IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CIVIL CAUSE NO. 09 OF 2023

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

AND

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

AND

IN THE MATTER OF INTERGOVERMENTAL AGREEMENT BETWEEN THE UNITED REPUBLIC OF TANZANIA AND THE EMIRATES OF DUBAI CONCERNING ECONOMIC AND SOCIAL PARTNERSHIP FOR THE DEVELOPING AND IMPROVING PERFORMANCE OF SEA AND LAKE PORTS IN TANZANIA

BETWEEN

MECZEDECK MAGANYA ---------- PETITIONER

VERSUS

THE ATTORNEY GENERAL ---------- 1ST RESPONDENT

THE UNITED REPUBLIC OF TANZANIA

HON. THE MINISTER FOR WORKS AND TRANSPORT -------- 2ND RESPONDENT

HON. THE DIRECTOR GENRAL OF

TANZANIA PORTS AUTHORITY ---------- 3RD RESPONDENT

THE CLERK OF THE NATIONAL ASSEMBLY ..... 4TH RESPONDENT

RULING.

MAGHIMBI, J:

By way of originating summons, on the 17th day of August, 2023, the petitioner, Meczedeck Maganya, filed a petition under the provisions of Article 27(1)&(2) and Article 30 of the Constitution of the United Republic of Tanzania, 1977, Cap. 2 (R.E 2002) ("the Constitution"), Section 4 and 5 of the Basic Rights and Duties Enforcement Act, Cap. 3 (R.E 2019) ("the BRADEA") and Rule 4 of the Basic Rights and Duties Enforcement (Practice and Procedure) Rules 2014 ("the Rules"). He is moving this court for the following relief(s):

1. A declaratory Order that the Respondents have a constitutional duty and mandate to protect and preserve all properties and resources collectively owned by the people, as imposed by Article 27 (1) and (2).
2. A declaratory Order that the Respondents have violated Article 27 (1) and (2) by failure to exercise its constitutional duty to protect and preserve public properties and resources collectively owned by the people.
3. An order that the 1st and 2nd Respondents be restrained from dealing in any manner with the furtherance of the execution of the Intergovernmental Agreement between Tanzania and the Emirate of

Dubai dated 22nd October 2022, more particularly the exchange of instruments as required by the said agreement, for reasons that the agreement is not in the interest of the people of the United Republic of Tanzania, not transparent and did not follow the procurement process and principles of good governance.

4. A declaratory Order that the Respondents are required by laws to safeguard and combat all forms of waste and squander to the property of the state authority and all properties and resources collectively owned by the people of the Republic of Tanzania.
5. A declaratory Order that the 2nd Respondent's act of signing the Intergovernmental Agreement between the United Republic of Tanzania and the Emirate of Dubai on the 22nd of October 2022 is in breach of Article 27 (1) and (2) of the Constitution.
6. An order that the Act of the 4th Respondent to table before the Parliament the said Intergovernmental Agreement dated 22nd October 2022 was in violation of Article 27 (1) and (2) of the Constitution.
7. That since this is a Public Interest case no orders for costs be granted.
8. Any other relies/reliefs the Honourable court may deem fit to grant.

The originating summons has been taken on the grounds set forth in the affidavit of Meczedeck Maganya, the petitioner herein, sworn on the 01st day of August, 2023.

While filing their reply to the originating summons under Rule 6(1) of the Rules, the respondents filed along a notice of preliminary of objection on points of law that:

1. The petition is bad in law for being Res Judicata as the issues in contention have been finally determined by this Honorable Court in Misc. Civil Cause No. 5 of 2023 between Alphonce Lusako and 3 Others Vs. Attorney General and 3 others.
2. The petition is bad in law for being frivolous and vexatious hence an abuse of court process.
3. The petition is incompetent and bad in law for contravening Section 6(e) of the Basic Rights and Duties Enforcement Act, Cap. 3 R.E 2019.
4. The affidavit in support of the petition is defective for containing averments which are statements of opinion and conclusion.

On those points of objection, the respondent moved the court to dismiss the petition in its entirety, with costs. When the matter came for hearing on the 18th September 2023, the applicant was represented by Mr. Mpare Mpoki, learned Senior Counsel, Mr. Meckzedeck Joachim, Ms. Rose Nyatega and Mr. Peter Majanjala, all learned advocates. On their part, the respondents were represented by Mr. Mark Mulwambo, Principal State Attorney, Mr. Edson

Mweyunge Principal State Attorney, Mr. Hangi Chang'a Principal State Attorney Mr. Stanley Kalokola and Mr. Edwin Webiro, both State Attorneys.

