

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

MISC. CIVIL CAUSE NO. 19 OF 2021

**IN THE MATTER OF THE CONSTITUTION OF THE UNITED
REPUBLIC OF TANZANIA, 1977, CAP 2 AS AMENDED**

AND

**IN THE MATTER OF THE BASIC RIGHTS AND DUTIES
ENFORCEMENT ACT, 1994 CAP 3 R.E. 2002;**

AND

**IN THE MATTER OF A PETITION TO CHALLENGE THE
CONSTITUTIONALITY OF SECTION 44 OF THE NATIONAL
ELECTIONS ACT CAP 343 REGARDING DECLARING UNOPPOSED
OR UNCONTESTED CANDIDATES AS ELECTED FOR PARLIAMENTARY
ELECTIONS WITHOUT GOING TO THE BALLOT BOX TO VOTE FOR
HIM OR HER**

AND

**IN THE MATTER OF A PETITION TO CHALLENGE THE
CONSTITUTIONALITY OF SECTIONS 45(2) AND 13(7) OF LOCAL
GOVERNMENT (ELECTIONS) ACT, NO. 7 OF 2010 REGARDING
DECLARING UNOPPOSED OR UNCONTESTED CANDIDATES AS
ELECTED FOR A LOCAL GOVERNMENT AUTHORITY ELECTIONS
WITHOUT VOTING FOR HIM OR HER**

JORAN LWEHABURA BASHANGE.....PETITIONER

VERSUS

THE CHAIRMAN OF NATIONAL ELECTORAL

COMMISSION.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

21 Sept & 20 Oct, 2021

MGETTA, J:

Earlier on, one Joran Lwehambura Bashange, the petitioner has filed
a petition by way of originating summons which contains grounds on

which his prayers relied upon and which is accompanied with affidavit and affidavit for admissibility sworn by himself.

Briefly, the petition challenges the validity and constitutionality of **section 44 of the National Elections Act, Cap 343** (henceforth Cap 343) because it allows unopposed candidate for Member of Parliament to represent the constituency. It also challenges the validity and constitutionality of **sections 45(2) and 13(7) of the Local Government (Elections) Act, Cap 292** (henceforth Cap 292) as amended by **the Electoral Laws (Miscellaneous Amendments) Act, no. 7 of 2010** because it allows unopposed candidate for councillor to represent the ward. All the above sections contravene **Article 21 (1) & (2) and Article 26(1) of the United Republic of Tanzania** as amended (henceforth the Constitution). Thus, they are unconstitutional, null and void and the same should be expunged from the statute books. The petitioner alleged that the constitution requires that a member of parliament or a councillor must be elected by vote in a secret ballot and does not permit unopposed or uncontested candidate to be declared as elected when in fact no election in respect of him/her has been taken place. He added the grounds contained in the originating summons and particulars of facts contained in the supporting affidavit are clear and

sufficiently explain the unconstitutionality of impugned provisions of the two principal legislations.

Likewise, he alleged that **sections 45(2) and 13(7) of Cap. 292;** and, **section 44 of Cap. 343** contravene **Article 13(1) of the African Charter on Human and Peoples' Rights, 1981; Article 25 (a) and (b) of the International Covenant on Civil and Political Rights, 1966; and, Article 21(1) and (3) of the Universal Declaration of Human Rights, 1948.**

When replying to the petition, the respondents namely the Chairman of the National Electoral Commission (the 1st respondent) and the Attorney General (2nd respondent) filed a notice of preliminary objection, the subject of this ruling, complaining that *the petition is vexatious, frivolous and an abuse of court process, thus contravening the provisions of section 8(2) of the Basic Rights and Duties Enforcement Act, 1994 (henceforth Cap. 3)* whose relevant part, for ease of reference, is quoted as hereunder:

"8. (2) The High Court shall not exercise its powers under this section if it is satisfied that the application is merely frivolous or vexatious".

When that objection was called on for hearing, Mr. Mpale Mpoki and Mr. Halfani Dalmu, both learned advocates appeared for the petitioner;

while, Mr. Hangi Chang'a, the learned Principal State Attorney assisted by Ms. Vivian Method Ishengoma, the learned Senior State Attorney, appeared for the respondents. The counsel for both sides requested, the request which was accepted, to prosecute the objection by way of written submissions. Both counsel did comply with the scheduled time by filing their respective written submissions.

