

TANZANIA / JUDGMENT

pili kisenga vs the hon attorney general

2021 tzhc 7513 3 december 2021

COURT
TZHCDECIDED
3 December 2021

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IN THE HIGH COURT OF TANZANIA (MAIN REGISTRY) AT DAR ES SALAAM MISCELLANEOUS CIVIL CAUSE NO. 15 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 RIGHTS AND DUTIES ENFORCEMENT ACT, [CAP. 3 R.E 2019] AND IN THE MATTER OF RIGHTS AND DUTIES ENFORCEMENT (PRACTICE AND PROCEDURE) RULES, 2014 AND IN THE MATTER OF A PETITION TO CHALLENGE THE PROVISIONS OF SECTION 6A,16(3) AND SECTION 16(4) OF THE GOVERNMENT PROCEEDINGS ACT [CAP. 5 R.E 2019] AS AMENDED BY SECTION 26 OF THE WRITTEN LAWS (MISCELLANEOUS AMENDMENTS) ACT NO. 1 OF 2020 FOR BEING UNCONSTITUTIONAL BETWEEN PILI KISENGA..... PETITIONER VERSUS THE HON. ATTORNEY GENERAL.....RESPONDENT

RULING

Date of last Order: 21/10/2021. Date of Ruling: 03/12/2021. E.E. KAKOLAKI, J Before this court and by way of originating summons accompanied with the affidavit and affidavit of admissibility both sworn by one Pili Kisenga, the 1 petitioner, a petition has been instituted under Articles 26(2) of the Constitution of the United Republic of Tanzania, 1977 hereinto referred as Constitution, sections 4 and 5 of the Basic Rights and Duties Enforcement Act, [Cap. 3 R.E 2019] hereinto referred as BRADEA and Rule 4 of the Basic Rights and Duties Enforcement (Practice and Procedure) Rules, 2014, against the above named Respondent praying this court for the declarations and orders that:

- (a) The provisions of Sections 6A,16(3) of the Government Proceedings Act, [Cap. 5 R.E 2019] and section 16(4) of the Government Proceedings Act, [Cap. 5 R.E 2019] as amended by section 26 of the Written Laws (Miscellaneous Amendment) Act, No. 1 of 2020 are unconstitutional for offending the provisions of Articles 13(4)(6) and 6(a) of the Constitution of the United Republic of Tanzania of 1977 as amended.

- (b) The provisions of Sections 6A,16(3) of the Government Proceedings Act, [Cap. 5 R.E 2019] and section 16(4) of the Government Proceedings Act, [Cap. 5 R.E 2019] as amended by section 26 of the Written Laws (Miscellaneous Amendment) Act, No. 1 of 2020 be expunged from the statute immediately without giving the 2 Government time through the Attorney General (the Respondent) to amend them as it will amount to continuous violation of human rights.
- (c) Any other reliefs this honourable court deems fit to grant.
- (d) Each party bear its own costs. The petition is premised on article 8 of the Universal Declaration of Human Rights (UDHR) in which Tanzania is a signatory and has ratified it with intent of enabling its people enjoy and be provided with fair and effective remedy through its local courts to the people, for acts of violation of fundamental rights granted by the Constitution and rights granted by the law, therefore embracing the spirit brought in by Article 13(4),(5) and (6)(a) of the Constitution of the United Republic of Tanzania 1977 as amended. In brief it is in the applicant's contention that, the impugned provisions of Government Proceedings Act as amended are unconstitutional for being discriminatory in nature and against the principles of natural justice of fair hearing, as they bar the decree holder in a civil proceedings from executing a decree issued in his favour under the Civil Procedure Code, for prohibiting attachment and sale of Government property and subject him as individual, to a distinct class of regime of decree enforcement something which is denying him with an 3 opportunity of being heard, thus violating the provisions of Article 13(4)(5) and 6(a) of the Constitution as amended. In his response to the petition ,the respondent filed a reply thereto supported by the counter affidavit duly sworn by one Hangi. M. Chang'a, Principal State Attorney, challenging the merits of the petition and praying the court to dismiss it with costs for want of merits, while declaring that, the impugned provisions are in accordance with the Articles of 13(4)(5) and 6(a) of the Constitution of the United Republic of Tanzania of 1977 as amended or issue any other orders as it deems fit. Further to that, the respondent raised a Notice of preliminary point of objection on the ground that: The petition is bad and untenable in law for being frivolous, vexatious and an abuse of Court Process for being preferred in contravention of the Laws of Tanzania. With that preliminary point of objection this court is invited by the respondent to dismiss the petition in its entirety. As a matter of practice, which is to dispose of first the preliminary objection when raised, parties in this petition who were both represented, with leave of the court resolved to proceed with hearing of the point of objection by way of written submission and religiously followed the courts' filing schedule orders. Mr. Melchzedek 4 Joachim and Steven Mwakibolwa both learned counsels represented the petitioner whereas the respondent enjoyed the services of Mr. Hangi Chang'a, learned Principle State Attorney. Submitting in support of the raised preliminary point of objection Mr. Changa contended this court is restricted from exercising its powers under section 8(2) of the BRADEA where the application/petition is frivolous or vexatious. Placing reliance on the cases of Ado Shaibu Vs. Honourable John Pombe Magufuli (The President of the United Republic of Tanzania) and Two Others, Misc. Civil Cause No. 29 of 2018 and SP Christopher Bageni Vs. Attorney

