IN THE HIGH COURT OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CIVIL CAUSE NO. 15 OF 2019

ONESMO OLENGURUMWA.....PETITIONER

VERSUS

ATTORNEY GENERAL.....RESPONDENT

RULING

Date of last Order: *07/12/2020*
Date of Ruling: *17/12/2020*

MLYAMBINA, J.

I. Introduction

The Petitioner Onesmo Olengurumwa moved this Court via a Petition by way of originating summons. It was made under *Articles 26(2) and 30 (3) of the Constitution of the United Republic of Tanzania of 1977 as amended.* The Petitioner sought for determination of the following issues:

1. Whether *Section 4 (2) of the Basic Rights and Duties Enforcement Act Cap.3 (R.E. 2019) (herein after referred to as BRADEA) as amended* is inconsistent with *Article 26 (1), 26 (2), 29 (1), 13 (2), (4) and 13 (6) (a) of the Constitution of the United Republic of Tanzania of 1977 as amended* and consequently unconstitutional, null and void.
2. Whether in enacting *Section 4 (2) of the BRADEA as amended,* the Respondent undermined the important role

and contribution of the Judiciary of Tanzania in expanding the concept of public interest litigation in Tanzania and consequently violated the concept of separation of powers.

3. Whether in construing *Section 4 (3) of the BRADEA as amended,* an Act of Parliament can override a provision of the Constitution and as a result rendering the provision of the Constitution superfluous.
4. Whether in construing *Section 4 (4) of the BRADEA*, the said Section can be noticed to infringe Constitutional principles of separation of powers, rule of law and good governance.
5. Whether in construing *Section 4 (5) of the BRADEA*, the said Section can be noticed to limit access to Constitutional remedies provided for in the Constitution.
6. Whether it is Constitutionally justifiable for an act of Parliament to introduce limitation of enjoyment of basic and fundamental rights guaranteed by the Constitution.

Whereupon, the Petitioner prayed for the following relief(s):

1. Declaration that in enacting *Section 4 (2), (3), (4) and (5) of the Basic Rights and Duties Enforcement Act as amended* is inconsistent with *Article 13 (2) and 26 (2) of the Constitution of the United Republic of Tanzania* and consequently unconstitutional and/or void.

2. Declaration that in enacting *Section 4(2) and (3) of the Basic Rights and duties Enforcement Act as amended*, the Respondents undermined the important role and contribution of the Judiciary of Tanzania in expanding the concept of Public interest litigation in Tanzania and consequently the said Section is unconstitutional, null and void.
3. Declaration that *Article 26 (2) and Article 30 (3)* introduce into the Constitution two distinct fundamental rights and those rights were intended by the framers of the Constitution to be distinct and separate and not intertwined and therefore *Section 4 (3) is unconstitutional*, null and void.
4. Declaration that *Section 4 (4)* breaches the Constitutional principles of separation of powers, rule of law and good governance and therefore unconstitutional, null and void.
5. Declaration that unconstitutional violation has no alternative available remedies other than those granted by the Constitutional Court and therefore the provisions of *Section 4 (5) of BRADEA* are unconstitutional, null and void.
6. Declaration that a Section in an act of Parliament that attempts to limit or derogate the enjoyment of a fundamental right enshrined in the Constitution is outrightly invalid and of no effect.

Further, the Petitioner prayed for the hereinafter orders:

(a) That, *Section 4(2), (3), (4) and (5) of the Basic Rights and Duties Enforcement Act as amended* is inconsistent with the Constitution of the United Republic of Tanzania for violating *Article 13 (2) and (4), 13 (6) (a), 26 (1), and 26 (2) of the Constitution.*

(b) That, *Section 4 (3) of the Basic Rights and Duties Enforcement Act as amended* is inconsistent with the Constitution of the United Republic of Tanzania for violating *Article 26 (2) and 30 (3) of the Constitution.*

(c) That, *Section 4 (4) of the Basic Rights and Duties Enforcement Act as amended* is inconsistent with the Constitution of the United Republic of Tanzania for violating *Article 26 (1) of the Constitution.*

(d) That, *Section 4 (5) of the Basic Rights and Duties Enforcement Act as amended* is inconsistent with the Constitution of the United Republic of Tanzania for violating *Article 13 (6) (a) and 26(1) of the Constitution.*

(e) That, parties who intended to file a Constitutional Petition under *Article 26 (2)* need not show/demonstrate personal interest.

(f) That, each party to bear its own costs because this Petition is filed in Public interest and with a view to assist

the Court to advance its mandate of promoting human rights jurisprudence within Tanzania.

(g) Any other relief this Hon. Court may wish to grant.

The Petition was supported with the Affidavit of admissibility sworn by the Petitioner Onesmo Olengurumwa.

II. Preliminary Objections

In reply to the Petition, the Respondent raised preliminary legal points of objections to the effect that:

1. The Petition is incompetent for contravening the provisions of *Section 6 of the Basic Rights and Duties Enforcement Act, Cap. 3, R.E. 2019.*
2. The Affidavit in support of the Petition is incurably defective for contravening *Order XIX Rule 3 of the Civil Procedure Code, Cap. 33 R.E. 2019*; and

In due course of arguing the Preliminary Objection, the Respondent raised another ground of objection, namely:

3. That the Petition is untenable for being frivolous, vexatious and offends *Article 26 (2) of the Constitution of the United Republic of Tanzania 1977 as amended.*

This ruling will decide the afore three legal objections which have been disposed by way of written submissions. The submissions of the Respondent were drawn and filed by George N. Mandepo,

Principal State Attorney. The reply submissions were drawn and filed by John Seka, Advocate for the Petitioner.

