IN THE HIGH COURT OF TANZANIA

(MAIN REGISTRY)

AT DARE S SALAAM

(CORAM: MWARIJA, MUJULIZI AND TWAIB, JJJ.)

MISC. CIVIL CAUSE NO. 28 OF 2014

SAED KUBENEA ..... PETITIONER

VERSUS

THE ATTORNEY GENERAL ..... RESPONDENT

23/09/2010 & 07/10/2014

REASONS FOR DECISION

Twaib, J:

This is perhaps the first case of its kind in the constitutional history of our country. The petitioner, Saed Kubenea, is a Tanzanian citizen who describes himself as a person concerned with the contemporary constitutional process in the country and a stakeholder in that process. He has filed the present petition, praying for declaratory orders in the following terms:

a) A declaration of the court on the proper interpretation of the provisions of section 25 (1) and (2) of the Constitutional Review Act;

b) A declaration of the court on whether the Constituent Assembly has powers to materially alter the contents of the Draft Constitution as

presented to it by the Constitutional Review Commission, and to what extent;

The petitioner is also praying for costs and "such other orders that this Honorable Court may deem appropriate and necessary to grant".

The facts forming the background to the case are not seriously disputed. Briefly, they are as follows:

1. On 1st December, 2011, the Parliament of the United Republic of Tanzania passed the Constitutional Review Act, No. 8 of 2011. The Act has been subsequently amended, and is now revised as Chapter 83 of the laws ("the Act"), to regulate the process leading to the enactment of a new Constitution for the United Republic.

2. Pursuant to section 5 of the Act, the President of the United Republic ("the President") formed the Constitutional Review Commission ("the Commission"), whose terms of reference are provided for in sections 9 and 17 of the Act.

3. The main functions of the Commission, as set out in section 9 (1), were to co-ordinate and collect public opinion on a new Constitution, examine and analyse the consistency and compatibility of the constitutional provisions in relation to the sovereignty of the people, political systems, democracy, rule of law and good governance, to make recommendations on each term of reference and prepare and submit a report to the President and the President of Zanzibar [section 19 of the Act].

4. The Commission then set out to discharge its functions and received 333,537 views from various people. They prepared a first draft which was further discussed by constitutional fora [section 18 of the Act]. The Commission later

prepared its report, with the second Draft Constitution forming an annex thereto, in terms of section 20 (2) of the Act. On 30th December 2013, the Commission submitted its report to the President and the President of Zanzibar, pursuant to sections 19 (2) and 20 (1) of the Act.

5. Upon receipt of the report of the Commission, the President convened the Constituent Assembly, pursuant to section 22 (2) of the Act. The Constituent Assembly consisted of all Members of the National Assembly of the United Republic and the Zanzibar House of Representatives and an additional 201 members that the President appointed, under powers vested upon him in terms of section 22 (1) of the Act.

6. The Constituent Assembly began its deliberations and, up to the time of filing the petition, it was yet to complete its work.

7. Meanwhile, immediately upon the presentation of its report to the Constituent Assembly, the Commission was dissolved pursuant to section 31 of the Act: see GN No. 81 of 2014.

After hearing counsel's submissions on the various issues arising out of this petition, and upon due consideration of all relevant matters, on 25th September 2014, we delivered an order containing the following findings:

1. There is an ambiguity and inconsistency in the English version of section 25 (2) of the Constitutional Review Act, Cap 83 (R.E. 2014) ("the Act");

2. Despite the said ambiguity and inconsistency, upon a harmonious reading of the whole Act, the proper interpretation of section 25 (1) and (2) of both the Kiswahili and English versions of the Act is—

a) The power "to make provisions for the New Constitution of the United Republic of Tanzania", means the power to write and pass the proposed Constitution for presentation to the citizens of Tanzania for voting in a referendum;

b) Such powers shall be exercised on the basis of the Draft Constitution after it has been tabled before the Constituent Assembly by the Chairman of the Constitutional Review Commission. In so doing, the Constituent Assembly may improve and/or amend the Draft Constitution. Those powers are limited, as were the functions of the Commission, only by the national values and ethos provided for in section 9 (2) of the Act;

3. The Court has no mandate to determine the nature and extent of the improvements and/or amendments that the Constituent Assembly may make to the Draft Constitution, as that is essentially a political rather than a legal question, so long as the said improvements and/or amendments do not contravene the provisions of section 9 (2) of the Act.

