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

MISCELLANEOUS CIVIL CAUSE NO. 29 OF 2018
IN THE MATTER OF THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA 1977, [CAP. 2 R.E, 2002] AS AMENDED FROM TIME TO TIME

AND

IN THE MATTER OF THE BASIC RIGHTS AND DUTIES ENFORCEMENT ACT, [CAP. 3 R.E, 2002]

AND IN THE MATTER OF A PETITION TO CHALLENGE THE APPOINTMENT OF ADELARDUS LUBANGO KILANGI AS ATTORNEY GENERAL OF THE UNITED REPUBLIC OF TANZANIA FOR BEING UNCONSTITUTIONAL

BETWEEN

ADO SHAIBU ..... PETITIONER

AND

1. **HONOURABLE JOHN POMBE JOSEPH MAGUFULI (THE PRESIDENT OF THE UNITED REPUBLIC OF TANZANIA) ..... 1ST RESPONDENT**
2. **ADELARDUS LUBANGO KILANGI ..... 2ND RESPONDENT**
3. **THE ATTORNEY GENERAL ..... 3RD RESPONDENT**

Date of Last Order: 30.08.2019
Date of Ruling: 20.09.2019

FELESHI, J.K.:

RULING

The applicant has moved this Court by way of an originating summons in terms of sections 4 and 5 of the Basic Rights and Duties Enforcement Act, [Cap. 3 R.E, 2002] hereinafter referred to as "the Act", rule 4 of the Basic Rights and Duties Enforcement (Practice and Procedure) Rules 2014 hereinafter referred

to as "the Rules" and articles 26(2) and 30(3) of the Constitution of the United Republic of Tanzania of 1977 as amended from time to time hereinafter referred to as "the Constitution"). The craved prayers are for: -

(a) **A declaratory order that His Excellency John Pombe Magufuli failed to adhere to his duty to abide by the Constitution of the United Republic of Tanzania as set out under article 26(1) of the Constitution of the United Republic of Tanzania of 1977 (as amended) by appointing Adelardus Lubango Kilangi, a person who does not have requisite qualifications to be the Attorney General of the United Republic of Tanzania.**

(b) **A declaratory order that Adelardus Lubango Kilangi failed to adhere to his duty to abide by the Constitution of the United Republic of Tanzania as set out under article 26(1) of the Constitution of the United Republic of Tanzania of 1977 as amended by accepting an appointment to be the Attorney General of the United Republic of Tanzania without having the requisite qualifications.**

(c) **A declaratory order that appointment of the 2nd respondent as Attorney General is unconstitutional for offending the provisions of article 26(2) of the Constitution of the United Republic of Tanzania of 1977 as amended and accordingly declare the said appointment invalid.**

(d) **An order that the respondents pay for costs of the petition.**

(e) **Any other relief(s) as the Court deems fit and just to grant.**

On 19th day of February, 2019, Dr. Julius Clement Mashamba hereinafter referred to as "the Solicitor General" for the respondents, filed a Notice of Preliminary Objection with six (6) points of law to wit:

i. **The petition is incompetent and bad in law for contravening the provisions of articles 46(2) and 46(3) of the Constitution of the United Republic of Tanzania of 1977 (as amended).**

ii. **The petition is incompetent for contravening the provisions of article 26(2) of the Constitution.**

iii. **The petition is incompetent and bad in law for contravening section 6 of the Presidential Affairs Act, [Cap. 9 R.E, 2002].**

iv. **The petition is frivolous, vexatious and an abuse of Court process.**

v. **The affidavit in support of the petition is fatally defective for contravening Order XIX Rule 3 of the Civil Procedure Code, [Cap. 33 R.E, 2002].**

vi. **The affidavit in support of the petition is fatally defective for obtaining a defective verification clause.**

Hearing of the aforementioned points of preliminary objection was conducted by way of written submissions in which learned counsel for the parties duly complied with the court orders, hence, this ruling. While the Solicitor General and Mr. Mark Mulwambo, Principal State Attorney represented the respondents, the petitioner was represented by Ms. Fatma Karume, Advocate.

Accounting for the merits of the raised points of objection, the Solicitor General submitted for the consolidated 1st and 3rd points of objection that the provisions of articles 46, 46(2) and (3) of the Constitution and section 6 of the Presidential Affairs Act set out the parameters for the doctrine of presidential immunity, that is, absolute immunity against criminal proceedings and immunity from civil litigations when a person is serving as the President of the United Republic of Tanzania.

He added that, the Presidential Affairs Act widens the scope of presidential immunity to the effect that a person in his capacity as the President cannot be summoned by Court to appear or procure his attendance or produce anything in Court as held by the High Court in the case of **Mwalimu John Mhozya vs. Attorney General** [1996] T.L.R 303. In case there is an application to that effect, the Court is not vested with powers to order, rather, it can inform the President regarding existence of such an application.

The English version of the provisions of article 46(2) & (3) of the Constitution reads:

> **"(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,**

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, unless at least 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 cause 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 46A (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 while he held the office of President in accordance with this Constitution".

The Solicitor General further submitted that, likewise, the provisions of section 6 of the Presidential Affairs Act provide that:

"(1) Where any person proposes to institute any proceedings against the President referred to in subsection (2) of section 46 of the Constitution –

(a) The notice of proceedings referred to therein shall be accompanied by the plaint".

(b) The notice and plaint shall be delivered to the Chief Secretary or to a Permanent or Private Secretary to the President, or sent by prepaid registered post to the Chief Secretary at the State House".

He further averred that, barring litigations against the President does not bar suits against the Government including actions or omissions by the President in which case what is required is for the Attorney General to be joined for the Government also to cover actions or omissions by the President. He argued that, absolute immunity is designed to protect certain prerogative or discretionary functions.

The Solicitor General further argued that, among the factors hinging across applicability of absolute immunity is when the sought impugned activity is "discretionary" as opposed to "ministerial" as held in **Barr vs. Matteo,** 360 U.S. 564, 574 and in the case of **Spalding vs. Vilas,** 161 U.S. 483, 498 (1896). The spirit behind such absolute immunity, he argued, is to the effect of assuring

vigorous and fearless performance as held in the case of **Imbler vs. Pachtman,** 424 U.S. 409 424 (1976).

He referred the Court to the United State Court of Appeal case of **Gregoire vs. Biddle** 177 F.2d 579, 581 (2d Cir. 1949) where the Court held that absolute immunity for Government Officers is important in the functioning of any government because the burden of trial and the danger of its outcome would 'dampen ardor' of most officials in performing their duties and L. Hand, Chief Judge added that:

> **"In this instance it has been thought in the end that better to leave unaddressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread retaliation. Judged as res nova, we should not hesitate to follow the path laid down in the books".**

He added that, it is through such line of reasoning that Judges, Magistrates, prosecutors, legislators and members of the Executive are granted absolute immunity from civil liability for all lawful activities done within the scope of their respective official functions.

As to qualified immunity, he cited the case of **Scheuer vs. Rhodes,** 416 U.S. 232 (1974) where the Court held that, an officer is only immune from action if at the time of action, he possessed a good faith belief that his actions were lawful. Such position was later qualified in **Wood vs. Strickland** 420 U.S. 308 (1975) to the effect that, immunity will be denied if such official reasonably should have known that his act constituted such violation.

