

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MAIN REGISTRY

AT DAR ES SALAAM

MISCELLANEOUS CIVIL CAUSE NO. 11 OF 2023

**IN THE MATTER OF THE CONSTITUTION OF THE UNITED REPUBLIC OF
TANZANIA [(1977) CAP 2 R.E. 2002] AS AMENDED FROM TIME TO TIME**

AND

**IN THE MATTER OF PETITION CHALLENGING THE CONSTITUTIONALITY OF
THE ACT OF EXTENDING THE TENURE OF OFFICE OF THE CHIEF JUSTICE OF
TANZANIA**

AND

**IN THE MATTER OF CHAPTER FIVE PART FIVE OF THE CONSTITUTION OF THE
UNITED REPUBLIC OF TANZANIA, 1977 [CAP 2 R.E. 2002] AS AMENDED FROM
TIME TO TIME**

BETWEEN

MPALE KABA MPOKI..... PETITIONER

VERSUS

THE HONOURABLE ATTORNEY GENERAL.....1ST RESPONDENT

PROF. IBRAHIM HAMIS JUMA.....2ND RESPONDENT

RULING

18/09/2023 & 17/10/2023

ISAYA, J.:

The petitioner Mpale Kaba Mpoki, a renowned and self-styled *sericum consilium* lawyer filed this present petition under Article 108 (2) of the Constitution of the United Republic of Tanzania 1977, as amended from time to time (from now on referred to as the constitution). He is basically challenging the constitutionality of the continual holding of the office of the Chief Justice by His Excellency Honourable Professor Ibrahim Juma, Chief Justice of Tanzania (the second respondent). He is assertive and firmly believes the act is unlawful and unconstitutional. Eventually, he prays that the petition be allowed with the following orders: -

- I. Judicial declaration that the office of the Chief Justice is vacant as of the 16th of June, 2023.*
- II. THAT, all actions and deeds performed by the 2nd Respondent between 16th June to date be validated by the Chief Justice to be appointed.*
- III. Any other relief/reliefs that the Honourable Court may deem fit to grant."*

On 25.08.2023, the parties made their first day of appearance in court when the matter was scheduled for mention. Mr Hangi Chang'a, the

principal State Attorney, who represented the respondents, staged onto the floor and was quick to notify the court that Miscellaneous Civil Cause No.7 of 2023 which was pending in the same court had the same subject matter as this present matter. He expressed his view that the present matter is *res subjudice* to the afore-stated matter and asked for the court's direction on the present matter. The Petitioner who was represented by Amani Melchzedeck Joachim, an advocate from the Legal and Human Rights Centre, responded confidently with a note of decisive and intentional move on his knowledge of the pending Miscellaneous Civil Cause No. 7 of 2023 that he filed the present petition not by accident but with full knowledge of the matter. He dismissed the view that the same can amount to *res sub judice* to the former.

Since the doctrine of *res subjudice* is envisaged under section 8 of the Civil Procedure Act, (CAP 33 R.E 2022), to all intents and purposes, the respondent raised a *plea in limine litis* to the effect. And since the parties locked horns on the point of law, the proper course was to order them to submit on the issue. The arguments were made by way of written submissions. Both parties complied with the schedule as ordered.

In the whole course of hearing of the preliminary point of objection raised, the Petitioner enjoyed the service of Mr. Amani Melchzedeck Joachim, Learned Advocate, while the respondent enjoyed the service of Mr.

Hangi Chang'a, principal State Attorney; Victoria Lugendo, State Attorney; Wisdom Francis, State Attorney and Mr. Lukelo Samwel, Principal State Attorney. I extend my gratitude and appreciation to the team of members of the bar for their industrious research and cooperation.

