IN THE HIGH COURT OF TANZANIA

AT DODOMA

(CORAM: HONS. SHANGALI, J., KWARIKO, J., And MWANGESI, J.)

MISCELLANEOUS CIVIL CAUSE NO. 52 OF 2008

JOSEPHAT JONES MWAIPOPO ..... APPLICANT

Versus

1. ATTORNEY GENERAL)
2. TANZANIA TELECOMMUNICATION) ..... RESPONDENTS
COMPANY LIMITED)

20.10.2011 & 13.12.2011

RULING

HON. MADAM, SHANGALI, J.

The petitioner **JOSEPHAT JONES MWAIPOPO** was employed by the second respondent, **TANZANIA TELECOMMUNICATION COMPANY LIMITED** from 1973 to 1999. In 1999 his employment was terminated by the second respondent. The petitioner believed that his employment was wrongly terminated. His petition to the Labour Conciliation Board was successful and the Board ordered for his re-instatement. The second respondent was not satisfied with that decision. He appealed to the Minister for Labour matters, who in turn dismissed the appeal and confirmed the decision of the Board.

Instead of re-instatement of the petitioner the second respondent opted to terminate the employment of the petitioner under the provisions of **section 40A (5) (b)(i) and (ii) of the Security of Employment Act**, as amended by Act No. 1 of 1975, now **section 42(5)(b) (ii) of the Security of Employment Act, Cap 387** of the Laws, and paid the petitioner his statutory compensations.

The petitioner's subsequent efforts to challenge that decision of the second respondent in court, ended in vain because the second respondent's option to pay the statutory compensation in lieu of re-instatement of the petitioner was lawful.

The petitioner, having accepted his statutory compensation, still strongly believe that the purported termination against him was illegal and unconstitutional hence this petition based on the **Basic Rights and Duties Enforcement Act, Cap 3 of R.E. 2002.**

The petition heels on two main grounds, namely **one**, that the then provision of the law under which his employment was terminated to wit, **section 40 A (5) (b) (i) and (ii) of the Security of Employment Act**, now **Section 42 (5) (b) (i) and (ii) of Cap 387 R.E. 2002** infringed his constitutional right to work as stipulated under Article 22 (1) and (2) of the Constitution of the United Republic of Tanzania, Cap 2 R.E. 2002 of the Laws; **two**, The said provision went

against the express stipulations of section 26 (1) (a) and 42 (4) (a) of the same Act which augurs well and give effect to the implementation of the stipulations of Article 22 of the Constitution of the United Republic of Tanzania.

In his petition the petitioner has joined the Attorney General, the first respondent because he is the Chief Legal adviser to the Government of the United Republic of Tanzania. The petitioner is seeking for the court's two major declarations namely; **One**, that the petitioner's termination from employment was unconstitutional and therefore null and void, and **two**; that the petitioner has been in continuous employment with the second respondent to-date thus entitled to all the benefits he was entitled to as an employee.

During the filling of the pleading, the second respondent filed a preliminary objection on two points of law namely, **one**, the application is time barred and **two,** the petition is vexatious, frivolous and overtaken by events after the repeal of the **Security of Employment Act, Cap 387.** Likewise, the first respondent filed his preliminary objection on two points of law namely; **One**, that the petition is bad in law as it contravenes with **section 6 (2) of the Government Proceedings Act, Cap 5** and **two**; that the petitioner has no cause of action against the first respondent.

It is convenient to state at this juncture that this ruling is in regard to the determination of the raised points of preliminary objection. The petitioner was represented by Mr. Njulumi, learned advocate while the first respondent was represented by Mr. Malimi assisted by Mr. Wambali, learned State Attorneys and the second respondent enjoyed the legal services from Mr. Nyabiri, learned advocate. By consent of the parties and the blessings of this court, the hearing of the preliminary objection was conducted by way of written submissions.

For reasons not apparent the written submission by the first respondent was prepared and filed by Ms. Magesa, learned State Attorney.

In his written submission Mr. Nyabiri, learned advocate for the second respondent introduced another point of law in his preliminary objection relating to the issue of jurisdiction namely, that no leave of the court was sought and obtained to sue the second respondent as provided under **section 9 of the Bankruptcy Ordinance, Cap 25, R.E. 2002**

For convenience reasons we would prefer to refer and discuss the points of preliminary objection raised by the second respondent along the line taken in his notice of preliminary objection and in addition of the above third stated point as points

No. 1, 2 and 3 respectively, followed in sequence with the first respondent's points of preliminary objection as points No. 4 and 5 respectively.

