

**IN THE HIGH COURT OF TANZANIA  
(MTWARA DISTRICT REGISTRY)**

**AT MTWARA**

**DC CIVIL APPEAL NO.2 OF 2021**

*(Originating from District Court of Lindi at Lindi in Civil Case No.5  
of 2019)*

**THE LINDI DISTRICT COUNCIL..... APPELLANT**

***VERSUS***

**MACRO TECH COMPANY LIMITED.....RESPONDENT**

**JUDGEMENT**

*19/7/2022 & 8/12/2022*

**LALTAIKA, J;**

The respondent herein, **MACRO TECH COMPANY LIMITED**, sued the appellant, **LINDI DISTRICT COUNCIL**, at the District Court of Lindi at Lindi for the claim of TZS 87,004,183.22 which include the principal sum of TZS. 32,594,280/= (Thirty-Two Million Five Hundred Ninety-Four Thousand Two Hundred Eight Only) plus interest arising from nine years without settling the principal sum of TZS. 32,594,280/=

The respondent had lodged the suit against appellant due to breach of Contract Agreement entered between them on October 2010. The Contract Agreement was on Periodic Maintenance along Rutamba-Mnara-Nyengedi Road (Rutamba-Chiponda Link) referenced as "LGA-52/2009/2010/HQ/W/02."

It is further provided that the Contract Agreement was valued at TZS. 270,000,000/= with a Certificate Value of works assessed at TZS. 237,330,000/=. The respondent allegedly performed her contractual obligation as per terms of the Contract Agreement, but the appellant defaulted to fulfill his contractual obligation to pay the balance and final sum of TZS. 32,594,280/= for about nine (9) years reaching TZS. 87,004,183/= by the end of April 2019.

In the said suit instituted at the District Court of Lindi, the respondent (then plaintiff) claimed the following reliefs:

- (i) An order by this Court that the plaintiff be paid in full the due amount of TZS. 87,004,183/22 and any extra amount that is likely to accrue in due course up to the date of the decision of this case.*
- (ii) An order that the defendant pay to the Plaintiff a decretal sum at commercial rate from the principal sum covering the period from the year 2010 to the date of judgment of this case.*
- (iii) Costs of the suit to follow the event.*
- (iv) Any other relief(s) this Honourable court may deem fit to grant.*

In reply, the appellant filed her Written Statement of Defence which was accompanied by a Notice of Preliminary Objections. On 25/2/2020 the trial court upheld the Preliminary Objection and proceeded to dismiss the suit. Dissatisfied and aggrieved, the respondent appealed to this court vide Civil Appeal No.2 of 2020. On 24<sup>th</sup> September 2020 this court quashed and set aside the ruling of the trial court. This court further ordered a retrial before another Resident Magistrate competent to try it. The matter was reassigned to Hon. M.A. Batulaine, RM.

After a full trial, the learned Magistrate was satisfied that the respondent had proved his claim against the appellant on the balance of probability. The trial court entered a judgment in favour of the respondent and gave the following reliefs: -

- (i) *The defendant to pay the plaintiff in full the due amount of Tshs. 87,004,183/22 and any extra amount that is likely to accrue in due course up to the due date of the decision of this case.*
- (ii) *The defendant to pay the plaintiff a decretal sum at commercial rate of 10% from the principal sum covering the period from the year 2010 to the date of judgment of this case.*
- (iii) *The defendant to pay the plaintiff general damages to the tune of TZS 15,000,000/= (Fifteen Million shillings only) and*
- (iv) *Costs of the suit to follow event.*

Dissatisfied and aggrieved, the appellant has appealed to this court on the following grounds: -

- (i) *That the proceedings of the trial court is irregular in law and fact when the trial magistrate misdirected himself on this matter it determined the suit when Non-Joinder of a party (Necessary party) and contravention section 6(5) of the Government Proceedings Act, Cap. 5 R.E. 2019 amended by the Written Laws (Misc. Amendment) Act No.1 of 2020.*
- (ii) *That the trial Magistrate misdirected himself (sic) when determined the suit which has no jurisdiction to try.*
- (iii) *That the proceedings of the trial court is irregular in law and fact in entertaining the suit while the appellant has no legal personality of its own to be sued in the subject matter the restriction imposed under the provision of section 3(1) of the Executive Agencies Act Cap.245 of 2017 and section 3(6)(i)(ii) of the Act.*
- (iv) *That the trial magistrate has contradicted himself (sic) when trying the suit by denying the appellant right to be heard disregarding the appellant's preliminary objection on point of law to prove or disprove over it.*

