

TANZANIA / JUDGMENT

MADEREKA APPLICATION1

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IN THE HIGH COURT OF TANZANIA (DAR ES SALAAM SUB-REGISTRY) AT DAR ES SALAAM
MISC. CRIMINAL APPLICATION NO. 35786 OF 2025 (Originating from Economic Case No. 31824
of 2024 pending in the Resident Magistrate's Court of Dar Es Salaam at Kisutu) ARTHUR
FREDRICK MGONGO.....APPLICANT VERSUS
REPUBLIC..... RESPONDENT

RULING

19th & 26th February 2025 MWANGA, J. In the Resident Magistrate Court, Dar es Salaam at Kisutu, the applicant, Arthur Fredrick Mgongo, and another not subject to this application are charged with two counts of economic offenses, namely, Obtaining Money by False Pretence, Contrary to Section 302 of the Penal Code [Cap.16 R.E.2022] and Money Laundering; Contrary to Sections 12(1) (d) and 13(1) (a) of the Anti-Money Laundering Act, [Cap. 423 R.E 2022], read together with Paragraph 22 of the First Schedule to, and Sections 57(1) and 60(2) both of the Economic and Organized Crime Control Act, [Cap.200 R.E 2022]. The particulars of the offense are that, on diverse dates between 3rd day of May 2023 and 30th June 2023 within the City and Region of Dar 1 Es Salaam, with intent to defraud applicant and Hassan Salum Hassan did obtain money from Pascal Peter Ndemba amounting to Tanzania Shillings Eighteen Million (TZS. 18,000,000/=) through use of various modes by pretending to be transacting under Motor Vehicle Sale Agreements. In the second count, it was alleged that Applicant and Hassan Salum Hassan, on diverse dates between the 3rd day of May 2023 and the 30th June 2023 within the city and Region of Dar es Salaam, acquired money amounting to Tanzania Shillings Eighteen Million (TZS. 18,000,000/=), while they ought to know that at the time of receipt of such money is the proceeds of a predicate offense namely Obtaining Money by False Pretence; Through the assistance of his counsel, Mr. Peter Madeleka filed this application under the certificate of most extreme urgency, complaining that the respondent has been arbitrarily charged and that if the charges against him are not dropped, he will continue to suffer the irreparable loss of his freedom unjustifiably. Thus, in the chamber summons under the provisions of section 372 (1) of the Criminal Procedure Act Cap 20 R.E 2022, he implores this court to call for and examine the records of Economic Case No. 31824 of 2024, which is pending in the Resident Magistrate's Court of Dar Es Salaam at Kisutu for the purpose of satisfying 2 itself as to the correctness, legality, propriety of any finding or order recorded or passed and regularity of the said proceedings. For clarity, I find it apt to narrate the facts in the affidavit supporting this application. It was said that, on the 31st October 2024, the

applicant was arrested by police officers from Dar Es Salaam Central Police Station and remanded therein until he was arraigned in the Resident Magistrate's Court of Dar Es Salaam at Kisutu on the 8th November 2024. It is asserted that the charges are civil in nature, that is, motor vehicle sale agreement; thus, the Respondent herein criminally charged the applicant before first exhausting all the civil remedies available as the law requires. It is stated further that, had the respondent herein, firstly, exhausted all the civil remedies available before criminally charging the applicant, the applicant would not arbitrarily suffer irreparable loss of his freedom. Respondent filed a counter affidavit asserting that the case was totally criminal in nature and that there was no need to initiate a civil case before charging the applicant. When the matter came for hearing on 19th February 2025, the respondent did not enter an appearance. In contrast, the applicant appeared to be represented by Mr. Madeleka, a learned counsel. In support of the application, Mr. Madeleka started by citing the case 3 of Dinna Pantaleo Moshi vs. R, Criminal Application No. 11 of 2023, pages 12 and 13, and the case of Peter Madeleka Vs. R, Criminal Appeal No. 263 of 2022, on pages 14 and 15, where it was stated that this court has powers to revise the proceedings of the subordinate court. He submitted that, in the present case, the applicant wants to challenge the legality of the lower court proceedings, which include the charge sheet. Further, he said that the first count is obtaining money by false pretense, and the root of the charge is the existence of the sale agreement. Hence, it makes the claim a civil claim and not a criminal claim. It was his further submission that the law in section 4(3) of the (CPA) states that any claim of a civil nature shall not be taken criminally before exhausting the civil remedy. He added that, in the cases cited above, the prosecution has not exhausted the civil remedy for the charge against the applicant to be compliant with the law. Thus, all the proceedings are null and void. He was insistent that the said section is mandatory. Mr. Madeleka clarified the definition of compulsory as defined in black's Law Dictionary 10th edition, on page 1106, which means a command, required, or pre-emptive. If not completed, it is void. He believed that the DPP violated section 8A of the NPS Act, where he needed to do justice. He also cited Article 59B (5) of the Constitution. According to him, the fact 4 that there is a contract, whether deceived or not, becomes civil, and after exhausting the civil remedy if the applicant agrees to pay the debt, the republic has no right to exhaust the crime in all remedies until the civil remedy fails. He maintained that the charges related to the civil before exhausting the civil remedy, the DPP had breached the law and the Constitution. I have carefully considered the affidavit and submission by Mr. Madeleka, the main issue being whether this court is empowered under section 372 (1) to revise proceedings before the subordinate court in P1 at the committal stage. For clarity, the section states; "The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any subordinate court." As to whether the section can be applicable under the situation, Mr. Madeleka submits that it is appropriate as the subordinate court can admit or reject the charge and read it to the accused person. As alluded to above, he supported his stance in the case of Dinna Pantaleo Moshi vs. R and Peter Madeleka vs. R; he was insistent that, as per the charge sheet, 5 the last phrases. "...pretending to be transacting under Motor Vehicle Sale Agreements" shows that the case is civil in nature. I have no query on the

