IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM MAIN REGISTRY

AT DAR ES SALAAM

MISCELLANEOUS CIVIL CAUSE NO. 17 OF 2022

IN THE MATTER OF THE CONSTITUTION OF THE UNITED REPUBLIC OF

TANZANIA 1977 AS AMENDED FROM TIME TO TIME [CAP. 2 R.E. 2002]

AND

IN THE MATTER OF ARTICLE 107A (1) OF THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA 1977, AS AMENDED FROM TIME TO TIME.

AND

IN THE MATTER OF ARTICLE 108 (2) OF THE CONSTITUTION OF THE

UNITED REPUBLIC OF TANZANIA 1977, AS AMENDED FROM TIME TO TIME

AND

IN THE MATTER OF A CONSTITUTIONAL PETITION TO CHALLENGE THE

CONSTITUTIONALITY OF SECTION 37 OF THE IMMIGRATION ACT CAP 54 R.E. 2016

BETWEEN

PRISCA NYANG'UBA CHOGERO ..... APPLICANT

AND

THE ATTORNEY GENERAL OF
THE UNITED REPUBLIC OF TANZANIA ..... RESPONDENT

RULING

MANGO, J.

By way of originating summons made under Article 108 (2) of the Constitution of the United Republic of Tanzania, and section 2(3) of the Judicature and Application of Laws Act, [Cap. 358 R.E 2019], the petitioner prays for the following reliefs: -

(a) Declaration that the provision of section 37 of the Immigration Act, [Cap 54 R.E 2016] are unconstitutional for offending Article 107 A (1) of the Constitution of the United Republic of Tanzania of 1977 as amended.

(b) That the provisions of section 37 of the Immigration Act [Cap 54 R.E 2016] be declared null and void and be expunged from the statute.

(c) Each party bears its own costs.

The petition is supported by an affidavit sworn by the Petitioner containing grounds for this petition. The Respondent contested the petition and filed a counter affidavit affirmed by Salum Othman, Immigration officer, employed in the Immigration department under the Ministry of Home Affairs.

The petitioner's ground of the petition as stated in his originating summon is that, the Immigration Act derogates Court's power to conduct an inquiry on the decision of Minister in the exercise of his appellate authority over the decisions of the Commissioner General of the Tanzania Immigration Services Department (Commissioner General) on issues pertaining to Residence permits. The Immigration Act empowers the Commissioner General to issue residence permits subject to the condition set for particular classes of permits and to vary the conditions or period of validity of a specified permit. The Commissioner General is also vested with powers to refuse an application for resident permit, variation or change of conditions of the permit or its validity period.

The main concern of the Petitioner is the inclusion of a derogation clause in section of 37 of the Immigration Act which ousts the Courts power to conduct inquiry on the decision of the Minister in appeals from the decision of Commissioner General. The clause provides that, the decision of the Minister on such appeals shall be final and not subject to inquiry by any court of law.

In his reply to petition the Respondent conceded on the wording of the disputed provision and powers vested in the Commissioner General and Minister. The Respondent is of the view that, despite such wording, the Minister's decision is challengeable in the ambit of the law.

Hearing of the petition was conducted by way of written submission. The Petitioner was represented by two learned counsels, Advocate Joan Ashisa Ndosi and Advocate Melchzedeck Joachim from Legal and Human Right Centre while Respondent was represented by Daniel Nyakiha, learned State Attorney from the office of Solicitor General.

In their submission, the Petitioner's counsels submitted that the crux of the matter is the impugned provision of section 37 of the Immigration Act, here in referred to as the Act. The Act was enacted in 1998 and it has undergone several revisions, with the latest revision being that of 2016. They submitted that, the Act vests the power to issue resident permits in the Commissioner General of the Tanzania Immigration Services Department. The Commissioner General also has powers to vary the conditions or period of validity of a specified permit and can refuse an application for a resident permit. They submitted that the Applicant has no issue with the said powers of the Commissioner General. According to them, the main issue in this application is the ouster clause contained in section 37 of the Act. They submitted that, section 37 of Act provides that any person aggrieved by the decision of the Commissioner General refusing to grant a permit or varying conditions or period of a permit may appeal to the Minister, and the decision of the Minister on that appeal shall be final and not subject to inquiry by any court of law.