We reserved our reasons for these findings, which we now give.

The submissions made before us by counsel for both sides illustrate the controversy that prompted the petitioner to seek the court's interpretation of the provisions of section 25 of the Act. The difference is in the parties' understanding of the limitations, if any, of the powers of the Constituent Assembly.

While the petitioner opines that the Constituent Assembly has no power to "materially alter the contents of the Draft Constitution as presented to it by the Constitutional Review Commission", the respondent holds the view that the Draft Constitution is only "a working document" which the Constituent Assembly has to use in preparing the Proposed Constitution, and that the Constituent Assembly is

not bound by anything contained therein. Instead, the respondent maintains that the Constituent Assembly's powers are limited only by the national values and ethos set out in section 9 (2) (whenever a section or subsection is hereinafter cited without mentioning any particular Act, the same shall be a reference to a section or subsection of the Act).

To resolve the controversy, we think it is important to begin with what we see as an inconsistency in the Kiswahili and English versions of the Act, and more specifically, section 25. Section 32 (4) makes this exercise pertinent when interpreting the Act, as it states that both versions are authentic. It is therefore essential that both versions of section 25 are set out in full. The Kiswahili version reads as follows:

25.*-(1) Bunge Maalum litakuwa na mamlaka ya kujadili na kupitisha masharti ya katiba inayopondekezwa, kutunga masharti ya mpito na masharti yatokanayo kama Bunge Maalum litakavyoona inafaa.*

(2) Mamlaka ya Bunge Maalum ya kupitisha masharti ya Katiba inayopendekezwa yatatekelezwa baada ya Rasimu ya Katiba kuwasilishwa na Mwenyekiti wa Tume na kupitishwa na Bunge Maalum.

The English version states:

25.*-(1) The Constituent Assembly shall have and exercise powers to make provisions for the New Constitution of the United Republic of Tanzania and to make consequential and transitional provisions to the enactment of such*

Constitution and to make such other provisions as the Constituent Assembly may find necessary.

(2) The powers of the Constituent Assembly to make provisions for the proposed Constitution shall be exercised by a Draft Constitution tabled by the Chairman of the Commission and passed by the Constituent Assembly.

In the course of the hearing, the court raised an issue as to whether the two versions are clear and consistent with each other. While both learned counsel for the petitioner, Mr. Mabere Marando and Mr. Peter Kibatala, agreed that there was an ambiguity and inconsistency in the two versions, Mr. George Masaju, learned Deputy Attorney General who led the team of lawyers who represented the respondent, disagreed. He was assisted by Mr. Gabriel Malata, learned Principal State Attorney. To Mr. Masaju, the two versions are clear, unambiguous and consistent.

With due respect to Mr. Masaju, we find the two provisions clearly inconsistent. While a literal translation of the Kiswahili version simply means that the Constituent Assembly would exercise its powers to make provisions for the New Constitution ***"after"*** the Chairman of the Commission has presented the Draft Constitution, the English version is obviously meant to convey a different meaning other than a literal one. Literally, it says that the powers of the Constituent Assembly will be exercised ***"by a Draft Constitution..."***, which would mean that a person or entity called "a Draft Constitution" will exercise the Assembly's powers! The Legislature in its wisdom could not have intended to say that. There is thus an obvious ambiguity in the English version of section 25. The ambiguity is inherent in itself and the way it is couched, while the inconsistency is in its incorrect reflection of the Kiswahili version. How do we resolve this ambiguity and inconsistency?

