

IN THE HIGH COURT OF TANZANIA**AT DAR ES SALAAM****MISC. CIVIL CASE NO.23 OF 2001**

- 1. FEDERATION OF MINES ASSOCIATIONS)**
OF TANZANIA)
2. THE ARUSHA REGIONAL MINES ASSOCIATION)..... APPLICANTS
3. FEMATA MINERS CORPORATION LTD)

VERSUS**M/S AFRICA GEM RESOURCES (AFGEM) & 7 OTHERS.... RESPONDENTS****RULING****MSUMI, JK:**

According to its heading, this petition has been filed under Articles 14,23,24,27 and 30(1) of the Constitution of the United Republic of Tanzania, sections 4,5,12 and 13 of the Basic Rights and Duties Enforcement Act No.33 of 1994; sections 68(e) and 95 of the Civil Procedure Code 1966 and any other enabling provisions of the law. However, the petition is for the enforcement of the basic rights as stipulated in Part III of chapter I of the Constitution, specifically articles 12 and 29. The petitioners are representative bodies of miners while the first six respondents are connected in different capacities with commercial mining of tanzanite gemstones at Merelani mines within Arusha Region. Though he is being sued in his personal capacity, the seventh respondent was at the material time Minister of Energy and Minerals. The conflict which is the subject matter of

this petition arises from the respondents' connection in the mining operation of tanzanite gemstone at Merelani mines. The petitioners allege a number of wrongs against the respondents in respect of the said mining operation and pray for declaratory reliefs and damages. Among the alleged wrongs and consequential reliefs sought are that the seventh respondent acted ultra vires in granting a Special Mining Licence to the third respondent and as such the said grant be declared null and void, that the third respondent be ordered to halt mining operation in Block C of the mines and instead the said area be granted to the petitioners after duly complying with the relevant provisions of the law. There is also a prayer for an order for exhumation of dead bodies of small-scale miners allegedly buried alive by the first, second and third respondents in various pits dug in Block C of the mines in the course of filling up exhausted pits.

Besides controverting the petition on merits, respondents have raised some points of law against it by way of preliminary objections. The points raised by first six respondents in their preliminary objection are:

1. That essential steps in the filing and prior to hearing of this petition have been skipped, and therefore the petition is incompetent and ought to be struck off with costs.
2. The 1st - 6th respondents are wrongly joined to the petition. Their names ought to be struck off with costs.

3. The matters subject of the petition are not amenable to adjudication before the High Court exercising its powers to enforce the provisions of Articles 12 to 29 of the Constitution of the United Republic of Tanzania 1997.
4. On the allegations in the petition as filed, the plaintiffs have alternative and adequate means of redress for the alleged contraventions.
5. The petition is merely superfluous and vexatious it must therefore be dismissed with costs.

As for the seventh respondents, his preliminary objection is based on the following points:

1. That the petition is incompetent in that it is not accompanied by an originating summons as required by law and thus cannot be the basis for the application for temporary injunction.
2. The seventh respondent is wrongly impleaded in the petition since in granting the Special Mining Licence he was performing his official functions as the Minister responsible for mining affairs in the Government of the United Republic of Tanzania.
3. That the facts alleged do not constitute any constitutional matter and thus the petition and the application are wrongly brought.

In their written submissions, counsels for all the respondents made lengthy elaborations of these points. As far as the first point is concerned counsels relied on the provision of section 5 of the Basic Rights and Duties Enforcement Act No.33 of 1994 which states:

5. An application to the High Court in pursuance of section 4 shall be made by petition to be filed in the appropriate registry of the High Court by originating summons.

