

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

MAIN REGISTRY

AT DAR ES SALAAM

MISC. CIVIL CAUSE NO. 5 OF 2023

ATHUMANI RAMADHANI KITAMBI.....1ST PETITIONER
KOLE JOGAYA MSIGARA.....2ND PETITIONER
JUMA SOSI ALOYCE.....3RD PETITIONER
ISAYA BOCHERA CHAMENE.....4TH PETITIONER
MWALAMI HUSEIN KIFIGO.....5TH PETITIONER
EDWARD ALI ABDALLAH.....6TH PETITIONER
KAENI MIRAJI KUFULA.....7TH PETITIONER
SAMWELI GIBAI.....8TH PETITIONER
RASHID OMARY MUHODE.....9TH PETITIONER
BONIFACE JUMA LUCHENJA.....10TH PETITIONER
DANIEL ERNEST BWEGULE.....11TH PETITIONER
SEIF BAKARI MAURA.....12TH PETITIONER
BIBIANA GELGORY MADOLE.....13TH PETITIONER
ANNA RAMADHANI.....14TH PETITIONER
NAWAI VICENT NAWAI.....15TH PETITIONER
SELEMANI YAHAYA MLEMBELE.....16TH PETITIONER
KENEDY REUBENI MANGADA.....17TH PETITIONER
IMLAN ALI MATOLA.....18TH PETITIONER
SILASI DOGANI NGALYA.....19TH PETITIONER
KASHINDE NGASA MILAMBO.....20TH PETITIONER
RAMADHANI TAHA ALLY.....21ST PETITIONER
HASANI LISATE.....22ND PETITIONER
SUPIANI MFAUME MBARUKU.....23RD PETITIONER
KINYEMI ALI MTURE.....24TH PETITIONER
MICHAEL ALISON MWASANGA.....25TH PETITIONER
MUSSA JUMA KHAMIS.....26TH PETITIONER

EZEKIELI RAZARO.....	27 TH PETITIONER
TOMAS ADAM MAHOMBA.....	28 TH PETITIONER
WAREN T. NDUKEKI.....	29 TH PETITIONER
ADAM THOMAS MAHOMBA.....	30 TH PETITIONER
RENGINA FILIMON MWAKANYANGO.....	31 ST PETITIONER
MARCO BENARD RUSANA.....	32 ND PETITIONER
KANANI BONDE.....	33 RD PETITIONER
BAHATI MTUNGA.....	34 TH PETITIONER
ELIASY PETRO.....	35 TH PETITIONER
HOSEN MILAGI.....	36 TH PETITIONER
AYUBU MAHONDO.....	37 TH PETITIONER
GEORGE DANIELY.....	38 TH PETITIONER
SAMWER WILIFRED NAIS.....	39 TH PETITIONER
JASON JAMES.....	40 TH PETITIONER
JONI TUMBA.....	41 ST PETITIONER
MET HOD MELIKON.....	42 ND PETITIONER.
PHILIPINO ANDELEA.....	43 RD PETITIONER
HAMAD ALLY MWALILU.....	44 TH PETITIONER
TIZO CHAMENE.....	45 TH PETITIONER
SILYAKUS SPRIANI.....	46 TH PETITIONER
JUMA HASSANI.....	47 TH PETITIONER
FLORIDA BONIPHANCE.....	48 TH PETITIONER
ESTER B, NGIRWA.....	49 TH PETITIONER
TATU ATHUMANI.....	50 TH PETITIONER
ASHURA SEPHU.....	51 ST PETITIONER
KATALINA MAGUNDUKE NDUWILE.....	52 ND PETITIONER
EDELISTA YETELI KULANGA.....	53 RD PETITIONER
ZAINABU ATHUMANI.....	54 TH PETITIONER
ZAKIA JUMANNE.....	55 TH PETITIONER
MAKOYE KANONI.....	56 TH PETITIONER
RAMADHANI K. ABDALLAH.....	57 TH PETITIONER