At the hearing of this appeal, the appellant was represented by Mr. Masunga Kamihanda, learned State Attorney while the respondent was represented by Mr. Sylvester L. J. Sengerema, learned Advocate from G & S Associates, Advocate. Both parties agreed to dispose the matter by way of written submissions.

Mr. Kamihanda commenced the hearing by giving the background of the matter. He submitted on the first and second grounds of appeal that the trial learned Magistrate had misdirected herself for entertaining Civil Case No.5 of 2019 for non –joinder of the Attorney General. The learned State Attorney contended that the Written Laws (Miscellaneous Amendment) Act No.1 of 2020 provided for joining the Attorney General as a necessary party in every suit against the Government, had a retrospective effect which was consequential to the jurisdiction of the trial court in terms of section 7 of the Government Proceedings Act [Cap.5 R.E. 2019]. To bolster his argument, the learned State Attorney quoted section 7 of the said Act which provides that “Notwithstanding any other written law, no civil proceedings against Government may be instituted in any court other than the High Court.”

To this end, the learned State Attorney submitted that the trial court was enjoined under Order VII R.10 of the Civil Procedure Code Cap.33 R.E. 2019 to return the plaint to be presented to the court in which the suit should have been instituted. The learned State Attorney submitted that he is aware of the order of this court that the matter be returned to the trial court was overtaken by event by Act No.1 of 2020. To cement his position, Mr. Kamihanda cited the case of **Wambura Maswe Karera and Others v. The Village Council of Mori and Another**, Civil Case No.5 of 2020 (unreported) which held that this court is required to

interpret the law by taking into consideration the intention of the parliament.

Mr. Kamihanda contended that he was alive to the fact that Civil Case No. 5 of 2019, now the present appeal was filed before the coming into force of Act No.1 of 2020. However, argued the learned State Attorney, procedural laws act retrospectively unless specifically stated to the contrary. To substantiate his argument, he referred this court to the case of **Lala Wino vs Karatu District Council**, Civil Application No.132/20/2018 CAT at Arusha (unreported) at page 4.

Expounding his point even further, Mr. Kamihanda submitted that the term Government has been defined under section 26 of the Act No.1 of 2020 (supra) to include the Local Government Authorities. The learned State Attorney contended that the matter at hand was supposed to be filed in the High Court as per section 7 of the Government Proceedings Act. To this end, Mr. Kamihanda thought, the proceedings before the trial court in Civil Case No.5 of 2019 were a nullity for non-joinder of the Attorney General and lack of jurisdiction on the trial court.

Submitting on the third ground of appeal, Mr. Kamihanda argued that the trial court erred in law and fact for awarding interests which were pleaded contrary to the law governing the interests. The learned State Attorney went further and submitted that PW1 at page 23 of the proceedings testified that the accrued interest was TZS 54,409,903.22 from 20/06/2010 up to 30/04/2019. The learned State Attorney stressed that the plaintiff neither pleaded nor proved the said accrued interest. To fortify his argument, the learned State Attorney referred this court to the case of **National Insurance Corporation (T) Limited and Another**

**vs China Civil Engineering Construction Corporation**, Civil Appeal No.119 of 2004 at Dar es Salaam (unreported).

The learned State Attorney submitted that the trial wrongly ordered the appellant to pay the respondent a decretal sum at commercial rate of 10% from the principal sum covering the period from the year 2010 to the date of judgment of the case. To support his argument, he cited section 29 of the Civil Procedure Code which provides that every judgment debt shall carry interest rate at the rate prescribed from the date of delivery of judgment until the same shall be satisfied. He argued that the same position was echoed in the case of **National Insurance Corporation (T) Limited and Another vs China Civil Engineering Construction Corporation** (supra).

