IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CIVIL CAUSE NO. 10 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 A PETITION TO CHALLENGE THE CONSTITUTIONALITY OF RULE 3, 4 AND 5 OF SHERIA NDOGO ZA HALMASHAURI YA MANISPAA YA KINONONDONI (ULINZI WA UMMA) ZA MWAKA 2002 GN NO. 385 OF 2002 PROMULGATED UNDER SECTION 80 OF THE LOCAL GOVERNMENT (URBAN AUTHORITIES) ACT CAP 288

AND

IN THE MATTER OF CHALLENGING THE PROVISIONS OF RULE 3, 4 AND 5 OF SHERIA NDOGO ZA HALMASHAURI YA MANISPAA YA KINONDONI (ULINZI WA UMMA) ZA MWAKA 2002 GN NO. 385 OF 2002 CONTRAVENING THE PROVISIONS OF ARTICLE 25(1) AND (3), ARTICLE 16(1), ARTICLE 28(2) OF THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA 1977 AS AMENDED FROM TIME TO TIME

BETWEEN

MECKZEDECK MAGANYA.....PETITIONER

AND

MINISTER OF STATE, PRESIDENT'S OFFICE, REGIONAL ADMINISTRATIION AND LOCAL GOVERNMENT.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

23rd November & 15th December, 2023

KAGOMBA, J.

By way of an Originating Summons made under the provisions of Article 26(2) of the Constitution of the United Republic of Tanzania, 1977 as amended (henceforth the "Constitution"), section 4 and 5 of the Basic Rights and Duties Enforcement Act [Cap 3 R.E 2019] (henceforth

"BRADEA") and Rule 4 of the Basic Rights and Duties Enforcement (Practice and Procedure) Rules, 2014, the Petitioner herein petitions this court for the following declaratory orders:

1. The provision of Regulations 3 and 4 of Sheria Ndogo za Halmashauri ya Manispaa ya Kinondoni (Ulinzi wa Umma) 2002 GN No. 385 of 2002 (henceforth "the impugned Regulations") are unconstitutional for offending the provisions of Articles 25(2) and (3) of the URT Constitution.
2. The provision of Regulations 3and 4 of the impugned Regulations are unconstitutional for offending the provisions of Articles 28(2) and (3) of the URT Constitution
3. The provision of Regulations 3and 4 of the impugned Regulations are unconstitutional for offending the provisions of Articles 147(1) (4) of the URT Constitution
4. The provision of Regulations 3 and 4 of the impugned Regulations are unconstitutional for offending the provisions of Articles 16(1) of the URT Constitution.

He also prays that each party bears own costs on account of public interest embedded in the petition as well as for any other or further order(s) or relief(s) incidental thereto which the court shall deem fit and appropriate to grant.

The Petition is accompanied by an affidavit sworn by Meczedeck Maganya, the Petitioner herein, lamenting about the enforcement of the provisions of the impugned Regulations, himself being a resident of Pwani street within Kinondoni Municipality.

On the other side, the respondents resist the petition. To this end, they have filed a reply to the petition, a counter affidavit and a notice of preliminary objection wherein three points of law have been raised. As the main petition is before a panel of three judges, I was assigned to determine this preliminary objection according to the law. The objection raised are states as follows:

1. The petition is untenable for want of jurisdiction for challenging the Rules made by Lord Mayor, Municipal Director and assented to by the Minister.
2. That the Petition is untenable and bad in law as the Petitioner has an alternative remedy.
3. That the Petition has been preferred against a wrong party who was entrusted with the making of the by-laws in dispute.

The hearing of the objection proceeded by way of written submissions. Mr. Daniel Nyakiha, learned State Attorney, drew and filed submissions in chief and a rejoinder for the respondents, whereas Ms.

Prisca Chogero and Mr. Melchzedeck Joachim, both being learned Advocates, drew and filed the reply submissions for the petitioner.

