IN THE HIGH COURT OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CIVIL CAUSE NO. 1 OF 2019

IN THE MATTER OF THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA 1977 AS AMENDED FROM TIME TO TIME

IN THE MATTER OF THE BASIC RIGHTS AND DUTIES ENFORCEMENT ACT CAP. 3 R.E. 2002

AND

IN THE MATTER OF A PETITION BY ZITTO ZUBERI RUYAGWA KABWE FOR DECLARATORY ORDERS THAT THE SUMMONING OF THE CONTROLER AND AUDITOR GENERAL BY THE SPEAKER OF THE NATIONAL ASSEMBLY OF THE UNITED REPUBLIC OF TANZANIA IS UNCONSTITUTIONAL

BETWEEN

ZITTO ZUBERI RUYAGWA KABWE..... PETITIONER

VERSUS

JOB NDUGAI SPEAKER OF THE NATIONAL ASSEMBLY.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

Date of last Order: 08/06/2021

Date of Judgment: 07/10/2021

E. B. LUVANDA, J.

The Petitioner above is challenging the constitutionality or rather the act of the first respondent to summon the Controller and Audit General (C.A.G.) to

appear before *Kamati ya Haki, Maadili na Madaraka ya Bunge* over the alleged statement or comments made by the former C.A.G. during interview with Mr. Kayanda of United Nations Radio on 7/1/2019 in the United States of America.

It was the argument of Mr. Jebra Kambole, learned Counsel for the petitioner, that the C.A.G. was just expressing his opinion concerning his function as C.A.G. in Tanzania; and he was expressing his freedom of expression which is protected under Article 18 of the Constitution of the United Republic of Tanzania (hereinafter to be referred to as the Constitution). He also cited Article 9 of the African Charter on Human and Peoples Rights, Article 19 of UDHR and Article 19(2) of the ICCPR. That the act of the first respondent is illegal and unconstitutional. That the power of the Parliament to order any person to appear before it has to be exercised according to the Constitution and other laws. He cited Articles 26(1) and 143(6) of the Constitution. That the power of the Parliament to call any person under section 13 of the Parliamentary Immunities Powers and Privilege Act (Cap 296 R.E. 2016) has some limits because some people has the immunity according to laws. He cited an example of the C.A.G. who is protected by Article 143(6) of the Constitution. The learned Counsel submitted that the C.A.G. is not obliged to comply with order or direction of any other person or government department. That the only institution which has power to question and inquire anything done by the C.A.G. is the court and not Kamati ya Kinga, Madaraka ya Bunge. The learned Counsel submitted that the statement made by the C.A.G. was made under his official capacity while discharging his duty.

In reply, Mr. Gabriel Pascal Malata, Solicitor General, submitted that the first respondent is legally mandated to summon any person for inquiry, judging and pronounce upon any action done or committed under the Act. He cited sections 13(2) and 26(a) and (e) of Cap 298 (sic, 296) R.E. 2002. That the C.A.G was not performing his official duties when he appeared on the media in United States of America and made statement against the Parliament. That no official duty entitles the C.A.G. to call or commenting other institution weak (*dhaifu*). That the C.A.G. is only immune under Article 143(2)(3) and (4) of the Constitution only when he is performing his duties of auditing and commenting on the said audited works of which it must be documented and submitted to the President for tabling before the National Assembly for debate, cited Article 143(4) of the Constitution. That there was no report ever been submitted to the President with such opinion save for the fact that it was for the first time heard on television during interview in the United States of America. That the C.A.G. is at all time required to observe rights, freedom duties and limits under which he exercises such rights and freedom as the same are not absolute. He cited Article 30(1) and (2) (a),(b),(d) and (f) of the Constitution.

