IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[MAIN REGISTRY]

AT DAR ES SALAAM

MISCELLANEOUS CIVIL CAUSE NO. 1222 OF 2024

KUMBUSHO DAWSON KAGINE.....PETITIONER

VERSUS

THE REGISTERED TRUSTEES OF

CHAMA CHA MAPINDUZ1.....FIRST RESPONDENT

THE REGISTRAR OF POLITICAL PARTIES .....SECOND RESPONDENT

ATTORNEY GENERAL.....THIRD RESPONDENT

JUDGEMENT

19TH SEPTEMBER 3RD OCTOBER 2024

RUMISHA, J.:

The Petitioner, a child rights and human rights advocate, instituted this constitutional petition challenging the actions of the 1st Respondent, specifically the involvement of children in political activities, which is alleged to be in violation of the Constitution, laws, and international conventions to which Tanzania is a party. Furthermore, the Petitioner contests the actions of the 2nd and 3rd Respondents for failing to exercise their oversight duties, thereby allowing the violations by the 1st Respondent to go unquestioned in contravention of their mandate to regulate political parties and political activities in this country. Consequently, the Petitioner seeks this Court to issue the following declarations and orders:

1. **DECLARATION that it is unlawful to involve children aged below 18 years in active political activities and party activities.**

2. **DECLARATION that the first Respondent contravened Section 6C[1][b] of the Political Parties Act by involving children aged below 18 years in active political activities and party activities.**

3. **DECLARATION that the first Respondent contravened Section 10A[a] of the Political Parties Act by involving children aged below 18 years in active political activities and party activities.**

4. **DECLARATION that the first Respondent contravened Article 7 of its approved constitution by involving children aged below 18 years in active political activities and party activities.**

5. **DECLARATION that the first Respondent contravened article 7 of its approved constitution by involving children aged below 18 years in active political activities and party activities.**

6. **DECLARATION that the involvement of children aged below 18 years in active political activities and party activities of the first Respondent is not in the best interest of the child.**

7. **ORDERS directing the second Respondent to supervise and monitor the non-involvement of children aged below 18 years in active political activities and party activities of the first Respondent.**

8. **ORDERS directing the Second Defendant to take administrative actions against the first Respondent for the**

unlawful use of children in political activities of the first Respondent.

9. **ORDERS that each party should bear its costs having regard to the fact that the case is filed as a public interest litigation to further promote human rights and respect for rule of law.**

10. **Any orders and reliefs the court may deem fit and proper to grant in the circumstances of the case.**

The Respondents vehemently contest the petition. In their respective replies and counter affidavits, they deny any alleged violations on their part. The 1st Respondent, for instance, argues that pursuant to Article 7 of the African Charter on the Rights and Welfare of the Child and Section 11 of the Law of the Child Act [CAP. 13 R.E. 2019], a child has the right to express his opinions and to be heard. Consequently, the Respondents urge this Court to dismiss the petition with costs.

The Petitioner was represented by Mr. Seka, Advocate, assisted by Mr Pongolela, Advocate. The 1st Respondent was represented by Mr Donatus, Advocate, while Mr Nyakiha, State Attorney, appeared on behalf of the 2nd and 3rd Respondents. Upon the request of Mr Seka, a cross-examination was conducted on the deponents of the affidavit and counter-affidavits. Additionally, I invited Counsel to address the Court on three issues, namely:

1. **The genesis, background, and cause of action in this case.**
2. **The specific violation complained of concerning the jurisdiction of this court.**

3. The orders sought *viz-a-vis* the jurisdiction of the High Court to grant such orders.

All parties also filed their respective submissions. At the outset, I must commend the learned advocates for their insightful and well-reasoned submissions. They were of great assistance to me in determining this matter.

In line with the submissions of learned counsel, I will address this matter by first considering the issues they were invited to address and then determining the merits of the petition as the opportunity arises. First, it is appropriate to provide a brief synopsis of the learned counsel's submissions regarding the three key issues.

Mr Seka, learned advocate for the Petitioner, submitted that the genesis of the petition is well-documented in paragraphs 2 to 5 of the Petitioner's affidavit. He submitted that the Petitioner, a self-proclaimed child rights activist, was disturbed by the widespread attention on social media surrounding the national-level election of the 1st Respondent's 'Chipukizi' and the participation of children in vying for leadership positions within the 1st Respondent's youth wing, UVCCM. Mr Seka further submitted that the Petitioner, concerned by what he viewed as the unlawful involvement of children in political leadership, which, under the law, is restricted to individuals aged 21 and above, gathered evidence, mostly from social media, with meticulous care and concluded that this situation was inappropriate, ultimately leading him to bring the matter before this Court.

