IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

(NDUNGURU, ISMAIL AND KAGOMBA, JJJ)

MISCELLANEOUS CIVIL CAUSE NO. 08 OF 2023

IN THE MATTER OF THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA [CAP 2] AS AMENDED;
AND
IN THE MATTER OF THE BASIC RIGHTS AND DUTIES ENFORCEMENT ACT [CAP 3 R.E 2019] AS AMENDED;
AND
IN THE MATTER OF A PETITION TO CHALLENGE THE CONSTITUTIONALITY OF INTERGOVERNMENTAL AGREEMENT BETWEEN THE UNITED REPUBLIC OF TANZANIA AND THE EMIRATE OF DUBAI CONCERNING ECONOMIC AND SOCIAL PARTNERSHIP FOR THE DEVELOPMENT AND IMPROVING PERFORMANCE OF SEA AND LAKE PORTS IN TANZANIA THAT WAS DEBATED AND PASSED BY THE NATIONAL ASSEMBLY OF TANZANIA ON THE 10TH OF JUNE, 2023

BETWEEN

FREDRICK ANTHONY MBOMA .....PETITIONER

AND

THE ATTORNEY GENERAL .....RESPONDENT

RULING

15/08/2023 & 17/08/2023

KAGOMBA, J.

This petition belongs to the same family as Misc. Civil Cause No. 5 of 2023 between **Alphonce Lusako & 3 Others vs. The Attorney General**

& 3 Others ("Alphonce Lusako's case"), a judgment of which was delivered by this court, in Mbeya, on 10th August, 2023. Their common totem appears to be the constitutionality of the Intergovernmental Agreement signed between the United Republic of Tanzania ("URT") and the Emirate of Dubai on 10th June, 2023 ("IGA"). The IGA is concerned with economic and social partnership between the State parties for the development and improvement of performance of sea and lake ports in Tanzania, as well as other economic infrastructures. Petitioners in both cases appeared to have sensed some intolerable stench from the manner the IGA was signed by the government of URT and its subsequent ratification by the Parliament. There is feeling that the process was faulty for non-observance of the URT Constitution, 1977 [Cap 2] as amended from time to time.

It happened that when the petitioners in Alphonce Lusako's case knocked the doors of this court in its Mbeya sub-registry to challenge the IGA, Fredrick A. Mboma, the petitioner herein, did the same at this registry, albeit on slightly different tone. He filed his petition under a Certificate of Utmost Urgency, accompanied by an affidavit sworn by himself. The reason for escorting his petition with an SOS, is that its object could soon be defeated if the hearing was not fast-tracked. In paragraph 4 of his affidavit,

the petitioner discloses his motivation for petitioning the court, where he says:

> *"4. My interest in this matter is to enforce the Constitution duties owed to the United Republic (not rights, or duties owed to me) required of every person;*
>
> - *to protect the Constitution and laws of the land;*
> - *to protect natural resources;*
> - *to protect state property;*
> - *to combat all forms of waste and squander;*
> - *to protect, preserve and maintain the independence, sovereignty, territory and unity of the nation; and*
> - *to manage the national economy assiduously as people who are masters of the destiny of their nation".*

He avers further that he was alerted on the presence of Alphonce Lusako's case by an article in the website of **Mwananchi Newspaper** titled "***Mawakili walifikisha Sakata la bandari Mahakamani***" whereby he "understood that there's a case pending at the High Court in Mbeya, titled as Misc. Civil Cause no. 5 of 2023 challenging the IGA". He also specifies in paragraph 9 and 10 of his affidavit the articles of the Constitution forming the basis of his petition. Finally, he seeks seven orders of this court, as stated in his Originating Summons made under Articles 26,27,28(1) and 108(2) of

the URT Constitution; sections 4 and 6 of the Basic Rights and Duties Enforcement Act, [Cap 3] and any other applicable provisions of the law.

