THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

AT IRINGA

MISCELLANEOUS CIVIL CAUSE NO. 23 OF 2021.

IN THE MATTER OF ARTICLE 26(1), (2) & 108(2) OF THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA, 1977 [CAP. 2 R.E 2002]

AND

IN THE MATTER OF ARTICLE 13 & 22(1) OF THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA, 1977 [CAP. 2 R.E 2002]

AND

IN THE MATTER OF THE BASIC RIGHTS AND DUTIES ENFORCEMENT ACT

[CAP. 3 R.E 2019]

AND

IN THE MATTER OF SECTION 69(b) and (c) OF THE ADVOCATES ACT [CAP. 341 R.E 2019] AND REGULATIONS 127(2) (a), (b), (c), (3) and (4) OF THE ADVOCATES (PROFESSIONAL CONDUCT AND ETIQUETTE)

REGULATIONS, 2018

AND

IN THE MATTER OF RESTRICTIONS IMPOSED BY THE LAW IN RESTRICTING ADVOCATES TO ADVERTISE THEIR OWN LEGAL PROFESSION BUSINESS

BETWEEN

GEOFREY WATSON MWAKASEGE..... PETITIONER

VERSUS

TANGANYIKA LAW SOCIETY.....1ST RESPONDENT

THE ATTORNEY GENERAL OF TANZANIA.....2ND RESPONDENT

RULING

5th May & 19th July, 2022

UTAMWA, J:

The petitioner in this matter, GEOFREY WATSON MWAKASEGE, an advocate of this court and subordinate courts thereto, sought to invoke the

provisions of Article 26(1) and (2) of the Constitution of the United Republic of Tanzania, Cap. 2 R.E 2002 (henceforth the Constitution), Sections 4 and 5 of the Basic Rights and Duties Enforcement Act, Cap. 3 R.E 2019 (The BRADEA) and Rule 4 of the Basic Rights and Duties Enforcement (Practice and Procedure) Rules, 2014 (hereinafter call the BRADEA Rules in short) for obtaining some declaratory orders. The sought orders relate to Regulations 127(2) (a), (b), (c), (3) and (4) of the Advocates (Professional Conduct and Etiquette) Regulations, 2018, G.N No. 118 of 2018. This G.N Will hereinafter be referred to as the Advocates Regulations in short. The petition essentially claims that, the said Regulations 127(2) (a), (b), (c), (3) and (4) (The impugned regulations) are unconstitutional and infringe the advocate's rights to advertise their legal profession business to the public. He thus, urges this court to make orders declaring them unconstitutional, directing the first respondent to amend them and both respondents to amend laws imposing tax and fees to advocates so that they can be free from paying them. The petitioner has done so by way of originating summons (a constitutional petition) supported by his own affidavit. The same is against the TANGANYIKA LAW SOCIETY and THE ATTORNEY GENERAL OF TANZANIA (the first and second respondent respectively).

The first respondent did not essentially resist the petition. The second respondent resisted it by way of a reply to the petition which contained a notice of a preliminary objection (the PO) and a counter affidavit. The PO is the subject of this ruling. It challenges the competence

of the petition on the following 3 limbs which I reproduce for the sake of a quick reference:

i. The petition is frivolous, vexatious for contravening the provision of Section 8(2) of the Basic Rights and Duties Enforcement Act, Cap. 3 R.E 2019.

ii. The petition is fatally defective for contravening provision of Section 8(4) of the Basic Rights and Duties Enforcement Act, Cap. 3 R.E 2019.

iii. The affidavit in support of the petition is incurably defective for contravening Order XIX Rule 3 of the Civil Procedure Code, Cap. 33 R.E 2019.

The PO was argued by way of written submissions. The petitioner was unrepresented in this matter. The first respondent enjoyed the services of Mr. Moses Ambindwile, learned advocate whereas the second respondent was represented by Ms. Ansila Makyao, learned State Attorney.

The learned State Attorney opted to submit only on the 1st and 2nd limbs of the PO and dropped the third. She argued them generally that, Section 8(2) of the BRADEA clearly provides that, the High Court shall not exercise its powers to hear and determine any application in pursuance of Section 4 of the BRADEA if it is satisfied that adequate means of redress for the alleged contraventions are available to the person concerned under any other law, or that, the application is merely frivolous or vexatious. In the matter at hand, the petitioner had all adequate means of redress to object the alleged violation of the regulations before resorting to this constitutional petition.

