

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(MAIN REGISTRY)**

**AT DAR ES SALAAM**

**MISCELLANEOUS CAUSE NO 36 OF 2022**

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF  
CERTIORARI, MANDAMUS AND PROHIBITION BY HALIMA JAMES  
MDEE AND 18 OTHERS**

**AND**

**IN THE MATTER OF THE DECISION OF CHAMA CHA DEMOKRASIA  
NA MAENDELEO (CHADEMA) EXPELLING THE APPLICANTS FROM  
BEING MEMBERS OF CHAMA CHA DEMOKRASIA NA MAENDELEO  
(CHADEMA)**

**BETWEEN**

**HALIMA JAMES MDEE.....1<sup>st</sup> APPLICANT**  
**GRACE VICTOR TENDEGA.....2<sup>nd</sup> APPLICANT**  
**ESTHER NICHOLAS MATIKO.....3<sup>rd</sup> APPLICANT**  
**ESTER AMOS BULAYA.....4<sup>th</sup> APPLICANT**  
**AGNESTA LAMBERT KAIZA.....5<sup>th</sup> APPLICANT**  
**ANATROPIA THEONEST.....6<sup>th</sup> APPLICANT**  
**ASYA MWADINI MOHAMED.....7<sup>th</sup> APPLICANT**  
**CESILIA DANIEL PARESSO.....8<sup>th</sup> APPLICANT**  
**CONCHESTA LEONCE RWAMLAZA.....9<sup>th</sup> APPLICANT**  
**FELISTER DEOGRATIAS NJAU.....10<sup>th</sup> APPLICANT**  
**HAWA S. MWAIFUNGA.....11<sup>th</sup> APPLICANT**

JESCA DAVID KISHOA.....12<sup>th</sup> APPLICANT  
KUNTI YUSUPH MAJALA.....13<sup>th</sup> APPLICANT  
NAGHENJWA LIVINGSTONE  
KABOYOKA.....14<sup>th</sup> APPLICANT  
NUSRAT SHAABAN HANJE.....15<sup>th</sup> APPLICANT  
SALOME MAKAMBA.....16<sup>th</sup> APPLICANT  
SOPHIA HEBRON MWAKAGENDA.....17<sup>th</sup> APPLICANT  
STELLA SIMON FIYAO.....18<sup>th</sup> APPLICANT  
TUNZA ISSA MALAPO.....19<sup>th</sup> APPLICANT

**AND**

**THE REGISTERED TRUSTEES OF CHAMA**

**CHA DEMOKRASIA NA MAENDELEO**

**(CHADEMA).....1<sup>st</sup> RESPONDENT**

**THE NATIONAL ELECTORAL**

**COMMISSION.....2<sup>nd</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY**

**GENERAL.....3<sup>rd</sup> RESPONDENT**

Date of Last Order: 26/08/2022

Date of Ruling: 02/09/2022

**RULING**

**MKEHA, J:**

When the learned counsel for the parties entered their first appearance before me, they expressed their intention of addressing the merits of this application, as early as practicable. As such, they asked the court to fix a schedule for filing documents, which had not been filed by then. It was on 22/07/2022. They also asked the court to fix a date for commencement of hearing of the application on merits, promising not to raise and pursue preliminary points of objection. On that day, Mr. Panya, Mwamanenge and Emmanuel learned advocates appeared for the Applicants. Mr. Kibatata, Mndeme, Mwasika and Matata learned advocates appeared for the 1<sup>st</sup> Respondent. Mr. Boaz Msoffe learned State Attorney appeared for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

By consent of the learned counsel for the parties, the court directed that, counter affidavits be filed by the respondents on 05/08/2022, affidavits in reply to the counter affidavits (if any) be filed by the applicants on 10/08/2022 and that, commencement of hearing of the application on merits be on 26/08/2022. Following prayer by Mr. Kibatata learned advocate for the 1<sup>st</sup> respondent, which was not objected by advocates for the Applicants, an order was also issued, summoning the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 8<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and 15<sup>th</sup> Applicants for cross examination.

