

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM MAIN REGISTRY)
AT DAR ES SALAAM
MISC. CIVIL CAUSE NO. 12 OF 2022
IN THE MATTER OF THE CONSTITUTION OF THE UNITED REPUBLIC OF
TANZANIA 1997 AS AMENDED
AND
IN THE MATTER OF BASIC RIGHTS AND DUTIES ENFORCEMENT
ACT [CAP 3 R.E. 2019]
AND
IN THE MATTER OF BASIC RIGHTS AND DUTIES ENFORCEMENT
(PRACTICE AND PROCEDURE) RULE G.N NO. 304 OF 2014
AND
IN THE MATTER OF A PETITION TO CHALLENGE THE PROVISIONS
OF ARTICLE 112 AND ARTICLE 113 OF THE CONSTITUTION OF
THE UNITED REPUBLIC OF TANZANIA AS AMENDED FROM TIME
TO TIME AS BEING IN CONFLICT WITH THE PRINCIPLE OF THE
CONSTITUTION**

MPALE KABA MPOKI.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

Date of last Order:

Date of the Ruling: 01.12.2022

A.Z.MGEYEKWA, J

By an originating summons made under Articles 26 (2) of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time, the petitioners pray for the following declaratory orders:-

- a) *The provisions of Article 112 (2) of the Constitution of the United Republic of Tanzania 1977 as amended (The Constitution of United Republic of Tanzania), which provides for the manner in which members of the Judicial Services Commission are appointed by the President of the United Republic, conflicts with the basic Constitutional structure of Separation of Powers and independence of the Judiciary as provided for under Articles 4 and 107 B of the Constitution of United Republic of Tanzania of 1977 as amended from time to time.*
- b) *The provisions of Article 113(2) & (3) of the Constitution of United Republic of Tanzania which gives the President of the United Republic Powers of appointment, confirmation, disciplinary and removal of judicial officers (Judges and Registrars) conflicts with the basic constitutional structure of Separation of Powers and Independence of the Judiciary as provided for under Articles 4 and 107 B of the Constitution of the United Republic of Tanzania of 1977 as amended.*
- c) *Under the provisions of Article 113(1) of the Constitution of United Republic of Tanzania the Judicial Service Commission acts as an advisory body to the President on matters of appointment, discipline, salaries and remuneration of Judges and Registrar, the provision which conflicts with the basic constitutional structure of Separation of Powers*

and Independence of the Judiciary as provided for under Article 4 and 107 B of the Constitution of the United Republic of Tanzania of 1977 as amended, for reasons that the President is the Head of the Executive.

- d) That the Attorney General, in the spirit of the principle of Separation of Powers as contained in the Constitution, be ordered by the Court to table a bill for the amendment of the Impugned Articles, so that members of the Judicial Services Commission are appointed by an Independent and impartial body to be formed.*
- e) That the Hon. Attorney General, in the spirit of the Principle of Separation of Powers and Independence of the Judiciary, be ordered to table a bill for the amendment of the Impugned Articles, an independent and impartial body to be formed to handle disciplinary matters and removal of judicial officers (Judges and Registrar).*
- f) That, the amendments so sought, should mention that the appointing officer of the judicial officers (Judges and Registrars) to carry their functions of appointing in accordance with the recommendations of the Judicial Services Commission.*
- g) Any other reliefs this Honourable Court may deem fit to grant.*
- h) Each party to bear its own costs.*

The essence of the petition is that the petitioner seeks to challenge the constitutionality of Article 112 (2) of the Constitution of the United Republic of Tanzania as amended which provides for the manner in which the members of the Judicial Services Commission are appointed by the President of the United Republic of Tanzania, conflicts with the basic Constitutional stricture of Separation of Power and independence of the Judiciary as provided for under Article 4 and 107B of Constitution of the United Republic of Tanzania.

The petitioner is Mpale Kaba Mpoki and the respondent is the Attorney General. The respondent filed a Counter Affidavit and raised two points of preliminary objection, which are:-

- 1. This Honourable Court has no jurisdiction to entertain and grant the reliefs sought in this Petition.*
- 2. The petitioner has no locus standi to institute this petition.*

At the hearing, which was by way of written submissions, the Petitioner enlisted the legal service of Mr. Melchzedek Joachim, counsel and the respondent had the legal service of Ms. Jacqueline Kinyasi, State Attorney.

The learned State Attorney began with a short introduction which I am not going to reproduce in this application. Submitting on the first limb of the

objection, the learned State Attorney submitted that the Petitioners is challenging the provisions of Articles 112 and 113 of the Constitution for being in conflict with the basic structure of the Constitution of separation of power and independence of the judiciary as provided for under Article 4 and 107B of the Constitution of the United Republic of Tanzania. Ms. Jacqueline referred this Court to paragraphs 1 up to 3 of the originating summons.

