IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MAIN REGISTRY

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 32 OF 2023

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

AND

IN THE MATTER OF THE LAW REFORMS (FATAL ACCIDENT AND MISCELLANEOUS PROVISIONS) ACT, (CAP 310 R.E 2019)

AND

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

AND

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 LEGAL AND CONSTITUTIONAL AFFAIRS.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

2nd of April, 2024
MANSOOR, J.

The applicant, Tanzania Women Lawyers Association "TAWLA", preferred the instant application by way of chamber summons made under section 2(3) of the Judicature and Application of Laws, Act (Cap 358 R.E 2019), section 17 (2) of the Law Reform (Fatal Accidents Miscellaneous Provisions) Act (Cap 310 R.E 2019), and Rule 18 (1) (a) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Judicial Review Procedure and Fees) Rules of 2014 seeking orders as listed hereunder:

1. The Honourable court be pleased to grant orders of Certiorari to quash the decision of the 1st respondent, the Minister of Constitution and Legal Affairs communicated through the Public

Notice issued by him on the 28th day of September, 2022, to conduct public consultations with a view to collect public opinion on the minimum age of marriage;

2. The Honourable Court be pleased to grant orders of 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. The Honourable Court be pleased to grant orders of Mandamus to compel the 1st and the 2nd respondent 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 Rebeca Gyumi Case, Miscellaneous Civil Cause No. 5 of 2016, and as confirmed by the Court of Appeal of Tanzania in the Attorney General vs Rebeca Z Gyumi, Misc. Civil Appeal No 348 of 2019.

4. Any other order/orders which the Honourable Court deem fit to grant in favour of the Applicant.

The application was supported by the affidavit of TIKE GEORGE MWAMBIPILE, the Principal Officer of TAWLA who also filed the statement to verify the same.

Briefly, the case of the applicant is as stated in the affidavit of its Principal Officer. The Applicant states that in the year 2017, the High Court of Tanzania delivered a decision in the case of **Rebeca Z. Gyumi versus the Attorney General of the United Republic of Tanzania,** Miscellaneous Civil Cause No 5 of 2016, declaring sections 13 and 17 of the Law of Marriage Act (Cap 29 R.E 2019) unconstitutional and thus the Government was ordered to amend the two provisions within a year from the date of Judgement. Clarifying on the issued orders she said, the court directed that the minimum age for Marriage for boys and girls be amended from 14 years to 18 years old. She stated further that the decision was confirmed by the Court of Appeal in the case of **Attorney General vs Rebeca Z. Gyumi,** Miscellaneous Civil Appeal No. 348 of 2019.

The applicant contended further that, on 28th September, 2022, the 1st respondent issued a notice to inform the public that in implementing

the court decision, the Ministry of the Constitutional and Legal affairs had submitted recommendations to amend the Law of Marriage Act, 1977 by making the age of 18 years as the minimum age of marriage for boys and girls. She averred that the notice indicated that the parliament had recommended 15 years to be the minimum age for girls to get married subject to certain safeguards, and also that they are carrying out consultation for public opinions on the matter.

She said the notice issued by the Ministry of Constitution and Legal Affairs informed the Public that it has prepared a Road Map for collecting public views and opinions for the purpose of having common understanding on issues that need amendments in the Law of Marriage Act, 1977. The Notice informed the Public further that the Ministry of Constitution and Legal Affairs, together with receiving public views and carrying out public consultations, it has been meeting various stakeholders in standing Parliamentary Committee on Constitutional and Legal affairs, members of parliament, religious leaders, traditional leaders, and monocyclic drivers, and the exercise was being undertaken in Dar es Salaam, Tanga, Lindi and Mtwara Regions.

The applicant states that the public notice issued disregarded completely the decision of the High Court of Tanzania in the case of **Rebeca Gyumi (supra),** which was also confirmed by the Court of Appeal of Tanzania. The Applicant lamented that the 1st respondent lacks powers in law or otherwise to act on the observed manner while it was aware of the decisions issued by the High Court, and confirmed by the Court of Appeal.

The Applicant stated further that the Ministry of Constitution and Legal Affairs is mandated to respect and comply with the decision of the Court for proper and orderly administration of Justice. She concluded that the decision of the 1st respondent to issue the public notice for carrying out the public consultations is wrong and that the act violates constitutional values and principles and it exceed the powers of the 1st respondent for the reasons that the Public Notice undermines the power and authority of the Judiciary by the executive arm of the State. She said the Public Notice is ultra-vires as the Minister lacks authority to initiate a consultations process that has an effect of making the court decision and order a nugatory, and that the Public Notice undermines the principle of rule of law and independence of the

judiciary which are entrenched and enshrined in the Constitution of the United Republic of Tanzania.