In a study by Jamhuri ya Muungano wa Tanzania, *Taarifa ya Utafiti Kuhusu Madaraka ya Rais wa Jamhuri ya Muungano wa Tanzania* (Taarifa Na. 1) (Dar es Salaam: Tume ya Mabadiliko ya Katiba, Disemba 2013), he argued, it was found that, immunity to the president is accorded not because the

country is his property or because he is above the law, rather, because of the nature of his responsibilities and duties as Head of the State and Commander in Chief.

He added, in relation to absolute immunity to serving Presidents the Court underscored in **Clinton vs. Jones** 105(95-1853) 520 U.S. 681 (1997) that the immunity granted to civil servants (including the president) is in respect of acts done in discharge of their official duties not in respect of private acts. In Tanzania, such immunity extends to retired Presidents regarding civil wrongs committed while in power under article 46(3) of the Constitution.

The Solicitor General further argued that, the appointment of the 2nd respondent as Attorney General was exercised by the 1st respondent when exercising his Constitutional duties thus immune from civil actions in a Court of law. He further argued that, the preferred petition against the President is in contravention of the provisions of section 6(1) of the Presidential Affairs Act that requires issuance of a mandatory prior thirty (30) days-notice to institution of a civil action against the President. Such noncompliance to the statutory requirement is fatal as held by the Court of Appeal in **Arusha Municipal Council v. Lyamuya Construction Co. Ltd** [1998] T.L.R 13.

He argued that, being a procedural requirement of the law, the same ought to have been adhered to as held by the Court of Appeal in **Citibank Tanzania Ltd v. Tanzania Telecommunications Co. Ltd & 4 Others,** Civil Application No. 64 of 2003, Dar es Salaam, unreported, at page 19 that:

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

This was also captured in another cited case of **Paul Mgana vs. the Managing Director Tanzania Coffee Board,** Civil Appeal No. 82 of 2001 (Unreported) at page 6-7 where the Court of Appeal observed that:

> **"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".**

Regarding the 2nd Point of Objection that the petition is incompetent for contravening the provisions of article 26(2) of the Constitution, the Solicitor General submitted that, citation of such article alone in moving the Court in redress of the sought remedies renders the petition incompetent in law. Article 26 reads:

> **"(1) Kila mtu ana wajibu wa kufuata na kuitii Katiba hii na Sheria za Jamhuri ya Muungano.**
>
> **(2) Kila mtu ana haki, kwa kufuata utaratibu uliowekwa na sheria, kuchukua hatua za kisheria kuhakikisha hifadhi ya Katiba na sheria za nchi".**

It was further submission by the Solicitor General that, the petitioner ought to have first abided to the procedural requirements before instituting the present petition. He added that, the complained of article 26(1) does not suit the remedies worth to be constitutionally challenged in terms of section 1(2) of the Act that encapsulates articles 12 to 29 of the Constitution. He rather argued the same to have been challenges as a normal civil suit.

He stressed that, the Court has been improperly moved for the redress sought under article 30(3) of the Constitution since the petition does not disclose a "cause of action". Reference was made to **Harrikson vs. Attorney-General of Trinidad and Tobago,** [1980] A.C. 265 where it was held that:

"The notion that whenever there is failure by an organ of government or a public authority or public officer to comply with the law necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by the chapters of the Constitution is fallacious. [The] mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the provision if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no contravention of any human right or fundamental freedom".

He further argued that, the petitioner has not shown how the conduct of the 1st respondent in appointing the 2nd respondent to the post of Attorney General has or is likely to affect his rights under part III of the Constitution. To him, treating such rights illimitable will amount into anarchy in the society as held by the Court of Appeal in **Julius Ishengoma Francis vs. the Attorney General,** [2004] TLR 14.

Regarding the 4th point of objection that the petition is frivolous, vexatious and an abuse of Court process, the Solicitor General submitted that, the same is so as such for failure to issue the 1st respondent with statutory notice to sue adding that, the same is an indicative factor that the petitioner failed to exhaust the available remedies as prescribed under section 8(2) of the Act. Reference was made to **Tanzania Cigarette Company Ltd vs. the Fair Competition Commission & Attorney General,** High Court, Dar es Salaam Registry, Miscellaneous Civil Cause No. 31/2010, unreported, where the Court held:

"One cannot jump from statutory remedies under the [Fair Competition Act] on to the remedies available under the Basic Rights and Duties Enforcement Act. It is our further opinion that where a Petitioner had an adequate means of statutory redress but opted to file a Constitutional Petition, the resulting Petition falls under the rubric of frivolous or

vexatious Petitions under subsection 2 of Section 8 of Basic Rights and Duties Enforcement Act".

As to 5th point of objection that the affidavit in support of the petition is fatally defective for contravening Order XIX Rule 3 of the Civil Procedure Code, [Cap. 33 R.E, 2002], hereinafter referred to as "the CPC", the Solicitor General submitted that, the affidavit contains law citations in paragraphs 5, 6, 7, 14 and 17, also, legal arguments and conclusions under paragraphs 15, 16 and 18 as well as speculations in terms of paragraphs 11 and 14 contrary to the position of the law that affidavits should contain only statements of facts as held by the Court of Appeal in **Juma S. Busiyah vs. the Zonal Manager (South) Tanzania Post Corporation,** Mbeya Registry, Civil Application No. 8/2004, Unreported.

According to law, affidavits must contain grounds supporting the application as observed by the Court of Appeal in **the Registered Trustees of the Archdiocese of Dar es Salaam vs. the Chairman, Bunju Village Government and 11 others,** Civil Appeal No. 147 of 2006, CAT, Dar es Salaam, unreported. The Solicitor General added, the affidavit contains untrue statements under paragraphs 4 and 8 with some contradictions. He thus prays for the affidavit to be struck out of the record as held by the Court of Appeal in **Ignazio Messina v. Willow Investments SPRL,** Civil Application No. 21 of 2001, unreported, Dar es Salaam, where the Court held that:

"An affidavit which is tainted with untruth is no affidavit at all and cannot be relied upon to support an application. False evidence cannot be acted upon to resolve any issue".

Regarding the 6th point of objection that the affidavit in support of the petition is fatally defective for obtaining a defective verification clause, the Solicitor General submitted that, though the deponent stated in the verification

clause that all that is stated in the affidavit is true to his own knowledge, the contents under paragraphs 9, 10, 11, 12, 13 and 14 are clear to have been obtained from other sources in the percepts of what has been defined by the Court of Appeal to be a verification clause.

Dealing with a similar situation, the Court of Appeal in the case of **Paul Makaranga v. Republic,** Criminal Application No. 3 of 2010, (Mwanza Registry), (Unreported) at page 6 described a verification clause to mean that part of an affidavit which shows the facts the deponent asserts to be true of his own knowledge and for those based on information or beliefs.

From the above in unison, the Solicitor General invited this Court to uphold all the foregoing points of preliminary objection and dismiss the petition in its entirety with costs in favour of the Respondents.