1. Submission on first ground of objectionS

a. Arguments of the Respondent on the first point of objection

The major contention by the Respondent was that this Petition is incompetent as it does not meet the requirements of the provisions of *Section 6 of the BRADEA which* reads:

> A Petition made under this Act shall set out:
> (a) The name and address of the Petitioner;
> (b) The name and address of each person against whom redress is sought;
> (c) The grounds upon which redress is sought;
> (d) The specific Section in Part III of Chapter One of the Constitution which are the basis of the Petition;
> (e) Particulars of the facts, but not the evidence to prove such facts, relied on and;
> (f) The nature of the redress sought.

Perturbed by the mandatory terms of the provision of *Section 6 of the BRADEA,* the Respondent argued that the framer of the BRADEA law considered seriousness of the Constitutional provisions thus one cannot easily challenge through the door of

Bill of Rights without first complying with the provisions of same Constitution particularly *Article 26 (2)* which provides as follows:

> *26 (1) Every person has the duty to observe and to abide by this Constitution and the laws of the United Republic.*
>
> *(2) Every person has the right, in accordance with the procedure provided by law, to take legal action to ensure the protection of this Constitution and the laws of the land. (Emphasis added).*

According to the Respondent, the provisions above entail that any person complaining against the violation of basic rights is required: *First*, to abide with the law to bring the Petition under the BRADEA. *Second*, the BRADEA itself imposes the limitation regarding enforcement of the basic rights under *Section 8 of the BRADEA* as regards to the jurisdiction of the High Court's on bill of rights cases. *Third*, BRADEA through *Section 10 and Rule 12 (1) of its Rules, 2014,* limits hearing of the case through panel of three Judges, this is as opposed to normal Civil Cases.

It was further submitted by the Respondent that the word "set out" as used in *Section 6 of the BRADEA* is defined in the **Black's Law Dictionary, Bryan A. Garner, 11th Edition at page 1649** to mean "...*to recite, explain, narrate, or incorporate (facts or circumstances)*...". From that definition, the above quoted

provisions of the law therefore demand that the Petition shall incorporate each of the above mentioned items in an orderly manner. To the contrary, the matter at hand is far from containing the same. The Petition contains extraneous matters including issues and questions for determination while some of the required contents per the provisions of *Section 6* are missing in the Petition.

In furtherance to the alleged incompetence of the Petition, Respondent submitted that the Petition specifically misses a part containing grounds upon which redress is sought. Even the part on specific Section in *Part III of Chapter One of the Constitution* which are the basis of the Petition is not clearly articulated in the Petition as the Petitioner has just mentioned the Articles of the Constitution without linking them with the impugned provisions. This therefore makes the Petition incompetent for contravening the provisions of *Section 6 of the BRADEA.*

The Respondent maintained that it was the intention of the Parliament for the Petition to contain all the items referred to in *Section 6 of the BRADEA*, that is why it is expressly indicated so. The Respondent called upon this Court when interpreting the provisions of *Section 6 of the BRADEA*, to confine itself into the ordinary meaning of the same. The Respondent cited the case

of **East African Development Bank v. Blue Line Enterprises Limited**, Civil Appeal No. 110 of 2009, Court of Appeal of Tanzania, (Unreported), in which the Court had this to say:

It has been established and we believe there is ample authority for saying so, that our first assumption in reading the words of any text is that the author is using them in their ordinary meaning'.....the Courts, therefore, under the ordinary meaning rule of statutory construction are obliged to determine the ordinary meaning in the absence of a reason to be rejected in favour of some other interpretation (Emphasis supplied).

It was further maintained by the Respondent that the Petitioner has described himself as having experience in litigating human rights within Tanzania and has previously petitioned before this Hon. Court, this shows that he is well aware of what a petition should contain, only that he omitted intentionally to include the contents of the petition as required by the law. Thus, the Petitioner is not at liberty to choose which contents are important and ought to be included in the petition, he is duty bound to comply with the procedural requirements.

b. Reply submission of the Petitioner in respect of the first point of objection

The Petitioner in submitting against ground number one advanced two reason: *Firstly*, this is not a novel point but a point that has already been decided by this Court vide Masoud, J in the case of **Onesmo Olengurumwa v. Attorney General.** Miscellaneous Civil Cause No. 24 of 2019 (unreported) and; *secondly*, that the use of the word *shall* in a statute is not always mandatory as pleaded by the Respondent but it is dependent on circumstances of each case and each statute.

According to the Petitioner, in the case of **Onesmo Olengurumwa** (*supra*), the Respondent herein raised a similar point of Preliminary Objection arguing that the Petition in that case was incompetent. The High Court after taking note that the Preliminary Objection **is pervasive and repetitive** decided to provide a lengthy and detailed exposition so at to provide future guidance. In that decision, this Court through Masoud, J went into great length to explain the legal import of *Section 6 of BRADEA* by delving on the import of *Section 6d and 6e* that:

> In relation to the allegation as to the failure of the petition to conform to *Section 6(d) and (e) of the BRADEA,* it is worthwhile to not that the general scheme of *the BRADEA and Basic Rights and Duties Enforcement Rules, 2014 (the*

rules) made thereunder *does not provide a specific format that a Petitioner must conform to when petitioning the Court against any allegation of Constitutional violation.* It is prudent to say that had it been important to prescribe the format, which must be religiously adopted in any petition, the same would have been clearly prescribed as a schedule to the BRADEA or to the Rules made under the BRADEA. Examples of such format being provided as Form A etc. abound; I need not mention them here.