The learned State Attorney submitted further that, the Regulations at issue were made under Section 69(b) and (c) of the Advocates Act, Cap. 341, R.E 2019 (The Advocates Act in short). This Act confers power to the Chief Justice through the Advocates Committee to make regulations with a purpose of maintaining the proper and efficient administration of justice. According to section 36(1) of the Interpretations of Laws Act, Cap. 1 R.E 2019, any subsidiary legislation shall not be inconsistent with the provisions of the parent Act. It follows thus, that, where a regulation is believed to have been made unreasonably and/or unconstitutionally the same is challenged through judicial review process. In the case at hand, the impugned regulations can therefore, be challenged on the ground of substantive *ultra vires* if the petitioner believes that they do not conform to the parent Act and are unconstitutional. She added that, where a regulation does not comply with the parent Act, then the procedure prescribed by the parent Act or general law applies. The petitioner therefore, ought to have moved this court through that other remedy of judicial review and not through the constitutional petition as he has done.

The learned State Attorney also referred this court to the case of **Sanai Murumbe and Another v. Muhere Chacha [1990] TLR 54** where the Court of Appeal of Tanzania (The CAT) enumerated grounds for recourse on judicial review. Bringing the constitutional petition whilst the petitioner had another recourse of the alleged violation of rights without stating the basis for the right sought also renders this petition frivolous, vexatious and abuse of court process.

It was also the contention by the learned State Attorney that, the petition at hand seeks to challenge the impugned regulations and leave out the parent Act which conferred power to the maker of the same. Constitutional petitions require the highest degree of proof as it was decided in the case of **Rev. Christopher Mtikila v. The AG [1995] TLR 31** and **Ado Shaibu v. Honourable John Pombe Magufuli (The President of the United Republic of Tanzania) and Two Others, Misc. Civili Cause No. 29 of 2018** (unreported). She concluded by urging this court to strike out the petition.

In his replying submissions, the petitioner argued that, the petition has been filed under articles 26(2) and 108(2) of the Constitution. The Advocates Act through its regulations breached a serious constitutional right. The PO, which insists on utilization of alternative remedies is without merit and ought to be dismissed. Under article 108(2) of the Constitution, the requirement of seeking alternative remedies is not outlined. What is outlined is that the High Court has inherent powers and jurisdiction to hear the petitioner and decide his claim on merits as there is no any available remedy to challenge the impugned regulations. A similar situation was observed in the case of **James Francis Mbatia v. Job Yustino Ndugai and Others, Misc. Civil Cause No. 2 of 2022** (unreported).

The petitioner submitted further that, it is premature to consider whether judicial review is an ideal remedy at this stage because, the provisions of section 8(2) of BRADEA provides that, the High Court must be satisfied that the adequate means are available to the petitioner. Such satisfaction is a matter to be reserved to the time of considering the

petition on merits. The **Ado Shaibu Case** (supra) cited by the second respondent should be distinguished from the present petition since it was decided on the basis of the fact that, the petition challenged the appointment of Mr. Aderladus Kilangi as the Attorney General. In that case, the court found the petition as frivolous, vexatious and abuse of court process because, that was an exercise of presidential powers for appointments.

It was also the contention by the petitioner that, for a court to determine if a matter is frivolous or vexatious it must first accord parties opportunity to be heard and adduce evidence as it was held in the case of **Freeman Aikael Mbowe v. The Director of Public Prosecutions and Others, Misc. Civil Cause No. 21 of 2021** (unreported). He also cited the case of **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors [1969] E.A 696** to cement his contention. He thus, urged the court to overrule the PO with costs.

I have examined the nature of the petition at issue, the submissions by the parties and the law. In my view, the main contention by the learned State Attorney for the second respondent as I understood her is that, the petition contravenes sections 8(2) of the BRADEA since he can still get another remedy by judicial review instead of filing the constitutional petition by invoking section 4 of the BRADEA. By that reason, the second respondent contends, the petition is frivolous and vexatious which said contention is refuted by the petitioner. The major issues for determination are therefore these:

1. *Whether the petition contraventions the provisions section 8(2) of the BRADEA.*
2. *In case the answer to the first issue will be affirmative, then what are the legal consequences of the irregularity to the petition under discussion?*