Submitting in support of the point of objection, the Respondents, however, started by first bringing to the attention of the court that there is a serious irregularity since the petition was brought against the 2nd Respondent instead of the Attorney General only. He pointed out that the same is also reflected in paragraphs 10, 11, 12, and 19 of the Petition. He submitted that the petition is incompetent as the same contravened the spirit of Section 4(4) of the **Basic Rights and Duties Enforcement Act [Cap 3 R.E. 2019] as amended by Written Miscellaneous Amendment Act No. 03 of 2020.**

Thereafter, the respondent turned to the legal objection on res sub judice. Mr. Lukelo Samwel was of the firm view that the petition is purely Res-Subjudice because, on 28th June 2023, ***Miscellaneous Civil Cause No. 07 of 2023 between Humphrey Simon Malenga and the Hon. Attorney General*** was instituted before this Court claiming among other things under paragraph 13(c) of the Petition that:

- a. The Honorable Court gives Judgment and Decree against the Respondent by interpreting the powers of the President of the United*

Republic of Tanzania to suspend the retirement age of the Justice of Appeal or extend the time of service of the Justice of Appeal for public interests pursuant to provisions of article 120 (2) and (3) of the Constitution of the United Republic of Tanzania 1977 as Amended does not apply to a Justice of Appeal who is also the⁴ Chief Justice.

b. The Honorable Court declares that the suspension of retirement age and/or extension of tenure of the current Justice of Appeal who is also the Chief Justice of Tanzania Honorable Professor Ibrahim Juma pursuant to the provision of Articles 120 (2) and 120(3) of the Constitution of the United Republic of Tanzania, 1977 as amended is unconstitutional; it was that concern which attracted this Court to order parties to address the same by way of a written submission, hence the present submission.

In contrast to the petition above, he noted that, on 17th August 2023, the Petitioner filed this Petition seeking orders for a judicial declaration that the office of the Chief Justice is vacant as of 16th June 2023, all actions and deeds performed by the 2nd Respondent between 16th June to date be validated by the Chief Justice to be appointed and any other reliefs.

In the foregoing, he submitted that the present matter is res sub judice because both cases were brought as Constitutional Petitions, both are challenging the constitutionality of the act of extending the tenure of the

office of the Chief Justice, both are moving the Court for Declaratory orders having the same effect in law as far the tenure of Chief Justice is concerned, and he added that both cases were instituted by public interest litigants against the Government.

To buttress his point, he cited section 8 of the Civil Procedure Code, (CAP 33 R.E 2022) and **MISCELLANEOUS COMMERCIAL CAUSE NO. 89 OF 2019 WENGERT WINDRODE SAFARIS (TANZANIA) LIMITED APPLICANT VERSION THE MINISTER FOR NATURAL RESOURCES AND TOURISM AND THE ATTORNEY GENERAL** at page 12 the four essential conditions for one to apply the principle of Res-Subjudice were enumerated as follows:

- "1. *That the matter in issue in the second suit is also directly and substantially in issue in the first suit;*
2. *That the parties in the second suit are the same or parties under whom they or any of them claim to litigate under the same title;*
3. *That the court in which the first suit is instituted is competent to grant the relief claimed in the subsequent suit; and*
4. *That the previously instituted suit is pending"*

Relating the prerequisite elements in the provision of section 8 of the CPC, he submitted that the element that there must be a pending suit

before the Court with competent Jurisdiction gets its way because there is a pending Miscellaneous Civil Cause No. 07 of 2023, scheduled for Ruling 22nd September 2022. He submitted that Misc. Civil Cause No. 07 of 2023, and the present case are directly and substantially similar to each other because the relief claimed by the parties are similar in substance and form. In the present case the Petition is seeking the declaration that the office of Chief Justice is vacant as of 16th June 2023 to date be validated by the next appointed Chief Justice. In miscellaneous Civil Cause No. 07 of 2023 the Petitioner is praying for among other things, a declaration that the suspension of the retirement and or extension of the Current Justice of Appeal who is also a Chief Justice of Tanzania is Unconstitutional.

He cemented his position by referring this Court to a recent case of **FREDRICK ANTHONY MBOMA v THE ATTORNEY GENERAL MISC. CIVIL CAUSE NO. 08 OF 2023** pages 1 & 2, where the Court held that,

"This petition belongs to the same family as Misc. Civil Cause No. 5 of 2023 between Alphonse Lusako & 3 Others vs. The Attorney General & 3 Others ("Alphonse 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 10 June 2023 ("IGA").