As to the cause of action, Mr Seka submitted that the Petitioner believed the cause of action was to highlight the clear involvement of children, as shown in the social media links mentioned in paragraphs 3, 4, 5, and 12

of his affidavit, along with the exhibits attached in paragraphs 2, 7, 8, and 9, arguing that this involvement was against the laws of the country.

Relying on Article 3(2) of the Constitution, which outlines how political party activities are to be conducted, Mr Seka submitted that the activities of the 1st Respondent were inconsistent with the laws governing political parties as Article 3(2) of the Constitution requires compliance with the Constitution and laws in political activities.

On the alleged violation of the law and the jurisdictional competence of this Court, he submitted that the main violation complained of was the failure of the 1st Respondent and its condonation by the 2nd Respondent to comply with sections 6C(1)(b) and 10A(a) of the Political Parties Act. The Petitioner argued that Article 3(2) of the Constitution required these provisions to be followed when conducting political activities. He further explained that Article 108(2) of the Constitution was the only available provision that allowed a person who noticed non-compliance to bring the matter to court.

He added that cases involving non-compliance with the Constitution and the laws of the country falling outside Part III of the Constitution could be brought to court under Article 108(2). This Article gives the High Court the authority to hear any case not expressly assigned to another court and the power to exercise jurisdiction traditionally held by the High Court. Based on this provision, Mr Seka concluded that the Court has jurisdiction because no other law addressed compliance with Article 3(2) of the Constitution, and the High Court traditionally has the authority to interpret laws and give meaning to the Legislature's intentions.

On the remedies sought and the Court's jurisdiction to grant them, he submitted that there was no law preventing this Court from issuing declaratory and consequential orders regarding the interpretation of laws. Under Article 107A of the Constitution, the Judiciary holds the authority to declare rights, and the High Court traditionally exercises this power. Therefore, the reliefs sought by the Petitioner, as outlined in the petition, fell squarely within the High Court's mandate under Article 108(2) of the Constitution.

In reply, Mr Donatus Advocate submitted that children under eighteen had formed an association called *Chipukizi*, which has existed since the 1970s. He submitted that these children have participated in national events to showcase their patriotism, particularly during ceremonies like the Independence Days of Tanganyika and Zanzibar and Union Day. This participation aligns with Article 29(c) and (d) of the Convention on the Rights of the Child, which encourages states to educate children about their cultural identity and values.

He raised three issues: whether the children are members of the 1st Respondent's political party, whether forming an association is unlawful, and whether their election of leaders violates the Political Parties Act.

In response, he stated that the children are not members of the 1st Respondent's party, as membership is not determined by wearing party attire but by records kept by the Registrar of Political Parties. He confirmed that the law, including the Tanzanian Constitution and international treaties, allows children to form associations.

He prayed for the petition's dismissal, arguing that the Petitioner misunderstood the facts.

On the genesis of the matter, Mr Nyakiha, learned State Attorney submitted that the petition stems from claims that, in December 2023, children under 18 were involved in elections within the 1st Respondent's youth wing, *Umoja wa Vijana wa CCM* (UVCCM), which the Petitioner argues violates both Tanzanian and International laws regarding the participation of children in political activities.

He submitted that the Petitioner's complaint focuses on actions allegedly violating statutory provisions but not the Constitution itself. He noted that the Court of Appeal in **Attorney General Vs Dickson Paulo Sanga** (Civil Appeal 175 of 2020) [2020] TZCA 371 (5 August 2020) and **Freeman Aikael Mbowe Vs the Director of Public Prosecution & Others** (Civil Appeal No. 382 of 2021) [2024] TZCA 836 (30 August 2024), emphasised that statutory provisions must be evaluated based on what they state, not potential abuses in their implementation.

Citing the case of **Elizabeth Stephen and Another Vs the Attorney General**, Misc. Civil Cause No. 82 of 2005 (Unreported), he was of the opinion that the petition does not warrant constitutional review as the Petitioner is not arguing that the law itself is unconstitutional but rather that certain actions by the 1st Respondent violate the law.

In conclusion, Mr Nyakiha asserts that the Petitioner's claims are outside the jurisdiction of the constitutional court, as the issues at hand involve the legality of actions under the Political Parties Act rather than constitutional matters.

As can be seen, the submission on the background and genesis of this matter focuses on the case itself rather than the broader context in which it was brought. Perhaps I should clarify that the present state of constitutionalism and public litigation has its genesis and background. Constitutional litigation in Tanzania has evolved *in tandem* with the country's socio-political developments, particularly in human rights and governance. The journey of constitutionalism can be traced back to the post-colonial era, as Tanzania transitioned from a one-party state to a multiparty democracy, ultimately embracing constitutional guarantees of individual rights and freedoms.

