THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(IRINGA SUB-REGISTRY)

AT IRINGA

MISCELLANEOUS LAND APPLICATION NO. 23 OF 2022

(Originating from the decision of the District Land and Housing Tribunal for Iringa in Iringa in Land Application No. 111 of 2018)

BARNABAS MATAGI ..... APPLICANT

VERSUS

1. IDETE VILLAGE COUNCIL
2. TEDI KIDIBULE } **..... RESPONDENTS**

RULING

Date of Last Order: 05/04/2024 &
Date of Ruling: 17/05/2024

S.M. KALUNDE, J.:

By way of a chamber summons preferred under sections 43(1), 44(1) & (2) and 45 of **the Land Disputes Courts Act [Cap. 216 R.E. 2019]** (hereinafter **"the LDCA"**), the applicant has lodged the present application seeking for the following reliefs:

> *(a) That, this Honourable Court be pleased to call for the records in **Land Application No. 111 of 2018** before the District Land and Housing Tribunal, revise the ruling given on the 16th of September 2022, and remit **Land Application No. 111 of 2018**, back to the trial tribunal to proceed for hearing.*
>
> *(b) That, costs of this application be provided for; and*

(c) Any other order(s) this Honourable Court may deem fit and just to grant.

The application is supported by an affidavit dully sworn by Dr. Ashery Fred Utamwa, learned counsel for the applicant. The application was resisted by two counter affidavits, one dully sworn by Henrick Kikoti, the chairman of the first respondent and another sworn by Tedi Kidibule, the second respondent.

To understand the gamut of the complaint in this application, I think it is instructive to narrate, albeit briefly, the facts of the case. In 2018, before the District Land and Housing Tribunal for Iringa in Iringa (henceforth "the trial tribunal"), the applicant lodged Land Application No. 111 of 2018, against the respondents seeking for *inter alia* a declaration that he was the lawful owner of a piece of land located at Ihanyi Area, Idete Ward withing the Iringa Municipality.

The application at the trial tribunal was filed on the 17th of October 2018. The first respondent filed their written statement of defence on the 21st day of November 2018. However, I could not find evidence on record that the second respondent filed her defense. Nevertheless, upon completion of pleadings, on the 15th day of December 2020, the trial tribunal framed issues for determination and hearing of the application commenced. On the day, the testimonies of SM1 and SM2 were recorded. Thereafter, the matter was adjourned on several occasion and hearing

proceeded on the 14th day of July 2022, where the testimony of SM3 was recorded. The records show that, upon completion of recording the testimony of SM3, the applicants' case was marked closed. The trial tribunal adjourned the matter and ordered that the defence case should commence on the 24th day of August 2022.

Whilst the matter was still pending in court, in 2020, specifically on the 21st of February 2020, the parliament of the United republic of Tanzania passed **the Written Laws (Miscellaneous Amendments), 2020, Act No. 1 of 2020**. The law amended various laws including **the Local Government (District Authorities) Act, [Cap. 287 R.E. 2002]; the Local Government (Urban Authorities) Act, [Cap. 288 R.E. 2002]** (henceforth **"the LGUA"**) and **the Government Proceedings Act, [Cap. 5 R.E. 2019]** (henceforth **"the GPA"**). Through section 25 of Act No.1 of 2020, the GPA was amended to provide a requirement that of the ninety (90) days statutory notice to the Government. Section 25 deleted the existing subsection (3) and (4) of section 6 and inserted the following clause:

> *"(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)."

To bring the Local Government (Urban Authorities) into the ambit of the GPA, section 33 of Act No.1 of 2020, amended section 106 of CAP. 288 in the following terms:

"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."

Subsequent the above amendments, on the 06th day of September 2022, when parties appeared for hearing of the defence case, the counsel for first respondent, Ms. Shamimu Ndazi, learned State Attorney filed a notice of objection on a point of law that continued hearing of the application contravened the requirements of law outlined in the new amendments promulgated through Act No.1 of 2020, specifically those brought about by section 25 and 33.