In reply, Ms. Karume, counsel for the petitioner rebutted the 1st point of Preliminary Objection and urged that, the Court should confine herself into the ordinary meaning of the statute in construing what has been provided for under the Constitution. She argued that, articles 46(1), 46(2) & 46(3) of the Constitution should be accorded their ordinary meaning in interpretation. She cited **EADB vs. Blueline Enterprises Limited,** Civil Appeal No. 110 of 2009, (Unreported), where the Court of Appeal underscored that:

> **"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 of the words to be interpreted and to adopt this meaning in the absence of a reason to be rejected in favour of some other interpretation".**

Ms. Karume argued that, article 46(1) prohibits prosecution of criminal offence against the President but it does not prohibit commencement or

continuation of civil cases. That, in clear terms under article 46(2) of the Constitution, the President can be sued in his personal capacity for matters he conducted or omitted to conduct before and or after holding the post of President provided a Notice of thirty (30) days is given to him. Regarding acts or omissions of the President in his capacity as President, she contended, the same does not require a thirty (30) days' notice to be given of the claim.

She argued that, the requirement of Notice is only needed when the President is sued in his personal capacity. Besides, article 46(3) of the Constitution applies after the President has left office covering both civil and criminal proceedings with an exception set under article 46A (10) of the Constitution, that is, upon impeachment by the National Assembly.

She argued that, the President has no immunity from litigations in his official capacity when he acts *ultra vires* against the Constitution. That, the Constitution cannot be used as a shield to protect unconstitutional conduct, as article 26(1) of the Constitution requires every person including the President to uphold the Constitution. By her words the learned counsel warned that, in the event this case fails on a preliminary point, it won't be over as if the President's unconstitutional conduct is protected by the Court on the ground that he is the President, they shall test it again once he leaves office be it in 2020 or 2025 and in the latter case when the bench will be a different one.

The learned counsel further argued that, being a Constitutional case, the President is not immune from being sued. She cited **Attorney General and two Others vs. Aman Walid Kabourou** [1996] TLR 156 where the Court of Appeal observed at page 170 that:

> **"On the face of it, it appears that the Constitution expressly prohibits the Courts from inquiring into the validity of such like the Tamko Rasmi,**

but on a deeper consideration of the principles that underlie the Constitution, it is obvious that such an interpretation of the Constitution is wrong. One of the fundamental principles of any democratic constitution including ours, is the rule of law. The principle is so obvious elementary in a democracy that it does not to be expressly stated in democratic constitution however, perhaps for purposes of clarity, there is an express provision to that effect under the Constitution of the United Republic of Tanzania. It is sub – article (1) of article 26 which states: "every person is obliged to comply with this constitution and the laws of the United Republic". In light of this principle, we respectfully I agree with the submission of Mr. Werema moving up. We are satisfied and we find that the High Court in this country like the High Court in England has a supervisory jurisdiction to inquire into the legality of anything done or made by the public authorities".

From the above submissions, the petitioner's counsel argued that the High Court can inquire any public authority including the President in his capacity as President.

Regarding the 2nd point of Objection the position reiterated on the 4th point of objection, the petitioner's counsel submitted that, parties to the petition have *locus standi* to challenge breach of the Constitution in terms of article 26(2) of the Constitution with reference to the decision of the Court in the case of **Rev. Mtikila vs. Attorney General** [1995] TLR 31 where it was held that:

".... I hold article 26(2) to be an independent and additional source of standing which can be invoked by a litigant depending on the nature of his claim. Under this provision, too, and having regard to the objectives thereof – the protection of the Constitution and legality – a proceeding may be instituted to challenge 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. Personal interest is not an ingredient in this provision, it is tailored to the community and falls under the subtitle "Duties to the Society". It occurs to me, therefore, that article 26(2) enacts into our constitution the doctrine of public interest litigation. It is then not in logic or foreign precedent that we have to go to for this doctrine, it is already with us in our own Constitution".

In respect of the 5th point of objection, the petitioner's counsel argued that, all that are contested in this point are matters of fact for mentioning of

sections does not necessarily make the same bad in law. Regarding allegations that there are some untrue statements, she argued that such averments cannot stand unless substantiated through evidence.

As to defective verification clause of the petitioner's affidavit in relation to the 6th point of objection, the learned counsel submitted that, what has been deposed is within the petitioner's knowledge for the annexed documents are in the public domain not rendering the verification defective.

She added that, such mixed issues on points of law and facts ought not to have been raised as preliminary points of objection in purview of what was held in **Mukisa Biscuits Manufacturing Company Ltd vs. West End Distributors Ltd** [1969] E.A. 696. The learned counsel further argued that, the credibility and admissibility of the attached CV cannot be contested at this point. Citation was made to a Court of Appeal decision in **Bruno Wenceslaus Nyalifa vs. the Permanent Secretary, Ministry of Home Affairs and Another,** Civil Appeal No. 82 of 2017 where the Court underscored that:

> **"We find further that the documents which were annexed to the appellant's affidavit should not have been disregarded on the ground that they were not tendered in evidence. This is for obvious reason that, affidavit is evidence and the annexture thereto is intended to substantiate the allegations made in the affidavit. Unless it is controverted therefore, the document can be relied upon to establish a particular fact."**

From the foregoing, Ms. Karume invited the Court to overrule the respondents' preliminary objections for being misconceived and proceed to determine the present Constitutional Petition on merit.

At the outset of his rejoinder submission, Mr. Mulwambo pointed out parts of Ms. Karume's reply submission which show she unprofessionally and disrespectfully advanced personal vindications to the Solicitor General and the

Honourable Attorney General contrary to Regulations 4, 5(1)(a) - (e) of the Advocates (Professional Conduct and Etiquette) Regulations GN No. 118 of 2018.

That, her complained of utterances include that – the Attorney General is far too junior to garner that kind of respect from the Bar; he lacks experience and has been a woefully disappointing legal advisor to the Government at the cost of rule of law and our Constitution supremacy; and that, if this case fails on a preliminary Point they shall test it again against the President's protected unconstitutional conduct once he leaves office, be it in 2020 or 2025 and in the latter case when the bench will have changed.

Mr. Mulwambo further referred the court to Regulations 5(d) and 6(1)(m) and submitted that:

> **"...acts that constitute lack of integrity by an advocate include using abusive/or inappropriate language in court or in any public setting. Looking at the language used by Advocate Fatma Karume in her Reply Submissions, one notes that such language is highly abusive to be uttered by such a seasoned advocate against a party to these proceedings and his counsel...."**

The learned Principal State Attorney added that, the provisions of articles 46(1), (2) & (3) of the Constitution cater for immunity whenever the President acts at both personal and official capacities. That, unlike claims mounted against the President in his official capacity as "the President," the petitioner's originating summons filed in Court has termed the President in his personal capacity meaning that whatever he did, he did so in his personal capacity and qualifies him to be so sued in that capacity.

He added that, the sitting President is clothed with immunity against both criminal and civil litigations with exceptions upon compliance with some procedural requirements. He argued, article 26 of the Constitution does not

provide for substantive rights, rather it is a general clause providing for standing for any individual to take action to protect the rights, freedom and/or duties enshrined under the Bill of Rights provided in articles 12–29 of the Constitution.

He stressed that the acts complained of by the petitioner in the present proceedings have not breached the provisions of article 26, instead, the complaint is premised around article 59(2) of the Constitution which is not within the ambit of the Bill of Rights and as such, no person can bring a constitutional petition under article 30(3) of the Constitution and the Act to vindicate article 59(1)&(2) of the Constitution providing for the appointment of the Attorney General to discharge a public duty under public law. He thus argued that, the petition having been filed under sections 4 & 5 of the Act, is unmaintainable for failure to meet the legal requirements of the governing law. He thus invited this Court to dismiss it with costs for lack of merit.

