IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOROGORO SUB-REGISTRY

[AT MOROGORO]

LAND APPEAL NO. 26338 OF 2023

(Originating from Misc. Application No. 187 of 2023 at the District Land and Housing Tribunal for Morogoro at Morogoro)

KAYAGHA P.E. ..... APPELLANT

VERSUS

JAHA HALFANI MLANZI ..... 1ST RESPONDENT

HALMASHAURI YA MANISPAA YA MOROGORO ..... 2ND RESPONDENT

JUDGEMENT

26/02/2024 & 27/03/2024

KINYAKA, J.:

Based on the matters canvassed by the parties in the present appeal, it is necessary to reproduce, albeit briefly, the historical background of the appeal. The appellant herein, Kayagha P.E. who was the 2nd respondent at the District Land and Housing Tribunal for Morogoro at Morogoro (hereinafter, the "Tribunal"), was sued together with Morogoro Municipal Council, the 2nd respondent herein and the 1st respondent at the Tribunal, by Jaha Halfani Mlanzi, the 1st respondent herein and the applicant at the Tribunal, *vide* Application No. 265 of 2017. The appellant and the 2nd

respondent were sued by the 1st respondent for trespass of his land located at Mgulu wa ndege, Mkundi Ward, Morogoro Municipality.

In the said suit, after closure of the prosecution case on 14th December 2021, the Tribunal ordered the defence hearing to proceed on 16th December 2021. However, the defence hearing did not proceed as the appellant and the 2nd respondent prayed for adjournment of hearing upon their failure to locate plot file and failure to present witnesses, respectively. The then appellant's counsel prayed to present witnesses on the following day, on 17th December 2021.

Invoking Regulation 11(1) (c) of Land Disputes Courts (the District Land and Housing Tribunal Regulations, 2003, G.N. No. 174 of 2002 (hereinafter, the "Regulations"), the Tribunal refused to adjourn the matter and ordered the suit to proceed *ex parte* against the appellant and the 2nd respondent. On 17th December 2021, the opinion of assessors were read whereby, the Tribunal scheduled the case for judgement on 31st December 2022. The judgement was duly delivered on the scheduled date.

Dissatisfied, the appellant made efforts to obtain copies of the *ex parte* judgement and decree of the Tribunal. On 1st March 2022, the appellant lodged Application No. 66 of 2022 which was struck out by the Tribunal on

2nd August 2022. On 25th May 2023, the appellant lodged Application No. 187 of 2023 for extension of time to apply for an order to set aside the Tribunal's *ex-parte* judgement dated 31st January 2022. On 24th October 2023, the Tribunal dismissed the appellant's application for his failure to demonstrate sufficient reasons for delay, including his failure to account for each day of delay. Aggrieved by the decision, the Applicant preferred the present appeal advancing two grounds of appeal as follows:

1. That the trial chairman erred in law and fact by failure to extend time for restoration of Application No. 265 of 2017 while the appellant demonstrated sufficient reasons; and
2. That the trial chairman erred in law and fact by failure to assess and address the issue of illegality in the Application for extension of time.

On 26/02/2024 when the matter was called on for hearing, Mr. Ahyadu Nannyohe, learned Advocate, appeared representing the appellant, Mr. Adv. Baraka Lweeka, also learned Advocate, appeared for the 1st respondent, and Mr. Alison Kireri, learned State Attorney, duly represented the 2nd respondent.

Before he began his submissions, Mr. Nannyohe prayed for amendment of the petition of appeal in the first ground of appeal in order to insert the word

'for setting aside the *ex parte* judgement' instead of the word 'restoration'. Both Mr. Lweeka and Mr. Kireri did not object to the prayer. I granted an order for amendment. The second ground of appeal was amended and read "**the trial chairman erred in law and fact by failure to extend time for the appellant to bring his application for setting aside *ex parte* judgment of Land Application No. 265 of 2017 while the appellant demonstrated sufficient reasons**."

