IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CIVIL CAUSE NO. 15 OF 2023

ODERO CHARLES ODERO.....PETITIONER

VERSUS

ATTORNEY GENERAL OF TANZANIA.....RESPONDENT

ATTORNEY GENERAL OF ZANZIBAR.....NECESSARY PARTY

RULING

13th December 2023 & 4th March, 2024

KAGOMBA, J.

This is a ruling on two sets of preliminary objections raised by the respondent and the necessary party herein, against a petition filed in this court by the petitioner to challenge the constitutionality of the operation of sea ports in Zanzibar by a non-union entity. The petitioner herein is aggrieved to notice that the management of seaports located within Tanzania Zanzibar is not placed in the exclusive domain and mandate of the Government of the United Republic of Tanzania through the Tanzania Ports Authority ('TPA') as per dictates of the Constitution of the United Republic of Tanzania, 1977 [Cap 2] as amended (Hereinafter referred to

as "the Constitution). Assuming his civic role as a public-spirited individual, the petitioner prays for judgment and decree, as follows:

1. An order proclaiming that all sea ports established within Tanzania Zanzibar fall within the exclusive mandate of the Government of United Republic of Tanzania;
2. An order proclaiming that the TPA is the proper union entity to manage all established courts within Tanzania Zanzibar, including those specified under the First Schedule to the Zanzibar Port Corporation Act, 1997;
3. An order proclaiming that the enactment of Zanzibar Port Corporation Act, 1997 contravened article 64(3), 64(4) and 64(5) of the Constitution,
4. An order proclaiming that under the provision of article 64(5) of the Constitution, the Zanzibar Port Act, 1997 is invalid.
5. Orders directing the respondent to institute urgent and necessary legal measures to immediately take over the operation of all seaports within Tanzania Zanzibar and vest them under the management and control of the United Republic of Tanzania through TPA and or any other designated entity.

6. Orders that parties bear their own costs because the petition advances jurisprudence on constitutionalism, separation of powers and rule of law.

The affidavit of Odero Charles Odero, the petitioner herein, is also before the court to support the petition.

On their side, the respondent and the necessary party have filed their respective counter affidavits to oppose the petition, each raising therein preliminary points of law as intimated earlier. The preliminary objection raised by the respondent is based on three points of law, thus;

1. This court has no jurisdiction to entertain this matter.
2. The petitioner has no *locus standi*.
3. This petition is hopelessly time barred.

On the other hand, the notice of preliminary objection raised by the necessary party carries the same grounds as above, with one additional point of law, thus;

4. The petition is bad in law for joining the Attorney General Zanzibar as a necessary party.

With parties' consent and vide an order of this court, the preliminary objections were argued by way of written submissions. Messrs. Hangi Chang'a and Said Salim Said, both learned Principal State Attorneys

serving in the Office of Solicitor General and Office of the Attorney General of Zanzibar, respectively, jointly drew and filed the joint written submission in support of the preliminary objections, while Mr. John Seka, learned counsel, drew and filed reply submissions for the petitioner. As for rejoinder, Mr. Mbarouk Suleiman Othman, learned Principal State Attorney from Office of the Attorney General of Zanzibar, teamed up with Mr. Chang'a in drawing and filing the same.

On the first point of preliminary objection, it was submitted that since the petition seeks to challenge the constitutionality of the Zanzibar Ports Corporation Act, 1997 (hereinafter the "ZPC Act"), which established the Zanzibar Ports Corporation (hereinafter "ZPC"), a non-union entity, to manage and control the said ports, the challenge being based on articles 64(3), 64(4) and 64(5) of the Constitution, this court has no jurisdiction to entertain the matter.

What is contended above is that while, by invoking the provision of article 108(2) of the Constitution, the petitioner implies that there is no specified forum and procedure for handling a dispute involving interpretation of the Constitution on management of union matters such as ports, in the view of the learned Attorneys such a forum exists, and it

is the Special Constitutional Court established under article 125 of the Constitution, hence this court has no jurisdiction.

The learned State Attorneys further argue that the mandate of this court is not so unlimited as article 108(2) of the Constitution may be taken to connote. Citing the decision of the Court of Appeal in **Salim O. Kabora v. Tanzania National Electricity Supply Co. Ltd & Others** (Civil Appeal 55 of 2014) [2020] TZCA 1812 (7 October 2020), the learned Attorneys submitted that the jurisdiction of this court can be limited either by the Constitution or any other law by specifying that a certain matter be dealt with by a certain specified court. They find the same spirit in section 7 of the Civil Procedure Code [Cap 33 R.E 2019]. In this connection, the case of **Mwananchi Communications Ltd. & Others v. Joshua K. Kajula & Others** (Civil Appeal 126 of 2016) [2020] TZCA 1824 was also cited wherein the case of **Tanzania Breweries Limited v. Anthony Nyingi**, Civil Appeal No. 110 of 2014 (unreported) was referred to, for the contention that it was wrong to determine the question of jurisdiction of this court by solely relying on the provision of article 108(2) of the Constitution, without looking at other laws.

Beaconing their argument on the above cited cases, as well as the case of **Rev. Christopher Mtikila v. Attorney General** [1995] T.L.R

31, the learned Attorneys hold the view that the Special Constitutional Court is, therefore, the proper forum for the grievances raised by the petitioner, and not this court.