On the fourth ground, Mr. Kamihanda went on submitting that the trial court erred in awarding general damages without assigning reasons. To cement his argument, the learned State Attorney referred this court to the case of **Alfred Fundi vs Geled Mango and Others**, Civil Appeal No.49 of 2017 at Mwanza (unreported). On top of that he argued that general damages awarded is too excessive considering that the appellant had already paid TZS.240,000,000/= out of TZS.270,000,000/=. Finally, the learned State Attorney argued that this appeal be allowed, the judgment and decree of the trial court be quashed and set aside with costs.

In response, Mr. Sengerema submitted that both the Written Laws (Misc. Amendments) enacted as Act No.1 of 2020 which came into force on 14/2/2020 were preceded by the filing of Civil Case No.5 of 2019 as amended, which was filed on 22/7/2019. The learned counsel argued that by the time this Act became operational the status of the case was a "*fait accompli*" (i.e. already commenced). To this end, the learned counsel

argued that that the focus should be directed to the words "No suit shall be commenced" and referred to section 31 of the amended Law(Cap 287) relating to section 190 as amended.

Submitting on the issue of retrospectivity of the amendment to the present case, Mr. Sengerema contended that the amendment had no effect at all on all aspects whether on appeal to the High Court at Mtwara in May 2020 or in return to the trial court at Lindi District Court for a retrial. He contended that the amended Act No.1/2020 was indeed in force yet it could not be practicably possible to resort to it. The learned counsel submitted that he acted professionally by adhering to the rules of procedure relating to the filing of appeals as provided **under Order XXXIX Rule 1 of the Civil Procedure Code.**

In addition, Mr. Sengerema submitted that the reasons for non-compliance were one, the matter was on the court of records and therefore out of reach. He stressed that it was not possible for them to retrieve the case from court of records for the sake of complying with the said amendments. The learned counsel cited Order XXXIX Rule 23 of the CPC that for High Court procedure or practice where the law shows that readmitting a suit is impliedly done under its original number in the register of Civil suits. Two, if there was such necessity the law is very clear that the court could have made an order of a rejoinder suo motto under Order I Rule 10 (2) of the Civil Procedure Code.

Mr. Sengerema contended further that the issue was raised at the trial court but by then it was not a requirement since the Government Proceedings Act was solely confined to the Central Government while the Local Government Authorities Act related proceedings were governed by Cap.287 under section 190. The learned counsel argued that that is why

the respondent informed the Attorney General and the Solicitor General vide the letter date on 27/6/2019 bearing a thirty days' notice. Based on that argument, the learned counsel strongly maintained that since the two high offices were notified, they ought to take judicial notice of what was at stake at Lindi District Council and could have acted timely but they never did so till late recent year (2022) when by the order of this court the Solicitor General at Regional level has now joined as party to this case.

On the case of **Lala Wino vs Karatu District Council** (supra) relied upon by Mr. Kamihanda, Mr. Sengerema contended that the same is irrelevant in the present case. The learned counsel went further and submitted that the retrospective application to the present case of the amended laws in Act No.1/2020 would turn to be bad law, incurably defective and offensive to Order XXXIX Rule (1) (2) on Appeal in 2020 to the detriment of Civil Appeal No.2 of 2020. Furthermore, the learned counsel strongly reacted against the appellant's argument based on section 25(3) and (4) of Act No.1 of 2020 and the decision in the case of **Lala Wino** (supra). Instead, Mr. Sengerema referred this court to the case of **Zuberi Mussa vs Shinyanga Town Council**, Civil Case No.100 of 2004 cited in the case of **Elisante Joseph Kamalangombe vs A.S. Kabembele**, Land Revision No.4 of 2014.

It was Mr. Sengerema's submission further that Article 107 A (2)(e) of the Constitution of the United Republic of Tanzania (1977) require courts of law to dispense justice without being tied up to legal technicalities. He went on to cite section 3A (1)(2) of the Civil Procedure Code and the case of **Elisante Joseph Kamalangombe vs A.S. Kabembele** (supra) on the overriding objective principle.