She rested her submissions by reiterating the prayers before this court as reproduced earlier herein.

The respondents resisted the application, they filed the joint counter affidavit sworn by Honorina Stanslausy Munishi, the Senior State Attorney from the office of the Attorney General. Basically, the respondents acknowledge, and agree that in the Rebeca Gyumi's case the High Court declared the provisions of Section 13 and 17 of the Law of Marriage Act, unconstitutional and directed the Government to amend the same. The respondents' state that the Government is in the process of amending the provisions which were declared un-constitutional, and for the amendment to take place the process of consultation and collection of public views must be undertaken. The respondents depose that it is the requirement of the law that before a statute is amended, it must first be tabled before the parliament, and that the ongoing nationwide consultations by the Government is a

result of the directives from the Parliament with the aim of engaging the public in the process.

The respondents stated further that the public have responded, and the majority have opined that the minimum age for marriage for boys and girls be amended to be 18 years old, and the respondents are in the final stages of submitting the Bill to the Parliament. The respondents' also stated that in order to implement the court decisions that have declared the provisions of the law unconstitutional, the process to amend the law involves public consultation's, and this is part of the parliamentary process in implementation of the court decisions. The respondents stated also at paragraph 10 of the counter affidavit that the Government is indeed in the process of taking into effect the decision of the court by amending sections 13 and 17 of the Law of Marriage Act. The process has begun, but the process is subjected to parliamentary procedures. That for the law to be amended, the parliamentary procedures require that the amendment must be preceded by consultation and participation of the general public for seeking views of the people who are the ultimate users of the law.

Hearing of the instant application was canvassed by written submission The submissions by the Applicant were prepared and filed by Mpoki and Associates Advocates in association with Jebra Kambole Advocates, while the submissions of the Respondents were prepared and filed by Jacqueline Kinyasi, the Learned State Attorney

The Counsels who represented the Applicant submitted at lengthy on the Rule of Law, Good Governance, Accountability and equality before the law which are the key principles founded under the Constitution of the United Republic of Tanzania 1977 as amended from time to time. The Applicant submits that the principles enshrined in the Constitution requires the Judiciary being the body empowered under the Constitution to check and balance the functions of the Government and the Parliament, once it does so and issues a decision, the decision issued by the Courts must be respected and complied with by all irrespective of the states in the society and he concluded that the act of the 1st respondent to issue notice and carrying out public consultation is wrong and violates the constitutional values and principles which at the end undermines the power and authority of the judiciary.

The Counsels for the applicant argues further that the act of the Minister to issue a notice to the public and calling for views or carrying out the consultations on the minimum age of marriage for boys and girls is ultra vires as the Minister lacks authority to initiate consultations process to debate and amend, vary and or question the Judgements of Courts of Law, and that the notice undermines the Rule of Law and Independence of the Judiciary which are well enshrined in the Constitution. They cited Article 4(1) and (2) of the Constitution, which states:

4.1 "Shughuli zote za Mamlaka ya Nchi katika Jamhuri ya Muungano zitatekelezwa na kudhibitiwa na vyombo viwili vyenye mamlaka ya utendaji, vyombo viwili venye mamlaka ya kutekeleza utoaji haki, na pia vyombo viwili venye mamlaka ya kutunga sharia na kusimamia utekelezaji wa shughuli za umma.

4.2 Vyombo vyenye mamlaka ya utendaji vitakuwa ni Serikali ya Jamhuri ya Muungano na Serikali ya Mapinduzi ya Zanzibar, vyombo vyenye mamlaka ya kuetekeleza utoaji haki vitakuwa ni idara ya Mahakama ya Serikali ya Jamhuri ya Muungano na

Idara ya Mahakama ya Serikali ya Mapinduzi ya Zanzibar, na vyombo vyenye mamlaka ya kutunga sheria na kusimamia utekelezaji wa shughuli za umma vitakuwa ni Bunge na Baraza la Wawakilishi.

