IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: KISANGA, J.A., RAMADHANI, J.A., And LUBUVA, J.A.)

CIVIL APPEAL NO. 82 OF 1999

BETWEEN

THE REGISTRAR OF SOCIETIES & 2 OTHERS ... APPELLANTS

AND

BARAZA LA WANAWAKE TANZANIA
& 5 OTHERS .....RESPONDENTS

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Katiti, J., Msoffe, J., Bubeshi, J.)

dated 9th June, 1999

in

Miscellaneous Civil Cause No. 27 of 1997

J U D G E M E N T

KISANGA, J.A.:

A petition was filed in the High Court seeking, inter alia, a declaration that the cancellation of the registration of the 1st respondent, Baraza la Wanawake Tanzania (BAWATA) from the Register of Societies was null and void, and for an order that certiorari or an order in the nature thereof issue to quash the said cancellation, with a mandatory injunction or an order in the nature thereof restoring the registration of BAWATA on the Register of Companies. The petition was brought under Articles 13 (6), 15, 18, 20 (1), 24, 26 (2) and 30 (4) of the Constitution of the United Republic of Tanzania, 1977, Sections 4 and 5 of the Basic Rights and Duties Enforcement Act, 1994 and Section 95 of the Civil Procedure Code, 1966.

Before the hearing of the petition could take off a preliminary objection to it was filed. It was heard by a panel of three judges of the High Court (Katiti, Msoffe and Bubeshi (JJJ.) who overruled

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it, holding in the process that proceedings for obtaining redress in respect of violations of basic rights guaranteed under the country's Constitution may be initiated by way of petition or originating summons, and that section 8 (4) of the Basic Rights and Duties Enforcement Act 1994 does not prohibit the High Court to issue prerogative orders under that Act to redress human rights violations. It is from that decision that this appeal now arises. Appearing before us in this appeal were Mr. Mwidunda, Principal State Attorney and Mr. Chidowa, State Attorney, for the appellants and Professor Shivji, advocate, for the respondents.

Mr. Mwidunda filed a memorandum of appeal containing four grounds but at the hearing he dropped one and argued only the following three grounds:-

"1. The learned High Court judges erred in law in ruling against an objection that a petition not made by an originating summons as prescribed is incompetent and incurably defective.

2. It was not open, necessary and proper in law for the Court to read the word "or" into section 5 of the Basic Rights and Duties Enforcement Act 1994.

3. The learned judges of the High Court erred in holding that under the Basic Rights and Duties Enforcement Act 1994, the High Court has jurisdiction to issue a prerogative order of Certiorari."

In grounds 1 and 2 which he argued together, Mr. Mwidunda criticised the High Court for holding that the proceedings could rightly be initiated by filing a petition, and for reading the word "or" into section 5 of the Act to mean that proceedings could be commenced

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except by using originating summons. If we understood him correctly he was for the view that proceedings could be commenced by using a petition and originating summons or by using originating summons alone, but never by using a petition alone. He conceded that the procedure of originating summons is not specifically provided for in the laws of Tanzania Mainland but submitted that the situation is taken care of by invoking section 2 (2) of the Judicature and Application of Laws Ordinance (Cap. 453) which makes applicable in Tanzania Mainland the law relating to practice and procedure which was obtaining in England at the reception date. Countering that argument, Professor Shivji submitted that the proceedings could be commenced by either petition or originating summons because in his view the two processes were originating processes, and it would be unbecoming to use both of them to commence one action.

It is common ground that Article 30 (3) and (4) of the Constitution of the United Republic of Tanzania, 1977, confers on the High Court original jurisdiction over complaints of human rights violations. Section 4 of the Basic Rights and Duties Enforcement Act, 1994 (hereafter referred to as the Act) is an amplification of Article 30 (3) and (4) of the Constitution, and section 5 of the Act provides the procedure for making complaints to the High Court. As section 5 of the Act is the centre of controversy in this appeal, it is necessary to reproduce here its provisions in full. It says:-

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

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According to Mr. Mwidunda the procedure sanctioned by this section is that a complainant of a human rights violation cannot access the High Court for redress except by originating summons. We find it difficult to accept this proposition for a number of reasons. To start with, petition and originating summons are both originating processes. For instance petitions are used in our jurisdiction to commence proceedings in divorce, probate and elections cases. And originating summons has been described as "... that mode of commencing an action by summons which is now allowed instead of commencing it by a writ." See In Re W. Holloway (a Solicitor), Ex parte Pallister [1894] 2 QB 163 at p. 166. We agree that the procedure of originating summons is made available in Tanzania Mainland by virtue of the reception clause under section 2 (2) of the Judicature and Application of Laws Ordinance (Cap. 453). But the pertinent question which arises is: What is the necessity, or even the logic, of requiring the use of both processes simultaneously to commence one action in this type of cases?

