IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
THE CORRUPTION AND ECONOMIC CRIMES DIVISION
AT MTWARA SUB-REGISTRY

MISC. ECONOMIC CAUSE NO. 3 OF 2018

(Originating from Economic Crimes Case No. 1 of 2017 - District Court of Masasi at Masasi)

1. KELVIN RAJAB UNGELE
2. LAWRENCE NJOZI
3. RAMADHANI YASSIN NAMAKWETO
4. YUSUPH ATHUMAN NAMKUKULA

VERSUS

REPUBLIC

RULING

Before the Court is an application filed under a certificate of urgency, pursuant to section 29(4)(d) and section 36(1) of the Economic and Organized Crimes Control Act, Cap 200 RE 2002, Section 148(3) of the Criminal Procedure Act, Cap 20 RE 2002, section 392A(1) of Written Laws (Miscellaneous Amendments) Act, No. 3 of 2011 and any other enabling provision of the law. The applicants, Kelvin Rajab Ungele (1st applicant), Lawrence Njozi (2nd applicant), Ramadhan Yassin Namakweto (3rd applicant) and Yusuph Athuman Namkukula (4th applicant) through their application via chambers summons supported by an affidavit sworn by Rainery Norbert Songea, an advocate of the High Court of Tanzania stating to be duly instructed by the applicants to represent them sought the following reliefs:

1. That this Honorable Court may be pleased to grant bail to the Applicants on condition as it may deem fit pending trial in Economic crime case No. 1 of 2017

2. Any other relief this Court may deem fit and or just to grant to the applicants.

First and foremost it is important for applicants to note that for future reference the title of the case needs to be stated as *Misc. Economic Cause No... of.....* and not Misc. Economic Application as titled in the present case. This is clearly outlined under Rule 6 of the Economic and Organized Crime Control (The Corruption and Economic Crimes Division)(Procedure) Rules, 2016 GN 267 of 2016. The Court has decided not to deal with this matter in this application but it is important for parties to note this for future reference.

The Respondent Republic filed their counter affidavit together with a notice of preliminary objection contending that the Court was "*functus officio*" to determine the application on hand. On the date fixed for hearing, the Court proceeded to first hear, consider and determine the preliminary objection raised. On behalf of the Respondent Republic, learned Senior State Attorney Mr. Ladislaus Komanya, proceeded to amplify the raised objection starting by providing the background to the matter. The Learned SSA submitted that the current application is similar in content to two previous applications filed by the applicants and determined by this Court. That the difference being that the previous applications were two and each application had two applicants whereas in the current application all four applicants are in one application. That the two previous applications similar to the current one originated from Economic Crime Case No. 1 of 2017 at the District Court of Masasi at Masasi.

Expounding on the two applications, the learned Senior State Attorney submitted that the two applications were Economic Crimes Application No. 01 of 2017, where the applicants were Ramadhani Yassin Namakweto and Yusuf Athumani Namkukula (who are the 3rd and 4th applicants in the application before the Court) and a Ruling was delivered on the 22nd of June 2017 by Hon. Matogolo, J. The second was Misc. Economic Crimes Appl. Case No. 2 of 2017 and the applicants were Kelvin

Rajabu Ungele and Lawrence Njozi (the 1st and 2nd applicants respectively in the current application) also decided by Hon. Matogolo J. and Ruling delivered on the 22nd of June 2017. That in both applications the Director of Public Prosecutions filed a certificate objecting grant of bail to the applicants pursuant to section 36(2) of the Economic and Organized Crimes Control Act, Cap 200 RE 2002. That upon finding that the filed Certificates by the DPP objecting to grant of bail to applicants valid, the Hon. Judge refrained from granting bail to the applicants and left the issue of grant of bail to await the time the Director of Public Prosecutions will decide to withdraw the certificate as guided by the provisions of section 36(3) of the EOCCA, Cap 200 RE 2002.

The Learned Senior State Attorney asserted that since the Court has already made a decision on the said two previous applications, the current application is aimed at deceiving the Court by going through a back door with a new application whilst the matter or the relief sought in the said applications was already determined. That with this being the case, the remedy available for the applicants is to appeal to the Court of Appeal or seek revision vide the relevant provisions in the Appellate Jurisdiction Act, Cap 141 RE 2002. That despite this the applicants have failed to seek the available remedies and decided to come back to the same Court to determine matters which have already been determined, arguing that this was not a proper move.