At the onset of their submissions, Mr. Mulwambo tabled a prayer before the court that the respondents wish to drop the third limb of their objection. He then informed the court that Mr. Stanley will submit on the 1st and 2nd points of objection and the third point of objection will be submitted by Mr. Edwin Webiro.

In the interest of convenient and expeditious disposal of the matter, I will determine the points of objections separately as they were argued by the parties. The first objection will be determined first and in case the same does not determine the matter, I will then determine the second point of objection as it is dependent on the outcome of the first point of objection. In a further case that both the objections are found to be lacking in merits, then the third point of objection will be determined.

Before going into the merits of the objection, I must first determine the point raised by Mr. Mpoki challenging the competence of the points of objection No. 1 and 2 as raised by the respondents. His argument is that the two points do not qualify to be called points of preliminary objections because a point of preliminary objection is a point which goes to the

jurisdiction of the court, and it should be based on a pure point of law. He based his submissions on the principles set down in the celebrated case of **Mukisa Biscuits Manufacturing Limited Vs. West End Distributors Limited, 1969 Vol. 1 EA 696** pointing to the relevant part of the holding by Sir Charles Newbold at page 701 which reads:

> *"a preliminary objection is in the nature of what used to be a demur, it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is exercise of judicial discretion"*

He then argued that from the cited quotation by Sir Newbold, a Preliminary Objection is supposed to be on a pure point of law on the facts pleaded and the court cannot look outside the pleadings. Further that it should not be ascertained as no proof will be required while arguing on a preliminary point of law. He further cited the case of **Babito Limited Vs. Freight Africa NV-Belgium, Civil Appeal No. 355/2020** (unreported) and **Mohamed Enterprises Tanzania Limited Vs. Masoud Mohamed Nasser, Civil Application No. 33 of 2012, CAT (DSM)** where the Court of Appeal adopted the position of the then EACJ.

He went on submitting that the two points of objection raised by the respondent in the current application don't meet a requirement of the preliminary objection as argued above. Further that the position has since remained the same, pointing that the plea of res judicata is plea of mixed law and facts. He then argued that since it is a mixture of law and facts, it means that one cannot simply establish the ingredients of res judicata without adducing proof in court. That in proving res judicata, the respondent tried to convince the court that there are two cases, one has been decided and one yet to be decided but they are substantially and directly the same to the current case.

His subsequent argument was that there is no way that it can be proved without needing evidence of the previous cases, since to establish that the latter is similar to the former, one has to show the court that the subject matter is the same, the cause of action is the same and the relief is the same and the only way to look at these things if they are similar is by looking at the plaint and the judgment. His conclusion was that this court cannot determine that these two matters are the same in the absence of pleadings and judgment in the previous case. On that regard, he submitted, the only

thing court can do is to take judicial notice, but judicial notice is only in judgment and not on the pleadings.

Mr. Mpoki then cited authorities in which the court held that the plea of res judicata is a mix of law and facts. He started with some Indian authorities in confidence that Section 11 of the Indian CPC is in peri material with our Section 9 of the CPC hence the judgments are highly persuasive because they talk about a statute which is in peri material to our CPC. The first case he cited is the case of **Smt. V. Rajeshwari Vs. T.C. Saravanabava** on 16 December, 2003, Supreme Court of India in which at page 3 the last para the court held:

> *"not only the plea has to be taken, it has to be substantiated by producing the copies of pleadings, issues and judgment in the previous case. Maybe in a given case only copy of judgment in previous case is filed in proof of pleading of res judicata and the judgment contains exhaustive or requisite the statement of pleadings and issues which were detected as in our proof."*

He emphasized that on his part, he does not remember seeing any of the pleadings and even the exhaustive judgment was not produced in this

court. In the absence of the pleadings and judgments, his conclusion was that that court cannot determine the four elements of res judicata.

In reply, Mr. Kalokola initially pointed out that in cases cited by Mr. Mpoki, there is no holding to the effect that a plea or res judicata is not pure point of law. He cited the case of **Tanzania Women Lawyers Association vs Attorney General (Misc. Civil Cause No.22 of 2019) [2020] High Court of Tanzania 2904; (03 July 2020),** a decision which clearly stated the position that a plea of res judicata is a pure point of law. His argument was that the case was not even distinguished by the Counsel, emphasizing that the same position was reiterated in the case of **Fredrick Anthony Mboma vs The Attorney General (Miscellaneous Civil Cause No. 08 of 2013) [2023] TZHC 20190 (17 August 2023)** in which this court upheld a PO on plea of res judicata. He also pointed at Mr. Mpoki's admission that the court is to take judicial notice of the existence of a judgment, a point which he argued should be the case in the court in terms of the existing judgment in the case of **Alphonce Lusako & 3 Others vs Attorney General & 3 Others (Misc. Civil Cause 5 of 2023) [2023] TZHC 19947 (10 August 2023).** He concluded that the entire submission by Mr.