Having considered the submissions by the respective counsel for the parties, the following are the deliberations of this Court in disposal of the paraded preliminary points of objection.

Notably, considering the nature and impact of the raised points of preliminary objection especially those faulting the competence of the petitioner's affidavit which go into the roots of the petition and which, if upheld, can even cause the merit of other points of law nugatory, this Court will thus first consider the 5th and 6th points of objection before delving into the remaining points of objection, but, keenly, after giving the gist of public litigated petition under which the present petition falls.

The position of law governing these proceedings in terms of articles 26(2) and 30(3) of the Constitution, sections 4 and 5 of the Act and Rule 4

of the Rules, predicates these proceedings under the rubric of public interest litigation. However, under Rule 19 of the Rules, the Court is at liberty to apply other practices and procedures applicable to the High Court in disposing matters falling under its jurisdiction.

The overarching objective and scope of public interest litigation was discussed in **Forward Construction Co. & Others vs Prabhat Mandal Andheri & Others** [1986] AIR 391 and **State of Karnataka & another vs All Indian Manufacturers Organisation and Others**, AIR 2006 SC 186 amongst others. In the latter case of **State of Karnataka & another,** the Supreme Court of India *inter alia* underlined that: in public interest litigation, the petitioner is not agitated by his individual rights but represents the public at large. That, as long as the litigation is bonafide, a Judgement in previous public interest litigation would be a judgment in rem, binding the public at large and barring any member of the public from coming forward before the Court to raise any connected issue or an issue, which had been raised/should have been raised on an earlier occasion by way of a public interest litigation.

The above position is shared in **Fikiri Liganga and another vs the Attorney General and Another,** Misc. Civil Cause No.5 of 2017 and **Jebra Kambole vs The Attorney General,** Misc. Civil Cause No. 22 of 2018, High Court, Main Registry, Dar es Salaam, all unreported, and **Machibya Selemani @ Chikonyolwa @ Makobela and 2 others vs the Attorney General,** Miscellaneous Civil Cause No. 24 of 2018, High Court, Shinyanga District Registry, unreported.

With the foregoing in my mind, I have thus generally and specifically carefully addressed my mind to the able arguments of both counsel and I

have also considered the wealth of authorities cited for my guidance. Back to the 5th and 6th points of objection which are to the effect that the affidavit in support of the petition is fatally defective for contravening Order XIX Rule 3 of the CPC; and that, the affidavit in support of the petition is fatally defective for obtaining a defective verification clause, this Court prefers to examine them collectively.

In reflection, the gist of the respondents' submission in respect of the 5th & 6th points of objection is that the affidavit in support of the petition is fatally defective for its paragraphs 5, 6, 7, 14 and 17 contain law citation, legal arguments and conclusions under paragraphs 15, 16 and 18 as well as speculations in terms of paragraphs 11 and 14 contrary to Order XIX Rule 3 of the CPC; and that, the affidavit in support of the petition is fatally defective for obtaining a defective verification clause because the contents under paragraphs 9, 10, 11, 12, 13 and 14 are clear to have been obtained from other sources. That apparently, makes the submission to boil down to the issue whether the impugned paragraphs raised are pure point(s) of law.

The petitioner's counsel vehemently submitted that as the assertions in the impugned paragraphs are mixed up points of facts and law, they are unworthy to be raised as preliminary objection in purview of the cited **Mukisa's** case (supra) in which Sir Charles Newbold, P underscored at page 701 that:

> **"A preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is 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."**

Furthermore, she submitted that, the credibility and admissibility of annextures AS3 (printed copy of the web page of SAUT), AS4 (2nd respondent's CV) and AS5 (a press clipping) cannot be contested at this point and that if the

respondents find the petitioner's knowledge on the impugned paragraphs to be incorrect, it was upon the deponent of the Counter Affidavit to say so for the Court to determine at the hearing of the matter on which assertions are correct. She thus distinguished the decisions in **Salima Vuai Foum** and **Paul Makaranga** above which did not have verification at all.

The respondents' rejoinder submission on the impugned paragraphs reiterated their position in the course of their submission in chief that the contents therein were not in the deponent's knowledge. Mr Mulwambo further argued that, for instance, in paragraph 11 of the petitioner's affidavit the petitioner narrates on the career history of the 2nd respondent (CV) which is a personal creature of the latter whose source is not found in his affidavit.

Groping the rival arguments by counsel above, the question is whether the contents in AS3, AS4 and AS5 qualify the test laid down in the famous case of **Mukisa's case** above that they are correct and do not need further substantiation from the parties.

The position regarding annextures to pleadings according to **Bruno's case** above is that an annexture to affidavit is intended to substantiate the allegations made in the affidavit. Likewise, dealing with the similar issue in the past, the defunct East African Court of Appeal underlined in **Castelino v Rodrigues** [1972] 1 EA 223 put it that in pleading, a reference to annexure incorporates contents of annexure in pleading. In that case, Spray, V.P., Law and Lutta JJA underscored that:

> **"As a general rule, a reference in a document to an annexure has the effect of incorporating the contents of the annexure in the document. On this principle, we do not think the notice of motion in the present case was in breach of the rules, especially having regard to the matters which, under O. 23, r. 4, have to be included in the affidavit."**

With the above considered in composite, it makes it clear that the legitimacy of the impugned paragraphs above cannot be ascertained without hearing the parties on merits. It will be wrong to preempt the petitioner or conclude at this stage that the paragraphs contain false evidence which cannot be acted upon. The decision in **Ignazio Messina's case** is thus inapplicable.

It is however also not needless to remind that, even if such paragraphs would have apparently been offensive, the court is always enjoined to examine them before adjudging the whole petitioner's affidavit fatally defective as claimed by the respondents' counsel and if found offensive the Court would ordinarily expunge them from the affidavit as was held by the Court of Appeal in **Phantom Modern Transport (1985) Ltd and D.T. Dobie (Tanzania) Ltd,** Civil Reference No.5 of 2001 and 3 of 2002.

Likewise, this Court would have discretion to order for an amendment to put right the petitioner's verification clause. In the case of **Raia Mwema Company Limited v. Minister for Information, Culture, Arts and Sports and 2 others,** Miscellaneous Civil Application No. 109 of 2017, Dar es Salaam, Main Registry, unreported, the Court had the following to say regarding verification clause: -

> **"Conversely, premised on a wide range of legal positions it is this Court's objective unfeigned observation that, even if it were assumed that the verification clause was as such defective the available remedial measures would be drawn from Order VI Rule 15(1) & (3) of the Civil Procedure Code, [CAP. 33 R.E, 2002]; a decision in F.A. Sapa vs. Singora [1991] 3 SCC 375 and further guidance from SRI. G.C. Mogha in "The Law of Pleadings in India", 14th Edition, published by Eastern Law House, at page 58 and 59 and Mulla, "The Code of Civil Procedure", 16th Edition, Volume II, at page 1181.**
>
> **It is worth noting here that, the Indian position in some citations above has been considered and domesticated with approval by the High Court in the decisions of: Kiganga and Associated Gold Mining Company Limited vs. Universal Gold N.L, Commercial Cause No. 24 of 2000 (Dar es Salaam Registry) (Unreported) and Godfrey Basil Mramba vs. The**

Managing Editor & 2 Others, Civil Case No. 166 of 2006, (Dar es Salaam Registry), (Unreported) in which the High Court in the two scenarios made orders for amendment of the pleadings."