Submitting on the second ground on appeal, the learned counsel contended that it was neither practicable nor possible to file this case at the High Court since it had already commenced far back in July 2019 before the amendments came into force in February, 2020. He further stressed that retroactivity was or is not tenable because Cap.5 R.E. 2019 only applied to the Central government and did not cover the Local Government District Authorities which were then governed by Cap.287 under section 190. The learned counsel submitted further that the amended Act No.1/2020 relating to Local Government District Authorities (Cap. 287) as amended under section 190 spells out under section 31 that the requirement only applies at the commencing suit. To this end, the learned counsel submitted that it is crystal clear that Civil Case No.5 of 2019 was *intravires* and very properly instituted resting on the meritorious jurisdiction.

Coming to the third ground, Mr. Sengerema contended that the complexity of the said contract which contains general and specific conditions of the contract makes it harder for the appellant, who seemingly lacks such knowledge to comprehend. He went on and submitted that the accrued interest of TZS. 54,409,903.22 as from 19.07.2010 to 30.04.2019 is well narrated in the body of Plaintiff as can be seen in paragraphs 3 and 7 of the Amended Plaintiff. The learned counsel contended that the same is captured in the plaintiff on prayer 1. To this end, the learned counsel argued that the interest was pleaded in the plaintiff. The learned counsel submitted that the special condition of the contract is clause 18 which states "The interest rate shall be 0% above prevailing interest rate for commercial borrowing from the contractor's bank".

Mr. Sengerema went on to submit that there was no contravention or breach of the law governing interests, because parties were guided by the signed contract between the employer and contractor. Furthermore, the learned counsel submitted that in consideration of the long span of time and the laxity of the appellant to service its principal debt, the 10% commercial rate award was deemed reasonable by the trial court in accordance with the rules prescribed by the Chief Justice on interest rates over the judgment debtor.

Mr. Sengerema argued that the fact that the trial court did not award such interest from the date of delivery of the judgment until such judgment was satisfied does not by itself justify faulting the law under the said section in so far as this does not prejudice the judgment debtor. The learned counsel stressed that this oversight on the part of the trial court may be rectified following the event at the time of the satisfaction of the judgment at hand.

Submitting on the last ground of appeal Mr. Sengerema argued that the ground was raised blindly by the appellant since the trial court assigned reasons as reflected on page 13 of the typed judgment of the trial court. He went further and argued that the trial court fortified its reasons by referring to the case of **Tanzania Saruji Corporation vs African Marble Co. Ltd.** (2EA,613) in which it was held and affirmed that general damages are such as the law will presume to direct natural and probable consequence of the act complained of. The learned counsel argued further that the appellant erroneously correlated the award of TZS 15,000,000/= with the principal debt of TZS. 32,954,280/=. Mr. Sengerema contended that should have been rightly correlated with TZS.30, 000,000/= being relief prayed by the respondent. The learned

counsel submitted that under construction contracts late payments remedial are guided by relevant clauses embodied within the respective contract, and for the present case clause 46.1 is relevant. Mr. Sengerema contended that the as a result, the awarded TZS 15,000,000/= as general damages are never at all part and parcel of the claimed and awarded accrued interest of TZS 54,409,903/22. Finally, the learned counsel prayed this court to uphold the judgment and proceedings of the trial court and dismiss this appeal with costs for being vexatious, frivolous, and aimed at obstructing the justice on legal technicalities.

In rejoinder, Mr. Kamihanda argued that the learned counsel has replied to the submission in chief guided by wisdom and not legal principles. In general terms the appellant reiterated his submission in chief stressing on the first, second and third grounds of appeal. However, the learned State Attorney submitted that awarding 10%.

Having dispassionately considered the submissions by both parties, the records of the trial court and grounds of appeal, I am now in the position to determine the merits or demerits of appeal. At the outset, I think it is important to start with the first and second ground of appeal. In the present matter, it is undisputed that the respondent sued the appellant which is the local Government Authority. **One**, whether an amendment of the procedural law operates retrospectively. **Two**, whether it was proper for respondent to sue the appellant without joining the Attorney General as a necessary party. **Three**, whether the trial court had jurisdiction to entertain the matter.