In the absence of such format, it is only *Section 6 of the BRADEA* that one has to have regard to when drafting his petition. Of significance is that the petition so drafted must set out the name and address of the Petitioner; the name and address of each person against whom redress is sought; the grounds upon which redress is sought; the specific sections in *Part II of Chapter One* of the Constitution which are the basis of the petition; particulars of facts, but not the evidence to prove such facts, relied on; and the nature of redress sought, as set out in the above provisions.

The provisions of *Section 6(d) & (e) of the BRADEA* complained about by the Respondents that were not complied with in the present petition cater for the contents

relating to provisions of the Constitution alleged to be violated and contents relating to facts relied on in the petition. The question is whether the petition runs short of such contents. I have had to examine the petition in the light of *Section 6 (d) & (e) of the BRADEA and rule 2(2) of the Rules* which related to demands of attaining substantive justice and realizing the basic rights and duties contained in the Constitution.

It is clear to me that the provisions of the Constitution allegedly violated by the impugned provisions are apparent on the petition. They are apparent from the first to the second page where the Petitioner set out Constitutional questions to be determined by the Court. They are also evident in the second page of the petition in the section where the Petitioner sets out the ground on the basis of which the Petitioner is made, so is at page three and four respectively on the declarations and orders sought. On this aspect, it is my firm view that the petition took into account, the provision of *Section 6(d) of the BRADEA* later on in the case of Onesmo. (Emphasis applied)

Hon. Masoud, J at page 8 decided the fate of the Preliminary Objection by dismissing the Preliminary Objection for not being merited.

According to the Petitioner, it is clear from the decision of the Court in **Onesmo Olengurumwa Case** (*supra*) that there is no prescribed format for filing a case by way of an originating summons unlike in the case of a petition whose format is prescribed and detailed by BRADEA. What can be gleaned from the decision of the High Court in Onesmo is to seek to discover if the essential requirements contained in Section 6 are present in the originating summons.

Re-borrowing a leaf from the approach taken by Masoud, J in Onesmo Olengurumwa, the Petitioner implored this Court to apply the same wisdom in this suit by reviewing the petition in the light of the questions posed, reliefs and orders sought and determine that there exists clear grounds upon which the petition is founded.

It was the Petitioner's firm view that there is no confusion in that by a quick review and glance at the petition, the Court will discover the following grounds on which the petition is hinged which are formulated by way of questions:

(a) That, *Section 4 (2) of the Basic Rights and Duties Enforcement Act Cap. 3 (R.E. 2019)* (hereinafter "BRADEA") as amended is inconsistent with *Article 26(1), 13 (2), (4) and 13 (6) (a) of the Constitution of the*

United Republic of Tanzania of 1977 as amended and consequently unconstitutional, null and void.

(b) That in enacting *Section 4 (2) of the BRADEA as amended*; the Respondent undermine the important role and contribution of the Judiciary of Tanzania in expanding the concept of public interest litigating in Tanzania and consequently violated the concept of separation of powers.

(c) That in construing *Section 4 (3) of the BRADEA as amended*; an Act of Parliament can override a provision of the Constitution and as a result rendering the provision of the Constitution superfluous.

(d) That in construing *Section 4 (4) of the BRADEA*, the said section can be noticed to infringe Constitutional principles of separation of powers, rule of law and good governance.

(e) That in construing *Section 4 (5) of the BRADEA,* the said section can be noticed to limit access to Constitutional remedies provided for in the Constitution.

(f) That it is not justifiable for an act of Parliament to introduce limitation of enjoyment of basic and fundamental rights guaranteed by the Constitution.

The Petitioner implored further on the use of "shall" by citing another decision of the Court of Appeal of Tanzania in the case

of **The Director of Public Prosecutions v. Freeman Aikael Mbowe & Another (Crim Appeal No. 420 of 2018) [2019] TZCA 1 – (Reported in Tanzlii)**. In this decision, the Full Bench of the Court of Appeal restated the position to the effect that; the use of the word shall is not always mandatory: The Court said the following at page 13 and 14 of the typed ruling:

> Recently, relying on what was decided in Bahati Makeja (supra) in the case **Vuyo Jack v. The Director of Public Prosecutions, Criminal Appeal No. 334 of 2016** (unreported), the Court concluded that, though Section 38 (2) of the CPA requires an exhibit seized pursuant to a search and seizure to be submitted to the magistrate, *failure to do so would not impeach the piece of documentary evidence because the use of word "shall" is not always mandatory but relative* and is subjected to Section 388 of the CPA. (Emphasis supplied).

In **Freeman Mbowe's Case,** the Court of Appeal reiterated the function and import of the word shall in a statute by saying at page 15 of the typed decision:

> In addition, in the light of what we said in Bahati Makeja (supra) *it is our considered view that, the use of the word "shall" under Section 362 (1) of the CPA is permissive and not mandatory in the circumstances.* (Emphasis supplied).

In another decision of the Court of Appeal to wit **Fortunatus Masha v. William Shija and Another** [1997] TLR 41 which had stated that the use of the word shall does not necessarily mean it is mandatory but is depends on the circumstances of each case. The Court of Appeal restated the position thus at page 43 of the reported decision:

> We entirely agree with Mr. Makani's submission. *We think that the use of the word "shall" does not in every case make the provision mandatory. Whether the use of that word has such effect will depend on the circumstances of each case.* For our part we think that the *word 'shall' in Rule 76 (3) does not have the effect of making that provision mandatory, nor do we think that Parliament can have intended so.* (Emphasis added)

The same position had earlier been restated in the unreported decision of **Chiriko Haruni David v. Kangi Alphaxard Lugola and 2 Others,** Civil Appeal No. 36 of 2012, CAT at Dar es Salaam (Unreported) whereby the full bench of the Court held that:

> *Where the word shall is used, such word shall be interpreted to mean the function so conferred must be performed.* (Emphasis supplied).

