IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MAIN REGISTRY)
AT
DODOMA

MISCELLANEOUS CIVIL CAUSE NO.16 of 2023

ALPHONCE LUSAKO.....PETITIONER

VERSUS

THE CONTROLLER & AUDITOR GENERAL.....1ST RESPONDENT
THE ATTORNEY GENERAL .....2ND RESPONDENT

The Last Order: 15th March 2024.
Date of Judgement: 27th May 2024.

JUDGEMENT

NANGELA, J.

The facts constituting this petition are brief. On March 30th, 2022, the first Respondent submitted to Her Excellence the President of the United Republic of Tanzania, an Annual Report on the Audit of the Central Government for the Financial Year ending 30th June 2021 (herein after referred to as The Report). Such submission was done as part of the first Respondent's discharge of his official duties.

In that Report, it was observed, among other things, that, the Central Government had disbursed, from the Consolidated Fund, a total of TZS 7,697,708.00 to Mwanza Regional Secretariat. The monies so disbursed were used for the construction of Mwanza Airport Terminal Building. Out of

such revelations, this 'Petition' was crafted and filed in this court by Mr. Alphonce Lusako, who is herein after referred to as "the Petitioner".

His petition, which was brought under Section 2 (3) of the Judicature and Application of Laws Act, Cap. 359 R.E 2019 and Article 108 (2) of the Constitution of the United Republic of Tanzania, 1977 (as amended from time to time) (to be referred hereafter as the Constitution), was supported by an affidavit of his own. Earlier, the Respondents had raised a set of preliminary objections which, nevertheless, were overruled by this court in its ruling dated 15th March 2024. Subsequently, it was agreed that parties should proceed arguing the merits of the matter at hand by way written submission.

In his Petition, whereas the Petitioner challenges the disbursement of the sum of TZS 7,697,217,708.00 from the Consolidated Fund alleging that such was done in contravention of the law, the Respondents hold a different view. The latter maintain that such disbursement was done in accordance with the budget re-allocation process through the Treasury and, for that matter, does not violate the Constitution.

In terms of his prayers, the petitioner requests this court to make the following orders:

1. Orders proclaiming that the disbursement of TZS 7,697,217,708.00 to Mwanza Regional Secretariat was in violation of Article 136 (1) (a), 136 (1) (b), 137 (6), 143 (2) (a) and (b) of the Constitution.

2. Orders proclaiming that the disbursement of TZS 7,697,217,708.00 to Mwanza Regional Secretariat was in violation of Article 47 (1) (a), of the Budget Act, 2014.
3. Orders proclaiming that the 1st Respondent breached the provisions of Article 143 (2) (a) and (b) of the Constitution for failing/neglecting to prevent the disbursement of TZS 7,697,217,708.00 to Mwanza Secretariat.
4. Orders proclaiming that by failing to properly advise the President and the Cabinet on Constitutionality and legality of the disbursement of TZS 7,697,217,708.00 to Mwanza Secretariat, the 2nd Respondent contravened Article 59 (3) of the Constitution.
5. Orders directing the 2nd Respondent to act or advise action to be taken to all those responsible in contravention of the laws and the Constitution during the disbursement of TZS 7,697,217,708.00 to Mwanza Secretariat.
6. Orders directing the 1st Respondent to continuously follow up, monitor and report satisfactory implementation of the orders granted by this Court in this Petition through his forthcoming annual reports.
7. Orders that each party to bear its own costs the same being a public interest Petition aimed at championing for national

economy that is planned and promoted in a balanced and integrated manner.

8. Any other order or relief which this Hounourable Court shall deem fit to grant.

On the 23rd of November 2023, the Respondents filed their counter affidavit. As earlier stated, this court had directed the parties to argue their positions and dispose of this petition by way of written submissions. They did duly file their submissions which I will briefly sum-up before I discuss the merits of each submission and offer my own verdict regarding this petition.

Submitting in support of this petitioner, Mr. Seka, the learned counsel for the Petitioner, relied on the Indian case of **Supreme Court Advocates on Record Association vs. Union of India** [2015] AIR 2015 SC 5457. In that case, the court held a view that:

> "Whatever the Constitution may or may not provide, the welfare of the country will depend upon the way in which the country is administered. That will depend upon the men who administer it. It is a trite saying that a country can have only the Government it deserves. Our Constitution has provisions in it which appear to some to be objectionable from one point or another. We must admit that the defects are inherent in the situation in the country and the people at large. If the people who are elected are capable and men of character and integrity, they would

> be able to make the best even of a defective Constitution. If they are lacking in these, the Constitution cannot help the country. After all, a Constitution like a machine is a lifeless thing. It acquires life because of the men who control it and operate it, and today India needs nothing more than a set of honest men who will have the interest of the country before them."

Drawing inspiration from the above excerpt, the learned counsel for the Petitioner argued that its bearing does apply to this country, the fact being that the country needs nothing more than a set of honest men who will have the interest of the country before theirs. In the Petitioner's view, however, such men/women of honest character and who put the interests of the country before theirs are currently lacking.

According to the Petitioner, it is from such a scarcity of noble men and women that a need for judicial determination of this controversy has arisen. He contended that, the functionaries entrusted with the constitutional obligation of safeguarding public funds accumulated in the Consolidated Fund have not heeded to such a noble requirement.

On that account, the learned counsel for the petitioner argued that there has been a blatant disregard and, hence, a violation of Articles 136(1) (a); 136(1) (b); 136(2); 136(3); 137 (3); 143 (2) and 143 (2) (b) of the Constitution and Section 47 (1)(a) of the Budget Act, 2014.

It was the Petitioner's learned counsel's submission that, in the setup of things, key constitutional institutions, such as the Controller and Auditor General, are either powerless to act or complicit in pouring mud into our constitutional text, and, hence, a need for judicial intervention in defence of the Constitution. He contended that, doing so will only be possible if this court will pronounce itself in terms of the reliefs prayed by the Petitioner.

The learned counsel for the Petitioner contended that, in context, this court must take judicial notice that the Judiciary of Tanzania has not done much or said much or take bold steps to take stern actions when information surfaces of wanton squander and theft of public funds surfaces mainly from the First Respondents annual audit reports.

Well, before I proceed looking at the rest of the learned counsel's submissions, I find it apposite to state, at this juncture, that, in my view, whether the learned counsel asserted it intentionally or accidentally, I cannot agree with the submission made by the Petitioner's counsel that the judiciary of this country has been inactive whenever there are allegations of misuse of public funds. Perhaps I will need to set, for the record, some few basic principles worth observing.

In the first place, one need to be mindful of the general observations made by this court in the case of **Lujuna Shubi Balonzi, Senior vs. Registered Trustees of Chama cha Mapinduzi**, [1996] T.L.R 203 regarding management of public

funds. In that case this court (Samatta, JK (as he then was) observed that, generally:

> "the management of public funds, like the management of the economy and foreign policy of the country, is the prerogative of the executive; it is not amenable to judicial process. In the exercise of its powers in that field the executive is accountable to parliament. It would be straining to the utmost the power of judicial innovation to say that in the exercise of its powers in that area the executive falls under judicial superintendence or scrutiny. Generally speaking, judicial process is unsuitable for determining issues arising from the exercise of those powers."

A somewhat similar remarks were made by an Irish Court in **Mackenna vs. Taoiseach (No 2)** [1995] 2 IR 10 in relation to the borrowing and spending powers of the executive. In that case Costello, J stated as follows:

> "The extent to which, and the manner in which, the revenue and borrowing powers of the State are exercised and the purposes for which the funds are spent are ... the paramount role of the two organs of state [which] is beyond question. For the courts to review decisions in this area by the Government or Dáil Errean (Assembly of Ireland) would be for them to assume a role which is

> exclusively entrusted to those organs of state, and one which the courts are conspicuously ill-equipped to undertake."

