IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

THE CORRUPTION AND ECONOMIC CRIMES DIVISION

AT DAR ES SALAAM REGISTRY

MISC ECONOMIC CAUSE NO. 9 OF 2018

(Originating from the Resident Magistrate's Court of Dar es Salaam at Kisutu in Economic Crimes Case No. 12 of 2016)

1. BENHARDARD MBARUKU TITO
2. KANJI MUHANDO MWINYIJUMA } **..... APPLICANT(S)**

VERSUS

THE REPUBLIC ..... RESPONDENT

Date of Last Order: - 06/04/2018
Date of Ruling: - 18/04/2018

RULING

W.B. KOROSSO, J

We have been invited to consider and determine an application filed under extreme certificate of urgency by the above named applicants via chamber summons, pursuant to section 29(4)(d) and Section 36(1) of the Economic and Organized Crime Control Act, Cap 200 RE 2002. Together with the application are two affidavits one affirmed by Mr. Bernhardard Mbaruku Tito (the 1st applicant) and the second affirmed by Kanji Muhando MwinyiJuma (the 2nd applicant). The reliefs sought being that the Court be pleased to grant bail to the applicants in respect of Economic Crime Case No. 12 of 2016 pending at the Resident Magistrate Court of Dar

es Salaam at Kisutu and any other order the Court may deem fit and just to grant.

The Respondents after being served with the application filed a counter affidavit in response, deposed by Tulumanywa Majigo learned State Attorney and also filed a Notice of Preliminary Objection on the ground that the Court is *functus officio*.

This ruling is for determination of the raised preliminary objection. We find it imperative to present the background before venturing into the substance of the objection raised as discerned from the available records before the Court. On the 14th day of March 2016 the two applicants were charges with two counts of economic offences in Economic Crime Case No. 12 of 2016 at RM's Court Kisutu. Later the charges were amended and currently they face 8 counts of economic offences. Before the current application, the applicants has filed another application before the High Court, District Registry of Dar es Salaam in Misc. Criminal Application No. 51 of 2016 praying to be granted bail but the said application did not succeed, the Court Hon. Arufani J. ruled that the certificate filed by the Director of Public Prosecutions was valid and therefore the Court refrained from granting bail. The application was therefore struck out.

In amplifying the raised objection, the learned State Attorney representing the Respondents, Mr. Majigo submitted that in the Application determined by Hon. Judge Arufani on the 12th April 2016 where the application was struck out, it disposed of the application for bail and the

matter was determined conclusively. That filing of the current application which originates from the same Economic Case No. 12 of 2016 pending at RM Court at Kisutu, seeking similar reliefs, before the same Court which had already determined similar prayers against the same applicants and the use of the same legal provisions to move the Court to hear and determined the matter renders the current application incompetent by reason that the Court is *functus officio* having already determined the same prayers brought by the same applicants originating from the same case pending at Kisutu RM's Court.

To support the above contention, the learned State Attorney invited the Court to consider the holding in ***Tanzania Telecommunication Comp. Ltd and 3 others vs. Tri Telecom Ltd***, Civil Revision No. 62 of 2006, a Court of Appeal case (unreported), the Court held at 3rd page from the last page, addressing when a Court becomes *functus officio,* endorsing the holding and the position stated in ***Kamundi vs R***. Therefore it was the Respondent argument that bearing in mind the fact that the matter relating to grant of bail for the applicants has already been determined by this Court on a matter originating from the same case, relating to the same charges against the applicants, this Court is *functus officio*. That this being the position the remedy available for the applicants is to file an appeal against the previous orders denying them bail they had applied for and not to file a fresh application before this Court. They thus prayed that the application be dismissed.

For the applicants, they were represented by Mr. Msemo learned Advocate and Mr. Mtobesya Learned Advocate. Their response on the preliminary objection raised was first, that a careful reading of the Ruling by Hon. Arufani J. in Criminal Application No. 51 of 2016 and laws governing when a Court is *functus officio,* reveals that under the circumstances it cannot be said that this Court is *functus officio*. That the last paragraph of the said ruling shows that the application was not heard, since before hearing of the application the DPP filed a certificate objecting to grant of bail to the applicants. Therefore they argued the application for bail was never heard and determined. Second is that what was considered and determined by Hon. Arufani J. in the first bail application was validity of the filed certificate by the DPP. That therefore, by reason of what case have propounded and it is now a settled principle on when a Court is *functus officio* as also stated in the cited case by the respondents ***Tanzania Telecommunication Comp. Ltd and 3 Others vs. Tri Telecom Ltd*** (supra). That for a Court to become functus officio the case must be finally disposed off which is not the case as per the Ruling by Hon. Arufani J. That this decision did not dispose of the application that the application is still pending. That the authority cited above defeats the contention or the position of the respondents that the Court is *functus officio*. The counsel cited the case of ***Hassanoo Othman Hassanoo vs. Rep.***, Criminal Appeal No. 193 of 2014, CAT (unreported) and the Court stated that even if bail application is determined 20 times, the answer is that the Court is not *functus officio.* That application for bail is interlocutor and is not an application that disposes of a case. It can be refiled

dependent on change of circumstances. That section 36(1) of Cap 200 contents opens doors for the Court to grant bail if it is inclined on its own motion or upon application can grant bail that this therefore shows the theory of *functus officio* does not apply in bail applications.

