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

MISC. CIVIL CAUSE NO. 1 OF 2020

IN THE MATTER OF THE CONSTITION OF THE UNITED REPUBLIC OF TANZANIA, 1977 (AS AMENDED FROM TIME TO TIME)

AND

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

AND

IN THE MATTER OF A PETITION TO CHALLENGE THE PROVISION OF SECTION 6 (1) OF THE PUBLIC AUDIT ACT, NO. 11 OF 2008, AS BEING UNCONSTITUTIONAL

AND

IN THE MATTER OF A PETITION TO CHALLENGE THE ACT OF THE 1ST RESPONDENT TO REMOVE THE 4TH RESPONDENT FROM THE POSITION OF THE CONTROLLER AND AUDITOR GENERAL AND REPLACE HIM WITH THE 3RD RESPONDENT EVEN THOUGH THE 4TH RESPONDENT HAD NEITHER REACHED 60 YEARS OF AGE AS BEING UNCONSTITUTIONAL

BETWEEN

ZITTO ZUBERI KABWE ----------APPLICANT

VERSUS

THE PRESIDENT OF THE UNITED REPUBLIC

OF TANZANIA ---------- 1ST RESPONDENT

THE ATTORNEY GENERAL ---------- 2NDRESPONDENT

CHARLES KICHERE ---------- 3RD RESPONDENT

PROF. MUSSA JUMA ASSAD ---------- 4TH RESPONDENT

RULING

MLACHA, J.

The Petitioner, ZITTO ZUBERI KABWE filed a petition against the PRESIDENT OF THE UNITED REPUBLIC OF TANZANIA, THE ATTORNEY GENERAL, MR. CHARLES KICHERE and PROF. MUSA JUMA ASSAD (herein after to be referred to as the 1st, 2nd, 3rd and 4th respondents, respectively). It is a Constitution Petition based on the Constitution of the United Republic of Tanzania, 1977 (as amended from time to time), the Basic Rights and Duties Enforcement Act, [Cap. 3 R.E 2002] (hereinafter referred to as BRADEA) and the Basic Rights and Duties Enforcement (Practice and Procedure) Rules, 2014. It was lodged by Originating Summons which was supported by the Affidavit of the Petitioner, Zitto Zuberi Kabwe.

The Petitioner prays for the following orders: -

a) *The provisions of Section 6 (1) of the Public Audit Act (No. 11 of 2008) ("the Public Audit Act") is unconstitutional for offending the provisions of Article 144 (1) of the Constitution, and for being incompatible with Section 6 (2) (a) of the Public Audit Act that extended the tenure of office of the Controller and Auditor General ("the CAG") from 60 years in line with the permission given by Article 144 (1) of the Constitution;*

b) *That the removal of the 4th Respondent from office by the 1st Respondent, under the pretext of expiration of hs tenure on the 3rd of November, 2019, is unconstitutional as the 4th Respondent had not reached the mandatory retirement age 65 years as required by Section 6 (2) (a) of the Public Audit Act in line with Article 144 (1) of the Constitution;*

c) *That the appointment of the 3rd Respondent is unconstitutional as the 4th Respondent, who was a substantive holder had not reached the mandatory retirement age of 65 years.*

d) *That the 4th Respondent is the substantive holder of the office of the Controller and Auditor General of the United Republic of Tanzania as he has not reached the mandatory age retirement age of 65 years;*

e) *That the 3rd Respondent is not the Controller and Auditor General of the United Republic of Tanzania;*

f) *Cost be provided for by the Respondents; and*

g) *Any other relief the Hon. Court may in circumstances deem fit to grant.*

Service of the petition was dully affected to the respondents as required by the law who filed Reply to Petition and counter affidavits. The 1st, 2nd and 3rd respondents went a step further and lodged a preliminary objection with six points which is the subject of this ruling.

