

**IN THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**HIGH COURT OF TANZANIA**

**MOSHI DISTRICT REGISTRY**

**AT MOSHI**

**LAND CASE APPEAL NO. 44 OF 2022**

*(C/F Application No. 49 of 2018 in the District Land and Housing  
Tribunal for Moshi at Moshi)*

**TPB BANK PLC .....1<sup>ST</sup> APPELLANT**

**NOLIC COMPANY LTD.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**GLADNESS DONALD NYALALI.....1<sup>ST</sup> RESPONDENT**

**SADIKIEL MBANDO.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

Date of Last Order: 19.10.2023

Date of Judgment: 06.12.2023

**MONGELLA, J.**

In the District Land and Housing Tribunal for Moshi at Moshi (the Tribunal, hereinafter), the respondent sued the appellants and the necessary party, over a registered piece of land located at Plot No. 558 Block “M” at Kingereka “B” Area, Bondeni Ward within Bomang'ombe Township in Hai District.

In brief, the background to the dispute is as follows: the respondent and the 1<sup>st</sup> appellant are mortgagor and mortgagee, respectively. They established that relationship on 29.04.2016 when the

respondent acquired a micro credit loan of T.shs.15,000,000/=. However, at a certain point she failed to repay the loan instalments. In February 2017 she sought assistance to reschedule the loan whereby her request was granted. She thus was given six months to revamp her business and resume servicing the loan. However, in July 2017, as she resumed to service her loan, an officer of the 1<sup>st</sup> appellant stopped her from doing so averring that brokers had been allocated to attach the suit property. She then had meetings with the appellant to rectify the situation whereby at the end they agreed to comply with the rescheduled plan.

However, on 26.03.2018 the respondent was informed of a public auction for the suit property by the 2<sup>nd</sup> appellant. The suit property was eventually sold for T.shs. 17,000,000/= which she believed to be below the market price. She contended that the market price of her property was T.shs. 60,000,00/- . The respondent thus sought for the auction to be declared unlawful and illegal; for her to be allowed to settle the loan; a permanent injunction against the appellants, necessary party and their agents, costs of the suit and any relief the Tribunal would deem just to grant.

On the other hand, the appellants held a view that the sale was lawful and justified as all procedures had been followed and the price at which the suit property was sold was the market price on the material date. The trial Tribunal found in favour of the respondent and granted her the reliefs she had sought.

Aggrieved, the appellants have filed this appeal on the following grounds:

- 1. That, the honourable chairman erred in law and fact for failure to evaluate properly the evidence adduced by the appellant's witness and led to erroneous conclusion.*
- 2. That, the honourable chairman erred in law and fact for determining the matter which the Tribunal lacked jurisdiction to determine the same.*

The appeal was argued by written submissions whereby all parties were represented. The appellants were represented by Mr. Epaphro Mwego, learned state attorney, the respondent was represented by Mr. Desderius Hekwe and the necessary party by Mr. Gideon Mushi, both learned advocates.

In his submission in chief, Mr. Mwago abandoned the 1<sup>st</sup> ground of appeal. Submitting on the 2<sup>nd</sup> ground, he averred that the 1<sup>st</sup> appellant is a public corporation, hence a government entity as established under The Tanzania Postal Bank Act (Repeal and Transitional Provisions) Act, 2015 (Act No. 18 of 2015), which repealed the Tanzania Postal Bank Act, 1991. In those premises, Mr. Mwango had the contention that it being a government institution, the Attorney General ought to have been joined as a necessary party. In support of his contention, he referred the case of **Fatuma**

**Hamis Sultani vs. TPB Bank Plc & 2 Others** (Land Case 88 of 2020) [2022] TZHCLandD 313 TANZLII.

He further argued that, since the government is the majority shareholder in the 1<sup>st</sup> appellant bank, then the proceedings of the Government Proceedings Act do apply. He cited the case of **Gladys Rogathe Metili vs. TPB Bank Plc and 3 Others** (Land Case 2 of 2020) [2022] TZHC 3112 TANZLII to support his stance.

Mr. Mwago contended further that **section 6 (4) and 7 of the Government Proceedings Act** [Cap 6 RE 2019] require all civil suits against the government to be instituted in the High Court. In that respect he challenged the trial Tribunal for determining the matter which it had no jurisdiction on. He had the view that that renders the proceedings and judgement a nullity.