The Learned Senior State Attorney cited various cases that discuss when a Court is said to be "*functus officio*". There is the case of ***Kamundu vs. Rep.*** (1973) EALR 540; ***Bibi Kisoko Medard vs. Minister for Lands, Housing and Urban Settlement*** (1983)TLR 250. Another case cited was a High Court Case, Criminal Appeal No. 87 of 1983, ***Samson Kalala - administrator of the Estate of the Late Emmanuel Mandawa vs Rep, and the Manager of Burigi Game Reserve***. That a Court having heard a matter cannot re-discuss the same issue not being an appeal Court. It was

therefore the Respondents assertion that this Court cannot now determine the application for bail before the Court because the Court's hands are tied. That the applicants be advised to seek their rights through other available remedies.

The opposing contention by the applicants were expounded by their counsels that is Mr. Songea. Mr. Msalenge and Mr. Mkali Learned Advocates respectively. The counsels premised by defining what it means for a Court to be "*functus officio*", taken from Blacks Dictionary 6th Edition, saying it means "*Having fulfilled the function, discharged the office or accomplished the purpose and therefore nor further force or authority*". They also went to restate the position in the cited cases by the counsel for the Respondent Republic stating that in both cases the word "*functus officio*" was found to apply where a matter was finally determined. That in the application on hand the issue is whether the matter was finally determined or not. That logically for a matter to be finally determined there should be a judgment, and that this is not the case in the two rulings cited by the respondents as to have disposed of the matter of the bail application for the applicants. That in Misc. Economic Crime Case No. 1 of 2017, Ramadhani Yassin Namakwelo and another vs. R, at pg 2 of the Ruling, the Hon. Judge highlighted what was being determined as being the raised preliminary objection. The applicants counsels argued that this clearly shows that the matter before the Court was not finally determined and what was determined were issues raised in the preliminary objection and the Court proceeded to sustain the objection raised whilst the application before the Court was never discussed.

That the doctrine of *functus officio* applies when both sides have been heard on merit which was not the case in the previous applications cited. A Zambian case from the Supreme Court, ***Ituna Partners vs Zambian Open University,*** No. 17 of 2018 was cited, and prayed to have a persuasive value to this Court. That in the said

case in interpreting the principle of *functus officio*, the Court stated that this applies where all substantive issues have been determined.

The counsels invited the Court to find that this was not the case in Misc. Application No. 1 and 2 of 2017, that is, that all substantive issues were not determined. They then submitted that this Court has inherent powers to hear and determine the matter before it. That consideration should be made on the time the applicants have been incarcerated and that it is only this Court which can accord the applicants opportunity to be heard since the previous applications were not finally determined, the previously rulings having not conclusively determined the said applications. The prayers by the counsels for the applicants were for the Court to overrule the preliminary objection raised and find it devoid of substance.

In rejoinder, the learned Senior State Attorney reiterated the position and contention advanced in the submission in chief relating to the preliminary objection raised. Arguing further that the argument by the applicants counsels that the matter pertaining in the 2 applications decided by this Court was never determined conclusively does not hold water since after determination of the preliminary objections in both applications Hon. Matogolo J dealt with the substantive matters before the Court. That all the parties were provided with an opportunity to state their cases. The decision of whether or not to grant bail is the substance of the two determined applications and that this was discussed and determined by the Court, which then left room for the DPP to withdraw the appeal and thereafter provide an opportunity for the Court to proceed. That todate, the DPP has yet to withdraw the certificate filed and therefore the Court may not revisit its decision thereto.

We have heard both parties, that is the applicants and the Respondents submissions and considered affidavital evidence before the Court supporting their respective positions. We find it pertinent before proceeding any further to first determine whether the Preliminary objection raised is a point of law warranting this Court to

proceed accordingly. It is a known fact that a preliminary objection raised must be on a point of law. An objection which raises a pure point of law if argued as such will dispose of the suit without any need to call for evidence to prove the fact. In the case of ***Mukisa Biscuit Manufacturing Co. Ltd. v West End Distributors Ltd., (1969) EA 696*** Law J.A. stated as follows at page 700: "*So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which ıf argued as a preliminary point may dispose of the suit.*" This means that the objection should be based on the pleadings and attachments before the Court and should not depend on any other evidence.

