

TANZANIA / JUDGMENT

sioi graham solomon vs icbc standard bank plc others 2023 tzhc 19121 10 july 2023

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TZHCDECIDED
10 July 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (DAR ES SALAAM MAIN REGISTRY) AT DAR ES SALAAM MISCELLANEOUS CIVIL CAUSE NO. 29 OF 2021 IN THE MATTER OF THE CONSTITUTION 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 2019) AND THE BASIC RIGHTS AND DUTIES ENFORCEMENT (PRACTICE AND PROCEDURE) RULES G.N NO. 304 OF 2014 AND IN THE MATTER OF A PETITION TO FULFIL CONSTITUTIONAL DUTY UNDER THE PROVISIONS OF ARTICLE 27(2) OF THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA 1977 AS AMENDED BETWEEN SIOI GRAHAM SOLOMON.....PETITIONER VERSUS ICBC STANDARD BANK PLC (Formally known as Standard Bank P L C) 1st RESPONDENT STANBIC BANK TANZANIA LIMITED..... 2nd RESPONDENT THE MINISTER OF FINANCE AND PLANNING..... 3rd RESPONDENT THE ATTORNEY GENERAL OF UNITED REPUBLIC OF TANZANIA..... 4th RESPONDENT THE ATTORNEY GENERAL OF THE UNITED KINGDOM.....5th RESPONDENT CHIEF SECRETARY TO HER MAJESTY'S TREASURY (HM Treasury)..... 6th RESPONDENT THE DIRECTOR OF THE SERIOUS FRAUD OFFICE(SFO)...7th RESPONDENT 1

RULING

24th May & 10th July 2023 Rwizile, J The petitioner Sioi Graham Solomon filed this petition under Articles 26(2) and 27(1)(2) of the Constitution of the United Republic of Tanzania of 1977 (hereinafter referred to as the Constitution). The petitioner is praying inter alia a declaration order that being the citizen of the United Republic of Tanzania has a duty under Article 27(1) and (2) of Constitution to safeguard the property of the state authority and/or all property collectively owned by the people and combat all forms of waste and squander thereto, for a declaration that all funds collected by the Government of United Republic of Tanzania through taxation pursuant to Article 138(1) of the constitution are the property of the state authority ,and collectively owned by the people as envisaged under Article 27(1) and

- (2) of the Constitution and last but not least an order against the 1st and 2nd respondent jointly and severally to pay (disgorge profit) the sum of ILLSD 8,400,000 to the Government of the United Republic of Tanzania through the 3rd respondent after a declaration that the same is the property of the state and the people of Tanzania made under a voidable contract between the Government of United Republic of Tanzania and 1st and 2nd respondents. The basis of this petition has been stated and averred in the originating summons and an affidavit of the petitioner respectively. It is the petitioner's averment in para 3, 4, and 6 of his affidavit that, sometime in 2012/2013 the Government of the United Republic of Tanzania (GOT) entered into an agreement with 1st and 2nd respondents to raise funds through loan in sum of USD 600,000,000.00 and the said amount was received by the Government. He averred more that it was agreed that the GOT will pay 2.4% of a principal sum to the 1st respondent as a commission for procuring subscription and payment of the Loan Notes as per para 5 of the affidavit. Further, he asserted that in 2015 the 1st respondent entered into a deferred prosecution agreement with the 7th respondent and admitted to having committed an offence of bribery in relation to the loan agreement which was signed between the 2nd respondent and the GOT. The petitioner alleged under para 9, 9.2 that the 1st respondent was ordered by the Crown Court of Southward, UK to pay among others the sum of USD 8,400,000.00 to the benefit of the UK Consolidated Fund being disgorgement of profit, the amount which is in dispute in this matter. Moreover, it is averred under para 11 to 18 of the affidavit that a contract obtained by fraudulent means becomes voidable at the option of the injured party. According to the petitioner, the injured part in this matter is the GOT. He then claimed that the amount of USD 8,400,000.00 paid to the United Kingdom was supposed to be paid to the GOT since the same was the interest obtained from the loan of USD 600,000,000.00 taken by the GOT. Petitioner asserted more that USD 8,400,000.00 was the property of the State Authority owned by the people of Tanzania of which as per the Constitution the petitioner has a duty to combat any forms of waste and squandering. It is from the background that this petition was filed. This application is riled by 9 preliminary points of objection filed by the 1st, 2nd, 3rd and 4th respondents to wit;
- i. The petition has been wrongly brought by a private person seeking that another private person specifically, ICBC Standard Bank Pic (the 1st Respondent be compelled by this Honorable Court to perform a public duty imposed under the constitution of the United Republic of Tanzania under which the petition is brought ii. The petitioner, being a private person, has no locus standi to initiate a constitutional action against the 1st Respondent, another private person who resides out of the jurisdiction of this Honourable Court and is not covered within the scope of the constitution of the United Republic of Tanzania,; under which the constitutional action is based. Hi. The petitioner has failed to demonstrate that any of the provisions of Articles 12 to 29 of the constitution have been, or are likely to be, contravened in relation to him contrary to the provisions of section 4(1) of the Basic Rights and Duties Enforcement Act - Chapter 3 of the Laws of Tanzania, Revised Edition 2019 (the "Enforcement Act") iv. The petition violates mandatory requirements of section 4(2) of the Enforcement Act - as amended by provisions of Section 7(b) of the (Enforcement