From the context of what pertains to our jurisdiction, it is my considered view, however, that, the above noted observations, are of general nature. They do not exclude all possibilities calling for courts' intervention where issues of management of public funds are interwoven with an alleged breach of the Constitution. In essence, therefore, where, in an appropriate case, a breach of the Constitution is made apparent, the court, as the guardian of the Constitution will surely have a right to intervene in the interest of protecting the sanctity of the Constitution.

I hold that view, given that, an alleged withdrawal of funds from the Consolidation Fund if done in breach of the established procedures laid down by the Constitution, would, regardless of how good the intention of such a withdrawal could have been, if the same is established, constitute a breach of the Constitution and, it is only this Court which is entitled to declare the existence of such a breach.

It means, therefore, that, at opportune time and circumstance, this court may question matters of management of public funds but only to the extent that they involve breach of constitutional principles or procedures or the laid down safeguards and, not otherwise.

A good example of the role which a court like this one may play can be drawn from the decision of the Supreme Court of India in the landmark case of **Rai Sahib Ram Jawaya**

Kapur and Ors. vs. The State of Punjab, AIR 1955 SC 549. In that case, the Court was called upon to discuss the validity and scope of an 'Appropriation Act' and held that -:

> "As soon as the Appropriation Act is passed, the expenditure made under the heads covered by it would be deemed to be properly authorised by law under ... the Constitution. The expression 'law' here obviously includes the Appropriation Acts. It is true that the Appropriation Acts cannot be said to give a direct legislative sanction to the trade activities themselves. But so long as the trade activities are carried on in pursuance of the policy which the executive Government has formulated with the tacit support of the majority in the legislature, no objection on the score of their not being sanctioned by specific legislative provision can possibly be raised. Objections could be raised only in regard to the expenditure of public funds for carrying on of the trade or business and to these the Appropriation Acts would afford complete answer".

The above holding does indicate that, once the constitutional procedures laid down for appropriation of funds from the Consolidated Fund are adhered to, courts will be precluded from questioning the Executive about that expenditure simply because that is in the realm of the

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The above holding does indicate that, once the constitutional procedures laid down for appropriation of funds from the Consolidated Fund are adhered to, courts will be precluded from questioning the Executive about that expenditure simply because that is in the realm of the

parliament, it being the institution mandated to hold the government accountable.

The above stated fact brings into the play the general observation made by this Court in the **Lujuna Ballonzi's case** (supra) to the effect that, judicial process is unsuitable for determining issues arising from the exercise of those powers. Instead, it is the Parliament that is better suited in the exercise of its powers in that field, given that the executive becomes accountable to parliament. The point to note, however, is that the questioning would stop if procedures laid down to appropriate funds from the Consolidated Fund were/are adhered to. One of such is where there has been an Appropriation Act, which allows the governments to withdraw funds from the Consolidated Funds for varied purposes such as either introducing and/or financing several social, economic and welfare development programs for the holistic development of people.

Such a position is also supported by yet another Indian case of **Bhim Singh vs. Union of India** (2010) 5 SCC 538 where the Indian Supreme Cour held that:

> "if the ... Government intends to spend money for public purpose and for implementing various welfare schemes, the same are permitted by presenting an Appropriation Bill which is a Money Bill and by laying the same before the Houses of Parliament and after getting the approval of Parliament, ... in particular, it becomes law and there cannot be any

> impediment in implementing the same so long as the scheme is for the public purpose. The law referred to in the Constitution for sanctifying expenditure from and out of the Consolidated Fund ... is the Appropriation Act, ... no money shall be withdrawn from the Consolidated Fund ...except under appropriation made by law based in accordance with the provisions of this article."

Secondly, it is my considered opinion that, although the learned counsel for the Petitioner has called upon this court to take judicial notice of what he stated as 'a fact' (i.e., that, courts in this country have been somehow 'lukewarm' against misuse of public funds'), I do not find such an assertion to be 'a fact befitting the taking of judicial notice of it'. I hold that view because, in the first place, judicial notice is essentially a technique used by a court when it declares a fact, presented as evidence, as true without a formal presentation of evidence. For instance, a court can take judicial notice of indisputable facts, and it will usually do so for convenience purposes.

Put differently, a court will only take judicial notice of those facts presented as true and conclusive evidence and, thus, requiring no formal presentation of evidence. Sections 58 to 60 of the Evidence Act, Cap. 6 R.E 2022 does provide for all that with section 59 (3) providing that:

> "If the court is called upon by any person to take judicial notice of any fact, **it may refuse to do so unless and until such**

> **person produces any such book or** document **as it may consider necessary to enable it to do so.**" (Emphasis added).

As regards the matters before me, since there have been no materials laid before this court as may be necessary to enable it to take judicial notice of such an alleged fact, I am constrained to refuse heeding to the plea made by the learned counsel for the Petitioner. To say the least, I find it inappropriately placed, unwarranted and, above all, unsubstantiated.

But the second reason for my refusal to take judicial notice of the assertions which the learned counsel for the Petitioner made, is the simple fact that **courts of law in this country (and in all jurisdictions, so to speak,) cannot and should not be likened to "ambulance chasers"**. In principle, courts are generally moved by the parties or litigants. This is not a novel idea but a fact which is in the common place and the learned counsel for the Petitioner is pretty much aware of it.

In view of such that, one may safely state that, it is not the business of this court to go out seeking for litigants who should come and litigate whatever issues touching on their public interests. Such is the duty of the litigants themselves, and any aggrieved member of the public, so long as the doors of the court are always open. Passivity of the members of the public regarding matters of public interest which they ought to have sought judicial clarifications or interventions, should not

be a ground or licence to heap blames or criticism on the judiciary.

For those reasons, let it be far from me and, from this court, that I should be called upon or associate myself with such a askew view or even bless, and/or sanction the kind of perception or attitude held or stated by the learned counsel for the Petitioner regarding the courts in this country or even agree with him that our courts have been lukewarm, as argued. In my view, it is only a blind and deafened legal mind that can partake of such a view, given the monumental tasks and issues of public concerns which courts in this country have tackled time and again, upon being moved by litigants. This petition is, by itself, a sufficient proof of the dignified role played by courts in this jurisdiction.

As I stated herein, above, as a matter of principle, courts are always moved and are guided by the law and agreed principles, rules, and norms that upholds rules of law and the due process. Having so observed and stated, let me revert to the submissions made by the learned counsel for the Petitioner. According to him, this petition presents an occasion for the court to say something louder and announce its formal entry in the quest to protect misuse of public funds. Well, I have already commented on that, and I need not overemphasize what I stated earlier. Even so, the learned counsel for the petitioner has also contended that, this Petition is special not only because it's one of those few petitioners that have attempted to seek judicial assistance to protect the Constitution, but because

it may eventually remind thieves and squanderers that the courts in Tanzania will not shy away to say something when the law is breached, and the constitution is disrespected.

The Petitioner's learned counsel reiterated that, his client is asking the court to fault the manner and style in which the sum of TZS 7,697,217,708.00 was disbursed from the Consolidated Fund to Mwanza Regional Secretariat. The petitioner alleges that such was done in utter and flagrant violation of the Constitution and the Budget Act, 2014. He argues that such laws and the laid down constitutional or legislative procedures were ignored. He, consequently, adopted and relied on the Petitioner's affidavit and affidavit in reply dated 20.09.2023 and 05.12.2023 respectively as his key reference documents.