Mpoki that a plea of res judicata is not a pure point of law is baseless and should be declined.

Having heard the parties on this point, I will begin with the principle laid down in the cited celebrated case of **Mukisa Biscuits** whereby the court emphasized that a preliminary point of objection has to be argued on the assumption that all the facts pleaded by the other side are correct. On that principle, the court negated an argument on a point of law where facts are to be ascertained (by evidence) or where the decision on whether a point is a preliminary point of law has to be decided based on exercise of judicial discretion. I will start with the point that the current petition is res judicata of the previously decided cases of **Aplhonce Lusako** and the case of **Fredrick Anthony Mboma vs The Attorney General [2023] TZHC 20188 (17 August 2023)**

It was Mr. Mpoki's submission that in determining this point, the court has to look at the pleadings, relief(s) sought and the court verdict in the previous cases. He cited the Indian case of **Smt. V. Rajeshwari Vs. T.C. Saravanabava** where he relied on the holding that not only the plea has to be taken, it has to be substantiated by producing the copies of pleadings, issues and judgment in the previous case in order to decide that what has

been decided by the judgment which operated as judicata is the same as in the subsequent case.

On their part, Mr. Kalokola argued that the cited cases did not show that a plea of res judicata could not be argued as point of law and the fact that there is a judgment and ruling on the same subject matter should be looked upon in deciding whether the current petition is res judicata of the initial petition and the second petition.

On my part, I agree with the parties that the principles of determination whether a matter is res judicata have to be looked at in line with the provisions of Section 9 of the Civil Procedure Code, Cap. 33 (R.E 2019) ("the CPC"). The Section provides:

> *"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court."*

In the cited Section, the law prohibits a court to try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in the same court competent to try such subsequent suit. To elaborate that, six explanations to determine whether a matter is res judicata have been set under the CPC. The court must first determine whether there is a suit which has been decided prior to the suit in question. In determining this part, the issue on whether or not the current suit was instituted prior thereto is irrelevant.

The second factor to look at is the competence of the court to try the preceding suit in relation to the subsequent suit, irrespective of any provisions as to a right of appeal from the decision of such court. In principle, the matter in question must have been alleged by one party and either denied or admitted, expressly or impliedly, by the other in the former suit and where persons litigate bona fide in respect of a public right like the case at hand, all persons interested in such right shall be deemed to claim under the persons so litigating.

From the tests above, it is my strong view that a plea of res judicata may be determined as a preliminary point of objection because, in order to determine whether evidence is required, a thorough analysis of the point raised must be done before any conclusion can be made on the competence of the objection. I have to look at the pleadings in the petition and tailor them with the essence of what was decided in the previous suit and subject them to the tests set in the explanations under Section 9 of the CPC. In case further evidence is required to make a finding on the resemblance of the subject matter, parties and or court, then the matter seizes to be a preliminary point of law. Otherwise, a plea of res judicata can well be determined as a preliminary point of objection if facts tabled and the records of the case suffice to establish the elements therein.

That being the case, the argument raised by Mr. Mpoki that the points of objection raised cannot be determined as preliminary points of objections lacks merits since without hearing what the basis of res judicata raised by the other party is, it cannot be summarily rejected on a mere reason that it is not a preliminary point of objection in principle of what is set under the **Mukisa Biscuit** case.

Having made that finding, the merits of the objections raised will now be determined. As pointed out earlier, the objection will be determined separately in the sequence that they were raised, therefore the first point of objection will be determined first.

The first point of objection attacks the jurisdiction of this court in determining the current petition. The respondents seek to convince the court that this matter is bad in law for being Res Judicata of a previously determined **Misc. Civil Cause No. 5 of 2023 between Alphonce Lusako and 3 Others Vs. Attorney General and 3 others** *("the initial petition").* The respondent's main line of argument is that the issues in contention in this matter have been finally determined by this court in the initial petition.

