IN THE HIGH COURT OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL CAUSE NO. 13 OF 2023

IN THE MATTER OF THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA OF 1977 (AS AMENDED)

AND

IN THE MATTER OF THE BASIC RIGHTS AND DUTIES ENFORCEMENT ACT

[CAP. 3 R.E 2019]

AND

IN THE MATTER OF BASIC RIGHTS AND DUTIES ENFORCEMENT (PRACTISE AND PROCEDURE) RULES 2014

AND

IN THE MATTER OF PETITION TO CHALLENGE THE CONSTITUTIONALITY OF THE PROCESS TOWARDS LAND ACQUISITION AND EVICTION OF TAMAU, NYATWALI AND SERENGETI PEOPLE IN BUNDA DISTRICT

BETWEEN

ALFRED M. MALAGILA.....1ST PETITIONER

ELIZABETH M. BAHEHE.....2ND PETITIONER

MAKOYE ENGELBERT NG'ERERE.....3RD PETITIONER

AND

MINISTRY OF LANDS, HOUSING AND HUMAN

SETTLEMENTS DEVELOPMENT.....1ST RESPONDENT

MINISTRY OF NATURAL RESOURCES

AND TOURISM.....2ND RESPONDENT

REGIONAL COMMISSIONER OF MARA REGION.....3RD RESPONDENT

DISTRICT COMMISSIONER OF BUNDA.....4TH RESPONDENT

THE ATTORNEY GENERAL .....5TH RESPONDENT

RULING

13th November & 18th December, 2023

BWEGOGE, J.:

The petitioners herein above named, by way of originating summons in terms of Articles 26 (2) and 30(3) of the Constitution of the United Republic of Tanzania of 1977 (as amended) (henceforth "the Constitution"); sections 4, 5 and 6 of the Basic Rights and Duties Enforcement Act [Cap.3 R.E. 2019] (henceforth "the Act") and rule 4 of the Basic Rights and Duties (Practice and Procedure) Rules, G.N. 34 of 2014 (henceforth "the Rules"), moved this court for grant of reliefs as thus:

(a) *Declaratory order that the process towards land acquisition and prospective eviction of Tamau, Nyatwali and Serengeti people in Bunda District is unconstitutional for violating the right to own property.*

(b) *Declaratory order that the process towards land acquisition and prospective eviction of Tamau, Nyatwali and Serengeti people in Bunda District is unconstitutional for derogating the right of freedom of expression.*

(c) *Declaratory order that the process towards land acquisition and prospective eviction of Tamau, Nyatwali and Serengeti people in Bunda District, is unconstitutional for violating the freedom to participate in public affairs.*

(d) *Declaratory order that the process towards land acquisition and prospective eviction of Tamau, Nyawali and Serengeti people in Bunda District, is unconstitutional for violating and restricting the right to equality.*

(e) *Declaratory order that the process towards land acquisition and prospective eviction of Tamau, Nyatwali and Serengeti people in Bunda District, is unconstitutional for violating right to life.*

(f) *Declaratory order that the process towards land acquisition and prospective eviction of Tamau, Nyatwali and Serengeti people in Bunda District, is unconstitutional for violating right to work.*

(g) *Any other relief(s) be awarded to the petitioners as the Court may be pleased to order.*

The aforementioned declaratory reliefs sought are premised on allegation that the respondents' acts towards land acquisition and prospective eviction of Tamau, Nyatwali and Serengeti people in Bunda District violate

the fundamental rights enshrined in the Constitution, namely; right to own property contrary to Article 24 (1) and (2); right of freedom of expression contrary to Article 18 (a), (b), (c) and (d) and freedom to participate in public affairs contrary to Article 21 (1) and (2); restricting the right to equality contrary to Articles 12 (1), (2) and 13 (1), (2), (3), (4) and (5); right to life contrary to Article 14 and right to work contrary to Article 22 (1).

The respondents, in tandem with filing reply to the petition, have raised two preliminary objections on points of law as follows: -

> *(a) The petition is incompetent for contravening the provisions of sections 4(5) and 8(2) of the Basic Rights and Duties Enforcement Act, Cap. 3, R.E 2019, as amended, as the petitioners have alternative means of redress or remedy;*
>
> *(b) The petition is untenable for being frivolous, vexatious and an abuse of Court processes;*

The petitioners herein enjoyed the services of Mr. Juma Habibu Mbwambo, learned advocate, whereas the respondents were represented by Ms. Narindwa Sekimanga, learned state attorney. The parties herein argued the preliminary objections by written submissions whose substance follows hereunder.

