**IN THE HIGH COURT OF TANZANIA**

**(MAIN REGISTRY)**

**AT DAR ES SALAAM**

**MISC. CIVIL CAUSE NO. 15 OF 2021**

**(CORAM: MASOUD, MAGOIGA, KAKOLAKI, JJJ.)**

**IN THE MATTER OF THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA 1977 AS AMENDED FROM TIME TO TIME**

**AND**

**IN THE MATTER OF THE BASIC RIGHTS AND DUTIES ENFORCEMENT ACT [CAP 3 R.E. 2019]**

**AND**

**IN THE MATTER OF BASIC RIGHTS AND DUTIES ENFORCEMENT (PRACTICE AND PROCEDURES) RULES, G.N. 304 OF 2014**

**AND**

**IN THE MATTER OF A PETITION TO CHALLENGE THE PROVISIONS OF SECTION 6A, 16(3) AND 16 (4) OF THE GOVERNMENT PROCEEINGS ACT, [CAP 5 R.E. 2019] AS AMENDED BY SECTION 26 OF THE WRITTEN LAWS (MISCELLANEOUS AMENDMENTS) ACT. NO. 1 OF 2020 FOR BEING UNCONSTITUTIONAL**

**BETWEEN**

**PILI KISENGA..... PETITIONER**

**AND**

**THE ATTORNEY GENERAL..... RESPONDENT**

**Date of Order: 17/8/2022**

**Date of Judgement: 27/10/2022**

**JUDGEMENT**

**MAGOIGA, J.**

The petitioner, PILI KISENGA has moved this court by way of an originating summons in terms of sections 4 and 5 of the Basic Rights and Duties Enforcement Act, [Cap 3 R.E. 2002] (to be referred herein as the **'the Act'**), article 30(3) of the Constitution of the United Republic of Tanzania as amended from time to time (to be referred herein as the **'the Constitution')** and Rule 4 of the Basic Duties and Enforcement (Practice and Procedure) Rules, 2014 (to be referred as the **'the Rules')** for craved prayers of:-

**(a) A declaration order that section 6A, 16(3) of the Government Proceedings Act, [Cap 5 R.E.2019] and section 16(4) as amended by section 26 of the Written Laws (Miscellaneous Amendment) Act, No. 1 of 2020 are unconstitutional for offending the provisions of section 13(4), (5) and (6) (a) of the Constitution of the United Republic of Tanzania 1977 as amended and declare the said sections void for failing to ensure petitioner's rights to equality before the law;**

**(b) The provisions of section 6A, 16(3) of the Government Proceedings Act [Cap 5 R.E.2019 and section 16(4) as**

**amended by section 26 of the Written Laws (Miscellaneous Amendment) Act No. 1 of 2020 be expunged from the statute immediately without giving the Government time through the Attorney General (respondent) to amend them as it will amount to continuous violation of human rights.**

The petition was supported by the affidavit of the petitioner stating the reasons why this petition should be granted as prayed.

Upon being served, the respondent filed reply to the petition and counter affidavit stating the reasons why this constitutional petition should not be granted.

The facts of this petition are simple and straightforward. The petitioner is a decree holder vide Civil Case No. 140 of 2012 against the Ministry of Works and the Attorney General, the Government. However, according to petitioner, the execution has been halted by the provisions of section 6A, 16(3) of the Government Proceedings Act and section 16(4) as amended by Act No.1 of 2020 which she alleges are unconstitutional by having a double standard, discriminatory, un-practicable, and unfair in an execution court decree against the Government, hence, offends the provisions of articles

13(4) (5) and (6) (a) of the constitution which ensure equality of all parties before the law and in any judicial proceedings. The petitioner continues to contend that the said provisions are discriminatory in nature. Thus, the application of the provisions are unconstitutional in so far as the provisions of article 13 (4), (5) and (6) (a) of the Constitution are concerned. The petitioner, it appeared to us got her standing under article 30(3) of the Constitution.

The respondents, on other part see the impugned provisions as being constitutional. According to the respondents, the provisions are meant to ensuring that public properties which are under the custodianship of the Government institutions are protected against any undesirable attachment and sale and ensure efficient discharge of the functions of the Government without affecting smooth running of the functions of Government for the interest of public and the entire nation.

It is against the above background, this court is asked to decide the contentious arguments, hence, this judgement.

