IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

IN THE DISTIRICT REGISTRY OF MUSOMA

AT MUSOMA

LAND CASE APPEAL No. 99 OF 2021

(Arising from the District Land and Housing Tribunal for Mara at Musoma in Land Application No. 232 of 2018)

SALOME SEMWENDA ..... **APPELLANT**

Versus

MUSOMA MUNICIPAL COUNCIL ..... **RESPONDENT**

JUDGMENT

09.06.2022 & 10.06.2022

Mtulya, J.:

On the 15th March this year, this court was invited and asked by Mr. Bwire Nyamwero and Ms. Rose Laurent Magoti to reply an issue on: *whether land suits filed in land tribunals before enactment of section 25 in the* ***Written Laws (Miscellaneous Amendments) Act No. 1 of 2020*** *are affected by the new provision inserted in section 6 of the* ***Government Proceedings Act*** *[Cap. 5 R.E. 2019].* The question was filed in the precedent of **Bwire Nyamwelo & Another v. National MicroFinance Bank PLC & Four Others**, Land Case Appeal No. 113 of 2021. On that day, this court stated that:

> *The law provides that* ***when a government institution is sued, the Attorney General shall be a necessary party****...it is upon a party who is suing to opt which parties to invite in land disputes. Once a*

disputant invites a government institution without joining the Attorney General as a necessary party, ***the suit shall fault for want of the Attorney General*** *as enacted in section 6 (4) of the Act via section 25 of the Amending Act.*

(Emphasis supplied).

Finally, this court replied the raised issue in affirmative that land suits filed before amendment in section 6 of the **Government Proceedings Act** [Cap. 5 R.E. 2019] (the Act) are affected by the new enactment in the section and accordingly dismissed the appeal for want of procedural enactment inserted in section 6 of the Act.

This court arrived into that thinking after citation of various laws in statutes and consultations of a bunch of precedents, including the precedents of the Court of Appeal on enactment of procedural laws that do not affect the substance of cases (see: **Lala Wino v. Karatu District Council,** Civil Application No. 132/02 of 2018; **Felix Mosha & Another v. Exim Bank Tanzania Limited**, Civil Reference No. 12 of 2017; **Makorongo v. Consigilo (2005) 1 EA 247**; **Municipal of Mombasa v. Nyali Limited [1963] EA 371**; **Benbros Motors Tanganyika Ltd. v. Ramanlal Haribhai Patel** [1967] HCD 435; **Director of public prosecutions v. Jackson Sifael Mtares & Three Others**, Criminal Application No. 2 of 2018; and

Joseph Khenani v. Nkasi District Council, Civil Appeal No. 126 of 2019.

The best cited paragraph on the subject is found in the precedent of **Municipal of Mombasa v. Nyali Limited** (supra) and for purposes of appreciation of the present appeal, I will quote:

> ***Whether or not legislation operates retrospectively depends on the intention of 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 information to that effect is manifested;* ***whereas if it affects procedure only, prima facie it operates retrospectively unless there is good reason to the contrary***.

(Emphasis supplied).

In the precedent of **Bwire Nyamwelo & Another v. National MicroFinance Bank PLC & Four Others** (supra), this court registered a bundle of precedents displaying similar thinking and appreciation of the above text, and in fact the decision was followed by this court

and Court of Appeal in many occasions without reservations since it was rendered down in 1963.

Yesterday evening, Mr. Emmanuel Gervas appeared in **Land Case Appeal No. 99 of 2021** filed in this court by Ms. Salome Semwenda (the appellant) praying this court to change its thinking in favour of the appellant. In order to persuade this court, Mr. Gervas contended that this court incorrectly interpreted the new enactment in section 25 of the **Written Laws (Miscellaneous Amendments) Act No. 1 of 2020** (the Amending Act). In order to persuade this court into his new thinking, Mr. Gervas registered three reasons, *viz*: first, the Amending Act is silent on suits registered before the enactment of Amending Act to show intention of the Parliament; second, the Amending Act is a procedural law, but affects substantive rights; and finally, this court may depart from its own previous decisions in favour of justice to the parties.

In interpolating his reasons, Mr. Gervas registered several materials in statutes and precedents, which in brief show that: first, previously filed cases in the tribunal are not covered by new enactment because the cases where filed under the law in section 106 of the **Local Government (Urban Authorities) Act** [Cap. 288 R.E. 2002] (the Urban Authorities Act) which required thirty (30) days' notice whereas the Amending Act affected section 6 of the Act

which require a ninety (90) days' notice and further the meaning of government and government institutions to include municipal councils; second, the Parliament did not intend to include already filed suits in the tribunal as it remained silent on the subject during passing of the Amending Act; third, the appellant had already been in the tribunal enjoying the right to access the tribunal in substantive right to be heard, but was declined by the procedural law. Finally, Mr. Gervas argued that this court should not be bound by its previous decisions which cause injustice to the parties.

