IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CAUSE NO. 09 OF 2022

IN THE MATTER OF THE CONSTITUTION OF UNITED REPUBLIC OF TANZANIA 1977 [CAP 2 R.E. 2002]

AND

IN THE MATTER OF ARTICLE 108 (2) OF THE CONSTITUTION OF UNITED REPUBLIC OF TANZANIA 1977 [CAP 2 R.E. 2002]

AND

IN THE MATTER OF SECTION 2 (3) OF THE JUDICATURE AND APPLICATION OF LAWS ACT [CAP. 358 R.E. 2019]

AND

IN THE MATTER OF ARTICLE 118 (2) OF THE CONSTITUTION OF UNITED REPUBLIC OF TANZANIA 1977 [CAP 2 R.E. 2002]

AND

IN THE MATTER OF CHALLENGING THE POWER OF THE PRESIDENT TO REMOVE THE CHIEF JUSTICE FROM HIS POST

BETWEEN

PAUL EMMANUEL KILASA KISABO ..... APPLICANT

AND

THE ATTORNEY GENERAL ..... RESPONDENT

JUDGMENT

ISMAIL, J.

Paul Emmanuel Kilasa Kisabo, the petitioner herein, is a sad and disgruntled person. Sad about what he considers to be the sad fact that the Constitution seems to erode the basic pillar in the dispensation of justice *i.e.* independence of the judiciary. While he has no qualms on how the Chief Justice is sourced into office, it is the manner in which he may vacate office that has drawn the petitioner's ire.

He is disgruntled by the manner in which the Chief Justice is subordinated to the head of another arm of the state and unto whom the power of firing are bestowed. Lack of a clear and, probably, dignified exit procedure of the Chief Justice is an intolerable omission that the petitioner has refused to keep up with.

Rather than sitting idle, twiddling his fingers and let doctrine of independence of the judiciary and separation of power stifled, the petitioner has chosen to live to the lyrics of the legendary Robert Nesta Marley @ Bob Marley, who urged his people to do an emancipation. In the petitioner's view, this is an emancipation from muzzling of the independence of the judiciary by another organ that has flexed its muscle and dictate on who should be at the helm of another organ.

It is for that reason, that the petitioner has taken this bold step of moving the Court to hear him out and grant the following reliefs:

(i) Declaration that Article 118 (2) (c) of the Constitution of the United Republic of Tanzania of 1977 ("The Constitution") does not provide for reasons, mechanisms, or procedures for removing the Chief Justice from his post of the Chief Justice;

(ii) Declaration that Article 118 (2) (c) of the Constitution of the United Republic of Tanzania of 1977 gives powers to the President which are unnecessary, unreasonable, and do not meet the test of proportionality in the democratic state;

(iii) Declaration that Article 118 (2) (c) of the Constitution of the United Republic of Tanzania of 1977 interferes with the principle of separation of powers as enshrined under the Constitution and human rights treaties to which Tanzania ia a party;

(iv) Declaration that Article 118 (2) (c) of the Constitution of the United Republic of Tanzania of 1977 interferes with the principle of independence of the Judiciary;

(v) Order directing the respondent to put in place, a legislative mechanism with respect to the complained provision of the

Constitution of the United Republic of Tanzania of 1977 setting down accepted legal procedures for removing the Chief Justice from his post;

(vi) Each party to bear own costs; and

(vii) Any other remedy and/or relief that the Court may deem fit to grant.

The petitioner's key contentions in the petition are pleaded in paragraphs 9 through to 14 of the petition. The thinking by the petitioner is that, whilst Article 118 (2) (c) of the Constitution gives powers to the President to remove the Chief Justice, the said provision disregards the fact that the President and the Chief Justice are equals, as they are both heads of organs of the State and are expected to work independently. The petitioner is unhappy that, unlike the President and the Speaker of the Parliament whose removal is clearly stipulated in the law, removal of the Chief Justice is not guided by any set of procedures.

The petitioner has taken the view that allowing the President to remove the Chief Justice is an interference with independence of the Judiciary that is guaranteed by the Constitution and international human rights treaties to which Tanzania is a party. This, the petitioner added, interferes, as well, with

the principle of checks and balances, placing the President above the heads of other organs, more particularly, the Judiciary.