In validating the 1st limb of the preliminary objection, Ms. Sekimanda argued that the petitioners are challenging the constitutionality of the process towards land acquisition of Tamau, Nyatwali and Serengeti people in Bunda District. That section 4(5) of the Act under which the petition is brought in no uncertain terms provides that;

> *"A petitioner shall, prior to seeking redress under this Act, exhaust all available remedies under any other written laws."*

In the same vein, the attorney submitted that the provision of Section 8(2) of the Act, reiterates thus;

> *"The Court shall not exercise its powers under this section if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law....."*

And, the attorney enlightened this court that in this petition, the petitioners are challenging the actions by the executive through the Ministry of Natural Resources and Tourism, Ministry of Land, Housing and Human Settlements Development, Regional Commissioner of Mara Region and District Commissioner of Bunda of the ongoing process of acquiring land in Tamau, Nyatwali and Serengeti streets whereas the alleged contravention is administrative in nature. Therefore, before filing their

petition herein, they could have filed a suit challenging the executive's administrative powers of acquiring the alleged land through judicial review not a constitutional petition. Based on the above premise, the attorney asserted that the petitioners have not exhausted the available remedy by way of judicial review which is under Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, failure of which violates the provision of section 4(5) of the Act.

Further, the petitioners' attorney contended that the petitioners herein are aggrieved by the impugned administrative decision of the executive (government agencies) in acquiring the disputed land previously allotted to them. She reiterated that, the adequate means of redress for the alleged contraventions is available under Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, specifically by way of judicial review. Therefore, this court should not exercise its powers as per the dictates of section 8(2) of the Basic Rights and Duties Enforcement Act, as the petitioners have other means of redress of the alleged impugned actions. In cementing her argument, the attorney cited the case of **Attorney General vs. Dickson Paulo Sanga** (Civil Appeal 175 of 2020) [2020] TZCA 371.

Based on the foregoing, the attorney prayed this court to invoke the provisions of sections 4 (5) & 8(2) of the *Basic Rights and Duties Enforcement Act,* and dismiss the petition herein with costs.

Regarding the second preliminary objection, the attorney submitted that the petition herein is frivolous, vexatious and abuse of court process for challenging the actions of the executive through the Ministry of Land, Housing and Human Settlement Development; Ministry of Natural Resources and Tourism; Regional Commissioner of Mara Region and District Commissioner of Bunda of the alleged ongoing process of acquiring the land under the possession of the people of Tamau, Nyatwali and Serengeti in Bunda District. In assigning meaning to the terms "frivolous" and "vexatious" the attorney cited the case of **Ado Shaibu vs. Honourable John Pombe Magufuli (President of the United Republic of Tanzania) & Others** (Misc. Civil Cause 29 of 2018) [2019] TZHC 3 whereas the terms were defined as thus;

> *"....a petition is said to be frivolous when it is without substance, or groundless or fanciful; and is vexatious when it lacks bona fide cause and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety trouble and expenses."*

In the same vein, the attorney cited the case of **Christopher Bageni vs. Attorney General** (Misc. Civil Cause 1 of 2021) [2021] TZHC 5535 *Miscellaneous Civil Cause No. 01 of 2021*, whereas it was opined that:

"...the application is frivolous and vexatious and an abuse of court process for the reason that, it lacks bona fide cause..."

In winding up her submission, the counsel opined that this petition is frivolous as it has no substance, groundless and vexatious as it lacks *bonafide* cause. That the institution of matter herein is sheer abuse of court process since the redress sought is available through other means not necessarily by way of constitutional petition. Therefore, the petition herein is unmaintainable and the only remedy available for the same is dismissal with costs.

On the other hand, Mr. Mbwambo, the petitioners' counsel, in replying to the first preliminary objection charged that the respondents' written submission in support of preliminary objection suffers from lack of substance. That, basing on the nature of the matter herein there is no alternative remedy apart from moving this court through constitutional petition. That the matter herein is purely a human right (constitutional) case which at first instance ought to be tried by this court, the only institution with adjudicative mandate on fundamental human rights guaranteed by our Constitution. The counsel clarified that the petition is not challenging the legality or correctness of decision, action or any activity conducted by the respondents at Tamau, Nywatwali and

Serengeti, but rather seeks declaratory orders over the human rights which are and have been and, or are likely to be violated. Therefore, the petitioners herein had no any alternative remedy available as contended by the respondents apart from the jurisdiction of the High Court in constitutional/human rights cases enshrined under Article 30(3) of the Constitution, read together with the Article 30(4) which confers exclusive original jurisdiction.

Notwithstanding the above contention, the counsel acknowledged the spirit of the provisions of section 4(5) and 8(2) of the Act in that for any person to access the High Court for constitutional or human right case must have exhausted the available remedies. The counsel conceded that the above cited provisions shoulder the High Court with an obligation to examine the tenability of the petition before rejecting or proceed to determine the same. Likewise, the counsel conceded that *"this court ought to be the fora of last resort and not the port of call the moment a storm brews."* That the legislature intended to create a subsidiarity mechanism in which this court should be the last resort where other remedies are available in the given circumstances, be it administrative or judicial avenues. Nevertheless, the counsel maintained his stance that the petition herein is worth to be presided by this court based on the ongoing

violation of the human rights and, or human rights likely to be violated in future under the auspice of Article 26(2) of the Constitution.

