

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

**(TANGA DISTRICT REGISTRY)**

**AT TANGA**

**MISC. CIVIL APPLICATION NO. 14 OF 2021**

**DR. MUZZAMMIL MUSSA KALOKOLA.....APPLICANT**

***-VERSUS-***

**TRUSTEES OF THE CHAMA CHA MAPINDUZI.....RESPONDENT**

**RULING**

*Date of last order: 01/12/2021*

*Date of ruling:09/02/2022*

**AGATHO, J.:**

The Applicant filed an application before this Court challenging the decision of Justice Amour J., regarding an amended petition filed with the leave of the Court in a way of the Originating Summons as Civil Application No, 5 of 2016 arising from the original petition in Civil Cause No. 2 of 2012 challenging nominations of Chama Cha Mapinduzi (herein cited as CCM) sponsored male gender candidates for East African Legislative Assembly (EALA) elections in the year 2012. The application was made under Section 8 and Section 10(1) and (2) of the Basic Rights and Duties Enforcement Act Cap 3 and Order XLI Rule 1 of the Civil Procedure Code Cap 33. Rule 2 and 19 of the Basic Rights and Duties Enforcement (Practice and Procedure) Rules, 2014, and Section 3A (1)

and (2) and Section 3B (1)(a) and (c) and Section 95 of the Civil Procedure Code [Cap 33 R.E. 2019]; Article 29 and Article 30(3), Article 12, 13, 21, 22 and 26 of the URT Constitution 1977; Rule 5 of the Rules of Procedure for Nomination of Candidates for the Election of Members of East African Legislative Assembly (G.N. No. 104 published on 23/03/2012). The present application was brought by way of chamber summons which was supported by the affidavit of the Applicant. The application was served upon the Respondent whose legal counsel filed his counter affidavit.

The Respondent's counsel also filed notice of preliminary objection (P.O.) on point of law. The PO contained two points: (1) that the application is res judicata, and (2) that the application is time barred. Before delving into the PO it is crucial to sketch the background of this application albeit briefly. The Applicant filed a petition against the Respondent and two others in Civil Cause No. 2 of 2012 the application sought to challenge the Central Committee of the CCM in screening of members for nomination to elected by the National Assembly to become EALA member. The Applicant name was axed. He was thus aggrieved. The records show that the Applicant had initially preferred the application against the Trustees of CCM, Returning Officer for EALA (the

Clerk of National Assembly) and the Attorney General. On 11<sup>th</sup> November 2015 when the application (petition) was still pending in the Court, the Applicant prayed to amend the Petition. The late Hon. Lady Justice Upendo Msuya J granted the prayer. The Applicant thereafter filed Originating Summons against the first Respondent (CCM) and left out the two others. The amended petition (in the name and face of Originating Summons) was then placed before Hon. Justice Amour Khamis J., who after having heard the parties ruled on 9/8/2016 that the petition could not be amended by filing originating summons. He held it was not only impracticable but also wrong. He consequently struck it out. The Applicant decided to file another application Civil Application No. 41 of 2016. This application was heard by a panel of three High Court Judges. The application sought to challenge the decision of Justice Amour Khamis J dated 9/8/2016. Again the Hon. Judges ruled on 16/4/2021 that the application was not proper before the Court because Justice Amour Khamis, J's decision did not hold that the petition was frivolous or vexatious but rather the Applicant failed to comply with the Order of the Late Hon. Lady Justice Upendo Msuya, J. Hence the application was struck out. The panel of three Judges on 16/4/2021 upheld the decision of Justice of Amour J., and struck out the application once again.

Having set the matter in perspective, let us now turn to the present PO. Of particular importance is the PO filed. On 23/9/2021 the parties made their submissions on the PO. As stated herein above the Respondent counsel raised PO on two points of law: the application is res judicata, and it is time barred. Before proceeding further it is vital to reiterate what PO means as held in **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (1969) E.A.C.A 696** that:

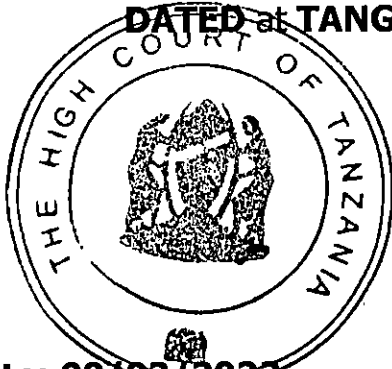
*So far as I am aware, a preliminary objection is in the nature of what used to be a demurrer. It raises pure point of law which when is argued on the assumption that all facts pleaded by other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is exercise of judicial discretion.*

