

IN THE HIGH COURT OF ZANZIBAR

HELD AT VUGA

MISCELLANEOUS CIVIL CAUSE NO. 02 OF 2019

(CONSTITUTIONAL MATTER)

IN THE MATTER OF THE CONSTITUTION OF ZANZIBAR

1984 [AS AMENDED FROM TIME TO TIME

AND

IN THE MATTER OF A PETITION TO CHALLENGE
ASUNCONSTITUTIONAL SUBSECTION 6 OF SECTION 3 OF THE
LAND TENURE ACT NO. 12 OF 1992 AS AMENDED BY SECTION 4
OF ACT NO. 1 OF 2018 WRITEN LAWS (MISCELLANEOUS
AMENDMENT] ACT

BETWEEN

OMAR SAID SHAABAN.....PETITIONER

AND

THE ATTORNEY GENERALRESPONDENT

Date of last order 05/09/2019

Date of Judgment 09/10/2019

JUDGMENT

MWAMPASHI, J.

The petitioner Mr. Omar Said Shaaban has filed this
petition under S. under S 25A(1)(b) of the Constitution of
Zanzibar of 1984 (as amended from time to time)

hereinafter to be referred to as the Constitution, challenging the constitutionality of S. 3(6) of the Land Tenure Act No. 12 of 1992 as amended by S. 4 of The Written Laws (Miscellaneous Amendment) Act No. 1 of 2018 hereinafter to be referred to as the Act. The respondent is the Attorney General of Zanzibar and the declaratory orders sought by the petitioner are in the following form;-

(a) Sub section 6 of Section 3 of the Land tenure Act No. 12 of 1992 as amended by Section 4 of the Written Laws (Misc. Amendments) Act No. 1 of 2018 is unconstitutional for violating the right of equality before the law, which include the rights to access to justice, principles of check and balance among the Government organs and for depriving the court of its inherent power to determine the right, justice and intervention to arbitrary administrative decisions as guaranteed under Sections 12(1)(3), 5A(1)(2)(3), 134(8) and 93(1) Of the Constitution of Zanzibar of 1984.

(b) Sub section 6 of Section 3 of the Land Tenure Act No. 12 of 1992 as amended by Section 4 of

The Written Laws (Misc. Amendments) Act No. 1 of 2018 is null and void for being unconstitutional.

(c) Any person aggrieved by a decision of the President under Sub section 6 of Section 3 of the Land Tenure Act No 12 of 1992 can question the decision in court of law.

(d) Any other relief(s) or order(s) as this court may deem just and equitable.

(e) Costs of the petition be borne by both parties.

S.3(6) of the Act is being challenged on three grounds, **firstly** that the provision grossly infringe the right to equality before the law by unnecessarily restricting access to justice in the court of law as the right which is enshrined under S. 12(1) and (3) of the Constitution, **secondly**, that the provision grossly infringe the principle of separation of power between the judiciary, executive and the legislature by precluding the power and functions of the judiciary in checking and balancing the power of the executive when making administrative decisions and **thirdly** that the provision ousts the jurisdiction of the Court to determine civil case relating to disposition of land.

The hearing of this petition proceeded by way of written submissions whereby the petitioner who is an advocate of this court who was unrepresented and Mr. Abubakar A. Omar learned State Attorney representing the respondent filed their respective submissions for and against the petition within the period of time given by the court.

For easy of reference S. 3(6) of the Act which is being challenged in this petition need to be displayed. The subsection in question reads as follows;-

*"Subject to the provisions of subsection (2) and (3) of this Section, the President shall, when satisfied with the evidence presented before him, revoke the decision of the Minister relating to disposition of the Public Land and **the decision of the President shall be final and shall not be questioned in any court of law**".*

(emphasis supplied)

In support of the petition the Petitioner started his submission by making it clear that he understands and appreciates the fact that by way of judicial review, administrative decision can be challenged in courts of law. He however pointed out that his grievance is on the constitutionality, of the mandatory restriction on the right

to access to justice and the finality nature of the decision of the President that is given by the provision in question in regards to justiciable issues or dispute that may arise from such decisions and which cannot be adjudicated by judicial review.