Supporting the appellant's first ground of appeal as amended, Mr. Nannyohe submitted that the Tribunal erred to dismiss the appellant's application for extension of time to set aside *ex parte* judgement, despite the sufficient cause advanced by the appellant in his affidavit and the affidavit of his then Counsel, Mr. Gabriel Kitungutu. He contended that the appellant became aware of the striking out of his application to set aside *ex parte* judgement, when he met Mr. Kitungutu on 20th March 2023 after he had been unreachable on his mobile phone for sometimes. He added that the same reason was also stated by Mr. Kitungutu in his affidavit in support of the application. He blamed the previous Counsel for inaction and negligence by his failure to perform his duty to inform the appellant immediately after the application to set aside *ex parte* judgement was struck out contrary to

Regulation 55 and 57 of the Advocates (Professional Conduct and Etiquette) Regulations.

Mr. Nannyohe argued that there are plethora of court decisions which restated the position that negligence of an advocate cannot be used to punish his client. He submitted that in the case of **Juma Kambale v. Noradi Tiliko Mongelwa, Civil Appeal No. 231 of 2018**, the Court of Appeal on page 12 held that negligence of an advocate cannot be used to punish his client. He concluded that it was wrong for the Tribunal to dismiss the appellant's application while there was negligence of an advocate.

On the second ground, Mr. Nannyohe submitted that the Tribunal erred in its failure to assess and address the issue of illegality which was raised by the appellant in paragraph 14 of the affidavit on the denial of the right to be heard. He contended that when an issue of illegality is raised in the application for extension of time, the court is obliged to extend time to the applicant, and the requirement to account for each day of delay is waived. He referred the Court to the decision of the Court of Appeal in the case of **Hawa Mashaka (as administratix of the estate of the late Mashaka Maftah Mwinyihami v. Mtami Maftah and Another, Civil Application No. 393/13 of 2023**, on page 14 of the decision. He faulted the Tribunal

to refuse the application in the circumstances contenting to be contrary to the decision of the Court of Appeal in the case of **Emmanuel Rurihafi and Another v. Janas Mrema, Civil Appeal No. 314 of 2019**, on page 8 of the decision.

He added that the issue of illegality is a point of law which cuts across the jurisdiction of the court, and can be raised at any time. He submitted that there are lots of illegalities in the proceedings of the Tribunal including lack of jurisdiction to hear the dispute in Land Application No. 265 of 2017. He argued that jurisdiction of a court is a creature of law as held by the Court of Appeal in the case of **R.S.A. Limited v. Hanspaul Automechs Limited and Another, Civil Appeal No. 179 of 2016** on page 12 of the decision. He contended that the suit ought to have been heard by the High Court as the Attorney General should have been joined to defend Morogoro Municipal Council as required by section 6(2) of the Government Proceedings Act, Cap. 5 R.E. 2019 (hereinafter, the "GPA") as stated by the High Court in the case of **Kilempu Kinoka Laizer v. Hai District Council and Another, Land Case No. 21 of 2014**. He argued that had the Tribunal been careful on the issue of illegality, it would have given an opportunity to the appellant to file his application to set aside *ex parte* judgement.

Mr. Nannyohe reminded the Court of his duty, as the first appellate court, to re-evaluate evidence adduced at the trial and make a finding, as held by the Court of Appeal in the case of **Mukhusin s/o Kombo v. R., Criminal Appeal No. 84 of 2016**, where it quoted with approval the holding in the case of **D.R. Pandya v. R. (1957) EA 336** and **Iddi Shaban @Amasi v. R., Criminal Appeal No. 2006** (unreported) and held that a first appeal is in the form of rehearing and that the first appellate court has a duty to re-evaluate the entire evidence on record and arrive at its own decision. He prayed for the appeal to be allowed with costs.

Mr. Lweeka began by opposing the appellant's submissions on jurisdiction. He opposed the issue of jurisdiction on the grounds that the point was not among the grounds of appeal, it had never been raised in the Misc. Application No. 187 of 2023, and the issue was not in the affidavits of the appellant and his former counsel. He argued that the matter of jurisdiction cannot be determined at this stage as the present appeal relates to Misc. Application No. 187 of 2023 and not Application No. 265 of 2017 which was not appealed against and not the subject matter of the present suit.

He argued that section 6(2) of the GPA was not applicable to the suit which was filed in 2017. He argued further that the amendment that brought the

requirement, was made in 2020 in the Written Laws (Miscellaneous Amendment) Act, No. 1 of 2020. He contended that previously, even the village council was sued without joining the Attorney General, as the requirement to join the Attorney General was not there prior to the amendments of the law in 2020.