KASHINJE NGASA.....	58TH PETITIONER
SIMON MASUO.....	59TH PETITIONER
MARIAMU YOHANA CHOMOLOLE.....	60TH PETITIONER
DOTTO MADUHU MABULA.....	61ST PETITIONER
CHAUSIKU YOHANA.....	62ND PETITIONER
GOLE JOGAYA CHIGULA.....	63RD PETITIONER
SANDE EZEKIA.....	64TH PETITIONER
SAID HAMIS.....	65TH PETITIONER.
NOOR SHIHI.....	66TH PETITIONER
ISAYA SAMWELI.....	67TH PETITIONER
PAULO SIKOMA.....	68TH PETITIONER
ANTONI SIMONI DANAMBA.....	69TH PETITIONER
MAKAMU ZANZIBA.....	70TH PETITIONER
BARAKA S. MBISE.....	71ST PETITIONER
MARIA MARIAN HANSON.....	72ND PETITIONER
MUSSA EDWARD LUFUNGILO.....	73RD PETITIONER
SAMWELI ATANASI.....	74TH PETITIONER
JAPHETI WILSON.....	75TH PETITIONER
ALI EDWARD.....	76TH PETITIONER
OMARY A. SALUM.....	77TH PETITIONER
JAMES SAMWEL.....	78TH PETITIONER
JOSEPH SONGA.....	79TH PETITIONER
KENEDY J. KAGWEBE.....	80TH PETITIONER
KHALFA KIGOMU.....	81ST PETITIONER
HASSANI JUMA.....	82ND PETITIONER
LEVISON LEMABI.....	83RD PETITIONER
PETER SIGANI.....	84TH PETITIONER
IRENE M. MVANGA.....	85TH PETITIONER
HONOLINA MAGUNDULE MDWALE.....	86TH PETITIONER
REYA MALAMUSO MAZENGO.....	87TH PETITIONER
VICKTORIA SOSTENESI.....	88TH PETITIONER

PAULINA TOMASI.....	89TH PETITIONER
DAUDI ZAKARIA NGADYA.....	90TH PETITIONER
JUMA HAMISI.....	91ST PETITIONER
HELINA MLONGANILA.....	92ND PETITIONER
SUDI M. PAZI.....	93RD PETITIONER
HAMISI MMANGA.....	94TH PETITIONER
SANANE ALLY OMARY.....	95TH PETITIONER
RAJABU ABUDALA ATHUMANI.....	96TH PETITIONER
HELENES MASHIMBA.....	97TH PETITIONER
ALLY ABUDALA ATHUMANI.....	98TH PETITIONER
RAMADHANI SALUMU BALAJA.....	99TH PETITIONER
RUIZA SLIVESTAR MAHIMBO.....	100TH PETITIONER
JAMES CHACHA MSETI.....	101ST PETITIONER
MTANYA KENAS MTANYA.....	102ND PETITIONER
JEREMIA AMANDUS.....	103RD PETITIONER
EMUSON MATELA.....	104TH PETITIONER
BENJAMENI WILLIAM.....	105TH PETITIONER
EMMANUEL HAMIS.....	106TH PETITIONER
MABULA A. TENGI.....	107TH PETITIONER
AMOSI C. BAHATI.....	108TH PETITIONER
EMANUELI GIDION.....	109TH PETITIONER
YAHYA S. MKAPU.....	110TH PETITIONER
JUMANNE HALFANI.....	111TH PETITIONER
FEDY MAMBA.....	112TH PETITIONER
ZAKARIA ADIRIANO.....	113TH PETITIONER
ESTER JOSEPH.....	114TH PETITIONER
MARY A. MBWAMBO.....	115TH PETITIONER
DOTTO BARNABA.....	116TH PETITIONER
FAUSTA HELEMAN.....	117TH PETITIONER
MAGERIGH MAJELE.....	118TH PETITIONER
MAUA SAIDY.....	119TH PETITIONER

DAUDI GALINDWA.....120TH PETITIONER
ALHAS ABDALAH.....121ST PETITIONER
DANIFORD OTOMALY MWAMBE.....122ND PETITIONER
NASRI SELEMANI.....123RD PETITIONER
IBARD ALLY KUUDEMBA.....124TH PETITIONER
MWAJUMA JAFARI.....125TH PETITIONER
JOSEPH LUKAS.....126TH PETITIONER
KHALFA KIGONO127TH PETITIONER
JOSHUA M. MWAKALASI.....128TH PETITIONER
ENOCK E. HOSEA.....129TH PETITIONER
IMANI SAMWEL.....130TH PETITIONER

VERSUS

THE REGIONAL COMMISSIONER FOR COAST REGION.....1ST RESPONDENT
THE HONOURABLE ATTORNEY GENERAL OF
THE UNITED REPUBLIC OF TANZANIA.....2ND RESPONDENT
RANCH OF ZANZIBAR IN BAGAMOYO (RAZABA).....3RD RESPONDENT
THE HONOURABLE ATTORNEY GENERAL OF ZANZIBAR.....4TH RESPONDENT
THE COMMISSIONER FOR LANDS.....5TH RESPONDENT
THE REGISTRAR OF TITLES.....6TH RESPONDENT

RULING

MKWIZU, J:

The Petitioners here in filed an Originating Summons under the provisions of article 26(2), 30(3), (5) and article 108 of the Constitution of the United Republic of Tanzania, 1977 as amended and sections 1 (2), 4 and 5 of the Basic Rights and Duties Enforcement Act, [Cap.3 R.E 2019] (BRADEA), Rule 4 of the Basic Rights and Duties Enforcement (Practice and procedure) Rules, 2014. The originating summons filed in Court is accompanied by an Affidavit of one Athumani Ramadhani Kitambi. The

gist of the dispute is well articulated in both the originating summons and the affidavit in support of the petition as follows: that in 1977 the Government of United Republic of Tanzania allocated to the Government of Zanzibar, 6000 hectors out of 28,000 hectors of land situated at Makurunge Ward in Bagamoyo District for purpose of established Ranch as a result the Ranch of Zanzibar in Bagamoyo @ RAZABA was established. The area of BOZI @ BOZI ESTATE constituting 22,000 hectors was given to RAZABA workers by RAZABA administration to develop their homesteads and livelihoods. In 1993, RAZABA clogged its operations in Bagamoyo, abandoning the land leaving behind the former workers of RAZABA who continued to live in BOZI ESTATE as their homesteads to date enticing new buyers ensuing into establishment of lives by innumerable people in Bozi estate.

Subsequent in 2008, the RAZABA land was allocated to EcoEnergy Tanzania with instructions to compensate all residents who were found within the project area. The Valuation for compensation of the homesteads and livelihoods was conducted by the director of Bagamoyo district but no compensations were made. The Government again, reallocated some part of the RAZABA land, (not Bozi estate) to Bagamoyo Sugar Limited followed by a compensation of residents found in occupation within the project area .

On 31/05/2023 and 06/06/2023 the Government of Zanzibar and the Government of United Republic of Tanzania through states spokesman and Regional Commissioner for coast region respectively issued a general public announcement with general directives against all residents of

Makurunge – RAZABA in Makurunge Ward Bozi Area (BOZI ESTATE) inclusive to vacate the area without compensation.

The petitioners are aggrieved by that order asserting that they have been in a lawfully and peaceful occupancy since 1977 when the land was allocated to RAZABA, they have established their homestead and livelihoods for quite long and therefore any alienation without fair, adequate and prompt compensation will deprive protection of their residence, family, persons, privacy and matrimonial life guaranteed under Article 16 (1) and (2) of the constitution. They believe that the 1st, 2nd and 3rd respondent acts are likely to deprive their freedom and right to properties guaranteed under Article 15 (1) and (2); 24 (1) and (2); 25 (1) (a) (b) of the Constitution and that they have the right to enjoy fundamental human rights and freedom guaranteed under Article 29 (1) and (2) of the Constitution. They also condemn the respondent actions for contravening provisions of part II section 3 (1) paragraph (g) of the Land Act, article 26 (1) of the constitution and therefore unconstitutional as they tend to abrogate the basic rights, freedoms and duties set out in Article 12-29 of the Constitution, posing a challenge to the constitutionality of section 52 (2) (3) and (4) of the land Act cap 113 RE 2013.

In response to the petition, the respondents filed their counter affidavit, and five preliminary objections as follows: -

- 1. The Petition is incompetent for contravening the provisions of Section 4(1) of the Basic Rights and Duties Enforcement Act, Cap. 3, R.E 2019 as amended as the Petitioners have no locus to institute the said petition.*

- 2. The petition is untenable for being frivolous, vexatious and an abuse of Court processes.*
- 3. The reliefs sought by the Petitioner are untenable for contravening the provisions of Section 13 of the Basic Rights and Duties Enforcement Act, Cap. 3, R.E 2019 as amended.*
- 4. The Petition is incompetent for contravening the provisions of Section 8(2) of the Basic Rights and Duties Enforcement Act, Cap. 3, R.E 2019 as amended as the Petitioners have alternative means of redress or remedy;*
- 5. The affidavit in support of the petition is incurably defective for contravening Order XIX Rule 3 of the Civil Procedure Code, Cap 33 Re 2019.*

The objections were disposed of by way of written submission. The petitioners were represented by Mr. Tenzi Anthony Nyundulwa advocate, while the respondents had the services of Daniel Nyakiha learned State Attorney. I thank the learned counsels for their prompt compliance.

Mr. Nyakiha's arguments on ground 1 are to the effect that the Petition is incompetent for contravening the provisions of Section 4(1) of the Basic Rights and Duties Enforcement Act, (Cap. 3, R.E 2019). His contention is that petitioners have no locus stand to institute the present matter before the court contended that section 4(1) of BRADEA requires the matter of this nature to be instituted by the persons affected by infringed provisions for which the Petition is based.

In establishing that locus, the state attorney said, the State via **The Written Laws (Miscellaneous Amendments) (No.3) Act, 2020,**

introduced the amendment which was incorporated under BRADEA as section 4(2) of the Act which require any person alleged contravention under section 4(1) of the Act, to file an affidavit stating the extent to which the contravention of the provisions of Articles 12 to 29 of the Constitution has affected such person personally but no single affidavit from the petitioners demonstrating the extent of violation to the Petitioners personally. To bolster his argument, the learned State Attorney cited the cases of **Tanzania Epilepsy Organization versus Attorney General**, Misc. Civil Cause No. 5 of 2022 and **Sioi Graham Solomon versus ICBC Standard Bank Plc And 6 Others**, Misc. Civil Cause No 29 of 2021 (All unreported) with an invitation to hold that the Petitioners have no locus to institute this petition. He was of the view that, there is no material facts disclosed in the pleadings as to how the Petitioners 'rights and duties have been violated or likely to be violated. No single ownership by the petitioner have been established to indicate that the petitioner and or any other person affected by the notice to vacate that has been issued by the 1st Respondent.