After gaining independence in 1961, Tanzania adopted a republican constitution, but this early constitutional framework lacked robust mechanisms for protecting fundamental rights. The country pursued a socialist ideology, which limited political and civil freedoms. The 1965 Interim Constitution further entrenched a one-party system, significantly curtailing political liberties and restricting the scope for constitutional litigation. Consequently, constitutional law had little development during this post-independence period, as political and civil rights were highly restricted.

The landscape changed dramatically with the adoption of the 1977 Constitution of the United Republic of Tanzania, which initially did not contain a comprehensive Bill of Rights. However, the Fifth Constitutional Amendment of 1984 introduced a Bill of Rights, marking a critical turning point. This amendment empowered citizens to challenge violations of their rights, paving the way for constitutional adjudication and the protection of human rights.

Following the introduction of the Bill of Rights, the Court began playing an increasingly important role in safeguarding fundamental rights. Notable constitutional cases started to emerge, contributing to the country's jurisprudence development. One significant case was **Chumchua Marwa Vs Officer in Charge of Musoma Prison and Attorney General** [1988] TLR 117, which dealt with the constitutionality of state powers to detain individuals without trial under the Preventive Detention Act. This case underscored the tension between individual rights and state security, with the Court upholding the state's authority under specific conditions.

The early 1990s saw further landmark cases that shaped Tanzania's constitutional law. The Preventive Detention Act was again challenged in **Kukutia Ole Pumbun and Another Vs Attorney General** [1993] TLR 159. This case highlighted the judiciary's role in scrutinising laws that allowed executive overreach. Similarly, in **Daudi Pete Vs Attorney General** [1993] TLR 22, the Petitioner challenged the Basic Rights and Duties Enforcement Act, which imposed stringent conditions on citizens seeking to enforce their constitutional rights. This case reaffirmed Tanzanians' right to seek judicial redress for constitutional violations, clarifying procedural requirements for constitutional petitions.

Another significant case in the evolution of constitutional litigation was **Rev. Christopher Mtikila Vs Attorney General** [1995] TLR 31, in which the Court upheld the principle that the Constitution guarantees fundamental freedoms that legislative acts cannot easily restrict. The decision was critical in promoting political pluralism and expanding rights in Tanzania.

Civil society also played a significant role in expanding constitutional litigation, as seen in **Legal and Human Rights Centre and Another Vs the Attorney General** [1998] TLR 239. This case challenged disproportionate restrictions on organisations' ability to participate in political discourse, ultimately strengthening civil society's role in advocating for human rights and political reforms in Tanzania.

In **Ndyanabo Vs Attorney General** [2001] TLR 495, the Court addressed the constitutional right to access justice, examining how statutory requirements can be balanced against this right. This case contributed to the growing body of jurisprudence on constitutional matters, particularly in protecting citizens' rights to approach the courts for relief.

Throughout the development of constitutional jurisprudence, various principles of statutory interpretation have emerged. While I will not delve into the details, it is important to emphasise that when interpreting a constitution, particularly in matters related to human rights and freedoms, a more liberal approach must be adopted; one that is free from unnecessary technicalities. This approach is the accepted position in Tanzania and likely in other Commonwealth countries as well. I find Lord Diplock's observation in **Attorney General of the Gambia Vs Modon Jobe** (1984) A.C. 689 at 700 (Privy Council) particularly relevant, where he stated:

> **"A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be**

entitled, is to be given a generous and purposive construction."

However, this principle should be applied with the understanding that, in constitutional law cases, courts serve as guardians of the Constitution. They are often called upon to interpret complex provisions and ensure that laws and other actions do not infringe upon fundamental rights. Constitutional law cases primarily focus on the interpretation and application of constitutional provisions. Courts, in such cases, act as arbiters of constitutional compliance, determining whether legislative or executive actions conform to the supreme law of the land.

In exercising these powers, courts must remain vigilant not to overstep their boundaries by becoming unchecked authority that indiscriminately strikes down every provision or issues declarations and orders now and then. The power of constitutional adjudication should be exercised sparingly and reserved for appropriate and fitting situations. This cautionary approach was articulated by the Court of Appeal in **Attorney General Vs W. K. Butambala** [1993] T.L.R. 46, where it was stated at page 51:

"We need hardly say that our Constitution is a serious and solemn document. We think that invoking it and knocking down laws or portions of them should be reserved for appropriate and really momentous occasions. Things which can easily be taken up by administration initiative are best pursued in that manner."

Equally important, in **Elizabeth Stephen and Another Vs Attorney General** [2006] TLR 404, the Court expressed the view that the Constitution should not be invoked when other forms of redress are available. On page 416, the Court held:

> **"If the Court is satisfied that other avenues for redress are or have been available those avenues had better be exhausted first before one comes to Court. We are satisfied that this is good for two main reasons. First, to preserve the sacrosanct nature of the Constitution and to bring to Court only matters of great importance and leave the rest to be dealt with by other authorities."**

Now, having set the context, it is appropriate to turn to the crux of the matter and assess the complaint and the reliefs sought, particularly in relation to the powers of this Court sitting as a Constitutional Court. In doing so, it is essential to keep in mind the background I have outlined. Perhaps the best starting point is to revisit the issues that the Petitioner is inviting this Court to determine.

