IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM,

CIVIL CASE NO. 270 OF 2013

HON. ZITO ZUBERI KABWE (MP).....APPLICANT

VERSUS.

1. THE BOARD OF TRUSTEES,
   CHAMA CHA DEMOCRASIA
   NA MAENDELEO.....1ST RESPONDENT
2. THE GENERAL SECRETARY
   CHAMA CHA DEMOCRASIA NA
   MAENDELEO.....2ND RESPONDENT

REASONS FOR THE ORDER.

02/01/ & 03/01/2014.

Utamwa, J.

On the 2nd January, 2014 I made an order (herein called the order) overruling the preliminary objection (PO) which had been raised by the two respondents, the **Board of Trustees, Chama cha Democrasia na Maendeleo** and **the General Secretary Chama cha Democrasia na Maendeleo** (first and second respondent respectively) against the chamber application filed by the applicant, **Hon. Zito Zuberi Kabwe**

(**MP**). For un-avoidable reasons stated into the order I reserved the reasons thereof, and I am now adducing them.

The applicant had filed a suit (the main suit) against both respondents along with the chamber application (the application). In the chamber application which was filed under a certificate of urgency, the he seeks for the following three orders;

1. That the Central Committee of the Chama cha Democrasia na Maendeleo, CHADEMA (a political party duly registered under the Political Parties Act, No. 5 of 1992) and or any other organ of the party should not deliberate, discuss and or determine the issue of party membership of the applicant in any of its meetings until such date when the suit pending before this court is determined.
2. Any other order as the court may deem fit to grant.
3. Costs to follow the event.

The application is preferred under the provisions of 2 (2) of the Judicature and Application of Laws Act, Cap. 358, R. E. 2002 and s. 95 of the Civil Procedure Code, Cap. 33 R. E. 2002 and any other enabling provisions of the law. It is supported by the affidavit of the applicant, **Hon. Zitto Zuberi Kabwe**. In his affidavit, the applicant complains, *inter alia*, that on the 22nd November, 2013 the Central Committee of CHADEMA (the Party) ordered that the applicant should be removed from all leadership positions that he was holding within the party. It also

directed that further action should be taken against him in relation to his party membership for the same grounds and reasons that led to his removal from the leadership positions with the party. He also complains that the second respondent has issued him with a notice to appear before the central committee for a hearing on the 3rd January, 2014 (by today), hence the application.

The PO was based on three points of law raised orally in court by the two learned counsel for the applicant, Messrs **Tundu Lisu** and **Peter Kibatala**. The three points are as follows;

i. That the application suffers from an incurable defect of wrong citation of the law, thus this court's jurisdiction is not properly invoked.

ii. That the affidavit supporting the application is fatally defective for containing prayers, arguments and opinions contrary to the law.

iii. That this court lacks jurisdiction to entertain the application being a matter arising out of disputes related to disciplinary proceedings between a political party and its member.

For these legal points the twine counsel for the respondent urged this court to strike out the application with costs. Mr. **Albert Msando** lerned counsel for the applicant forcefully countered all the three points of the PO and urged the court to dismiss it and proceed to hear the application on merits, hence the order. In giving my reasons for the order, I will discuss the points of PO one after another.

As to the first point of PO, Mr. Kibatala learned counsel for the respondent contended that, the application is essentially seeking for a temporary injunction pending the determination of the main suit. It is however, trite law that for a party to properly invoke a court's jurisdiction a proper citation of the law under which an application is made must be cited. Wrong or non-citation of proper law renders the application incurably defective and makes it liable to be struck out. He supported his contention by the decision of the Court of Appeal (CAT) in the case of **Marky Mhango (on behalf of 684 others) v. Tanzania Shoes Co. Ltd and another, CAT Civil Application No. 37 of 2003, at Dar es salaam** (unreported) and **Edward Bachwa and 3 others v. the Attorney General and another, CAT Civil Application No. 128 of 2006, at Dar es salaam** (unreported). He also argued that an issue of jurisdiction is a paramount one and a court of law must decide it before it proceeds to determine any matter.

The learned counsel argued also that, in the matter at hand the application is preferred under s. 2 (2) of Cap. 358 which is a wrong citation because the provisions do not carter for injunctive order pending proceedings in court. He submitted that, the proper provisions would have been s. 68 (c) and (e) and order XXXVII rule 2 (1) of Cap. 33. The learned counsel also argued that, s. 95 of Cap. 33 cited in the chamber summons is not helpful because, it applies only where there is no any provisions guiding a matter in court. He cited the case of **Shaku Haji**

Osman Juma v. Attorney General and 2 others (2000) TLR. 49. Adding force to these arguments, Mr. Tundu Lisu learned counsel contended that, wrong citation or non-citation of proper provisions of the law is not a mere procedural technicality, it goes to the root of the matter. This is not thus an omission protected under article 107A (2) of the Constitution of the United Republic of Tanzania (the Constitution), Cap. 2 R. E. 2002 which prohibits courts from being overwhelmed by procedural technicalities in dispensation of justice.