They also do not see this court being clothed with mandate to interpret and nullify laws enacted by the House of Representatives such as the ZPC Act. According to their submission, such jurisdiction rests exclusively in the forum established under the Constitution of Zanzibar of 1984, which is the High Court of Zanzibar. To support this view, they referred to section 93(1) of the Constitution of Zanzibar and the decision of this court in **Paul John Muhozya v. Attorney General**, Misc. Criminal Cause No. 2 of 2023.

It is their further contention that for this court to exercise jurisdiction over laws enacted by the House of Representatives, such a law must have applicability in both Tanzania Mainland and Tanzania Zanzibar. The case of **Republic v. Farid Hadi Ahmed**, Criminal Session Case No. 121 of 2020 (Unreported) was cited in this regard. The above arguments boil down to their conclusion that since the ZPC Act is not a union law, this court lacks jurisdiction to interpret it for the purpose of nullifying the same, nor can it check on the legislative powers of the House of Representatives spelt under the Constitution of Zanzibar.

The above constitute, in the main, the arguments for the first limb of the objection, based on which the learned Principal State Attorneys enjoined the court to dismiss the petition for lack of jurisdiction.

As for the second point of objection challenging petitioner's *locus standi*, the contention is that since in the instant petition there is no violation of the petitioner's private rights, which would cloth him with necessary *locus standi* to bring up an action in court, and since the matter filed by the petitioner constitutes a public-interest litigation, therefore it is the Attorney Generals of both sides of the union who have *locus standi* in this matter for being the custodians of public interests. Citing the case of **Lujuna Shubi Balonzi v. Registered Trustees of Chama Cha Mapinduzi** (1996) T.L.R 203, the learned Attorneys argued that public-interest cases can only be brought under article 26(2) of the Constitution but when filed under article 108(2) thereof, it requires the petitioner to prove violation of personal rights or interests caused by the impugned ZPC Act. The decision of the Court of Appeal in the case of **Godbless Lema v. Mussa Hamis Mkenga & 2 Others**, Civil Appeal No. 47 of 2012 (Unreported) was cited to support this contention.

The case of **Peter Mpalanzi v. Christina Mbaruka**, Civil Appeal No. 153 of 2019 was also cited for the contention that *locus standi* on

matters concerning the union rests with the two governments in the union, and the such matter can be adjudicated by the Special Constitutional Court.

As for the consequences of lack of *locus standi*, they cited the case of **the Registered Trustees of SOS Children Village Tanzania v. Igenge Charles & Others**, Civil Application No. 426/08 and the case of **Byabazaire v. Mukwano Industries** [2002] E.A 353. The ultimate contention here is that since *locus standi* is a jurisdictional issue, lacking it leads to dismissal of the petition. The learned Attorneys so prayed.

Submitting on the third ground of objection that impugns the petition for being time barred, it was argued that since the petition was filed under article 108(2) of the Constitution, the same becomes normal civil proceedings for which the court is bound to apply the normal procedures for civil court, including the Law of Limitation Act [Cap 89 R.E 2019] as well as the Civil Procedure Code [Cap 33 R.E 2019]. Citing the cases of **Moto Matiko Mabanga v. Ophir Energy PLC & 6 Others**, Civil Appeal No. 119 of 2021, CAT at Dodoma, and **Swilla Secondary School v. Japhet Petro**, Civil Appeal No. 362 of 2019, CAT at Mbeya (Unreported), the learned Principle State Attorneys raised two arguments in this regard. **Firstly**, if the petition seeks declaratory orders from a

cause of action that is time barred, then this court will have no jurisdiction to entertain the same.

Secondly; pursuant to item 24 of part I to the Schedule of the Law of Limitation Act, and considering that there is no specific item in the said schedule under which this petition falls, the same is therefore amenable to *"Any suit not otherwise provided for"* for which the time limit for filing such a suit is six (6) years. The case of **CRDB (1996) Ltd. v. Boniface Chimya** [2003] T.L.R 413 was cited to support the contention.

In connection to the case cited above, the learned Attorneys submitted that since the cause of action is founded on enactment of the impugned ZPC Act on 9th June, 1997 when the law was assented to, and since the petitioner and the entire public were made aware of the enactment of the law via a Government Gazette, the instant petition is thus hopelessly time barred.

Drawing reference to the petitioner's averments in the petition, the learned Attorneys argued that the recent debate on Inter-Governmental Agreement (IGA) between the Government of the United Republic of Tanzania and the Emirate of Dubai is not what informs the public on the enactment of the law, rather it is the Government Gazette which does. The case of **Zella Adam Abraham & 2 Others v. The Honourable**

Attorney General & 6 Others, Consolidated Civil Revision No. 1,3 and 4 of 2016, CAT at DSM (Unreported) was cited in this regard.

As for the fourth point of objection raised by the necessary party, it was submitted to the effect that unlike in Tanzania Mainland, the Attorney General of Zanzibar cannot be sued as a necessary party but as a substantive party. Hence, the learned Attorneys deem the petition to be bad in law for joining the Attorney General of Zanzibar as a necessary party. Section 6(3) of the Government Proceedings Act, Act No. 3 of 2010, of Zanzibar, was referred to in this contention. Also, reference was made to section 56 of the Constitution of Zanzibar and section 14(1)(b) of the Attorney General's Chambers (Discharge of Duties) Act No. 6 of 2013 to show that the Attorney General of Zanzibar, being a principal and chief legal advisor to the Revolutionary Government of Zanzibar has full mandate to be sued in his own name.

In summing up their submission in chief, the learned Principal State Attorneys concluded that this court lacks jurisdiction in this matter on account of being a wrong forum, for having a wrong petitioner before it who lacks standing, and for the petition itself being filed out of time. Their main prayer is to have the petition dismissed with costs.