It was then submitted by the Petitioner that the right to access to justice as one of the components of Human Rights which are enshrined in the Bill of Rights contained in Chapter III of the Constitution is guaranteed by the Constitution. He further argued that under S. 5A of the Constitution the doctrine of Separation of Powers among the three arms of government is enshrined and also that S. 93(1) of the Constitution establishes the High Court which under S. 134(8) of the Constitution has supreme authority and jurisdiction to inquire the legality of any administrative action or decision by public authorities.

The Petitioner went on submitting that S. 3(6) of the Act which was passed by the House of Representatives on 06/12/2017 and which was assented by the President on 02/01/2018 grossly infringes the right to equality before the law by restricting access to justice which is guaranteed by the Constitution under S. 12(1) and (3) and also by infringing the principle of Separation of Powers guaranteed by the Constitution under S. 5A(1) and (2) and finally that the impugned provision is repugnant to S. 93(1) of the Constitution as it ousts the jurisdiction of the court in determining cases relating to disposition of land.

The Petitioner then identified two issues that to him need to be determined by this court. The first issue identified by him is as to whether the clause in question i.e Sub section 6 of Section 3 of the Act, ousts the jurisdiction of the court from adjudicating justifiable disputes and the second issue is whether the clause restricts the right to access justice before the court of law.

As on the issue in regard to the jurisdiction of the court being ousted it was submitted by the Petitioner that since S. 93(1) of the Constitution vests the High Court of Zanzibar with unlimited jurisdiction on criminal and civil cases then even justifiable disputes arising out from disposition of land should be adjudicated by the court which is vested with the jurisdiction to determine the disputes to their finality rather than the disputes being finalized by administrative decisions. On this the Petitioner referred the court to the case of **Re: Racial Communications** (1980) All ER 634 where it was the position by Lord Diplock that the presumptions that when the Parliament confers on an administration, tribunal or authority, as distinct from a court of law, power to decide a particular question defined by the Act, conferring the power, Parliament intends to confine that power to answering the question as it has been defined as if there has been any doubt as to what that question is, this is the matter for court of law to resolve in fulfillment of their constitutional role as interpreters of the written law and expounders of the common law and rules of equity.

To further cement his argument that S. 3(6) in question ousts the jurisdiction of the court and therefore that it is unconstitutional, the Petitioner cited the case of **Attorney General v. Lohay Akonaay and Joseph Lohay** [1995] TLR 80 where the Court of Appeal of Tanzania held among other things that any purported ouster of jurisdiction of the ordinary courts to deal with any justiciable disputes is unconstitutional.

On the issue whether the right to access justice before court of law is restricted by S. 3(6), it was the Petitioner's argument that according to SS. 12(3) and 24(2) of the Constitution, the civic right, duties and interests of every person shall be protected and determined by the courts of law, state organs and other organs established by the law and that any person alleging that any provision in any law concerning his right or duty owed to him has been, is being or is likely to be violated by any person anywhere in Zanzibar, may institute proceedings for redress in the High Court and that the High Court shall have the power to declare and order compensation to any concerned person. It was stressed by the Petitioner that the fact that a person aggrieved by a decision made under S. 3(6) of the Act can seek redress to the court by way of applying for judicial review should also mean to allow such a person to access the court through other avenues.

It was further submitted by the Petitioner that basing on what was held by the Court of Appeal in the case of

Director of Public Prosecution v.s Daudi Pele [1993]

TLR 22 as far as the requirements that should be met by the law that seeks to limit or derogate from the basic right of the individual on grounds of public interest, S. 3(6) of the Act is unconstitutional because it is arbitrary as it does not provide for any procedure for the exercise of the President's power in upsetting the decision made by the Minister relating to the disposition of public land. He also argued that the law does not provide for any safeguards against abuse of powers conferred under that provision and also that there are no checks or controls whatsoever in the exercise of the power and therefore that the decision depends on the President's whims. He concluded by contending that the provision is drafted too widely that it applies to all disposition of public land.