Hearing of preliminary objections was heard by written submissions and parties complied with the schedule of filling them. I had time to read the submissions and supporting authorities repeatedly. I enjoyed reading the submissions and would wish to thank the counsel for the research and time taken to prepare them. I will make a reference to the

submissions and cases cited by learned counsel in the course of deliberations but where I will not refer to any part of them or make reference to any case, it does not mean that what was written has not been considered. Each and every paragraph of the submission and attached authorities was given a close eye and due consideration.

The points set forward for decision were coached to read thus;

(i) The petition is bad in law for containing omnibus prayers.

(ii) The petition is frivolous, vexatious and contrary to the provision 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.

(iii) The petition is incompetent for having been preferred against a wrong party.

(iv) The petition is misconceived, incompetent and bad in law for being brought in contravention of section 1 (2), 3, 4 and 6 (1) (d) of BRADEA.

(v) The petition is totally defective for contravening the provisions of section 8 (4) of the BRADEA; and.

(vi) 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. 2002.

I plan to discuss to the points as arranged, though as we shall see later, there is some relation in the points particularly on grounds one, two and five making a distinct separation impossible.

Submitting in ground one, Ms Alisia Mbuya, Principal State Attorney had this to say; that, the Petitioner seeks to challenge the constitutionality of (i) section 6 (1) of the Public Audit Act and (ii) the removal of the 4th respondent from office. Counsel submitted that the remedies to the two aspects are available in two different forums. That whereas the former can be challenged through a constitution petition, the latter can only be challenged through judicial review of administrative action. She cited to the court two cases namely; **JUMA YUSUFU V. MINISTER OF HOME AFFAIRS** [1990] TLR 80 and Sanai **MURUMBE AND ANOTHER V. MUHERE CHACHA** [1990] TLR 54 to point out circumstances under which prerogative orders can be issued. Counsel stressed that the Petitioner has included two separate prayers in his

petition which are required to be persuaded through two separate forums using separate procedures and processes. She added that, the outcome of the two reliefs have different effects. She concluded that this kind of petition does not deserve the determination of court and has to be dismissed.

Submitting in reply on this ground, Mr. Nyaronyo Mwita Kicheere had this to say; that in an action for challenging the removal of the 4th Respondent from office, the proper way is not to proceed under judicial review but by filling a constitutional petition as was done in this case. Referring to **CHRISTOPHER MTIKILA V. AG** [1995] TLR 31 counsel submitted that, the Petitioner seeks to protect the constitution itself (i.e. article 144 (1) and section 6 (2) of the Public Audit which can only be done through a constitutional petition and not otherwise. Further counsel submitted, the Petitioner cannot proceed under the Law Reform (Fatal Accidents and Miscellaneous Provisions Act Cap. 310 R.E 2002 because he has no personal interest in the matter as required by rule 4 of the Rules. His case is a Public Interest Litigation which required the filling of a constitution petition, he submitted.

In a rejoinder submission which was drawn and filed by

Mr. George N. Mandepo, Principal State Attorney, emphasis was put that the two aspects are district and could not be mixed together or else the petition becomes omnibus.

I have examined the submissions and the authorities supplied closely. It appears that the complaint is twofold; one that the acts of the 1st respondent cannot be challenged in a constitution petition and second that the mixing of the two prayers made the petition omnibus and bad in law. As it is clear from the submissions, counsels are in agreement that section 6 (2) of the Public Audit Act can be challenged in a petition of this nature. They agree that the Petitioner had mandate to lodge a constitution petition to challenge its legality. Their problem is on the second part; whether the Petitioner could challenge the powers of the 1st Respondent through a constitutional petition and whether the two prayers could be mixed together. Whereas, Mr. Nyaronyo has the view that it can be done, the Principal State Attorney say it is not.

Having examined the matter carefully, with respect to the Principal State Attorneys, I think it was the question of choice. The petitioner could lodge a petition against the constitution

or under judicial review. He never opted to challenge the acts of the 1st Respondent under judicial review. He opted to do in a constitution petition. I think we cannot force him to do what he did not opt to do. Neither do I think it could be proper to proceed under judicial review. I think that the proper course is what was opted by the Petitioner and not otherwise.

