

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

MISCELLANEOUS CAUSE NO. 09 OF 2022

**IN THE MATTER OF THE CONSTITUTION OF UNITED REPUBLIC OF
TANZANIA 1977 [CAP 2 R.E. 2002]**

AND

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

AND

**IN THE MATTER OF SECTION 2 (3) OF THE JUDICATURE AND
APPLICATION OF LAWS ACT [CAP. 358 R.E. 2019]**

AND

**IN THE MATTER OF ARTICLE 118 (2) OF THE CONSTITUTION OF
UNITED REPUBLIC OF TANZANIA 1977 [CAP 2 R.E. 2002]**

AND

**IN THE MATTER OF CHALLENGING THE POWER OF THE
PRESIDENT TO REMOVE THE CHIEF JUSTICE FROM HIS POST**

BETWEEN

PAUL EMMANUEL KILASA KISABO APPLICANT

AND

THE ATTORNEY GENERAL RESPONDENT

RULING



29th August, & 7th September, 2022

ISMAIL, J.

Paul Emmanuel Kilasa Kisabo, the Petitioner herein, has preferred an action, seeking several declaratory orders. The action, in the form of a petition, is challenging the powers vested in the President of the United Republic of Tanzania, under Article 118 (2) (c) of the Constitution of the United Republic of Tanzania, 1977, Cap. 2 R.E. 2019 (URT Constitution), to remove the Chief Justice from his position. The petitioner terms the removal as an interference with the principles of separation of powers that require each State Organ to operate and act independently, as enshrined in the URT Constitution and international human rights treaties to which Tanzania is a party.

The petitioner further alleges that, whilst the URT Constitution has an elaborate procedure on how the heads of the other organs of the State may be removed from office, there is no guidance on how the Chief Justice may be removed from office. This, he said, leaves everything in the whims of the President, an act that interferes with the independence of the Judiciary.

The respondent has filed a reply to the petition in which the contentions by the petitioner are rebutted. Besides that, the respondent has raised a preliminary point of objection to the effect that:



"This Honourable Court constituted by the single Justice has no jurisdiction to entertain and grant the reliefs sought in this Petition."

Hearing of the objection involved recording the parties' oral submissions made by their counsel. While the petitioner appeared in person and argued the case for himself, the respondent was represented by Ms. Stanley Kalokola and Ms. Narindwa Sekimanga, both learned State Attorneys.

In his submission, Mr. Kalokola stated that the instant petition has been preferred under Article 108 (2) of the URT Constitution, together with section 2 (3) of the Judicature and Application of Laws Act, Cap. 358 R.E. 2019 (JALA). He argued that, whereas the provisions of Article 108 (2) vest jurisdiction in the Court to entertain any matter where the Constitution or any other law is silent, the jurisdiction that this Court is bestowed with must take into consideration the tradition that obtains in Tanzania. Mr. Kalokola contended that the tradition of the Court is that, when it sits to determine a constitutional matter, the sitting must involve three judges.

Learned counsel was heard submitting that Article 108 envisioned that there would be a *lacunae*, and that the Court filled the said gap by developing a board of traditions. He argued that, prior to 1994, a single judge of the

Court would sit and determine a constitutional matter, and the case in point is that of the ***Director of Public Prosecutions v. Daudi Pete*** [1993] TLR 22, in which the Court of Appeal of Tanzania guided, that in the absence of any formal procedure, the Court would maintain its tradition. This, he said, was for matters falling under Articles 30 (4) and 108 (2). He argued that with the advent of the Basic Rights and Duties Enforcement Act, Cap. 3 R.E. 2019 (BRADEA) in 1995, sitting of the judges of the Court in matters of constitutional importance involves, under section 10 (1), three judges. Mr. Kalokola took the view that this tradition extends to petitions brought under Article 108 (2). He buttressed this contention by referring to decisions in ***Odero Charles Odero v. Director of Public Prosecutions & Another***, HC-Misc. Civil Cause No. 20 of 2021; and ***James Francis Mbatia v. Job Yustino Ndugai & 2 Others***, HC-Misc. Civil Cause No. 2 of 2022 (both unreported), in both of which the Court had sittings of three judges. He maintained that the shift came with the case of ***Tito Magoti & Another v. National Electoral Commission & 3 Others***, HC-Misc. Civil Cause No. 3 of 2022 (unreported).