General, Misc. Civil Cause No. 1 of 2021 (both High Court decisions unreported), interpreting the terms "frivolous and vexatious" informed the court that, the applicant's act of merging all of the impugned provisions in single allegation that, they are unconstitutional on the basis of being discriminatory to parties who want to execute their decrees against the Government is incorrect, thus frivolous, vexatious and abuse of legal process as not all of the said provisions provide for execution. He told the court, section 6A of the Government Proceedings Act provides for intervention of the Attorney General in the suit against or for the Government while section 16(4) of the same Act, providing for the definition of the term "Government". On the basis of that submission, Mr. Chang'a implored this court to dismiss the petition. In rebuttal counsels for petitioner submitted, the raised preliminary point of objection is misconceived as it does not qualify to be a pure point of law under the principle enunciated in the celebrated case of Mukisa Biscuits Manufacturing Co. Ltd Vs. West End Distributors Ltd (1969) EA 606, for containing facts requiring additional evidence or supplementary evidence to be proved. They mention the said adduced facts by the respondent on merger of the provisions asserted to provide for execution against the Government to be the interpretation that, the impugned provisions provide for different matters including intervention of Attorney General in the suit against or for government and definition of the term Government, while arguing that, it is difficult to prove at this stage whether the same are unconstitutional or not, unless the applicant is availed with an opportunity to so prove by bring evidence in court. Referring the court to the cases of Wangai Vs. Muganda and Another (2013) 2 EA 474, 418, Freeman Aikael Mbowe Vs. DPP, IGP and AG, Misc. Civil Cause No. 21 of 2021 and Onesmo Ole Ngurumwa Vs. Attorney General, Misc. Civil Cause No. 15 of 2019 (Both High Court decision unreported) articulating on what amounts to and when can a matter be proved to be frivolous and/or vexatious, they argued the circumstances of this matter does not fall in. The learned counsels distinguished the cases relied on by the respondent submitting that, in the cases of SP Christopher Bageni (supra) judges were examining the pure point of law while in the case of Ado Shaibu (supra) the petition was tainted with so many defectiveness that is why were both struck out, unlike the petition at hand in which there are facts to be proved at the hearing stage. They thus pleaded the court to find the preliminary objection is premature and needs facts to be ascertained and therefore not worth of being entertained as a preliminary objection hence dismiss it. I have dispassionately followed the fighting arguments by the parties in regard with the raised point of objection and revisited the pleadings at issue. What is gleaned from their submissions is that, both parties are at one that, this court is barred by the law under section 8(2) of the BRADEA to entertain any application/petition which is frivolous or vexatious. Indeed that is the position of the law. In the case of Freeman Aikael Mbowe (supra) this court when deliberating on the same issue had this say: "I agree that this court is not vested with jurisdiction to entertain frivolous or vexatious application. I also agree with this court elaboration on which amounts to frivolous or vexatious petition in the case of Ado Shaibu..." (Emphasis added). On the definition of the terms and what amounts to frivolous and/or vexatious petition, the same were well adumbrated in the case of Wangai (supra) where the court had this to state: "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 cause the opposite party unnecessary anxiety, trouble and expenses.” Similar views were aired by this court in the case of Ado Shaibu (supra) on the said terms and their application when held: “...discerning from decision of Wangai Vs. Mugamba and Another (2013) 2 E.A 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 party unnecessary anxiety trouble and expensive.” (Emphasis added) 8 From my understanding of the submissions parties are parting their ways on the issue as to when the issue whether matter this petition is frivolous and vexatious or not. It is Mr. Chang’a submission that, the petition is frivolous and vexatious hence abuse of court process for inclusion of sections 6A and 16(4) of the Government Proceedings Act, providing for intervention of the Attorney General in the suit against the Government or for the Government and the definition of the Government in the bunch of provisions accused of being unconstitutional for discriminating the party who wants to execute his decree against the government. Counsels for the petitioner are of the contrary view arguing that, the issue as to whether the two provisions are discriminative in nature to the person who would want to execute his decree against the Government as alleged is the question of fact which needs proof of evidence, thus does not qualify to be a pure point of law within the dictates of Mukisa Biscuits case. It is true as submitted by counsels for the petitioner that, where the point raised as preliminary objection needs to be ascertained through facts or evidence, it ceases to be a pure point of law. It was stated in Mukisa Biscuits (supra) on when the preliminary objection raised ceases to be a point of law, where the Court held thus: 9 “A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which if argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.” (Emphasis added) In this matter as rightly submitted by counsels for the petitioner it will be difficult to establish at this stage whether the two provisions of section 6A and 16(4) of the Government Proceedings Act, are hindering execution of decrees against the Government thus unconstitutional without evidential proof from the petitioner, as she is the one who so alleges. That being the case I hold the raised point of objection does not qualify to be a pure point of law within the interpretation of Mukisa Biscuits case. This conclusion drives me to the crux of the matter whether under the circumstances the petition is untenable for being frivolous, vexatious and abuse of court process. As rightly held above, since it requires ascertainment of facts by both parties through evidence to establish whether the two provisions of the 6A and 16(4) of the Government Proceedings Act at issue are unconstitutional or not as asserted by the petitioner, I hold it is premature 10 to conclude at this stage that, the petition is untenable for being frivolous and vexatious hence abuse of court process. Similar stance to this was taken by this court in several cases one of which is Freeman Aikael Mbowe (supra) where the court held that: “I agree that this court is not vested with jurisdiction to entertain frivolous or vexatious application. I also agree with this court elaboration on which amounts to frivolous or vexatious petition in the case of Ado Shaibu. However, my concern is how a

