IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

(MAIGE, MAGOIGA AND KULITA, JJJ)

MISC CIVIL CAUSE NO. 10 OF 2020

IN THE MATTER OF THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA

AND

IN THE MATTER OF THE ENFORCEMENT OF ARTICLE 71(1) (f) OF THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA 1977 (AS AMENDED FROM TIME TO TIME)

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLE 71(1) (f) OF THE CONSTITUTION OF THE UNITED

REPUBLIC OF TANZANIA (AS AMENDED FROM TIME TO TIME)

AND

IN THE MATTER OF A PETITION TO CHALLENGE THE STATEMENT OF THE SPEAKER OF THE NATIONAL ASSEMBLY TO RECOGNIZE MR. CECIL MWAMBE AS STILL A MEMBER OF PARLIAMENT WHILST HE HAS ALREADY CROSSED THE FLOOR FROM CHAMA CHA DEMOKRASIA NA MAENDELEO (CHADEMA) TO CHAMA CHA MAPINDUZI (CCM) AS BEING UNCONSTITUTIONAL

PAUL REVOCATUS KAUNDA .....PETITIONER

VERSUS

THE SPEAKER OF THE

NATIONAL ASSEMBLY ..... 1ST RESPONDENT

MR. CECIL DAVID MWAMBE .....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

I. MAIGE, J

RULING

Under article 71(1) (f) of the Constitution of the United Republic of Tanzania, 77 [Cap. 2, R.E., 2002], as amended from time to time, (herein after referred to as "the Constitution"), a member of the Parliament he who denounces his/her membership in or ceases to be a member of a political party in whose sponsorship he or she was elected into Parliament, loses, by operation of the law, a qualification of being a member of the Parliament. The second respondent was, in 2015 General Elections, elected a member of Parliament for Ndanda Constituency under the sponsorship of Chama cha Demokrasia na Maendeleo, (herein after referred to as "CHADEMA"). The assertion of the petitioner is that, while the second respondent has denounced his membership in **CHADEMA** and joined into Chama Cha Mapinduzi, otherwise referred to as "CCM", the Honourable Speaker, the first respondent, has declined to declare his seat vacant despite the written request by the Secretary General of **CHADEMA**. In the petitioner's contention, that amounts to a clear violation of the provision of the **Constitution** just referred. Therefore, by this petition, which is preferred by way of originating summons

supported by an affidavit, the petitioner is inviting this Honourable Court to grant the following declaratory reliefs:-

(a) *The statement which was made by the Speaker of the National Assembly regarding the recognition of Mr. Cecil David Mwambe as still the Member of the Parliament while the latter has already crossed the floor from Chama cha Demokrasia na Maendeleo (CHADEMA) is unconstitutional for offending the provisions of Articles 71(1) (f) of the Constitution of the United Republic of Tanzania.*

(b) *A declaration that Mr. Cecil David Mwambe ceased to be a member of the Parliament when he declared to renounce his membership of CHADEMA in favour of CCM party.*

(c) *A declaration that Mr. Cecil David Mwambe should return all parliamentary privileges and benefits which he received from the moment when he crossed the floor from CHADEMA to CCM.*

The petitioner, it would appear to us, got his standing under articles 26(2) of the **Constitution**. The provision which is alleged to have been violated is article 71 (1) (f) of the **Constitution**. It is in Part Two of Chapter Three which is entitled *"Wabunge, Wilaya za Uchaguzi na Uchaguzi wa Wabunge"*.

Aside from filing an affidavit in opposition, the first and third respondents have doubted the maintainability of the petition on the following preliminary points of law, namely;-

1. *The petition is unmaintainable in law for want of the* petitioner's *locus standi.*
2. *This Honourable Court is not clothed with jurisdiction to entertain the present Petition, and subsequently grant the reliefs sought herein, as per provisions of Article 100(1) of the Constitution of the United Republic of Tanzania (as amended from time to time), and Section 3 of the Parliamentary Immunities Powers and Privileges Act (Cap. 296 R.E.2015).*
3. *The present petition is incompetent and bad in law for contravening the provisions of Sections 1(2),3,4,6(d) and 8(1) of the Basic Rights and Duties Enforcement Act, [Cap. 3 of R.E. 2002] (henceforth, "the BRADEA"), and Article 26(2) of the Constitution of the United Republic of Tanzania, 1977, [Cap.2 R.E.2002).*
4. *The affidavit in support of the Petition is incurably defective for contravening Order XIX Rule 3 of the Civil Procedure Code, 1966[Cap. 33, R.E.,2002]*
5. *The Petition is incompetent and bad in law for being frivolous, vexatious and unjustifiable.*

At the hearing of the preliminary objections, the petitioner was represented by a team of four learned advocates namely;

Daimu Halifani, Fulgence Masawe, Stephen Mwakiborwa and Prisca Chogero. The first and third respondents were represented by a team of five learned counsel namely; Vicent Tangoh, learned Principal State Attorney, George Mandepo, learned Principle State Attorney, Alesia Mbuya, also learned Principal State Attorney, Erigh Rumisha, learned State Attorney and and Narindwa Sekimwanga, also learned State Attorney. On his part, the second respondent was advocated for by Mr. Dismas Raphael, learned advocate.

