IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CIVIL CAUSE NO. 6 OF 2022

ALPHONCE LUSAKO ..... PETITIONER

VERSUS

ATTORNEY GENERAL ..... RESPONDENT

RULING

20/7/2022 &19/8/2022

MZUNA, J.:

This ruling is in relation to the raised preliminary objection by Hon **Attorney General,** the respondent herein. Two issues are subject for determination: -

> *1. Whether the affidavit is incurably defective for lack of the name and address of the drawer?*
>
> *2. Whether this court is seized with jurisdiction to determine this matter on harmonisation of provisions of the Constitution?*

Hearing of the said preliminary objection was done through written submissions. The **Petitioner/Applicant** was ably represented by Mr. John Seka, the learned counsel whereas Ms. Kashamba, the learned State Attorney appeared for the respondent.

The basis of the application is that Alphonce Lusako, the applicant herein, lodged this Miscellaneous Civil cause under Article 108(2) of the

Constitution of the United Republic of Tanzania and section 2(3) of the Judicature and Application of the Laws Act, Cap 358 RE 2019 (JALA). He is challenging the propriety of Article 67 (1) (a) of the Constitution of the United Republic of Tanzania which restricts on 21 years' age of seeking elected office as a member of Parliament as being discriminatory and unjustifiable in a democratic socialist country. It is therefore argued that, that provision is neither reconcilable nor in harmony with Article 13 (1) (13(2), 13(5), 21 (1) and 29 (1) of the Constitution.

Consequent upon the raised preliminary objection, this case which was originally assigned to a panel of three Hon Judges, was assigned to me so as to compose a ruling as per the provisions of Section 10 (1) of the Basic Rights and Duties Enforcement Act, Cap 3 RE 2019 (BRADEA).

I propose to deal with the above issues seriatim as presented above. The question relevant for the first issue is, *is the affidavit incurably defective? If so, does it affect the application?*

Arguing in support of the above issue, the learned State Attorney submitted that the affidavit in support of petition is incurably defective for lack of the name and address of the drawer. This defect according to her, contravenes section 44(1) of the Advocate Act, Cap 341 R.E. 2019. This court was also referred to the case of **George Humba vs James M.**

Kasuka, Civil Application No. 1 of 2005, Court of Appeal (unreported) at page 13-14 and **Amina Mhongole vs Medical Store Department (MSD),** Revision No. 331 of 2016, High Court of Tanzania (unreported).

The learned State Attorney went on saying that the rationale of endorsement of pleadings is for authenticity. To augment her submission, she referred to the case **Mohamed Shaban and 6 Others vs Tanzania Electric Supply Co. Ltd,** Revision No. 292 of 2017, High Court of Tanzania (unreported).

Based on the above anomalies, the learned State Attorney said that it is a procedural irregularity which renders the petition incurably defective and liable to be struck out.

Responding to the submission by the respondent, the learned counsel for the applicant said that the raised preliminary objection on point of law is without merits and ought to be dismissed. That it is intended to deny a party the fundamental right of hearing. The case of **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd** (1969) E.A. 696 was cited to support his proposition.

The learned counsel said the verification clause is valid and proper in supporting the originating summon. He mentioned reasons for their position to be the name of the drawer is not one of the key features

mentioned in the case of **DPP vs Dodoli Kapufi & Another,** Criminal Application No. 11 of 2008. That the provision of section 44(1) cannot be read in isolation but has to be read together with section 43 of the Advocates Act. The two sections address a situation where a drawer is not a qualified person and not applicable where there is a direct or inferential indicators that the drawer is an advocate. He cited the case of **George Humba vs James K. Kasuka, TBR,** Civil Application No. 1 of 2005 (Unreported) and **Beatrice Mbilinyi vs Ahmed Mabkhut Shaniby [2021],** Civil Application No. 475 of 2020. That the defect is procedural and may be cured by an amendment to attain substantive justice since such amendment does not prejudice the respondent. The case of **Sanyou Service Station Ltd vs BP Tanzania Ltd [now Puma Energy TZ Ltd],** Civil Application No. 185 of 2018 and **Jamal S. Mkumba and Another v. Attorney General,** Civil Application No. 240/01 of 2019, CAT at Dar es Salaam (unreported) were cited.

