IN THE HIGH COURT OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CAUSE NO 36 OF 2022

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION BY HALIMA JAMES MDEE AND 18 OTHERS

AND

IN THE MATTER OF THE DECISION OF CHAMA CHA DEMOKRASIA NA MAENDELEO (CHADEMA) EXPELLING THE APPLICANTS FROM BEING MEMBERS OF CHAMA CHA DEMOKRASIA NA MAENDELEO (CHADEMA)

BETWEEN

HALIMA JAMES MDEE.....1st APPLICANT

GRACE VICTOR TENDEGA.....2nd APPLICANT

ESTER NICHOLAS MATIKO.....3rd APPLICANT

ESTER AMOS BULAYA.....4th APPLICANT

AGNESTA LAMBERT KAIZA.....5th APPLICANT

ANATROPIA THEONEST.....6th APPLICANT

ASYA MWADINI MOHAMED.....7th APPLICANT

CECILIA DANIEL PARESSO.....8th APPLICANT

CONCHESTA LEONCE RWAMLAZA.....9th APPLICANT

FELISTA DEOGRATIUS NJAU.....10th APPLICANT

HAWA S. MWAIFUNGA.....11th APPLICANT

JESCA DAVID KISHOA.....12th APPLICANT

KUNTI YUSUFU MAJALA.....13th APPLICANT

NAGHENJWA LIVINGSTONE KABOYOKA.....14th APPLICANT

NUSRAT SHAABAN HANJE..... ....15th APPLICANT

SALOME MAKAMBA.....16th APPLICANT

SOPHIA HEBRON MWAKAGENDA.....17th APPLICANT

STELLA SIMONI FIYAO.....18th APPLICANT

TUNZA ISSA MALAPO.....19th APPLICANT

AND

THE REGISTERED TRUSTEES OF CHAMA CHA DEMOKRASIA NA MAENDELEO (CHADEMA).....1st RESPONDENT

NATIONAL ELECTORAL COMMISSION.....2nd RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3rd RESPONDENT

Date of Last order: 9th March 2023

Date of Ruling:9th March 2023

RULING

MKEHA J,

In this ruling, the following legal question has to be answered. The question is whether a party to an application can controvert factual averments contained in an affidavit or counter affidavit served upon him in any other way than filing a counter affidavit or affidavit in reply. The question arose in the following way. When the applicants filed the present application, all the three respondents were served with the application and the accompanying affidavits. Subsequent to the said service, only the 1st respondent filed a counter affidavit. In the said counter affidavit, it is alleged by the 2nd and 3rd respondents through Mr. Kalokola learned State Attorney that, there is evidence affecting the interests of the other two respondents i.e the 2nd and 3rd respondents. Neither did the 2nd and 3rd respondents file any affidavit to controvert the evidence of the 1st respondent against them, which allegedly is contained in paragraph 8.0 of the 1st respondent's counter affidavit.

In the course of hearing of the application, Mr. Panya learned advocate for the applicants asked for leave to cross examine the deponents of the counter affidavit of the 1st respondent. The court granted such leave.

Subsequently, Mr. Kalokola learned State Attorney rose to make a similar prayer, that the 2nd and 3rd respondents be allowed to controvert factual averments contained in the counter affidavit of the 1st respondent by way of cross examination. According to Mr. Kalokola learned State Attorney, the two respondents could not have filed anything to counter the 1st respondent's case as Rule 13 of the Judicial Review Procedure Rules of 2014 recognizes filing of a counter affidavit, only upon being served with the application. According to the learned State Attorney, the Rules are silent on what should be done by one of the respondents who wishes to oppose a counter affidavit of a co-respondent. In his considered view and guided by Rule 17 of the Judicial Review Procedure Rules, the two respondents could achieve the said purpose by way of cross examining the deponents of the counter affidavit of the 1st respondent.