Submitting on the first point of the objection, the learned State Attorney argues that since the petitioner seeks declaratory orders against the provision of the impugned Regulations, which have been made via powers vested under section 88 and 89 of the Local Government (Urban Authorities) Act, [Cap 288 R.E 2010], and since any by-law has to be construed subject to the parent Act and any other laws, hence it is the Minister who is responsible for any inconsistencies within the Act through administrative action and therefore, the petitioner should have sought the prayers herein via judicial review against the Minister under the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act [Cap 310 R.E 2019] (henceforth "Cap 310 R.E 2019").

The basis of the above contention, according to the learned State Attorney, is the provision of section 8(4) of the BRADEA which prohibits the application of judicial review provisions on matters covered by BRADEA. It is further argued that since the impugned regulations have not been declared to be inconsistent with the parent Act, which confers powers for their promulgation, one cannot determine that the impugned Regulations are unconstitutional before identifying first whether the same are inconsistent with the parent Act.

In the above connection, the learned Attorney argues that the authority concerned with making of the impugned Regulations should have been made a party to these proceedings.

On the second limb of the preliminary objection, the learned State Attorney argues that since the promulgation of the impugned Regulations derives its authority from the parent Act, any person alleging that the regulations are inconsistent with the parent Act, shall have direct recourse to the Minister and/or an authority concerned with promulgation of the same, through an administrative action, being the procedure provided by the law. He cites the case **Citi Bank Tanzania Ltd TTCL & 7 Others**, Civil Appeal No. 64 of 2003 CAT, (Unreported) on the need to comply with rules of procedure.

To further concretize his point of objection, learned State Attorney cites the provision of section 8(2) of BRADEA which prohibits this court to exercise its jurisdiction under section 8 if it satisfied that there is adequate alternative remedy under the law or if the application is merely frivolous or vexatious. For this reason, he argues that, the court cannot exercise its powers under Article 30(5) of the Constitution and section 13 of BRADEA. He cites the case of **Legal and Human Rights Centre v. Minister for Finance and Planning & Others**, Misc. Cause No. 11 of 2021

(Unreported) as an example of a matter challenging subsidiary legislations through a judicial administrative action.

Learned State Attorney further cites the decision of this court in **Geofrey Watson Mwakasege v. Tanganyika Law Society & Another**, Miscellaneous Civil Cause No. 23 of 2021 (Unreported) praying that it persuades me to struck out the petition for contravening the provision of section 8(2) of BRADEA. He also cites **Ado Shaibu v. John Pombe Magufuli & 2 Others**, Miscellaneous Civil Cause No.29 of 2018 (Unreported) as to what makes a petition frivolous or vexatious.

Lastly, on the third limb of the objection, the learned Attorney's contention is simply that, since the impugned Regulations were made by Kinondoni Municipal Council and assented to by the District Executive Director and the Lord Mayor and thereafter assented to by the Minister, who is the 1st respondent herein, those authorities concerned with Kinondoni Municipal Council should be joined as parties. He is concerned that this court, if it decides to nullify the impugned Regulations, may not have heard the views of those directly affected, i.e Kinondoni community and the Municipal Council. In his views, the 1st respondent is only responsible for the parent Act, which the petitioner doesn't challenge.

Based on these submissions, the respondents pray for dismissal of the application in its entirety, with costs.

Replying, beginning with the first limb of the preliminary objection, learned counsel for the petitioner emphatically argues that since the promulgation of the impugned Regulations is subject to the consent of the 1st respondent as per section 89(1) of the Local Government (Urban Authorities) Act, [Cap 288 R.E 2010], and in view of the mandatory requirement for Ministerial approval under section 90(3) of the said Act as well as his other approval for publication of by-laws required under section 90(5) of the same Act, in effect it is the 1st respondent who actually makes the bylaws, and not the Lord Mayor or the Municipal Director. In the Advocates' views, the fact that the 1st respondent is the last line of scrutiny for the impugned Regulations, he is a proper party to be sued.

As regard the contention that the prayers sought in the petition ought to be sought via judicial review in line with section 8(4) of BRADEA, the petitioner's Advocates preferred to reply this contention jointly with the second point of the objection.