Based on those documents he asserted that there are three critical events factually narrated in the Petitioners affidavits which are worth noting. According to him, the first is the fact that, in its annual audit report for the financial year ended on June 2021, the First Respondent reported, on pages 41 and 42, (annexed as **Annex 01** to the affidavit in support of the Petition) that, TZS 7,697,217,708.00 was taken out of the Consolidated Fund and transferred to Mwanza Regional Secretariat for construction works at Mwanza International Airport.

The second factual issue, according to the Petitioner's counsel, is that, as per the 1st Respondent's report, the transferred funds were not budgeted for nor requested by

Mwanza Regional Secretariat given that the Mwanza International Airport construction activity of was not one of the planned activities of Mwanza Regional Secretariat for the financial year ended June 30, 2021. The last factual issue is that, as per the first Respondent report, the disbursement was in contravention of section 47(1)(a) of Budget Act, 2014.

The learned counsel did also point out and noted the 1st Respondent's the observations, that, allocation of funds to implement unbudgeted activity affects the implementation of the planned activities, and further, that, it poses a room for misappropriation of Government funds. He contended that, in his recommendations, the 1st Respondent had recommended that:

> "[the] government and responsible authorities monitor compliance with the Budget Act and its regulations for the purpose of achieving value for money and all implementing entities are encouraged to plan and budget for all activities."

In his submission, however, the Petitioner argued that the matter should not just end there with a mere recommendation to the central government. For his part, more pivotal and stern measures need to be taken given that, the actions of disbursement of TZS 7,697,217,708.00 from the Consolidated Fund to Mwanza Regional Secretariat amounted to clear breach of Article 136(1) (a); 136(1) (b); 136(2); 136(3); 137(3); 143(2)(a) and 143(2)(b) of the Constitution and Section 47(1)(a) of the Budget Act, 2014.

The Petitioner's counsel argued, but conceded, however, that, while it was appropriate on the part of the 1st Respondent to end up with recommendations, the duty and authority to interpret the Constitution rests with the courts. He contended that, to do so, however, regard should be had to the constitutional and legal framework governing funds disbursement from the Consolidated Funds, arguing that the framers of the constitution placed a stricter control on the use of funds from the Consolidated Funds.

Reliance was placed on the procedures detailed under Articles 135 to 144 of the Constitution of United Republic of Tanzania, which I need not narrate here. He maintained that the central Government and the 1st Respondent did not adhere to the procedure set out in the Constitution when disbursing the aforementioned amount to Mwanza Regional Secretariat. From such submission, the Petitioner's counsel proposed five issues for consideration by this court and proceeded to submit on them. At the end of his submission, the learned counsel for the Petitioner urged this court to respond to those issues in the affirmative and grant the reliefs sought. I will look at those issues and adopt them later during analysis and determination of the merits of this petition.

In his submission in reply, Mr. Hangi, the Principal State Attorney for the Respondents, had a view that, the Indian case relied on by the Petitioner pertains to the administration of that country and the character of its administration. He argued, therefore, that the wisdom contained in it is context specific. He

conceded, however, that, this country needs men and women of integrity but argued that such a need is not one of the issues before this court. He asserted that, the duty of this court is to impartially uphold the rule of law by applying legal principles and rules to matters laid before it.

However, in my view, what both counsels for the parties have stated while prefacing their submissions is an obvious fact, not only to this country, but any other country that cherishes and respects the rule of law and constitutional governance. And, if I may add, because one cannot argue the obvious, their submission to that effect will rest where they have landed it without any further ado, allowing me to consider the more pertinent concerns raised by the petitioner in this petition.

In his submission, Mr. Hangi contended that the present petition is anchored on the issue of alleged misappropriation of public funds. He outlined and argued that, while it is commendable that the Petitioner seeks redress through judicial mechanism, one should be reminded of the fact that courts will only adjudicate matters based on evidence and the legal arguments presented before it and not on mere broader considerations as those raised by the petitioner regarding the courts' inaction and or complacence.

Mr. Hangi submitted that any perception of inertia on the part of the courts in this country, if there be such, should be addressed through constructive engagement with the legal system rather than through criticism or conjecture, the fact

being that the judiciary operates within the confines of the law, precedent, and due process.

I think I have already made a position regarding whatever the petitioner might have meant in his perceived notion about the response of the judiciary of this country to matters regarding misuse of public funds. For that matter, I do not think there is any need for a reiteration of what I stated earlier here above at this juncture. It suffices to say, albeit in passing, that, the judiciary of this country is always moved to act and, when properly moved, it has always acted promptly and decisively and, will continue to act in that manner even if, at some point, a matter might have been overtaken by events to the extent of there being a possibility of attracting the doctrine of mootness, provided that such a matter has a likelihood of recurring.

That has been a position, not only of a judiciary like ours, but also of all other judiciaries in countries that cherish the rule of law and constitutional democracy. For clarity on the doctrine of mootness, such doctrine applies when, during a lawsuit or claim proceedings, an event or a changed of circumstances transpires, that render the continued hearing or determination of the claim pointless or unnecessary. See: **Ghana Center for Democratic Development & 8 Others vs. Attorney General**, Supreme Court of Ghana, Writ No. J1/01/2021 (31st May 2023) at page 12-13 citing, as well, the case of **J.H. Mensah vs. Attorney-General** [1996-97] SCGLR 320.

In that latter case, the court held that:

> "The principle guiding the court in refusing to decide moot questions was quite settled. If the question, though moot, was certainly not likely to recur, the courts would not waste their time to determine questions and issues which were dead. Thus, for a court to decline deciding a moot question, it had to be established that subsequent events made it absolutely clear that the allegedly wrong behaviour could not reasonably be expected to recur. Since no such proof had been established in the instant case, and the court could not be certain that the issue might not recur, the court would go into the question to forestall multiplicity of suits and for the guidance of future governments and Parliaments."

In yet another Ghanaian case of **Amidu vs. Kufuor and Ors** [2001-2002] SCGLR 86, the court provided detailed insights of such a doctrine in light of constitutional matters, where there is a likelihood of a recurrent pattern. In that case the court had the following to say, and I quote *in exstenso*:

> "To read the doctrine of mootness into article 2 of the Constitution, 1992 will be a dangerous step to take. A breach of the Constitution, 1992 cannot be countenanced under any circumstances; nor can any plea of extenuating circumstances be allowed to prevail. A

> Constitution cannot be operated and defended by such considerations, lest we put expediency above constitutionalism. The mootness doctrine can easily expose the Constitution, 1992 to frequent breaches resulting in subsequent loss of sanctity. A Constitution must be a sacrosanct document and must remain so in all situations or circumstances. And it cannot remain inviolate as a sacred document if certain alleged infringements are denied judicial attention because there are extenuating or special circumstances justifying such a breach. There cannot be any plea of justification when a breach of the Constitution is alleged; otherwise, this court could be accused of casting an indulgent judicial eye on certain breaches, by certain persons, of the fundamental law."

I have deliberately gone to such extent of explain what the judiciary may be, and is, prepared to do only to bring to the attention of the learned counsel for the petitioner (and for the benefit of all others who might have a blind perception regarding the judiciary), how far it may go when it is properly moved. Having said all that, I will now turn to the issues that will guide this court in determining the controversy that has set the parties apart.

As a matter of principle, the duty to formulate issues for determination, as correctly submitted by the learned Principal

State Attorney appearing for the Respondents, rests with the court. In his submission, he has cited the case of **Juma Issa Ramadhani vs. Mkurugenzi Mkuu Shirika la Bandari Zanzibar**, Civil Appeal No. 47 of 2018 (unreported) and, I do agree that this case is quite instructive on that point. In that case, the Court of Appeal of Tanzania, citing with approval the decision of the defunct East African Court of Appeal in the case of **Odd Jobs vs. Mubia** [1970] 1 E.A. 476 (CAN), made it clear that:

> "it is the duty of the court to frame such issues as may be necessary for determining the matters in controversy between the parties."

