IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB – REGISTRY OF MANYARA

AT BABATI

MISCELLANEOUS LAND APPEAL 4278 OF 2024

(Originating from the decision and order of the Assistant Registrar of Titles Babati, Manyara, made under section 99 (1) of the Land Registration Act, Cap 334)

THE REGISTERED TRUSTEES OF MASJID AL-AZHAL..... APPELLANT

VERSUS

ASSISTANT REGISTRAR OF TITLES.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

REASONS FOR THE RULING OF THE COURT

8th and 12th March, 2024

MIRINDO J.:

The appellant, Registered Trustees of Masjid Al-Azhal, dissatisfied with the intention to rectify the Land Register by the Assistant Registrar of Titles in Manyara Region, has appealed to this Court. The intention was set to take effect on 9th March 2024 after the expiry of thirty days of the issuance of the notice to the appellant pursuant to section 99 (1) (a) and (b) of the Land Registration Act [Cap 334 RE 2019). The notice directed the appellant to surrender the Certificate of Title No 9717 of the Land Registry Moshi for cancellation by the Assistant Registrar of Titles in Manyara Region after the expiry of that period of thirty days.

When the appeal was called for hearing on 8th March 2024, the appellant was represented by Mr Hamisi Mkindi and Mr Nicodemus Mbugha, learned Advocates. The respondents who are the Assistant Registrar of Titles and the Attorney General were represented by Mr Hance Mmbando, learned State Attorney. Referring to their certificate of extreme urgency under which the appeal was filed, the learned advocates applied for an order to maintain the status quo pending hearing of the appeal. On the other hand, the learned State Attorney, Mr Mbugha sought leave of the Court to raise a preliminary objection.

I directed that hearing on both applications to continue together and at the end I overruled the preliminary objection and granted the order to maintain the status quo until the determination of the appeal but reserved my reasons. I now proceed to give reasons, and I will start with the points of objection raised by Mr Mbugha, learned State Attorney.

The first and second points of objection boils down to whether the appeal is incompetent for being filed prematurely because the Assistant Registrar of Titles has made no decision, and if not, whether the appeal was accompanied by a copy of the decision, or an order, or act appealed against in terms of section 102 (3) of the Land Registration Act [Cap 334 RE 2019]. The appellant was issued with a thirty days' notice of the intention of Assistant Registrar of Titles to proceed with rectification of Land Register on 9th February 2024. The period of thirty days had not expired and no rectification of the Certificate of Title No 9717 by the Assistant

Registrar of Titles. Section 102 (1) (a) of the Land Registration Act [Cap 334 RE 2019] authorises appeals against a decision, an order or act of the Registrar and not the notice. He concluded that the notice directs the appellant to submit its proof of ownership and so it accords the appellant the right to be heard.

The learned Advocate Mkindi opposed this point of objection on the ground that it is clear from the notice that the Assistant Registrar of Titles had already made the decision. The notice states that after rectification the appellant's name in the Land Register will be replaced by the name of Her Excellency, the President of the United Republic of Tanzania. The learned Advocate clarified that the rectification will be effected within thirty days from the date of the postage or dispatch of the notice, and that the appellant was required to produce Certificate of Title No 9717 to the Assistant Registrar of Titles for cancellation within those thirty days. Under these circumstances, the learned advocate contended, the provisions of section 99 (1) of the Land Registration Act confers the right to appeal to the High Court after receipt of notice. He pointed out that the notice issued to the appellant states that "unless within that period the Court orders otherwise."

Subsection (1) of section 102 of the Land Registration Act [Cap 334 RE 2019] confers a right to appeal to the High Court in relation to "a decision, order or act" of the Registrar of Titles. Under section 2 of that Act, the expression Registrar of Titles includes the Deputy Registrar of Titles and Assistant Registrar

of Titles. Subsection (3) of section 102 directs that the appeal must be "accompanied by a copy of the decision, order or act appealed against." The question is whether the "NOTICE-RECTIFICATION OF THE LAND REGISTER" issued on 8th February 2024 by the Assistant Registrar of Titles justified an appeal to this Court under subsection (1) of section 102. The subsection authorises an appeal against three matters, namely a decision, an order or act. In order not to prejudice the merits of the pending appeal before this Court, I refrain to determine what the notice was, among the three appealable items, but I hold that the notice was appealable under subsection (1) of section 102 and that the appeal was duly filed in this Court.

