IN THE HIGH COURT OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS 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. 310 R. E. 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 AND 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 FOR CONSTITUTIONAL

AND LEGAL AFFAIRS.....1ST RESPONDENT

HON. THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

12th &. 18th July, 2023

DYANSOBERA, J.:

The applicant, the Tanzania Women Lawyers' Association, has filed an application by Chamber Summons under Section 2 (3) of the Judicature and

Application of Laws Act [CAP. 358 R.E.2002], Sections 18 (1) and 19 (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act CAP 310 as amended in 2019 and Rule 5 (1), (2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014, for leave to apply for orders of:-

1. ***Certiorari*** to quash the decision of the 1st respondent communicated through the Public Notice issued by him on the 28th day of September, 2022 to conduct public consultations with a view of collecting public opinion on the minimum age for marriage.
2. **Prohibition** to restrain the 1st respondent from carrying out the purported public consultations in the manner communicated through the Public Notice mentioned above pending the hearing and determination of the application for substantive orders
3. ***Mandamus*** to compel the 1st and 2nd respondents to table in Parliament a bill to amend the Law of Marriage Act in full intent and spirit of the decision of this court in **Rebecca Gyumi case,** Misc. Civil Cause No. 5 of 2016 and as confirmed by the Court of Appeal of Tanzania in the **Attorney General v. Rebecca Z. Gyumi**, Misc. Civil Appeal No. 348 of 2019; and,
4. Any other order/orders which this court deems fit to grant.

The basis of this application is the Public Notice issued by Dr. Damas Daniel Ndumbaru (MP.), the 1st respondent herein, on 28th September, 2022 respecting, **'UKUSANYAJI MAONI KUHUSU MABORESHO YA SHERIA YA NDOA'** following the decision of this court (S.A. Lila, JK, S.S. Kihio, J., and A.A.Munisi, J.) in **Rebecca Z. Gyumi v. the Attorney General**: Miscellaneous Civil Cause No. 5 of 2016 delivered on 8th July, 2016; the decision which was confirmed by the Court of Appeal of Tanzania in the **Attorney General v. Rebecca Z. Gyumi**, Civil Appeal No. 204

of 2017 dated 23rd October, 2019. In **Rebecca Z. Gyumi** case this court found Sections 13 and 17 of the Law of Marriage Act [CAP 29 R.E.2002] unconstitutional and, exercising its powers under Articles 30 (5) and 13 (2) of the Constitution of the United Republic of Tanzania and the Basic Rights and Duties Enforcement Act, directed the Government through the 2nd respondent, within a period of one year from the date of the order, to correct the complained anomalies within the the said provisions and in lieu thereof put 18 years as the eligible age for marriage in respect of both boys and girls. As alluded earlier, this decision was confirmed by the Court of Appeal.

It is complained that, the government, instead of complying with the decisions of the courts, it, through the 1st respondent, issued the said Public Notice conducting public consultations with a view of collecting opinions on the minimum age for marriage.

In the statement of claim in support of the application for leave to apply for the said prerogative orders filed on 17th November, 2022, the applicant has stated under paragraph 6 as follows: -

i. The said Public Notice is illegal as it purports to undermine the power and authority of the Judiciary, particularly the Courts by the Executive arm of the State;
ii. The said Public Notice is ultra vires as the Minister lacks jurisdiction to question and or discus, vary, modify judgment of the court duly pronounced;
iii. The said Public Notice is unreasonable as it undermines the principle of the rule of law which is well enshrined in our Constitution;
iv. That the said Public Notice is illegal as it is against the principle of Independence of the Judiciary in that the executive is interfering with a judgment of the Court;
v. The said Public Notice is illegal and against the Constitution as it is

against the basic principles enshrined in the Constitution, namely equality before the law and the right of appeal; and

vi. The said Public Notice is so unreasonable, arbitrary and unfair.

At the time of hearing this application, Mr. Jebra Kambole, learned Advocate, appeared for the applicant whereas both respondents were represented by Ms Vivian Method, learned Senior State Attorney.

Arguing in support of the application, learned Advocate for the applicant, adopting the affidavit of Tike Mwambipile, Executive Director of the applicant and the statement filed in support of application, made the following submission.

