

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO.111 OF 2019

GAPCO TANZANIA LIMITED.....PLAINTIFF

VERSUS

TANZANIA RAILWAY CORPORATION.....DEFENDANT

RULING

OPIYO J.

There were cross objections on point of law requiring determination in this suit. The 1st objection is from the defendant, that the suit contravenes section 6(2) and (3) of the Government Proceedings Act, Cap 5 R.E 2019, read together with the Written Laws (Miscellaneous Amendments) Act No. 4 of 2019 and No. 1 of 2020. The 2nd objection come from the plaintiff that the Written Statement of Defense is bad in law for being filed out of time. Both were argued simultaneously and by way of written submissions. Advocate Muganyizi appeared for the plaintiff while the respondent was represented by Baraka Nyambita, learned State Attorney.

Mr. Nyambita, submitting for the defendant on their objection insisted that, the defendant is a Government Corporation under the Ministry of Works, Transport and Communication, hence, under the control of the Government. He contended that, the law needs any person who wishes to sue the Government Department/Corporation or Institution to comply

with the provisions of the Government Proceeding Act, Cap 5 R.E. 2019, section 6(2) and (3), read together with Written Laws Amendment Act No. 1 of 2020 which requires notice of 90 days to be served to the Government, Government Department, Ministry, Local Government Authority, Executive Agency, Public Corporation, Parastatal Organization or Public Company. Failure to comply with these mandatory provisions of the law renders the suit incompetent worth of being struck out as held in the case of **Natural Wood (t) Ltd versus The Attorney General, Civil Case No. 139 of 2019, High Court of Tanzania at Dar Es Salaam (unreported)**, he submits.

In reply, the plaintiff's counsel, one Hamisa Nkya, relied on section 3(1) of the Railways Act, No. 10 of 2017 which provides for the establishment of the defendant and section 4(1)-(5) which gives the defendant a legal personality, with perpetual existence, capable of being sued and suing in its own name. That being the case, there is no need of invoking the provisions of the Government Proceedings Act in such cases, he argued. He further contended that, the amendments so relied upon by the State Attorney (Written Laws Amendment Acts No. 11 of 2019 and No. 1 of 2020) came into operation after filing the instant suit, hence, the said laws cannot be applied retrospectively. He cited the case of **Benbros Motors Tanganyika Ltd versus Ramanlal Haribal Patel (1967) HCD No. 435** as cited in approval in **Lala Wino versus Karatu District Council, Civil application No. 139 of 2019, CAT** to substantiate his argument. In that case it was argued that:-

"When new enactment deals with rights of action, unless it is so expressed in the Act, an existing right of action is not taken away, but when it deals with procedure only, unless the contrary is

expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act."

I appreciate the arguments of both counsels for the parties. Each is so persuasive in its own right, I have to admit. The cited provision of the Written Laws (Misc. Amendment) Act, No. 1 of 2020 states clearly that:-

"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 above provision renders the argument by Hamisa Nkya on defendant's capability due to its legal personality redundant. The argument that defendant, by having separate legal personality capable of suing and being sued, it falls out of the above provision is a misconception. All the government institutions are affected by the above provision, regardless of their legal personalities. The question that requires determination is the effect the amendment have on the instant suit that was instituted before it came to play.

The case of **Benbros Motors Tanganyika Ltd versus Ramanlal Haribal Patel (1967) HCD No. 435**, gives a clue on what to do in such amendments. It is well settled that, if the enacted law or amendment affects the substantive rights like the right of action, then it

will not operate retrospective, but if it affects the procedures only, then retrospective operation of the same is allowed.

I agree that, the amendments noted above created new procedures to be followed by persons including the plaintiff in order to sue the defendant. That, there should be a notice to the defendant and Attorney General prior to the institution of the suit and also the Attorney General must be joined as a necessary party, short of which the suit fails. The records show that, the instant case was instituted before the amendments so stated came into operation. The plaintiff's counsel has questioned whether the same can operate retrospectively against plaintiff's case. In my view, the plaintiff's right of action against the defendant in this suit is intact and remains unaffected by the above amendments, but the procedure on how to pursue the same have been affected by it. Therefore, the amendments of the said law have a retrospective operation against the plaintiff. Upon such finding, the next question determination of what befell this suit in the circumstances. Should the court find this suit incompetent? I highly hesitate to do so owing to the obligation vested in court by article 107A (2) (e) of the Constitution of the United Republic of Tanzania coupled with overriding objective principle under section 3A of the Civil Procedure Code, Cap 33 RE 2019 urging court to adhere to substantive justice than indulging on technicalities.

consequently, the above defendant's objection against the instant is partly sustained to the extent that, the suit is affected by the amendment above, but the suit is not struck out as urged for the reasons explained, instead the plaintiff is allowed to effect amendment of her pleadings in compliance with the requirement of joining Attorney General. Given the fact that, joining Attorney General is a result of the order of the court due to

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operation, the requirement of 90 days' notice is waived owing to the number of years, this matter has been in court before the amendment came into play. Also regard is given to the fact that, Attorney General is already aware of the existence of this matter through the first defendant and sent a representative by the name Baraka Nyambita, learned State Attorney who argued the preliminary objection.

The plaintiff's objection is that the defendant's written statement of defence is time barred as it was filed beyond the prescribed time without leave of the court. He prayed for the same to be expunged from the records and order the case to proceed *ex parte*. The gist of the objection is that, the written statement of defence was in violation of order VIII Rule 1 (1) of the Civil Procedure Code which provides for filing of the same within 21 days from the date of service. He submitted that the defendant was duly served on 23rd September, 2019. The last date for filing written statement of defence was 14th October, 2019. That the defendant appeared on 3rd December, 2019, when already late for 50 days without filing written statement of defence. But still he did not notify court of his intention to file written statement of defence. Therefore, the written statement of defence which was filed on 17/8/2020 was well outside the prescribed period.

In reply the defendant's counsel submitted that, the Written Statement of Defence was filed by leave of the Court granted on 30th July 2020 that seems have skipped the plaintiff's eye. Therefore, the objection is baseless. In rejoinder plaintiff's counsel submitted that, in whatever circumstances the WSD was still time barred. This is because, even the application for extension of time to file WSD out of time was itself filed beyond the prescribed 7 days from the date. The defendant made such

application when they were already barred by law in seeking leave to file written statement of defence out of time. Therefore, it was granted in a time barred application before the court.

As per records, the prayer to file written statement of defence was made when parties appeared for the first time before the trial judge after appearances were dispensed with in a number of occasions due to the Covid 19 pandemic extending beyond the prescribed 21 days. That means, the defendant could not have made such application within time due to dispensation of appearance by the court. This was beyond the control of the parties including the defendant. When they finally made the application, when appearance was afforded for the first time, the court considered all those unusual circumstances surrounding their failure to file and granted them the chance to file WSD. Defendant filed their WSD within the time extended by the court. It is therefore inconceivable stating that, they filed WSD out of time. If the plaintiff is not contented with extension of time that the defendant was granted by the court, she should deal with it differently challenging the decision extending time, rather than by way of preliminary objection that it was time barred. For the reasons, the defendant's WSD was not time barred as it was filed by court's leave. Plaintiffs objection against defendant's WSD is therefore overruled.



A handwritten signature in black ink, appearing to read 'M. P. Opiyo', is written over a horizontal line.

**M. P. OPIYO,
JUDGE
1/3/2021**