Despite their concession as to the shortcomings in the two versions, both Mr. Marando and Mr. Kibatala for the petitioner argued that the ambiguity and inconsistency can be cleared once one reads the whole Act (whichever the version) and gives it a harmonious interpretation. Mr. Marando submitted that one needs to read the Act from the beginning to the end and especially sections 17, 18, 19 and 20, to understand the scheme in which it is built and the stages through which the whole process must go. He contended that the various stages would then lead one to the petitioner's interpretation of section 25.

Mr. Kibatala mentioned that there is a dichotomy of interpretations as to what section 25 entails and the powers of the Constituent Assembly. He said that on the one hand, there is a group of the Assembly members known as *Umoja wa Katiba ya Wananchi* ("UKAWA"), which is formed mainly by members of several opposition political parties, who construe section 25 as requiring the Assembly not to materially depart from the basic structure of the Draft Constitution.

The other group, constituting mostly of members of the ruling *Chama cha Mapinduzi*, opine that the Assembly is not bound by the Draft Constitution and that it can substantially depart from the draft. Counsel for the petitioner stated that UKAWA members decided to walk out of the Assembly in protest at what they considered the flouting by Assembly members of its legal mandate by proposing material changes to the Draft Constitution.

According to Mr. Marando, the constitution-making process begins with the formation of the Commission, then moves to the collection of views, the preparation of the first draft, the holding of the constitutional fora whereby views on the first draft are given, the preparation of the second draft followed by its presentation to the Constituent Assembly, the debate in the Constituent Assembly, the preparation of the Proposed Constitution and then ultimately, the holding of the referendum.

When one considers these stages and their sequence, maintains Mr. Marando, one would come to the conclusion that the legislature intended that after the Commission had presented the Draft Constitution to the Constituent Assembly, the deliberations of the Assembly would have to be based on the Draft Constitution, and any change or amendment to it should not materially depart from its basic structure. Mr. Marando asserts that the basic structure of the Draft Constitution is in its proposals for a three-tier Government (containing the Union Government, the Government of Tanganyika, and the Revolutionary Government of Zanzibar), the provisions that prohibit ministers from being Members of Parliament and the right of the people in constituencies to recall their Members of Parliament if dissatisfied with their performance. Mr. Marando said that the Constituent Assembly has powers to discuss the Draft Constitution and write the Proposed Constitution, but that does not mean that it is free to change its "basic structure".

On behalf of the respondent, Mr. Masaju acknowledged the various stages explained by Mr. Marando, and agreed with him that the interpretation of section 25 cannot be taken in isolation but rather, on a harmonious and holistic approach. However, the learned Deputy Attorney General refused to be drawn into a consideration of the powers of the Constituent Assembly simply by following Mr. Marando's approach of the stages of constitution-making provided for in the Act to interpret section 25. He thus invited the court to interpret section 25 of the Act by considering the different roles that the two major players in the process (the Commission and the Constituent Assembly) have been assigned by the Act.

Mr. Masaju pointed out that while the Commission's role is termed "functions" in English or "*kazi*" in Kiswahili [section 9 (1)], the role of the Constituent Assembly is referred to as "powers" in English or "*mamlaka*" in Kiswahili [section 25]. He thus contends that while the Commission was only given "functions" to perform, namely, collecting people's views and preparing the Draft Constitution, the Constituent Assembly, on the other hand, has been given "powers" to make or

enact the "Proposed Constitution", to be followed by a referendum as provided for in the Referendum Act, No. 11 of 2013. In his view, the Assembly is the one that has "powers" and not the Commission, which had only been assigned certain tasks. With those powers, therefore, the Assembly cannot be bound by the Draft Constitution as presented to it by the Commission.