In the first objection, the respondents are moving to convince the court that the petition at hand is res judicata of the previously determined petition in Alphonce Rusaka (supra) determined by this same court in Mbeya in ... 2023. In his submissions to support that the matter is res judicata, Mr. Kalokola laid a foundation by citing the case of **Hassan Marua vs Tanzania Cigarette Company Limited (Civil Application 338 of 2019) [2022] TZCA 491 (1 August 2022)** where the court held that points of law do not

exist in vacuum hence a court cannot address a point of law without laying a foundation. In particular, the court held:

> *"We are mindful, and we have no doubt that Mr. Halfani will appreciate as Ms. Kihampa does, that points of law do not exist in a vacuum. That means that* ***a determination of a point law cannot be divorced from the underlying facts which includes evidence on record.*** *We cannot hazard a guess how could the Court determine that ground without relating it with the evidence on record to satisfy itself if the High Court and the CMA applied the law correctly to the facts and evidence before concluding as it did." (Emphasis is mine)*

Mr. Kalokola then pointed out that the instant petition is res judicata since it raised issues which have already been finally determined by this Honorable Court and those issues are finally determined in the previous petition.

In his reply submissions, Mr. Mpoki strongly argued against the objection from three angles, he differentiated the court sitting in Mbeya and the current court on the ground that the court in Alphonce Lushako case was determining a violation of the constitution under the provisions of Article 108 of the Constitution while the court in this petition is composed under Article

30(3) of the Constitution hence the objection fails the test under Explanation No II of Section 9 of the CPC. He also challenged the objection from the point of view that in the contested IGA, what was challenged (subject matter) in Alphonce Lushako case was violation of the constitution while in this case, it is the Fundamental Rights and Duties of the State which are challenges. On the reliefs sought and content of the petition, he reiterated his argument that the same could not be determined without one being privileged with the pleadings and judgment of the court in the initial petition/Alphonce Lusako case.

A thorough analysis of the arguments for and against the objection has brought me to a satisfaction that there are several issues in foundation that the parties are not in dispute with. The first issue is that the current case fits in explanation No. I in that the petition before me falls under the definition of suit as held in the cited cases of **Honourable Attorney General vs Reverend Christopher Mtikila (Civil Appeal 20 of 2007) [2008] TZCA 57 (15 May 2008)**, where the court held that Civil Proceedings under the BRADEA are suits. The second undisputed issue is that the current petition as well as the initial petition are both Public Interest Litigation ("PIL") cases. The third issue is that there is judgment challenging the same IGA, a

judgment which the court takes judicial notice of. I must point out that although in the beginning Mr. Mpoki attempted not to be privileged with the judgment in Alphonce Lusako case, in due course of his submissions, he admitted that a court must take judicial notice of the existence of any judgment/ruling. For that reason, since the initial petition/Alphonce Lushako case is already reported on TanzLii and undisputedly so existing, it is conclusive that there is a previous judgment on a petition challenging the same IGA. The question remains whether the matters directly or substantially in issue therein are the same as in the current petition.

As correctly argued by Mr. Kalokola, I have to look at the records of this court including the petition of the applicant, the applicable laws and what was decided in the initial petition before I proceed to determine whether the matters directly and substantially in issue herein were also directly and substantially in issue therein.

The first issue for determination in res judicata is whether the parties in the two suits are the same. According to Mr. Kalokola, this petition and the initial petition are both Public Interest Litigation cases. He based his point on the argument that when the judgment in any public interest litigation is delivered, it becomes a judgment in rem and binds the whole public.

Subsequent to that, he argued, any member of a public is barred from raising a similar or connected issues from the previously decided public interest case. Borrowing from above, he pointed out that first, the case of Alphonse Lusako was a public interest case challenging the IGA between the URT and the Emirates of Dubai, the reason why the court decided not to grant costs.

He then submitted that from that date when the decision was issued, every member of the public was bound by that judgment and no one is allowed to come forward to raise connected issues or an issue which would have been raised in a previous petition. In that scenario, he submitted, for the petitioner herein to raise similar issues, such as issues on public procurement, issues related to contracts, competence of the agreement in line with the constitution and issues of public notice, the effect makes the petition res judicata because the prayers made in the previous case and the prayers sought in this petition have similar effects.

In reply, Mr. Mpoki submitted that the parties in the two petitions are not the same. He pointed out that in this case, the petitioner is Meckzedeck Maganyi while in the other case it was Alphonce Rusako and 3 others the petitioner herein not being among the 3 others. On the part of the respondents, he submitted that in the previous petition there are 4

respondents and in this one there are 5 respondents. The absence of the Director General of TPA as a party in the previous case and absence of the Permanent Secretary, Ministry of Works and Transport in this petition cemented his line of argument that the parties are not the same.