In that view, this Court holds the impugned paragraphs are arguable and require substantiation and even if it were to expunge them, which is not the case, that would naturally fall within the discretionary powers of the Court which in purview of **Mukisa's case** above, does not qualify to invite filing of preliminary objection(s). It is from the above position this Court finds both the 5th and 6th raised Preliminary Points of Objection to be not pure points of law, hence, untenable in law. The same are consequently hereby overruled.

As this Court moves on, this being a public interest litigation case, this Court has first to consider the competence of the impleaded parties in relation to the reliefs sought. That is because, the aspect is a common determinant factor to the remaining points of objection considering that, in the course of advancing their rival submissions, particularly in relation to the 1st and 3rd points of objection, the learned counsel at some points stretched into the merit of the petition which is not an assignment of this Court at the moment.

According to the petitioner, the gist of the submission by the petitioner's counsel is that the petition is competent because the appointment of the 2nd respondent to hold office of the 3rd respondent is tainted with constitutional irregularities. On the other hand, the respondents hold that the petition is incompetent for being frivolous, vexatious and an abuse of the Court process and offends articles 26(2), 46(2) & (3) of the Constitution and section 6 of the Presidential Affairs Act (supra).

However, it is a common ground that reliefs (a), (b) and (c) in the petition seek to annul the qualifications and appointment of the 2nd respondent in holding the office of the 3rd respondent. It is also worth noting that both parties

are in agreement that the Attorney General of the United Republic of Tanzania is appointed by the President of the United Republic of Tanzania and he/she is a public officer whose appointment is governed by the Constitution.

With the foregoing revelation, this Court is mindful that establishment of public offices and appointment of public officers are aspects governed by the Constitution and other laws. Articles 35(1) and 36(1) & (2) of the Constitution and section 48(1)(a)&(b) of the Interpretation of Laws Act, Cap.1 R.E, 2002 hereinafter "the Interpretation Act", vest in the President powers to: establish, disestablish and or re-structure such offices in the Service of the Government of the United Republic; appoint public officers to discharge the functions therein on his behalf; and or suspend or reinstate them accordingly.

In that connection therefore, the constitutional provisions provide that, public officers so appointed as leaders are responsible for: formulating policies for departments and institutions of the Government and supervision of the implementation of those department's and institution's policies in the Service of the Government of the United Republic.

The learned Solicitor General and Mr Mulwambo in their submission on the 1st and 3rd points of objection vehemently argued and maintained that, whereas article 46(2) and (3) of the Constitution and section 6 of the Presidential Affairs Act provide for presidential immunity against civil liability, article 46(1) provides absolute immunity against criminal proceedings to the serving President of the United Republic of Tanzania. Therefore, to them, in exercising his mandate as the President, he enjoys absolute immunities covering his private and official actions. Mr Mulwambo further added:

> **"It is unfortunate that, in the Originating Summons, the Petitioner has brought these proceedings naming the President in his own name, which means that the Petitioner does not complain against acts by the**

President acting in his official capacity, but in his individual capacity as a citizen. This fact is further substantiated by the declaratory orders and nature of redress sought in which the Petitioner seeks for a declaratory order that His Excellency John Pombe Magufuli failed to adhere to his duty to abide by the Constitution."

The reply submission by Ms. Karume, as recapped earlier on, is that, the President in the present petition is not impleaded in his own personal capacity, that is, as Hon. John Pombe Joseph Magufuli, but rather, in his official capacity. So, there was no need to issue a statutory notice which is only issued when the President is sued in his personal capacity.

The foregoing rival submissions by counsel in this public interest litigated petition create a situation where under Rule 19 of the Rules, Order I Rule 3, Order VII Rule 1(c) and (g) of the CPC have to be considered in resolving the aspect of contested parties' competence. According to the cited provisions of the CPC, the petitioner was obliged to implead rights and reliefs arising out of the 1st, 2nd and 3rd respondents' same act or transaction or series of acts or transactions for them to be jointly or severally responsible even where, if separate petitions were brought against them, the same common question(s) of law or fact would arise.

Now, picking up from above, this Court pose to ask whether by bracketing the official title of Hon. John Pombe Joseph Maguguli, that is, "(THE PRESIDENT OF THE UNITED REPUBLIC OF TANZANIA)" it made him officially impleaded, hence, mandating him to exercise the powers vested to the President under articles 36(1) (2) and 59(1) of the Constitution and section 48(1)(a) & (b) of the Interpretation Act, that is, powers to establish the Office of the Attorney General and appoint the 2nd respondent for him to further suit the requirement of articles 35(1), 59(3)&(5)(a) &(b) of the Constitution and sections 3A (a)-(e),

4, 5 and 6 of the Attorney General (Discharge of Duties) Act, Cap.268 as amended by the Written Laws (Miscellaneous Amendments) Act (No.2) Act No.7 of 2018 read together with the Office of the Attorney General (Re-structure) Order, 2018 GN. No. 48 of 2018. The articles provide that:

> **"35. (1) Shughuli zote za utendaji za Serikali ya Jamhuri ya Muungano zitatekelezwa na watumishi wa Serikali kwa niaba ya Rais...**
>
> **36. (1) Bila ya kuathiri masharti mengineyo yaliyomo katika Katiba hii na ya sheria nyingine yoyote, Rais atakuwa na mamlaka ya kuanzisha na kufuta nafasi za madaraka ya namna mbalimbali katika utumishi wa Umma wa Serikali ya Jamhuri ya Muungano.**
>
> **(2) Rais atakuwa na madaraka ya kuteua watu wa kushika nafasi za madaraka ya viongozi wanaowajibika kuweka sera za idara na taasisi za Umma na watendaji wakuu wanaowajibika kusimamia utekelezaji wa sera za idara na taasisi hizo katika utumishi wa Umma wa Serikali ya Jamhuri ya Muungano, nafasi ambazo zimetajwa katika Katiba hii au katika sheria mbalimbali zilizotungwa na Bunge kwamba zitajazwa kwa uteuzi unaofanywa na Rais."**

The English version of the above quoted articles 35(1) and 36(1) & (2) reads:

> **"35. - (1) All Executive functions of the Government of the United Republic of Tanzania discharged by officers of the Government shall be so done on behalf of the President...**
> **36.- (1) Subject to the other provisions of this Constitution and of any other law, the President shall have authority to constitute and to abolish any office in the service of the Government of the United Republic.**
>
> **(2) The President shall have the authority to appoint persons to hold positions of leadership responsible for formulating policies for departments and institutions of the Government, and the Chief Executives who are responsible for supervision of the implementation of those department's and institution's policies in the Service of the Government of the United Republic, in this Constitution or in various laws enacted by the Parliament, which are required to be filled by a appointment made by the President."**

On the other hand, section 48(1)(a) & (b) of the Interpretation Act provide:

> **48. (1) Where a written law confers a power or imposes a duty upon a person to make an appointment to an office or position, including**

an acting appointment, the person having such power or duty shall also have the power–

(a) To remove or suspend a person so appointed to an office or position, and to re-appoint or reinstate, any person appointed in exercise of such power or duty;

(b) where a person so appointed to an office or position is suspended or unable, or expected to become unable, for any other cause to perform the functions of such office or position, to appoint a person to act temporarily in place of the person so appointed during the period of suspension or inability, but a person shall not be appointed to so act temporarily unless he is eligible and qualified to be appointed to the office or position; and

(c) To specify the period for which any person appointed in exercise of such a power or duty shall hold his appointment.