He submitted that section 22 of GPA provides that the provisions of the Act shall not affect proceedings which were instituted before the commencement of this Act. He contended that the case of **Kilempu Laizer** (supra) does not apply in the present case and being persuasive in nature, it does not bind this Court. He prayed for the court disregard of the point on jurisdiction as this Court has no original jurisdiction to entertain new matters brought before it for the first time in the appeal stage.

Against the second ground of appeal, Mr. Lweeka submitted that there was no illegality and that the appellant was accorded the right to be heard and was duly represented by a seasoned advocate before the Tribunal. He argued that it was the appellant who denied himself his right to be heard by his failure to give his testimony in Application No. 265 of 2017. He cited the case of **Hawa Mashaka** (supra) on page 14 of the decision, where it was held that for the illegality to constitute good cause, it must be apparent on

face of record, of public significance, and occasion injustice calling for superior court to cure. He insisted that the counsel for the appellant did not state the conditions of illegality stated in the cited case and that it would have been different if the appellant was denied the right of hearing upon his appearance before the Tribunal. He prayed for the dismissal of the second ground of appeal.

Mr. Lweeka submitted that the question of limitation of time is fundamental issue, which the Tribunal ought to have decided. He referred the Court to the case of **Nazar Manase v. The Headmaster Magnus Secondary School and Another, Revision Application No. 167 of 2022** on page 5 last paragraph of the decision. He contended that the appellant failed to demonstrate sufficient cause under section 14(1) of the Law of Limitation Act, Cap. 89 R.E. 2019. He stated the conditions for sufficient cause as amplified in the case of **Hawa Mashaka** (supra), on page 11, which include, the applicant must account for all period of delay, the delay should not be inordinate, the applicant must show diligence and not negligence, and illegality. He submitted that the appellant did not comply with all the requirements including accounting for each day of delay. He referred the Court to the decision of the High Court in Misc. Land Application No. 44 of

2021 between **Nelson Mesha E. Mpemba v. Stephano S.M. Mpemba and 5 Others**, on page 7, where the Court quoted the decision of the Court of Appeal in the **Tanzania Fish Processing Limited v. Eusto Ntagalinda, Civil Application No. 4 of 2008**, where it was held that the applicant must account for each day of delay.

He contended that the delay was inordinate and the affidavit of the appellant and his then counsel demonstrated negligence which was reiterated by the counsel for the appellant in the present proceedings. He contended further that the fact that the appellant had no close communication with his counsel has no merit as he was not following up on his case which is his duty. He pointed out that even the date that he was informed of the striking out of his application on 20/03/2023, he filed his application for extension of time on 22/06/2023, three months later. He argued that from 02/08/2022 when the decision was made to 22/06/2023, it was more than 10 months when the application was filed. He referred the Court to the case of **CRDB Bank Limited v. George M. Kilindu and Another, Civil Application No. 87 of 2009**, on page 6 and 7 of the decision to argue that the negligence is inacceptable.

He agreed with the position held in the case of **Mukhusin Kombo** that the court has a duty to re-evaluate evidence and prayed for the Court to find that paragraphs 11 and 12 of the affidavit of Gabriel Kitungutu contradicted with paragraphs 11 and 12 of the affidavit of the appellant. He pointed out that Advocate Kitungutu stated to have made efforts to inform the appellant but the appellant stated not to have been informed by his counsel; and that the appellant stated to have been following up his case oftenly, but the counsel stated that the appellant was not following up on his case. He concluded that one of the affidavit state lies and the other stated the truth. He prayed for the Court to ignore one of the affidavits that contain lies. He prayed for dismissal of the appeal with costs for lack of merit.

To save time of the Court, Mr. Kireri, learned State Attorney for the 2nd respondent joined hands with the 1st respondent by adopting the submissions of the 1st Respondent as their submissions were essentially the same as the 1st respondent even if he was to make his reply submissions. He opposed the appeal and prayed for its dismissal with costs.