On his side, the petitioner's counsel refused to let his client's petition succumb to the four points of objections. He attempted to come tall against each objection, viewing the same as misconceived and misguided.

Replying to the first ground of objection, the learned counsel for the petitioner was emphatic that this court is the only existing judicial platform with mandate to receive, entertain and adjudicate complaints raised in the petition. To support this contention, he referred to the case of **Fanuel Mantiri Ng'unda v. Herman Mantiri Ng'unda** & 20 Others [1995] T.L.R 155. Citing article 108(1) and (2) of the Constitution, the learned counsel further argued that, where the Constitution or other laws do not expressly specify the jurisdiction for determination of any matter, jurisdiction to adjudicate such a matter shall lie in this court.

On the argument that it is the Special Constitutional Court which has jurisdiction to determine the grievances made in the petition, he opposed it on three grounds; **Firstly**, while article 126(1) of the Constitution requires that a matter in dispute must be between the Government of United Republic of Tanzania and the Revolutionary Government of Zanzibar, the petitioner is an individual and not a government.

Secondly; while the duty of the Special Constitutional Court is to reconcile the two governments in case of dispute referred to it for adjudication, the petitioner herein does not seek reconciliation. The case of **Mtumwa Said Haji and 49 Others v. the Attorney General of the United Republic of Tanzania**, Civil Case No. 2 of 1995 (Unreported) was referred to for the reconciliatory duty of the Special Constitutional Court. The learned counsel for the petitioner unearthed two conditions for invocation of the jurisdiction of the Special Constitutional Court as stated by this court in **Mtumwa Said Haji** (supra), thus:

1. A matter must exists concerning the interpretation of the Constitution.
2. Such an interpretation or its application must be in dispute between the Government of the United Republic of Tanzania and the Zanzibar Revolutionary Government.

The learned Counsel argued that in absence of these conditions, his client could not file his petition at the Special Constitutional Court.

Thirdly; the Special Constitutional Court is not functional currently, and therefore, even if the petitioner would be allowed to access it, non-existence of the said Court could make the petition futile. This contention is built on an argument that article 128(4) of the Constitution requires the

Parliament to legislate on some preconditional matters for operation of the said Court but such matters have not been legislated upon.

The learned counsel for the petitioner was also emphatic that it is this court which has the sole and exclusive mandate on issues relating to union matters in terms of article 64 of the Constitution, and may invalidate any law within the United Republic of Tanzania which violates the provisions thereof. He views the impugned ZPC Act as violative of the Constitution for legislating on ports operation and management, which is a union matter. His further view is that such violation of article 64(3) of the Constitution by the impugned Act entitles this court to declare it invalid on account of House of Representative exceeding its legislative mandate. According to him, article 64(5) of the Constitution establishes the supremacy of the Constitution in all union matters including matters specified under item 11 of the 1st Schedule to the Constitution.

Concluding his reply submission in respect of the first ground of objection, while basing on article 64(1), 64(2), 64(3) and 64(5), the learned counsel argued that this court, being the High Court of the United Republic of Tanzania, has requisite jurisdiction to address allegations of breach of these articles which involve union matters.

It is the learned counsel's opinion that article 108(2) of the Constitution can be used to challenge the breach of other articles of the Constitution other than articles 12 to 29, the latter set of articles being on basic rights and duties. On this point, he cited the cases of **Paul Revocatus Kaunda v. Speaker of the National Assembly & Others** [2020] TZHC 4758; **James Francis Mbatia v. Job Yustino Ndugai & Others**, and **Odero Charles Odero v. DPP & Another** [2021] T.L.R 738 to argue that his client's petition is properly before the court.

Replying in respect to the second objection on *locus standi*, the learned counsel was very economical with his words. He submitted that his client, being a Tanzanian, is permitted to champion for the supremacy of the Constitution and its respect. He applauded the trend, shown by courts, of relaxing the strict common law rules by recognizing the *locus standi* of public-spirited individuals when it comes to litigation involving the Constitution, human rights and fundamental rights. Citing **Rev. Christopher Mtikila v. Attorney General** [1995] T.L.R 31, he beseeched this court to hold that the petitioner has the requisite *locus standi*.

On the third point of objection which challenges the petition for being time barred, the first entry point in reply by the learned counsel is

that this is not a normal litigation, hence not covered by the Law of Limitation Act. Citing the cases of **Ezekiah Tom Oluoch v. Chama cha Waalimu Tanzania & Others** [2022] TZHC 11572; **Joan Akinyi Kabaselleh & 2 Others v. Attorney General** [2014] eKLR; **Jamlik Muchangi Miano v. Attorney General** [2017] eKLR; **Florence Wakiuru Muchiri & Another v. Attorney General** [2017] eKLR and **Otilo Margaret Kanini & 16 Others v. Attorney General & 4 Others** [2022] eKLR, the learned counsel for the petitioner submitted that a petition challenging breach of constitutional and or fundamental rights has no time limitation and can be filed in court at any time. He asserts that there should never be a bar to vindication of supremacy of the Constitution.

Arguing as an alternative, the learned counsel reckoned that his client pleaded in his petition that he discovered the breach of constitution during the recent debate on IGA, hence the discovery of the breach is within the period of six (6) years.