(2) For the purposes of paragraph (b) of subsection (1), "cause" includes–

(a) Illness;

(b) Temporary absence from the United Republic; and

(c) Conflict of interest.

(3) The validity of anything done by a person purporting to act under an appointment made under paragraph (c) of subsection (1) shall not be called in question on the ground that the occasion for his appointment had not arisen or had ceased.

(4) N/A

(5) Nothing in this section affects the tenure of office or position of any person under the express provisions of any written law.

Moreover, articles 59(1),(3) and (5)(a) &(b) of the Constitution and sections 3A(a)-(e), 4, 5 and 6 of the Attorney General (Discharge of Duties) Act, read together with the Office of the Attorney-General (Re-structure) Order (supra) in unison provide *inter alia* for: **one;** the establishment of the Office of the Attorney-General; **two;** his appointment; **three;** his tenure in office; **four;** his functions and powers; and **five;** the administration and the relationship of his office with other officers discharging legal duties in the public service.

Regarding the appointment of the Attorney General and his tenure in office articles 59(1) and (5) provide thus:

> **"59 (1) Kutakuwa na Mwanasheria Mkuu wa Serikali ya Jamhuri ya Muungano ambaye katika ibara zifuatazo za Katiba hii atatajwa tu kwa kifupi kama "Mwanasheria Mkuu" ambaye atateuliwa na Rais.....**
>
> **(5) Mwanasheria Mkuu atakuwa Mbunge kutokana na wadhifa wake, na atashika madaraka yake mpaka–**
>
> **(a) uteuzi wake utakapofutwa na Rais; au**
>
> **(b) mara tu kabla ya Rais mteule kushika madaraka ya Rais....."**

The English version of the above quoted articles 59(1) and (5) (a) & (b) read:

> **"59. -(1) There shall be the Attorney General for the Government of the United Republic, who in the subsequent Articles of this Constitution, shall simply be referred to as the "Attorney-General" who shall be appointed by the President....**
>
> **(5) The Attorney-General shall be a Member of Parliament by virtue of office, and shall hold office until -**
>
> **(a) his appointment is revoked by the President; or**
>
> **(b) immediately before the President elect assumes office...."**

With the foregoing exposition of the explicit constitutional and statutory mandates and responsibilities held by the President of the United Republic of Tanzania in view of the quoted provisions of the Constitution and other laws in relation to the establishment of public offices, the Office of the Attorney General and his appointment, its powers and functions in particular, this Court is of clear state of mind that, the 1st and 2nd respondents cannot be said to have been properly impleaded. They are parties to the present public interest litigated petition who, under the referred provisions of the Constitutions and those of the CPC, have no mandates and responsibilities from which a cause of action and reliefs sought can be founded.

Besides, paying regard to the case of the 1st respondent in particular, that is, Hon. John Pombe Joseph Magufuli, articles 37(2), (3) and (5) and 38, 42(2)

& (3) of the Constitution are clear that the President in office, may at any time cease to hold the office of President before completing the five years term in office but without causing effect to duly established public offices and appointed public officers, the 2nd respondent inclusive.

The above situation for instance may happen at any time when the Chief Justice after considering the medical evidence certifies to the Speaker that: the President, due to physical or mental infirmity, is unable to discharge the functions of his office; or where the office of President becomes vacant by reason of death, resignation, loss of electoral qualifications or failure to discharge the duties and functions of the office of President for being absent from the United Republic; or the removal of President from office following his impeachment by the National Assembly in accordance with this Constitution. The excerpts from the aforesaid articles of the Constitution read:

> **"37(1) ....**
>
> **(2) Endapo Baraza la Mawaziri litaona kuwa Rais hawezi kumudu kazi zake kwa sababu ya maradhi ya mwili au ya akili, laweza kuwasilisha kwa Jaji Mkuu azimio la kumwomba Jaji Mkuu athibitishe kwamba Rais, kwa sababu ya maradhi ya mwili au akili, hawezi kumudu kazi zake. Baada ya kupokea azimio kama hilo, Jaji Mkuu atateua Bodi ya utabibu ya watu wasiopungua watatu atakaowateua kutoka miongoni mwa mabingwa wanaotambuliwa na sheria ya matabibu ya Tanzania, na Bodi hiyo itachunguza suala hilo na kumshauri Jaji Mkuu ipasavyo, naye aweza, baada ya kutafakari ushahidi wa kitabibu kuwasilisha kwa Spika hati ya kuthibitisha kwamba Rais, kutokana na maradhi ya mwili au ya akili, hamudu kazi zake; na iwapo Jaji Mkuu hatabatilisha tamko hilo ndani ya siku saba kutokana na Rais kupata nafuu na kurejea kazini, basi itahesabiwa kwamba kiti cha Rais ki wazi, na masharti yaliyomo katika ibara ndogo ya (3) yatatumika.**
>
> **(3) Ikitokea kwamba kiti cha Rais ki wazi kutokana na masharti yaliyomo katika ibara ndogo ya (2), endapo kiti cha Rais ki wazi kutokana na sababu nyingine yoyote, na endapo Rais atakuwa hayupo katika Jamhuri ya Muungano, kazi na shughuli za Rais zitatekelezwa na mmojawapo wa wafuatao, kwa kufuata orodha kama ilivyopangwa, yaani–**

(a) Makamu wa Rais au kama nafasi yake i wazi au kama naye hayupo au ni mgonjwa; basi

(b) Spika wa Bunge au, kama nafasi yake i wazi au kama naye hayupo au ni mgonjwa; basi

(c) Jaji Mkuu wa Mahakama ya Rufani ya Jamhuri ya Muungano.

(4) .....

(5) Endapo kiti cha Rais kitakuwa wazi kutokana na Rais kufariki dunia, kujiuzulu, kupoteza sifa za uchaguzi au kutomudu kazi zake kutokana na maradhi ya mwili au kushindwa kutekeleza kazi na shughuli za Rais, basi Makamu wa Rais ataapishwa na atakuwa Rais kwa muda uliobaki katika kipindi cha miaka mitano....."

"38. (1) ....

(2) Bila ya kuathiri masharti mengineyo ya Katiba hii, kiti cha Rais kitakuwa ki wazi na uchaguzi wa Rais utafanyika au nafasi hiyo itajazwa vinginevyo kwa mujibu wa Katiba hii, kadri itakavyokuwa, kila mara litokeapo lolote kati ya mambo yafuatayo–

(a) baada ya Bunge kuvunjwa;

(b) baada ya Rais kujiuzulu bila ya kuvunja Bunge kwanza;

(c) baada ya Rais kupoteza sifa za kushika nafasi ya madaraka ya kuchaguliwa;

(d) baada ya Rais kushtakiwa Bungeni kwa mujibu wa Katiba hii, na kuondolewa katika madaraka;

(e) baada ya kuthibitishwa kwa mujibu wa masharti ya ibara ya 37 ya Katiba hii kwamba Rais hawezi kumudu kazi na shughuli zake;

(f) baada ya Rais kufariki.