On the first point of preliminary objection which states that the application is time barred, Mr. Nyabiri submitted that what the second respondent did in relation to the order of the Minister for Labour was to comply with the law under **section 40 A (5) (b) (i) and (ii) of the then Security of Employment Act, Cap 574** which allowed payment of Statutory Compensation to an Employee whom the employer deemed undesirable to reinstate to work. Mr. Nyabiri contended that, that decision was made under the **Security of Employment Act, Cap 574** which was later in 2002 changed to **Cap 387** and repealed in 2004.

Mr. Nyabiri submitted that the **Basic Rights and Duties Enforcement Act No. 33 of 1994** does not provide for a time limit within which to file petition under it and that section **15 of *that Act*** confer powers to the Chief Justice to make rules including rules with respect to the time within which application may be filed under the law. The counsel contended that all his efforts to find the existence of such rules has failed. He argued that, in the absence of specific Rules of Limitation of time, the practice dictate to resort to the limitation period provided for under **The Law of Limitation Act, Cap 89.** Mr. Nyabiri further submitted that the petitions filed under the **Act No. 33 of 1994** are classified as suits.

In support of his proposition Mr. Nyabiri referred to the decision of the **Court of Appeal of Tanzania, Civil Appeal No. 20 of 2007, The Hon. Attorney General versus Christopher Mtikila.**

On that account, Mr. Nyabiri invited this court to invoke **section 3 (1) and 5 of The Law of Limitation Act, Cap 89** together with **item 24** of the **First Schedule** to that Act which requires a suit whose limitation period is not specifically provided to be filed within a period of six years from the date when the cause of action accrued. Mr. Nyabiri argued that in the present petition the petitioner was terminated in 1999 and duly paid his statutory compensation. Then, the present petition was filed in 2008 that is after almost nine years. Mr. Nyabiri concluded that the petition was filed out of time and that a suit which is barred by limitation is a suit barred by law. In support of his legal position, Mr. Nyabiri referred to the case of **Stephen Mapunda (Minor) vs Shirika la Usafiri Dar es Salaam and Another (1982) TLR 258.**

The second point of law on preliminary objection avers that the petition is vexatious, frivolous and overtaken by events after the repeal of **The Security of Employment Act, Cap 387.** Mr. Nyabiri submitted that there is no dispute that **The Security of Employment Act** was wholly repealed in 2004 without any saving. He argued that, in the actual fact what the petitioner is asking this court to do is to resurrect the dead law and declare some provisions therein unconstitutional. Mr. Nyabiri cited **Section 13(2)**

of the Basic Rights and Duties Enforcement Act, No. 33 of 1994 which provide for powers of the High Court on such matter and wondered if this court can declare a provision of repealed law to be unconstitutional; and secondly, if this court can use its discretion to allow the Parliament to correct the defect, if any, in a repealed law. The learned advocate position was that this court cannot do that and therefore the petition is frivolous and a mere academic exercise with no merits.

Submitting on the third point of preliminary objection, Mr. Nyabiri strongly argued that although this ground was not raised earlier as required by procedure, it is an important point touching on jurisdiction and competence of the court to adjudicate upon the matter. Mr. Nyabiri submitted that, it is the stance of the law that question of jurisdiction is basic and capable to be raised at any stage of the proceedings. He referred to the case of **Fanuel Mantiri Ngunda vs Herman Mantiri Ngunda and two others (1995) TLR 155 (CA).**

In amplifying on the third point of preliminary objection Mr. Nyabiri contended that according to **The Public Corporation (Specified Corporations Declarations) Order, GN No. 543 of 1997,** the second respondent was declared as one of the Specified Public Corporations and was put under receivership. As a result, advanced Mr. Nyabiri, the second respondent could not be sued unless the provisions of **The Public Corporations Act 1992** and **The**

Bankruptcy Ordinance Cap 25 have been complied with. Mr. Nyabiri submitted that **section 9 of the Bankruptcy Ordinance** provide that before a specified public corporation can be sued, the intended plaintiff has to obtain leave of the court and join the official receiver to the suit. In support of that position of the law, the counsel cited the case of **Mathias Eusebi Soka versus Registered Trustees of Mama Clementina Foundation, John Amos Udumbe and TANESCO, Civil Appeal No. 40 of 2001** in which the Court of Appeal of Tanzania quashed and set aside the whole proceedings of the case because the matter illegally proceeded in the High Court without leave and without joining the official receiver.