The petitioner's averments have been scathingly rebuffed by the respondent. In the reply to the petition, the respondent has taken the view that by the very nature of the presidential system, the President is bestowed upon him, more constitutional and legal powers compared to other heads of state organs. The respondent averred that the powers enjoyed by the President are exercisable under Articles 110A (2), (3) and 120A (2) of the Constitution which are applicable to Judges of the High Court and Justices of Appeal of the Court of Appeal of Tanzania, and they factor in the Chief Justice, he also being the Justice of Appeal.

The further view held by the respondent is that the separation of power amongst the organs is not absolute, and this is exemplified by the fact the President takes oath of allegiance before the Chief Justice, while his removal through impeachment is presided over by the Speaker of the National Assembly. The respondent was convinced that there is an elaborate procedure that guides removal of the Chief Justice from office, and that independence of the judiciary is a guaranteed duty that cannot be stifled by removal of the Chief Justice.

Disposal of the petition took the form of written submissions whose filing conformed to the schedule drawn on the parties' consensual basis.

In conformity with the tradition, the petitioner threw the first jab. He began by giving a preface that introduced the statement of the parties' contention. He came up with proposed issues that he intended that they should guide the parties in arriving at the conclusion on the merits or otherwise of the petition. These are:

(a) Whether it is legally appropriate and/or legitimate for the Chief Justice of Tanzania to be removed by virtue of Article 118 (2) (c) from his position at the pleasure of the President of the United Republic of Tanzania;

(b) Whether the procedures available for the removal of Judges of the High Court and the Court of Appeal can be read into and made applicable in the case of intended removal of Chief Justice from the Office of the Chief Justice; and

(c) To what reliefs are the parties entitled?

The petitioner argued that in the case of ***Julius Ishengoma Francis Ndyanabo v. Attorney General*** [2004] TLR 1, it was held that the Constitution of Tanzania rests on three pillars which are rule of law; fundamental rights; and independent, impartial and accessible judicature.

These pillars, he argued, are relevant when a question is posed on whether it is in order for the Head of Executive branch of the government to remove the Chief Justice - the head of another branch - at his pleasure.

Addressing the Court on the 1st issue, the petitioner argued that predicating tenure of the Chief Justice on the pleasure of the President, as provided in Article 118 (2) (c) of the Constitution, is legally inappropriate and uncalled for. He argued that lack of an elaborate procedure for removal of the Chief Justice, akin to what is provided for in Articles 46A and 84 (7) (d) of the Constitution impairs the independence of the Judiciary, and weakens the principle of Separation of Powers. In the petitioner's view, the position of the Chief Justice is left exposed while other heads of the organs have their tenure secured. This means that the Chief Justice is technically discriminated against by the Constitution. On circumstances under which the Separation of Powers can be infringed, the petitioner cited the decision of the Court of ***Tanzania in DPP v. Daudi Pete*** [1993] TLR 22, in which it was held that separation of power is said to be infringed when either or both of the other arms of the state take over the function of the judicature in the interpretation of laws and adjudication of disputes.

The petitioner decried what he considers to be lack of the explicit provision creating security of tenure of the Chief Justice provides a room

arbitrary use of the enormous powers of the President. He called for enhancement of security of tenure to reflect what was held in the Canadian case of ***Walter Valente v. Her Majesty The Queen and Attorney General of Canada, Attorney General of Quebec, Attorney General for Saskatchewan, Provincial Court Judges Association (Criminal Division) and Ontario Family Judges Association*** No. 17583 [1995] 2 SCR 673. The petitioner urged the Court to take inspiration from the decision and that removal of the Chief Justice in Tanzania should emulate the procedure that obtains in Canada.

In another effort to insulate the Chief Justice from the vagaries of immense presidential powers, the petitioner urged the Court to borrow a leaf from the Indian Constitution, 2020, whose Article 124 (4) provides for an elaborate procedure through which Supreme Court Judges and the Chief Justice can vacate office. Examples of Ghana and Kenya were also cited. It was his contention that the preambular spirit of the Constitution, enshrined in Article 8 has been negated by what is provided in Article 118 (2) (c).