In the second place, the current approach to human rights matters is that complainants of breaches or violations of fundamental or basic rights and freedoms should be given unimpeded access to the courts to seek redress. Deliberate efforts should be made to facilitate that access rather than to frustrate it. Once again we pose the question: Does Mr. Mwidunda's view of section 5 of the Act accord with this approach? It seems plain to us that to require the complainant, as Mr. Mwidunda insists, to use two parallel processes to commence a single action cannot be said to facilitate his access to the court; rather it complicates it.

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Again, the procedure of originating summons involves adducing evidence by affidavit and counter-affidavit and, if necessary, reply to counter-affidavit. This would be in addition to adducing oral evidence by the plaintiff and defence sides at the trial of the petition. Obviously this cannot be said to be in keeping with the current approach requiring that access to court in matters of human rights violations be made easier and faster.

Furthermore, as stated before, the procedure of originating summons is not specifically provided for in the laws of Tanzania Mainland. And although it is available by virtue of the reception clause in terms of section 2 (2) of the Judicature and Application of Laws Ordinance (Cap. 453) it is nevertheless not used in practice. Does it really facilitate access to court or does it make that access easier for a complainant of human rights violations to require him to use originating summons, a procedure which is available only indirectly by importation from England, and which in practice is not used here?

Lastly where originating summons is available, for instance, in England it is generally used for actions where there is no great dispute on the facts, see Craig Osborn, Civil Litigation, London: Blackstone 1993 p. 114. But it is well known that allegations about human rights violations are highly contentious matters, and why Mr. Mwidunda should insist on using originating summons to commence highly contentious litigation is far from clear.

The answer to the question posed therefore, is that Mr. Mwidunda's construction of section 5 of the Act does not accord with the current approach which emphasises on the need to afford easy access to court for complainants of human rights violations.

His construction, if anything, tends to make that access less simple, prolonged and, indeed cumbersome. In the light of the foregoing we are inclined to agree with Professor Shivji that the two procedures of petition and originating summons provided under section 5 of the Act are to be used as alternative processes for commencing proceedings of human rights violations. A complainant may move the High Court by filing either a petition or originating summons. The High Court rightly came to that conclusion.

Professor Shivji went on to say that section 5 of the Act was drafted inelegantly and that in order to try to overcome that problem we should read into the section the word "or" as indeed did the High Court, so as to amend it to the effect that a complainant should move the High Court by petition or by originating summons. In support of that view he cited the case of Joseph Warioba v. Stephen Wassira and Another [1997] TLR 272 (C.A.). We find merit in this submission. In Warioba's case, supra, the Court read into section 114 of the Elections Act, 1995 the words "corrupt or" in order to make the section complete and thereby give effect to the clear intention which Parliament had shown of restoring the offence of corrupt practice to the Elections Act, 1995 but had inadvertently omitted to do so in section 114 of that Act. Reading section 114 without those words made that section incomplete, leading to absurdity, in that under the section the offence of illegal practice was to be certified to the Director of Elections for sanctions, while no such consequences were visited upon the offence of corrupt practice which was equally, if not more, serious. A similar situation arises in the present case. Literal interpretation of section 5 of the Act is that a complainant of a human rights

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violation should petition the High Court using or by means of originating summons. With that interpretation, however, the section does not make sense at all. Petition and originating summons as originating processes are mutually exclusive. One cannot be used as a means of invoking or complementing the other to commence litigation. Using both processes in one application or action not only would be superfluous, but is impracticable; it is a procedure which is unknown to the law. An action is commenced by either petition or originating summons.

Thus literal construction of the section renders that provision meaningless or leads to a meaning which at least borders on absurdity. If this had been brought to the attention of Parliament we feel confident that appropriate steps would have been taken to avert the situation. To make the section meaningful, therefore, we find it necessary to read the word "or" into it to mean that an aggrieved person should move the High Court by either petition or originating summons. We agree with Mr. Mwidunda that the use of the word "shall" in the context of section 5 of the Act connotes a mandatory requirement, but we are firmly of the view that commencing the action by a petition alone is a sufficient compliance with the section.

Ground 1 of appeal therefore, fails. And so does ground 2. For having found that it is necessary to read the word "or" into section 5 of the Act we are prepared to hold, as indeed we have done, that petition and originating summons are prescribed under section 5 as modes of initiating proceedings and that a complainant may use either process for the purpose.

Turning now to ground 3 of appeal, Mr. Mwidunda submitted that the High Court has no power to issue orders of certiorari in the

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proceedings brought under the Act because section 8 (4) of the Act forbids or excludes the exercise of such power. He contended that the High Court has such power only under the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance (Cap. 360). Learned counsel, therefore, urged that the clause in the Petition seeking an order of certiorari be struck out.

