

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI**

CIVIL REFERENCE NO. 7 OF 2021

*(C/F Misc. Application No.48 of 2018, originating from Appeal No. 27 of 2017
all of Same District Land and Housing Tribunal)*

GAUDENCE DOMINIC AUFENI.....APPLICANT

Versus

NGUJINI VILLAGE COUNCIL.....RESPONDENT

RULING

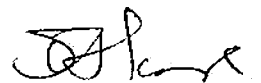
22/3/2022 & 08/4/2022

SIMFUKWE, J.

The applicant herein has filed reference against the ruling of a Taxing Master, **Hon. T.J. Wagine- Chairman** of the District Land and Housing Tribunal (DLHT), in a taxation matter. The application has been brought under **Regulation 7 (1), (2) of the Advocate Remuneration Order, G.N. No. 264 Of 2015**. It is supported by Applicant's affidavit which was contested by the counter affidavit of Phillip Daniel Mvungi, the Respondent's Village Executive Officer.

Upon filing counter affidavit, the respondent's representative also raised one Preliminary Objection (PO) based on point of Law that;

"This application is bad in law for non joinder of necessary parties that is Attorney General and District Executive Director."



The hearing of the preliminary objection was conducted by way of written submissions.

In support of the Preliminary objection the respondent's advocate argued that the Tribunal ruled out by striking out the bill of cost on the reason that the applicant failed to join the Attorney General as per the requirement of the law. The learned counsel condemned the applicant for instituting this application of reference without following proper procedure provided for under the **Written Laws (Miscellaneous Amendment) No.1 of 2020** in which **section 30** amends **section 26(3) of the Local Government (District Authority) Act Cap 287 R.E 2002** and **section 6(3) and (4) of the Government Proceedings Act** which requires the District Executive Director and the Attorney General respectively, to be joined as parties before instituting the suit against the government.

He further referred to **section 6 (4) of the Government Proceedings Act** which provides that:

"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 respect of the quoted provision, the respondent's advocate argued that the word used is "**shall**" which means that it is mandatory to join the District Executive Director and Attorney General as necessary parties to cases instituted against the village. He further commented that since the Village Council stands as an institution of the Government of Tanzania, then those necessary parties ought to be joined.



It was further submitted that the cited law apply retrospective since it deals with procedural issues and not substantive issues. He cited the cases of **Lala Wino vs Karatu District Council, Civil Application No.132/02/2018** CAT (Unreported); **Municipality of Mombasa vs Nyali Limited [1963] E.A 371** and **Benbross Motors Tanganyika Ltd vs Ramanial Haribhai Patel [1970] HCD No. 435** to buttress his point.

Basing on the cited cases, it was opined that the reference at hand is almost similar with the cited cases meaning that, joining the District Executive Director and Attorney General is procedural thus all necessary parties were to be joined. He insisted that, this application is bad in law for non joinder of those parties. He called upon this court to strike it out with costs.

On the other hand, the applicant was of the view that, determining the said Preliminary Objection will prejudice the reference because in the instant application the applicant is challenging the same decision which made the Tribunal Chairman to dismiss the Bill of Costs for non-joinder of the Attorney General. Thus, determining this Preliminary Objection will directly go to the merits of this reference.

The applicant argued further against the Preliminary Objection to the effect that, this reference had not contravened any provision of the law due to the reasons that; *First*, the Attorney General was not party in the previous proceedings from the Ward to the District Land and Housing Tribunal, and even in this court. He averred that the position of the law is that the party who was not in the original proceedings cannot be made party at appellate stage.



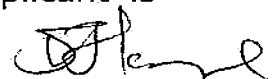
Second, the applicant stated that it is a legal principle that only a party to the proceedings has a right of appeal; the remedy for the interested party is Revision as it was held in the case of **Ahmed Ally Salum vs Ritha Baswali and Another, Civil Appeal No 21/1999** and the case of **Bank of Tanzania vs Said A. Marinda and 30 Others, Civil Appeal No 74 of 1998**. He also referred to the case of **Mbeya Rukwa Autoparts and Transport Ltd vs Jestina George Mwakyoma (CA) [2003] TLR 251** where it held that:

"The Applicant was not a party to the original application, notwithstanding that he was required to appear and show cause, and had, therefore, no right of appeal."

In that respect therefore, the applicant opined that, since the Attorney General was not party in the original proceedings, he cannot be made a party at this stage.