Applying this principle to the matter on hand, it is clear that where there is a prayer/an objection raised that the Court is "*functus officio*" to hear an application such as the case at hand, it may lead to finality of the matter and it is without a doubt a point of law. There is also the fact that the applicants did not challenge the nature of the raised preliminary objection as a point of law. Therefore we are satisfied that it is a point of law and we will proceed determining this accordingly.

Moving on, we proceed to understand venture into understanding the concept of a Court being "*functus officio*". The applicants and the Respondents have cited various cases and provided legal definitions on the principle. In the case cited by the applicants, emanating from Zambia Supreme Court, with persuasive value, that is ***Ituna Partners vs Zambian Open University Limited,*** Appeal No. 117 of 2008, adopted the definition in Black's Dictionary 9th Edition (2009), that the term means "*having performed his or her office" (of an officer or official body") without further authority or legal competency because the duties and functions of the original Commission have been fully accomplished".* From the above definition the Court thus found that a Court becomes *functus officio* when all the substantive issues in the cause are determined by i***t. In Chief Abdallah Said Fundikira vs Hillal L. Hillal,*** Civil Application No. 72 of 2002, CAT at Dar es Salaam at pg. 5, adopting the holding

in ***Bibi Kisoko Medard vs Minister for Lands Housing and Urban Development and anothe***r (1983) TLR 250 where it was held " *in a matter of judicial proceedings once a decision has been reached and made known to the parties, the adjudicating tribunal thereby becomes functus officio*". The Court also at pg 6 of the Judgment, also considered the holding in ***Kamundu vs Republic*** (1973) E.A 540, where it was held that, *"a Court becomes functus officio when it disposes of a case by a verdict of guilty or by passing sentence or making some orders finally disposing of the case".*

From the cited case law it is clear that that the principle of a Court being *functus officio* restated means that as a general rule, a final decision of a Court cannot be reopened- this applying after the formal judgment has been drawn up, issued and entered. This being the position, therefore, applying to the current application. There is no dispute that prior to the filing of the current application, two applications, that is Misc. Economic Crimes Application Case No. 1 of 2017, with two applicants, Ramadhani Yassin Namakweto and Yusuph Athuman Namkukula (the 3rd and 4th applicants in the current application) and Misc. Economic Crimes Application Case No. 2 of 2017 with Kevin Rajab Ungele and Lawrence Njozi (the 1st and 2nd applicants in the present application) were before this Court and two Rulings were issued and read on the 22/6/2017 by Hon. Matogolo J. There is no dispute that both of the two applications originated from Economic Crimes Case No. 1 of 2017 in the District Court of Masasi at Masasi and were against charges of conspiracy and occasioning loss to a specified authority particulars being that on diversed dates between October 28th 2016 and 6th January 2017 within Masasi District did commit the offences charged. The value of charged property being Tshs. 5,200,665,634.00 as seen in the copy of the charge sheet part of the affidavit.

It is a fact not disputed by both parties that, for both the two applications, as shown in the respective Rulings, the Court dealt with two issues before it. The first was determination of the Preliminary objection raised and the Filed Certificate objecting

to grant of bail to the applicants vide Section 36(2) of the Economic and Organized Crime Control Act, Cap 200 RE 2002. In both of the two applications, the Court overruled the Preliminary objection raised and then proceeded not to grant bail, by reason of being satisfied that the filed DPP's certificate objecting to grant of bail to applicants had passed the validity test propounded by case law as can be discerned from the Rulings related to the two applications. It is important to note that the prayers/relief sought in both applications was grant of bail to the applicants.

That being the background, we move to address whether this Court is *functus officio*- that is determining whether this Court has already in the two application determined the substantive matter relating to the applications. Here the question is what were the substantive matters in the two applications decided by Hon. Matogolo J., that is in Misc. Economic Crime Application No. 1 and No. 2 of 2017. Suffice to say the prayers before the Court were for grant of bail. In both applications, the Court did not grant bail. In Misc. Economic Crime Application No. 1 of 2017, the Court held, at page17: " *In the case on hand the certificate in question has passed the validity test. It follows therefore that this court cannot grant bail to the applicants at the moment for the reasons explained above, until when the certificate is withdrawn.*".