Mr. Nannyohe rejoined by denying contradictions in paragraphs 11 and 12 in the respective affidavits. He submitted that the appellant had not been negligent as the affidavit of the appellant's former counsel clearly stated that

he informed the appellant on 20th March 2022 after he was unreachable for some time. He argued that the counsel failed to exercise his duty which constitute negligence. He prayed for the Court's consideration of the decision in **Abdallah Juma Kambale** (supra) and ignore the decision in the case of **CRDB Bank Limited** for being distinguishable.

He conceded that the ground of jurisdiction was not part of the case in Misc. Application No. 187 of 2023, and it was not among the grounds of appeal. However, he argued, it does not bar this Court to determine the point raised. He prayed for the Court to ignore the respondents' opposition to the ground of lack of jurisdiction of the Tribunal and consider the position enunciated in the case of **R.S.A Limited** (supra). Regarding section 6(2) and 22 of the GPA, he argued that they are procedural law which ought to have applied retrospectively. He contended that there was no good cause to overrule the procedural law. He argued that section 22 of the GPA could not apply in the circumstances of Application No. 265 of 2017.

He reiterated that the requirement of accounting for each day of delay was submerged by the point of illegality on denial of the right to be heard and lack of jurisdiction. He argued that the case of **Nelson Mesha Mpemba** (supra), is distinguishable from the present case where there was illegality.

On the issue of time limitation, he opined that there are laid down procedure available to a person who delayed to take action on time. He referred the Court to the case of **Nazar Manase** (supra), on page 5 of the decision. He contended that the appellant demonstrated good cause in his affidavit that he was informed late about the striking out of his application. He reiterated his prayers for the appeal to be allowed with costs.

From the above submissions, my duty is to determine whether the decision of the Tribunal dismissing the appellant's application for extension of time was incorrect at fact and law. The first ground of appeal attacked the Tribunal for its failure to extend time to the appellant to re-lodge his application for setting aside *ex parte* judgment in Land Application No. 265 of 2017, despite the appellant's demonstration of sufficient reasons.

As agreed by both parties, this Court, being the first appellate court, has powers to re-evaluate evidence adduced before the Tribunal. In doing so, I am enjoined to find out from the affidavits in support of the application, to ascertain whether the appellant demonstrated sufficient or good cause for delay.

I have thoroughly read the affidavits in support of Application No. 187 of 2023, the subject of the present appeal. In totality, the affidavits of the

appellant and his then Counsel demonstrated that the delay was occasioned by miscommunication between them, after the striking out of Application No. 66 of 2023 for setting aside *ex parte* judgement of 31st December 2022. It has been held in a number of decisions of the courts that although an order of extension of time is on the court's discretion, the discretion should be exercised judiciously in cases where the applicant demonstrates good cause. It has also been the decisions of the courts in the country that good cause may include the applicant's diligence and promptness, accounting for each day of delay, and some other legal points such as illegality.

I wish to state at the very beginning that the affidavit in support of the application does not disclose the reasons for the delay or inaction by the appellant to apply to set aside *ex parte* hearing order of the Tribunal made on 16th December 2021. It was expected of the appellant to apply to set aside the order, even before delivery of the *ex parte* judgement on 31st December 2022, especially where the appellant was duly notified by his counsel on the same day, on 16th December 2021. The appellant slept on his right to challenge the *ex parte* order made pursuant to Regulation 11(1) (c) of the Regulations. His delay was for 380 days from 16th December 2021

when the *ex parte* hearing order was made, to 31st December 2022, when the *ex parte* judgement was delivered.

Even by assuming that it was appropriate for the appellant to wait for delivery of the *ex parte* judgement, the application was unmerited for failure by the appellant to account for each day of delay. The appellant failed to demonstrate his or his the counsel's inaction from 31st December 2022 when the *ex parte* judgement was delivered, to 7th February 2022 when he applied for copies of the judgement and decree; and from when he received a copy of the judgement, to 1st March 2022 when he filed the application to set aside the *ex parte* judgement.