We will be ungrateful, if we do not express our sincere appreciation to the learned counsel for their well researched and brilliant submissions which, admittedly, have been very instrumental in this decision. We have duly taken them into account. We regret, however, that due to the urgency of this matter and shortness of time, we have not been able to repeat each and every substance contained in the counsel's submissions.

For convenience, we find it appropriate to consider the third limb of preliminary objection first. In the said point, we have

noted, the petition is faulted for, among others, contravening the provisions of sections 1(2), 3,4, 6 and 8(1) of the Basic Rights and Duties Enforcement Act, [Cap. 3 of R.E. 2002] ("the (BRADEA"). In his brief submissions in support of this point, Mr. Tangoh, learned Principal State Attorney contends, with all forces that, the instant proceedings ought to have adhered to the procedure set out in the respective provisions. Mr. Halifani, learned advocate, speaking for the petitioner submits, correctly in our view that, since the cause of action arises from article 71 of the **Constitution** which is not within the purview of article 30(3) of the **Constitution**, the said provisions are inapplicable. With respect and without much ado, we entirely subscribe to Mr. Halifani's submissions. The provision of section 1(2) of the **BRADEA** which provides for the application of the law is clear and unambiguous. It does not, in our view, need interpretation. It is to the effect that, the procedure therein are applicable to causes of action emanating from the provisions of articles 12 to 29 of the **Constitution**. This is in line with article 30(3) of the **Constitution**. In our respectful opinions, therefore, the matter at hand does not fall under the **BRADEA** and therefore, the third point of preliminary objection is to fail and it is accordingly overruled.

This now takes us to the first point of preliminary objection as to *locus standi* of the petitioner to institute the instant proceedings. The submissions by Mr. Tangoh on this point is that, in so long as he has not demonstrated any personal interest over and above that of the society, the petitioner cannot be said to have the necessary standing to institute these proceedings. The learned counsel places heavy reliance on the authority of this Court in **Lujuna Shubi Balonzi, Senior vs. the Registered Trustees of Chama cha Mapinduzi**, 1996 TLR 203 where it was held;-

> *"Locus standi is governed by common law according to which a person bringing a matter to court should be able to show that his right or interest has been breached or interfered with".*

In his humble argument, Mr. Halifani learned advocate, maintains that, the position in the case of **Shubi Balonzi** *(supra)* much as it may be appropriate in ordinary civil proceedings, cannot apply in public interest litigation as it is in the instant matter. His submission is premised on his

understanding of article 26(2) of the **Constitution** as judicially considered, in among others, **Rev.Mtikila vs. the Attorney General, (1995)** TLR 31.

On our part, we have closely followed the learned counsel's debate on the issue. With respects, we are preparing ourselves to overrule the preliminary objection. We will explain. As rightly submitted for the petitioner, the issue of *locus standi* in public interest litigation in Tanzania is well settled. It was initially propounded in the cerebrated case of **Rev.Mtikila vs. the Attorney General** *(supra),* where it was held as follows:-

> *Under this provision, too, and having regard to the objectives thereof-the protection of the Constitution and legality-proceeding may be instituted to challenge the validity of the law which appears to be inconsistent with the Constitution or legality of a decision or action that appears to be contrary to the Constitution or the law of the land.* ***Personal interest is not an ingredient in this provision, it is tailored to the community and falls under the subtitle "Duties to the Society". It occurs to me, therefore, that article 26(2) enacts into our constitution the doctrine of public interest litigation.*** *It is then not in our logic or foreign precedent that we have to go for this doctrine, it is already with us in our own Constitution" (emphasis is ours)*

There has, since the above decision, been consistent judicial pronouncements by the High Court and Court of Appeal in support of the view that, personal interest is not an essential ingredient of the proceeding under article 26(2) of the **Constitution**. For instance, in the **Attorney General vs. Jeremia Mtobesya** Civil Appeal No. 65 of 2016, the Court of Appeal of Tanzania (Hon. Mussa, JA) having subscribed to the principle in **Mtikila case *supra*** made the following instructive remarks:-