In the first place, he pointed out that for the applicant to be granted leave to apply for judicial review, the following three criteria must be established. One is that the application must be filed within six months. He elaborated that the applicant has successfully fulfilled this requirement in that the impugned decision having been made on 28th September 2022, the applicant managed to file this application on 24th November, 2022 hence within the time as prescribed. Two, the applicant must show that there is an arguable case. According to Counsel for the applicant, the applicant has, under paragraphs 12 to 16 of the affidavit, complained that the said decision is against the principle of the rule of law, was improperly issued, undermines the Independence of the Judiciary and is ultra vires. These averments, Counsel submitted, have been disputed by the respondents as indicated under paragraphs 9 and 10 of their joint counter affidavits, a fact which is indicative of the establishment of an arguable case and three, he stated that the applicant has to show that he or she has interest on the matter. In support of his argument, he made reference to the decision of the Court of Appeal in the case of **Emma Bayo versus The Minister for Labour and Youth Development and others, Civil Appeal No. 19 of 2012 CAT** at Arusha (unreported) at page 8. He also referred this court to its judgment in **Ndalamia Partareto Taiwap & Others versus The**

Minister for Natural Resources and Tourism and another: Miscellaneous Civil Cause No. 9 of 2022, to buttress his argument.

Elaborating on the last criterion, that is the existence of sufficient interest, Mr. Kambole invited this court to look at paragraphs 2, 3, 4 and 10 of the affidavit on the applicant's vision, mission and objectives as well as areas of operation. He asserted that those averments explain about the activities of the applicant which are to champion gender equality, promote human dignity and gender justice as well as promoting good governance and a rule of law. It is his contention that the contents in those paragraphs 2, 3 and 4 of the applicant's affidavit have not been disputed by the respondents in paragraph 3 of their joint counter affidavit meaning that the applicant's objectives, existence and operation are not a matter in dispute.

Counsel for the applicant observed that the applicant is intending to challenge the decision of the respondents to collect public opinion concerning the age of marriage and her interest is derived from the fact that she is among the institutions registered in Tanzania to champion human rights and gender equality and further that the Public Notice is a public invitation for which the applicant is among the interested stake holders in the process and hence has interest in the matter. Mr. Kambole was emphatic that this matter being a public interest one concerning women and girls in the United Republic of Tanzania and the applicant being a professional association of Women Lawyers in the United Republic of Tanzania, she is an interested party and has sufficient interest in the process of the amendment of the Law of Marriage in Tanzania. He perceived that this being at the leave stage, there is nothing substantial to determine, only that the applicant is knocking at the door and should be allowed to have access to the court.

Responding to the submission for the applicant, learned Senior State Attorney, adopting the joint counter affidavit sworn by Griffin Venance Mwakapeje to form part of her submission, was candid and frank that her line of objection centres only on one ground that the applicant has not demonstrated sufficient interest to pursue this matter. Making reference to the case of ***John Mwombeki***

Byombalirwa v. The Regional Commissioner and Regional Police Commander; [1996] TLR page 74 which interpreted sufficient interest to mean *Locus Standi,* she was confident that for a person to apply for judicial review, he or she must have a *locus standi.* She admitted that the conditions for the grant of leave were set out in ***Emma Bayo case*** (supra) elucidating that it is the condition which requires a person to show sufficient interest is also statutory one as stipulated under Rule 4 of the Law Reform (Fatal Accidents and Miscellaneous Provision) (Judicial Review Procedure and Fees) Rules, GN No. 324 of 2014 which is to the effect that for a person to have sufficient interest, he must demonstrate that his interest has been or will be adversely affected by the complained act. Ms Vivian placed reliance of her argument on the case of **Legal and Human Rights Centre and 5 others Vs. The Minister for Information, Culture, Arts and Sports and 2 others**: Miscellaneous Civil Application No. 12 of 2018 (unreported). She was of the view that the applicant has not demonstrated that she has sufficient interest in the matter.