It is their argument that in essence, the impugned provision creates an ouster clause that in effect, seeks to oust the jurisdiction of the courts from conducting any inquiry against the decision of the Minister. They cited the case of **Attorney General versus Lohay Akonaay and Another** [1995] TLR 80, (at page 93) in which the court clearly stated the effect of a statute which ousts the court's jurisdiction;

> *"What we do not agree is that the Constitution allows the courts to be ousted of jurisdiction by conferring exclusive jurisdiction on such quasi-judicial bodies...wherever the Constitution establishes or permits the establishment of any other institution or*

body with executive or legislative or judicial power, such institution or body is meant to function not in lieu of or in derogation of the central pillars of the State, but only in aid of and subordinate to those pillars. Since our Constitution is democratic, any purported ouster of jurisdiction of the ordinary courts to deal with any justiciable dispute is unconstitutional. "

They also cited the case of **James Gwagilo versus Attorney General** [1994] TLR 73, (page 86) to back up the above position.

They submitted further that, apart from violation of Article 107A (1), the impugned provision deprives of individuals from the right to be heard and fair hearing, which is a paramount right that has been enshrined under Article 13(6)(a) of the Constitution of the United Republic of Tanzania. They referred to different authorities including the case of **Pili Ernest vs Moshi Musani**, Civil Appeal No. 39 of 2019, Court of Appeal of Tanzania at Dar es Salaam, in which the court had this to say;

"The right to be heard is one of the fundamental constitutional rights as it was religiously stated in the case of Mbeya-Rukwa (Supra at page 265 thus: In this country, natural justice is not merely a principle of the common law, it has become a fundamental constitutional right. Article 13(6)(a) includes the right to be heard among the attributes of equality before the law..."

They submitted that, what can be gathered from the above cases is that the impugned provision absolutely violates the right to be heard and access justice before the courts of law, and thus, they are deprived of

effective remedy in cases where justice is occasioned by the administrative actions. They added that it, has been stated that, a law which limits the enjoyment of individual's right must meet the test set in the case of **Kukutia Ole Pumbuni and Another vs AG and Another** [1993] TLR 159 at page 161 where it was stated that: -

> *"A law which seeks to limit or derogate from the basic right of the individual on grounds of public interest will have special requirements; first, such laws must be lawful in the sense that it is not arbitrary. It should make adequate safeguards against arbitrary decision and provide effective controls against abuse by those in authority when using the law. Lastly the limitation imposed by such law must not be more than is reasonably necessary to achieve the legitimate object. That is what is also known as proportionality test".*

They submitted further that, legislation can be declared void under article 64(5) of the Constitution which provides that,

> *"Without prejudice to the application of the Constitution of Zanzibar in accordance with this Constitution shall have the force of law in the whole of the United Republic, and in the event any other law conflicts with the provisions contained in this Constitution, the Constitution shall prevail and that other law, to the extent of the inconsistency with the Constitution, shall be void."*

It is their further submission that, where any law conflicts with the provisions contained in this Constitution, the Constitution shall prevail and

that other law, shall be void to the extent of the inconsistency with the Constitution. The court in such circumstances is enjoined to declare the said law void and strike out the law as held in the case of **Attorney General versus Lohay Akonaay and Another** [1995] TLR 80.

They concluded by citing article 64(5) of the Constitution and stated that the impugned provision is void and liable to be struck down from the statute book without affording the government or legislature time to amend them. They argued that, if the disputed provision will be struck down nothing will be distorted in the control of the immigration regime, the only effect is that the process will be more transparent and fair to everyone.