Likewise, in the case of **Prisca Nyang'uba Chogero vs. Attorney General,** [2022] TZHC 15880, this court reiterated the same principle, which was also echoed in the case of **Mwalimu Paul John Mhozya vs. Attorney General**, (1996) TLR.13. In the latter case of **Mwalimu Mhozya** (supra), this court stated that:

> "It is the function of a court of justice to try to get the bottom of the real dispute and determine what are the real issues in the matter before it provided, of course, no party can be prejudiced."

In his submission, however, Mr. Hangi, the learned Principal State Attorney, has argued that it was improper for the petitioner's counsel to propose issues as doing so goes contrary to the above stated principle. He contended that what was proposed as issues by the petitioner do not, in real sense, aim

at determining the controversy between the two parties in the petition. He argued, for example, that, the first issue does not really help the court to determine the petition.

In my view, sound as the argument he has made may be, it is correspondingly clear that the parties to a case may as well propose to the court what they themselves consider as the real controversy or issues for its determination by the court. If that happens to be the case, the role of the court will be either to discard such issues and frame issues afresh or adopt and/or modify such proposed issues, if the court considers them to be at the centre of the controversy.

Such a position may vividly be discerned from the above cited case of **ODD JOBS vs. MUBIA** (supra) where, apart from noting that '*the prime responsibility to ensure that issues are framed lies on the court the court*', the court did go ahead and noted that:

> "... but ... the **advocates also have a duty** to see that this requirement is complied with by the court." (Emphasis added).

Essentially, an advocate being an officer of the court may discharge that duty by proposing the kind of issues constituting the core of the controversy which the court is called upon to resolve and, in so doing, it cannot be said that the advocate has hijacked the role or function of the court. The decision of this court, in the case of Gipson **S. Kisanga vs. Atrisiana Karisia** [2020] TZHC 424, which cited a decision of the Supreme Court of India to its aid, in the case of **Makhan Lai Bangal vs.**

Manas Bhunia and others, AIR 2001 SC 490, is quite an apt decision to rely on regarding the framing of issue and what kind of assistance the learned counsels appearing before the court can offer to the court.

In that case it was observed that:

> "An obligation is cast on the court to read the plaint/petition and the written statement of defence/counter, if any, and then determine with assistance of the learned counsel for the parties, the material proposition of fact or law on which the parties are at variance. The issues shall be framed and recorded on which the decision of the case shall depend. The parties and their counsel are bound to assist the Court in the process of framing of issues. Duty of the counsel does not belittle the primary obligation cast on the court. An omission to frame proper issues may be a ground for remanding the case for retrial subject to the prejudice having been shown to have been shown to have resulted by the omission."

For sake of clarity on such a point, what is necessary where the counsels for the parties propose the issues to the court, in my view, is for the court to ensure that such proposed issues are based on the pleadings and, if such are accepted as being useful in the context of resolving the dispute, then, the court should go ahead and formerly adopted them. Once that is

done, the same shall thereby be recorded and deemed as having been framed by the court to guide its discussion.

From that end, therefore, I see on sin where an advocate proposes the issues, and the court adopts such and deems them as having framed by itself.

In their submissions, therefore, both counsels for the parties have listed issues which, hitherto were proposed by the counsel for the Petitioner as pertinent in resolving the controversy which has set the parties aloof. The listed issues are as follows:

(i) Whether the Annual Audited Report of the First Respondent for the year ended June 2021 is worthy of belief.

(ii) Whether the disbursement of TZS 7,697,217,708.00 from the Consolidated Fund to Mwanza Regional Secretariat was consistent with the procedures for disbursement outlined in article 136 (1) (a); 136 (1) (b); 136 (2); 136 (3); 137 (3); 143 (2) (a) and 143 (2) (b) of the Constitution.

(iii) Whether the actions and omissions by the First respondent in relation the disbursement of TZS 7,697,217,708.00 from the Consolidated Fund to Mwanza Regional Secretariat were consistent with the procedures outlined in Section 47(1)(a) of the Budget Act, 2014.

(iv) Whether the omission by the First Respondent to properly advise the

President and the Cabinet on the constitutionality and legality of the disbursement of TZS 7,697,217,708.00 to Mwanza Regional Secretariat, contravened Article 59 (3) of the Constitution; and,

(v) To what relief are parties entitled.

As I earlier stated hereabove, I will, therefore, proceed to adopt them as I hereby do, and move ahead to consider such issues, one after the other, as issues framed and recorded by this court to guide its thinking. And I will do so while taking into consideration the pleadings, the parties' submissions thereon, the law, and the various authorities considered to be relevant to this case at hand. I will, therefore, start by looking at the first issue regarding:

> Whether the Annual General Audited Report of the First Respondent for the year ended June 2021 is worthy of belief.

As observed by the learned Principal State, Mr. Hangi, and as also as admitted by the learned counsel for the Petitioner, Mr. Seka in his submission, the first issue is not an issue which needs to detain this court in a long discussion. However, while I do agree that parties are bound by their pleadings, and matters not pleaded need not be considered, or relief not founded on the pleadings need not be granted, (see the cases of **Odd Jobs vs. Mubia**, (supra), **Pendo Flugence Nkwenge vs. Dr. Waida Shangali**, [2022] TZCA 309), I do not tag along with Mr. Hangi's submission, whose effect is to show that the first issue is a matter that falls outside the pleadings.

On the contrary, it is my considered view that, since the Petitioner's concerns were premised on the First Respondent's General Annual Audit Report for the Year Ended June 30, 2021, the first issue does address a matter falling within the pleadings. Responding to it, therefore, is necessary for the purposes of laying a foundation for the rest of the issues raised and adopted by this court.

But, even if such an issue was to be not proposed by any of the parties, still the court could have proposed it as a collateral question not in controversy, but which seeks to lay a foundation for a meaningful discussion, given that, the court is duty bound to take cognizance of such a fact as per section 59 of the Evidence Act.

Besides, and as correctly stated by the Petitioner's counsel, the Respondent's averments in the counter affidavit, which carries with it denials to the Petitioner's averments in his affidavit supporting the petition, would certainly necessitate a formulation of such an issue. This is because such denials tend to doubt the authenticity of what the Petitioner stated based on what he gathered from the said report of the First Respondent.

From that premise and, considering that the office of the Controller and Audit General is a constitutional office established under Article 143 (1) of the Constitution, no one will doubt the 'genuiness' of its reports and, more so, the contents therein. Given such a circumstance, therefore, the first issue should be responded to affirmatively. That affirmation allows

me to move ahead to the second issue which, in my view, can be merged with the third issue and responded to jointly.

As such, I will address these two issues (ii) and (iii) jointly. The issues are as follows:

> ***Second issue:*** Whether the disbursement of TZS 7,697,217,708.00 from the Consolidated Fund to Mwanza Regional Secretariat was consistent with the procedures for disbursement outlined in article 136 (1) (a); 136 (1) (b); 136(2); 136 (3); 137 (3); 143 (2) (a) and 143 (2) (b) of the Constitution.
>
> ***Third issue:*** Whether the actions and omissions by the First respondent in relation the disbursement of TZS 7,697,217,708.00 from the Consolidated Fund to Mwanza Regional Secretariat were consistent with the procedures outlined in Section 47(1)(a) of the Budget Act, 2014.