The C.A.G. was alleged to have been summoned to appear before the Parliamentary Committee under the auspices of rule 4(1)(a) *Kanuni za kudumu za Bunge (Toleo la Januari, 2016), Nyongeza ya Nane, Sehemu ya Kwanza* which provide, we quote:

> *'Kamati ya Haki, Maadili na Madaraka ya Bunge itatekeleza majukumu yafuatayo:*

(a) Kuchunguza na kutoa mapendekezo kuhusu masuala yote ya haki, kinga, maadili na madaraka ya Bunge yatakayo pelekwa na Spika'

Sub rule (2) is of equally important under the subject, it provide, we quote,

'Kamati itakapokamilisha kushughulikia jambo husika, Mwenyekiti wa kamati atamjulisha Spika kwa maandishi kwamba, Kamati imemaliza kujadili jambo husika'

Under the above provisions, it can be said that the Speaker has power and mandate to refer any matter or person to the Parliamentary Committee. Even the manner reporting is done, the Standing Committee report to the Speaker. The provisions above quoted are in line with the provision of section 13(2) of Cap 296 R.E. 2002. The said provision provides, we quote:

'The Speaker shall have the power, subject to the Standing Orders of the Assembly, to determine whether or not any act, matter or thing is one into which the Assembly may inquire, judge and pronounce upon'

Again subsection (1) of section 13 provides, we quote:

'It is declared for the avoidance of doubt that subject to the Constitution and the Standing Orders of the Assembly, the Assembly has all such powers and jurisdiction as may be necessary for inquiring into, judging and pronouncing upon the commission of any act, matter or thing, not amounting to an offence under this Act, which is a breach of Parliamentary privileges'

The above provision suggests that the Parliament or Standing Committee or even seasonal Committee can summon any person to appear before it. As such an averment by the deponent in the affidavit in support of the originating summons, that Standing Parliamentary Committee does not regulate the conduct of people outside the National Assembly or that the *Kamati ya Haki, Maadili na Madaraka ya Bunge* works within the National Assembly only, is unrealistic and hence untenable.

The learned Counsel for the petitioner argued that the power of the Parliament to call any person under section 13 of the Parliamentary Immunities, Powers and Privilege Act (Cap 296 R.E. 2016) has some limits, because the C.A.G. has the immunity and is protected by Article 143(6) of the Constitution and is not obliged to comply with order or direction of any other person or government department. It is true that the C.A.G. is protected under the provision of Article 143(6) of the Constitution. However, the privilege therein is limited to protecting the C.A.G. when performing or discharging his duty. Article 143(6) provide, we quote in verbatim:

> *'(6) Katika kutekeleza madaraka yake kwa mujibu wa masharti ya ibara ndogo ya (2), (3) na (4) ya ibara hii, Mdhibiti na Mkaguzi Mkuu wa Hesabu hatalazimika kufuata amri au maagizo ya mtu mwingine yeyote au idara yoyote ya Serikali, lakini maelezo hayo ya ibara hii ndogo hayataizuia Mahakama nayo kutumia madaraka yake kwa ajili ya kuchunguza kama Mdhibiti na Mkaguzi Mkuu wa Hesabu ametekeleza madaraka yake kwa mujibu wa masharti ya Katiba hii au sivyo'.*

The catchword encapsulating the phrase above, is when the C.A.G. is exercising his power. The learned Counsel for the petitioner was of the view that the statement made by the C.A.G. was made under his official capacity while discharging his duty. We cannot ascribe to this assertion, as correctly submitted by the learned Solicitor General, that the C.A.G. is only under immunity while carrying his function under Article 143(2)(3) and (4). It can be said that the C.A.G. was just making his opinion as a matter of expression of his freedom. But the test is whether the statement made during the interview with the United Nations Radio in the United States of America concerned his function as C.A.G. in Tanzania. The learned Solicitor General submitted that there was no report submitted to the President with such opinion. Indeed, it was not stated anywhere if at all the statement made was among the concerns or recommendations made in his report.

We understand that the interview was in connection with the C.A.G. report and recommendations made therein. But nowhere it was said that an allegation of weak parliament was among his recommendations, for it to be said was privileged. Had that report of C.A.G. subject for interview embedded that opinion among others that the Parliament is weak, then the statement by the C.A.G. could be said to be protected under Article 143(6) of the Constitution. In that way the C.A.G. could not be subjected to the dictate under the provisions of section 13(2) of Cap 296 and rule 4(1)(a) of *Kanuni za Kudumu za Bunge (Toleo la Januari, 2016), Nyongeza ya Nanne, Sehemu ya Kwanza.*

That said the petition is devoid of merit.

The petition is dismissed. We do not make any order as to costs as the matter was in the nature of public interest litigation.

B.S. Masoud

Judge

07.10.2021

E.B. Luvanda

Judge

07.10.2021

Y.J. Mlyambina

Judge

07.10.2021