

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CAUSE NO. 18 OF 2023

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI,
MANDAMUS AND PROHIBITION BY JAMES FRANCIS MBATIA**

AND

**IN THE MATTER OF THE DECISION OF THE NATIONAL CONGRESS OF
THE NATIONAL CONVENTION FOR CONSTRUCTION AND REFORM
MAGEUZI (NCCR-MAGEUZI) EXPELLING THE APPLICANT FROM THE
RESPONDENT**

AND

**IN THE MATTER OF THE DECISION OF THE NATIONAL CONGRESS OF
THE NATIONAL CONVENTION FOR CONSTRUCTION AND REFORM
MAGEUZI (NCCR-MAGEUZI) REMOVING THE APPLICANT FROM THE
POSITION OF THE NATIONAL CHAIRPERSON OF THE RESPONDENT**

BETWEEN

JAMES FRANCIS MBATIA APPLICANT

VERSUS

THE REGISTERED TRUSTEES OF NATIONAL CONVENTION

FOR CONSTRUCTION AND REFORM MAGEUZI

(NCCR-MAGEUZI) RESPONDENT

6th March & 28th May, 2025

KAGOMBA, J:

RULING

This ruling is in respect of an application for judicial review filed by James Francis Mbatia (the “applicant”) to challenge a two-faceted decision of the National Congress (“the Congress”) of the National Convention for Construction and Reform- Mageuzi (“NCCR- Mageuzi” or the “party”) made

on 24th September, 2022 terminating his membership in the party and removing him from his position as the National Chairperson thereof. According to the applicant, the decision is illegal on account of being made without affording him right to be heard, and for being based on unfounded, unreasonable and unjustified reasons. He, therefore, prays as follows:

a) That, this Honourable Court be pleased to issue prerogative orders of *mandamus, certiorari* and prohibition: -

- i) against the decision of the Congress dated 24th September, 2022 for unlawful removal of the applicant from the position of the National Chairperson of the party and expelling him from membership thereof without adhering to the principle of natural justice (right to be heard).
- ii) against the decision of the Congress dated 24th September, 2022 for unlawful removal of the applicant from the position of the National Chairperson of the party and expelling him from membership thereof based on unfounded, unreasonable and unjustified allegations/ reasons.
- iii) directing, any further, additional or subsequent orders prohibiting the respondent from removing the applicant from the position of National Chairperson of NCCR Mageuzi and from

expelling the applicant from membership thereof without complying with procedures stipulated under the laws and the constitution of the party.

b) cost to be provided for.

c) Any other relief(s) this Court may deem just and fit to grant.

The application is made under the provisions of Section 17(2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, [Cap. 310 R.E 2019] and Rule 4 and 8(1) (a) & (b), 8(2) & (3) of the Law Reform (Fatal Accidents) (Judicial Review Procedure and Fees) Rules, 2014 (GN No. 324 of 2014). It is supported by an affidavit of James Francis Mbatia, the applicant, as well as a statement in respect of which leave was granted.

In opposition, a counter affidavit sworn by one Beati Aishakiye Mpitabakana was filed, supported by an affidavit of Rajabu Kazimoto as well as respondent's statement in reply.

At hearing, Mr. Edson Mchau, learned Counsel, represented the applicant while Mr. Novatus Michael Muhangwa, also learned Counsel appeared for the respondent.

Submitting on behalf of the applicant, Mr. Mchau firstly amplified the ground of illegality of the impugned decision. He relied upon the averments

in paragraphs 6, 8 and 9 of the applicant's affidavit to contend that the impugned decision was reached without his client being afforded his right to be heard, hence a breach of principle of natural justice.

He clarified that while the Congress met over the matter on 24th September, 2022, it was not until 30th September, 2022 when the applicant received a notice to attend that meeting. Annexure **JFM-7** to the applicant's affidavit, was relied upon to show that the notice of the meeting was delivered to the applicant on 30th September, 2022 at 8:10am.

According to Mr. Mchau, the above scenario signifies a contravention of the provisions of section 6(c) (5) of the Political Parties Act, [Cap. 258 R.E 2019], which requires political parties to observe their constitutions in revoking party memberships. He also finds a contravention of Article 10(4) of the party's constitution on right to be heard; Article 14(1) of the same constitution on the right of the party leaders to defend themselves before party meetings which determine allegations facing them, as well as Article 13(6) (a) of the Constitution of United Republic of Tanzania, 1977 ("the URT Constitution") guaranteeing the right to be heard.