In his submission, Mr. Seka, the learned counsel for the Petitioner, asserted that the fact that TZS 7,697,217,708.00 were disbursed to Mwanza Regional Secretariat for purposes of construction of Mwanza International Airport from the Consolidated Fund is undisputed. Indeed, Mr. Hangi, the Respondents' learned Principal State Attorney, does not dispute such a fact. However, the question that has antagonized the two is whether such disbursements were done in line with the

laid down constitutional and statutory procedures governing disbursement of funds from the Consolidated Fund. And, to add on that, if the procedure were not adhered to, whether such omission amounts to a Constitutional breach.

For his part, Mr. Seka believes that the procedures were flouted, disregarded, and, hence, the Constitution was breached. He asserted further that, to prove that alleged fact, the standards are on the balance of probability and should not beyond reasonable doubt. Indeed, it is a settled legal position that proof of constitutional breaches is to be based on the balance of probability and not on the beyond reasonable doubt standard considering what the Court of Appeal stated in the case of **Attorney General versus Dickson Paulo Sanga** [2020] 1 TLR 61.

In that case, the Court of Appeal of Tanzania had the following to say, and I quote:

> "... we agree with the respondent that, while the respondent had a duty to establish a prima facie case which he discharged, the burden shifted to the appellant who was duty bound to prove that the impugned provision is not violative of the Constitution. We need not say more. In the premises, we do not agree with the appellant that in constitutional petitions it is incumbent on the petitioner to prove his case beyond reasonable doubt."

In his submission, therefore, Mr. Seka relied on that case in proof of the Petitioner's alleged non-adherence to the constitutional and statutory requirements regarding disbursement of finds from the Consolidated Fund. He argued that the Petitioner has heavily relied on the observations and findings of the First Respondent as the basis for the required proof, having demonstrated that the First Respondent's Report is highly authoritative. Based on such a Report, the Petitioner has contended, therefore, that, there was neither a strict compliance with the dictates of the Constitution regarding how monies from the Consolidate Fund ought to be spent; nor compliance with the dictates of Section 47 (1) (a) of the Budget Act, 2014.

He concluded that, on such account, there was an obvious breach of the Article 136 (1) (a); 136 (1) (b); 136 (2); 136 (3); 137 (3); 143 (2) (a) and 143 (2)(b) of the Constitution and section 47(1)(a) of the Budget Act. Further still, Mr. Seka relied on section 115 of the Evidence Act, Cap. 6 R.E. 2022, which shifts a burden of proof to a party to proceedings to prove such facts as are within his/her knowledge. He contended that, since the Respondents have all along maintained that the impugned disbursements were made in full compliance with the dictates of the law, it should therefore be incumbent upon the Respondents to prove such a special fact as it is within their own knowledge.

According to Mr. Seka, the First Respondent did as well violate Article 143 (2) (a) and (b) of the Constitution, especially

when he turned a blind eye when the Constitution was being abused. He maintained that in such a circumstance, the First Respondent was obliged to have acted firmly and prevent the transgression of the Constitution.

In a counter response, Mr. Hangi, the learned Principal State Attorney appearing for the Respondents, admitted that, certainly, the findings of the First Respondent's report in respect of the Audit of the Central Government for the Financial Year Ended 30th of June 2021 did indicate that Mwanza Reginal Secretariat received TZS 7,697,217,708.00. He also conceded that such disbursements were made from the Consolidated Fund and for the purpose of facilitating the construction of Mwanza Airport Terminal Building. He also conceded that, such an activity was not indicated in the Medium-Term Expenditure Framework and the allocated budget for the year 2020/2021.

Mr. Hangi maintained, however, that, such disbursement was neither done in violation of the Constitution nor the Budget Act, 2015. His was a position that, the First Respondent's comments, as they appear in the submitted Audit Report, were only to the effect that disbursements and allocation of funds to implement unbudgeted activity affects the implementation of planned activities and might create a room for misappropriation of Government Funds.

He contended, and rightly so, in my view, that, under the Constitution, the Controller and Auditor General (CAG) has double functions. One of such functions is that of *carrying out audits* while the other is that of *ensuring that the use of any*

monies payable out of the Consolidated Fund has been authorized and are made payable in line with the provisions of Article 136 of the Constitution. Mr. Hangi navigated extensively on the provisions of Article 143 (2) (a), Article 136 (1), (3) of the Constitution, Section 46 (a) and (b), Section 47 (1) (a) of the Budget Act, 2015, and Sections 21 (1), and (2) (c) and (d), Section 22 (1), Section 25, Section 26 (1) and Section 27 of the Public Finance Act, 2014.

Having navigated on such provisions, Mr. Hangi submitted that, once the Controller function of the CAG is discharged and, since the discharge of such a function principally initializes the budget implementation process, the CAG has no other role in the authorization process at the execution level.

He contended that, the Government, through the Ministry of Finance, did, in essence, submit an exchequer requisition of the whole general nation's budget appropriated by the Parliament (including a portion of the same for construction of Mwanza Airport Terminal), through Ministry Responsible for Works. According to Mr. Hangi, such requisition was done by way of the Appropriation Act No.2 of 2021 to the CAG for his determination whether or not to issue a grant of credit on basis of provision of Article 143 (2) (a) of the Constitution and a Warrant to grant credit to Paymaster General authorizing the use was issued by the CAG upon his satisfaction that all conditions had been met.

On that premise, Mr. Hangi submitted that, since subsequently, the Paymaster General warranted Accounting Officer to use the monies approved, the First Respondent cannot be said to have violated Article 143 (2) (a) and (b) of the Constitution as alleged by the Petitioner. Besides, Mr. Hangi endeavoured to distinguish between the two functions of the CAG, which are Controllership and Audit process, and the subsequent actions or processes related re-allocation of already approved funds, which processes do not fall within the CAG's mandate.

On that account, Mr. Hangi argued that, the disbursement of TZS 7,697,217,708.00 from the Consolidated Fund to Mwanza Regional Secretariat, was an act of budget-reallocation done in accordance with the processes of budget re-allocation through the Treasury and did not, in any way possible, violate Article 136 (1) (a), 136 (1) (b), 136 (1), 136 (2), 136 (3), 137 (3), 143 (2) (a) and 143 (2) (b) of the Constitution and Section 47 (1) (a) of the Budget Act, 2015.

In his rejoinder submission on the two issues (number (ii) and (iii) jointly addressed herein negatively by the Respondents, Mr. Seka faulted Mr. Hangi's contention that an Exchequer requisition was submitted to the CAG for withdraw of the entire budgeted amount appropriated by the Parliament and that such included the funds used for the construction of Mwanza Airport. Mr. Seka rejoined that, such a contention is, in essence, a statement from the bar, which is not supported by the pleadings and, secondly, and more importantly, it is not a

true account of the facts on the ground. He asserted so because it is an admitted fact that there was no fund approved for the construction of Mwanza Airport nor was there any plan by the Regional Secretariat of Mwanza to construct the airport.

Furthermore, Mr. Seka rejoined further that, since it is indisputable that the Mwanza Regional Secretariat had not planned nor budgeted for the use of the funds, then, clearly, all the procedures outlined in Article 136 (1) (a) and 136 (1) (b) of the Constitution were flouted and breached. On that account he urged this court to reject Mr. Hangi's arguments that the funds disbursed to Mwanza were by way of reallocation from other votes. He instead argued that the clear facts on the ground are that there was no planned activity in the form of construction of Mwanza Airport and no funds were ever approved for such.

Based on that account, Mr. Seka questioned the rationale of providing funds to an entity that had no planned construction activity, in the first place, equating it to a grant of a bonus or a windfall reminiscent of the Biblical manna in the wilderness. At the end of his rejoinder submission, he reiterated his submission in chief urging this court to grant the prayers made in this petition.