It was Mr. Masaju's further argument that the Draft Constitution has no legal force, that it is "a mere annex" to the Commission's Report [relying on section 20 (1)] and can only serve as a "working document". He wondered how could a document that is not part of the law be binding on the Constituent Assembly. Submitting on this point, Mr. Kibatala stated that the Draft Constitution was "law" and therefore binding. However, he did not mention the source of that legal status, apart from section 20 (1) which, however, only describes the Draft Constitution as an annex to the Commission's Report.

We would respectfully differ from both counsel on this point, though we differ more markedly from counsel for the petitioner's position. We do not think that the Draft Constitution is law, as it has not been enacted into one. However, since it is part of the Commission's report, it has been published in the official Gazette and presented to the Constituent Assembly for debate, it is part of a legal process done pursuant to the express provisions of the Act. The fundamental objective of all this is that the Constituent Assembly would debate the Draft Constitution, improve and amend the same and, at the end of the day, it would pass the Proposed Constitution. The Proposed Constitution will then be presented to the citizens of Tanzania for voting in a referendum.

Before the Proposed Constitution, the Draft Constitution had been prepared after passing the various stages of constitution-making, including the collection of views from the people. If we understood Mr. Masaju well, his description of the Draft Constitution as a working document is not meant to belittle it. For, it is a document

that deserves serious consideration by the Constituent Assembly. Taking the Act as a whole, we do not think that the Nation would have gone to such great lengths to have the Commission come up with a document that accounts for little in the entire process. We would thus read into section 22 (2) words that would give it the meaning that the Constituent Assembly is required, by section 25 (2), to exercise its powers under that subsection using the Draft Constitution as the basis for its deliberations.

Admittedly, this interpretation does not come out very clearly from the wording used in either of the two versions. However, we are convinced that it is the most consistent way of construing the section and give it a sensible meaning that fits the circumstances and the scheme that the drafters of the Act intended to devise. In this regard, we agree with Mr. Marando that this must have been the purpose for the whole process up to the point when the Chairman of the Commission presented the Draft Constitution to the Constituent Assembly.

Having discussed the statutory positions of the two institutions, the issue is: how far is the Constituent Assembly bound by the Draft Constitution, if at all? To put it more appropriately, are the powers of the Constituent Assembly limited, and if so, by what and to what extent? To these crucial questions we now turn.

We will begin with a brief discussion of the nature, role and place of the Constituent Assembly *vis-à-vis* the Commission. Mr. Kibatala sought to rely on two Kenyan cases, **Onyango & 12 Others v Attorney General & 2 Others** (2008) 3 KLR 84 and **Timothy Njoya v CKRC & National Constitutional Conference**, HC Misc. App. No. 82 of 2004, to support the proposition, a trite one in our view, that the sovereign power to make the Constitution is vested in the people themselves. What is controverted is his derivative conclusion that the Constituent Assembly's powers are limited by the Draft Constitution.

Mr. Masaju responded by making reference to a paper by Prof. Yash Ghai, a renowned authority in Kenyan Constitutional Law. In that paper, *"The Role of Constituent Assemblies in Constitution-making"*, Prof. Ghai expresses views which we find quite instructive and of great assistance in charting out the true position of each of the two institutions that have shared the role of constitution-making in Tanzania. He begins (on page 1), with a description, as follows:

> *"The distinguishing characteristic of a constituent assembly is that it is established to make a constitution, or at least that this is its primary role....The constituent assembly must be viewed in the context of the entire process of making a new constitution. In some countries it has been in charge of the entire process, but in others it has shared the task with other institutions, including giving the force of law to the constitution."*

Prof. Ghai further states that:

> *"At some point, a draft constitution will be prepared, to serve as a basis for detailed discussion. The "making" of a revised or new constitution will be an article by article detailed discussion and analysis—of the draft or perhaps of the existing constitution—in the light of the comments of the public and of the wishes and views of the negotiating parties and of the members of the body charged with this process."*

What Prof. Ghai says is that the functions and powers of constituent assemblies differ from one to another, and one must take each of them in the context in which it operates. In our context, the role of the Commission was to collect people's views and prepare the Draft Constitution, and that of the Constituent Assembly is to write and pass the Proposed Constitution, which will be presented to the citizens of Tanzania who will have the last say (through a referendum) on whether to enact it as the new Constitution of the United Republic. Read in this context, it is clear

that the proper interpretation of the provisions of section 25 (1), is that the Constituent Assembly has powers to write and pass the New Constitution of the United Republic, and the people, in whom lies the sovereign, will then decide whether to accept it or not.