The case of **Lengai Ole Sabaya and 2 Others vs. The Director of Public Prosecution**, Criminal Appeal No. 129 of 2021, High Court at Arusha; **Pastory Henry & 2 Others vs. Wema Gema**, Misc. Land Appeal

No. 139 of 2021, High Court Land Division at DSM, and **Mwajuma Malulu Aloyce vs. TUDARCO**, Misc. Civil Application No. 13 of 2023 High Court, Main Registry at DSM were referred to regarding the legal consequences of denial of the right to be heard.

In the same vein, the decisions of the Court of Appeal in **Independent Power Tanzania Ltd & Standard Chartered (Hong Kong Ltd)**, Civil Revision No. 1 of 2009, CAT at DSM; **MB Business Ltd vs. Amos David Kasanda & 2 Others**, Civil Application No. 429/17 of 2019, CAT at DSM and **Anna Alphonse Kasembe vs. Dora Kawawa Fusi, (*Administratrix of the Estate of the Late Secilius Edward Fusi*) & 4 others**, Civil Appeal No. 56 of 2021, CAT at DSM were also cited. To concretize his contention that the applicant was evidently not heard, Mr. Mchau drew attention of the Court to paragraph 2.2.3 of annexure **JFM-6**.

Turning to the second ground that the impugned decision was unreasonable, unfounded and unjustifiable, Mr. Mchau again called annexure **JFM-6** to his aid. Referring to paragraph 2.2.4 of the said annexure, he submitted that while the main reason for the impugned decision is allegation of embezzlement of party properties as reported by the Controller and Auditor General (CAG) for the year 2019 -2020, the following two points of contention defy the reasonability and bases of such decision:

Firstly, the applicant is mentioned nowhere in the CAG Report (annexure **JFM-9**) as an embezzler of party properties; and,

Secondly, in terms of Article 26(2) (a) & (b) and 26(7) of the constitution of the party, party's properties are under the custodianship of the registered trustees who can access the same, and not the National Chairperson.

Mr. Mchau further contended that the reasons given by the Congress for revoking his client's party membership are nowhere stipulated in the provision of Article 12(2) of the Party's constitution. According to him, Article 12(2) is the provision which prescribes circumstances under which such a revocation could constitutionally be warranted.

In winding up his submission in chief, the learned Counsel cited the case of **Council of Civil Service Union & Others vs. the Minister of Civil Service**, [1984] 3 ALL ER 935 on what constitutes illegality and the decision of the Court of Appeal in **Sanai Murumbe & Another vs. Muhere Chacha** [1990] T.L.R 54 to support his prayer for *certiorari* to issue. Having prayed the Court to grant all the reliefs shown in the statement, Mr. Mchau rested his case.

In his reply, Mr. Novatus Michael Muhangwa firstly prayed to adopt the affidavit of Beati Aishikiye Mpitabakana together with the respondent's

statement in reply to be part and parcel of his submission. His entry point is that the applicant does not challenge the decision of the party's National Executive Committee (NEC) of 21st May, 2022 which suspended him from his chairmanship. The Counsel's early contention is that the decision to suspend the applicant from chairmanship of the Party cannot be overturned by this Court based on a prayer for any other reliefs, made in paragraph (c) of the chamber summons. It was his submission that doing so will be tantamount to making a new case out of the instant one.

As for lamentation of denial of right to be heard, Mr. Muhangwa firstly found it contradictory in that, while the applicant complains, on one hand, that he was not afforded an opportunity to be heard, on the other hand he is only complaining of insufficiency of that opportunity. He referred to paragraph 8 of applicant's affidavit for the latter aspect of the applicant's grievances. Either way, the learned Counsel opposed the applicant's complaint in its entirety by asserting that the right to be heard was sufficiently afforded to the applicant without any abrogation of the provisions of the Party's constitution or the URT Constitution.