Essentially, before I make a finding regarding whether the respective Articles of the Constitution and the relevant section of the applicable laws were violated or not, it is imperative, on my part, to address the pertinent concerns raised by the Petitioner by looking at what such provisions stand for. The respective provision of the Constitution and the

relevant laws contended to have been breached or violated include Article 136 (1) (a), 136 (1) (b), 136 (2), 136 (3), 137 (3), 143 (2) (a) and 143 (2) (b) of the Constitution and Section 47 (1) (a) of the Budget Act, 2015.

The question, therefore, has been, were the provisions really breached as alleged? Essentially, funds kept in the Consolidated Fund are public funds. For that matter, the Constitution has laid down very strict conditions regarding appropriation of such funds. In essence, there cannot be disbursements from the Consolidated Fund unless such disbursement is for the purposes of authorized expenditure chargeable from that Fund by the authority or sanction of either the Constitution or any other law; or, where the disbursement is for expenditure authorized either by Appropriation Act enacted by Parliament for that purpose or a law enacted by Parliament to meet contingent or unforeseen needs. That, in a nutshell, is all what Article 136 (1) (a) and (b) of the Constitution provides.

Similarly, under Article 136 (3) no money shall be disbursed out of the Consolidated Fund for Government expenditure unless such expenditure has obtained an approval of the Controller and Auditor General and, the monies are to be paid out inline with a procedure prescribed for that purpose pursuant to a law enacted by the Parliament. Such a law includes an Appropriation Act enacted by the Parliament.

For sake of clarity and convenience, I will reproduce the whole of Article 136 here below. It reads as follows in its Kiswahili version (with added emphasis):

136 (1) Fedha **hazitatolewa kutoka Mfuko Mkuu wa Hazina ya Serikali kwa ajili ya Matumizi** ila kwa mujibu wa masharti yafuatayo:

(a) fedha hizo ziwe kwa ajili ya matumizi ambayo yameidhinishwa yatokane na fedha zilizomo katika Mfuko Mkuu wa Hazina ya Serikali na ***idhini hiyo iwe imetolewa na Katiba hii au Sheria*** nyingine yoyote;

(b) fedha hizo ziwe kwa **matumizi ambayo yameidhinishwa ama na Sheria ya Matumizi ya Serikali iliyotungwa mahususi na Bunge au Sheria iliyotungwa kwa mujibu wa masharti ya ibara ya 140** ya Katiba hii.

(2) Fedha zilizomo katika mfuko maalum wowote wa Serikali, ukiachilia mbali Mfuko Mkuu wa Hazina ya Serikali, **hazitatolewa kutoka mfuko huo kwa ajili ya matumizi ila mpaka matumizi hayo yawe yameidhinishwa na Sheria.**

(3) Fedha zilizomo katika Mfuko Mkuu wa Hazina ya Serikali **hazitatolewa kutoka Mfuko huo kwa** ajili **ya matumizi ila mpaka matumizi hayo yawe yameidhinishwa na Mdhibiti Mkuu wa Hesabu za Serikali** na pia kwa sharti

kwamba fedha hizo ziwe **zimetolewa kwa kufuata utaratibu uliowekwa kwa ajili hiyo kwa mujibu wa Sheria iliyotungwa na Bunge.**

As noted, hereabove, the Constitution has defined the scope of the executive power in relation to appropriation of funds from, either the "**Consolidated Fund**" or as Article 140 (2) of the Constitution provides, in respect of borrowing from any government's "**Contingent Fund**" established under sub-article (1) of that relevant Article.

In essence, therefore, the Constitution leaves no doubt about the manner of authorization of expenditure or withdrawal of moneys from and out of the Consolidated Fund. In fact, one can comfortably state that, there is, on the ground, a '*constitutional fiscal discipline*,' so to speak, which the framers of the Constitution levied on the executive through the above cited constitutional provisions. The same discipline is as well, envisaged under Articles 137 (3) (a), and (b), 139 (1) and (2) and 143 (2) (a) to (c) of the same Constitution and, all these articles demand a strict adherence to such a fiscal discipline.

Besides, such fiscal disciple limits the executive powers in such a manner that the government cannot whimsically appropriate or even borrow monies from the "Consolidated Fund" or, "any Contingent Fund", without strictly adhering to the conditions and procedures laid out in the Constitution and the appropriate laws. That discipline is, for control purposes, further monitored by the office of the Controller and Autor General by virtue of Article 143 (2) (a).

It follows, therefore, that, if will be made evident that the government wantonly expended monies from the Consolidated Fund or any other "Contingent Fund" in disregard of such fiscal discipline, that would be acting without the force of the law and will constitute a serious breach of the relevant Constitutional provisions. Has such been the case as alleged by the Petitioner?

In his submission, while Mr. Hangi does acknowledge there being a constitutional fiscal discipline regarding any use of monies proposed to be withdrawn or disbursed from the Consolidated Fund, he has utterly refuted the allegations made by the Petitioner, noting that all the relevant procedures in line with Article 136 (3) of the Constitution were appropriately followed. The question now would be, were they followed as alleged by Mr. Hangi?

In our jurisdiction the procedure for disbursing monies out of the Consolidated Fund is also stipulated in detail in the Public Finance Act, Cap.348 R.E 2020 and the Budget Act, 2015. As correctly pointed out by Mr. Hangi, section 47 (1) (a) of the Budget Act, 2015 does provide that, any payments made from the Consolidated Fund, must be done in a manner provided for by an enactment of the Parliament. In essence, this provision echoes what Article 136 of the Constitution provides in relation to the conditions that need to be met or sanctions that need to be obtained before effecting payment of funds from the Consolidated Fund.

The other relevant provision to consider is Section 21(1) of the Public Finance Act, Cap.348 [R.E 2020]. That section provides that:

> "Subject to Article 139 of the Constitution, **no money shall be withdrawn from the Consolidated Fund** except upon the authority of **a warrant under the hand of the Paymaster-General** addressed to the Accountant-General." (Emphasis added)

As it may be noted hereabove, this provision is subjected to Article 139 of the Constitution which provides for **instances of appropriation of funds from or out of the Consolidated Fund in advance of Appropriation Act**, and Article 139 (2) of the Constitution, provides for a procedure regarding how to go about that route when such need arises. Those two Constitutional provisions are to be read together with Section 28 (1), (2) and (3) of the Budget Act, 2015.

In addition, according to Section 21 (2) of the Public Finance Act, Cap.348 [R.E 2020], the issuance of a "**Warrant by Paymaster- General**" envisaged under Section 21 (1) of the Act, for the purpose of meeting any expenditure in a particular financial year, is conditioned upon there being **a grant of credit by the Controller and Auditor-General** sufficient to cover that intended sum and, the expenditure in question, **must have been authorized for the respective financial year during which the withdrawal** is to take place.

According to the dictates of the law, the requisite authorization is to be derived either from an **Appropriation Act**; a **Supplementary Appropriation Act**, or a **Warrant under Section 22(1) of the Public Finance Act**, Cap.348 R.E 2020. Further still, where there is an authorization by way of a "Warrant by the Paymaster-General", the law states, under Section 21 (2) (b) of the Act, that, such a "Warrant" may be issued if it is in respect of **a statutory expenditure charged on the Consolidated Fund by the provisions of the Constitution or any other law** but, such "Warrant", will be issued subject to there being **the CAG's grant of credit** sufficient to cover the sum stated thereon.