It must however be noted that in his subsequent submissions, Mr. Mpoki was in admission that the current petition is a PIL. He submitted that the case was brought under the provisions of Article 30(3) of the Constitution and as pleaded by the petitioner, it is a public interest litigation case which means that the petitioner is trying to vindicate the constitutional duty not on behalf of himself but on behalf of the larger part of the society. He also elaborated that public interest litigation is a new innovation in our jurisprudence under which the common law doctrine of locus standi was relaxed. As a result of relation of the doctrine, he submitted, there were some changes in the old doctrine of res judicata where there was added explanation VI to Section 9 of the CPC which reads:

> *"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."*

At this point, his argument was that if a person wants to raise a plea of res judicata case in public interest litigation case, he must show that one, the previous proceedings were bonafide in respect of public interest and that the same was done on behalf of the other. He faulted the respondent for not showing the court that the two conditions contained under explanation 6 of Section 9 exist. He argued that in this particular case, for the respondent's plea to be sustained the respondent was duty bound to show proof of res judicata and they have another burden to show, that the previous case was taken bonafide and on behalf of others, an obligation which according him, the respondents did not fulfill.

His conclusion was that the respondent's contention that this is a public interest case was argued as word from the bar and that they omitted to show how the claim was bonafide. Citing the Indian case of **Forward Construction Co. & Others Vs. Prabhat Mandal & Others, 1986 AIR 391** he further faulted the respondents for not showing that the previous litigation was a public interest litigation and not by way of a private interest. That it was incumbent on the part of the respondent to show and prove the bonafide of the previous proceedings and also prove that it was done in

common with the interest of others. He concluded that since it was not shown, the plea cannot be safely sustained.

I need not be detained much by this part, as I pointed out earlier, both parties agree that both this petition and the initial petition were constitutional cases challenging the IGA between the United Republic of Tanzania and Emirates of Dubai. Both sides admit that the two cases were constitutional cases, the only difference, according to Mr. Mpoki, being the Articles of the Consititution. In the cited case of **Fikiri Liganga & Another vs The Attorney General & Another (Misc. Civil Case 15 of 2017) [2018] TZHC 120 (5 April 2018)** this Court cited with approval an indian case of **The State of Karnataka & Another Vs All Indian Manufacturers Organization & Others, AIR 2006 SC 186** where it held:

"Indeed, the Supreme Court of India is rich in aUthorities/literature on Public Interest litigation. This principle Was further expressed recently in the case of The State of Karnataka & Another Vs All Indian Manufacturers Organization & Others, AIR 2006 SC 186 where the court held inter alia that in a public interest litigation the petitioner claims for his individual rights as well as for the public at large. To quote the precise words, the court stated:

"As a matter of fact in Public Interest Litigation, the petitioner is not agitating his individual rights but represents the public at large. As long as the litigation is bonafide, a judgment in a previous Public Interest Litigation would be a judgment in rem. It binds the public at large and bars any member of the public from coming forward before the court and raising any connected issue or an issue, which had been raised/should have been raised on an earlier occasion by way of a public Interest Litigation."

As it has not been disputed that the current petition is a PIL, and so was the initial petition, whether the litigation therein is bonafide or not will be determined later while this court will be analyzing whether matters substantially and directly in issue therein are the same as matters substantially and directly in issue herein. As for now we have a judgment in a PIL case which was finally determined, the same was attacking the same IGA agreement between United Republic of Tanzania ("URT") and the Emirate of Dubai, the parties at this point are deemed the same because the right they are trying to protect is not a private right, that a right in rem in

the interest of all Tanzanians. It is therefore safe to conclude that the parties in the two petitions are the same.

Mr. Mpoki also challenged the similarity of the courts in the initial petition and the current one. His submission was that the court sitting herein is different from the Court that sat in Alphonce Lusako case. That the initial petition was instituted under Article 108 of the Constitution while this case has been instituted under Article 30(3) of the Constitution arguing that there is a big difference in these courts. He went on submitting that on the eyes, the two courts may look the same but jurisprudential is not the same court. That the court established under Article 30(3) has been established specifically to deal with violation and enforcement of Rights and Duties contained in Article 12-29 of our constitution. It is a court dealing with very jurisdiction with one on the ordinary category of jurisdiction exercised by a judge and the complains of violation of fundamental duties that the state owes the citizens and they are compelled to exercise.

His argument, which I failed to see the basis of (considering the fact that Mr. Mpoki alleged not to be privileged with the pleadings in Alphonce Lusako case), is that the other one was brought under Article 108(2) because the claim in the previous suit was not similar. That they were not complaining

of the violation or either rights or duties and that is why they did not come anywhere near the provisions of BRADEA hence the two courts are different each with its own jurisdiction.

In reply, while agreeing that the enabling provisions in the two petitions are different, Mr. Kalokola submitted that the same petitions were brought to the same High Court which is in our constitution so the rest remain to be enabling provisions. More important, he argued, is that the High Court was competent to decide the previous decision so that does not take away an element of competent jurisdiction simply because the enabling provisions are different, it is the same High Court under our constitution.