While emphasizing that the decision in the first two cases is the correct one, he maintained that the High Court that sits when determining a matter under Article 30 (3) is the same as that which sits to determine a matter



under Article 108 (2). This is because the Constitution has no best structure rule that gives preference to one provision over the other. On this, he cited the decision of the Court of Appeal of Tanzania in ***The Attorney General v. Rev. Christopher Mtikila***, CAT-Civil Appeal No. 45 of 2009 (unreported).

Mr. Kalokola argued that the effect of the decision is to impose the principle of harmonious interpretation of two provisions of the same Constitution. He invited the Court to interpret the two Articles i.e. 30 (3) and 108 (2), harmoniously and conclude that the procedure in respect of both should be the same. He maintained that the Court should direct that the composition in this matter be same as in other matters.

Mr. Kisabo did not hide his divergence in the thinking of his counterpart. He took the view that the Court is, as currently constituted, clothed with jurisdiction to handle the matter. The reason is that section 2 (3) of the JALA provides for inherent powers of the Court which are not specifically provided for by any law. Mr. Kisabo contended that there is no procedure under the URT Constitution on how matters like this should be dealt with.


Still on JALA, the learned petitioner argued that section 5 talks about the powers of a single Judge of the Court, and that such powers are all those



that are conferred upon the Court. He argued that this is an express provision of the law with respect to the powers of a single Judge, and that it is the Court that is vested with jurisdiction to entertain the matter which is before this Court.

Reverting of Article 108 (2), Mr. Kisabo's take is that the same provides for powers of the Court, and that the ***Tito Magoti case*** provides a precedent on how the Court should be constituted. He submitted that the position is that a single Judge of the Court can entertain matters like the instant application.

Regarding the application of BRADEA, Mr. Kisabo's take is that the said legislation is specifically for matters under Part III, Chapter 1 of the URT Constitution, and not for matters covered under other articles of the Constitution. He was adamant that, since there is no procedure developed to guide these other proceedings, it cannot be urged that this matter should be heard by a panel of three judges, unless there is an express provision warranting such composition. Mr. Kisabo took the view that composition of a panel is not done out of a fashion, there must be a provision and, in this respect, he referred me to rule 5 of the High Registries Rules, 2005 (GN. No. 96 of 2005), which provides for types of cases that can be filed in the High Court and the composition in each of the cases. These are:




- (i) Cases filed under BRADEA. These are presided over by a panel of three Judges;
- (ii) An appeal from the Advocates Committee. These are also presided over by three Judges;
- (iii) Court Martial appeal cases, preferred under section 146 (1) (2) and (3) of the National Defence Act. These are also presided over by three judges;
- (iv) Judicial Review cases under Article 30 (4) of the URT Constitution and section 17 of Cap. 310. The quorum here is three Judges; and
- (v) Constitutional petitions whose composition is not spelt out by the law.

Mr. Kisabo argued that, since there is no prescription on the composition of the quorum, and there is a decision of the Court guiding on the procedure, the Court should follow that route.

Submitting on the cited cases, Mr. Kisabo submitted that the cases are distinguishable. This is in view of the fact that the same were filed under other provisions of the Constitution, alongside Article 108.

He prayed that the petition be entertained by a single Judge and that the objection be overruled.



Mr. Kalokola maintained in his rejoinder that the petition is not provided under section 5 of the JALA, and that the procedure and powers of the Court under Article 108 are different. He argued that this explains why the instant matter was not preferred by way of a plaint. He maintained that the composition of the constitutional Court should be maintained.

On the High Court Registries Rules, he submitted that, since the petition has been filed in the Main Registry, the Court should buy the practice for cases filed in the Main Registry.

On ***Mbatia's case***, Mr. Kalokola submitted that his counterpart conceded that the Court sat as a panel of three judges, and that Article 108 was also invoked. He noted that the petitioner did not touch the ***Odero case***. He maintained that uniformity of the Court should be maintained.

Glancing through the submissions by counsel, the question for determination revolves around the question of jurisdiction of a single Judge of the Court in dealing with constitutional matters for which the provisions of BRADEA do not apply.

Perhaps the starting point should be to state the general position, put by the law, to the effect that jurisdiction of a court must not be inferred. It must be expressly provided by law. It is not a consensual function of the parties to the suit (See: ***Shyam Thanki and Others v. New Palace Hotel***



[1972] HCD No. 97). While this is a known position of the law with respect to courts, the question in this matter revolves around jurisdiction of a Judge in a constitutional petition like this.