Basically, the CAG's mandate to issue such a "**grant of credit"** on the Consolidated Fund to the Minister is drawn from section 46 (a) and (b) of the Budget Act, 2015 and Section 25 (a) and (b) of the Public Finance Act, Cap.348 R.E 2020. The issuance of such a grant is a mandatory requirement.

Accordingly, such **'grant of credit'** is to be issued **for the amounts becoming payable during the 'ensuring' (sic) three months for statutory expenditure** and for the amounts becoming payable for the service of a financial year **under the authority of an Appropriation Act or** under the provisions of **Sections 21 (2)(c) and (d), 26 (1) and 27 of the Public Finance Act.**

In my considered view, and in a nutshell, it may be said that such a "**grant of credit**" is for the already authorized statutory expenditure amounts by virtue of the Constitution or

the relevant laws or expenditures authorized by an Appropriation Act or as provided for under **Section 25** of the Public Finance Act and not otherwise. Whereas section 26 (1) and (2) of the Public Finance Act as pointed out here above provides for a situation where an Appropriation Act is yet to come into force, which situation has been alluded to earlier here above in relation to Article 139 of the Constitution, Section 21 (2) (c) and (d) of the same Act provides for another alternative ground upon which a "**Warrant by the Paymaster-General**" will be issued.

It should be noted, however, that, such issuance of "**Warrant by the Paymaster-General**" is subjected to the conditions earlier stated regarding the role of the CAG. Moreover, the respective expenditure must be for purposes of "repaying any monies erroneously received by the Consolidated Fund" **or** for the purpose of "paying sums that may be required for any advance, refund, rebate or drawback", where the payment of such advance, refund, rebate or drawback is provided for in the Public Finance Act or any other Act.

After obtaining the requisite Government Budget's authorizations, the moneys for Government expenditure are, in essence, due for release to the expending entities through issuance of **Exchequer Warrants**. The respective functionary who works on that aspect is the Accountant-General who, in line with Section 49 of the Budget Act, 2015, is required to issue Warrants of Payment to accounting officers. Such

"Warrants", however, must have been included in the "Warrant issued by the Paymaster-General" under Section 21 (2).

On the other hand, it is also worth noting that, by virtue of Section 27 (4) of the Budget Act, once an appropriation for the Government and public entities has been approved, it shall be used only in accordance with the purpose described and within the limits set by different classifications within the Government and public entities' estimates.

Having stated the requisite procedural legal conditions to be adhered to let me now revert to the submissions made by the parties. In his submissions, Mr. Hangi submitted that, in practice, every year, immediately after the President signs an Appropriation Bill into a law, the Permanent Secretary Ministry of Finance submits an '**Exchequer Requisition**' of the whole budget appropriated by the Parliament for the CAG to issue "**Grant of Credit**" on **expenditure approved by the Appropriation Act** from the Consolidated **Fund**.

He contended that, upon satisfaction that the request is for 'monies becoming payable during the 'ensuring' three months for statutory expenditure'; and, is 'for the amounts becoming payable for the service of a financial year under the authority of the Appropriation Act or under the provisions of Sections 21 (2) (c) and (d) , 26 (1) and 27 of the Public Finance Act,' the CAG will thereby issue "Warrant" under his hand authorizing the use from Consolidated Fund to the Paymaster-General.

In my view, however, I find, as earlier pointed out here, that, what the CAG issues is a "**Grant of Credit**" to the Paymaster-General following the latter's issuance of a "**Warrant by the Paymaster-General**". But be that as it may, Mr. Hangi was of a firm view that, for the CAG to be able to exercise his mandate under Article 143 (2)(a) of the Constitution, the Government through the Ministry of Finance must have submitted an 'Exchequer Requestion' of the whole budget appropriated by the Parliament to him to determine whether or not he should issue a 'Grant of Credit' on the basis of Article 143 (2)(a) of the Constitution.

In my humble view, I see no offence in that submission and, I do fully concur with it. Principally, such a step is what ignites and rolls the wheels of budget implementation process and execution for which the CAG has no Controllership role until when he emerges to the scene through the discharge of his other accountability function during the auditing process. Under such a process, the CAG will authoritatively query how the monies were expended, including whether such were expended for the intended targets or not, which is usually after the end of a financial year.

A fair enough submission by Mr. Hangi in my view. However, the question remains: *has it responded to the pricking issue which is the subject of this Petition?* To respond to that question, I better remain patient to Mr. Hangi's submission. In it he has contended that, the Government, through the Ministry of Finance, submitted an **Exchequer Requisition of the**

whole budget appropriated by the Parliament through the Appropriation Act No. 2 of 2021 to the CAG for his determination as to whether it was appropriate to issue a 'Grant of Credit' in line with Article 143(2) (a) of the Constitution. According to Mr. Hangi, such submission was inclusive of a line item for construction of Mwanza Airport Terminal building through the Ministry Responsible for Works.

He further submitted that as such, the CAG did, indeed, issued the requisite 'Grant of Credit' and, subsequently, the Paymaster-General warranted the Accounting Officer to expend the monies as approved. It was on such an account that Mr. Hangi denounced the allegations that Article 143 (2) (a) of the Constitution was breached. According to Mr. Hangi's submission, under Article 143(2)(c) of the Constitution, the CAG is mandated to examine, inquire, and audit the final accounts of all accounting officers employed by the Government, a mandate which is further elaborated under the Public Audit Act, Cap.418 R.E 2020 and its Regulations, the Public Finance Act, Cap.348 R.E 2020 and other relevant legislation.

Mr. Hangi, maintained that, it was in the course of discharging his audit function as envisaged under the above noted provisions, that, the CAG, upon auditing the Mwanza Regional Secretariat financial statements, came to a conclusion that TZS 7,697,217,708.00 was not part of the budget approved by the National Assembly for Mwanza Regional Secretariat, and reported such a finding in his "Auditor General Report for

Central Government Affairs" (at pages 41 and 42 thereof) which observations the Petition has relied upon to mount this petition.

Mr. Hangi contended, however, that, the financial statements submitted to the CAG at the time when the audit exercise was being carried out, had not disclosed that such funds had been re-allocated from other various votes to Mwanza Regional Secretariat. For him, therefore, the CAG's conclusions, thought correctly made at the time, were not based on an appropriately informed position.

Mr. Hangi argued that, to bring about a well-informed picture, the correct information regarding the same was brought to the attention of CAG during the follow-up of the implementation of the CAG's audit recommendations in the succeeding Audit of the financial year ended June 30, 2022. According to him, the earlier raised "audit query" was cleared in the Management Letter issued to Mwanza Secretariat which the learned Principal Attorney had attached to the Affidavit of one Preslin Mashaka Peter at **Annexure CAG-2.**

He contended, therefore, that the disbursement of the said TZS 7,697,217,708.00 to Mwanza Regional Administrative Secretariat, through the Treasury, was lawfully done and, that, all procedure for reallocation were adhered to. Based on that factual background, he denounced, as irrelevant, the Petitioner's contention that the Respondents were supposed to bring evidence of Supplementary estimates or Supplementary Appropriation Bill laid before the National Assembly as per Article 137 (3) (a) and (b) of the Constitution.

The Petitioner's rejoinder submission on that point, was, however, to the effect that, the Mwanza Airport rehabilitation activity by the Mwanza Regional Administrative Secretariat, was an unplanned and unbudgeted for activity and, that an unplanned and unbudgeted activity cannot be funded outside the provisions of Article 137(3) of the Constitution.

I have carefully considered such rival submissions. Essentially, it is a trite rule that any spending outside what has been approved by an Appropriation Act of Parliament will be unlawful. As for the current petition at hand, it is an undisputed fact, that, while performing his audit function for the year ended June 2021, the CAG (First Respondent) made observations and conclusions, at pages 41 and 42 of his Report, that, the construction of Mwanza Airport Terminal building was not an activity included in the Medium-Term Expenditure Framework and the allocated budget.

