IN THE HIGH COURT OF TANZANIA
(MAIN REGISTRY)

AT DAR ES SALAAM

(CORAM: EBRAHIM, MASOUD, AND MASABO JJJ.)

MISC. CIVIL CAUSE No. 33 OF 2019

PAUL REVOCATUS KAUNDA.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

13/08/2020 & 14/12/2020

Masoud, J.

We are to determine whether the provision of section 8(3) of the Basic Rights and Enforcement Rights Act, Cap. 3 R.E 2019 is unconstitutional for violating articles 13 (2) & (3), 26 (1) & (2) and 30 (3) & (4) of the Constitution of the United Republic of Tanzania (the Constitution). The impugned provision requires this court to dismiss every application challenging constitutionality of proposals contained in any Bill on the grounds of their likelihood of infringing articles 12-29 of the Constitution.

The provision, according to the petitioner, prohibits an aggrieved person from challenging the constitutionality of proposals in a bill which are, in

his view, likely to infringe his constitutional rights guaranteed under articles 12 up to 29 of the Constitution. The impugned provision reads thus:

> *'S.8(3) The High Court shall dismiss every application brought under this Act which it is satisfied is brought only on the grounds that the provisions of sections 12-29 of the Constitution are likely to be contravened by reasons of proposals contained in any Bill, which at the date of the application has not become a law.'*

The provisions of the Constitution alleged by the petitioner to be infringed by the impugned provision are, as mentioned above, found under articles 13 (2) & (3), 26 (1) & (2) and 30 (3) & (4) of the Constitution. The said provisions read thus, and we hereby quote as follows:

> *'13(2) No law enacted by any authority in the United Republic shall make any provision that is discriminatory either of itself or in its effect.*
>
> *(3) The civic rights, duties and interests of every person and community shall be protected and*

determined by the courts of law or other state agencies established by or under the law.

26(1) Every person has the duty to observe and to abide by this Constitution and the laws of the United Republic.

(2) 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.

30(3) Any person claiming that any provision in this Part of this Chapter or 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 the United Republic, may institute proceedings for redress in the High Court.

(4) Subject to the other provisions of this Constitution, the High Court shall have original jurisdiction to hear and determine any matter brought before it pursuant to this Article; and the state authority may enact legislation for the purposes of -
(a) regulating procedure for instituting proceedings pursuant to this Article;

(b) specifying the powers of the High Court in relation to the hearing of proceedings instituted pursuant to this Article; and

(c) ensuring the effective exercise of the powers of the High Court, the preservation and enforcement of the rights, freedoms and duties in accordance with this Constitution.'

We are aware that the impugned provision has never before been a subject of constitutional judicial scrutiny. The only nearest attempt was in **Zitto Zuberi Kabwe and Others vs Attorney General**, Misc. Civil Cause No. 31 of 2018. In this case, however, the issue as to the unconstitutionality of the impugned provision was not determined as the case was disposed of on a preliminary point of objection.

Nonetheless, in **Zitto Zuberi Kabwe case**, by way of obiter, the court had it that challenging a Bill which is yet to become law may require looking into whether there are adequate means of redress available to the petitioners that can prevent the likelihood of violation of the Constitution. Considering the context of the case, we think the court was mindful of the mandate of the parliament in the legislation process, the parliamentary stages that a Bill passes before it becomes law, and the parliamentary debates that inform potential modifications of the Bill,

which may, as a result, save to address various concerns raised against proposals contained in the Bill before it becomes law.

The provisions of the Constitution which the impugned provision is said to infringe, and which we reproduced herein above, speak for themselves. Worth noting is that the provisions have been a subject of judicial scrutiny in a number of cases which we need not mention all of them here. To start with, article 13(2) prohibits enactment of any law which is discriminatory directly or discriminatory in effect. As to article 26(1) & (2), it requires every person to observe and abide by the Constitution and the laws of the United Republic, and to take legal action to protect the Constitution and the laws of the land.

With regard to article 30(3), it opens the gate to this court for any person who is aggrieved by any violation or threatened violation of his right or duty under the Bill of rights to institute proceedings for redress. Thus, any allegation by any person that his fundamental right or duty owed to him has been, or is likely to be violated, is sufficient to disclose a cause of action in cases of this nature.

Thus, in relation to the provision of article 30(3) of the Constitution, the Court of Appeal of Tanzania in **DPP v Daudi Pete** stated that "*... article 30 sufficiently confers original jurisdiction upon the High Court to certain proceedings in respect of actual or threatened violations of the basic rights, freedoms and duties.*" One may also wish to read the decision in the case of **Legal and Human Rights Centre and Two Others vs Attorney General** [2006] TLR 240 for a thorough discussion on these provisions of the Constitution which informed our understanding.