The Court of Appeal in **Kangi Lugola** (*supra*) went on to hold that; the use of the words "shall" and "May" is not always the determination factor. Regard must always be given in the content object matter and object of the statutory provision in question, in determining whether the same is mandatory or directory/discretionary.

In reaching this decision in **Kangi Lugola,** the Court of Appeal was inspired by its previous full bench decision in the case of **Bahati Makeja v. Republic** Criminal Appeal No. 118 of 2006 (Unreported). In the latter case, the Court of Appeal noted *that it is not always the case that where the word shall is used that should mean that the function must be performed.*

Looking at the provisions of *Section 6 of BRADEA* and in the absence of a format for originating summons it was the Petitioner's submission that the word shall as used in the section doesn't spell mandatory compliance especially in a situation where the petition when read as a whole clearly demonstrates presence of a clear and discernible cause of action through which a reasoned decision of the Court can be arrived at.

As argued in the foregoing paragraph the Petitioner contended *that the Respondent was able to appreciate the nature of the Constitutional petition and what it seeks to achieve and on that score, the Petitioner cannot be faulted on the grounds that he*

brought an incompetent petition. It was the Petitioner's submission, that if at all, the petition appears not be clear, then it is to the advantage of the Respondent when the petition is argued on its merits.

The Petitioner was of submission that the Petitioner has substantially complied with the provisions of *Section 6 of BRADEA by setting out the grounds upon which the redress is sought in the form of questions to be answered by the Court.* In support of the argument, the Respondent cited the case of **Citibank Tanzania Ltd v. Tanzania Telecommunications Co. Ltd & 4 Others**, Civil Application No. 64 of 2003, Court of Appeal of Tanzania (Unreported) in which it was held at page 19 that:

> The mere fact that an issue is of Constitutional significance is not a licence for disregarding procedural rules.

Another cited authority by the Petitioner was the case of **Paul Mgana v. the Managing Director Tanzania Coffee Board,** Civil Appeal No. 82 of 2001 (Unreported) at page 6-7 the Court of Appeal had this to say:

> *It is common knowledge that rules of procedure being handmaid of justice, should be complied with by each*

and everybody ...whether the case involved a Constitutional right as the Appellant urged or not, so long as the provisions of Rule 83(1) are mandatory going to the root of the matter, there is no way in which the appellant could be exempted from complying with the rule. (Emphasis supplied).

c. Analysis on the first point of objection and decision thereof

Having carefully gone through the submissions of both parties, I believe that I am called upon to consider whether there is a set out standard format in filling a petition brought by way of originating summons. I must confess to have faced difficulty in dealing with this matter in view of the ruling of this Court in the case of **Onesmo Olengurumwa v. Attorney General.** Miscellaneous Civil Cause No. 24 of 2019 (*supra*). However, a reading of the ruling in *Miscellaneous Civil Cause No. 24 of 2019* suggests that the Preliminary Objection was on none complying with the requirement of *Section 6d and 6e of the BRADEA.* In this petition the objection is that the petition is incompetent as it does not meet the requirements of the provisions of *Section 6 of the BRADEA.* Therefore, the instant objection is not only limited to the two paragraphs under *Section 6* (*supra*) but the whole format and skipping of some paragraphs thereon. As

properly argued by the Respondent, as far as *Part III of Chapter One of the Constitution* is concerned, the Petitioner just mentioned the Articles of the Constitution without linking them with the impugned provisions.

Further, though it is proper as stated by this Court in *Miscellaneous Civil Cause No. 24 of 2019* that the format of the petition is not clearly prescribed as a schedule to the BRADEA or to the Rules made under the BRADEA in a format such as Form A, the reading of *Section 6 of the BRADEA* is clear that the intention of the Parliament was to mandate every Petitioner to comply with all the contents therein. These are: *One*, the name and address of the Petitioner. *Two*, the name and address of each person against whom redress is sought. *Three*, the grounds upon which redress is sought. *Four*, the specific Section in Part III of Chapter One of the Constitution which are the basis of the petition. *Five*, the Particulars of the facts, but not the evidence to prove such facts, relied on and. *Six*, the nature of the redress sought.

I am of further observation that our society consists of a variant group of people with different level of understanding about Constitutional matters. If such society is left to petition the way it deems fit, there will be chaos in handling Constitutional matters. Some petitions may even be brought by way of letters.

It will erode the seriousness expected in Constitutional petitions. Therefore, abiding with the contents spelt out under *Section 6 of the BRADEA* serves the purpose even though the format is not in the schedule.

Taking into consideration of all the contents of *Section 6 of the BRADEA*, I am inclined to agree with the Respondent that though this is a Constitutional petition, Petitioners must confirm with all the requirements. All the contents spelt out in *Section 6 of the BRADEA* must be included in the petition. Without going into the dabate on the use of 'shall' and 'may', which has been exhausted by the Court of Appeal in among other cases, **the case of Kangi Lugola** (*supra*), it is the findings of the Court that none compliance with the contents required under *Section 6 of the BRADEA* will lead to striking out of the petition. It must be noted further that the requirement of complying with the contents under *Section 6 of the BRADEA* is not a matter of technicalities. It is a handmaid of Constitutional justice.

Given my findings above with respect to complying with the contents spelt out under *Section 6 of BRADEA*, I am satisfied that the objection raised by the Respondent is merited.

