

**IN THE HIGH COURT OF TANZANIA
(MAIN REGISTRY)**

AT DAR ES SALAAM

MISCELLANEOUS CIVIL CAUSE NO: 14 OF 2023

**IN THE MATTER OF THE CONSTITUTION OF THE UNITED
REPUBLIC OF
TANZANIA 1977 - AS AMENDED FROM TIME TO TIME**

AND

**IN THE MATTER OF BASIC RIGHTS AND DUTIES ENFORCEMENT
ACT**

[CAP. 3 R.E. 2019]

AND

**IN THE MATTER OF AN APPLICATION FOR STRUCTURAL
INTERDICTION TO
ENFORCE THE FUNDAMENTAL RIGHT**

FOLLOWING THE DECISION OF THE

HIGH COURT OF TANZANIA

IN MISCELLANEOUS CIVIL APPEAL NO 65 OF 2016

ARISING OUT OF MISCELLANEOUS CIVIL CAUSE NO 29 OF 2015

BE TWEEN

JEREMIAH MTOBESYA..... APPLICANT

Versus

**THE ATTORNEY GENERAL OF THE UNITED REPUBLIC OF
TANZANIA1st RESPONDENT**

**THE CHIEF PARLIAMENTARY
DRAFTSMAN.....2NDRESPONDENT**

RULING

Date of Last Oder: 14/3/2024

Date of Ruling: 24/04/2024

MARUMA, J.:

In Miscellaneous Civil Cause No. 20 of 2015 in the High Court of Tanzania between the Applicant and the Respondent herein, the judgment delivered on 22nd February 2015 was in favour of the petitioner and declared section 145(4) of the Criminal Procedure Act Cap. 20 R.E. 2002 is unconstitutional for contravening Article 13(6) of the Constitution of the United Republic of Tanzania 1977 as amended. The Respondent unsuccessful appealed to the Court of Appeal of Tanzania in Civil Appeal No 65 of 206 which affirmed the decision of the High Court to the effect that the impugned section 148(4) of the CPA is indeed unconstitutional as well as null and void on account of its derogation from the provisions of Article 13 (d)(a) of the Constitution and ended dismissing the appeal.

Since the judgment of the Court of Appeal and the High Court, the Respondent has made several amendments to the Criminal Procedure Code Cap 20 however, she has not brought to amendment of the impugned provision of law in Parliament which renders the provision as it is reading from the structure of the Criminal Procedure Act. Hence this petition brought on Articles 13(1) (2) and 30 (3) of the Constitution and sections 4 and 5 of the Basic Rights and Duties Enforcement Act Cap. 3 R.E. 2009 and Rule 4 of the Basic Rights and Duties Enforcement (Practice Procedure) Rule 2014 to enforce the decision of the High Court of Tanzania in Civil Appeal No. 65 of 2016 arising from Civil Cause No. 29 of 2015 seeking the following orders:

- a) Within one month of the date of the ordered of the Court, the Respondent herein be directed to file an action Plan and Report under Oath,
- b) The said action plan shall:
 - i. Be detailed and comprehensive.
 - ii. Address the noncompliance issues addressed by the

applicant in this application.

- iii. Explain the steps that the respondent will take to comply with the Judgment of the Court of Appeal dated 20th February, 2018 affirming the Judgment of the High Court dated 22nd February, 2015.
- iv. Set measurable and periodic deadline for progress.
- v. That the applicant or any interested party be entitled to comment on the action Plan.
- vi. Within two months of the date of the order the respondent be directed to file a report to this Court showing progress on the further discharge of the remedy referred to in this application, and be ordered to appear in Court to illustrate the said progress until the completion of the complying with the Judgement of the Court of Appeal dated 20th February, 2018.
- vii. Costs of the application.
- viii. Any further relief (s) the Honorable Court may deem fit to grant.
Responding to the petition filed, the respondent also filed preliminary objection on three points of law to the effect that;

1. The Petition is incompetent and barred in law for being brought in the wrong forum.
2. The Petition is untenable and bad in law as the Court is *functus Official*.
3. The Application is incompetent for want of an affidavit stating the extent to which the contravention of the Provisions of Articles 12 to 29 of the Constitution has affected the Petitioner personally pursuant to section 4(2) of the **Basic Rights and Duties Enforcement Act CAP. 3 R.E. 2019 as Amended by Written Laws (Miscellaneous Amendment) Act No. 3 of 2020.**

The hearing of these preliminary points of objection in accordance with the court order proceeded by way of written submissions made by the

respondent represented by Ms. Pauline Mdendemi State Attorney and the Petitioner who had the service of the Counsel Mr. Melchizedeck Joachim.