Much as what is said by the State Attorney may sound good theoretically, but I don't see its practical side. Neither have I managed to see any authority from within or outside the country showing that the acts of the President, who is also the Head of State, can be challenged under judicial review. I think there is no way in which this court can issue orders of certiorari and mandamus against the President. It does not sound to be logic and practicable. And if it is done, it will amount to an interference to his power which is not allowed under the Principles of Separation of Power and Heath in any system of good governance. Orders of certiorari, prohibition and mandamus are usually directed to Ministers, Permanent Secretaries, Directors, Heads of Executive Agencies, Regional Commissioners and the like. They are never directed to the office of the President who is also the head of State. The best

approach is, and has always been, to measure his actions against the constitution which put him in office and on which he took the oath to protect and preserve. And where this court can have enough evidence that a particular act or omission of the President has contradicted the constitution, it has power to declare the act or omission unconstitutional. Its powers are limited to a declaration. It cannot compel him to do or refrain from doing anything.

Once the declaration is made, that a certain act of the President is unconstitutional, it will be upon the President and his advisers to take steps to remedy the situation. The courts cannot compel him. If anything, it is the Parliament which can institute impeachment proceedings under Article 46A of the constitution, if it can deem fit to do so. Again here the court cannot compel the Parliament to do so. It will act on its own following the procedure laid down in the constitution and the relevant law. Judicial review cannot therefore, be used to measure the acts of the President removing and replacing the CAG.

Further to that, as correctly pointed out by Mr. Nyaronyo, this is a public interest litigation. It is not a private litigation.

Proceedings under judicial review will require the Petitioner to prove the way he has been or is likely to be affected personally by acts of the 1st respondent, something which is not the case here. The Petitioner has no personal interest in the matter. He is just a member of the public who want to see that the provisions of the Law and the constitution are respected. His interest is to see that the act of the 1st Respondent of removing and replacing the CAG are in line with the constitution. The best remedy in such a situation is to file a constitution petition because in judicial review he will lack the *locus standi* for want of personal interest. The petition is thus not omnibus as alleged. That disposes ground one.

In ground two, the court is invited to find that the petition is frivolous, vexatious and contrary to section 8(2) of BRADEA. Section 8(2) prevents the court to act on frivolous and vexations matters. Submitting to the court, Ms Alicia Mbuya, Principal State Attorney, said that the Petitioner is not personally affected by the acts of the 1st respondent and that, the 4th Respondent who is alleged to have been affected has not complained, making the petition frivolous and vexations contrary to section 8(2) of BRADEA which bar such petitions. Citing **ZITTO ZUBERI KABWE AND 2 OTHERS VS.**

AG, Miscellaneous Civil Cause No. 31 of 2018, counsel had the view that this was a fit case for judicial review in which case the Petitioner had to prove personal interest. She proceeded to cite a paragraph from **ADO SHAIBU V. HON. JOSEPH POMBE MAGUFULI AND 2 OTHERS**, Miscellaneous Civil Cause No. 29 of 2018 where it was held that section 8 (2) of the Act does not vest jurisdiction to this court on frivolous and vexations applications. She also quoted another paragraph from **WANGAI V. MUGAMBA AND ANOTHER** (2003) EA 474, AT 481 quoted in **ADO SHAIBU** (supra) where it was said that a petition is frivolous when it is without substance or groundless and fanciful and it is vexatious when it lacks cause and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expanses. She described this petition to be of this type and argued the court to dismiss it.

In reply Mr. Nyaronyo submitted that, the court is asked to declare that the 4th respondent who has not reached the mandatory retirement age of 65, to be still the CAG and that the person who was unconstitutionally appointed to take the post of CAG in his place, is not the holder of the position. He said that these prayers are declaratory and are capable of

being issued by the court in the exercise of its powers under section 64(5) of the constitution. He said that this court has power to make the declaration orders and it need not be moved under judicial review. That, it was enough to move it under section 26 (2) of the constitution as it was done. And therefore the petition is not frivolous and vexations.