In this process (and this is our answer to the question regarding the limits of the powers of the Constituent Assembly), we are not convinced that the Constituent Assembly is bound to follow any of the provisions in the Draft Constitution—be they basic or not. In our respectful opinion, the contention that there are certain basic structures in the Draft Constitution that the Assembly is simply not empowered to change is not supported by the Act. Indeed, our reading of section 25 (1) and (2), together with section 9 (2), supports the position taken by the respondent to the effect that the powers of the Constituent Assembly to alter the Draft Constitution are limited only by the national values and ethos laid down in section 9 (2) of the Act.

Mr. Marando submitted that the limits mentioned in section 9 (2) only apply to the Commission, and not the Constituent Assembly. If one were to apply a literal approach to those provisions, that construction would be perfectly correct. But the conclusion deduced from that position would be that the powers of the Constituent Assembly would then be unlimited, because there is not a single provision in the Act that specifically provides for any such limits.

Can that be taken to be the intention of the Legislature when enacting the Act? We are persuaded to give a harmonious interpretation in our reading of the Act. Does the Draft Constitution contain a "basic structure"? If yes, what is it? What does the term "basic structure" really mean? In Constitutional Law, what has come to be known as the "Basic Structure" or "Basic Features" Doctrine was developed by Indian Courts, which have taken the position that there are certain basic features in the Indian Constitution that are so fundamental that the Parliament

cannot change them—not even by a unanimous vote: see **Kesavernanda Bharat v State of Kerala** (1973) 4 Supreme Court Cases 225.

Mr. Kibatala relied upon the Kenyan Case of **Timothy Njoya v CKRC & National Constitutional Conference** *(supra)*, where **Kesavernanda's Case** was used but, as Ghai opines (*supra*, p. 8), it was actually abused in a decision that brought the constitutional review process in Kenya to a premature end.

It would appear that through section 9 (2) of the Act, the legislature intended to ensure that the new Constitution must contain the matters mentioned therein as necessary features. While the Act is not a constitutional enactment, and we cannot apply the doctrine to it, we can derive inspiration from it. In doing so, it is fair to say that the national values and ethos mentioned in section 9 (2) constitute its basic features.

On the other hand, as already intimated, section 25 does not expressly provide for any limitations in the exercise of the powers of the Constituent Assembly. What is clear, as Mr. Masaju submitted before us, is that "*the power to make provisions for the New Constitution*" is vested in the Constituent Assembly and not the Commission. The law has not given such powers to the Commission, or any "powers" for that matter. Even though section 4 mentions it as one of the objectives of the Act and section 10 makes reference to some "powers" for the Commission, there is no provision in the Act that turns this into reality.

Instead, the Commission's role is limited to preparing a report, with the Draft Constitution as one of the documents to be annexed to that report. It would not be correct, in our respectful view, for one to construe the Draft Constitution, a product of the Commission while exercising its "*functions*" to "*prepare and submit a report*", to mean that that product would be binding on the Constituent Assembly in which the law vests "*powers*" to "*make provisions for the new Constitution*". It

is also erroneous to say that the Constituent Assembly, which by its composition is more representative than the Commission, would be bound by the Commission's Draft Constitution, unless there are express provisions to that effect. No such provision has been cited to us by counsel for the petitioner, and we have not found any. Neither is it correct to say, as Mr. Kibatala has submitted, that the Draft Constitution should be equated to a Bill presented before Parliament for passing into law. The latter is always subject to the powers of Parliament as given by the existing Constitution, while the Constituent Assembly is charged with the powers of making provisions for a new Constitution.