In his reply submission, Mr. Nyakiha learned State Attorney submitted from the outset that section 37 of the Immigration Act is in line with the provisions of the Constitution. According to him, the impugned provision does not contravene article 107 of the constitution rather, it complements the protection of right to be heard and freedom of law.

He reproduced the provision above cited and added that, any foreigner intending to reside in the United Republic of Tanzania for investment, business, employment or any other legal activity may be issued with Residence Permit.

He argued that, in its literal meaning, the provisions of section 37 concerns applications for permits (residence permit) by the foreigner. He stated that, permits are sought by the people who are not residents of United Republic of Tanzanian. There is no point that a resident of Tanzania will be required to seek a resident permit in Tanzania. This alone suffices to say that the applicability of the section 37 is not intended for the

Citizens of United Republic of Tanzania but rather foreigners who apply for residence permits.

He argued further that, the provision cannot be said to have limited Tanzanians from accessing the Court for redress. He quoted the preamble to the Constitution of the United Republic of Tanzania and added that, the relevant issue in this matter is whether the Constitution of the people of United Republic of Tanzania covers Foreigners, who have been referred under section 37 of the Act.

He submitted that, Article 107A (1) concerns the citizens of the United Republic of Tanzania while section 37 of the Act, from its literal meaning, deals with foreigners who apply for Residence permits. The learned State Attorney is of the view that, since the two provisions deal with two different category of persons, section 37 of the Act cannot be considered to have violated article 107A (1) as argued by the Petitioner's advocates.

He submitted further that, in its totality, the impugned section, meets the test of proportionality, legitimacy and lawfulness as it was held in the case of **Attorney General versus Dickson Sanga**, Civil Appeal No.175 of 2020 [202] TZCA 371. He is of the view that, the disputed provision does not oust any jurisdiction of the court within the ambit of our Constitution.

The learned State Attorney also pointed out the settled position of the law in this aspect. He submitted that, in modern Jurisprudence it is settled position of law that, for any person who has been aggrieved by any administrative action the remedy is to seek judicial review. To cement his argument, he cited the case of **Sanai Mirumbe and Another v Muhere Chacha,** [1990] TLR 54. In the cited case, the Court enumerated grounds for recourse on certiorari as follows:

"The High Court is entitled to investigate the proceedings of a lower court or tribunal or public authority on any of the following grounds apparent on the record;

(a) Taking into account matters which it ought not to have taken into account;

(b) Not taking account matters which, it ought to have taken into account;

(c) Lack or excess of jurisdiction;

(d) Conclusion arrived at is so unreasonable that no reasonable authority could ever come to it;

(e) Rules of natural justice have been violated

(f)Illegality of procedure or decision."

He then referred to Article 26(2) of the Constitution which provide as that:

"Every person has the right, in accordance with the procedure provided by law, to take legal action to ensure the protection of this Constitution and the laws of the land"

He concluded that, with such provisions that guarantees access to Courts section 37 of the Immigration Act cannot be considered to violate Article 13(6) (a) of the Constitution.

In rejoinder Ms. Ndossi and Mr. Joachim reiterated their submission in chief and responded on the issue whether the Immigration Act was intended to serve only foreigners.

They referred to Article 64. -(1) of the Constitution of United Republic of Tanzania,

"Legislative power in relation to all Union Matters and also in relation to all other matters concerning Mainland Tanzania is hereby vested in Parliament"

They submitted that the legislature enacts laws that will impact its territorial jurisdiction, therefore binding every person who enters and operates within the said territorial jurisdiction. They referred to sections, 31, 32, 33, 34, 35 and 36 of the Act and stated that, the provisions are not impacting the new Applicants for the resident permit but also those who wish to renew their permits. It is very unfortunate that, the aforementioned provisions are connected to investment legislation which means it involves capital and job opportunities to the citizens of the United Republic and yet at any time the commissioner general can revoke the permits by written notice under his hand and the appeal procedure will end at the Minister's desk with no laid down procedure on how the appeal will adhere to Article 13(6) of the constitution. The worst part is that, the decision of the Minister will be final and the court will not be able to inquire into correctness or fairness of the decision of the Minister.