In the originating summons, the Petitioner invites this Court to determine the following:

1. Whether it is permissible to involve children below the age of 18 years in political activities of the first Respondent;
2. Whether the involvement of children in first Respondents political activities is in violation of Section 6C[1][b] of the Political Parties Act.

3. Whether the election of children below the age of 18 years into leadership positions within the first Respondents party is in violation of Section 10A[a] of the Political Parties Act.
4. Whether the involvement of children in first Respondents political activities is in violation of article 7 of first Respondent's approved constitution;
5. Whether the first Respondents' involvement of children below the age of 18 years in its political activities is in violation of the best interests of the children under section 4[2] of the Law of the Child Act;
6. Whether the first Respondents' involvement of children below the age of 18 years in its political activities is in violation of best interests of the children under international law; and,
7. Whether under section 19 of the Political Parties Act, the second Respondent is empowered to

In my opinion, a thorough assessment of the above issues leads me to conclude that the primary complaint revolves around the involvement of children in political activities allegedly orchestrated by the 1st Respondent. This raises pertinent questions about the intersection of statutory law, particularly the Political Parties Act, with the Constitution. Is invoking constitutional provisions the only or most appropriate remedy in this case? And if those provisions are not invoked, does that signify a failure of justice, or, to put it plain, will the heavens fall? Let us see.

The Petitioner contends that the 1st Respondent's actions violate the provisions of Section 6C[1][b] and 10A[a] of the Political Parties Act, which outlines the age-related restrictions on membership and leadership

in political parties. This alleged violation, if proven, could trigger serious legal consequences under the Political Parties Act. Section 19 of the Political Parties Act is the more appropriate provisions in this matter. This Section gives the Registrar of Political Parties wide ranging powers, including the ability to suspend or deregister a political party in breach of the law.

A critical issue in this case is whether invoking the Constitution is the only available remedy. The Political Parties Act serves as a comprehensive legislative framework governing the conduct and regulation of political parties. This Act, notably, provides mechanisms for self-regulation and enforcement through the office of the Registrar of Political Parties. Given that the Political Parties Act provides clear procedures and sanctions for non-compliance, it raises the question: Is it necessary to invoke the Constitution in this case? I have explained that if other remedies exist, they should be exhausted before constitutional provisions are invoked. The Constitution is a supreme law, so its invocation should be reserved for instances where there are no adequate remedies under ordinary law. In the present case, Section 19 of the Political Parties Act provides remedies, including suspension or deregistration of a political party. This provision underscores the Act's self-regulatory nature, designed to address internal violations without immediately escalating to constitutional litigation.

The Petitioner asserts that the 1st Respondent violated the provisions of the Political Parties Act, specifically about age restrictions. In fact, paragraph 11 of the supporting affidavit acknowledges the Registrar's authority to act when a political party contravenes the law. The Petitioner

further expresses frustration over the "silence, refusal, and/or omission" of the 2nd Respondent to take action against the 1st Respondent. However, I could not find any evidence in the petition suggesting that the Petitioner attempted to move the Registrar of Political Parties to take action before seeking constitutional relief. Without substantive evidence that the Petitioner actively engaged the Registrar and that the Registrar failed or refused to act, it is difficult to justify the leap to constitutional litigation.

Undoubtedly, it is a noble and commendable duty of every citizen to act when they believe the Constitution is being violated. The Petitioner's sense of civic duty in bringing this case before the court is worth mentioning. However, I have already indicated that invoking the Constitution should not be the default remedy for every alleged violation of the law. As the supreme law, the Constitution is a safeguard for fundamental rights and freedoms, and its invocation should be reserved for circumstances where no other legal remedy is available or where statutory remedies have failed.

This leads us to the question of whether the court could grant the declarations and orders sought. The Petitioner's Counsel has rightly submitted that, under Article 108(2) of the Constitution, this court has jurisdiction to hear the matter. I cannot agree more with this observation. However, a departure between the Petitioner's Counsel and I is in the approach. As I have explained, the constitutional jurisdiction of this court should be exercised sparingly. In this case, the Political Parties Act provides a clear regulatory framework for addressing the alleged violations. The Registrar is empowered to take corrective measures, and the Petitioner has not demonstrated that these statutory mechanisms

have been exhausted or are inadequate. Given this, invoking this Court's constitutional jurisdiction is inappropriate.

In conclusion, the petition stands dismissed. Since this is a public interest litigation matter, I make no order as to costs.

DATED at **DAR ES SALAAM** this 3rd day of October 2024

A. K. RUMISHA

JUDGE