

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MAIN REGISTRY
AT DAR ES SALAAM**

MISC. CAUSE NO 61 OF 2022

**IN THE MATTER OF AN APPLICATION FOR PREROGATIVE ORDERS OF
PROHIBITION, CERTIORARI AND MANDAMUS**

AND

**IN THE MATTER OF LAW REFORMS (FATAL ACCIDENTS AND
MISCELLANEOUS PROVISIONS) ACT, CAP 138 RE 2022**

AND

**IN THE MATTER OF LAW REFORMS (FATAL ACCIDENTS AND
MISCELLANEOUS PROVISIONS) (JUDICIAL REVIEW PROCEDURE AND
FEES) RULES OF 2014**

**IN THE MATTER OF THE DECISION OF THE MINISTER OF CONSTITUTION OF
LEGAL AFFAIRS ISSUED ON THE 28TH SEPTEMBER, 2022 TO CONDUCT
PUBLIC CONSULTATION REGARDING THE MINIMUM AGE OF MARRIAGE**

BETWEEN

TANZANIA WOMEN LAWYERS ASSOCIATION.....APPLICANT

VERSUS

HON. MINISTER CONSTITUTIONAL

AND LEGAL AFFAIRS.....1st RESPONDENT

HON. THE ATTORNEY GENERAL.....2nd RESPONDENT

RULING

22nd March 2023 & 26th May 2023

MZUNA, J.:

This is an application for leave. It is premised on a decision of the Minister for Constitution and Legal Affairs Dr. Damas D. Ndumbaro, who on 28th September, 2022 published the so called "Taarifa kwa Umma" consulting

the general public that they should submit their opinion regarding the proposed amendment of the Law of Marriage in connection with the minimum age for marriage (see Annexure C to the applicant's affidavit).

The applicant is of the view that he ought to have tabled in the Parliament a bill to amend the Law of Marriage Act in compliance with the Court of Appeal decision in the case of **Attorney General v. Rebeca Z Gyumi**, Misc. Civil Appeal No. 348 of 2019.

On account of the above, leave is therefore being sought:-

a/ To apply for orders of prohibition to restrain the 1st respondent from carrying out the purported public consultations in the manner communicated through the Public Notice pending the determination of the application for substantive orders.

*b/ For the order of mandamus to compel the 1st and 2nd respondent to table in the Parliament the bill to amend the law of marriage Act in full intent and spirit of the decision of this Court in **Rebeca Z. Gyumi vs Attorney General**, Misc Civil Cause No 5 of 2016.*

The application is supported by the affidavit of Tike Mwambipile, Principal Officer of the Applicant. In their joint counter affidavit, the 1st and 2nd respondent sternly objected the application for leave and raised two preliminary objections that the application for certiorari is bad in law for want of decision and that the applicant has no sufficient interest to file

this application. The respondents opted to abandon the 2nd preliminary objection.

The hearing on the preliminary objection proceeded by way of written submissions. Both parties had representation. Mr. Jebra Kambole, the learned Advocate appeared for the Applicant whereas Ms. Jacqueline Kinyasi, the learned State Attorney represented the 1st and 2nd respondent. The raised preliminary objection is couched in the following words:- *"The application for certiorari is bad in law for want of a decision."*

The main issue is whether the raised preliminary objection meets the requirement to be categorized as a preliminary objection?

Submitting in support of the preliminary objection, the learned State Attorney argued that application is unmaintainable for failure to attach the decision sought to be challenged. Ms. Kinyasi said that the law requires a person aggrieved by any decision, order or act to attach the same. The case of **Rehema Ally Kinyaka vs Tanzania Institute of Accountancy**, Misc. Civil Application No. 21 of 2018, High court of Tanzania, Main registry (unreported); **Stephen Semba v. Leonard Obed Mlewa and two Others**, Misc. Civil Cause No. 66 of 2005, High court, Dar es Salaam Registry (unreported) and **Joshua Nassari vs The Speaker of the National Assembly of the United Republic of**

Tanzania, Misc. Civil Cause No. 22 of 2019 (both unreported) were cited in support.