It is a fact that no originating summons has been filed in these proceedings, respondents are therefore arguing that the petition is incompetent. Arguing on behalf of the first six respondents in support of the second point, counsel submitted that the petition is incompetent in so far as it seeks redress for breach of human rights for which respondents being private persons cannot be held answerable. If the applicants are entitled to any reliefs for these alleged breaches should be against the State. The argument in support of the third issue raised by the first six respondent is similar to that submitted in support of the third point raised by the seventh respondent. In respect of both points the counsels are contending that the subject matter of the petition does not raise any constitutional issue as described under articles 12 to 29 of the Constitution. In other words counsels are arguing that proceedings for enforcement of duties and basic rights must be founded on the breach of articles 12 to 29 of the Constitution. As far as

the fourth point raised by the first six respondents is concerned it is argued that there is adequate alternative means by which applicants could get redress for the alleged wrongs. For example, it is argued that applicants could get the prayed exhumation order through criminal proceedings with or without involving the police. In the elaboration of his second point, seventh respondent is arguing that since he committed the alleged wrong of issuing void licence in his capacity as a Minister responsible for mines, he cannot be sued in his personal capacity. It is appreciable that counsel for the applicants filed fairly detailed written submission in reply to the preliminary objections. However, rather than summarize it generally, we will refer this submission in the course of determination of each point of the preliminary objection.

Before considering the arguments for and against the preliminary objection we wish to make the following general observation. We are quite aware of the well established modern approach to human rights matters that provisions of law relating to human rights have to be construed liberally, with elasticity, and not restrictively or rigidly. Being grave matters, allegations of human right breaches should not be dismissed on mere rigidity of the law. This does not, however, mean that a party in a human right case can disregard compliance of legal requirement with impunity. The mentioned liberal approach is not applicable if it renders a provision of law nugatory.

As noted earlier, the first issues raised by the first six respondents and seventh respondent are similar. It is contended that the petition is incompetent because it is not accompanied by originating summons as required under section 5 of the Basic Rights and Duties Enforcement Act. We find no difficulty in overruling these objections in view of the decision in the **Registrar of Societies and 2 others vs Baraza la Wanawake Tanzania and 5 Others (CA)** Civ. App. No. 82 of 1999 (unreported) in which the Court of Appeal held that the procedures of a petition and originating summons under section 5 of the Act are alternative procedures. It is not correct view, as submitted by the respondents in the present case, that both procedures must be complied with cumulatively.

The arguments in support of the second point raised by the first six respondents require more information than what is available in the pleadings. Evidence on the actual identities of the respondents is required in order to determine whether they have been misjoined. On this ground we are of the view that this issue cannot be raised and determined by way of a preliminary objection. Accordingly this point is overruled.

Points number three and four of objection raised by the first six respondents and point number three raised by the seventh respondent are basically the same. What is substantially being contended in these points is that the alleged wrongs narrated in the petitions are not constitutional issues which are subject to

persons' anus". The referred article 14 says:

14. Every person has the right to live and to the protection of his life by the society in accordance with law.

However liberally the provisions of this article are construed, they cannot be said to have been contravened by the said wrongs alleged in paragraph 12 of the petition. All the wrongs alleged in paragraphs 11 and 12 are criminal offences of economic sabotage and corruption. As far as the provisions of the Act are concerned these allegations are not amenable. On the other hand the allegations contained in the other paragraphs have not been specified the constitutional provisions which they contravened. Even without this specification, these allegations are basically not constitutional matters. On this ground, we respectfully sustain point of objection number three raised by the first six respondents and point number three raised by the seventh respondent.

The basis for the fourth and fifth points of objection raised by the first six respondents is the provisions of section 8(2) of the Act which says:

8(2) the High Court shall not exercise its powers under this section if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law, or that the application is merely frivolous or vexatious.

It is notable that paragraphs 11, 14, 15 and 16 of the petition allege criminal

offences ranging from simple assault, corruption, economic sabotage and murder. There is no indication in the petition that cogent reports have been made to police authorities for steps to be taken and that no appropriate steps have been taken in furtherance of the report. As regards paragraphs 12 and 13, the allegations are tortious acts of assault and negligence which are entertainable in an ordinary suit. Similarly the allegations in paragraph 17 could adequately be dealt with in ordinary proceedings for revocation of mining licence for infringement of conditions of the licence. The allegation in paragraph 27 is libellous hence actionable in an ordinary suit. Generally all the declaratory reliefs and damages prayed in the petition may be sought by way of ordinary suit. We accordingly sustain the fourth point of objection raised by the first six respondents that this petition is incompetent because the petitioners have adequate alternative means of redress for the alleged complaints. However despite this finding we are not convinced that the petition is superfluous and vexatious. Accordingly the fifth point of preliminary objection raised by the first six respondents is overruled.