2. Submission on second ground of objection

a. Argument of the Respondent on the second point of objection

It was the Respondent's submission that the Affidavit in support of the petition contains extraneous matters by way of legal arguments and points of law. Paragraph 7 of the Affidavit contains legal argument as it is a statement which needs to be substantiated. Paragraph 7 of the Affidavit in support of the petition reads as follows:

> That having read the amendments introduced in the BRADEA, I noticed that the amendments have undermined the utility and importance of the exclusive Constitutional role of the Judiciary of Tanzania to interpret the Constitution.

The Respondent added that paragraph 4 of the Petitioner's Affidavit contains extraneous matter by way of a proposed bill which has been quoted by the Petitioner. Further, it is contrary to *Order XIX Rule 3 of the Civil Procedure Code, Cap. 33 R.E. 2019.* For ease of Reference paragraph 4 read:

> That being a trained lawyer, I made reference to the statement of objects and Reasons contained in the proposed Bill that was introduced in the Parliament as Bill

Supplement No. 1 dates 29.05.2020 and I gathered from the statement of objects and reasons the following intention of the government in introducing the amendments highlighted in paragraphs and 3b, 3c and 3d:

Part III of the Bill proposes to amend *the Basic Rights and Duties Enforcement Act, Cap. 3.* It is proposed to amend *Section 4* to empower the Court to reject an application which has not complied with *Article 30 (3) of the Constitution of the United Republic* which requires a person who intends to institute proceedings under Part III of the Constitution to establish that his right or duty owed to him has introduced a new subsection which requires all suit or matters against the Heads of Organs of the State to be instituted against the Attorney General. The proposed amendment intends to enhance the provisions relating to immunity of Heads of Organs of States.

The contents of Affidavit are stipulated under *Order XIX Rule 3 of the Civil Procedure Code Cap. 33 [R.E. 2019]* which reads as follows:

> *Affidavit shall be confined to such facts the deponent is able of his own knowledge to prove, except in interlocutory application, on which statements of his belief may be admitted.*

As to what an Affidavit should contain, the Respondent cited the case of **Uganda v. Commissioner of Prisons, Ex Parte Matovu** [1966] 1 EA 514, it was held that:

> *[...] as a general rule of practice and procedure, an Affidavit for use in Court being a substitute for oral evidence, should only contain statements of facts and circumstances to which the witness deposes either of his own knowledge or from information which he believes to be true. Such an Affidavit should not contain extraneous matters by way of objection or prayer or legal argument or conclusion.* (Emphasis supplied)

In the case of **Jumuiya ya Wafanyakazi v. Shinyanga Region Cooperative Union 1997 TLR 200 (HC)**, the Court observed at page 202 that:

An Affidavit is essentially a substitute for oral evidence, and should only contain statements of fact and circumstances. That being the case then the Respondent was in common view with Sir Udo Udoma, C.J in the case of **Commissioner of Prisons, Ex-parte Matovu** (*supra*), that such an Affidavit must not contain extraneous matter by way of objection or prayer or legal argument or conclusion.

In the case of **Juma Busiyah v. The Zonal Manager, (South) Tanzania Post Corporation**, Civil Application No. 8 of 2004, Court of Appeal (unreported), at page 7 it was held that:

> ...an Affidavit is essentially, facts and therefore evidence, not points of law or legal arguments...

The Respondent argued that noncompliance of the aforementioned legal requirement renders the Affidavit in support of the petition incurably defective hence incompetent Petition. In discussing the import of *Order XIX Rule 3 of the Civil Procedure Code* and its applicability, the Respondent cited the case of **Mantrac Tanzania Limited v. Junior Construction Co. Ltd and Nchambi's Transporters Ltd**, High Court of Tanzania at Dar es Salaam, Misc. Commercial Cause No. 70 of 2017 (unreported) at page 6, where it was stated that the requirements set out in *Order XIX Rule 3 (1) of the Civil Procedure Code* are mandatory and must be complied with by a deponent who verify the Affidavit. The Court, at page 8 went on to observe that:

> ...the only option left to the Court is to strike out the application on the grounds that, the verification clause in support of the application is defective for contravening the mandatory provisions of *Rule 3 (1) of Order XIX of the Civil*

Procedure Code Cap. 33 R.E. 2002 which governs statutory requirements of the Affidavit.

b. Reply submission by the Petitioner on the second point of objection

The Petitioner was of reply submission and position that what is contained in paragraph 4 and 7 are proper averments of the facts and by any stretch of imagination, don't fall into the category of legal arguments nor extraneous matters.

The provision of the *Order XIX Rule 3 of Civil Procedure Code, Cap. 33 R.E 2019* reads that:

> Affidavit shall be confined to such facts the deponent is able of his own knowledge to prove, except in interlocutory applications, on which statements of his belief may be admitted.

It was the Petitioner's contention that the Respondent replied in a clear demonstration of understanding that there were no extraneous matters. The reply to the Affidavit read as follows:

> That the contents of paragraph 4 of the Petitioner Affidavit are noted to the extent that the Bill Supplement No. 1 dated 29.05.2020 that was introduced in the parliament contain object and reasons from the said amendments, the rest of the facts are denied. The Respondent states that the

purpose of the Amendments as stated in the Bill is to facilitate proper enforcement of the provisions of the Constitution.

