

**IN THE HIGH COURT OF TANZANIA**

**(MAIN REGISTRY)**

**AT DAR ES SALAAM**

**MISCELLANEOUS CIVIL CAUSE NO. 5 OF 2022**

**IN THE MATTER OF THE CONSTITUTION OF THE UNITED  
REPUBLIC OF TANZANIA 1977 [CAP. 2 R.E. 2002]**

**AND**

**IN THE MATTER OF THE BASIC RIGHTS AND DUTIES  
ENFORCEMENT ACT [CAP. 3 R.E. 2019]**

**AND**

**IN THE MATTER OF A PETITION TO CHALLENGE THE  
CONSITUTIONALITY OF SECTION 39 (a) (ii) OF THE LAW OF  
MARRIAGE ACT [CAP 29 R.E. 2019]**

**BETWEEN**

**TANZANIA EPILEPSY ORGANISATION.....PETITIONER**

**VERSUS**

**ATTORNEY GENERAL.....RESPONDENT**

**RULING**

Date of Last Order: 19/05/2022

Date of Ruling: 23/06/2022

**BEFORE: S. C. MOSHI; J.**

The respondent, via a notice of preliminary objection challenges the competency of the petition which is made through an originating summons, in which the petitioner prayed for the following orders:

- a. DECLARATION that section 39 (a) (ii) of the Law of Marriage Act [Cap 29 R.E 2019] (Herein referred to as "LMA") contravenes Article 12 (2), 13(1) and 13 (4) of the constitution of the United Republic of Tanzania, 1977 and consequently unconstitutional, null and void.
- b. DECLARATION that Section 39 (a) (ii) of LMA discriminates a person with epilepsy or with recurrent attacks of epilepsy from enjoying the right to marriage because of his or her medical or social condition of epilepsy contrary to Article 13 (1) and 13 (4) of the Constitution of the United Republic of Tanzania, 1977 and consequently the said section is unconstitutional, null and void.
- c. DECLARATION that section 39 (a) (ii) of LMA does not recognize and respect the dignity of a person with epilepsy or recurrent attacks of epilepsy contrary to Article 12 (2) of the Constitution of the United Republic of Tanzania, 1977 and consequently unconstitutional, null and void.

- d. DECLARATION that in enacting section 39 (a) (ii) of LMA, the framers of LMA abdicated their duty and responsibility to take cognizance of, observe and apply Article 8 (2), 9 (a), 9 (f), 9(h) of the Constitution of the United Republic of Tanzania, 1977.
- e. Any other relief (s) and/ or orders (s) that the court may deem just and equitable to grant.

The application is supported by an affidavit sworn by Fides Peter Uiso, human rights defender and chairperson of the petitioner (Tanzania Epilepsy Organisation). The respondent opposed the application, and filed a counter affidavit which was sworn by Gallus Lupogo, State Attorney who also as hinted above, raised a preliminary objection on two points of law that: -

- i) The Petitioner has no locus standi.
- ii) The affidavit in support of the petition is incurably defective for contravening Order XIX rule 3 (1) of the Civil Procedure Code [CAP. 33 R.E. 2019].

The points involve legal issues relating to competence of the petition; hence procedurally they have to be determined before hearing of the petition on the merits. The submissions were heard viva voce, and the petitioner was

represented by counsel Paul Emmanuel Kisabo, whom I will also refer to him as Mr. Paul while the respondents were represented by Ms Vivian Method Senior State Attorney whom I will also refer to her as Ms vivian.

Ms Vivian started her submission on the 1<sup>st</sup> point of objection, she inter alia argued that, the Petitioner has no locus standi; she submitted that, Article 30 (3) of the constitution and section 4(1) 5 and 6 of the Basic Rights and Duties enforcement Act, Cap. 3 R.E 2019 gives standing to a person whose rights have been violated by the alleged contravention. The petitioner is a legal person and cannot be affected by the provisions which provides for voidable marriages. She said that, the Petitioner has no locus standi to file the Petition for the reason that she is not personally affected by the complained provision.

