

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

MISCELLANEOUS CIVIL CAUSE NO. 7 OF 2022

**EMMANUEL MASONGA1ST PETITIONER
TITO ELIA MAGOTI.....2ND PETITIONER
MARTIN MARANJA MASESE.....3RD PETITIONER
PETER MICHAEL MADELEKA.....4TH PETITIONER**

VERSUS

**INSPECTOR GENERAL OF POLICE (IGP).....1ST RESPONDENT
THE ATTORNEY GENERAL.....2ND RESPONDENT**

RULING

22 & 31 Aug, 2022

MGETTA, J:

In response to petition filed by the petitioners namely Emmanuel Masonga, Tito Elia Magoti, Martin Maranja Maseese and Peter Michael Madeleka (henceforth the 1st, the 2nd, the 3rd and 4th petitioner respectively), the respondents namely Inspector General of Police (IGP) and the Attorney General filed a notice of preliminary objections to the effect that:

1. The petitioner has an alternative means of redress; and,
2. The petition is frivolous, vexatious and an abuse of court process

When the preliminary objections were called on for hearing, Ms. Vivian Methods, the learned senior state attorney appeared for the respondents. She dropped the second preliminary objection and

continued to argue for the 1st preliminary objection. The petitioners enjoyed a legal service of Mr. John Seka, the learned advocate.

Arguing for the point of objection, Ms. Vivian clarified that the petitioners are challenging the manner of their arrest or their arraignment in court. It was her firm argument that the petition is not fit for determination under the Basic Rights and Duties Enforcement Act by considering the grounds of the petitions and relief sought. She firmly stressed that the petitioners have an alternative redress. Hence, **sections 4 and 8(2) of the Basic Right and duties Enforcement Act Cap 3** (henceforth Cap 3), bars this court from entertaining the petition in which the petitioner has an alternative means of redress. She consistently insisted on her point by referring to the case of **Tanzania Cigarette Company Versus The Fair Competition Commission and Another**, Miscellaneous Civil Cause No.31 of 2010 (HC)(Dar es Salaam)(unreported).

Her argument pointed out that the 4th petitioner is connected to the ongoing Criminal case no. 68 of 2022 at the Resident Magistrate Court at Kisutu, in which he is charged with publication of false information contrary to **section 16 of the Cyber Crimes Act**. It was her submission that since the complained arrest, detention and confinement relates to the ongoing criminal case above, the 4th

petitioner could have raised his complain before the trial court as his complains originated from the breach of **Criminal Procedure Act CAP 20**. That CAP 20 provides for the remedies under **section 169 (1)** that the petitioner can rise objections to admission of any evidence taken during the arrest or search which is in contravention with the law. She urged this court to refer to the case of **Freeman Aikael Mbowe Versus the Director of Public Prosecution and Others**; Miscellaneous Civil Cause No. 21 of 2021, at page 7 and 8 whereby this court was faced with a similar situation in which this court held that the petitioner had alternative remedy under the Criminal Procedure Code through proceedings which were going on.

With regard to the 1st, 2nd and 3rd petitioners, she stressed that they have an alternative remedy of instituting a normal civil suit as what they asked before this court for a declaratory order of compensation to the tune of Tzs 1,000,000,000/= which can be obtained through general damages for the pain, injuries inconveniences, sufferings etc as per relief sought in paragraph 15. She insisted on her argument by referring to Part I item 1 of the **Law of Limitation Act, CAP 89**. That the petitioner has to file a suit for compensation. That the alternative remedy is available in the Civil Procedure Code.

She further argued that not every violation of the constitution gives rise to constitutional case. She referred to the case of **Elizabeth Steven & Another Versus The Attorney General** [2006] TLR 404 at page 415 and the case of **Geoffrey Watson Mwakasege Versus Tanganyika Law Society & Another**, Misc. Civil Cause No.23 of 2001 (HC)(Iringa)(unreported) at page 18 paragraph 3. She concluded that the 1st, 2nd and 3rd Petitioners have alternative remedy through filing a civil suit. She prayed this matter to be dismissed with cost.

Responding, Mr. John Seka had the view that the Ms. Vivian has gone to the merits of this petition. However, he alternatively submitted that the applicants are seeking for declaratory orders. Other remedies like damages are just ancillary orders. Declaratory orders are only sought before this court. To substantiate his point, he referred to the case of **James Francis Mbatia Versus Job Yustin Ndugai and Others**, Miscellaneous Civil Cause No. 2 of 2022 (unreported) when this court was dealing with alternative remedy at pages 3 and 4. He insisted that this matter is properly before this court. He also insisted that this court can grant compensation to the parties by referring to **Article 107 A (2)(c) of the Constitution of**

the United Republic of Tanzania which empowers a court to grant compensation by way of damages.

To stress that this court can issue compensation orders, he referred to the case of **Judge-In-Charge, High Court at Arusha and The Attorney General Versus Munuo Ng'uni** [2004] TLR 40 in which it was held to the effect that a Court hearing declaratory orders can also give an order of compensation.

With regard to the bar provided by section 4 and 8 (2) of Cap 3, he stressed that the law says without prejudice to any other law, but in the present case, the door of the high court for declaratory orders is not closed.

He further submitted that action of the 1st to the 3rd petitioner is an action in civil case. He stated that action must be filed within one year from when the cause of action arose. That if one goes into the merits of the application, one year provided by law within which to apply for civil damages has already lapsed as the petitioners were arrested long time ago. Further for the decision that there is an alternative remedy the route to the High Court has been closed. He differentiated the case of **Tanzania Cigarette Company Ltd** with the present matter to the effect that the above cited case, the court was not disposing preliminary objection, but merits of the case.