Further, the counsel contended that our jurisdiction embraces the common law practice which is purely adversarial in nature. Hence, the parties are the one who have the choice to choose the most appropriate and effective remedy to heed their prayers based on the nature of matter under litigation, such as violations of human rights, under which the petitioners seek to litigate. In bolstering his argument, the counsel cited the case of **Zitto Zuberi Kabwe vs President of the United Republic of Tanzania** (Misc. Civil Cause 1 of 2020) [2020] TZHC 72 whereas the court held that;

> *"With respect ... I don't think that it is proper to take the petitioner to a route which he did not opt. Neither do I see anything wrong to the route he has taken. As pointed out above, this is not an issue for judicial review. It is an issue for public interest litigation in the safeguard of the constitution, for which the Petitioner, as a citizen of this country, has mandate to file under Article 26(2) of the Constitution. With these remarks ground two is found to be baseless and dismissed."*

And, in the same vein, the counsel contended that compelling the petitioners to pursue the approach or remedy which does not deem fit a litigant is tantamount to "change of goal post" as the remedies provided

by the law have different features based on the facts at hand and the reliefs sought. That Article 26 (2) of the Constitution, is a refuge for any person who craves to enforce the fundamental rights which are, have been, are being or likely to be violated; and also, for protection of the Constitution which is the kernel of the petition herein. The counsel cited the case of **Rev. Mtikila vs. Attorney General** [1995] TLR 31 to bring his point home.

In tandem to above, the counsel asserted that the misconception of the spirit of the provision of section 4(1) and 8(2) of the Act, may deny right to access the Court for redress and the right to fair trial. The counsel borrowed a leaf in the case of **Julius Francis Ishengoma Ndyanabo vs. The Attorney General** [2004] TLR 14 in that:

> *"Access to courts is undoubtedly, a cardinal safeguard against violations of one's rights whether those rights are fundamental or not without that right, there can be no rule of law and therefore; no democracy. A court of law is the "last resort of the oppressed and the bewildered" anyone seeking a legal remedy should be able to knock on the door of justice and be heard."*

Likewise, the counsel contended that the quest for exhaustion of alternative remedy is not an absolute bar for granting relief under the provisions section 4(5) and 8(2) of the Act but should be taken into consideration in admissibility of a petition herein. That the Supreme Court

in India when examining the Article 226 of the Indian Constitution which is a *replica in pari materia* with our section 4(5) and 8(2) of the Act, with the same nature and effect, in the cases; **Collector of Customs vs. Ramchand Sobhraj Wadhwani** [AIR 1961 SC 1506] and **Harbanslal Sahnia & Another vs. Indian Oil Corporation Ltd & Ors** [2003 (2) SCC 107, among others, affirmed that an alternative remedy does not operate as a bar. That in the same spirit, the defunct East African Court of Appeal (E.A) in the case of **Shah Vershi and Co. Ltd vs. The Transport Licensing Board** [1971] E.A 289 held:

> *"Ordinarily, the High Court will decline to interfere until the aggrieved party has exhausted his statutory remedy.... **But this is a rule of policy, convenience, and discretion, rather than a rule of law**. In other words, the existence of a right of appeal is a factor to be taken into account: it does not bar the remedy (of certiorari), especially where the alternative is not **speedy, effective and adequate**... I am of the view that neither the existence of a right of appeal nor the filing of an appeal deprives the company of its right to ask for certiorari".* [Emphasis supplied].

Based on the above premises, the counsel insisted that considering the nature of facts and claim in this matter at hand, which are apparent in the pleadings in which the petitioners are praying this court, *inter-alia,* for declaration that the respondents are violating several human rights guaranteed under the Part III of the Constitution; there is no any other

administrative or judicial forum which can make a declaration for human rights violation apart from this Court which has an original jurisdiction to that effect.

And, the counsel asserted that the wording of sections 4(5) and 8(2) of the Act are coached under a discretionary tone; hence, should not defeat the spirit of the provision of Article 30(3) of the Constitution. That the paramount duty of this court is to protect the Constitution of as aptly stated in the case of **Hamisi Masisi and Others vs. The Republic** [1985] T.L.R. 24 that: *"one of the duties of this Court is to protect the Constitution of the land."*

Lastly, in the same vein, the counsel contended that the word "shall" as used in the provision of sections 4(5) and 8(2) of the Act, according to the *Blacks Law Dictionary, 8th Edition,* does not often stand for mandatory especially when it is preceded by other effective words. The counsel cited the cases; **Director of Public Prosecutions vs. Freeman Aikael Mbowe & Another** (Crim Appeal No. 420 of 2018) [2019] TZCA 1; **Fortunatus Masha vs. William Shija** and Another [1997] TLR 41 to buttress his point. On above grounds, the attorney prayed this court to find the 1st limb of the preliminary objection with substance.