Mr. Nyabiri argued that for the above reasons the present petition is not only illegal but also incompetent. He strongly urged us to struck out the petition with costs.

On the fourth point of preliminary objection Ms. Magesa, learned State Attorney for the first respondent submitted to the effect that it is mandatory **under section 6 (2) of the Government Proceedings Act, Cap 5,** that whoever intends to sue the Government should issue a 90 days' notice of his intention to sue. She contended that failure to issue such a notice, the whole suit is rendered incompetent and thus since no notice was issued by the petitioner the present petition must be declared incompetent.

On the fifth point of preliminary objection Ms. Magesa submitted in short that the first respondent was wrongly joined in the suit because the petitioner has no cause of action against the first respondent. She submitted that the petitioner is a corporate body capable of suing and being sued on its own capacity as provided under **section 4(2) (a) and (b) of the Tanzania Telecommunication Company Act, Cap 304**. She prayed for the entire suit against the first respondent to be dismissed with costs.

In response to the first point of preliminary objection Mr. Njulumi, learned advocate for the petitioner appreciated the research conducted by the second respondent's counsel on the existence of specific provision of law on time limit within which to file petition under **The Basic Rights and Duties Enforcement Act, No. 33 of 1994**. Mr. Njulumi conceded that there is no such law. However, Mr. Njulumi submitted that it is wrong for the petition filed under *the said* ***Act No. 33 of 1994*** to be classified as a suit because there is no clear provision of the law providing to that effect. Mr. Njulumi charged that in the absence of a clear provision of law which sets limitation of time for such proceedings, it goes without saying that due to **section 15 of *the Act No.33 of 1994***, and since the Chief Justice and the Minister has not made any rules with respect to the time limit, then such proceedings basing on the said law can be instituted at any time as long as the above mentioned law ***(Act No. 33 of 1994)*** is still in force until such

time when such rules regulating or setting for time limit of proceeding will be made. Due to that fact therefore, argued Mr. Njulumi, the first point of preliminary objection must fail.

Mr. Njulumi submitted with the same courage on the second point of preliminary objection, that it has no merits at all. He contended that the submission of the second respondent's counsel is wrong in implying that since the law which is being challenged has already been repealed since 2004, then this petition cannot stand. Mr. Njulumi retorted that there is no any legal proof or authority which has been brought to the attention of this court to support such views. He insisted that the crux of the petition is to see and determine the rights of the petitioner having been unlawfully terminated from his employment. Mr. Njulumi contended that the fact that **The Security of Employment Act, Cap 387** was repealed in 2004 does not make a wrong which was committed by anybody while basing on that repealed law to be a right, even if there is no saving in the new labour law. In support of his contention, Mr. Njulumi cited **Section 32 (1) (b) and (d) of the Interpretation of Laws, Cap 1 R.E. 2002.**

Responding on the third point of preliminary objection Mr. Njulumi submitted that it is a requirement of the law that parties should be bound by their own pleadings and that reliefs not found on pleadings will not be granted. He stated that since the issue of requirement of leave of the High Court and joinder of the official

receiver was not pleaded, this court has no jurisdiction to entertain it.

On the fourth point, Mr. Njulumi submitted that the required notice of intention to sue the government was duly issued and received by the first respondent on 3rd April, 2007. He prayed for the court to see the attached copy of the notice and the copy of dispatch which bears a signature of the receiver as evidence that the notice was duly served.

Replying on the fifth point of preliminary objection Mr. Njulumi submitted that this petition was filed to challenge the provision of **Security of Employment Act** as being unconstitutional as it infringes the petitioner's right to work, and therefore the main relief sought by the petitioner is for the court to declare them unconstitutional. The counsel argued that for that matter the Attorney General is a necessary part because he is a Chief Legal Advisor to the Government. In support of his submission Mr. Njulumi referred to **Article 30 (3) of the Constitution** which states clearly that any person whose right has been violated by provision of any law has a right to file petition in the High Court. He concluded that the contention that the petitioner has no cause of action against the first respondent is totally misconceived and must be rejected.