The petitioner was represented by Mr Daimu Halfani, learned Advocate, who filed written submissions on his behalf, and the respondent was represented by Ms Alesia Mbuya, learned Principal State Attorney assisted by Mr Stanley Kalokola, learned State Attorney, who also filed written submission in reply on behalf of the respondent. We thank the learned counsel for both parties for their hard work. Their well-deserved research brought to our attention useful authorities from which we drew inspirations and guidance.

The rival submissions on the record were, seemingly, built on the pleadings and affidavits of the parties on the record which were filed pursuant to article 26(2) and 30(3) of the Constitution and sections 4

and 5 of the BRADEA and rules 4 and 7 of the Basic Rights and Duties Enforcement (Practice and Procedure) Rules, 2014 (G.N No. 304 of 2014). The submissions addressed the issue as to whether section 8(3) of the BRADEA contravenes articles 13(2) & (3), 26(1) & (2) and 30(3) & (4) of the Constitution. The submissions were detailed and lengthy. We need not reproduce them here in full.

The petitioner's submissions could best be summarised and understood in the following manner. In so far as section 8(3) of the BRADEA requires this court to dismiss every application challenging the constitutionality of a proposal contained in any Bill, it infringes article 13(2) of the Constitution which prohibits enactment of a discriminatory law. The impugned provision is also unconstitutional as it prevents exercising the constitutional right of taking legal action in anticipated and possible violation of the bill of rights under the Constitution contrary to article 30(3) & (4) of the Constitution and section 4 of the BRADEA. In so doing, the impugned provision also infringes article 26(1) & (2) of the Constitution which requires every person to observe and abide by the Constitution. By enacting the impugned provision, it was further argued, the legislature breached its duty to observe and to abide by the

Constitution, and thereby taking the protection accorded by the Constitution to itself.

Apart from the above, it was submitted that the argument that Bills are mere proposals is misplaced because parliamentary debates on proposed Bills rarely consider constitutional matters related to proposals contained in a Bill. This argument was only buttressed by reference to the minimum qualification requirements for one to become a member of the parliament under article 67(1)(a) of the Constitution.

According to the counsel for the petitioner the minimum requirements do not augur with capacity needed for holding informed debates on constitutional aspects of any given proposal in a Bill. It was, in this respect, pointed out that under article 67(1(a) of the Constitution, a member of the parliament is only expected to know how to read and write in Kiswahili or English.

In relation to the above argument, it was argued further that proposals contained in Bills proposed in the national assembly by the government and private members of the parliament are likely to contravene the provisions of articles 12 to 29 of the Constitution. Thus, the impugned

provision is, in so far as it denies an aggrieved person the right to challenge proposals contained in a Bill, unconstitutional, and it is against the cumulative effect of the provisions of articles 13 (2) & (3), 26, 30 (3) (4), & (5) and 64 (5) of the Constitution.

We were, in the light of the foregoing, told that a Bill like any other decision or action, may be violative of the Constitution. The immediate question which lingered in our minds is whether a Bill is such an action, which can be said to violate, or threaten violation, of the basic rights under articles 12- 29 of the Constitution. We further wondered as to whether circumstances in such respects were shown in the pleading and affidavit of the petitioner for our necessary deliberations. As we considered these questions, we reflected on articles 97, 100 and 101 of the Constitution which surprisingly were not expressly and forcefully relied on or brought to our attention.

There was, in addition, a flat argument by the counsel for the petitioner to the effect that the petition is meant to prevent wastage of time and public fund spent in Bills which are violative of the Constitution, and which would end up being declared unconstitutional. We had no doubt that this argument was reflective of costs involved in such processes like

the process of legislation, the debates on the Bill, and the parliamentary stages that a Bill passes before it becomes law.

To fortify the afore going submissions, the court was referred to a number of authorities. The case of **Attorney General vs Lesinoi Ndeinai and Another** [1980] TLR 214, where the court underscored the fact that the executive as is the judiciary is entitled or bound to do what the Constitution and the law of the country provide. In the case of **Attorney General vs Rev. Christopher Mtikila** [2010] 1 EA 13, the Court of Appeal emphasized that the court should not disregard clear words of a provision of the Constitution because such undertaking can create anarchy. The other was the case of **Rev. Christopher Mtikila vs Attorney General**, Civil Case No. 5 of 1993 (unreported), which emphasized on the doctrine of separation of power under which the executive, the legislature, and the judiciary are, as far as possible, assigned different duties and enjoined not to trespass into each other's field.