The State Attorney argued that the Court of Appeal of Tanzania in **Attorney General v Reverend Christopher Mtikila**, Civil Appeal No. 45 of 2009 was faced with the same situation whereby the petitioner was challenging the constitutionality of Article 67 and Section 39 of the Local Authorities (Elections) (Amendments) Act, 1992, (Act No.7 of 1992) which brought out a requirement for membership of and sponsorship by a political party abridged the right to participate in national public affairs under Article 21 (1). Ms. Jacqueline continued to submit that the Petitioner is moving this Court to declare that Articles 112 and 113 of the Constitution are in conflict with other two Articles of the Constitution; Articles 4 and 107B of the Constitution. It was her submission that this Court has no jurisdiction but rather the Parliament as it was decided in Mtikila's case.

She went on to submit that the Petitioner further prayed this Court to order the Attorney General to table a bill for the amendment of the impugned

Article. She insisted that the amendment of a Constitution is different from other legislation since ordinary legislation can be enacted by a simple majority of parliamentarians while is not so with a constitutional amendment which requires a specific number of votes while ordinary law is not subjected to that stringent requirement. To fortify her submission she referred this court to page 23 of **Mtikila's** case and she cited the case of **Jesse Kamau & 25 Others w* A.G.** [2010] eKLR. The State Attorney urged this Court to strike out this Petition since this Court is not clothed with jurisdiction to declare the two Articles of the Constitution are in conflict.

Submitting on the second limb of the objection, the State Attorney contended that the Petitioner has no *locus standi* to institute the petition. To buttress her submission, Ms. Jacqueline referred this Court to the case of **Tanzania Epilepsy Organization v Attorney General**, Misc. Civil Cause No. 5 of 2022, this Court at page 14 cited with authority the case of **Chama Cha Wafanyakazi Mahotel na Mkahawa Zanzibar v Kaimu Mrajis wa Vyaman vya Wafanyakazi wa Waajiri Zanzibar**, Civil Appeal No. 300 of 2019, the Court defined the meaning of *locus standi*. Ms. Jacqueline contended that the Petitioner is challenging the Constitutionality of Article 112 of the Constitution which establishes the Judiciary Service Commission's roles and responsibilities which is to advise the President on the appointment,

remuneration, and disciplinary matters of Judges. Registrars of the High Court and Court of Appeal of Tanzania.

The learned State Attorney continued to submit that the petitioner should have shown in their pleadings that he is the direct victim of a potential victim of the impugned Articles. In her view, the petitioner does not belong to this group of persons in the Judicial Service Commission. She went on to assert that the Petitioner under paragraph 4 of his affidavit of admissibility that he is a judicial member by the mere fact that he is an advocate of the High Court since the role of the advocate is kept by the Registrar of the High Court hence that makes him a member of judicial hold no water. She valiantly submitted that Advocates are non-judicial officers of the Court and that cannot cover them in the context of this particular position. To bolster her submission he cited the Basic Rights and Duties Enforcement Act, Cap. 3 [R.E 2019], Article 30 (3) of the Constitution and section 4 (1) 5 and 6 of the Basic Rights and Duties Enforcement Act, Cap.3 [R.E 2019] which gives standing to a person whose rights have been violated by the alleged contravention. She insisted that the petitioner being an Advocate cannot be affected by the Articles which provide for appointments of members of the judicial service commission.

On the strength of the above submission, the learned State Attorney for the respondent urged this Court to strike out the instant petition since he is not

affected by the impugned Articles for not being a member of the judicial service commission.

In rebuttal, the counsels for the petitioner's counsel submitted, the raised preliminary point of objection is misconceived as it does not qualify to be a pure point of law under the principle enunciated in the celebrated case of **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd** (1969) EA 606, for containing facts requiring additional evidence or supplementary evidence to be proved. Mr. Joachim argued that, it has been stated time and again that if an argument involves a factual matter that cannot be a point of law as defined in the case of Mukisa Biscuits. To fortify his submission he cited the case of **Mount Meru Flowers Tanzania Limited v Box Board Tanzania Limited**, Civil Appeal No. 260 of 2018. Mr. Joachim went on to submit that the first point of the preliminary objection raised by the respondent does not meet the definition and requirements stated in the cited cases. He stressed that the first preliminary objection needs ascertainment of the facts to decide this point. Supporting his submission he cited the case of **Mechmar Corporation (Malaysia) Berhad Versus Vip Engineering & Marketing Ltd**, Civil Application No. 9 of 2011 (unreported).