In totality, he summarized in the first element that the matter in issue is directly and substantially the same in the subsequent case and the main allegation in the two Petitions is that, the extension of tenure of the Chief Justice by the President of the United Republic of Tanzania is unconstitutional and should be declared as such.

On the second condition he submitted that both Petitions are filed by personal litigating under a public duty, they are deemed as the same parties as far as the doctrine of Res Subjudice is concerned. He again referred us to the cited case of **Fredrick Mboma (Supra)** in which it was stated that;

"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 petitioner is litigating under the same public title"

He finally prayed for the petition to be stayed pending the determination of **Miscellaneous Civil Cause No. 07 of 2023.**

On the other hand, Mr. Amani Melchzedek Joachim, responding to the first point had the view that this Petition before this Court has been predicated under the Provisions of Article 108(2) of the Constitution of the United Republic of Tanzania and the Petition has not been brought under

the Provisions of the Basic Rights and Duties Enforcement Act (Cap 3) RE 2019. He elaborated that the requirements of Section 4(4) of the Basic Rights and Duties Enforcement Act deals with immunity in respect of violation of Basic Rights contained in the Bills of Right and is only applicable to matters that have been brought under BRADEA and not any other matters. His further view is that the 2nd Respondent is sued in his personal capacity for the same reason that any decision that will be made in this case will affect him personally and not by virtue of his office.

In the second limb of the preliminary objection, the learned counsel found and admitted that the first condition for the doctrine of res sub judice was present; and that both cases were pending in Court as judgment has not been delivered in any of the two.

As regards the second condition, he found that the most important phrase contained in the said Section is firstly **matter in issue** and secondly the phrase **directly and substantially in issue**. He defined the matter in issue to be rights litigated between the parties, they are the facts on which the right is claimed. He equated the matter in issue with the cause of action, and cited the case of what is a cause of Reed **vs. Brown 22 QBD3** which defined a cause of action to mean;

"Every fact which is material to be proved to enable the plaintiff to succeed or every fact which if denied, the plaintiff must prove in order to obtain judgment".

He cited a Tanzanian case of **John M. Byombalirwa vs. Agency Maritime International (Tanzania) Ltd 1983 TCR 1** in which the cause of action was defined to mean;

"Simply means essential facts which a plaintiff in a suit has to plead and later prove by evidence if he wants to succeed in the suit".

The learned counsel now turned to the phrase "directly and substantially in issue". He referred the court to the book by **Sir Dinshaw Fardunji Mulla in his book Mulla on the Code of Civil Procedure Volume 1, 18th Edition Lexis Nexis 2011** states on page 166;

"The language used by the Apex Court in the above case is very significant. It has been stated that 'the words used in s 10 are 'the matter in issue is directly and substantially in issue' are used in contradiction to the word 'incidentally or collaterally in issue' the words 'directly and substantially in issue' are used in contradiction to the words 'incidentally or collaterally in issue' thus s 10 would apply only if there is identity of the matter in issue in both suits, meaning

thereby, that the whole subject matter in both the proceedings is identical"

Guided by the above-cited authority he had the view that by looking at the petitions the reliefs prayed were different. In the previous suit, the relief sought by the Petitioner is the interpretation of the provisions of the Constitution which is manifested in the certificate of urgency and prayers which seek the assistance of the Court to interpret the provision of **Articles 118(2), 120(2) and (3)** of the Constitution and that the suspension of retirement age and or extension of tenure of the current Chief Justice is unconstitutional.

He defended that in the subsequent petition, the petition's prayers are different in that he seeks a Judicial Declaration from the Court that the Office of the Chief Justice is vacant as of the 16th June 2023, and further to that all actions and deeds performed by the 2nd Respondent between 16th June 2023 to date be validated by the Chief Justice to be appointed He submitted that the matters in the two cases are not identical at all.