Mr. Masaju recited to us a line in Yash Ghai's article in which the learned professor states that:

> *"A constituent assembly is often considered to have full powers to constitute or reconstitute the state, untrammeled by the restraints of the 'basic features' doctrine."*

However, Prof. Ghai goes on to say:

> *"But this is a fallacy for it is perfectly possible to set up a constituent assembly with limited powers—the most striking recent example of this is South Africa where the constituent assembly was bound by 34 constitutional principles and values that it had to incorporate in the constitution."*

Further on, Ghai states that a constituent assembly *"can be established without limitations and will then correspond to the popular perception of its powers."*

We accept the above statements by Prof. Ghai as representing the variety of powers that a constituent assembly can have. These powers may vary from the very restricted, to the virtually unlimited. In Tanzania's case, the Act placed specific

limitations to the work of the Commission in section 9 (2). In carrying out its work in accordance with subsection (1) of that section, the Commission was bound "to adhere to national values and ethos" and to "respect, safeguard and promote" a total of nine matters. These were:

(a) the existence of the United Republic;

(b) the existence of the Executive, Legislature and the Judiciary;

(c) the republican nature of governance;

(d) the existence of Revolutionary Government of Zanzibar;

(e) national unity, cohesion and peace;

(f) periodic democratic elections based on universal suffrage;

(g) the promotion and protection of human rights;

(h) human dignity, equality before the law and due process of law; and

(i) existence of a secular nature of the United Republic that does not inclined [*sic*] to any religion and that respect freedom of worship.

Counsel for the petitioner submitted that these matters bind the Commission and not the Constituent Assembly. Instead, counsel proposed that the "basic features" of the Draft Constitution were the three-tier Government structure, non-MPs as cabinet members, and the right of the people to recall their MPs. Unfortunately, the Draft Constitution was not annexed to the petition. However, as it was published in the official Gazette, this Court can take judicial notice thereof in terms of section 59 (1) (a) of the Evidence Act, Chapter 6 of the Laws.

As stated earlier, the Act says nothing in express terms on limitations to the powers of the Constituent Assembly. Would that mean that the powers of the Assembly are unlimited, and that it can do anything it deems appropriate? We do not think so. It would be inconceivable that if the Commission was bound by the national values and ethos contained in section 9 (2), the Constituent Assembly would be free to depart from those values and ethos.

We think that if there was any "basic structure" that the Draft Constitution, as well as the Proposed Constitution to come out of the Constituent Assembly was bound to adhere to, then that basic structure would be the national values and ethos mentioned in section 9 (2). To suggest that the Constituent Assembly would be bound by any "basic structure" submitted to it by the Commission, as the petitioner asserts, would be tantamount to saying that even if the Commission presented a Draft Constitution whose basic features went contrary to the national values and ethos, the Constituent Assembly would have to accept those basic features and whatever alterations they would make thereto would be unlawful. It is also unthinkable that if the Draft Constitution adhered to those basic features (and there is no suggestion that it has not), the Constituent Assembly would be free to depart from them and replace them with its own basic features.

The totality of all this is that, however one looks at it, in the exercise of their respective tasks, the two institutions cannot depart from the national values and ethos. The basic features cannot be the three-tier government, ministers not being MPs, or the right of recall, because these are not legal issues arising from the Act. The only way that any of these could contravene a binding basic feature would have been to link them to the national values and ethos and demonstrate that they (or any of them) amount to a departure from one or more of the basic features. The petitioner has not even attempted to say so. His case is based on some other, perceived basic features that do not, as we have tried to demonstrate, qualify as

basic features. In any case, whatever "basic structure" the Draft Constitution might have, it cannot supersede the one expressly mentioned in the law.