I now test the first major issue. In my consideration, the existence of the provisions of sections 4 and 8(2) of the BRADEA is not disputed by the parties. Indeed, section 4 provides for the "right to apply to the High Court for redress" by any person who alleges that his basic rights have been contravened. As to section 8(1) and (2) of the same Act, it provides for the jurisdiction of the High Court and conditions thereto, in entertaining such proceedings. These provisions provide thus, and I quote them verbatim for the sake of a readymade reference:

> "**4(1).** Where any person alleges that any of the provisions of Articles 12 to 29 of the Constitution has been, is being or is likely to be contravened in relation to him, he may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the High Court for redress.
>
> **8.-(1)** The High Court shall have and may exercise original jurisdiction-
>
> **(a)** to hear and determine any application made by any person in pursuance of section 4;
>
> **(b)** ...(Not Applicable).
>
> **(2)** The High Court shall not exercise its powers under this section if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law, or that the application is merely frivolous or vexatious."

My construction of the law is therefore that, though any person is entitled to invoke section 4 of the BRADEA to get redress before this court against the contravention of his basic rights, such entitlement is not absolute. There are conditions precedent for the course. One of them is set under

section 8(2) of the same piece of legislation. Under such condition, such person cannot take that course (under section 4) if there are other adequate legal remedies. The provisions in fact, go further and deprive this court of its jurisdiction to entertain a matter that is brought before it while other legal remedies exist.

In the matter under consideration therefore, the second respondent maintains that, for the availability of the course of judicial review, the petitioner cannot resort to the course provided under section 4 of the BRADEA. His petition is thus, frivolous and vexatious. The petitioner disputes these contentions. The sub-issues at this juncture are therefore, two as follows:

i. *Whether under the circumstances of the case at hand judicial review is an adequate redress/remedy available to the petitioner.*
ii. *In case the answer to the first issue will be affirmatively, then whether by virtue of that reason the petition under discussion is frivolous and vexatious.*

Regarding the first sub-issue, my settled opinion is that, the circumstances of the case attract answering it affirmatively and in favour of the second respondent. This view is based on the following reasons: in the first place, the impugned regulations are part of the Advocates Regulations made by the Advocates Committee with the approval of the Chief Justice under section 69 of the Advocates Act. The Committee, as a public authority, thus, made the Advocates Regulations in performing its public duty in exercising its statutory powers or duties. It is the law that, an act of a public body or official or authority performed in exercising statutory duties

or powers or powers that could be characterized as public, may be subject to judicial review. This is so even though the powers are not statutory or prerogative. Such act may be challengeable on the ground of illegality, irrationality and procedural impropriety. This was the stance of the law underlined by this court (Mapigano, J. as he then was) in the case of **Regional Services Ltd v. Secretary - Central Tender Board and Three Others [2001] TLR. 184.**

In deciding the **Regional Services Ltd case** (supra), this court followed the precedent of **Lausa Alfan Salum and Others v. Minister for Lands, Housing and Urban Development and another [1992] T.L.R. 293** (Moshi, J. as he then was). It also made reference to a passage in Lewis, C's book, Judicial Remedies in Public Law (1992), Sweet and Maxwell, London, at page 31. The passage goes thus, and I reproduce it for the sake of a quick reference:

> "Bodies performing public duties or exercising powers that could be characterized as public may be subject to judicial review, even though the powers are not statutory or prerogative. Given the wide or disparate range of bodies that operate in the administrative landscape, and given a revitalized approach on the part of the courts to judicial review and the need to control potential abuses of power, a large number of non-statutory bodies might well be brought within the ambit of public law and judicial review."

In my further opinion therefore, as long as the impugned regulations in the matter at hand were made under the exercise of the statutory powers of the Advocates Committee, they are challengeable through judicial review as per the **Regional Services Ltd case** (supra) and the **Lausa Alfan case** (supra). It would have been a different case had the impugned regulations been enacted under the Advocates Act, being an Act of

Parliament. That would have given the opportunity to the petitioner to resort to appropriately invoke section 4 of the BRADEA and bring the constitutional petition like the one under discussion. It would be so because, in my statutory construction, only challenging provisions of Acts of Parliament can be pursued through section 4 and constitutional petitions (like the one under discussion). This particular view is based on the fact that, such Acts of Parliament are directly made under the constitutional powers of the Parliament vested in it by the Constitution itself.