Some of the orders sought by the petitioner are; to order the respondent to produce a certified copy of the IGA that was tabled before the National Assembly of the URT for discussion and ratification on 10th June, 2023; to declare whether the IGA is a contract or not; to order the respondent to state on affidavit supported by documentary evidence on whether, following the ratification of the IGA by the National Assembly, the IGA is now a treaty or not, and whether it is an Act of Parliament or not, and if the IGA is not yet a treaty nor an Act of Parliament, then the respondent to state the reason(s) as to why it is not yet so; and to declare whether the IGA contravened the provisions of Articles 9(b), 9(c), 9(d), 9(i), 9(k), 25(1), 25(3)(d)(iii), 27(2); and Article 9(h) when read together with Article 4(3) and item 11 in the list of union matters. He also prayed for any other order(s) and/or declaration(s) as the court may deem just; and that each party to bear own costs.

The commonality of the instant case and the Alphonce Lusako's case is of legal significance. Both are public interest litigation filed by URT citizens against their government, challenging the constitutionality of the IGA and

engaging the court to determine whether IGA is a contract. These issues have already been decided upon by this court in Alphonce Lusako's case.

It happened that when Alphonce Lusako's case was still *sub judice* with all its preliminaries sorted out ready for hearing, the court ordered, with a nod from both parties, the stay of proceedings of this instant matter pending the hearing and determination of its sister case. On 14th August, 2023 when this matter came up for a mention before Ndunguru, J, singly, the petitioner indicated that he had substantive prayers to make, for which an adjournment was ordered until 15th August, 2023 so that he could make his prayers before our panel, which he has now done.

Before us, through virtual proceedings, were on one hand, Mr. Fredrick A. Mboma, the petitioner, who sagaciously fended for himself, while Messiers Lukelo Samuel and Francis Rodgers, both learned Principle State Attorneys were at the High Court building, Dar es Salaam and Mr. Joseph Tibaijuka, a learned State Attorney was at the High Court building in Mbeya, making a team of three to represent the respondent. With the court panel duly constituted, that awaited opportunity for the petitioner to address us on his prayers, arrived.

Seizing the opportunity, the petitioner skillfully made three prayers after warning the court not to be mistaken that he was arguing a preliminary objection against his own case, or he was unprepared to take on the respondent's counsel. **Firstly,** he prayed the court to declare this petition *res judicata* and consequently dismiss it following the recent pronouncement, by this court, of the judgment in Alphonce Lusako's case. **Secondly**, to order each party to bear own costs. And **thirdly**, to order that he be availed with the judgment, proceedings and other documents in Alphonce Lusako's case.

As for the first prayer, the petitioner submitted that the instant petition is substantially the same as Alphonce Lusako's case, with both cases challenging the constitutionality of the IGA, having parties substantially the same, as in both cases the petitioners are citizens of Tanzania suing their government. It was his further contention that the decision in Alphonce Lusako's case has determined the matter substantially in issue in the instant case, with a total effect of rendering it *res judicata*. He referred us to the provisions of section 8 and 9 of the Civil Procedure Code [Cap 33 R.E 2019] ("**CPC**") and the cases of **Jebra Kambole v. the Attorney General**, Civil Appeal No. 236 of 2019, and **Emmanuel Simforian Massawe v.**

Attorney General, Civil Appeal No. 216 of 2019, both being decisions of the Court of Appeal. In the latter decision, he said, the Court of Appeal stated that the principle of *res judicata* applies to constitutional cases too. It was his humble contention that even if this court would proceed with hearing of the instant matter, it would not avoid determining the constitutionality of the IGA, an issue that has already been decided upon in the other case.

Addressing us on the available remedies following declaration that this petition is *res judicata*, he submitted that the court has options of either striking out the petition or dismissing it or, in unlikely circumstances, proceed with its hearing to finality. He indicated that he was not unprepared to proceed with hearing, save that he saw no other befitting remedy than to dismiss the petition in conformity to the authorities he cited to us earlier. As to why he didn't opt to withdraw the petition, being another option, he conceded that it was, indeed, an available remedy but rebelled not to pursue it, ostensibly for fear of being burdened with costs of the case. He clarified that if the matter was to be struck out, there would be room for refiling but if it is adjudged *res judicata* the same will be dismissed and will not resurface.