Clarifying, Mr. Muhangwa submitted that the decision to expel the applicant originated from the NEC meeting of 21st May, 2022 which suspended him from the position of the National Chairperson. Referring to

an internal Memo from the applicant, being the National Chairperson, to the Secretary General of the party (Annexure **NCCR – 1**), the learned Counsel asserted that the applicant was aware of the said NEC meeting. He inferred such awareness from the applicant's act of directing the party's Secretary General to update him on preparations of the said meeting.

According to Mr. Muhangwa, the decision to suspend the applicant from party chairmanship was not subject to approval by the Congress as averred by the applicant in paragraph 6 of his affidavit. The Counsel's contention is that the applicant ought to have challenged the decision of NEC, but he didn't. He cited the provision of Article 22(5) (t) of the party's constitution (Annexure **JFM-8** to the applicant's affidavit) to support his contention.

In the main, Mr. Muhangwa laboured on demonstrating how unclean the applicant's hands are, in so far as his claim of denial of his right to be heard is concerned. Referring to Annexure **NCCR-3** to the counter affidavit, the learned Counsel explained that, the applicant was served with a letter containing allegations levelled against him (Annexure **NCCR-2A**) which were to be deliberated in the Congress meeting of 24th September, 2022 but chose to remain silent regarding the same.

Clarifying, Mr. Muhangwa submitted that on 20th September, 2022, Mr. Rajabu Kazimoto was given a letter (Annexure **JFM-7**) to deliver to the applicant but having delivered it, the applicant refused to sign the dispatch, withheld the letter and demanded that he should be served the same via Expedited Mail Service (EMS), instead. The learned Counsel referred to paragraph 5 of the affidavit of Rajabu Kazimoto to emphasize that the applicant had already read the letter but remained with it. It was his contention that those averments by Rajabu Kazimoto stand uncontroverted. as there was no reply filed thereto by the applicant.

As for the applicant's assertion that he became aware of the Congress meeting as late as 30th September, 2022, Mr. Muhangwa pressed for a supporting affidavit of Agrey Lweshwa, the applicant's assistant who collected the notice of the Congress meeting from Tanzania Posts Corporation. Citing the case of **John Chuwa vs. Anthony Ciza** [1992] T.L.R 233 and **Sebana Technics Dar Ltd vs. Michael J. Luwunzu**, (Civil Application No. 451 of 2020) [2021] TZCA 108 (14 April, 2021) the learned Counsel contented that when an affidavit mentions another person on something material, that other person has to swear an affidavit too, else the concerned averments will be rendered hearsay. He further cited section 110 of the Evidence Act [Cap. 6

R.E 2022] for a contention that the burden of proving that the notice was received late lies on the applicant.

Based on the above submission, it was Mr. Muhangwa's position that the applicant was afforded his right to be heard but chose not to utilize it.

On the other hand, and without prejudice to his submission above, Mr. Muhangwa cited the case of **Judge In charge High Court Arusha & Another vs. Lord Munuo Ngumi** [2004] T.L.R 44 to argue that since the applicant was served with sufficient notice to attend the Congress hearing but refused, the Congress was no longer bound to hear him.

Referring to paragraph 6 and 7 of applicant's affidavit, Mr. Muhangwa further submitted that the applicant was aware of the NEC resolution suspending him from party leadership and was aware of the meeting of the Congress held on 24th September, 2022 which expelled him from party membership.

On the reasonableness of the impugned decision, Mr. Muhangwa's reply is that the decision is correct, justifiable and fair. While referring to paragraph 2.2 and 2.3 of the minutes of the Congress meeting (Annexure **JFM-6**), he argued that the said decision was based on unanimous resolutions of members, on account of applicant's absence without notice. He cited Article 22(3) (m) of the party's constitution for back up.

Mr. Muhangwa had two more points of contention. **One**, that if the applicant was aggrieved by the decision of NEC which suspended him from party chairmanship, he ought to have appealed to the Congress vide Article 22(3)(j) of the party's constitution. The contention here is that the applicant has brought this application prematurely without exhausting remedies available under the party's constitution.

Two; the applicant's membership is questionable on account of his averment that he joined the party since 1992 while the party was fully registered in 1993.

Based on **Sanai Murumbe** (supra), the learned Counsel beseeched this Court to decline issuance of an order of *certiorari* on account of non-exhaustion of local remedy. In the end, he prayed for dismissal of the application with costs, holding that the orders sought in the chamber summons have not been sufficiently supported.