This conclusion begs the question: under what circumstances would the court be justified in interfering with the way the Constituent Assembly is exercising its powers? Our clear answer is: it is where the Constituent Assembly acts in contravention of the national values and ethos set out in section 9 (2). However, if the Assembly decides to depart from the Draft Constitution, alter or amend it, so long as it does not go against the national values and ethos, it is doing so within its legal mandate. It is not the court's duty to substitute itself for the Constituent Assembly, or its views on the nature and extent of the changes to be effected on the Draft Constitution, with those of the Assembly. So long as the Constituent Assembly does not contravene the provisions of section 9 (2) (and there is not even an allegation to that effect by the petitioner), 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. Sebelius, 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:

> *"...possess neither the expertise nor the prerogative to make policy 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.***"[emphasis ours]

Though stated in a different setting, these words by Roberts, CJ, are apt and relevant to the situation at hand. They constitute an important reminder to the courts that, in a democracy, there are areas of policy where the Judiciary would do better to leave to the political establishment. When the political leaders go wrong in matters of policy, the people have power to sanction them through the electoral process.

The participants in the on-going process of constitution-making in our country are the citizens of Tanzania in their individual capacities, in their groupings, and as a collective whole. Though not a Parliament in the usual sense of the word, the Constituent Assembly is a representative body, and its tasks are essentially policy-making. The majority of its members are members of the two legislative assemblies (the Union Parliament and the Zanzibar House of Representatives). The rest are representatives of political parties and other interested organizations covering the broad spectrum of our people.

Members of the Constituent Assembly are entrusted with a crucial role in determining the future of our country. They have been given an important mandate by the law. While one may not agree with what they may be doing, it is important that, within that mandate, they are left to exercise their powers in total freedom. They have the discretion to decide how they go about doing that, as section 25 (1) of the Act stipulates. Unless it is shown that they have gone beyond those powers by acting *ultra vires* or otherwise unlawfully or unconstitutionally, it is not the business of the court to get into the middle of that process and make

pronouncements as to the propriety or otherwise of what is going on in the Assembly.

Unless clearly supported by the law and facts, meddling into that area by the courts would be an intrusion into the process of constitution-making, an essentially political sphere that is beyond the scope of the constitutional mandate of the Judiciary. In **Mtikila v Attorney General** [1995] TLR 31, p. 56, the late Lugakingira, J (as he then was) expressed similar sentiments as those of Chief Justice Roberts above. The learned Judge had this to say:

> *"Courts are not authorised to make* ***disembodied pronouncements on serious and cloudy issues of constitutional policy*** *without battle lines being properly drawn."* [emphasis ours]

It is thus our finding that as a court of law, it is not within our prerogative to enquire into the way the Constituent Assembly goes about discharging its powers under section 25 of the Act.

Before we wind up, we would make one pertinent observation. What the petitioner wanted us to do in this case is analogous to the exercise of the powers of judicial review. He has exercised an important right as a citizen, and has shown the way where such matters crop up in the affairs of our country. That power represents, in our respectful opinion, the most fundamental constitutional reason for the existence of the Judiciary. It is the tool that enables the Judiciary to counter-balance the exercise of the powers of the State and ensure that all that is done by the various State bodies and public officials is within the parameters of the law and the Constitution.

We would thus not hesitate, where it is adequately shown that a public official or another organ of the State has exceeded its powers under the law, to step in and

make appropriate orders. That is the role that our constitutional set-up has reserved for the Judiciary. However, that jurisdiction must be exercised in appropriate situations, and a correct balance must be maintained between it and other fundamental legal principles, such as the principle of separation of powers and the doctrine of the rule of law.

It was for the above reasons that we reached our findings of 25th September 2014. There shall be no order as to costs.

Dated at Dar es Salaam this 7th day of October, 2014.

A.G. MWARIJA
JUDGE

A.K. MUJULIZI
JUDGE

F.A. TWAIB
JUDGE