Basing from the response by the Respondent in their Counter Affidavit the Petitioner was of view that one could easily see that what was raised by the Petitioner was not an extraneous matter but rather an important legal matter which is central in resolving the Constitutional dilemma presented by the Petitioner objected expunging the said paragraph 4 for the following four reasons:

a) Firstly, the said paragraph is a mere statement and understanding of the Petitioner as far as the reasons and object of the Amendment is concerned. The Respondent has stated that the statement is extraneous matter, which we do not agree to. Upon closer reading, the complained paragraph is a mere statement of facts known to the deponent who has pleaded to being exposed as a lawyer who has regularly Petitioned to this Court for determination on Human Rights issues which need to be expounded further during the hearing.

   It was the Petitioner's submission that it is premature to start showing relevance and reasoning at this stage it is the work to be done during hearing of the matter on merit.

b) Secondly, the Respondent just stated that the Affidavit contains extraneous matter, without stating to what extent or rather explaining what extraneous matters are within the paragraph be it legal arguments, conclusions or prayers.

It was the Petitioner's submission that absent that explanation, it is not safe for the Court to proceed on the line urged by the Respondent.

c) Thirdly, the said paragraph does not contain law or legal arguments but it is just a quotation from the Bill, and under our laws it is elementary principle that a Bill is not the law, it is just a suggestion of the coming of the law or the law in pipeline and in order for the Court to know the intention of the framers of the law has to look in the bill and especially in objective and reasons as states within the bill and therefore citing a bill is not the same as citing a law, in that regard we submit that citing bill is not forbidden under the law. We submit that this is not extraneous matter but a matter whose relevance will be shown during hearing of the case on merit and not at this stage.

d) Fourthly, the paragraph is statement of fact by the Petitioner which has been asserted by the Petitioner and Respondent by the Respondent in the Counter Affidavit, it is up to the Court to determine this matter when the hearing of the issue on merit comes. We submit that the

matter is a factual issue otherwise Respondent could not have successfully contradict the same on his Counter Affidavit.

As regards paragraph 7 of the Affidavit, The Petitioner argued that it has not violated any written law or principles of the Affidavit on the strength of the following reasons:

a) Firstly, that the paragraph is a mere statement and understanding of the Petitioner on the Amendment according to his own knowledge as a trained lawyer.
b) Secondly, that the Respondent just stated that the Affidavit contains extraneous matter by way of legal argument without showing the alleged legal argument within the paragraph. We submit that we have not seen any extraneous matter and the Petitioner believes that the statement is important in determination the petition which is pending before this Honourable Court and the same will be articulated in the submissions on the merit of the case.
c) Thirdly, that the said paragraph does not contain law or legal argument but is it just a mere statement by the Petitioner and it is a factual statement and not legal argument or conclusion, this is the Petitioner's understanding on the amended law as stated in his Affidavit the same cannot be termed to be legal arguments. If they

were at all factual, the Respondent could not have successfully filed a reply to the paragraph.

d) Fourthly, the paragraph is statement of fact by the Petitioner which has been asserted in his Affidavit and countered by the Respondent's Counter Affidavit. It is up to the Court to determine this matter when the hearing the issue on merits.

e) Fifthly, that the said issue is so trivial as it is difficult to define and determine the difference between legal argument and factual argument.

To buttress the afore reasons, the Petitioner cited, the case of **Hammers Incorporation Co. Ltd v. The Board of Trustees of Cashewnut Industry Development Trust Fund**, Civil Application No. 93 of 2015 Court of Appeal of Tanzania at Dar es Salaam (unreported), whereby a Preliminary Objection was raised against a paragraph which states that:

> *the hearing and determination of this application is a matter of extreme* argent.

The Court of Appeal of Tanzania after considering several of its decision with argues to the contents of the Affidavits, the Court held at page 15 of the ruling:

As correctly submitted by Mr. Majembe, *the averments in paragraph 2 and 9 of the Affidavit, includes the urgency of the matters, appear to be mere factual assertions of fact within the personal knowledge of the deponent for the reasons stated therein.* For this reason, we find the Affidavit in support of the notice of motion to be legally proper. We overrule, therefore, the fourth point of Preliminary Objection. (Emphasis added).

In view of the Petitioner, assuming it is true that paragraph 4 and 7 of the Affidavit are legal arguments and not mere assertion of the understanding of the Petitioner, the Petitioner argued in the alternative that the remedy available to the Court is to expunge the complained paragraph and let the Court proceed to determine the Petition on the basis of the remaining paragraphs. To back up the position, the Appellant cited the Court of Appeal decision in the case of **Msasani Peninsula Hotels Limited and 6 Others v. Barclays Bank Tanzania Limited and 2 Others**, Civil Application No. 192 of 2006 (Court of Appeal of Tanzania at Dar es Salaam) Unreported. In the Msasani Peninsular case (*supra*), the Court while making reference to Civil References Nos. 15 of 2001 and 3 of 2002, **Phantom Modern Transport (1985) Limited v. D.T. Dobie (Tanzania) Limited** noted the following at page 8 of the typed decision:

It seems to us that where defects in an Affidavit are inconsequential, those offensive paragraphs can be expunged or overlooked, leaving the substantive parts of it intact so that the Court can proceed to act on it. (Emphasis supplied)

Since the petition is supported by 13 paragraphs, it was the Petitioner's submission that even if the Court were to expunge/overlook paragraphs 4 and 7 of the Affidavit the remaining paragraphs are capable of supporting the determination of the Petition on merit.

c. **Analysis and determination of the second ground of objection.**

I have taken consideration of the arguments from both parties. Though denied by the Petitioner, Paragraph 7 of the Affidavit contains legal argument that the amendments introduced in the BRADEA, have undermined the utility and importance of the exclusive Constitutional role of the Judiciary of Tanzania to interpret the Constitution. Such averment is legal which requires substantiation. In the case of **Godgives Transport Ltd and Another v. Commercial Bank of Africa,** High Court of Tanzania, Commercial Division, Commercial Case No. 135 of 2018 the Court struck out the application on inter alia reason that the

supporting Affidavit contained legal arguments and opinions.

