

**IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM
MISC.CIVIL CAUSE NO. 21 OF 2004
LEILA SHEIKH.....APPLICANT
VERSUS
EXECUTIVE CHAIRMAN OF)
TANZANIA COMM. AIDS & OTHERS).....RESPONDENT**

R U L I N G

MLAY, RUGAZIA, MASSATI, J. J. J.

The petitioner LEILA SHEIKH has filed a petition in this court under the Basic Rights and Duties Enforcement Act No. 33 of 1994; and Articles 13 (6) 15, 18, 20 (1) 24, 26 (2) and 30 (4) of the Constitution of the United Republic of Tanzania 1977. Her claims against the Respondents include, a declaration that her termination from employment with the Tanzania Commission for Aid's (TACAIDS) headed by the 1st Respondent, is illegal and unconstitutional in atrocious defamatory and lowers her dignity as a woman and a professional; for an order for reinstatement in her employment; for Shs. 1,000,000,000/= as damages for breach of contract and exemplary damages of an amount that may be assessed by the court to champion her crusade the petitioner has to be able services of Mr. Kassim Nyangarika, learned counsel.

The first Respondent enlisted the assistance of MS LAW ASSOCIATES learned counsel. The other Respondent are defended by he Honourable Attorney General. All the Respondents have raised a number of preliminary Objection. To begin with, the 1st Respondent has listed down 8 of them; namely (in a nutshell):

- (i) That the petition was badly drafted and therefore in curably defective.
- (ii) That this court has no jurisdictional to entertain the petition in the alternative.
- (iii) That the petition has Violated S.6 of the Basic Right and Duties Enforcement Act.1994.
- (iv) That the petition is bad in law for Violating Article 30 (3) of the constitution of the United Republic of Tanzania.
- (v) That the case is an abuse of the court process as the petition has adequate redress available to her.
- (vi) That the petition is frivolous and vexatious as against the 1st Respondent.

(vii) That the relief's (a) vi, (a) (viii) and (b) (vii) are not supported by the grounds of petition and should be struck out and lastly.

(viii) There has been no notice to bring the petition in accordance with the ^{Government} Garamond Proceeding Act as amended by Act 30 of 1994.

The Second and Third Respondent filed three objection, namely (also in a nutshell).

(i) That the petition does not disclose any cause of action against the Respondent.

(ii) That the petition contains arguments and evidence and so untenable in law.

(iii) That the petition offender sections 5 and (6) (e) of the Basic Rights and Duties Enforcement Act No. 33 of 1994.

For the above reasons, the Respondents jointly beseech this court to dismiss the petition.

Mr. Nyangarika, learned Counsel for the petitioner could not stomach the Respondents answers. He filed a reply to both answers. Against the 1st Respondent's answer, the Petitioner also filed a preliminary objection, which is:

- (a) That the 1st Respondent being a Civil Servant could only be represented by the Attorney General:
- (b) No leave has been sought and obtained by the 1st Respondent to appear in Court through the services of a private firm of advocates.

As a matter of law we have to dispose of the preliminary object first. So on 30/6/2004 and by consent of the counsel, we ordered that the preliminary objections be disposed by written arguments. Since all the parties have now filed their respective submissions we shall now shortly proceed to deliver.

Our ruling. But before we embolic on that task, we wish to make one observation. As noted above in reply to the 1st Respondent's preliminary objections, Mr. Nyangarika had also raised preliminary objections. All the parties are silent on the propriety of this practice in their submissions. We think that the practice of raising preliminary objections against preliminary objections is not

proper and should be discouraged in the strangest possible terms. In Civil Application No. 42 of 1999 between SHAHID ABDUL HASSANALI KASSAM vs. MOHAMED GULAMALI KANJI (Unreported) the Court of Appeal of Tanzania put it in the following words P. 4.

"..... A notice for directions filed by Prof. Shinyi is a novel practice. It is tantamount to a preliminary objection filed against another preliminary objection. The aim is to empty a preliminary objection filed in accordance with the rules."

And on P. 5. The court concluded:

".....This emerging practice of contesting a preliminary objection by another preliminary objection by another preliminary objection encapsulated in some innocent sounding phrases should be nipped in the bud."

So, without evincing any words, the court of Appeal directed that this improper practice should stop. It is in the spirit of this guidance issued by the court of Appeal, that we do not intend and shall not consider Mr. Nyangarika's preliminary objections in the present ruling.

