IN THE HIGH COURT OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CAUSE NO 36 OF 2022

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION BY HALIMA JAMES MDEE AND 18 OTHERS

AND

IN THE MATTER OF THE DECISION OF CHAMA CHA DEMOKRASIA NA MAENDELEO (CHADEMA) EXPELLING THE APPLICANTS FROM BEING MEMBERS OF CHAMA CHA DEMOKRASIA NA MAENDELEO (CHADEMA)

BETWEEN

HALIMA JAMES MDEE.....1ST APPLICANT

GRACE VICTOR TENDEGA.....2ND APPLICANT

ESTER NICHOLAS MATIKO.....3RD APPLICANT

ESTER AMOS BULAYA.....4TH APPLICANT

AGNESTA LAMBERT KAIZA.....5TH APPLICANT

ANATROPIA THEONEST.....6TH APPLICANT

ASYA MWADINI MOHAMED.....7TH APPLICANT

CECILIA DANIEL PARESSO.....8TH APPLICANT

CONCHESTA LEONCE RWAMLAZA.....9TH APPLICANT

FELISTA DEOGRATIUS NJAU.....10TH APPLICANT

HAWA S. MWAIFUNGA.....11TH APPLICANT

JESCA DAVID KISHOA.....12TH APPLICANT

KUNTI YUSUFU MAJALA.....13TH APPLICANT

NAGHENJWA LIVINGSTONE KABOYOKA.....14TH APPLICANT

NUSRAT SHAABAN HANJE..... ....15TH APPLICANT

SALOME MAKAMBA.....16TH APPLICANT

SOPHIA HEBRON MWAKAGENDA.....17TH APPLICANT

STELLA SIMONI FIYAO.....18TH APPLICANT

TUNZA ISSA MALAPO.....19TH APPLICANT

AND

THE REGISTERED TRUSTEES OF CHAMA CHA DEMOKRASIA NA MAENDELEO (CHADEMA).....1ST RESPONDENT

NATIONAL ELECTORAL COMMISSION.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

Date of Last Hearing: 24th October, 2023

Date of Ruling: 14th December, 2023

RULING

MKEHA, J:

The applicants were members of a political party known as **CHAMA CHA DEMOKRASIA NA MAENDELEO** hereinafter referred to by its acronym `**CHADEMA**`, up to the 27th day of November 2020. Because of their expulsion from continuing being members of the said political party, they are now engaged in a serious legal battle aimed at restoring their membership.

The facts giving rise to the present application are these: On 28th October 2020, presidential and general parliamentary elections were held countrywide. **CHADEMA** happened to be one of the political parties which participated in the said general elections. In terms of the official election results declared by the National Electoral Commission and as per the provisions of Articles 66 (1) (b), 67 (1) (a) and (b) and 78 (1) of the Constitution of the United Republic of Tanzania, **CHADEMA** was entitled to have nineteen (19) Members of Parliament for Women Special Seats in the National Assembly.

In accordance with the provisions of section 86 (2), (6) and (7) of the National Elections Act, a political party entitled to have whatever number of

Members of Parliament for Women Special Seats would submit to the National Electoral Commission names of its eligible women candidates for nomination to Women Special Seats. The Commission would upon receipt of proposal submitted to it by a qualifying political party, subject to Articles 66, 67 and 78 of the Constitution and in accordance with the order of preference indicated in the list proposed by each political party, declare such number of women candidates from the respective political parties as Members of Parliament for Women Special Seats. After the said declaration, the Commission would then send a notification of declaration to the Speaker of the National Assembly and to the Secretary General of the respective political parties.

On 24th November 2020, the applicants appeared on Tanzania Broadcasting Television taking their respective oaths as Special Seats Members of Parliament sponsored by **CHADEMA.** Soon after the applicants had been sworn in as Members of Parliament, particularly, in the evening of the 25th November 2020, **CHADEMA'S** Secretary General, having a bone to pick with the applicants, issued a public statement condemning them for being sworn in indicating that, their swearing in violated the Party's directives disowning the 2020 General Elections. Through the said

public statement and afterwards through WhatsApp, the Secretary General summoned the applicants to appear before the Party's Central Committee in the morning of 27th November 2020, to show cause why they took up positions as Special Seats Members of Parliament, purporting to be sponsored by **CHADEMA,** without abiding by the Party's inherent processes and in contravention of the Party's political electoral stance.

Upon receipt of the show cause notices, all the applicants sought for adjournment of the hearing scheduled to be done on 27/11/2020. They coincidentally sought the adjournment for similar grounds. Each of the applicants wrote to the Secretary General alleging presence of security threats on her part. They all prayed for seven days' adjournment to let the atmosphere cool down, to secure safety environment and reasonable time to prepare for hearing and submit a fair and just defence.

The requests for adjournment were denied by the Party's Central Committee vide letters by the Secretary General, allegedly received by the applicants at various times between the midnight of 26/11/2020 and 28/11/2020 in the morning. Despite denial of adjournment, none of the 19 applicants appeared before the Central Committee on 27/11/2020, at the time when hearing of the disciplinary matter had to take place.

In spite of the fact that none of the applicants attended the hearing session on 27/11/2020, **CHADEMA'S** Central Committee proceeded in the absence of the applicants. The Central Committee held that, the Commission had inappropriately or wrongly appointed the applicants who were thereafter sworn in as Special Seats Members of Parliament of the United Republic of Tanzania. The Central Committee decided against the applicants. All the nineteen (19) applicants were expelled from being members of **CHADEMA** henceforth.

Against the Central Committee's decision, the applicants appealed to the Party's Governing Council which under the Party's Constitution, was the final appellate body. On 11th May 2022, the Party's Governing Council (Baraza Kuu) affirmed the decision of the Central Committee (Kamati Kuu).

On these facts and in these circumstances, an application is being made by the applicants, moving the High Court for prerogative orders of, **Certiorari** to quash the decision passed by the Governing Council of the 1st respondent on the 11th day of May 2022 and formally published on the 12th May 2022 along with the whole process of expelling the applicants from being members of **CHADEMA; Mandamus** to compel the 1st respondent to accord the applicants the right to be heard, observe the due

processes and principles of natural justice in determining questions/ matters affecting the applicants' rights as members of **CHADEMA** and **Prohibition** to proscribe the 2nd and 3rd respondents from acting upon the whole decision passed by the 1st respondent's Governing Council on 11th day of May 2022 and formally published on the 12th May 2022 expelling the applicants from being members of **CHADEMA.**

The application is made under section 17 (2) of **the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act** [Cap.310 R.E.2019], Rules, 4 and 15 (a) and (b) of **the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules**, GN. No.324 0f 2014, Section 2 (3) of **the Judicature and Application of Laws Act**, [Cap. 358 R.E. 2019] and Article 108 (2) of **the Constitution of the United Republic of Tanzania of 1977** as amended from time to time. The application is supported by the applicants' joint statement, nineteen (19) affidavits and joint applicants' affidavit in reply to the 1st respondent's counter affidavit, all the affidavits being sworn /affirmed by the applicants.

On the other hand, the application is contested through the 1st respondent's answer /reply to the applicants' joint statement as well as

joint counter affidavit sworn /affirmed by the Registered Trustees of **CHADEMA.** The 2nd and 3rd respondents did not file any counter affidavit.

Whereas the applicants were represented by Messrs Ipilinga Panya, Aliko Mwamanenge, Edson Kilatu, Emmanuel Ukashu, Humphrey Malenga, Mss. Matinde Waissaka and Joyce Mwakapila learned advocates; and whereas the 1st respondent was represented by Messrs Peter Kibatala, Jeremiah Mtobesya and Hekima Mwasipu learned advocates; the 2nd and 3rd respondents were represented by Ms. Jesca Shengena learned Principal State Attorney, Messrs Stanley Kalokola, Boaz Msoffe, Ayoub Sanga, Mathew Fuko, Masunga Kamihanda, Mss. Leonia Maneno, Kause Kilonzo, Lilian Mirumbe, and Frida Mollel, learned State Attorneys.

The application is decided, basing not only on the depositions of the parties as the obtaining practice pertaining to judicial review cases would require, but also, responses of some of the deponents of the affidavits from the applicants' and 1st respondent's sides, who under exceptional circumstances, appeared before the court for being cross examined with regard to what they had deposed in their respective affidavits.

This happened as follows: Before the parties were invited to argue the application in the ordinary way, Mr. Peter Kibatala lead counsel for the 1st respondent, made a prayer for cross examination of the 1st, 2nd, 3rd, 4th, 8th, 11th, 12th and 15th applicants. According to the learned advocate, some necessary information that would be determinative of the application had been concealed by the said applicants. While the learned counsel for the applicants did not object the prayer for cross examination of some of the applicants, they also accused the deponents of the counter affidavit of the 1st respondent of similar offence, of concealment of necessary information to just and transparent disposition of the application. Therefore, a counter prayer was made for cross examination of all the deponents of the 1st respondent's counter affidavit. This prayer was not contested by the learned counsel for the 1st respondent.

Granting the two prayers hereinabove would imply that, the court had to depart from the obtaining practice whereby in judicial review cases, rarely, witnesses have to be cross examined. However, upon reflection and taking into account high public interest involved in the dispute and the need to determine it transparently, fairly and justly, I granted the two prayers. In adopting what seemingly would appear a strange practice, I

was encouraged by the following passage in a similar case from a foreign jurisdiction: `*I acknowledge that cross examination is exceptional in judicial review proceedings. This is largely because the primary facts are often not in dispute, or at least those asserted by the defendant public authority are undisputed. In addition, the defendant public authority may normally (but not invariably) be relied upon to disclose its relevant documents, thus fulfilling its duty of candour in relation to its documents. However, the Court retains a discretion to order or to permit cross examination, and it should do so if cross examination is necessary if the claim is to be determined, and is seen to be determined, fairly and justly*` Read: **R (BANCOULT) VS SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS** [2012] EWHC 2115 (Admin) per Stanley Burton LJ. It is however hoped that, the exceptional procedure adopted in this case, of permitting cross examination in judicial review proceedings will not be a justification for making adduction of evidence in cases of this nature, a routine exercise.