Of significance was the case of **Bahamas District of the Methodist Church in the Caribbean and the Americas and Others vs The Hon. Vernon J. Symonette M.P and 7 Others (Bahamas)** [2000]

UKPC 31. This case was used by Mr Daimu Halfani, the petitioner's counsel, to drive home his submission that where circumstances merit, the court must intervene before a Bill becomes law. It was thus argued that as the consequences of the offending provisions are normally immediate and irreversible and give rise to substantial damages and prejudice to the Constitution, there is need to give full effect to the Constitution by requiring the court to intervene before a Bill becomes law. The relevant part of the decision reads as follows:

> *'The primary and normal remedy in respect of a statutory provision whose content contravenes the Constitution is a declaration, made after the enactment has been passed, that the offending provision is void. This may be coupled with any necessary, consequential relief. However, the qualifying words "so far as possible" are important. This is no place for absolute and rigid rules. Exceptionally, there may be a case where the protection intended to be afforded by the Constitution cannot be provided by the courts unless they intervene at an earlier stage. For instance, the consequences of the offending provision may be immediate and irreversible and give rise to substantial damage or prejudice. If*

such an exceptional case should arise, the need to give full effect to the Constitution might require the courts to intervene before the Bill is enacted. In such a case parliamentary privilege must yield to the courts' duty to give the Constitution the overriding primacy which is its due.'

Conversely, the respondent's submissions in reply were mainly reflected in the following arguments: That, the submission in chief of the petitioner was not in conformity to rule 13(3) of the Basic Rights and Duties Enforcement Rules. The provision of this rule provides a format which the submissions should confine to; and that the provisions of the Constitution alleged to be infringed by section 8(3) of the Constitution are inapplicable in the present petition.

It was further argued that a Bill is a mere draft of a proposed law which is neither enforceable nor capable of conferring any power to any person or organ and can never be acted upon. It was also contended that the provision of article 13(2) of the Constitution alleged to be infringed only prohibit enactment of law, and not a Bill which is likely to be discriminatory. In this respect, it was argued that a Bill does not have any force of law and cannot be said to infringe any rights or freedom

provided in the Constitution. The argument was concretized by a further argument that a Bill traces its origin from a proposal in a whitepaper before it is presented as a Bill and subsequently enacted into law; and that there are other redress available in relation to a Bill which is likely to infringe rights of a person if it were to become law.

It was also argued in support of the respondent's position that a Bill is just a proposal within the mandate of legislative process which ought not to be interfered by the court. It was further argued in this regard that interfering the legislative process is tantamount to denying the parliament its core function of debating a Bill and enacting a Bill into law. In relation to the impugned provision, it was argued that the legislative process in which a Bill is enacted into law is a manifestation of the will of the people of which the parliament is a custodian.

We were, at this juncture, referred to some decisions including those which were also cited by the petitioner. We were told about the case of **Attorney General vs Rev. Christopher Mtikila** (supra). Instructively, this case highlighted on the need of the court to refrain from interfering with the legislative process as the same is reflective of the will of the people. Thus, as long as a Bill is still yet to become law, it is within the

mandate of the legislative process of the parliament which should not be inferred by the court. The case of **Saed Kubenea vs Attorney General**, Misc. Civil Cause No. 28 of 2014 was also relied on in a bid to emphasise that the court must avoid meddling into areas that fall within the purview of the mandate of the parliament.

Besides the above cases, the respondent also drew our attention to the case of **Bahamas District of the Methodist Church** (supra) which was heavily relied upon by the petitioner. We were referred to a part of this decision which the petitioner's counsel did not draw our attention to. The omitted part which was in fact the opening paragraph of the statement of their Lordship in para 31 of the judgment quoted herein above reads as follows:

> *'Their Lordships consider that this approach points irresistibly to the conclusion that so far as possible, the courts of The Bahamas should avoid interfering in the legislative process.'*

Hand in hand with the above observation, we were referred to the case of **Rediffusion (Hong Kong) Ltd v Attorney General of Hong Kong** [1970] A.C 1136 cited in **Bahamas District of the Methodist Church** (supra). In this case (**Rediffusion**), the plaintiffs sought a declaration

that it would not be lawful for the legislative council of Hong Kong to pass a particular Bill, together with an injunction to restrain the members of the council from passing it. The action was dismissed as it did not disclose a cause of action.

