

IN THE HIGH COURT OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CIVIL CAUSE NO. 30 OF 2021

**IN THE MATTER OF THE CONSTITUTION OF THE UNITED
REPUBLIC OF TANZANIA, 1977 AS AMMENDED FROM TIME TO
TIME [CAP 2. R.E. 2002]**

AND

**IN THE MATTER OF THE PETITION TO ENFORCE CONSTITUTIONAL
BASIC RIGHTS AND DUTIES UNDER THE BASIC RIGHTS AND
DUTIES ENFORCEMENT ACT [CAP. 3. R.E. 2019]**

AND

**IN THE MATTER OF PETITION TO CHALLENGE THE
CONSTITUTIONALITY OF SECTION 109B OF THE LOCAL
GOVERNMENT (URBAN AUTHORITIES) ACT [CAP. 88 R.E. 2002]
AS AMMENDED BY ACT NO. 13 OF 2006, SECTION 15(4) OF THE
GOVERNMENT PROCEEDINGS ACT [CAP. 5 R.E. 2019] AS
AMMENDED BY ACT NO.1 OF 2020, SECTION 4(2) OF THE BASIC
RIGHTS AND DUTIES ENFORCEMENT ACT [CAP. 3. R.E. 2019] AS
AMMENDED BY ACT NO. 6 OF 2020 AND SECTION 290 OF CIVIL
PROCEDURE CODE, [CAP 33 R.E. 2019]**

BETWEEN

S. GROUP SECURITY CO. LIMITED PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

DAR ES SALAAM CITY COUNCIL 2ND RESPONDENT

RULING

14TH Dec, 2021

16TH Feb, 2022

MARUMA, J.

The respondent herein filed a notice of preliminary objection on two points of law that;

1. The Petition is untenable for failure to exhaust the available remedies contrary to section 4(5) and 8(2) of the Basic Rights and Duties Enforcement Act, Cap 3 R.E. 2019.
2. The petition is untenable for being res-subjudice.

However, in the due course of the hearing of the preliminary objections, the respondent dropped the second objection.

This petition is brought under article 26(2), 30(5) and 64(5) of the Constitution of United Republic of Tanzania, 1977, section 4(1), 4(2) and 6 of the Basic Rights and Duties Enforcement Act (BRADEA) [Cap. 3 R.E. 2019] as amended by Act no. 6 of 2020 and rule 4 of the Basic Rights and

Duties (Practice and Procedure) Rules, 2004, (G.N. No. 304 of 2014). The petitioner is challenging the constitutionality of section 109B of the Local Government (Urban Authorities) Act Cap. 288 R.E. 2002 as amended by Act No. 13 of 2006, section 16 (4) of the Government Proceedings Act Cap 5 R.E. 2019 as amended by Act No. 1 of 2020, section 4(2) of the Basic Rights and Duties Enforcement Act Cap. 3 R.E. 2019 as amended by Act No. 6 of 2020. An Order for the parliament to modify section 29 of Civil Procedure Code Cap. 33 within 120 days. Lastly, an order authorizing petitioner to apply for execution of the decree in Civil Case No.15 of 2007 before High Court of Tanzania Dar es salaam sub registry.

At the hearing of the preliminary objection raised Mr. Audax Vedasto, Advocates, appeared for the petitioner while Ms. Pauline Mdendimi, assisted by Mr. Aloyce Lyimo, state attorney appeared for respondents.

Arguing on the first preliminary point of objection, Ms. Pauline for the respondent submitted that, the petition is untenable for failure to exhaust the available remedies contrary to section 4(5) and section 8 (2) of BRADEA Cap 3 R.E 2019. To clarify this, she pointed out that the petitioner the judgement in Civil Case No. 15 of 2007 was delivered in 2010 and the Court awarded the petitioner Tsh. 6,000,000/=. She further

submitted that upon issuing of the judgment and decree of the Court, the petitioner was supposed to file an application for execution as per the provision of the Local Government (Urban Authorities) Act which provide for mode of execution. The petitioner did file an execution proceeding against the 2nd respondent but the same was withdrawn with a leave to refile. To date the petitioner has yet filed an application for execution as per section 109B instead, she filed this matter by way of constitutional petition asking the Court to nullify section 109B and authorize him to apply for execution of court decree in civil case no. 15 Of 2007.