Admittedly, I appreciate that, subsidiary legislations (like the one under discussion) are also sources of binding laws like Acts of Parliament. This is so because, the phrase "written law" is defined under section 4 of the Interpretation of Laws Act (cited previously) as including all Acts and subsidiary legislation for the time being in force. Actually, there are various sources of law in this land. They include precedents, Public International Law and Academic Writings; see the book by Mirindo, F., Administration of Justice in Mainland Tanzania, Law Africa Publishing (T) Ltd, Dar es Salaam, 2011, at page 44-52. According to another book by Shivji, I. G., Majamba, H., Makaramba, R. V. S., and Peter, C. M., Constitutional and Legal System of Tanzania, A Civic Sourcebook, Mkuki na Nyota Publishers Ltd, Dar es Salaam, 2004, at page13-20, sources of law in Tanzania include Received Laws (to wit; common law, doctrine of equity and statutes of general application which were in force in England by 22/7/1920, i. e. the reception date), Local Law (i. e. the Constitution of the United Republic, Ordinances passed by the British Colonial Legislative Council before independence, Acts of Parliament passed after independence and Subsidiary Legislations) and

Customary Law (i. e. accepted customs and practices of local ethnic societies and Islamic Law).

Furthermore, PART III of the Judicature and Application of Law Act, Cap. 358 R.E 2019 (The JALA) which is titled "APPLICATION AND RECOGNITION OF LAWS" (enveloping sections 9-18 of the Act), also recognizes some sources of law that apply under some circumstances in our jurisdiction. They include some Acts of the United Kingdom, Indian Acts and customary law. The CAT also once observed that, the JALA prescribes circumstances where to apply Acts of Parliament, Customary law, Islamic Law and even Common Law; see the case of **Magambo J. Masato & 3 Others v. Ester Amos Bulaya & 2 Others [2016] TLR 485,** at page 500.

Nonetheless, the only reason cited above that subsidiary legislation are sources of binding law like Acts of Parliament, does not mean that, provisions under subsidiary legislations can be challenged in the same way the provisions under Acts of Parliament are challenged (i. e. through constitution petitions by virtue of section 4 of the BRADEA). In fact, not every kind of offending law from the above mentioned list of sources of law in our jurisdiction, can be challenged by a constitutional petition like Acts of parliaments. We do not for example, challenge offending precedents or customary laws by way of constitutional petitions. A mode for challenging provisions of law depends thus, on the nature of their making and other factors. It is not thus, true that subsidiary legislation are challengeable by way of constitutional petitions like Acts of Parliament.

The procedure for challenging the two kinds of provisions of law mentioned above, i.e. those made under subsidiary legislations and those enacted under Acts of Parliament are therefore, different because, they are made by different bodies under different mandates. The former are made by public authorities or officials or bodies etc. under mere statutory mandates. On the other hand, the latter provisions are made by the Parliament itself under the constitutional mandate as I observed earlier; see for example, its powers under article 64(1) and 4(2) of the Constitution which also promulgates the constitutional principle of Separation of Powers of the three pillars of the state.

In my view, there is another justification for differentiating the modes for challenging the two kinds of legal provisions discussed above. It is common ground that, unlike Statutes, subsidiary legislations are in law made by various authorities to make details for better enforcement of the respective principle Acts under which they are made. Such delegated legislations are thus, practically more bulky in number than Acts of Parliament. It follows thus, that, if the law will permit every provision of a subsidiary legislation to be challenged by a constitutional petition by invoking section 4 of the BRADEA as the petitioner in the matter at hand wants to do, constitutional petitions will overwhelm this court as the Constitutional Court.

Actually, the view that subsidiary legislation can be challenged through judicial review is further clearly supported by some decisions of this court. In my search, I was not lucky enough to find a decision of the CAT deciding on this aspect of the law. The learned State Attorney in her

submissions did not cite any precedent which directly underlined such aspect of the law. The **Sanai Murumbe case** (supra) for example, did not consider any issue related to challenging a subsidiary legislation through a judicial review. It only considered the propriety of a decision of a District Court in an inquiry conducted under section 15 of the then Stock Theft Ordinance, Cap.422. Again, the **James Francis Mbatia case** (supra) cited by the petitioner did not consider the above mentioned legal position on a proper mode for challenging subsidiary legislation. It only considered issues related to the resignation of the Speaker of the Parliament. However, my search fruitfully showed that, this court considered issues related to challenging provisions of subsidiary legislation at least in three instances as shown below.