Responding to **section 6(3) and (4) of the Government Proceedings Act**, (supra) which was cited by the learned advocate for the respondent, the applicant was of the view this the case is not a suit, it is an appeal since the proceedings equivalent to the suit were determined at Ngujini Ward Tribunal way back in 2017 when the said law had not yet come into operation. He also added that, the case before this court is not a suit but a reference which is equivalent to an appeal and the same challenges the Tribunal's decision in respect of the case instituted before the operation of the amendment of the said law, which cannot act retrospectively.

In conclusion, the applicant prayed the purported point of law to be overruled with costs and the matter to proceed on merits. He added that the point of law had been raised prematurely since the applicant is



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challenging the same point of law that the Chairman erred to dismiss the bill of costs for the alleged non- joinder of the Attorney General.

I have considered the submissions of the parties for and against the Preliminary Objection. I have also considered the cited laws and case laws. The parties are not disputing the legal requirement of joining the Attorney General as per **section 6(3) of the Government Proceedings Act** and joining the District Executive Director as per **section 26(3) of the Local Government (District Authority) Act**. The issue in dispute is *whether the instant application for reference is not tenable for non-joinder of the Attorney General and the District Executive Director as necessary parties?*

It is undisputed that this application emanates from the DLHT in application for Bill of Costs. Also, it is undisputed the Attorney General and District Executive Director were not parties in the previous matters (Land Case before the Ward Tribunal and Land Appeal No. 27 of 2017 and Bill of costs No 48 of 2017). As per the affidavits, the dispute was instituted prior to these legal requirements of joining the Attorney General and District Executive Director.

The respondent's advocate is of the view that, joining the Attorney General is a procedural issue thus such law should act retrospectively. On the other hand, the applicant submitted that, the Attorney General cannot be joined at this stage since he was not a party to the original suit.

Let me point out from the outset that, I join hands with the applicant on the following reasons:

First, this is not the original suit, meaning that it emanates from the Application for Bill of Costs No.48 of 2018 which originated from Land

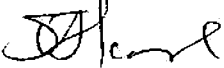
Appeal No. 27 of 2018 of the DLHT. In all these cases, the Attorney General and the District Executive Director were not parties as rightly submitted by the Applicant. Thus, joining them at this point of reference will not only prejudice the applicant but also will be fatal to justice itself.

Second, I am aware with what the respondent's advocate submitted in respect of when the law could act retrospectively. To add on his authorities, I wish to make reference to the case of **Director of Public Prosecutions vs Jackson Sifael Mtares and 3 Others**, Criminal Appeal No. 2 of 2018 at page, where it was stated that:

"Normally, it may not be made to apply retrospectively where the said legislation affects the substantive rights of the potential victims of that new law. On the other hand, however, if it affects procedure only prima facie it operates retrospectively unless there is good reason to the contrary".

Much as I am aware of this principle, with due respect, the instant application being the application for reference which is the continuation of the application for bill of costs, no party who was not party to the original dispute can be added at this stage.

The applicant has contended that this Preliminary Objection has been raised prematurely on the reason that it will affect the whole application for reference; I entirely agree with the applicant since the gist of the application is based on the same issue. Thus, allowing the preliminary objection will pre-empt the whole of the application for reference. It is a considered opinion of this court that, since the preliminary objection was dealt with before the District Land and Housing Tribunal, though the same was raised by the Taxing Officer and its decision is the subject of this


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reference, the same cannot be dealt with by way of preliminary objection. I wish to quote the conclusion of the decision of the District Land and Housing Tribunal, it reads:

"Kwa hali hii maombi haya ya gharama hayafai mbele ya baraza hili kwa kutomuunganisha Mwanasheria Mkuu wa Serikali kama matakwa ya Sheria yanavyohitaji hivyo maombi haya ninayafuta bila gharama yoyote kwa kuwa jambo hili la kisheria limeibuliwa na baraza hili." Emphasis added

It goes without saying therefore that, it is the above decision of the Tribunal that is sought to be varied. Thus, dealing with the same in the preliminary objection will amount to *res judicata*.

That being the case, I find the preliminary objection raised to have no merit. In the event, it is dismissed with costs. The application for reference should proceed on merit.

It is so ordered.

Dated and delivered at Moshi this 8th day of April, 2022.



S.H. Simfukwe

Judge

8/4/2022