It was also observed that passing a Bill which upon enactment was repugnant was a waste of time for the legislators, but it was not in itself unlawful. Further that the conduct of the legislative council could not affect the legal rights of anyone because the legislation once enacted as proposed would be void and inoperative. While denying the invitation to hold the Bill unconstitutional, Lord Diplock held that:

> *'Conduct however much it lies outside the legal power of the actor does not give rise to any cause of action on the part of any person unless it infringes or threatens to infringe that person's legal rights. Such an infringement can only occur when steps are taken to enforce the void Ordinance. It is committed not by the makers of the Ordinance but by those who take steps to enforce it after it has been made.'*

We noted, however, that their Lordships in **Bahamas District of the Methodist Church**, were unable to read that decision or Lord Diplock's observations as meaning that, where a Bill contains provisions which on enactment would contravene the Constitution, the court can never grant declaratory or other relief before the Bill is enacted. They were of the view that Lord Diplock recognized that there could be circumstances where a court remedy would, exceptionally, be needed at the pre-enactment stage of the legislative process, to enable the courts to afford the protection intended to be provided by the Constitution. We noted further that their Lordship in **Bahamas District of the Methodist Church**, observed in paragraph 34 of the judgment in relation to **Rediffusion** and we hereby quote thus:

> *'When the state of necessity exists, to deny the courts power to intervene would, ex hypothesi, be a failure to safeguard citizens' rights under the Constitution. When that state of necessity exists, the threatened enactment of legislation, which will be void under the Constitution but nonetheless cause irreparable damage, is sufficient foundation (or "cause of action") for the complainant's application to the court.'*

We, additionally, noted that their Lordships in **Bahamas District of the Methodist Church**, observed that the above approach was consistent with the preponderant view expressed in the decision of the High Court of Australia in **Cormack v Cope** (1974) 131 C.L.R 432 in relation to an alleged constitutional irregularity in the lawmaking process. They stated thus:

> *'Barwick CJ., at page 454, noted that ordinarily the court's interference to ensure due observance of the Constitution in connection with the making of laws is effected by a post-enactment declaration that what purports to be an Act is void. In general, this is sufficient means of ensuring that the processes of law-making which the Constitution requires are properly followed. But in point of jurisdiction the court is not limited to that method of ensuring the observance of the constitutional processes of law-making. In an appropriate, though no doubt unusual, case the court is able, and indeed in a proper case bound, to interfere. Gibbs J., at page 466-7, expressed a substantially similar view. Mason J., at page 474, seems to have envisaged that, exceptionally, there might be intervention in the parliamentary process. At different approach, or a different*

emphasis, appears in the judgments of Menzies J. and Stephen J. Menzies J. stated that it was no part of the authority of the court to restrain Parliament from making unconstitutional laws, but he left open the case where the adoption of a particular law-making procedure would defeat the constitutional power of the court to deal effectively with legislation when enacted.'

At the outset, we were satisfied that although **Bahamas District of the Methodist Church** is useful in so far as it ventured into important principles touching on separation of power and the power of the court in dealing with a Bill, it is nonetheless distinguishable from the present matter in several respects. The distinguishable features of **Bahamas case** viewed in relation to the present petition are as follows:

One, in **Bahamas case**, the issue was whether a Bill, which had already become law when the case was heard and decided, was unconstitutional. Two, in the **Bahamas case**, there was no statutory provision proscribing challenging constitutionality of a Bill on a ground of a threatened violation of the Constitution. Three, it was not in the **Bahamas case** discussed or shown that there was a constitutional provision proscribing or restricting interference by the court in the

legislation process of the parliament. And, four, the **Bahamas case** was determined in the light of existence of special circumstances warranting granting of an application whose subject matter (i.e a Bill), had already become law, and amendment had been allowed in the pleading to reflect such development. It is in such context that their Lordship observed that:

> *'....had the main action come to trial before the enactment of the 1993 Act, the court would have been bound to decline to intervene in the legislative process.'*

We noted the insightful reasoning and deliberations in **Bahamas case**. However, we took a cautious approach on the applicability of the principles emanating from the case because of the Bahamas case is materially distinguishable from the instant petition. We had thus to consider the applicability of the principles in the instant matter in the light of jurisprudence obtaining in our jurisdiction on the powers of this court in matters touching on the interference with the national assembly, and the legislative process, and the provisions of the Constitution stipulating on the legislative procedure, the power and privilege of the

parliament, and the preservation and enforcement of freedom of debate and procedure.

Before making any further progress, we saw it fit, at this juncture, to dispose of the preliminary issue raised by the respondent to the effect that, the submission in chief of the petitioner was not in conformity to rule 13(3) of the Basic Rights and Duties Enforcement Rules which provides a format for the submissions to be filed by the parties. We were clear that the point needed not detain us. Upon reading the submissions in chief for the petitioner, we could clearly see right from the first paragraph of the submissions the issue which preoccupied the entire submissions. Evidently, the issue revolved on the alleged unconstitutionality of the impugned provision which is indeed at the heart of the petition. We agree with the counsel for the petitioner that the objection was misconceived and baseless. We therefore forthwith dismissed the objection.

