

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB-REGISTRY)
AT DAR ES SALAAM**

**(CORAM: MANSOOR, J., DYANSOBERA, J. AND KAGOMBA, J.)
MISCELLANEOUS CIVIL CAUSE NO. 10 OF 2023
(CF: Case Ref. No. 20230817000520925)**

**IN THE MATTER OF THE CONSTITUTION OF THE UNITED REPUBLIC OF
TANZANIA, 1977 [CAP. 2 R.E.2002]**

AND

**IN THE MATTER OF A PETITION TO CHALLENGE THE
CONSTITUTIONALITY OF RULE 485 OF SHERIA NDOGO ZA
HALMASHAURI YA MANISPAA YA KINONDONI (ULINZI WA UMMA ZA
MWAKA 2002, GN NO. 385 OF 2002 PROMULGATED UNDER SECTION
80 OF THE LOCAL GOVERNMENT (URBAN AUTHORITIES) ACT [CAP.
288 R.E. 2019]**

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 (2) AND (3) OF THE
CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA, 1977 AS
AMENDED FROM TIME TO TIME**

BETWEEN

MECZEDECK MAGANYA.....PETITIONER

AND

**MINISTER OF STATE, PRESIDENT'S OFFICE,
REGIONAL ADMINISTRATION AND**

LOCAL GOVERNMENT.....1ST RESPONDENT

KINONDONI MUNICIPAL COUNCIL.....2ND RESPONDENT

KINONDONI DISTRICT DIRECTOR..... 3RD RESPONDENT

LORD MAYOR, KINONDONI MUNICIPAL..... 4TH RESPONDENT

THE ATTORNEY GENERAL.....5TH RESPONDENT

RULING

26th April, & 6th May, 2024

DYANSOBERA, J.:

Meczedeck Maganya, the petitioner herein has, by way of originating summons and through the legal services of Ms Prisca Chogero, learned Advocate, brought this petition against the five respondents, viz., the Minister of State, President's Office, Regional Administration and Local

Government (1st respondent), Kinondoni Municipal Council (2nd respondent), Kinondoni District Director (3rd respondent), Lord Mayor, Kinondoni Municipal (4th respondent) and the Attorney General (5th respondent). The petitioner is challenging constitutionality of rules 3, 4 and 5 of *Sheria Ndogo za Halmashauri ya Manispaa ya Kinondoni (Ulinzi wa Umma) za mwaka 2002* in GN No. 385 of 2002 for contravening the provisions of Articles 25 (2) and (3) and 16 (1) of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time.

On the 4th day of April, 2024, we, *Suo motu*, raised an issue of whether or not this court is still clothed with jurisdiction to entertain this petition in view of the clear provisions of rule 15 (2) of the Basic Rights and Duties Enforcement, (Practice and Procedure), Rules, 2014 GN No. 304 published on 29/08/2014 hereinafter referred to as "the Rules". On this score, we requested both the learned State Attorney representing the respondents and the learned Counsel acting for the petitioner to address us on that crucial issue before proceeding with the hearing of the petition. Both Counsel readily agreed and opted to address the court in writing by way of written submissions. A time frame for that purpose was set and duly observed.

Submitting in support of the competence of and the court's jurisdiction to entertain this petition, the petitioner's learned Advocate Ms. Prisca Chogero of AVC & Partners, Advocates, took the floor. She contended

that under the Basic Rights and Duties Enforcement Act [CAP. 3 R.E.2019], (“the Act”) and its Rules of 2014, the hearing of the Constitutional petitions is divided into two stages: determination of the competence of the petition and the hearing of the petition on merit.

Laying emphasis on these stages, learned counsel argued that the two legislations are littered with vested powers on the High Court to determine competence of the petition on different cause before proceeding into the hearing of the petition.

Pushing the argument further, Counsel for the petitioner adverted to the provisions of sub-sections (2), (3) and (4) of Section 8 and sub-section (1) of Section 10 of the Act. She noted that by those provisions, the legislation created a filter mechanism to make sure that only competent petition can receive the attention of the panel of three judges. She was confident that in order to understand the stages of the hearing of the constitutional petition, the principal legislation must be read with the subsidiary legislation. In support of her argument, she made reference to sub-rules (1) and (2) of Rule 15 of the Rules.