Following the objection, parties were heard on the point raised by the counsel for the first respondent. In the end, the

learned chairperson sustained the objection and struck out the matter. The trial chairperson was convinced that the amendments brought about by Act No. 1 of 2020, were procedural; and thus affected the suit at the trial tribunal because amendments to procedural laws operated retrospectively. In its decision the learned trial chairperson placed reliance in the decision of this court in the case of **MSK Refinery Ltd vs Tib Development Bank Ltd and Another** (Misc. Civil Application 307 of 2020) [2020] TZHC 1326 (30 June 2020) TANZLII; and the decision of the Court of Appeal in the case of **Lala Wino vs Karatu District Council** (Civil Application 132 of 2018) [2019] TZCA 46 (1 April 2019) TANZLII.

It is the decision striking out the application which infuriated the applicant resulting into the present application. In his submissions, Dr. Ashery Fred Utamwa, learned counsel for the applicant, took off by contending that the inclusion of the Attorney General in Land Application No. 111 of 2018, was exempted by section 22 of the GPA which excluded the application the law to all proceedings which have been instituted before the commencement of the Act. Believing that the GPA commenced in 2019, Dr. Utamwa argued that the retrospective operation of the amendments brought by Act No. 1 of 2020 to the GPA were not operational beyond 2019. Relying on the above understanding, the learned counsel implored that, since Land Application No. 111 of

2018, was filed in 2018 before commencement of the revised GPA, the retrospective operation was exempted by section 22.

Turning to whether the amendment to the LGUA were "procedural" or "substantive" in nature, Dr. Utamwa argued that, since the LGUA addressed substantive rights, the amendment to section 106 affected substantive rights of the parties. To bolster his position, the learned counsel cited the decision of the Court of Appeal in the case of **Felix H. Mosha & Another vs Exim Bank Limited** (Civil Reference No. 12 of 2017) [2021] TZCA 257 (14 June 2021) TANZLII, where the Court quoted the case of **Makorongo v. Consigilio** [2005] 1EA 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."*

In view of the above submissions, the learned counsel argued that the trial tribunal erred in striking out the application as the new amendments did not affect the current suit. His view was therefore that, the requirement to file the 90 days statutory notice was not applicable to the present case. He thus urged the court to

quash the relevant proceedings and set aside the resultant orders. He advised that the matter be ordered to proceed to its merits.

In reply, Ms. Shamimu Ndazi, learned State Attorney representing the first respondent, argued that in terms of the amended section 6 of the GPA, it was a mandatory requirement that the Attorney General be joined and that upon joining the Attorney General, the 90 days statutory notice of intention to sue the Government comes into play. The learned state attorney argued that non joinder of the Attorney General and non-issuance of the 90 days statutory notice as required by sections 6 of the GPA and 106 of the LGUA vitiated any suit brought against the Government.

Reverting to the retrospectivity of procedural laws, Ms. Ndazi argued that the amendments of sections 6 of the GPA and 106 of the LGUA affected procedural laws as such they had an effect of operating retrospectively. To support her argument, she cited the case of **Lala Wino Case** (supra) and **Salim O. Kabora vs Kinondoni Municipal Council and 3 Others** (Land Case 10 of 2020) [2021] TZHCLandD 574 (6 August 2021) TANZLII. The learned state counsel submitted that the trial tribunal was right in striking out Land Application No. 111 of 2018 for non-compliance with the provisions of sections 6 of the GPA and 106 of the LGUA. He urged the court to dismiss the application.

The second respondent had nothing different than what was stated by the learned counsel for the first respondent. In fact, he "concurred" with the respective submissions. He submitted the amendments to sections brought by Act No.1 of 2020, to sections 6 of the GPA and 106 of the LGUA were procedural and therefore they operated retrospectively. He argued that the present case affected directly by the said amendments. To support the above view, the second respondent cited the case of **Lala Wino Case** (supra) and **Salim O. Kabora Case** (supra).

That sums up the background to the matter and submissions made by the parties for and against the application. My duty now is to examine whether the present application is merited.