court of law can decide that this matter is frivolous or vexatious without first according to the parties an opportunity to be heard, to adduce evidence. There is need of adducing evidence from both sides and then one could correctly decide that indeed the matter is frivolous and/or vexatious. Thus, I find the objection raises factual issue which is not pure point of law as the same need ascertainment.” (Emphasis added). The same position was taken in the case of Onesmo Olengurumwa (supra) where the Court had this to say: 11 ”I find the objection is preferred prematurely, as properly stated by both parties, a matter is considered frivolous when it is without merit...however, that assessment of the petition on whether it is frivolous or vexatious can be fairly made upon hearing the matter on merits. It is premature to entertain the objection at this stage. Determination of the instant objection will require more substantiation which in turn it will erode the whole essence of the PO.” (Emphasis supplied). Guided by the above position of the law, I find the cases relied on by the respondent to support her preliminary objection are distinguishable under the circumstances of this matter. It is the law, each case is decided on its own merits. As rightly argued by the counsels for the petitioner, the position reached in the case of SP Christopher Bageni (supra) resulted from judges examining the pure point of law as there was no factual material needed by the court to arrive at the conclusion that, the petition was frivolous and vexatious, while in Ado Shaibu (supra) the petition was tainted with so many defectiveness in which the court banked on to find the 12 petition was also frivolous and vexatious, thus an abuse of court process, unlike in this matter where evidence is needed to prove or disprove that fact. As in this matter it requires ascertainment of facts to arrive to the conclusion that, the petition is frivolous or vexatious hence abuse of court process as alluded to above, I find the above raised issue is answered in negative since the raised preliminary point of objection by the respondent is not only disqualified from being a pure point of law but also the same is raised prematurely. It is from those reasons I find it lacking in merit and hereby proceed dismiss it. Let the petition be placed before the panel of three judges for determination on merit. Costs shall be determined in the course. It is so ordered. DATED at DAR ES SALAAM this 03rd day of December, 2021. E. E. KAKOLAKI JUDGE 03/12/2021 The Ruling has been delivered at Dar es Salaam today on 03rd day of December, 2021 in the presence of the Mr. Amani Joachim advocate for the 13 Petitioners also holding Ms. Narindwa Sekimanga, State Attorney for the Respondent and Ms. Asha Livanga, Court clerk. E. E. KAKOLAKI JUDGE 03/12/2021 14

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