In the case of **Legal and Human Rights Centre v. The Minister for Finance and Planning and 3 others, Miscellaneous Cause No. 11 of 2021, the High Court of Tanzania, at Dar es Salaam** (unreported, by Mugetta, J.), hereinafter called the **LHRC-1 case** for example, some provisions of the National Payment Systems (Electronic Mobile Money Transfer and Withdrawal Transactions Levy) Regulations, 2021, G.N. No. 496A of 2021 were challenged by a judicial review. A preliminary objection was raised against that course. This court held, at page 10-11 of the typed version of its ruling that, subsidiary legislations are challengeable by judicial review before this court under the authority of sections 2(3) of the JALA and 17(2),(3) & (4) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap. 310. The court went

further to support its finding by the following words which I quote for swift reference:

> "In a democratic country like Tanzania, delegated legislation does not fall beyond the scope of judicial review whereby a court of law can decide on the validity of such delegated legislation. They are administrative actions in nature. For example, in case of possible abuse of legislative power by executive authorities, such power may be subjected to judicial control, legislative control or other controls...I thus conclude that as stated earlier the parliament derives its powers from the Constitution to enact Acts of Parliament; while, the executive authorities have administrative powers to make regulations, rules, etc, which powers are derived from a specific Act of Parliament. Thus, if a person finds that an Act of parliament has any problem, he could challenge it by petitioning Constitutional court; while, if one finds aggrieved or that a regulation or rule made by executive authority has problem, he could challenge it by way of judicial review. Hence, the 1st preliminary objection fails."

Another precedent supporting the stance highlighted above is the case of **Legal and Human Rights Centre and two others v. The Minister for Information, Culture and Sports and two others, Miscellaneous Civil Cause No. 25 of 2018, the High Court of Tanzania, at Mtwar**a (unreported, by Dyansobera, J.), henceforth the **LHRC-2 case** to differentiate it from the **LHRC-1 case** (supra). In this case, some provisions of the Electronic and Postal Communications (Online Content) Regulations, G.N No. 133 of 2018 were challenged on ground that they had been promulgated in excess of powers, illegally, against the principles of natural justice, unreasonably, arbitrarily and ambiguously. At page 13 of the typed version of its ruling this court held thus, and I reproduce the pertinent passage for ease of perusal:

> "Generally, courts review the validity of a subsidiary legislation by applying the doctrine of *ultra vires* in that the subsidiary legislation may be declared void if it is made in excess of statutory authority conferred by the

parent Act or a particular mandatory procedure prescribed by the parent Act has not been followed or is contrary to the Constitution."

Indeed, even in the **Lausa Alfan case** (supra), the subject matter of the application for leave to seek judicial review was a subsidiary legislation. The applicants were challenging an Order made by the Minister for Lands, Housing and Urban Development under section 2(1)(b) of the then Rent Restriction Act, 1984. The Order was published under the Government Notice No. 41 of 1992. The grounds for challenging the same were that, the Order offended Articles 13 (1), (2) and (3) of the Constitution and was *ultra vires* the enabling provisions (i.e. section 2(1)(b) of the Rent Restriction Act). In granting the applicants leave to apply for Orders of *Certiorari*, *Mandamus* and an interim prohibitory order, the court made useful remarks (at page 296-297), and I reproduce the pertinent passage for an expedient perusal;

"Broadly speaking, prerogative orders of certiorari and Prohibition may be issued in certain cases, either to quash a decision made in the course of performing a public duty or to prohibit the performance of a public duty, where the injured party has a right to have anything done, and has no other specific means of, either having the decision quashed or the performance of the duty prohibited, when the obligation arises out of the official status of the party or public body complained against. Quite clearly, the applicants have an interest in the matter they are applying for. The first respondent, and the second respondent, are a public official, and a public body, respectively, who had an imperative legal duty of public nature which they had to perform in their official capacity. In my considered view, any of their actions or decisions is challengeable, firstly, if it is tainted with illegality, that is, the power exercised is *ultra vires* and contrary to the law. Secondly, if it is tainted with irrationality, that is, the action or decision is unreasonable in that it is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had rightly applied his mind to the matter to be acted upon or to be decided could have thus acted or decided. And thirdly if the action or decision is tainted with procedural impropriety, that is, failure to observe basic rules

of natural justice or failure to act with procedural fairness towards the person who will be affected by the action or decision."

