IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MOSHI SUB REGISTRY)
AT MOSHI

LAND REVISION NO. 06 OF 2022

(C/F Application No. 139 of 2015 Moshi District Land and Housing Tribunal)

SETH JACOB NDOSSI (Administrator of the estate of the late Jacob Ndeshiliyo Ndossi).....**APPLICANT**

VERSUS

1. HAI DISTRICT COUNCIL
2. HERMAN LEIYA .....**RESPONDENTS**

RULING

Last Order: 16th May 2023
Ruling: 8th June 2023

MASABO, J.: -

The applicant has moved this court under section 43(1)(a) and (b) of the Land Disputes Courts Act, 2002 CAP 216. He is praying that the court be pleased to examine the record of Moshi District Land and Housing Tribunal in Application No. 139 of 2015 to satisfy itself as to its correctness, regularity, legality and or propriety and thereafter, revise the order made on 26th July 2022, and quash and set the said order and award the applicant costs.

In his affidavit accompanying the application, he has averred that, he was an applicant in the original case in which he was claiming ownership of a parcel of land illegality allocated to the 2nd respondent by the 1st respondent while it belonged to his deceased father whom he is legally representing. The application was untimely terminated on 06/05/2023

after it was dismissed for being time barred. After successfully appealing against the dismissal via Land Appeal No. 11 of 2016, this court remitted the case file to the DLHT to be heard on merit. The applicant's case commenced and two of his witnesses were heard. His two other witnesses died without giving their testimony.

Meanwhile, the case file was reassigned to another chairman, Hon. Kinyerinyeri on 12/07/202. After he took over the case, he suo motto, raised an issue whether the tribunal had jurisdiction over the case following the amendment of the Government Proceedings Act, Cap 5, as introduced by the Miscellaneous Amendment Act, No.1 of 2020. Both parties submitted on the issue on 21/07/2022. On 26/07/2022 the tribunal delivered a ruling which struck out the application. It is this ruling which has aggrieved the applicant herein.

The application was resisted by the respondent through a counter affidavit deponed by Ms. Blandina Mwita. Hearing of the application proceeded in writing. Both parties were represented. The applicant was represented by Mr. Chiduo Zayumba, learned advocate and the respondent by Ms. Blandina Mwita, learned State Attorney.

Mr. Zayumba commenced his submission in chief, by adopting the affidavit of the applicant. He submitted that the tribunal materially erred in striking out the application on ground that it has no jurisdiction as in doing so, it failed to exercise its jurisdiction and erroneously used the law. He argued that, the matter had been filed in 2015, 5 years prior the amendment of the law. He argued further that, the case of **Lala Wino vs Karatu**

District Council Civil Application No. 132/02 of 2018 which the tribunal relied upon in holding that the application had been rendered incompetent by the amend which being a procedural law operate retrospectively, does not apply to the circumstances of the present case and ought not to have been used. He argued further that, it is a cardinal principle of law that each case must be decided on its peculiar facts. The facts in **Lala Wino vs Karatu District Council** (supra) are distinguishable from the ones in the case at hand. The said case concerned an application for leave to appeal which was rejected as leave was no longer a legal requirement. To the contrary, in the present case, the applicant was claiming ownership of land.

Mr. Zayumba averred that there are numerous cases where it has been stated that the amendments of procedural law shall unnecessarily apply retrospectively and this include **Raymond Costa vs Mantrac Tanzania Ltd,** Civil Application No. 42/08 of 2018, CAT at page 16. He also cited the decision of this court in **Tanzania Railway Corporation vs Raphael Siaga**, Revision No. 194 of 2021, HC Labour Division of DSM where it was held that, it is neither necessary nor mandatory to join the Attorney General on a matter instituted before the law came into effect. Decisions of this court in **Evans G. Minja and others vs TANAPA**, Revision No. 37 of 2020 (HC Moshi Registry) and **Gaudence Dominic Aufeni vs Ngujini Village Council,** Civil Reference No. 7 of 2021 (HC, Moshi Registry) were further cited in support of the argument that, the requirement to join the Attorney General cannot act retrospectively. In further fortification, he cited **Zadock Maenda Elphace vs Bunda District Council, C**ivil Appeal No. 126 of 2019 (HC, Mwanza) where it

was held that it was not justifiable to apply the said law retrospectively to a matter filed in DHLT prior institution of the amendment and argued that, as the present case was filed 7 years ago prior the amendment, it ought not to have been struck out. Compelling the applicant to start a fresh will be contrary to the interest of justice. The order striking out the application, impliedly compelled the applicant to start afresh which is not in the interest of justice.