> *"We fully subscribe to and adopt the foregoing statement of principle. We may only add that by commencing with expression "Every person...." As distinguished from "an aggrieved or interested person", the Article is, in itself, a departure from the doctrine of locus standi as we know it in the Common Law tradition".*

More or less a similar position was stated in among others, **Zito Kabwe vs. the President of the United Republic of Tanzania,** Misc. Civil Cause No. 1 of 2020 (Hon. Mlacha, J), **Ado Shaibu vs. Hon. John Pombe Joseph Magufuli and two others,** Misc. Civil Cause No. 29 of 2018 (Hon. Feleshi, JK) and **The Legal and Human Rights Centre and another vs. Hon. Mizengo Pinda,** Misc. Civil Cause No. 24 of 2013 (Hon. Jundu, JK, as he then was).

In view of the foregoing discussions, therefore, we entertain no doubt that, the petitioner being a citizen of the United Republic of Tanzania has the necessary standing, under article 26(2) of the **Constitution**, to institute a proceeding for violation of any provision of the Constitution. The first point of preliminary objection is henceforth overruled.

Before we shift to the second preliminary objection, we find it necessary to comment, albeit briefly, on appropriateness of the citation of article 71(1) (f) of the **Constitution** and the procedure that has been employed in initiating these proceedings.

As we pointed out in our introductory remarks, the provision of article 71(1)(f) of the **Constitution** was cited in the originating summons as one of the enabling provisions. We think that it was not appropriate. For, the said provision was *ipso facto* inapplicable for moving the Court to entertain any Constitutional proceedings. Quite apart, it is a provision upon which the petitioner's cause of action was based. It should

have therefore, not been cited as an enabling provision. That aside, in as much as the proper enabling provision of law has been cited along with it, the defect is so trivial that it can be tolerated without there being any failure of justice. On this, the following remark of the Court of Appeal of Tanzania in **Mtobesya case** *(supra)* may be pertinent;

> *All said, our curiosity was satisfactorily quenched and we fully subscribe to counsel submission that, with citation of Article 26 (2) of the constitution, the petition was properly before the High Court. We note that the respondent additionally cited sections 4 and 5 of the Act as well as Rule 4 of the practice procedure Rules which are inapplicable to the situation at hand. Nonetheless, as correctly urged by both Mr. Mpoki and Dr. Nshala, reference to those provisions were unnecessary surplusage which did not affect the competency of the petition so long as the enabling Article 26(2) of the Constitution was cited.*

On the issue of the format of the petition, we are in agreement with Mr. Rumisha, learned State Attorney that, article 26(2) does not, in its isolation, provide for the procedure to deal with proceedings under article 26(2) of the **Constitution** in a situation like the instant one, where the cause of action arises from a Constitutional provision not part of the Basic Rights and Duties. The procedure in **BRADEA** which is made under the authority of article 31(4) of the **Constitution**, we have held

in this decision, do not apply where the cause of action does not arise from articles 12-29 of the **Constitution**.

In a situation where the law does not provide for the procedure, we are in agreement with Mr. Halifani that, the general practice and usage by the High Court would come to place. This is in terms of article 108(1) and (2) of the **Constitution** read together with section 2 (3) of the **Judicature and Application of the Laws Act,** [CAP. 358 R.E.2002]. In the **Director of Public Prosecutions vs. Daudi Pete** [1993] TLR 22,) which was decided before the procedure in **BRADEA** had come into force, the Court of Appeal having considered article 108 (1) and (2) of the **Constitution** and the general practice of the High Court, observed as follows:-

> *"We also concur that until the Parliament legislates under sub-art (4) the enforcement of Basic Rights, Freedom and Duties may be effected under the procedure and practice that is available to the High Court in the exercise of its original jurisdiction depending on the nature of the remedy sought".*

The procedure of the High Court in dealing with Constitutional matters ever since before the coming into force of the **BRADEA** has been by way of petition. The same procedure has been codified, with renovations, in section 5 of **BRADEA**. In our firm opinion therefore, since there is no specific statutory law providing for the procedure to initiate proceedings under article 26(2) of the **Constitution** in causes of action not falling under **BRADEA**, the general practice of using petition is appropriate. It does not, in our opinion, matter whether the petition is initiated by originating summons like in the instant matter or petition. This is so because the Court of Appeal has held in **Registrar of Societies and 2 Others vs. Baraza la Wanawake Tanzania**, Civil Appeal No. 82 of 1999 (Unreported) that;-

> *"Petition and originating summons as originating processes are mutually exclusive and cannot compliment each other. Using both in the same action would be superfluous and impracticable. The word "or" would be read into it to make the two procedures of petition and originating summons provided for under s. 5 of the Act as alternative processes for commencing proceedings of human rights violation.*

In our opinions therefore, though the subject to the above decision was a petition under **BRADEA**, the principle therein is broader enough to capture any proceedings for violation of the Constitution. The initiation of this petition by way of originating summons is thus appropriate.

