IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

MISC. LAND APPEAL NO 108 OF 2021

(Originating from Land Application No 186 of 2019 of District Land and Housing Tribunal for Mara at Musoma)

ZADOCK MAENDE ELPHACE ..... APPELLANT

VERSUS

BUNDA TOWN COUNCIL ..... RESPONDENT

JUDGMENT

22nd & 23rd March 2022

F. H. MAHIMBALI, J.:

The appellant sued the respondent at the DLHT of Musoma vide Land Application 186 of 2019 on a claim of land ownership. While the suit was still pending, there came Miscellaneous Amendment Act, No. 1 of 2020 which led to amendment of the Government Proceedings Act, Cap 5 under section 6 (3) whereby the Local Government Authority was included into the Government Proceedings Act on the manner of being sued. The DLHT then dismissed the suit for want of jurisdiction.

The order aggrieved the appellant, thus the current appeal based on two grounds of appeal namely:

1. *That, trial court erred in law to order that it had no jurisdiction to try the case while in fact appellant's case does not fall under section 6 (3) of the Government proceedings Act as amended by (miscellaneous amendment) Act, 2020 referred as GPA which requires Attorney General to be joined in the case as a necessary party since it was not disputed during trial that the appellant filed the case in 2019 Government Proceedings Act No. 1/2020 came into force.*
2. *That, trial court erred in law for failing to heed that it had jurisdiction to try the case as appellant's case does not fall under section 6 (3) of the Government Proceedings Act, as amended by the written law's (Miscellaneous amendment Act, No. 1 of 2020 as the appellant filed the case in 2019 before Act no 1/2020 came into force.*

During the hearing of the appeal, the appellant fended for himself whereas the respondent was dully represented by Mr. Stamili Ndaro, solicitor.

In his brief submission, the appellant argued that as the amendments came in 2020, his application before Musoma DLHT which is No. 186 of 2019 filed earlier than the amendment date, then the filed case cannot be affected by that recent amendment.

In his reply to the submission made, Mr. Stamili Ndaro learned state attorney (solicitor), submitted that the governing law for suits

against the government is Cap 5. That in 2020, the said law was amended in which it imposed the condition that for a party suing Local Government Authority, must include AG as well like in other suits against the Governments. Therefore, failure to implead the AG, the whole proceedings become nullity. He clarified further that, this being a procedural issue, its amendment affects even all the proceedings filed before. In support of this stance, he referred this Court to the case of **Lala Wino vs Karatu District Council**, Civil Application No 132 of 2018, CAT Arusha.

On that basis, he advised the appellant to abide by that legal requirement as he has not suffered anything. Thus, it is his humble prayer that this appeal be dismissed with costs.

In his rejoinder submission, the appellant insisted that as his case was filed earlier than the date of the said amendments, he considers his case could not be affected anyhow. He thus maintained that his appeal be allowed with costs.

Having keenly followed the submissions of both sides, before I proceed, I better reproduce what the said amendment says:

"(3) All suits against the Government shall, upon the expiry of the notice period, be brought against the Government, ministry, government department, ***local government authority****, executive agency, public corporation, parastatal organization or public company that is alleged to have committed the civil wrong on which the civil suit is based, and the Attorney General shall be joined as a necessary party.*

(4) Non-joinder of the ***Attorney General*** *as prescribed under subsection (3) shall vitiate the proceedings of any suit brought in terms of subsection (3).";*

In essence, I agree with Mr. Stamili Ndaro that the appeal falls under the purview of the procedural amendment alluded to earlier and that it would lie to this Court that the DLHT lacked jurisdiction to handle the same. In demonstrating this position, I wish to begin by citing with approval a holding made by the Court of Appeal of Tanzania in the case of **Lala Wino V. Karatu District Council**, Civil Application No. 132 /02/ 2018, where it made reference to the case of High Court (Hamlyn, J.) in **Benbros Motors Tanganyika Ltd. v. Ramanlal Haribhai Patel** [1967] HCD n. 435 that: -

"When a new enactment deals with rights of action, unless it is so expressed in the Act;. an existing right of action is

not taken away, but when it deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act. "[Emphasis added]

The same position was subsequently taken by the Court of Appeal in **Makorongo v. Consigilio** [2005] 1 EA 247. In that case, the Court quoted with approval the statement of principle made by Newbold, J.A. of the defunct East Africa Court of Appeal in the case of **Municipality of Mombasa v. Nyali Limited** [1963] EA 372, at 374 that:

"Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by legislation. In seeking to ascertain the intention behind the legislation the Courts are guided by certain rules of construction. One of these rules is that if the legislation affects substantive rights, it will not be construed to have retrospective operation unless a clear intention to that effect is manifested; whereas if it affects procedure only, prima facie it operates retrospectively unless there is good reason to the contrary. But in the last resort it is the intention behind the legislation which has to be ascertained and a rule of construction is only one of the factors to which regard must be had in order to ascertain that intention."