Moving on to the 2nd issue, the petitioner's argument is that the Court has inherent powers to harmonize the procedure covered in Article 120A (2) of the Constitution and extend its application to Article 118 (2) (c) of the Constitution. In his view, the procedure sought to be harmonized is elaborate

and recognizes and implements constitutional principles of rule of law, separation of powers and security of tenure. The petitioner further contended that the proposed harmonization is not an idea that is alien as it was adopted in many a decision, including the case of ***Honourable Attorney General v. Reverend Christopher Mtikila***, CAT-Civil Appeal No. 45 of 2009 (unreported), in which it was held that the process entails reading the entire constitution as an integrated whole without letting one provision destroy the other.

With regards to the 3rd issue, the petitioner held the view that all the reliefs enumerated in the petition are grantable through issuance of declaratory orders. He urged the Court to be imaginative in the exercise of its powers and in interpreting the provisions of the Constitution, keeping in mind the safeguards that will prevent removal of the President at the pleasure of the President.

The respondent came with all guns blazing. He was strenuously opposed to the contentions raised by the petitioner. He began his rebuttal submission by sounding a warning to the Court, holding that in disposing the matter, the Court should be guided by holding of the High Court of Kenya in ***EG v. AG of Kenya & 10 Others***, Petition No. 150 of 2016 in which it was held as hereunder:

"Constitutional provisions must be construed purposively and in a contextual manner. Accordingly, courts are constrained by the language used. Courts may not impose a meaning that the test is not reasonably capable of bearing. In other words, the interpretation should not be "unduly strained" but should avoid "excessive peering at the language to be interpreted without sufficient attention to the historical contextual scene," which includes the political and constitutional history leading up to enactment of a particular provision."

The respondent argued that this Court is a creature of the Constitution, deriving its mandate from the provisions of Articles 107A and 108 (1) & (2) of the Constitution, and that its mandate in the interpretation and dispensation of justice is limited to observing the provisions of the Constitution and laws of the land. This, the respondent contended, is consistent with Article 107B of the Constitution. The respondent was in concurrence with the petitioner's argument that a harmonious approach must be taken in interpreting the provisions of the Constitution. At no point, should the Court declare one provision of the Constitution as unconstitutional or offensive of the other. The respondent invited the Court to be guided by the wisdom ushered in ***Julius Ishengoma Francis Ndyanabo v. Attorney General*** (supra). The respondent took the view that supremacy

of the Constitution should be upheld when the Court is called upon to interpret any provision of the Constitution. To fortify his contention, he cited the decision in ***Jayne Mati & Another v. Attorney General & Another*** [2011] eKLR, in which it was underscored that the responsibility of the court is to weigh the facts of the breach against the letter and spirit of the Constitution and determine whether relief should be granted to protect the Constitution.

In the respondent's view, the petitioner had failed to show facts warranting the abuse or violation of the Constitution, and that any fear of removal of the Chief Justice is speculative. He urged the Court to be inspired by the decision in ***Rev. Christopher Mtikila v. Attorney General*** [1995] TLR 31, wherein it was held that mere possibility of a statutory provision being abused in actual operation will not make it invalid.

With regards to the 1st issue, the respondent took the view that ours being a Presidential System or Washington Model of governance in which the head of the State is an elected President, it is fair to submit that, since the State has three organs, then the President is a head of all the three organs and enjoys immense powers including those of appointing and removing the Chief Justice. He argued that such powers are the preserve of what people decided when they promulgated the Constitution. The powers

to remove the Chief Justice are, therefore, sovereign powers accorded under Article 8 (1) of the Constitution. They are a reflection of the will of the people. The respondent reiterated the contention that this Court has no jurisdiction to defer the sovereignty of the people and supremacy of the Constitution. On this, the case of ***Honourable Attorney General v. Reverend Christopher Mtikila*** (supra) was cited. In the respondent's contention, anything that aims at altering this equation must involve amendment of the Constitution under Article 98.

The respondent further contended that the position is settled and it is to the effect that, if there are provisions which cannot be harmonized within the Constitution, resort must be had to the Parliament and not the Court, unless the Court is expressly empowered to do so.