There was a rejoinder by Mr. Mchau. On non-exhaustion of domestic remedy, the Counsel was categorical that the applicant is aggrieved by the decision to expel him from both membership and chairmanship of the party made by the Congress on 24th September, 2022, and not the suspension decision made by NEC on 21st May, 2022.

On the submission that the decision of NEC does not require approval of the Congress, Mr. Mchau's position is that it does, as per Article 22(3)(m) and Article 27 (2)(j) of the party's constitution.

According to the learned Counsel, the contention that the applicant received the notice of the Congress meeting but refused to turn up is a submission from the bar, not averred in the respondent's counter affidavit.

On the demand for a supporting affidavit of Agrey Lweshu, Mr. Mchau's position is that since the EMS receipt and the stamp on the envelope show the date when the notice of Congress meeting was delivered, the need for a supporting affidavit does not arise.

As for Rajab Kazimoto deponing that he presented a notice of the Congress meeting to the applicant who refused to receive it, Mr. Mchau finds no such averments in the said affidavit. And, on the argument that the affidavit of Rajab Kazimoto had not been controverted, Mr. Mchau reckons that on 18th May, 2023 the applicant filed a reply to that counter affidavit.

Regarding the cases of **John Chuwa** and **Sabena** (supra) and S.110 of the Evidence Act, cited to support the respondent's case, Mr. Mchau's view is that all the principles of law therein are irrelevant to this case.

On the submission that the applicant was aware of both meetings of NEC and the Congress as per paragraph 6 and 7 of his affidavit, the learned Counsel denied that his client stated so.

On the impugned decision being unanimous, the learned Counsel's view was that if the procedures were not followed, the decision is illegal.

On applicant's failure to exhaust alternative remedies, Mr. Mchau's view is twofold. Firstly, he deemed such a submission a brain child of the bar as it was nowhere raised in the counter affidavit. Secondly, he found this Court *functus officio* since Hon. Mgonya, J (as she then was) had decided on the matter when it was raised as a preliminary objection. The learned Counsel rejoined further that in terms of Article 22(3) (m) & (n) of the party's constitution, the decision of the Congress is final, hence a resort to this application for further remedy.

As for the applicant becoming a party member before the party was registered, Mr. Mchau's reaction is twofold. Firstly, he deemed it as a submission from the bar. And, secondly, he relied on the constitution of the party (annexure **JFM-8**) which bears the year 1992 to show that the same was issued in 1992. To him, the contention of his counterpart is a misconception.

Regarding the case of **Sanai Mirumbe** and the grounds for granting an order of *certiorari*, the learned Counsel reiterated his submission in chief. He denied existence of any contradiction between what was averred by the applicant in the supporting affidavit and the submission made in Court.

Towards winding up, Mr. Mchau pointed out that his counterpart made no comment on the applicant's exculpation of embezzlement allegation. To him, silence means his learned friend had conceded that aspect.

In the very end, the applicant's Counsel enjoined the Court to grant all the prayers made by his client.

Having heard the above rival submissions, three main issues are up for determination: -

1. Whether the applicant was denied right to be heard before the decision was made by the Congress on 24th September, 2022, to remove him from his position as the party's National Chairperson and revoke his party membership.
2. Whether the reasons for the decision made by the Congress to remove the applicant from his position as the party's National Chairperson and revoke his party membership on 24th September, 2022 are unfounded, unreasonable and unjustified.

3. Whether the applicant is entitled to the reliefs sought in the chamber summons.

In this application, the applicant's grievances are very straight forward. The applicant is aggrieved by the decision of the Congress to revoke his party membership and to remove him from the position of the National Chairperson of the party. As emphatically submitted by Mr. Mchau, the applicant is not contesting the decision of NEC which suspended him from his chairmanship on 21st May, 2022. This is in line with the averment in paragraph 12 of the applicant's reply to the counter affidavit filed in Court on 18th May, 2023, which categorically states, in part, as follows:

".....the applicant is challenging the decision of the National Congress of the Respondent dated 24th day of September, 2022 which has nothing to do with the decision of the National Executive Committee of the Respondent as the same was overtaken by the decision of the National congress hence does not exist".
[Emphasis added].

The above averment is consistent with the applicant's prayers in the chamber application as well as the reliefs being sought in his Statement, and therefore defines the scope of this matter.