In respect of the 2nd preliminary objection, in that the petition is untenable for being frivolous, vexatious and an abuse of Court processes the counsel opined that this Court should be guided by the previous decision of this court in the cases of **Ado Shaibu vs. Honourable John Pombe Magufuli (President of the United Republic of Tanzania) & Others** (supra) and **Onesmo Olengurumwa vs. Attorney General** (Misc. Civil Cause 15 of 2019) [2020] TZHC 4555.

The counsel concluded by stating that, for the remedy to be equated as an alternative remedy, it has to be available, then adequate and efficacious. That, this is the appropriate forum for grant of declaratory reliefs sought for violation of fundamental rights. Based on the foregoing, the counsel prayed the preliminary objections herein to be overruled.

It is now my turn to delve into the preferred preliminary objections and submissions made by counsel herein and find whether the objections are merited to be sustained. In discharge of this delicate duty, I shall commence with the 2nd limb of the advanced objections in which it alleged that the petition is untenable for being frivolous, vexatious and an abuse of Court processes. Unarguably, the provision of section 8 (2) of the Act, in no uncertain terms instructs that this Court shall not exercise its original jurisdiction in presiding constitutional matters if it is satisfied that, among

others, *"the application is merely frivolous or vexatious."* The matter before the court is said to be **frivolous** when it is "*without substance, or groundless or fanciful."* Likewise, the matter is termed ***vexatious*** when *"it lacks bona fide cause and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety trouble and expenses."* See the cases: **Wangai vs. Mugamba & Another** [2003] 2 EA 474 and ***Ado Shaibu vs. Hon. John Pombe Magufuli (The President of the United Republic of Tanzania) & 2 Others*** (supra). In the same vein the matter before the court may be taken to be an ***abuse of court process*** when a litigant invokes judicial process for a purpose different than the proceeding's intended purpose(s), calculated to cause the adverse party to suffer damages (economic injury), among others.

Having scrutinized the submission in chief crafted by the respondents' attorney, I apprehend that the gist behind the charge made herein that the petition before this court is frivolous, vexatious and an abuse of court process is that the petition instituted by the petitioners herein involves the complaint of administrative actions violating human rights of which there is another means available for redress. Be that as it may, procedural sin committed *per-se* doesn't render the matter frivolous, vexatious and abuse of court process. See also in this respect the case of **Judge In-**

Charge High court arusha vs. N.I.N. Munuo Ngúni [2004] TLR 44. At this juncture, I am constrained to borrow a leaf in the holding of my learned brother, Hon. Justice Mlyambina in **Onesmo Olengurumwa vs. Attorney General** (supra) whereas he aptly opined:

> *"In any case, I find the third objection prematurely preferred. As properly stated by both parties, a matter is considered frivolous when it is without substance, groundless and or fanciful. However, the assessment of the Petition on whether it is frivolous or vexatious or useless or hypothetical, can fairly be made upon hearing of the matter on merits. It cannot be determined at preliminary stage. It is premature to entertain the objection at this stage. Determination of the instant objection will require more substantiation on the point, which in return, it will erode the whole essence of preliminary objection."*

Based on the submission made by the respondents' attorney, I am unable to arrive to the conclusion that the petition herein amounts to frivolous, vexatious and the abuse of court processes, lest I derogate the tenets of fair trial. It suffices to point out that, I find no cogent ground to certify the charge made by the respondents' attorney in that the matter herein is without substance, or groundless or fanciful. Likewise, I lack premise upon which I would find the matter herein to be devoid of *bonafide* cause or otherwise instituted for a purpose different than the proceeding's intended purposes.

That said, I would find the 2nd limb of the preliminary objections advanced herein bereft of substance.

Now, I proceed to attend the first and delicate limb of the preliminary objections advanced in this court in that the petition herein is incompetent for contravening the provisions of sections 4(5) and 8(2) of the Basic Rights and Duties Enforcement Act, as the petitioners have alternative means of redress or remedy. It is patently clear that this is jurisdictional issue of which I am called upon to determine. And, primarily, I find it pertinent to put it clear that, as rightly submitted by the counsel for the petitioners, the jurisdiction of this court to preside constitutional matters is conferred under Article 30(3) of the Constitution which I prefer to quote in *verbatim:*

> *"Any person claiming that any provision in this Part of this Chapter or in any law concerning his right or duty owed to him has been, is being or is likely to be violated by any person anywhere in the United Republic, may institute proceedings for redress in the High Court."*

Likewise, the provision of section 4 (1) of the Basic Rights and Duties Enforcement Act augments the above constitutional provision by aptly providing that:

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

In the same vein, the provision of Article 26 (2) of the Constitution provides viz:

"Every person has the right, in accordance with the procedure provided by law, to take legal action to ensure the protection of this Constitution and the laws of the land."