Having dealt with the background of the case and the submissions that ensued, we thoughtfully revisited the authorities that the counsel for both parties relied on to support their respective positions and leading authorities in constitutional petitions and interpretation in our

jurisdiction. The principles that we gathered from such authorities were applied in respective places in the course of our deliberations in this matter.

We are settled that the purpose of the BRADEA is "to provide for the procedure for enforcement of constitutional basic rights, for duties and for related matters. With this context in mind, section 8 of the BRADEA provides for the High Court's jurisdiction in bill of rights cases. Sub-sections 8(1)(a) and (b) generally vests in this court jurisdiction to hear and determine any application made under section 4 of the BRADEA which provides for the right to apply to this court for redress.

However, sub-sections 8(2) and (3) of the BRADEA outline some limitations as to the exercise of such jurisdiction. Sub-section 8(2), on its part, excludes the exercise of the powers of this court in cases where "it is satisfied that adequate means of redress for the alleged contravention are or have been available to the person concerned under any other law, or that the application is merely frivolous or vexatious."

Sub-section 8(3), which is herein impugned, compels this court to dismiss any application which challenges the passing by the parliament

of a Bill alleged to threaten contravention of the provisions of the bill of rights. This Sub-section also excludes the exercise of the power of this court to issue prerogative orders in all applications concerning the bill of rights.

In the light of the above context, we read and understood the impugned provision. It prohibits any application seeking to challenge a proposal contained in a Bill, which has not yet become law, on the grounds that it is likely to contravene any of the provisions of articles 12 to 29 of the Constitution. The import of the provision is that any person who is aggrieved by proposals contained in a Bill should only challenge law which results from the Bill once the Bill is enacted into law. The impugned provision underlines the mandate of the legislature in law making, and the legislation process in which a Bill is subjected to, debated and may, ultimately, be modified before it becomes law.

The construction of the impugned provision is in our considered opinion meant for a Bill which at the date of the application has not become law. It would therefore mean that where a person is aggrieved by a proposal contained in a Bill, he should wait until the Bill is passed by the

Parliament, and becomes law, before seeking to challenge its constitutionality.

Invoking the guiding principles on the duty of this court as well as the principles that should guide the court in making its determination on whether a provision of law is unconstitutional or not, we laid the provisions of the articles of the Constitution herein invoked beside the provision of section 8(3) of the BRADEA which is challenged. We recalled the rival submissions as we laid the provisions beside each other and made comparisons.

We then endeavoured to determine whether the latter squares with the former, as we also pondered on the purview and applicability of the provisions of articles 97, 100 and 101 of the Constitution, which relate to legislative procedure, the power and privilege of the parliament and the preservation and enforcement of freedom of opinion, debate and procedure. In our determinations, we are convinced that the impugned provision of section 8(3) of the BRADEA squares with the provisions of article 13 (2) & (3), 22 (1) & (2), and 30 (3) & (4) of the Constitution for reasons which will become clear subsequently. We must mention at the

outset that our reasoning, as it will become clear afterwards, takes into account the provisions of articles 97, 100 and 101 of the Constitution.

In the above undertaking, we also drew inspirations and guidance from **Attorney General vs Jeremia Mtobesya** Civil Appeal No. 65 of 2016, and **Julius Francis Ishengoma Dyanabo v. The Attorney General** [2004] TLR 14. These cases restated the guiding principles, and the intricacies of the application of such principles in any given case. We were also guided by principles emanating from **Attorney General vs Rev. Christopher Mtikila**, Civil Application No. 45 of 2009; **Mtikila vs Attorney General** [1995] TLR 31; **Saed Kubenea vs Attorney General**, Misc. Civil Cause No. 28 of 2014; and **Mwalimu Paul John Mhozya vs Attorney General**, (No.1) [1996] TLR 130 (HC) which relate to smooth working of a democratic society and the separation of power between the legislature, the executive and the judiciary.

The main arguments of the petitioner, if we were to recapitulate, were as follows: That the impugned provision prevents an aggrieved person from exercising his right of challenging a Bill which is likely to infringe the provisions of the Constitution; that, it ousts the powers of the court to protect the Constitution from being infringed by enactment of law

which is unconstitutional; that it ousts the powers of the court to protect rights and duties of people against violation; and that it goes against the Constitution which guarantees enactment of law which is not unconstitutional. The respondent's argument is that the provision is not violative of the Constitution as a Bill which is a mere proposal cannot have force of law which could result in infringement.

Whilst the argument of petitioner's counsel is that consequences of a Bill are immediate and irreversible and usually lead to substantial damage and prejudice, the respondent's argument is that a Bill is a mere proposal which does not have any force of law to the extent of violating the stated provisions of the Constitution. The question is whether the impugned provision can indeed lead to likelihood of infringement of the Constitution which is caused by a Bill or a proposal contained in a bill.

