

**IN THE HIGH COURT OF TANZANIA
(MAIN REGISTRY)
AT DAR ES SALAAM.**

MISCELLANEOUS CIVIL CAUSE 22 OF 2017

IN THE MATTER OF THE CONSTITUTION OF THE UNITED REPUBLIC OF
TANZANIA 1977[AS AMMENDED FROM TIME TO TIME]

AND

AND IN TH MATTER OF THE BASIC RIGHTS AND DUTIES ENFORCEMENT
ACT, [CAP 3 R.E 2002] AND THE BASIC RIGHTS AND DUTIES
ENFORCEMENT(PRACTICE AND PROCEDURE] RULES, 2014.

AND

IN THE MATTER OF CONSTITUTIONAL PETITION TO ENFORCE THE
CONSTITUIONAL FUNDAMENTAL RIGHT AND FREEDOMS UNDER THE BASIC
RIGHTS AND DUTIES ENFORMCEMENT ACT, [CAP 3 R.E. 2002]

AND

IN THE MATTER OF PETITION TO CHALLENGE AS UNCONSTITUIONAL THE
CONSTITUTION OF THE EVANGELISTICE ASSEMBLIES OF GOD TANZANIA
(EAGT) OF **2017**

BETWEEN

REV. DR. JOHN MAHENE	1 ST PETITIONER
REV. ALEXANDER ISAI MGUNDA	2 ND PETITIONER
REV. PAUL BUSUGA MALUKI	3 RD PETITIONER
REV. BOAZ KAZEBA	4 TH PETITIONER
REV. DR. DANIEL KULOLA	5 TH PETITIONER
REV. STEVEN KASHINDYE	6 TH PETITIONER
REV. LEONARD MASALU	7 TH PETITIONER
REV. GILBERT F. WEJA	8 TH PETITIONER

VERSUS

THE REGISTERED TRUSTEES OF THE EVANGELISYTIC ASSEMBLIES OF GOD TANZANIA (EAGT).....	1 ST RESPONDENT
THE REGISTRAR OF SOCIETIES	2 ND RESPONDENT
THE ATTORNEY GENERAL	3 RD RESPONDENT.

10/4/2018 & 29/5/2018

RULING

I.P.KITUSI,J.

By an originating summons made under Articles 26 (2) and 30(2)
of the Constitution of the United Republic of Tanzania, 1977 as amended

from time to time, Sections 4 and 5 of the Basic Rights and Duties Enforcement Act [Cap 3 R.E 2002] and Rule 4 of the Basis Rights and Duties Enforcement (Practice and Procedure) Rules 2014, the petitioners pray for two main declaratory orders. The petitioners are Rev. Dr. John Mahene, Rev. Alexander Isai Mgunda, Rev. Paul Busunga Maluki, Rev. Boazi Kazeba, Dr. Daniel Kulola, Rev. Steven Kashindye, Rev. Leonard Masalu and Rev. Gilbert F. Weja and I shall hence forth refer to them as the first, second, third, fourth, fifth, sixth , seventh and eighth petitioners. The first petitioner is the Deputy Arch Bishop of the Evangelistic Assemblies of God Tanzania referred to in its acronym as EAGT and a Pastor of that Church at Bugando, in Mwanza Region. The second to eighth Petitioners are also Pastors of the Church stationed in various places in Tanzania, namely Kigoma, Shinyanga, Mwanza and Dar es Salaam.

EAGT is a religious body whose Registered Trustees is the first respondent. The essence of the petition is the passing of the first respondent's new constitution in 2017 replacing the existing 2011 constitution. The petitioners seek to challenge the constitutionality of that constitution alleging that it, ~~it~~ violates Articles 13(3), 18(a)&(b) and 21(2) of the Constitution of the United Republic of Tanzania. It is also alleged that the new constitution violates Articles X1(B) (1) (d) & (e) and XVII(a) of EAGT 2011 constitution in that in writing the said new constitution the procedures stipulated in that constitution were not followed. It has allegedly within it a provision that denies pastors of EAGT free access to Courts of law or any government office or free

expression of views through any media without prior approval of EAGT's authorities.

The first Petitioner wrote the Registrar of Societies, the 2nd respondent, to raise the issue of the unconstitutionality of the EAGT new constitution and to require the said 2nd respondent not to register it. Despite this caveat, the 2nd respondent proceeded to register the new constitution thereby giving legitimacy to the unconstitutional provisions within it. The first petitioner raised with the 2nd respondent other irregularities in the constitution, but all these cries fell on deaf ears as the 2nd respondent did not act. This is the reason the court is asked to declare the EAGT new constitution, unconstitutional and for an order that the said constitution be struck off from the register of the Registrar of Societies, the 2nd respondent.

The third respondent is the Attorney General who is being sued in his capacity as the 2nd respondent's chief legal advisor. The 2nd and 3rd respondents raised five points of preliminary objection, which are;

" 1. The petition is misconceived and bad in law for contravening section 6 of the Basic Rights and Duties Enforcement Act (Cap3 R.E 2002).

2. The Petition is misconceived and bad in law for contravening section 8 (2) of the Basic Rights and Duties Enforcement Act(Cap 3. 3. R.E 2002]

3. The petition is misconceived and bad in law for being frivolous and vexatious.

4. The petition is misconceived and bad in law as the petitioner has no cause of action against the 2nd and 3^d Respondent.

5. The petition is misconceived and bad in law for containing untenable prayers under cap 3 R.E 2002.

At the hearing, which was by way of written submissions, the 2nd and 3rd respondents abandoned the first point and combined points 2 and 3 of the objection.

This ruling is in respect of the four points of preliminary objection.