On the impairment of separation of powers, the view held by the respondent is that the Constitution does not embrace total separation of powers, a view expressed by I.G. Shivji, H.I. Majamba, R.V. Makaramba & C.M. Peter, in a book titled ***Constitutional and Legal Syatem in Tanzania, A Civics Sourcebook***. In this, the learned legal luminaries were quoted as saying that separation of power should not be viewed as disunity of power, and that state power is separated but integral and unified. It is the respondent's take that checks and balances exist and that the framers of the

Constitution were all too aware of the existence of the doctrine of separation of power. The respondent argued that what the president does in appointing the Chief Justice is in conformity with the Constitution and in line with his oath of allegiance to protect the Constitution under Article 42 (5).

Expounding on the checks and balances, the respondent submitted that removal of the President under Article 46A, is as justified as removal of the Chief Justice, or swearing in of the President by the Chief Justice, and that none can be said to amount to interference with separation of power.

On the allegation that the appointment of the Chief Justice by the President is a violation of the independence of the Judiciary, the respondent's contention is that this is not evident and the petitioner bears the burden of proof under section 110 (1) of the Evidence Act, Cap. 6 R.E. 2019. He backed up his contention by restating the holding accentuated in ***Rev. Christopher Mtikila v. Attorney General*** (supra), wherein it was held:

> *"Breach of the Constitution is such a grave and serious matter that cannot be established by mere inference but by proof beyond reasonable doubt."*

It is the respondent's take that independence of the Judiciary is well secured by Article 107B of the Constitution which stipulates that the Court is

not obliged to take any instruction from any person or organ. The Court is guided by the Constitution and the laws of the land.

Addressing the issue of security of tenure, the respondent urged the Court to give that contention a wide berth, the reason being that the same was not pleaded in the petition that founded this matter. He held, in the alternative that, in any case, security of tenure of the Chief Justice, Justices of Appeal and Judges of the High Court is well accommodated in the Constitution.

Submitting on the 2nd issue, the respondent made reference to paragraph 5 of the reply to the petition in which the procedure for removal of Justices of Appeal was given. The respondent has taken the view that the Chief Justice being a Justice of Appeal, his removal is as enshrined in Articles 120A (2) and 110A (2), (3), (4) and (5) of the Constitution. He played down the petitioner's contention and urged the Court to read Article 118 (2) (c) together with subsequent provisions of the Constitution.

The respondent argued that, since the Chief Justice is also a Justice of Appeal and has all the qualifications reserved for justices of appeal, his tenure is secured to his retirement, in similar way that of the Justices of Appeal is insulated. He further contended that, once appointed, the process of his removal is highly regulated and that the power of removal under Article

118 (2) (c) is exercisable consistent with other applicable procedures. They include the procedure that relates to discipline of judges as provided under sections 13 and 37 (1) of the Judicial Administration Act, No. 4 of 2011. This legislation was enacted pursuant to Article 120A (1) of the Constitution. The respondent further argued that there is a procedure for removal of Justices of Appeal under Article 120A (2) of the Constitution, and that such procedure applies to the Chief Justice. The respondent remarked further that, applying a harmonious interpretation of the provisions of the Constitution, the procedure under Articles 110A and 120A sufficiently caters for removal of the Chief Justice.

The respondent took an exception to the contention of lack of procedure for removal of the Chief Justice while at the same time recognizing that there is a procedure in respect of which harmonization is craved. The respondent took the view that this contention is self-defeating.

Moving on to the reliefs sought, the contention by the respondent is that the prayers sought are not tenable and not within the Court's jurisdiction. The respondent maintained that the duty of the Court is to provide an interpretation that will harmonize the provisions of the Constitution. In the alternative, the respondent urged the Court to let the procedure under Article 98 be applied to let the Parliament alter the

Constitution. The respondent urged the Court to dismiss the petition with costs.

Having scrupulously reviewed the pleadings, the parties written submissions, and after leafing through a litany of literature on the subject, I am ready to deal with the parties' rival contentions. In my view, the singular issue for determination in this matter is whether the current provisions of the Constitution on the tenure of office of the Chief Justice impede the realization of the independence of the Judiciary.

