9, 10, 11, 12 and 13 of the affidavit of the applicant contain arguments thereby contravening the law. She referred the Court to the case of **Frank Anastus Lui vs the Minister for Constitutional and Legal Affairs and Another**, Criminal Revision No. 6 of 2019 (unreported) in which it was held that an affidavit should not contain legal argument or extraneous matter. Therefore, she prayed that the said paragraphs be expunged for contravening the law.

The learned Senior State Attorney prayed to drop the third limb of objection.

As to the issue raised by the Court, Ms. Nchalla's response was brief. She argued that omnibus application was not competent before the Court without expounding more. In view of the foregoing, the learned Senior State Attorney urged me to strike out this application.

In his reply submission, Mr. Kimaro started to respond on the issue of competency of this omnibus application. It was his submission that the law does not bar omnibus application. He bolstered his submission by citing the case of **MIC Tanzania Limited vs Minister for Labour and Youth Development and Another**, Civil Appeal No. 103 of 2004, CAT at DSM (unreported).

Responding to the first limb of objection, the learned counsel submitted that it does not qualify as a preliminary objection on the account that it calls for evidence.

With regard to the second point of objection. Mr. Kimaro was of the view that paragraph 9 of the applicant's affidavit contains facts and legal arguments. However, he conceded that paragraphs 10, 11, 12 and 13 of the applicant's affidavit contain legal argument and prayed that the same be expunged. He supported his submission by citing the case of **Msasani Peninsular Hotels Ltd and 6 Others vs Barclays Bank Tanzania Limited**, Civil Application No. 192 of 2006, CAT at Dar es Salaam (unreported).

In her short rejoinder, Ms Nchalla reiterated her submission that paragraph 9 of the affidavit deposed by the applicant contain legal argument.

I have gone through the pleadings and considered the submissions made by the learned counsel for both parties. My duty is to determine whether the preliminary objections are meritorious and whether the issue raised by the Court renders the present application incompetent.

The first point of objection calls us to determine whether the application is premature. The law is settled that a preliminary objection must consists of a point of law pleaded or which arises by clear implication out of the pleadings. Furthermore, a preliminary objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. [See **Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited** (1969) EA 696].

It is gleaned from Ms. Nchalla's submission, that the first objection is based on the facts that the applicant request for refugee status is being worked upon by the responsible organs including NEC. Considering that the applicant did not depose that fact, I agree with Mr. Kimaro that the first point does not qualify as a preliminary objection. This is when it is considered that the said point calls for evidence. Thus, I dismiss the first ground of objection.

Moving to the second point of objection, it is not disputed that in terms of the settled law, an affidavit should be premised on the statement of facts which are to the knowledge of the deponent or information which the deponent believes to be true. The stance underscored in the case of **Uganda vs Commissioner of Prison ex-parte Matovu** (1996) EA 514, **Msasani Peninsula Hotels Limited and Others** (supra) and **Frank Anastus Lui** (supra) is to the effect that an affidavit should not contain extraneous matter by way of objection, prayer, legal argument or conclusion.

Given the fact that Mr. Kimaro conceded that paragraph 10, 11, 12 and 13 of the affidavit of the applicant contains legal argument, I expunge the same from the affidavit. However, other paragraphs of his affidavit remains intact. As to paragraph 9 of the applicant's affidavit, I agree with Mr. Kimaro that it is based on the facts known to the applicant. I see no legal argument therein.

I will now consider the issue whether this omnibus application is competent before the Court. As rightly argued by Mr. Kimaro, the law does not bar omnibus application. It also an established position that omnibus application are encouraged. See the case of **MIC Tanzania Limited** (supra) in which the Court of Appeal held:

"Therefore, unless there is a specific law barring the combination of more than one prayer in one chamber summons, the court should encourage this procedure rather than thwart it for fanciful reasons. We wish to emphasize, all the same that, each case must be decided on the basis of its own peculiar facts"

Now, the law is settled that the prayers qualify to be combined in one application if they are not opposed to each other or made under different laws. This stance was taken by my brother Hon. Ismail, J in the case **Rutunda Masole vs Makufuli Motors Limited**, Misc. Labour Application No. 79 of 2019, HCT at Mwanza (unreported) when he stated:

"The condition precedent for applicability, of this rule is that the application should not be diametrically opposed to each other or preferred under different laws, complete with different timelines and distinct considerations in their determination"

I associate myself with the above holding. The reliefs sought in this case are habeas corpus, issuance of refugee status card to the applicant, release of the applicant to UNHCR with his refugee status card or "proceed with a process to seek asylum". The fact that the applicant seeks asylum in Tanzania is also reflected in the affidavit of Boniface Macharia Kinyanjui who deposed as follows in paragraph 4:-

"That the Applicant is an Eritrean national who fled from his country of origin, Eritrea due to fear of persecution. The applicant is unwilling to return to his country of origin, and he expressed to UNHCR his wish to seek asylum in the United Republic of Tanzania as his rights and freedom would be at risk if he is forcibly returned to his country of origin, Eritrea."

He went on to depose as follows in paragraph 7:

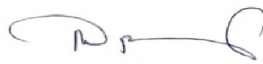
"That, as the applicant expressed his wish to seek asylum in Tanzania, UNHCR has been making tireless efforts to liaise with the Immigration authorities and the Refugees Services Department on the release of the Applicant, but all the efforts have proved futile."

The relief for habeas corpus is determined by this Court under section 390 of the CPA. On the other hand determination of refugee status is governed by section 9 of the Refugees Act, Cap 37, R. E. 2002. Further to this, the provisions cited in the chamber summons do not empower this Court to determine the reliefs available under the Refugees Act. In terms of section 7 of the Refugees Act (supra), the mandate to consider the applicant's application for refugee status is vested the NEC. At end of the day, the NEC recommends to the minister responsible for home affairs to grant of refugee status and

asylum or denial of refugee status. That being the case, I am of the considered view that this omnibus application is incompetent before the Court.

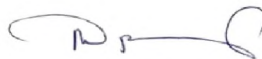
In view of the foresaid reasons, this application is hereby struck out for being incompetent.

DATED at DAR ES SALAAM this 27th day April, 2022.



S.E. Kisanya
JUDGE

Court: Ruling delivered this 27th day of April, 2022 in the presence of the applicant in person, his counsel Mr. Richard Kimaro and Ms. Angel Nchalla, learned Senior State Attorney for the respondent.



S.E. Kisanya
JUDGE
27/04/2022