The petitioner is advocated by Messrs. Melchzedeck Joachim and Stephen Ally Mwakibolwa, learned advocates from Legal and Human and Right

Centre and Alley and Associates Attorneys respectively. The respondents are represented by Messrs. Hangi Chang'a learned Principal State Attorney and Charles Mtae, learned State Attorney.

The petition was argued by filing written submissions. We are grateful and express our sincere appreciation to the learned counsel for their well researched and brilliant submissions which, admittedly, have been very useful in arriving in this decision. We have duly taken them into account. We regret, however, that to avoid having a long judgement, we will not be able to repeat each and every substance contained in the counsel's submissions.

In support of the petition and in their humble submissions, Mr. Joachim argued that the petitioner is a decree holder in Execution No.2 of 2021 against the Ministry of Works and Attorney General, which decree arises from Civil Case No. 140 of 2012. However, the learned advocate argued that, since 2020 the execution has been impossible because as the law stands, the decree holder is required to request for a certificate from the Registrar of the High Court certifying that, the Government is actually indebted to pay the amount in the decree, which has, then, to be submitted

to the Government to await the satisfaction at the pleasure of the judgement debtor.

According to the petitioner, this procedure is different from the ordinary procedure available under the Civil Procedure Code by making the judgement debtor more favoured as compared to other judgement debtors in execution. Accordingly, the procedure is against the principle of fair hearing, as it denies her right to be heard when the Treasury Registrar decides to pay.

The learned advocates for the petitioner cited the impugned provisions and strongly argued that, reading between them, it is clear that they are discriminatory and contrary to article 13(4) (5) and (6) of the constitution as the execution against the Government creates discriminatory treatments of litigants. Thus, the process, it was argued provides two different, diverse, and distinctive avenue of execution proceedings at the finalization of the civil trial.

It was a further argument of the learned advocates for petitioner that, reply by the respondent was an admission on different modes of execution but

were quick to point out that, that difference amount to discrimination and is not for public interest.

Citing the cases from India, Canada, England and home decision in the case of JULIUS NDYANABO vs. ATTORNEY GENERAL [2004] TLR 14 on reasonableness, the learned advocates concluded that, the impugned provisions are unreasonable, arbitrary, and unfair. The reasons for such conclusion were that, it is against the principle of fair hearing for the Paymaster General is part of the Government and that the whole process entails denial of right to be heard on the part of decree holder, and to make it worse, there was no remedy in place if the Paymaster General refuses to pay.

Additional arguments were advanced to the effect that the right to be heard is fundamental that cannot be taken away by any law. Not only that, but also argued that, right to effective remedy is curtailed under those provisions.

On public interest, the learned advocates for the petitioner argued that there was no public interest applicable in the situation pertaining to this matter.

In the totality of the above reasons, the learned advocates for the petitioner urged this court to grant the petition as prayed.

On the other hand, in response, learned State Attorneys for the respondent argued that, this petition should be dismissed for want of prove beyond reasonable doubt of all allegations raised. The learned State Attorneys pointed out that, section 16(4) of the Act [Cap 5 of R.E. 2019] defines what a government and posed a question on how does that definition infringe the right of the petitioner? It was also their strong arguments that, the interventions by the Attorney General under section 6A do not absolve an individual right to be heard as it is practice of the court to hear both parties before a decree is issued.

According to the learned State Attorneys, the impugned sections are neither discriminatory nor infringes right to be heard. The provisions are, in their view, in accordance with the provisions of articles 13(4), (5) and (6)(a) of the 1977 Constitution. Scanning through the impugned section, it was contended that the payment procedure is as per the section 21(4)(f) of the Budget Act, [Cap 439 R.E. 2019]. Such procedure is that the Government pays in accordance with the allocated and approved budget of the financial year and the court grants interests on late payment, hence, concluded that

there is no issue as to the alleged absence of no effective remedy as argued.

As to argument that Paymaster General is part of the Government, it was argued that the said Paymaster General receives order for payment as per the certificate issued by the court and do not re-opens the case as argued because there is no hearing after issuance of the certificate.

The learned State Attorneys equally distinguished the cases relied on by the petitioner's counsel. In their argument, the cited cases do not befit the instance we have in the instance case.