With those remarks, it may be desirable to direct our minds on the objection as to jurisdiction raised in the second point of preliminary objection. The objection is premised on article 100(1) of the **Constitution** which provides as follows:-

> *(1) Kutakuwa na uhuru wa mawazo, majadiliano na utaratibu katika Bunge na uhuru huo hautavunjwa wala kuhojiwa na chombo chocote katika Jamhuri ya Muungano, au katika Mahakama au mahali pengine nje ya Bunge.*

In the understanding of Mr. Tangoh, Learned Principle State Attorney, under the respective article, what transpired within the Parliament in the course of its ordinary business, cannot be questioned to any Court of law. In his humble submission, the rationale behind that prohibition is to uphold the Constitutional principle of separation of powers which is set out in article 4 of the **Constitution**. The parliamentary

privileges and immunities under the respective article, says Mr. Tangoh, are absolute. His submission was not unsubstantiated. It was well founded on, among others, the decisions of this Court in **Legal and Human Rights Centre and another vs. Hon. Mizengo Pinda and another,** Misc. Civil Cause No. 24 of 2013 where my Lord Jundu, JK (as he then was) held, at page 18 of the ruling that;

> *In view of the analysis of the law, we may now conclude by saying that we partly agree with the first point of the preliminary objection in so far as it relates to sub article (1) of the article 100 of the Constitution: The Parliamentary privileges of freedom of thought and debate granted by the sub-article are absolute and cannot be challenged anywhere outside parliament.*

In rebuttal, Mr. Masawe was of the humble but strong contention that, the provision of article 100(1) should be read together with sub-article (2) so that, the privileges and immunities therein protected should not operate as to exclude Court intervention, by way of checks and balance, even where the actions by the Parliament are violative of rule of law and constitutionalism. The attention of the Court was drawn to the statement of this Court in the authority just referred that, the

immunity in sub-article (2) is not absolute in as much as it is subjected to the **Constitution** and other laws. He submits further, basing on the authority in **Anisminic Ltd vs. Foreign Compensation Board** (1969) AC 147 that, a statutory provision purporting to except the jurisdiction of the Court cannot extend as to affect the power of the Court to inquire into a decision given as a result of nullity or illegality.

In his rejoinder submissions, Mr. Tangoh has urged the Court not to place reliance on **Anisminic case** because unlike the instant matter, it was an ordinary case of judicial review.

We have very prudently considered the rival submissions on this point and studied between lines the authorities referred. From the available judicial pronouncements of this Court as afore mentioned, it would appear to us that, the absoluteness of the privileges and immunities under article 100(1) of the **Constitution** are well settled. We are not preparing ourselves to depart from the said principle. We therefore, entirely agree with Mr. Tangoh, learned Principle State Attorney that, the privileges and immunities under article 100(1) of the

Constitution are absolute and cannot be questioned to any Court of law. Perhaps, the main question which we have to answer is what is the scope of the application of the privileges and immunities under the respective article. In other words, the discussion involves what is covered under the respective article and what is not.

Admittedly, determination of the scope of the application of parliamentary privileges and immunities in a country governed by rule of law and constitutionalism is not an easy assignment. Appreciating the intricates involved, His Lordship Ellenborough speaking of the English Constitution, remarked in **Bradlaugh vs. Gossett (1884) 12 QBD, 271** as follows:-

> *No doubt, to allow any review of Parliamentary privilege by a court of law may lead, has led, to a very grave complications, and might in many supposable cases end in the privileges of the Common being determined by the Lords.* ***But to hold the resolutions of either House absolutely beyond inquiry in a court of law, may land us in conclusions not free from grave complications too. (emphasis supplied)***

The danger of the broader interpretation of the provision was also doubted in **Augustine Lyatonga Mrema vs. the Speaker of the National Assembly and the Attorney General,** [1999] T.L.R. On what would appear to be a deliberate intention to narrow down the scope of the application of the provision, His Lordship, Katiti, J (as he then was) deducting from the decision of the Supreme Court of India in **MSM Sharma vs. Dr. Shree Krishna Sinha and others,** AIR 1960,1187B, considering a provision in the Indian Constitution which is more or less similar with article 100(1) of our **Constitution**, made the following pronouncement at pages 229 and 230 which we fully subscribe to;-

