

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)
AT DAR ES SALAAM
MISC. CIVIL APPLICATION NO. 128 OF 2022

BETWEEN

HON. MBWANA SALUM KIBANDA (TREASURER).....1ST PETITIONER

HON. RAMADHAN ALLY ABDALLAH (VICE TREASURER).....2ND PETITIONER

VERSUS

HON. ABDALLAH MOHAMED KHAMIS (VICE CHAIRMAN).....1ST RESPONDENT

HON. HAMAD MOHAMED IBRAHIM

(SECRETARY GENERAL).....2ND RESPONDENT

RULING

Date of last order: 4th August, 2022

Date of ruling: 9th September, 2022

E.E. KAKOLAKI, J.

The 1st and 2nd petitioners herein who claim to be senior officials and members of United People's Democratic Party's National Executive and Central Committees, lodged this petition praying for the judgment and decree against the respondents on the following:

- (i) That this Court be pleased to declare that the respondents have breached the United Peoples Democratic Party (UPDP) Constitution and they are supposed to vacate their position forthwith.

- (ii) That, this Court be pleased to order the respondents to conduct assembly of Central Committee, National Executive Committee and General Assembly of the UPDP.
- (iii) Costs to be borne by the respondents.
- (iv) Any other relief(s) that this honourable court may deem fit and just to grant.

When served with the petition, the respondents filed their reply to the petition energetically challenging the membership of petitioners. Subsequent to that, the petition was confronted by the respondents' preliminary points of objection to the effect that:

(1) The 1st and 2nd petitioners have no locus stand.

(2) That the affidavit in support of the petition is incurably defective for contravening Order XIX Rule 3(1) of the Civil Procedure Code, [Cap 33 R.E 2019].

As per the court's practice, where a preliminary objection is raised before the court, the court will have to determine it first before embarking into the subject matter of the case. It is from that practice parties were ordered to submit on the said objections. With leave of the court the preliminary

objections were argued by way of written submissions. Both petitioners and respondents were represented by Mr. Dominicus Nkwera and Mr. Shilinde Swedy, both learned advocates respectively.

Submitting in support of the preliminary objections, Mr. Shilinde argued on the first point of objection that, it is the rule of law that a person cannot maintain a suit or action unless he stands in a sufficient position to establish relationship or interest against the other party and be able to demonstrate infringement of his rights from the law or action challenged in that particular case. He went on submitting that, the petitioners in this case lack cogent interests against the respondents for not being active UPDP party members. In his view, they do not possess any right to the party operations and duties designated to the respondents as party members or leaders as per Article 5.0(1)(e) of the UPDP's Constitution for having lost it when expelled from party, and have never exhausted the remedies available to them within the party for appealing against such decision as provided under Article 5.4(f) of the party Constitution. In his further view, petitioners' locus stand in this matter would have been established by annexing their letters of appointment or identity card to the petition if any, proving their active membership in party, but there is no such proof. According to him this petition is premature

and incompetently filed hence liable to dismissal since petitioners for that matter are considered as busy bodies. To cement his argument on establishment of locus stand first as jurisdictional issue Mr. Shilinde referred this Court to the case of **Peter Mpalanzi Vs. Christina Mbaruku**, Civil Appeal No 153 of 2019 (CAT-Unreported) as cited by this Court in the case of **Dirshad Othman Hassan and Others Vs. Kariakoo Auction Mart Co. Ltd**, (Misc. Cause 596 of 2021) [2021] TZHC 9530 Tanzilii, where it was held that:

"...locus standi is a point of law rooted into jurisdiction. It is for that reason that it must be considered by a court at the earliest opportunity or once it is raised."

In his further efforts to fortify his stance that applicant or petitioner must show that he is entitled to bring the matter before the Court, he invited this Court to consider the cases of **Abdallah Saleh Vs. Dodoma Wine Company Limited** [1990] TLR 113, **R Vs. Paddington, Valuation Officer, Ex-parte Peachey Property Corpn Ltd** [1966] 1QB 380 at 400-1, **Lujuna Shubi Balonzi Vs. Registrar of Chama cha Mapinduzi** (1996) TLR 203, where in the later the case the Court stated that:

"In this country, locus standi is governed by the common law. According to that law, in order to maintain proceedings successfully, a plaintiff or an applicant must show not only that the court has power to determine the issue but also that he is entitled to bring the matter before the court."

On invitation to this Court not to entertain petition for their failure to exhaust the available remedy within the party Mr. Shilinde implored court to consider the decision in **Abdallah Salehe Vs. Dodoma Wine Company Limited** [1990] TLR 113, where the Court stated that:

"As a general rule the court will refuse to issue the prerogative order if there is another convenient and feasible remedy within the reach of the applicant."