He pointed to another aspect which he alleged to show that the matters in issue are different is that the Petitioner and the Respondent cannot appeal against the decision of the Court, but in the subsequent matter both Petitioner and the Respondent can appeal against the decision because he contended, the nature of the case, the petitioner is seeking an

interpretation of the provisions of the Constitution which means that the Petitioner is not certain as to what the provisions of the Constitution. He concluded by submitting that the two matters are not subsequently and directly in issue.

In the condition that both the suits must be between the same parties or any person acting under the parties, the learned counsel submitted that the parties are different. To buttress his point, he cited the case of **Wengert Windrose Safaris (Tanzania) Ltd vs. The Minister of Natural Resources and Tourism and another Miscellaneous Commercial Case No 89 of 2016 Par es Salaam Registry Unreported** in which, Mwambegele J (as he then was) stated as follows;

"The expression "the same parties" means the parties between whom the matter in issue has arisen and also has to be decided."

On the last condition, that the previously instituted suit must be pending in the same or any other Court having competent jurisdiction to grant the relief asked, he was of the view that the Court in the previous suit has no jurisdiction to issue the orders sought. He referred us to Article 108(1) of the Constitution which states;

"Kutakuwa na Mahakama Kuu ya Jamhuri ya Muungano itakayojulikana kama Mahakama Kuu ambayo mamlaka yake yatakuwa kama ilivyoelezwa katika Katiba hii au katika Sheria nyingine yoyote".

He then urged the court to find the provision of Section 2(3) of the Judicature and Application of Laws Act cap 358 RE 2019 giving special importance and have regard to the High Court is the provision of Article 107A(I) of the Constitution which states as follows;

"Mamlaka yenye kauli ya mwisho kwenye utaoji wa haki katika Jamhuri ya Muungano itakuwa ni Mahakama".

Relating to the cited law above, he submitted that the interpretation of the Constitution as prayed by the Petitioners in the previous case is not the preserve of the Judiciary which is vested with the power to decide cases according to law.

He has further views that there is no provision of law that grants the High Court powers to interpret the Constitution specifically when an individual is not certain about a provision of the Constitution or the law.

Lastly, he argued that there are no issues to be litigated in this case as there is no dispute as is the case in many other cases. Furthermore, even

the reliefs in the two cases are completely different, with different issues hence, there is no multiplicity of suits, as submitted by the defendants. He prayed for the plea or *Res Subjudice* to be dismissed and the matter to proceed on merits.

In rejoinder, Mr. Chang'a submitted that in ***Miscellaneous Civil Cause No. 07 of 2023*** between ***Humphrey Simon Malenga and the Hon. Attorney General***, apart from seeking interpretation of **Articles 118(2) and 120(2)(3)**, the Petitioner also sought for a declaration that;

"The suspension of retirement age and/ or extension of tenure of the current Justice of Appeal who is also the Chief Justice of Tanzania, Honorable Professor Ibrahim Juma pursuant to the provision of Articles 120 (2) and/ or 120(3) of the Constitution of the United Republic of Tanzania, 1977 as Amended is unconstitutional."

He was therefore of the view that in order for the Court to determine whether the extension of tenure of the current Chief Justice of Tanzania is unconstitutional or not, it must first interpret the provisions of the Constitution that provide for the tenure of the Office of the Chief Justice. He argued that in case this Court reaches the conclusion that the said extension of tenure was unconstitutional, it would automatically mean that, the Office of the Chief Justice is vacant from the date of the said extension. Due to this reason, he submitted that the two Petitions are very similar and that

deciding on both would be a waste of the Court's precious time. The right of appeal is present in both Petitions.

Responding to the issue of jurisdiction, he submitted that the Petitioner brought this Petition under Article 108(2) of the Constitution, which is the same provision that gives the High Court Exclusive Jurisdiction over all matters expressly provided for or otherwise. Meaning, this Honorable Court has Jurisdiction to interpret the Articles of the Constitution and grant all other reliefs sought in ***Miscellaneous Civil Cause No. 07 of 2023***. That being said, ***Miscellaneous Civil Cause No. 07 of 2023***, is pending before a Court with competent Jurisdiction, making the present Petition Res subjudice. In the rest, he reiterated what he submitted in chief.