In his submission against the petition Mr. Abubakar A. Omar learned State Attorney for the respondent, started by giving a brief background on why the amendments to the Land Tenure Act No 12 of 1992 and which resulted to the inclusion of the impugned provision in the law, had to be made by Act No 1 of 2018. It was argued by him that because the President is the sole custodian of public land then the amendments were made to complement the President's powers in regard to issues relating to disposition of public land, on behalf of the President.

Mr. Omar's arguments against the petition were premised on three issues to wit; whether S. 3(6) of the Act infringes any provision of the Constitution, whether S.

3(6) of the Act restricts access to justice and lastly whether S. 3(6) of the Act infringes the principle of separation of power.

It was submitted by Mr. Omar, on the issue whether S. 3(6) of the Act infringes any provision of the Constitution that the provision does not, in any way, infringe the Constitution but rather that it gives the President power to control public land for the benefits of the people of Zanzibar. He contended that the provision just lays the mechanism by which the Minister responsible for land can be checked by the President. The court was also referred to the case of ***Fatma Idha Salum v. Khalifa Khamis Said***, Civil Appeal No. 28/2002 (unreported) where the Court of Appeal held among other things that from March, 1964 all natural land was declared public land vested in the President on behalf of the people of Zanzibar as such that the president has superior title over the land.

Mr. Omar went on arguing that the fact that the decision by the President is final and that the decision cannot be questioned in any court of law does not in any way infringe the Constitution because if the decision was to be questioned then that would be tantamount to suing the President which is prohibited under S.36(2) of the Constitution. He insisted that allowing individuals to sue the President for his administrative decision would be a clear violation of S. 36(2) of the Constitution. It was also pointed out by Mr. Omar that the impugned clause in the

Act, is not the first clause in our laws because there are many other laws that contain such clauses. He referred the court to S. 34(7) of the Constitution and Article 41(7) of the United Republic of Tanzania Constitution of 1977 where no court is allowed to question any matter relating to election results of the Presidents of Zanzibar and of the United Republic. The other law cited to that effect is the Zanzibar Electoral Commission Act No. 4/2018 where it is made clear under SS.52(4) and 143 that decision by the Commission on appeal or on other matter related to election shall be final and shall not be questioned by any court.

As on whether the right to access to justice is restricted by S. 3(6) of the Act, it was Mr. Omar's position that access to justice is not restricted because under S. 62(4) of the Act a person dissatisfied with the decision of the Minister may appeal to the high Court. It was therefore insisted by him that the fact that the decision of the President made under S. 3(6) of the Act, shall be final and shall not be questioned in any court of law has no effect of restricting access to justice but it merely provided for the procedure of acquiring the justice.

In regard to the issue whether S. 3(6) of the Land Act infringes the principle of separation of power as enshrined in the Constitution under S. 5A, it was Mr. Omar's stand that there is no infringement of the Constitution because S. 3(6) of the Act just vests the President with administrative powers to control the

Minister. He contended that decisions by the President made under S. 3(6) of the Act do not in any way violate S. 5A of the Constitution or interfere with functions of any other arm of the Government.

For the foregoing submission it was therefore prayed by Mr. Omar that the petition be dismissed with costs because S. 3(6) of the Act does not in any way violate or infringe SS. 12(1)(3), 93(1) and 5A(1)(2) and (3) of the Constitution of Zanzibar of 1984.

To my observation this petition in which the constitutionality of S. 3(6) of the Act is being challenged, is premised on two main issues or questions which are whether the impugned provision ousts the jurisdiction of the court and therefore that it is contrary to the doctrine of separation of power as enshrined under S. 5A of the Constitution and whether the provision limits the right to access to justice. It is also a considered view of this court that the issue whether the impugned provision is unconstitutional or not can be approached and decided by considering whether a decision made by the President under S. 3(6) of the Act is not subject to judicial review and if the answer is in the affirmative whether a complainant aggrieved by the decision under the impugned provision by the President cannot be adequately remedied by judicial review. In other words if the above issue is in the affirmative the next issue would be whether there is any justiciable dispute that may arise from the President's decision made under the impugned

provision that cannot be adjudicated and remedied by judicial review. In tackling the issue whether the impugned provision is unconstitutional or not this court will therefore be revolving around the above identified sub-issues.