It is not disputed that the applicant was a member of the respondent's party and was also its National Chairperson. The applicant's affidavit and the counter affidavit thereto both state so. The only element of dispute surrounding the applicant's membership is the year he joined the party, the issue being whether he joined in 1992 or afterwards.

Despite being brought up in parties' submissions, I find the above issue immaterial since both parties are in agreement that the applicant was, indeed, a member of the party and its National Chairperson before the impugned decision was made. In my view, to dispute the applicant's membership would be akin to questioning the very decision of the Congress. It is as night follows the day that the Congress' decision to expel the applicant from party membership wouldn't have been made, if the applicant wasn't a member of the party in the first place.

Besides, having perused the respondent's counter affidavit, I agree with Mr. Mchau's contention that the dispute as to the date the applicant joined the party is nothing but a submission from the bar. It is nowhere founded in the counter affidavit, hence the same is disregarded.

For the above reasons, therefore, it is my considered position that the applicant was a member and the National Chairperson of NCCR Mageuzi prior to the impugned decision of the Congress.

The main question in this application is whether the applicant was denied his right to be heard by the Congress. No doubt, this is the crunch issue given the position taken by the Court of Appeal in a plethora of its decisions when right to be heard was adjudged to be infringed. In **Onesmo Nangole vs Dr. Steven Lemomo Kiruswa**, Civil Appeal No. 129 of 2016, CAT at Arusha (Unreported) the Court of Appeal quoting its previous decision in **Abbas Sherally and Another vs. Abdul Sultan Haji Mohamed Fazalboy**, Civil Application No. 133 of 2002 CAT at DSM, stated that the right to be heard before an adverse action or decision is taken against a party is so basic that a decision arrived at in its violation will be nullified, even if the same decision would have been reached had the party been heard.

It is the applicant's main grievance that, the Congress denied him right to be heard on his defence. In his oral submsison, Mr. Mchau echoed his client's complaint that he was not served with a notice of the Congress meeting of 24th September, 2022 until on 30th September, 2022, an assertion which is strongly denied by the respondent. The latter's position is that the applicant was aware of, not only the Congress meeting but also the allegations or charges made against him. The respondent asserts, in the counter affidavit, that the applicant chose to make no show knowingly,

having been served since 20th September, 2022 with a summons to appear. The respondent's contention is that the applicant's lamentation be dismissed because the right to be heard was afforded to him but he freely chose not to exercise it.

Some pertinent arguments as to whether or not the applicant was aware of the Congress meeting and the allegations facing him have been raised by both Counsel. On one hand, Mr. Muhangwa finds as a mere hearsay the applicant's averment that he received late the notice of the Congress meeting. He seeks back up in the decisions in **John Chuwa vs. Anthony Ciza**; and **Sebana Technics Dar Ltd vs. Michael J. Luwunzu**, (supra) and on the fact that Agrey Lwesha, who received the mail, did not swear an affidavit to corroborate what was averred by the applicant. Surely, it is the position of the law that when a matter is attributed to have been acted upon by another person in an affidavit of one person, that other person's affidavit must also be produced to corroborate what is stated about him.

However, Mr. Mchau seemed to distinguish the above legal position by these two arguments: **Firstly**, that the EMS receipt attached to the affidavit is sufficient evidence to prove the date of delivery of the summons. According to him, the stamp affixed on the envelope of the summons clearly shows the date the mail was delivered, hence no need for a corroborating

affidavit of Agrey Lweshu. And, **secondly**, his counterpart's argument pressing for a supporting affidavit of Agrey Lweshu, is untenable for being a mere statement from the bar.

I agree with Mr. Mchau on both points above. While the position of the law stated in the case of **John Chuwa vs. Anthony Ciza** (supra) and **Sebana Technics Dar Ltd vs. Michael J. Luwunzu**, (supra) remains true, I think, in this particular situation, where the controversy is merely on the date on which the summons was delivered to the applicant by Agrey Lweshu, the applicant's affidavit which states that fact and the envelope of the said summons being attached, bearing a stamp that shows the date of delivery and the receipt to that effect, sufficiently prove the date when the mail in question was finally delivered to the applicant. In so holding I am mindful of the fact that in these types of matters a preponderance of probability suffices to prove a fact.