(3) Kiti cha Rais hakitahesabiwa kuwa ki wazi kwa sababu tu ya Bunge kupitisha hoja ya kutokuwa na imani kwa Waziri Mkuu."

"42 (1) ...

(2) Isipokuwa kama atajiuzulu au atafariki mapema zaidi.....

(3) Mtu aliyechaguliwa kuwa Rais atashika kiti cha Rais hadi–

(a)...; au

(b) siku ambapo atafariki dunia akiwa katika madaraka; au

(c) siku atakapojiuzulu; au

(d) atakapoacha kushika kiti cha Rais kwa mujibu wa masharti ya Katiba hii."

An extract of English version of article 37(5) on the other hand reads:

> **"Where the office of President becomes vacant by reason of death, resignation, loss of electoral qualifications or inability to perform his functions due to physical infirmity or failure to discharge the duties and functions of the office of President, then the Vice-President shall be sworn in and become the President for the unexpired period of the term of five years....".**

So, in view of the foregoing provisions of the Constitution, this Court is left with no spec of doubt in mind that, by bracketing the official title of the President, that is, "The President of the United Republic of Tanzania" next to the 1st respondent's personal name that by itself does not make the 1st respondent, in his personal capacity, qualified to be impleaded in his official capacity of the President of the United Republic of Tanzania as forcefully argued by the petitioner's counsel.

And, had the petitioner taken note of the fact that Hon. John Pombe Joseph Magufuli, the President in office, may at any time, by virtue of article 37(5) of the Constitution be succeeded over by one of the persons named therein by their titles that is, the Vice-President, the Prime Minister and the Chief Justice, this Court is sure that he would have known that his public interest litigated petition is untenable. That is because he mounted his pleadings and predicated the reliefs sought against a private person whom upon ceasing holding the Office of the President cannot perpetually discharge the presidential mandates and responsibilities under the above-mentioned provisions of the Constitutions and other laws. Therefore, this Court has no doubt whatsoever in mind that no public interest litigated petition of this kind can be sustained because it was mounted against wrong parties to the said petition.

This Court thus parts away from Ms. Karume's position above for going by her reasoning, the Court will be dragged into open-ended questions like why didn't the petitioner likewise implead the 3rd respondent in his personal name followed by his bracketed official title that is, Hon. Adelardus Lubango Kilangi (The Attorney General)? And why shouldn't all criminal cases be preferred in the personal name of the Director of Public Prosecutions followed by his bracketed official title or acronym, that is, XY (D.P.P or DPP) which is formally used in Court proceedings? So, by impleading the 1st respondent in his personal name whether intentionally or not it should have clicked in the mind of the petitioner that he severed him from the mandates and responsibilities vested to the President under the above-mentioned provisions of the Constitution and other laws.

With the foregoing discussion, this Court finds that the petitioner's petition is devoid of cause of action and actionable reliefs deserving a competent public interest litigated petition. It has clearly turned out that, the respondents were improperly impleaded. As a result, they lack competence to satisfy the constitutional and statutory prerequisites of articles 26(2) and 30(3) of the Constitution, sections 4 and 5 of the Act, Rule 4 of the Rules as well as Order I Rule 3, Order VII Rule 1(c) and (g) of the CPC on the one hand and articles 35(1), 36(1)&(2), 59(1), (3) and (5)(a) &(b) of the Constitution, section 48(1)(a) & (b) of the Interpretation Act and sections 3A (a) - (e), 4, 5 and 6 of the Attorney General (Discharge of Duties) Act (supra) read together with the Office of the Attorney – General (Re-structure) Order (supra) on the other.

From the foregoing discussion, I find the submission by the learned Solicitor General that, the Court is improperly moved for the redress sought

under article 30(3) of the Constitution for want of cause of action is meritorious. However, the case of **Harrikson vs. Attorney-General of Trinidad and Tobago (supra)** he cited is of no significance because the present petition is not founded on aspects of human rights or fundamental freedom, but, is rather challenging the appointment of the 2nd respondent as the Attorney-General under the rubric of public interest litigation.

In so far as the above discussion and holding on the aspects of parties' competence and cause of action is concerned, the Court has given effect to the plain meaning of the words used in the aforementioned articles of the Constitutions and other laws rather than inventing ambiguities in them for purposes of making them operative and not inoperative.

To that effect, this Court wholly subscribe to the authoritative decision in **EADB vs. Blueline Enterprises Limited** (supra) cited by Ms. Karume. (See: **Julius Ishengoma Francis vs. the Attorney General** (supra) and **Tanzania Cigarette Company Ltd vs. the Fair Competition Commission & Attorney General** (supra). Subsequently, The Full Bench of the Court of Appeal of Tanzania stressed on that position in the case of **Chiriko Haruna David vs. Kangi Alphaxard Lugora, The Returning Officer for Mwibara Constituency and the Attorney General,** Civil Appeal No. 36 of 2012 (unreported) where it ironically directed that:

> **"We wish to observe here by way of emphasis, even if it is at the expense of repeating ourselves, that one of the cardinal rules of construction is that courts should give a piece of legislation its plain meaning."**

Turning to the 2nd and 4th points of objection, they are to the effect that the petition is incompetent for contravening the provisions of article 26(2) of the Constitution and is frivolous, vexatious and an abuse of Court process.

Addressing the Court, the respondents' counsel vigorously submitted that, the petition is incompetent for failure to abide to section 1(2) of the Act which confines jurisdiction of this Court to contraventions relating to articles 12 to 29 of the Constitution and for failure to disclose cause of action for remedies premised under articles 26 and 30(3) of the Constitution.

Whereas this Court subscribed to the submission by the respondents' 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 of the Constitution. This Court wholly agrees with Ms Karume that the position of law in **Julius Ishengoma Francis vs. the 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 sections 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. Article 26 of the Constitution that attracted the rival submissions provides that:

> **"(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."**

So, whoever seeks to premise his public interest litigation under that article or generally under the umbrella of public interest litigation must present a petition which on the face of it is compliant to section 6 of the Act, that is, ensuring the contents of the petition contains (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 sections 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.

In view of the above, this Court do not see how the petitioner complied with section 6(b), (c), (e) and (f) of the Act for his petition to garner support of the decision in **Julius Ishengoma Francis vs. the Attorney General** (supra). Under the circumstance, this Court will agree with the respondents that the present petition is vexatious as it is hopeless and offends article 26(2) of the Constitution and tends to cause the opposite party (respondent(s)) unnecessary anxiety trouble and expenses.

On the other hand, section 8 (2) of the Act does not vest jurisdiction to this Court on frivolous or vexatious applications. In **Elizabeth Stephen & Another** [2006] TLR 404 at page 416 this Court underscored that the section was put in place to preserve the sacrosanct nature of the Constitution and to bring to Court only matters of great importance and leave the rest to be dealt with by other authorities.

Discerning from the decision in **Wangai vs Mugamba & Another** [2003] 2 EA 474, 481 a petition is said to be frivolous when it is without substance, or groundless or fanciful; and is vexatious when it lacks *bona fide* cause and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety trouble and expenses.