With regard to the 1st petitioner, that is subjected to prosecution, he averred that the only remedy available if successful is acquittal which is not the alternative remedy to violation of constitutional right. The remedy under section **169(1) of the Criminal Procedure Act** was only to prove his innocence which was violated unlawfully and that is not a remedy but a defence.

He pointed out that in subordinate court, alternative remedy is found under **section 9 of Cap 3**. However, when the matter is in subordinate court and the issue of violation of human rights arises, the court has no jurisdiction to try the matter. It has to refer the matter to the high court. He substantiated his point by referring to the case of **DPP vs Anjelina Ojare** [1999] TLR 163, in which it was held among others, that whenever a constitutional right issue is raised in subordinate court the only remedy is to refer the matter to the High Court, as the subordinate court is not clothed with jurisdiction to entertain it.

In rejoinder, Ms. Vivian maintained her submission in chief and insisted that preliminary objection does not fall within the ambit of **Mukisa Biscuit** case. She distinguished the case of **James Fransis Mbatia** (supra) to the effect that the law governing the

determination of issues in the said case are different from the present matter.

I have considered the rival submissions of the parties and I agree that it is now a settled law that litigants before they can seek remedies under the **Basic Rights and Duties Enforcement Act, CAP 3** should first exhaust other lawfully available remedies as per section 4 and 8 (2) of the same Act as well as the case of **Tanzania Cigarette Company LTD** (supra).

I have the settled view that, the preliminary objection has merit considering the nature of the grounds of the petition as well as the prayers sought because by carefully scrutiny of the grounds of the petition, I have found that the petitioners are challenging the constitutionality of the acts of the members and officers of the 1st respondent emanating from administration of criminal justice. They are praying for declaratory orders for the complained acts to be declared unconstitutional as they have infringed their fundamental rights enshrined in the Constitution under **Article 13(2) (6) (d); 15(1), (2) (a), 17 (1), (2)(a); 26 (1),(2); 29 (1),(2) and 30 (3).**

However, the relief sought by petitioners can be obtained by filing a normal civil proceeding rather than Constitution petition as

they are barred by **sections 4 and 8(2) of Cap 3**; for, there are alternative remedies. That they can file a fresh Civil suit under the **Civil Procedure Act CAP 33** subject to **Law of Limitation Act CAP 89**, against those officers complained against to have violated the said provision of the law in which courts of law are empowered to order compensations for the affected party or give an order for recovery of damages for the injuries sustained during such wrongful acts of the members and officers of the 1st respondent. The issue of being time barred seek civil relief is not fault of this court, but rather for the petitioners themselves for either sleeping on their rights by taking a wrong route to pursue their rights. Therefore, failure to timely execute a right in court of law does not mean there was no alternative remedy. At this juncture, I find that all the petitioners have alternative remedy under other laws of the land and therefore are barred from instituting this constitution petition.

The Court of Appeal in the case of **DPP Versus Angelina Ojare** (supra) at page 172 observed that:

".....Parliament enacted the Basic Rights and Duties Enforcement Act, so that sub-articles (3) and (4)(a) of the Constitution have to be read together with this Act. When that is done, the

import is that a person who complains of a violation of his basic right has the option whether to seek redress in the High Court by filing a petition in that court, or to take any other action lawfully available to him such as instituting a civil suit under the ordinary law to recover damages, say, for unlawful confinement. But where in the course of any proceedings in the subordinate court the issue of violation of a basic right of a party arises, then the trial magistrate must refer such question to the High Court for determination. However, if the parties agree that the question should not be referred to the High Court, then the magistrate may proceed under the ordinary law to dispose of the suit or proceedings before him”.

Taking in consideration of the quotation above, I find that the petitioners have not exhausted local remedies. Further, it is not correct to generalise that subordinate court has no jurisdiction to entertain constitutional matters as under **section 9(1) of Cap 3** the

trial court may have jurisdiction to try Constitutional matters disposable through ordinary laws when parties agree otherwise or in the opinion of trial magistrate the matter is merely frivolous. **Section 9(1) of Cap 3** reads:

*9.-(1) Where in any proceedings in a subordinate court any question arises as to the contravention of any of the provisions of Articles 12 to 29 of the Constitution, the presiding magistrate shall, **unless the parties to the proceedings agree to the contrary or the magistrate is of the opinion that the raising of the question is merely frivolous or vexatious,** refer the question to the High Court for decision; save that if the question arises before a primary court, the magistrate shall refer the question to the court of a resident magistrate which shall determine whether or not there exists a matter for reference to the High Court”.*

Furthermore, in the case **DPP Versus Anjelina Ojare** (supra) at page 172 the Court of Appeal observed that:

*"However, if the parties agree that the question should not be referred to the High Court, then the magistrate **may proceed under the ordinary law to dispose of the suit or proceedings before him.** Again if, on that question being raised in the District Court, the magistrate is of the opinion that the raising of it is merely frivolous or vexatious, then he can overrule it and proceed to conclude the proceedings under the ordinary law."* (bold added)

All being said, I sustain the preliminary objection and proceed to dismiss this petition with no orders as to cost.

It is so ordered

DATED at **Dar es Salaam** this 31st day of August, 2022.



A handwritten signature in blue ink, appearing to read "J.S. MGETTA".

J.S. MGETTA
JUDGE