Again, the reason as to miscommunication between the appellant and his counsel demonstrates negligence and lack of diligence, not only by his counsel but also by the appellant. The reason for my finding is the appellant's demonstration of lack of diligence to follow up on his application to set aside *ex parte* judgement to the Tribunal and through his counsel. The appellant decided to meet his then counsel after lapse of more than 9 months that is from 2nd August 2022 when his application was struck out, to 20th May 2023 when he met his counsel. A person of the appellant's status, an educated engineer working for a reputable government institution, would not stay for

more than 9 months without following up on his application either through his counsel, or at the Tribunal. I agree with the Tribunal when it reasoned that a person of the appellant's status would not be unreachable over his mobile phones for that long period. I agree with respondents that the inaction by the appellant demonstrates negligence and lack of diligence. Although the then counsel for the appellant demonstrated some degree of negligence by his failure to advise his client on appropriate cause of action to take upon the Tribunal's order for *ex parte* hearing, and his alleged failure to inform him on the status of the case, it was the duty of the appellant to constantly and diligently make follow up on his case.

The facts in the decision relied by the appellant's counsel, the case of **Juma Kambale** (supra) are distinguishable from the present case. In that case, the appellant's counsel was suspended from practice and did not inform the appellant when he filed an appeal to the high court. In addition, the appellant was not aware of the existence of Land Case No. 03 of 2015 when it was called for hearing, as he was not served with summons. It is apparent the mishaps were beyond the control of the appellant, which is different from the negligence exhibited by the appellant in the present case as I observed above.

Importantly in the decision, the Court of Appeal invoked the principle that the appellant should not be punished by negligence of his counsel as an exception to the general rule that the negligence of an advocate is not a good ground for extension of time. The Court of Appeal insisted that the party to a case who engages the services of an advocate, has a reciprocal duty to closely follow up the progress and status of his case citing the holdings in the cases of **Lim Han Yung & Another v. Lucy Treseas Kristensen, Civil Appeal No.219 of 2019**, [2022] TZCA 400 (28 June 2022) TanzLII and **Elias Masija Nyang'oro & Others v. Mwanachi Insurance Company Limited, Civil Appeal No.278 of 2019** [2022] TZCA 648 (24 October 2022) TanzLII.

In concluding my determination of the first ground, I am fortified by the holding in **Zephania Letashu v. Muruo Ndelama, Civil Appeal No. 31 of 1998** (unreported), where the Court of Appeal held that carelessness or inadvertence on the part of the litigants or their counsel, cannot be accepted as sufficient explanation to move the Court's hand in their favor. It follows that the Tribunal did not err to refuse extension of time based on the appellant's failure to demonstrate sufficient cause warranting an order for extension of time. I dismiss the first ground of appeal for being unmerited.

Turning to the second ground of appeal, I agree with the appellant that the Tribunal did not assess and address the legal point raised by the appellant in paragraph 14 of his affidavit on the denial of a right to be heard. However, this being the first appellate Court, I am enjoined to determine whether there was illegality in the proceedings in Application 265 of 2017.

It is on record in Application No. 265 of 2017 that the case was on scheduled to be heard in the special session set by the Tribunal for clearance of backlog cases. Upon closure of the prosecution case on 14th December 2021, the Tribunal scheduled hearing of defence case on 16th December 2021 in the presence of the then counsel for the appellant. On 16th December 2021, neither the appellant nor the 2nd respondent herein, who were the 2nd and 1st respondents, respectively, were ready to proceed with hearing. The appellant's counsel did not present any witness on the alleged reason that the appellant was working in Mtwara and was to process permission from his employer, Tanzania Rural and Urban Roads Agency. The 2nd respondent's reason for adjournment was out of his failure to locate the plot file at his office. The Tribunal made an order to proceed with the case *ex parte* under Regulation 11(1) (c) of the Regulations.

The appellant waited until the *ex parte* judgement was delivered on 31st December 2022, and took action on 1st March 2022 to file the previous application to set aside the *ex parte* judgement, which was later on struck out. In the circumstances, I do not find any instance of the denial of the appellant's right to be heard by the Tribunal. If the case was on special clearance session, and hearing was conducted in the presence of the appellant's counsel, the counsel was aware that upon closure of the prosecution case, he ought to have presented his witnesses for the defence hearing. In addition, when the defence hearing was adjourned on 14th December 2021 to 16th December 2021, the counsel ought to have at least prayed for issuance of summons to assist the appellant in processing permission from his employer, if it was necessary, for him to attend hearing on 16th December 2021.