AmendmentAct"), for failure by the petitioner to demonstrate the effect of the alleged contravention of Articles 12 to 19 of the constitution on his person, and for failure to show the extent of any such effect on him personally,

- v. The petition is bad in law for failure by the petitioner to abide by the provisions of Article 30(3) of the constitution requiring the petitioner to demonstrate that his rights or any duty owed to him have been, or are likely to be, violated by any person within the United Republic of Tanzania; the 1st Respondent is not a resident of the United Republic of Tanzania and the action complained of was not committed within the United Republic of Tanzania nor within the jurisdiction of this Honourable Court, vi. The petition has been prematurely brought prior to the petitioner's exhaustion of other recourse available under the law and/or, the petitioner has failed to move this honorable court to exercise jurisdiction under the enforcement Act for failure to exhaust the available redress for the alleged contravention of the constitution, vii. Rex Advocates, a law firm previously known as Rex Attorneys, ENS Tanzania, ENSAfrica Tanzania Attorneys (in which Sinare Zaharani drawer of this petition and others was a partner and continues to be a partner in Rex Advocates) has a conflict of interest in representing the petitioner in this matter after previously acted as counsels for the 2nd Respondent in the financial transaction subject of this petition. viii. The petition is incompetent for contravening section 6(d) of the Basic Right and Duties Enforcement Act, Cap. 3R. E. 2019: and ix. the petition is untenable for being frivolous and vexatious 6 To avoid verbosity, this court will only determine the preliminary objection ii to viii together under one head of locus standi because the same will dispose of the petition. At the hearing, parties were represented. The Petitioner enjoyed the legal services of Mr. Sinare Zaharan learned advocate while the 1st respondent was represented by Mr. Edward Nelson Mwakingwe learned advocate, 2nd respondent was represented by Mr Audax Kijana Kameja whereas Mr. Daniel Nyakiha learned State Attorney represented both the 3rd and 4th respondents. It is exparte against the 5th, 6th' and 7th respondents. In support of the objection, the learned advocate for the 1st respondent argued that the petitioner has no locus standi to file this petition. He argued that for a person to have locus to sue, must show an interest in the subject matter, infringement of his right or duty, and the right of action against the opposite party. The case of Lujuna Shubi Balonzi vs Registered Trustees of Chama Cha Mapinduzi [1966] TLR 203, was cited to support the same. He, therefore, contended that the petitioner failed to establish how his right was infringed in relation to the subject matter of the case. The learned counsel claimed that that right alleged by the petitioner does not give him the right to interfere with the private contractual agreement For the 2nd respondent, Mr. Audax learned advocate held the same view that the petitioner lacks locus standi. He stated that locus standi as defined in the case of Peter Mpalanzi vs Christina Mbaruka, Civil Appeal No. 153 of 2019(Unreported) means the right or legal capacity to bring an action or to appear in court. In relation to the same, the learned advocate argued that the petitioner does not have such right or legal capacity to institute this petition against the respondents. It was Audax's contention further that section 4(1) of the Basic Rights and Duties Enforcement Act, (BRADEA) [Cap 3 R.E 2019] provides two conditions to be met