In his rejoinder Mr. Nyabiri re-iterated his position on the first point of preliminary objection and stated that according to the cited legal authorities, a petition is a suit and therefore subject to limitation of time. On the second point of preliminary objection Mr. Nyabiri rejoined to the effect that the petition was filed after the law it seeks to impugn had been repealed hence vexatious, frivolous and overtaken by events. On the third point, Mr. Nyabiri argued that the counsel for the petitioner has dodged to comment on the position of the law as stated in the case of **Fanuel Mantiri Ngunda** (supra) and instead capitalized on cases restricted on the contents of pleadings which do not raise issues of law touching on jurisdiction of the Court.

In her rejoinder, Ms. Magesa, learned State Attorney insisted on her position regarding to the fourth point of preliminary objection. She replied that the petitioner has failed to produce sufficient evidence to prove that the notice of intention to sue the Government was issued to the first respondent in accordance with the law. Challenging the copy of notice produced and attached to the reply to the written submission filed by the counsel for the petitioner, Ms. Magesa contended that the said notice was not served to the correct office of the Attorney General's Chambers at Dodoma because it shows a wrong address of P.O. Box 1559 Dodoma while the correct address for the first respondent is always P.O. Box 963, Dodoma. She further questioned the signature shown in the copy of the Dispatch Book which is unknown to the office of the Attorney General Chambers Dodoma.

Ms. Magesa argued that the copy of the alleged notice have no Attorney General's Stamp to acknowledge official receipt of the document. In conclusion, she pressed for the fourth point of preliminary objection to be upheld and the petition be dismissed.

On the fifth point of preliminary objection Ms. Magesa, rightly conceded with the position of law as submitted by Mr. Njulumi that the Attorney General was correctly joined in the petition as first respondent.

To that extent we are left with four points of preliminary objection to determine. Having dispassionately considered the submission and competing contentions from both counsel, we have found ourselves set and confident to resolve the raised points of preliminary objection as follows:

We agree with Mr. Nyabiri's ample submission on the first point of preliminary objection that the application is time barred. We have no reason to repeat what has been stated by Mr. Nyabiri on the question whether a petition under *the* ***Basic Rights and Duties Enforcement Act No. 33 of 1994*** is a suit or not. Suffice it to say, the decision of the Court of Appeal in the case of the **Hon. Attorney General** (**supra**) has said it all. For the benefit of the petitioner let us reproduce the **ratio decidendi** of that case;

"It is therefore our holdings that civil proceedings and the Act for protection and enforcement of basic rights, duties and/or freedom are suits. We find support for this view in ***section 2 of the Act.*** *The section provides that the Act shall apply to Tanzania Zanzibar as well as mainland Tanzania in relation to all suits the causes of action in which concern the provisions of* ***section 12 to 29 of the Constitution."***

It must also be noted that the absence of the rules under **section 15 of *the said Act No. 33 of 1994 Act*** does not mean a petition thereof can be delayed at will and brought only at the convenience of the petitioner. There should be an end of litigations as a matter of public policy and the court should be duty bound to reject inordinate delayed matters or/and resurrection of dead matters.

Therefore, the present petition was supposed to be filed within a period of six years as provided **under section 3(1), 5 and item 24** of the **First Schedule** to the **Law of Limitation Act, Cap 89.** The present petition was filed in 2008 almost after nine years hence out of time. The first point of preliminary objection is thus upheld.

On the second point of preliminary objection we are satisfied beyond a shadow of doubt that the present petition is vexatious, frivolous and overtaken by events after the repeal of the **Security of Employment Act, Cap 387.** The submission made by Mr. Nyabiri, Learned Advocate is the correct position of the law. We are of the view that before the **Security of Employment Act, Cap 387** was repealed in 2004, its provisions were not used by the second respondent to effect wrongful termination to the petitioner as argued by Mr. Njulumi. What was done by the second respondent was to exercise his discretion within the ambit of the law at that time and opted to the payment of statutory compensation to the petitioner instead of reinstating him. The main complaint of the petitioner is not directly against the second respondent but against the provisions of the repealed law which he believes to be unconstitutional.

Furthermore the present petition was not pending in court during the repeal of the law intended to be impugned and therefore it cannot fall or be considered under the category of ***"effect of repeal on the pending proceedings."***

In our considered opinion, the petitioner's claim is a complete new issue which was not in force or in existence within that law before it was repealed. In other words the petitioner is intending to revive a repealed law. That is exactly what is

forbidden by **section 32 (1) (a)** of the **Interpretation of Laws Act, Cap I**, which states;

> *" 22 -(1) Where a written law repeals an enactment, the repeal does not, unless the contrary intention appears –*
>
> ***(a) Revive anything not in force or existing at the time at which the repeal takes effect."***

With due respect to Mr. Njulumi, **section 32 (1) (b) (a) and (d) of the Interpretation of Laws Act, Cap I**, is not applicable in this case because the present petition was not in existence at the time when the repeal was effected.