Ms. Kinyasi submitted that the applicant supported his claim by attaching annexure c (Public Notice dated 28th September 2022) which according to Ms Kinyasi does not qualify to be a decision subject for Judicial Review. The Court in dealing with the same issue in **Joshua Nassari vs The Speaker of the National Assembly of the United Republic of Tanzania** (supra), the applicant in this case attached a press release titled Public Notice that Joshua Nassari was no longer a Member of Parliament (Annexure HK4) the court ruled out that the public notice was not a decision. Therefore, the public notice issued to inform the public on measures taken by the 1st respondent in implementing the Court's decision is not the decision capable of judicial review by any court. That being the case, the application is incompetent and the same should be struck out.

Mr. Kambole sternly objected the preliminary objection by inviting this Court to consider the meaning of preliminary objection as defined under **Mukisa Biscuits Manufacturing v Co. Ltd vs West End Distributors Ltd (1969) EA** at page 700. That since annexure C was disputed and the respondents asked the applicant to make proof thereof,

therefore the issue whether it is a decision or not cannot be determined at this stage. It is a matter of fact not law, which needs proof during trial. It cannot be raised if any fact has to be ascertained or if it is exercise of judicial discretion.

He insisted that the preliminary objection raised by the 1st and 2nd respondent does not pass the test of **Mukisa Biscuits' case** (supra) because there is no specific definition of the term decision.

It is submitted further that, there is no law in the country setting a requirement of attaching a copy of the decision in the application and the Applicant did not provide the law setting such a requirement. Even the **Law Reform (Fatal Accidents and Miscellaneous Provisions) Act Chapter 310 RE 2002**, and **The Law Reform (Fatal Accidents and Miscellaneous Provisions) Judicial review Procedure and Fees) Rules 2014** do not set a requirement of attaching copy of the decision in the application for the order of certiorari and prohibition. Moreover, the cited case of **Joshua Nassari vs The Speaker of the National assembly of the United Republic of Tanzania** (supra) is not binding. It is also distinguishable in the sense that there was an automatic operation of the law as to how a member of parliament lose a seat which does not make a speaker to make any decision except inform NEC. In the

instant case, copy of the decision is attached. Therefore, the preliminary objection be dismissed with costs.

I have keenly considered the attendant submissions from both parties. My task is to determine the preliminary objection that the application is bad in law for want of a decision.

Reading from the above submissions, Ms. Kinyasi submitted that the application is untenable for want of decision. The public notice does not amount to a decision but rather the implementation of the Court of Appeal directives. However, the Applicant sternly objected it.

My close look on the affidavit, the said challenged "decision" is annexed as "C". It is pleaded under paragraph 8 of the affidavit. It is also replied under paragraph 6 of the joint counter affidavit that the ongoing nation wide consultation by the Government is a directive from the Parliament with the aim of engaging the public in process for effecting amendments as per the legal requirement.

This was countered in the applicant's answer to the respondent's statement in reply that:-

"...there was a decision for public consultation and we have attached a public notice as proof of that decision."

Since there is no specific law setting the requirement of attaching the decision and there is no law specifically defining the meaning of the word 'decision' the preliminary objection raised by the respondents lack legal basis. Such fact needs proof. It is a matter of fact not law. In the above cited case of **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd (1969)** (supra), the court held that:-

"a preliminary objection consists of a point of law which has been pleaded or which raises a clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit examples are an objection on the jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

That holding is almost akin to what was stated in the case of **The Soitsambu Village Council v. Tanzania Breweries Ltd and Another**, Civil Appeal No. 105 of 2011 (unreported), which held that: -

"A preliminary objection must be free from facts calling for proof or requiring evidence to be adduced for its verification. Where a court needs to investigate facts, such an issue cannot be raised as a preliminary objection on a point of law. The court must, therefore, insist on the adoption of the proper procedure for entertaining applications for preliminary objections. It will treat as a preliminary objection only those points that are pure law, unstained by facts or evidence, especially disputed points of fact or evidence. The objector should not condescend to the affidavits or other documents accompanying the pleadings to support the objection such as exhibits."

