**IN THE HIGH COURT OF TANZANIA**

**(DAR ES SALAAM MAIN REGISTRY)**

**AT DAR ES SALAAM**

**MISCELLANEOUS CIVIL CAUSE NO. 18 OF 2022**

**IN THE MATTER OF THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA OF 1977 AS AMENDED;**

**AND**

**IN THE MATTER OF THE BASIC RIGHTS AND DUTIES ENFORCEMENT ACT, CAP. 3 [R.E 2019];**

**AND**

**IN THE MATTER OF BASIC RIGHTS AND DUTIES ENFORCEMENT (PRACTICE AND PROCEDURE) RULES G.N NO. 304 OF 2014**

**AND**

**IN THE MATTER OF A PETITION TO CHALLENGE THE PROVISIONS OF SECTION 7 (1) AND (2) (c) AND (4) (a) AND (6) OF THE TANZANIA CITIZENSHIP ACT, CAP. 357 (R.E 2002) AND SECTION 23 (1) (h) AND (l) AND 27 (2) (a) OF THE IMMIGRATION ACT, CAP. 54 (R.E 2016) AS BEING UNCONSTITUTIONAL**

**BETWEEN**

**1. SHAABANI FUNDI.....1ST PETITIONER**
**2. PATRICK NYELESA NHIGULA.....2ND PETITIONER**
**3. RESTITUTA KALEMERA.....3RD PETITIONER**
**4. NKOLE MUYA.....4TH PETITIONER**
**5. EMMANUEL C. EMMANUEL.....5TH PETITIONER**
**6. BASHIR KASSAM.....6TH PETITIONER**

**VERSUS**

**THE ATTORNEY GENERAL..... RESPONDENT**

**RULING**

*31st May & 20th July, 2023*

**MWANGA, J.**

The instant petition has been preferred by way of originating summons, and pursuant to the provisions of article 26 (2) and 30 (3) of the Constitution of the United Republic of Tanzania, 1977, Cap. 2 [R.E 2002]; hereinafter referred to as "the Constitution". The petition is supported by the sworn affidavits of the petitioners, Shaabani Fundi, Patrick Nyelesa Nhigula, and Emmanuel C. Emmanuel who are residents and citizens of the United

States of America; Restituta Kalemera and Nkole Muya, residents and citizens of the United Kingdom and Bashir Kassam, a resident and citizen of Canada.

It is worthy of a note, that before the petitioners acquired citizenship of the countries in which they are now residents, they were the citizens of the United Republic of Tanzania. The instant petition is a bold attempt to challenge the constitutionality of the provisions of sections 7(1) and (2) (c) and (4) (a) and 7(6) of the Tanzania Citizenship Act, Cap 357 [R.E 2002]; and sections 23(1)(h) and (1) and 27(2)(a) of the Immigration Act, Cap. 54 R.E 2016. The contention by the petitioners is that the cited provisions are offensive of articles 5(1) and (2) (a); 13(1), (2), (4) and (6) (a); 17(1); and 21(1) and (2) of the Constitution. The petitioners' argument is premised on the fact that, having obtained citizenship of their respective countries of residence, the petitioners have, by virtue of the cited provisions of the law, automatically lost their Tanzanian citizenship. This automatic loss, the petitioners assert, has denied them of their rights that are guaranteed in the Constitution.

Simultaneous with filing a reply to the Originating Summons, which was admitted on 2nd January, 2023, the Respondent raised three points of preliminary objections to the effect: -

i. That, the Affidavits filed in support of the Application (Originating Summons) are bad in law in that they contain a jurat of attestation which is incurably defective for being contrary to the mandatory provision of section 8 of the Notaries Public and Commissioner for Oaths Act, Cap. 12 R.E 2019;

ii. That the originating summons is bad in law for contravening the mandatory provision of section 4(1) of the Basic Rights and Duties Enforcement Act, Cap. 3 R.E 2019; and

iii. That the originating summons is bad in law for want of a date and signature of the petitioners and or their legal counsel.

When the parties appeared before the Court on 2nd May, 2023, they unanimously prayed that that the preliminary objections to be argued by way of written submissions, a pray which was acceded to by the Court. It is significant to note that whereas the petitioners enlisted the able services of Messrs Peter Kibatala, and Dickson Matata, both learned Advocates; the respondent enjoyed the usual services of the Office of the Solicitor General

through Messrs Charles Mtale and Salum Othman, the learned State Attorneys.

On perusal of the written submissions filed by the respondent, it came to the Court's knowledge that ground three of the preliminary objections had been abandoned. This left the parties to tussle over two remaining grounds of objection.