Our position regarding to the second point of preliminary objection is strengthened by **section 13 (2)** of the **Basic Rights and Duties Enforcement Act, No. 33 of 1994** which invest the court with powers over such matters. That section provide as follows:

> *"Where an application alleges that any law made or action taken by the Government or other authority abolishes or abridges the*

basic rights, freedom or duties conferred or imposed by ***section 12 to 29 of the Constitution*** *and the High Court is satisfied that the law or action concerned to the extent of the contravention is invalid or unconstitutional, then the High Court shall, instead of declaring the law or action to be invalid or unconstitutional,* ***have the power and the discretion in an appropriate case to allow Parliament or other Legislative authority****, or the Government or other authority concerned, as the case may be,* ***to correct any defect in the impugned*** *law or action within a specified period, subject to such conditions as may be specified by it, and the law or action* ***impugned shall until correction is made*** *or the expiry of the limit set by the High Court, whichever be the shorter,* ***be deemed to be valid****." (Emphasis ours).*

In his submission, Mr. Nyabiri, Learned advocate asked two very logical questions of which we feel convenient to recapitulate here. **One**, is it possible for this court to declare a provision of repealed and dead law unconstitutional? **Two**, Is it possible for this court to use its discretion to allow Parliament or other legislative authority or the Government to correct any defect in a repealed

and dead law? By any stretch of imagination, the answers to those questions are in negative. No wonder the counsel for the second respondent lamented that the petitioner is seeking for resurrection of the dead law and declaration of some provisions therein unconstitutional, something which is impossible.

The third point of preliminary objection is equally maintainable in law. We agree with Mr. Nyabiri's lucid submission which was duly supported with unchallenged case authorities. As stated above it has been said time and again that a question of jurisdiction is basic and fundamental and it can be raised at any stage of the proceedings. A court of law cannot adjudicate on a matter which faults the law and by faulting the law the court cannot cloth itself with jurisdiction where the law prescribed a procedure to be followed and it is not followed. Therefore it is incumbent upon the court to attend and resolve the issues of jurisdiction at any available opportunity. With that position of law in mind we now proceed to disclose our reasons for upholding the third point of objection.

There is no dispute that the second respondent is a Specified Public Corporation under receivership. **Section 9 of the Bankruptcy Ordinance, Cap 25** provides:

"On the making of a receiving order the official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or ***shall commence any action or other legal proceedings unless with the leave of the court and on such terms as the court may impose****."*
(emphasis ours)

Therefore, leave of the High Court to join the second respondent in the suit has to be sought and obtained. That position of the law has been emphatically re-iterated as a legal pre-requisite before suing a Specified Public Corporation. See the case of **Mathias Eusebi Soka** (supra)

We have anxiously deliberated on the fourth point of preliminary objection and concur with submission by Ms. Magesa, learned State Attorney, that there is no evidence to prove that the notice to sue the first respondent issued under **section 6 (2) of the Government Proceedings Act** was properly effected. The copy of the purported notice filed by the Counsel for the petitioner indicate a wrong address of the first respondent; it lacks official

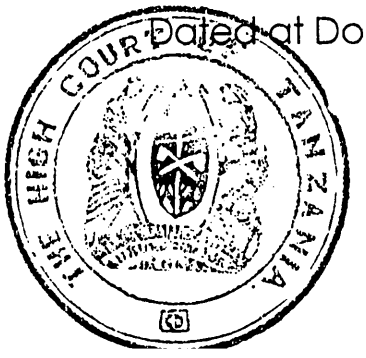
stamp or seal of the intended addressee and even the copy of dispatch contains unknown and unverified signature. For those reasons we uphold the fourth point of preliminary objection.

We have already indicated above that Ms. Magesa, learned State Attorney for the first respondent did concede to the submission made by Mr. Njulumi on the fifth point of preliminary objection to the effect that it was misconceived and baseless. It is accordingly rejected.

In conclusion therefore we uphold all points of preliminary objection with the exception of the fifth point as stated above.

The petition is hereby dismissed with costs.

Dated at Dodoma this 13th day of December, 2011.



HON. M.S. SHANGALI
JUDGE

HON. M.A. KWARIKO
JUDGE

HON. S.S. MWANGESI
JUDGE