On my part, I have thoroughly read the judgment in Alphonce Lusako case and at page 4 and 5 of his Judgment, Hon. Ismail J, (as he then was), while outlining the basis of the claim before him observed:

"Through a petition, preferred by way of originating summons, that is supported by the petitioners' affidavit, four grounds have been raised as the basis for their unreserved denunciation of the IGA. These grounds are as reproduced hereunder:

1. ...(NA).....

2. *That, the Intergovernmental Agreement between the United Republic of Tanzania and the Emirate of Dubai signed by the second respondent and witnessed by the third respondent by virtue of articles 2 (1), 4 (2), 5 (1), 6 (2), 7 (2), 8(1) (a), (b) (c), 8 (2), 10 (1), 20 (2) (a), (e) (i) and (ii), Article 18, 21, Article 23 (1), (3) and (4), articles 26, 27 and 30 (2)* ***of the international agreement contravene the laws and the Constitution of the United Republic of Tanzania****;"*

In the current petition, the petitioner is moving the court to make a finding that the highly contested IGA is in violation of Article 27(1)&(2) of the Constitution. Further to the above, both the current petition and the initial petitions were filed under the BRADEA. The Court in cases under the BRADEA is defined under Section 10(1) of the same Act which provides:

"For the purposes of hearing and determining any petition made under this Act including references made to it under section 9, ***the High Court shall be composed of three Judges of the High Court****; save that the determination whether an application is frivolous, vexatious or otherwise fit for hearing may be made by a single Judge of the High Court."*

In Alphonce Lusako case, at pg 45 the court observed:

> *"**This being a Constitutional petition** brought under Article 108 (2) of the URT Constitution, the Court would ordinarily confine itself to such issues which have bearing on the breach of the Constitution."*

The catching words in the cited para are ***"this being a constitutional petition",*** which is relevant in determining that in that petition, the court was sitting as a constitutional court determining a constitutional petition, composed of three judges. This is the case in this court, the composition is of three judges determining a constitutional petition on complaints of violation of Articles 23(1)&(2) of the Constitution. This line of argument hence crumbles, the court in the two petitions is the same court.

The next issue for determining whether this matter is res judicata is on what was challenged (subject matter) in the two petitions. In his submissions to support the objection, Mr. Kalokola was of the view that in the originating summons and the grounds in this petition, particularly para 3, 4, 10, 11, 12, 13, 14, 17 and 20 seek to question the compliance of the IGA with the Public Procurement Act and its principles. He linked the grounds

to those determined in Alphonce Lusako case at page 57-59 of the judgment arguing that the issues have been finally determined.

He then turned to the petitioner's grievance on IGA with regard to the capacity of parties to enter into an agreement and the question of consideration in the same agreement. He pointed to para 8, 9, 15 and 16 of the grounds in this petition which in his strong view were considered and determined by the court from page 46-56 of the judgment in Alphonce Lusako case. He hence argued that the issues relating to contract have been finally determined and cannot be raised again.

The other aspect is of IGA being challenged, pointed Mr. Kalokola, is in line with the constitution of Tanzania. He submitted that the issues have been raised in para 15 and 18 of the grounds of petition and in para 1, 2, 5, 6, 7 and 8 the specific Articles of the Constitution alleged to be violated were mentioned. It was his submission that these questions were determined by this court under Page 73-90 of the decision in Alphonce Lusako.

On the last point of their grievance as submitted by Mr. Kalokola, the petitioner is challenging the process of ratification of that agreement and

issuance of Public Notice done by the parliament. His argument was that those allegations are found under para 25, 26 and 27 of this petition which seek to challenge the process of ratification and how the parliament issued the notice to the public. He then pointed to pg 59-73 of the judgment where the determination of the court was on the whole process including how the public was informed.

In conclusion, Mr. Kalokola submitted that all the four areas cited have finally been determined by this court in Alphonce Lusako case hence fit to answer the question whether the same subject matter previously litigated has been brought again in the same court so as to determine whether the matter is res judicata. He cited another case brought in this court challenging the same IGA, the case of **Frederick Anthony Mboma**, a petition which came after the judgment in Alphonce Lusako and at page 11 of the ruling, the court held:

> *"therefore the petitioner in Alphonce Lusako case and the petitioner in the instant matter in this respect deemed to be one and same. It follows that since 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 by the*

petitioner in this subsequent suit. Therefore, without any further a due, 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 IGA and whether IGA is a contract".

His conclusion was that the subjects are res judicata as they have been finally determined by the court.