Arguing in support of the first point of objection, the learned State Attorneys argued that, the supporting affidavits were neither affirmed nor sworn and attested in accordance with the provisions of section 8 of the Notaries Public and Commissioners for Oaths Act, Cap. 12 RE 2019. It was the Respondent's submission that the cited provision is mandatory and does not brook any contravention of its terms that every notary public and commissioner for oaths must insert his name and state truly in the jurat of attestation the place at which and the date on which the oath or affirmation is taken or made.

The Respondent further contended that, a cursory review of the affidavits reveals that they were prepared in a manner that disaccords, significantly, with the cited provision. With respect to the affidavit of Shaaban Fundi, the contention is that, whereas the same was signed and

verified in United States of America on 23rd November, 2022, it was affirmed virtually in Dar es Salaam on 29th November, 2022. This is exactly seven days after it was signed and verified by the petitioner in the United States of America. The same defect afflicts the Affidavit of Patrick Nyelesa Nhigula which is said to have been signed and verified in United States of America on 7th December, 2022, while it is also indicated to have been virtually sworn at Dar es Salaam on 8th December, 2022, one day after the date on which it was signed and verified in the United States of America. The disparity extends to the deposition by Restituta Kalemera which informs that the same was signed and verified in United Kingdom on 23rd November, 2022, but sworn virtually at Dar es Salaam on 29th November, 2022, seven days from the date it was signed and verified in United Kingdom. The trend is observed with regards to the affidavit deposed by Nkole Muya which is said to have been signed and verified in United Kingdom on 23rd November, 2022, but sworn virtually at Dar es Salaam on 29th November, 2022, seven days from the date it was signed and verified in United Kingdom. The same was contended with respect to the affidavit of Emmanuel C. Emmanuel signed and verified in Houston, Texas, the United

States of America, on 22nd November, 2022, and sworn virtually at Dar es Salaam on 29 November, 2022. Again, it was allegedly signed and verified in United States of America.

The Respondent fortified its contention by referring to the decision of the Court of Appeal of Tanzania in ***Director of Public Prosecutions Versus Dodoli Kapufi and Another,*** CAT-Criminal Application No. 11 of 2008. In the cited decision, the guiding principles of the jurat and what the Commissioner for Oaths has to certify on it were enumerated. It was held that such depositions must show that: -

i. the person signing the document did so in his presence;

ii. the signer appeared before him on the date and at the place indicated thereon; and

iii. he administered an oath or affirmation to the signer, who swore to or affirmed the contents of the documents.

The learned State Attorneys argued that, on the basis of the outlined guidelines, coupled with the advancement of technology and, being cognizant of the fact that our law does not explicitly provide for the procedure and circumstances for execution of remote notarization, affidavits may be sworn in two ways. **First,** by the Deponent appearing physically

before the Commissioner for Oaths (which is practical and conventional method of notarization); and **second**, by the Deponent appearing virtually before the commissioner for oaths (which is the case in the instant matter). In both of these scenarios, learned attorneys argued, the Deponent must appear in person before the commissioner for oaths. It was contended that, in the circumstances, a person appearing virtually before the commissioner for oaths must comply with the directives which require an indication that the person signing the document did so in his presence, on the date and at the place indicated thereon.

It was learned State Attorneys's take that the commissioner for oaths is a witness to the deponent, who signs and verifies the affidavit. It is in view thereof, learned state Attorneys argued, that the word "Before Me" found at the foot of the affidavit means that the signatures are appended by the Deponent in front of the said commissioner for oaths, whether virtually or physically. It implies, therefore, that the date of swearing should be the same as the date on which the deponent appears before the commissioner for oaths, which is not the case in the instant matter.

The respondent's counsel concluded that, the petitioners' affidavits flouted each one of the requirements as set forth in ***Director of Public***

***Prosecutions Versus Dodoli Kapufi and Another***(supra). The respondent emphatically submitted that the affidavits are incurably defective, and that the resultant consequence is that the petition which they support is incompetent and liable to striking out with costs.