The above notwithstanding, upon an order for Tribunal for *ex parte* hearing on 16th December 2021, the appellant ought to have immediately applied for setting aside the order before the matter was decided a year later, on 31st December 2022. The appellant had unfettered right to challenge the *ex parte* hearing order before delivery of judgment which the appellant, for unknown reasons, sat on the same. It follows that the appellant cannot be heard

complaining of the denial of his right to be while he was not ready to defend the suit, and failed to take action against the order for *ex parte* hearing of 16th December 2021. Based on the above observation, I hold that the appellant was not denied his constitutional right of hearing.

I now turn to determine the issue of lack of jurisdiction of the Tribunal in entertaining Application No. 265 of 2017 in which Morogoro Municipal Council, 2nd respondent herein and the 1st respondent at the Tribunal, was sued. According to the appellant, the 1st respondent ought to have joined the Attorney General and prefer his suit to High Court.

I agree with the respondents that the issue of lack of jurisdiction was not raised by the appellant at the Tribunal during hearing of Application No. 187 of 2023. On the other hand, I also agree with the respondents that the issue of lack of jurisdiction of the Tribunal, being a point of law, can be raised at any stage even at the level of the appeal. It is for simple reason that if the Tribunal is held to have acted without jurisdiction, both the proceedings and the resultant judgement will be vitiated. I find it appropriate to determine the jurisdiction issue raised to support the illegality of the proceedings of the Tribunal in Application No. 265 of 2017 as a ground for extension of time to set aside the *ex parte* judgement made in the same proceedings.

The Application No. 265 of 2017 was lodged by the 1st respondent herein on 6th November 2017. Prior to the coming into force of the changes made to section 6 of the GPA, section 190 of the Local Government (District Authorities) Act, Cap. 287 R.E. 2019 (hereinafter the "LGDAA), and section 106 of the Local Government (Urban Authorities) Act, Cap. 288 R.E. of 2019 (hereinafter the "LGUAA), by section 25(a), 31 and 33 of the of Written Laws (Miscellaneous Amendment) Act, No. 1 of 2020 (hereinafter, the "amending Act"), respectively, there was no requirement to join the Attorney General in a suit against or involving the Municipal Councils. The corresponding provisions of sections 25(a), 31 and 33 of the amending Act provide as follows:

> *25(a). 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)"; and

(b) renumbering subsections (4), (5) and (6) as subsections (5), (6) and (7) respectively.

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.".

33. The principal Act is amended in section 106, by deleting subsection (1) and substituting for it the following:

"(1) No suit shall be commenced against an urban authority-

(a) unless a ninety days' notice of intention to sue has been served upon the urban 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."

It is on record that the 1st respondent's Application No. 265 of 2017 was lodged on 6th November 2017 while the promulgation of the amending Act was made on 21st February, 2022. It is clear that at the time of institution of the suit, the 1st respondent was not under legal requirement to join the Attorney General in a suit against the 2nd respondent, hence the suit was properly lodged at the Tribunal.

I also agree with the appellant's counsel that the above provisions are procedural in nature. On the same basis, I disagree with the counsel for the respondents that section 22 of the GPA operate to dis-apply the changes made to sections 6 of the GPA, 190 of the LGDAA, and 106 of the LGUAA. Section 22 of the GPA was not meant to apply in the present circumstances after the enactment and operation of the GPA. Section 22 of the GPA provides:

> *22. Except as is otherwise in this Act expressly provided, the provisions of this Act shall not affect proceedings which have been instituted before the commencement of this Act.*

I am of the considered position that section 22 of the GPA operated to dis-apply the provisions of the GPA to proceedings commenced before the coming into force of the GPA. It does not dis-apply subsequent amendments

of the provision of the GPA to proceedings that were instituted when the GPA was in force.

The amendments of sections 6 of the GPA, 190 of the LDGAA, and 106 of the LDUAA, being procedural in nature, would apply to the suits that commenced after the coming into force of the GPA, including the Application No. 265 of 2017 which was still pending before the Tribunal at the time of promulgation of the amending Act. However, the general rule that procedural law apply retrospective, is not without exception. The exception is 'unless there is good reason to the contrary'. It means that, generally, procedural law will apply retrospectively, unless there is good reason to the contrary.