It should also be pointed out at this very stage that looking at the impugned provision i.e S.3(6) of the Act the Petitioner's dispute is on the last part of the provision which reads "**the decision of the President shall be final and shall not be questioned in any court of law**". This last part of the impugned provision can conveniently be divided into two distinct parts. Firstly is that part which makes the decision made by the president final i.e which reads "**the decision shall be final**" and secondly is the last part in regards to the limitation or restriction which reads "**the decision shall not be questioned in any court of law**".

I would start with the issue whether by providing that the decision of the President shall be final, S.3(6) of the Act limits the right to access to justice and whether it ousts the jurisdiction of the court. A decision by the President made under S. 3(6) of the Act is an administrative decision that can be challenged before the court by way of judicial review. That the decision can be challenged by judicial review is not disputed by anyone including the Petitioner who is however arguing, if I understood him well, that there are some justiciable issues or questions that may arise from the President's decision made under

S. 3(6) that cannot be adjudicated and adequately remedied by judicial review. With due respect to the Petitioner this court does not think that there is any question or dispute that may arise from the decision made by the President under S. 3(6) of the Act that cannot be adequately adjudicated and remedied by judicial review. After all the Petitioner has not identified what are those issues or justiciable questions that cannot be adjudicated and adequately remedied by judicial review.

On the face of it the provision in question i.e S.3(6) of the Act appears to mandatorily provide that the decision is final but in reality and practice it is not. An person aggrieved by a decision made by the President under S. 3(6) of the Act can challenge the decision by judicial review and he can also be adequately remedied as demonstrated hereunder.

Judicial review is a procedure by which an individual can seek to challenge a decision, act or failure to act of a public body. Remedies that can be granted by the court in judicial review include quashing the decision and requiring the body to re-consider the decision, making a declaration and or order, awarding costs and requiring the body to take some other steps or to not take certain action (injunction).

A decision by a public body can be challenged by way of judicial review on three grounds namely illegality,

irrationality and procedural impropriety or unfairness. A decision is illegal when a decision maker acts outside or beyond its powers (*ultra vires*), where he misdirects himself in law, instance where he does not understand and apply the law correctly and where he exercises his powers wrongly or for an improper purpose. Irrationality of a decision arises where the decision is so unreasonable that no reasonable decision maker could have come to the same decision or where a decision maker takes into account irrelevant matters or fails to consider relevant matters and it is also irrational if the decision maker acts in bad faith or dishonestly. Finally a decision of a public body is unfair or procedurally improper if the body does not properly observe and comply with its procedural duties, if it fails to consult or give reasons for its decision and if it is biased. (see *ww.saunders.co.uk*.)

It is also worthy to point out that in the case of ***Anisminic Ltd v. Foreign Compensation Commission*** [1969]2 AC. 147 it was held by the House of lords that provisions that purport to oust the jurisdiction of the court and limit the right to access to justice cannot prevent the courts from examining an executive decision that, due to an error of law is a nullity and also that the provisions do not prevent courts from dealing with both jurisdictional and non-jurisdictional errors of law. Jurisdictional error is where the commission of an error of law meant that the public body did not in fact have power to act and non-jurisdictional error is where the public body

was acting within the powers conferred on it by law but committed an error of law. It was concluded in **Anisminic** case that;-

“Any error of law made by a public body will make its decision a nullity and that a statutory exclusion clause does not deprive the courts from their jurisdiction in judicial review”.

Because a person aggrieved by the decision of the President made under S. 3(6) of the Act can challenge the decision by judicial review on grounds of illegality, irrationality and procedural impropriety or unfairness and as he is entitled to all the remedies that can be granted in judicial review then this court does not see any kind of a dispute that may arise from such a decision that cannot be challenged and be adequately remedied by judicial review.

It is insisted that from a considered view of this court and also from the above observations a decision made by the President under S. 3(3) of the Act can be challenged by way of judicial review. In fact, that part of S. 3(6) which purports to oust the jurisdiction and limit the right to access to justice has no legal effect. The provision is just like a non-poisonous snake that can bite but not kill or a toothless dog that can bark but not bite. The decision of

the President made under S. 3(6) of the Act is only final administratively and not judicially. By providing that the decision is final S.3(6) of the Act does therefore neither limit access to justice nor oust the jurisdiction of the court because a person aggrieved by such a decision can, as amply demonstrated above, question the decision in court of law by way of judicial review.