The three precedents cited above therefore, to wit; the **LHRC-1 case**, the **LHRC-2 case** and the **Lausa Alfani case**, clearly demonstrated that, in this country, provisions of subsidiary legislation are challengeable through judicial review.

Moreover, in his submissions, the petitioner tried to support his course by arguing that his application was made under article 26(2) and 108(2) of the Constitution. However, in my consideration, these provisions are not free from any condition. Article 26(2) for instance, directs that, every person has the right, in accordance with the procedure provided by law, to take legal action to ensure the protection of the Constitution and the laws of the land. It is thus, the duty of any person who wants to rely upon these provisions of the Constitution to observe the procedure provided by the law. Likewise, the jurisdiction of this court under article 108(2) of the Constitution, is not free of any condition though it is always underlined that it has unlimited jurisdiction. Its jurisdiction is, in fact, subject to other provisions of the Constitution itself and other laws as conspicuously shown in the first two lines of article 108(2) itself. The provisions of articles 26(2) and 108(2) of the Constitution do not thus, constitute any warrant for the petitioner to skip using the process for judicial review discussed earlier.

Furthermore, the contention by the petitioner that the satisfaction by this court referred to under section 8(2) of BRADEA can only be met at the time of hearing the petition under discussion is not forceful and I do not

buy it. This is because, by the bear wording of such provisions (quoted above), the legislature might have intended to guide that, the satisfaction must be in relation to available laws. It must be thus, met by the parties making submissions related to the applicable laws or by the court itself construing the relevant laws. Indeed, the satisfaction must be met before the court exercises its powers under section 4 of the BRADEA. Such satisfaction cannot wait until the hearing of the petition since the hearing of the petition itself connotes the exercise of the powers of this court under such provisions.

It must also be born in mind that, section 8(2) of the BRADEA has to be read together with section 4(5) of the same legislation as amended by the Written Laws (Miscellaneous Amendments) (No.3) Act of 2020. These provisions guide that, a petitioner shall, prior to seeking redress under the BRADEA, exhaust all available remedies under any other written laws. It is clear that, both parties did not address themselves to these lastly cited provisions of law thought the amendments concerned were made prior to the filing of the petition under discussion. The amendments were effective 19th June, 2020. This is because, the amending Act was assented to by the President on 15th June, 2020 and gazetted in the Gazette of the United Republic of Tanzania No.6. Vol. 101 dated 19th June, 2020. The amended provisions also drew the attention of this court in the case of **Onesmo Olengurumwa v. The Attorney General, Miscellaneous Civil Cause No. 9 of 2021, in the High Court of Tanzania, at Dar es Salaam** (unreported, by Mlyambina, J.). The petition under discussion however, was filed in this court on the 20th September, 2021 according to the record.

By simple arithmetic, this was after the lapse of a period of more than a year and 3 months from when the amendments were effective.

Owing to the above cited statutory amendments, the petitioner was also bound by them apart from the provisions of section 8(2) of the same BRADEA. He was therefore, not only restricted to file the petition under discussion by virtue of section 8(2) of the BRADEA for the availability of the process of judicial review (as discussed earlier), but he was also enjoined to exhaust it first as per section 4(5) and the amendments shown above.

It is also apparent that, the petitioner in the case at hand took the course of the constitutional petition because he is also contending that the impugned regulations also offended his constitutional rights. Nonetheless, that reason alone could not justify him to avoid the process of judicial review. This is so because, this court can also interpret constitutional provisions in the course of a judicial review. I am fortified in this view by the envisaging under section 18(2) of Cap. 310, which said Act vests in this court the powers for judicial review. The provisions of this section provide, *inter alia*, that in any proceedings involving the interpretation of the Constitution with regard to the basic freedoms, rights and duties specified in Part III of Chapter I of the Constitution, no hearing shall take place unless the Attorney-General or his representative is summoned to appear as a party to those proceedings; save that if the Attorney- General or his representative does not appear before the Court, the hearing may proceed ex-parte. These provisions therefore, imply that, this court is empowered to interpret constitutional provisions under the above mentioned circumstances in the process of judicial review.

Due to the above reasons, I answer the first sub-issue posed previously affirmatively that, under the circumstances of the case at hand judicial review is an adequate redress/remedy available to the petitioner. This finding attracts the examination of the second sub-issue posed above.