On the second point of the objection, where it was contended that the petitioner had an alternative remedy that was yet to be exhausted, it is replied that the provisions of Article 30(3) of the Constitution and section 4(1) of BRADEA, under which the petition is made, clearly support the procedure applied by the petitioner in seeking remedy for violation of his constitutional rights.

As regards the provision of section 8(2) of BRADEA which restricts this court from exercising jurisdiction where the petitioner seems to have other adequate remedies under the law, or where the application is merely frivolous or vexatious, it's the petitioner's reply that the only forum for enforcing basic rights is BRADEA and this is the relevant court, as per section 4(1) (sic) of BRADEA. For this reason, the Advocate for the petitioner argue that the provision of section 8(2) of BRADEA and the cases cited by respondents' State Attorney to show that the petitioner has an alternative remedy through judicial review are not applicable in this particular situation.

Citing the decisions in **Felix Mselle v Minister for Labour and Youth and 3 Others** [2002] T.L.R 437; **Reid v. Secretary of State for Scotland** [1991] 1 All ER 481 and **Republic v. The Permanent Secretary/ Secretary to the Cabinet and Head of Public Service Office**, (the latter not fully cited), the Advocates for the petitioner argue that in judicial review there is no substantive right given to the applicant since the court will normally confine itself to the legality or otherwise of the procedure used in reaching the decision or Act.

It is further argued that the constitutional petition alleging violation of basic rights differs with an application for judicial review. The petitioner's Advocates cite a Kenyan case of **Jeremiah Wambui Ikere v. Standard Group Ltd & Another** which was referred to in another

Kenyan case of **Martin Lemaiyan Mokoosio and Emmanuel Toyanka Mokoosio v. Reshma Pracful Chandra Vadera & Others** [2021] KEHC 56 (KLR), for a contention that what this court need to determine is whether there is a constitutional issue raised in the petition so as to address it.

Referring to the case of **Union of India & Another v. Ganayutham**, the petitioner's Advocates submit that judicial review can only apply in several distinct grounds such as illegality, procedural impropriety and irrationality.

As to whether judicial review can allow constitutional remedies, the learned Advocates are of the view that the remedies in judicial review differ from remedies in constitutional law breaches. They argue that, unlike in judicial review, in claims for constitutional violations the end result is granting of a substantive relief to the petitioner. Hence, the reason for a statutory exclusion under section 8(4) of BRADEA on the use of judicial review for seeking redress against violations of basic rights.

To clarify the petitioner's contention, the learned Advocates refer to the wording of sections 41(1) and (2) of the Interpretation of Laws Act [Cap 1 R.E 2019], to contend that since reference to a written law is taken to include reference to any subsidiary legislation made under that written law, the impugned Regulations also fall under the laws that can be

challenged before this court under Article 30(3) of the Constitution and section 4(1) (sic) of BRADEA.

They submit further that their client is not alleging illegality, irrationality or procedural impropriety of the impugned Regulations but their constitutionality whereby the infringed Articles of the Constitution have been specified as well as the facts relied upon by the petitioner.

Turning to the decision of this court in **Geofrey Watson Mwakasege v. Tanganyika Law Society & Another** (supra), the learned Advocates for the petitioner submit that the same is a bad precedent owing to misconceptions involved. They pray this court to depart from that decision. They state their main reasons for so praying as; **one**, the said decision vests distinctive jurisdictions for principle and subsidiary legislations basing on who made the legislation. That, if it's a violation of subsidiary legislations then its determination is done by a bench of judicial review, while violations of principle legislations are determined by constitutional court. They deem this distinction as a serious misdirection arguing that the court itself admitted that subsidiary legislations are also source of binding laws like Acts of Parliament.

It is their emphatic contention that nowhere the law provides for separate modes of challenging violations of principle and subsidiary legislations save in **Mwakasege's case**. They also capitalize on the admission by the court therein that it failed to find a decision of the Court

of Appeal concerning the proposition that subsidiary legislation should be challenged through judicial review.

