



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.)**

**CIVIL APPEAL NO. 51 OF 2013**

**BETWEEN**

**1. KHATIJA RAMTULA NUR MOHAMED**

**2. ZAHID ABBAS MOHAMED AKRAM .....APPELLANTS**

**AND**

**1. THE MINISTER FOR CITIZENSHIP AND IMMIGRATION**

**2. THE DIRECTOR FOR IMMIGRATION**

**3. ASSISTANT DIRECTOR OF IMMIGRATION COAST....RESPONDENTS**

*(Being an appeal from the judgment of the High Court of Kenya at Mombasa*

*(Makau, J.) dated 2<sup>nd</sup> August, 2013*

in

H.C. Constitutional Petition No. 38 of 2012)

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**JUDGMENT OF THE COURT**

This is an appeal arising from the judgment of *Tuiyot, J.* delivered on 2<sup>nd</sup> September, 2013. The background to the appeal is that *Khatija Ramtula Nur Mohamed* (the 1<sup>st</sup> appellant) a Kenya national and *Zahid Abbas Mohamed Akram* (the 2<sup>nd</sup> appellant) a Pakistani national contracted a marriage on 25<sup>th</sup> September, 2011 under Islamic Law. The 2<sup>nd</sup> appellant came to Kenya in 2009 under an Alien Certificate issued pursuant to the Immigration Act Cap. 172. Whilst in Kenya, the 2<sup>nd</sup> appellant with others incorporated a company, Mombasa Khushi Motor Company Limited. He deposed that due to differences in the company his co-directors hatched a scheme to have him deported by detaining his passport to the extent that he was unable to renew his visa when it expired. It was against the above background that the

two appellants filed a Constitutional Petition on 17<sup>th</sup> April, 2012 and sought the following orders:

***“a) A Declaration that the citizenship and Immigration Act No. 12 of 2011 (of the Laws of Kenya) is unconstitutional to the extent that it discriminates upon the Petitioners herein from getting automatic residency status by virtue of their marriage contrary to Article 27 of the constitution.***

***b) A Declaration that the rights of a citizen like the 1<sup>st</sup> Petitioner herein envisaged by Section 22 of the Kenya Citizenship and Immigration Act which provides that:***

***“22(I) Every citizen is entitled to the rights, privileges and benefits and is subject to the limitations provided for or permitted by the Constitution or any other written law including:-***

***(a) The right to enter, exit, remain in and reside anywhere in Kenya.***

***(b) Entitled to any document of registration or identification issued by the state to citizens.”***

***Includes:-***

***(a) The right of foreign spouses married to Kenyan citizens to enter, exit remain in and reside anywhere in Kenya in accordance with Article 39(3) of the Constitution.***

***(b) That a denial of the said rights of ingress, egress and abode at will in Kenya is protected by Article 27 and 45 among others of the constitution of Kenya.***

***(c) An Order for injunction restraining the respondents from doing such actions purportedly that may negate the Petitioners Constitutional rights as husband and wife resulting in the unconstitutional separation and severance of their marital status through means of Deportation, Arrest or Prosecution for purportedly being illegally present in the Republic of Kenya.***

***(d) A Declaration that a denial of the 2<sup>nd</sup> Petitioner by the Respondents of a permanent resident Permit based on the limitation period of 3 years of the Act is contrary to Article 45(2)(3) and amounts to an unfair administrative action contrary to Article 27 of the Constitution.***

***(e) An Order for injunction restraining the Respondents from doing such actions purportedly that may negate the Petitioners Constitutional rights as husband and wife resulting in the unconstitutional separation and severance of their marital status through means of Deportation, Arrest or Prosecution for purportedly being illegally present in the Republic of Kenya.***

***(f) A Mandatory injunction compelling the state through the Respondents to regularize the 2<sup>nd</sup> Petitioners presence in Kenya by issuance of such permits, passes or visas or such authority or any such document so as to secure the Petitioners’ choice of domicile as spouses in the Republic of Kenya.***

***(g) Such other Order as the Court may deem just and necessary in the circumstances.***

***Costs be borne by the Respondent.”***

The respondents opposed the petition which was subsequently heard by **Tuiyot, J.** who in his aforementioned judgment dismissed the Petition. The appellants were dissatisfied with the said judgment and hence this appeal.

On 24<sup>th</sup> June, 2014 upon request of the parties’ counsel and after several adjournments occasioned mainly by the non-availability of the appellants’ counsel, the court directed that the appeal be disposed of by way of written submissions. The appellants and the respondents duly filed their submissions on 9<sup>th</sup> July, 2014 and 20<sup>th</sup> August, 2014 respectively. They chose not to highlight their submissions.

The gist of the appellants' submission was that **section 37(d)** of the Citizenship & Immigration Act which outlaws the presence of a foreign spouse in Kenya within the first three years of marriage is unconstitutional and flies in the face of **Article 45** which provides for right to family. Further, that the impugned judgment **"sanctions a discrimination outlawed by the Constitution creating differential standards of treatment of marriages between citizens and non-citizens without ample justification"** as the Constitution does not provide for a 'waiting' period of three (3) years. Further, that there was no guarantee that such a foreign spouse will attain the envisaged status upon the expiry of the three (3) years.

It was the appellants further contention that the petitioners married on 25<sup>th</sup> September, 2011 under Islamic Law and have lived together as a husband and wife having chosen Kenya as their domicile of choice; that due to bad business relationship the 2<sup>nd</sup> appellant's co-directors have collaborated with the respondents in a bid to throw him out of Kenya; that the learned Judge fell into an error of law by finding that the 2<sup>nd</sup> appellant was unlawfully present in Kenya yet he had a valid marriage; that a marriage to a citizen can validate unlawful presence in Kenya without the necessity to await the expiration of three years; and finally that the learned Judge erred in failing to consider the 1<sup>st</sup> appellant's case whose rights as a citizen to marry a foreigner were violated.