I happened to deal with similar issue in the case of **Otilia Nyamwiza Rutashobya v. Chief Secretary and 5 Others**, Miscellaneous Cause No. 13 of 2022, High Court Main Registry, (unreported).

In that case, the applicant, a lawyer by profession was seconded and promoted to the level of a higher grade but was not paid her salary arrears let alone upgrading her salary to that position. Upon enquiry, she was told that there was no such category at her new placement. She was erased from the Human Capital System (LAWSON). She referred that matter to Katibu Mkuu Kiongozi who maintained the same stand.

The applicant challenged the act of the 3rd respondent (Permanent Secretary President's Office and Good Governance) in refusing to sign appropriate employment cadre of Senior Legal Officer II and denial of being paid salary arrears by the 4th respondent (National Institute of Transport) and 5th respondent (National Art Council) as well as 2nd respondent's (ie Public Service Commission) failure to exercise its powers while 1st respondent (Chief Secretary) failed to give reason for its findings.

The respondents raised a preliminary objection that there is no challengeable decision such that there can be an arguable case for this court to grant leave to file application for judicial review.

In dismissing the said preliminary objection, I observed that it was dependent upon determination on whether the letters which insisted there was no such category of Senior Legal Officer 2, amounted to a decision or not and whether such point could be determined at a preliminary stage, did not amount to a pure point of law for the reasons that:

*"The raised PO...goes to deal with production of evidence as there are 'facts to be ascertained' which is not the gist of preliminary objection in view of the decision in the case of **Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd** (Supra). What this court has to do is only believe that **"the factual depositions in the affidavit would have been presumed to be true"**, See the case of **Cosmas Mwaifwani v. The Minister for Health, Community Development, Gender, The Elderly and Children and Two Others**, Civil Appeal No. 312 of 2019 CAT at Dar es Salaam (Unreported), page 9."*

(Underscoring mine).

The above holding and especially the decision of the Court of Appeal in the case of **Cosmas Mwaifwani** (supra) is still valid. This court is also guided by the case of **Emma Bayo Versus the Minister or Labour and Youths Development and 2 Others**, Civil Appeal No. 79 of 2012 (Unreported) that:-

"it is now an established part of the procedural law of Tanzania that a person applying for prerogative orders in the High Court must first apply

for leave, which if granted will be followed by a subsequent main application for the prerogative orders."

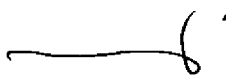
If the respondents have anything tangible to challenge annexure C, that should be subject for discussion in the main application for judicial review. In any case even the PO was wrongly worded, to say "*The application for certiorari is bad in law for want of a decision*" while the application is for leave, is a misnomer. Certiorari comes into question after granting leave. It is no doubt that even the cited case laws by the respondents never dealt with issue under discussion. The case of **Rehema Ally Kinyaka** (supra) never attached the decision subject for review which is not the case here where it has been attached. Other cases like that of **Stephen Semba** (supra) and the case of **Ali Shabani and 48 Others v. Tanzania National Roads Agency (TANROADS) and Another**, Civil Appeal No. 261 of 2020 CAT at Tanga (unreported), dealt with issue of time limitation. They are distinguishable. The case of **Ali Shabani and 48 Others** (supra) dealt with issue of limitation of time. The alleged date of demolition of the houses which encroached the road area due for expansion was not seriously disputed to be 2009. It was even pleaded. It was a matter of law which did not require examination of evidence. The court observed at page 8 that:-

"Accordingly, we agree with the learned Senior State Attorney and find nothing to fault the learned High Court Judge in his finding that the preliminary objection raised was a point of law. We thus find no merit in ground one and dismiss it."

That said and done, I overrule the preliminary objection for the reasons that the challenged decision attached as annexure "c" to the affidavit, to establish whether it is a decision or not requires proof which calls on evidence to be adduced. More so what amounts to a decision is also seriously in dispute. It is not a pure point of law.

For the above stated reasons, the preliminary objection stands dismissed. No order for costs.

Dated at Dar es Salaam, this 26th day of May, 2023.


M. G. MZUNA,
JUDGE.