Two; they argue that the jurisprudence used by this court in **Mwakasege's case** is distinguishable to the matter at hand. Their contention here is that in all the cases adopted in **Mwakasege's case** their respective applicants knocked the doors of the court with a specific prayer for judicial review, and not to challenge the constitutionality of the violations they faced. That, for lacking that desire, the applicants therein ended up rerouted to judicial review, by the court.

Distinguishing the case of **Legal and Human Right Centre** with this instant matter, the learned Advocates argue that the applicant therein alleged that GN No. 496A of 2021 was *ultra vires* in substance and procedure. In the learned Advocates' view, such an allegation made that case fit for judicial review. Also distinguished is the case of **Lausa Alfan Salum & Others v. Minister for Lands, Housing and Urban Development & Another** [1992] T.L.R 293 where the applicant applied for leave to apply for orders of *certiorari* and prohibition against the Minister for Lands.

Having made a well-loaded reply submission on the second point of objection the learned Advocates for the petitioner wound up on this limb by emphasizing that their client has no any alternative remedy and that this petition is preferred under the correct law.

On the third and last ground of preliminary objection, learned Advocates for the petitioner don't seem to differ with the observation made by their counterpart. In their reply, they only argue that as per rule 9 of Order I of the Civil Procedure Code [Cap 33 R.E 2019] ("CPC"), a suit shall not be defeated by reason of misjoinder or non-joinder of parties. Citing rule 10(1) and (2) of Order I of CPC, they further argue that a wrong party can be struck out and a right party can be added where there is necessary to do so.

Referring to the decision of the Court of Appeal in **Abdullatif Mohamed Hamis v. Mehboob Yusuf Othman & Another**, (Civil Revision 6 of 2017) [2018] TZCA 25, the learned Advocates argue that the jurisprudence in that case which focused on the importance of joining necessary parties for effecting court decrees, can only be relevant in appellate stage where the matter has been determined in the first instance without joining the proper or necessary party. They argue that in the instant situation, if at all there is non-joinder or mis-joinder of a party, that is curable under the cited provision of the CPC.

As regards the concern that Kinondoni community may be affected by an adverse decision of this court without being afforded an opportunity to be heard, the Advocates' reply is that the petitioner has complied with the law by filing his affidavit to show how far he has personally been

affected by the impugned Regulations. They argue that the petitioner is not obliged to collect signatures or consent of the rest of the community.

Having submitted at length, the Advocates for the petitioner pray the court to overrule the three points of the preliminary objection for lacking in merit. Still undone, they cited the cases of **Zakaria Kamwela & 126 Others v. Minister of Education and Vocational Training & A.G**, Civil Appeal No. 2 of 2012, CAT at Dar es Salaam; and **Ezekia Thom Olouch v. The Minister of State, Office of the Vise- President, Union Affairs and Environment & The Attorney General**, Miscellaneous Civil Cause No. 20 of 2016, High Court, Main Registry at Dar es Salaam, as among the petitions which have been heard and determined by this court and the Court of Appeal where petitioners challenged the constitutionality of subsidiary legislations.

They also pray the court to make an order for the petition to be disposed on merit, consequent to dismissing the preliminary objection.

Rejoining, the learned State Attorney argues that the consent of the Minister in subsidiary legislation should be treated the way the Presidential assent to an Act of Parliament is treated, adding that the assent would not make the Minister a maker of the subsidiary legislation.

For the above reason, the learned State Attorney maintains that the jurisdiction to make the impugned Regulations vests in the Urban Authority and the Minister remains responsible for inconsistence, if any,

with the parent Act through administrative action. The learned Attorney is emphatic that the authority concerned with the making of the regulations should be made a party to this petition.

Rejoining on the second ground of objection, learned State Attorney concedes that the petitioner complains about breach of his constitutional right. He reiterates, however, that the remedy sought could be obtained through judicial review, whereby the court would quash the said regulations. He reiterates the view that a constitutional petition will affect other residents of Kinondoni Municipality who assented to the *Ulinzi Shirikishi* but are not in court to be heard.

Reiterating the rest of his submission in chief, the learned State Attorney wound up by praying that the petition be dismissed.