He further contended that in 2020, public corporations owned by the government were statutorily defined through the **Written Laws (Miscellaneous Amendments) Act** (Act No. 01 of 2020). That, since the amendment was procedural, it operated retrospectively. He cemented his argument with the case of **TPB Bank Plc vs. Umoja Wa Madereva Wa Mabasi Tanzania** (Civil Appeal 150 of 2022) [2023] TZHC 16869 TANZLII; **Benbros Motors Tanganyika Ltd vs. Ramanral Haribal Patel** [1969] HCD No. 435 and; **Mbeya City Council vs Romuald Andrea Materu & 3 Others** (Consolidated Land Appeal 59 of 2020) [2022] TZHC 13049 TANZLII.

Maintaining that the trial Tribunal improperly adjudicated this matter for lack of jurisdiction, Mr. Mwago asked for this court to allow the appeal and vitiate all the proceedings of the trial Tribunal, quash and set aside its judgement and decree and grant them costs of the suits.

Mr. Hekwe first acknowledged that in some circumstances a new law may operate retrospectively. However, he contended that if the amendment or new law affects the substantive rights of the parties, then the same cannot not operate retrospectively. He referred the case of **Benbros Motors Tanganyika Ltd** (supra) to support his contention.

He distinguished the position settled in **TPB Bank PLC vs. Umoja wa Madereva wa Mabasi Tanzania** (supra) from the case at hand whereby the suit was filed on 28.03.2018, while the amendment entered into force on 21.02.2020, when the hearing of the matter had already commenced. In the circumstances, he contended that applying a new position would prejudice the respondent. In support of his argument, he cited the case of **Makorongo vs Consiglio** [2005[] 1 EA 247 and asked for the appeal to be dismissed.

Prior to addressing the submission of the necessary party, I wish to note that upon observing the submission, it came to my attention that the party was wrongly referred as “the 2<sup>nd</sup> respondent” instead of “necessary party.” I having taken note of the error, and shall

maintain the status of Sadikiel Mbando as the necessary party in this judgement.

Mr. Mushi concurred with the submission of Mr. Mwago. He then went forth to advance his client's concerns that since the sale was made on 26.03. 2018 when he purchased the house and handed a certificate of sale, he has not been handed the suit property and has no access to the same and even the 1<sup>st</sup> appellant has failed to evict the respondent. Feeling prejudiced with the entire ordeal, he requested for an order requiring the 1<sup>st</sup> appellant to pay 20% interest per annum until full payment. He also prayed for an order declaring that he legally purchased the suit house by way of public auction from the 2<sup>nd</sup> applicant; and an order that the be handed to him. He finally prayed for the appeal to be allowed to such extent.

I have considered the ground of appeal, the submissions from the counsels for all parties and gone through the trial Tribunal record. Prior to resolving the appeal, I wish to address the issue raised by Mr. Mushi in his submission for the necessary party. He presented his client's concerns pertaining his rights as a purchaser of the suit house in this matter. This was not in any way a proper avenue. He ought to have invoked relevant procedure to obtain the reliefs he wishes to be granted by the court and not seek them through the appellant's back as he did. In that respect, I shall not address these issues.

Coming to the gist of the appeal, undoubtedly, the appellants and the necessary party hold the view that since the 1<sup>st</sup> appellant is a government institution then, the Attorney General must have been joined as a necessary party and the matter ought to have been filed in this court. On the other hand, the respondent does not object that the 1<sup>st</sup> appellant is a public corporation or that suits against public corporations are filed under the Government Proceedings Act and that the Attorney General must now be joined as a necessary party. The respondent's contention was on whether the amendments under the **Written Laws (Miscellaneous Amendments) Act, 2020** could operate retrospectively.

It is well settled that procedural laws operate retrospectively. However, such rule will not be applied where the application thereof shall affect the parties' substantive rights. This was stated in **Benbros Motors Tanganyika Ltd vs. Ramanlal Haribhai Patel** (supra) to the effect that:

“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.”

In **Makorongo vs. Consiglio** [2005] 1EA 247 the Court of Appeal elaborated that:

" 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 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.**" (Emphasis mine)

See also; **Director of Public Prosecution (DPP) vs. Jackson Sifael Mtares** (Criminal Appeal 2 of 2018) [2018] TZCA 393 TANZLII and **Lala Wino vs. Karatu District Council** (Civil Application 132 of 2018) [2019] TZCA 46 TANZLII.

Among the good reasons to deviate from the said rule, is the fact that the retrospective application of the new rule would likely cause injustice to a party. Such position was taken in the case of **Raymond Costa vs. Mantrac Tanzania Ltd.** (Civil Application 42 of 2018) [2019] TZCA 63 TANZLII in which it was held:

"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 **Consiglio** (supra). That is to say, there exists in the present case good reason not to adhere to the retrospective application



of the procedural amendment under consideration.”