As I begin the disposal journey, I wish to express, in no mean way, my profound appreciation to both sets of learned counsel for the industry exhibited in their lengthy and fabulous submissions. Their effort in addressing the Court on the pertinent issues was nothing short of splendid and I immensely commend their effort.

I choose to preface my analysis by quoting the reasoning of the late Justice Buxton Chipeta, Judge of the High of Tanzania, as extracted from the decision in the case of ***Republic v. Iddi Mtegule***, PC-Criminal Revision No. 1 of 1979 (Dodoma). This excerpt was quoted in the book by Prof. Chris Maina Peter titled: ***Human Rights in Tanzania: Selected Cases and Materials***, Rudiger Koppe Verlag, Koln, 1997. The learned Judge remarked as follows:

"As I understand the constitutional position in our country, the Judiciary is supposed to be an independent institution – independent in the sense that those who are entrusted by the Constitution to decide the rights and liabilities of guilt or innocence of people must be free from all kinds of pressures, regardless of the corners from which those pressures come. The Judiciary must be free from political, executive or emotional pressures if it is going to work with the smoothness and integrity expected of it under the supreme law of the land – the Constitution. It must not be subjected nor succumb to intimidation of any kind."

The reasoning by the learned departed Judge beds well with magnificent excerpt extracted from an address by Ranjan Gogol, the Chief Justice of India, delivered to the 14th Conference of Chief Justices of members of the Shanghai Cooperation Organisation in Sochi, Russia, on 18th June, 2019. He guided as follows:

"Independence could be said to be the very soul of a functional judiciary. Whatever be the political system of governance, people across Nations aspire for free and independent Judicial system to serve them. In fact, such aspirations are common to, and bind different judicial systems across the comity of nations. If a judicial system fails to enjoy public confidence, its deliverables would never constitute 'justice' – conversely, if the deliverables of a

judicial system are not known to be impartial, just, equitable and appealing to good conscience, such system would never earn confidence and high esteem in the minds and hearts of the common citizens. Every Judicial System is required to functionally wield what may be referred to as 'power to judge' or the 'power to finally decide' – what is 'judged' or 'finally decided' is human conduct or decisions or a state of things."

The clear and unanimous message that is distilled from these quotations feeds into what James Madison, the 4th President of the United States of America, hailed as the Father of Constitution, came up with, close to four centuries ago. He came up with the antithesis of what would be considered to be the independence of the Judiciary:

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny."

It should be acknowledged that, whilst it may be possible that each nation may come up with their own interpretation of what constitutes independency of the Judiciary, the 7th United Nations Congress on the Prevention of Crime and Treatment of Offenders, held in Italy in 1985, came up with universally accepted pillars on which independence of judiciary rests.

The Congress, which was endorsed by the UN General Assembly through Resolutions 40/32 and 40/146, adopted seven guiding principles which are considered to be standard norms in gauging independence of the Judiciary. These can be paraphrased as follows:

1. The independency of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governments and other institutions to respect and observe the independence of the judiciary;
2. The judiciary shall decide matters before them impartially, on the basis of the facts and in accordance with the law, without any restrictions, improper influence, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason;
3. The judiciary shall have jurisdiction over all issues of judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law;
4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial

review or to mitigation commutation by competent authorities of sentences imposed judiciary, in accordance with the law;

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals;
6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected; and
7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

These are broad tenets of what independence of the judiciary across democracies. They are good practices that constitute international norms and that the constitutions should have these, as a minimum content. The principles inform on whether a certain constitutional dispensation conforms to the principles governing independence of the judiciary.