In his final point of objection, the learned State Attorney, argued that the appeal from Assistant Registrar of Titles amounted to a suit and the appellant, was in terms of section 6(2) of the Government Proceedings Act [Cap 5 RE 2019], bound to issue a prior notice of ninety days of intention to sue. For this legal position he made reference to a 2020 decision of this Court in *Burafex Ltd (formerly known as Ametaa Ltd v Registrar of Titles*, Civil Appeal 235 of 2019.

In *Burafex Ltd*, the petitioner appealed against the refusal by the Registrar of Titles to register its name in respect of a certain piece of land in Mikocheni Industrial Area Dar es Salaam. At the hearing of the appeal, the presiding judge questioned *suo motu* the competence of the appeal before him, that is, the non-joinder of the Attorney General. Having heard the appellant arguments, *ex parte*

the presiding judge extended the meaning of the term "suit" to include an "appeal." His Lordship went on to hold that the appeal was bad for non-joinder of the Attorney General and struck off the appeal.

With due respect, I am unable to agree with the conclusion arrived at in *Burafex Ltd* even though it is a position that has been followed in some High Court cases.

Section 6 of the Government Proceedings Act [Cap 5 RE 2019] was amended in 2020 to make the Attorney General a necessary party in all "suits" against the Government subject to the expiry of the ninety days of the statutory notice of intention to sue the Government. The amendment was effected by section 25 of the Written Laws (Miscellaneous Amendments) Act 1 of 2020. The amending Act received presidential assent on 14th February 2020 and was gazetted on 21st February 2020.

The general rule under section 14 of the Interpretation of Laws Act [Cap 1 RE 2019] is that an Act of Parliament comes into operation on the date on which it is gazetted. Section 14 provides that:

> Every Act shall come into operation on the date of its publication in the *Gazette* or, if it is provided either in that Act or in any other written law, that it shall come into operation on some other date, on that date.

This general rule was applicable to the facts in the case of *Burafex Ltd.* The facts giving rise to the appeal in *Burafex Ltd* arose in 2019 and the appeal was lodged

in the same year but came for hearing on 14th July 2020. The immediate question now is whether the amendment had retrospective effect. Unless stated in the legislation in question, the common law presumption is that legislation does not operate retrospectively to affect a constitutional or substantive right. There is no doubt that an appeal is a constitutional right under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania of 1977. The recognition of the constitutional right of appeal was re-affirmed by Rutakangwa JA in *Butabutemi v* R, Criminal Application 5 of 2005, Court of Appeal of Tanzania at Mwanza (2007) (unreported) when he held that:

> To me the right of appeal is not only a statutory one but a constitutional right, of which a person cannot be lightly denied, when his rights are being determined by a court of justice.

Besides the constitutional embodiment of the right to appeal, at common law, the right to appeal is a substantive right and not simply a procedural one. It is a vested right that accrues at the institution of a proceeding. This legal position was stated by the Judicial Committee of the Privy Council in the leading case of *Colonial Sugar Refining Co Ltd v Irving* [1905] AC 369. The facts in that case were that at the date of the institution of the suit, there was a right to appeal to the Judicial Committee of the Privy Council from the judgment of the Supreme Court of Queensland. The Judiciary Act of 1903 was passed and received royal assent ten days before the judgment of the Supreme Court of Queensland. The Act abolished appeals to the Privy Council. However, the Supreme Court of

Queensland granted leave to the appellants to appeal to the Privy Council. The Privy Council held that there was a right to appeal was not taken away: [at page 372].

> As regards the general principles applicable to the case there was no controversy. On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore, the only question is, was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.

This legal position has been applied in various Indian cases and the Supreme Court of India summed up the principles governing a vest right of appeal in the leading case of *Garikapatti Veeraya v N. Subbiah Choudhury* AIR 1957 SCR 488 at pages 514-515:

From the decisions cited above the following principles clearly emerge:

(i) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.

(ii) The right of appeal is not a mere matter of procedure but is a substantive right.

(1) A.I.R. 1954 Mad. 543.

(2) I.L.R. 1955 Bom 530

(3) A.I.R. 1955 Bom. 332; 57 Bom. L.R. 304.

(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved, to the parties thereto till the rest of the career of the suit.

(iv) The right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the *lis* commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

(v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise.