I find there were good reasons to dis-apply the changes made to the GPA, LGDAA, and LGUAA retrospectively. These include, that at the time the suit was filed, the Tribunal was clothed with jurisdiction to hear the dispute. Further, at the time the changes came into force on 21st February, 2022 the suit had progressed to a hearing stage upon completion of the parties' pleadings. Additionally, the new amendments required the 1st respondent, who was the applicant at the Tribunal to withdraw the suit, issue a 90 days' notice to the 2nd respondent and send a copy to the Attorney General and

the Solicitor General. Subject to the limitation of time of filing the suit, the 1st respondent was then required to file his suit upon expiry of the 90 days' notice to the High Court.

It is clear that the provision would highly prejudice the 1st respondent if it was to apply retrospectively. There was no good reason to apply the changes retrospectively in the circumstances. Even the legislature did not intend to apply the provisions to a suit of that nature and circumstance. In promulgation of the amending Act, the legislature did not expressly state so in clear terms.

In holding as above, I am guided by the decision of the Court of Appeal in the case of **Joseph Khenani v. Nkasi District Council, Civil Appeal No. 126 of 2019** (unreported). In that case, the appellant was terminated by the respondent and referred his matter to the Commission for Mediation and Arbitration (hereinafter, the "CMA"). Upon the parties' dissatisfaction of the award of the CMA, they both preferred revisions to the High Court. Dissatisfied by the decision of the High Court, the appellant preferred an appeal to the Court of Appeal. At the Court of Appeal, an issue arose as to whether the CMA had jurisdiction to hear the dispute in the wake of section 32A of the Public Service Act which was introduced by section 26 of the

Written Laws (Miscellaneous Amendments) Act, Act No. 13 of 2016. The provision required a public servant to exhaust mechanism under the Public Service Act, Cap. 298 R.E. 2019 prior to invoking the labour dispute mechanisms under the attendant laws. Having found that the appellant's dispute was lodged at the CMA on 21st September 2016 before the promulgation of Act No. 13 of 2016 on 18th November 2019, the Court of Appeal held on page 12 through to 13 of the decision that:-

> *"In the case at hand, it is apparent that the appellant filed the complaint before the CMA when it was quite in order to do so without exhausting the remedies provided for in the Public Service Act. That was the law then. The requirement to exhaust all remedies under the Public Service Act came later; when the matter the subject of this appeal was already in the CMA. Was the enactment meant to apply retrospectively? We have serious doubt, for, Parliament did not state so in clear terms. Was the requirement purely procedural? We equally have serious doubts. Having deliberated on the matter at some considerable length, we think to hold that the appellant ought to have withdrawn his matter before the CMA with a view to complying with section 32A of the Public Service Act will be too much an overstatement and will, in our considered view, leave justice crying. The appellant will certainly be prejudiced. We were confronted with an akin predicament in* ***Raymond Costa*** *(supra). In that case, we*

hesitated to hold that a procedural amendment to the law applied retrospective because that course of action would occasion injustice on the adversary party. We stated:

> *"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 find the circumstance of the above cited case similar to the present case. The decision squarely apply in the present case. I do not find to be in the interest of justice to subject the 1st respondent to the dictates of section 25(a) of the GPA, 190 of LGDAA and 106 of the LGUAA which was inexistent at the time he filed his suit at the Tribunal. The Tribunal was clothed with jurisdiction to entertain Application No. 265 of 2017 which was filed prior to the promulgation of the amending Act.

In the circumstance, the Tribunal was clothed with jurisdiction to hear and determine Application No. 265 of 2017. It follows that there was no illegality that would constitute sufficient or good reason to warrant an order for

extension of time. The second ground of appeal is dismissed for being unmerited.

From the foregoing analysis, the present appeal is without merit and is hereby dismissed with costs.

It is so ordered.

DATED at MOROGORO this 27th day of March 2024.

H. A. KINYAKA

JUDGE

27/03/2024

Court:

Judgment delivered in this 27th day of March, 2024 in the presence of the Ms. Tekla Kaitan, Learned Counsel for the Appellant and Mr. Baraka Lweeka, Learned Counsel assisted by Ms. Suzana Mafwere for the Respondent.

S. P. Kihawa

DEPUTY REGISTRAR

27/03/2024

Court:

Right of the parties to appeal to the Court of Appeal of Tanzania fully explained.

S. P. Kihawa

DEPUTY REGISTRAR

27/03/2024