With respect to the second limb of the objection, the learned State Attorneys submitted that Section 4(1) of the Basic Rights and Duties Enforcement Act, Cap. 3 R.E 2019 is also couched in a mandatory terms to the effect that, where any person alleges that any of the provisions of Articles 12 to 29 of the Constitution has been, is being, or is likely to be contravened in relation to him, he may, without prejudice to any other action with respect to the same matter, apply to the High Court for redress. The import of the foregoing submission is that redress sought is only limited to allegations of violations of the provisions of Articles 12 to 19 of the Constitution and not otherwise. In that regard, the learned State Attorneys submitted, paragraph (f) of the Originating Summons and paragraph 1 of the Specific Articles of the Constitution which are said to be breached leading to the petitioners' contention of violation of Articles 5(1) and (2) (a) of the Constitution fall outside the purview of the above provision which makes it mandatory that the redress sought must be limited only to allegations of violation of

Article 12 to 19 of the Constitution. The upshot of the above submission is that, since the allegation underpinning the petitioners' originating summons falls outside the scope of the redress as envisaged in the aforesaid provision, the application is incompetent and deserves a dismissal.

The Respondent also contended that, since the application is incompetent for the reasons which are spelt out in its submission and as enumerated above, the incompetent Application cannot be withdrawn or adjourned. Learned Attorneys referred me to the case of ***Mwatima Suleiman Petro and Ramadhani Abdalla Shaaban v. Halima Juma and 8 Others,*** CAT-Civil Appeal No. 293 of 2019, which quoted the case of ***Ghati Methusela v. Matiko Marwa Mariba,*** CAT-Civil Application No. 8 of 2006 (both unreported), wherein it was observed that, incompetent proceedings, be they an appeal, application etc., are incapable of adjournment, for the court cannot adjourn or allow a withdrawal of what is incompetently before it.

The petitioners' rebuttal submission began by referring to the celebrated case of ***Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd.*** [1969] EA 696 at page 701 by stating that, in law, a point

of preliminary objection ought and should only be confined to points of law, nothing more, nothing less. Buttressing their argument, the learned counsel cited the case of ***Sugar Board of Tanzania v. 21st Century Food & Packaging Limited and 2 others*** CAT-Civil Application No. 49 of 2005 (unreported), which was also quoted in the above case. In the latter, it was held that any objection that calls upon the Court to look into evidence, including the absence of the Notice of Motion, is not a point of law and cannot be entertained as a preliminary objection.

In the alternative, the learned counsel cited the case of ***The Director of Public Prosecutions v. Wilfred Muganyizi Lwakatare and Another,*** CAT-Criminal Application No. 23 of 2014 (unreported) concerning ingredients of the affidavit, wherein, at pages 8 and 9, it was stated that an Affidavit shall contain (i) statement of facts by deponent; (ii) Verification Clause; (iii) A Jurat; and (iv) the signature of the deponent, as well as the administrator of the oath or affirmation.

Learned counsel acknowledged that, all affidavits that support the petition were signed and dated at the indicated places on the indicated dates. They also argued that, that is neither an anomaly, nor is it a valid ground of objection for an affidavit to be verified a day or seven days prior to the

attestation, as long as the commissioner for oaths was seized of that fact. The counsel supported their contention by citing the case of ***The Attorney General v. The Board of Trustees of The Cashewnut Industry Development Trust Fund And Another,*** CAT-Civil Application No. 73 Of 2015(unreported), in which it was_held that it is quite in order for the deponent to verify the Affidavit a day ahead of attestation and that it would make a whole difference if such verification was done after the attestation.

As to the mode of administering oaths used in respect of these petitioners, the counsel submitted that, in several occasions, courts have heard cases virtually from witnesses who are outside Tanzania and that in the same legal pedestal commissioners for oaths are permitted to administer oaths virtually.

It is on the basis of foregoing that the learned counsel advanced the following arguments: **One,** that the point raised is not a preliminary objection because it is purely speculative and fact-based allegation or opinion that does not fit in the guidelines provided for in the case of ***Mukisa Biscuits****(supra)*. In the learned counsel's contention, determination of the preliminary objection shall require examination of the commissioner for oaths and/or the Deponent on the details of how the signature was

appended virtually in Dar es Salaam during attestation. **Two,** that the jurat of attestation is clear that the commissioner for oaths administered each and every oath and received affirmation virtually, in respect of each and every deponent on a specified date. **Three,** that what seems to escape the respondent's mind is that, going by the Court of Appeal of Tanzania's reasoning, in the case of ***The Attorney General v. The Board Of Trustees Of The Cashewnut Industry Development Trust Fund And Another*** (Supra) at pages 7 And 8), an affidavit may be prepared and signed by a deponent on **date A** and the same be transmitted to Tanzania and placed before a commissioner for oaths on **date B**, who then reaches out virtually to a deponent. And the commissioner for oaths asks the Deponent whether indeed the Affidavit (contents, signature and verification) is his and upon such confirmation, an electronic signature is appended by the Deponent in the presence of the commissioner onto the respective affidavit, and an oath is administered, or affirmation received by such commissioner in his presence, consequent to which the commissioner appends his signature and stamp. **Four,** that counsel for the respondent seem to still be stuck in the age before the modern electronic era; that is, before the advent of electronic signatures. The learned counsel referred to the provision of

section 6 (1) and (2) (a-b), as well as section 7 (a-e), and 8 (a-b) of the Electronic Transactions Act, Cap. 442 R.E. 2019 which recognize electronic signatures. **Five,** that any argument regarding appearances of signatures is a question of fact, and thus of proof; and no assumptions or conclusions can be made, or validly drawn without evidential contestation procedures.