They submitted further that, the Constitution of the United Republic of Tanzania contains a bill of rights that was incorporated in 1985 through the Fifth Constitutional Amendment. The bill of rights enshrined within it Human Rights, and not just citizens' rights. He referred to the case of **Director of Public Prosecution v Daudi Pete** [1993] TLR 22 and stated that, in light of the above case, it is clear that the Constitution of the United Republic of Tanzania finds no distinction in its application basing on the grounds of citizenship nor nationality, but the rights contained therein are enjoyable by both the citizens and non-citizens, save where expressly stated otherwise. Thus, the argument that section 37 of the Act is intended to apply only to incoming foreigners is not correct.

Replying on the issue whether the limitations by the impugned provision are saved by Article 30 (2) of the Constitution of United Republic of Tanzania, they submitted that, the provision is unlawful in a sense that it restricts individuals from effectively being heard on their cause in the court of law. Moreover, the provision has no safeguards nor exception to which an individual can rely upon to access the courts of law. Lastly, the restriction of access to justice and ousting of the jurisdictions of the courts which are Constitutionally allowed under Article 107A (1) to dispense justice are not necessary in any democratic society, including Tanzania.

They argued that, Article 30(2) of the Constitution of the United Republic of Tanzania, 1977 holds the limitations for the restriction of the fundamental rights. The Respondent has submitted to have relied on the derogation clause and it was upon the Respondent to explain how the impugned provision are meant to protect and or ensuring the defence, public safety, public peace, public morality, public health as is required by Article 30(2) of the Constitution of the United Republic of Tanzania.

In his conclusion he prayed that this court finds that Section 37 of the Immigration Act is unconstitutional and grant the prayers in the petition.

I am grateful for lucid submissions by the parties to this petition. The issue for determination here is ***whether section 37 of Immigration Act violates the provision of section 107A (1) of the Constitution of the United Republic of Tanzania of 1977 as amended***. If response to this issue will be in affirmative, then the Court will assess if the provision can be served by article 30(2) of the constitution and later determine remedies to the parties.

From the submissions made by the parties, challenges posed against section 37 of the Immigration act finds its roots in the last statement of

the provision which sounds like limiting access to Court for those who are aggrieved by the decision of the Minister. The section reads: -

> *"Any person aggrieved by any of the decisions of the Commissioner General refusing an application for the residence permit or varying the conditions or period of validity specified in the permit may appeal to the minister against the decision and* ***the decision of the Minister shall be final and shall not be subject to inquiry by any court of law****." (emphasis added)*

The phrase "*...shall be final and shall not be subject to inquiry by any Court of law*" is the basis of the matter at hand. The petitioner is of the view that, such words contravene the Provisions of Article 107A (1) of the Constitution of United Republic of Tanzania which reads: -

> *"The Judiciary shall be the authority with final decision in dispensation of justice in the United Republic of Tanzania."*

Article 107A (1) of the constitution provides expressly and boldly that, the only institution which can have final decision in dispensation of justice is the Judiciary. In that regard, any provision that tend to limit jurisdiction of the Court in dispensation of justice may literally be considered to be unconstitutional. Section 37 of the Immigration Act provides that, the decision of the minister shall not be subject to any inquiry by the Court. Plainly, the section makes the minister's decision to be final and limits persons aggrieved by such a decision from approaching the Court through Judicial Review. Access to Court is a fundamental right in any country that respects human right. In insisting the importance of right to access courts of law, the Court in the case of **Julius Ishengoma Ndyanabo versus Attorney General** [2004] TLR 14 had this to say;

"Access to Court is undoubtedly a cardinal safeguard against violation of ones right, whether those rights are fundamental or not. Without that right, there can be no rule of law and no democracy. A Court of law is the last resort of the oppressed and be wildered"

However, before I declare section 37 of the Immigration Act to be unconstitutional, it is prudent to assess the practical effects of the limitations contained therein. In other words, it is important to assess whether the words, *the decision of the minister shall be final and shall not be subject to inquiry by the Court*, can limit those aggrieved by such a decision from accessing the Court for prerogative orders. The gist of this assessment is to make sure that, the Court is not merely dealing with academic exercises rather it deals only with issues that concern administration of justice.