Mr. Kibatala learned advocate for the 1st respondent was strongly opposed to the view taken by Mr. Kalokola learned State Attorney. He thus objected prayer for the two respondents being allowed to cross examine the deponents of the counter affidavit of the 1st respondent. According to Mr. Kibatala learned advocate, the two respondents having chosen not to file any affidavit to controvert factual presentations made by the 1st

respondent, could only make legal presentations and not factual presentations aimed at challenging the first respondent's case. The other parts of submissions made by the learned counsel for the parties, though relevant, are not determinative to the question that resolves the controversy between the contending parties. That is the reason for not reproducing them in this ruling.

Rule 17 of the Judicial Review Procedure Rules of 2014 requires the courts to adopt the obtaining procedures at the High Court where the Procedures are silent on how to approach a particular issue brought under the Rules. In cases pegged on affidavits, the evidence adduced before the court is what is averred in the affidavits before the court. Thus, where a party to an application disagrees with or challenges the contents of an affidavit and has evidence to challenge it, the only way to bring it to the attention of the court is by way of a duly sworn affidavit. The law is therefore settled that, when a party does not believe an averment in an affidavit or counter affidavit the best way to dispute it is to file a counter affidavit or an affidavit in reply as the case may be. That is the obtaining procedure at the High court. **See: LUCY THOMAS KIMARO Vs STANBIC BANK (T) LTD & ANOTHER, MISCELLLANEOUS COMMERCIAL APPLICATION NO.**

68 OF 2022. See also **WATHARDA Vs. ULARARAMU (2014) LPELR 24177 (CA) 10.**

The position hereinabove was also insisted by the Court of Appeal of Tanzania in the case of **GILBERT ZEBEDAYO MREMA Vs. MOHAMED ISSA MAKONGORO, CIVIL APPLICATION NO. 369/17 of 2019, CAT (DSM)** Whereby the Court cited its earlier decision in **MANDAVIN COMPANY LIMITED Vs. GENERAL TYRE (E.A) LTD, CIVIL APPLICATION NO. 47 OF 1998** and held as follows:

> *"We declined to entertain an application for review after being satisfied that the applicant failed to contradict by affidavit, the deposition made by the respondent." We said: "We agree with Mr. Ngalo, that, affidavital deposition is evidence on oath which cannot be contradicted by statements from the bar. Such evidence like any other type of evidence given under oath* ***can only*** *by controverted on oath. In the instant case, apart from the statements from the bar by Mr. Lugua learned advocate, denying service, there was no evidence to contradict the respondent's evidence."*

The foregoing quotation as held by his Lordship **Nangela, J** (my brother), is an authority to the affect that, in our jurisdiction, one cannot controvert evidence made under oath by other means than by producing under oath

facts which seek to controvert such other evidence and where such earlier facts are by way of affidavit, then they must be countered or negated in the same way, that is to say, by way of a counter affidavit or affidavit in reply as the case may be. See: **LUCY THOMAS KIMARO Vs. STANBIC BANK (T) LTD & ANOTHER (supra)**

Therefore, the analysis and cited case laws hereinabove support the position taken by Mr. Kibatala learned advocate that, for failure of the 2nd and 3rd respondents to file an affidavit controverting the 1st respondent's counter affidavit, they are precluded from challenging matters of fact arising from the counter affidavit of the 1st respondent. They are however permitted to challenge the first respondent's case on matter of law. See: 1. **YOKABETI SIMON SANGA Vs. YOHANA SANGA, CIVIL APPLICATION No. 1 OF 2011, CAT (UNREPORTED) 2. FINN WURDEN PETERSEN & MLIMANI FARMERS LIMITED Vs. ARUSHA DISTRICT COUNCIL, CIVIL APPLICATION No. 562 of 2017, CAT (UNREPORTED)**. From the foregoing, I allow the 2nd and 3rd respondents' prayer in the following limited extent: The learned counsel for the 2nd and 3rd respondent is only permitted to cross examine the deponents of the

counter affidavit of the 1st respondent on matters of law if any. It is so held.

Dated at DAR ES SALAAM this 09th day of March, 2023

C. P. MKEHA

JUDGE

09/03/2023

Court: Ruling is delivered in open court in the presence of the parties' learned counsel.

C. P. MKEHA

JUDGE

09/03/2023