When both parties have made such lengthy and extensive arguments, I should observe and find that both matters; **Miscellaneous Civil Cause No. 07 of 2023 and Miscellaneous Civil Cause No. 11 of 2023** are public interest litigation cases. Neither party disputed this fact. It is again worth noting that Miscellaneous ***Civil Cause No. 07 of 2023*** between ***Humphrey Simon Malenga and the Hon. Attorney General*** which was pending before this court when the present matter was filed, has been conclusively determined on 22.09.2023. Of interest, the parties agree on the four important conditions to be present for the plea of *res sub judice* to sustain which were stipulated in **MISCELLANEOUS COMMERCIAL**

**CAUSE NO. 89 OF 2019 WENGERT WINDRODE SAFARIS
(TANZANIA) LIMITED APPLICANT VERSION THE MINISTER FOR
NATURAL RESOURCES AND TOURISM AND THE ATTORNEY
GENERAL**

It again a common ground that, among the four conditions, the first one is that *there must be two suits instituted. The former is known as previously instituted and the latter is known as subsequently instituted suit and the previous must be pending*, is not the matter under controversy.

In the foregoing, I think the central questions are; **One**, Whether the joining of the 2nd Respondent is a violation of Section 4(4) of the Basic Rights and Duties Enforcement Act [Cap 3 R.E. 2019] as amended by Written Miscellaneous Amendment Act No. 03 of 2020; **Two**, whether the instant case is *res sub judice* to Civil Cause No. 07 of 2023.

In determining the first question, it is pertinent to reproduce the cited section 4(4) of the Basic Rights and Duties Enforcement as hereunder: -

(4) "If any person alleges that any of the provision of Section 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".

(4) "Notwithstanding any provisions to the contrary, where redress is sought against the President, Vice President, Prime Minister, the Speaker, Deputy Speaker or Chief Justice for an act of omission in the performance of their duties a petition shall only be brought against the Attorney General".

Mr. Lukelo had found to be a serious irregularity since the petition was brought against the 2nd Respondent instead of the Attorney General only. The Petitioner states that the immunity is in respect of the violation of Basic Rights contained in the Bill of Rights. And since he filed his petition pursuant to Article 108(2) of the Constitution, the section cannot be applicable.

In my deep consideration of this issue, I think the Petitioner is right in stating that the Basic Rights and Duties Enforcement Act deals with immunity in respect of violation of Basic Rights contained in the Bills of Rights and is only applicable to matters that have been brought under BRADEA because the same was enacted pursuant to Article 30(4) of the Constitution in 1994 specifically for petitions in which the petitioner allege infringement of the rights and duties in the High Court. It is from this very premise that since Article 108(2) of the Constitution is not engulfed by the Bill of Rights contained from Article 12 to Article 29 Of the Constitution, the point of objection cannot stand. I find it devoid of merit.

The second question is whether the instant case is *res sub judice* to Civil Cause No. 07 of 2023. In the course of determining this issue, I will be examining the three contested conditions for the plea of *res sub judice* to stand; One, there must be a matter in issue in the second suit that is also directly and substantially in issue in the first suit. Two, the parties in the second suit are the same or parties who claim to litigate under the same title. Three, the court in which the first suit is instituted is competent to grant the relief claimed in the subsequent suit.