Beginning with the first issue, it has been a highly contested debate between the parties since each has tried to persuade this court to buy his line of reasoning. Apparently, my answer is affirmative that unless the

contrary is expressed, procedural law applies retrospectively. In the present case the matter in disputes involves the procedure to sue the Government and not the substantive claim against the government. This position is well articulated in the case of **Benbros Motors Tanganyika Ltd. v. Ramanlal Haribhai Patel** [1967] HCD n.435. In addition, the Court of Appeal in the case of **Lala Wino vs Karatu District Council** (supra) extensively elaborated how a procedural law when amended become retrospective. For instance, at page 7 the Court stated: -

*"In the premises, I am of the view that the amendment of section 47(1) of Cap.216 (supra) is retrospective on two grounds: first, it pertains to the procedure governing the exercise of appeal to this Court in respect of a land matter arising from the original exercise of the jurisdiction of the High Court. Secondly, the amendment contains no express stipulation limiting the ostensible retrospectivity of that new provision".*

Considering the above position, I am of the settled position that Mr. Kamihanda is right that the Written Laws (Miscellaneous Amendment) Act No.1 of 2020 vide section 25 brought a retrospective effect to section 6 of the Government Proceedings Act.

On the second and third issues combined, it is apparently clear that Civil Case No.5 of 2019 was lodged in the trial court before the Written Laws (Miscellaneous Amendments) Act No.1 of 2020 came into force on 14<sup>th</sup> February 2020. However, the order of this court for retrial was made after the said law had come into force. In view of that observation, I agree with the learned State Attorney that the order of this court was overtaken by the Written Laws (Miscellaneous Amendments) Act No.1 of 2020. I am holding so because the amendment under section 25(3) and (4) of Act No.1 of 2020 which amended section 6 of the Government Proceedings

Act has put a condition that suits against the government which included the local government require the Attorney General to be joined as a necessary party to any suit where the Government, ministry, government department, local government authority, executive agency, public corporation, parastatal organization or public company has alleged to have committed a civil wrong join the Attorney General as necessary party.

As far as this amendment is concern, it widened the meaning of the word Government. As correctly put by the learned State Attorney, the learned trial Magistrate ought to have invoked Order VII Rule 10 of the Civil Procedure Code by returning the plaint presented for non-joinder of the necessary party as provided by the law. To this end, I am convinced that the respondent lodged an incompetent suit. The law attracts no other sounder construction than that failure to join the Attorney General in a suit automatically vitiates the proceedings.

It is equally important to note that section 6(4) of the Government Proceedings Act (GPA) stipulates that all suits against the government shall be instituted in the High Court by delivering a claim in the Registry of the High Court with the area where the claim arose. The same position was underscored by this court in the case of **Attorney General v. Diocese of Njombe** [2004] T.L.R. 97.

In the present matter the respondent had sued the local government before the District Court of Lindi. Following the amendment brought by Written Laws Amendment Act No.1/2020 vide section 25 which amended section 6 of the Government Proceedings Act the meaning of the word government was widened to include the local government. As alluded to earlier, the amendment covered how and where a suit may be lodged.

Since, as argued, the amendment was retrospective, the respondent was required to file suit at the Registry of this court and not at the trial court since law had deprived the trial court of such jurisdiction. I see no benefit in labouring on the third and fourth grounds since the first and second grounds have finalised the matter.

In upshot, I allow the appeal and proceed to quash and set aside the judgment and decree of the trial court. I make no order as to costs.

It is so ordered.



**E.I. LALTAIKA**

Handwritten signature of E.I. Laltaika in blue ink.

**JUDGE**

**08.12.2022**

**Court:**

This judgment is delivered on this 8<sup>th</sup> day of December 2022 under my hand and seal of this court in the presence of Mr. Masunga Kamihanda, learned State Attorney for the appellant and Mr. Sylvester L.J. Sengerema, learned advocate for the respondent.



**E.I. LALTAIKA**

Handwritten signature of E.I. Laltaika in blue ink.

**JUDGE**

**08.12.2022**

**Court:**

The right to appeal to the Court of Appeal of Tanzania is duly explained.



**E.I. LALTAIKA**

Handwritten signature of E.I. Laltaika in blue ink.

**JUDGE**

**08.12.2022**