IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM MAIN REGISTRY)
AT DAR ES SALAAM

MISC. CIVIL CAUSE NO. 3 OF 2013

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY
FOR ORDERS OF CERTIORARY AND PROBIBITION

AND

IN THE MATTER OF THE DECISION OF THE BOARD
OF THE TANZANIA RED CROSS SOCIETY

BETWEEN

LAUREAN RUGAMBWA .....APPLICANT

AND

TANZANIA RED CROSS SOCIETY ..... 1ST RESPONDENT
THE ATTORNEY GENERAL 2NDRESPONDENT

Date of submissions: *05/12/2014*
Date of ruling: *26/03/2014*

RULING

F. Twaib, J:

Laurean Rugambwa, the Applicant, avers that he is a member of the Tanzania Red Cross Society. He joined the Society while still a Secondary School student in 1991. Since then, he has held various positions within it, both in Tanzania and abroad.

In 2011, he contested for the Chairmanship of the Society for Dar es Salaam Region as well as for the national level. However, his name was not included in the short list of contestants for Dar es Salaam Region published on 11th October 2012. He filed a complaint with the Chairperson, pointing out what he perceived to be material irregularities and breaches of the Society's Constitution. However, his complaint was never attended to, he says.

When the list for the national elections was published in January 2012, Mr. Rugambwa's name was again not included for the post of national Chairman. He registered his complaints with the Secretary General. He also expressed his intention to commence an action against the Society if his complaints were not addressed. Once again, the Society did not act on his complaints.

On 30th January 2013, Mr. Rugambwa was informed that his membership with the Society had been terminated effective 27th January 2013. He thus filed the present action, pleading to the Court to issue the prerogative orders of *certiorari* and prohibition against the Society.

Mr. Rugambwa's affidavit in support of the present application mentions the reasons for filing the same as, among others, breach of the rules of natural justice (the right to be heard and bias due to lack of impartiality in the decision-making process), failure to abide by laid down procedures, lack of jurisdiction, and error of law due to reliance on an inapplicable provision of the Society's Constitution.

In their responses, both Respondents have raised points of preliminary objections. Learned counsel for the Society maintains that the application is bad in law, as it seeks to rely on public law remedies in a matter that is essentially private. This contention is shared by the Attorney General, who also adds one more point of preliminary objection, to the effect that the chamber summons is bad in law for failure to cite proper provisions of the law.

In support of the first point, Ms. Helen Mrema, learned Advocate for the 1st respondent, began with a description of judicial review. She relies on Hilaire Barnett, who says that judicial review represents the means by which Courts control the exercise of governmental powers. According to Barnett, judicial review is only available to test the lawfulness of decisions made by public bodies. The test is not whether or not the authority is a government body as such, but, rather, whether it is a body exercising powers analogous to those of government bodies.

According to Ms. Mrema, the functions that the Society exercises that have given rise to this case are private in nature and not public. Mr. Malata, learned Principal State Attorney, added in his submissions that even if the body in question is a public body, and does exercise public functions, a distinction has to be drawn between those functions of the same body that are public in nature and those that are purely private. He thus supports Ms. Mrema's argument that the function being complained of in this case, which relates to the election of the Society's leadership, is private since it traces its origin to the Society's Constitution, which is not a statutory instrument, but a private contractor or an arrangement between the Society and its members. That, in his view, removes issues of elections from the public domain.

The ultimate conclusion of Ms. Mrema and Mr. Malata's argument, therefore, is that the Petitioner should have proceeded by suing for private reliefs, and not, as he has done, for public law remedies, which are not available to him. Counsel have cited quite a few authorities for this proposition. Two of these are most significant: *R v Panel of Takeovers*[1958] All ER 564 and *Abdallah Likanoga & Others v Dar es Salaam Regional Management Committee of the Tanzania Red Cross Society*, Misc. Civil Cause No. 37 of 1996.

On the other hand, Mr. Makulilo, learned counsel for the Petitioners, argued quite strongly in favour of the proposition that public law remedies are available to his client in the present case. While he agreed with the applicable test, that the body whose decision is being challenged must be a public body, and the decision must be public in nature, he is of the considered opinion that the decisions cited by counsel for the Respondents are not good authorities that can be applied to the present case. According to him, both decisions did not squarely consider the fact that the Society is a creature of statute (Act No. 71 of 1962), which grants it statutory powers (which are public in nature) under section 4.

Furthermore, it is Mr. Makulilo's argument that Section 6 (1) (a) to (e) gives the Society powers to make rules governing specific matters under the Act. It was under that provision that the Society made its Constitution. Council referred to

article 1 (1) of the Constitution and article 4 to 10, which he says relates to the rules-making functions of the Society.

Counsel further reminded the Court that the grounds for instituting this case include breach of rules of natural justice, which are public law in nature. He further countered and distinguished the authorities cited.

In *Abdallah Likanoga*, Mapigano J had an opportunity to decide whether Tanzania Red Cross Society is a public body or not. He cited a decision he had made earlier on that same day, in *Alhaj A.J. Mungula v. BAKWATA*, Misc. Civil Appl. No. 6 of 1996, where he declined to exercise the powers of judicial review on the ground that the BAKWATA was not a public body but a private one. He held the same with regard to the Tanzania Red Cross Society, which is the 1st Respondent herein.

A similar position was taken in *Panel of Takeovers*, where the Court declined to exercise judicial review powers, reasoning that for one to be availed that avenue, the duty performed must be a public duty or must have public law consequences. [The issue of membership of the Society in this case (I would actually add, for purposes of specificity, member's rights to vie for leadership positions) is, in Ms Mrema's and Mr. Malata's view, private in nature.]

Mr. Makulilo submitted that I am not bound by Mapigano J's decision. I agree. Neither am I bound by the decision in *Panel of Takeovers.* But the two decisions, and especially that of Mapigano J in *Abdallah Likanoga*, being a decision of this same Court on the decision of the same body as in the present case, namely, Tanzania Red Cross Society, are highly persuasive. The doctrine of *stare decisis* requires that any departure from the position taken by a fellow judge, while allowable, must be supported by very strong and compelling reasons.

I see no such reasons in this case. I am in fact persuaded by the submissions of learned counsel for the Respondents that this being a matter relating to the conduct of elections within the Tanzania Red Cross Society, under a Constitution that is a creature of the Society itself, though it may have been adopted through

powers given by statute, is a private arrangement between the Society and its members. It is neither a governmental function, nor is it a matter that can have any public law consequences. With respect, I am of the considered view that the Petitioner's redress, if any, lie in the sphere of private law, and not, as he has attempted to expound herein, in public law. The prerogative orders of *certiorari* and prohibition, being public law remedies, are not available to him.

Having found as I have done in respect of the first ground of preliminary objection, I see no need for discussing the second ground, which would be a pure academic exercise.

In the result, the petition is hereby struck out, with costs to the Respondents.

DATED AND DELIVERED in Court this 26th day of March 2014.

F. Twaib

Judge