With respect to the above question, we examined the petition and the affidavit supporting the petition. We could neither see any circumstances showing how a proposal in a Bill is likely to violate the Constitution and which would therefore render the impugned provision unconstitutional, nor averments as to how the parliamentary debating during legislative process cannot address the constitutional concerns relating to a proposal

contained in a Bill which threatens infringement of the Constitution. The argument as to minimum qualifications for one to become a member of parliament was not supported by any evidence from which inference could be drawn that members of parliament holding minimum qualifications were indeed unable to participate effectively in debates involving constitutionality or unconstitutionality of proposals contained in a Bill.

The argument by the counsel for the petitioner that "*consequences of the offending provisions [of] the bill is normally immediate and irreversible and give rise to substantial damage or prejudice to the Constitution and the fundamental rights and duties*" was not supported by the petition or the affidavit of the petitioner either. In the same vein, while we were implored in the course of the submissions that a Bill or a proposal in a Bill amounts to an action that threaten violation of the Constitution which was envisaged in the provisions of the Constitution safeguarding infringement of the Constitution, there was nothing in this respect in the petition and the affidavit. In all, there were therefore no materials upon which the court could act upon for its deliberations on the issues at stake.

We did not take the above anomalies or omissions lightly. We did so because we are aware of the principle that until the contrary is proved, a piece of legislation or a provision in a statute is presumed to be constitutional. It would follow that the absence of supporting averments in the petition and the affidavit of the petitioner means that the respective arguments by the counsel for the petitioner are mere arguments from the bar. The said arguments cannot therefore be relied upon by the court to support the petition and for granting the reliefs sought by the petitioner.

We toyed further on the argument that the impugned provision is not violative of the alleged provisions of the Constitution because a Bill or a proposal contained in a Bill is a mere proposal with no force of law and cannot therefore infringe the Constitution. We reiterated the construction of the impugned provision and the phrase that "....*which at the date of the application has not become a law* ," and recalled our position that the provision points out loud and clear that one should not file a constitutional petition in this court against a Bill or a proposal containec in a Bill, but he may only do so once the Bill becomes law. In other words, and as we earlier pointed out, one should wait until the legislative

process is completed and the Bill is enacted into law before he may challenge the enacted law or a provision thereof.

We are satisfied that a Bill is, admittedly, a proposal with no force of law, which may eventually be passed into law through a rigorous legislative process of the legislative assembly characterised by parliamentary debates. This is evident in the following definitions amongst several others.

Firstly, **Osborn's Concise Law Dictionary 11th Edition at page 57** defines a Bill as '*....a parliamentary measure, which having been passed...and receiving the ....Assent, becomes an Act of Parliament.*' And secondly, **Black's Law Dictionary With Pronunciations Abridged Sixth Edition (1991)** page. 115 defines a Bill as a "*.....The draft of a proposed law from the time of its introduction in a legislative body through all the various stages...*"

As to the hallmarks of what is entailed in the legislative process and how proposals contained in a Bill are likely to be modified from the original position of the Bill through the legislative process evolving the will of the

representative nature of the legislature, Vepa P. Sarathi in his book entitled **Interpretation of Statutes 5th Edition**, at page 2 has it that

> *"...The Bill is then placed before the legislature. It is there discussed rule by rule, clause by clause and scrutinized carefully by members of the legislature supporting the Government and those who are in the Opposition.* ***It is then voted upon with or without modifications.....The final result is sent to the President .....When the President .....signs the Bill, it becomes an enactment or the law and it is binding on everyone****...The Law is said to have been passed....****When the rules are passed into an enactment, it is the expression of the will of the....legislature*** *and becomes an Act....Therefore, a statute is the will of the legislature. [Emphasis supplied]*

What we have observed herein above is, in our considered opinion, consistent with legislative procedure, and power and privilege of the parliament as they relate, for instance with, freedom of opinion, debating and passing Bills which eventually shall have to be assented to by the President, and as stipulated under articles 97, 100 and 101 of the

Constitution. Of significance, articles 100 and 101 read and we hereby quote as thus:

> *100(1) There shall be freedom of opinion, debate and procedure in the National Assembly, and that freedom shall not be breached or questioned by any organ in the United Republic or in any court or elsewhere outside the National Assembly.*
>
> *(2)Subject to this Constitution or to the provisions of any other relevant law, a Member of Parliament shall not be prosecuted and no civil proceedings may be instituted against him in a court in relation to anything which he has said or done in the National Assemby by way of a petition, bill, motion, or otherwise.*
>
> *101.* ***Parliament may enact a law making provisions to enable the court and the law to preserve and enforce freedom of opinion, debate, and procedure of business in the National Assembly which in terms of Article 100 is guaranteed by this Constitution.*** *[Emphasis supplied]*