Another reason is that a long-drawn process of identifying the drawer for purposes of section 44(1) of the Advocate Act cannot be approached by way of preliminary Objections in the light of **Mukisa Biscuit case** (supra). Lastly, he said that an affidavit being a testamentary instrument is exempted from compliance with section 45 and 44 of the Advocate Act.

Further, the counsel submitted that to establish that affidavit is defective it is imperative for the court to inquire into the ingredient of the valid affidavit as per the case of **Dodoli Kapufi** (supra). Having noticed the ingredients of the valid affidavit, it is misconception to call Petitioner's affidavit defective as it contains all the essential ingredients. He prayed for this court to find the preliminary objections to have no merits hence dismissed.

In rejoinder submission, the respondent reiterated her submission in chief that the affidavit in support of Petition is incurably defective for lack of name and address of drawer. That all cases cited by the petitioner are distinguishable from the case at hand. The respondent prayed this court to dismiss the Petition in its entirety with costs.

This court has the following to say on the issue that the affidavit in support of the petition is incurably defective for lack of the name and address of the drawer; Is the application is incompetent for want of the name of the advocate who drew the document?

The provision relied upon by the respondent's counsel is section 44 (1) of the Advocates Act. That provision reads:-

"Every person who draws or prepares any instrument in contravention of section 43 shall endorse or cause to be endorsed thereon his name and

address; and any such person omitting so to do or falsely endorsing or causing to be endorsed any of the said requirements shall be liable on conviction to a fine not exceeding two hundred shillings."

That provision requires the name and address of the drawer be indicated in the document to be submitted to court. The essence of this provision can be drawn from section 43 which is to prohibit unqualified persons from preparing documents for rewards.

The Applicant's Advocate submitted that the two sections named above address a situation where a drawer is not a qualified person and not applicable where there is a direct or inferential indicators that the drawer is an advocate. The wording of section 44(1) makes mandatory for the document to indicate the name of the drawer as word "shall" has been used. All the same sometimes the word shall is used in "relative term" not necessarily in 'imperative term" see the case of **Zahara Kitindi & Another vs. Juma Swalehe,** Civil Application no. 4/05/2017, CAT at Arusha (Unreported) at page 10.

The record shows that originating summons was signed by Mr. Seka whose address is based in Dar es salaam, who is not a targeted person as per section 43. This is also the position in **George Humba's** case (supra) at page 13. In the case of **Kasimu Ahmed Bingwe Versus Mtepa Bakari**, Misc. Land Application No. 14 Of 2016, High Court at

Mtwara, Twaib, J (as he then was) while quoting the position in **Faith Mohamed Mtambo v. Zuberi Mohamed Kuchauka & 2 Others,** Misc. Civ. Cause No. 2 of 2015, High Court, Mtwara Registry, (unreported). Said:

> *"the omission to name the advocate concerned would not render the pleading incurably defective, such that the pleading would be liable for order striking it out. I opined that an order for amendment to indicate the name of the advocate would be more ideal."*

I fully associate myself with that view. This position was also stated in the case of **Jamal S. Mkumba and Another v. Attorney General,** (supra) where it was held that:-

> *"...but it is the cherished legal principle that every case is to be decided on its own merits. See:* ***Amos Kabota v. The Republic, Criminal Application No. 24/11 of 2017*** *(unreported). On account of the facts presented, to us and for the interest of justice, we think this is one of those cases which demands for substantive justice in its determination. But further to that, we are satisfied that the respondent will not be prejudiced by an order of amendment of the affidavit so as to accord a chance to the applicant to insert a proper verification clause according to law and parties be heard on merit."*

In light of the above case law, the error occasioned in the case at hand is fit for an order for amendment instead of striking out the whole document.

Based on the above authoritative case law, I join hands with the learned counsel for the applicant that the defect is only procedural and may be cured by an amendment to attain substantive justice as in so doing the respondent will not be prejudiced thereby. Therefore, amendment can be made to insert the name and address of the drawer so as to suit the requirement of section 44(1) of the Advocates Act. The raised preliminary objection fails.