In reply to this point of law Mr. Msando learned counsel for the applicant submitted that, s. 68 (c) and (e) and order XXXVII rule (2) (1) of Cap. 33 do not apply in this application as they deal with temporary injunction matters in respect of matters related to properties and breach of contract which is not the case in the matter at hand. He argued further that, this court in **Kibo Executive Lodge Ltd v. Vicky Nsilo Swai, High Court Commercial Case No. 16 of 2013, at Arusha** (unreported) held that s. 68 of Cap. 33 only summarises the powers of this court and is not an enabling law. The case cited above followed the CAT decision in **Tanzania Electrical Supply Company (TANESCO) v. Independent Power Supply Tanzania Ltd (IPTL) AND 2 others [2000] TLR 324.** He thus contended that the application was properly brought under the above cited provisions of law; hence the PO should be dismissed with costs.

In rejoinder, Mr. Kibatala learned counsel submitted that, order XXXVII rule (2) (1) of Cap. 33 applies to this matter because it covers matters of temporary injunctions related to any other injuries of any kind in addition to matters related to property and breach of contract. S. 68 of Cap. 33 also applies together with XXXVII rule 2 (1) of Cap. 33 because this application is in a nature of a temporary injunction. The court will not stop the meeting complained of without issuing an injunction order. As to the case of **Kibo Executive Lodge Ltd** (supra) Mr. Kibatala argued that, the same is distinguishable from this matter and it was decided *per incurium* and does not bind this court. He added that, s. 2 (2) would apply only where there is no any applicable law.

The issue in respect of this first point of PO is *whether or not this court has been properly moved by the applicant to entertain the sought orders*. In my view, from the arguments by the counsel for the respondents, and the precedents cited by them, it is clear that the stance of the law in this country is that, a wrong or non-citation of the law in a chamber application renders the same incompetent. The omission is not a mere procedural irregularity, it goes to the root of the matter. It is also the law that the court's jurisdiction cannot be invoked by a wrong or non-citation of a proper law. Mr. Msando for the applicant did not seriously dispute this position of the law and did not cite any precedent holding differently; his main fight in this respect is that, the application has been brought under proper law. In my considered view, I totally

agree with the learned counsel for the respondents that the above is the right position of the law in our jurisdiction. In fact, there is a bulk of authorities by the CAT supporting this position of the law. It must be born in mind that the CAT is the highest court in the court system of our land. According to the common law doctrine of *stare decisis* which is applicable in our jurisdiction, decisions of the CAT form binding precedents to all courts and tribunals bellow it, this court inclusive; **Jumuiya ya Wafanyakazi Tanzania v. Kiwanda Cha Uchapishaji Cha Taifa [1988] TLR. 146.** For this reason, I would not thus succumb to the finding of my learned Brother Judge who decided the case of **Kibo Executive Lodge Ltd** (supra) and observed that in this country, some precedents decide differently on the issue of wrong or non-citation of law. The reasons for my departure from his stance are that, both cases which he found were deciding differently were foreign precedents which do not bind this court. He cited **Sangu v. Roadmaster Cycle (U) [2000] 1 EA 253** by the Court of Appeal of Uganda and **Abdul Azizi Suleiman Nyanki Farmers Cooperation Ltd and another [1966] E. A. 409** (by the East African Court of Appeal, but originating from Kenya). Again, the finding of my colleague judge of this same court is not binding to me under the same doctrine of *stare dicisis*, though I indeed, assign the greatest respect to him. After all, the case of **Kibo Executive Lodge Ltd** (supra) is distinguishable from the matter at hand as rightly argued by Mr. Kibatala learned counsel for the respondents because, the same was

a ruling made in respect of a sale of property which had already been effected, which is not the case here where the complained of acts have not been effected yet.

As hinted above, while the respondent's counsel argued that the application has been preferred under wrong provisions of law (or that no proper law was cited) the applicant's advocate contended that the same are the proper provisions. It is thus the duty for this court to examine the provisions under which this application is made. In the first place I am of the view that according to the anatomy of the chamber application, the prayed order numbered 1 above is the kingpin relief sought, the rest two are merely incidental there to. I will thus concentrate in that major prayer in this assignment.

