

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM**

MISC. CRIMINAL APPLICATION NO 27 OF 2014

1. ALL OTHUMANI RASHID 2. SHABANI BAKARI WAZIRI 3. FARAJI ALI RAMADHANI 4. MUSA DAUDI MTWEVE	}	APPLICANTS
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VERSUS

THE REPUBLIC.....RESPONDENT

*Date of Last Order: 23/06/2014
Date of Ruling: 18/8/2014*

RULING

Bongole,J

The applicants had filled an application before this court under a Certificate of Urgency i.e Misc. Cr. Application no 27 of 2014.

The application was made under Section 165(1) and 372 of the Criminal Procedure Act Cap. 20 R.E 2002, and any other enabling provisions of the law. The reliefs sought in the application were:-

1. That the Honourable court be pleased to call upon the records of the RM's Court of Dar es Salaam at Kisutu in P.I No. 18 of the 2013 currently pending before Hon Mchauru S.R.M and revise the proceedings.

2. That the Honourable court be pleased to order that the charges against the 1st, 2nd, 3rd and 4th applicants currently pending in the RM's Court of Dar es Salaam at Kisutu in P.I. No 18 of 2013 before Hon MCHAURU SRM be dismissed.
3. That the Honourable court be pleased to order and direct that the 1st, 2nd, 3rd and 4th Applicants be released from remand prison where they are currently with held.
4. Costs for this application to follow the event.
5. Any other relief this court may deem appropriate, just and equitable to grant.

Further the application is supported by an affidavit deposed on by Mr. Tibanyendera Mohamed learned Advocate who represents the applicants.

The Respondent (Republic) represented by Mr. Kongola learned Principal State Attorney and Mr. Mango learned Senior State Attorney filed a Counter Affidavit along with a notice of Preliminary Objection to challenge the competence of the application to wit:-

1. The Application is incompetent.
2. The court is wrongly moved.

The respondent pray for the dismissal of the entire application.

The substance of the Oral arguments by Mr. Kongola were that the affidavit in support of the application contains legal arguments and extraneous matters which are against the law. For example he pointed at paragraphs 10, 11, 12, 13,16,17 and 20 which he said contains legal arguments while para 14 and 15 contains extraneous matters. That

general an affidavit is supposed to contain facts and not arguments on points of law. He invited this court to stand by the decision of in the case of **Rustamali Shivji Karim Merani Vs. Kamal Bhushan Joshi CAT – Civil Application No 80 of 2009** (unreported).

On the 2nd limb of the Preliminary Objection he argued that the court is wrongly moved as the sections i.e S.165(1) and 372 of the CPA are not enabling laws. He said S.165(1) is not relevant because the offence with which the Applicants are charged is triable by the High Court except where the DPP issues a consent Certificate. Further that S.372 is a dead law as it was amended by Act No 25 of 2002 and after the amendment the section gave birth to two subsections.

- (i) Which allows revision
- (ii) Which gives boundaries to the revision.

He insisted that this application is Incompetent because in the committal court no any decision which has been made which call forth for revision i.e there are no any proceedings subject for revision. So he said the application is pre-mature and it deserves a dismissal order.

Responding to the arguments advanced, Mr. Tibanyendera pointed out that the application originates from Criminal Case P.I 18/2013 at RM's Court Kisutu. That the said Criminal Case has been framed against the applicants in a charge contains two counts 1st Count under S. 21(a) of Prevention of Terrorist Act and 2nd Count under S.25(1)(b) of the same Act.

He argued that by virtue of the Criminal proceeding an application may be made as per S.392 A of the CPA. Two options are provided for he said. One is orally when a person can access the court and the second way is by writing where it must be by way of Chamber Summons supported by an affidavit.

He said, the contents of the affidavit attached to the Chamber Summons in paragraphs No. 10,11,12,13,16,17 and 20 are facts emanating from the file in Criminal Case No 18/2013.

That as an advocate representing the Applicant he said the legal facts are those facts which he came to know as a professional lawyer. That at the verification he stated he knew the facts of law in para 10,11,13,16 and so on.