In terms of the applicants' joint statement, the grounds on which the reliefs are sought are the following: That, soon after the applicants were sworn in as Members of Parliament, in the evening of 25th November 2020,

the 1st respondent via **CHADEMA'S** Secretary General one Mr. John John Mnyika issued a public statement condemning the applicants for being sworn in purporting that their swearing in violated the Party's directives disowning the 2020 General Elections; That, in the said public statement, the 1st respondent's Secretary General invited the Party members and the public to send him proposals via his email on how the applicants ought to be punished something that manifested a pre-conceived decision; That, through the said public statement and WhatsApp, the Secretary General summoned the applicants to appear before the Party's Central Committee in the morning of 27/11/2020.

According to the applicants, the public statement by the Party's Secretary General resulted in serious anger amongst scores of **CHADEMA** followers whereas some of them vowed to attack the applicants as they approached the place where the Central Committee was to hold its disciplinary meeting; That, given the safety concerns, each of the applicants prayed vide a letter communicated through WhatsApp, for adjournment of the disciplinary meeting to let the atmosphere cool down and be assured of their security before they would appear before the Central Committee.

The applicants' joint statement indicates further that, the applicants were not issued with any charge sheet as required under the 1st respondent's Constitution and internal disciplinary procedures; That, the Central Committee decided to conduct its meeting in the absence of all the applicants who were still in Dodoma, despite being furnished with reasonable excuse; That, the Central Committee acted speculatively by introducing new claims which were not even communicated in the show cause notices; That, the Central Committee's meeting was conducted summarily in total abrogation of the 1st respondent's procedures and ended up expelling the applicants from being members of the 1st respondent's Party.

The applicants went on to state that, aggrieved by the decision of the Central Committee, they appealed before the 1st respondent's Governing Council; That, top 1st respondent's leaders who also presided over the Governing Council on appeal, were reported making adverse remarks against the applicants pending appeal and some of them vowed to deal with the applicants perpendicularly and that, the 1st respondent conducted the disciplinary proceedings without abiding by the 1st respondent's laid

down disciplinary procedures under the Party's Constitution by denying the Applicants right to be heard and lacking impartial decision.

The evidence relied upon by the applicants is contained in their respective affidavits, joint affidavit in reply to the 1st respondent's counter affidavit as well as responses of some of the Registered Trustees of **CHADEMA** who appeared in court to be cross examined in respect of what they had deposed in their joint counter affidavit. The applicants' affidavits resembled in almost all material aspects.

The said affidavits indicate that, the applicants were Special Seats Members of Parliament of the United Republic of Tanzania appointed by the 2nd respondent for 2020/2025 tenure sponsored by **CHADEMA** since the 24th November 2020 having been sworn in on 24/11/2020; That, on 25/11/2020 the 1st respondent through its Secretary General one Mr. John John Mnyika, issued a public statement in a press conference published by the local and international media as well as several online media against the applicants for being sworn in as Members of Parliament of the United Republic of Tanzania; That, the Secretary General said, "..... *Waandishi wa Habari, wapate Public notisi ya chama ya kuitwa kufika tarehe 27 saa mbili kamili asubuhi Makao Makuu ya Chama kwa ajili ya taratibu nyingine....Leo*

tarehe 25 leo..... `waliokwenda kuapa walikwenda bila baraka za chama na nikisema chama , ni chama kama Taasisi ikiongozwa na Mwenyekiti Freeman Mbowe....Mwenyekiti wa chama Mh. Freeman Mbowe ndiye atakayeongoza kikao cha Kamati Kuu ya Chama kitakachofanyika tarehe 27 ambacho kitawasikiliza wahusika kwa nini waliamua kufanya, kushiriki kwenye huu uasi na usaliti, nini kiliwasukuma kufanya hivyo....uteuzi umefanyika tarehe 20, uapishaji umefanyika tarehe 24.....kesi ya walioapa 19 kimsingi inahusisha vilevile kughushi orodha ya majina ya Chama na mchakato mzima wa fomu....tutakwenda kufanya Kikao cha Kamati Kuu tarehe 27. Na nitoe wito kwa Wanachama na viongozi popote pale milango iko wazi na wadau wa demokrasia kutoa kutoa (sic) maoni kwa Chama, juu ya ni hatua gani zichukuliwe na Kamati Kuu tarehe 27...."

Free translation:

..... Members of the press; they should get the Party's public notice that summons them to the Party's Headquarters on 27th at eight o'clock in the morning for further procedures ..... today, the 25th today .... Those who went to take oaths did so without the assent of the Party. When I refer to the Party, it means the Party as an Institution led by the Chairperson-Freeman Mbowe.... The Chairperson of the Party, Hon. Freeman Mbowe

will chair the meeting of the Party's Central Committee, which will be held on 27th. It shall listen to them, the reasons for their decision to commit, collude and participate in this defiance and disloyalty; what enticed them to do it.... The nomination was done on 20th, the swearing-in procedures were conducted on 24th... basically, the accusation against the 19 sworn-in members, involves also the forgery defiance to the Party's list of names and the entire process concerning the forms.... We are going to hold the Central Committee's meeting on 27th. I plead with the members and leaders (of our Party) wherever they are; that the doors are open and (for) the stakeholders in democracy to give give (sic) their opinions to the Party on (which appropriate) legal action should be taken by the Central Committee on 27th ..... USB Flash Drive containing public statements made on 25th November 2020 by the Secretary General of the 1st respondent Mr. John John Mnyika was annexed to the affidavit as Annexure **HJM-01.**

The applicants contended in their respective affidavits that, during the 25th November 2020 press conference, **CHADEMA'S** Secretary General stated that, the applicants participated in forgery defiance and were traitors; That, the Secretary General invited the members and general public to send recommendations to him regarding any appropriate

sanctions or actions that could be imposed by **CHADEMA** against the applicants.

The applicants went on to contend that, in the evening of 25/11/2020, after they had already been sworn in as Special Seats Members of Parliament, **CHADEMA'S** Secretary General sent a letter through WhatsApp message inviting them to appear before the Central Committee scheduled in the morning of 27/11/2020 to be held at the Party's Head Quarters. Copy of a letter inviting the applicants to attend before the Central Committee of the 1st respondent was annexed to the applicants' affidavits as Annexure **HJM-02.** The said letter appeared to have been issued pursuant to ***Regulation 6.5.1 (d)*** of the Party's Regulations, December 2019 version, which covers emergency situations.

The applicants stated further that, in fear of being attacked by the rallying members of **CHADEMA,** sought adjournment and extension of time in writing to the Central Committee to allow among other things, the public atmosphere to cool down, secure safety environment and reasonable time to prepare for hearing and submit a fair and just defence. Copies of letters dated 26th November 2020 by the applicants seeking adjournment were annexed to each affidavit as Annexure **HJM-03**; That,

the request for adjournment was denied by the Central Committee through a letter by the Secretary General received by the applicants at different times between the midnight of 26/11/2020 and 28/11/2020 in the morning. Copies of a letter refusing adjournment were annexed to the applicants' affidavits as Annexure **HJM-04.**

The affidavits indicate further that, on 27/11/2020 members rallied at the Party's Head Quarters where the meeting was to be held against the applicants labelling them as ***COVID 19*** and that, one Mr. Shaaban Othman was televised holding a banner with the caption, " *Kamati Kuu, fukuzeni hao* ***COVID 19"***. A Flash Drive showing demonstrations of members of **CHADEMA** rallying at the 1st respondent's Head Quarters was annexed to the affidavits as Annexure **HJM-05**.

The applicants contended further that, on 27/11/2020 **CHADEMA'S** Central Committee proceeded in their absence to determine that, they (applicants) had been inappropriately or wrongly appointed by the 2nd respondent and thereafter sworn in as Members of Parliament of the United Republic of Tanzania; That, the Central Committee expelled the applicants from being members of **CHADEMA.** Copies of a letter expelling the applicants dated 30th November 2020 were annexed to the applicants'

affidavits as Annexure **HJM-06**; That, the letter notifying the applicants of their expulsion contained new claims that were never communicated to them in the show cause notices.

The applicants stated in their respective affidavits that, the decision of the Central Committee passed on 27/11/2020 expelling them from being members of **CHADEMA** affected their status as Special Seats Members of Parliament and their constitutionally guaranteed freedom of association and the right to participate in public affairs; That, immediately after their expulsion by the Central Committee, they appealed in writing to the Party's Governing Council challenging the whole procedure used in reaching at the decision which expelled them. Copies of the applicants' appeal to the Governing Council were annexed to the said affidavits as Annexure **HJM-07**.

In terms of the applicants' affidavits, in the appeal, they demanded the Governing Council to reconsider the process undertaken by the Central Committee of **CHADEMA** in reaching at its decision dated 27/11/2020; That, the applicants' appeal was predicated on the fact that, they were not heard by the Party's Central Committee when the decision was made on 27/11/2020 and that, they were not satisfied with the process leading to

the decision by **CHADEMA'S** Central Committee expelling them as members of the said Party.