In his arguments against the petition Mr. Omar has contended that questioning the decision made by the President under S. 3(6) of the Act is tantamount to suing the President who under S. 36(2) of the Constitution cannot be sued. With due respect to the learned State Attorney this court is of a different view. To a considers view of this court where in the course of his public duties the President makes any decision under S. 3(6) of the Act and where the decision is to be challenged what is prohibited by S. 36(2) of the Constitution is challenging the decision by suing the President in his personal capacity. Because presidency is an office or institution, the President cannot, under those circumstances, be sued in his personal capacity or name but through the Attorney General (see the decision of the High Court of Tanzania in ***Ado Shaib v. Honourable John Pombe Magufuli (The President of the United Republic of Tanzania & 2 Others***, Civil Cause No. 29/2018, (unreported)). The decision made by the President under S. 3(6) of the Act can therefore be challenged by way of

judicial review not by suing the President but by suing the Attorney General.

As regards to the last part of S.3(6) of the Act that reads "**and shall not be questioned in any court of law**" it is a considered view of this court that that part of the impugned provision truly ousts the jurisdiction of the court and limits the right to access to justice. That part of the provision prohibits the court from looking at the legality and correctness of the decision made by the President where the decision aggrieves any one. Prohibiting the court from performing what is its constitutional core function cannot in any way be valid and constitutional. It was held by the Court of Appeal in the case of **Attorney General v Aman Walid Kabourou** [1996]TLR, 156 among other things that;-

"The High Court of this country has a supervisory jurisdiction to inquire into the legality of anything done or made by a public authority, and this jurisdiction includes the power to inquire into the legality of an official proclamation by the Electoral Commission".

In the above cited case the Court of Appeal interpreted Article 74(12) of the Constitution of the United Republic of Tanzania of 1977 which reads that "**No court shall have jurisdiction to inquire into anything done by the Electoral Commission in the exercise of its functions according to the provisions of this Constitution**" and made the following observation;-

"In the face of it, it appears that the Constitution expressly prohibits the court from inquiring into the validity of such things like the Tamko Rasmi, but on a deeper consideration of the principles that underline the Constitution it is obvious that such an interpretation of the Constitution is wrong"

The Court went on holding that;-

"One of the fundamental principles of any democratic Constitution, including ours, is the rule of law... in light of this principle, we respectively agree with the submission of Mr. Werema. We are satisfied and we find that the High Court in this Country like the High Court in England,

has a supervisory jurisdiction to inquire into the legality of anything done or made by the public authorities”.

Part of S. 3(6) of the Act which reads ***and shall not be questioned in any court of law”*** does not only oust the jurisdiction of the court and limit the right to access to justice but it is also contrary to the doctrine of separation of powers which is enshrined in the Constitution under S. 5A thus;-

S. 5A(1) Zanzibar itafuata mfumo wa mgawanyo wa Madaraka kati ya mamlaka tatu, Mamlaka ya Utendaji, Mamlaka ya Kutunga Sheria na Kusimamia Utekelezaji wa Shughuli za Umma na Mamlaka ya Kutekeleza Utoaji Haki.

(2) Mamlaka ya Utendaji ni Serikali ya Mapinduzi Zanzibar, Mamlaka ya Kutunga Sheria na Kusimamia Utekelezaji wa Shughuli za Umma ni Baraza la Wawakilishi na Mamlaka ya kutekeleza Utoaji wa Haki ni Mahkama.

(3) Hakuna mamlaka itakayoingilia Mamlaka
Nyingine Isipokuwa kama ni kwa kadri
Ilivyoelezwa katika Katiba hii”.