In Misc Economic Crimes Application Case No. 02 of 2017, the Court concluded: " *I therefore hold that at the moment this court cannot proceed to hear the bail application filed by the applicants and release them on bail, it is until when the certificate filed by the DPP is withdrawn*". Though the holdings are written differently, in effect what is stated is a refusal of the Court to grant bail to the applicants at the time in view of the obtaining certificate by the DPP objecting to grant of bail having found the said certificate to be valid. From case law, the issue we find for consideration at this juncture is whether the situation obtaining at the time have which led to denial of bail are no longer there. This is in effect is a departure in

a way from consideration strictly on whether the Court is *functus officio* or not which we find may not be the real matter for consideration in this case.

We are guided to take this root by the holding in the case of ***DPP vs Ally Nur Dirie and Another*** (1988)TLR 252, where the Court of appeal had an opportunity to discuss whether the High Court can entertain the second bail application and the principle of *functus officio.* The Court was satisfied that the second bail application before Hon. Mwakibete, J. was incompetent having regard to the earlier Ruling by Chua, J., a where the High Court had concluded in the following words;"*In this case I rule that release of the applicant on bail in the face of the objections raised is not in the best interests of justice in the case*" .

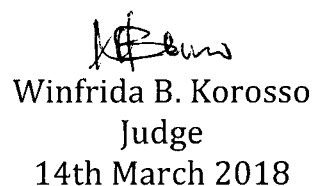
The Court of Appeal held that where there is a ground for objecting to bail which is static and cannot change with the passing of time then a Court would be found to have been exhausted. The Court of appeal proceeded to give guidance to Courts stating that, "*where a bail application is rejected by a judge or magistrate and a subsequent application is made to the same court, the proper practice is to bring the subsequent application before the same judge or magistrate, unless it is impracticable so to do*". Also that "*where a the ground for rejecting the first bail application is still valid it is wrong for the same Court to grant the second application*". We find that this guidance is the one we will apply in the matter on hand as opposed to consideration whether this Court is *functus officio* or not at this juncture in view of the obtaining peculiar circumstances to this case and being unable to only address the issue within the ambit of what is foreseen in the principle a Court being *functus officio* as outlined hereinabove.

The issue of change of situation or position as a factor for consideration in a second bail application in the same Court was also discussed in the case of ***Hassan Othman Hassan@Hasanoo vs. Republic***, Criminal Appeal No. 193 of 2014 where the Court of Appeal held that an application can be heard in the same Court if circumstances

which led to denial of bail in the first application no longer exist. This means were the circumstances leading to denial of bail in a first application continue to exist then an application cannot be entertained by the same Court.

In the present case, the two bail applications presented hereinbefore were denied on the ground of existence of the filed Certificate by the Director of Public Prosecution. Hon. Judge Matogolo stated that his hands were tied until the same is withdrawn. From the affidavital evidence and oral submissions of counsels by the applicants and Respondents we find nothing has been put forward in Court to show that the DPP certificate objecting to bail has been withdrawn or otherwise within the provision of section 36(3) of the EOCCA, Cap 200 RE 2002. The Learned Senior State Attorney averred to this and there was no objection to this averment from the learned counsels for the applicants. Which leads the Court to discern that the Certificate is still operative, a Certificate found to be valid by Hon. Matogolo J, in the two applications already considered by this Court as expounded hereinabove.

In the premises, we find that having regard to the fact that, the reasons for rejection of bail continue to exist as outlined in the orders by Hon. Matogolo. This Court cannot proceed to consider the present application nor will it be justified to do so. Consequently, this being the position, we hold that the current application before the Court cannot be entertained being incompetent before this Court and it is therefore Struck out. Ordered.



Winfrida B. Korosso
Judge
14th March 2018

Ruling delivered in Chambers this day in the presence of Mr. Ladislaus Komanya, learned Senior State Attorney for the Respondent Republic and Mr. Alex Msalenge and Kasian Mkali, learned Advocates respectively representing the applicants. Also present were all four applicants.

Winfrida B. Korosso
Judge
14th March 2018