In response to the second point of preliminary objection, the learned counsel were equally unfazed by it, and took the view that the same was devoid of merits. It was the counsel's submission that, all the prayers, except one, pointed to the fact that the impugned provisions of the law violate provisions that fall within Article 12 to 29 of the Constitution and, since the impugned sections have shown to be in violation of Articles 13 (1), (2) and (4); 13 (6) (a); 13 (6), (a); 21(2); and 17(1) of the Constitution, then the contention that the petition is in contravention of section 4(1) of the Basic Rights and Duties Enforcement Act is patently false and must be disdainfully looked at, and dismissed with costs. In support of the above contention, the learned counsels cited the case of ***Christopher Mtikila v. The Attorney General*** [1995] 31 where it was stated that, Article 26 (2) is an independent and additional source of standing which can be invoked by a litigant depending on the nature of his claim, and that, under this provision, a

proceeding on the protection of the Constitution and legality may be instituted to challenge either the validity of a law which appears to be inconsistent with the Constitution or the law of the land. The counsel also cited the case of the ***Attorney General v. Jeremia Mtobesya,*** CAT-Civil Appeal No 65 Of 2016 (unreported) where it was held that by commencing with the expression "Every person..." as distinguished from "an aggrieved or interested person", the Article confers a standing on a desirous petitioner to seek to protect the rights of another or the general public at large despite having no sufficient interest on the impugned contravention. The counsel submitted that, since in the present petition the petitioners seek to protect the constitution itself (of Article 5 (1) and (2) (a); Article 13 (1), (2) and (4); Article 13 (6) (a); Article 13 (6), (a); Article 21(2); and Article 17(1) then a constitutional petition is the answer and this is precisely what the Petitioners have done. The counsel cited the case of ***Saed Kubenea v. The Attorney General,*** HC-Misc. Civil Cause No. 28 of 2014 (unreported), at pages 8 and 9; in which it was stated that a Petition, even a Constitutional Petition, is a Suit; and in a Suit whether or not a Relief can be granted, or a matter is justiciable, is an issue to be determined upon substantive hearing, and not disposable as a Point of Preliminary Objection, unless it is premised on other

factors such as ouster as limitation, *Res Judicata* or Lack of Notice and such related genres. It was their view that, the current trend of dispensing justice in democratic societies, for which Tanzania aspires to be, is to do substantive justice, and to permit curative measures as it was stated in the case of ***Israel Malegesi and Another v. Tanganyika Bus Service,*** CAT-Civil Application No.172/08 of 2020 (unreported), at pages 6 to 9. According to the counsels, Article 5(1) of the Constitution is in accord with Article 21(1) of the same Constitution which provides the right to vote for all citizens who have reached the age of majority. In their view, the two are intertwined and inseparable.

Learned counsel further argued that nothing under section 4 (1) of the Act is couched "in mandatory terms", and that remedies are obtainable on proof of allegations of violations of Articles 12 to 29 , arguing that they have not seen anywhere in the entire Petition, where striking out of the petition for the reason that Petitioners have, in a single paragraph (paragraph f) of the Relief segment of the Originating Summons and a single paragraph (1) of the specific articles, breached Article 5 (1) and (2) of the Constitution. It is in view thereof, that the counsels urged the Court to overrule the objections as respective affidavits have shown that the petitioners are

personally affected by the impugned provisions and they have also shouldered their public duty, as public-spirited individuals, by invoking Article 26(2) of the Constitution to file this petition.