They submitted further that, Article 13 (1) of the Constitution has provided for the Rule of Law and Equality, and Principle of the independence of the Judiciary is well stated in Article 107B of the Constitution. The Counsels for the Applicant also have emphasised in bold words coupled with a number of Court decisions that the Courts have powers of judicial review and its purpose is to supervise the legislature and executive branches when they exceed their statutory powers, or when they act illegally, irrationally or when there is procedural impropriety. The Applicants buttressed their arguments by citing the decisions in the case of **Chief Constable of North Wales Police vs Evans (1982)**1 WLR 1155, the case of **Minerva Mills vs Union of India (1980)** 3 SCC 625 at 677-688, the case of **P. Sambamurthy vs Union of India (1987)** 1 SCC 124, the case of **Maneka Gandhi vs Union of India AIR (**1987) SC 597, the case of **S.P Sampath Kumar vs Union of India**_(1987) (1) SCC 124, and

the case of **SS Bola & Ors vs B D Sardana & Ors** AIR 1999 SC 3127, all of which emphasise the role of the courts in judicial review which hinges on the checks and balances, and that the judicial review is necessary for controlling the other branches from abusing of power to ensure that the law is observed and there is compliance with the requirements of law on the part of the executive and other authorities for maintenance of the Rule of Law. In their view, the Judicial Review is therefore held to be an integral part of the Constitution as its basic structure.

The Counsels continues to argue that the notice issued by the 1st respondent is ultra vires, illegal and unreasonable. They submit that the Minister acted without authority to issue the Notice seeking for Public Consultation as there is already the Judgement of the Apex Court in Tanzania which has pronounced the provisions of Section 13 and 17 of the Law of Marriage Act unconstitutional, and the Government through the Attorney General was given a period of one year from the date of the decision to correct the complained anomalies within the provisions of section 13 and 17 of the Law of Marriage Act

and in lieu thereof put 18 years as the eligible age of marriage in respect of both boys and girls.

The Counsels for the Applicant argues that since the Minister has acted without authority, that, his actions are ultra vires, he acted outside his limits, and without jurisdiction, and it is the role of the court through judicial review to keep the Minister within his allocated authorities. That the Minister has no powers to cause the judgement of the Court to be discussed, varied or modified by the Public. To fortify their arguments, the Counsels referred to the case of **Mary Barnabas Mushi vs AG,** Misc. Civil Cause No. 14 of 2022, Main Registry, Dar es Salaam, in which it was held that the powers to call for public opinion, or public consultations is vested to the committee responsible for legal affairs, and not to the Minister, and this is per the Provisions of Order 97 (2), Part II of the Parliamentary Standing Orders.

The Counsels also argue that the act of the Minister, the 1st respondent, to issue the Notice calling for public views is illegal as it undermines the powers and authority of the Judiciary, the courts, and the act of issuing the Notice calling for public views on a decision issued

by the Court is akin to contempt of court. That it has been observed that the greatest recipe for chaos in every democratic society is disobedience of court orders and that the choice to disregard court orders threatens not only the courts legitimacy and credibility but also that of the Constitution and the Rule of Law. This is since such disobedience will in one way or another interfere with the independence of the Judiciary, negating the real purpose of separation of powers. Court orders are compulsive, peremptory and expressly binding, and it is not for any party, be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey, to choose which to obey and which to ignore or to negotiate the manner of compliance. The courts will make sure that the orders are complied with not for preservation of its own authority and dignity but more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities.

The counsels insisted that, it is the principles enshrined in the Constitution that no one is above the law and all are equal before the law (Article 13(1) of the Constitution), and Article 107B enacts the

principle of independence of the Judiciary, and that the decisions of the Court must be obeyed by everybody including the executive and the legislature.

The Counsels argues that the respondents agree that there is a court order and that they must comply with it, but issuing the Notice to Public is not compliance of the Court Order, as in paragraph (a) of the Notice "TAARIFA KWA UMMA", the Minister tells the public that it has received directives from the Parliament to issue the Notice for the public needs to be consulted so that to get more views. The applicant argues that the court's decision cannot be questioned or varied by the public views. The Applicant's Counsels argues that there was an illegality in the decision of the Minister to publish a notice seeking for public views, and they are now asking the court to intervene. The Counsels cited the case of **Associated Provincial Picture Houses Limited vs Wednesbury Corporation** (1948) 1 KB 223, where Lord Green MR (as he then was) defined illegality more so the extent of courts power to intervene. In doing so, he provided the test for unreasonableness, which stated that,

> "whether the authority had acted, or reached a decision, in a manner so unreasonable that no reasonable authority could ever have come to it".

The Counsel also cited the case of **Counsel of Civil Services Union vs Minister for Civil Service** (1984) 3 ER 935, where Lord Diplock said the administrative actions is subject to judicial control by judicial review. He said,

> "the first ground of exercising the judicial control over administrative actions is where there is illegality in the action of the administrators, the second is irrationality and the third is procedural impropriety."