In his written submission, Mr. Chang'a stated that the petition is vexatious, frivolous and abuse of court process because it does not meet the requirements of **section 6 (e) of Cap. 3** which provides and I quote the relevant part for ease of reference that:

"6. A petition made under this Act shall set out-
(e) Particulars of the facts, but not the
evidence to prove such facts, relied on;"

He submitted further that because the present petition lacks particulars of the facts relied on by the petitioner that amounts to irregularity that makes the petition without substance, hence frivolous and vexatious. He added that **section 6(e) of Cap.3** ensures that the petitioner has a standing and sufficient interest in the matter. To him that is crucial in ensuring that the court is not overburdened with frivolous and vexatious petitions. At a glance at the petition, Mr. Chang'a stated that the same lacks particularization of facts in terms of a ward or

constituency, the petitioner is eligible to vote; and, lacks facts as to how the impugned provisions have affected him personally, particularly whether the impugned provisions have ever been implemented in the ward or constituency he is entitled to vote and the adverse effect of the same to him. He further stated that since such facts are lacking in the present petition, it is just hopeless to determine it, and that the provisions of **section 4(2) of Cap. 3** were also contravened by the petitioner's failure to give facts as to how the alleged contravention had affected him.

On the other hand, Mr. Chang'a submitted that this petition is frivolous and vexatious because the petitioner seeks for declaratory order that the impugned provisions contravene the African Charter on Human and People's Rights, International covenant on Civil and Political Rights, and Universal Declaration of Human Rights while this court has no jurisdiction to declare the same. He cited to me the provisions of **Article 30(3) of the Constitution** which requires this Court to exercise its jurisdiction in determining matters contravening basic rights and duties enacting from **Articles 12 to 29 of the Constitution**. Similar **Article 26 (2) of the Constitution** empowers the court to determine violation of any constitutional provision, he added.

To support his submissions he cited to me the case of **Dezydelius Patrick Mgoya and Another Versus The Attorney General and 2**

Interested parties; Misc. Civil Cause No. 19 of 2019 (HC) (DSM) (unreported); and, the case of **Onesmo Olenguruma Versus The Attorney General;** Misc. Civil Cause No. 15 of 2019 (HC) (unreported).

In response to Mr. Chang'a's submission, in their submission on whether the petition is vexatious or frivolous, the petitioner's advocates stated that the respondents without issuing a notice, have come up with another preliminary objection which is couched in the words that the petition is frivolous or vexatious as it does not meet the requirements of **section 6(e) of Cap 3**. They asked this court to disregard that objection as, **one**, it is not part of the notice of preliminary objection filed earlier; and **two**, the same objection is vague, lacking clarity as a pleading cannot be frivolous and vexatious under **section 8(2) of Cap. 3** and at the same time lack particulars under **section 6(e) of Cap. 3**. They submitted further that this court should ignore Mr. Chang'a's submission for being unconnected to preliminary objection that was raised.

Otherwise, they added, by virtue of **rule 19 of the Basic Rights and Duties Enforcement (Practice and Procedure) Rule, 2014**, this court be pleased to invoke the provisions of **Order VI rules 3 & 5 of the Civil Procedure Code, Cap. 33** (henceforth the CPC) and order the petitioner to either give better particulars or further and better

statements. For ease of reference, **rules 3 & 5 of Order VI of CPC**, are quoted hereunder:

"3. Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively; and dates, sums and numbers may be expressed in figures.

5. A further and better statement of the nature of the claim or defence or further and better particulars of any matter stated in any pleading may in all cases be ordered, upon such terms, as to costs and otherwise as may be just".

The petitioner counsel went on submitting that for purposes of determining either or not the petition is frivolous or vexatious, evidence should be supplied. Once evidence is required, then such objection becomes not preliminary objection on point of law to meet the principle that was made in **Mukisa Biscuits Manufacturing Ltd. V. West End Distributors Ltd**, [1969]1 EA 696 which defines what a preliminary

objection is and also provides when it can be raised and when it should not be raised. In order an objection to be considered as preliminary objection, it must be on pure point of law and not on facts which needs ascertainment by production of evidence. For ease of reference, I quote the position set out in **Mukisa Biscuits case** as hereunder:

*"A preliminary objection is in the nature of what used to be a **demurrer**. It raises a **pure point of law** which is argued on the assumption that all the facts pleaded by the other side are correct. **It cannot be raised if any fact has to be ascertained** or if what is sought is the exercise of judicial discretion."*