The Court have in several times dealt with laws with similar wordings and it is a well settled position of law that, in our jurisdiction that, the words that reflects finality of administrative decisions, shall not limit access to the court for prerogative remedies. In the case of **Tanzania Air Services Ltd versus Mister for Labour, Attorney General & amp; The Commissioner for Labour** [1995] TZHC (131) (22May 1995) the Court held that: -

"Although a decision of the Minister or Commissioner under s. 26 of the Act is, according s 27(1), cited supra, final and conclusive, that does not mean the decision is not subject to review by courts. That remedy is not excluded by those or similar words. No appeal will lie against decisions protected by such words or phrases, but an aggrieved party may come to this Court and ask for prerogative orders."

In the same view I find the words that the decision of the minister is final by itself does not oust the jurisdiction of the Court since an aggrieved party may still access the Court through judicial review. However, the impugned provision did not end with the word 'final' which has been considered to have no limitations to the aggrieved party to access the Court via Judicial Review. The last sentence of the provision contains a phrase *"... shall not be subject to inquiry by any court of law."* I found it necessary to check whether the word inquiry includes Judicial Review.

According to Black Law Dictionary, judicial review means, Courts power to review the actions of other branches or levels of Government especially the courts power to invalidate legislative and executive actions as being unconstitutional. Review is defined to mean consideration, inspection, or re-examination of a subject or thing. *see Black's Law dictionary 9th edition page 924 and 1434 respectively.*

The words "inspection", "consideration" and "re- examination" are synonymous to inquiry. In that regard, the phrase *"...not subject to inquiry by any Court"* ousts the jurisdiction of the courts to review the decision of the Minister issued under section 37 of the Immigration Act. It also makes the Minister's decision final and conclusive on both factual, procedural and legal issues. The effects of express words ousting the jurisdiction of the Court were discussed in the case of **R V Medical Appeal Tribunal**, *ex parte Gilmore* [1957]1QB 574 (CA) in which the Court held that: -

> *"I find it very well settled that the remedy by certiorari is never to be taken away by any statute* ***except by the clearest and explicit words****. The word "final" is not enough. That only means "without appeal." It does not mean "without recourse to certiorari." It makes the decision final on the facts, but not final on the law. Notwithstanding*

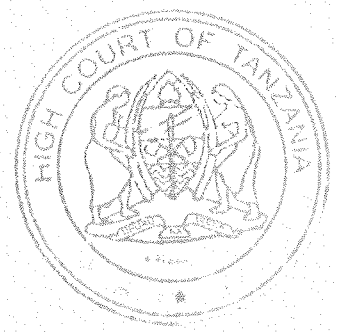
that the decision is by a statute made "final," certiorari can still issue for excess of jurisdiction or for error of law on the face of the record..."

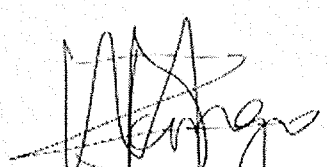
I am of a considered view that the phrase "*...shall not be subject to inquiry by any Court*", expressly and clearly limits access to Court remedies for those aggrieved by the decision of the Minister under section 37 of the Immigration Act. By so doing, it makes section 37 of the Immigration Act contravene the provision of Article 107A (1) of the Constitution of United Republic of Tanzania.

For that reason, section 37 of the Immigration Act is hereby declared unconstitutional to the extent expressed in this Judgement. The Government is directed through the Attorney General to correct the anomaly complained of within twelve months from today. Given the fact that this is a public interest litigation, no costs are awarded. Each party should bear its own costs.

It is so ordered

Dated at Dar es salaam this .....18th..... day of December 2023





Z. D. MANGO

JUDGE