In rejoinder it was submitted that not all infringement of the law call for constitutional litigation. There are other forums and this petition was said to fit better under judicial review not as a constitutional matter.

I have tried to examine the rival submissions carefully. I think that this point should not detain us longer. I think it is all about the question of approach. The Petitioner has opted to take it as a constitutional matter. The learned State Attorney has the view that the nature of the reliefs sought and their effects which are to remove the 3rd Respondent and return the 4th Respondent to his office as an CAG, call for a judicial review and not a constitutional petition. And that this matter being a matter for judicial review call for personal interest which he does not have. They view him as a busy body, a person with an evil mind. They see his petition as being

frivolous and vexations in total contravention of section 8 (2) of BRADEA because of that.

With respect on again, I don't think that it is proper to take the Petitioner to a route which he did not opt. Neither do I see anything wrong to the route he has taken. As pointed out above, this is not an issue for judicial review. It is an issue for public interest litigation in the safeguard of the constitution, for which the Petitioner, as a citizen of this country, has mandate to file under Article 26 (2) of the Constitution. With these remarks ground two is found to be baseless and dismissed.

In ground 3, the petition is challenged for having been filed against a wrong party. It was submitted by the Principal State Attorney that the petition is against article 46 (2) and (3) of the Constitution of the United Republic of Tanzania which restrict the institution of proceedings against the sitting President in any court in respect of anything done or not done or purported to have been done or not done by him in his personal capacity as an ordinary citizen whether before or after he assumed Office of President. Counsel proceeded to submit that if any person has claims against the President

or against his office such person should sue the Chief Secretary and not the President. The Chief Secretary is the CEO of the Office of the President and therefore the right person to be sued; counsel stressed. She went on to submit that the provisions of section 7 of the BRADEA envisage that matters under the Act can be brought only against the Government, Minister, Deputy Minister, Permanent Secretary, Commissioner or other servant of the Government and **not against the President.** She added that, claims under the BRADEA for basic rights cannot be brought against the President whether such action is brought in his official or personal capacity. And that having filed it against Article 46 (2) of the constitution, this petition has to be dismissed.

In reply to the submission made on the third point, counsel for the Petitioner said that the 1st Respondent has been sued in line with the directives of this court made in **ADO SHAIBU** (supra) which said that he cannot be sued in his personal name but in his official name. Counsel submitted that, Article 46(2) of the constitution prohibits filling criminal or civil proceedings against the President in his personal capacity as an ordinary citizen. He went on to submit that, the provision does not bar the filing of constitutional petitions against him

in his official capacity. He proceeded to submit that, the present petition is not against the 1st Respondent in his personal capacity; it is rather challenging the constitutionality of his actions in respect of the removal of the 4th Respondent as CAG before he reaches the age of 65, as provided under article 144(1) of the constitution, and his replacement by the 3rd Respondent, which was done by him in his official capacity.

Counsel for the Petitioner went ahead and said that there is no law in this country which prevents the challenging of actions of the President or which directs that the person to be sued is the Chief Secretary. He stressed that Article 46(1) of the constitution only prohibits to prosecute him criminally. Further that what is in section 7(2) of BRADEA is merely a requirement to serve a copy to the Attorney General and not a restriction. He went on to submit that, the requirement of a 30 days' Notice which is contained in article 46 (2) of the constitution pertains to civil cases, not constitutional cases, which have their own procedure.

In rejoinder, the Principle State Attorney reiterated that Article 46(2) has restriction to institute Civil Proceedings against the

sitting President in any court in respect of anything done or not done or purporting to have been done or not done by him in his personal capacity as an ordinary citizen whether before or after he assumed the Office of President. And that, if anything, the Chief Secretary is the proper person to be sued not the President. He concluded that, this case cannot proceed because it was filed against a wrong party.