That even if those paragraphs could not be enumerated yet his affidavit being an affirmation or a sworn document, this court may rely on it as per S.59(1)(a) of Cap. 6 R.E 2002 (the evidence Act) which gives the court the power of acknowledging the existing of law, notices and soon. He went on arguing that what is in para 14 and 15 which the respondents Advocate said it is a denial, he said the information are true facts which the deponent believe to be true. So he prays this court rely on it in hearing of the application.

Further that the authority cited by the respondent Civil Application No 80/2009 the controversy was on an affidavit supporting notice of motion which was governed by Appellate Rules 1999 which have now been amended. That the Court of Appeal in that case never dealt with affidavities

attached in an application filed in court by way of chamber summons supported by an affidavit.

He said a Criminal Case is different from a civil suit and the court when determining a Criminal matter the court should not resort legal technicalities.

With regard to the second Preliminary objection he said the State Attorneys wants him to cite the subsections. He argued that this is an old position as there is a Court of Appeal direction that it is not mandatory to cite the subsections. That S.372 is the relevant law under which the application should be brought as the amendment was ment to increase subsection (ii) as a proviso to revisions relating to Interlocutory orders where no finality element in existence. That S.372(I) is full and gives powers of Revision by the High Court and that the present application is basing on "*as to the regularity*".

Equally, he said S.165 is relevant because it states the direction and powers with which courts should have jurisdiction. He prayed the Preliminary Objection raised be overruled and the applicants be allowed to access justice by hearing the application on merit.

Let my sincere thanks and gratitude beyond measure go to the learned State Attorneys and counsel for the wonderful arguments they advanced.

Let me at this point glance on the law that governs such kind of Applications. It is provided for in Criminal Procedure Act Cap 20 R.E. 2002 under S.372.

It reads and I quote in extensor "*S.372 Power of High Court to call for records.*

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order record or passed, and as to the regularity of any proceedings of any subordinate court".

This provision was however amended by the written laws miscellaneous amendment Act No 25 of 2002 and reads "The Criminal Procedure Act is amended:-

(c) in section 372

(i) designating that section as section 372(1)

(ii) by adding immediately after subsection (1) the following subsection (2) Notwithstanding the provision of subsection (1) no application for revision shall lie or be made in respect of any preliminary or interlocutory decision order of a subordinate court unless such decision or order has the effect of finally determining the criminal charge.

At the outset I must point out that the amendment to S.372 has not substantially changed the purpose under which it was enacted. The section was given another name, baptised i.e designated as S.137 (1). Now should I follow the preposition that non citation of subsection (i) renders the whole application incompetent. It is my conviction that holding so will occasion injustices to the applicants. see **Dodsal Hydrocarbons Vs Hasmukh – Common Case No 42/2011** (unreported)

The issue whether there is any decision which has been made by the committal court or there is any proceeding subject for revision that do not qualify to be points of law but of facts which needs to be proved or been locked at the proceedings.

It traversed one paragraph after another in the affidavit and I find no any paragraph that contains legal arguments as argued by Mr. Kongola. It is true that in some paragraphs the laws under which the applicants are charged with in the subordinate court have been mentioned. To my understanding, I think those provisions constitute the facts in the said criminal charge and do not amount to legal arguments. Generally the affidavit at hand contain facts of which all parties expects legal arguments to be advanced to support those facts or oppose when the application shall be heard on merit.

In view of the aforesaid I find the preliminary points raised and the arguments in support thereto though not lacking in attractiveness are with no merits. The same are overruled.

S.B. Bongole

JUDGE

18/08/2014

18/8/2014

Coram: Bongole,J

For the 1st Applicant }
2nd Applicant } Mr. Tibanyenda
3rd Applicant }
4th Applicant }

For the Respondent: Mr. Kongola P.S.A
Mr. Maungo S.S.A

C.C. Evelina

Court: Ruling delivered.

S.B. Bongole

JUDGE

18/8/2014

Mr. Kongola:- My lord, we pray for a hearing date of the application

Order: Hearing on 3/9/2014

S.B. Bongole

JUDGE

18/8/2014