On the discrimination, it was the response of the learned State Attorneys that, same is misconceived and do not apply in the circumstances of this petition. It was in this respect, argued that, the Government monetary affairs depends on, among others things, the allocated and approved budgets from revenue collected and have to be paid in accordance with that procedure.

It was the view of the learned State Attorneys that, much as the petitioner utterly failed to tender any certificate issued by the court, any evidence that the same was delivered to the Paymaster General without being

subsequently honoured meant that, the allegations that the said procedure is discriminatory and that no effective remedy under the Government Proceedings Act legal regime is but bare assertions not supported by evidence.

In the absence of such material evidence, the learned State Attorney pointed out that, in a petition of this nature, this court cannot say that the petitioner has been personally affected or is she likely to be affected by the said procedure. To bolt up this point, they cited the case of TANZANIA EPILEPPSY ORGANIZATION vs. ATTORNEY GENERAL, MISC. CIVIL CAUSE NO. 5 OF 2022 HC (DSM) (UNREPORTED) in which it was held that petition of this nature should state the extent to which the contravention of the articles has affected such a person personally.

It was the strong submission by learned State Attorneys that, none of the cited cases relates to execution against the Government which means and that the principles applied are not applicable in the circumstances. We are, in this respect, urged to conclude that, the petitioner utterly failed to prove the allegations leveled against the impugned provisions.

We find it appropriate at this stage, we find it appropriate to consider the two issues in this petition; **firstly,** whether the provisions of sections 6A, 16 (3), (4)of the Government Proceedings Act, [Cap 5 R.E.2019) as amended by section 26 of the Written Laws (Miscellaneous Amendment) Act, No.1 of 2020 are unconstitutional for offending the provision of article 13(4) (5) and (6(a) of the Constitution; and **secondly,** if the first issue is answered in the affirmative, should the said provisions be expunged from the statute immediately without giving the Government time through the Attorney General to amend them.

We are mindful of the fact that, execution is very important and an integral aspect of justice delivery. It is the last judicial process in which a decree holder gets the money or other relief awarded to him or her under the judgement. In the case of SHELL AND PB TANZANIA LIMITED vs. UDSM, CIVIL APPLICATION NO.188 OF 2016 (unreported) Court of Appeal of Tanzania held that:

***"Execution is the final act, that is, the satisfaction of the judgement ... the nature of the subject matter would dictate the mode of execution."***

Therefore, it is legal duty of a decree holder to know the nature of the subject matter in execution and the mode in which execution is to be carried in accordance to the established procedures. It is up to the decree holder to choose proper mode of execution, otherwise this last part may seem useless and un-effective.

In another case of KARATA ERNEST AND OTHERS vs. ATTORNEY GENERAL CIVIL, REVISION NO.10 OF 2010 (UNREPORTED) Court of Appeal had this to say relating to the execution against the Government:

***"Ordinarily, the execution of decree passed by the High Court is governed by section 31 to 55 and Order XXI of the CPC. However, in suit involving the Government, the application of Order XXI has been expressly disallowed in execution of the decree against it by rule 2Aof the said Order. Instead the execution process is governed by section 16 of the Government Proceedings Act, [Cap 5 R.E.2019]."***

With the above guidance, on our part, we have closely and seriously followed the learned counsel's rivaling debate on the first issue. With respects, we are preparing to find the first issue in the negative for want of

evidence as we hereby explain. **One,** as rightly submitted for the respondent, the issue of execution against the Government in Tanzania is an exception to the general rule of execution. The exception was well captured in the Civil Procedure Code under Order XXI Rule 2A since 1968 by G.N. 376. The said Rule provides as follows:

***2A. Satisfaction of orders against the Government G.N. No. 376 of 1968***

> ***'Where a decree contains any order in favour of any person against the Government or against an officer of the Government as such, the provisions of section 15 of the Government Proceedings Act, shall apply in relation to satisfaction of the order, in lieu of the provisions of rules 3 to 110 of this Order.'***

Going by the literal meaning of the wording of the above rule, which is not ambiguous, it is not in doubt that it is for public interest as stated in the counter affidavit of the respondent, that the execution against the Government is treated as an exception process to the general rule of execution. The exception underlines the nature of the Government as the

custodian of Government properties which operates on allocated and approved budgets in accordance with the Budget Act, [Cap 439 R.E.2019] on yearly basis.