The applicants contended in their respective affidavits also that, **CHADEMA'S** National Chairman, a member of both the Central Committee and Governing Council made public statements seconding the decision of the Central Committee prior to the Governing Council's meeting scheduled on the 11th May 2022. According to the applicants, the Chairman remarked:

" *Spika anajua....wanajua kuwa wabunge hawa wamekwishafukuzwa na chama hiki.....inasemekana ooh, Baraza Kuu limepangwa, Baraza Kuu letu lipo tarehe 25 mwezi wa nne.....kama kuna rufaa zao tutawaona kwenye Baraza Kuu....Ishu siyo kukubali Wabunge 19, tunapokataa Wabunge 19 tunakataa ukiukwaji wa sheria za nchi, forgery iliyofanyika katika Taifa....nakwendaje mimi kuidhinisha ama ku-endorse ubatili wa namna hiyo. Hakuna kitu kama hicho na hakitatokea kwenye* ***CHADEMA*** *ambayo sisi tunaiongoza na wenzangu hapa....tunasimama upright,* ***CHADEMA*** *haijawahi kuteua Wabunge 19".*

Free translation:

The Speaker knows.... They know that these Members of Parliament have been expelled by this Party... it is claimed ooh, the Governing Council has been designedly organized, and our Governing Council will sit on 25th April..... If they have appeals we shall see them before the Governing Council..... The issue is not whether we recognize the 19 MPs; when we reject the 19 MPs, we deny the infringement of the state's laws, the forgery that was committed in the nation. How do I approve or endorse this kind of fraud. There is nothing like that and it will never happen within ***CHADEMA*** *that we are leading with my colleagues here. We will stand firm (upright),* ***CHADEMA*** *has never nominated 19 Members of Parliament...* A Flash Drive containing public statements made by the Party's National Chairman Hon. Freeman Mbowe was annexed to the applicants' affidavits as Annexure **HJM-08**.

The applicants contended in their affidavits that, they were invited to attend and actually attended the Governing Council's meeting that was held at Mlimani City-Dar es Salaam on 11/05/2022; That, the only opportunity availed to the applicants during the said meeting was an opportunity for apologizing; That, on 11/05/2022 **CHADEMA'S** Governing Council affirmed the decision of the Central Committee without hearing the

applicants and went on expelling them from being members of the said Party. A copy of a letter confirming the applicants' expulsion was annexed to the affidavits as Annexure **HJM-09.**

The applicants contended in their affidavits that, members of **CHADEMA'S** Central Committee who passed the decision on 27/11/2020 including the Party's National Chairman and Secretary General were also part of the Governing Council which met on 11/05/2022 to determine the applicants' appeal.

It was stated further that, **CHADEMA'S** Secretary General had written a letter to the Honourable Speaker of the National Assembly informing her of his Governing Council's decision dated 11/05/2022 affirming expulsion of the applicants demanding the Honourable Speaker to act on the decision; That, the 2nd respondent would declare the applicants' positions as Special Seats Members of Parliament vacant upon a notification from the Honourable Speaker of the National Assembly acting on the decision of the Governing Council dated 11th May 2022.

Finally, the applicants stated that, the Party's Central Committee and Governing Council were vested with a public duty while determining rights

of the applicants which duty had to be exercised judiciously with due regard to principles of natural justice and that, the applicants, having exhausted all the available remedies within the Party's framework, having no alternative remedy and still aggrieved with the process leading to the decision of the Governing Council dated 11/05/2022 affirming the decision of the Central Committee expelling them from being members of **CHADEMA,** preferred the present application.

Five (5) out of the nineteen (19) applicants appeared in court for being cross examined in respect of what they had deposed in their respective affidavits. Responding to questions put to her by Mr. Peter Kibatala learned advocate, the 2nd applicant (Ms. Grace Victor Tendega) told the court that, **CHADEMA'S** Constitution recognized Information and Communication Technologies in the Party's official communication. The 2nd applicant acknowledged that, they had really received show cause notices though informally. Ms. Grace Tendega insisted that, although under the Party's Constitution email and other related means of communication would be acceptable, it was acting informally on part of the Secretary General to send show cause notices to the applicants through WhatsApp. The 2nd applicant admitted that, there was no evidence to the effect that, the

Secretary General's letter refusing adjournment and notification on change of venue was actually received on 27/11/2020 in the evening. The 2nd applicant maintained that, they were neither accorded a right to be heard before the Central Committee, nor before the Governing Council. Ms. Grace Tendega told the court that, if anything, the applicants were availed with an opportunity for apologizing before the Party's Governing Council.

On her part, Ms. Hawa Subila Mwaifunga (11th applicant) admitted through cross examination that, under **CHADEMA'S** Constitution to which she was a subscriber at a time relevant to the dispute, the Central Committee was empowered to take measures in emergency situations. She could not actually prove that, the letter on change of venue was received on 27/11/2020 as alleged. The 11th applicant complained of participation of the Central Committee members in both, the meeting which expelled the applicants at first instance and the appellate meeting which affirmed their expulsion.

To add fuel to the fire, Ms. Nusrat Shaban Hanje (15th applicant) and Ms. Cecilia Daniel Pareso (8th applicant) maintained that, it was wrong on part of the Central Committee to attend the matter urgently in the circumstances whereby urgency had ceased. According to the two

applicants, the matter was no longer urgent after their swearing in as Members of Parliament. The two applicants were responding to a question regarding their summoning under ***Regulation 6.5.1(d)*** of the Party's Regulations which in their considered opinion would only be applicable in a real emergency situation which was not the case. The two applicants were adamant that, in any case, it was improper for those who passed the disciplinary measure of expulsion, to sit on appeal before the Party's Governing Council. Ms. Cecilia Pareso admitted that, the Party's Constitution to which she was a subscriber before her expulsion, allowed the National Chairperson and Secretary General to preside in both, the Central Committee's and Governing Council's meetings.

Further on cross examination, Ms. Jesca David Kishoa (12th applicant) admitted that, she actually received a show cause notice containing the allegation she was to defend against before the Party's Central Committee. The said applicant admitted also that, the request for adjournment was not prompted by absence of a charge sheet but security reasons.

It was stated in the 1st respondent's answer/ reply to the applicants' joint statement that, the reliefs and grounds upon which the reliefs were being sought were without merit as none of the nineteen (19) applicants

was a member of **CHADEMA** and that, nor were they sponsored by the 1st respondent as Special Seats Members of Parliament; That, the applicants had forged the appointment letter. The Registered Trustees of **CHADEMA** stated that, the reliefs sought were untenable for reasons that, the applicants had deliberately absented themselves from hearing by the 1st respondent's Central Committee.

It was stated that, the 1st respondent fully abided by all the procedural requirements prior to the making of decisions at the Central Committee and the appellate stage; That, the applicants never sought or pursued the recusal of any member of the 1st respondent's Central Committee or Governing Council that heard their appeals; That, the applicants were fully afforded the right to be heard at the Central Committee and the appellate Governing Council; That, the applicants never demanded performance from the 1st respondent in any manner.

The reply to the joint statement of the applicants went on to indicate that, the alleged statements by the Secretary General were never made in the context alleged; That, in any case, the Secretary General had no power to singularly determine the disciplinary fate of the applicants who were convicted after due process.

The reply indicates further that, the applicants were duly notified of the charges against them so much so that they sought extension of time to respond to the same; That, the charges were so clear that, even the specific provision of the Party's Constitution that they were charged of having violated was duly quoted in the show cause notice.

It was stated that, the Central Committee of the 1st respondent did not act speculatively as alleged as the applicants were duly notified by all reasonable means and with urgent dispatch of the charges against them which constituted conniving and self-appointing without abiding by the 1st respondent's Constitution and facilitating their swearing in as Special Seats Members of Parliament contrary to Party's processes and procedures; That, the alleged security threats to the applicants were never reported to any police station.

Finally, the Registered Trustees of **CHADEMA** stated in reply that, the applicants sought adjournment in response to having been duly served with charges and notification of hearing scheduled to be on 27/11/2020; That, the 1st respondent's reply to the request for adjournment was for the applicants to seek the same from the Central Committee which had jurisdiction over the disciplinary process; That, none of the applicants

responded to the directives for seeking the adjournment from the requisite body, instead, they took it upon themselves to absent from the hearing.

As for the 1st respondent, the evidence relied upon in challenging the application is contained in the joint counter affidavit sworn/affirmed by the Registered Trustees of **CHADEMA** as well as responses obtained from five (5) out of the nineteen (19) applicants, who appeared in court for being cross examined. The relevant parts of the said counter affidavit are to the following effect: That, the applicants' affidavit contained nothing about the internal **CHADEMA'S** appointment processes that culminated into their appointments as Special Seats Members of Parliament; That, the Secretary General's public statements contained in Annexure **HJM-01** and the Chairperson's statements contained in Annexure **HJM-08,** had nothing pre judicial to the applicants; That, the applicants had admitted having received show cause notices in which the subject of the Central Committee's meeting was clear.

The Registered Trustees of **CHADEMA** deposed that, all the applicants were subscribers to the Party's Constitution up to 25/11/2020 including **Regulation 6.5.1 (d)** of the Party's Regulations, provisions for dealing with emergency situations; That, **CHADEMA** did not know the

conniving and masquerading of the applicants as duly appointed Special Seats Members of Parliament until when they learn through the media that the applicants had been sworn in as Members of Parliament.

It was further deposed that, there was no evidence that on 25/11/2020 the applicants were in Dodoma or evidence to the effect that, they still needed to be in Dodoma on the 26th and 27th November 2020; That, the Secretary General had advised that, adjournment be sought from the Central Committee, an advice that was not heeded to; That, none of the applicants sought hearing through video conference or other alternative media that could constitute hearing in lieu of physical attendance.

According to the depositions of the Registered Trustees of **CHADEMA,** the nineteen (19) applicants, in a carefully choreographed scheme, chose to deliberately absent themselves from the scheduled Central Committee's hearing in order to obtain a platform for eventually using the court to validate their Special Seats Membership of Parliament; That, hearing that was planned to commence at 10.00 am was adjourned to 11.40 am in anticipation and hope that, the applicants would attend hearing to no avail.

The Registered Trustees of **CHADEMA** deposed further that, since the year 2020 **CHADEMA'S** Central Committee and Governing Council had not sat in their ordinary sessions, but for extra-ordinary meetings that being the reason that, all the minutes annexed to the counter affidavit were un-signed; That, **CHADEMA** had discharged its right to be heard obligation to the fullest extent.