Similarly, in the case of **Mustapha Raphael v. East African Gold Mines Ltd,** Court of Appeal Civil Application No 40 of 1998 at Dar es Salaam the Court held that:

> An Affidavit is not a kind of superior evidence. It is simply a written statement of oath. *It has to be factual and free from extraneous matters such as hearsay, legal arguments, objections, prayers and conclusions.* (Emphasis added)

Indeed, paragraph 4 of the Petitioner's Affidavit contains extraneous matter by way of a proposed bill which has been quoted by the Petitioner. The remedy thereof, as conceded by the Petitioner, is to expunge the said paragraphs. The High Court in the case of **Omari Ally Omary v. Idd Mohamed and Others**, Civil Revision No. 90 of 2003 (Dar es Salaam Registry), (Unreported). Massati, J. (as he then was) had these to say:

> From the authorities contained in the decision of the Court of Appeal in **Lalago Cotton Ginnery and Oil Mills Company Limited v. LART,** Court of Appeal of Tanzania at Dar es Salaam, Civil Application No. 8 of 2003. **Phantom Modem Transport (1985) LTD**

v. D.T. Dobie (Tanzania) Ltd, Court of Appeal of Tanzania at Dar es Salaam, Civil References No. 15 of 2001 and 3 of 2002 and **Manorial Aggarwal v. Tanganyika Land Agency Ltd. & Others,** Court of Appeal of Tanzania at Dar es Salaam, Civil Reference No. 11 of 1999.the position of the law can safely be summarized as follows:

> As a general rule *a defective Affidavit should not be acted upon by a Court of law,* but in appropriate cases, where the defects are minor, the Courts can order an amendment by way of filing fresh Affidavit or by striking out the Affidavit *but if the defects are of a substantial or substantive nature, no amendment should be allowed as they are a nullity, and there can be no amendment to a nothing.*

At the strength of the above authorities, I hereby expunge paragraphs 4 and 7 of the supporting Affidavit for containing arguments and extraneous matters respectively. Admittedly, the remaining paragraphs of the supporting Affidavits are sufficient for determination of the Petition to its merits.

3. Submissions on the third ground of objection

a. Argument by the Respondent on the third ground of objection

It is on the point that the Petition is untenable for being frivolous, vexatious and offends Article 26 (2) of the Constitution of the United Republic of Tanzania 1977 as amended. *Section 8 (2) of the BRADEA* provides that:

> The High Court shall not exercise its powers under this section if it is 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 vexations.

The Respondent cited the case of **Ado Shaibu v. Honourable John Pombe Magufuli (President of the United Republic of Tanzania) and 2 Others,** Misc. Civil Cause No. 29 of 2018, High Court of Tanzania (unreported) at page 32, Feleshi, JK had this to say:

> ...discerning from decision of **Wangai v. Mugamba and Another** [2013] 2 EA 474, 418, the Petition is said to be frivolous when it is without substance, groundless or fanciful and vexatious when it lacks bonafide claim, it is

hopeless or offensive and to cause the opposite party unnecessarily anxiety trouble and expensive.

It was the Respondent's contention that the claims by the Petitioner neither have substance nor bonafide claim, hence frivolous and vexatious in respect of the Petitioners' contention that the impugned provisions narrow down access to justice by indigent persons. The Respondent was of submission that the Parliament has enacted *the Legal Aid Act, No. 1 of 2017* for the provision of legal aid to indigent persons on both, Civil and Criminal matters. Under the said Act, advocates, lawyers and paralegals can provide legal aid services to indigent persons on behalf of a legal aid provider. Therefore, indigent persons are well accommodated under the said Act.

As regards the Petitioner's contention that he cannot protect the Constitution in the manner prescribed by the same, the Respondent submitted that the same Constitution demands under *Article 26 (2)* that a person shall abide with the procedural requirements when taking legal action in the protection of the Constitution, this includes compliance with the BRADEA as it provides for the procedure for enforcement of basic rights and duties.

b. Reply submission by the Petitioner on the third ground of objection

The Petitioner called upon the Court to take judicial notice of the meaning of the phrases frivolous and vexatious. On that note, the Petitioner joined hands with the Respondents in stating that this Court in **Ado Shaibu's case** (*supra*) quoted by the Respondent categorically laid down grounds and criterial of what would amount to being frivolous and vexations. In **the Ado Shaibu case** (*supra*), the Court noted that a matter is considered *frivolous when it is without substance, groundless and or fanciful* the Court went on the sate that a matter will be considered *vexatious when it lacks bonafide claim, it is hopeless and or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expenses.*

It was the Petitioner's submission that it was wrong and quite un-procedural for the Respondent to ground his third Preliminary Objection on a document which is administrative in nature and which had become functus when the case was declared fit and proper before the Court.

Even if it is true that the Respondents erred and wrongly relied on the Affidavit of admissibility and indeed there is material within the Petition to justify the contention. The Petitioner submitted that the Petition before the Court cannot be said to be

frivolous because as noted in **Ado Shaibu**, it has substance, it is firmly grounded on clear principles of laws and is not fanciful. Also, on the basis of **Ado Shaibu's case** that this Petition is not vexatious because it is bonafide and was filed with bonafide intention of seeking the Court's position on the manner and style of amending the Constitution through the backdoor. Further, the Respondent has been able without any trouble to respond to all the paragraphs of the Petition and without any semblance of anxiety, unnecessary trouble, nor any expense.