On his part, Mr. Mpoki's reply was brief. He submitted that the subject matter in Alphonce Lusako case is different from the subject matter in this case. He pointed out that in Alphonce Lushako case, the petitioner was challenging the IGA on the ground that it was in violation of other parts of the constitution and other laws which were not mentioned in this case. As for this case, his submission is that the petitioner herein is complaining of the violation of fundamental duty of the state.

In a short rejoinder, Mr. Kalokola was in admission that the enabling provisions in this petition are based on the BRADEA and the constitution itself. He was however quick to point that even in Alphonce Lusako case, the petitioner was enforcing rights and duties under the part III of Chapter 1 of the Constitution which deals purely with the Bill of rights. He further pointed

that even the said Article 27 of the Constitution forming the basis of this petition was well discussed at page 15 of the judgment. The argument on protection of natural resources and permanent sovereignty were discussed in length in the case of Alphonce Lusako as it is the case in this petition.

In addressing this part, I must point out two issues which are conspicuously common in the two petitions. **The first one** is that in both this petition and the initial petition, the petitioners are challenging the constitutionality of the IGA between the URT and the Emirate of Dubai *(the content).* The numerous contents of the areas challenged are what is at dispute. **The second one** is that in both petitions, the petitioners are moving the court to determine that the process of tabling and signing of the IGA by the two governments was in breach of the constitution *(the procedure).*

However, in this case, what the petitioner attempts to establish is that the subject matter in terms of what exactly is to be determined in terms of the validity of IGA is different from what was tabled before this same court in Alphonce Lusako case. It was Mr. Mpoki's argument that the subject matter in the two petitions are distinguishable for in the initial petition, the petitioner was challenging the IGA on the ground that it was in violation of

other parts of the Constitution and other laws which were not mentioned in this case. As for this case, the petitioner herein is complaining of the violation of fundamental duty of the state. However, as correctly so pointed out by Mr. Kalokola, most of the issues raised in this petition were raised and finally determined in the initial petition as I will strive to elaborate.

Amongst the issue pointed out by the the respondents are issues raised in para 15 and 18 of the grounds of petition and in para 1, 2, 5, 6, 7 and 8 whereby the specific Articles of the Constitution alleged to be violated were mentioned. In this petition, these issues are designed to revolve around violation of Article 27(1)&(2) of the Constitution. However, looking at the pointed pages 73-90 of the decision in Alphonce Lusako the court, at page 73, the court made a conclusive remark that:

> *"It is our conclusion that, while there are obviously inadequacies surrounding the issuance of the notice and the duration thereof,* ***we are inclined to hold that the net effect of the inadequacies would not have the consequence of vitiating the ratification process or render the IGA invalid.*** *This Court would not be tempted to* ***cross the judicial line and poke our fingers or meddle in the affairs of the Legislature."***

In simple and plain language of the above holding, the court has confirmed the validity of the IGA in relation to violation of the constitution. The court hesitate to move and interefere with how the legislature handled its business on the inadequencies pointed by the petitioner therein. This is the same thing that is being challenged by the petitioners herein. For that reason, this court can not subsequently determine the validity of the process of ratification regardless of the Article of the Constitution that is deemed to have been violated. This owes to the fact that in so far as the constitutionality of the same is concerned, the final declaration has already been made by the court, that it is a valid agreement hence the issue is res judicata.

I have also looked at the averment of para 5 of the grounds of the petition at hand where the petitioner challenges the IGA as in violation of Article 27(1)&(2) of the Constitution on the ground that it was entered between the Government of URT with a party which has no capacity to enter into an Intergovernmental agreement as Dubai is not a state. Again, this same issue was raised by the petitioner in the initial petition as captured by the Court in the following words:

"Mr. Mwabukusi further observed that IGA is an international agreement governed by the Montevideo Convention on the Rights and Duties of States, 1933, whose Article 1 sets conditions for a state to enter into an agreement. ***In Mr. Mwabukusi's contention, Dubai does not have the status of a state*** *and,* ***therefore, unable to enter into any international agreement of IGA's stature.****"(Emphasis is mine).*

The obvious need not be over emphasized. In the initial petition, the petitioner was challenging the capacity of Dubai to enter into an intergovernmental as a state. The same issue is clearly raised on ground 15 of the current petition. Whether that issue had already been determined can be found at page 53 of the judgment where the court held that:

"With this position in mind, ***the question is whether Dubai would still have the capacity to enter into the IGA*** *that is under the cosh in the instant proceedings.* ***In our unflustered view, the answer to this question is in the affirmative,*** *and the reason for our contention is twofold. One,* ***issues relating to trade and investment covered in the IGA are not matters touching on foreign policy and international***

relations which are within the purview of the Union. *This, as Mr. Kalokola correctly argued, is a permissible indulgence under the provisions of Article 116 of the UAE Constitution, which allows the Emirates to exercise all powers not assigned to the UAE by the said Constitution. This acknowledges the fact that issues of trade and investment are not Union matters, covered by Article 120 of the UAE Constitution as to require the express permission of the Union.* ***In our settled view, the IGA is one of the bilateral agreements in respect of which Dubai is allowed to sign, as it outlines the intent of cooperation and serves as a framework for future collaboration in trade and investment."***

The issue on the capacity of Dubai to enter into IGA has also been finally determined in the initial petition.

Further to the above, the respondent pointed to para 3, 4, 10, 11, 12, 13, 14, 17 and 20 of the grounds of petition which seek to question the compliance of the IGA with the Public Procurement Act and its principles. As pointed out by Mr. Kalokola, the question of Public procurement was finally

determined in the initial petition as held at 57-59 of the judgment where the court held:

"We hasten to state and take the view that the petitioners were too removed from the realities of international law that has modelled these types of agreements in a manner that excludes the application of municipal laws that the petitioners contend that they have been infracted. In our considered view, it is a folly, to say the least, to contend that this is an Agreement which would be governed by any or all of the provisions of the Public Procurement Act while the petitioners are aware or ought to be aware that:

(i) No procurement had actually been done by any of the State Parties;

(ii) That this is not the kind of an agreement which would factor in low levels issues of procurement whose 'place of domicile' is in the Host Government Agreement and/or project agreements that await further negotiations between TPA and DPW;

(iii) That assuming, just for the sake of argument, that procurement of goods or services had been done, it is not clear, and the petitioners have not stated, with any absolutes, if such

procurement was through tendering, a condition precedent for the invocation of section 64 (1) of the PPA;

(iv) If TPA was involved in the conversation that is alleged to have bred the award which is said to infract section 64, then TPA ought to have been impleaded and be called to answer questions that surround the alleged award;

(v) The petitioners ought to be aware of the overriding effect of section 4 (1) (a) of the PPA which is to the effect that an obligation under international treaty or agreement supersedes provisions of the PPA.

As stated earlier on, the provision that is said to have been infracted is section 64 of the PPA. To be able to opine on the plausibility or otherwise of the petitioners' contention, it behooves us to reproduce the substance of the said provision. Of particular relevancy is section 64 (1) which states as follows:

> *"Procuring entity engaging in the procurement of goods, works, services, non consultancy services or disposal by tender shall apply competitive tendering, using the methods prescribed in the regulations depending on the type and*

value of the procurement or disposal and, in any case, the successful tenderer shall be the tenderer evaluated to have the capacity and capability to supply the goods, to provide the services or to undertake the assignment or the highest evaluated offer in case of services for revenue collection or disposal of public assets."

From the quoted excerpt the clear message is that relevance of the provisions of section 64 comes in where there is a procurement and that such procurement is through tender. We entertain no doubt, therefore, that the contention by the petitioners on the alleged violation of the law lacks the spine which would hold it firm and form the basis for a plausible argument. We are unpersuaded by the argument that the PPA is a relevant law on which to gauge the propriety or otherwise of the IGA."

From the cited holding of the court, the issue of contravention of the Public Procurement Act in IGA has been well dealt with in the initial petition. Since that judgment was a judgment in rem, it cannot be raised again in this petition.

On those observations and findings, it is to the satisfaction of this court that the subject matter of the petition herein was directly and substantially the same as it was in the initial petition hence the objection passes the third test of the principles of res judicata.

The last point is that a matter directly and substantially in issue in the previous suit has been subsequently raised, heard and finally decided by such court. This is another point which need not detain me much. Parties unanimously agreed that the initial petition/Alphonce Lusako case was finally determined by the court.

In conclusion, having so made the above findings, I am satisfied that the first line of objection raised by the respondent is meritious. The current petition is res judicata of the initial petitition, the case of Alphonce Lushako as the matters directly and substantially in issue herein which is the constitutionality of the IGA, have already been finally determined by this court in the initial petition. This court hence lacks jurisdiction to re-determine the issue. Since the court lacks jurisdiction, I need not dwell on the remaining grounds of objection as it will be but an academic exercise.

That being the case, the petition before me is hereby struck out. Since as correctly argued by Mr. Mpoki that in practice, no costs are awarded in a PIL petition, I make no order as to costs.

Dated at Dar-es-salaam this 02nd day of October, 2023

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S.M. MAGHIMBI

JUDGE.