He enjoined the court not to order costs upon dismissal of the petition, adding that with declaration of the petition to be *res judicata*, the question of costs will not arise as the jurisdiction of the court will be curtailed.

Lastly, he prayed to be availed with all documents pertaining to Alphonce Lusako's case, submitting that it was his right to know what transpired therein as the matter was a public interest litigation.

Responding to the above submissions, Mr. Samuel for the respondent was at one with the petitioner in most of his views and prayers. He, however, took a rather strong exception to the available remedies, contending that the cited cases of **Jebra Kambole v. Attorney General** and **Emmanuel Simforian Massawe v. Attorney General** (supra) were dismissed because they were heard to finality, which is not the case in the instant matter that was merely stayed. He implored us to note that distinction while praying the court to struck out the petition, as an appropriate remedy.

Mr. Samuel's views were conglomerated by his colleague Francis Rogers, who came up with decisions of the Court of Appeal differentiating the instances where the orders of striking out and dismissal can be made.

He cited to us the cases of **Ngoni Matengo Cooperative Marketing Union Ltd. v. Ali Mohamed Osman [1959] EA 577**; and **National Insurance Corporation (T) Ltd. v. Shengena Ltd**., Civil Application No. 230 of 2015. He submitted that in the latter case, the Court of Appeal stated that a case that has not been heard to finality can be struck out and would not to be dismissed. He therefore prayed the court to struck out this petition. He deflated the petitioner's fear of carrying the burden of costs of the case by agreeing with him on his prayer that each party should bear own costs.

As regards the petitioner's prayer to be availed with copies of the judgment and proceedings in respect of Alphonce Lusako's case, Mr. Rodgers had no any hard feelings, but suggested that the judgment, being a public document, could be obtained by downloading it from the court's website while the proceedings could be sought from the Registrar.

In his rejoinder the petitioner, by and large, reiterated his earlier submission while praying to be availed with the proceedings of the other case even by email.

From the above submissions, we are confronted with two substantive issues for our determination. **Firstly**, whether the matter at hand is *res judicata* following our decision in Alphonce Lusako's case; and, if so, **secondly**, what is the appropriate remedy on the fate of this suit, in light of the petitioner's prayer?

The first issue is rather a matter of confirmation of the position of the law, and it shall not detain us. Both the petitioner and the counsel for the respondent are reading the same page of the law, and so do we. Section 9 of the **CPC** provides the ingredients of the principle of *res judicata* with explanations. A suit or an issue is considered *res judicata* if; the matter directly and substantially in issue in the latter suit has been directly and substantially in issue in the former suit; parties being the same or being a suit between parties under whom they or any of them claim litigating under the same title; the court trying the subsequent suit being competent and being the court in which the same issue was previously raised, heard and finally determined.

It is irrefutable that in Alphonce Lusako's case (the former suit) the constitutionality of the IGA was raised, heard and finally determined by this

court. In both suits, the petitioners are citizens suing their government under a public duty of protecting their natural wealth and resources. That being the case, the petitioners are litigating under the same public title. This is in sync with the Explanation Note VI under section 9 of the **CPC,** which clarifies that:

> "***Where persons litigate bona fide in respect of a public right*** *or of a private right claimed in common for themselves and others,* ***all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating".***

[Emphasis added].

Therefore, the petitioners in Alphonce Lusako's case and the petitioner in the instant matter are, in this respect, deemed to be one and same. It follows that since the other elements of *res judicata* are in place as shown above, the court's decision on the constitutionality of the IGA made in the earlier suit binds the petitioner in this subsequent suit. Therefore, without any further ado, we hold that the instant matter is, in the eyes of law, *res judicata* following the decision of this same court on the issue of constitutionality of the IGA and on whether IGA is a contract. This disposes of the first issue.