However, the above prescribed power vested to this court to hear constitutional matters is not without fetters. The provisions of sections 4(5) and 8(2) of the Basic Rights and Duties Enforcement Act, speak volumes in this respect. I likewise find it pertinent to reproduce the same in *verbatim*: Section 4(5) of the Act provides that: -

"A petitioner ***shall, prior to seeking redress under this Act, exhaust all available remedies*** *under any other written laws." Emphasis mine.*

And, the provision of Section 8(2) of the same Act echoes that: -

"The High Court shall not exercise its powers under this section ***if it is satisfied that adequate means of redress for the contravention***

> ***alleged are or have been available*** *to the person concerned under any other law* or that the application is merely frivolous or vexatious." *[Emphasis mine].*

Reading the afore reproduced provisions between the lines, it is my observations that: **One,** the right vested to person under section 4 (1) of the Act, to commence legal action for redress for contravention of the enshrined fundamental rights is ***"without prejudice to any other action with respect to the same matter that is lawfully available."*** And, in the same vein, the provision of Article 26(2) of the Constitution in no uncertain terms, instructs that a person exercising right to commence legal action in protection of the constitution and the laws of the land should litigate ***"in accordance with the procedure provided by law."***

Two, the provision of section 4(5) of the Act, in patently mandatory terms instructs that the petitioner exercising his right under section 4 (1) of the Act, shall *"prior to seeking redress under the Act,* ***exhaust all available remedies*** *under any other written laws."* **Three,** the provision of section 8(2) of the Act, in clear terms, restricts this court not to exercise its power to hear and determine any matter made pursuance of section 4 (1)of the Act, ***"if it is satisfied that adequate means of redress for the***

contravention alleged are, or have been available to the person concerned under any other law."

My observations above, are not nebulous in our jurisdiction. There plethora of decided cases of this court and the Apex Court with apposite restatements of the afore-revisited provisions of the laws, among others, the cases: **Tanzania Cigarette Company Ltd vs The Fair Competition Commission & Another** (Misc. Civil Cause 31 of 2010) [2012] TZHC 31 and **Elizabeth Steven & Another vs. Attorney General** [2006] TRL 404. In **Tanzania Cigarettes Co. Ltd case,** this court aptly held:

> *".....we think, law in Tanzania is also settled on the principle that litigants should first exhaust other lawfully available remedies under statutory or case law, before they can seek remedies under the Basic Rights and Duties Enforcement Act. This principle of resorting to lawfully available remedies before seeking basic rights remedies complements the principle of constitutionality of Acts of Parliament. The duty to exhaust other lawfully available remedies before resorting to basic rights and duties remedies is borne out from our reading of sections 4 and 8 (2) of Basic Rights and Duties Enforcement Act. Section 4 of the Basic Rights and Duties Enforcement Act in essence restates the position of law that is also articulated under subsection (2) of section 8. We think that these provisions exhort litigants to first exhaust other lawfully available remedies before seeking remedies under the Basic Rights and Duties Enforcement Act. Section 8 (l) of the Basic*

Rights and Duties Enforcement Act, read together with section 4, gives this court original jurisdiction to hear and determine any application made by any person who alleges that any of the provisions of sections 12 to 29 of the Constitution has been, is being or is likely to be contravened in relation to him.

Further, the court citing a persuasive decision of the Privy Council decision in **Jaroo vs. Attorney General of Trinidad & Tobago** [2002] UKPC 5 stated:

"The words "without prejudice to any other action with respect to the same matter which is law fully available," in section 14 (1) of the Constitution of Trinidad and Tobago are in pari materia with the words "without prejudice to any other action with respect to the same matter that is law fully available,"- under section 4 of the Basic Rights and Duties Enforcement Act. Interpretation of these words by the Privy Council in the case of ***Jaroo vs. Attorney General of Trinidad & Tobago*** *(supra) is of immense persuasive value to our own understanding of the significance of these words in section 4 of the Basic Rights and Duties Enforcement Act of Tanzania. In paragraph 29 of its decision, the Privy Council stated:*

> *'Nevertheless, it has been made clear more than once ..... that the right to apply to the High Court ..... should be exercised only in exceptional circumstances where there is a parallel remedy. The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter I of the Constitution is fallacious. The right to apply to the High Court for redress when any human right or*

fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; ***but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action.*** [Emphasis mine].