> *As per this article, and the authorities above cited, it is clear, that the Indian Court would not be entitled to question the validity of "any proceeding" in Parliament on ground of irregularity of procedure. Thus the above immunity from judicial interference is confined to matters of* ***irregularity of procedure, not to matters done without jurisdiction, or done in defiance of mandatory provisions of the Constitution, or exercising powers not granted by the Constitution****. It would seem to me that the above articles are, in substantive contents, and not very different from what article 100(1) of the Constitution ordains, and I cannot see how suspension of the applicant as a punishment can be*

described other than culmination of the procedure within the House. (Emphasis is ours)

A similar precaution was made by the Supreme Court of Zimbabwe in **Smith vs. Mutasa and Another** (1990) LRC (Const) 87 at 94 where it remarked as follows:-

In Zimbabwe the question of Parliamentary privileges has not remained static. It has to some extent been affected by Declaration of Rights contained in the constitution. The result is that the Parliament of Zimbabwe, unlike that of the House of Common (England) may not enjoy, hold and exercise privileges, immunities and powers which are inconsistent with fundamental rights and privileges of the Parliament. If in Zimbabwe there is a conflict between fundamental rights and the privileges of Parliament, the conflict can only be resolved by courts of justice. The Constitution of Zimbabwe is the supreme law of the land . It is true that parliament is supreme in the legislative field assigned to it by the Constitution, but even then Parliament cannot step outside the bounds of the authority prescribed to it by the Constitution.

Similarly, in Canada, where the jurisprudence on parliamentary privileges and immunities is well developed, the absoluteness of the parliamentary privileges and immunities do not operate as to exclude the power of the Court to ascertain whether the claimed privileges and immunities is

within the legal parameters. Therefore, in **Canada (House of Commons) vs. Vaid** [2005] 1S.C.R., 2005 SCC 30 (page 27), it was observed as follows:-

> *Legislative bodies created by the Constitution .. do not constitute enclaves shielded from the ordinary law of the land.... Accordingly, to determine whether a privilege exists for the benefit of the Senate or House of Commons, or their members, a court must decide whether the category and scope of the claimed privilege has been authoritatively established in relation to our own Parliament or to the House of Commons at Westminster. If so, the claim to privilege ought to be accepted by the Court. However, if the existence and scope of a privilege have not been authoritatively established, the court will be required to test the claim against the doctrine of necessity- the foundation of parliamentary privilege. In such a case, in order to sustain a claim of privilege, the assembly or member seeking its immunity must show that the sphere of the activity for which privilege is claimed is so closely and directly connected with the fulfillment of by the assembly or its members of their functions as legislative and deliberative body, including the assembly's work in holding the government to account, that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their legislative work with dignity and efficiency. Once a claim to privilege is made out, the court will not enquire into the merits of its exercise in any particular instance.*

A further account of the scope of the application of the privileges and immunities was discussed in **Legal and Human Rights Centre and another vs. Hon. Mizengo Pinda and another,** Misc. Civil Cause No. 24 of 2013 where His Lordship Jundu, JK (as he then was) held, at page 18 of the ruling that;

> *In view of the analysis of the law, we may now conclude by saying that we partly agree with the first point of the preliminary objection in so far as it relates to sub article (1) of the article 100 of the Constitution: The Parliamentary privileges of freedom of thought and debate granted by the sub-article are absolute and cannot be challenged anywhere outside parliament.*

Yet, in **Hon. Andrew John Chenge vs. the Public Leaders' Ethics Secretariat and two others,** Misc. Civil Cause No. 18 of 2015, His Lordship Twaib, J, (as he then was) speaking of the scope of the application of the respective provision, remarked at page 13 of the ruling as hereunder:-

> *We subscribe to this view, which is not disputed by any of the parties, and would hold that, in principle, the petitioner cannot challenge the proceedings in the National Assembly, unless he can show that, either they do not fall under sub-article (1) or, that they can be preserved by some provisions of the Constitution.*

From the above discussions, it would sound to us to be the law that, the privileges and immunities protected under article 100(1) of the **Constitution** is limited to **freedoms of thoughts, deliberations and procedures** enjoyed in the formal transaction of business in the Parliament or in its Committees. It does not, in our view, extend to matters done without jurisdiction, or done in contravention of mandatory provisions of the Constitution, or exercising powers not granted by the Constitution.