We think, the Respondents preliminary objections can be grouped into two broad categories:-

- (I) Objection (s) on the jurisdiction of this court
- (ii) Objections on the form and property of the
petition.

As the Court of Appeal observed in SHAHIDA ABDUL HASSNALI KASSAM'S Case (a case we have cited above) the issue of jurisdiction has always to be determined first. We intend to do exactly that.

The objection on the jurisdiction of the court was directly raised by the first Respondent what comes out clearly from the 1st Respondent's submission is a two pronged argument. The first leg is that under Article 30 (3) (5) of the constitution of the United Republic of Tanzania an act complained of must be against a statute, or any written law, committed or omitted by a public official or government authority exercising his authority under that particular law, statute or written law, so, the act complained of must call upon the court to interpret the constitution viz a viz the particular law or statute. The second leg of the objection on jurisdiction, is that in the present case the acts complained could easily and adequately be dealt with in ordinary courts.

In support of the first leg of the argument counsel for the 1st Respondent cited two decisions decided by the neighbors constitutional court of Uganda to wit SSEMOGERE (RE (1999 UGA J. No. 89 (Constitutional petition No. 3 of 1999) and KABAGAMBE vs UGANDA ELECTRICITY BOARD (1997 UGA J. n. 46 And in support of the second leg, of the objection the learned counsel cited a decision of this court in FEDERATION OF MINES ASSOCIATION OF TANZANIA AND TWO OTHERS VS M/S AFRICAL GEM RESOURCES AND 7 OTHERS MISC Civil Case No. 23 of 2001 (Unreported). The learned counsel therefore submitted that in the present petition, there is nothing which calls for the interpretation of the constitution and in any case the petitioner to claims for dismissal, defamation, and sexual harassment are actionable in ordinary courts for those reasons we have been urged to dismiss the petition.

The 2nd and 3rd Respondents in their submission, approached the issue differently. It was submitted that the petition does not disclose any breach of the provisions of the constitution as alleged. Alternatively, that the petition is not properly before the court for citing wrong provisions of the constitution. In support of these arguments the Respondents referred to us the unreported decision of the court of appeal of Tanzania in HARISH AMBARALI JINA V ABDULRAZAK JUSSA SULEMANI (Civil Application No.2 of 2003) ALMAS IDIE MWINYI V. NATIONAL BANK OF COMMERCE AND ANOTHER (Civil Application No. 88 of 1998).

Mr. Nyangarika in response to the 1st Respondent's preliminary objection on jurisdiction was brief but said although the petitioner's claims may sound like ordinary civil wrongs they are nevertheless contrary to the constitution. He said the petitioner's complaints were not entertained by high ranking government officials because she is a woman; and this contrary to the constitution. And this led to her wrongful dismissal. Mr. Nyangarika learned counsel, further submitted that all the cases cited by the learned counsel for the 1st Respondent are distinguishable, from the present case, because in the present case, because of her sex, she was discriminated against, not heard and so wrongfully condemned. In response to the 2nd and 3rd Respondents objection Mr. Nyangarika learned counsel submitted that the petition was based on Article 13 (6) of the constitution, which was cited. That was so because the petitions alleged that she was not protected against false allegations and discriminated against because of her sex, which was contrary to Article 13 (6) of the constitution. Mr. Nyangarika, said after all what the Attorney General raised was not a preliminary objection within the parameters of MUKISA BISCUIT vs. WEST END DISTRIBUTERS LTD (1969) E.A. 696 because the objection does not rest on a pure point of law, but this objection is intended to discuss the provision of the constitution which is the mainstay of the main petitions.

In rebuttal, the 1st Respondent reported his earlier arguments. The 2nd and 3rd Respondents did not file anything in rebuttal.

As shown in the preface to this ruling this petition is instituted under Articles 13 (6) 15, 18, 20 (1) 24, 26 (2) and 30 (4) of the constitution of the United Republic of Tanzania, and SS 4 and 5 of the Basic Human Rights and Duties Enforcement Act 1994, as well as SS 7 and 95 of the Civil Procedure Code 1966. The Articles of the constitution above cited, enshrine the basic rights of equality before the law, personal freedom, freedom of speech, freedom of association and the right to own property Article 26 (1) imposes a duty on all persons to obey the constitution and other laws of the country. Article 30 (4) confers on this court original jurisdiction to determine matters filed under this article. The Basic Rights and Duties Enforcement Act No. 33 of 1994 was enacted to provide for the procedure of enforcing constitutional basic rights and duties. Section 4 of that Act provides:

4 "If any person alleges that any of the provisions of section 12 to 29 of the constitution has been, is being or is likely to be contravened in relation to him, he may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the High Court for redress."