Concerning the second sub-issue, I am of the view that, the two terms "frivolous" and "vexatious" proceedings are not defined by our written laws. However, case law does so. In the case of **Kiama Wangai v. John N. Mugambi and Another (2003) 2 EA 474** it was held that, a matter is frivolous if it has no substance, or it is fanciful, or where a party is trifling with the court, or when to put up a defence would be wasting court's time, or when it is not capable of reasoned argument. The court went on to point out that, a matter is also frivolous or vexatious if it has no foundation, or it has no chance of succeeding, or the defence (pleading) is brought merely for purposes of annoyance, or it is brought so that the party's pleading should have some fanciful advantage, or where it can really lead to no possible good, or it lacks *bona fide* purpose and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expenses.

As I observed earlier, the reason why the second respondent considered the petition under discussion as a frivolous and vexatious was that, it offended section 8(2) of the BRADEA. In my view, such error alone cannot render the petition frivolous or vexatious. In fact, the error does not even fit into the definition provided in the **Kiama Wangai case** (supra). The error might have thus, been caused by mere mistaken interpretation of the law which is a common phenomenon in the legal practice among

parties and/or advocates. Had that error been taken by the law as a factor for rendering a matter before a court frivolous or vexatious, injustice would prevail in courts for, a good number of matters would be struck out for being considered frivolous or vexatious. The circumstances of this matter thus, show that the petitioner is an apparent honest justice-seeker, but has only mistaken the apposite course to his destiny.

It is also my view that, the affirmative answer to the first sub-issue above only meant that, the petitioner has another forum for remedying his grievances, but he has not used the same and he is enjoined to firstly use it before he resorts to the course under discussion. That answer did not mean that the petition falls under the definitions of the terms "frivolous" or "vexatious" offered above in the **Kiama Wangai case** (supra).

Having observed as above, I answer the second sub-issue negatively that, the fact that the petition did not resort to judicial review does not render the petition under discussion frivolous or vexatious.

Owing to the above discussions and findings in relation to the first and second sub-issues, I answer the first major issue posed earlier affirmatively that, the petition under consideration contravenes the provisions of section 8(2) of the BRADEA. In fact, it also contravenes section 4(5) of the BRADEA as amended by the Act No. 3 of 2021 discussed earlier, though both parties did not address themselves to such new provisions of the law.

The above affirmative answer to the first major issue calls for testing the second major issue on the legal consequences of the contravention of

the provisions discussed above, as I hereby do. In my settled view, the effect of that irregularity in contravening sections 8(2) and 4(5) of the BRADEA discussed above, is none other than rendering the petition incompetent. It also erodes the requisite jurisdiction of this court for entertaining the petition at issue as observed previously. I accordingly agree with the learned State Attorney that the petition is liable to be struck out.

I therefore, partially uphold the PO and partially overrule it. Its partial upholding is due to the fact that, I have approved the contention by the learned State Attorney for the second respondent that, the petition contravenes section 8(2) of the BRADEA. The partial overruling of the PO is due to the reason that, I have not agreed with the learned State Attorney that the petition is frivolous or vexatious.

Regarding costs of this matter, I find that, this is an appropriate case for directing each party to bear its own costs. This is because, I have partially upheld the PO and partially overruled it as indicated above. I accordingly strike out the petition and each party shall bear its own costs. It is so ordered.

J.H.K. UTAMWA

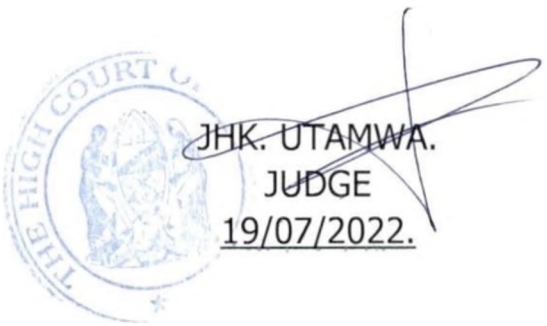
JUDGE

19/07/2022

19/07/2022.

CORAM; JHK. Utamwa, Judge.
Petitioner: present in person.
For 1st respondent: absent.
For 2nd respondent: Ms. Ancila Makyao, State Attorney.
BC; Ms. Gloria. M.

Court: ruling delivered in the presence of the petitioner in person and Ms. Ancila Makyao, State Attorney for the second respondent, this 19th July, 2022.



JHK. UTAMWA.
JUDGE
19/07/2022.