My position above is also influenced by the evidence relied upon by the parties, which is the sworn averments in paragraph 8 of the applicant's affidavit *vis a vis* paragraph 8 (iv) of the counter affidavit. While the applicant avers that it was on 30th September, 2022 when he received the summons to appear before the Congress, the respondent avers that the applicant was aware of the Congress meeting as far back as 20th September, 2022 when

he was allegedly served with the summons by Rajabu Kazimoto. In such a situation, my remit is to determine whether the burden of proof has been discharged by a party on whom it lies.

Since the issue at hand is whether the applicant was afforded his right to be heard or not, the burden of proof lies on the respondent. This is because while the applicant asserts that he was not afforded that right, the respondent asserts that the same was availed but the applicant didn't take it. It is not in dispute that in this matter the respondent had a duty to afford the applicant right of hearing before it made the impugned decision. Section 111 of the Evidence provides, in this regards, thus;

"111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side".

And, while the respondent's submission is intended to show the Court that the respondent did avail the applicant with a right of hearing, Section 110(2) of the Evidence Act, further guides thus:

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person".

In law, no one can be tasked to prove a negative assertion or non-existence of a fact because a negative is usually incapable of proof. (See **Sarkar's Law of Evidence**, 13th Edition at page 908). In the case of **Dr.**

A. Nkini & Associates Limited vs National Housing Corporation, Civil

Appeal No. 72 of 2015, CAT at DSM, the Court of Appeal held thus:

"The law is settled that he who wants the court to consider that a certain fact exists, has the duty to adduce evidence to that effect."

That being the position of the law, the applicant cannot be called to prove his negative assertion that he was denied the right to be heard. Hence, that burden automatically shifts to the respondent who asserts otherwise.

It also follows from the above deliberations that, since it is the respondent who wants the Court to believe that the applicant was timely served with the summons but refused to appear, the burden of proof lies on her in view of the provision of Section 112 of the Evidence Act, which states:

"112. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person". [Emphasis added].

As it stands, the only evidence to be relied upon by the respondent is the counter affidavit sworn by Beati Mpitabakana, particularly paragraph 8(iv) which makes reference to the affidavit of Rajabu Kazimoto. The latter avers in paragraph 3 and 4 that on 15th September, 2022 he was given a

letter with No. NCCR-M/KM/22/13 dated 19th September, 2022 to serve upon the applicant and that he delivered the same to the applicant. In paragraph 5, he describes the applicant's reaction after delivering the said letter to him. He states:

"5. After opening and read it, he asked me a question of what if he says he has not received the letter; I asked him to sign a dispatch but refused; he ask me to send him by EMS; I asked him to return back the letter but refused; he asked his boy to suck me out; but before he came I took my way to the office".

The above averment constitutes the entire proof by the respondent that the applicant was availed, by the Congress, his right to be heard but refused to take it up. In other words, this is what the Court is asked to consider to come up with a conclusion that the respondent has discharged her duty to prove that the applicant slept on his right.

In his reply to the counter affidavit, the applicant labels the averments by Mr. Kazimoto as mere lies. It will be recalled that the applicant averred in his affidavit that he was served with the summons on 30th September, 2022 via EMS. Now, since, there is no any other evidence to show that what is averred by Mr. Kazimoto is not lies, the Court has to assess the evidential value of what he has deponed. In the famous case of **Goodluck Kyando**

vs Republic [2006] T.L.R 363, the position of the law was stated that every witness deserves credence, unless proved otherwise. It should be stated here that an affidavit is a substitute of oral evidence.

Annexure **NCCR -2** to the respondent's counter affidavit, which is a letter with Ref. No. NCCR.M/KM/22/05 dated 30th May, 2022 addressed to the applicant, bears the charges or allegations the applicant was facing. The first count is "*Kupuuza Maazimio Halali ya Vikao vya Chama*", which literary means Neglecting Lawful Resolutions of Party Meetings. It is alleged that the applicant neglected the decision of NEC meeting held in February, 2020 by appointing some Regional Commissioners of the party other than those appointed by NEC.