The obvious question which we have to address therefore, is whether the statement of the first respondent complained of falls squarely within the purview of the protection under article 100(1) of the **Constitution**? We, for the reasons which shall be apparent henceforward, are preparing ourselves to answer the question negatively. Guided by the principle in **Mukisa Biscuit Manufacturing Company Ltd vs. West End Distributors Ltd,** (1969) EA 696, the resolution of this question shall base on the presupposition that, the facts deposed in the affidavit are true. Besides, for the reasons that we shall assign as we go along, we, at this juncture, find

appropriate to discuss concurrently with this, the issue of the petition being frivolous and vexatious raised in the fifth ground of preliminary objection.

In order to separate the wheat from the chaff, we find it imperative to reproduce hereunder the facts in the affidavit constituting the petitioner's cause of action. They are deposed in paragraphs 7, 8,9,10, 11,12,13 and 14 of the affidavit in the following words;-

7. *That, Mr. Mwambe has been representing Ndanda Constituency from 2015 until 15th of February, 2020 when he voluntarily renounced his membership and affiliation to CHADEMA and immediately he defected to Chama cha Mapinduzi (CCM). (A copy of the video clip and print media renouncing his CHADEMA membership are hereto appended collectively and marked annexure A1 for ease reference).*

8. *That, sometime in March, 2020, the Secretary General of CCM Comrade Dr. Bashiru Ally Kakurwa whilst knowing Mr. Mwambe has voluntarily renounced his CHADEMA membership, he accepted him formally as a fully-fledged member of CCM by giving him the membership card of CCM and the latter surrendering to him his defunct membership card of CHADEMA. (A copy of the video clip evidencing the*

same is hereto appended and marked as annexure A2 for ease of reference).

9. *That, from thereon, Mr. Mwambe ceased to attend parliamentary proceedings in the capital Dodoma being conscious of the fact that his seat has expired automatically by his act of crossing the floor from his sponsor CHADEMA to CCM within the astute meaning of article 71(1) (f) of the Constitution of the United Republic of Tanzania (CAP 2 R.E. 2002) as amended.*

10. *That, to cap it all, on 6th day of March, 2020, the Secretary General of CHADEMA Mr. John John Mnyika informed by letter the Speaker of the National Assembly that, Mr. Mwambe has lost his seat in parliament by his act of swapping parties, hence he is not entitled to any parliamentary privileges and benefits. But, surprisingly as it may seem, whilst acknowledging receipt of the said letter by reading it viva voce, in the house, the Speaker discredited and disparaged in its entirety the crux of said letter by uttering the following words to wit; "...**namshangaa Myika kwa sababu haya maneno anayoyasema ilipaswa aambatanishe na barua ya Mheshimiwa Mwambe inayothibitisha haya anayoyasema, hakuambatanisha. Pili, mimi (speaker) sina barua ya Mwambe ya kusema kwamba ameacha ubunge kwa hiyari yake mwenyewe na kama chama hiki kimechukua hatua, sina viambatanisho vinavyoonyesha vikao halali ambavyo vilivyofanya maamuzi hayo. Kwa hiyo hii barua haina maana, haina mantiki, na kwa nafasi hii nichukue nafasi hii nawaambia wabunge wote including wabunge wa***

CHADEMA na wengine wanaotishwatishwa huko kwamba wasibabaike, msiwe na wasiwasi, mnaye spika imara atawalinda mwanzo mwisho. Habari ya ukandamizaji, ubabaishaji hauna nafasi hapa. Fanyeni kazi zenu kwa kujiamini, mmeaminiwa na wananchi, fanyeni kazi zenu, wala msiwe na wasiwasi" *(A copy of the video clip evidencing that utterance by the speaker and a copy of the letter by Mr. Mnyika to the speaker are hereto collectively appended and marked* ***annexure A3*** *for ease of reference)*

11. *That, sequel to the above, on the same day, i.e. 6th day of May, 2020, the Speaker of the National Assembly was quoted in various electronic and print media that, he has ordered Mr. Mwambe to return to the parliament and proceed with his normal parliamentary duties because the non-recognition letter of the secretary General of CHADEMA Mr. John Mnyika has no any basis for want of requisite legitimate party caucus. (A copy of newspaper cutting evidencing the same is hereto appended and marked as* ***annexure*** *A4 for ease of reference).*

12. *That, on 7th day of May, 2020, Mr. Mwambe was also quoted saying the following words;* ***"ni kweli nilishajiondoa Chadema na sio mwanachama wao tena, nikajiunga CCM na kuachia nafasi yangu ya ubunge, lakini nimerudi bungeni kutii wito wa Mhe. Spika Ndugai aliyenirudisha bungeni kumalizia muda uliobaki, mimi ni mwanachama wa CCM lakini nimetii wito wa Spika".***