As regards the second issue concerning the fate of this petition, we are not moved by the petitioner's contention that the appropriate remedy is to dismiss it. There is a very long and strong chain of authorities on the position that where the matter has not been heard on merit, and for some reasons the same has to be dislodged, the appropriate remedy would be an order to struck it out and not a dismissal.

When rejoining, the petitioner was indifferent as to the above position of the law, murmuring that there were instances where a suit is dismissed without being heard on merit, to finality. We agree with him. Indeed, there are exceptions to the general rule, and in this respect the same was enunciated in **Ngoni Matengo (supra)** and was echoed in numerous similar decisions which followed. For example, the Court of Appeal in **Mabibo Wines & Spirits Limited v. Fair Competition Commission and Three Others**, Civil Application No. 132 of 2015 (unreported) stated:

> *"We should pause here to observe albeit en passant, that it will turn differently if the relevant Legislation or Rules of the Court imposes, on the Court a duty or discretion to give a dismissal order with respect to a matter which has not been heard on the merits. A case in point is, for instance Rule 63(1) of the Rules which gives the Court a*

discretion to dismiss an application in the wake of the non-appearance of the applicant".

Apart from the exception in Rule 63(1) of the Court of Appeal Rules, which applies to the Court of Appeal, we have in mind the provision of section 3(1) of the Law of Limitation Act [Cap 89 R.E 2019] which instructively requires that a matter filed outside the prescribed time limitation has to be dismissed. As such, these are some of the exceptions to the general rule.

Other decisions of the Court of Appeal supporting our line of contention include **National Insurance Corporation (T) Ltd. v. Shengena Ltd**.(supra) cited to us by counsel for the respondent, and **Attorney General Zanzibar v. Jaku Hashim Ayoub and Another**, Civil Appeal No. 241 of 2020, CAT at Zanzibar. On page 8 to 9 of the typed ruling of the latter case, the Court of Appeal stated:

"At this juncture, we are compelled to remark that upon numerous decisions of this Court and its predecessor, the law is settled as to when it comes to the Court taking a decision whether to dismiss or strike out an application or appeal before it. Instructively, in ***Ngoni Matengo Cooperative Marketing Union Ltd. v. Ali Mohamed Osman*** *[1959] EA*

577, the defunct Court of Appeal for Eastern Africa pronounced as follows: -

> *"This Court, accordingly, had no jurisdiction to entertain it, what was before the Court being abortive and not a properly constituted appeal at all.* ***What this Court ought to strictly have done in each case was to "strike out" the appeal as being incompetent, rather than to have "dismissed" it, for the latter phrase implies that a competent appeal had been disposed of****, while the former phrase implies that there was no proper appeal capable of being disposed of". [Emphasis added].*

Based on the cited decisions of the Court of Appeal, the position of the law can be stated thus; where a matter has not been heard on merit by court, and a good reason arises to dislodge it by means other than withdrawal, such a matter will be struck out unless there are specific provisions of the law providing otherwise. As we find no such a shield in respect of the matter at hand, we do not hesitate to pronounce that the appropriate remedy regarding the fate of this petition, consequential to our decision in Alphonce Lusako's case, and in view of the petitioner's prayer, is to struck it out, and we so hold.

Regarding the petitioner's prayer to be availed with the proceedings of Alphonce Lusako's case, we have no qualms granting it. Accordingly, we order the Registrar of the High Court at Mbeya sub- Registry to avail the same to the petitioner who is deemed to be a party to those proceedings.

In the upshot, this petition is struck out. However, since there is no denying that this matter constitutes a public interest litigation, we make no order as to costs. Order accordingly.

Dated at **Dar es Salaam,** and delivered virtually this 17th day of August, 2023.

DUNSTAN B. NDUNGURU

JUDGE

MUSTAFA K. ISMAIL

JUDGE

ABDI S. KAGOMBA

JUDGE