before filing such a petition. One, the existence of an actual or likely contravention of any of the provisions of Articles 12 to 29 of the Constitution. Two, the alleged contravention must have been, is being, or is likely to be contravened in relation to him. He said the phrase "relation to him" means a direct victim or potential victim. According to the learned counsel, the petitioner is/was not a direct victim of the contravention of Articles 12 to 29 of the Constitution. He cited the case of Legal and Human Rights Centre & Another vs Hon. Mizengo Pinda, Misc. Cause No. 3 of 2014 (Unreported) on page 24 to cement his argument. The learned counsel argued, from what transpired based on paras 2.1.8 to 2.1.10 of the petitioner's affidavit, it is clear that the petitioner purports to Institute this petition on behalf of all Tanzanians, hence falls into the realm of a public interest litigation. According to Mr. Audax, the same cannot be done by a private person but rather by the Attorney General who deals with all litigation of public interest. To support his argument, he cited the case of Lujuna Shubi Balonzi vs Registered Trustees of Chama Cha Mapinduzi (supra). His conclusion was that the petitioner has no locus standi to institute the petition under BRADEA. Relatively, the Attorney for the 3rd and 4th respondents argued in support of the preliminary objection that section 4 of BRADEA does not give a petitioner automatic right to sue before this court, rather he argued the petitioner ought to show how this impugned right is/was likely to be violated in relation to him. It was his argument that the petitioner failed to show as far as the agreement subject of this petition is concerned, how he has been affected. He contended further that, the petitioner invoked Article 26(2) of the Constitution which gives him locus in public interest litigation as per the case of Rev. Christopher Mtikila vs A.G [1995] TLR 31 and A.G vs Jeremiah Mtobesya, Civil Appeal No. 65 of 2016 (unreported). However, he argued, locus standi must be exercised according to the procedures provided by the law, and for this petition, the same is provided under section 4(1) of BRADEA. It was the advocate's argument that the petitioner has not satisfied this court on how he has been personally affected by a contract to which he is not a party. The case of Tanzania Epilepsy Organisation vs Attorney General, Misc. Civil Cause No. 5 of 2022, pages 14-20 was cited to buttress his argument. Disputing the preliminary objection Mr. Sinare learned advocate for the petitioner argued that, since the petitioner cited Article 26(2) of the Constitution and as far as this petition is concerned, the petitioner filed a public interest hence no locus standi or a person of interest is needed to file the same. He contended further that article 26(2) is, in itself a departure from the doctrine of locus standi as known in common law tradition. To buttress his argument, he cited the cases of The Attorney General vs Jeremiah Mtobesya, Civil Appeal No. 65 of 2016, and Rev. Christopher Mtikila (Supra). It was the learned advocate's argument that despite the fact that this petition is a public interest case, the petitioner being a citizen of Tanzania has an interest in the subject matter which is USD 8,400,000 claimed to be the property of the Government. Mr. Sinare argued further that the cases of Legal and Human Rights Centre & Another (supra) and Tanzania Epilepsy Organisation (supra) cited by the 2nd respondent and 3rd and 4th respondents 10 respectively are distinguishable from the case at hand, the reason being that in those case the petitioners were legal persons/ juristic persons hence infringement which was contemplated thereof could not have been committed against them. He stated that as for

this case at hand the petitioner is a natural person who has a duty under Article 27(2) of the Constitution to combat all forms of squander and waste of natural resources. He then prays for the preliminary objection to be overruled. When rejoining learned advocates reiterate what they submitted in their submissions in chief. Before analysing the objection, 3 would like to appreciate all the learned counsel for their submissions in support and against the objections raised. I have read the submissions and reviewed the court case records. We agree with the learned advocates that locus standi is a standing ground for a person to institute a case in court. The same is defined in the famous case of Lujuna Shubi Balonzi (supra); Locus standi is governed by Common Law according to which a person who brings a matter to court should be able to show that his right or interest has been breached or interfered with. ii The question here now as far as this petition is concerned is whether the petitioner has locus standi to institute this petition before this court. It is in the record that the basis of this petition is Articles 26(2) and 27(1) and

- (2) of the Constitution. For clarity the same are as hereunder; 26.-(1)N/A
- (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. 27.-(1) Every person has the duty to protect the natural resources of the United Republic, the property of the state authority, all property collectively owned by the people, and also to respect another person's property.
- (2) All persons shall be required by law to safeguard the property of the state authority and all property collectively owned by the people, to combat all forms of waste and squandering, and to manage the national economy assiduously with the attitude of people who are masters of the destiny of their nation. 12 From the foregoing provisions, it is undisputed that the petitioner has a right to institute a legal action in court to protect the Constitution. It is therefore true that he has the right to protect the natural resources of the country from being squandered and wasted. And as far as this petition is concerned the amount which he claimed to be squandered and wasted is USD 8,400,000. It is settled that the enforcement of part III of the Constitution is done under section 3 of the BRADEA which provides; This Act shall apply only for the purposes of enforcing the provisions of the basic rights and duties set out in Part III of Chapter One of the Constitution. It is therefore a rule that for a person to institute a legal action before the court as far as Part III of BRADEA is concerned, must abide by the requisite conditions stated under section 4(1) of BRADEA as amended by Section 7 of The Written Laws (Miscellaneous Amendments) (No. 3) Act, 2020 and Article 30(3) of Constitution which state inter alia that; 4(1) Where any person alleges that any of the provisions of Articles 12 to 29 of the Constitution has been, is being or is likely to be contravened in relation to him, he may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the High Court for redress. 30(3) Any person claiming that any provision in this Part of this Chapter or in any law concerning his right or duty owed to him has been, is being; or is likely to be violated by any person anywhere in the United Republic may institute proceedings for redress in the High