The Counsels for the Applicants therefore argue that the Minister's act of making a publication in the form of a Notice calling for public views was illegal and unreasonable as the Notice is equivalent to disobeying the Court, thus illegal. The Counsels buttressed their argument by the decision in the case of **Mary Barnaba Mushi vs Attorney General,** Misc. Civil Cause No. 14 of 2022, HC, Main Registry, Mzuna J (as he then was) had this to say:

> "what the minister is trying to employ, without mincing words, is derogation of the powers vested to this court and

> the court of appeal or the judiciary, to be more specific, the minister, let alone the general public, I am worried cannot circumvent the clear wording of the two judgements, above cited, I am of the settled view that public consultations is in defiance of the spirit of the constitution which he was appointed and swore oath to abide to it."

The learned counsel maintained that the executive is obliged to obey the court orders as the rationale behind disobedience of court orders is the maintenance of sanctity of the Principle of Rule of Law. On this argument, the Counsels referred this Court to the case of **Karori Chogero vs Waitahache Mirengo,** Civil Appeal No. 64 of 2019, where the Court of Appeal categorically stated as follow;

> "Court Orders should be respected and complied with. Courts should not condone such failures, to do so, is to set bad precedents and invite chaos, this should not be allowed to occur."

The Counsels also referred to the case of Micky **Gileed Ndeliwa vs Exim Bank Limited,** Commercial Case No. 4 of 2014, and the **Kenyan Case of Kenya Human Rights Commission Vs Attorney**

General (2018) KLR at page 57, where the Court in the Kenyan case said:

> "Courts and Tribunals exercise authority of courts on behalf of the people. The decisions courts make are for and on behalf of the people and for that reason they must not only be complied with in order to enhance- public confidence on the judiciary which is vital to the preservation of our constitutional democracy. The judiciary acts only in accordance with the Constitution and the law and excise its judicial authority through its judgements, decrees, orders and or directions to check the Governments' powers, keep it within its constitutions stretch, hold the executive and legislative to account thereby secure the rule of law, administration of justice and protection of human rights, for that reason the authority of the courts and dignity of their process are maintained when their court orders are obeyed and respected, thus Courts become effective in their discharge of their constitutional mandate."

Also, they quoted the Constitutional Court of South Africa in the case of **Nthabiseng Pheko vs Ekurhuleni Metropolitan Municipality & another** CCT 19/11 (75/2015), where the Court stated that:

> "disobedience towards courts orders or decisions risks rendering our courts impotent and judicial authority a more mockery. The effectiveness of courts orders or decisions is substantially determined by the assurance that they will be enforced."

The Counsels also refers to another Kenyan Decision in the case of **Wildlife Lodges Ltd Vs County Council of Nirok & Another** (2005) 2 EA, in which it was held that:

> "it was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged, and disobediences of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had urged his contempt. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it.

The Counsels argue that the legislature had no powers to ask the executive to carry out public consultations, they have no power under the Constitution or law to refuse to honour a Judgement of the Court whether right or wrong. The Counsels further argued that it is wrong

for the Minister to ask the General Public to give views on the Court decision, and their act is an illegal act, and the courts prerogative powers must be exercised to ensure constitutional structures in our society which is based on Constitutional Supremacy, Separation of Powers and Independency of the Judiciary are protected.

The counsels were of the view that it is because of the ultra vires acts, the illegalities mentioned and the unreasonableness on the part of the executive represented herein by the respondents, this Court has powers to issue an order to quash the decision of the respondents of collection of views from the public to discuss the judgement of the Courts.

Regarding the order of Mandamus, the learned counsels urged this court to compel the respondents to table to the Parliament, a Bill to amend the Law of Marriage Act in compliance of the Court's decision in **Rebecca Gyumi's case** as till today the respondents have not complied with the Court order to amend the provisions in the Law of Marriage Act that has been declared unconstitutional. On this point, the Counsels referred to the case of **Canadian Metal Co. Ltd vs**

Canadian Broadcasting Corp (No. 2) (1975) 48 DCR 30, which was quoted in the Kenyan Case of **Human Rights Commission** (supra), where the Court said:

> "to allow court orders be disobeyed would be to tread the road towards anarchy. If orders of the Court can be treated with disrespect, the whole administration of justice is brought into scorn.....if the remedies that the Courts grants to correct.... wrongs can be ignored, then there will be nothing left for each person but to take the law into their own hands. Loss of respect for the Courts will quickly result into the destruction of our society"

They finally humbly put their submissions to rest and prayed for the court to issue the orders sought.