In rejoinder, the learned State Attorneys reiterated earlier submissions that the raised preliminary objections are on pure points of law and in accordance with the eminent case of ***Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors*** (supra). It was added that, it is a trite principle that, in determining preliminary objections, all what needs to be looked at are the pleadings and their annexture as a whole. The learned State Attorneys distinguished the cited case of ***The Attorney General v. the Board of Trustees of the Cashewnut Industry Development Trust Fund and Another*** (supra) from the instant matter, stating that the argument in this case was that the affidavit was verified by the Deponent on 9th April, 2015 and attested physically before the commissioner for oath on the 10th April, 2015, one day later which is a totally different case. The argument in the instant is that everything is said to have been done virtually or remotely. The learned State Attorneys made reference to the Affidavit of Patrick Nyelesa Nhigula, which, in essence, indicates that he appeared

virtually before the commissioner for oaths on 7th December, 2022, while the commissioner for oaths signature shows that he appeared virtually before him on 8th December, 2022. They took the view that, there was no clarity as to when exactly he virtually appeared before the commissioner for oaths, which means that the person who signed it did not do so in his presence or appear virtually before him on the date indicated.

They further argued that, practically, witnesses whose testimonies are taken virtually do so in the presence of the court (Judicial Officers) with the aid of facilities under the supervision of the court. It was therefore their submission that, conducting such proceedings, including administering oaths virtually, is possible because, there are specific rules of procedure for such judicial undertaking and supporting technological tools under the control of the judiciary. But with respect to remotely sworn affidavit the law is silent, and there is no specific procedure for such undertaking, and such procedure. As such, it cannot be left open and applied blindly and let anyone to do what deems fit in his or her own under the name of advancement of technology.

Regarding the second point of preliminary objection, the learned State

Attorneys submitted that, this preliminary objection was specifically directed to paragraph (f) found at page 4 of the Originating Summons and paragraph 1 of the Specific Articles of the Constitution found at page 7 of the Originating summons. It was submitted that, under Article 26 (2) of the Constitution, every person has the right, in accordance with the procedure provided by law, to take legal action to ensure protection of the Constitution. Under the circumstances, among others, the procedure provided by the law (Section 4(1) of the Basic Right and Duties Enforcement Act, Cap 3 R.E 2019 (BRADEA)), is that the legal action to ensure protection of the Constitution must be in respect to allegations of violation of Articles 12 to 29 of the Constitution and not otherwise.

In that regard, the counsel argued, the provisions of Article 5(1) and 21(1) of the Constitution are not intertwined. That is why the BRADEA made it categorically mandatory that legal action on allegations of violations of the Constitution should be in respect to Articles 12 to 29, with regards to basic rights and duties. The counsel's take is that the respective paragraphs upon which the petition is based are not in compliance with the above provision

of the law, rendering the Originating Summons is incompetent. It was further submitted that, much as the cited cases of ***Christopher Mtikila v. the Attorney General*** (supra) and ***The Attorney General v. Jeremia Mtobesya***, (supra) and ***Saed Kubenea v. the Attorney General*** and ***Israel Malegesi and Another versus Tanganyika Bus Service*** (supra) are good decisions, they are not, in the circumstances of this case, supportive of the petitioners arguments.

I have gone through the contested petition, including affidavits of the petitioners and relevant submissions of the respective counsels in support of and against the two points of preliminary objections. My considered view is that the law is settled, and it is to the effect that a preliminary objection is a pure point of law which, if conclusively determined, can dispose of the matter without any need for further evidence. The rules are clearly provided for in several cases. The case in point here is ***Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd,*** (supra), which was quoted with approval in the cases of ***Sugar Board of Tanzania v. 21st Century Food & Packaging Limited and 2 Others,*** (supra) and ***Hezron Nyachiya v.***

***Tanzania Union of Industrial and Commercial Workers & Another***, CAT-Civil Appeal No. 79 of 2001 ( unreported).

In the present petition, the points of preliminary objection raised by the respondents distil a number of issues. These are: whether the affidavits complied with mandatory provision of Section 8 of the Notaries Public and Commissioner for Oaths Act, Cap. 12 R.E 2019 is a pure point of law; Whether the originating summons contravened the mandatory provisions of section 4(1) of the Basic Rights and Duties Enforcement Act, (supra); and Whether the affidavit of the petitioners and the petition itself contravened the relevant provision of the law to sustained the preliminary objection.