In support of her submission, she cited the case of **Chama cha Wafanyakazi Mahotel na Mikahawa Zanzibar (Horau) V. Kaimu Mrajis wa Vyama vya Wafanyakazi na Waajiri Zanzibar**, Civil Appeal No. 300 of 2019 at page 11, paragraph 2 which defines locus Standi as follows:

*"It has to be understood at the outset that, locus standi is a common law principle which provides that, only a person whose right or interest has been interfered with by another person has a right to bring his claim to court against that other person..."*

Ms Vivian argued that, according to the definition the petitioner has no locus standi for the reasons that her rights or interests have not been interfered with. Cementing her argument, she cited the case of **Rev. Christopher Mtikila vs Attorney General** (1995) TLR p. 31 where it was held that: -

*"The petitioner in this case has locus standi by virtue of article 30(3) of the Constitution which entitles a person who alleges that a basic right is being or is likely to be contravened in relation to him to institute proceedings for relief in the High Court, as well as by virtue of article 26(2) of the Constitution which entitles every person to institute proceedings for the protection of the Constitution and of legality..."*

She contended that, looking at the words of the court in this case, it's obvious that Article 30 (3) of the Constitution only gives right to a person to institute a petition where the complained Act or provision has affected that person.

On the second preliminary point of objection, Ms Vivian submitted that the affidavit is defective for contravening Order XIX r. 3 (1) of the Civil Procedure Code, CAP 33 R.E 2019. She said that, what the affidavit should contain has been elaborated in Order XIX rule 3. She cited the case of **Jumuiya ya Wafanyakazi vs. Shinyanga Regional Cooperative Union** (1997) TLR page 200, where at page 202 paragraph (e) the High Court of Tanzania elaborated what an affidavit should contain.

She pointed out that, the affidavit in support of the petition contains extraneous matters by way of opinions and arguments at paragraphs 4, 5, and 6. She said that, paragraph 4 contains opinions, the averments are just opinions of the deponent especially the word to live with constant fear, such fear causes frustration, and other averments in this paragraph are just opinions. She also said that, paragraph 5 contains opinions especially in the words see himself incompetent as a husband or wife compared to the rest of the marital couples, are just opinions of the deponent, they are not facts which can be proved by the deponent.

In respect of paragraph six, she said that, the paragraph contains arguments. It reads that a person with epilepsy or with recurrent attacks of

epilepsy contemplating marriage has lower prospect is an argument as it has to be substantiated with other legal argument.

She argued that, those three paragraphs contain extraneous matters, the affidavit in support of the petition is therefore defective, and the three paragraphs have to be expunged.

She further said that, if the three paragraphs are expunged, the remaining paragraphs cannot support the petition since the petitioners claim centers on the three paragraphs.

Ms Vivian ended her submission in chief by praying the court to strike out the petition for being accompanied by a defective affidavit.

In reply, Mr. Paul, responded to the submission relating to the 1<sup>st</sup> preliminary objection, and he began by citing Article 30 (3) of the Constitution of the United Republic of Tanzania, which reads thus:

*"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. This Article is the basis for Locus Stand for any person who has been*

*offended, including the petitioner to institute a case before the High Court."*

He submitted that, it is true that the petitioner is a legal person, this does not mean that a legal person is barred from instituting a case before this court or it can't be said that the petitioner is not affected by the complained provision. The petitioner can institute the present petition in view of paragraph two of the affidavit which reads that:

*That, Tanzania Epilepsy Organisation is a registered non-governmental organization in Tanzania since 2021 under the Non-Governmental Organizations Act No 24 of 2002. Its objectives are "to raise awareness on epilepsy in the community, empower women and youths who are living with epilepsy for the development of their families and community, to promote values and dignity of the society. Its mission is to change the negative attitude towards people living with epilepsy through awareness, empowerment, promote education, advocacy research, access to best medication and diagnose."*



He said that, in the performance of its duties, the petitioner is in fact dealing with persons that have been affected by section 39 (a) (ii) of the Law of the Marriage Act.

He contended that, the petitioner is recognized under section 4 of the Interpretation of Laws Act, CAP. 1 R.E. 2019 which defines the term person, that, "person" means any word or expression descriptive of a person and includes a public body, company, or association or body of persons, corporate or unincorporated. In support of his contention, he cited the case of **Rev. Christopher Mtikila vs. Attorney General** (supra) which was cited in the case of **God Bless Jonathan Lema vs Mussa Hamis Nkanga**, Civil App.47/2012 at Page 11 in which case the court held that, *in matters of public interest Litigation this court will not deny standing to a genuinely and bonafide litigant even though he has no personal interest in the matter*. He said that, in the same case at page 11 the Court of Appeal cited the case of **Attorney General v. Malawi Congress Party & another Civil Appeal No. 22 of 1996**; in which the Malawian Supreme Court of Appeal provided a test for Locus Standi. He argued that, therefore in line with this definition the petitioner has interest in the complained provisions, in view of the averments in paragraph two of the affidavit.