13. *That, since the order of the Speaker of the National Assembly, Mr. Cecil Mwambe has been attending parliamentary proceedings in the capital Dodoma and he is receiving all parliamentary privileges, immunities and*

benefits in blatant breach of Article 71 (1) (f) of the Constitution of the United Republic of Tanzania

14. *That, on 26th day of July, 2017, the Speaker of the National Assembly recognized in its entirety and gave it full force of law the letter of the then Chairman of Civic United Front (CUF) Party which informed the Speaker of the decision of the Party to dismiss from membership a total of eight (8) members of parliament. (A copy of that recognition letter is hereto appended and marked as annexure A5 for ease of reference).*

From the express provisions of the depositions in the affidavit, it is quite clear to us that, the issue raised therein is not whether a member of parliament who denounces membership of a political party at whose instance he was elected does not cease to be as such. Instead, it is whether the procedure for moving the speaker to so declare was adhered to or whether the speaker was right in declining to declare that the second respondent had ceased to be a member of parliament. While in the view of the speaker which is expressed in paragraphs 10 and 11 of the affidavit, there was no sufficient evidence to establish the said claim, to the petitioner there was.

It has to be observed that, the power of the speaker to declare a parliamentary seat vacant, is not in essence conferred by the **Constitution**. It is provided by section 37 (3) of the **National Elections Act,** Cap. 343 R.E. 2010 which provides as follows:-

> *(2) Where a Member of Parliament resigns, dies or otherwise relinquishes his office for reason other than under section 113, the Speaker shall, in writing to the Chairman of the Commission, and by notice published in the Gazette, declare that there is a vacancy in the seat of a Member of Parliament.*

It would follow from the foregoing discussions therefore that, if there be any wrong committed by the speaker, the same would be limited into his exercise of the power under section 37 (3) of the **Elections Act** and not whether he violated the provision of article 71 (1) (f) of the **Constitution**. The issue of violation of the respective provision would perhaps arise if there was in the statement complained of any, which is not, a negative assertion on the effect of article 71 (1) (f) of the **Constitution**. The dispute here in our opinion, appears to be on the assessment of evidence and interpretation by the

speaker, of the procedure involved in moving him to exercise his duty under section 37(3) of the **Elections Act**.

In our respective opinion therefore, the issue involved in this matter is not a pure constitutional issue. Rather, it is an issue of the procedure involved in determining whether the second respondent has ceased to be a member of **CHADEMA**, the political party which sponsored him during the election proceedings in 2015. That, in our respective opinion, is an issue of procedure and evidence which would have not been pursued through such superior proceedings as Constitutional petition.

On this, we entirely subscribe to Mr. Rumisha, learned State Attorney that, if there be any issue as to whether or not the second respondent ceased to be a member of parliament, that would be dealt with by this Court under article 83 (1) (b) of the **Constitution** which provides as follows:-

83(1) Kila shauri kwa ajili ya kupata uamuzi juu ya suala-

(a) inapplicable

(b) kama Mbunge amekoma kuwa Mbunge na kiti chake katika Bunge ki wazi au hapana, litafunguliwa na kusikilizwa kwanza katika Mahakama Kuu ya Jamhuri ya Muungano wa Tanzania bila kuathiri masharti ya ibara ndogo ya (2) ya ibara hii.

If we deduct from the provision just quoted, we cannot agree with Mr. Tangoh that, the statement of the Hon. Speaker in the circumstance would fall squarely under sub-article (1) of article 100 of the **Constitution**. We have two reasons to justify our contention. First, the decision at hand is within the exclusive power of the speaker conferred by section 37(3) of the **Elections Act**. In our view, the power envisaged in the respective provision is not institutional but a specific power conferred on the speaker in his capacity as the head of the House. It can therefore not be said to arise from the ordinary businesses of the Parliament within the four corners of the House. Neither of any of its committees. As the power is not conferred on the Parliament as an institution, it is not necessary that it should be collectively exercised in parliamentary proceedings. On this, we are inspired by the

following remarks of the Supreme Court of Kenya in **Francis Matheka & 10 Others vs. Director of Public Prosecution & Another**, [2015] eKLR;

> *It is to be recognized that privilege essentially belongs to the House as a whole; individual members can only claim privilege insofar as any denial of their rights, or threat made to them, would impede the functioning of the House. In addition, individual Members cannot claim privilege or immunity on matters that are unrelated to their functions in the House. It follows that the special privileges of Members are not intended to set them above the law; rather, the intention is to give them certain exemptions from the law in order that they might properly execute the responsibilities of their position.*

