

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL CASE NO. 236 OF 2022

STEPHANO ABEL SAPI 1ST PLAINTIFF

NASSORO ATHUMANI SAIDI 2ND PLAINTIFF

EKALISTA CHARLES NGOROKA 3RD PLAINTIFF

ASHURA ABDALLAH NYAGONGO 4TH PLAINTIFF

JOSIA ELIABU KAMSOBA 5TH PLAINTIFF

STANISLAUS PETRO BUJIJI..... 6TH PLAINTIFF

JOHN MATHIAS BUSUNGU..... 7TH PLAINTIFF

SUPHIANI HAMIS JUMA 8TH PLAINTIFF

VERSUS

TANZANIA RED CROSS SOCIETY DEFENDANT

RULING

21/04/2023 & 16/06/2023

BWEGOGGE, J.

One Stephano Abel Sapi and 7 others, the plaintiffs herein, have commenced civil proceedings against the defendant alleging that the

defendant has called and convened General Assembly Meeting to deliberate on, among others, the amendment of the defendant's constitution whereas the proposed constitutional amendment was passed by the said meeting of which, allegedly, contravenes the procedure for amending the constitution under article 52 (1) (2) (3) of the Tanzania Red Cross Society of 2018.

Therefore, the applicants prayed for reliefs as under:

- a) An order for declaration that the amendment of the defendant constitution passed and approved by the General Assembly meeting of the National Society called and convened at Dodoma on 09th May, 2022 was illegal and nullity as was in fundamental violation of the constitution of the defendant.*
- b) Declaration order that the defendant through the National Executive Committee (NEC) operation violates the defendant's constitution for failure to observe seven fundamental principles of the Red Cross.*
- c) Costs of the suit.*
- d) Any other reliefs this Court deems fit and equitable to grant.*

The defendant herein, upon receiving summons for order, in tandem with filing of the defence, lodged a notice of the preliminary objections on points of law as thus:

- 1) *That this court is not properly moved to grant prayers sought by plaintiffs, as it contravenes the provisions of section 17(1) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act (Cap. 310).*
- 2) *That the suit is incompetent for being filed without the endorsement of the draw contrary to the express provision of S. 44 (1) and 44 (2) of the Advocates Act (Cap. 341 of 2019).*

The plaintiffs were represented by Mr. Godfrey Francis, learned advocate, whereas the defendant had the service of Mr. Atranus Method, learned advocate. The counsel aforementioned argued the preliminary objections herein orally. Their submissions are briefly recounted hereunder.

Mr. Francis, in substantiating the 1st preliminary objection argued that the defendant is a public entity constituted by law, namely, Tanzania Red Cross Societies Act. That the plaintiffs seek to challenge the decision made by the National Executive Committee of the Tanzania Red Cross Society as depicted by reliefs prayed for in items "a" and "b". Further, the counsel argued that based on the nature of the prayers made before this court whereas the plaintiffs seek to challenge the procedure and legality of the governing body who acted according to the law enacted by the parliament, they were supposed to file judicial review, not normal civil suit.

The counsel opined that the plaintiffs were supposed to file an application for leave; and upon grant of the same, they would then file an application to challenge the acts of the governing body of the Tanzania Red Cross Societies.

Therefore, based on the foregoing, the counsel asserted that the suit filed herein and the prayers made thereon contravenes the provision of sections 17(1) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act [Cap. 310 R:E 2019]. That the prayers in the plaint lodged herein amount to prerogative orders. Hence, this Court is improperly moved to issue the reliefs prayed for.

And, in validating the 2nd preliminary objection, the counsel alleged that the plaint lodged herein lacks endorsement contrary to the provisions of section 44(1) and 44(2) of the Advocates Act [cap 341 R:E 1019] which require the drawer of any legal document to endorse thereon. Therefore, opined the counsel, the suit before this court is incompetent.

Replying to the 1st preliminary objection, Mr. Godfrey, counsel for the respondent, contended that the objection is misconceived in that the defendant's counsel has misinterpreted the provisions of the relevant law. That the provisions of section 17 of the Law Reform (Fatal

Accidents and Miscellaneous Provisions) Act provide for orders in nature of *mandamus*, *prohibition* or *certiorari* whereas to the contrary, the prayers in the plaint are not in the nature of prerogative orders above mentioned; hence, within the ambit and, or power of this court to grant.

And, in respect of the 2nd limb of the preliminary objection raised, the counsel countered that this court should invoke the overriding principles under the Written Law (Miscellaneous Amendment No. 18) Act of 2018 which requires the court to have regard to the substantive justice not technically. The counsel referred the case of **Yakobo Magoiga Gichere vs Penina Yusufu**, Civil Appeal No. 55 of 2017, CA to buttress his argument.

In rejoinder, the counsel reiterated his previous stance which I find it needless to replicate herein.

The issue for determination before this court is whether the objections advanced are merited.

It has been alleged in the 1st preliminary objection that this court is not properly moved to grant the prayers sought by the plaintiffs, as it contravenes the provisions of section 17(1) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act.

Ab initio, I find it pertinent to reproduce the provision of section 17 (1) of the relevant law as hereunder;

Section 17;

1. *"The High Court shall not, whether in the exercise of its Civil or Criminal jurisdiction, issue any of the prerogative writs of mandamus, prohibition of certiorari."*

The above reproduced provision is loud and clear, needing no further interpolation, in that this court is prohibited, in his usual exercise of civil or criminal jurisdiction to issue the prerogative writs.

I now revert to the scrutiny of the prayers in the items "a" and "b" of the plaint. The controversial reliefs were coached as thus:

*a) An order for declaration that the amendment of the defendant constitution passed and approved by the General Assembly meeting of the National Society called and convened at Dodoma on 09th May, 2022 **was illegal and nullity as was in fundamental violation of the constitution of the defendant.***

*b) Declaration order that the defendant through the National Executive Committee (NEC) operation **violates the defendant's constitution for failure to observe seven fundamental principles of the Red Cross.***
(Emphasis mine).

Upon scrutiny of the prayers made above, without much ado, I am on all fours with the defendant's counsel in that the prayers in items "a" and

"b" in the pleadings filed hereto, in substance, amount to prerogative writs. Reading through the line, the relief pleaded in item "a" is in substance the prayer for the writ of *certiorari* though brought in the guise of declaration for nullification. And, the relief pleaded in item "b" is in substance the prayer for the writ of prohibition though guised in the form of declaration of violation.

The provision of section 5 of Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014, **Government Notice 324 of 2014** provides as thus:

1. *"An application for judicial review shall not be made unless a leave to file such application has been granted by the Court in accordance with these Rules".*

The above provision makes it mandatory for leave to be sought and granted prior to the institution of the suit for judicial review/prerogative orders reliefs. It is needless to state that the plaintiffs herein failed to comply with the requirement to seek and obtain leave prior to the commencement of the proceedings herein.

Therefore, in view of the foregoing, it is my considered opinion that the court herein is not properly moved to grant the reliefs sought. It is

patently noticeable that the suit herein is incompetent before this court. And, subject to the foregoing conclusion, I find it needless to discuss the remaining limb of the preliminary objection.

In fine, I find the 1st limb of the preliminary objection meritorious and sustain the same. The suit herein is hereby found incompetent before this court for want of leave. The suit herein is hereby struck out. Since the defendant has responded upon the incompetent petition, the same is entitled to be awarded costs, as I hereby do.

So ordered.

DATED at DAR ES SALAAM this 16th June, 2023.



O. F. BWEGOGGE

JUDGE