The Kiswahili version of the provision of article 101 of the Constitution, which we think is the basis for the enactment of the impugned provision,

is worthwhile to be reproduced herein for want of clarity. We say so because the said article 101 of the Constitution essentially provides for enactment of a law ***"...making provisions to enable the court and the law to preserve and enforce freedom of opinion, debate, and procedure of business in the National Assembly..."***. The provision in Kiswahili reads thus:

> *101. Bunge laweza kutunga sheria kwa ajili ya kuweka masharti ya kuwezesha mahakama na sheria kuhifadhi na kutilia nguvu uhuru wa mawazo, majadiliano na utaratibu wa shughuli katika Bunge ambao kwa mujibu wa ibara ya 100 umedhaminiwa na Katiba hii.*

With the foregoing observations, we were convinced that the prohibition of challenging the constitutionality of a proposal contained in a Bill before a Bill becomes law echoes the provisions of articles 97, 100 and 101 of the Constitution, and indeed, the spirit of allowing a guaranteed space within which the legislative process involving the representative will of the legislature can take place, and can be finalised without interference of the exclusive control of the legislature over the conduct of its affairs.

We may in other words succinctly say that the import of the impugned provision also echoes the following principles. Firstly, the principle that the law makers must be free to deliberate upon such matters as they wish. And secondly, the principle of separation of power which is essential to the smooth operation of a democratic society. We are in this regard mindful that it is only an application brought "*only on the grounds that the provisions of section 12 to 29 of the Constitution are likely to be contravened by reason of proposals contained in a Bill*" which is banned under the impugned provision.

In the light of the foregoing, we were very clear that when there are modifications that have to be made to a Bill, it is within the mandate of the legislative process to effect such changes prior to the Bill becoming law, and not the court. It is in the same way when the Bill is rejected and shelved all together, in which case, the court cannot compel the Bill to be retrieved, debated and passed in a particular manner. When a Bill is passed as an Act of Parliament, it is within the mandate of the President to assent to the same. It would seem, therefore, that the impugned provision is based on the above principles which insist on and inform separation of power and the court being sensitive to refraining

from trespassing or appearing to trespass upon the province of the legislators.

Consistent with the above, it is clear to us that the court would only entertain an application challenging the constitutionality of a Bill which has already become law, and in which case the application will be challenging the law, and not the Bill. It is to be noted that threatened violation of the Constitutional rights by a Bill before the completion of the legislation process may not hold true when the Bill becomes law. We say so because modifications that are likely to be effected to the Bill during the process of legislation may address constitutional concerns raised on the Bill. Thus, there might be no grounds for challenging the law which resulted from the Bill once the Bill becomes law. Of significance is the guaranteed space presented by the impugned provision for the process of legislation and debating prior to a Bill becoming.

We pondered further on the complaint that the impugned provision is potentially violative of the Constitution as it bans applications intended to prevent the passing by the National Assembly of a potentially unconstitutional Bill. Since the Bill may not be passed as it is as it is

subjected to the legislative process, we think that the present petition is speculative in its very nature as it assumes that the Bill will remain as it is despite the legislative process in which it is subjected to and the parliamentary stages that it has to pass through. We think this links well with the principle in **Rev Christopher Mtikila vs Attorney General** [1995] TLR 31 that prohibits a petition which is hinged on what could happen but not what the law actually provides for. We are of that view because the impugned provision is thought to be violative of the Constitution because it prevents an aggrieved person from challenging a Bill which has a likelihood of infringing the Constitution.

We were referred to decisions of this court and the Court of Appeal which have had opportunity to consider the principles requiring the court to refrain from interfering with the legislative process. They include **Attorney General vs Rev. Christopher Mtikila**, Civil Application No. 45 of 2009; **Saed Kubenea vs Attorney General**; and **Mwalimu Paul John Mhozya vs Attorney General**, whose cumulative effect supports the impugned provision, in so far as they relate to separation of power, and the need of the courts to refrain from trespassing or appearing to trespass upon the province of the legislators.