It was submitted and argued further that, striking out the application based on technicality was inconsistent with the order made by this court in Land Case appeal No. 11/2016 between the parties in which, while remitting the instant case to the trial tribunal, warned the tribunal not to dispose of cases on technicality. He concluded that, by striking out the application, the tribunal committed a material irregularity which need be corrected and the case file remitted to the tribunal for continuation of hearing.

In reply, Ms. Mwita joined hands with Mr. Zayumba's submission as to the reasons for striking out of the application. However, she disputed the argument that there a material error on the tribunal's order. In her view, the order was well founded as the amendment effected to the section 6(3) of the Government proceedings Act by the Written Law Miscellaneous Amendment No. 1 of 2020 is procedural in nature and has a retrospective effect. In view of the amendment, she argued, the omission to join the Attorney General is a fatal irregularity capable of vitiating the proceedings and the rulings thereto. She reasoned further that, as the application had

not been heard, the applicant was duty bound to comply with it by joining the attorney General. His omission, vitiated the proceedings.

As to the authority in **Lala Wino vs Karatu District Council** (supra), Ms. Mwita argued that, much as its facts are distinguishable from the present case, it is still applicable as the principle it set is general and applicable to all cases, the case at hand inclusive. Accordingly, she proceeded that, even though this case was filed in 2015, the applicant was duty bound to follow the procedure.

In rejoinder, Mr. Zayumba reiterated that the argument that the Attorney General must be joined as a necessary party is erroneous as the case was filed way before the amendment. The present case, he argued, ought to have been treated as an exception to the rule in **Lala Wino vs Karatu District Council** (supra) as the right of the applicant stands to be greatly affected if the case starts afresh considering the time taken in pursuit of the application in the tribunal as well as in this court. Thus, it is crucial that the impugned order be reversed as the retrospective application of the said law is not in the interest of justice as held in **Joseph Kenani vs Mkasi District Council** Civil Appeal No. 126 of 2019.

I have dispassionately considered the submissions of both parties. As vividly demonstrated in the submissions, the affidavit accompanying the application and the impugned ruling, the genesis of the application is the retrospective application of the law requiring joinder of the Attorney General in all matters filed against Local Government Authorities. As correctly submitted by both parties, this requirement which was previously applicable to cases against the central Government, was ushered into our

statutes by section 25 the Written Laws (Miscellaneous Amendments) Act, 2020 which amended Section 6 of the Government Proceedings Act Cap. 5 R.E. 2019 by extending the said requirement to all matters concerning Local Government Authorities.

The contested issue is whether the said law has a retrospective effect and whether, in striking out the application, the trial tribunal properly exercised its jurisdiction. Before I proceed further, I think it is relevant to reproduce the provision on which the parties have locked their horns. It reads;

> "25. The principal Act is amended in section 6, by- (a) deleting subsection (3) and substituting for it the following-
> "(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)." [emphasis added].

It is too obvious that, the amendment introduced a mandatory requirement for joinder of the Attorney General as necessary party in all suits local government authorities, the 1st respondent inclusive. The same Act, under section 31, introduced amendments to Section 190 of the Local Government (District Authorities) Act Cap 287. The amendment reads;

> "31. The principal Act is amended in section 190, by deleting subsection (1) and substituting for it the following:
> "(1) No suit shall be commenced against a local government authority-

(a) unless a ninety days' notice of intention to sue has been served upon the local government authority and a copy thereof to the Attorney General and the Solicitor General; and
(b) upon the lapse of the ninety days period for which the notice of intention to sue relates."

There is certainly no doubt that both amendments are procedural in nature. It is similarly settled, and the parties herein seem to agree that, procedural laws have retrospective effect unless there exists some good reasons for deviation. There is a plenty of authorities from this court and the Court of Appeal. In addition to the cases cited above, other relevant authorities include **Municipality of Mombasa v Nyali Limited** [1963] EA 371; **Makorongo v Consigili**o [2005] 1 EA 247; **DPP v Jackson Sifael Mtares & 3 Others**, Criminal Application No. 2 of 2018 (CAT); **Rebecca Wegessa Isaack v Tabu Msaigana & Another**, Civil Application No. 444/08 of 2017 (CAT) at Mwanza, **and Felix H. Mosha and Another vs Exim Bank Limited** (Civil Reference No. 12 of 2017) [2021] TZCA 257.