The first point of preliminary objection has its answer in the provisions of Section 8 of the Notaries Public and Commissioners for Oaths Act (supra) and the reasoning in ***Director of Public Prosecutions v. Dodoli Kapufi and Another*** (supra). For ease of reference the said provision is reproduced as hereunder:

> ***"Every notary public and commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall insert his name and state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made".***

The quoted excerpt was complimented further in the same decision of ***Director of Public Prosecutions v. Dodoli Kapufi and Another*** (supra), in which it was reasoned:

> ***"it's brevity a jurat is a certification added to an affidavit or deposition stating when, where and before what authority (whom) the affidavit was made. See, section 8 of the Notaries Public and Commissioner for Oath Act, Cap12 R.E 2002. Such authority usually, a Notary Public*** *and/or* ***Commissioner for Oath, has to certify three matters, namely: -***
>
> *i. That the person* ***signing*** *the document did so in his presence;*
> *ii. That the* ***signer*** *appeared before him on the date and at the place indicated thereon; and*
> *iii. That he administered an oath or affirmation to the* ***signer,*** *who swore to or affirmed the contents of the documents.*

From the foregoing, the issue to be determined is whether the petitioners signed affidavits before or in the presence of the commissioner for oaths. In my considered view, this is the requirement of the law and that nothing waters down this point of preliminary objection. In the case of **D.P.**

***Shapriya & Co. Ltd v. Bish International B.V*** [2002] E.A. 47, the Court held that: -

> ***"The requirement to strictly comply with Section 8 of Cap. 12 is mandatory and not a sheer technicality and that irregularities in the form of a jurat cannot be waived at all by parties".***

Deducing from the decision of the Court, it is easily discernible that the law requires physical presence of the deponent before the commissioner when taking an oath. The words "in his presence" as used in the cited case clearly depict so. In the South African Case of ***Gulyas v. Minister of Law and Order*** [1986] 4 All SA 357 (C), Baker J equated 'in the presence of' to be analogous to 'within eyeshot'. The reason for a commissioner and the deponent to be within eyeshot of one another is for the commissioner to ascertain the identity of the deponent by examining the document provided to him, and comparing it to the deponent, with a view to ensuring that the correct papers are properly deposed to.

However, as acknowledged by both counsel, the modern technology has introduced and it still does introduce various types of programs such as *Zoom, Skype, jitsi meet, google meet,* and similar other inventions as a means of conducting virtual meetings, thereby making life even easier for

those who are at a considerable distance and to utilize them whenever such need arises. And, in consideration of functions of the Court to deal with new innovations, the same technologies or programs can be used in court business. Such use would include hearing of cases. In such cases, physical presence can as well be achieved through "virtual presence", which is simpler in modern times.

In view of the above, the question on whether the oath was administered virtually or remotely is of no significance because, as I have indicated herein, physical presence can as well be achieved or extended to virtual presence. But that is not without proper regulations or procedures in place, otherwise the whole process has the potential of being rendered meaningless. The learned State Attorneys have taken the view that appearing virtually before a commissioner for oaths must comply with the directives which are to the effect that the person signing the document should do so in his presence on the date and at the place indicated therein. However, the learned State Attorneys were economical with a prescription of the means within which "visual presence can be attained in compliance with the law. This is unlike the learned counsel for the petitioners who made reference to the case of ***The Attorney General v. The Board of Trustees***

***of The Cashewnuts Industry Development Trust Fund & Another*** (Supra), in which it was stated that an affidavit may be prepared and signed by a deponent on **date A** and the same be transmitted to Tanzania, and placed before a Commissioner for Oaths on **date B**, the latter of whom reaches out virtually to a deponent. The learned counsel made further reference to sections 6 (1) and (2) (a) and (b), as well as 7 (a-e), and 8 (a-b) of the Electronic Transactions Act, Cap. 442 which recognize electronic signatures. Section 6(a-b) recognizes and accepts electronic signatures and that the requirement said to have been met if-

(a) the method is used to identify the person and to indicate the intention of that person in relation with information communicated; and

(b) at the time the method was used, that method was reliable and appropriate for the purposes for which the information was communicated.

Section 7 (a-e) talks about the identification of electronic signature. It thus provides that an electronic signature shall be deemed to be secure if it- (a) is unique for the purpose for which it is used; (b) can be used to identify the person who signs the electronic communication; (c) is

created and affixed to the electronic communication by the signer; (d) is under control of the person who signs; and (e) is created and linked to the electronic communication to which it relates in a manner such that any changes in the electronic communication would be revealed.

What can be gathered from the affidavits is that, the petitioners either affirmed or swore virtually. There is nothing to indicate that the petitioners appended electronic signatures thereon. As it appears, the signatures are in original form, indicating that they were appended in the country of residence of the petitioners. How the same were transferred back to Tanzania, and Dar es Salaam for the commissioner to attest remains a mystery.

This represents a challenge on how to utilize a virtual plat form that will ensure the deponent and commissioner for oath can both see and hear each other, and that the affidavit is signed by the deponent while the commissioner witnesses the deponent signs and apply the technology in the best manner possible, within the ambit of the law.