Counsel for the petitioner highlighted that the competence of this matter was decided on 15th December, 2023 with reservation of further orders if complied with by the petitioner would make the matter fully

competent which was to join some necessary parties and the court scheduled the matter to be mentioned on 12th March, 2024 to check if orders were complied with.

It was counsel's argument that the long skip is contributed in court's holiday of December. On the said date of 12th March 2024, she argued, the court determined that the parties were joined as ordered and the counsel for the respondent requested to comply with rule 6 of the Rules to reply to the new amended petition with additional respondents now impleaded. Counsel for the petitioner insisted that the court granted the said request and on 4th April, 2024, the court decided that the matter was fully competent to start a hearing after the respondent filed their response.

With this state of affairs, learned counsel for the petitioner was of the view that the time of competence of this matter to be assigned to 3 judges and to start a hearing started to run on 4th April, 2024 when the court and parties admitted that rule 6 had been complied with and there was no objection from any party on the competence of the petition.

Counsel for the petitioner beseeched the court to proceed with the hearing insisting that the petition is within time provided by law.

In reply, Mr. Daniel Nyakiha, learned State Attorney for the respondents, supported the petitioner's submission that the provisions of sub-rule (2) of rule 15 of the Rules are counted after the petition is said to be competent from a single judge. He clarified that the respondents raised preliminary objection which was determined by a single judge who, among other things, ordered the amendment of the Petition to afford the other parties to be heard. It is the learned State Attorney's view that the competence of the petition has now been established and hence placed before the panel for the ascertainment of the petition and that, in that regard, the petition is within time to be determined by this court counted from the date the petition became competent.

In the alternative, it was submitted on part of the respondents that, should the court find that the time to determine this petition has elapsed as per the Rules, and for the interests of justice, it should use its inherent powers and extend time within which the petition will be finalized.

On a due consideration of the submissions and the position of the law, the starting point as we see it is rule 15 sub-rules (1) and (2) of the Rules which provides as follows: -

*'15. -(1) Where the petition is found to be competent by a single Judge, the Principal Judge or the Judge in-charge shall, within seven days assign the application to a panel of three Judges.
(2) The petition shall be heard and determined within ninety days after the assignment.'*

As indicated before, it is the argument by Ms. Prisca Chogero supported by Mr. Daniel Nyakiha that when the petition is filed under this Act and its Rules, a single Judge of the High Court must first determine the competence of the petition and thereafter, when the petition is found to be competent, the Principal Judge or the Judge-in-charge assigns it to a panel of three Judges. It is their further argument that the time for competence of this matter to be assigned to 3 Judges and to start a hearing started to run on 4th April, 2024 when the court and parties admitted for rule 6 to have been complied with.

With due respect, this argument is misplaced. We think that sub-rule (1) of rule 15 of the Rules is inconsistent with, and run counter the clear provisions of the parent Act. Section 10 of the Act which relates to the constitution of the High Court enacts as follows: -

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

(2) Subject to subsection (1), every question in a petition before the High Court under this Act shall be determined according to the opinion of the majority of the Judges hearing the petition'.

According to the above provisions of the parent law, in hearing and determining any petition or reference, the High Court must be composed

of three Judges of the High Court; only the determination of the competence of the petition may be heard by a single Judge of the High Court. Besides, it is the law that every question in the petition before the High Court must be determined according to the opinion of the majority of the Judges hearing the petition.

We are fully aware that the current practice of the court is that once a petition is filed under the Act and its Rules, it is assigned to a 3-judge panel and it is the 3-judge panel which is legally empowered to allocate a single Judge of the High Court within that panel to determine the competence of the petition. As parties' counsel will agree with us, this is the procedure adopted by the court in respect of the current petition and this accords with the letter and spirit of the parent Act.

It is our finding, therefore, that sub-rule (1) of rule 15 of the Rules, as it currently stands, suffers from two flaws. In the first place, it is not indicated how that single Judge of the High Court seizes the petition to determine its competence - whether it is by assignment by the Principal Judge or the Judge in-charge or whether it is by assignment of a 3-panel of Judges of the High Court. Second, that provision is inconsistent with the principal legislation which mandatorily requires the composition of the High Court to be three Judges of the High Court as provided for under subsection (2) of Section 10 of the Act.