Mr. Paul argued further that, any one with sufficient interest may seek a remedy. In this regard, he cited the case of **Josia Baltazar Bais and 138 others vs. Attorney General and others** (1998) TLR at page 331, at Page 342.

He wrapped up his submission in respect of the first point of objection in law by saying that, the petitioner has locus standi to institute a case before this court and is entitled to be heard on merits. He prayed the court to overrule the 1<sup>st</sup> preliminary objection and let the matter be heard on merit.

In regard to the 2<sup>nd</sup> preliminary point of objection, Mr. Paul referred to Order XIX rule (3) (1) which provides that:

*"Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted..."*

He however, contended that, in accordance to Article 107 A (2) (e) of the constitution of the United Republic of Tanzania, the court is supposed to dispense justice without being tied up with technicalities which may obstruct dispensation of justice.

He argued that, Order XIX rule 3 (1) is a rule of Procedure, it is a principle of law that rules of procedure are hand maiden of justice. In the case of **Juma S. Busiayah v. Zonal Manager (south) Tanzania Post Corporation** Civil No. 8 of 2004, at Page 2 the Court of Appeal cited the case of **Uganda vs. Commissioner of Prisons Ex parte Matovu**, 1966 E.A, 514 at p. 520 where it was observed that:

*"The affidavit sworn to by the counsel is also defective. It is clearly bad in law. Again, as a general rule of practice and procedure, an affidavit for use in court, being a substitute of oral evidence, should only contain statements of facts and circumstances to which the witness deposes either of his own personal knowledge or from information to which he believes to be true. Such affidavit must not contain extraneous matter by way of objection or prayer or legal argument or conclusion..."*

He said that the phrase in the cited case that, *should only contain statement of facts* is what is contained under Order XIX rule (3) (1) of the Civil Procedure Code, explained that, the averments in paragraph 4 of the affidavit are facts which are in the knowledge of the deponent, likewise, the contents of Paragraph five are facts which are in the knowledge of the

deponent, they are not opinions and averments in paragraph six (6) are also facts which are within the knowledge of the deponent.

He submitted that, the word knowledge was defined in the case of **Nasreen Hassanali vs. Agakhan Health service, Tanzania** Rev. Appl 84/2021 Labour Division, (High Court), at page 13. The facts in paragraph 4, 5, and 6 are within the knowledge of deponent based on experience or familiarity gained by the petitioner and that experience has been through routine activities as deponed at paragraph two of the affidavit. He also cited the case of **Mantric Tanzania Ltd. V. Junior Construction Ltd,** Misc. Commercial case No. 70/2017, at P. 3 which is in line with the provisions of Order. XIX rule 3 (1) of the Civil Procedure Code.

In the end, the counsel for the petitioner prayed the Court to overrule the preliminary objections. However, he suggested that if the court were to find that paragraphs 4, 5, & 6 of the affidavit are defective, then the proper remedy, is to give an order for amendment of the affidavit, or alternatively, even if the three paragraphs are expunged, and they are not allowed to amend the affidavit, the remaining paragraphs still can support the petition. His proposals were based on Article 107 A (2) (e) of the constitution.

In rejoinder, the Respondent's counsel, reiterated the submission in-chief, and she conceded that, a legal person is not barred from instituting a case, and that a legal person has also legal standi under Art. 30 (3) however, in the petition at hand, the petitioner being a legal person lacks locus standi in relation to the complained provision.

She pointed out that, paragraph two, contains mere words by the petitioner as she has not attached the certificate of registration to prove that she is registered. She prayed the court to disregard it.

She argued that **Godbless Lema's Case (Supra)** is a public interest case, therefore personal interest is not required for petitioner to have locus; page 10 paragraph 4, clearly shows that one can file a petition under public interest by citing Art 26 (2) as enabling provision and not Art 30 (3) as cited in the matter at hand. Art. 30 (3) only relates to a person whose rights have been affected by the complained provision or action.

In relation to the case of **Mtikila (Supra)**, that no personal interest is required in public interest litigation, she said that, since the petitioner failed to prove before this court that she is indeed registered and performs those functions which are stated in paragraph two of the affidavit, the court will

not be in a position to determine if the petitioner is genuine and bonafide litigant.

She in the end, prayed the court to strike out the petition with costs, as the petitioner has no interest.