This section is drafted so widely to imply that this remedy is available even if same other alternative redress is also available. However, these wide powers, like a two way highway road then sharply ends up in one way road in S 8 (2) of the Act which provides:

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

Therefore in our view, this provisions of the Act has the effect restricting the general powers of this court set out in S. 4 of the Act. Whether, there exist adequate means of redress, in a question that has to be determined by looking at the petition and the law in each particular case.

We have also looked at the decisions cited before us. Of course, we are aware that the Uganda constitutional Cases, have only a persuasive value to us, the case in SSEMOGERERE RE) was based on the interpretation of Article 137 (3) of the constitution of Uganda relating to statutes contravening the constitution. The equivalent provision in Tanzania is, in our view, Article 30 (5) of the

constitution of the United Republic of Tanzania, which empowers the High Court to declare statutes unconstitutional. This necessarily calls for the interpretation of the constitution. In our view we agree with Mr. Nyangarika learned counsel that this case is distinguishable from the present case. The present case was instituted under Article 30 (4) of the constitution. This Article, however merely declares the original jurisdiction of the in dealing with cases filed under this Article. It also directs the relevant authorities to enact procedural laws to enforce the court's jurisdiction. On the premises we also agree with the 2nd and 3rd Respondents that this was not exactly the correct Article to cite in a petition which does not call for the interpretation of a statute viv a vis the constitution. In our view the correct Article that should have been cited is Article 30 (3) of the constitution.

The decision in KABAGAMBE's case was based on Article 42 of the constitution of Uganda which enshrines the basic rights such as the right to be heard. The equivalent Tanzanian provisions is Article 13 (6) (a) of the constitution. In KABAGAMBE's case the petitioner had also petitioned against infringement of his right to be treated justly and fairly leading to wrongful dismissal by his employer. The constitutional court hold that this infringement did not call for constitutional interpretation and that the petitioner could go an ordinary court and claim damages for wrongful dismissal. Similarly in the present case, and with due respect to Mr. Nyangarika, we do not

agree that the alleged infringement of the petitioner's rights necessarily call for the interpretation of the constitution although Article 13 (6) has been cited in support of the petition. In FEDERATION OF MINES ASSOCIATION OF TANZANIA VS M/S AFRICAN GEM RESOURCES (AFGEM) & 7 OTHERS, a case cited to us by the 1st Respondent; the petition contained allegations of simple assault, comption , economic sabotage and murder. Our brother in raked S. 8 (2) of Act No. 33 of 1994, held that all the declaratory reliefs and damages prayed in the petition could be sought by way of ordinary ~~sort~~^{suit} and so the petition was incompetent as the petitions had adequate alternative means of redress for the alleged complaints. Mr. Nyangarika's response to this aspect of the submission was in our view far from being satisfactory. We do not think that the AFGEM'S case could be substantially distinguished from the present one. According to paragraph 5 of the petitioner's petition, the petitioner claims for declaratory orders and damages for sexual harassment, indecent assault and wrongful dismissal. Like our brothers in the AFGEM case and the Uganda Constitutional court in KABAGAMBE V. UGANDA ELECTRICITY BOARD, we are of the unshakable view that these claims could adequately be dealt with by an ordinary civil court as breach of contract, a tract of defamation while same of the allegations are prosecutable under the Penal Code.

Since we have held that none of the allegations put up by the petitioner call up for the interpretation of the constitution and since

the petitions has adequate means of redress in the ordinary courts we find and hold that this action is caught up in the web of S.8 (2) of the Basic Rights and Duties Enforcement Act to 33 of 1994. We are therefore inclined to uphold the 1st Respondent's preliminary objection and declare that this court has no jurisdiction to entertain the petition. Accordingly the petition is dismissed with costs.

Order accordingly

J. I. Mlay J. Sgd.

P. A. Rugazia J. Sgd.

S. A. Massati

JUDGE

18/11/2004

Delivered in the presence of Mr. Shukh advocate, Mr. C. Tenga advocate and MS Malecela State Attorney this 18th day of November, 2004.

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