Responding to the counsels for the applicant's submission, it was Ms Jacqueline Kinyasi firm submission that the respondents have obeyed the court decisions. She reasoned that court orders couldn't be effected without complying with the laid procedures on amendments of the provisions of law. Explaining on how the 1st Respondent was complying with the court order she submitted that, the Minister made the proposed amendments through GN No. 1 of 2021 which was

gazetted on 5th February 2021 and later on the Bill was tabled before the Parliament for the first reading. She added further that the Bill was thereafter sent to a Special Committee under the Cabinet of Ministers dealing with parliamentary issues and laws which directed the views of public to be sought, she averred further that it was due to that a press release or Public Notice was issued on 28th day of September 2022 to conduct Public Consultations with a view to collect public opinion on the minimum age of marriage.

She demonstrated further that the reliefs sought by the applicant are overtaken by events since the process of collection of public views or the process of public consultation is complete, and the majority have opined for 18 years to be the age for boys and girls to get married and she added that the Minister has already prepared another Bill which has been presented to the Attorney General who will publish it in the Government Gazette. The learned State Attorney therefore argues that the respondents have all along been in compliance of the court decision, and never undermined the power of the Judiciary in any way.

As said hereinabove, the respondents said they are aware that there is a court order issued by the High Court in **Rebecca Gyumi's case**, and the decision was confirmed by the Court of Appeal, and that they are in the process of complying with the order. They also argue that an order of Mandamus cannot be issued by this Court as already in the case of **Mary Barnabas Mushi vs AG, Misc. Civil Cause No 14 of 2022**, the High Court Main Registry , Mzuna J (as he then was) had already determined the issue of mandamus, and the Attorney General was given six months from 14th June 2023, the date the order was given , and therefore the deadline for compliance of the Court order was on 14th December 2023, and that the respondents have finalised collecting the views from the Public, and the Bill is already prepared by the Ministry, and presented to the Attorney General who will thereafter present the Bill to be gazetted for general public. The respondents, thus, argue that the order of certiorari to quash the Notice issued by the 2nd respondent on 28th September, 2022 cannot be issued as the prayer has been overtaken by events, as the exercise to collect public views is already done and completed. The prayer for an order of prohibition as well is overtaken by events, as the period issued in the

Notice for public consultations has passed. The majority have opined for 18 years of age to be the age for marriage for boys and girls, and that the Bill is ready to be gazetted.

In their Rejoinder, the Counsels for the Applicant states that the averments or submissions by the respondents lacks substance as if at all the respondents have complied with the Orders of the Court as they have submitted, they were expected to give proof in the forms of documents that they have complied, they were to annex in their pleadings a copy of the Bill which was submitted in February 2020 as alleged. Nothing was attached in the respondents' counter affidavit to substantiate that the there was a Bill Drafted and presented to the Parliament, and the Bill was returned, and that there were directives issued by the Parliament to seek for Public Views. According to them, all that what stated in the affidavit of the respondents, and all that was submitted by the respondents in their written submissions lacked proof.

On the issue of the orders issued by the High Court by Honourable Judge Mzuna, in the case of **Mary Barnabas (supra),** the counsels

in their rejoinder submissions argues that by determining an issue of mandamus, this court is not functus officio, and it does not amount to reopening of the case, and that the applicant is in total support of the decision given in that case. The order of mandamus can still be issued as to date the respondents have not complied with the decision of the Court which ordered them to amend the Law of Marriage Act.

The counsels for the applicant also countered on the issue of ultra vires saying that it was pleaded in their affidavit in support of the application, and the respondents have answered the issue of ultra vires in paragraph 4 and 6 of the Reply Statement, in which they allege to have complied with the court orders but they needed to undergo a number of procedures, and those procedures could not be ignored. They also said in order to amend the law, different internal directives and Part III of the Parliamentary Standing Orders must be observed.

That was all that was submitted by the parties' counsels.