I have taken time to think about this matter. I have also read authorities relied by the parties on this point. This court had an opportunity to examine the question whether there can be a constitutional case against the President of this country in **ADO SHAIBU** (supra). In that case the president was sued in his name; JOHN JOSEPH POMBE MAGUFULI with the title of his office fixed in brackets. The court had the view that it was wrong to sue the president in his personal name in a constitutional case. My brother Feleshi JK had this to say at page 28:

> *"... by bracketing the official title of the president ... next to the first respondent's personal name that by itself does not make the 1st respondent, in his personal capacity, qualify to be impleaded in his*

official capacity of the president of the United Republic of Tanzania as forcefully argued by the petitioner's counsel."

The court went on to say as follows:

"... he mounted his pleadings and predicted the reliefs sought ***against a private person*** *whom upon ceasing holding the office of president cannot perpetually discharge the presidential mandates and responsibilities...* ***no public interest litigation of this kind can be sustained because it was mounted against wrong parties to the said petition.***" *(Emphasis added)*

It was therefore clear before Feleshi JK that, the President of this country can be a party in a public interest litigation but has to be pleaded in his official capacity not as a private person. I share the views of Feleshi JK, but I propose to go a step further for future guidance. I will start by reproducing Article 46 of the constitution in full. I will use the English version. Article 46 reads thus;

"46 (1) During the President's tenure of office in

accordance with this constitution it shall be prohibited to institute or continue in court any ***Criminal Proceedings whatsoever against him.***

(2) During the President's tenure of office in accordance with this constitution, ***no Civil Proceedings*** *against him shall be instituted in court in respect of anything done or not done, by him* ***in his personal capacity as an ordinary citizen*** *whether before or after he assumed the office of President, unless at least a* ***thirty days*** *before the proceedings are instituted in court,* ***notice of claim in writing has been delivered to him*** *or sent to him pursuant to the procedure prescribed by an Act of parliament, stating the nature of such proceedings, the course of action, the name, residential address of the claimant and the relief which he claims.*

(3) ***Except where he ceases to hold the office of president pursuant to the provisions of Article 46 A (10) it shall be prohibited to institute in court Criminal or Civil Proceedings*** *whatsoever against a person who was holding the office of president* ***after he ceases to hold such office for anything he did in his***

capacity as President *in accordance with this constitution." (Emphasis added)*

Article 46 (1) deals with criminal matters. The words used are clear. It is prohibited to institute any criminal proceedings against the sitting President. A sitting President cannot be an accused person in any criminal court. Much as the DPP has wide powers to mount criminal charges to any person but he cannot do so to a sitting president for anything done by him. The president has an absolute criminal immunity given by the constitution.

Article 46 (2) deals with civil liability. Reading through it, one can see that it restricts suing the President in any Civil Court in his **personal capacity as an ordinary citizen**. There is restriction here to send him to a civil court for wrongs done by him in his personal capacity, but it is not absolute. Two things must be noted here. **One**, the constitution restricts suing the President in his personal capacity not in his official capacity as President of the United Republic of Tanzania. **Two**, the constitution allows to sue the president in his personal capacity as an ordinary person, on civil matters which are personal in nature, subject to giving a **30 days' Notice**.

It means that, the President of this country can be sued for civil wrongs done by him in his personal capacity after issuing the 30 days' Notice of intension to sue which must be made in writing giving the particulars of the claim, the address of the claimant and the relief sought.

Article 46 (3) put a restriction to institute criminal and civil proceedings against a retired President for acts done or omitted to be done by him while holding the office of the President. It refers to actions done or omitted to be done by him while in office, in his official capacity. This restriction is wide but is subject to Article 46 A (10) which speaks about the resolution of the National Assembly to impeach him. It means that if the president is removed under a resolution of the Parliament made under Article 46 A (10), he can be charged criminally or sued in a civil court, as the case may be, for actions done or omitted to be done by him while in office.

It is therefore clear, with respect to the learned Principle State Attorney, that Article 46 (2) has no relation to constitutional petitions against actions of the President of the United Republic of Tanzania done in his official capacity. If there

was such a restriction, in my view, the whole purpose of rule of the law would be meaningless. The rule has always been that, the actions of the government and the President can be measured against the constitution and that is the logic behind the enactment of Article 26 (2) of the constitution. It follows that, actions of the President, and the Government as such can be tested against the constitution by any person through public interest litigation under Article 26 (2) as was in this case. The fourth ground is thus devoid of merits and it is dismissed.