Having considered the above rival submissions on the three points of preliminary objection, I find three specific issues to be determined. **Firstly**, whether the petition is unmaintainable for want of jurisdiction for challenging the Rules made by Lord Mayor, Municipal Director and assented by the 1st respondent. **Secondly**, whether the petition is untenable and bad in law for not exhausting alternative remedy, and **thirdly**; whether the petition has been preferred against a wrong party.

The first issue arises from the first limb of the preliminary objection. As submitted by counsel for the respondents, this limb is premised under the provision of section 8(4) of BRADEA, which states:

"(4) For the avoidance of doubt, the provisions of Part VII of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, which relate to the procedure for and the power of the High Court to issue prerogative orders, shall not apply for the purposes of obtaining redress in respect of matters covered by this Act.

In my considered view, the above provision recognizes and confirms the existence of two distinct procedures, one being for civil actions and related matters, which is provided for under the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act [Cap 310 R.E 2019], and the other procedure is for enforcement of constitutional basic rights and duties and for related matters, which is enacted under BRADEA. Existence of two distinct procedures can be gleaned from the objectives of the two Acts of Parliament above-named, as stated in their respective long titles.

Simply stated, the provision of section 8(4) of BRADEA demands that the procedure and jurisdiction of this court for granting redress in civil actions shall not commingled with the procedure and jurisdiction of the court for enforcing constitutional basic rights. The two grounds of claims and their respective procedures are not one and the same.

In their written submission in chief, the respondents appear to argue that the impugned Regulations could be challenged via judicial review and not through constitutional petition under BRADEA. In their own words they stated thus;

"The basis of our objection is premised to section 8(4) of BRADEA as the rules which are subject to this petition are subject to challenge via Law Reform (Fatal Accidents and Misc. Provisions) Act, as such the prayers sought against rules 3, 4 and 5 of Sheria Ndogo za Manispaa are prayers which can be sought through judicial review".

It is probably, for the above reason, the jurisdiction of this court has been put to question by the respondents, having in mind the restriction against mixing up remedies expressed in section 8(4) of BRADEA. Apparently, in holding this view, the respondents rely on the position stated by this court (Hon. Utamwa, J, as he then was) in **Mwakasege's case** (supra) where the petitioner therein, one Geofrey Watson Mwakasege impugned regulation 127 (2) (a), (b), (c), (3) and (4) of the Advocates (Professional Conduct and Etiquette) Regulations, 2018 G.N No. 118 of 2018 for being unconstitutional. To prosecute his grievances, he sought to invoke the provision of Article 26(1) and (2) of the Constitution, section 4 and 5 of BRADEA as well as Rule 4 of the BRADEA enforcement Rules, 2014.

In upholding a preliminary objection against that petition, for contravening the provision of section 8(2) of BRADEA, the court held, thus;

"In my further opinion therefore, as long as the impugned regulations in the matter at hand were made under the

exercise of the statutory powers of the Advocates Committee, they are challengeable through judicial review as per the ***Regional Services Ltd case*** *(supra) and the* ***Lausa Alfan case*** *(supra). It would have been different case had the impugned regulations been enacted under the Advocates Act, being an Act of Parliament. That would have given the opportunity to the petitioner to resort to appropriately invoke section 4 of BRADEA and bring the constitutional petition."*

It is clear from the above passage that, a principle of law which the court was setting is that, where a subsidiary legislation is being impugned, the applicant has to seek judicial review, and where an Act of Parliament is impugned for contravening the Constitution, then a constitutional petition under BRADEA applies. It is this proposition which the learned State Attorney wants me to uphold, while the Advocates for the petitioner vehemently reject it for being bad law.

I should first and foremost acknowledge the courage and great effort put by my learned brother, the late Hon. Dr. Utamwa,J in establishing a principle of law where one is wanting. In my very humble opinion, this area of law is still in a reformative state, particularly in our jurisdiction. It cannot be said that the law is fully settled as to the exact demarcation for the application of judicial review remedies and those available under BRADEA.