In bolstering his arguments, Mr. Gervas cited the authorities of this court and Court of Appeal in a multiple precedents, namely: **Benbros Motors Tanganyika Ltd. v. Ramanlal Haribhai Patel** [1967] HCD 435; **Hassan James v. Republic**, Criminal Appeal No. 110 of 2020; and **Evans G. Minja & Six Others v. Bodi ya Wadhamini Shirika la Hifadhi ya Taifa (TANAPA)**, Labour Revision No. 37 of 2020. In closing the submission in chief, Mr. Gervas cited a book on interpretation of statutes published in India by the Universal Law Publishing Company (see: Kafaltiya, A.B., ***Interpretation of Statutes***, 2008 Edition, Universal Law Publishing Co., New Delhi India). In his opinion with regard to the citation of the book is based on contention that no individual person can be curtailed his right to action by procedural enactments.

Replying the arguments and several citations of Mr. Gervas, the respondent had invited the services of Solicitor General under Mr. Goodluck Lukandizya, learned State Attorney to argue the appeal. Mr. Lukandizya was very brief and contended that the issue before this court is whether the **District Land and Housing Tribunal for Mara at Musoma** (the tribunal) in **Land Application No. 232 of 2018** (the application) was correct in inviting and using the new enactment of the law in section 6 of the Act to dispose of the application.

In replying the issue, Mr. Lukandizya stated that the decision of the tribunal in the application was correct. In substantiating his reply, he registered five (5) reasons, namely: first, Mr. Gervas did not dispute there is new procedural enactment of the law which amended section 6 (3) of the Act which currently wants joining of the Attorney General as a necessary party where government institutions are sued; second, Mr. Gervas admitted that there is precedent of this court on interpretation of section 6 of the Act in **Bwire Nyamwelo & Another v. National MicroFinance Bank PLC & Four Others** (supra); third, the new insertion of section 6(3) of the Act was enacted by use of the word *shall* and is read together with sections 6A and 7 of the Act which limit the tribunal's mandate to admit, hear and determine applications involving government institutions; fourth, the idea of prior lodging of applications before

enactment has no merit as the point of competence challenging the jurisdiction of the tribunal may be raised at any stage of the proceedings; and finally, the title of the amended law shows that it regulates civil procedures when government institutions are sued.

In order to bolster his arguments, Mr. Lukandizya cited the precedent of **Bwire Nyamwelo & Another v. National MicroFinance Bank PLC & Four Others** (supra) and submitted that the precedent cited the authority of **Municipal of Mombasa v. Nyali Limited** (supra) which stated all with regard to procedural enactments. In his opinion, he cannot bother to reply all arguments and cited precedents or statutes registered by Mr. Gervas in a situation where there is already in place the precedent of this court. Finally, Mr. Lukandizya contended that the substantive right to sue is still in place for the appellant to access this court hence to argue her substantive right to access and enjoy right to be heard has been infringed is wrongly invited in this appeal.

In a brief rejoinder, Mr. Gervas repeated his previous arguments and insisted that the new enactment found the appellant already in the tribunal and cannot affect her. He insisted that procedural right cannot waive substantive right to be heard and finally prayed this court to allow the appeal and depart from its previous decision.

I glanced and scanned the record of present appeal and found that the application in the tribunal was filed on 9th November 2018. Nearly two (2) years on the course, on 21st February 2020, the Parliament sat and enacted the Amending Act to alter section 6 of the Act. The drafters enacted section 25 of the Amending Act to insert words in section 6 of the Act to reflect the following:

> *All suits against the Government* ***shall****, upon expiry of the notice period be brought against the Government, Ministry, Government department, local government authority, executive cogency, 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.***

(Emphasis supplied)

The section provides further that non-joinder of the Attorney General as provided in the Act *shall vitiate the proceedings of any suit brought before any deciding forum*. The new insertion in section 6 of the Act is appreciated by section 7 of the Act which provides that no civil proceedings against the Government may be instituted in any court other than the High Court. Following these provisions of the law, the tribunal on 4th October 2021, struck out the application

for want of the law in the Amending Act. At page 2 of the decision, the tribunal reasoned that:

> *Kwa ujio wa Sheria Na. 1 ya 2021 inayotaka kuunganishwa kwa Mwanasheria Mkuu na Wakili Mkuu wa Serikali, Baraza hili linakosa mamlaka ya kusikiliza na kulitolea maamuzi shauri hili.*

Following the decision of the tribunal, the appellant hired the legal services of Mr. Gervas to register four (4) grounds of appeal to protest the decision and pray an order of this court to direct the tribunal to hear the matter to the finality. Yesterday evening when the suit was scheduled for hearing, Mr. Gervas prayed to consolidate all grounds of appeal into one (1) to read:

> *That the tribunal erred in law and fact for failure to determine the application based on the* ***Written Laws (Miscellaneous Amendments) Act No. 1 of 2020****.*

In arguing for and against the ground of appeal the learned minds of the parties in Mr. Gervas and Mr. Lukandizya took five (5) precious hours of this court, which is to my opinion is unfortunate. I have scanned the arguments of the learned minds and found they both emanated from the interpretation of the clause of the Court in the cited paragraph of the precedent in **Municipal of Mombasa v. Nyali Limited** (supra), that:

> ***Whether or not legislation operates retrospectively depends on the intention of 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 information to that effect is manifested;* ***whereas if it affects procedure only, prima facie it operates retrospectively unless there is good reason to the contrary***.