Arguing ground 2, 3 and 4 of the objections together Mr. Nyakiha submitted that the High Court is under section 8(2) of the BRADEA restricted to exercise its powers if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law, or that the application is merely frivolous or vexations. He cited to the court a decision of the court in **Ado Shaibu vs Hon. John Pombe Joseph Magufuli & 2 Others** Misc. civil Cause No 29 of 2018, (CAT Unreported).

He compellingly categorised the petitioners's claim into two classes, **one** that it is pure land matter arising from the dispute on legality of the Petitioners being at the area seeking for an order of this court compelling the 5th Respondent to declare the said part of the land as abandoned. And secondly that the petitioners are seeking to challenge administrative actions , namely the notices issued by the 1st Respondent and the Revolutionary Government of Zanzibar, underlining that these are matters which can be dealt with by this court either by judicial review or normal land case and not by way of a constitutional petition . To bolter his argument, Mr Nyakiha cited to the court the decision of **Zitto Zuberi Kabwe & 2 Others vs A.G**, Misc. Civil. Cause No.31 of 2018 (Unreported) and **Ado Shaibu vs Hon. John Pombe Joseph Magufuli & 2 Others**(supra). He lastly prayed for the dismissal of the Petition in its entirety with costs.

In reply, the Petitioners' counsel started by challenging the preliminary objections contending that they do not raise a pure point of law. He said, the purpose of the notice of preliminary objection is to prevent surprise in litigation and to ensure fair hearing and therefore needs to be crafted in a clear term and elaborative, consisting of a point of law pleaded or which arises by clear implication out of pleadings. Citing cases of **Registered Trustees of Baptist Convention of Tanzania @Jumuiya Kuu ya Wabatist V. James Kasomi& Others** Misc. Civil Appl.No.35 of 2021; **Gabinious Sigano V.St Timoth Pre &Primary School**,Labour No.8 of 2019; **James Burchard Rugemalira Vs The Republic & Another**, Criminal Application 59 OF 2017 (All Unreported); **Juma and Others VS Attorney General** (2003) 2 EA and **Mukisa Biscuit Manufacturing Company Ltd V. West End Distributors Ltd** [1969]

EA 296 he said, the respondents objection are coached in general terms, as mere technical defences without any bearing to the pleadings.

He maintained that ground 1 of objection, lacks particularities, as to how the Petitioners have no locus to institute the said application. The second ground has no bearing in what ways the Petition is frivolous, vexations and an abuse of court process; the third ground, call for facts and therefore not a preliminary objection, the fourth preliminary objection lacks particularity as no alternative means of redress has been mentioned by the Respondent to enable the petitioner respond to and the fifth point has no details as to what part of the affidavit is defective.

In the alternative, the learned counsel argued that while the petition is premised on Articles 26(2),30, (3), (5) and 108(2) of the Constitution and section 1, (2),4 and 5 of the Basic Rights and Duties Enforcement Act, the preliminary objection was directed to section 4(1) of BRADEA only. To him locus standi is governed by the Constitution, Statute law and Common law depending on the nature of the case. Referring the court to the case of **Rev. Christopher Mtikila V Attorney General**, 1995 TLR 31, and **Lekengere Faru Parutu Kamanyu & 52 Others V Minister for Tourism, Natural Resources and Environment & 3 Others**, Civil Appeal.No.53 of 1998 CAT the leaned advocate said Article 26(2),30(3),(5) confer locus Standi in Constitutional litigation to individual litigant and public at large and article 30(3) caters for both personal and public interest litigation and at times the two may prove inseparable. He insisted that article 26(2) confers standing on a desirous petitioner to seek to protect the rights of another or the general public at large despite having no sufficient interest on the impugned contravention providing a departure from the doctrine of locus standi described in Common law

tradition. The decision in **Attorney General V Jeremia Mtobesya**, Civil Appeal No.65 of 2016 (CAT Dar es Salaam, Unreported) was cited on this point.

He insistently stated that, since the right to institute a petition for the enforcement of basic rights and duties is conferred by both the constitutional and statutory provisions depending on the nature of petition, one enabling provision of the law cannot be used to defeat the whole suit if there are other cited provision of the law conferring jurisdiction to the court. He maintained that the preliminary objection based on section 4(1) of BRADEA and sidelining the other enabling provisions of law cited, fail to stand as Preliminary objection.