We considered the cases as we were revisiting the rival submissions of the parties herein above. We need not repeat ourselves. It would only suffice to draw our attention to what this court observed in the **Saed Kubenea** when it referred to a decision in the United States. It was stated:

> *'So long as the Constituent Assembly does not contravene the provisions of section 9(2)....., then that is the realm of politics, beyond our powers as the Judiciary, and we would do better not to interfere.*
>
> *In a recent case in the United States,* ***National Federation of Independent Business et al v Sebeluis, Secretary of State for Health and Human Services,*** *et al, No. 11-303, the Supreme Court was faced with the question as to whether it could exercise its powers of judicial review to prevent the coming into operation of the National Protection and Affordable Care Act of 2010 (known as "Obama Care" law), which had been passed by both Houses of Congress.'*
>
> *Chief Justice Roberts took the position that the Act posed a question of policy which was beyond the scope of judicial review. His main reasoning, it would appear, was centred on the lack of two*

things on the part of the Judiciary; expertise and the mandate to determine matters of policy, and the absence of direct accountability to the people. He pointed out that he and the other Supreme Court Judges:

> *"...possesses neither the expertise nor the prerogative to make political judgments. Those decisions are entrusted to our Nation's elected leaders who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices."* '

Similar position is echoed in **Mtikila vs Attorney General** [1995] TLR 31, page 56 where Lugakingira J (as he then was) stated and we quote:

> *Courts are not authorized to make disembodied pronouncements on serious and cloudy issues of constitutional policy.*

Consistent with the above, Samatta JK (as he then was) in **Mwalimu Paul John Mhozya,** in relation to the doctrine of separation of powers, stated as we do hereby quote:

> *The principle that functions of one branch of government should not encroach on the functions of another branch is a very important principle,*

one of the principles which ensure that the task of governing a state is executed smoothly and peacefully.

We are satisfied that the position emerging from the above authorities leans heavily towards refraining from interference with the legislative process. We are of the view that when the statements of principles emerging from the afore mentioned cases are put together, we may comfortably say that the position in our jurisdiction is one that supports the impugned provision whose essence is to, forestall proceedings challenging the constitutionality of a Bill, and allow the legislation process to be accomplished before the law resulting from the Bill is constitutionally scrutinised as to its validity. As we pointed out above, this position is consistent with the impugned provision of the BRADEA which ban filing of an application seeking to challenge a Bill only on the grounds that it is likely to infringe the Constitution.

In our determination, we considered the petitioner's claim against the backdrop of the principle of a presumption of constitutionality of legislation or a provision of a statute. This principle has it that until the contrary is proved, a piece of legislation or a provision in a statute shall

be presumed to be constitutional. The Court of Appeal in **Julius Ndyanabo** regarded this principle as a sound principle of constitutional construction, that if possible, a piece of legislation should receive such a construction as will make it operative and not inoperative.

We think that the impugned provision also owes its foundation on the principle of the presumption of constitutionality of legislation or a provision in a statute. This principle would in my view envisage a presumption that the lawmaking process is necessarily presumed to lead to enactment of a piece of legislation which is constitutional. In other words, although a Bill may have a proposal which is potentially unconstitutional if it is enacted without being modified or removed, it has to be presumed that the legislative process would at the end of the day result into legislation which is, by all standards, constitutional.

We noted earlier that the impugned provision reflects the separation of powers between the three pillars of the state. Thus, in the event a Bill is not modified to address the constitutional concerns raised and thus ends up being enacted into law as it is, with its provisions which are potentially violative of the Constitution, any person who is aggrieved by the enacted law may apply to challenge its constitutionality.

The foregoing findings took us to the warning of the Court of Appeal in **Attorney General vs W. K. Butambala** [1993] TLR 46 in which the Court stated:

> *'We need hardly say that our Constitution is a serious and solemn document. We think that invoking it and nock down laws or portions of them should be reserved for appropriate and really momentous occasions. Things which can easily be taken up by administration initiative are best pursued in that manner.'*

We are satisfied that a foundation was neither shown nor proved for us to invoke the Constitution, declare the impugned provision of section 8 (3) of the BRADEA unconstitutional for violating article 13 (2) & (3), 26 (1) & (2), and 30 (3) & (4) of the Constitution, and nock the very provision down. In other words, since the petitioner alleged that section 8 (3) of the BRADEA was unconstitutional for infringing the afore mentioned provisions of the Constitution, the onus to prove the unconstitutionality of the provision lies upon him. In the circumstances, we find and hold that section 8(3) of the BRADEA is not violative of the Constitution. The cummulative effect of our findings have it therefore that the impugned provision is constitutionally valid.

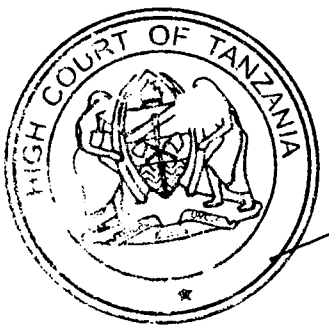
In the end, we find and hold that the petition by the petitioner is not meritorious. It is, as a result, dismissed. We make no order as to costs as the petition at hand was in the public interest.

It is so ordered.

Dated at Dar es Salaam this 14th day of December 2020.

R. A. EBRAHIM

JUDGE



B. S. MASOUD

JUDGE

J. L. Masabo

JUDGE