Professor Shivji vigorously resisted the submission. He stated that the source of the court's jurisdiction to issue prerogative orders is the Judicature and Application of Laws Ordinance (Cap. 453) which empowered the High Court to issue prerogative writs (now prerogative orders) which the High Court in England had power to issue. Our High Court now exercises the power to issue prerogative orders upon an application for judicial review under the Law Reform Ordinance (Cap. 360). However, he contended that the power of the High Court to issue such orders is not limited to applications brought under the Law Reform Ordinance (Cap. 360) only. He submitted that the High Court has such power under the Basic Rights and Duties Enforcement Act, and that, in fact, under section 8 (4) of the Act the procedure of accessing the High Court to obtain such remedy is made easier.

The controversy in this ground of appeal revolves around sub-section (4) of section 8 of the Act, but for a better appreciation of the arguments it seems necessary to reproduce herein below the whole of section 8. It says:-

> "8. - (1) The High Court shall have and may exercise original jurisdiction -
>
> (a) to hear and determine any application made by any person in pursuance of section 4;

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(b) to determine any question arising in the course of the trial of any case which is referred to it in pursuance of section 6, and may make such orders and give directions as it may consider appropriate for the purposes of enforcing or securing the enforcement of any of the provisions of sections 12 to 29 of the Constitution, to the protection of which the person concerned is entitled.

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

(3) The High Court shall dismiss every application brought under this Act which it is satisfied is brought only on the grounds that the provisions of section 12 to 29 of the Constitution are likely to be contravened by reason of proposals contained in any Bill which, at the date of the application, has not become a law.

"(4) For the avoidance of doubt, the provisions of Part VII of the Fatal Accidents Cap 360 (Law Reform and Miscellaneous Provisions) Act, which relate to the procedure for and the power of the High Court to issue prerogative orders, shall not apply for the purposes of obtaining redress in respect of matters covered by this Act".

According to the marginal note this section is dealing with jurisdiction, and sub-section (1) confers on the High Court as a Court of

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first instance broad powers to hear and determine ~~cases involving~~ human rights violations. Sub-section (2) qualifies or restricts that power by excluding its application to cases where adequate means of redress are or have been available to the complainant under any other law. Sub-section (3) imposes further limitation on the court's jurisdiction by requiring the court to dismiss or not to entertain complaints arising from alleged violations of any Bill which has not yet become law. Sub-section (4) seems to us to be the last of this series of qualifications or limitations placed on the broad jurisdiction conferred on the court by sub-section (1). We could not readily find any other provision or provisions of the Act which this sub-section logically seeks to qualify or to be connected to. And our understanding of the sub-section is that a complainant of human rights violations who moves the court under section 5 of the Act should not in the process invoke the procedure or ask for prerogative orders available under the Law Reform Ordinance (Cap. 360). The idea behind such prohibition seems to arise from the need to avoid possible confusion which might result from a mix up in the application to one set of proceedings of the provisions of two different laws.

We therefore agree with Mr. Mwidunda that section 8 (4) of the Act excludes the power of the High Court to grant certiorari to a petitioner seeking redress for human rights violations under the Act. Therefore the High Court, with great respect, erred in holding to the contrary. It seems that if such a complainant specifically seeks remedy by way of a prerogative order, he has to opt for the procedure under the Law Reform Ordinance (Cap. 360). However, this is not to say that the petitioners in the present case,

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if they succeed, would be without remedy. The court has wide powers under section 13 (1) and (3) of the Act to give redress. That provision says:-

> "13. - (1) Subject to this section, in making decisions in any suit, if the High Court comes to the conclusion that the basic rights, freedoms and duties concerned have been unlawfully denied or that grounds exist for their protection by an order, it shall have power to make all such orders as shall be necessary and appropriate to secure the applicant the enjoyment of the basic rights, freedoms and duties conferred or imposed on him under the provisions of sections 12 to 29 of the Constitution.
>
> (2) Not applicable.
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> (3) The power of the High Court under this Act shall include the power to make all such orders as shall be necessary and appropriate to secure the enjoyment by the applicant of the basic rights, freedoms and duties under the provisions of sections 12 to 29 the Constitution should the Court come to the conclusion that such basic rights, freedoms or duties have been unlawfully denied or violated or that grounds exist for their protection by an order.

We think that if the petition proceeds to trial as a suit and the petitioners succeed, the court has vast powers under the section to give appropriate remedy.

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In the result, although we have held that the High Court has no power to grant certiorari under the Act, we nevertheless direct that the High Court should proceed to hear the petition with or without amendment as to the reliefs sought. If no amendment is made then if the petition succeeds the court should exercise the wide powers it has under section 13 (1) and (3) of the Act to give appropriate remedy. The appeal is therefore partly allowed. The parties have each to bear their own costs.

DATED at DAR ES SALAAM this 25th day of April, 2001.

R. H. KISANGA
JUSTICE OF APPEAL

A.S.L. RAMADHANI
JUSTICE OF APPEAL

D. Z. LUBUVA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(F.L.K. WAMBALI)
DEPUTY REGISTRAR