On the arguments that section 4(1) of BRADEA does not automatically grant the petitioner a locus before this Court, and there is no material facts disclosed in pleadings as to how the Petitioners rights and duties have been violated or likely to be violated, Mr. Tenzi submitted that the Petitioners are not only challenging the notice issued by the 1st and 4th Respondent but also the intended actions contained in the notice, that is, forcefully eviction from the suit premise without compensation, intended destruction of their homestead, livelihood and livestock without due process of law, infringement of their basic right enshrined in the Constitution in accord with the provisions of section 4(1) of BRADEA which are parametria with provisions of Article 30(3) and the constitutionality of section 51(2)(3) and (4) of the Land Act that contravene article 24(1) and 64 (5) of the Constitution necessitating the filing of this petition to challenge the impugned law and intended actions by the 1st and 4th Respondents without necessarily filing separate suits.

Regarding the requirement of filing affidavit under section 4(1) and (2) of the BRADEA, Mr. Tenzi was of the view that the wording of section 4(2) of BRADEA requires a single affidavit stating the extent to which the contravention of the provision has affected the petitioners. He banked on the Court of appeal decision in the **Registered Trustees of ST. Anita`s Greenland school (T) & 6 Others**, Civil Application 168/16 of 2020 CAT Dar es Salaam, on the position that an application can be supported by either one or more affidavits of the petitioner or of some other person or persons having knowledge of facts.

He maintained that this is a public litigation, where any desirous person may bring action on behalf of himself, or a victim who does not have the necessary resources to commence litigation or public at large without any personal interest. To him, the requirement of personal interest is not a must for the petitioner but an affidavit of a person so affected is a must and single affidavit suffices insisting that the facts deposed in the affidavit by Athuman Ramadhan Kitambi suffice as Joint affidavit of all Petitioners for it covers all residents of Bozi, despite of lack of heading to that effect and clarification that it was sworn on behalf of the deponent and others.

Responding to the 2, 3, and 4 points of the objection, Mr. Tenzi said, the Petitioners are not substantially challenging the ownership of land parcels but an immediate intended action of removing and destroying their homestead, livelihood and livestock without compensation and due process of law, the constitutionality of section 51(2),(3) and (4) of the Land Act and the remedy under Article 30(5) of the Constitution. He inelegantly stated that the remedy sought under article 30(5) cannot be sought under land courts but in this court in exercising its power conferred

under the Constitution and BRADEA contending that Judicial Review cannot determine the validity and Constitutionality of these provision of the law and therefore the alternative remedy proposed by the respondent are not only ineffectual and convenient to the petitioners but also not applicable in the circumstances of this case. He in addition argued that the provision of section 4(1) of BRADEA gives a person direct access to High Court even if there are other action/ remedies on the same matter available.

In relation to the contention that the Petition is untenable for being frivolous, Vexatious and an abuse of the court process, Mr. Tanzi said, a matter is considered frivolous when it is without substance, groundless and or fanciful and a fair conclusion on this can only be arrived at upon hearing of the matter on merits.

Having given due scrutiny to the submission filed by the learned counsel from both sides, I am satisfied that the five preliminary objections raised by the respondent counsel are all legal points worth consideration as a preliminary objection.

The first point tests the petitioner's locus stands to institute this petition before the court. As hinted above this petition is premised on among other provisions articles 26(2) and 30(3), (5) and 108 of the Constitution and sections 1 (2), 4 and 5 of the Basic Rights and Duties Enforcement Act, [Cap.3 R. E 2019]. I will for clarity begin with article 30 (3) of the constitution and section 4(1) of BRADEA cited by the petitioners. Article 30 (3) is couched thus:

30(3) Any person claiming that any provision in this Part of this Chapter or in any law concerning his right

or duty owed to him has been, is being or is likely to be violated by any person anywhere in the United Republic may institute proceedings for redress in the High Court.

And section 4(1) of BRADEA says:-

"4(1) Where any person alleges that any of the provisions of Articles 12 to 29 of the Constitution has been, is being\ or is likely to be contravened in relation to him, he may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the High Court for redress.

Article 30(3) of the constitution and section 4(1) of BRADEA prescribes the right to file a constitutional petition in protection of the constitution rights by any person affected by the alleged infringement. Article 26(2) on the other imposes a duty upon a person taking that legal action to abide with the procedural requirements. The article says:

*"26.- (2) Every person has the right, **in accordance with the procedure provided by law**, to take legal action to ensure the protection of this Constitution and the laws of the land."* (emphasis added)

There is no doubt also that to enforce Part III of the constitution one must resort to the Basic Rights and Duties Enforcement Act. This is what exactly the petitioners did. Sections 4 (2) and (5) of BRADEA (Cap 3 RE 2019) as amended by the Written laws

(Miscellaneous Amendment) No. 3) Act, 2020 are explicitly on the procedure to be adopted. The section says.

