IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT MOSHI

LAND APPEAL NO. 48 OF 2022

(Originating from Application No. 21 of 2020 of the District Land and Housing Tribunal for Moshi at Moshi).

DONISIAN FRANCIS KILEO ..... 1ST APPELLANT

EMMANUEL CHARLES KWEKA ..... 2ND APPELLANT

ESTOMIN JOSIAH MLAY ..... 3RD APPELLANT

VERONICA JOHN ..... 4TH APPELLANT

MUSSA EMAM NGEREZA ..... 5TH APPELLANT

REHEMA BAKARI ..... 6TH APPELLANT

ALEX JOHN CHAMI ..... 7TH APPELLANT

FESTO ALBIN MALYA ..... 8TH APPELLANT

DOLVINA EDOS MASSAWE ..... 9TH APPELLANT

SYLVIA EXPERI MAKUNDI ..... 10TH APPELLANT

VERSUS

MOSHI MUNICIPAL COUNCIL ..... RESPONDENT

JUDGMENT

11/09/2023 & 13/10/2023

SIMFUKWE, J.

On 14th day of February 2020, the appellants herein instituted a land disputed against the respondent before the District Land and Housing Tribunal for Moshi (the trial Tribunal) claiming for the following reliefs:

1. *The honourable tribunal to find that the suit premises are owned by the applicants.*
2. *In alternative to the above paragraph (a) that, the honourable tribunal finds that the Respondent has to issue subtitles to the Applicants over the suit premises with land rent proportionate to the land rent chargeable by the government on nearby localities.*
3. *Cost of the Application to be paid by the Respondent.*

The matter proceeded for hearing before Hon. P. Makwandi whereby the applicants presented their evidence by calling twelve (12) witnesses and closed their case. Thereafter, the matter was assigned to Hon. J. F. Kanyerinyeri who was to proceed with defence case following the transfer of Hon. P. Makwandi. When the matter was scheduled for defence hearing, the successor trial Chairman raised a point of law *suo motto*, whether or not the Attorney General should be joined in the suit. He invited the parties to address him on that issue. After hearing both parties, the trial Chairman found that the application was incompetent for non-joinder of the Attorney General and struck it out.

The appellants herein were aggrieved, they preferred the instant appeal on three grounds of appeal as follows:

1. *That, the learned trial chairperson erred in law and fact by striking out the Application on the ground that the tribunal had no jurisdiction.*
2. *That, decision by the tribunal affects the rights of the Appellants and denies them right to be heard.*

3. The decision is bad in law.

At the hearing of the appeal, the appellants were represented by Mr. Kipoko E. G, learned advocate while the respondent enjoyed the service of Ms. Leah Francis, the learned State Attorney.

On the first ground of appeal Mr. Kipoko submitted that the trial Chairperson erred to hold that the tribunal had no jurisdiction to determine the application which was filed on 14/02/2020 while the law was passed on 21/02/2021. He went on to submit that the law does not operate retrospective to affect the case which had been determined in 2008. He made reference to the case of **Evans G. Minja & 7 Others vs Bodi ya Wadhamini Shirika la Hifadhi ya Taifa (TANAPA)**, Labour Revision No. 37 of 2020 (HC) to buttress his argument.

On the second ground of appeal, Mr. Kipoko submitted that the decision of the trial tribunal affects the rights of the appellants and denied them right to be heard since most of the witnesses are indisposed and won't be available for retrial.

In respect of the third ground of appeal Mr. Kipoko submitted that the decision by the trial Tribunal is bad in law as it will affect the substantive rights of the appellants who had already closed their respective case before the tribunal. He supported his contention with the case of **Gabriel Joseph vs Mabrose Gwasi Mukohi and Others** (Misc. Civil Appeal No. 53 of 2021) [2022] TZHC 11204.

In his final remarks, Mr. Kipoko had two prayers; first, that the case be returned to the trial tribunal for hearing and second, he prayed the costs to be paid by the respondent.

In her reply, Ms. Leah submitted that under **section 25 of the Written Laws (Misc. Amendments) Act**, **No. 1/2020** it is mandatory for the Attorney General to be joined as a necessary party in all suits against the Government. That, non-joinder of the Attorney General vitiates the proceedings of any suit. The learned State Attorney was of the opinion that the respondent herein being a local Government Authority is a Government as defined under **section 26 of Act No. 1/2020**.