It is not contested that Land Application No. 111 of 2018, was filed before the trial tribunal on the 17th of October 2018. The records were also clear that issues were framed, and hearing commenced on the 15th day of December 2020. It is also common knowledge that Act No.1 of 2020, which brought the contested amendments was assented to by the President on the 14th of February 2020, and came into operation on the 21st of February 2020, upon its publication through Government Notice No. 8 Vol. 101 dated 21st of February 2020. From the above timeline, it goes without saying that by the 15th day of December 2020, when hearing commenced, the requirements set out under the amended sections 6 of the GPA and 106 of the LGUA were operational.

The principal question that I must answer is whether the amended sections 6 of the GPA and 106 of the LGUA are provisions of substantive law, not expressly rendered applicable to preceding and present cases, and, therefore, only prospective; or whether they are merely procedural attracted to all pending and prospective cases.

To respond to the above question, I think it is enlightening to ascertain the contextual distinction between "substantive law and procedural law". The distinction between substantive law and procedural provisions has been indicated by Henry L. Black and Henry Campbell Black in **Black's Law Dictionary, Sixth Edition** at page 1203 as follows:

> *"As a general rule, laws which fix duties, establish rights and responsibilities among and for persons, natural or otherwise, are 'substantive laws' in character, while those which merely prescribe the manner in which such rights and responsibilities may be exercised and enforced in a court are 'procedural laws."*

The above excerpt was also relied in Indian case of **CWT v. Sharvan Kumar Swarup & Sons**, (1994) 6 SCC 623 at page 628. In the same case the court quoted the authors of **Salmond on Jurisprudence**, 12th Edition (Patrick John Fitzgerald) at page 462 where the distinction between substantive law and law of procedure is indicated in the following words:

> *"What, then, is the true nature of the distinction? The law of procedure may be defined as that branch*

> *of the law which governs the process of litigation. It is the law of actions — jus quod ad actiones pertinet — using the term action in a wide sense to include all legal proceedings, civil or criminal. All the residue is substantive law, and relates, not to the process of litigation, but to its purposes and subject-matter.* ***Substantive law is concerned with the ends which the administration of justice seeks. Procedural law deals with the means and instruments by which those ends are to be attained.*** *The latter regulates the conduct and relations of courts and litigants in respect of the litigation itself; the former determines their conduct and relations in respect of the matters litigated."*
>
> [Emphasis is mine]

Equally, in **Izhar Ahmad Khan v. Union of India** [1962 Supp 3 SCR 235: AIR 1962 SC 1052] it is observed: (SCR p. 251)

> *"The division of law into two broad categories of substantive law and procedural law is well known. Broadly stated, whereas substantive law defines and provides for rights, duties and liabilities, it is the function of the procedural law to deal with the application of substantive law to particular cases and it goes without saying that the Law of Evidence is a part of the law of procedure."*

I entirely subscribe to the above authorities and adopt them accordingly. What I have sieved from those authorities is that while substantive law defines rights, duties and obligations of individuals and entities, procedural law establishes and defines the modes and conditions of the application and enforcement of substantive laws. It is from the above context that the

consequences of violating procedural law and substantive law are also different.

In the light of the above principles, the following points arise for consideration: are the provisions of section 6 of the GPA and 106 of the LGUA merely matters of procedure? or, do they create or affect vested rights and remedies? To respond to these issues, I will first examine the provisions of section 6 of the GPA. Following the amendments brought about by Act No. 1 of 2020, the new section 6 reads:

> *6.-(1) Notwithstanding any other provision of this Act, civil proceedings may be instituted against the Government subject to the provisions of this section.*
>
> *(2) No suit against the Government shall be instituted, and heard unless the claimant previously submits to the Government Minister, Department or officer concerned a notice of not less than ninety days of his intention to sue the Government, specifying the basis of his claim against the Government, and he shall send a copy of his claim to the Attorney-General and the Solicitor General.*
>
> *(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).*

(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.

(6) Notwithstanding the provisions of subsection (3), the Attorney General may, unless another person ought to be sued, be sued or be joined as a co-defendant, in proceedings against the Government.