When the court convened on 26/08/2022, it turned out that, the Applicants had filed notices of preliminary points of objection. As such, Mr. Panya, lead counsel for the Applicants urged the court to vacate its previous order for hearing of the application, so that, the preliminary points raised by the Applicants could be determined first, that being the obtaining practice whenever a preliminary point of objection is raised. The prayer for vacation of the earlier set hearing date was preferred under Order VIIIIB rule 23 of the Civil Procedure Code. According to the learned advocate for the Applicants, although the hearing date was a consent order, matters contained in the notices of preliminary objection were unknown to the Applicants when they consented to the scheduling of the application for hearing. In his view therefore, it would be in the interests of justice that, the points of objection be determined first.

Mr. Kibatala learned advocate for the 1<sup>st</sup> Respondent submitted in rebuttal to the effect that, the prayer for vacation of the court`s former order for hearing of the application was very weak. In his view, if anything, the Applicants ought to have moved the court to review its previous order. However, Mr. Kibatala was quick to remind the court that, the hearing order was consented to by the learned advocates for the applicants which

snatches whatever weight that might be associated with the Applicants' move for review. In view of Mr. Kibatata, which is shared by Mr. Mtobesya learned advocate for the 1<sup>st</sup> Respondent, the court is functus officio regarding the order for hearing of the application. According to the learned advocates, the order for hearing was not dependent upon filing of the counter affidavit by the 1<sup>st</sup> Respondent. While Mr. Kibatata acknowledged the fact that a preliminary point of objection has to be determined first, he politely reminded the Applicants that, a preliminary point of objection is a tool of the respondent.

When Mr. Edson Kirati learned advocate for the Applicants rose to rejoin, he was insistent that, raising preliminary objections ought to be equally enjoyed by both parties to a case. The rest of his rejoinder was almost reiteration of what had been submitted in chief by the lead counsel for the Applicants.

In the course of making arguments, the learned counsel for the parties referred to a number of case laws and statutory provisions. I have not recited any of the case laws as they do not directly relate to what appears to be the determinative issue. In the spirit of the overriding objective

principle, I do not intend to make proper or improper citation of the enabling provision under which the court is moved, an issue.

The only determinative issue is **whether a consent hearing date cannot be varied by the trial court in any way whenever fixed.**

There is no denial that, what the Applicants are moving the court to vacate is a consent hearing date that was issued in the presence of three learned advocates who represent the Applicants. That is to say, the hearing date was not arbitrarily imposed by the court upon the parties. There is also no denial that, notices of preliminary points of objection have been filed by the Applicants and served upon the Respondents. Mr. Kalokola learned State Attorney for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not file counter affidavits. He did not either challenge the Applicants' prayer for vacating the court's previous order for hearing of the application.

The applicants' prayer traces its genesis from the 1<sup>st</sup> Respondent's counter affidavit which had not been filed when the Applicants consented that hearing the date of the application be fixed. Counsel for the parties are in agreement that, whenever a preliminary point of objection is raised, it has to be determined first before any other thing proceeds. **See: AMOS**

**FULGENCE KARUNGULA VS. KAGERA COOPERATIVE UNION  
(1990) LTD, CIVIL APPLICATION NO. 435/04 OF 2017, CAT AT**

**BUKOBA.** Mr. Kibatala learned advocate would seem to suggest that a consented hearing date is an exception to such time honoured practice. Is that so? I respectfully hold a different view.

It is true that courts should be reluctant to vacate consent orders save for good reasons. However, such reluctance should be done away if circumstances have arisen since the order was made rendering it impracticable for the order to be carried out. If such circumstances have arisen, it is just and equitable to vary the consent order or set it aside. In its place, the court is permitted to make a different order.

In this application, contrary to the expectations of the court, notices of preliminary objection have been filed. The obtaining practice and prudence dictate that, the points of objection are to be determined first. This is a justifiable reason for vacation of the previous court's order for commencement of hearing of the application on merits. The said order is hereby vacated. The parties are invited to address the preliminary points of

objection first, as the obtaining practice requires. The prayer is granted with no order as to costs.

DATED at DAR ES SALAAM this 2<sup>nd</sup> day of SEPTEMBER, 2022.



  
**C. P. MKEHA**

**JUDGE**

**02/09/2022.**

**Court:** Ruling is delivered in the presence of the parties' advocates.



  
**C.P.MKEHA**

**JUDGE**

**02/09/2022.**