In ground 4, the Petition is alleged to be misconceived, in competent and bad in law for being brought in contravention of section 1(2), 3, 4 and 6(1) of BRADEA. I have examined the argument for and against this point and I must admit that this was the most challenging ground. It stretched the muscles of my brain more than any ground. Counsel submitted that, whoever comes to court must make sure that the petition is in full compliance with section 6 of BRADEA because Article 26(2) of the constitution cannot be applied in isolation of section 6 of BRADEA as per **ADO SHAIBU** (supra). Counsel proceeded to submit that this constitution petition is not within the justiciable or enforceable part of the

constitution (articles 12 – 29) and therefore bad in law.

In reply, Mr. Nyaronyo made a submission calling the objection baseless. He said that section 1(2) has long been widened by judicial interpretation to cover all situations. He relied on the decision of this court in **ADO SHAIBU** (supra).

The problem here is that sections 1(1), 3, 4 and 6(d) of BRADEA say that the jurisdiction of the court is limited to PART III of the constitution meaning that Articles 12 – 29 only. Now whereas Article 26(2) which gives the right to file public interest litigation is well within Articles 12 – 29, Article 144(1) which is sought to be protected is outside the said Articles (12- 29). Now the Principle State Attorney is arguing forcibly that the present petition is not maintainable as it seeks to challenge something which is outside BRADEA. The counsel for the petitioner is not in agreement with him.

The principles of constitutional and statutory interpretation can be seen in many judicial decisions of this country and outside our jurisdiction. They are well known. Samatta CJ (rtd) had this to say in **JULIUS FRANCIS ISHENGOMA NDYANABO**:

> *"The Constitution of the United Republic of Tanzania is a living instrument, having soul and consciousness*

of its own as reflected in preamble and fundamental objectives and directive Principle of State Policy. ***Courts must therefore, endeavor to avoid crippling it by construing it technically or in a narrow spirit.*** *It must be construed in tune with the lofty purposes for which its makers framed it.* ***So construed, the instrument becomes a solid foundation of democracy and rule of law."*** *(Emphasis added).*

Lugakingira J (deceased, as he then was) had similar observations in **CHRISTOPHER MTIKILA V. AG** [1995] TLR 31. He observed thus:

> ***"a constitution must not be construed in a narrow and pedantic sense...*** *The principle hold that the entire constitution has to be read as an integrated whole, no one particular provision destroying the other but each sustaining the other". (Emphasis added).*

The judge went on and said:

> *"... it must be remembered that the operation of*

any fundamental right may be excluded by any other article of the constitution or may be subject to an exception laid down in some other article. In such cases, ***it is the duty of the court to construe the different Articles in the constitution in such a way as to harmonize them and try to give effect to all the articles as far as possible and it is only if such reconciliation is possible one of the conflicting articles will have yielded to the other****". (Emphasis added).*

The court is called upon to construe the constitution by looking at it as one document and avoid technicality or giving it a narrow spirit. I will examine the provisions in that line of Thinking.

The issue now is whether Article 26(2) can be construed so as to enable the petitioner to question a violation outside Articles 12 – 29.

This issue was raised before my brother Feleshi JK in **ADO SHAIBU** (supra) just the way it has been raised before me. He had this to say at page 31 of his ruling:

"Whereas this court subscribed to the submission by the respondent's counsel on the wanting cause of action, ***I respectfully disagree with them that public interest litigation can be narrowed to cover only breaches relating to Articles 12- 19 (sic) of the constitution.*** *This court wholly agrees with Ms Karume that the position of the law in* ***JULIUS ISHENGOMA FRANCIS VS. ATTORNEY GENERAL*** *(Supra) stands binding.* ***There is no dispute that it widened the scope of section 1(2) of the Act which also appear in section 4 and 6(d) of the same Act entitling anyone to file a petition under Article 26 (2) of the constitution for purposes of protecting the constitution and legality,*** *challenging 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". (Emphasis added)*

Having read the case of **JULIUS ISHENGOMA FRANCIS,** I agree with Feleshi, JK that the scope of section 1(2) of BRADEA was widened by the Court of Appeal to cover other Articles, outside article 12 – 29, in all matters of public interest litigation.