(7) The Attorney General may, where necessary, give instructions to the Solicitor General to proceed or terminate any proceedings instituted by the Government and which is pending in court of law, and shall state the reasons thereof.

The new section 106 of the LGUA now reads:

106 – (1) No suit shall be commenced against an urban authority until one month at least after written notice of intention to commence the suit has been served upon the authority by the intending plaintiff or his agent.

(2) The notice served under this section shall state the cause of action, the name and place of abode of the intending plaintiff and the relief which he claims."

From the above quotation it is quite clear that section 6 of the GPA and 106 of the LGUA outlines the procedure for institution of suits against the Government, Ministry, Government Department, Local Government Authority, Executive Agency, Public Corporation, Parastatal Organization or Public Company. The nature of the section can also be ascertained through its marginal notes of section 6 which reads ***"Civil proceedings against Government"***. The marginal note clearly shows that the

section regulates civil proceedings against Government. It is also plainly clear that the section does not create any rights, duties and obligations. That said, I am satisfied that section 6 of the GPA is procedural in nature.

In his submissions, Dr. Utamwa had argued that, even if section 6 of the GPA was a procedural provision, its applicability to the present case was exempted by section 22. The learned counsel seems to suggest that section 22, which is a transitional provision, meant that the Act does not affect proceedings which have been instituted before the 30th of November 2019, when the revised edition was published. With due respect to the learned counsel, in terms of **the Laws Revision Act [CAP. 4 R.E. 2020]**, issuance of a revised is in no way a suggestion that a law is repealed. As pointed out above, revised editions are issued in terms of the Laws Revision Act. The Act is meant to ensure that laws are continuously revised and updated to incorporate all amendments and repeals, if any.

Turning to the effects of the transitional provision. It is common knowledge that most statutes contain transitional or saving provisions. According to **Halsbury's Laws of England** (LexisNexis 5th Edition, 2012), vol 96 at [694] a transitional provision is a provision that:

> *"Regulates the coming into operation of [an] enactment and (where necessary) modifies its effect during the period of transition"*

A transitional provision is therefore meant to interpret the relationship between the provisions or actions in the new regime and those in the old regime and the extent to which modifications have been made to the provisions or actions. The Constitutional Court of Zambia had an opportunity to consider the objective of transitional provisions. This was in the case of **John Sangwa v. the Attorney General and the Law Association of Zambia** 2021 /CCZ/0012. In that case the Court held that transitional provisions are enacted to address what should happen in the interim and how the changes are to be effected in an orderly way so as to avoid undermining the intended purposes of an amendment.

From that understanding, transitional provisions enacted at the commencement of an Act are temporary, they not meant to survive forever, they are only meant to ensure the survival of the provisions or actions they were meant to cover at the commencement of the Act. On this, I subscribe to views expounded by Lord Keith said in **Regina v Secretary of State for Social Security, Ex parte Britnell** [1991] 1 WLR 198 at 202; [1991] 2 All ER 726 at 730 where he stated:

> *"One feature of a transitional provision is that its operation is expected to be temporary, in that it becomes spent when all the past circumstances with which it is designed to deal have been dealt with, while the primary legislation continues to deal indefinitely with the new circumstances which arise after its passage. In the present instance [the transitional regulation concerned] must eventually become spent, although it may be envisaged that that could take a considerable period of time."*

In the instant case, the publication of the revised edition in 2019 was not, therefore, an indication of the commencement of the GPA. It was only meant to indicate that the now GPA has been revised to include all amendments and repeals as of the 30th of November 2019. The birth of the GPA remains to be 1st of January 1975. It is this date that section 22 was meant to cover and not the former. What was argued by Dr. Utamwa is, with due respect, a misconception.