I revert to the second point of objection as to *whether this court is seized with jurisdiction to determine this matter?*

Supporting the point of objection, the respondent submitted that, suggesting that article 67(1)(a) being not harmonious with articles 13(1), (2) & (3); 21(1) and 29(1) of the constitution hence calls for amendment of the constitution be proposed to the parliament and thereby deny this court jurisdiction to determine the matter. This position is centred on the case of the **Honourable Attorney General vs Reverend Christopher Mtikila,** Civil Appeal No. 45 of 2009, Court of Appeal of Tanzania (unreported). The court in the above cited case stated that it is parliament which will deal with the matter and not the court. The position was re stated in the case of **Dezydelius Patrick Mgonya and Another vs The Honourable Attorney General and two Others,** Misc. Civil Cause No.

19 of 2019 High court of Tanzania (unreported). The respondent said since the scenario in the above-mentioned cases are similar, she prayed for this court to borrow a leaf from above cases and dismiss the matter at hand.

Further, she said upon close reading of Article 108 and section 2(3) of JALA which the applicant has moved this court, the same do not confer this court with the jurisdiction to entertain a petition which seeks to challenge a constitutional provision. They confer jurisdiction to the High court to entertain a matter whose procedures are not prescribed in any other statutory law. For that reason, the respondent said by entertaining this matter the court will be usurping the role of the Parliament in contravention of the doctrine of separation of the powers, a situation which may lead the country into chaos. She referred the case of **Dezydelius Patrick Mgonya and Another** (Supra) and emphasized the rationale behind separation of power as stated in the case of **Mwalimu Paul Mhozya vs Attorney General** [1996] TLR 130.

In response, the applicant responded that whether the court is empowered to harmonise two articles of the constitution is a question to be determined on the merits and cannot be argued at the stage of preliminary objection in the light of **Mukisa Biscuits'case** (Supra). He

further said to continue arguing on whether this court has capacity or not will require long and extend examination of facts and evidence including examination of the cited full bench case of **Attorney General vs Mtikila** (supra) against other cases from within and beyond.

The learned counsel added that the raised ground of PO is not challenging the competence of the Petition but goes to challenge the particular reliefs which are largely province of discretionary powers of the court upon hearing of the Petition on merits to grant or not.

Further the applicant submitted that the ability of this court to reconcile has been explicitly recognised by the Court of Appeal in a full bench decision of **Rev. Christopher Mtikila versus Attorney General** [1995] TLR 31. The Court approved the doctrine of harmonisation in approving the position taken by Lugakingira, J (as he then was) in what the petitioner is asking by way of this petition to do is exactly what the Honourable Judge said the court can do.

In his view, it was wrong to dwell into the merits of the case a stage not yet reached. At the stage of hearing preliminary objection, it is pre mature to argue what relief the court is capable of granting and what it cannot grant. He went on saying the case of **Rev. Mtikila** (supra) the court felt that it is not capable of granting several reliefs prayed after a

full hearing of the case before a bench of 7 eminent Judges of the Court of Appeal. That, it entices the court to address the substantive merits of the case an approach which has been categorically rejected in plethora judgement of this court.

Alternatively, the applicant said if this court consider it cannot harmonise provisions of the constitution, the court should expunge those portions of reliefs relating to harmonisation and thus leave intact those portions of the petition that allege breach of the EAC Treaty, African Charter and International Convention of Civil and Political Rights (ICCPR)

In rejoinder, the learned State Attorney went on submitting that granting of relief is the exercise of jurisdiction and the court can determine its jurisdiction based on the type of reliefs sought. Regarding the enabling provision cited by the petitioner, the same do not confer this court with jurisdiction to determine this matter. There is nothing showing that the court in **Rev. Mtikila** case (supra) ordered the Attorney General to prepare and submit proposed constitutional amendment to the Parliament for consideration.

That the preliminary objection meets the test of **Mukisa Biscuit Manufacturing Co. Ltd** (Supra). The preliminary objection cannot be determined from abstract but needs to look into the pleadings and

annexures. They cited a case of **Ali Shabani & 48 others versus Tanzania National Roads Agency (TANROADS) & AG,** Civil Appeal No. 261 of 2020 Court of Appeal at Tanga and **Moto Matiko Mabanga vs Ophir Energy PLC and 6 Others,** Civil Appeal No. 119 of 2021, Court of Appeal at Dodoma to emphasize a point that sometimes a preliminary objection must be looked into by *"reference to some facts plain on the pleadings..."*