The court concluded that:

"From the persuasive decision of the Privy Council in ***Jaroo vs. Attorney General o f Trinidad and Tobago*** *(supra), we can deduce as a principle of law that* ***the right to apply to the High Court under Basic Rights and Duties Enforcement Act should not be granted in Tanzania where the law has already prescribed a statutory remedy.*** *This principle is in line with the presumption of constitutionality of all the Acts of Parliament and the obligation law has imposed on courts to not only take judicial notice of Acts of Parliament but to also adopt an interpretation that gives effect to the statutory provisions."* [Emphasis mine].

In the same vein, in the case of **Elizabeth Steven & Another vs. Attorney General** (supra), the Apex Court aptly held:

"It appears to us that where under section 4 an aggrieved person may take two avenues for redress, this is qualified under section 8(2) of the Act. If the court ***is satisfied the avenues for redress are or have been available, those avenues had better be exhausted first before one come to court****. We are satisfied this is good for two reasons,* ***first to preserve the sacrosanct nature of the constitution*** *and to bring to court only matters of great importance and leave the rest to be dealt*

with by other authorities". [Emphasis mine].

Based on the foregoing, I would conclude that it is settled law that the right to petition to the High Court under the Basic Rights and Duties Enforcement Act for redress for contravention of enshrined fundamental rights in this land, should not be exercised where there is a remedy already prescribed by the law of the land.

That said, a pertinent question arises herein as to whether the petitioners herein had other adequate statutory means to redress their claims other than through the remedies available under the Basic Rights and Duties Enforcement Act. This delicate question I attempt to answer as follows: It is deponed in the affidavit of the petitioners that in 1974, through the Government Notice (GN) 269, the Government of Tanzania through the Minister of Natural Resources and Tourism declared the area of Peke Gulf (Ghuba Ya Speke) which includes the former three villages, Serengeti, Nyatwali and Tamau (currently known as Serengeti, Nyatwali and Tamau Streets after establishment of Bunda District Council as game controlled areas. That Tamau, Nyatwali and Serengeti villages were established in 1976, 1987 and 2009 with Registration numbers Reg. No; MR/VC/200 (for TAMAU), Reg No; MZ/VC/511 (for Nyatwali) and Certificate No. 3 BND (for Serengeti) respectively. That sometimes in January 2006 the former

president of United Republic of Tanzania, Dr. Jakaya Mrisho Kikwete, ordered the Ministry of Natural Resources and Tourism to merge the Speke Gulf Game controlled area with Serengeti National Park. Different measures were taken by the Ministry with the help of the Regional and District Authorities to implement the said Order including formulation of the said agenda which was discussed in several meetings conducted by the Council and village governments of the respective villages, which included; "Kamati ya Maendeleo ya Kata (WDC), Timu ya Wataalamu ya Halmashauri (CMT), Kamati ya Uchumi, Ujenzi na Mazingira (KUUM), Kamati ya Elimu, Afya na Maji(KEAM), Kamati ya Fedha, Uongozi na Mipango (KFUM), Kamati ya Ushauri ya Wilaya (DCC) na Baraza la Madiwani. That throughout all the meetings conducted, the members suggested non- eviction of the citizens on their villages and they suggested other means rather than eviction including, the government to create proper infrastructures to enable water supply in the Serengeti National Park. That despite of all the meetings conducted on how to implement the Order of merging the Speke Gulf with Serengeti National Park, there were no any formal eviction process conducted, but rather more discussions on how to implement the Order.

It is further deponed that: sometimes in December, 2022 the Regional Authority of Mara and District Authorities of Bunda conducted several gatherings with the local governments of Tamau, Nyatwali and Serengeti, where they informed them of the intention of the Government to acquire and evict the people of respective villages. Throughout these meetings, there was no any legal notice of the said intention that was shown to the Local Government leaders of villages targeted, nor to the villagers who requested to be shown severally at every meeting conducted. That on 4th January, 2023 the Committee of Ministers of Secretarial Ministries (Kamati ya Mawaziri wa Wizara za Kisekta) visited and conducted a meeting with people of villages concerned with the purpose of further informing the same the intention of the government to acquire their land. The villagers, once again, requested to be shown the legal notice of the Order but the request ended in vain and there is no any formal arrangements so far communicated by the government to secure the future of villagers intended to be evicted, in terms of the reallocation of another suitable land when the eviction is due.

Finally, it is deponed that recently, there have been several administrative measures to enable the land acquisition process, through which villagers have been forcefully demanded to sign the valuation forms with threats

that failure to do so will render non-compensation and imprisonment of local leaders who hinders the process. And, that some of the valuation forms that does not tally with the actual value of the properties and the level of development made by villagers.