*4(2) Without prejudice to the provisions of the Commission for Human Right and Good Governance Act, relating to powers of the Commission to institute proceedings, **an application under subsection (1) shall not be admitted by the High Court unless it is accompanied by an affidavit stating the extent to which the contravention of the provisions of Articles 12 to 29 of the Constitution has affected such person personally.***

(3) ...N/A

(4)....N/A

*(5) A petitioner shall, **prior to seeking redress** under this Act, **exhaust all available remedies under any other written laws.**" (emphasis added)*

Thus, to pursue the rights articulated under article 30 (3) of the constitution and section 4(1) of BRADEA, one must firstly establish at the inception of the matter through affidavit how he is affected by the alleged violation personally and this is done after he has exhausted all available remedies available under any other written laws.

The respondent's contention in the 1st objection is that the petition lacks the prerequisite affidavits with particulars on how the petitioners are personally affected by the alleged violation contrary to section 4(2) of BRADEA. I have reviewed the petition by the petitioners herein. Indeed,

the originating summons contains a list of 130 petitioners with one supporting affidavit affirmed by the 1st petitioner, Athuman Ramadhani Kitambi on his own behalf without reference to other petitioners in court. The opening paragraph, 1, 8 and 18 of the supporting affidavits are relevant here: They reads:

"I ATHUMANI RAMADHANI KITAMBI, Adult, Muslim and resident of Makurunge, Bozi Bagamoyo Pwani, hereby affirms and state as follows:-

1. That, am the petitioner herein and conversant with the facts to be deponed herein.

8. That the Petitioner is challenging the intended actions of 1st, 3rd and 5th Respondents which have been described in the originating summons as unconstitutional and void.

18. That, the petitioner is a citizen and resident of Tanzania, and subject to laws of Tanzania. The petitioner herein has the right to take measure and to ensure that the Constitution and the laws of Tanzania are protected".

The above quotation clearly shows that the 1st petitioner affirmed the affidavit on his own behalf. Meanings that there is no affidavit by the rest 129 petitioners to support their petition. The Petitioners advocate has two arguments on this point, one that the law does not require affidavit by each petitioner, it only require an affidavit setting out the effects of the alleged violation insisting that since the accompanying affidavit talks of Bozi Resident in general it suffices a joint affidavit covering all the petitioners. I think this is a misconception of the law. Section 4(2) of BRADEA is couched in a mandatory term. It imposes a duty upon every

single petitioner to give evidence ***from one's personal standpoint*** through an affidavit demonstrating how the alleged constitutional violation has affected him/her. And even if I was to agree with the petitioner's counsel argument that one affidavit suffices, still the depositions by Ramadhani Kitambi have nothing specific demonstrating effects of the contravened provisions to each of the petitioners. I had an opportunity to read the cited case of **Registered Trustees of ST. Anita's Greenland school (T) & 6 Others (supra)** cited to me by the petitioner's advocate. This decision is highly distinguishable. That case was dealing with the interpretation of the Court of Appeal rules and not the provisions at hand and like in this case, the Court of Appeal was of the position that the averments in the supporting affidavit did not cover all applicants. The application was at the end struck out for failure by the second, fourth, fifth, sixth and seventh applicants to file the requisite affidavit in support of the application. The courts finding at page 9,10 and 11 was that:

". That paragraph in our view, has nothing to do with the averments to cover all petitioners in the affidavit supporting the application.

..... since there is no affidavit(s) or the second, fourth, fifth, sixth and seventh applicants, there is nothing to be supplemented on their respect.

..., the omission renders the application incompetent and thus it cannot be partly saved as urged by Mr. Vedasto". (emphasis added)

The petitioners in this case have derogated their duty to show how the violation has affected them rendering the Petition incompetent. The first preliminary objection is sustained.

Connected to the above is the fourth preliminary objection where the petitioners are faulted for failure to exhaust available remedies before seeking remedies under the Basic Rights and Duties Enforcement Act. I think, the originating summons and affidavits will assist in answering this very crucial point. According to the originating summons, the petitioners are seeking the following:

- 1. Declaratory order that the government, has constitutional duty and mandate to observe, protect and preserve the rights and freedoms guaranteed and entrenched the under the provisions of the constitution of the United Republic of Tanzania of 1977 and the laws of the United Republic of Tanzania.*
- 2. That the acts of all respondents specifically the 1st and 3^d respondents 'General Public Announcements issued on 31/05/2023 and 6/06/2023, with general directives and intended consequential actions against all residents of Makurunge – RAZABA in Makurunge Ward which include Bozi Area (BOZI ESTATE) are likely to contravene with the provisions of Articles 29 (1) and (2) of the Constitution of the United Republic of Tanzania of 1977 to the detriment of residents of BOZI estate.*
- 3. Their intended actions are well in contravention with provisions of *Land Act in part II section 3 (1) paragraph (g)***