Court. As said earlier the requisite conditions or requirements stated by provisions of the law cited above are two; one, there must be or likely to be a contravention of a right or duty and two such contravention must be in relation to the person himself or herself. Now the crucial question would be, has the petitioner shown any contravention in relation to his right or duty as stated in this petition? It has to be noted that the law requires, the affidavit accompanying the petition to state the extent of contravention and how it affected the petitioner personally. Section 4(2) of BRADEA as amended by Section 7 of The Written Laws (Miscellaneous Amendments) (No. 3) Act, 2020 reads; 14 Without prejudice to the provisions of the Commission for Human Rights and Good Governance Act, relating to the powers of the Commission to institute proceedings, an application under subsection (1) be admitted by the High Court unless it is accompanied by an affidavit stating the extent to which the contravention of the provisions of Articles 12 to 29 of the Constitution has affected such person personally It goes without saying therefore that the petitioner's affidavit must show the extent of contravention as far as Article 27(1)(2) is concerned and how that contravention affected him personally. Looking at the petitioner's affidavit para 9 to 18, the petitioner averred about the agreement which the Government entered with the 1st and 2nd respondents, the respondent was not party thereto. He stated in para 16 of the affidavit that the amount of USD 8,400,000 which was paid to the United Kingdom consolidated fund instead of the Government of Tanzania amounted to squandering of the property of the state authority. He then under para 17 of the petitioner's affidavit, said to have a duty to protect the natural resources and to safeguard the property of the state 15 authority by combating all forms of squandering and waste as per Article 27(2) but, he failed to show how that duty was or is likely to be contravened and the effect thereof in relation to him. The learned advocate for the petitioner argued that the phrase "Every person...." used under Article 26(2) is distinguished from an aggrieved or interested person, rather it means a desirous person or petitioner, hence makes a petitioner a desirous person to institute this petition. He contended that if this petition falls under the realm of public interest litigation, then the doctrine of locus standi cannot be raised. He made reference to the cases of Rev. Christopher Mtikila and Jeremiah Mtobesya (supra). I agree with the learned counsel and what was stated in the said cases, however with all due respect it is my view that this was a position before the amendment of section 4 of BRADEA. Section 7 of The Written Laws (Miscellaneous Amendments) (No. 3) Act, 2020 amended section 4 by introducing to it subsection 3 which makes it mandatory for a person who initiates a proceeding under Article 26(2) to abide by Article 30(3) of the Constitution. Article 30(3) requires a petitioner to be an aggrieved person or interested person. Even if I agree with what was stated in Mtikila's case (supra) that in public interest litigation, the doctrine of locus standi cannot be invoked, 16 still, this petition would not fit what public interest litigation envisages as it was held by this court, Lugakingira J (as he then was) Mtikila's case that; "Under this provision, too, and having regard to the objective thereof, the protection of the Constitution and legality, a proceeding may be instituted to challenge either the validity of a law which appears to be inconsistent with the Constitution or the legality of decision or action that appears to be contrary to the constitution or the law of the land ', [emphasis added] The

court stated further that; "It is emphasized in the case that the condition which must be fulfilled before public interest litigation is entertained by the court is that the court should be in a position to give effective and complete relief. If no effective or complete relief can be granted, the court should not entertain public interest litigation". 17 The petitioner claimed about the agreement between the Government of Tanzania and 1st and 2nd respondents to be voidable, the fact to consider is that the agreement is a mere speculation since there was no evidence to prove the same. He also claimed that the amount of USD 8,400,000 was the property of the Government of Tanzania without any evidence to prove so. It is therefore my view that this petition falls short of what is a public interest litigation due to the failure of the petitioner to show the contravention of Article 27(1) and (2) as far as this petition is concerned. Furthermore, in line with the above decision, concerning reliefs, the petitioner in this petition prays for an order directing the 1st and 2nd respondents jointly and severally to pay USD 8,400,000 to the Government of Tanzania and an order directing the Government of Tanzania through 3rd and 4th respondents not to engage in any future business whatsoever with the 1st and 2nd respondents. The question would be whether this court can grant that relief or orders. The answer to this question is negative for the following reasons; One, this relief arises from what the petitioner called a 'voidable contract' which is not a proper forum to determine the legality of the said contract. Two, an aggrieved party to the agreement in question has/had a right to sue on the same and seek payment of USD 8,400,000 in the court of law 18 subject to the terms of the agreement. Therefore, the petitioner being a third party can not interfere with the agreement. That said I, sustain the preliminary objection and dismiss this petition. Based on the nature of the case and the intention of the petitioner, I do not find it fit to order costs on him. — - ■ A. K. RWIZILE JUDGE . 10 07.2023 19

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