South Africa being one of the Commonwealth countries has gone further and made some remarkable development regarding "virtual presence", as opposed to physical presence. In the case of ***Elchin Mammadov and Vugar Dadashov v. Jan Stefanus Stander and***

***Three Others*** **(GP)** (unreported); Case No. 100608/15), Mavundla, J. outlined some steps to be undertaken in order to validate oaths taken virtually or remotely similar to what is alleged to have been done in this case. He guided as follows: **One,** the commissioner shall transmit the affidavit to the deponent by e-mail, which the deponent then prints. **Two,** the deponent evidences their identity by means of a suitable document shown to the commissioner over video technology. **Three,** once the deponent's identity is confirmed, the commissioner applies the questions as to the content and nature of the affidavit and, if the answers are all appropriate, applies the oath or affirmation. **Four,** the deponent then signs, scans the document whereupon it becomes a data message, and sends it back to the commissioner who then prints it, checks to confirm that the document sent by the deponent matches the document sent to the deponent, and if so, signs where required.

In my conviction, the way the commissioning is done in South Africa correlates with what the counsel for the petitioners submitted. As rightly submitted by the counsel for the petitioners, the commissioner for oaths must ask the Deponent if indeed the affidavit (contents, signature and verification) is his and, upon such confirmation, an electronic signature is

appended by the deponent in the presence of the Commissioner, and an oath is administered, or affirmation received by such commissioner, in his presence, consequent to which the commissioner appends his signature and affixes his stamp.

Guided by the foregoing, my considered view is that such procedure is good for adoption in our system because "appearance of the deponent before the commissioner" is a mandatory requirement, and the same can be achieve that way. Looking at the pleadings and annextures in the petition, there is nothing on which to build an impression that the petitioners took the oath virtually, in the presence of the commissioner, and in compliance with Section 8 of Cap.12.

As it can be seen from the jurats, the challenges unearthed by the learned State Attorneys are the following:

i. Whereas the Commissioner signed the petition of the 1st petitioner at Dar es salaam on 29th November, 2022, the 1st petitioner himself indicated that he was affirmed and signed the jurat virtually at Dar es salaam on 29th November, 2022, whilst the same affidavit was verified in the United States of America on 23rd November, 2022.

ii. The commissioner signed the jurat of the 2nd petitioner at Dar es salaam on 8th December, 2022, while the 2nd petitioner indicated that he was sworn and signed the jurat virtually at Dar es salaam on 7th December, 2022. That same affidavit was verified in the United States of America on 7th December, 2022.

iii. The commissioner signed the jurat of the 3rd petitioner on 29th November, 2022, whereas the 3rd petitioner was sworn and signed virtually on the same date, and that the same affidavit was verified in the United Kingdom on 23rd November, 2022;

iv. The commissioner signed the jurat of the 4th petitioner on 29th November, 2022, while the 3rd petitioner indicated that he was sworn and he signed virtually on the same date, and the same affidavit was verified in the United Kingdom on 23rd November, 2022;

v. For the 5th petitioner, the commissioner signed the jurat on 29th November, 2022, while the 5th petitioner indicated that he was sworn and signed virtually on the same date. The same affidavit was verified in the United States of America on 22nd November, 2022;

vi. The commissioner signed the jurat of the 6th petitioner on 17th November, 2022, while the 6th petitioner indicated that he was sworn

and signed virtually on the same date and the same affidavit was verified in Canada on 22nd November, 2022.

The clear import of the pointed variances is that the Respondent is questioning the exact dates on which the petitioners' appeared virtually before the commissioner for oath, as the dates on which oaths were taken virtually differ considerably from each other. The position taken by the learned counsel for the petitioners is that the difference in the dates is not an issue. Their view is predicated on the decision in ***The Attorney General v. The Board of Trustees of the Cashewnuts Industry Development Trust Fund and Another*** (supra) in which it was held that:

> ***"The fact that the deponent verified the affidavit a day ahead of attestation is, to me, innocuous, the more so as the attesting officer was seized of the details. Perhaps, it would have made a whole difference if the verification was done after the attestation."***

In my view, the issue here is not really so much about the difference in the dates. Rather, it is about the exhaustion of procedures which substantiate the claims that the oath was taken virtually in the presence of the commissioner for oaths and that's where the question of dates comes

in. Allegedly, since the oaths were taken virtually or remotely, two things would be expected; **One**, to be informed of the mode on how the affidavits reached the petitioners and returned back to the commissioner for his signature after the virtual oath was taken, either through an e-mail or other modes of transporting the documents. **Two,** that such mode of transporting the documents to be provided through an additional affidavit, stating clearly how integrity of the process was maintained. Otherwise, the submission that the petitioners took oath virtually becomes a mere statement without any semblance of evidence. In the South Africa case of ***S v. Munn*** 1973(3) SA 734 (NC) Katzew AJ, held that:

> ***"The purpose of the administration of oath is twofold, namely to add to the dignity of the occasion and obtain irrefutable evidence that the relevant deposition was indeed sworn to".***

It is in view thereof I hold that though an oath may be taken virtually or remotely, the process should be to the satisfaction of the court that the facts pleaded come from the deponent and not otherwise and, that the deponent appeared before the commissioner for oaths, which is a conditional precedent set out in Section 8 of Cap.12

The second preliminary objection was with respect to the originating summons, and the contention is that the same is bad in law for contravening mandatory provision of section 4(1) of the Basic Rights and Duties Enforcement Act (supra). The cited provision, read together with subsection (2), loudly and clearly prescribe that a person is eligible to apply to the High Court for redress on any allegations of breach of the provisions of articles 12 to 29 of the Constitution, if that person has been affected personally. For ease of reference, let me quote the relevant sections 4(1) and (2) as hereunder.

> ***4(1)-"Where any person alleges that any of the provisions of Articles 12 to 29 of the Constitution has been, is being or is likely to be contravened in relation to him, he may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the High Court for redress.***
>
> ***(2) Without prejudice to the provisions of the Commission for Human Right and Good Governance Act, relating to powers of the Commission to institute proceedings, an application under subsection (1) shall not be admitted by the High Court unless it is***

***accompanied by an affidavit stating the extent to which the contravention of the provisions of Articles 12 to 29 of the Constitution has affected such person personally".***

Having gone through the affidavits of the petitioners, specifically paragraphs 11,13 and 15 of the first petitioner's affidavit; paragraphs 8, and 9 of the 2nd petitioner's affidavit, paragraphs 8, 9, 10 and 14 of the 3rd petitioner's affidavit , paragraphs 9, 10, 11 and 12 of the 4th petitioner's affidavit , the 5th petitioner's affidavit at paragraphs 9, 10, and 11, and the 6th petitioner's affidavit at paragraphs 7, 8 and 9; one can tell that petitioners asserted that their constitutional rights under articles 5(1) and (2) ( a); articles 13(1), (2), (4) and (6) (a); articles 17(1) and article 21(1) and (2) of the constitution have been violated by existing provisions of Section 7(1) and (2) (c) and (4) (a) and 7(6) of the Tanzania Citizenship Act, Cap. 357 [R.E 2002] and Section 23(1) (h) and (1) and 27(2) (a) of the Immigration Act, Cap. 54 R.E 2016.

In essence, the applicable procedures pursuant to article 26(2) of the Constitution is under section 4(1) of the Basic Rights and Duties Enforcement Act (supra), which applies only for rights under the mentioned article 12 to 29 of the Constitution. Therefore, the relevant article 5(1) and

(2) (a) was pleaded out of context. In the decision of this court in ***Legal and Human Rights Centre and Another v. Hon. Mizengo Pinda and The Attorney General,*** HC-Misc. Civil Cause No. 24 of 2013 the Court held that:

> ***"We think that the petitioners' standing is provided for by article 26 (2) of the Constitution, and as well-articulated by Lugakingira J. in Mtikila (1). There is no similar wording in article 30 (3). However, it seems clear to us that the rights in article 26 (2) can only be pursued in accordance with the law".***

The relevant law here, as rightly contended by the leaned State Attorneys, is the provision of section 4(1) and (2) of the Basic Rights and Duties Enforcement Act (supra). It is unreservedly to the effect that the petitioners had the rights to take legal action to ensure protection of the Constitution only on matters falling under section 12 to 29 of the Constitution. It is, undoubted that, article 5(1) and (2) (a) of the Constitution, which is one of the main contentions in this petition, does not fall under article 12 to 29 to seize this Court with competence to try it.

That said, I hold and find that the instant petition is incompetent and unmaintainable. It follows, therefore, that the same must be and is hereby

dismissed. This being a constitutional matter, I order that each party shall bear its own costs.

Order accordingly.

**H. R. MWANGA**

**JUDGE**

**20/07/2023**

**COURT:** Ruling delivered in the presence of Mr. Peter Kibatala, learned Advocate for the Petitioners and Mr. Kaoneka Jamali assisted by Mr. Salum Othman, learned State Attorneys for the Respondent.

**H. R. MWANGA**

**JUDGE**

**20/07/2023**