Lastly, let us now consider the second ground of the seventh respondent's preliminary objection. There is no doubt that seventh respondent issued the alleged offensive Special Mining Licence in his capacity as the Minister responsible for mines. Indeed he acted in accordance with the statutory power vested in him as a Minister and not in his personal capacity. In suing the seventh

respondent in his personal capacity, counsel for the applicants is relying on the decision in **Mtikila v Editor, Business Times and Augustine Lyatonga Mrema**. 1993 TLR 60. The plaintiff in that case sued the second respondent who was a Government Minister for defamation arising from words uttered by him in the course of his business. It was argued as preliminary objection that because second defendant uttered the alleged defamatory words in the course of discharging his ministerial duties, he could not be sued in his personal capacity rather the suit should have been against the Government. The court overruled this argument and stated as a general rule that any public officer including a minister can be sued for tort based on the acts of such officer in the course of discharge of his duties. Similar view was held by the Court of Appeal in **Ismail G. Lazaro v. Josphine Ngomera** Civil Appeal No.2 of 1986 (unreported). On the same issue there is also another decision of this court in **Lucas Matafu v Hon M.M. Songambe** [1977] LRT 10. The plaintiff in this case sued the defendant who, at the material time was Regional Commissioner, for closing his bar business premises. In upholding the defendant's contention that it was legally incompetent to be sued in his personal capacity, Mfalila J, as he then was, said:

“The third difficulty relates to the competency of this application. I take it that for the purpose of the Government Suits Ordinance Cap 5 this application is a suit. It is alleged in the affidavit that the

respondent Songambebe closed the applicant's bar and tenantable premises. I cannot imagine how the respondent could have done this in his personal capacity. He must have used his authority as a Government Officer to effect whatever he did so that the final responsibility lay with the Government. For instance if indeed the respondent close these two premises, and he were either transferred or removed from office tomorrow, he would not as Songambebe have the authority to re-open them, even if he wanted, or was ordered so.

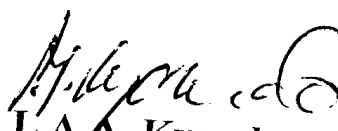
In the present case, the petitioners are not suing the seventh respondent for tort. The petition has been purportedly brought under the procedure provided in the Basic Rights and Duties Act. Hence appropriately as the seventh respondent's act of granting the alleged offensive Special Mining Licence is concerned, applicants are praying for declaratory order that the said licence is null and void. Since the suit against the seventh respondent is not for tort, the two decisions in **Lazaro** and **Mtikila** cases are not applicable in the present suit. In other words our understanding of the law as restated in these cases is that a public officer, including a Government Minister is personally answerable for tort arising from his acts done in the course of discharge of official duties. As noted earlier that the cause of action against the seventh respondent is not tortious hence he cannot be sued in his personal capacity. Indeed the declaratory reliefs sought by the

petitioners are not enforceable against the seventh respondent personally. We accordingly uphold the second point of seventh respondent's preliminary objection.

In summary our findings are that we do not consider that the complaints in the petition are proper matters for suit under the Basic Rights and Duties Enforcement Act. They are crimes or torts which can be prosecuted in ordinary court proceedings without impediment or cumbersomeness. Furthermore we are of the view that it is not legally proper for the seventh respondent to be sued in his personal capacity for a non tortious suit. For these reasons the petition as a whole is incompetent and it is accordingly struck out with costs.


H.A. Msumi
JAJI KIONGOZI.


B.D. Chipeta
JUDGE.


L.A.A. Kyando
JUDGE.

22/8/2001

For the petitioners:
For the 1st-6th respondents:
For the 7th respondent:

Rweyemamu.
Mujulizi
Mdamu