Having read the rival lengthy submissions of the applicant's counsels and the reply submissions of the respondents', and having gone through the judgements of the court in both the High Court, and as

confirmed by the Court of Appeal, the issue to be addressed is, firstly, what was the order of the Court, and secondly, whether the orders passed by the Court were complied with by the respondents, or the respondents have ignored the court orders. However, before I decide the 2nd issue, I shall first consider whether this Court has powers to entertain the issues raised in the present case bearing in mind the decision passed by this same Court in **Mary Barnaba Mushi's case.**

In **Rebecca Gyumi's case**, the High Court declared the provisions of Section 13 and 17 of the Law of Marriage Act unconstitutional to the extent explained in the Judgement, and ordered the Government through the Attorney General to correct the anomaly complained of within the provisions of section 13 and 17 of the Law of Marriage Act and in lieu thereof put 18 years as the eligible age for marriage in respect of both boys and girls. They were ordered to correct the anomalies within the period of one (1) year from the date of the Order. The order was given on 08 July 2016, and the Government through the Attorney General were to correct the anomalies before 7th June 2017.The High Court had said as follows:

"From the wording of the above provisions, it is clear that this court has powers to give directions for correcting the impugned provisions. Having found as we have found herein above that the impugned provisions have lost their usefulness, we have no option but to find that the two provisions i.e. sections 13 and 17 of the Law of Marriage Act, Cap 29 RE 2002 are unconstitutional to the extent explained herein above. Consequently, exercising the powers vested in this court by Articles 30(5) and 13(2) of the Constitution and the Basic Rights and Duties Enforcement Act respectively, we direct the Government through the Attorney General within a period of one (1) year from the date of this order to correct the complained anomalies within the provisions of section 13 and 17 of the Law of Marriage Act and in lieu thereof put 18 years as the eligible age for marriage in respect of both boys and girls."

It is however true that the Government appealed to the Court of Appeal, but they lost the appeal, and the Court of Appeal ordered the Government through the Attorney General to comply with the Order of the High Court within a year from the date of the Order. The Court of Appeal Judgement was delivered on 15th October, 2019, and stated that the appellant was supposed to abide by the order of the High

Court to cause the amendment of the LMA as directed. The Court of Appeal said as follows:

> "The High Court having considered all the arguments for and against the petition found that sections 13 and 17 of the LMA are unconstitutional and that was the conclusion reached by the High Court's correctly pointed out by the respondent. It should be noted that, the said provisions of the LMA were not declared null and void by the High Court as the appellant would wish us to consider. That is why having found the said provisions unconstitutional, the High Court gave the Government a period of one year to cause the amendment of the LMA. In the circumstances, we find and hold that the fifth ground of appeal is also unmerited. For the foregoing, we find and hold that the entire appeal has no merit. The appellant was supposed to abide by the order of the High Court to cause the amendment of the LMA as directed. Having so stated, we dismiss the appeal in its entirety with no order as to costs."

In 2022, the decision of the High Court was still not complied with, no amendment was effected in Section 13 and 17 of the Law of Marriage Act as directed, this prompted one **Mary Barnaba Mushi** to petition before the High Court under Article 108 (2) of the Constitution of the

United Republic of Tanzania to declare the Minimum Age for marriage for boys and girls to be 18 years and a declaration that there are no legal confusions in the **Rebeca Gyumi's case**. She also sought to declare the ongoing nationwide consultation by the Government on minimum age of marriage to be misconceived, unwarranted and intends to ridicule the authority and stature of the Judiciary of Tanzania, and a declaration that section 13 and 17 of the Law of Marriage Act were by operation of law redundant and automatically deleted from statutes as at 07/06/2017, and as of that date ceased to have legal effect, and that the retention of section 13 and 17 of the Law of Marriage Act was a contempt of the Orders of the Court.

The High Court in **Mary Barnaba Mushi's Case** had held that there were no confusions as to the minimum age for marriage for boys and girls in **Rebecca Gyumi's case**, however at page 7 of the typed Judgement, Hon Judge Mzuna, the Judge of the High Court said, and I quote:

> "as a matter of fact, the Government was given directives by the Court to amend section 13 and 17 of the Law of Marriage Act. I am aware that the amendment of the law

is a legal process stipulated under the Parliamentary Standing Orders (supra). It is trite law in our country that the mandate to make laws is vested to the Parliament pursuant to Article 64 (1) of the Constitution, Chapter 2 of 2005."

The decision of the High Court in **Mary Barnaba Case** was that the amendment of the law is a process, and the procedure for amending the laws is provided for under Order 93 (1) and (2) of the Parliamentary Standing Orders, and under Order 97 (2) of the Parliamentary Standing Orders, it is the Committee responsible for Legal Affairs that is vested with powers to issue Notice calling for public views. This is provided for at page 8 of the decision.