As stated earlier on, BRADEA has settled the question of composition and, on this, Section 10 (1) is quite clear. It deals with the composition of the Court when it sits to determine matters touching on the provisions of Part III of the URT Constitution. It provides as hereunder:

"(1) For the purposes of hearing and determining any petition made under this Act including references made to it under section 9, the High Court shall be composed of three Judges of the High Court; save that the determination whether an application is frivolous, vexatious or otherwise fit for hearing may be made by a single Judge of the High Court."

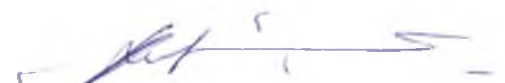
The present matter has been instituted under the provisions of Article 108 (2) of the URT Constitution, a provision that is outside the scope of Part III. This means that its placement or location in the Constitution rules out the application of the provisions of the BRADEA. This provision (Article 108 (2)) provides for the inherent and general powers of the Court to deal with matters in respect of which no specific law caters for. It stipulates as follows:

"Iwapo Katiba hii au Sheria nyingine yoyote haikutamka wazi kwamba shauri la aina iliyotajwa mahsusi litasikilizwa kwanza katika Mahakama ya ngazi iliyotajwa mahsusi kwa ajili hiyo, basi Mahakama Kuu itakuwa na mamlaka ya kusikiliza kila shauri la aina hiyo. Hali kadhalika, Mahakama Kuu itakuwa na uwezo wa kutekeleza shughuli yoyote ambayo kwa mujibu wa mila za kisheria zinazotumika Tanzania, shughuli ya aina hiyo kwa kawaida hutekelezwa na Mahakama Kuu."

This formal quotation is translated in English to mean as follows:

"Where the Constitution or any other law does not expressly provide that any specified matter shall first be heard by a court specified for that purpose, then the High Court shall have jurisdiction to hear every matter of such type. Similarly, the High Court shall have jurisdiction to deal with any matter which, according to legal traditions obtained in Tanzania, is ordinarily dealt with by a High Court."

It is to be discerned that the vast powers vested in the Court, flowing from the quoted provision, do extend to spelling out the composition whenever the Court sits to exercise such powers. I take the view, therefore, that since the Court's powers under the rest of the pieces of legislation expressly provide that it should sit as a panel, the law would have expressly



stated - if it was so intended - that the Court should be composed of three Judges whenever it sits to determine a matter preferred under Article 108 (2).

Silence of the Constitution or any other law to prescribe the quorum brings an impression, to me, that the implied wish or design of the Constitution is to have the matter handled by a single Judge of the Court. The silence does not, in my considered view, amount to conferring superiority on some provisions of the Constitution while others are made to play second fiddle. It is simply an implicit expression of intention of the legislature that matters falling in a framework different from that enshrined in other laws must be presided over by a single Judge.

As I entertain no qualms that the ***Mbatia*** and ***Odero cases*** (supra) were placed before a panel of three Judges of the Court, I subscribe to the reasoning by Mr. Kisabo and hold that, in the ***Mbatia's case***, Article 26 (2), which falls under Part III of the Constitution was included as one of the enabling provisions. Such inclusion justified the composition of a panel of three Judges, consistent with section 10 (1) of the BRADEA. The same can be said with respect to the ***Odero's case*** in which Article 59B was also involved. It is my conclusion that composition of the panel in the two cases

was in coping with the provisions of section 10 (1) of the BRADEA, a clear distinction from the case at hand.

It is worth of a note that, whilst I am not oblivious to the fact that this matter was not brought under section 5 of the JALA, is common knowledge that part of the powers that the Court enjoys are derived from the provisions of the JALA, specifically, sections 2 (3) and 5. For ease of reference, section 5 is quoted as hereunder:

"Subject to any written law to the contrary, a judge of the High Court may exercise all or any part of the jurisdiction of, and all or any powers and authorities conferred on, the High Court."

My reading of the provision conveys an impression that, save for the cases in respect of which the law expressly provides that they be presided by a panel of judges, exercise of the powers of the Court is to be done by a single Judge. Since matters preferred under Article 108 (2) are not excepted by any particular law, the plausible conclusion is, in my view, that such matters should be presided over, singly, by the Judges of the Court.

I am convinced that the objection by the respondent is based on practice and not the provisions of the law, and it is for this reason that I find



that the ***Magoti case*** settled the matter. In that respect, I find nothing untoward in the decision to have the matter handled by a single Judge.

In consequence of all this, I find the objection destitute of merits and I overrule it. I order that the matter proceeds to a hearing on merit.

No order as to costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 7th day of September, 2022.




M.K. ISMAIL

JUDGE

07/09/2022