With regard to paragraphs 2, 3, 4 and 17 of the affidavits in support of this application showing that the applicant has interest in the matter, learned Senior State Attorney was under the impression that those paragraphs as referred simply introduce the applicant and her areas of activity but do not show how the applicant has been affected or how she will be adversely affected by this act. In her opinion, the cooperate body area of interest or activity cannot be enough to satisfy the requirement of *locus standi* in a judicial review matter. Putting emphasis on the **Legal and Human Rights Centre** case, learned Senior State Attorney told this court that the court in that case was faced with a similar situation whereby the applicants who were body cooperate applied for leave to apply for judicial review and in their affidavits, they only introduced themselves and the area of operation so as to prove that they had sufficient interest to bring the matter. There, this court observed at p. 21 of the ruling that, "it is as if the applicants have that assumed that once the court hears who and what they are-even by name or at most, what

they are engaged in the court would assume that they necessarily have an interest in the Online Content Regulations". The court answered the questions in the negative holding that the applicants had failed to demonstrate how they were adversely affected.

It is further contended on part of the respondents that the applicant has failed to show a link between the complained of decision and its having adversely affected her.

On the applicant's argument that the respondents have not disputed the facts in the affidavit which introduces the applicant and her objectives, the learned Senior State Attorney argued that since what the court should look at is the applicant's pleadings only, the respondents' failure to dispute those facts is inconsequential. This court was again referred to the **Legal and Human Rights Centre** case at page 11, first paragraph 4th line where it was stated that the court should thus look at the applicant's pleadings, that is the chamber summons, affidavits in support thereof, and the statement).

The lack of insufficiency of interest on part of the applicant was also pegged on another front which, to my mind, is strange. According to learned Senior State Attorney, since the decision the applicant complains about is in respect of the amendment of the Law of Marriage Act and specifically the minimum age of marriage, the applicant who is a juristic person cannot enter into marriage and therefore cannot be said to be affected by the provisions regarding the age of the marriage.

With respect to the argument that the applicant has sufficient interest as the matter has public interest, it was submitted on part of the respondents that a matter being of public interest cannot be a basis of an individual within a public to have *locus standi.* Reliance was placed on the case of **Alexander J. Barunguza v. The Honourable Attorney General,** Miscellaneous Cause No. 22 of 2023 High Court

Dar es Salaam, Main Registry on the authority that only a person whose personal rights have been interfered with has a standing to bring a claim for judicial review.

With this submission, learned Senior State Attorney prayed that this court declines to grant the leave as the applicant has not sufficient interest in this matter.

Counsel for the applicant, in a short rejoinder, reiterated his submission in chief that she has sufficient interest in the matter. He insisted that in this matter the applicant is just applying for leave so that she can file an application for judicial review concerning public consultation in law making process resulting from courts' decisions and not a marriage process which is intended to be challenged but rather, intends to challenge the non-compliance of a judicial decision.

It was insisted on part of the applicant that the applicant did not only introduce herself and state her areas of activities under paragraphs 2, 3 and 4 of the affidavit but has also stated her mission, vision and attached her Constitution (Annexture "A"), the facts which show that the applicant has not only sufficient interest in the matter but also has attached the invitation and that, as a stake holders, she has to make sure that the court order is complied with.

Counsel for the applicant sought to distinguish this case from that of **Legal Human Rights Centre** case arguing that in that cited case, their Constitution was not attached and did not explain about their activities while in the case under question, the applicant has attached the Constitution, explained the activities and other relevant matters and given evidence to show the applicant's actual business, the facts which are missing in the **Legal Human Rights Centre** case (supra).

On the case of **John Myombeki Byombalirwa,** it was submitted for the applicant that it is not a proper as a guidance for this court to determine this matter particularly at the leave stage but that it can properly apply only when determining the judicial review on merit. In other words, the above case was not

interpreting sufficient interest at the leave stage, Counsel for the applicant asserted.

I have carefully considered the affidavit verifying the facts relied on by the applicant. I have equally taken into account the competing arguments by both sides as well as the laws and case laws cited to me.