Turning to the second limb of the preliminary objection Mr. Shilinde submitted that, the affidavits are fatally defective for the reasons that the verifications thereof contain facts which are not in the applicants' knowledge. He urged this court to expunge paragraphs 3, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 23 which will finally render the petition incompetent for want of evidence to support it. Mr. Shilinde referred this court to the case of **Lalago Cotton Ginnery and Oil Mills Company Limited Vs. Loans and Advance 10 Realisation Trust (LART)**, Civil

Application No. 80 of 2020(CAT-un reported) where the Court of Appeal at length discussed a valid affidavit and matters not allowed to go in the said affidavit such as opinions, arguments and further that, once the affidavit contains those contents should be declared defective. Mr.Shilinde went further to invite this Court to consider the provision of Order XIX Rule 3(1) of CPC and the case of **Uganda Vs. Commissioner of Prisons, ex parte Matovu** [1966] E.A.514 at page 520 which are good law on what should be contained in the affidavits.

In light of the above arguments and authorities Mr. Shilinde urged this Court to dismiss the petition as it aims not at construing justice but rather create conflicts in already served justice, since in his view the petition is frivolous for want of legal basis or legal merit.

In reply, Mr. Nkwera attacked the submissions by the respondent' counsel stating that, the same intends to deceive and mislead this Court since the petitioners are valid members of the UPDP political party as stated in the petition hence the issue of locus stand cannot arise at this stage as it needs evidence to prove it. It was his submission therefore that, the raised preliminary objection on locus standi is premature and do not qualify to be a point of law, hence cannot be determined at this stage. It was in

Mr.Nkwera further submission that, hearing of the suit is yet to commence, thus petitioners cannot adduce any evidence before the court to prove their membership in compliance with the provisions of under Order XIII Rule 1(1) of the Civil Procedure Code,[Cap 33 R.E 2019]. He cited the case of **Olais Loth (administrator of the estate of the late Loth Kalama) vs Moshono Village Council**, Civil Appeal No.95 of 2012(CAT-unreported) in support of his stance. On disqualification of this ground of objection to fit as a point of law, Mr. Nkwera referred this Court to the case of **Mukisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Ltd [1969] E.A 696** at page 701 and the case of **James Burchard Rugemalira Vs. The Republic & Another**, Criminal Application No.59 of 2017 (CAT-unreported), where the Court of Appeal clearly observed that, preliminary objection must be clear and elaborative otherwise it is not considered as a pure preliminary objection on point of law.

Mr. Nkwera went on submitting that, the respondents' assertion that petitioners were supposed to appeal to the UPDP council instead of bringing this petition is a concession that the petitioners are valid members of the UPDP.

Submitting on the second point of preliminary objection, Mr. Nkwera stated that the respondents intend to mislead the court as what was filed by the petitioners is the petition not accompanied by affidavit. According to him, the respondents must have understood that, the petition is a different and distinct document from an affidavit. In his view, the respondents' argument on defectiveness of the petition clearly shows that they intended to not only lie before this court but also mislead it. On the respondents' submission that verification clause in the petition renders it incurably defective, he countered the same is wanting in merit as the respondents did not do enough research to familiarise themselves with the law and practice as to the contents of verification clause in the petition since the same is not governed by Order XIX of the Civil Procedure Code.

In summing up his submission Mr. Nkwera invited this court to be guided with Article 107A (2) of the Constitution as well as the principle of overriding objective for furtherance of the interest of justice and be pleased overrule the respondents' objection and allow the petition to be heard on merits. He referred this court to the decision made in **Yakobo Magoiga Gichere Vs. Penina Yusuph**, Civil Appeal No.55 of 2017 and rested his submission. The respondents had no rejoinder to make.

I have serenely considered the competing arguments by the learned counsels from both sides. In my considered view the only issue this Court is called to determine is whether the raised preliminary objections are meritorious or not.

To start with the first point of preliminary objection, from the outset I do agree with Mr. Shilinde that, *locus standi*, being a common law principle and therefore a rule of equity dictates that, any person bringing his matter in the Court of law should be able to indicate that his rights or interest has been interfered with and he is entitled to bring such suit before the Court, hence the rule raises a jurisdictional issue which as a matter of law has to be determined at the earliest possible stage of the case. The Court of Appeal in the case of **Godbless Jonathan Lema Vs. Mussa Hamis Mkanga and 2 Others**, Civil Appeal No. 47 of 2012 (CAT-unreported) on the issue of locus stand cited with approval the Malawian Supreme Court decision in the case of **The Attorney General Vs. The Malawi Congress Party and another**, Civil Appeal No. 22 of 1996, where the Court observed thus:

"Locus standi is a jurisdictional issue. It is a rule of equity that a person cannot maintain a suit or action unless he has an interest in the subject of it, that it to say he stands in a

sufficient close relation to it as to give a right which requires prosecution or infringement of which he brings the action.”