From the foregoing I am at once taken to consider if the raised objection meets the principle enshrined in Mukisa case. I would first borrow the definitions of the terminologies of frivolous and vexatious as provided in a persuasive Kenya case of **Kiama Wángai Versus John N. Mugambi & Anther** [2012] eKLR or [2013] 2 EA 474. The court found that:

"A matter is frivolous if (i) it has no substance; or (ii) It is fanciful; or (iii) where a party is trifling with the court; or (iv) when to put up a defence would be

wasting court's time; (v) when it is not capable of reasoned argument"

In **Klama Wangai case** (supra), the Kenya court also found that a matter is said to be vexatious when:

"(i) it has no foundation; or (ii) it has no chance of succeeding; or (iii) the defence (pleading) is brought merely for purposes of annoyance; or (v) it is brought so that the party's pleading should have some fanciful advantage; or (v) where it can really lead to no possible good; or (vi) it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense".

Furthermore, in a **Longman Dictionary of Contemporary English**; the Pitman Press, 1st edn, 1979 by Paul Procter (Ed) the word frivolous (adj) means 1. *not serious; silly; useless*; 2. *unable to take important matters seriously; liking to spend time in light useless pleasures*. While, the word vexatious (adj) means *displeasing; troublesome*.

Having all the attempted meaning of terminologies - vexatious and frivolous in mind, I am of the view that they should not be taken casually

by courts of law at the expense of the litigants. The courts should always do justice to these terminologies. Depicting unseriousness, Mr. Chang'a submitted that failure to provide particulars of the facts relied on by the petitioner, the petition becomes vexatious and, frivolous; as a result it contravenes **section 6(e) of Cap. 3**. On the other hand, he submitted, failure to provide particulars of the facts relied on by the petitioner is an irregularity that makes the petition without substance hence frivolous and vexatious. By the way can one say that an irregularity amounts to a pure point law? Such type of submissions in the circumstances shows how the principal state attorney fumbled and miserably failed to put up the respondents case of whether the petition is vexatious and frivolous. Not only that they failed to tell the court if at all the raised objection fall under the ambit of Mukisa case (supra). If I may be excused I may say and I am saying that the move taken by the respondents to raise that unfounded objection intends to waste court's time.

Furthermore, Mr. Chang'a admitted that the facts he enlisted are lacking in the petition. I am of firm view that since he does not talk of law, pure point of law, but facts I should consider, with much respect his submission, as it contains nothing convincing. In other words, it goes without say that to reach the threshold if that is frivolous or vexatious need proof. That is to say that one have to prove by giving evidence to

show what is required. Now, if evidence is required, then it is not a pure point of law properly falling in the four corners of Mukisa case (supra).

Finally, Mr Chang'a submitted that the petition is vexatious and frivolous and therefore it has no substance and should be dismissed with costs. But with due respect, for reasons stated herein above I find the contrary. I am of the firm view that in the circumstances whether or not the petition is frivolous or vexatious is a matter of fact which requires the production of evidence to prove or disprove the same. Thus I find the petition with substance and has basis in law. It is therefore properly before this court.

Before I conclude Mr. Chang'a stated that this court has no jurisdiction to declare that the local legislations contravene the African Charter on Human and Peoples Rights 1981, the International Covenant on Civil and Political Rights, 1966 and the universal Declaration of Human Rights, 1948. On this issue, I am in agreement with the advocates for the petitioner that, by itself, that argument does not amount to pure point of law. The full bench of this court is tasked to determine whether on the merits it has power to make such a declaration. The precedent shows that in the case of **Christopher Mtikila Versus Attorney General** [2006] TLR 279 this Court had dealt with provisions contravening the International Covenants to which Tanzania is a party.

By and large, for the above reasons the raised preliminary objection is a total misconception and should be dismissed, as I do now. The preliminary objection is accordingly dismissed. No order as to costs.

It is so ordered.

Dated at Dar es Salaam this 20th day of October, 2021.




J.S. MGETTA
JUDGE

COURT: This ruling is delivered today this 20th October, 2021 in the presence of Mr. Daimu Halfani, the learned advocate for the petitioner and in the presence of Ms. Narindwa Sekimanga, the learned State Attorney for the respondents.


J.S. MGETTA
JUDGE
20/10/2021