

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF DAR ES SALAAM
AT DAR ES SALAAM**

MISC. CRIMINAL APPLICATION NO. 36 OF 2022

SILAS SASI TUGARA @ JACOB TUGARA APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

(Arising from Criminal Sessions Case No. 68 of 2019)

RULING

28th March & 11th April, 2022

KISANYA, J.:

By a chamber summons made under section 173 (1)(a)(b), (2) and (3) of the Criminal Procedure Act, Cap. 20, R.E. 2002, the applicant, Silas Sasi Tugara @Jacob Tugara is moving this Court for the following orders, in verbatim:

- 1. That, this Honourable Court be pleased to grant the applicant prayers for an extended jurisdiction pending trial and set aside a date, time and place for hearing in accordance with due process right.*
- 2. That, this Honourable Court be pleased to grant any legal remedies to cure unjustifiable prolong in hearing this case for more that (sic) 32 months.*

- 3. For the sake of justice and also discontinue detention of the Applicant. The High Court are (sic) required by the Law to set a date, time and place as soon as possible or set the Applicant at Liberty, in order to avoid continues (sic) violation of his due process right;*
- 4. That this Honourable Court be pleased to grant a legal remedy of Right to be heard which were infringed by the Public Agency. This is in violation with Article 30(3) of the Constitution U.R.T 1977 as amended from time to time.*

The application is supported by the affidavit sworn by the applicant on 1st March, 2022.

In order to facilitate an understanding of this matter, I find it appropriate to highlight the facts deposed in the supporting affidavit. The same can be summarized as follows: The applicant was arrested on 19th January, 2017 for an offence of murder. It is deposed that he was committed to this Court on 20th May, 2019 and that he was called upon to plead to the charge on 20th December, 2019. Since he has not been summoned for trial, the applicant decided to lodge the present application for the foresaid orders.

At the hearing of this matter, the applicant appeared in person, unrepresented. On the other side, Ms. Angelina Nchalla, learned Senior State Attorney appeared to represent the respondent.

Before commencement of the hearing of the application, I required the parties to address me on whether the Court has been properly moved to determine the application and whether the Court has jurisdiction to determine the present matter.

The applicant was the first to take the floor. He submitted that this court is enjoined to transfer a criminal case to be heard by the magistrate with extended jurisdiction. Therefore, he was of the view that the court has been properly moved to determine the matter. Citing the provision of Article 29 of the Constitution of the United Republic of Tanzania, 1977, the applicant argued that this court is empowered to determine issues related to breach of right and duties.

On her part, Ms. Nchalla conceded that the court has not been properly moved to determine the orders sought. She was of the view that the matter ought to have been dealt with administratively. Therefore, the learned Senior State Attorney prayed that the application be struck out, and that the

applicant be advised to channel his complaints to the Deputy Registrar or Judge In-Charge.

In his brief rejoinder, the applicant argued that he has the right to be heard and that the respondent had not stated how they will be prejudiced with the application. He urged the court to consider that he has been in remand prison for a long time without being called for trial. He reiterated that the court is enjoined to determine the matter.

I have examined the chamber summons and supporting affidavit as well as the submissions from both parties. The issues for my determination are whether the Court has been properly moved to determine the application and whether the Court has jurisdiction to determine the present matter.

My starting point on the first issue is to restate the timebound principle that non-citation or wrong citation of the relevant provisions of the law renders the matter incompetent. See the case of **Hussein Mgonja vs The Trustees Tanzania Episcopal Conference**, Civil Revision No. 2 of 2002, CAT at Arusha, (unreported) in which the Court of Appeal held:

"If a party cites the wrong provisions of the law the matter becomes incompetent as the Court will not have been properly moved."

That position was also stated in the case of **Elly Peter Sanya, Civil Application No. 3 of 2015**, Civil Application No. 3 of 2015 (unreported) where the Court of Appeal held that:

"In view of the stated position of the law, the current application is brought under a wrong provision of the law which renders the application incompetent and hence the Court is not properly moved. In our jurisprudence, it is equally settled law that non-citation of the relevant provisions in the notice of motion renders the proceeding incompetent."

After introduction of the principle of overriding objective which was also underscored by the Court of Appeal in the case of **Yakobo Magoiga Kichere vs. Peninah Yusuph**, Civil Appeal No. 55 of 2017, CAT at Mwanza (unreported), an application brought under wrong citation or non-citation of the relevant provisions of the law cannot be declared incompetent if the court has mandate to determine the matter. This position was underlined by this Court (Utamwa, J) in the case of **Maranatha Engineering and Trading Co. LTD vs. TPB (Mbeya Branch)**, Misc. Land Application No. 39 of 2020, HCT at Mbeya (both unreported).

As stated earlier, the instant application is made under section 173(1)(a)(b), (2) and (3) of the Criminal Procedure, Cap. 20, R.E. 2002 (now R.E. 2019, henceforth "the CPA"). The provisions cited in the chamber summons empowers the Minister responsible with legal affairs, after consultation with the Chief Justice and the Attorney General to publish in the Gazette name any resident magistrate with power to try offences which are ordinarily tried by the High Court and specify the area within which the said resident magistrate may exercise such extended powers. The above cited section provides further that the resident magistrate with extended jurisdiction is deemed to be a judge of the High Court, and that the court presided over by him while exercising such jurisdiction is be deemed to be the High Court.

In the light of the foregoing, it is my considered view that the application is preferred under the provisions of the law which do not empower this court to make the order sought in the chamber summons.

The second issue is whether there are other provisions of the law which empower this court to hear and determine the application. Starting with the relief of transferring the criminal case to resident magistrate with extended

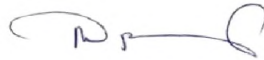
jurisdiction, this Court is enjoined under section 256(1) of the CPA to direct that the preliminary hearing and the trial of an accused person committed for trial by the High court be transferred to the resident magistrate with extended jurisdiction. However, I agree with Ms. Nchalla such power is exercised administratively. The accused person cannot move the Court seeking that his case be heard by the resident magistrate with extended jurisdiction.

It is also deduced from the pleadings and the applicant's argument that his right to be heard and right to liberty have been infringed. Therefore, the applicant was of the view that this Court is empowered to determine the matter under Articles 29 and 30(3) of the Constitution. The procedure for enforcement of constitutional basic rights and duties is provided for in the Basic Rights and Duties Enforcement Act, Cap. 3, R.E. 2019 (the BRADEA) and its Rules. Any person who allege that any of the provisions of Articles 12 to 29 of the Constitution has been, is being or is likely to be contravened may apply to the High Court for redress. However such right is subject to other laws.

In terms of section 5 of the BRADEA, the said application is made by petition and filed in the appropriate Registry of the High Court by originating summons. Having considered that the originating summons was not lodged before this court, I am of the view that the applicant's prayers based on breach of constitutional right are not tenable for contravening the BRADEA and the Rules made thereon.

With the foregoing, I find the present application incompetent before the Court. It is hereby struck out.

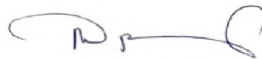
DATED at DAR ES SALAAM this 11th day of April, 2022.



S.E. Kisanya
JUDGE

Court: Judgment delivered 11th day of April, 2022 in the presence of the applicant, his counsel Mr. Nixon Tugara, learned advocate and Ms. Angelina Nchalla, learned State Attorney for the respondent.

Right of appeal explained.



S.E. Kisanya
JUDGE
11/04/2022