There is no dispute that the delegated authority which promulgated the Rules derived its power under Section 15 of the Act which provides that:

'15. Subject to the provisions of this Act, the Chief Justice may, after consultation with the Minister make rules with respect to other matters relating to the practice and procedure of the High Court and of subordinate courts in relation to the jurisdiction and powers conferred by or under this Act, including rules with respect to the time within which application may be brought and references shall be made to the High Court from subordinate courts.'

(Emphasis supplied)

It is trite that an enabling law which donates power to a delegated authority to make law towers above subsidiary legislation. That explains why, under sub-section (1) of Section 35 of the Interpretation of Laws Act [CAP. 1:R.E.2019], 'subsidiary legislation shall not be inconsistent with the provisions of any written law under which it is made or of any Act, and any subsidiary legislation shall be void to the extent of such inconsistency'.

There is thus need for sub-rule (1) of rule 15 of the Rules to be amended to address the inconsistency and conform to the parent law, that is the Basic Rights and Duties Enforcement Act.

Now on the competence of this petition in view of sub-rule (2) of rule 15 of the Rules. Both learned State Attorney for the respondents and the learned Advocate for the petitioner are of the view that this petition is competently before this court. It is their argument that the time of

competence of this matter to be assigned to three Judges and to start a hearing started on 4th April, 2024 when a single Judge found the petition to be competent and there was no objection on its competence. Furthermore, it is submitted on part of the respondents that the competence of the petition has now been established and therefore placed before the panel for the ascertainment of the petition and in that regard the petition is within time to be determined by this court, counted from the date the petition became competent.

Statutorily, rule 15 (2) of the Basic Rights and Duties Enforcement (Practice and Procedure), Rules, 2014, outlines the parameters of effluxion of time by defining the period of hearing and determination of the petition to be ninety days after the assignment.

A well settled canon of interpretation and application of the provisions of a statute or an enactment is that where the words and the language used are clear and unambiguous as in the case under consideration, they must be given their ordinary or actual meaning because such words or terms used do best declare the intention of the law makers unless this would lead to absurdity or be in conflict with some other provisions thereof. Put differently, where the language and intent of an enactment is apparent, courts must not distort their meaning.

This means that the argument of the counsel for the parties that the computation of ninety days starts to run after a single Judge of the High Court has determined the petition to be competent is not the correct position of the law; rather, the computation of ninety days period starts after assignment by either the Principal Judge or the Judge in-charge. To say that the computation of ninety days starts after the competence of the petition is determined, as counsel for the parties suggest, is to distort the meaning of the word 'assignment'.

As the record depicts, this petition was assigned by Hon. M.M. Siyani, the Principal Judge, to the 3-judge panel, namely, Latifa Mansoor, W.P. Dyansobera and A. Kagomba, JJJ on 18th August, 2023. The period of ninety days lapsed on 17th November, 2023. It is our view that the moment the ninety days ended, the court's jurisdiction lapsed by way of effluxion of time.

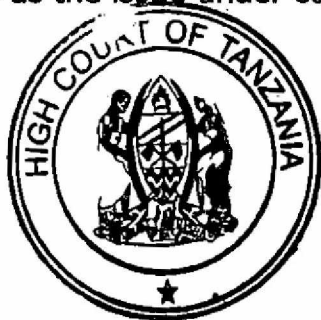
It should be observed that jurisdiction is everything. It is what gives a court the power, authority and legitimacy to entertain a matter before it. Besides, jurisdiction is the gateway to the temple of justice, and without it there is no basis for continuing with the proceedings, for a decision made by a court of law without jurisdiction is null and void.

We find and hold that this court cannot hear and determine this petition which is outside its mandatory statutory timelines.

Mr. Daniel Nyakiha pleaded that should the court find that time to determine this petition has lapsed as per the rules, the court should, for interests of justice use its inherent powers to extend time in which the petition should be finalized.

With unfeigned respect, we are unable to accede to that invitation. It hardly bears stressing that without jurisdiction, a court has no power to take one step more and the better we can do is to take down our tools in respect of the matter under consideration.

We thus strike out this petition and order each part to bear its own costs as the issue under consideration was raised by the court *Suo motu*.



A handwritten signature in black ink, appearing to read "Latifa Mansoor".

Latifa Mansoor, J.
6/5/2024



A handwritten signature in black ink, appearing to read "Wilfred Dyansobera".

Wilfred Dyansobera, J.
6/5/2024



A handwritten signature in black ink, appearing to read "Abdi S. Kagomba".

Abdi S. Kagomba, J.
6/5/2024