I will find here convenience and wisdom to start with the third condition, whether this court is competent to deal with the former suit. Mr. Melchzedek, based on 108(1) and Article 107A (1) of the Constitution had the view that the Court in the previous suit had no jurisdiction to issue the orders sought. He clarified that the interpretation of the Constitution as prayed by the Petitioners in the previous case is not the preserve of the Judiciary which is vested with the power to decide cases according to law. Mr. Chang'a responded that since the Petitioner brought this Petition under Article 108(2) of the Constitution, which is the same provision that gives the High Court Exclusive Jurisdiction over all matters expressly provided for or otherwise means that this Court has Jurisdiction to interpret the Articles of the Constitution and grant all other reliefs sought in ***Miscellaneous Civil Cause No. 07 of 2023.***

Admittedly, this question hit harder on what I comfortably know from the readily obtainable information that the major function of the court is to interpret the law (visit <http://www.judiciary.go.tz>)

Professor Jain, M.P, in his book titled Indian Constitutional Law, (4th Edition) at pg. 836, writes on the fitness of the court to interpret the law;

"In the absence of an accepted authority to interpret the constitution, a written constitution would promote discord rather than order in society when different organs of the government take conflicting actions against the individual..."

But again, in the case of **Attorney General vs Rev. Mtikila, Civil Appeal No. 45 of 2009, Court of Appeal of Tanzania at Dar es Salaam (Unreported)** it was stated that

"The Constitution must be interpreted as a whole. ...A court of law has no power to disregard any provision of the fundamental Laws"

In the former case; Miscellaneous **Civil Cause No. 07 of 2023** between **Humphrey Simon Malenga and the Hon. Attorney General**, which has been conclusively determined, the court found to be within the province of this court to interpret the law. The most poignant point here is that the court is the proper body to perform the function of interpretation of the law.

Article 107A(I) of the Constitution provides as follows;

"Mamlaka yenye kauli ya mwisho kwenye utoaji wa haki katika Jamhuri ya Muungano itakuwa ni Mahakama".

Also, Article 108 of the Constitution which state;

"Kutakuwa na Mahakama Kuu ya Jamhuri ya Muungano itakayojulikana kama Mahakama Kuu ambayo mamlaka yake yatakuwa kama ilivyoelezwa katika Katiba hii au katika Sheria nyingine yoyote".

Sincerely, both the constitutional provisions never oust the jurisdiction of this court to perform its main duty of interpreting the law. After all, according **to Iain Cufiie & Johan de Waal the Bill of Rights Handbook** 61st ed. p. 133, *"Constitutional interpretation is the process of determining the meaning of a constitutional provision."* Indeed, interpreting a constitution entails giving "meaning", which we understand in its wide sense, to the provisions of a constitution.

I agree with Mr. Chang'a that in the process of deciding cases, the interpretation of laws is part and parcel of the process. In order for the Court to determine whether the extension of tenure of the current Chief Justice of Tanzania is unconstitutional or not, it must first interpret the provisions of the Constitution that provide for the tenure of the Office of the Chief Justice.

Now comes the question of whether the matter in issue in the second suit is also directly and substantially in issue in the first suit. Mr. Lukelo submitted that Misc. Civil Cause No. 07 of 2023, and the present case are directly and substantially similar to each other because the relief claimed by the parties are similar in substance and form.

He has cited the recent case of **FREDRICK ANTHONY MBOMA v THE ATTORNEY GENERAL MISC. CIVIL CAUSE NO. 08 OF 2023** to reinforce his point that both petitions belong to the same family and that the constitutionality of the extension of the tenure is the issue in both matters.

Mr. Melchzedech, seeking to get the definition of "directly and substantially in issue" referred the court to the book by **Sir Dinshaw Fardunji Mulla in his book Mulla on the Code of Civil Procedure Volume 1, 18th Edition Lexis Nexis 2011** states on page 166;

"The words used in s 10 (Indian Code) are 'the matter in issue is directly and substantially in issue' are used in contradiction to the word 'incidentally or collaterally in issue' the words 'directly and substantially in issue' are used in contradiction to the words 'incidentally or collaterally in issue' thus s 10 would apply only if there is identity of the matter in issue in both suits, meaning thereby, that the whole subject matter in both the proceedings is identical"

He thereafter contended that by looking at the petitions the reliefs prayed were different. In the previous suit, the relief sought by the Petitioner is the interpretation of the provisions of the Constitution which is manifested in the certificate of urgency and prayers which seek the assistance of the Court to interpret the provision of **Articles 118(2), 120(2) and (3)** of the Constitution and that the suspension of retirement age and or extension of tenure of the current Chief Justice is unconstitutional.