Based on the depositions made by the petitioners revisited above and reliefs sought in this court, it is the argument of the respondents' attorney that the petitioners are challenging the actions by the executive through the Ministry of Natural Resources and Tourism, Ministry of Land, Housing and Human Settlements Development, Regional Commissioner of Mara Region and District Commissioner of Bunda of the ongoing process of acquiring land in Tamau, Nyatwali and Serengeti villages (now streets) whereas the alleged contravention is administrative in nature. Therefore, before filing their petition herein, they could have filed a suit challenging the executive's administrative powers of acquiring the alleged land through judicial review not a constitutional petition. It is on this premise that the counsel charged that the petitioners have not exhausted the available remedy by way of judicial review which is under Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, failure of which violates the provision of section 4(5) of the Basic Rights and Duties Enforcement Act.

Having gone through the orders prayed for, grounds upon which the redress is sought and the matters deposed in the affidavit of the petitioners herein, I am on all fours with the respondents' attorney in that the impugned acts of the government and its agencies are administrative in nature. It must be born in mind that though the purported notice (G.N. No. 269 of 1974) declared the area of Peke Gulf (Ghuba ya Speke) which includes the former three villages, Serengeti, Nyatwali and Tamau within Bunda District Council as game-controlled areas, yet it was until recently that allegedly the government is taking initiative to merge the Speke Gulf Game controlled area with Serengeti National Park in compliance with executive directives issued in January 2006, whereas evaluation process is underway to pave way for the forthcoming eviction. To date, the government has not executed its resolution to evict the residents of the above-mentioned former villages.

The provision of rule 5 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014 provides thus:

> *"A person whose interests have been or believes will be adversely affected by any act or omission, proceeding or matter, may apply for judicial review."*

And, the term judicial review is assigned meaning under rule 3 of the Rules to mean *"... an application for prerogative orders of mandamus or prohibition or certiorari."* And, in this respect, I find it pertinent to borrow a leaf in the case of **John Mwombeki Byombalirwa vs. The Regional Commissioner & Regional Police Commander** [1986] TLR 75 whereas it was held:

> *"Judicial review is* ***an important weapon in the hands of the judges of this country by which an ordinary citizen can challenge an oppressive administrative action****. And judicial review by means of prerogative orders (certiorari, prohibition and mandamus) is one of those effective ways employed to challenge administrative action."* [Emphasis mine].

I am of the settled view that, basing on the circumstances of this case, the prerogative writs would be effective remedy for the acts complained of. I would add that, in the circumstances of the case herein, contrary to declaratory orders prayed for in this court, the prerogative writs, if justified, would be effective in rendering the alleged actions by the government null and void altogether. I am, therefore, constrained to agree with the respondents' attorney in that the petitioners herein have another available procedure prescribed by law for redress before instituting constitutional matter under the auspice of enshrined fundament rights allegedly encroached. The petitioners were obliged by

law to invoke and, or exhaust the prescribed procedure for redress before instituting the matter herein before this court. I, therefore, refuse to purchase the argument made by the petitioners' counsel in that the petitioners herein had no any alternative remedy available in any other law apart from the Constitution. Likewise, based on the opinion I made above, I refuse to agree with argument in that there was no other appropriate and effective remedy available to heed the petitioners' prayers apart from the procedure invoked in this court.

Contrarywise, the petitioners' counsel argued that quest for exhaustion of alternative remedy is not an absolute bar for granting relief under the provisions section 4(5) and 8(2) of the Basic Rights and Duties Enforcement Act. I find this argument misplaced. The case of the erstwhile East African Court of Appeal in the case of **Shah Vershi & Co. Ltd vs. The Transport Licensing Board** (supra) cited by the petitioners' counsel to buttress the argument that the requirement to exhaust available statutory remedy "**is a rule of policy, convenience, and discretion, rather than a rule of law**" is altogether misleading. The time in which the decision was rendered, i.e. 1971, should be taken into account. It is needless to *replicate* the fact that the requirement imposed on litigant to exhaust available remedy before instituting constitutional

matter is sanctioned by both statutory law and case law afore-revisited. It is for this reason I opined that the assertion that the requirement to exhaust available remedy is based on ***"a rule of policy, convenience, and discretion, rather than a rule of law"*** is misleading. And, I am at loss to comprehend how the petitioners' counsel arrived to the conclusion that the remedy provided by judicial review is not speedy, effective and adequate.