Both counsel submitted at length their submissions in support of or in opposition to each one of these three points of objection. Submitting in support of objections, Ms. Mdendemi in her submission in chief and reply to the petitioner's submission adamantly argued that the application is incompetent and should be dismissed. To support her submission she referred to this court a number of court decisions to support her position such as **Philip Samson Chigulu vs The Judge of the High Court of Tanzania and 7 Others, Misc. Civil Cause No.23 of 2021, Freeman Aikael Mbowe vs The Director of Public Prosecutions and 2 Others, Misc. Civil Cause No. 21 of 2021 and S. Group Security Co. Ltd vs Attorney General and Dar es Salaam City Council, Miscellaneous Civil Cause No. 30 of 2021.**

On the other side Mr. Joachim was equally resourceful in urging to each of the points raised making reference to the weakness of laws in which the application is brought He strongly insisted why he in court in respect to this petition and distinguish the cases cited by the respondent in support of the points objection raised.

I wish to begin with the first point of objection as listed above to the effect that this is not a proper forum for the petitioner to enforce the decision of the Court of Appeal of Tanzania in Civil Appeal No. 65 of 2016 arising out of Miscellaneous Civil Cause No. 29 of 2015. The argument by Ms. Mdendemi is to the effect that the order emanating from the proceedings under the BRADEA can be excuted like any other decree emanating from ordinary civil proceedings. She pointed out that the law applicable is the Government Proceedings Act, Cap. 5. R.E. 2019 (GPA) under Section 16 of the Act since the decree is against the Government and as Order XXI rule 2A preclude the application of the Code.To support her arqument she made reference to the case of **Hon. Attorney General Vs Reverend Christopher Mtikila, Civil Appeal No. 20 of 2007.** She also pointed out that the Petitioner knowing that he was supposed to resort to execute the decree of the Court under the provision of the Code as he stated

in paragraphs 15 and 16 of his affidavit as to why he was resorted to come to this court contrary to what is required by the law to exhaust all available remedies.

Addressing to this point, Mr. Joachim for the petitioner argued that the gist of this application is for structural interdict to enforce the fundamental right following the decision of the High Court of Tanzania in Civil Appeal No. 65 of 2016 arising out of Miscellaneous Civil Cause No 29 of 2015. He argued that, the point that execution is provided by law and relevant provision dealing with powers of the Court to enforce execution under Section 42 of the Civil Procedure Code. However, the Court can only orders five types of execution of decree and structural interdict does not fall under any of the five modes of execution provided by law. He also submitted that, the Basic Right and Duties Enforcement Act Cap. 3 R.E. 2019 (BRADEA) does not provide for a manner in which a decree or order under the said law can be executed. He concluded that since both the Civil Procedure Code Cap. 33 R.E. 2019 and BRADEA are silent on the mode in which an application for execution for a constitutional decree can be brought, therefore it cannot be said that this application is in a wrong forum. He also submitted that the proceedings which the applicants seek to enforce are not ordinary civil matter but constitutional matters which have already been determined and the right has already given to the applicant. He distinguished the cases of **Freeman Ahmed Mbowe** (supra), as this court is a proper forum to order for the execution of decree in Constitutional matters.

Appreciating the submissions made by the counsel from both sides on the first point, there is no dispute that the petition is to enforce the decision made by this court in Civil Cause No. 29 of 2015 and upheld by the Court of Appeal in Civil Appeal No. 65 of 2016. The issue of whether the cited provisions of the law do or do not support the execution of the said decisions should not take much time for this court. This is due to the fact that no decision shall be defeated either by a reason that the law is silent on the modality to execute or otherwise, as it was held in the case of **Abdullatif Mohamed Hamis vs. Mehboob Yusuf Osman & Another**,

Civil Revision No. 6 of 2017 at page 14 that, it would be idle for a court to enter a judgment that would not be of practical utility to the one who is in favour of such decision.

In that note, although not at this juncture of this petition for the reasons to be elaborated in subsequent points, it is within the discretion of the court with the appropriate jurisdiction to determine which law to apply in support of the requested prayers or otherwise.

Coming to the second point of objection that the petition is untenable and bad in law as the Court is "*functus officio*". Going by the petitioner submission, it is clearly pointed out loudly that this petition is to enforce the decision of the Court of Appeal in Civil Appeal. No. 65 of 2016 arising from Miscellaneous Civil Cause No. 29 of 2015.

The argument by the respondent is that the ruling issued by the Court on 22nd December, 2015 in Miscellaneous Civil Cause No. 29 of 2015 was followed by the drawn order which clearly expressed the rights of the parties on each issue and conclusively determined those rights hence it cannot go back and reopen the matter and give orders as prayed by the Petitioner. To support her argument she made reference to the case of **Attorney General vs Jeremiah Mtobesya, Civil Appeal No. 65 of 2016.**

Having made a perusal of said ruling dated 22nd December 2015, the court ruled out that, I quote;

"... The provisions of section 148 (4) of the Criminal Procedure Act, Cap. 20 R.E. 2002 hereby declared unconstitutional for offending the provisions of Article 13(6) (a) of the Constitution of the United Republic of Tanzania of 1977 as amended .."