Thus, the issue regarding the Notice issued by the Minister for Constitutional and Legal Affairs dated 28th September, 2018, titled "TAARIFA KWA UMMA" was deliberated, discussed and adjudicated upon by the High Court in **Mary Barnaba Case**, and the Court declared the process of publication of Notice for Public Consultation as a Legal requirement of the Law, and in line with Order 93 (1) and (2) of the Parliamentary Standing Orders. The Honourable Judge at page 9 of the decision continues to state that:

> "connected to that, under the common law principle of precedent, decision of the Court of Appeal binds the lower courts. However, this mandate does not take away the parliamentary powers to make laws."

However, in deciding on the issue of the notice issued by the Minister, the Honourable Judge had this to say at page 15 of the Judgement, that:

> "the other arm of the Government through the Attorney General failed to effect the alleged amendment in line with the decision of the Court of Appeal. There was no move to review its decision either. What the Minister is trying to employ, without mincing words, is derogation of the powers vested to this Court and the Court of Appeal and the Judiciary, to be more specific. The Minister, let alone the general public, I am worried, cannot circumvent the clear wording of the two judgements, above cited. I am of the settled view that public consultation is in total defiance of the spirit of the constitution which he was appointed and swore oath to abide to it.

The High Court Judge continued to Rule the provisions of Section 13 and 17 of the Law of Marriage Act to be redundant, and declared the act of the Minister to issue a Notice for public view as an incorrect

approach to take. The Judge repeated his stance at page 18 of the Judgement and continued to rule that the provisions of section 13 and 17 of the Law of Marriage Act are redundant since the Attorney General failed to effect the amendments within the period specified in the **Rebecca Gyumi's** Judgement.

I have reproduced extensively, the verdicts in **Mary Barnaba Mushi** Case for a reason that the matter in the present petition was already determined by this same Court, and re-opening the matter, although in a different kind of petition, is wrong as this Court *becomes functus officio* to determine the same issue which was already determined by the High court in a constitutional petition.

It is trite law that no court is mandated, when it has signed its judgment or final order disposing of a case to alter or review the same except to correct a clerical or arithmetical error. It is also the cherished principle of law that once a matter is finally disposed of by a Court, the same Court in the absence of a specific statutory provision become *functus officio* and disentitled to entertain a fresh prayer for the same relief unless the former order of final disposal is

set aside by a court of competent jurisdiction in a manner prescribed by law. The court becomes functus officio the moment the official order disposing of a case is signed. Such an order cannot be altered except to the extent of correcting a clerical or arithmetical error.

The applicant could not address this issue in details. It was raised by the respondents in their reply submissions, and on rejoining, the applicant simply said, the court is not functus officio, and that the filing of the instant application does not amount to reopening the case. They said at page 5 of the Rejoinder submissions, they said:

> "Next Madam Judge, whether there was a final determination of the Order of the Court. We humbly state that the later was a case in which the applicant was challenging the violation of the Constitution and the same was brought under the provisions of Article 108 (2) of the Constitution of the United Republic of Tanzania and the prayers therein was asking to ask the court to declare that the minimum age of marriage for a child is 18 years.

The applicant's counsels continue to argue that the present case is different to the case decided by the High Court as the present case

relates to two different things altogether, from the law applicable, the reliefs sought, the issues and the orders sought, and they argue that there is no reopening of the case.

I disagree with them, as I pointed out earlier herein the issue was not only the declaration of the minimum age of marriage for girls and boy's to be 18-year-old. That was the first issue decided by the High Court, and the Court had held that there was no confusion in the decision of **Rebecca Gyumi's case**. The decision clearly stated that the provisions of Section 13 and 17 of the Law of Marriage Act be amended to reflect the age of marriage for boys and girls to be 18 years old, and the **Rebecca Gyumi's** holding was clear and there was no confusion to require public views, this was the decision of the High in **Mary Barnaba Mushi's** case.

In **Mary Barnabas Mushi's** case, there was an issue of the Notice issued by the Minister "TAARIFA KWA UMMA" dated 28th September, 2022. This issue was discussed in details by the High Court in the case, and there was an adjudication and a decision on the issue. The Court, in clear words stated that the act of the Minister to issue the Notice

calling for public consultation was derogation of the powers of the Court. The act was, in other words declared illegal, ultravires, and irrational. The Court had already dealt with the issue, and asking the court to re-litigate the same issue again, albeit in another forum, is reopening the case, and the court is now functus officio.