Having carefully read the submissions of the parties herein, I am of a different opinion as to the principle stated in **Mwakasege's case** above quoted. I think, and very respectfully so, that a question whether a matter is fit to be brought to this court as an application for judicial review or a constitutional petition depends on whether such matter seeks redress for civil wrongs, remedies for which being typically the prerogatives orders of *certiorari, mandamus* and prohibition, or it seeks redress for violations of constitutional basic rights and duties as clearly defined under section 4 of BRADEA.

In my opinion, the court shall register, hear and determine a petition seeking redress on the grounds of basic rights and duties, for as long as the pleadings show that the grievances therein and reliefs being sought are based on violations of basic rights and duties. It appears to me that, this criterion shall apply irrespective of the category of legislation the provisions of which are being impugned. This is to say, the criterion has to be the same for both principal and subsidiary legislations. For this reason, if a subsidiary legislation is impugned for violating basic rights, and the petitioner is able to show in his petition and accompanying affidavit, how that subsidiary legislation has affected his basic rights, and he observes all the requirements under BRADEA and its rules for filing his petition, such a petitioner shall have the right to petition this court for redress based on violations of basic rights and duties, and this court shall

be obliged to exercise its jurisdiction under section 8(1) (a) of BRADEA. The reverse, as to satisfaction of the judicial review requirements under Cap 310 R.E 2019 and its rules, is also true and distinct.

In holding the above view, I am fortified firstly, by the provision of Article 30(3) of the Constitution which permits any person who claim violation, actual or potential, of his basic rights under part III, Chapter I of the Constitution, to institute proceedings for redress in this court. Secondly, the provision of Article 30(4) of the Constitution which requires the State authority to put in place a law to prescribe for the exercise of jurisdiction of this court in determining violations of the basic rights provides for under part III, Chapter I of the Constitution; and thirdly, the enactment of BRADEA which is in line with the above constitutional prescriptions. The relevant parts of Article 30 of the Constitution, clearly provides thus:

> *"(3) Mtu yeyote anayedai kuwa sharti lolote katika Sehemu hii ya Sura hii au katika sheria yoyote inayohusu haki yake au wajibu kwake, limevunjwa, linavunjwa au inaelekea litavunjwa na mtu yeyote popote katika Jamhuri ya Muungano, anaweza kufungua shauri katika Mahakama Kuu.*
>
> *(4) Bila ya kuathiri masharti mengineyo yaliyomo katika Katiba hii, Mahakama Kuu itakuwa na mamlaka ya kusikiliza kwa mara ya kwanza na kuamua shauri lolote*

lililoletwa mbele yake kwa kufuata ibara hii; ***na Mamlaka ya Nchi yaweza kuweka sheria kwa ajili ya- (a) kusimamia utaratibu wa kufungua mashauri kwa mujibu wa ibara hii; (b) kufafanua uwezo wa Mahakama Kuu katika kusikiliza mashauri yaliyofunguliwa chini ya ibara hii; (c) kuhakikisha utekelezaji bora wa madaraka ya Mahakama Kuu, hifadhi na kutilia nguvu haki, uhuru na wajibu kwa mujibu wa Katiba hii".***

[Emphasis added].

It is pursuant to the above provision of the Constitution, the Parliament enacted BRADEA, which provides under section 4, as follows:

"4. Where any person alleges that any of the provisions of Articles 12 to 29 of the Constitution has been, is being or is likely to be contravened in relation to him, he may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the High Court for redress".

The phrase "without prejudice to any other action with respect to the same matter that is lawfully available" should not be misinterpreted to mean that judicial review can be invoked where provisions of Articles 12 to 29 are alleged to be violated. If the provision of section 25(1) of the Interpretation of Laws Act [Cap 1 RE 2019] ("CAP 1") is anything to go by, such a construction of the above quoted words would not arise. Section 25(1) of CAP 1 provides:

"25.-(1) ***The preamble to a written law*** *forms part of the written law and* ***shall be construed as a part thereof intended to assist in explaining its purport and object****". [Emphasis added].*

With that position of the law in mind, it cannot be difficult to glean the object of BRADEA, particularly in actualizing the constitutional requirements under Article 30(3) and (4) with regards to enforcement of peoples' basic rights and duties. The preamble to BRADEA, which is part of the said law, states:

"An Act to provide for the procedure for enforcement of ***constitutional basic rights and duties and for related matters****.* [emphasis added]

In contradistinction to the above, the preamble of Cap 310 RE 2019, which is the law governing applications for judicial review, is coined as:

"An Act to effect miscellaneous reforms in the law relating to ***civil actions and for related matters****".*

[Emphasis added].