It was further deposed that, as per **CHADEMA'S** Constitution, the National Chairman and Secretary General were members of both, the Central Committee and the Governing Council; That, the applicants had not preferred any application for recusal of any of the members of the Central Committee or the Governing Council.

The Registered Trustees of **CHADEMA** deposed also that, the applicants were each invited to make presentations/submissions in support of their appeal if they so opted in response of which they all chose not to make any submissions, consequent to which members of the Governing Council voted zone-wise for or against the appeal. Minutes/Proceedings of the Governing Council's meeting were annexed to the 1st respondent's counter affidavit as Annexure **TAL-7;** That, whereas the Governing Council had 442 members in total, those who voted on 11/05/2022 were 437.

Finally, it was deposed that, whereas leave was granted to challenge the decision of the Governing Council dated 11/05/2022, the applicants had filed an application seeking to challenge not only the Governing Council's decision, but also, the whole process of expelling the applicants from being members of **CHADEMA.**

Five (5) members of the Registered Trustees of **CHADEMA** appeared in court for being cross examined in respect of their averments in the 1st respondent's counter affidavit. Professor Azaveli Lwaitama happened to be one of such members. During his cross examination, amongst other things, he said the following: That, in terms of the Constitution of the United Republic of Tanzania, one could not be a Member of Parliament without being a party member; That, he witnessed the applicants being heard on appeal; That, the letter inviting the applicants to appear before the Central Committee did not prohibit representation; That, even when the applicants had already been sworn in there still existed a state of emergency as the Party wanted to rescue itself from being divided hence, there was no room for delay; That, the applicants considered refusal of the sought adjournment as a strategy; That, the Party's Chairperson who had taken part in expelling the applicants before the Central Committee, voted among

others when the appeal was being determined; That, those who supported the decision of the Central Committee were so many; That, the Chairperson must have supported the decision of the Central Committee; That, the allegation against the applicants was explicit in the letter inviting them to appear before the Central Committee and that, the Party had never regarded the applicants as Special Seats Members of Parliament sponsored by **CHADEMA.**

Ms. Ruth Mollel happened to be one of those who deposed the 1st respondent's counter affidavit in her capacity as one of the members of the Registered Trustees of **CHADEMA.** During her cross examination, she had the following to say: That, there was a state of emergency which placed an obligation upon the applicants to attend the Central Committee's meeting; That, what enabled members of the Central Committee who expelled the applicants to determine their appeal before the Governing Council was the Party's Constitutional problem; That, Article 83 of the Constitution of the United Republic of Tanzania could only apply to those who followed the requisite procedures before being sworn in as Members of Parliament.

Mr. Ahmed Rashid Khamis and Ms. Maulida Anna Komu were insistent that, the applicants had denied themselves of the opportunity for

being heard as they refused attending the hearing session. They also maintained that, the Commission was not authorized to declare the applicants Members of Parliament as they had not fulfilled the requisite procedures to be sponsored by **CHADEMA.**

Finally, Mr. Francis Mushi responded to questions put to him by way of cross examination as follows: That, the applicants did not follow the procedures to become Members of Parliament; That, the applicants denied themselves right to be heard; That, at a time relevant to this dispute, the Party had its Deputy Chairman and Deputy Secretary General; That, the decision of the Governing Council was made by more than those who dealt with the dispute at first instance and that, in any case, it would be unbecoming for the same person who determined the dispute at first instance to sit on appeal.

The learned counsel for the parties made lengthy final submissions to clarify evidence supporting their respective positions. In this ruling, only those parts of submissions having bearing to the actual dispute of the parties are reproduced.

It was submitted for the applicants that, the prayer for certiorari was intended to billet the decision of the Central Committee in the prayer as well since the expulsion process commenced with the Central Committee on 27/11/2020. In that regard, the court was being invited to quash the Governing Council's decision along with the whole processes of expelling the applicants from being members of **CHADEMA.**

It was also submitted that, **CHADEMA'S** Central Committee proceeded to determine the fate of the applicants in their absence without hearing them and that, the said fact had not been denied by the 1st respondent in its counter affidavit and that, the five members of the Registered Trustees of **CHADEMA** had accepted the said fact during their respective cross examination.

According to the learned counsel for the applicants, there would be sufficient hearing if there was sufficient notice of the date of hearing, properly communicated. It was insisted that, the purported notice had not been properly communicated. The applicants condemned the Central Committee for its refusal to grant the sought adjournment. The learned advocates for the applicants submitted that, denial of adjournment resulted into failure on part of the applicants to travel from Dodoma to Dar es

Salaam. That, the applicants had no sufficient time to prepare for their defence and further that, as the atmosphere was still tense, the applicants would have been attacked by angry **CHADEMA** members had they shown up. As it happened to some of the applicants who appeared in court for cross examination, the learned counsel maintained that, the state of emergency ceased when the swearing in exercise was completed.

The learned counsel for the applicants went on to submit that, since none of the applicants appeared on 27/11/2020, it would not be proper to hold that, they were given time to be heard but that, they chose not to attend. In view of the applicants, the change of venue where the Central Committee's meeting was held was of no relevance as it came to the knowledge of most of them after the decision for their expulsion had been made. It was submitted further that, the deponents of the counter affidavit of the 1st respondent had no depositions regarding safety of the alternative venue.

Regarding lack of impartiality, the learned counsel for the parties criticized the composition of the appellate body which allegedly, among others, was comprised of some members of the Central Committee who made the decision which was being appealed against. As to the

composition and functions of the Central Committee and the Governing Council, reference was made to Articles **7.7.11, 7.7.12** and **7.7.14** of the Party's Constitution. The learned counsel for the applicants submitted that, the fault committed by the 1st respondent's appellate body had long been warned against, in the case of **CRDB (1996) LIMITED VS THE MINISTER FOR LABOUR AND YOUTH DEVELOPMENT,** (MISCELLANEOUS CIVIL APPLICATION NO. 13 OF 1997), HCT, AT DAR ES SALAAM [1999] TZHC 10 (TanzLII). In view of the learned counsel, the 1st respondent's counter argument that the composition of the Governing Council was a creature of the Party's Constitution which had not been challenged before any court of law was immaterial. The learned counsel for the applicants were insistent that, the test ought to be whether the decision of the Governing Council met the impartiality test.

It was the applicants' further submission that, given the fact that the Principles of Natural Justice superseded laws made by the Parliament, the Party's Constitution ought not to undermine such vital principles. To substantiate this argument, the decision in **COOPER VS WANDSWORTH BOARD OF WORKS** (1863) 14 CB (NS) 180: 143 ER 414, was cited. The learned counsel for the applicants insisted that, in any case, the framers of

CHADEMA'S Constitution and the Registrar of Political Parties must not have intended that the Party's Constitution superseded the Principles of Natural Justice and Article 13 (6) (a) of the Constitution of the United Republic of Tanzania which embodies the rule against bias. The learned counsel for the applicants condemned the Governing Council's decision for being tainted with bias.

Finally, the learned counsel for the applicants attacked the 1st respondent's case for reasons of illegality of procedure and decisions of the Central Committee and the Governing Council. It was submitted that, the Central Committee did not give a charge sheet to the applicants; That, the applicants had never been disqualified under Article 83 (1) (b) of the Constitution of the United Republic of Tanzania; That, Regulation 2 (1) to (10) of **Part E** of the Party's Constitution was not observed; That, there was introduction of new claims before the Central Committee and that, the public statements made by the Party leaders immediately before the Central Committee's and Governing Council's meetings amounted to pre conceived decisions.

On the other hand, it was submitted for the 1st respondent that, in the chamber summons, no reference was specifically made to indicate that

the applicants were also challenging the Central Committee's decision dated 27/11/2020. That notwithstanding, the applicants had by their respective affidavits led evidence on matters that they had not pleaded in their originating motion and that the court could not in any way grant what had not been specifically prayed/pleaded, matters relating to the Central Committee's meeting dated 27/11/2020. The decision in **MARIA AMANDUS KAVISHE VS NORAH WAZIRI AND ANOTHER,** (CIVIL APPEAL NO. 365 OF 2019) [2023] TZCA 31 (TanzLII) was cited. Under this part of submissions, it was suggested that, the 1st respondent was prepared to see the Governing Council's decision being faulted, if need be, but not the Central Committee's decision. According to the 1st respondent's submissions, by the ejusdem generis rule, the words "...*the whole process of expelling the applicants from being members of* ***CHADEMA"*** related to the decision of the Governing Council which had been referred to and not that of the Central Committee which had not been specifically mentioned.

The learned counsel for the 1st respondent discarded the applicants' main complaint that the Central Committee did not afford them full right to be heard or that; the Governing Council's meeting was biased and influenced. Relying on the decision in **MT. 59505 SGT. AZIZ ATHUMAN**

YUSUF VS THE REPUBLIC, (CRIMINAL APPEAL NO. 324 OF 2019), CAT AT ARUSHA [2022] TZCA 718 (TanzLII), it was submitted that, it was one thing to be afforded the right to be heard and a different thing to the party concerned to exercise it. It was stressed that, a party who squandered that right could not be heard to complain. It was submitted with full force that, given the fact that the applicants had admitted having received show cause notices through a means accepted under their own Constitution, that they chose not to attend the scheduled hearing would not operate in their favour. The learned counsel were insistent that, all what the 1st respondent could offer which it actually did, was to offer the opportunity for being heard.

The learned counsel for the 1st respondent quoted the decision in **PANTALEO LYAKURWA VS LEOKADIA LYAKURWA,** CIVIL APPLICATION NO. 54 OF 1998 to the effect that, the rule against bias does not take away the power of the decision maker to hear the matter exparte when a party duly notified of the hearing elects not to take part in it or without good cause absents himself. That, a party who having been duly notified of the hearing, absents himself of the hearing is deemed to have waived his right to be heard. According to the position taken by the learned

counsel for the 1st respondent, no valid finding of lack of notice could be entered just because the applicants chose calculated convenience over substance and compliance. The learned counsel were insistent that, although personal attendance had been directed, anybody acting in good faith would have sent a representative to plead any valid waiver. In view of the learned counsel, by absenting, all of the applicants waived their right to be heard before the Central Committee.