At this juncture I will again declare my agreement with Mr. Kibatala learned counsel that the kingpin relief sought in the application (the sought order numbered 1 above) is purely in the nature of a temporary injunction because, though couched in different phrasing, it basically moves this court to restrain the Central Committee of CHADEMA and or any other organ of the party from deliberating, discussing and or determining the issue of party membership of the applicant in any of its meetings pending the determination of the main suit. **S. C. SARKAR** in his book of Sarkar's Code of Civil Procedure, Lexis Butterworths Wadhwa Nagpur (Publishers), 11th Edition, 2006, (reprint 2010) at page 2274 (in volume 2) describes a temporary

injunction under Order XXXIX rule 1 (a), (b) and (c) of the Indian Code of Civil Procedure, 1908 (the Indian Code) as amended from time to time, to be a judicial process whereby a party is required to do or to refrain from doing any particular act, the main purpose is to preserve the subject matter of the suit in *status quo* for time being. Order XXXIX rule 1 (a), (b) and (c) of the Indian Code contains almost similar provisions to our Order XXXVII rule 1 (a) and (a) of Cap. 33.

In Mr. Kibatala's view however, each and every application for a temporary injunction must be brought under Order XXXVII rule 2 (1) of Cap. 33, which said stance is disputed by Mr. Msando. In my view, Order XXXVII rule 2 (1) of Cap. 33 should not be read in isolation from order XXXVII rule 1 (a) and (b) of Cap. 33. It is only Order XXXVII rule 1 of Cap. 33 (and not Order XXXVII rule 2 (1) of Cap. 33) that gives this court the requisite mandate to grant temporary injunction orders. Order XXXVII rule 2 (1) of Cap. 33 only gives the right to a plaintiff to apply for the temporary injunction order for restraining the defendant from committing a breach of contract or other injury of any kind or injury complained of, or injury of a like kind arising out of the same contract or relating to property or right to that property or contract.

However, in my close scrutiny of the law, Order XXXVII rule 1 (a) and (b) is very restrictive, it gives powers to courts to issue temporary injunction orders where any property in dispute in a suit is in danger of being wasted, damaged, or alienated or is suffering loss of

value by reason of its continued use by any party to the suit, or wrongly sold in execution of a decree; or that the defendant threatens, or intends to remove or dispose of his property with a view to defraud his creditors. Under these restricted circumstances Order XXXVII rule 1 (a) and (b) gives the powers to this court by the following wording which I quote for a readymade reference;

> "...the court may by order grant a temporary injunction to restrain such act or make such other order for the **purpose of staying and preventing the wasting, damaging, alienation, sale, loss in value, removal or disposition of the property** as the court thinks fit, until the disposal of the suit or until further orders" (bold emphasis is mine).

It follows therefore that, for Order XXXVII rule 2 (1) of Cap. 33 to apply, the subject matter of the suit must relate to a contract or property or right related to that contract or property. It is for this understanding that Sakar, in the said book of Sarkar's Code of Civil Procedure, (supra) remarked that temporary injunctions are regulated by the Indian Code and cases in which they may be granted are stated in clauses (a), (b) and (c) of the order XXXIX rule 1 of the Indian Code, which I observed earlier that it contain almost similar wording to our XXXVII rule 1 (a) and (b) of Cap. 33. It is common knowledge that the Indian Code is assigned a

high respect in our civil justice system for its similarity to our Cap. 33 which was borrowed from India. I thus agree with Mr. Msando learned counsel that Order XXXVII rule 2 (2) of Cap. 33 does not apply in the matter at hand because the sought temporary injunction here is neither related to breach of contract nor to property.

As to the applicability of s. 68 of Cap. 33, I also agree with Mr. Msando learned counsel for the applicant that it does not give any power to this court except summarising its powers under the first schedule of Cap. 33. It is thus merely a supplementary provision of law. This was the stance underscored by the CAT in the case of **Tanzania Electrical Supply Company (TANESCO)** (supra). It be remembered here that this decision by the CAT is binding to this court as observed previously. S. 68 could not thus apply in this matter if Order XXXVII rule 2 (1) was inapplicable.

For the finding I have just made above, it is safe to take that, Cap. 33 does not have specific provisions to carter for the temporary injunction under the circumstances of this matter. Which law should then be applicable? to answer this quiz I must agree with Mr. Msando learned counsel for the applicant that s. 2 (2) of Cap. 358 takes over in this matter being assisted by s. 95 of Cap. 33. This is because, in **Tanzania Electrical Supply Company (TANESCO)** (supra) the CAT held that, where Cap. 33

is silent, it is legitimate to apply the provisions of s. 2 (2) of Cap. 358. The CAT held further that, s. 95 of Cap. 33 does not give jurisdiction to this court, it only applies as a supplement to the applicable law. I will thus totally agree with Mr. Msando learned counsel that the application was properly brought before this court and there is no any wrong or non-citation of the applicable provisions of law. It was for these reasons that I answered the main issue in respect of this point positively that this court had been properly moved by the applicant to entertain the sought orders.