Practically, for purpose of determining whether the court should invoke its jurisdiction under section 8(1) of BRADEA, I think that where the facts pleaded in a petition plainly disclose a breach of basic rights or the Constitution in relation to the petitioner, there shall be a basis for invocation of court's jurisdiction, provided that the court is properly

moved. The same views were expressed by the High Court of Kenya in **Martin Lemaiyan Mokoosio and Emmanuel Toyanka Mokoosio v. Reshma Pracful Chandra Vadera & Others** (supra), which was cited to this court by petitioner's Advocates. So, the devil or even the angel, for that matter, is to be found in the details of the petition and its accompanying affidavit.

Since, in the instant petition the petitioner alleges that regulations 3, 4 and 5 of the impugned Regulations are unconstitutional for offending the provisions of Articles 25(2) and (3); 28(2) and (3); 147(4) and 16(1) of the URT Constitution; and since the petitioner has complied with section 4, 5 and 6 of BRADEA by alleging that the impugned Regulations have violated his basic rights falling under Article 12 to 29 of the Constitution; he has also lodged in court a duly prepared petition that sets out, *inter alia*, the grounds upon which redress is sought, the specific sections in Part III of Chapter One of the Constitution forming the basis of his petition; particulars of the facts relied on; and has stated the nature of the redress he is seeking from the court, the petition cannot be untenable for want of jurisdiction merely because it seeks to challenge the Rules purportedly made by Lord Mayor, Municipal Director and assented to by the 1st respondent. To the contrary, the petition is impeccable and the court's jurisdiction to entertain it is untainted.

For the above reasons, the first issue is answered in the negative and *ipso facto*, the first limb of preliminary objection fails.

Having laboured to set the above foundation, my determination of the second issue shall be more concise. The issue whether the petition is untenable and bad in law for not exhausting available alternative remedy does no longer arise in view of the position I have taken above, that constitutional petitions challenging violation of basic rights, lodged in conformity to the requirements of sections 4, 5 and 6 of BRADEA, cannot be said to have alternative remedies under Cap 310 RE 2019. As I stated above, the two laws cater for distinct matters and offer different reliefs which cannot be substituted for one another.

Therefore, since the instant petition befits the bill of a constitutional petition on its own merits, there is no remedy for the petitioner to exhaust as the procedure under BRADEA is the only way to go for seeking redress for alleged violations according to Article 30(4) of the Constitution.

For the above reason, the second issue is answered in the negative and its corresponding limb of the objection also fails.

As for the last issue on whether the petitioner has sued a wrong party, my answer is partially yes and partially no. As to whether the 1st respondent is a wrong party to be sued in this petition, I don't think so. Basically, the 1st respondent who is the Minister responsible for local governments under whose portfolio Kinondoni Municipality falls, is a fit

party to proceed against, as he is responsible for overall supervision of performance of duties of the municipalities. For this reason, it is not the wholly truth to say that the 1st respondent is a wrong party to this petition.

However, recognizing the need to have court orders that can be effectively enforced should the court eventually find merits in the petition, I agree with the learned State Attorney, for the respondents, that all appropriate legal personalities and, or entities, responsible for promulgation of the impugned Regulations for Kinondoni Municipal Council be joined in this petition as necessary party or parties, and it is so ordered. For this reason, the third issue which corresponds to the third limb of the preliminary objection is partially upheld.

In the main, the preliminary objection raised by the respondents is overruled. Owing to the fact that part of the objection is upheld, I make no order as to costs.

Dated at **Dodoma** this 15th day of December, 2023.

THE HIGH COURT TANZANIA

ABDI S. KAGOMBA

JUDGE