Back home, the Court of Appeal in *S S Makorongo v Severino Consigilo* [2005] TLR 24 declined retrospective bar of appeals against preliminary or interlocutory orders introduced by the Written Laws (Miscellaneous Amendments) (No 3) Act 25 of 2002) and upheld the right of appeal:

Appeals to civil proceedings to this Court are governed by section 5 of the Appellate Jurisdiction Act, 1979 and rules of court regulating appeals to the Court are governed by the Tanzania Court of Appeal Rules, 1979 made under

> the Act. The appellant's right to appeal was in existence before the passing of Act No 25 of 2002. It was not an amendment to a course of procedure for this would have entailed an amendment to the Court Rules. It did not alter the form of procedure. The amendment affected the appellant's substantive right to appeal which was vested in him when he instituted the suit...This vested right of appeal can be taken away only by a subsequent enactment if it so provides expressly or by necessary implication and not otherwise...[1]

In light of the above authorities, I am satisfied that the 2020 amendment to section 6 of the Government Proceedings Act was not retrospective, was inapplicable to the facts in *Burafex Ltd*; and so the reasoning in *Burafex Ltd* was definitely o*biter dictum* and does not authoritatively settle issue at hand.

As to the argument in *Burafex Ltd*, that an appeal is a suit, it is my considered opinion that it is strictly not a suit. This view was adumbrated by Masaju J in *Registered Trustees of Tanzania Agricultural Society (Taso) v Registrar of Titles, Commissioner for Lands and Attorney General* (Land Appeal 4 of 2022) [2022] TZHC 12095 (1 August 2022). In this case, the Registrar of Titles, acting under section 99 (1) (f) of the Land Registration Act [Cap 334 RE 2019], rectified the Land Register in relation to a plot in Uzunguni Area within Dodoma City. The rectification involved entering the name of Her Excellency, the President of the United Republic of Tanzania instead of the "Registered Trustees of Tanzania Agricultural Society (TASO)". On appeal to the High Court, the appellant complained against the Registrar of Titles as well as the Commissioner for Lands and the Attorney General. At the hearing of the appeal,

[1] [2005] TLR 24 at p 28.

the learned Senior State Attorney who appeared for the respondents argued that the Commissioner for Lands and the Attorney General were wrongly joined in the appeal and the appeal should have been only against the Registrar of Titles. Masaju J upheld the objection and struck out the appeal for being incompetent because:

> This was an appeal in the Court pursuant to section 102 of the Land Registration Act [Cap 33 RE 2019, not a suit ...[or] trial....

The reasoning in *Registered Trustees of Tanzania Agricultural Society (Taso)* was applied in *Salaudin Mohamed Musa v Registrar of Titles and the Attorney General* (Miscellaneous Land Application 81 Of 2022) [2023] TZHC 18385 (23 June 2023). In the latter case, the appellant appealed against the rectification by Registrar of Titles of a plot at Nyegezi in Mwanza Region. The appeal was met with a preliminary objection that it was lodged prematurely without a prior ninety days' notice to the Registrar of Titles and the Attorney General. The objection rested on the 2020 amendment to section 6 of the Government Proceedings Act alluded to earlier on in this ruling. Itemba, J held that there was need of a statutory notice and the appeal was bad for misjoinder of the Attorney General:

> ...[T]this is the type of appeal which do not require service of 90 days' notice to the respondent because section 102(1)(a) of the Land Registration Act which is the enabling Act, does make it a mandatory requirement. The only notice

> mentioned is that under section 102(1)(a) which is 30 days. However, the same section 102 (1)(a) clearly does not require the Attorney General to be a party as well. So, it was wrong for the appellant to include the Attorney General as a party in this appeal.

The learned Judge struck off the name of the Attorney General from the petition of appeal and directed the amendment of the petition of appeal.

From the above analysis, I agree with the position that an appeal, is strictly speaking, not a suit even though an appeal is a continuation of the original case on the assumption that parties are the same. It was for these reasons, that I overruled the preliminary objection on 8th March 2024.

Notwithstanding the dismissal of the preliminary objection, the appellant is hereby directed to amend the petition of appeal to exclude the Attorney General within seven days from the date of this Ruling.

Regarding the application for maintenance of the status quo until the determination of the appeal, the learned Advocate Mbugha argued that the appellant applicant would suffer irreparable loss should the rectification of the Land Register proceed after the lapse of the thirty days. The respondent opposed the application on the ground that there was no sufficient cause for maintaining the status.

The circumstances under which the notice of rectification of the Land Register was made and the directives it contains do establish a prima facie case

for the issuance of an order of maintaining the status quo under Order 39 Rule 5(1) of the Civil Procedure Code [Cap 3 RE 2019.

It was for the above reasons that I overruled the preliminary objection and granted the order to maintain the status quo pending hearing of the appeal.

Order accordingly.

F.M. MIRINDO

JUDGE

12/3/2024