(Emphasis supplied).

Mr. Lukandizya thinks that the amendment affected the procedural provisions and displays the new procedure to follow for persons who sue government institutions in land disputes whereas Mr. Gervas thinks that there is a substantive right to be heard touched by the new enactment. However, in order to distinguish the two contesting arguments, the Court in the above cited paragraph preferred the parties to the *intention* of the drafters of the legislation, Parliament. According to Mr. Gervas, the drafters were silent as whether the Amending Act affects the previously registered applications whereas Mr. Lukandizya cited the heading in the Act arguing that previous applications in the tribunal before the

amendment are touched. I have consulted the Amending Act in section 25, and found it is silent on applicability of the section. However, the short title of the Act shows that: *This Act may be cited as government proceedings Act*, whereas the long title displays:

> *An Act to provide for the rights and liabilities of the Government in civil matters, for the procedure in civil proceedings by or against the Government and for related matters.*

From the title, it is obvious that the Act itself regulates procedural issues. However, the question remains whether the law applies retrospectively or not. The answer is found at page 7 of the precedent of the Court of Appeal in **Lala Wino v. Karatu District Council** (supra) when determing a dispute on whether section 47 (1) of the **Land Disputes Courts Act** [Cap. 216] as amended by section 9 of the **Written Laws (Miscellaneous Amendment) (No. 3) Act, 2018, Act No. 8 of 2018** is applicable retrospectively in land disputes for leave to appeal to the Court of Appeal. The answer at page 3 and 7 of the precedent shows that:

> *Admittedly, the application having been lodged on 10th April 2018, proceeded the amendment under consideration. In terms of section 14 of the* ***Interpretation of Laws Act*** *[Cap. 1 R.E. 2002], the*

amendment took effect subsequently on the date of publication in the Gazette of Act No. 8 of 2018, that is 25th September 2018...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 the right of appeal to this Court in respect of a land matter arising from original exercise of the jurisdiction of the High Court; and secondly, the amendment contains no express stipulation limiting the ostensible retroactivity of that new provision.

I think the paragraph provides it all. In the case at hand, the amended section 6 of the Act governs the exercise of right to sue government institutions in respect of land matters and the amendment contained no express stipulation limiting the retrospective application of the new insertion in section 6 of the Act. I am quietly aware that Mr. Gervas coined his arguments to display that when a person is already in the hearing stage in the tribunal, she cannot be affected be the Amending Act, as doing so, would curtail her substantive natural and human right to be heard. I think, this is unfortunate argument and I do not share it: first, because the record shows that application, when was struck out, no single witness was heard; and second, there was no any other possibility

for the application to proceed in presence of the new law that applies retrospectively and multiple precedents as indicated above in this judgment.

I understand the prayer of Mr. Gervas on the right to this court to depart from its previous decision in **Bwire Nyamwelo & Another v. National MicroFinance Bank PLC & Four Others** (supra) in favour of justice to the parties. However, the general rule of law is that this court is bound by its past decisions and precedents of the Court of Appeal in our judicial hierarchy. That is important because of certainty and predictability of the decisions emanating from this court, and of course, enhancing efficiency of our judges in this court as they will not waste time and resources in similar case.

I am quietly aware in some circumstances, this court may depart from its previous decisions, but that occurs very rarely and when there are good reasons and appears right to do so for interest of justice. I do not think if the present appeal is one of them. The appellant has the right to be heard in this court by re-litigating the dispute in this court according to the laws regulating land matters and government proceedings.

Having found the Amending Act applies retrospectively, and noting this court cannot easily depart from its previous decisions, and being aware the substantive rights of the appellant were not

curtailed by the new enactment, I think, the protest was brought in this court without sufficient reasons hence dismissed. In furtherance of fairness and equity, and noting the dispute is still on the course, I make no order as to costs. Each part shall bear its own costs.

Accordingly ordered.

Right of appeal explained.

F. H. Mtulya

Judge

10.06.2022

This judgment was delivered in chambers under the seal of the court in the presence of the appellant, Ms. Salome Semwenda and in the presence of Mr. Mr. Kitia S. Turoke, learned State Attorney, for the respondent.

F. H. Mtulya

Judge

10.06.2022