Similar stance was taken in **Felix H. Mosha & Another vs. Exim Bank Limited** (Civil Reference 12 of 2017) [2021] TZCA 257 TANZLII; **Joseph Khenani vs. Nkasi District Council** (Civil Appeal 126 of 2019) [2022] TZCA 82 TANZLII and; **Henry Lubinza vs. Agricultural Inputs Trust Fund & Others** (Civil Application 114 of 2019) [2020] TZCA 1852TANZLII.

It is well provided under **section 6 (3) of the Government Proceedings Act** as amended by **section 25 of Written Laws (Miscellaneous Amendments) Act, 2020**, that in suits against the Government, the Attorney General must be joined as a necessary party. The provision states:

“**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.”

The consequence of not doing so is well settled under **section 6 (4)** of the same Act, which states:

“(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).”

When the suit is against the government the same must be filed in the High Court. This requirement is set under **section 6 (5) of the Government Proceedings Act** as amended by the **Written Laws (Miscellaneous Amendments) Act, 2020**, which states:

“(5) All suits against the Government shall be instituted in the High Court by delivering a claim in the Registry of the High Court within the area where the claim arose.”

There are two main issues introduced by the amendments to the **Government Proceedings Act** that affect this matter. First, as seen hereinabove, the amendment of **section 6 (3)** introduced other parties qualifying treatment under the Government Proceedings Act, including public corporations. Previously, there were only three parties; the Government Ministry, Department or Officer. The provision provided:

“(3) All suits against the Government shall, after the expiry of the notice be brought against the Attorney-General, and a copy

of the plaint shall be served upon the Solicitor General, Government Ministry, Department or Officer that is alleged to have committed the civil wrong on which the civil suit is based.”

The above provision clearly shows that public corporations did not qualify as part of the listed institutions. They were only introduced vide the amendment effected. The amendment now allows for suits against public corporations to be brought in compliance with the Act and thus they must be filed in the High Court and the Attorney General must be joined as necessary party.

As stated by the appellants, indeed the 1<sup>st</sup> appellant was established following the requirement under **The Tanzania Postal Bank Act (Repeal and Transitional Provisions) Act, 2015** and the Government is the majority shareholder therein as per facts adduced and acknowledged in **Gladys Metili vs. TPB Bank PLC and Others** (supra). This makes the 1<sup>st</sup> appellant a government owned institution and thus the Government Proceedings Act ought to be applied in matters involving it. To this point, the nagging question in this matter is, whether the amendment applies retrospectively.

In this case, the suit was instituted in the trial Tribunal on 28.03.2018. The hearing of the suit commenced on 04.05.2021 whereby SM1, the respondent testified. The matter was subsequently adjourned and eventually heard until 17.07.2022 when the defence side (that is, the appellants and necessary party) finalized its evidence. From

the record, it is therefore clear that by the time the amendment entered into force on 21.02.2020, the matter was already in court. In the premises, I agree with Mr. Hekwe that the circumstances in **TPB Bank PLC vs. Umoja wa Madereva wa Mabasi Tanzania** (supra) are inapplicable since in the said matter the suit was filed in April 2019, the 1<sup>st</sup> PTC and mediation held in March 2020, and hearing of the suit started in June 2020. Thus, when the amendment entered into force, the matter was still somehow at initial stages.

In the matter at hand, given the fact that the proceedings had commenced and in fact advanced to hearing of the defence case, I am of the considered view that at such point the law could not operate retrospectively because the same would prejudice the respondent. The respondent had filed her case under certificate of urgency wherein the suit property had already been sold to the necessary party. At such time, the respondent was fighting to reclaim her right to settle the mortgage while the necessary party awaited the finalization of the matter so he would know the way forward. In the circumstances, clearly it was already too late to employ the amendment on the matter as it would prejudice the respondent and the necessary party whose interests hanged on the line.

If the amendment was applied retrospectively, the respondent would have stood to suffer a great deal as her substantive rights would have been affected leading to injustice on her part and that

of the necessary party. In any case, the amendment did not stripe off the Attorney General his powers to intervene into the proceedings as enshrined under **section 6A of the Government Proceedings Act**. In the same vein I am also not persuaded by the holding in **Mbeya City Council vs Romuald Andrea Materu & 3 Others** (supra), which held similar facts to this case.

I thus find the trial Tribunal had the jurisdiction to entertain this matter. In the foregoing, I find the appeal without merit. It is hereby dismissed with costs.

Dated and delivered at Moshi on this 06<sup>th</sup> Day of December, 2023.



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L. M. MOMNGELLA  
JUDGE  
Signed by: L. M. MONGELLA