As to the second point of PO, Mr. Kibatala maintained that paragraphs 13, 25 and 27 contain prayers, arguments and opinions. For that reason the affidavit is defective. Mr. Msando replied that the affidavit was in accordance to the tune of order XIX of Cap. 33, but in case the court agrees with the respondent's counsel it should not hold that the whole affidavit is defective. It may expunge the offending paragraphs only. In his rejoinder Mr. Kibatala insisted that the offending paragraphs are seriously defective and cannot be expunged without declaring the whole affidavit defective. The affidavit is not in accordance to order XIX of Cap. 33, he argued. The issue here is *whether or not the impugned paragraphs are seriously defective so as to vitiate the whole affidavit.* The general affidavital law is to the effect that; affidavits shall be confined to such facts as the deponent is able of

his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted, see Order XIX rule 3 of Cap. 33. As to paragraph 13 of the affidavit I am of the settled view that it is in order because, it only states to the best of the applicant's knowledge to the effect that the CHADEMA constitution provides for the procedure of disciplinary proceedings which was not followed by the Central Committee, hence a need to appeal. It will thus remain for the applicant to prove these facts. Paragraph 25 contains a statement to the effect that respondents shall not suffer any greater loss if the injunction is issued. This is an argument which should not be contained into the affidavit, may be in the submissions by the counsel during the hearing of the application for, this is one of the legal factors to be considered when the court considers the issue of whether or not it should grant a temporary injunction order. Paragraph 27 also suffers the same syndrome. It contains a statement to the effect that the applicant deserves the prayers sought in the chamber summons. This is an argument. It is for these grounds that I partially held the issue in respect of this point of PO positively and partially negatively by expunging paragraphs 25 and 27 of the affidavit from it and leaving paragraph 13 intact. However, the expunge of the two paragraphs does not affect the whole affidavit as argued by the respondents' counsel.

As to the third point of law, Mr. Lisu learned counsel for the respondents essentially argued that, this court does not have jurisdiction to entertain this matter being a matter related to a disciplinary proceedings conducted by a political party against its member, unless there was an allegation of breach of natural justice in the process, which is not the case according to the affidavit. He argued further that, the applicant in his affidavit admits that there is an appellate process and he is pursuing the same. He cannot thus do so and come to court at the same time. He also argued that political parties are voluntary groups for parties to join or to pull out as per article 20 (1) of the Constitution. He equated political parties to religious institutions and submitted that courts of this land have held that they do not have jurisdiction to entertain religious disputes, he cited the cases of **Amani Mwenegoha, Secretary General E.L.C.T v. The Registered Trustees of the Lutheran Church in Tanzania and 3 others, High Court Misc. Civil Cause No. 8 of 2005, at Dar es salaam** (unreported) and **Simon Maregesi and 2 others v. Fr. Wojciech Koscielniak and another, High Court Civil Revision No. 7 of 2005, at Mwanza** (unreported) to fortify his fight. He said, the legal principle should apply *mutatis mutandis* to political bodies like CHADEMA.

Mr. Msando essentially replied that this is not a point of PO in law because it requires evidence to prove whether principles of

natural justice have been complied with in the process of disciplinary proceedings. He differentiated religious bodies from political parties. In his rejoinder Mr. Lisu reiterated his submissions in chief.

The issue here is whether or not this is a pure point of law for a PO. As rightly contended by Mr. Lisu learned counsel, a point of PO must be a pure point of law. The court in considering whether the raised concern is a actually a point of PO in law must consider the pleadings or the affidavit in the matter at hand, he argued. However, it is also the law that a point of PO must be a point which will not attract parties to give evidence in its proof as rightly submitted by Mr. Msando. This is a trite stance of the law, see **Mukisa Biscuit Manufacturing Company Ltd. v. West End Distributors Ltd. (1969) EA 696** and the recent CAT's ruling in **Karata Ernest and others v. Attorney General, TCA Civil Revision No.10 of 2010, at Dar es salaam** (unreported). In the matter at hand however, there is a serious dispute between the parties in respect of the fact that principles of natural justice are being observed by the respondents in the process of the said disciplinary proceedings against the applicant. Under paragraph 18 of the affidavit for example, the applicant complains that the failure by the second respondent to furnish him with a copy of the proceedings and reasons for the decision of the Central Committee has denied him

an opportunity to appeal to the Governing Council. He also states that the second respondent's failure to prepare a report to be submitted to the Governing Council within 14 days from the decision of the Central Committee has denied him an opportunity to be heard by the Governing Council. This disputed fact needs evidential proof. The point raised by Mr. Lisu learned counsel for the respondents cannot thus be considered as a point of PO properly so called in law. For these reasons I answered the issue posed above negatively.

These are the reasons that moved me to discard all the three points of the PO, expunge paragraphs 25 and 27 of the affidavit and consequently overrule the PO in its entirety.

JHK. UTAMWA.

JUDGE

02/01/2014.