The second and third respondents have submitted in relation to points 2 and 3 that the settled position of the law is that resort to a Constitutional Court under the Basic Rights and Duties Enforcement Act, Cap 3, should only be had when the petitioner has exhausted all other available remedies or means of redress. They have submitted in that regard that the petitioners' main complaint being the unprocedural way in which the EAGT new constitution was passed, could have pursued their complaint by way of a Judicial Review.

It is further submitted that the petitioners' other complaint is that the EAGT constitution has elements of forgery, which, they submitted could be prosecuted in a Criminal Court. The learned State Attorney cited

section 8(2) of the Basic Rights and Duties Enforcement Act Cap 3 and a number of decisions on the point of alternative remedies.

Section 8 (2) of the Basic Rights and Duties Enforcement Act, Cap. 3, hereafter the Act, provides,

"The High Court shall not exercise its powers under this section if it 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".

It is submitted that this statutory position of the law has been applied and confirmed in court in the cases of **Elizabeth Steven and Another V. Attorney General** [2006] TLR. 404 and; **Tanzania Cigarette Company Limited V. The Fair Competition Commission & Attorney General**, Miscellaneous Civil Cause No. 31 of 2010 High Court, main Registry, (unreported). In those decisions the court underlined the fact that by desisting from turning to the constitutional court on matters that could be resolved by the ordinary courts, the sacrosanct nature of the constitution will be preserved.

This principle has been extended to include a situation where a party has a right to be heard or a right of appeal. This is what was decided in the case of **Athuman Kungubaya and 482 others Vs. Presidential**

Parastatal Sector Reform Commission and Another, Civil Appeal No. 56 of 2007 CAT (unreported).

It is submitted that the provision of section 8 (2) of the Act and the trend of decided cases is in line with Article 26 (2), of the Constitution of the United Republic which requires people to take legal actions according to the procedures provided by law.

On their part the petitioners took the view that their complaints fall within Part III of the constitution of the United Republic and that Article 30(3) thereof opens the doors to anyone with a complaint under that part to access the Court under Section 3 of the Act. Mr. Sylvester Sebastian learned advocate for the petitioners submitted that the petitioners have no alternative means of redress and proceeded to distinguish the cases cited by the learned State Attorney from the present case. In the case of **Elizabeth Steven** (Supra) the parties had an alternative remedy and in the case of **Tanzania Cigarette** (Supra) the party who was aggrieved by the decision of the Fair competition Commission had a right to appeal.

The learned counsel faulted the learned State Attorney's suggestion that the petitioners could resort to judicial review. He submitted that judicial review does not apply in private law matters as the one at hand.

To begin with, I respectfully agree with the learned counsel for the petitioners that judicial review being a public law procedure would not be available to them in this case involving private law. I find the following

passage from the Uganda Civil Justice Bench Book, The Law Development Centre (LDC) 1ST Edition, 2016 at page 340, useful;

*"Judicial review is the process by which the High court exercises its supervisory jurisdiction over proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are engaged in the performance of **public acts and duties**. Those duties may affect the rights or liberties of the citizen. It is a matter within the ambit of administrative law."*

To qualify for judicial review the petitioners' complaint against the first respondent must establish that the said first respondent was performing quasi – judicial functions or that it was engaged in discharge of public functions. I do not see how this matter could be brought within the ambit of administrative law.

Now the question is whether the petitioners could challenge the new constitution of EAGT otherwise than by way of this petition. I note that the new constitution is being challenged for violating Articles of the EAGT old constitution. With respect, while I agree with the learned counsel for the petitioners that Articles 30(3) of the Constitution of the United Republic opens the doors to aggrieved persons to access the Constitutional Court I wish to draw the learned counsel's attention to sub Article 4 of Article 30 which provides that the State authority shall

enact law which shall provide for the procedures to do so, and in that respect the Act is that specific procedural law.

Is the complaint that the enactment of the new constitution of EAGT 2017 violated the old Constitution of EAGT 2011 a matter that falls under the Act?

Section 3 of the Act provides;

"This Act shall apply only for the purposes of enforcing the provisions of the Basic Rights and Duties set out in Part III of Chapter one of the Constitution."

Perhaps it is, but does that necessarily mean that it is to be determined by the Constitutional Court?.

At this juncture I shall take a look at the fourth point of preliminary objection which is to the effect that the petitioners have no cause of action against the second and third respondents. The learned State Attorney submitted that the 2nd and 3rd respondents had nothing to do with the new constitution of EAGT which forms the basis of the petition. The case of **Tyantkumar Chandrubhai Patel @ Jeetu Patel and 3 others V. Attorney General & 2 others**, Misc. Civil Case No. 30 of 2009 High Court (unreported) has been cited. In this case the court stated that the complaints against the second respondent Reginald Mengi were matters justifiable in the realm of private law in ordinary Civil Courts not a Constitutional Court. In response the petitioners insisted that there is no alternative remedy in this case

and sought to distinguish the case of **Jeetu Patel** (supra) from this one.

With respect I do not see how I can agree with the petitioners' proposition that every other time an individual violates another's constitutional right the jurisdiction of the Constitutional Court should be brought to use. If that were the case then there is no imagining which cases would not qualify to be constitutional. In my conclusion I agree with the learned State Attorney that the petition could be preferred in ways other than constitutional petition because it seeks to challenge the new constitution of EAGT 2017, for violating the procedure stipulated in the old constitution of EAGT 2011. Neither the Constitution of the United Republic of Tanzania nor 2nd and 3rd respondents had anything to do with that process.

For the reasons given I uphold the 2nd, 3rd and 4th points of Preliminary Objection and hereby strike out the petition. The petitioners have other means of redress and they have no cause of action against the 2nd and 3rd respondents. Order with costs.



I.P.KITUSI

JUDGE

29/5/2018