4. *That lack of diligence and omissions to take statutory actions by the 5th respondent is also in **contravention of provisions of section 51 (1), (3) and (4) of the land Act [Cap. 113 R.E. 2013]***
5. *That the provisions of **section 51 (2), (3) and (4) of land Act CAP P 113 R.E 2013** are in contravention with Article 24 (1) and (2) of the Constitution of the United Republic of Tanzania of 1977.*
6. *Costs this Application.*
7. *Any other or further order or relief which the honorable court shall deem fit to grant. (Bold is mine)*

The second prayer above is a challenge to the '**General Public Announcements**' issued by the 1st and 3rd respondents on 31/05/2023 and 6/06/2023,. Certainly, these are administrative statements made by the administrators in their administrative capacity amendable by prerogatives order (certiorari, mandamus or prohibition orders) through Judicial review powers exercised under the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act which is not part of the matters amendable under the Basic Rights and Duties Enforcement Act. Section 8(4) is specific on this issue that:

*"8 (4) For the avoidance of doubt, the provisions of Part VII of the **Law Reform (Fatal Accidents and Miscellaneous Provisions) Act**, which **relate to the procedure for and the power of the High Court to issue prerogative orders, shall not apply for the purposes of obtaining redress in***

respect of matters covered by this Act.”(
emphasis added)

There is no gain saying therefore that the petitioners were required to first challenge public pronouncement complained of through Judicial review and not by way of a constitutional petition.

Prayers 3, 4 and 5 are rooted on adverse possession claim arising from alleged abandonment of land held under a right of occupancy under section 51 of Land Act. Paragraph 17(a-g) of the 1st petitioner’s affidavit contains detailed information on the point as follows:

17. That the intended actions of the respondents and the provisions of section 51 (2) (3) and (4) of Land act are unconstitutionally challenged as:

a). That the acts of the 1st, 2nd and 3rd respondent of regarding the resident of bozi estate as trespassers, who should vacate the place without compensation or that they shall be forcefully removed and deported elsewhere are likely to deprive the freedom of residents of bozi estate protected under article 15 (1) and (2) of the constitution.

b) The residents of Bozi estae have in a lawful and peaceful occupancy since 1977 when the land was allocated to RAZABA they have established their homesteads and livelihoods, for quite a long time any alienation without fair adequate and prompt compensation will deprive protection of their residence family, person privacy and matrimonial life guaranteed under article 16 (1) and (2) of the Constitution.

c) That through abandonment and long possession sale and inheritance the resident of Bozi estate have acquired title to land built house homesteads they have developed the land and maintain it as arable for quite a long time as means of their livelihood by planting permanent and annual crops livestock

keeping all these properties are entitled protection under article 24 (1) and (2) of the constitution hence to direct the resident of Bozi estate to vacate the place without compensation is to deprive their right to properties and denial of protection of their properties guaranteed under the said article 24 (1) and (2) of the constitution.

d) That for quite a long time the residents of Bozi estate have been using the area for livelihood any alienation of the resident of Bozi estate from place of work is the denial to participate responsibly and honestly in lawful and productive work enshrined under article 25 (1) (a), (b) of the constitution of United Republic of Tanzania.

e) That the petitioner has the right to enjoy fundamental human rights and freedoms guaranteed entrenched and protected under article 2 (1) and (2) of the constitution.

f) That the respondent intended actions of removing the residents of Bozi estate without compensation are in contravention with provisions of land act in part II section 3 (1) paragraph (g) and contrary to the provision of article 26 (1) of the constitution of United Republic of Tanzania.

g) That the provisions of section 51 (2), (3) and (4) of the land act cap 113 RE 2013 that lay the procedure for declaration of abandonment of land without limitation of time and at pleasure of the land commissioner without stating when and how it comes to the knowledge of the commissioner of the abandonment while the provision of section 72 of the Land Registration Act Cap 334 entitles a person to acquire title of any estate in any abandoned registered land by adverse possession. The provisions of section 51(2), (3) and (4) of the Land Act, that sets indefinite time for declaration of abandoned land infringes the provisions of article 24 (1) of the constitution of the United Republic of Tanzania on ownership of land...."

I have comprehensively read the complained section 51 of the Land Act. The section stipulates the procedures to be taken to have the land held under the right of occupancy declared abandoned. It reads:

"51. Abandonment of land held under a right of occupancy.