**Two,** much as the petitioner pegged her claims on article 30(3) which allows individual standing to petition for their person interest as opposed to article 26(2) which is for public interest litigation as correctly argued by the respondent, one would have expected the petitioner to tender or provide evidence that the laid down legal procedure are indeed ineffective to realize fruits of justice and that was personally affected. The mere allegations that the procedure are unconstitutional without providing any evidence how the same have been or are likely to infringe her or his rights, in our humble view, is not sufficient. On our part, we hold view that, there was no evidence tendered in this court to show that, indeed, the petitioner's failure to get the certificate was due to unconstitutionality of the impugned provisions. The affidavit of the petitioner left this court with nothing to consider on allegations that the impugned provisions are unconstitutional.

**Three,** the provisions of article 30(3) are to be read together with the provision of article 30(2) (a), (b) (c) and (f) of the Constitution. These

provisions give factors that must be considered when a personal guarantee is at issue versus public interest.

**Four,** the arguments by the petitioner that, public interest is not relevant in the present circumstances does not hold. Indeed, if the petitioner view is upheld, there is no doubt a decree holder against the Government may one day execute his decree in a manner that will paralyze the entire Government machinery.

**Five,** the procedure does not deny a decree holder's right to be heard, neither does it discriminate her. Rather the procedure enhanced the protection of public interest in the execution of a decree against the Government.

**Six,** the provisions of section 6A of the Government Proceeding Act deals with the Attorney General's powers of intervention in a suit against the Government without affecting its standing or merits in the absence of 90 days statutory notice as provided in the proviso to sub section 2 of section 6A. As there is no evidence from the petitioner albeit on the balance of probability or on the lower scale between beyond reasonable doubt and

balance of probability, this court cannot make a finding as to how such intervention affects or is likely to infringe the rights of the petitioner.

**Seven,** the provision of section 16(3) deals with protection of individual officers of the Government from any harassment in the process of execution of a decree. We say so because such harassment may equally disturb the operations of the Government.

**Eight,** Our understanding of section 16(4) of Cap 5 as amended by section 26 of the Written Laws (Miscellaneous Amendments) Act No.1 of 2020 is that, it does not infringe the rights of the petitioner. We say so because the 2020 amendment defined the word **"Government"** and its institutions. However, the petitioner failed to show how such definition infringes her rights.

**Ninth,** Upon receipt of the certificate, the Paymaster General or accounting officer concerned in the Government office under the Act, has no room for discussion or otherwise but to honour the certificate in accordance budget allocated and approved. It means that denial of right to be heard as alleged does not arise in the circumstances. It is worthwhile to note that the petitioner did not lead evidence that she obtained and lodged a certificate

but she was denied payment. So, the question of denial of right to be heard does not arise here.

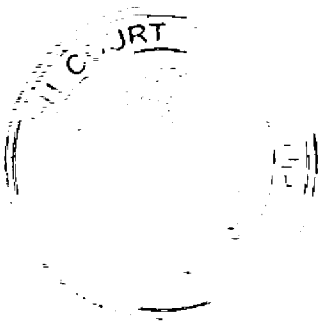
It is in the totality of the above reasons, that, we are increasingly of the settled finding that, the instant petition is devoid of any useful merits and the arguments and cited cases by the counsel for petitioner are respectively misplaced and distinguishable. That said and done, the first issue must be and is hereby answered in the negative.

The second issue was relevant if first issue was answered in the affirmative. Given our findings on the first issue, it is not relevant to address the second issue. Accordingly, the second issue dies a natural death.

In the final analysis, we are constrained to dismiss this petition with costs as we do herein. We so hold because the matter was not instigated for public interest but rather for personal interests.

It is so ordered.

Dated at Dar es Salaam this 27th day of October, 2022.



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**B. S. MASOUD**

**JUDGE**

**27/10/2022**

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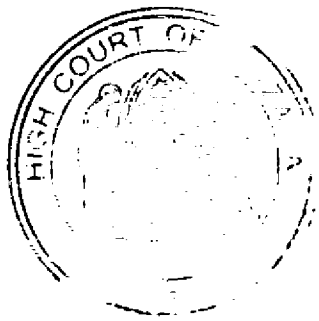
**S.M. MAGOIGA**

**JUDGE**

**27/10/2022**



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**E. KAKOLAKI**

**JUDGE**

**27/10/2022**