She added that the petitioner has an alternative remedy to enjoy the fruits of the Court decree in respect of the mentioned civil case by way of filing an application for execution in accordance with the law and not by asking this honourable Court to authorize him to apply for execution. She further submitted that section 4(5) of BRADEA Cap 3 R.E. 2019 as amended by the Act No. 3 of 2020 provide for mandatory requirement for the petitioner to exhaust all available remedies under any other written laws and section 8(2) which limits the jurisdiction of the court if the petitioner failed to meet the mandatory procedure under section 4(5) of the Act. To support her arguments, she referred this Court to the following

decisions such as the case of **Tanzania Cigarette Company LTD vs The Fair Competition and Another, Misc. Civil Cause No. 31 of 2010** which elaborated section 8(2) of BRADEA where the Court said that “ *in our interpretation sub section 2 of section 8 suggest that recourse to provisions of the BRADEA, is not to be resorted to where there are other adequate means of redress available to a potential petitioner. Sub section 2 of section 8 of BRADEA provides that the jurisdiction of the High Court is not to be exercised if the High Court is satisfied that adequate means of redress are or have been available to the person concerned under any law or that the application is merely frivolous and vexatious*”. Also, the case of **Philip Samson Chigula vs The judge of the High Court of Tanzania and 7 others, Misc. Civil Cause No. 23 of 2021**, where the Court emphasized that constitutional proceedings should not be taken as alternative to normal ordinary proceedings and for this court to continue with the matter is contravention with the provision of section 8(2).

Further to the above, the learned State Attorney submitted that, it is not indicated by the petitioner that the alternative means of redress were sought, so this Court is precluded under section 8(2) of BRADEA to determine this matter.

Contesting to the point of law raised, Mr. Audex Vedasto, the Counsel for the petitioner submitted that, this objection is misconceived because it fails to analyze the case of the petitioner rather than stating the general principle which is not applicable to the matter at hand. He further submitted that the normal execution process against the 2nd respondent was stopped with effect from 22nd December 2006 when Act No. 13 of 2006 came into force. The act amended Cap 288 by adding a new section 109B which prohibit attachment of property owned by the local government. He further said the provision infringes the petitioner's constitutional right hence, there is nothing the decree holder even the Court can do against the 2nd respondent if it decides not to give effect to the valid order of the Court. He also pointed out that, the normal mode of execution as per Order 21 rule 28 is barred by section 109B of Cap 288. He further submitted that the mode of execution the petitioner was invoking and later on withdrew was for the Court to detain the director of the 2nd respondent. He also submitted that when he was preparing to file an application for execution as per provision of section 109B he found a decision of this Court in the case of **Tabora Municipal Council vs Philbert Regoshora, civil Appeal No. 14 of 2008** where the meaning

of section 109B was extended to prohibit execution by detention of the city director.

He added that, he expected the respondent to analyze the law showing alternative remedy beyond section 109B. Also, with amendment of section 167 of the Government Proceedings Act by Act No. 1 of 2020 by adding subsection (4) which included local Government Authorities in the definition of the term Government. The respondent had said nothing regarding the bar provided under section 16 (3) of the Act that infringed petitioner's constitutional right of enjoying the fruits of the valid decree.

In her rejoinder, Ms. Pauline countered the issues submitted by the Counsel for the petitioner, she said that the Counsel has failed to properly interpret the provision of section 109B of Local Government Urban Authority Act. She said that, the said section does not bar execution of the Court decree against the 2nd respondent rather than it requires the petitioner to file an application of execution before the Court asking to direct the District Executive Director to satisfy the Court decree out of her revenue, something the petitioner has not done. She also said that, in respect to the interpretation of section 109B of Local Government Urban Authority Act and section 16(3) of Government Proceedings Act, that is a

mere speculation and assumption since the petitioner has not applied for execution regarding civil case no. 15 of 2007.

Regarding to the submission that the law does not guarantee delay of satisfaction of the decree of the Court entitled to a decree holder. She submitted that is not true and is to mislead this Court since the issue is addressed under Order 21 rule 6 of the Civil Procedure Code R.E of 2019.

Given the competing submissions by the parties, I believe and find significant to emphasize on the question raised by the respondent which has already been explained by this Court in the case of **Philip Samson Chigula vs The judge of the High Court of Tanzania and 7 others**, Misc. Civil Cause No. 23 of 2021, that constitutional proceedings should not be viewed as an alternative to the normal ordinary proceedings. This is because, it has been a practice for certain litigants to bypass accessible remedy and instead seek relief from the Constitutional Court for matters which abuse Court process.