(1) Land held for a right of occupancy shall be taken to have been abandoned where one or more of the following factors are present—

(a) the occupier owes any rent, taxes or dues in respect of the land and has continued to owe such rent, taxes or dues or any portion of them for not less than five years from the date on which any rent, taxes or dues or any portion thereof first fell to be paid;

(b) the occupier has left the country without making any arrangement for any person to be responsible for the land and for ensuring that the conditions subject to which the right of occupancy was granted are complied with and that occupier has not given any appropriate notification to the Commissioner;

(c) any building on the land has failed into a state of such disrepair that it has become a danger to the health and safety of any person occupying that building for any lawful purpose or a neighbour to the occupier;

(d) persons with no apparent lawful title so to do are occupying or using the land or any buildings on the land and one or more of those persons or a person from a community which contains one or more such persons have so occupied or used the land or any building on the land for a period of not less than two years immediately preceding the date on which in accordance with this section, the Commissioner publishes a notice of abandonment in the Gazette;

(e) by reason of the neglect of the land, the land is—

- (i) no longer capable, without significant expenditure and remedial work, of being used for productive purposes; or*
 - (ii) suffering serious environmental damage.*
- (2) Where it appears to the Commissioner that any land has been abandoned, he shall publish in the Gazette and in a newspaper circulating in the area where the land is situate a notice of abandonment which shall–*
 - (a) state the location of the land;*
 - (b) state the boundaries of the land;*
 - (c) set out briefly the grounds on which the Commissioner intends to rely in determining that the land has been abandoned.*
 - (d) state the time, being not less than sixty days from the date of the publication of the notice, within which any person claiming to have an interest in the land may show cause why the land should not be declared to be abandoned.*
- (3) Where the Commissioner after considering any representations received abandoned, the Commissioner shall issue in the prescribed form, a declaration of abandonment and shall send a copy of that declaration to the occupier of the land at his last known place of abode or last known address.*
- (4) Proceedings to revoke a right of occupancy under section 49 in respect of land which has been declared abandoned under subsection (3) shall be commenced forthwith.*
- (5) Where any person claiming to have an interest in land shows cause that the land is not abandoned, the Commissioner if satisfied as such shall take no further action.”*

The section above is very clear on what is to be done for the land to be declared an abandoned land. There is nothing in this petition exhibiting compliancy of the stipulated procedure above or denial of that right by the mandated authority before moving this court under the Basic Rights and Duties Enforcement Act. I agree with the learned State attorneys

arguments that this court is under section 8(2) of BRADEA expressly restricted from entertaining petitions under the Basic Rights and Duties Enforcement Act before all available redress are exhausted. The section reads:

*"8(2) The High Court **shall not exercise its powers** under this section **if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law**, or that the application is merely frivolous or vexatious"* (emphasis added)

This position was underscored by this court in **Tanzania Cigarette Co Limited V FCC**, High Court Misc. Case No. 31 of 2010(unreported) quoting with approval a decision of **Jaroo vs. Attorney General of Trinidad & Tobago**, [2002]] UKPC 5, where it was observed :

"...we can deduce as a principle of law that the right to apply to the High Court under Basic Rights and Duties Enforcement Act should not be granted in Tanzania where the law has already prescribed a statutory remedy".

Expounding the position further this court in the above case held:

"Apart from the principle of constitutionality of Acts of Parliament, we think, law in Tanzania is also the settled on the principle that litigants should first exhaust other lawfully available remedies under statutory or case law, before they can seek remedies under the Basic Rights and Duties Enforcement Act. This principle of resorting to lawfully available remedies before seeking basic rights remedies complements the principle of constitutionality of Acts of

*Parliament. The duty to exhaust other lawfully available remedies before resorting to basic rights and duties remedies is borne out from our reading of sections 4 and 8 (2) of Basic Rights and Duties Enforcement Act. Section 4 of the Basic Rights and Duties Enforcement Act in essence restates the position of law that is also articulated under subsection (2) of section 8. **We think that these provisions exhort litigants to first exhaust other lawfully available remedies before seeking remedies under the Basic Rights and Duties Enforcement Act.***

....

*In our interpretation, subsection (2) of section 8 suggests that recourse to provisions of the Basic Rights and Duties Enforcement Act is not to be resorted to where there are other adequate means of redress available to a potential petitioner. Subsection (2) of section 8 of the Basic Rights and Duties Enforcement Act provides that **the jurisdiction of High Court is not to be exercised if the High Court is satisfied that adequate means of redress are or have been available to the person concerned under any other law**, or that the application is merely frivolous or vexatious. In fact, this interpretation of section 8 of the Basic Rights and Duties Enforcement Act gives effect to the presumption of constitutionality of statutory provisions. This means that **the reliefs and remedies available under the Fair Competition Act, 2003 are as constitutional as reliefs and remedies that are available under the Basic Rights and Duties Enforcement Act**" (Emphasis added)*

I subscribe to the above position. The Petitioner had other adequate statutory means to redress their claims other than through the remedies available under the Basic Rights and Duties

Enforcement Act. The 4th objection is as well sustained. The petition is marked incompetent. The findings in the two objections suffices to dispose of the petition. I thus proceed to strike out the incompetent petition with costs. Order accordingly.

DATED at DAR ES SALAAM, this 15th day of DECEMBER 2023



E. Y Mkwizu

Judge

15/12/2023