In a further alternative argument, he contended that since the impugned operation and management of ports, is still undertaken by ZPC, there is a continuing breach of the Constitution whereby section 7 of the Law of Limitation Act applies, and not section 3 and 24 of the said Act. He

also rebuffed the time limitation argument on account of failure by the learned Principal State Attorneys to cite any similar instance where a constitutional petition was wrestled for being time barred.

Regarding the fourth, and the last point of preliminary objection, the learned counsel raised the issue whether the joinder or non-joinder of a party was fatal to the petition. He argued that the inclusion of the Attorney General of Zanzibar was necessary to achieve a fair adjudication of the matter. According to him, the admission in the joint submission that the Attorney General of Zanzibar has full statutory mandate to stand and protect the interests of the Revolutionary Government of Zanzibar makes this point of objection rather moot.

The learned counsel concluded by praying for dismissal of the preliminary objections and for orders that the petition proceeds for determination on merits.

In their rejoinder, the Attorneys for the respondent and the Necessary party, by and large, reiterated their submissions in chief in respect of the first point of objection. They emphasized that the proper forum for adjudication of the concerns stated by the petitioner is the Special Constitutional Court. They also clarified that article 128 of the Constitution provides for a situation whereby the Special Constitutional

Court, which is an *ad hoc* forum, can be called upon to act on a matter even where its procedural law is not yet in place, as it can adopt its own procedure.

As regard the petitioner's contention that this court is the only court with powers to determine union matters in terms of articles 64(1), 64(2), 64(3) and 64(5) of the Constitution, the learned Attorneys disagreed and maintained their submission in chief in this aspect.

On lack of *locus standi*, they maintained that when it comes to union matters, *locus standi* is a preserve of the two governments and not individuals. They agree with the decision in **Rev. Christopher Mtikila v Attorney General** (supra) regarding public-spirited petitioners but find **Mtikila's** case distinguishable as the same was about human rights claims.

Rejoining on the third point of objection concerning time limitation, the learned Attorneys hold the view that the cases cited by the petitioner's counsel are on claims of fundamental rights, hence inapplicable in the instant scenario.

As regards section 7 of the Law of Limitation Act, they are of the view that the cited provision on continued breach, is also inapplicable as it only applies to contracts.

Regarding the last point of objection, the learned State Attorneys again, maintained that unlike Tanzania Mainland, the Attorney General of Zanzibar cannot be sued as a necessary party, rather as a proper party, in his own name.

Having rejoined as above, they reiterated their prayer for dismissal of the petition on jurisdictional grounds.

The above rival submissions call for determination of one general issue which encompass four specific sub-issues. The general issue is whether the preliminary objections raised by the respondent and the necessary party have merits. The specific sub-issues are;

Firstly; whether this court has jurisdiction to determine the petition at hand;

Secondly; whether the petitioner herein has *locus standi*.

Thirdly; whether the petition is time-barred, and

Fourthly, whether the petition is bad in law for joining the Attorney General of Zanzibar as a necessary party.

As for the first sub-issue questioning the jurisdiction of the Court, the bedrock of the respective objection is twofold. **Firstly**, it is argued that the jurisdiction to determine the instant petition, for what it claims,

lies in the Special Constitutional Court by virtue of article 126(1) of the Constitution, and not in this court under article 108(2) of the Constitution.

Secondly, it is argued further that since the impugned law is an Act of the House of Representatives, it can only be questioned by a forum established under the Constitution of Zanzibar, particularly the High Court of Zanzibar.

The petitioner holds a contrary view. As submitted by his counsel, this court being established under article 108(1) of the Constitution, has unlimited jurisdiction in all criminal and civil matters, the determination of this petition being one of such matters, as per article 108(2) of the Constitution. Such are the main arguments on record.

In determining this issue, I find it imperative to start with the obvious. It is not in dispute that the petition before the court has been preferred under article 108(2), alongside with section 2(3) of JALA. It is article 108(1) which establishes this court and states that the source of its jurisdiction shall be the Constitution and other laws. Article 108(2) goes on to elaborate that if the Constitution or other laws are silent on where jurisdiction lies to determine any matter, such jurisdiction shall be assumed by this court. In its own wording, the relevant part of article 108 of the Constitution provides:

"108.-(1) ***Kutakuwa na Mahakama Kuu ya Jamhuri ya Muungano*** *(itakayojulikana kwa kifupi kama "Mahakama Kuu")* ***ambayo mamlaka yake yatakuwa kama ilivyoelezwa katika Katiba hii au katika sheria nyingine yoyote.***

"(2) ***Iwapo Katiba hii au sheria nyingine yoyote haikutamka wazi kwamba shauri la aina iliyotajwa mahususi iitasikiizwa kwanza katika Mahakama ya ngazi iliyotajwa mahsusi kwa ajili hiyo, basi Mahakama Kuu itakuwa na mamlaka ya kusikiliza kila shauri la aina hiyo...".***

It has been contended by the learned Attorneys for the respondent and the necessary party that since the Special Constitutional Court exists as a creature of the Constitution, the words ***"Iwapo Katiba hii au sheria nyingine yoyote haikutamka wazi kwamba shauri la aina iliyotajwa mahususi litasikiizwa kwanza katika Mahakama ya ngazi iliyotajwa mahsusi kwa ajili hiyo"*** negate the jurisdiction of this court under article 108(2) of the Constitution for a reason that the Special Constitution Court is in existence and vested with such authority under article 126 of the Constitution. Such a contention necessarily calls for scrutiny of the wording of the said articles 108(2) and 126(1) of the Constitution. I shall start with article 126(1) as reproduced hereunder:

"126.-(1) Kazi pekee ya Mahakama Maalum ya Katiba ya Jamhuri ya Muungano ni kusikiliza shauri lililotolewa mbeie yake, kutoa uamuzi wa usuluhishi, juu ya suala lolote linalohusika na tafsiri ya

Katiba hii iwapo tafsiri hiyo au utekelezaji wake unabishaniwa kati ya Serikali ya Jamhuri ya Muungano na Serikali ya Mapinduzi Zanzibar.

