

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
CORRUPTION AND ECONOMIC CRIMES DIVISION
DAR ES SALAAM

MISCELLANEOUS ECONOMIC CAUSE NO. 10 OF 2018

(Originating from Economic Case No. 65/2017 of Kisutu RM's Court)

1. SELEMANI SEBASTIAN MSOMI 2. FILO LUAMBANO BAKARI 3. KIZITO MBOJE @ PAUL 4. RASHID HUSSEIN ALLY	}APPLICANTS
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VERSUS

THE REPUBLIC RESPONDENT

R U L I N G

16/3 & 10/4/2018

Matogolo, J.

This is an application for bail in which the applicants namely Selemani Sebastian Msomi, Kizito Mboje @ Paul and Rashid Hussein Ally through their Advocate Mr. Machumu Gaspari Pamba are praying to be released on bail pending trial.

The application is by chamber summons made under sections 29(4)(d) and 36(1) of the Economic and organized crimes control Act [Cap.200 RE.2002] as amended by the written laws (Miscellaneous Amendments Act)

No.3/2016. The chamber summons is accompanied by an affidavit taken Mr. Machumu Gaspar Pamba.

The respondent/Republic was served with the chamber summons and the accompanying affidavit. He has filed to this court counter-affidavit taken by Tulumanywa Majigo State Attorney. But the respondent presented a certificate by the DPP barring grant of bail to the applicants on ground that if they are released on bail, the safety and interests of the Republic will be prejudiced.

This application was fixed for hearing on 16/3/2018. Mr. Elia Athanas learned advocate who appeared for the respondent addressed this court on the presence of the said certificate and its effect once filed in Court. He said the certificate was filed under Section 36(2) of the Economic and Organized Crimes Control Act (the Act), once is fixed in Court, provided that it has met the three preliquisite validity test as stated in the recent decision of the Court of Appeal in **Emmanuel Simforian Massawe, v.R.** Miscellaneous Economic cause No.252/2016.

The Court cannot grant bail to the applicants. Mr. Elia Athanas stated that in that case another condition was added that the certificate could only be invalid where it is proved that the DPP acted on bad faith or abuse of Court process.

The learned State Attorney also cited the case of **DPP vs. Li Ling Ling**, Criminal Appeal No.508/2015 in emphasis to the conditions to be met in order for the certificate to be valid. On his part Mr. Machumu Pamba learned advocate who represented the applicants, did not agree with what Mr. Elia Athanas learned State Attorney had submitted. First, he pointed out that the three conditions on the validity of a DPP's certificate were not

propounded in the cases Mr. Elia Athanas has cited, that **Emmanuel Simforian Massawe and Li Ling Ling**. But we were propounded in **DPP v. Ally Nuru Dirie and Another [1988] TLR 252**.

He stated further that, they are mindful of Section 36(2) of the Act where the DPP is mandated to bar bail to the applicants provided the three conditions are met. But their concern is the provision of the law which lay foundation of this certificate. In **Dirie case**, the Court of Appeal was dealing with Section 148(4) of the CPA. Section 36(2) of the Act is a replica to Section 148(4) which was declared unconstitutional in civil Appeal No.65/2016 **DPP vs. Jeremiah Mtobesya**.

In that case the argument was that Section 148(4) of the CPA has similar implication to Section 36(2) of the Act, because the DPP is the one in both statutes who can issue certificate to deny bail to accused. Mr. Pamba said as both sections are similar in wording he prayed to this Court to apply the principle of statutes in **pari materia**

Mr. Pamba also referred this Court to the definition by Black's Law Dictionary 8th Edition at page which he said provide a literal meaning of in **pari materia**.

The learned advocate submitted further that Section 148 (4) of the CPA which is a replica of Section 36(2) of the Act cannot be separated and as far as in **Jeremiah Mtobesya** case was held in regard to the unconstitutional of Section 148(4) of the CPA there is no need to discuss Section 36(2) of the Act again. So he invited this Court to apply the principle of statutes in *pari materia* although he understand that this is not a constitutional matter. He said the Court of Appeal in **Emmanuel Simforian Massawe** did not discuss in detail as to what statutes in *pari materia* entails.

That is why he invited this Court to look at its definition in Black's law Dictionary.

Mr. Pamba said there is a contradiction between the impugned Section 148(4) of the CPA and Section 36(2) of the Act which is the basis of the DPP certificate, which should be resolved in favour of the applicants by granting them bail. But he went further submitting that had this Court finds the certificate in question valid, the same should be used sparingly because it has been always misused only on the reason that investigation is incomplete and the accused remain in remand indefinitely. He prayed to this Court to set limitation to the DPP's certificate in terms of duration so that after such period the applicants be admitted on bail.

Mr. Pamba also prayed that in the event this court finds that the certificate is valid, should not dismiss the application but be struck out and provide ample time to the DPP to finalize investigations otherwise the certificate will cease to have effect and applicants will be at liberty to file fresh bail application, he concluded.

In rejoinder Mr. Elia Athanas based on the decision of **Emmanuel Simforian Massawe** and said the Court of Appeal in this case insisted on adherence to Section 36(2) of the Act because the decision in **Mtobesya case** was in a constitutional petition. But the former is of criminal nature. And they clearly said they failed to buy the principle of in pari materia.