Even when the parties institute a different action as it was pointed that inherent powers conferred on High Courts to exercise prerogative powers or judicial review on checking and balancing the powers of the administrative, the power has to be exercised sparingly, carefully and with caution and only where such exercise is justified by the tests specifically laid down in the law itself. It is not disputed that the petition filed under Article 108 (2) of the Constitution, asking for the order to declare the act of the Minister to issue Notice calling for Public Views as illegal and irrational, that issue had been finally disposed of by the High Court on 14th June 2023, by Honorable Mzuna J (as he then was) in **Mary Barnaba Mushi** 'case.

In **Mohamed Enterprises (T) Limited vs Masoud Mohamed Nasser,** Civil Application No. 33 of 2012, the Hon'ble Apex Court has

dealt with the issue of *Functus officio* and reopening of cases in depth and made the following decision:

> "we do so bearing in mind that there should be no room open to the High Court and courts subordinate thereto where by one judge would enter judgement and draw up a decree in one case (thus bring such a case to a finality) only to find another judge of the High Court soon thereafter setting aside the said judgement and decree and substituting therefore with a contrary judgement and decree in a subsequent application. To do so in our considered opinion, amounts to a gross abuse of the court process. Such abuse should not be allowed to win ground in this jurisdiction. Once judgement and decree are issued by a given court, judges or magistrates of that court become functus officio, in so far as that matter is concerned. Should a new fact arise which should have been brought to the attention of the court during trial, then Cap 33 provides for procedures for review (Order XLII), and where appropriate, Revision before a higher court I.e. this court (section 4 of Cap 141). An aggrieved party may if he so wishes, institute a new suit challenging the findings in the earlier one."

This means that the Court is now barred to entertain an issue of the Notice issued by the Minister as that issue was already determined by the High Court. The Court went on to declare the provision of section 13 and 17 of the Law of Marriage Act as redundant, thus the Court now becomes functus officio and is disentitled to entertain a fresh prayer for any relief unless the former order of final disposal is set aside by a Court of competent jurisdiction in a manner prescribed by law. The Court becomes functus officio the moment the order for disposing of a case is signed. Such an order cannot be altered except to the extent of correcting a clerical or arithmetical error. There is also no provision for modification of the judgment and the prohibition is absolute; after the judgment is signed, even the High Court in exercise of its inherent power of Judicial Review has no authority or jurisdiction to alter/review the same or give a different judgement on the same issue.

Again, as submitted by the respondents, and as it was repeated in the case of **Mary Barnaba Mushi**, the process of collecting public views or public consultation is complete, the Bill was prepared, and it was taken to the Attorney General for Publication. This was also done since

there was an Order of extension of time of six months given by the High Court Judge in Mary Barnaba Case. If at all, the Attorney General has presented to court false or untrue information, the proper action to take is to subject him in contempt, and not to ask for certiorari to quash the Notice which was already dealt with by the Court, or to prohibit the respondents from carrying out the public consultation, again it is an issue of the Notice, and as stated herein above, this issue was already dealt with in depth by the High Court in Mary Barnaba Case, and the same Court cannot reopen and re-litigate the same issue in another forum. As for the third prayer of mandamus to compel the Attorney General to table the Bill before the Parliament, again, this issue was dealt with in depth in the case decided by the High Court, and the respondents were granted with six more months to comply with the Orders of the Court.

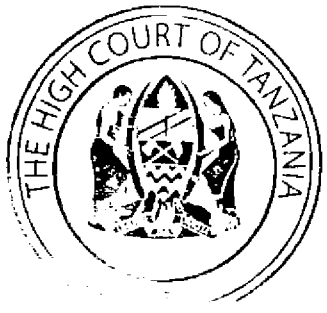
As held in the **Mohamed Enterprise Case**, the Courts are precluded, and becomes functus officio, and lacks jurisdiction to entertain and determine issues which were already determined by the Court in a previous action.

In the light of the above, I am of the view that the Law as laid down by the Apex Court in **Mohamed Enterprises Case** (supra) and falls under the principles of precedents and the Courts below are obliged to follow. It therefore, means that this Court lost jurisdiction to entertain the Judicial Review on matters already adjudicated by the same Court via a Constitution Petition. Naturally, this court lacks jurisdiction to entertain the present proceedings, being "FUNCTUS OFFICIO".

As such, the application for Judicial Review is hereby dismissed, with costs.

It is so ordered.

DATED AND DELIVERED AT MOROGORO by Video Conferencing this 2nd of April, 2024



L. MANSOOR

JUDGE

02/04/2024