Both sides are agreed on two aspects. One, that in an application for leave all what the court looks for is whether the applicant has the *locus standi,* whether they have made out a *prima facie* case and whether they have timeously filed their action. Elucidating on this aspect, the Court of Appeal of Tanzania in **Emma Bayo versus The Minister for Labour and Youth Development and others, Civil Appeal No. 19 of 2012** (supra) at p. 8 observed:

> "We also respectfully agree with both Mr. Materu and Mr. Chavula that the stage of leave serves several important screening purposes. It is at the stage where the High Court satisfies itself that the applicant for leave has made out any arguable case to justify the filing of the main application. At the stage of leave, the High Court is also required to consider whether the applicant is within the six months limitation period within which to seek a judicial review of the decision of the tribunal subordinate to the High Court. At the leave stage is where the applicant shows that he has sufficient interest to be allowed to bring the main application. These are preliminary matters which the High Court should consider when exercising its discretion to grant or to refuse to grant leave"

Two, that the only question to be considered in this application is whether the applicant has demonstrated sufficient interest in the matter in question.

The decision of this question turns largely upon the whether or not the applicant has conformed to the provisions of rule 4 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees)

Rules, 2014 Government Notice No. 314 published on 5 September, 2014 which enacts thus: -

> **'A person whose interests have been or believes will be adversely affected by any act or omission, proceeding or matter, may apply for judicial review.'**

In the case in question, while the learned Senior State Attorney argues that the applicant has failed to demonstrate how her interests have been or believes will be adversely affected in accordance with rule 4 of the Rules, the applicant holds the contrary view.

Understandably, the interpretation of a statute be it principal or subsidiary, is not a mere exercise in semantics, but an endeavour to find out the meaning of the legislation from the words used, understand the context and purposes of the expressions used and construe the expressions sensible.

It will be recalled that at the era of the restrictive approach at common law which I may, *mea culpa*, call ubiquitous old concept of *locus standi*, a person who approached the court for relief was required to have interest in the subject matter of litigation in the sense of being personally adversely affected by the alleged wrong. It was not enough for the applicant to allege that the defendant had infringed the rights of someone else, or that the defendant was acting contrary to the law and that it was in the public interest that the court granted the relief.

Now, with the unrestrictive approach, the applicant has to show either that their interests have been adversely affected any act or omission, proceeding or matter or that they believe will be adversely affected by any act or omission, proceeding or matter. This is what rule 4 of the said Rules provides. Here, the interests must be neither remote nor hypothetical but genuine and sufficient.

Nevertheless, what constitutes sufficient interests depends on the facts of each case and whether or not the person's interests are worthy of court's protection is, in my view, a matter of judicial discretion which may vary according to the reliefs asked

for. As rightly submitted by learned Counsel for the applicant, the circumstances in the instant case are different from those obtaining in **Legal and Human Rights Centre** case referred to me by the learned Senior State Attorney. I will explain.

In the first place, the applicant, as an institution, has not only the right but also is under obligation under the law to go to court and bring a case on behalf of some victimised group without sufficient means or with no easy access to legal service taking into account the fact that public law is aimed at keeping public bodies within their powers, based on the assumption that citizens normally should be enabled to vindicate the public interest. I say so because, on the material available particularly the statement of claim and the affidavit, though she is a juristic person, the applicant has an interest in the process of amending the Law of Marriage Act and making sure that the court's order is complied with; she being not only a stake holder but also an invitee of the process. According to Article 9 of the Applicant's Constitution, the objectives of the Association include to advance the gender equality and the promotion of human dignity and gender justice and to promote good governance and the rule of law.

Second, it would, in my view, be improper in our system of public law if an association like the applicant or even a spirited individual, were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful action stopped, the alleged interference with the independence of the judiciary for that matter.

Third, in the case under consideration, there are some important factors to be considered including the importance of vindication of the rule of law and the independence of the judiciary and the importance of other issues raised in the application. After all, as pointed out by learned Counsel for the applicant, this not a substantive application for prerogative orders but rather, an application for leave and the applicant is just knocking at the doors of this court.

For the reasons stated, this application succeeds. Leave to the applicant to

file judicial review for the prerogative orders is granted.

W. P. Dyansobera

JUDGE

18. 7. 2023

This ruling is delivered at Dar es Salaam under my hand and the Seal of this Court on this 18th day of July, 2023 in the presence of Mr. Mpale Mpoki, learned Counsel for the applicant and Ms Lilian Milumbe, learned Senior State Attorney for the respondents.

W.P.Dyansobera

JUDGE