The Petitioner was of argument that what is before this Court is a serious Constitutional matter in which the provision of the Act of Parliament is amending and limiting, through the backdoor, the utility of *Article 26 (2) of the United Republic of Tanzania Constitution of 1977* as amended from time to time. This being the serious Constitutional claim cannot be said to be frivolous and vexatious. Therefore, Tanzania's Constitution guarantees the public a right to challenge violations of fundamental human rights and public interest the right which is has been taken away by *the Written Laws (Miscellaneous Amendment) Act No. 3/2020.* The Court has duty to protect Constitution and every act which violates the provision of the Constitution can be challenged in Court and not otherwise. The Petitioner cited the case of **Attorney General v. Barker** [2000] 1 F.L.R 759 in which it was held that:

> The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the Court, meaning by that a use of the Court process for a purpose or in a way which is significantly different from the ordinary and proper use of the Court process. Those conditions are in my view met in this case. (Emphasis supplied).

It was the Petitioner's further submission that the Court has on several occasions strongly pointed out a notion that the Court as the guardian of the Constitution has a duty of interpreting the law and protecting the Constitution. In the course of protecting the Constitution, the matter before the Court cannot be said to be frivolous and vexatious. The Petitioner cited the decision of the Court of Appeal in the case of **Ally Linus and Eleven Others v. Tanzania Harbours Authority and Another** [1998] T.L.R 5 at page 12 where it stated that:

> It is clear that the basic structure of the Constitution of this country vests the judicial power of the state in the judicature, that is, judicial arm of the Government. The

function of the interpreting the laws of the state is a judicial function and for that reason the judicial arm of the Government has the final word about the meaning of the laws of this Country. (Emphasis supplied).

The Petitioner cited another case of **Hamisi Masisi and Others v. The Republic** [1985] T.L.R. 24 at page 30 where the High Court stated:

> the duty of the Court in the following words: *one of the duties of this Court is to protect the Constitution of the land.* (Emphasis added)

According to the Petitioner, one of the provisions being complained of, is *Section 4 (2) of BRADEA as amended.* In view of the Petitioner, this amended section has severe implications on the protection of Constitution and Human in Tanzania in general because it tends to limit the number of public-spirited persons who want to bring the claim for the interest of the public. In the given scenario it is absurd to say the matter before the Court which intends to protect the Constitution and the role of the Court in protecting the same if frivolous and vexatious. *Section 8 (2) of BRADEA* provides:

> *The High Court shall not exercise its powers under this section if it is 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 vexations. (Emphasis supplied).

It was the Petitioner's submission that this being the Constitutional matter the law is very clear; it is only this Court which has jurisdiction to entertain the matter of this nature and it cannot be said is frivolous and vexatious.

The Petitioner reiterated that there is no any other adequate means of redress available to the Applicant from this Court. Thus, the matter cannot be said to be frivolous and vexatious as the Respondent has even failed to point out in his submission in support of Preliminary Objection the said alternative means or redress.

It was maintained by the Petitioner that in interpreting Constitutional matters and where there is issues of technicality, the Court should look into a wider and broad interpretation and borrow the wisdom offered by the Court of Appeal of Tanzania in the case of the **Judge In-charge High Court Arusha versus N.I.N Munuo Ng'uni** [2004] TLR 44 where at page 44 and 45, the Court was of the position that:

Procedural irregularities should not vitiate proceedings if no injustice has been occasioned and that rules should not be used to thwart justice because as held by Biron J. that rules of procedures are handmaids of justice and should not be used to defeat justice [Emphasis supplied]

The Petitioner winded up his submission by arguing that the spirit shown above be reflected to this Constitutional case which is for and on behalf of all Tanzanians. The Petitioner, therefore, invited this Court to overrule all the points of Preliminary Objections and pave way for the Petition to be determined on merits.

c. Analysis and determination of the third ground of objection

With due respect to the Petitioner, the jurisdiction of the Court in determining competence of the Petition including its admissibility is vested through a single Judge assigned to determine the same and not the Registrar. As argued by the Respondent, the utility of the document could not be finalized by the Registrar.

In any case, I find the third objection is prematurely preferred. As properly stated by both parties, a matter is considered frivolous when it is without substance, groundless and or fanciful. However, the assessment of the Petition on whether it

is frivolous or vexatious or useless or hypothetical, can fairly be made upon hearing of the matter on merits. It cannot be determined at preliminary stage. It is premature to entertain the objection at this stage. Determination of the instant objection will require more substantiation on the point, which in return, it will erode the whole essence of Preliminary Objection.

As stated by the Petitioner, in the case of **Hamisi Masisi and Others** (*supra*), the Court was of findings that one of the duties of this Court is to protect the Constitution of the land. The protection thereof cannot be guaranteed if Petitions are thrown out at preliminary stages without affording parties the right to be heard substantively. Petitions should only be thrown out at preliminary stages only if the objections are pure points of law. If the objection is the mix of facts and law, prudence will dictate the matter be handled to its finality.

III. Conclusion

In the light of the findings, I have made in this ruling, I grant the first and second points of objections. Basing on the effect of the first point of objection, I hereby strike out the Petition with costs.

Y. J. MLYAMBINA

JUDGE

17/12/2020

Ruling delivered and dated 17th day of December, 2020 in the presence of Counsel John Seka assisted by Ferdinand Kiheche for the Petitioner and in the presence learned State Attorney Nalindwa Sekimanga for the Respondent. Right of Appeal explained.

Y. J. MLYAMBINA

JUDGE

17/12/2020