I am further impressed by another decision of the Court Appeal in the **Director of Public Prosecutions v. Jackson Sifael Mtares & Three Others,** Criminal Application No. 2 of 2018 (unreported) which followed the standpoint in **Makorongo v. Consigilio** (supra). In **Jackson Sifael Mtares** (supra), the Court of Appeal, cemented that position by excerpting from a book of the learned author A.B. Kafaltiya bearing the title "Interpretation of statutes'; 2008 Edition, Universal Law Publishing Co., New Delhi - India, at page 237 the following passage:

> *"No person has a vested right in any course of procedure, but only the right of prosecution or defence in the manner prescribed for the time being, by or for the court in which he sues. When the legislature alters the existing mode of procedure, the litigant can only proceed according to the altered mode. It is well settled principle that 'alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be.' The rule that 'retrospective effect is not to be given to laws' does not apply to statutes which only alter the form of procedure or the admissibility of evidence. Thus amendments in the civil or criminal trial procedures, law of evidence and limitation etc; where they are merely the matters of procedure, will apply even to pending cases. Procedural amendments to a law, in the absence of anything contrary, are retrospective in the sense that they apply to all actions*

after the date they come into force even though the action may have begun earlier or the claim on which action may be based accrued on an anterior date. Where a procedural statute is passed for the purpose of supplying an omission in a former statute or for explaining a former statute, the subsequent statute relates back to the time when the prior statute was passed. All procedural laws are retrospective, unless the legislature expressly says they are not. "

Moreover, in the case of **Joseph Khenani V. Nkasi District Council**, Civil Appeal No. 126 of 2019, CAT at Mbeya (unreported) had a deeper thought on a similar issue while making reference to other cases dealt with by the same Court of Appeal and other jurisdictions as well. The Court of Appeal subscribed to the position taken by the erstwhile Court of Appeal of East Africa in **Municipality of Mombasa v. Nyali Limited** [1963] EA 371 that:

"Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by legislation. In seeking to ascertain the intention behind the legislation the Courts are guided by certain rules of construction. One of these rules is that if the legislation affects substantive rights it will not be construed to have retrospective operation unless a clear intention to that effect is manifested; whereas if it affects procedure only, prima facie it operates retrospectively unless there is good reason

to the contrary. But in the last resort it is the intention behind the legislation which has to be ascertained and a rule of construction is only one of the factors to which regard must be had in order to ascertain that intention."

The Court of Appeal in **Joseph Khenani** (supra) was also persuaded by the principle as laid down in the decision of the Privy Council in **Yew Bon Tew v. Kendaraan Bas Mara** [1983] 1 AC 553 in the following terms:

"Apart from the provisions of the interpretation of statutes, there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in regard to events already past. There is, however, said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed."

This principle was followed in the case of **Makorongo** (supra). Flowing from the above, the question that I am called to consider and

determine, I think, is whether the provisions of section 6 (3) of the Government Proceedings Act took away the vested right of the appellant to refer his complaint to the DLHT which right he had at the time of referring his complaint to the DLHT. In the case at hand, it is apparent that the appellant filed the complaint before the DLHT when it was quite in order to do so without exhausting the remedies provided for in the Government Proceedings Act. That was the law then. The requirement to comply with the law under the Government Proceedings Act came later; when the matter subject of this appeal was already in the DLHT. Was the enactment meant to apply retrospectively? I have serious doubt, for Parliament did not state so in clear terms. Was the requirement purely procedural? I equally have serious doubts. Having deliberated on the matter at some considerable length, I think to hold that the appellant ought to have withdrawn his matter before the DLHT with a view to complying with the current section 6 of the Government Proceedings Act will be too much an overstatement and will, in my considered view, leave justice crying. The appellant will certainly be prejudiced.

The Court of Appeal was confronted with an akin predicament in **Raymond Costa** (supra). In that case, the Court of Appeal hesitated to

hold that a procedural amendment to the law applied retrospective because that course of action would occasion injustice on the adversary party. They stated:

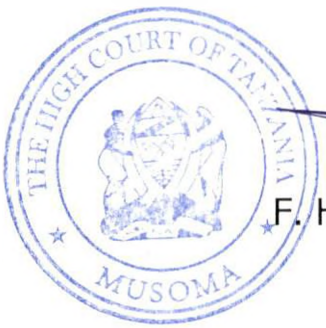
> *"In the case at hand, we are positive that if the principle stated above is applied, the respondent will certainly be prejudiced. In the premises, we find the present case as falling within the scope and purview of the phrase "unless there is good reason to the contrary" in the case of Consigilio (supra). That is to say, there exist in the present case good reason not to adhere to the retrospective application of the procedural amendment under consideration."*

With this guidance, I am minded to take the same standpoint taken by the Court of Appeal in this appeal as well. That is, I do not find it justifiable in the interest of justice to subject the appellant to the dictates of section 6(3) of the Government Proceedings Act which was inexistent at the time he filed his complaint. I therefore find merit in the appellant's contention that the amendment provision was not applicable to his case and hence the authorities cited by the respondent are not applicable as well. I thus hold that the DLHT had jurisdiction to entertain and hear the matter filed by the appellant before it for the interests of justice.

From the foregoing, the appeal is allowed with costs. The decision of the DLHT is quashed and set aside as that it had jurisdiction to handle the matter in disregard to the purview of the amendment brought by the Written Laws (Miscellaneous Amendment Act), Act No.1 of 2020.

It is so ordered.

DATED at MUSOMA this 23rd day of March, 2022.



F. H. Mahimbali

JUDGE

Court: Judgment delivered this 23rd day of March, 2022 in the presence of Mr. Stamili Ndaro – solicitor for the respondent, for the appellant present in person and Mr. Gidion Mugoa – RMA.

Right of appeal is explained.

F. H. Mahimbali

JUDGE

23/03/2022