Having resolved that the provisions of section 6 of the GPA and 106 of the LGUA, and their consequential amendments, are "procedural" in nature, my duty now is to consider whether they operate retrospectively. It is settled law that procedural amendments apply to all the actions pending as well as future and will operate retrospectively. In **Jose Da Costa v. Bascora Sadasiva Sinai Narcornim** [(1976) 2 SCC 917], the Supreme Court of India laid down the rule as follows: (SCC p. 925, para 31)

> *"Before ascertaining the effect of the enactments aforesaid passed by the Central Legislature on pending suits or appeals, it would be appropriate to bear in mind two well-established principles. The first is that while provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment (see **Delhi Cloth and General Mills Co. Ltd. v. CIT** [AIR 1927 PC 242: 54 IA 421: 32 CWN 237].)*

The position of law in our jurisdiction was recently articulated by the Court of Appeal in its decision in the case of **Municipality of Mombasa vs. Nyali Limited** [1963] EA 371 at 374

> *"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 above decision was followed in several decision of the Court including in the case of **Makongoro vs. Consigilio** (supra), and **Gasper Peter vs. Mtwara Urban Water Supply Authority**, Civil Appeal No. 35 of 2017, CAT at Mtwara (unreported); **The Director of Public Prosecutions vs Jackson Sifael Mtares and Three Others**, Criminal Application No. 2 of 2018, CAT (unreported); and **Lala Wino** (supra).

The rationale for the distinction between "procedural and substantive" provisions was stated in the case of **CWT v. Sharvan Kumar Swarup & Sons** (supra) at page 627, where the court stated:

> *"10. The basis of distinction between statutes affecting rights and those affecting merely*

procedure is well-recognised. Dixon, C.J. in Maxwell v. Murphy [(1957) 96 CLR 261, 267] drawing upon the following words of Lord Justice Mellish in ***Republic of Costa Rica v. Erlanger*** *[(1876) 3 ChD 62, 69: 45 LJ Ch 743] said:*

> *"No suitor has any vested interest in the course of procedure, nor any right to complain, if during the litigation the procedure is changed, provided, of course, that no injustice is done."*

Reverting to the facts of the present case, I have demonstrated above that Land Application No. 111 of 2018, was filed at the trial tribunal on the 17th of October 2018 and hearing commenced on 15th day of December 2020. I also pointed out that, in view of these timelines, by the time when hearing commenced, the requirements set out under the amended sections 6 of the GPA and 106 of the LGUA were in operation.

In the present case, in its decision the trial tribunal took note that, in terms of section 7 of the GPA, all proceedings against the Government shall be instituted at the High Court. Having resolved that the provisions operated retrospectively the trial tribunal proceeded, and rightly so, to strike out the application. It must be borne in mind that amendments in procedural law are never meant to infringe the rights of the parties, to the contrary, they are meant to benefit the parties consistently with the public interest. This view was stated by the Supreme Court of India in **CWT v. Sharvan Kumar Swarup & Sons** (supra) at page 629 where the court stated:

> *"20. Bennion's Statutory Interpretation (First Edn., p. 446, para 191) lays down as follows:*
>
> *"Because a **change made by the legislator in procedural provisions is expected to be for the general benefit of litigants and others**, it is presumed that it applies to pending as well as future proceedings."*
>
> *At page 447 it is stated:*
>
> *"Procedure and practice is the mere machinery of law enforcement. As Ormrod, L.J. said:*
>
> ***'The object of all procedural rules is to enable justice to be done between the parties consistently with the public interest'."***
>
> [Emphasis is mine]

Pursuant to the above authority, I am convinced that the amendments to section 106 of the LGUA and the requirement to involve the Attorney General in all cases involving local authorities is consistent with the prevailing public interests. The trial tribunal was therefore correct in its finding and conclusion.

In fine, my conclusion is that, since the amendments brought by Act No.1 of 2020, to sections 6 of the GPA and 106 of the LGUA were "procedural" in nature they, therefore, applied retrospectively to all the actions pending as well as future actions. For the foregoing reasons, the learned trial tribunal was right in holding that the provisions of sections 6 of the GPA and 106 of the LGUA which were made effective on the 21st of February 2020, could be applied to the suit at the tribunal. Considering the said provision as having retrospective effect it being procedural in

nature, this application for revision is answered in the negative, that is in favour of respondents and against the applicant. I make no order for costs.

It is so ordered.

DATED at **IRINGA** this **17th** day of **May 2024**.

S.M. KALUNDE

JUDGE