Submitting on the first limb of the objection, the learned counsel for the applicant contended that, the first objection by Respondent is to the effect that this

Honourable Court has no jurisdiction to entertain and grant the reliefs sought in the petition. He argued that the first objection does not fall in the ambit of preliminary objection as defined by several decisions of this Court and the Court of Appeal of Tanzania. It was his view that the objection goes to the root of the Petition. He went on to state that the arguments as to whether or not Articles 112 and 113 of the United Republic of Tanzania Constitution are harmonious or otherwise with Articles 4 and 107B of the United Republic of Tanzania Constitution shall be discussed in the course of hearing the Petition. Regarding the ground of jurisdiction, Mr. Joachim contended that there are issues of law that should be discussed in the course of hearing the Petition. To fortify his submission he cited the case of **The Honourable Attorney General; of the United Republic of Tanzania v African Network for Animal Welfare (ANAW)**, Civil Appeal No. 3 of 2011.

The learned counsel for the Petitioner submitted that the proposition of Articles 112 and 113 of the United Republic of Tanzania Constitution are not harmonious with Articles 4 and 107B of the same United Republic of Tanzania Constitution are matters which have been pleaded by the Petitioner in his petition and equality disputed by the respondent in his pleadings. It was his view that those contentions by the Petitioner and respondent according to Order XIV

Rules 1 to 4 of the Civil Procedure Code Cap,33 [R.E 2019] form issues of law that are to be determined in the course of the hearing.

Submitting on the second limb of objection, the learned counsel for the Petitioner contended that the proposition that Articles 112 and 113 of the United Republic of Tanzania Constitution only affect the Magistrates, Registrars and Judges is a narrow way of looking at the effect of those Articles he submitted that the two Articles regulate how those judicial officers are appointed how they are remunerated, how their disciplinary matters are handled and how their general welfare is governed. The learned counsel contended that the Judicial Service Commissions is responsible for the appointment of members of the Judiciary whose main duty is to administer justice in the country, thus, being a citizen of the country the Petitioner is a consumer of services rendered by the said judicial officer is directly affected by the manner in how they are appointed and remunerated. He added that the Petitioner is dully affected by the manner in which the Judicial Service Commissions is appointed and dispense justice. He did not end there, he stated that he is dully affected as a practitioner during operations and proceedings of the court. The Petitioner's counsel has laid reliance on the case of **Tanzania Epilepsy Association v The Attorney General**, Misc. Civil Case No. 5 of 2022.

The learned counsel went on to state that the certification of admissibility is for the consumption of the registrar while submitting the case per Written Laws (Miscellaneous Amendments) (No.3) Act, 2020, he valiantly submitted that it would be erroneous for this court to try to challenge the judicious discretion of the registrar in admitting the Petition as the law does not confer such power to the court. It was his submission that since the effect of Articles 112 and 113 of the United Republic of Tanzania Constitution will have an effect on the Petitioner's practice as an officer of the Court, then the Petitioner is in the light of section 4 of the Written Laws (Miscellaneous Amendments) (No.3) Act, 2020, hence has locus to bring this petition before this Court.

On the strength of the above submission, the learned counsel for the Petitioner urged this Court to find that both objections are demerits and should be dismissed entirely and allow the Petition to proceed on merit.

Rejoinder, the learned State Attorney reiterated her submission in chief. She referred this Court to the principle of stare decisis whereby the lower Court is bound by the decision of the higher Court regardless of its error. She went on to state that the jurisdiction of the Court to adjudicate on the matter is the first and most important thing to be established before the Court can proceed with adjudicating on the case. To buttress her contention she cited the case of **Mukisa Biscuits** (supra). She stressed that this Court can determine whether

she is clothed with jurisdiction to determine whether the Article of the Constitution conflicts with another Article.

Rejoining on the second limb, it was her submission that the petitioner has failed to show how the said Articles person affects him since he is not a member of the Judicial Service Commission. She added that the Petitioner should not speculate things that have not happened since it is not guaranteed that the Petitioner will be elected as a Judge. Ending, the learned State Attorney urged this Court to strike out the Petition.

Having gone through the arguments of both parties, the question that presents itself for the Court's determination is whether the preliminary objections are meritorious. In the matter at hand, the Petition is complaining that the first objection is not a pure point of law.

Before I get to the substance of the preliminary objection it is apposite that I should address the issue raised by the Petitioner's counsel in his reply to the written submission of the respondent. In the instant application, the point of preliminary objection concerns jurisdiction of this Court to entertain the matter at hand.