He insisted this Court not to buy that Principle because the case at hand is of criminal nature. He insisted that the DPP's certificate is valid one and that the applicants should not be granted bail.

From the foregoing rival submissions, it is a common ground that if the DPP file a certificate under Section 36(2) of the Act, which met the validity test, then the Court cannot grant bail.

But the applicants' learned advocate has argued that by virtue of the decision of the Court of Appeal in **Jeremiah Mtobesya** case, which declared Section 148(4) of the CPA unconstitutional, this Court should apply the principle of statutes in **pari materia** because Section 36(2) is a replica to Section 148(4) of the CPA which was impugned, and read the two provisions together. On his part Mr. Elia Athanas learned State Attorney urged this Court to follow the more recent decision of the Court of Appeal in **Emmanuel Simforian Massawe**, in which the Court could not buy the principle in *pari materia* because it was applied in a constitutional petition but the latter case is of criminal nature like the case at hand.

Section 36(2) of the Act, under which the certificate was filed provides:-

"36(2) Notwithstanding anything in this section contained no person shall be admitted to bail pending trial, if the Director of Public prosecutions certifies that it is likely that the safety or interests of the Republic would thereby be prejudiced."

Admittedly, the Court of Appeal in **Ally Nuru Dirie case** (supra), propounded three conditions which if are met by the DPP in his certificate make the certificate valid one and that such certificate when filed in Court, the Court cannot grant bail to the accused.

I am aware of the two decisions of the Court of Appeal in **Jeremiah Mtobesya case** and in **Emmanuel Simforian Massawe case**. I have keenly heard and understood the arguments

submitted for and against the certificate under consideration. I agree with Mr. Elia Athanas that this Court is bound by decisions of the superior Court. The Court of Appeal reminded us in the case of **Jumuiya ya wafanyakazi Tanzania Vs. Kiwanda cha uchapishaji Tanzania [1988] TLR 146**

That where there are decisions of the same superior court with different effect, the more recent one is to be followed. The reason behind is that in arriving at its decision in a recent decisions the Court had opportunity to see its previous decision.

In its recent decision in **Emmanuel Simforian Massawe** the Court of Appeal did not follow its earlier decision in **Jeremiah Mtobesya case**. The reason it gave is that the former case was a constitutional petition and the latter is of criminal nature.

This reasoning also apply to the case at hand which is also of criminal nature. I have gone through the certificate under discussion there is no doubt that it has met all three conditions for it to be valid. It is in writing, the DPP has certified that the safety or interests of the Republic will be prejudiced by granting bail to the applicants and that the certificate is in respect of economic case No.65 of 2017 which is pending in the Court of Resident Magistrate awaiting trial. And lastly in issuing the said certificate there is no proof that he acted on bad faith or in abuse of Court process.

The certificate is therefore valid worth to be considered. Mr. Machumu Pamba learned advocate in his argument went an extra mile by requesting this Court, in the event finds the certificate is valid, not to dismiss the application. It has to strike it out. And further the

Court has to set limitation to the said certificate in terms of duration so that after the expiry of that duration, the applicants may file a fresh application for bail. It is a good and sound argument and prayer, but the relevant provision, does not provide for that, subsection (3) of Section 36 of the Act provides

"36(3) A certificate issued by the Director of Public Prosecutions under Sub-section(2) shall take effect from the date it is fixed in Court or notified to the officer Incharge of a police station, and **shall remain in effect until the proceedings concerned are concluded or the Director of public prosecutions withdraw it.**" (emphasis supplied)

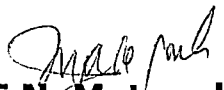
It means therefore that the certificate in question will remain in force until the circumstances explained under subsection (3) of Section 36 have occurred.

However it is in the interest of justice that cases filed in Court should be heard and finalized as early as possible. The prosecution therefore are duty bound to expedite investigations.

Given the above explanation and provided that the certificate filed by the DPP is valid, this Court cannot proceed with hearing of the application for bail, the same is hereby struck out.

Order accordingly.




F.N. Matogolo
Judge
16/03/2018

Date: 10/04/2018.

Coram: Hon. F.N. Matogolo, J.

For Applicants: Absent

1st Applicant: Present

2nd Applicant: Present

3rd Applicant: Present

4th Applicant: Present

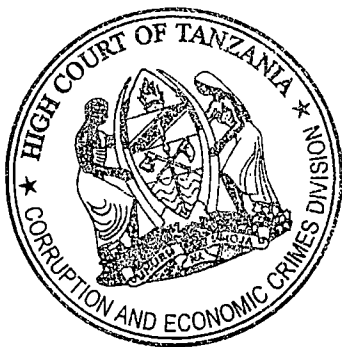
Respondent: Mr. Elia Athanas – State Attorney

C/Clerk: M. Lukindo

Mr. Elia Athanas – State Attorney

My Lord I appear for the respondent. The applicants are present.
The case is for ruling we are ready.

Court: Ruling delivered.




F.N. Matogolo
Judge
10/04/2018