That disposes the objection but for what it worthy, I will move a step ahead. I have the view that limitations imposed in sections 1(2), 3, 4 and 6(d) go against the spirit of Articles 26(1) and (2) of the constitution. It brings no sense in putting an obligation to each and everybody to respect the constitution, and be ready to defend it, and at the same time enact a law which says that only one part of it is enforceable. I think there is need for the legislature to look at these provisions with the view of repealing and replacing them with provisions which will bring a safe guard to the whole constitution.

In ground five, the petition is accused of contravening section 8 (4) of BRADEA. This provision provides that the provisions of part VII of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act which relate to the procedure for and the power of the High Court to issue prerogative orders, shall not apply for the purposes of obtaining redress in respect of matters covered under the BRADEA. Counsel submitted that the petitioner in prayer (b) and (c) of the petition is challenging the removal of the 4th Respondent and replacement of the 3rd Respondent which is a matter fit for judicial review. It was therefore brought wrongly under

BRADEA in the light of section 8(4) of the Act. She referred the court to her submission in ground one for further details.

Submitting in reply to ground 5, the counsel for the respondent submitted that there is no authority from this country or elsewhere which shows that this court can declare any part of the law or acts as being unconstitutional under judicial review. He said that the reliefs sought in the petition cannot be obtained under judicial review. He argued the court to dismiss the objection.

In rejoinder, the Principal State Attorney submitted that judicial review would have allowed the Petitioner to challenge the way in which the alleged decisions were reached in a better way than through constitutional litigation.

I have reasoned out carefully over this issue. I think having ruled out that the Petitioner acted properly in filing a constitutional petition in respect of acts of the 1st Respondent in removing the 4th Respondent and replacing him with the 3rd Respondent, I will not have something more to say on this aspect. It follows that the contravention of section 8(4) of BRADEA is not real.

And finally, ground 6 challenge the Affidavit supporting the petition as being in contravention of rule 3 of **Order XIX** of the Civil Procedure Code Act, Cap 33 R. E. 2002. This rule requires the deponent to state facts which are of his **own knowledge** except on interlocutory applications where statements of his own belief may be admitted. Counsel submitted that the Affidavit of the Petitioner contains legal arguments in para 13 and 15. She said that these paras challenge the removal of the 4th respondent as the CAG who can only be removal upon attaining the age of 65 years or dies or commits acts incompatible with his office. She submitted that these statements require legal arguments to substantiate them which is a contravention of order XIX rule 3 of the CPC which require the deponent to give facts which are based on his own knowledge. Counsel went on to submit that para 17 has personal opinions. That the Petitioner opined that the 3rd respondent upon being appointed assumed office despite knowing that the 4th respondent had not reached the mandatory age of 65 years. She referred the court to **UGANDA V. COMMISSIONER FOR PRISON, EX-PARTE MATOVU** [1966] E.A 514 where it was held that an Affidavit should not contain extraneous matters by way of objection or prayer or

legal arguments or conclusion. She also referred the court to **AUGUSTINE LYATONGA MREMA AND OTHERSS V. AG AND OTHERS** [1995] TZHC 21 or [1996] TLR 273 where it was held that order XIX rule 3 requires affidavits to be confined to facts to the knowledge of the deponent. He also cited the case of **JUMUIYA YA WAFANYAKAZI V. SHINYANGA REGIONAL CO – OPERATIVE UNION** [1997] TLR 2002 on the same subject.