I have carefully considered the submissions by both parties. I will determine the two points of law seriatim, and I will start with the first point which relates to the issue of locus standi of the petitioner to prefer the present petition. In **Chama cha Wafanyakazi Mahotel na Mikahawa Zanzibar (Horau) V. Kaim Mrajis wa Vyama vya Wafanyakazi na Waajiri Zanzibar (Supra)** Locus Standi has been generally defined as follows:

*"It has to be understood at the outset that, locus standi is a common law principle which provides that, only a person whose right or interest has been interfered with by another person has a right to bring his claim to court against that other person..."*

However, locus standi for matters which are preferred under article 30 (3) of the constitution is well explained in the case of **Rev. Christopher Mtikila vs Attorney General (supra)** that: -

*"The petitioner in this case has locus standi by virtue of article 30(3) of the Constitution which entitles a person who alleges that a basic right is being or is likely to be contravened in relation to him to institute proceedings for relief in the High Court, as well as by virtue of article 26(2) of the Constitution which entitles every person to institute proceedings for the protection of the Constitution and of legality..."*

From the above interpretation, it is obvious that for a petition to be brought under article 30 (3) the petitioner must show that, a basic right is being or is likely to be contravened in relation to him personally.

It is common ground that a legal person may sue or be sued as it is recognized under section 4 of the Interpretation of Laws Act, CAP. 1 R.E. 2019 which defines the term "person" to mean any word or expression descriptive of a person and includes a public body, company, or association or body of persons, corporate or unincorporated.

However, Article 30 (3) of the constitution reads thus:

*"Mtu yeyote anayedai kuwa sharti lolote katika Sehemu hii ya Sura hii au katika sheria yoyote inayohusu haki yake au wajibu kwake, limevunjwa, linavunjwa au inaelekea litavunjwa na mtu yeyote popote katika Jamhuri ya*

*Muungano, anaweza kufungua shauri katika Mahakama Kuu” and Article 26 (2 reads that; “Kila mtu ana haki, kwa kufuata utaratibu uliowekwa na sheria, kuchukua hatua za kisheria kuhakikisha hifadhi ya Katiba na sheria za nchi.*

Therefore for a person who wishes to apply these provisions of the constitution to institute a constitutional petition before the High Court he is required to lodge it under the provisions of the Basic Rights and Duties Enforcement Act, Cap. 3 R.E. 2019 as amended by Written Laws (Miscellaneous Amendments) (No.3) Act, 2020, and section 4 it reads thus:

*(1) If any person alleges that any of the provisions of sections 12 to 29 of the Constitution has been, is being or is likely to be contravened in relation to him, he may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the High Court for redress.*

*(2) Without prejudice to the provisions of the Commission for human rights and Good Governance Act, relating to powers of the Commission to institute proceedings, an application under subsection (1) shall not be admitted unless it is accompanied by an affidavit stating the extent to which the*



*contravention of the provisions of Articles 12 to 20 of the Constitution has been affected such person personally.*

*(3) For avoidance of doubt, a person exercising the right provided for under Article 26 (2) of the Constitution shall abide with the provisions of Article 30 (3) of the Constitution.*

Indeed, the cited provisions of the Act are in line with the interpretation given by the Court of Appeal in its holding in the Case of **Rev. Christopher Mtikila (supra)**.

The issue raising at this stage is whether the petitioner has been affected personally. The facts in paragraph two of the petitioner's affidavit show that, the petitioner is an *Organization which is a registered non-governmental organization in Tanzania since 2021. Its objectives are "to raise awareness on epilepsy in the community, empower women and youths who are living with epilepsy for the development of their families and community, to promote values and dignity of the society. Its mission is to change the negative attitude towards people living with epilepsy through awareness, empowerment, promote education, advocacy research, access to best medication and diagnose."*

Petitioner's counsel argued that, it has locus to institute the case due to its legal personality and because in the performance of its duties, the petitioner is in fact dealing with persons who have been affected by section 39 (a) (ii) of the Law of the Marriage Act. With due respect to petitioner's advocate, as argued by respondent's counsel, firstly, paragraph two, contains mere words by the petitioner as she has not attached a certificate of registration to prove that she is registered so as to qualify to have a legal personality. Secondly, even if it is assumed that the petitioner is a legal person, it cannot be personally affected by section 39 (a) (ii) of the Law of Marriage Act, cap. 29 R.E.2019 because it is incapable of contracting a marriage.

I am persuaded by the High court decision in the case of **Legal and Human Rights Center and another vs. Hon. Mizengo Pinda and another**, Misc. Civil Cause No. 24 of 2013 where the High Court discussed at length and amplified the doctrine of locus standi under article 30 (3) of the constitution. At page 21 the court held among other things that: -

*"With respect, we think that this proposition is not supported by the said article because, by their own pleadings in the petition and supporting affidavits, the petitioners are not the ones whose rights are likely to be infringed, which would have brought the matter under*

*article 30 (3) of the Constitution, rather, it is individuals, as we shall soon see. We think that the petitioner's standing is provided for under article 26 (2) of the constitution..."*

Similarly, in the case at hand the petitioner is not the one who is personally affected.