It was submitted further that, it was surprising how was it possible, for all the nineteen (19) applicants to refuse/neglect attending hearing for exactly the same reasons, vide letters that were identical to the commas and dots. To the learned counsel for the 1st respondent, that was nothing but the applicants' convenient strategy. It was submitted further that, there was no evidence of security threats towards the applicants. Rhetorically, it was submitted to mean that, in any case, one person holding aloft a banner condemning fellow Party members for taking public positions against collective mantra, could not rightly be equated to lack of security assurance on part of the applicants.

The learned counsel for the 1st respondent submitted further that, despite absence of evidence of security threats on part of the applicants,

the Central Committee had, at higher costs, during challenging times, moved from the Party's Head Quarters to Ledger Plaza Bahari Beach Hotel, to address the alleged security concerns. The learned counsel for the 1st respondent remained surprised that, the threats if any had not been reported to relevant authorities such as the police. Responding to the argument that the Central Committee had added more claims which had no reflection in the show cause notices, it was submitted that, at all times, the central charge remained to be that, the nineteen (19) applicants took up positions as Special Seats Members of Parliament purported to be sponsored by **CHADEMA,** without abiding by the Party's inherent processes and in contravention of **CHADEMA'S** political electoral stance.

The learned counsel for the 1st respondent went on to submit that, the view that the Secretary General's press conference prior to the Central Committee's meeting showed pre meditation of the said meeting was a fallacy. According to the learned counsel, all what the Secretary General did was to summon the applicants so they attend the Central Committee's meeting to justify their actions considered by **CHADEMA** to be betrayal of its political principles. It was submitted that, in any case, it would be

demanding much, to expect a politician to be as precise in choosing words as a Judge in his speech.

The learned counsel for the 1st respondent submitted further that, whereas the applicants put reliance on Article **6.5.1 (a)** of the Party's Constitution to fault the Central Committee for its failure to give them 14 days defence period, there was an exception under Article **6.5.1 (d).** It was submitted that, the latter provision allowed departure from the former provision for emergency disciplinary measures and that, **CHADEMA** considered the applicants as ordinary Party members whose disciplinary remit was as set out in Article **6.5.1(d)** of the Party's Constitution.

Regarding the decision of the Governing Council, it was submitted that, the 19 applicants were not challenging the validity, efficacy, propriety or constitutionality of **CHADEMA'S** Constitution as it ought to be taken as it was no matter how imperfect. According to the learned counsel, there ought to be different fora and mechanisms for challenging the Party's Constitution to any of the subscribing member who felt aggrieved by its provisions. The learned counsel was insistent that, at all times, all the 19 applicants had subscribed to the said Constitution up to when the present dispute arose.

The learned counsel for the 1st respondent maintained that, the position under Article **7.7.11** of the Party's Constitution whereby all members of the Central Committee should as well be members of the Governing Council ought to be taken, read and applied as it was until such time the provision would be amended by **CHADEMA'S** internal processes or upon being specifically challenged in court. The learned counsel for the 1st respondent was of a firm position that, while it was open for the court to opine or advise, it would not fault in terms of the prayers made in this application, such provisions. In view of the learned counsel, it was outside the purview of the domain of Judicial Review, to validate, or condemn a voluntary society's constitutional provisions.

Regarding the Chairperson's utterances in Annexure **HJM-08** before the Governing Council's meeting, that they showed pre meditation by the said Council, it was submitted that, the said utterances did nothing than affirming that, the 19 applicants would be accorded full audience before the Council. It was submitted that, as a matter of fact, the applicants were fully heard before the Governing Council whereby they presented their appeals, written submissions on the grounds of appeal and that, **CHADEMA** walked an extra mile by inviting the 19 applicants to personally

attend the Council's meeting. Reference was made to Annexure **TAL-7**. According to the submissions by the learned counsel for the 1st respondent, the appeal process was transparent to the extent of inviting the Assistant Registrar of Political Parties one Mr. Sisty Nyahoza.

Regarding the writ of Mandamus, it was submitted that, the applicants had not demanded performance from the 1st respondent which was refused. The learned counsel were not prepared to treat the applicants' appeal before the Governing Council as a demand for performance which is one of the conditions for grant of the relief of Mandamus.

Finally, the learned counsel for the 1st respondent submitted that, Prohibition could not be issued against a decision that had already been made. The decision in **NATIONAL EXAMINATIONS COUNCIL EX PARTE GEOFREY GATHENJI NJOROGE AND OTHERS,** CIVIL APPEAL NO. 266 0F 1996 (CAK) e KLR was cited. The learned counsel submitted that, the Governing Council, having rendered its decision on 11/05/2022, the prayer for Prohibition was, but a non-starter.

The 2nd and 3rd respondents, having not filed any counter affidavit or statement in reply, remained with an option of making final submissions in respect of the legal aspects pertaining to the application. They could not submit on matters relating to factual averments of the applicants.

Regarding Prohibition sought against the 2nd and 3rd respondents, it was submitted that, there was no any act or decision which was about to be made by the two respondents to warrant this court to issue an order of Prohibition against them. The learned State Attorneys joined hands with the 1st respondent in submitting that, Prohibition could not in any way be issued against a decision which had already been issued. The decision in **NATIONAL EXAMINATIONS COUNCIL VS REPUBLIC EXPARTE GEOFREY GATHENJI NJOROGE AND OTHERS** (supra) was again cited.

On the foregoing evidential materials and submissions of the learned counsel for the parties, the following issues arise for determination:

(i) Whether the 1st respondent was under its Constitution/Regulations, empowered to conduct a disciplinary hearing under emergency situations and if the answer is in the

affirmative, whether the applicants were accorded right to be heard before the Central Committee;

(ii) Whether the applicants were accorded right to be heard before the 1st respondent's Governing Council (appellate body);

(iii) Whether there was illegality of procedure;

(iv) Whether the Governing Council contravened the Impartiality principle and

(v) Whether the application meets the conditions for its grant.

The parties were in agreement that the 1st respondent was under its Regulations empowered to conduct hearings of disciplinary matters in emergency situations. The course could be taken under Regulation **6.5.1 (d)** of the Party's Regulations of 2019. It was the applicants' position that, the matter ceased to be urgent upon their swearing in as Special Seats Members of Parliament on 24/11/2020. On the other hand, the 1st respondent maintained that, even after the swearing in ceremony, the matter was still urgent. According to the 1st respondent, the Party wanted to rescue itself from being divided; hence the dispute had to be attended urgently.

All the applicants admitted to have received show cause notices which required them to attend before the Central Committee for hearing. Whereas all the applicants sought adjournment of the scheduled hearing for similar grounds to wit, getting sufficient time to prepare for their defence and letting the atmosphere cool down because of the security threats towards them, none of the applicants had reported the alleged threats to any of the known security organs. None of the applicants produced evidence to the effect that actually, the Secretary General's letter refusing adjournment was received between the midnight of 26/11/2020 and 28/11/2020 in the morning as alleged in their respective affidavits. Neither was there any evidence to the effect that the applicants were still in Dodoma, on 27/11/2020 when the Central Committee held its meeting in view of hearing them.

There was no denial to the fact that, the 1st respondent had responded to the applicants' security concerns by changing the place for the Central Committee's meeting (venue), from the Party's Head Quarters to Ledger Plaza Bahari Beach Hotel, which was communicated to the applicants on 26/11/2020. Correspondences between the applicants and the Secretary General was through WhatsApp, a means of communication

accepted under the Party's Constitution to which the applicants were faithful subscribers up to when this dispute arose.

Whereas the applicants condemned the 1st respondent for not issuing a charge sheet to them, the latter maintained that, the show cause notices served upon the applicants contained sufficient information of the allegation against them; hence they merely asked for time to prepare for their defence. The applicants' counsel submitted that, denial of adjournment was tantamount to denial of right to be heard. The learned counsel for the 1st respondent submitted in rebuttal that, it was one thing to be availed an opportunity for making defence and the other thing making use of the opportunity.

Whereas the 1st respondent submitted that there was no leave obtained to challenge the decision of the Central Committee, the learned counsel for the applicants were of the firm stand that, the two decisions were inseparable. That, in no way could the applicants challenge the Governing Council's decision without touching or disturbing the Central Committee's decision. In this respect, it was maintained that, the decision of the Governing Council was being challenged along with the whole

process leading to the said decision, the Central Committee's decision inclusive.

Regarding the accusation directed to the Central Committee of having dealt with additional claims not contained in the show cause notices, it was submitted by the learned counsel for the 1st respondent that, at all times, the central charge upon which the expulsion decision was based remained to be one, taking up positions as Special Seats Members of Parliament purported to be sponsored by **CHADEMA** contrary to the Party's electoral stance of disowning the 2020 General Election Results. Further, the applicants condemned the statements made by the Party's Secretary General and National Chairperson immediately before holding the Central Committee's and Governing Council's meetings. That they contained pre-conceived decisions. The learned counsel for the 1st respondent submitted in the opposite.

In resolving the contending arguments of the parties, I have found it necessary to seek aid of, amongst other guides, the Halsbury's Laws of England. In this regard, Paragraph 201, Volume 19 (1) (4th Edition) is relevant. It reads:

*"**201. Expulsion.** A society is founded on a written contract expressing the terms on which the members associate together, there is no inherent power to expel a member, and a member may not therefore be expelled unless the rules provide that power. Any power of expulsion must be exercised in good faith, for the benefit of the society and strictly in accordance with the rules. If rules give the committee or some other authority power to expel a member for some act of disobedience or misconduct on his part, its decision cannot be questioned, provided the decision is arrived at after the member's defence has been heard or he has been given an opportunity of being heard. If a member is not given the opportunity the decision will be null and void. If the rules have been strictly observed, and the member has had due notice and full opportunity of answering the charges made against him and the power of expulsion has been exercised in good faith and for a reason which is not manifestly absurd, no tribunal can interfere to prevent the expulsion."*

Therefore, where the rules providing for expulsion have been strictly observed and the Committee or the members have otherwise acted properly, the court has no jurisdiction to interfere even though it considers

that the Committee or the members voting for expulsion have, in fact, come to a wrong conclusion. The burden of proving want of good faith lies on the person who alleges that he has been wrongfully expelled.