In **Felix H. Mosha and Another vs Exim Bank Limited (**supra), the Court of Appeal held thus;

We are mindful of the position of the law that when an amendment of the law affects a procedural step or matter only, it acts retrospectively, unless good reason to the contrary is shown. For instance, in the case of **Makorongo v. Consigilio** [2005] 1 EA 247, the Court stated thus:

"The general rule is that unless there is a dear indication either from the subject matter or from the working of the Parliament, that Act should not be given a retrospective construction. One of the rules of construction that a court uses to ascertain the

> intention behind the legislation is that if the legislation affects substantive rights, it will not be construed to have retrospective operation, unless a dear 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."

Further, in its previous decision in **Raymond Costa vs Mantrac Tanzania Ltd** (Civil Application No. 42 of 2018) [2019] TZCA 63 (Tanzlii), the Court had this to say;

> For the avoidance of doubt, we feel pressed to state at this stage that we are alive to the principle that once an amendment has been effected to the legislation, if such amendment is on matters of procedure, it would apply retrospectively. The High Court of Tanzania when confronted with similar situation in **Benbros Motors Tanganyika Ltd v. Ramanlal Haribhai Patel** [1967] HCD 435 had this to say: -
>
> > 'when a new enactment deals with rights of action, unless it is so expressed in the Act and 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.

Moved by these authorities and its position in **Makorongo v. Consigilio** [2005] lEA 247 and **The Director of Public Prosecutions v. Lackson Sifael Mtares and 3 Others**, Criminal Appeal No. 2 of 2018 (unreported); the Court concluded that;

> 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"

I have cited the latter decision extensively to derive home the argument that the retrospective effect of procedurally law is not without exception nor it is oblivious of the unique circumstance of each particular case. What is gathered from the authorities above is that, in determining whether the retrospective effect should prevail or not, due regard must have to the particular circumstances of the case and the prejudice likely to be occasioned to the parties. If in the end it appears that the retrospective operation of the law will prejudice the party and impair his exercise or enjoyment of a right, the retrospective operation of the said law should be halted as the prejudice constitutes a good cause for deviation from the general rule.

Holding a similar view, Mr. Zayumba has passionately submitted that indeed the applicant stands to be prejudiced by the retrospective application of the amendment. The respondent on the other hand, is of a different view. Having carefully weighed these opposing views, I will respectfully decline the learned State Attorney's invitation as I find her argument to have been misconceived and inconstant of the principle above. The uncontested fact that the case was filed way back in 2015 and that it was partly heard before the amendment was ushered bears a great testimony of the prejudices likely to be occasioned to the applicant as he would have to commence fresh proceedings after issuing a 90 days' notice to the Attorney General and possibly be caught up in the advent of

statutes of limitation which he will have to battle with before restoring his action. In my firm view, the circumstances of the case exhibited exceptional circumstances warranting the deviation.

That said, I agree with Mr. Zayumba's argument that the order striking out the applicant's application was misconceived considering that, when the applicant filed his application in the tribunal, he committed no wrong as the requirement for joinder of the Attorney General was no yet in place. The order striking out his application is, therefore, tantamount to condemning him for the scene he never committed. At most, had the tribunal found, as it did, that the joinder of the Attorney General was mandatory, it would have reasonably ordered an amendment of the pleadings instead of striking out the application.

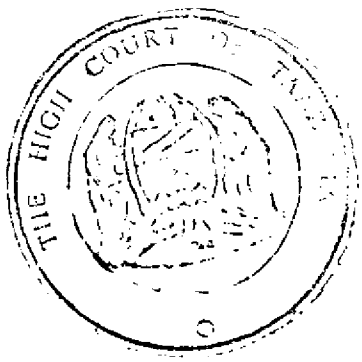
In my further considered view, under the peculiar circumstances of this case, the appropriate remedy available to the tribunal was to allow the Attorney General to intervene in the application under section 6A of the Government Proceedings, if he wished to be a party thereto. This provision which was not touched by the amendment, vests in the Attorney General discretion to intervene in suits already filed in court.

In the upshot of the above, I have come to the conclusion that the trial tribunal materially erred in striking out the application. Accordingly, I allow the application, quash and set aside the ruling delivered by the trial tribunal on 26th July 2022 and its respective order. I subsequently order that the case file be remitted back to the trial tribunal for continuation of

hearing before another chairman. For clarity, the hearing is to commence from where it ended.

Since the point that led to the striking out of application was raised by the trial chairman *suo motu*, it is just and fair that the costs of this application be shared by each of the parties shouldering its respective costs.

DATED and DELIVERED at MOSHI on this 8th day of June, 2023.



J. L. MASABO

JUDGE