

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF DAR ES SALAAM
AT DAR ES SALAAM
LAND CASE NO.4 OF 2019
(Original Jurisdiction)**

**HAMISI ISMAIL KAPONA.....1ST PLAINTIFF
FREEMAN NJAU2ND PLAINTIFF
ELIAS NCHOLE3RD PLAINTIFF
EUFEMIA WILLIAM DESOKIA4TH PLAINTIFF
ANGELINA ELIAS MREMI5TH PLAINTIFF
ALOYCE L.KESSY6TH PLAINTIFF
TISHI SALUM7TH PLAINTIFF
DEUSDETITI MURUNDI.....8TH PLAINTIFF
FRIDA TOBIAS MAKOI.....9TH PLAINTIFF
GASTON MASIKA10TH PLAINTIFF
THADEO KATUSHIBILA KATABAZI.....11TH PLAINTIFF
LYDIA WAKUKU LYARUU.....12TH PLAINTIFF
AGNESS MCHAU NJAU.....13TH PLAINTIFF
SALUM UKWAMA.....14TH PLAINTIFF
K.N. SHAYO.....15TH PLAINTIFF
DR. EMIL LEBABU WOISO.....16TH PLAINTIFF
ELIZABETH G. TIMASI.....17TH PLAINTIFF
MARY MWAIMU.....18TH PLAINTIFF
AMINI H. MINJA.....19TH PLAINTIFF
FFELISTA THADEI MAKOI.....20TH PLAINTIFF
NEEMA MVUNGI.....21ST PLAINTIFF
BETTY WANGWE.....22ND PLAINTIFF**

VERSUS

KINONONDI MUNICIPAL COUNCIL.....DEFENDANT

24th May & 31st July 2023

RULING

F.H. MAHIMBALI, J.

This ruling is in respect of the legal concern raised by the parties themselves which this court also took cognisance of, whether the suit is now properly before the court following an amendment brought by the Written Laws (Miscellaneous Amendment) Act No. 1 of 2020.

In essence, both counsel are in agreement that the said law brought two major amendments in all suits against the Government shall: first, the requirement of 90 days' notice before filing a suit. Secondly, making the Attorney General a necessary party to the suit. This suit being filed against the defendant: Kinondoni Municipal Council is also affected by the said amendment as well.

It is undisputed that this suit as its number connotes, was filed on **8th February 2019**, that is prior to the said amendment brought by the governing law through Written Laws (Miscellaneous Amendment) Act No. 1 of 2020. Parties' counsel are also in agreement that the procedural law amendment has a retrospective effect to a pending suit in court.

As what is the way forward, counsel are at different opinions. Whereas solicitor for the defendant says the suit is bad before the court for want of legal compliance, counsel for the plaintiff is of the different view that, the wisdom of the court be applied to order an amendment of the pleadings and dispense with the requirement of the 90 days' notice to the suit already pending in Court.

In convincing the court for an order of amendment without affecting the suit, Mr. Juvenalis Motete relied on the decision of the Court of Appeal in the case of **Ilala Municipal Council Vs. Sylvester J. Mwambije**, Civil Appeal No. 155 of 2015.

Ms Grace Lupondo, learned state attorney for the defendant, resisted the view and concern of Mr. Motete of amending the pleadings and dispense with the 90 days' notice for legal compliance. She submitted that as the law stands now, all proceedings against the government (be it central or local government), departments, ministries, its agencies, corporations as per section 6(2) and (3) of the Cap 6 it is now mandatory. The said law has also amended section 106 of the Local Government Urban Authorities Act. As the amendment of the said law has a retrospective effect (see **Lala Wino Vs. Karatu District Council**, Civil Application No. 132/02/2018), the plaintiffs are mandatorily required to

comply with the law. She prayed that this Court to rely on the case of **Arusha Municipal Council Vs. Lyamuya Construction Company Ltd**, [1998] TLR 13 which insisted on the issue of compliance to issuing notice. Furthermore, she cited the case of **Salim O. Kabora Vs. Kinondoni Municipal Council and 3 Others**, Land Application No. 10 of 2020 (Hon Kalunde, J) at pages 9,10,11 and 12. She winded up her submission on the issue by drawing support from the case of **Martin B. Kumaliya & 117 others Vs. Iron and Steel Ltd**, Civil Application No. 70/18/2018, CAT that circumvention of the rules is mandatory and not indispensable.

Upon digest of the both counsel submissions on the issue, the relevant question to pose now is what appropriate course in the circumstances of this case, should this court order. Both counsel are at agreement that the procedural law has a retrospective effect thus it must be complied with. Whereas the plaintiffs' counsel is seeking for the indulgence of this court to dispense with the requirement of 90 days' notice as per law as the suit is already filed and pending in Court but just make an order for amending the pleading and implead the Attorney General.

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 Ms Grace that the current case falls under the purview of the procedural amendment alluded to earlier.

As to the retrospectiveness effect of the procedural amendment, 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 earlier taken by the Court of Appeal in **Makorongo v. Consiglio** [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 subsequent 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. Consiglio** (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.** [Emphasis added].*

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."

That in mind, it is clear that retrospectives of procedural amendment is a common law principle that is universally applied. However, depending on the circumstances of each case, it can be restrictively applied or relaxed depending on the circumstances of each case.

In the current case, it is clear that since the filing of the suit on 8th February 2019, today is 2023 but no single witness has given his testimony.

I am also aware that on 5th October 2021, the plaintiffs filed an amended plaint in this case but didn't consider the dictate of the law as amended. All that done in forgetful of the law, cannot make this court close its eyes. As to the stage of the case reached, ordering compliance with the procedural law as it is will not jeopardize the plaintiffs' rights as they are not prejudiced.

That said, for the interests of justice and smoothness of proceedings featuring the necessary party as per law it is important then for the law to take its course as it is. Had there been good advancement of the case, there would have been soft approach of making compliance to it by ordering amendment as prayed.

As each case must be decided by its own merits, in the current case I hereby order strike out of the case for the plaintiffs to comply with the procedural law as it is now. As to the best way forward, I hereby order exemption of filing fees by the plaintiffs if they decide to comply with the law as discussed above.

DATED at DAR ES SALAAM this 31st day of July, 2023.



F. H. MAHIMBALI
JUDGE