It appears to me that the words in the above quotation are clear on the point that the Special Constitutional Court has only one function in our constitutional set up. That function is to hear and give a conciliatory decision over a matter referred to it concerning the interpretation of the Constitution where such interpretation or its application is in dispute between the Government of the United Republic and the Revolutionary Government of Zanzibar. As correctly argued by the counsel for the petitioner, when citing the decision of this court in **Mtumwa Said Haji and 49 Others v. the Attorney General of the United Republic of Tanzania** (supra), in order for the jurisdiction of the Special Constitutional Court to be invoked, there are conditions which must be fulfilled. In my view, the following conditions can be gleaned from the wording of the said article 126(1) of the Constitution, as follows:

Firstly, there must be a dispute involving the interpretation or implementation of the Constitution, and not any other dispute. **Secondly**, the dispute must be referred to the Special Constitutional court by an aggrieved party. This is to say that the Special Constitutional Court shall not act *suo mottu*. **Thirdly**, and most relevant to this instant matter, the

aggrieved party must either be the Government of the United Republic of Tanzania or the Revolutionary Government of Zanzibar.

It is undisputed that the petition before the court is instituted by an individual and not one of the two governments mentioned under article 126(1) of the Constitution. For this reason, in my view, the argument that the petitioner's concerns would be better placed for determination by the Special Constitutional Court lacks legal basis. Simply stated, the Special Constitutional Court is not a forum meant for individual petitioners, hence it cannot be said to be clothed with jurisdiction to determine this petition filed by an individual petitioner, as the conditions for its invocation under article 126(1) are, evidently, not met.

Having firmly observed as above, the question now is whether it is this court which has jurisdiction. As mentioned earlier, article 108(2) of the Constitution and section 2(3) of JALA are the provisions of the law cited by the petitioner to move this Court to determine his petition. Vide article 108(2) of the Constitution, this court can exercise unlimited jurisdiction over civil and criminal matters brought before it. The provision of section 2(3) of JALA is also of the same effect. Therefore, these two provisions of the law cited by the petitioner, stand as the general source of the unlimited jurisdiction of the court to determine various civil and

criminal matters, within the bounds set by the Constitution and other laws. What appears to be missing, but which I should hasten to say it is not fatal and certainly not mandatory, as I shall demonstrate herein, is the citation of other provisions of the law that empowers the petitioner to knock the doors of this Court.

In my view, if there were a legal requirement compelling the petitioner to cite all provisions of the law that entitles him to file this type of petition, in so far as the petition largely seeks to have the ZPC Act declared unconstitutional for contravening the Constitution, then the citation of article 4(2), 26(2) and 64(5) of the Constitution could be required. These articles, in my view, constitute the enabling provisions for invocation of the jurisdiction of this Court to grant the prayers made by the petitioner in his petition. While article 4(2) recognizes the Judiciary of the United Republic of Tanzania, under which this court falls, as one of the two organs of the State for dispensation of justice, article 26(2) of the Constitution entitles every citizen a right to take legal measures to protect the Constitution. Article 26(2) of the Constitution provides:

> *"(2) Kila mtu ana haki, kwa kufuata utaratibu uliowekwa na sheria, kuchukua hatua za kisheria kuhakikisha hifadhi ya Katiba na sheria za nchi".*

It follows that the above provision, which grants every person a right to take measures for protection of the Constitution and other laws, is the main gateway for the petitioner to knock the doors of this court.

Next in the list of the enabling provisions is article 64(5) of the Constitution which is, obviously, in sync with the overarching remedy sought by the petitioner, namely, a declaration that the impugned ZPC Act is invalid. Sub-article (5) of the said article 64 aptly states as follows:

> *"(5) Bila ya kuathiri kutumika kwa Katiba ya Zanzibar kwa mujibu wa Katiba hii kuhusu mambo yote ya Tanzania Zanzibar yasiyo Mambo ya Muungano,* ***Katiba hii itakuwa na nguvu ya sheria katika Jamhuri nzima ya Muungano na endapo sheria nyingine yoyote itakiuka masharti yaliyomo katika Katiba hii, Katiba ndiyo itakuwa na nguvu, na sheria hiyo nyingine, kwa kiasi inachokiuka Katiba itakuwa batili". [Emphasis added].***

The connotation carried under the underlined italicised words, in my considered view, address the concern raised by the learned Attorneys that nowhere article 64 of the Constitution states that it this court which is empowered to determine this petition. Admittedly, on the face of it, there is no such exact wording in the cited provision. However, one of the rules of construction of statutes requires that the wording of a statute, (in this case, the Constitution), must be construed so as to give a sensible meaning to them. (See **Odgers' Construction of Deeds and Statutes**,

5th Edition, Universal Law Publishing Co. New Delhi, 2013, at page 237). Applying this principle of construction, I find it irresistible that, while the Constitution establishes the High Court of the United Republic and proclaims its own supremacy over the entire Republic, and state categorically that any law contravening the Constitution shall be declared invalid, the only sensible construction that can be given to the underlined italicized words in the above quoted provision of article 64(5), when read together with article 108(2) of the Constitution and section 2(3) of JALA, is that the court empowered to determine the type of perversion alleged in the petition, at the union level, is this Court.