A provision that ousts the jurisdiction of the court and limits or denies a person the right to access the court is unfair and contravenes the Constitution. In the case of **Francis Ishengoma Dyanabo v. Attorney General** [2004] 14 it was held by the Court of Appeal among other things that;-

“Access to justice is undoubtedly, a cardinal safeguard against violations of ones rights whether those rights are fundamental or not. Without that right, there can be no rule of law and therefore no democracy. a court of law is the resort of the oppressed and the bewildered. Anyone seeking a legal should be able to knock on the door of justice and be heard”.

At this point it is also prudent to cite the case of **The Attorney General vs. Jeremia Mtobesya**. Civil Appeal No. 65/2016 (unreported) where it was held by the Court of Appeal among other things that a provision that abrogates the right to access to court and completely

bars the court of law from making any intervention is unconstitutional and therefore invalid.

This court therefore agrees with the Petitioner only to the extent that it is the last part of S. 3(6) of the Act which reads" ... **and shall not be questioned in any court of law"** that offends S. 5A of the Constitution of Zanzibar of 1984. That part of S. 3(6) of the Act infringes the principle of separation of powers which is enshrined in our Constitution under S. 5A of the Constitution by preventing the court from carrying out its constitutional core function of adjudication and also of keeping the executive in check. According to the doctrine of separation of powers one of the important functions of the judiciary is to keep the executive in check by ensuring that its acts comply with the law. In the case of **Mwalimu Paul John Mhozya v. Attorney General** [1996] TLR 103 it was insisted by the Court of Appeal that;-

"The principle that the functions of one branch of a government should not encroach on the functions of another branch is an important one to ensure that the governing of a state is executed smoothly and peacefully".

The argument by Mr. Omar that the President as a trustee and guardian of public land has superior title over

all public land is correct. That, however, does not mean that the President can use or deal with public land in whatever manner he wishes and for his own benefits and interests. The President must use and deal with public land for the benefits and interests of the public and not otherwise. It is in that spirit that it cannot be said that or thought that in passing S. 3(6) of the Act the House of Representatives had intended for the decision by the President in disposition of public land not to be questioned by any court of law.

There was also an argument from Mr. Omar S.3(6) of the Act does not infringe the Constitution because there are many other provisions in different laws that are of the same effect as S.3(6) of the Act. With due respect to Mr. Omar the fact there are many other provisions in other different laws that are of the same effect as S. 3(6) of the Act does not necessarily make the impugned provision valid. Two wrongs do not make a right.

For the above reasons and observations it is therefore a finding and conclusion of this court that it is only the last part of S. 3(6) of the Land Tenure Act No. 12 of 1992 as amended by S. 4 of the written Laws (Misc. Amendments) Act No 1 of 2018 which reads "**and shall not be questioned in any court of law**" that limits the right to access to justice, ousts the jurisdiction of the court and contravenes the doctrine of separation of powers. That part of the provision offends SS. 5A, 12(1)(3) and 93(1) of the Constitution of Zanzibar of

1984 and it is therefore hereby declared invalid and unconstitutional. The petition is therefore allowed to the extent demonstrated above and the following declaratory orders are made.

- (1) The last part of S.3(6) of the Land Tenure Act No. 12 of 1992 as amended by S. 4 of the Written Laws (Misc. Amendments) Act No. 1 of 2018 which reads "**and shall Not be questioned in any court of law**" is hereby declared invalid and constitutional for offending SS. 5A, 12(1)(3) and 93(1) of the Constitution of Zanzibar of 1984.
- (2) Any person aggrieved by the decision made by the President under S. 3(6) of the Land Tenure Act No. 12 of 1992 as amended by S. 4 of the Written Laws (Misc. Amendments) Act No. 1 of 2018 can question the decision in the court of law.

Sdg: Abraham Mwampashi,

Judge,

09/10/2019.


Delivered in court this 09th day of October, 2019 in the presence of the Petitioner and Mr. Abubakar A. Omar (SA) for the respondent the Attorney General of Zanzibar.

Sdg: Abraham Mwampashi,


Judge,

09/10/2019.

I CERTIFY THAT THIS IS A TRUE COPY OF THE ORIGINAL



DEPUTY REGISTRAR
HIGH COURT
ZANZIBAR.



mbs/...

12/00
HIGH COURT 299292
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29/11/2020