The following Articles of the Party's Constitution and Regulations provide for a manner in which cessation of membership and related matters can occur. They provide:

"**5.4.3** *Kuachishwa ama kufukuzwa na tawi lake ama ngazi nyingine ya Chama, kwa mujibu wa Katiba kwa kukosa sifa za kuendelea kuwa mwanachama ama kwa mwenendo usioendana na Itikadi, Falsafa, Madhumuni, Kanuni, Maadili na Sera za Chama. Mwanachama atakuwa na haki ya kukata rufaa kwa ngazi ya juu kama hakuridhika na adhabu hiyo.*

5.4.4 *Bila kuathiri kifungu **5.4.3** cha Katiba, Kamati Kuu inaweza kumwachisha ama kumfukuza mwanachama yeyote kwa mujibu wa Kanuni za Chama.*

Kanuni za Chama, 2019

6.5.1 *Kwa mujibu wa Ibara **5.4.3** na **5.4.4** ya Katiba, mwanachama yeyote hatachukuliwa hatua za kinidhamu ama kuonywa ama kuachishwa au kufukuzwa uanachama bila kwanza:*

(a) *Kujulishwa makosa yake kwa maandishi na kutakiwa kutoa majibu katika muda usiopungua wiki mbili.*

(b) *Kupewa nafasi ya kujitetea mbele ya kikao kinachohusika.*

(c) *Mwanachama atajulishwa kwa maandishi uamuzi wa kikao ndani ya wiki mbili baada ya kusikilizwa.*

(d) *Kamati Kuu inaweza kuchukua hatua za dharura bila kuzingatia utaratibu wa kifungu (a) na (b) hapo juu kama itaona maslahi ya Chama kwa ujumla yanaweza kuathiriwa isipokuwa mwachama (sic) au Kiongozi anayelalamikiwa atalazimika kuitwa kwenye kikao husika.*

6.5.3 *Mwanachama aliyepewa adhabu na kikao kimoja cha kikatiba atakuwa na haki ya kukata rufani kwa kikao cha ngazi ya juu ya kile kilichompa adhabu."*

Free translation:

5.4.3. *To be removed or expelled by his/her branch office or any other (administrative) level of the Party, in terms of the Constitution for lacking*

the qualifications to sustain the membership or for comporting himself in a manner that contradicts the ideology, philosophy, aims, regulations, ethics and policies of the Party. A member shall have the right to appeal to the higher level if he/she is not contented with the said decision.

5.4.4. *Without prejudice to article* ***5.4.3*** *of the Constitution, the Central Committee may remove or expel any member in accordance with the regulations of the Party.*

Party's Regulations, 2019

6.5.1 *In terms of the provisions of articles* ***5.4.3*** *and* ***5.4.4*** *of the Constitution, no disciplinary action, warning, expulsion or termination of membership shall be preferred against any member until the following have been observed:*

(a) To be informed of the accusations against him or her in writing and shall be required to plead in a period of not less than two weeks.

(b) To be given an opportunity to defend himself or herself before the relevant session.

(c) A member shall be informed in writing of the verdict of the panel within two weeks after the hearing.

(d) The Central Committee may take urgent action without observing the procedures in provisions (a) and (b) above if it feels that the Party's interests in general are undermined; nevertheless, the member against whom allegations are made or leader shall be summoned to the relevant session.

6.5.3 *A member against whom a sanction is imposed by any constitutional session shall have the right to appeal to the higher organ than the organ that issued the sanction.*

As the reproduced provisions clearly indicate, at the time relevant to the dispute, Articles **5.4.3** and **5.4.4** of the Party's Constitution provided for expulsion powers. The powers could be exercised against any of the Party members upon occurrence of any of the circumstances listed under Article **5.4.3** of the Party's Constitution or in terms of the provisions of the Party's Regulations.

In normal circumstances, under Regulation **6.5.1 (a)** and **(b)**, before a disciplinary action is taken against any member, the said member had to be notified of the allegation against him or her in writing. The member against whom allegations are made had to be given not less than

two weeks to answer the allegations against him or her. Then, the said person would be availed right to be heard before the respective meeting.

However, in terms of Regulation **6.5.1 (d)** of the Party's Regulations, for a matter considered by the Central Committee to be of urgency nature, Regulation **6.5.1 (a)** and **(b)** would not apply. Instead, the Central Committee was empowered under Rule **6.5.1 (d)** to take prompt measures, after inviting the person against whom allegations are made, to appear before the respective meeting.

Considering that the act of the applicants to offer themselves for being sworn in as Special Seats Members of Parliament allegedly without valid sponsorship was a matter deserving being resolved urgently, the 1st respondent resorted to Regulation **6.5.1 (d)** of the Party's Regulations. On 25/11/2020, the Secretary General summoned the applicants vide a letter **(HJM-02)** to appear before the Central Committee on a date and at a time specified in the said letter. The said letter reads:

YAH: WITO WA KUFIKA MBELE YA KIKAO CHA KAMATI KUU

Tafadhali husika na kichwa cha habari hapo juu.

*Kwa mujibu wa Kanuni ya **6.5.1 (d)** ya Kanuni za Chama toleo la Disemba, 2019, nakujulisha kwamba, kutakuwa na Kikao Maalum cha Kamati Kuu kitakachofanyika jijini Dar es Salaam tarehe 27 Novemba 2020. Ufike makao makuu ya Chama katika tarehe tajwa saa 2 kamili asubuhi kwa ajili ya maelezo zaidi.*

Utatakiwa kufika wewe binafsi bila kukosa ili ujieleze kuhusu hatua iliyopelekea wewe kuapishwa kuwa Mbunge wa Viti Maalum wa Jamhuri ya Muungano wa Tanzania kupitia Chadema huku ukijua kwamba Kamati Kuu haijafanya uteuzi wowote wa nafasi hizo kwa mujibu wa Katiba ya Chama Ibara ya 7.7.16 (a) na kwamba taratibu za ndani ya Chama kwa mujibu wa Kanuni na Miongozo mbalimbali hazijafuatwa.

Wako katika Demokrasia na Maendeleo.

Imesainiwa na

John John Mnyika

Katibu Mkuu

Chadema

Free translation:

REF: NOTICE TO APPEAR BEFORE THE CENTRAL COMMITTEE' S MEETING

Please refer to the heading above.

*According to Regulation **6.5.1 (d)** of the Party's Regulations, December 2019 edition, I inform you that there shall be the Central Committee's Special Meeting which will be held in Dar es Salaam on 27th November, 2020. You are asked to be at the Party's Headquarters on the day mentioned at 8 o'clock in the morning for more details.*

You are asked to appear in person without fail in order to explain the reasons for being sworn in as a Special Seat Member of Parliament of the United Republic of Tanzania through CHADEMA while knowing that the Central Committee has not made any nomination for such positions in terms of Article 7.7.16 (a) of the Party's Constitution and that the Party's internal procedures were not observed in accordance with various Regulations and Guidelines.

Yours in Democracy and Development,

Sgd

John John Mnyika

Secretary General

Chadema

The foregoing show cause notice was received by all the applicants who coincidentally, sought for adjournment of the scheduled hearing for similar grounds: To allow the atmosphere to cool down, to seek proper and safe environment for holding the Central Committee's meeting and to prepare for their defence. Without receiving notification that the requested adjournment had been granted, and being subscribers to the Rules which empowered the Central Committee to deal with the matter urgently as it did, none of the applicants appeared before the Central Committee.

The alleged security concerns of the applicants, which had not been substantiated for their failure to report the said concerns to any of the security organs, were nevertheless taken care of by the 1st respondent as evidenced by the applicants' own evidence. That was done through change of place of meeting (venue), which was communicated to the applicants. The Central Committee held its meeting at Bahari Beach Hotel instead of the former venue indicated to be at the 1st respondent's Head Quarters.

The applicants' allegations that notification regarding change of venue was received at various times between the midnight of 26/11/2020 and 28/11/2020 in the morning, were neither substantiated through production of actual WhatsApp texts or any other evidence, mere words apart. The applicants' own evidence indicates that, the Secretary General's letter refusing adjournment was dated 26/11/2020. The allegations that the applicants were still in Dodoma were neither substantiated.

Again, Annexure **HJM-06** indicates plainly that, the applicants were convicted of the accusation they had been charged with in the show cause notices; offering themselves to be sworn in as Special Seats Members of Parliament purported to be sponsored by **CHADEMA** contrary to the Party's electoral stance of disowning the 2020 General Elections Results. The applicants' lamentations that they suffered expulsion for claims not having reflection in the show cause notices were neither substantiated.

Regarding the applicants' complaint that the statements of the Secretary General and that of the National Chairperson disentitled them from further dealing with the disputed disciplinary proceedings, I hold differently. In so holding, I am persuaded by the decision of the Supreme Court of India in **LALIT KUMAR MODI VS. BOARD OF CONTROL FOR**

CRICKET IN INDIA, 2011 AIR-SCW 5919: 2011-10 SCC 106. It was held that, merely because a member has participated in such a meeting he cannot be accused of bias to disentitle him from being appointed on the Disciplinary Committee, especially when only a prima facie opinion was formed in such a meeting. In any case, it is not expected that, because all the members of a particular society have participated in the discussion concerning an allegation against a member, the society should therefore appoint an outsider to hold the disciplinary proceedings to avoid blame of institutional bias. Looking at the actual statements contained in Annexures **HJM-01** and **HJM-08**, other things being equal, the National leaders could still be members of the respective Disciplinary Committees.