We also subscribe to the opinion of the Supreme Court of Canada in **Roman Corp. et al v. Hudson's Bay Oil & Gas Co.,** [1971] 2 OR 418, that;-

> *An exact and complete definition of ' proceedings in Parliament' has never been given by the courts of law or by either House. In its narrow sense the expression is used in both Houses to denote formal transaction of business in the House or in Committees. It covers both the asking of a question and the giving of the written notice of such questions and include everything said or done by a member*

proceeding. They are clearly set out in the Kenyan authority in **Mpaka Road Development vs. Kana** (2004) 1 EA 161 which was relied upon by the counsel from both sides. In accordance with the respective authority, a claim is said to be frivolous if it is logically baseless or inconsequential or a mere abuse of court process. It is vexatious if it annoys or tend to annoy or to embarrass. Here in Tanzania, the High Court had an opportunity to consider in **Tanzania Cigarette Company Ltd vs. the Fair Competition Commission and Another,** Miscellaneous Civil Cause No. 31 of 2010 when a proceeding is said to be frivolous or vexatious. It is observed as per His Lordship Juma, J (as he then was) as follows:-

> *It is our further opinion that where a Petitioner had an adequate means of statutory redress but opted to file a constitutional petition, the resulting petition falls under the rubric frivolous or vexatious petition under subsection (2) of section 8 of the Basic Rights and Duties Act.*

We have already established that, though the instant action could be pursued through a non- constitutional law remedy provided under article 83(1) (b) of the **Constitution**, the petitioner has in this case, invited the Court to sit as a Constitutional Court in terms article 26 (2) of the

Constitution. This approach is uncalled for. There are several authorities in support of the view that, where ordinary remedies are available, one cannot come to the Court through Constitutional petition. For instance, in **Athuman Kungubaya & 482 Others vs. the Presidential Parastatal Commission and Another**, Civil Appeal NO. 56 of 2007, the Court of Appeal of Tanzania was of the considered opinion that, where there is statutory provision providing for right to be heard, a party cannot come to this Court through **BRADEA** and complain that his constitutional right to be heard has been infringed. A similar position was reinstated in **Tanzania Cigarette Company Ltd vs. the Fair Competition Commission and Another,** (*supra*) where, like the instant case, a constitutional petition was brought to the Court while there was available, under Fair Competition Act, 2002, remedy to redress the issue. The High Court made the following instructive opinions:-

> *Applying the foregoing principle laid down by the Court of Appeal, it seems to us that, the FCA, 2003 has appropriate procedural machinery under section 61 providing the right to a hearing as well as right to appeal. We can state without hesitation that where statutory provision is already in place to provide for a right of appeal then that right of appeal should be pursued. Therefore, the Petitioner should not claim that its rights to be heard and its right of appeal that is guaranteed under Article 13(6) (a) of the Constitution*

has been infringed if in fact it is the Petitioner who had opted out of the available statutory right to be heard in Complaint No.1 of 2008 and its potential right of appeal under section 61 of FCA.

Though the subject in the above decisions were constitutional petitions under the **BRADEA**, we have no doubt that, the principle therein enunciated is of general application to every constitutional proceeding. In our view, superior and fundamental as they are, constitutional proceedings are not expected to be pursued as alternatives to ordinary proceedings. They are preferable as a matter of necessity and where the law does not provide for other avenues.

Applying the principles of law above referred therefore, it is our considered opinion that, since the matter at hand was capable of being dealt with by the High Court as an ordinary petition in terms of article 83(1) (b) of the **Constitution**, it was not appropriate for the petitioner to move the Court to exercise its Constitutional law jurisdiction under article 26(2) of the **Constitution**. In any event, as we established in this ruling, the facts in the affidavit do no *prima facie* establish a pure case of constitutional violation. It is a case on an allegation, if any,

of incorrect exercise on the part of the speaker of his statutory duty under section 37(b) of the **Elections Act**. In our judgment therefore, we agree with the learned counsel for the first and third respondents that, the instant matter is frivolous and vexatious. We do not, in the circumstance, find it useful to consider the fourth point of preliminary objection. Accordingly therefore, the petition is hereby struck out with no order as to costs.

It is so ordered.

HIGH COURT OF TANZANIA

I.MAIGE
JUDGE
03/06/2020

S.MAGOIGA
JUDGE
03/06/2020

S.KULITA
JUDGE
03/06/2020