In the same vein, I dismiss the argument by the petitioners' counsel in that the petition herein is worth to be presided by this court based on the ongoing violation of the human rights and, or human rights likely to be violated in future under the auspice of Article 26(2) of the Constitution. As I afore said, the provision of Article 26(2) of the Constitution in no uncertain terms, instructs that a person taking legal action in protection of the constitution and, or the laws of the land should litigate in accordance with the procedure provided by law. I need not reiterate that there is already available procedure providing redress for the alleged acts of the government of which the law of this land obliges the petitioner to exhaust. And, this court can only render justice in accordance with the law of the land, not otherwise. Moreso, the case of **Zitto Zuberi Kabwe vs. The President of United Republic of Tanzania** (supra) cited to

bolster the contention that the adversarial legal practice applicable in this land, confers the parties with the right of choice of the route to attain the desired redress is patently distinguishable from this case based on the nature of petition and reliefs sought in that case. In the said case, the petitioner challenged the constitutionality and validity of, **first**, the provision of section 6(1) of the Public Audit Act (No. 8) of 2008; **second**, removal of under section 6 of the Act of the 4th respondent from the position of Controller and Auditor General (the CAG) by the 1st respondent, among others. It goes without saying that that invoking the prerogative writs through judicial review would have been inappropriate in the circumstances of the respective case.

Lastly, it was contended by the petitioners' counsel that the wording of sections 4(5) and 8(2) of the Basic Rights and Duties Enforcement Act are coached under a discretionary tone; hence, should not defeat the spirit of the provision of Article 30(3) of the Constitution. Further, the counsel contended that the word **"shall"** as used in the provisions of sections 4(5) and 8 (2) of the Act, does not often stand for mandatory especially when it is preceded by other effective words.

In respect of the argument advanced by the petitioners' counsel in that the provisions under scrutiny are coached under a discretionary tone, I

would opine that an accustomed canon of statutory interpretation is based on the principle that when the words of the statute are unambiguous, judicial inquiry is complete. See in this respect the cases; **Chiriko Haruna David vs. Kangi Alphaxard Lugora & Others** (Civil Appeal No. 36 of 2012) [2013] TZCA 189; **Republic vs. Mwesige Godfrey & Another** (Criminal Appeal 355 of 2015) [2015] TZCA 264 and **Director of Public Prosecutions vs. Freeman Aikael Mbowe & Another** (supra). This principle is premised on the rule that there would be no need for interpolations when the language of the legal provision under scrutiny is plain and, or clear. In this respect, in the case of **Director of Public Prosecutions vs. Freeman Aikael Mbowe & Another** (supra) the Court appositely opined.

> *"....we have opted to be guided by the familiar canon of construction that* ***the starting point for interpreting a statute is the language of the statute itself****. Departing from a clearly expressed legislative intention to the contrary, that language must be ordinarily regarded as conclusive."* [Emphasis mine].

Unarguably, I join hands with the petitioners' counsel in that the word **"shall"** does not often stand for mandatory term. See the case of **Bahati Makeja vs. Republic**, Criminal appeal No. 118 of 2006, CA (unreported); **Vuyo Jack vs. Director of Public Prosecutions**, Criminal Appeal No.

334, of 2016, CA (unreported); **Director of Public Prosecutions vs. Freeman Aikael Mbowe & Another** (supra); **Fortunatus Masha vs. William Shija & Another** (supra). In all the above-mentioned cases, the Apex Court opined that the provisions which were under scrutiny the word "shall" was found to be not mandatory but permissive. Whether the use of word "shall" is mandatory or rather permissive and, or discretionary, depends on the circumstances of each case and, or particular provision of law under scrutiny. See the opinion of the Apex Court in this respect in the case of **Fortunatus Masha vs. William Shija & Another** (supra) at page 2 of the judgement. I am of the settled view that, in the circumstances of this case, in which the provisions of sections 4(5) and 8 (2) of the Act were at scrutiny, the rule in the cases mentioned above doesn't apply. In my opinion, the wordings of the relevant provisions are manifestly mandatory. Fortunately, the cases I cited in arriving to the conclusion that the petitioners were obliged to exhaust other remedies available before instituting the petition herein, speak volumes of the fact that I have not stepped into the virgin land. The petitioners' counsel has not cited any authority to support his argument in that the wording of sections 4(5) and 8(2) of the Act are coached under a discretionary tone.

In view of the foregoing, I am constrained to purchase the argument made by the respondents' attorney in that the petitioners herein have not exhausted the available statutory remedy for the alleged acts of the government and its agencies.

Finally, based on the foregoing reasons I endeavoured to give, I find the 1st limb of the preliminary objection with merit; I hereby sustain the same. Otherwise, I find the 2nd limb of the preliminary objection without grain of substance; I hereby overrule the same.

Now, therefore, having sustained the 1st limb of the preliminary objection on the point of law, I hereby strike out the petition herein for reason of incompetence. And, taking into consideration of the nature of the matter herein, I find that entering an order for costs against the petitioners would be repugnant to justice.

So ordered.

DATED at **DAR ES SALAAM** this 18th day of December, 2023.

O. F. BWEGOGE

JUDGE