I recall that the learned Attorneys had attempted to invoke the provision of Article 115(2) of the Constitution to show that the High of Zanzibar could also assume jurisdiction as it has concurrent jurisdiction with this Court. To clarify, Article 115(2) of the Constitution which provides for concurrent jurisdiction of this Court and the High Court of Zanzibar only comes into play where the matter under consideration emanates from an Act of Parliament that applies to both parts of the union. The impugned Act is not. If it were a union statute enacted by the Parliament of the United Republic of Tanzania, the High Court of Zanzibar could exercise the same powers concurrently with this Court. Since the

matter at hand does not originate from an Act of Parliament of a type described above, reference to article 115(2) by the learned State Attorneys is misplaced.

I have already pronounced my considered position that the Special Constitutional Court, much as it is true that it can be convened on *ad hoc* basis using its own procedures, as rightly argued by the learned Attorneys, the same cannot be convened to determine the instant petition which is filed by an individual petitioner. The instant matter is simply not a fit case for convening the Special Constitutional Court under article 126(1) of the Constitution for reasons earlier stated herein.

It was rightly submitted by the learned Principle State Attorneys that the Constitution has to be construed wholistically, a position supported by the decision of the Court of Appeal in a number of authorities on the matter including **Rev. Mtikila's Case** (Supra). With this principle of construction in mind, I therefore hold that article 64(3), 64(4) and 64(5) when read together with articles 108(2), 4(2) and 26(2) of the Constitution sufficiently confer jurisdiction to this court to determine the petition at hand.

A new adverse argument could be that the petitioner didn't cite articles 4(2) and 26(2) in his petition. My position would, firstly, be that

the jurisdiction of the court is not conferred by citation of legal provisions but by the law itself. Secondly, since to my knowledge, there is no law, which mandatorily requires a petitioner to cite all provisions of the law in a petition like the instant one, as it is also the case with plaints, I find no strong reason to reject the petitioner's petition for as long as the jurisdiction to determine it exists in the Constitution and the law cited.

In the above connection, I have not been able to find an authority requiring full citation of the provisions of the law in a constitutional petition like the instant one. However, I am deeply inspired by in-depth deliberation by the Court of Appeal in **Commissioner General (TRA) v. Pan African Energy (T) Ltd.**, Civil Application No. 206 of 2016, CAT at DSM (unreported) on whether it was fatal not to cite a provision of the law in a notice of preliminary objection. Despite it being a discussion on a different case, a lesson can be drawn that a wrong or non-citation of a provision of law would not deter the court to deliver substantive justice.

As for the cases cited by the learned Principle State Attorneys enjoining this court to consider the question of jurisdiction wholistically, the same have been duly considered. I agree with the learned Principle State Attorneys that the jurisdiction of this Court, though it is stated under Article 108(2) of the Constitution to be unlimited, the same is subject to

the provisions of other laws. The cases for reference on this point include **Mwananchi Communications Ltd & Others v. Joshua K. Kajula** (supra) as well as **Salim O. Kabora v TANESCO (supra).** However, as I have stated earlier, the jurisdiction of this Court is by no means ousted by the presence of the Special Constitutional Court, as the learned Attorneys have wrongly maintained.

Based on the foregoing deliberation, it is my considered view that this court has jurisdiction to determine constitutional petitions, filed by individual petitioners who seek to challenge the constitutionality of any piece of legislation within the United Republic of Tanzania, provided the allegations are on contravention of the Constitution in terms of its article 64(5).

I therefore, find no merit in the first ground of the preliminary objection and accordingly the first specific sub-issue questioning jurisdiction of this Court is answered in the affirmative.

The second specific sub-issue is about *locus standi* of the petitioner. The contention by the learned State Attorneys is, again, twofold. They argue, **firstly**, that the petitioner, being an individual, cannot bring up a public-interest litigation since, according to **Lujuna Shubi Balonzi v. Registered Trustees of Chama Cha Mapinduzi** (supra), "public rights

can only be asserted in a civil action by the Attorney General as the guardian of the public interest". **Secondly**, since public interest cases can only be brought under the provision of Article 26(2) of the Constitution, the petitioner who filed his petition under article 108(2) of the Constitution should prove violation of his personal rights or interest. They conclude that *locus standi* on matters of the union rests with the governments and are justiciable by the Special Constitutional Court.

As hinted earlier, the counsel for the petitioner disagreed and contends that his client, being a citizen of this great nation, is permitted to champion for the supremacy of the Constitution.

Having painstakingly scrutinized the rival submissions in respect of the second point of objection, I find it imperative to firstly state that the petition before the court cannot be said to be a private matter owing to the nature of the allegation therein and the reliefs being sought. In **Godbless Lema v. Mussa Hamis Makanga & 2 Others** (supra) the Court of Appeal distinguished a public interest litigation from private one by the nature of the relief being sought. If the relief sought would not benefit the entire society as a whole, that becomes a private right litigation, and not public interest litigation. In this instant matter, the reliefs being sought are, mainly, declaratory orders that the proper entity

for operating and managing ports in Zanzibar is TPA, and that ZPA Act is contrary to the Constitution hence be declared invalid. These reliefs cannot be said to benefit the petitioner individually.

Whether the impugned Act breaches the Constitution or not is not in my plate for the time being. Going by the details of the petition, what is before the Court is a petitioner exercising his right to protect the Constitution against what he considers to be outright transgression. The question now is whether the petitioner has standing to do that before this court.