Ms. Leah was alive with **section 6 of the Government Proceedings Act**, Cap 5 R.E 2019 that requires the Attorney General to be joined as a necessary party where Government institutions are sued. She referred to the case of **Municipality of Mombasa vs Nyali Ltd** (1963) E.A 371 which stated that:

> *"…the court is guided by certain rules of construction to seek as to whether or not the legislation operates retrospectively…*
>
> > *1st rule is that,* ***if the legislation affects substantive rights, it would not be construed to have a retrospective*** *operation unless a clear intention to that effect is manifested.* (Emphasis added to the bolded words)

2nd rule is that, if it affects procedural only, prima facie it operates retrospective unless there is good reason to the contrary."

Ms. Leah continued to state that the amended Act is silent on the applicability of **section 25**. She averred that, the Act itself regulates procedure issues. However, the question is *whether it affects substantive rights or not.*

The learned State Attorney continued to submit that the parties to this appeal were at the hearing stage and the applicants had already presented a total of 12 witnesses and their case was closed for the defence to start. She opined that, the act of the Trial Chairperson to strike out the application curtailed the appellants' substantive right to be heard. Also, Ms Leah observed that the act of the trial Chairperson to consider the amended Act as procedural law only without taking into account the substantive rights of the appellants erred in law and facts by striking out the application on the ground that the Tribunal has no jurisdiction.

Ms. Leah concluded that, the tribunal's findings could not be challenged if only the application was not at the hearing stage. She prayed the court to give appropriate orders as it thinks fit and costs of this appeal be borne by the appellants.

I have thoroughly considered the submissions of both parties, the grounds of appeal and the ruling of the trial Tribunal. In essence, both parties are not disputing the legal requirement of joining the Attorney General in all

suits against the Government as envisaged under **section 6(3) of the Government Proceedings Act** (supra).

The issue for determination is ***whether it was necessary to join the Attorney General in the application before the trial Tribunal which commenced before the amendment*.**

The learned counsels of both parties agreed that it was not necessary to join the Attorney General. The appellants' advocate was of the view that the said law does not operate retrospectively while Ms. Leah was of the view that the Tribunal Chairperson erred in law to consider the amended Act as a procedural law only without taking into account the substantive rights of the parties, especially the appellants who had already given their evidence.

I agree with the learned counsels that under the circumstances of this case, striking the application prejudiced the parties particularly the appellants.

Joining the Attorney General in any dispute, aims to safeguard the rights of the government and public interests whenever the government is sued. In the instant matter, the hearing had already proceeded and the appellants had already given their evidence by calling 12 witnesses. I don't think if justice will smile seeing the dispute being struck out on the reason of failure to join the Attorney General while the matter had already taken off before the amendment of the said law. As correctly stated by the learned State Attorney, striking out the application did not consider the substantive rights of the appellants.

I am persuaded by the decision of this court cited by Mr. Kipoko in the case of **Evans G. Minja and 7 Others** (supra) where this court held that the Act was not meant to act retrospectively.

Even if the said Act was meant to act retrospectively, under the circumstances where the appellants had already given their evidence and closed their case waiting for defence case, to adhere to the retrospective operation of the said Act, prejudiced the appellants. In the case of **Raymond Costa vs Mantrac Tanzania Ltd** (Civil Application 42 of 2018) [2019] TZCA 63 Tanzlii at page 16 it was held that:

> *"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."*

Guided by the above authority, in the present matter I find it not sound to strike out the application which was almost to the end based on the requirement of the law which was not there when the appellants instituted their case and gave their evidence. Therefore, I agree with the appellants' argument under the second ground of appeal that the Tribunal's decision affects the right of the Appellants and denies them right to be heard.

Basing on the above findings, I am strongly convinced that the learned trial Chairperson erred to strike out the application. In the circumstances, I hereby remit the matter back to the trial Tribunal for the Chairman to proceed with the hearing from the stage where it ended. Considering the circumstances of this case, no order as to costs. Appeal allowed.

It is so ordered.

Dated and delivered at Moshi this 13th day of October 2023.

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

13/10/2023