Worthy of a note is the fact that, whereas the question of tenure of office of the judicial officers features nowhere in the principles adopted in

the 7th Congress, it is certainly an indispensable ingredient of the independence of the judiciary. The captivating remarks made by Brian Opeskin, Professor of Legal Governance, Macquarie University, Sydney, Australia, in his paper: ***Models of Judicial Tenure: Reconsidering Life Limits, Age Limits and Term Limits for Judges,*** serve to cement the view. In his introductory notes, the learned Professor posited as follows:

> *"Tenure is an important facet of judicial independence and a key principle underpinning the rule of law, yet its protection varies markedly from country to country…."*
>
> *"Judicial tenure is an important facet of judicial independence and a key principle underpinning the rule of law. Robust provisions for tenure allow judges the freedom to decide cases according to law, without fearing reprisal through demotion or dismissal, or anticipating favour through promotion or re-appointment, by executive government…."*

In view of their overlapping nature, disposal of the first two issues will be in a combined fashion, meaning that the discussion on the issues will not call for separate determination of each of the issues. Turning on to the heart of the parties' contention, my assessment is that, while the petitioner in the instant matter appears to harbor no qualms on the manner in which the

Judiciary of Tanzania carries out its adjudicatory duties, and it is generally accepted that it conforms to the seven principles, he has taken a serious exception to what he considers to be an exposure created by Article 118 (2) (c) of the Constitution. He thinks that the President should not be involved in the manner in which the Chief Justice leaves office. The respondent finds nothing faulty in the architecture and the spirit of the provision that the petitioner has raised issues on. As we move on to tackle this issue, it serves us right to reproduce the substance of the 'emotive' Article 118 (2) (c) of the Constitution as hereunder:

> *"Jaji Mkuu atateuliwa kutoka miongoni mwa watu wenye sifa za kuwa Jaji wa Rufani na atakuwa ndiye Kiongozi wa Mahakama ya Rufani na pia Mkuu wa Mahakama ya Tanzania kama ilivyofafanuliwa katika Ibara ya 116 ya katiba na atashika madaraka ya Jaji Mkuu mpaka atakapotimiza umri wa kustaafu kama Jaji wa Rufani, isipokuwa kama (c) atavuliwa wadhifa wa Jaji Mkuu na Rais."*

The wording of this provision has drawn an interpretation from the petitioner. His thinking is that service of the Chief Justice is at the pleasure of the President, and that, in the absence of any detailed procedure for removal by the President, the latter's action is nothing but meddling in the independence of the judiciary. This view does not sell to the respondent

whose position is that powers enjoyed by the President under Article 33 (2) of the Constitution entails appointment of Chief Justice, and they include powers to remove him to office, subject to other provisions of the law and the Constitution. The respondent's view, which draws convergence with mine, is that the presidential system, that our system of governance is, is tailored in the manner that projects the President as the Head of State and vested with powers to appoint and make a decision to relieve his appointees from the positions they hold. The Chief Justice would not be any different, though his manner of departure from office must conform to the Constitution and, more specifically, what is stipulated in Articles 110A and 120A.

This is in line with what obtains in the Presidential system of governance that the people of Tanzania chose to go with. It is precisely how the will of the people has been expressed through the current constitutional dispensation. My reading of the provisions of Article 118 (2) (c) of the Constitution conveys the following messages:

(i) That the Chief Justice shall be appointed by the President of the United Republic of Tanzania;

(ii) Once appointed, he shall see out his tenure until retirement, or if he vacates his office pre-maturely, on account of other reasons, including removal by the President;

(iii) Implicitly, such removal must be removal in the manner stipulated in the Constitution.

It is logical and legally in order that the appointing authority, who in this case is the President, should also be the authority that ultimately wields powers of ending the tenure of the Chief Justice. This is a constitutional reality and what Article 118 (2) (c) does is to spell out that the existence of the possibility, leaving the rest of the process to be taken care by the other provisions of the Constitution and other legislation. In this case, other provisions are Articles 110A and 120A both which provide a detail of the procedure that is to be observed whenever a Judge of the High Court and/or Justice of Appeal is to be removed from office by the President.

In my considered view, these provisions are to be invoked whenever a Judge of the High Court or Justice of Appeal is to vacate office at the instance of invocation of the powers of the President. As the respondent contended, an argument that I go along with, appointment of the Chief Justice is done to one of the persons who deserve or are eligible to serve as justices of appeal. The cumulative sense gathered here is that treatment of the Chief Justice ought to be and is the same as what a justice of appeal would be accorded. It is legitimate, in my view, to conclude that removal of the Chief Justice, akin to the removal of the Justice of Appeal, has a clear methodology

that would not be subjected to any personal whims of the appointing authority, be it the President or anybody else.