Submitting in reply, counsel for the respondent said that the Petitioner who is a member of parliament who participated in the debate which lead to the passing of the Public Audit Act has personal knowledge of the law. He is aware that the age limit of the CAG is 65 years. There is therefore nothing wrong in what he said, counsel submitted.

Counsel went on to submit that, the Affidavit of the Petitioner has no legal arguments, if anything it is the Counter Affidavit of the 1st, 2nd and 3rd respondents which has legal arguments. He added that even where it is held that the 3 paragraphs contradict the law of affidavits, they can be removed without offending the Affidavit. Alternatively, he argued the court to adopt the overriding objective principle and ignore the problem in the best interest of justice.

In rejoinder, the Principal State Attorney maintained that the paragraphs are fatally defective and must be expunged from the Affidavit. He cited the case of **SHIVJI KARIM MERANI V. KAMAL BHUSHAN JOSHI,** CAT Civil Application No. 80 of 2009 where it was held that an Affidavit which is incurably defective cannot support the application.

I have tried to examine the Affidavit in question carefully in line with the arguments raised by counsel. I have also examined order XIX rule 3 of the CPC. The paragraphs in question are 13, 15 and 17. It was argued in support of the objection that paras 13 and 15 do not contain facts to the knowledge of the deponent but contain legal arguments. The issue now if whether they contain facts to the knowledge of the deponent or contain legal arguments. The counsel for the deponent say that they contain information best known by the deponent because he participated in passing the bill which ended to be the law which fixed the retirement age of 65.

I think I should reproduce para 13 and 15 for easy of reference;

"13. That I do challenge the removal of the 4th respondent as the Controller and Auditor General

(CAG) who can only be removed from office upon attaining 65 years of age or dies in office, or commits acts incompatible with his office and is investigated with an independent panel that upon finishing its investigation finds him or her guilty of the charges and recommends his or her removal from office.

15. *That as a citizen I am under obligation to ensure that our country's constitution and laws made under it are adhered to and respected by all including the 1st respondent. I am further enjoyed to ensure that the natural resources of our country are assiduously managed and utilized and that the CAG is one of the officials that are supposed to ensure that those resources are assiduously utilized and for him, to discharge that duty his independence and security of tenure must be respected and protected".*

What is stated in para 13 is that the Petitioner challenges the removal of the 4th Respondent who can only be removed upon reaching the age of 65 years or dies or commits acts incompatible with his office, investigated and found guilty. These are not legal arguments. They are just facts which as

correctly submitted by Mr. Nyaronyo, they are to the best of his knowledge as an MP because he participated in passing the law which govern the situation.

Para 15 carry the message that as a citizen of the country he has the obligation to ensure that the country's constitution and Laws made thereunder are respected. These are mere facts to his knowledge. Even the words which follow do not cite any legal provision so as to amount to legal arguments. They are just mere facts which are to the best of his knowledge as an MP. Whether that is correct or not can be challenged in the Counter Affidavit, which was done, and is the subject of this court for decision in the end.

Para 17 is attacked as having personal opinions. It read thus;

> *"That, the 3rd respondent upon being appointed he assumed office despite knowing that the 4th respondent had not reached the mandatory age of 65."*

I could not see any personal opinion in this para. If anything, is the age of the 4th Respondent which is contained in his attached CV, which the deponent has an access to it as an

MP from the relevant authorities. I have the view that what is stated there is not an opinion but facts to his knowledge as an MP and member of the public. That said, the objection based on the defects on the Affidavit is dismissed.

In the upshot, with great respect to the Principle State Attorneys, on the reasons given above, all the objections are dismissed. Costs in course.

L. M. Mlacha

JUDGE

18.03.2020

Court: Ruling delivered this day of 18th March, 2020 in presence of Nyaronyo Kicheere and Nasson Godon, Advocates for Petitioner, Ms. Alicia Mbuya, Principal State Attorney and Narindwa Sekimanga, State Attorney for 1st, 2nd and 3rd Respondents and Beatrice Mapunda, Advocate for 4th Respondent.

HIGH COURT OF TANZANIA

L. M. Mlacha

JUDGE

18.03.2020