Proceeding under a presumption that the applicants were still in Dodoma after their swearing in on 24/11/2020, one would be tempted to ask whether under the current state of transport infrastructure, it was really impracticable for them to appear before their own disciplinary organ, on 27/11/2020, to attend urgent hearing of the allegations against them. The applicants admitted to have received the show cause notices on 25/11/2020 in the evening. They had more than 36 hours to travel from Dodoma to Dar es Salaam. They chose not to attend the Central

Committee's meeting. As it was correctly submitted by the learned counsel for the 1st respondent, citing **MT. 59505 SGT AZIZ ATHUMAN YUSUF VS. THE REPUBLIC** (supra), being accorded right to be heard is one thing and utilizing the opportunity is another thing. In this connection, I respectfully hold that, where an opportunity of being heard has been afforded to the person against whom an adverse action is sought to be taken, but the person afforded the opportunity of being heard chooses not to avail himself of that opportunity, he cannot afterwards be heard complaining. In my considered opinion, upholding the applicants' complaint that they were denied of an opportunity for being heard before the Central Committee, in the circumstances of this case, would even result in manipulation of hearings by those who for their own convenience, may choose not to attend the scheduled hearings and would have an effect of hindering the disposal of abandoned matters before judicial and quasi-judicial bodies. Courts will not intervene to correct alleged procedural defects which arose from the fault of the applicants or their representatives, unless, perhaps the tribunal was also at fault. Read: **De Smith, Woolf and Jowell, Judicial Review of Administrative Action, 5th Edition at page 504.**

The applicants were of the firm position that, after they had been sworn in as Special Seats Members of Parliament, there remained nothing to be attended urgently. The 1st respondent's counter argument was that, failure to resolve the controversy urgently would have adverse impact to the Party as its members remained with divided opinions hence, the need to bring the dispute to an end as immediate as it would be practicable. The Central Committee which had powers to determine matters of urgency, considered it to be a matter to be resolved urgently. As it is the practice, urgency may warrant relaxing the requirements of fairness even where there is no statute or regulation by which this is expressly permitted. In the case of **DE VERTEUIL VS. KNAGGS** (1918) AC 557 it was decided that, *a magistrate is under no obligation to hear a person other than the informant before issuing a search warrant.*

Despite the urgency nature of the matter, before exercising the expulsion powers conferred upon it, the Central Committee afforded the applicants the opportunity to be heard which the latter chose not to utilize for reasons of unsubstantiated security threats. I hold that, the 1st respondent was under its Constitution and the Regulations, empowered to conduct disciplinary hearings in urgency situations and the applicants were

accorded right to be heard before the 1st respondent's Central Committee which they declined utilizing. The first issue is answered in the affirmative in whole.

It was the applicants' other complaint that they were not accorded the right to be heard before the Governing Council (appellate body). There was no dispute however that, the applicants had submitted their grounds of appeal and written submissions clarifying the said grounds of appeal. What the applicants and their respective learned counsel considered as the right to be heard was an opportunity for making oral submissions. There was also no dispute that all the applicants appeared before the Governing Council whereupon being invited to comment on their appeals, all of them chose not to add anything to their written submissions earlier on presented. As a matter of fact, when a person has been given an opportunity to submit his case in writing, there is no violation of the principles of natural justice that oral hearing was not given. The second issue is as well answered in the affirmative.

The applicants' further complaint was that, there was illegality of procedure. That, whereas the applicants were Members of Parliament, **Part E " Mwongozo wa Chama"** which ought to be applied in handling

their dispute was not applied. The learned counsel for the 1st respondent and the Registered Trustees of **CHADEMA** had a shared response that, the applicants had never been validly sponsored Special Seats Members of Parliament hence, they could not be dealt with as such. The applicants were also of the view that, after they had been sworn in, legality of their being Members of Parliament could only be challenged in a manner provided under Article **83 (1) (a)** and **(b)** of the Constitution of the United Republic of Tanzania.

Under the circumstances whereby the 1st respondent renounced having sponsored the applicants to be Special Seats Members of Parliament, which triggered institution of the present case yet to resolve the controversy to its finality, to borrow the Persians' saying, it would amount to being born at six months, if this court were to condemn the 1st respondent for having not dealt with the applicants as Members of Parliament. Under such circumstances, if not for the applicants' attitude of running out of patience, it would not be expected that the 1st respondent would at the stage of disciplinary hearing, treat them as incumbent Members of Parliament. No wonder the applicants' own counsel, did not refer them as such, in the Chamber Summons.

Whereas Article **83 (3)** of the Constitution of the United Republic of Tanzania provides that the Parliament would enact a legislation providing for persons who would institute proceedings in the High Court seeking for determination of amongst other things, questions regarding validity of appointment of any person to be a Member of Parliament, grounds and times for instituting such proceedings, powers of the High Court over such proceedings and the procedure for hearing of the matter, no such legislation was ever enacted regarding Special Seats Members of Parliament. Neither the National Elections Act, nor the Regulations made under the Act contains a provision on how to challenge nomination or declaration of Members of Parliament for Special Seats. Looking at the reliefs which may be claimed by a Petitioner who presents an election petition before the High Court, it is clear that, Special Seats Members of Parliament cannot be challenged in the manner suggested by the applicants. See: **Section 112 of the National Elections Act [Cap 343].**

While it might have been thought that nomination and declaration of Special Seats Members of Parliament would pose no challenge requiring the court's intervention, this case is a sufficient testimony to the contrary. The relevant Authorities are reminded to work upon the instructions

provided under Article **83 (3) (a)** to **(c)** of the Constitution of the United Republic of Tanzania regarding Special Seats Members of Parliament. I thus answer the third issue in the negative.

Next to be determined is the issue whether the Governing Council contravened the Impartiality principle. The impartiality principle, otherwise known as the rule against bias **(nemo judex in causa sua),** simply means that, a person is barred from deciding any case in which he or she may be, or may fairly be suspected to be biased. This embodies the basic concept of impartiality and it applies to courts of law, tribunals, arbitrators and all those having a duty to act judicially. The purpose of maintaining impartiality is to maintain public confidence in the legal system. As Lord Denning M. R. said in **METROPOLITAN PROPERTIES CO (FGG) LTD VS. LANNON** (1968) EWCA CIV 5**:** *"Justice must be rooted in confidence and confidence is destroyed when right minded people go away thinking, the judge was biased".* And Lord Hewert, Lord Chief Justice of England and Wales, also said in **R VS. SUSSEX JUSTICES ex parte MC CARLTHY** (1924) 1 KB 256 at 259 that: *"It is not merely of some importance, but of fundamental importance that justice should not only be done but should manifestly be seen to be done"* See: **RAMADHANI MLINDWA VS. THE**

REPUBLIC, (CRIMINAL APPEAL NO. 158 OF 2015), CAT, AT TABORA [2015] TZCA 131 (TanzLII).

In the present case, some members of the Governing Council including **CHADEMA'S** National Chairperson and Secretary General have been accused of partiality. That, whereas they participated in rendering the decision leading to the applicants' expulsion by the Central Committee on 27/11/2020, they also participated in affirming the said decision before the Governing Council on 11/05/2022. This allegation was not denied by the 1st respondent in its counter affidavit. Members of the Registered Trustees of **CHADEMA** who appeared in court for being cross examined, had divergent views on that state of affairs. Whereas some of them held a view that this was one of the Party's Constitutional problems, others were of the position that, even if votes of all the members of the Central Committee were to be discounted, still, the remaining votes in favour of the applicants' expulsion would suffice to validate the Governing Council's decision.

On their part, the learned counsel for the 1st respondent submitted that, the position under Article **7.7.11** of the Party's Constitution whereby all members of the Central Committee were as well members of the Governing Council ought to be taken, read and applied as it was, until such

time the provision would be amended by **CHADEMA'S** internal processes or upon being specifically challenged in court. The learned counsel for the 1st respondent were emphatic that, while it was open for the court to opine or advise, it would not fault in terms of the prayers made in this application, such provisions. In view of the learned counsel, it was outside the purview of the domain of Judicial Review, to validate or condemn a voluntary society's constitutional provisions. I respectfully disagree!

Whereas the learned counsel for the 1st respondent cited no authority to support their argument, the courts have for a long time, almost throughout the World, held otherwise. Courts have always inferred the principles of natural justice even when statutes were silent.

More than 300 years ago, it was decided in England that: "*although there are no positive words in the statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature*". See: 1. **COOPER VS. WANDSWORTH BOARD OF WORKS** (1863) 14 CB (NS) 180: 143 ER 414. 2. **R VS. UNIVERSITY OF CAMBRIDGE** (1723) I Str 537.

Again, Courts have consistently held in India that, the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. That, the non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. That, it all comes from a person who has denied justice that the person who has been denied justice is not prejudiced. See: **S. L. KAPUR VS. JAGMOHAN,** AIR 1981 SC 136.

Here at home, more than 24 years ago, this court, His Lordship **Kalegeya, J** (as he then was) warned against exclusion/non-observance of the principles of natural justice in a case having almost similar facts with the instant case. It was in the case of **CRDB (1996) LIMITED VS. THE MINISTER FOR LABOUR AND YOUTH DEVELOPMENT** (supra). The relevant part is quoted hereunder in extenso:

> *"The above apart, the applicant submitted unchallengedly that the Chairperson of the Conciliation Board was the very Deputy Labour Officer who deliberated on the matter before it was sent to the Board and that she was the one encouraging Rutahakana not to go on transfer*

and that therefore she was biased. The learned State Attorney did not submit on this.