As I have intimated earlier, the standing of the petitioner is being challenged mainly for a reason that it is only the Attorney General(s) who can bring up civil action to foster public interests. I think, this concept is misconceived by the learned Attorneys, who should know too well that in our jurisdiction, individual litigants have been filing public interest litigation in multitude. The case of **Rev. Christopher Mtikila** (supra) cited to this court by the petitioner's counsel is one of many such litigation. Suffice to say that while it is true that the Attorney General(s) are charged with a duty to protect public interest in litigation, the doors for individual citizens to do the same is never closed, save as where the law expressly provides some limitation.

A flip argument against the petitioner's standing is that if the petition represents public interests, it ought to be filed under article 26(2) of the Constitution in line with the decision of the Court of Appeal in **Godbless Lema** (supra), and not under article 108(2) of the Constitution as the petitioner did. I have hinted, when determining the first point of objection, that indeed there were other provisions of the law which could have been cited to invoke the jurisdiction of this court. Amongst them are articles 26(2) and 64(5). The question now is whether non-citing of such provisions is fatal to the petition? I would, again, answer this question in the negative, based on the inspiration drawn from the Court of Appeal in **Commissioner General (TRA) v. Pan African Energy (T) Ltd**. (supra). Also, in **Odero Charles Odero** (supra) my learned colleague observed that there is no statutory law providing specific procedures under which a petitioner should observe in instituting constitutional cases before this court. I share the same finding.

Besides, it is true that article 108(2) of the Constitution provides for the general jurisdiction of the court, and so does section 2(3) of JALA. With these two provisions of the law being cited, the petitioner should be welcome to the court. In finding so, I have two additional reasons: **One**, the need to uphold the principle that each case has to be decided based

on its own set of facts and obtaining circumstances. To expound a little on this aspect, the petition at hand is from the family of petitions recently filed in this court to question the legality of the famous Inter-Governmental Agreement (IGA) between the United Republic of Tanzania and the Emirate of Dubai. The same sparked a heated nation-wide debate which was settled by the decision of this court. In my view, judicial pronouncements on controversial constitutional or nation-wide legal issues vaccinate the nation, despite some pains that may be associated with taking the jab.

Two, I am inspired by the observation of the Court of Appeal in **Rev. Christopher Mtikila v. Attorney General** (supra) where it stated:

> *"If there should spring up a public-spirited individual and seek the Court's intervention against legislation or actions that pervert the Constitution, the court, as guardian and trustee of the Constitution and what it stands for, is under an obligation to rise up to the occasion and grant him standing".*

Looking at the petition in hand, the petitioner is described in sufficient details to be a public-spirited litigant. There is no doubt that he befits the above-described treatment. I therefore find that he has requisite *locus standi* to bring up his petition as a public-spirited individual.

Accordingly, the second specific sub-issue is also answered in the affirmative, as I hold that the second point of preliminary objection is also devoid of merit.

On the third specific sub-issue concerning time limitation, it is the contention of the learned State Attorneys that since the law being impugned was enacted as far back as 1997, the filing of this petition recently makes it hopelessly time barred. The counsel for the petitioner disagrees with this contention arguing that the Law of Limitation Act does not bar constitutional petitions. I agree with him. In fact, this contention by the learned Attorneys is novel and unsupported in our jurisdiction.

In their rejoinder, the Attorneys for the objectors seemed to concede that time limitation wouldn't apply to petitions seeking enforcement of personal rights. Distinguishing the cases cited by the counsel for the petitioner from the matter at hand, the learned attorneys' contention is that all the cases cited by their counterpart are concerned with basic rights, while the instant matter isn't. In my considered opinion, the limitation law would not operate to bar enforcement of any constitutional rights, including the right to protect the Constitution itself as is the case in this matter, save where the law expressly so provides.

This position is based on the purposeful interpretation of the Constitution, as I attempt to demonstrate it hereunder.

Firstly, while it is true that the right of persons to take action to protect the Constitution and the law under article 26(2) of the Constitution is subjected to observing the laid down procedures, widening the application of the Law of Limitation Act, to encompass constitutional petitions of this nature would, undoubtedly, be counterproductive to the very exercise of such a right. The learned Attorneys could not drop a hint as to what good purpose would invocation of the Law of Limitation Act saves in this matter. In my unfettered opinion, the stretching of limitation law to constitutional petitions which seek to protect the Constitution would result into the infringement of the inherent right of the very makers of the Constitution, the citizens, to take legal measures for such protection whenever needed, which is the purpose of the said article 26(2), whether cited by the petitioner or not.

Secondly, the argument that non-citing of article 26(2) of the Constitution as its enabling provision, causes the petition to degenerate into a normal suit, appears to me to be grossly generalized. Apart from banking on the case of **Godbless Lema** (supra), for this proposition, the learned State Principal Attorneys did not elaborate as to whether this

metamorphosis, apply to each and every constitutional petition. In my opinion, the case of **Godbless Lema** cited in this argument doesn't establish a legal principal that a petitioner must cite Article 26(2) of the Constitution for his petition to constitute a matter of public interest.