Again, in the same case at page 22 the court stated that: -

*"However, one needs only to look at the pleadings to realize that the nature of the infringement contemplated is such that it cannot be committed against the petitioners who are juristic persons. Torture, inhuman and degrading treatment or a breach of human dignity and security of the person by way of physical violence (which is the basis of the petitioner's grievance) can only be committed against an individual (a natural person, as opposed to a corporate body), since the latter only exists in legal fiction and not in flesh and blood..."*

Likewise in this case, the petitioner who introduced herself as a juristic person has not shown that the impugned provision of the Law of Marriage Act, that is section 39 (a) (ii) do violate its rights personally.

The applicant's counsel argued that, the issue of locus standi should have been dealt upon during admission before the registrar, now that it has been admitted the same should not be entertained. With due respect to petitioner's counsel, it is my view that the argument is misconceived. Section 4 (2) of the Basic Rights and Duties Enforcement Act, Cap. 3 mandates that for a petition to be admitted by the High Court an affidavit accompanying the petition should state the extent which the contravention of Articles 12 to 29 has affected such person personally. The high court is given powers to determine the jurisdiction of the court, see section 8 (2) of the Act and Rule 7 (1) and (2) of the Basic Rights and Duties Enforcement (Practice and Procedure) Rules, 2014.

Basing on the above, I find that, the Petitioner has no locus standi; hence the first point of objection is sustained.

On the second limb of Preliminary point of objection that the affidavit in support of the petition is incurably defective for contravening Order XIX rule 3 (1) of the Civil Procedure Code, [CAP. 33 R.E. 2019]. Order XIX rule 3 (1) of the Civil Procedure Code reads thus: -

*"Affidavits shall be confined to such facts as **the deponent is able of his own knowledge to prove** except on interlocutory applications on which statements of his belief may be admitted."*

**[Emphasis provided]**

An affidavit is essentially a substitute for oral evidence, and should only contain statements of fact and circumstances. In a well celebrated case of **Uganda v. Commissioner of Prisons, Ex-parte Matovu (Supra)** the court stated inter alia that: -

*" As a general rule of practice and procedure, an affidavit for use in court, being a substitute of oral evidence, should only contain statements of facts and circumstances to which the witness deposes either of his own personal knowledge or from information to which he believes to be true. Such affidavit must not contain extraneous matter by way of objection or prayer or legal argument or conclusion..."*

I have read the contents of the impugned paragraphs; they read thus:

**Paragraph 4**, *"That, a married couple whom at the time of marriage was subject to epilepsy or recurrent attacks of epilepsy live with the constant fear*

*that his or her present marriage can be annulled, such fear causes frustration, unhappiness and mental stress to him.*

**Paragraph 5,** *"That, a married couple whom at the time of marriage was subject to epilepsy or recurrent attacks of epilepsy see himself or herself incompetent as husband or wife compared to the rest of the marital couples."*

**Paragraph 6,** *"That, a person with epilepsy or with recurrent attacks of epilepsy contemplating marriage has lower prospects of marriage on account of ever-present possibility of the marriage being annulled and stigmatized by the other spouse or community members."*

Evidently, the averments are not facts which are in the knowledge of the deponent which it can prove, they all contain petitioner's opinions.

Likewise, another error, the source of information is not disclosed in the verification clause. It is true that, being a chairperson of a juristic person of the applicant and not the affected person, the deponent could not have known on his own knowledge the fears experienced by a married couple whom at the time of marriage was subject to epilepsy or recurrent attacks of epilepsy or a person living with epilepsy as illustrated in paragraphs four, five, and six of the affidavit. All in all, I find that the affidavit is defective;

hence the three paragraphs are doomed to be expunged, and I hereby expunge paragraphs 4, 5 and 6 accordingly. It is obvious that, the remaining contents of the affidavit cannot support the petition.

Petitioner's advocate prayed that if I were to find an affidavit defective then, he be allowed to amend it, however, I have the same stand with respondent's counsel, the contents of an affidavit, being in place of oral evidence, and the defects are of substantive nature as they go to the root of the matter, it cannot be salvaged through amendment.

That said and done, I sustain the preliminary objection on both points of law.

Consequently, the petition is struck out accordingly.

I make no orders as to costs.

  
**S.C. MOSHI**

**JUDGE**

**23/06/ 2022**