That the case of ***Hassanoo Othman Hassanoo*** (supra) highlights the rationale for consideration and grant of bail and therefore the objection raised, the contended does not hold water. The applicants counsel also submitted a Court of Appeal decision in ***AG vs. Mtobesya***, on the premise of a Court being *functus officio* cannot apply in view of possibility of change of circumstances. That in the present application, as per the decision in cited court of appeal case -Mtobesya case, the certificate filed by the DPP is no longer valid. That apart from Mtobesya, there is a High Court case of Antonio Zacharia Wambura and another vs R., Misc Economic Case 1 of 2018, where Hon. Matogolo J. applied the principle of change of circumstances to discard the Certificate filed by the DPP objecting to grant of bail to applicants. The counsel argued that at the time of the decision by Hon. Arufani J., the issue of the DPP's certificate was as it where and it had not been challenged regarding its validity.

Counsel Mtobesya submitted further that the doctrine of *functus officio* should not be applied wholesome but should consider specific circumstances on a matter under scrutiny. What should be considered is the finality of a decision. That since by law, the certificate by the DPP can be lifted under section 36(3) of the EOCCA, this in effect reopens doors for possible change of circumstances to warrant the certificate to be lifted. That the principle of *functus officio* does not apply where there is an

undetermined application. That a strict application of the principle of *functus officio* as contended by the respondent will lead to miscarried of justice especially having regard to the fact that a Court is a temple of justice and should be looked upon to abide to this. The counsel challenged assertion by the respondents that the previous decision on a similar matter has already been finally determined but that in this case the Court declined from entertaining the application. The applicants counsel therefore pray for the Court to overrule the preliminary objection raised by the respondents so that the matter may proceed on merit pending circumstances.

The respondent Republic rejoinder was brief but reiterated what was stated in the submissions in chief. On the argument that there are change of circumstances he contended that is not the case in the present case. The learned State then proceeded to distinguish all the cases stating that the circumstances obtaining to the said cases are different to the current case and insisted that the Court is functus officio.

We find it imperative in deliberation of the issue at hand to start by addressing our understanding of a Court being *functus officio*, this being the crux of the matter for determination. The applicants and the Respondents have cited various cases and provided to define the doctrine which we find relevant and applicable. Black's Dictionary 9th Edition (2009), defines this term to mean "*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".* ***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 another*** (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 officid*". The Court also at pg 6 of the Judgment, considered the holding in ***Kamundu vs Republic*** (1973) E.A 540, where it was held that, *"a Court becomes funcus 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 a Court being *functus officio* means that as a general rule, a final decision of a Court cannot be reopened and that this takes effect after the formal judgment has been drawn up, issued and entered. This being the position, applying to the current application, there is no question that prior to the filing of the current application, the applicants had filed Misc. Criminal Application No. 51 of 2016 decided by Hon. Arufani J. at the High Court – Dar es Salaam District Registry. Records show that in the said decision delivered on the 12th of April 2016 held that since the certificate objecting to grant of bail to applicants has passed a validity test, then the hands of the Court are tied and cannot grant bail to the applicants while the DPP certificate is still in operation. It is also true that in the said Ruling stated that the Court cannot grant bail to the applicants and that, "*there is no need of proceeding with the hearing of the applicants application...*" and continues that the "*court is declining to proceed with the hearing of the applicants application*". Looking at the said wordings in the last paragraph of the

respective Ruling one can infer that the substance of the application was not determined and we find no dispute in that argument.

Thus taking that in consideration it is without doubt that the issue which was determined was validity of the certificate filed by the DPP and by virtue of section 36(2) and 36(3) of the EOCCA Cap 200 RE 2002, while the valid certificate continues to operate, the court shall not grant bail, that in effect means the application for bail may be seen as not being finally determined to the standard to lead this Court to find that it is now *functus officio*. There fact is also cemented by case law on whether a Court can be *functus officio* in matters related to bail applications. In one of the cited cases, ***Hassan Othman Hassan @Hasanoo vs. Rep.***, Criminal Appeal No. 193 of 2014, though with different facts and circumstances we find the principle therein is relevant to the present case from the holding at pg 6 of the Judgment that; "*Was the learned Judge right in finding that the court was "functus officio" in determining the bail application that was filed by the appellant? The answer is definitely NO. Why? Section 36(1) of Cap 200 is clear. It empowers the Court (meaning the High Court sitting as an Economic Crimes Court pursuant to section 3) to grant bail to an accused person*" and again at pg. 8 held; "*The Court was not functus officio. Section 36(1) Of Act 200 is clear. Bail can be granted by the Court on its own motion or upon an application by the accused person*".

There is also the decision of ***DPP vs Ally Nur Dirie and Another*** (1988) TLR 252, 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 held that they were 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 were 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 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 proper and more applicable in the matter on hand at this juncture, rather than making a finding whether this Court is *functus officio* or not at this juncture in view of the obtaining circumstances which are peculiar to this case and cannot be defined within the ambit of what is foreseen in the principle of a matter being *functus officio* as outlined hereinabove. In effect saying that the principle of a matter being *functus officio* cannot be said to have been fully complied with the guiding principles.

We have already highlighted the reasons for the rejection of the bail application in the first instance, we have no record that the DPP has lifted

the certificate. While it is true that in determination of the bail application this Court is not strictly speaking *functus officio* for the reasons stated above, the holding on the validity of the Certificate by the DPP objecting to granting bail was already determined by this Court. Whilst we are aware of the Court of Appeal Decision, In ***Mtobesya's case (supra)***, finding section 148(4) of the CPA which relates to issuance of the DPP certificate and invalidating the said provision, we are also aware of the court of appeal decision in ***Simforian Massawe's case (supra)***, and endorsing the holdings in ***DPP vs Li ling Ling*** (supra) on the consequences upon determining the validity of the DPP's certificate. We find at this juncture where the Certificate objecting to bail has not been lifted, and was held to be valid our hands are tied, since the matter has already been determined.

The application is therefore struck out.

HIGH COURT OF TANZANIA
CORRUPTION AND ECONOMIC CRIMES DIVISION

Winfrida B. Korosso
JUDGE
18th April 2018