Going through the submission by the parties in respect of the second preliminary objection I find the basic question to be answered by this court is whether this court is seized with jurisdiction to grant reliefs prayed. The application is enabled by Article 108(2) of the Constitution of United Republic of Tanzania of 1977 R.E. 2019 and section 2(3) of the Judicature and Application of the Laws Act, Cap 358. The two provisions of the law establish the jurisdiction of the High Court of Tanzania. For the purpose of clarity, I will reproduce the said provision;

Article 108(2)

> *"Where this 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 obtaining in Tanzania, is*

ordinarily dealt with by a High Court provided that; the provisions of this sub article shall apply without prejudice to the jurisdiction of the Court of Appeal of Tanzania as provided for in this Constitution or in any other law."

Section 2(3) of JALA:-

"Subject to the provisions of this Act, the jurisdiction of the High Court shall be exercised in conformity with the written laws which are in force in Tanzania on the date on which this Act comes into operation..."

The above provisions expressly provide that the High court cannot assume jurisdiction on matters which the law has clearly conferred jurisdiction to another organ or body.

In this matter, the applicant has prayed for this court to order amendment of constitution for the reason that Article 67(1)(a) is not harmonious with Articles 13(1), (2) & (3); 21(1) and 29(1) of the constitution. On the spirit of the above discussion, this court is called to examine whether the High court is properly clothed with the jurisdiction to grant the prayer. The respondent said, this court lacks jurisdiction to order amendment of the constitution on the reason that the same is done by the parliament. My close look on Article 64(1) of the Constitution gives Legislative powers in Tanzania. The provision reads:

"Legislative power in relation to all Union Matters and also in relation to all other matters concerning Mainland Tanzania is hereby vested in Parliament."

It is also my findings that legislative powers include power to propose a bill for amendment of laws including Constitution. These powers fall squarely in the ambit of the Parliament of United Republic of Tanzania as the only organ vested with legislative powers as per the above provision of the Constitution. I subscribe to the position taken by the respondent in their submission that by entertaining this matter the court will be usurping the role of the Parliament in contravention of the doctrine of separation of powers, a situation which may lead the country into chaos. I also subscribe to the position in the case of **Honourable Attorney General vs Reverend Christopher Mtikila** (supra), paragraph 3 of page 35 the Court of Appeal clearly stated,

"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 the power is expressly given by the constitution, which we have categorically said, it has not."

The position taken by the Court of Appeal is still valid and remain the position to date in absence of another decision to change that position. This court is bound by the principle of precedent to follow it.

The applicant when replying submission by respondent said arguing relief sought in preliminary objection stage this court would have gone to the merits of the application and is equally to denying the applicant the right of hearing.

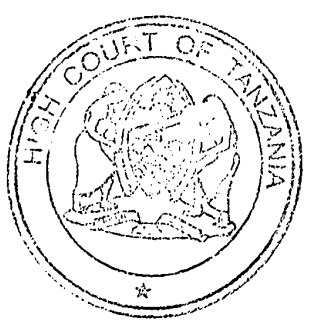
As rightly submitted by the respondent this court cannot ignore into looking at the relief(s) sought by the applicant and see whether it can lawfully exercise its powers, and if so what powers? I am fortified to this view by the decision of the Court of Appeal in the case of **Moto Matiko Mabanga vs Ophir Energy PLC and 6 Others** (Supra). The argument that this court is dealing with the merits of the application and is denying the applicant the right of hearing is without merit. I find this argument to have no merit for the reason that where court finds it has no jurisdiction, such proceedings are declared as a nullity. I am not prepared to fall in that error. This argument equally fails.

Similarly, the applicant submitted in alternative for the court to expunge those portions of reliefs relating to harmonisation and thus leave intact those portions of the petition that allege breach of the EAC Treaty, African Charter and International Convention of Civil and political rights (ICCPR). It is my considered view even if the court would agree and expunge those portion still the application remain without enabling

provisions. It will be illusory and indeed without the intended mischief but mere declaratory orders contrary to the dictates of section 4 of the **"BRADEA"** This argument I dare say is just an afterthought.

From the foregoing discussion, the second preliminary objection is sustained. This court lacks jurisdiction to deal with this matter. I proceed as I hereby do, to dismiss this Petition with usual consequences as to costs.

It is hereby so ordered.



M. G. MZUNA,
JUDGE.
19/08/2022