Similar position was held by the Court of Appeal in the case of **Peter Mpalanzi Vs. Christina Mbaruka**, Civil Appeal No. 153 of 2019 (CAT-unreported), where the Court had this to say:

“...locus standi is a point of law rooted into jurisdiction. It is for that reason that it must be considered by a court at the earliest opportunity or once it is raised.”

Guided with the above position of the law, the follow up question now is whether in the petition at hand the issue of locus standi as raised by the respondents qualify to be a preliminary point of objection. To answer this pertinent question, I find this Court is enjoined to revisit the law on what amounts to preliminary objection on point of law.

The Court of Appeal when deciding the case of **Alphonse Buhatwa Vs. Julieth Rhoda Alphonse**, Civil reference No.9/01/of 2016 (unreported) referred to the case of **Ayubu Bendera and 10 others Vs. AICC**, Civil Application No. 9 of 2014 (unreported), which quoted the case of **Mukisa Biscuit Manufacturing Company** (supra) and the case of **Hezron Nyachiya Vs. Tanzania Union of Industrial and Commercial workers**

and others, Civil Application No.79 of 2001 (unreported), on the issue of what is to be considered as preliminary objection, had this to say:

"...to be considered as a preliminary point of objection, the point concerned must raise a pure point of law which is argued on the assumption that all the facts pleaded by other side are correct. It cannot be raised if any fact is to be ascertained or in what entails the exercise of judicial discretion."

The above position of the law was expounded by the Court in the case of **Tanzania Telecommunications Co. LTD Vs. Vedasto Ngashwa and Four Others**, Civil Application No.67 of 2009 (CAT-unreported) where the Court established three conditions to be satisfied before the ground is considered as the preliminary point of objection. These are **one**, the point of law raised must either be pleaded or arise as a clear implication from the proceedings. **Second**, it must be a pure point of law which does not require close examination or scrutiny of the affidavits and counter affidavits, and **third**, the determination of such point of law in issue must not depend on the exercise of the Court's discretion.

Applying the above tests to the facts in the present matter, it is not in dispute petitioners identified themselves in the petition as active members of the UPDP National Executive and Central Committees while respondents asserts

that they have no locus standi for not being active members of the UPDP and failure to attach their letters of appointment or identity cards. And further that after being expelled from the party they failed to exhaust first the remedies provided under the party Constitution on members expelled from party. Now the issues as to whether the petitioners are active members of UPDP party as deposed in paragraphs 3 and 4 of the petition and whether were expelled from the party hence required to exhaust appeal process remedy within the party before coming to this Court, I find are factual matters which need proof by evidence hence a mixture of fact and law in the matter which need to be ascertained by evidence. Applying the principle in **Mukisa Biscuits** (supra), **Tanzania Telecommunications Co. LTD** (supra) and **Alphonse Buhatwa** (supra), I find the raised point of objection by the respondents do not qualify to be a point of law for not meeting the tests established therein as it was also held in the case of **Ibrahim Abdallah (the administrator of the Estate of the late Hamisi Mwalimu vs Selemani Hamisi (the administrator of the late Hamisi Abdallah)**, Civil Appeal No. 314 of 2020 (CAT-unreported). In the latter case the Court of Appeal had the following to say in relation to the preliminary objection containing both point of law and fact:

"It is a settled law that where a preliminary objection raised contains more than a pure point of law, say law and facts it must fail because factual issues will require proof, be it by affidavit or oral evidence."

As alluded to above since the issue as to whether petitioners are members or not invites tendering of evidence which procedure cannot be taken at this stage, I find that the issue of locus stand raised by the respondents cannot be determined at this earlier stage. I therefore find the first point of preliminary objection is devoid of merit hence dismiss it.

I now turn to the second point where the respondents asserts that, the affidavit in support of the petition is incurably defective for contravening the provisions of Order XIX Rule 3 of the CPC. Having considered both parties arguments on this ground, I am of the view that, the point should not detain me much. Glancing at the contested petition it is not in dispute that, the same is not supported by affidavit as asserted by Mr. Shilinde. As the document (affidavit) which its verification is subjected to contest by the respondents is non-existing, I find the preliminary objection on face of it lacks legs to stand on. I therefore share Mr. Nkwera's proposition that by raising this ground the respondents intended to mislead this court hence the objection is devoid of merit and overruled

That said and done, this court is of the findings that, the preliminary points of objection raised by the respondents are devoid of merit. The same are therefore dismissed in its entirety with costs. I order that, the petition is to proceed with hearing on merit.

Ordered accordingly.

Dated at Dar es Salaam this 9th September, 2022.



E. E. KAKOLAKI

JUDGE

09/09/2022.

The ruling has been delivered at Dar es Salaam today 09th day of September, 2022 in the presence of both petitioners and respondents in person Mr. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

09/09/2022.