Of interest, the first person whose appointment was allegedly neglected by the applicant, according to the list supplied, is Rajabu Kazimoto, who was to be the party Regional Commissioner for Dar es Salaam. It is unfolding that this is the same person as the deponent of the affidavit in question who has described himself in paragraph 1 therein as the Dar es Salaam Regional Commissioner of the party. Given this fact, Mr. Rajabu Kazimoto whose previous appointment by NEC aborted in the hands of the applicant, cannot avoid to be deemed as a conflicted witness and his

averments have to be taken with a pinch of salt. For this reason, it will be dangerous to take his averment as the whole truth.

Secondly, it is evident that via annexure **JFM -7** the respondent served the applicant by EMS on 30th September, 2022, which connotes that even the respondent was not sure of the first service allegedly done by Mr. Kazimoto on 20th September, 2022. It follows, therefore, that the Congress met on 24th September, 2022, being (5) five days before the applicant was served with a notice to appear and defend himself before it.

As a consequence, the Court holds the view that the assertion by the respondent that the applicant was afforded his right to be heard but refused to exercise it, is unproved. The burden of proof placed on the respondent by sections 111 and 112 of the Evidence Act, has not been discharged. Hence, the first issue as to whether the applicant was denied right to be heard before the decision was made by the Congress to remove him from his position as the party's National Chairperson and revoke his party membership on 24th September, 2022 is answered in the affirmative.

As correctly submitted by Mr. Mchau, sub-Article (4) of Article 10 of the party's constitution grants party members the right to be heard as "*Haki za Wanachama*", translated as "Rights of party members". Sub-article 4 partially quoted hereunder clearly provides:

"Kuwa na haki ya kujitetea mbele ya kikao cha Chama kinachohusika katika mashtaka au madai yoyote...."

(Literary translated as, to have the right to defend oneself before a relevant party meeting against any charge or allegation).

The provision of sub-Article (4) of Article 10 of the party's constitution was apparently not observed in this matter. Likewise, the right to be heard which is sanctioned by the URT Constitution under sub-Article (6)(a) of Article 13 was transgressed. The latter provision requires that in determining the rights and duties of any person, that person shall be entitled to a fair hearing, among other rights. In this case, the applicant was not afforded a hearing at all.

Along the way, sub-section (5) of section 6C of the Political Parties Act [Cap 258 R.E 2019] was also violated. With regard to revocation of the applicant's party membership, sub-section (5) of section 6C emphatically states that:

"(5) A member of a political party shall not be expelled from the party unless due processes prescribed in the party constitution has been complied with".

I have stated above that the constitution of NCCR Mageuzi granted the applicant the right to defend himself before the Congress against the allegation or charges levelled against him. It goes without saying that, since

that constitutional due process was not observed, the provision of subsection (5) of section 6C of the Political Parties Act, [Cap 258 RE 2019] was also violated.

Now, having determined the first issue as above, the second issue on whether the reasons for the impugned decision were unfounded, unreasonable and unjustified or not, is rendered inconsequential. Besides, for the reasons which will be revealed in due course, there is no need to deliberate on this second issue.

The third issue is on consideration of the applicant's prayers. In his chamber summons the applicant seeks three prerogative orders of *mandamus*, *certiorari* and prohibition against the respondent in respect of the impugned decision.

There are, however, two observations to be considered before granting the applicant's prayers.

Firstly, with the exception of the order of prohibition which apparently relates to prayer **(a)(iii)** in the chamber application, it is not clearly provided in prayers **(a)(i)** and **(ii)** why the order of *Mandamus* is being craved. According to S.A. DE Smith, **Judicial Review of Administrative Actions**, 3rd Edition, page 490, an applicant of the order of *mandamus* must have a specific legal right to enforce. None has been specifically pleaded as per

proceedings of this application. Under such circumstances, I find no justification to grant the order of *mandamus*.