He defended that in the subsequent petition, the petition's prayers are different in that he seeks a Judicial Declaration from the Court that the Office of the Chief Justice is vacant as of the 16th June 2023, and further to that all actions and deeds performed by the 2nd Respondent between 16th June 2023 to date be validated by the Chief Justice to be appointed. He submitted that the matters in the two cases are not identical at all.

I have very carefully and dutifully considered this question. It is a shrewd twist of the word game. It is very correct as submitted by the Petitioner that the prayers in both matters are not identical, they are different. In my view, one cannot arrive at the reliefs sought in either matter without dwelling to determine the constitutionality of the remaining in office of the retired, his Excellency Chief Justice of Tanzania. For

instance, paragraph 19 of the Petition in this matter states: -

"The act of the 2nd Respondent to continue holding office of the Chief Justice of Tanzania is unlawful and unconstitutional as by the clear terms of the Constitution in Tanzania the office of the Chief Justice of Tanzania cannot be occupied by a person who is above the age of 65."

I agree, as rightly submitted by Mr. Lukelo, that the position in **FREDRICK ANTHONY MBOMA v THE ATTORNEY GENERAL MISC. CIVIL CAUSE NO. 08 OF 2023**, that both petitions belong to the same family and that the constitutionality of the extension of the tenure is the true issue in both matters

The Petitioner also alleged that there are no issues to be litigated in the former case as there is no dispute as is the case in many other cases. I revisited the former matter. I should admit here that the matter was very bitterly contested. There were issues with serious legal wrangling. In the end, the right to appeal was pronounced. I find the matters to be identical and in the same family. The issue is answered affirmatively.

The last issue which makes a scrutiny if the parties in the second suit are the same or parties who claim to litigate under the same title, should not waste much of our time here. As rightly submitted by Mr. Melchzedek, definitely, the parties are definitely different. I agree with the position in the cited case of **Wengert Windrose Safaris (Tanzania) Ltd vs. The**

Minister of Natural Resources and Tourism and another
Miscellaneous Commercial Case No 89 of 2016 Par es Salaam
Registry Unreported in which, Mwambegele J (as he then was) stated as follows;

"The expression "the same parties" means the parties between whom the matter in issue has arisen and also has to be decided."

But, in contrast to the above-cited authority, the question before this court is on public interest litigation as stated earlier. Public litigation requires considering the intent of the public at large. In **MISCELLANEOUS CIVIL CAUSE NO.3 OF 2019 between BONIFACE VICENT MUHORO AND 4 OTHERS AND THE ATTORNEY GENERAL**, this court had the view that if the definition of "a party" is narrowly interpreted, there can be a danger for the court to have conflicting decisions over the same issue. I will therefore answer this issue affirmatively too.

Now, what can be said of this petition? I find the first preliminary point of objection devoid of merit and dismiss it. I, however, find the second limb of the preliminary objection meritorious and sustain it. But again, as observed above, **Miscellaneous Civil Cause No. 07 of 2023** between ***Humphrey Simon Malenga and the Hon. Attorney General***, is no longer pending in this court. Since the purpose of the principle of *res sub*

judice is to protect a person from the multiplicity of proceedings as well as to avoid conflict of decisions, the fact that the provision gives effect to the rule of *res judicata* {see the Indian case of BALKISHAM V. KISHAM LAL, ILR 1889) 11 All 148 (154)}, the matter is hereby dismissed being momentarily a *res judicata*. Being a public interest litigation, I make no order as to costs.


G.N ISAYA
JUDGE
17/10/2023

The ruling is delivered today on 17th October 2023 in the presence of Ruth Kimaryo, Learned State Attorney, for both respondents and Ms. Catherine Shemkunde (BC) only.


G.N ISAYA
JUDGE
17/10/2023