In **Godbless Lema's case**, the Court of Appeal was considering whether the respondents therein had *locus standi* to petition and challenge the election of a Member of Parliament for Arusha Constituency based on some words allegedly uttered by the Appellant during election campaigns in October, 2010. In the Course of deliberations, the counsel for the Appellants were of the view that since the matter was not a public interest litigation brought under Article 26(2) of the Constitution, then the respondents had to abide by the rule of *locus standi* that, one has to show his rights or interest being interfered with or suffered to have standing. Based on such a discussion, all what the Court of Appeal had to say in respect of that subject is as follows:

> *"First, we wish to state categorically that the rule of locus standi is governed by common law. The rule is applicable in our courts by virtue of section 2(3) of the current Judicature and Application of Laws Act, Cap 358 RE 2002 subject to modification to suit the local conditions* ***(See Lujuna Shubi Ballonzi, Senior V Registered Trustees of Chama cha Mapinduzi [1996] TLR 203).*** *Currently the rule in Tanzania*

has been extended to cater for matters of public interest under Article 26(2) of the Constitution then a citizen of this country has locus standi to sue for benefit of the society. And the test whether a litigation is of public interest depends on the nature of the relief sought and its effect."

My emphasis is that the above exposition of the law on *locus standi* does not support the proposition that one must cite Article 26(2) of the Constitution in his petition for it to constitute a public interest litigation. Besides, the said case stands an authority for the criteria that qualifies a matter as a public interest litigation which the instant petition appears to meet, as I have demonstrated above.

In concluding my deliberation on this aspect, I am inclined to hold that a petition like the one before the court, which seeks a declaration that a piece of legislation is invalid for abrogating the Constitution, is a constitutional petition, whether article 26(2) is cited or not. It cannot, in my view, be considered as a normal suit and subjected to limitation law. The petition itself clearly tells what type of document it is. For all these reasons, the third sub-issue asserting that the petition is hopelessly time-barred is answered in the negative.

The fourth and last sub- issue is whether the petition is bad in law for joining the Attorney General of Zanzibar as a necessary party. In

submitting on this point, both sides acknowledged the need for the Attorney General of Zanzibar to stand on behalf of the Revolutionary Government of Zanzibar for a fair adjudication of the petition. Under such circumstances, this fourth issue is rather academic.

However, to give this sub-issue the consideration it deserves, I have thoroughly read the imports of section 6 of the Government Proceedings Act No. 3 of 2010, section 56 of the Zanzibar Constitution and section 14(1) (b) of the Attorney General's Chambers' (Discharge of Duties) Act, No. 6 of 2013, all enacted by the House of Representatives. Generally, I fully subscribe to the position that, in effect, these provisions require the Attorney General of Zanzibar to be sued in his own name in all civil proceedings filed against the Revolutionary Government of Zanzibar, among other things. This observation does not by itself warrant the court to find the petition bad in law for having the Attorney General Zanzibar joined as a necessary party. I shall deliberate more on this point in due course. As for now I think the concern should be on whether or not substantive justice has been rendered.

It is a fact that the Attorney General of Zanzibar was graciously granted leave of this court to file a counter affidavit and statement in reply, which he jointly did with the respondent herein. The idea here was

to grant him opportunity to be heard knowing it was necessary to do so. This opportunity being fully taken, it cannot be said that the said Attorney General was prejudiced in any way by being joined as a necessary party.

We may look at this issue in another perspective. There is no gainsaying that the thrust of the petitioner's claim is that the Constitution has been perverted. It is the Constitution of the United Republic of Tanzania that is alleged to have been transgressed. This being the case, one could argue that, it would suffice, for the petitioner to proceed against the Attorney General (the respondent herein) alone, without joining the necessary party, a practice which is not uncommon (See for example the case of **Mtumwa Said Haji and 49 Others v. the Attorney General of the United Republic of Tanzania** (supra). Such an argument may find support under article 59(3) and (4) of the Constitution, which state:

> *"(3)* ***Mwanasheria Mkuu atakuwa ndiye mshauri wa Serikali ya Jamhuri ya Muungano juu ya mambo ya sheria*** *na, kwa ajili hiyo,* ***atawajibika kutoa ushauri kwa Serikali ya Jamhuri ya Muungano kuhusu mambo yote ya kisheria****, na kutekeleza shughuli nyinginezo zozote zenye asili ya au kuhusiana na sheria zitakazopelekwa kwake au atakazoagizwa na Rais kuzitekeleza, na pia kutekeleza kazi au shughuli nyinginezo zilizokabidhiwa kwake na Katiba hii au na sheria yoyote.*
>
> *(4)* ***Katika kutekeleza kazi na shughuli zake kwa mujibu wa ibara hii, Mwanasheria Mkuu atakuwa na haki ya***

kuhudhuria na kusikilizwa katika Mahakama zote katika Jamhuri ya Muungano. *" [Emphasis added].*

It could further be argued that despite the fact that the petition impugns the ZPC Act, which is a statute of the House of Representatives, the respondent could deploy internal government communication systems to obtain all the necessary details and answers to the questions raised in the petition. The petitioner herein didn't see it that way. He thought it was necessary to implead the Attorney General of Zanzibar as a necessary party, a line of thinking I find meritorious.

Therefore, in line with the submission by the petitioner's counsel, I hold the view that it was necessary for the voice of Zanzibar to be heard so as to enrich the proceedings and eventually have an effective decree, because the impugned Act was enacted in Zanzibar. Thus, having considered the Attorney General of Zanzibar a necessary party and having granted him full audience, I find no merit in this ground of objection too.

In final analysis, all the preliminary objections raised herein are devoid of merits. The same are accordingly dismissed.

Dated at Dar es Salaam this **4th** day of **March, 2024.**

ABDI S. KAGOMBA

JUDGE