In the present application as with regards to the PO, the Respondent counsel submitted that the application is res judicata. He argued that the present application has already been finally determined by this Court in the Civil Application No. 41 of 2016. He said similar application to the present was brought and it was struck out by a panel of three judges. He went on submitting that the three High Court judges in their ruling dated 16/4/2021 agreed with the findings of Amour Khamis J., in Civil

Cause No. 2 of 2012 whose ruling was delivered on 9/8/2016. The Applicant disputed the view shared by the respondent's counsel. He argued that the application is not res judicata because for the matter to be res judicata the case must have been decided on merits. Both applications (Civil Cause No 2 of 2012 and Civil Application No. 41 of 2016) were struck out. When a matter is struck out, it means it was not conclusively determined. It was not determined on merits. Section 9 of Civil Procedure Code [Cap 33 R.E. 2019] provides for conditions under which the doctrine of res judicata applies. That the parties are the same, the issues, subject matter, or cause of action is the same, and that the matter was determined on merit by a Court of competent authority/jurisdiction. In **Katok v Kuverji [1969] EA 295** it was held that res judicata arises even where the case was dismissed on point of law. I thus concur with the Applicant's submission that the application at hand is not res judicata because the previous applications did not or was not determine in merit. The doctrine of res judicata has also been examined in the case of **Athanasia T Masinde (T/A Abeti Primary School) v National Bank of Commerce, Commercial Case No. 34 of 2016, Hight Court of Tanzania Commercial Division at Dar es salaam**. It follows that the first point of PO that the application is res judicata is overruled for lacking substance.

Regarding the second limb of the PO, that the application is time barred, the Respondent's counsel submitted that the present application seeks to challenge the decision in Civil Cause No. 2 of 2012 whose decision was rendered on 9/8/2016. He argued further Part III of the Schedule Para 21 of the Law of Limitation Act [Cap 89 R.E. 2019] provides that any application whose time of limitation is not provided for, its time of limitation shall be 60 days. He added that the application at hand its time of limitation has not been provided for. It thus falls under Part III of the Schedule Para 21 of the Law of Limitation Act [Cap 89 R.E. 2019]. Therefore, the time of limitation is 60 days from the date of the ruling of Justice Amour Khamis J. That is 9/8/2016. The 60 days lapsed on 9<sup>th</sup> October 2016. He argued that on the date of submission it was more than five (5) years from the date the ruling in Civil Cause 2 of 2012 was given. The Applicant ought to have applied for extension of time. The Applicant countered the Respondent's counsel submissions by submitting that the application at hand is not time barred. He argued that the ruling in Civil Application No. 41 was handed down on 16/4/2021. The present application was filed on 25/5/2021. The issue to be determined is whether the application is indeed time barred. But before that we ask is which ruling is the present application seeking to challenge? Is it the ruling in Civil Cause No. 2 of 2012 or Civil Application

**DATED** at **TANGA** this 09<sup>th</sup> Day of February 2022.



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**U. J. AGATHO**

**JUDGE**

**9/02/2022**

**Date: 09/02/2022**

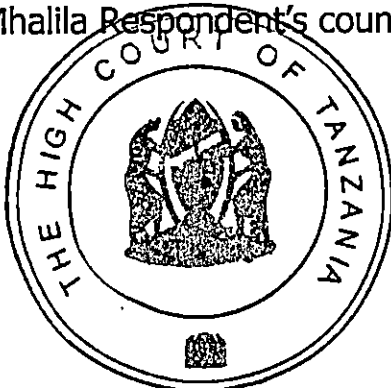
Coram: Hon. Agatho, J

Applicant: Present

Respondent: Advocate Elisia Paul holding brief of Advocate Fortunatus Mhalila for the Respondent

B/C: Zayumba

**Court:** Ruling delivered on this 9<sup>th</sup> day of February 2022 in the presence of the Applicant, and Advocate Elisia Paul holding brief of Fortunatus Mhalila Respondent's counsel.



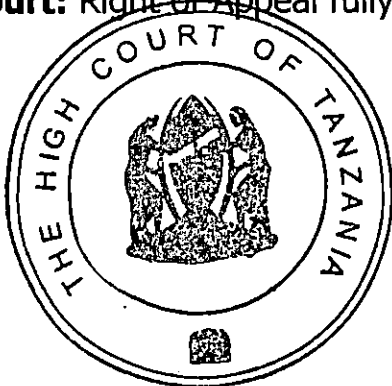
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**U. J. AGATHO**

**JUDGE**

**09/02/2022**

**Court:** Right of Appeal fully explained



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**U. J. AGATHO**

**JUDGE**

**09/02/2022**