Mr. Joachim claims that the raised first objection is not a point of law. The nature and scope of a "preliminary issue" is cogently defined in the statement

of Law J.A., in the case of ***Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] EA 696***. The Eastern African Court had this to say:-

“A preliminary objection consists of point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit”.

Furthermore, the Court in the same case of ***Mukisa*** (supra) at 700 held that:-

“a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, a plea of limitation, or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.” [Emphasis added].

Considering the *ratio decidendi* in the above-cited authority, I conclude, without much hesitation, that the first objection falls squarely within the scope of a preliminary objection. The same arises by clear indication from the pleadings. It is in view thereof that, I find Mr. Joachim's contention implausible and unmeritorious, I do not go along with it. I choose to find that the first objection is a pure point of law.

For the sake of clarity, I have read the case of **Honourable Attorney General v African Network** (supra) cited by the Petitioner's counsel in the cited cases the CAT noted that the points of objection grounds 3, 4, 5, 6, and were not points of law and the same were not related to jurisdiction. In the case of **Sugar Board of Tanzania** (supra), the same is also distinguishable from the case at hand, the raised objections were not apparent on the face of the notice of motion, while in the matter at hand the first objection is apparent on the face of the record. The Petitioner in his Petition is challenging the provisions of Article 112 and 113 of the Constitution of the United Republic of Tanzania. Therefore the same can be dealt with at this stage.

Reverting to the raised objections, the controversy on which the objection is anchored is whether *this Court has jurisdiction to entertain and grant the reliefs sought in this Petition*. The Petitioner in his Petition is challenging the provisions of Articles 112 and 113 of the Constitution of the United Republic of Tanzania for conflicting with the basic structure of the Constitution of separation of power and independence of the judiciary as provided for under Articles 4 and 107B of the Constitution of the United Republic of Tanzania.

The Petition's counsels have locked horns with the Respondent's counsel on whether this Court has jurisdiction to grant the reliefs sought by the

Petitioner. Each part opposes the version of the other. I had to peruse the Petition and found that in the matter at hand the Petition is moving this Court to determine whether Articles 112 and 113 of the Constitution are in conflict with other Articles of the Constitution. The question to ask is whether this Court has jurisdiction to determine the petition at hand. I am guided by the decision of the Court of Appeal of Tanzania in the case of **Attorney General v Reverend Christopher Mtikila**, Civil Appeal No. 45 of 2009 (supra). The Court of Appeal of Tanzania in the cited case of **Mtikila** faced a similar matter and it held that:-

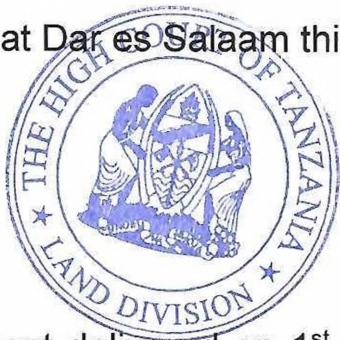
“ So if there are two or more articles or portions of articles which cannot be harmonized, then it is Parliament which will deal with the matter and not the Court unless that power is expressly given by the Constitution, which, we have categorically said it has not.”

I am in accord with the above holding and the submission made by the State Attorney that this Court cannot exercise its jurisdiction to determine the Petition due to the fact that the Petition is challenging the provisions of Articles 112 and 113 of the Constitution of the United Republic of Tanzania which cannot be dealt with by this Court.

I find the Respondent's contention in the first limb of objection meritorious. I will therefore detain myself in evaluating and analyzing the second point of the preliminary objection raised by the respondent.

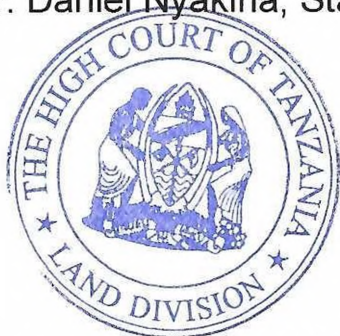
In the upshot, I proceed to strike out the Petition. As the case falls within the category of public interest litigation, I would refrain from making any order as to costs.


Dated at Dar es Salaam this date 1st December, 2022.




A.Z. MGEYEKWA
JUDGE
01.12.2022

Judgment delivered on 1st December, 2022 in the presence of Deogratius Mahinjia, counsel holding brief for Mr. Jeremiah, counsel for the Petitioner, and Mr. Daniel Nyakiha, State Attorney for the respondent.




A.Z. MGEYEKWA
JUDGE
01.12.2022

Right to appeal fully explained.