application of section 4(1) of CPA, as cited by Mr. Madeleka. Likewise, it is undoubtedly that this court has revisional powers under section 372 (1) of the Criminal Procedure Act Cap 20 R.E 2022, as the counsel relates. The remaining issue is whether, in this case, the court at the committal stage revised the proceedings of the subordinate court. It is a well-settled principle of law that this court is clothed with jurisdiction to deal with a matter that is in subordinate court upon a committal order by the subordinate court committing the accused for trial. In the absence of a committal order, there is no way that this court can chip in the proceedings for committal under the umbrella of supervisory powers before committal, as Mr. Madeleka would like this court to believe. This principle was adumbrated in the apex court decisions in the case of Republic vs. Farid Hadi Ahmed & Others, Criminal Appeal No. 59 of 2015 CAT-Unreported), Republic vs. Dodofi Kapufi & Another, Criminal Revision No. 1 &2 of 2008 CAT and DPP Vs Bookeem Mohamed @ Ally and Others (Criminal Appeal No 217 OF 2019). For instance, in the case of Republic vs. Farid Hadi Ahmed & Others, 6 Criminal Appeal No. 59 of 2015 CAT -Unreported) the apex court stated that; “When sections 245(3) and 246(2) of this Act are read together, it becomes clear that in committal proceedings, the magistrate has no other role to perform in this regard beyond the mere requirement to cause the statements to be read to the accused, before it may commit such person for trial to the High Court. In that vein, we hold the view that those matters to which were raised before the RM's court on 3.9.2014 were legal matters to which the RM's court had no jurisdiction to decide. Those matters ought to have been reserved with a view of raising them in the High Court upon being committed to that court for trial. In another case of Republic vs Dodofi Kapufi & Another, Criminal Revision No. 1 &2 of 2008 CAT, the apex court had this to say; “..it is difficult to appreciate how the High Court in the instant revision could have the power to grant bail to the applicants, pre committal and in the absence of any committal order under section 246(1) of the CPA, which would have submitted them to its jurisdiction. Not only that, Save for exhibit to the High Court of an information by the D.P.P. under section 93 (1) of the CPA, section 178 creates a bar against the taking of cognizance by the High Court of a criminal case, 7 unless the same has been properly investigated by a subordinate court and the accused person has been duly committed to it for trial. In the above case on page 24, the court of appeal cited with approval the case of Republic vs. Asafu Tumwine, Criminal Revision No 1 of 2006 CAT - Unreported) where it was held that; “It is only a specific order of committal at the end of this exercise [i.e., committal proceedings] which formally and properly submits an accused to the jurisdiction of the High Court.” Lastly, the case cited by Mr. Kimweri, SSA, is the case of DPP vs. Bookeem Mohamed @ Ally and Others (supra), where the court of Appeal referred the case of Republic vs. Dodoli Kapufi (supra) thereafter, the court made a finding that; “Guided by the above-cited authority, it is our view that if the High Court, in Dodoli Kapufi's case (supra), was found to have no powers to grant bail to the applicants on a matter which was still under committal proceedings without prior order which could have vested jurisdiction on it, the matter at hand is even more serious. We say so because, one, there was no illegality, incorrectness or improprieties which ought to be corrected in terms of section 372 of the CPA. Neither was there any order, finding, or 8 sentence which needed to be corrected in terms of section 373 (1) (a) of the CPA. [See also Domiano Qadwe's case (supra)]. Two, there was no committal order by the subordinate court as the matter was still in the pre-committal state, which the High Court was prohibited

even to take cognizance of it". Given the above position, it is clear that this court has no jurisdiction to revise the matter, which is in subordinate court for pre-committal stages—the case of Peter Michael Madeleka Vs. Republic, referred to this court by the applicant's counsel, is distinguishable from this application on one central point: in the former, the subordinate court had jurisdiction to deal with the matter, while in this case, the subordinate court has no jurisdiction as the matter is in pre-committal stage the proceedings available is only holding charge sheet. In the upshot, applying the principles stated in the apex court cases cited above to the facts of this case, it is apparent that this court is not clothed with jurisdiction to revise the proceedings at pre-committal stages. Doing so would be going against a well-established principle by the apex court, the principle of stare decisis, which dictates this court to respect and abide by. 9 That said, I believe the application was prematurely brought before this court; thus, I am proceeding to strike it out for want of jurisdiction to entertain it. To avoid doubt, I order the case in Economic Case No. 31824 of 2024, pending before the Resident Magistrates Court of Dar es Salaam at Kisutu, to proceed with the necessary stages. It is so ordered accordingly. H. R. MWANGA JUDGE. 26/02/2025 COURT: The ruling was delivered at Dar es Salaam on February 26th , 2025, in the presence of Ms. Phoibe Magiri, learned State Attorney for the Respondent and the absence of the Applicant. H.R. MWANGA JUDGE 26/02/2025 10

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