Nevertheless, as per the CAG's Report forming the subject of this petition, the Mwanza Regional Administrative Secretariat had received a total of TZS 8.33 billion for such activity, part of which, i.e., TZS 7,697,217,708, had been disbursed from the Treasury. Further, based on the CAG's Report, such funds are the funds he labelled as "unbudgeted funds" and recommended that, in future the Government should not only ensure compliance with the Budget Act and its regulations but also that, the implementing agencies should plan and budget all their fundable activities.

Besides, there is no dispute as well that, in his observations, the CAG noted, and I quote, that:

> "[a]llocation of funds to implement unbudgeted activity affects the implementation of the planned activities, further it poses a room for misappropriation of Government funds."

In my considered view, however, much as the above findings were arrived at by the CAG and raised as an audit query, reading from the Respondents' submissions regarding the source of impugned TZS 7,697,217,708 disbursed to Mwanza Regional Administrative Secretariat, I am fully convinced that such was an amount which had earlier been appropriated for use in accordance with the laid down procedures.

I hold that view because, **first**, based on **Annexure CAG-2** to the Respondents' Counter Affidavit, there is an ostensible revelation that the monies used for construction of Mwanza Airport Terminal building were monies re-allocated from other various votes. Monies in those votes were already monies approved for use, an approval which had been arrived at through the normal processes and procedures of budgetary approval, including there being enacted an Appropriation Act.

Secondly, as correctly argued by Mr. Hangi, in the post-budgetary approval stages (i.e., the budgetary implementation stage) the CAG is only charged with the task of carrying out appropriation audits. Such an auditing role discharged by the CAG, is primarily aimed at ascertaining whether the monies

expended has been applied as planned, i.e., their expenditure went to the meet the purpose or purposes for which the "Grant" or "Appropriation" was/were intended to provide and, further that the amount of expenditure against each "Grant" or "Appropriation", did not exceed the amount authorized.

For that matter, it is not the role of the CAG to determine how public money should be spent as he is not a party in dictating what to do or when and where to allocate for use such monies approved vide the Appropriation Act. His is the role of auditing such usage with a view to find out whether the same was as per the plans or not and query such usage. That, in essence, is part of his constitutional role which tends to support the fundamental principle of Parliamentary control over Government expenditure.

That being said, and given the fact that the amount alleged to have been disbursed from the Consolidated Fund without authority of the Parliament was in fact an amount which was re-allocated from other votes as evinced by **Annexure CAG-1**, which amount in those votes had been cleared for spending, there cannot be a valid argument that such was disbursed in breach of the Constitution or any other relevant law or laws.

As correctly argued, the power to reallocate funds already authorised is not vested in the CAG but to the Accounting Officers and the Minister of Finance as per Section 41 (1), (3) and (4) of the Budget Act, No. 11 of 2015, as read together with Regulation 28 (1) of the Budget Regulations, GN.

336 of 2015. The same provides that, an accounting officer may, upon approval by the Minister, reallocate funds from the authorised expenditure within votes and, that, the Minister of Finance may also reallocate funds between the votes within the ambit of the appropriated budget.

Worth noting, however, is the fact that, reallocation between votes may either be a reallocation that intends to exceed the budget that was appropriated or may be for execution of the same budget, but the crucial point to take note of is that such reallocation must not exceed the limits set by the appropriated budget.

In the circumstances at hand, the reallocation, though done between votes, was done within the ambit of the appropriated budget. In so doing, the Mwanza Regional Administrative Secretariat votes consumed the appropriated budget meant for activities in other various votes that were affected by the act of reallocation of funds as **Annexure CAG-1** reveals.

Considering the above, I am satisfied, therefore, that the Respondents cannot be said to have acted in violation of the Constitution of any other law as argued by the Petitioner. It is also worth noting that, even if the First Respondent had made observations in his Report indicating that the activity for which the disbursement of TZS 7,697,217,708.00 was made was an unplanned and unbudgeted for activity, given what I have pointed out hereabove, that did not mean that the disbursement of such funds was done in breach of the law.

Instead, such observations, as correctly submitted by Mr. Hangi, were observations made based on the materials which were made available to the First Respondent in the course of discharging his role of appropriation audit. As I stated herein earlier, in discharging such a role, the CAG only seeks to ensure that money appropriated were indeed expended in line with the purpose or purposes for which the Grant of Credit or Appropriation was intended to provide and the amount of expenditure against each Grant or Appropriation did not exceed the amount authorized.

However, because the CAG's findings constituted an audit query on the party of the Auditee, the same demanded clarifications or clearance through the follow-up of his audit recommendations as evinced by **Annexure CAG-2**, (Management Letter). That annexure does, indeed, indicate that, much as the CAG's recommendations were taken on board as sound and appropriate in avoiding possible future risks, upon being availed with appropriate information and documentary evidence in respect of all activities the earlier raised audit query in the CAG's Report for the Year Ended 30th June 2021, was "cleared" and, thenceforth, marked "closed".

In view of all that, it is my settled findings that, the second and the third issues raised earlier herein above, should receive an affirmative response. That is to say, that, the disbursement of the TZS 7,697,217,708.00 and the subsequent actions of the First Respondent were all done in line with the applicable laws and the laid down procedures and, in that

regard, nothing in the form of legal or procedural violations can be imputed on the Respondents.

The *fourth issue* was dependent upon the findings arrived at in respect of the third issue. Since the second and third issues have been resolved in the affirmative, the fourth issue raised herein will eventually collapse. That gives way to the *last issue* regarding the relief which the parties are entitled to. In my considered view, given the findings made by this court to the effect that there has been no breach of the provisions of the Constitution or any other provision of any other relevant laws by the Respondents, this court cannot accede to the prayers sought by the Petitioner. On the contrary, this court will accede to the Respondents' wish that this Petition be dismissed in its entirety.

On the other hand, although Mr. Hangi, the learned Principal State Attorney Respondents, has urged this court to dismiss the petition with costs, I do not think it will be appropriate to make any order regarding costs.

It is only sufficient to state, therefore, that, this petition should fail and, in the upshot of all what has been considered and analysed hereabove, this court settles for the following orders:

(i) That, this petition is without merit and is hereby dismissed in its entirety.

(ii) That, each party shall bear its own costs.

It is so ordered.

DATED ON THIS 27th DAY OF MAY 2024

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DEO JOHN NANGELA

JUDGE

Right to Appeal is Fully Explained.

2. Orders proclaiming that the disbursement of TZS 7,697,217,708.00 to Mwanza Regional Secretariat was in violation of Article 47 (1) (a), of the Budget Act, 2014.
3. Orders proclaiming that the 1st Respondent breached the provisions of Article 143 (2) (a) and (b) of the Constitution for failing/neglecting to prevent the disbursement of TZS 7,697,217,708.00 to Mwanza Secretariat.
4. Orders proclaiming that by failing to properly advise the President and the Cabinet on Constitutionality and legality of the disbursement of TZS 7,697,217,708.00 to Mwanza Secretariat, the 2nd Respondent contravened Article 59 (3) of the Constitution.
5. Orders directing the 2nd Respondent to act or advise action to be taken to all those responsible in contravention of the laws and the Constitution during the disbursement of TZS 7,697,217,708.00 to Mwanza Secretariat.
6. Orders directing the 1st Respondent to continuously follow up, monitor and report satisfactory implementation of the orders granted by this Court in this Petition through his forthcoming annual reports.
7. Orders that each party to bear its own costs the same being a public interest Petition aimed at championing for national