The respondents opposed the appeal. It was their position that public policy, safety and security call for limitation of rights under **Article 24** of the Constitution; that the 2<sup>nd</sup> appellant's presence in Kenya was unlawful; that the marriage of the two appellants did not legalize the status of the 2<sup>nd</sup> appellant; and that there has been no discrimination as **Article 24(1)** provides for limitation of freedoms.

As can be discerned from the above, the issue raised in the petition was whether **section 37(d)** of the Citizenship and Immigration Act is unconstitutional. That section provides as follows:-

*"The following persons their children and spouses, shall be eligible upon application in the prescribed manner for grant of permanent residence status in Kenya...*

a) ...

b) ...

c) ...

d) *The spouses of Kenyan citizen married for at least three years"*

It was the petitioners' further contention that their marital union is protected by **Article 27** of the Constitution. In respect of the 1<sup>st</sup> appellant it was contented that the intended deportation of the 2<sup>nd</sup> appellant from Kenya was a contravention of **Articles 27(3)** and **27(4)** of the Constitution which provides:

***(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.***

***(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth."***

It is not in dispute that the 2<sup>nd</sup> appellant entered and remained in Kenya on the authority of a visa. At the time of filing his petition, he complained that his co-directors had confiscated his passport thus rendering his inability to seek a renewal of his visa. Indeed in considering the status of the 2<sup>nd</sup> appellant's presence in Kenya, the learned Judge relied on the contents of paragraph 5 of the 2<sup>nd</sup> appellant's affidavit sworn in support of the petition. It stated:

***“5(a) THAT the Immigration Officers have declined to extend my Visa. So my resident status in the country is not regular. My Visa has now expired. Fresh efforts by my Company have been initiated to have me arrested and charged in Court. This is for being illegally present in the Country.”***

Based on the above, the learned Judge found that by his own admission the 2<sup>nd</sup> appellant’s presence in Kenya at the time he filed the petition was unlawful. In essence, the appellant was admitting that his visa had expired and his presence in Kenya was unlawful. In view of this we could not agree more with the learned Judge’s finding that the 2<sup>nd</sup> appellant’s status of being present in Kenya was unlawful and to allow the petitioner’s plea would be tantamount to endorsing and protecting the 2<sup>nd</sup> appellant’s illegitimate presence in Kenya. This being the case, the appellant’s accusation of his co-directors hatching a scheme against him with the aid of the respondents is misplaced.

The appellants’ other complaint was that there was a violation of the Constitution as **section 37(d)** of the Citizenship and Immigration Act that provides for a “waiting” period of three years before a foreign spouse obtains permanent residency was discriminatory. It was argued that this position was discriminatory as a marriage contracted between two Kenyans does not have a “waiting” period unlike a marriage contracted between a Kenyan national and a foreigner. It was the appellant’s argument that this was contrary to **Articles 27(3)** and **27(4)** of the Constitution.

Further, we were invited to find that **section 37(d)** of the Citizenship and Immigration Act that requires the foreign spouses of Kenyan Citizens to have been married for at least three years, is unconstitutional, and contrary to **Article 45** of the constitution which provides as follows:

***“(1) The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.***

***(2) Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.***

***(3) Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.***

***(4) Parliament shall enact legislation that recognizes-***

***(a) marriages concluded under any tradition, or system of religious, personal or family law; and***

***(b) any system of personal and family law under any tradition, or adhered to by persons professing a particular religion,***

***To the extent that any such marriages or systems of law are consistent with this Constitution.”***

Whereas the above provision places a premium on the family unit, we are alive to the fact that whatever rights the Constitution bestows, there are also limitations and/or qualifications in the same Constitution for the full attainment of such a right. We find **section 37(d)** which has placed a fetter on automatic acquisition of citizenship is in tandem with **Article 24(1)** which provides that:

***“24(1)A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –***

***(a) The nature of the right or fundamental freedom;***

***(b) The importance of the purpose of the limitation;***

*(c) The nature and extent of the limitation;*

*(d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and*

*(e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.”*

We have considered the provisions of **section 39(d)** of the Citizenship and Immigration Act vis-a-vis **Article 24(1)** of the Constitution and we are in agreement with the findings of the learned Judge that this limitation is reasonable and justifiable and hence not unconstitutional. It provides for a waiting period of three (3) years and in our view, this period is not unduly long, bearing in mind the importance of the purpose of the limitation. One can well imagine the harm if there was no such limitation as undesirable persons may enter into this country, contract a marriage for convenience and automatically become citizens. This may pose real danger to the security of the country.

Given the above, it is our considered view that **Section 37(d)** of the Citizenship & Immigration Act which provides for a three (3) year waiting period is not reasonable. Besides, this requirement cuts both ways, as the statutory provisions providing for a waiting period of three years affects the Kenyan spouse as well as the foreign spouse, it does not affect the foreign spouse alone. Again, we do not think that this is a heavy price to pay for the 1<sup>st</sup> appellant who having chosen to marry a foreigner has to await the expiry of three years before they can live together as husband and wife in Kenya, being their domicile of choice. The security of the country outweighs the inconvenience to be suffered by the 1<sup>st</sup> appellant.

It is for the foregoing reasons that we find that **section 37(d)** of the Citizenship and Immigration Act is not unconstitutional and dismiss the appeal with costs to the respondents.

*Dated and delivered at Malindi this 26<sup>th</sup> day of February, 2015*

**H. M. OKWENGU**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

*I certify that this is a  
true copy of the original.*

**DEPUTY REGISTRAR**