Secondly, in the course of writing this Ruling, on 7th April, 2025, the respondent wrote the Court a letter with Ref No. NCCR-M/MM/BW/025/04 notifying us that on 29th March, 2025 and 30th March, 2025 the Congress and NEC respectively met, appointed new leaders including the National Chairperson, and thereafter notified the Registrar of Political Parties about the new leadership and secured the Registrar's full endorsement. Documentary proof of those meetings, names of new leaders and the Registrar's endorsement were furnished both to the Court and the applicant's Counsel. In light of this development, I found it reasonable to avail both parties an opportunity to address the court on the following two issues: Firstly; *Whether the Court can entertain such information at this stage of the proceedings where the Ruling is pending for delivery? And secondly; whether, as contended therein, this matter is overtaken by events and it should be dismissed to enable the applicant sue appropriate parties; namely, the Registrar of Political Parties and the new leadership of the Party.*

In their oral submission on 26th May, 2025, Mr. Faustin Sungura Head of Legal Services for the respondent was of the view that this Court can rightly receive and consider the letter submitting new development prior to

the delivery of its Ruling. He was also emphatic that owing to the new development, the application before the court is overtaken by events in view of Article 36(3)(o) of the party's constitution and section 8(1) of the Political Parties Act, [Cap 258 R.E 2019]. In his view, it was in good order for this Court to have the application dismissed to allow the applicant sue the appropriate parties who are the new party leadership and the Registrar of Political Parties.

In opposition to that proposition, Mr. Jeremiah Mtobesya, who took over from Mr. Hardson Mchau as the counsel for the applicant, was of the view that since the matter was already set for Ruling, no new matter could be entertained at this stage since the Court is *functus officio*. He also despised it for being brought by way of a letter addressed to the presiding Judge seeking the Court to re-consider its ruling which is supposed to be based on facts presented by way of affidavits.

And, as regard the second supplementary issue, Mr. Mtobesya was of the view that this matter has not been overtaken by events because what the applicant seeks from the Court are the orders specified in the chamber application, particularly the order of *certiorari* against an act of the applicant that occurred on 24th September, 2022. In general, Mr. Mtobesya called upon the Court to consider itself *functus officio*, reject the respondent's new

matters brought by way of a letter and proceed to render its ruling on the matter it has already heard.

Having considered the parties' submissions and court practice in commonwealth jurisdictions where we belong, I am of the position that this court can entertain a post-hearing pre-ruling argument as a matter of its discretion where administration of justice so demands. In **Bibi Kisoko Medard vs. Minister for Lands, Housing and Urban Development and Another** [1983] TLR 250, this court held to the effect that a court becomes "*functus officio*" once a decision has been reached and made known to the parties. Under such circumstances, the court or tribunal could not sit in judgement of its own decision as it ceases to be seized of the case and cannot re-open it for any purpose whatsoever.

The doctrine of *functus officio* as I understand it, is about finality in litigation relative to final judgments or orders. My humble view is that since there was no ruling or final order in the matter at hand, this court is very much in charge of the affairs of the case at this stage. As the learned counsel would agree, it is not uncommon in our jurisdiction for courts to open up hearing for further clarification or information, or to recall witnesses prior to final disposition of cases.

Having set the above clarification, there is another significant question to be considered. This is whether it was proper for the respondent to move the Court by a letter? On this argument, I agree with Mr. Mtobesya that the Court cannot be moved this way because the law doesn't provide so. Consequently, I disregard the content of the respondent's letter henceforth.

Reverting to the remaining prayers in the chamber application, it has been my key finding that the decision of the Congress to revoke the applicant's membership and remove him from party National Chairmanship was done in contravention of the principle of natural justice, particularly the denial of right to be heard. It is also my further finding that the impugned decision transgressed the provisions of Article 13(6) of the URT Constitution, Article 26(3)(o) of the constitution of NCCR Mageuzi and section 8(1) of the Political Parties Act, [Cap 258 R.E 2019].

Since it is the firm position of the law as stated in **Onesmo Nangole vs Dr. Steven Lemomo Kiruswa** (supra) and many other authorities, that a decision rendered without observing the principles of natural justice has to be quashed even if same decision would have been reached had the complainant been heard, I grant the order of *certiorari* to quash the decision of the Congress dated 24th September, 2022 for unlawfully revoking the applicant's membership in the Party and expelling him from his position of

the National Chairperson without adhering to the principle of natural justice, that is, the right to be heard.

As for the order of prohibition, I find it speculative in that there has been no averment in the applicant's affidavit to back up this prayer.

In the end, this application succeeds to the extent indicated herein above. Costs to follow events.

Dated at Dodoma this 28th day of May, 2025.



A handwritten signature in blue ink, appearing to be "A.S. KAGOMBA", written in a cursive style.

A.S. KAGOMBA

JUDGE