The decision which was upheld by the Court of Appeal in Civil Appeal No. 65 of 2016 at page 70 which held that;

"...uphold the decision of the High Court to the effect that impugned section 148(4) of CPA is, indeed, unconstitutional as well as null and void on account of its derogation from the provision of Article 13 (6) (a) of the Constitution."

Considered the construction of the two parts of the above decisions despite the absence of details from the court orders. I relied on the definition of the term "*functus officio*" provided by the petitioner on the Major Law Lexicon at page 2822 that "Latin phrase meaning no longer having power or jurisdiction because the power has been exercised." This interpretation was also supported by Mr. Joachim for the petitioner in his argument that this petition seeks a structural interdict from the court to enforce the Decree of the Court as outlined in the originating summons. This indicates his awareness of the court decree regarding the decision contested by the respondent.

Based on those facts, I agree with the respondent's argument that entertaining this petition would reopen a matter already conclusively decided by this Court. This conclusion is drawn from the prayers requested in the petition as outlined below:

".....seeking the following orders:

- c) *Within one month of the date of the ordered of the Court, the Respondent herein be directed to file an action Plan and Report under Oath,*
The said action plan shall:
 - i. *Be detailed and comprehensive.*
 - ii. *Address the noncompliance issues addressed by the applicant in this application.*
 - iii. *Explain the steps that the respondent will take to comply with.*
 - iv. *the Judgment of the Court of Appeal dated 20th February, 2018 affirming the Judgment of the High Court dated 22nd February, 2015.*
 - v. *Set measurable and periodic deadline for progress.*
 - vi. *That the applicant or any interested party be entitled to comment on the action Plan.*
 - vii. *Within two months of the date of the order the respondent be directed to file a report to this Court showing progress on the further discharge of the remedy referred to in this application,*

and be ordered to appear in Court to illustrate the said progress until the completion of the complying with the Judgement of the Court of Appeal dated 20th February, 2018.

viii. *Costs of the application.*

ix. *Any further relief (s) the Honorable Court may deem fit to grant..."*

Reading between the lines, it is evident that the prayers requested do not accurately reflect the two decisions, yet they introduce new conditions on how the two decisions can be implemented. This goes against not only the law but also the standards upheld by professionals, as determined by the Court of Appeal in **Mohamed Enterprises (T) Limited vs Masoud Mohamed Nasser**, Civil Application No. 33 of 2012 at page 15 of the ruling that,

"...Once judgment and decree are issued by a given court, judges (or magistrates) of that court become "functus officio" in so far as that matter is concerned .."

Thus, based on the aforementioned point, I firmly believe that once this Court had issued a judgment as interpreted earlier, it was precluded from reconsidering the requests made in this petition seeking to implement the same decision. The situation might have been different if the purpose of this petition was not to enforce the two decisions, as explicitly indicated by the petitioner in the facts presented in the originating summons, supported by his affidavit, and in his submission that;

"...This petition seeks to enforce the decision of the High Court of Tanzania in Civil Appeal No. 65 of 2016 arising from Civil Cause No.29 of 2015... "

On that note, in my opinion, for this court to consider this petition amounts to abusing the court process, which cannot be allowed to simply fulfill the petitioner's desires.

In light of the above conclusion, I see no need to address the final objection regarding the petitioner's competence. Nevertheless, I would like to briefly touch on a few points regarding this matter to prevent the recurrence of the same issue in the future. The argument that petitioner's

application lacks an affidavit as to the extent to which the contravention of the provisions of the Articles 12 to 29 of the Constitution has affected the Petitioner personally pursuant to Section 4 (2) of the **Basic Rights and Duties Enforcement Act, Cap. 3 R.E. 2019 As Amended by the Written Laws (Miscellaneous Amendment) Act No. 3 of 2020**. Taking into consideration the petitioner's response, I believe the respondent has misunderstood the objection raised.

It is indeed true that the law mandates a person filing a petition under the BRADEA to have a locus standi, as defined and explained in the case of **Chama cha Wafanyakazi Mahotel na Mikahawa Zanzibar (Horau) V. Kaimu Mrajis wa Vyama vya Wafanyakazi na Waajiri Zanzibar, Civil Appeal No. 300 of 2019**. However, this is not the point in this the purported petition as to the fact that the petitioner was the one involved in the High Court as well as at the Court of Appeal. The two decisions which impugned provision of section 148 (4) of the CPA for being unconstitutional as well as null and void on account of its derogation from the provisions of Article 13 (d) (a) of the constitution. Therefore, the point that the petitioner has no locus stand in that matter cannot apply as the petitioner has interest as demonstrated in the two courts' decisions.

In light of the aforementioned considerations, I uphold the second preliminary objection which is sufficient to dispose of the petition before this court as I accordingly strike it out. Each party shall bear its own costs. It is so ordered.

DATED at **DAR ES SALAAM**, this 24th day of April, 2024.



Z.A. Maruma
Judge
24/04/2024