The petitioner's action is moved by a fear that the vagaries of the presidential power provides a potential for muzzling the less insulated powers of the Chief Justice. While these fears may not be far-fetched or entirely unfounded, my contention is that fears, however genuine they may be, would not be the basis for what the petitioner craves. As stated in the ***Mtikila case*** (supra), sensing that there may be a possibility of abuse is too remote to give it a thought. It has to go far beyond the mere possibility of abuse of such powers. It must be real, and I find nothing to validate the petitioner's fear and make them significant plausible and warrant a pronouncement from this Court. The petitioner ought to know that this is not a Court of ***"ifs"***. It is a Court that deals with actualities, without indulging in a ***"hit and hope affair"*** that he invites us into.

In my considered view, these are fears that may be quelled by the proper construction of what Article 120A (1) of the Constitution, the procedure that obtains therein, and the provisions of the Judicial Administration Act (supra) which deal with matters of discipline involving Justices, including Justices of Appeal. This procedure is placed in the hands

of the Judicial Service Commission, consistent with what Section 37 (1) provides.

It is my conviction that, through the application of the principle of harmonization of the provisions of the Constitution, which is part of our practice, nothing untoward can be inferred by the petitioner as endangering the independence of the judiciary or security of tenure of the Chief Justice. It is my reiteration that the procedure outlined in Article 120A (1) is elaborate and well stoked to starve off any possible meddling of the discharge of the mandate reserved for the Judiciary. This means, in my view, that the petitioner's agitation for models preferred in constitutional dispensations elsewhere is not predicated on the need to address any gaps that there may be in our system. It is, at best, an urge to style the wording in manner that suits the petitioner, and I find that too insignificant a reason to call for a deviation from what obtains in our legal system and constitutional set up.

The petitioner has contended that the dispensation that obtains in our system does not meet the test set out in international conventions, standards and norms. In his view, the Indian, Kenyan and Ghanaian models represent the admirable foolproof safeguard against erosion of the independence of the judiciary. The petitioner's argument attempts to portray Tanzania as a lone ranger that has a system which is completely out of sync with other

countries. With great respect, this is outrightly incorrect. My unfleeting reading of the Compendium and Analysis of the Best Practices on the appointment, tenure and removal of judges under the Commonwealth Principles (by Bingham Centre for the Rule of Law), informs that Tanzania falls in the 8.3% of jurisdictions in which appointment of the Chief Justice is in the hands of the Executive alone. Whereas stats show out the position relating to appointment, it is worth of a note that, where removal is inevitable and is to be called into question, the Commonwealth Latimer House Principles require that grounds on which judges may be removed from office be clearly discernible from the legal and constitutional framework under which they serve. This is mainly because removal from office is of vital importance to the rule of law. Because of that importance, the process must be rigorous, and the Commonwealth Principles demand that there should be appropriate safeguards to ensure fairness. The question that flows from the foregoing subscription is: under which framework does the Chief Justice serve? Clearly, in our jurisdiction, the Chief Justice works under the Constitutional Framework which caters for his duties and responsibilities and the provisions of sections 23, 24 and 25 of the Judiciary Administration Act (supra). This framework provides, as well, the manner in which the Chief Justice should leave office, and this is where Articles 118 (2) (c) and 120A

(1) come into play. In my considered view, the combination of Articles 110A and 120A (1) of the Constitution are all about that safeguard, and need does not arise for legislating an entirely new procedure. Doing so would amount to a needless replication of what we already have in our dispensation.

It is useful, in my view, to state, here and now, that the position that obtains in our dispensation on appointment, and even removal of the Chief Justice, is reflected in other countries such as Bahamas, Belize and Sri Lanka, and this is what peoples of these countries desired through their respective constitutional arrangements. It is my take that diversity of methodologies of appointment, tenure and removal of the Chief Justices is a matter that is widely acknowledged by the comity of nations. I find no reason for any squawking. It is all in order.

In the upshot of the foregoing, I find this petition barren of fruits and deserving nothing less than a dismissal. Accordingly, the same is dismissed. No order as to costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 7th day of March, 2023.

M.K. ISMAIL

JUDGE

07/03/2023