Applying section 8(2) of the Act and the above definition to the pleadings and submissions on record, there remains no doubt that the Court has already concluded that the same is untenable because: there is no cause of action

against the respondents; the respondents were improperly impleaded; and, the petition contains reliefs that cannot be granted. By this reasoning which is glaringly different from that of the respondents' counsel, it appears to this Court that the petition lacks *bona fide* cause hence vexatious.

Hence, by choosing to implead the 1st and 2nd respondents in their personal names for matters which they cannot be legally held responsible, the petition is indubitably rendered to bend in all fours with the factors befitting a frivolous and vexatious petition within the context of section 8(2) of the Act and definition provided in **Wangai's case** above. Besides, the emphasis by this Court in **Machibya Selemani @ Chikonyolwa and 2 others (supra)** that, this Court must remain vigilant at the inception and meticulously examine the *bona fide* of the petitioner to seek redress through public interest litigation stands unfettered.

To the extent of the above discussion, having overruled the 5th and 6th points of objection, this Court hereby wholly sustains the 2nd and 4th points of objection that the petition is incompetent for contravening the provisions of article 26(2) of the Constitution and is frivolous, vexatious and an abuse of court process. And to the extent of the aforesaid discussion, this Court partly sustains the 1st and 3rd points of objections save to the aspect of immunity whose submissions could have been good materials during hearing.

In the event, it is on the basis of wholly and partly sustained points of objection above the petitioner's petition is rendered incompetent. The same is hereby struck out. Considering the nature of these proceedings, the petitioner is condemned to pay the costs in consequential.

In winding up, this Court in indebted to briefly address the complaint raised by the respondents' counsel on the language used by the petitioner's counsel in her reply submission where she is on record to have *inter alia* submitted that:

> **".... The Constitution cannot be used as a shield to protect unconstitutional conduct, as article 26(1) of the Constitution requires every person including the President to uphold the Constitution. So, mark my words, in the event this case fails on a Preliminary Point, it is not over. If the President's unconstitutional conduct is protected by the Court on the ground that he is the President, we shall test it again once he leaves office, be it in 2020 or 2025 and in the latter case, the bench will also be a different one. That is the beauty of time,"[emphasis supplied]**

Arguing on the complaint, Mr Mulwambo referred the Court to Ms Karume's submission where she acted unprofessionally and disrespectfully by advancing personal vindications to the Solicitor General and the Hon. Attorney General. Parts of the complained of utterances are reproduced hereunder:

> **"...this Attorney General is far too junior to garner that kind of respect from the Bar..."; "Given his lack of experience and junior position, Adelardus Kilangi has been a woefully disappointing legal advisor to the Government at cost of the rule of law and Constitution supremacy"; "In this Adelardus Kilangi has failed. A matter that is not surprising given his experience ...".**

The learned Principal State Attorney further referred the Court to Regulations 4,5(1)(a) -(e) and 6(1)(m) of the Advocates (Professional Conduct and Etiquette) Regulations (supra) for its action.

According to section 66 of the Advocates Act, Cap. 341 R.E. 2002 any person duly admitted as an advocate is an officer of the High Court and is subjected to its jurisdiction.

The advocate's duty to the Court in this country, like in other jurisdictions, has remained paramount. (see: **Rogath Utouh vs Anna Munuo**, HC Miscellaneous Civil Application No.20 of 2012, Dar es Salaam Registry,

unreported, **Rondel v. Worsley** [1966] 3 W.L.R. 950 (Eng. C.A.) at. 962-63 (per Lord Denning) and **Giannarelli v. Wraith** (1988) 165 CLR 543,556-7). In a nutshell, the Court had the following to say in **Wraith's case** above:

> **"The performance by counsel of his paramount duty to the court will require him to act in a variety of ways to the possible disadvantage of his client. Counsel must not mislead the court, cast unjustifiable aspersions on any party or witness or withhold documents and authorities which detract from his client's case. ...It is not that a barrister's duty to his client that the dividing line between the two is unclear. The duty to the court is paramount and must be performed, even if the client gives instructions to the contrary. Rather it is that a barrister's duty to the court epitomizes the facts that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he had an eye, not only to his client's success, but also to the speedy and efficient administration of justice. In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross-examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow."**

Regarding misconducts committed by advocates, the Apex Court in India underscored the following in the case of **D. P. Chaddha vs Triyuagi Narayan Mishra 2001 (3) XLIII GLR 2687** at page **2697**:

> **"The term misconduct has not been defined in the Act. However, it is an expression with a sufficiently wide meaning. In view of the prime position which the advocates occupy in the process of administration of justice and justice delivery system, the courts justifiably expect from the lawyers a high standard of professional and moral obligation in the discharge of their duties. Any act or omission on the part of a lawyer which interrupts or misdirects the sacred flow of justice or renders a professional unworthy of right to exercise the privilege of the profession would amount to misconduct attracting the wrath of disciplinary jurisdiction."**

It is clear to this Court that, the complained of unethical reply submission by Ms Karume which in a way challenged this Court's impartiality to enforce article 13(1) of the Constitution, was tantamount to *viva voce* hearing with all

attendant consequences. (see: **P3525 Lt Col Idahya Maganga Gregory vs. The Judge Advocate General**, Court Martial Cr. Appeal No.4 of 2002, in the Court Martial Appeal Court, **Ivan Mankobrad v Miroslav Katik and Annor**, HC.Civ Case No.321/1997 (Dar Registry), **Frederick A.M.Mutafurwa v CRDB 1996 Limited and Others,** HC. Land Case No.146/2004 and **Petro Andrea v Mwishehe Abdallah,** HC. Civil Application No 58 of 2008, all unreported decisions from HC., Dar es Salaam Registry).

Informed by the above exposition regarding the paramount position and role played by advocates in the administration of justice and having considered that, Ms. Karume did not have had opportunity to reply to the respondents' complaint on record, the Court stands unjustified to adjudge the complaint without according her opportunity to be heard.

Obedient to my oath to the office and mindful of my duty to uphold the principles of natural justice, I find it apt that, the complained of unethical reply submission by Ms. Karume be dealt with by a proper and unfettered forum which, during hearing, can justly draw a line from which the independence of the Judiciary has optimal protection against the rights advocates and other Court users are entitled to in mounting critiques to the Judiciary on one hand and to the adjudicating Judicial Officers.

Now, to pave way for the advocates professional disciplinary proceedings on the complained of unethical petitioner's reply submission to take off, I hereby suspend Ms. Fatma Aman Karume, Roll No. 848 from practicing under section 22(2)(b) of the Advocates Act (supra) pending the reference of the professional misconduct matter to the Advocate's Disciplinary Committee.

The Registrar of the High Court is thus ordered to refer the professional misconduct matter contained in petitioner's reply submission and respondents' rejoinder submission together with this ruling to the Advocate Disciplinary Committee for determination.

It is so ordered.

Dated at Dar es Salaam this 20th Day of September, 2019

E.M. FELESHI
JAJI KIONGOZI
20/09/2019

COURT:

Ruling delivered this 20th day of September, 2019 in presence of the Petitioner and Ms Arwa Yusufali, Advocate, holding brief of Ms Fatma Karume, Advocate for the petitioner on one hand, and in presence of Mr George Mandepo, Principal State Attorney accompanied by Ms Alicia Mbuya, Principal State Attorney and Ms Nalindwa Sekimanga, State Attorney, for all the Respondents.

E.M. FELESHI
JAJI KIONGOZI
20/09/2019