The rule against bias cannot go with this kind of situation. Having been a Labour Officer who deliberated on the matter before it went to the Board, and more specifically, having been the one encouraging Rutahakana not to go on transfer (we should take it to be true for it was not challenged) sitting as a Chairperson of a Board which has to deliberate that very issue on appeal cannot fail to attract suspicion if not direct presumption of bias. When considering the existence of such breach the court has to look for real likelihood of bias. As was persuasively observed in R V. GOUGH (1993) A.C. 646 at page 670, "Having ascertained the relevant circumstances, the court should ask itself whether having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that, he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him."

In the circumstances of this case, there is no way Mrs. Mpasisingo could escape from bias. In any case, justice should not only be done but it

must be shown to be done. Normal mind cannot believe that she acted without bias even if she did." Having so observed, His Lordship proceeded to quash the Board's decision.

Recently, the Court of Appeal of Tanzania has held that, it is well settled principle that, even where there are no provisions or guidelines with clear procedure on conduct of investigation or inquiry, the situation should not lead to infringement of rights since rules of natural justice, demands of due process, good faith and fairness and compliance with the principles of good administration which are ordinarily inferred in decision making. This is because demand of sound administration entails the need to act reasonably, in good faith and relevant consideration. See: **AIDAN FREDRICK LWANGA EYAKUZE VS. THE COMMISSIONER GENERAL OF TANZANIA IMMIGRATION SERVICES DEPARTMENT AND TWO OTHERS** [2020] 2 T.L.R. 51 [CA]. Similar views are echoed by His Lordship **B. A. Samatta (CJ Ret'd)** in his recent book titled: **UTAWALA BORA, Vita Dhidi ya Udhalimu, Rushwa na Elimu Duni (2023) at pages 28 to 29.**

It has as well been observed by other eminent authors on this subject that, normally, there will be a breach of natural justice where an

adjudicator takes part in the determination of an appeal against one of his own decisions *unless he is expressly authorized to do so by a statute.* At best, he is likely to incline towards affirming his earlier decision; at worst he can be depicted as` a judge in his own cause`. And that, *authorization by rules of a voluntary association may be inadequate for these can be declared to be contrary to natural justice.* Read: **De Smith, Woolf and Jowell, Judicial Review of Administrative Action, Fifth Edition, at pages 530 to 531.**

I am mindful that, the Party's Constitution is not a statute. Neither are the Regulations and Guidelines made under the said Constitution. That being the position, the 1st respondent cannot rely on the decision in **TANZANIA BREWERIES LIMITED VS. MOHAMED KAZINGUMBE,** (CIVIL APPEAL NO. 53 OF 2008), CAT AT DAR ES SALAAM [2009] TZCA 19 (TanzLII) to validate the decision of the Governing Council.

Therefore, despite the great ingenuity by the learned counsel for the 1st respondent in inviting me to hold in favour of the practice adopted by the Governing Council, I decline accepting the said invitation. To hold that way, would amount to going against the well-established principle that principles of natural justice have to be inferred into silent statutes,

constitutions and rules of voluntary associations. I have no sufficient reasons for going against the global trend.

On the other hand, I am unable to read from Articles **7.7.11, 7.7.12 (f), 7.7.14** or **7.7.16 (d)** of the Party's Constitution, anything suggesting that, framers of the said Constitution must have intended that, members of the Central Committee would decide a disciplinary matter at first instance and thereafter remain qualified, to sit on appeal over the same subject matter before the Governing Council. In any case, the principles of natural justice, particularly, the rule against bias ought as well, to be read into the said Articles of the Party's Constitution as the global trend and common sense dictate.

For the foregoing reasoning and observations, I hold that, indeed, the Governing Council contravened the Impartiality principle. The fourth issue is answered in the affirmative.

Finally to be determined is the issue whether the application meets the conditions for its grant. It was submitted for the applicants that all the necessary conditions for granting the reliefs sought had been satisfied. On the other hand, it was submitted in rebuttal that, regarding the writ of

Mandamus, the applicants had not demanded performance from the 1st respondent which was refused. The learned counsel for the 1st respondent insisted that, in any case, the applicants' appeal before the Governing Council could not rightly be treated as demand for performance, one of the conditions for grant of the writ of Mandamus.

The learned counsel for the 1st respondent and the learned State Attorneys for the 2nd and 3rd respondents submitted in unison that, Prohibition could not be issued against a decision that had already been made. They cited the decision in **NATIONAL EXAMINATIONS COUNCIL EX PARTE GEOFREY GITHENJI AND OTHERS** (supra) to buttress their shared argument.

It is true that, as a general rule, the order of Mandamus will not be granted unless the party complained of has known what it was he was required to do, so that he had the means of considering whether or not he should comply, and it must be shown by evidence that there was a distinct demand of that which the party seeking the Mandamus desires to enforce, and that the demand was met by a refusal. See: **Paras 124 and 134, Volume 1 (4th Edition) of the Halsbury's Laws of England.**

Literatures suggest that, such denial/refusal, may be express or implied. It need not be in a particular form. Refusal by conduct of the party is enough. Jurisprudential guides from India are to the effect that no demand is required if the court is satisfied that it is an empty formality or an idle ceremony. See: **AMRIT LAL BERRY VS. CCE** (1975) 4 SCC 714: AIR 1975 SC 583**.** And that, demand and refusal can be inferred from the circumstances also. In the case of **VENAGO PALAN VS. COMMISSIONER, VIJAYAWADA MUNICIPALITY,** AIR 1957 AP 833**,** the court inferred demand and refusal from the situation in which the petitioner filed a suit of injunction restraining the municipality from holding elections and the suit was contested by the municipality. Read: **C. K. Takwani, Lectures on Administrative Law Law, Fifth Edition at page 376** and **I. P. Massey, Administrative Law, Fourth Edition, at page 258.** I subscribe to the views of the learned authors cited hereinabove.

In the present case, there was no submission from the 1st respondent's side that, had the applicants demanded performance in the manner acceptable to it, there would be success. Given the fact that the demand need not be in any particular form and persuaded by the

authorities I have soon cited, I hold that, in the circumstances of the present case, the appeal by the applicants to the Governing Council could rightly be treated as demand for performance. The said appeal was dismissed.

Regarding the writ of Prohibition, I am in total agreement with the position taken by the learned counsel for the 1st respondent and the learned State Attorneys for the 2nd and 3rd respondents. A writ of Prohibition can only lie in cases where the proceedings are still pending before a judicial or quasi-judicial authority. Thus, when such authority hears a matter over which it has no jurisdiction, the aggrieved person may move the High Court for the writ of Prohibition forbidding such authority from proceeding with the matter. The High Court exercises its power of superintendence over an inferior tribunal or public authority by keeping the latter within the limits of jurisdiction conferred on it by the law or its rules. There should be something left to prohibit. If the proceedings before the lower court, tribunal or quasi-judicial authority have been terminated, (as is the case in the instant matter), and such authority has become functus officio, a writ of Prohibition cannot lie. Read again: **C. K. Takwani,**

Lectures on Administrative Law, Fifth Edition, at pages 384 and 385.

As correctly submitted by the learned counsel for the 1st respondent and the learned State Attorneys for the 2nd and 3rd respondents, in the present application, not only that the writ of Prohibition was untimely preferred, but also that, it was brought against wrong parties, the 2nd and 3rd respondents. Therefore, in the circumstances of the present application, the writ of Prohibition is not grantable.

As I conclude, I make a finding that, this is a fit case for issuance of the writs of Certiorari and Mandamus. This is because, from my holdings and observations hereinabove, the application falls squarely on what Lord Atkin observed in **R VS. ELECTRICITY COMMISSIONERS , EXP LONDON ELECTRICITY JOINT COMMITTEE CO. LTD** (1924) 1 KB 171 : 1923 ALL ER 150 (CA). His Lordship observed:

"Whenever anybody of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, act in excess of their legal authority they are subject to the

controlling jurisdiction of the Kings Bench Division exercised in these writs."

In the present case, the 1st respondent's Governing Council was a quasi-judicial body having legal authority to determine questions affecting rights of the applicants by way of determining their respective appeal. The Governing Council had a duty to act judicially. To the extent indicated while determining the fourth issue, the Governing Council acted in excess of its authority.

Again, it cannot be disputed, membership within **CHADEMA** is a constitutionally guaranteed right, thus a legal right. Article **7.7.12 (f)** of the Party's Constitution imposes an imperative duty, to be performed by the Governing Council. The duty to hear and make decisions on amongst other things disciplinary appeals from the Party's Central Committee. I have already made a finding that in this case, there was demand of performance by the applicants which was met by a refusal of the 1st respondent's Governing Council. I can see no ulterior motive on part of the applicants, but good faith in making the present application. Since the 1st respondent's Governing Council was the final appellate body within the

Party, it follows therefore that the applicants had no alternative remedy but making the instant application.

For the foregoing reasoning and holdings, the following orders are hereby issued:

1. The Prerogative Order of Certiorari is granted to quash the decision passed by the Governing Council of the 1st respondent on the 11th day of May 2022 and formally published on the 12th May, 2022.

2. The Prerogative Order of Mandamus is granted to compel the 1st respondent to observe the due process and Principles of Natural Justice in determining questions/matters affecting the applicants' rights.

3. No order is made as to costs. Right of appeal is fully explained.

DATED at **DAR ES SALAAM** this 14th day of **DECEMBER 2023.**

C. P. MKEHA

JUDGE

14/12/2023

Court: Ruling is delivered in open court this 14th day of December 2023 in the presence of Messrs Aliko Mwamanenge, Edson Kilatu, Humprey Malenga, Gilbert Masaga, Mss. Matinde Waisaka and Joyce Mwakapila learned advocates for the applicants, Messrs Dickson Matata, Seleman Matauka, Deogratius Mahinyila and Tito Magoti learned advocates for the 1st respondent and Mr. Hangi Chang'a, Mss. Rose Chilongozi, Jesca Shengena learned Principal State Attorneys, Leonia Maneno and Kause Kilonzo learned State Attorneys for the 2nd and 3rd respondents.

THE HIGH COURT OF TANZANIA

C. P. MKEHA

JUDGE

14/12/2023