In line with the above stand, this application is brought as the result of amendment of Chapter 288 by Act No. 13 of 2006 which introduced section 109B. According to the petitioner, section 109B infringes his right to

enjoy the fruits of Court judgment and decree in Civil Appeal No. 15 of 2007. He claimed that the clause in section 109B denies him the right to file an application for execution against the 2nd respondent who is expected to furnish the Court award.

The law under section 4(1) of BRADEA Cap. 3 open the door for one who believes his right have been infringed or likely are to be infringed to bring a case before this Court seeking protection of his rights. However, this right is not absolute but is subject to the limitation provided under section 4(5) as reads below:

“A petitioner shall, prior to seeking redress under this Act, exhaust all available remedies under any other written laws.”

Failure to exhaust the available remedies denies this Court jurisdiction to entertain the matter as per section 8(2) of BRADEA. This position was discussed in the case of **BOB CHACHA WANGWE VERSUS THE ATTORNEY GENERAL AND 2 OTHERS, MISC. CIVIL CAUSE NO. 06 OF 2018:**

“Petition is misconceived for failing to satisfy the preconditions set out under section 8 (2) of cap 3 that is to say, it is not merely vexatious or frivolous or that the petitioner has no other remedy under the relevant law”.

Applying this to the matter at hand, section 109B reads:

“Where any decree or order is granted or obtained against the Urban Council, no execution or attachment or process of that nature shall be issued against the property of the Council, except that the Urban Council Director shall cause to be paid out of the revenue of the Council such amount as may by judgement, or order be awarded against the Council to the person entitled to it.”

This provision restricts attachment of council’s property in execution but does not exclude an execution against the Urban Council. The provision establishes a procedure that requires the applicant to move the Court for an order directing the director of the Urban Council to pay the amount granted to the person entitled by judgment or order against the council.

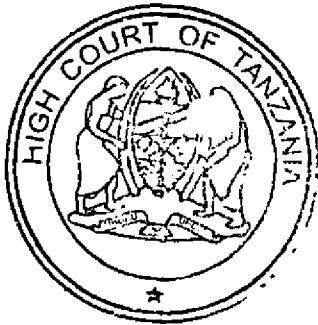
The petitioner in this application had to apply to the Court to have the Urban Council director to pay the amount out of revenue collected by the council in order to reap the benefits of the court's judgment and decree awarding him Tshs 6,000,000/=. Thus, even if it was indicated in paragraph 3.5 of the petition where the petitioner notified the Court that the normal execution process against the 2nd respondent was stopped with on 22nd December 2006 when Act no.13 of 2006 came into force. It is not enough to say that the remedy was exhausted since no application for execution was applied to that effect. This was discussed in the case of **FREEMAN AIKAEL MBOWE VERSUS THE DIRECTOR OF PUBLIC PROSECUTIONS AND 2 OTHERS, MISC. CIVIL CAUSE NO. 21 OF 2021**, it was stated:

"This Court assumes jurisdiction to hear application of this nature only after all available remedies under any other written laws have been exhausted. It therefore provides at what time this Court would exercise its jurisdiction, which is, of course after the petitioner has exhausted other available remedies such as that provided under CPA, etc".

Also, the argument that, when the petitioner was about to file an application, he came to find the decision of **Tabora Municipal Council vs Philbert Regoshora, Civil Appeal No. 14 of 2008** where the meaning of section 109B was extended to prohibit execution by detention of the city director. Also, the argument that the law through 109B stops any person against Urban Council to get his money which he has been validly awarded through a judicial process unless the urban council feels or desirable or pleasing to do so. Or the complaining that the law does not contain the provisions that guarantee delays of satisfaction of decrees of the Court of any kind entitled to a decree holders to any interest as against the judgment debtor (the government institution), hence infringed article 30 (3) of the Constitution of the United Republic of Tanzania. I am of the view that the validity of all these issues may be legally considered if the petitioner could file an application for execution and failed to enjoy the fruit of the decree awarded by the Court.

As a result, failure to satisfy that the remedy provided by section 109B of Cap 3 has been exhausted by filling an application for execution of Civil Case No. 15 of 2017. This Court no longer has jurisdiction to entertain the petition.

In the event I find merit in the respondents' objection and I uphold it. The petition is hereby struck out. Each party to bear his own costs. It is so ordered.



A handwritten signature in black ink, consisting of several overlapping loops and lines.

Z.A.Maruma, J

16/2/2022