

TANZANIA / JUDGMENT

# Erick Judgment Final

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IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA THE SUB-REGISTRY OF MWANZA AT MWANZA LAND APPEAL NO. 20723 OF 2024 (Arising from Ruling and Orders of the District Land and Housing Tribunal for Mwanza, at Mwanza, in application no. 121 of 2015 delivered on 07th August 2024 by Hon. PAULOS L.S LEKAMOI- CHAIRMAN) BETWEEN ERICK DOMINICK MASAWA ..... APPELLANT VERSUS

1. RICHARD KELLY
2. MWANZA CITY COUNCIL ..... RESPONDENTS

## JUDGEMENT

28th October & 20th November, 2024 CHUMA, J. The appellant preferred this appeal after being quite uncomfortable with the decision of the District Land and Housing Tribunal for Mwanza, at Mwanza (DLHT), in application No. 121 of 2015 dated 7th August, 2024 fronting one ground of appeal as follows; That the trial tribunal erred in law and fact to struck out the application without considering the court of appeal order in Civil Case No. 343 of 2020 dated 15th February, 2024 and also the law as per the Government Proceedings Act Cap 5 R.E 2019. 1 At the hearing of this appeal, both parties were represented by Learned Advocates, the appellant was represented by Mr. Dennis Kakere, Mr. Mteuele advocate for the first respondent, and Mr. Vungwa State Attorney for the second respondent. Arguing for the appellant Mr. Denni's advocate stated that the record reveals that the Court of Appeal in Civil Appeal No. 343/2020 ordered a retrial before the District Land and Housing tribunal (DLHT) before another Chairman in its decision dated 15.2.2022 on pages 9 and 10. Under the Government Proceedings Act Cap 5 R.E 2019 in its amendment on section 6 provides that all matters involving the Government should be instituted before the High Court. That is a general Rule. But in the same Act section 22 provides for exemption to the requirements under section 6 cited above that reads, except as otherwise provided the provision of this Act shall not affect proceedings which have been instituted before the commencement of this Act. The matter subject to this appeal was instituted in 2015 and the amendment of the Government Proceedings Act is of 2019 under the same law section 22 remained unamended to date giving exemption to the matters filed before the commencement of the Act. And that the 2 decision of the court of Appeal that ordered retrial ought to have been complied with by the trial tribunal. To support his submission Mr. Dennis cited the case of Adjane Abubakar Vs. R Criminal Application No. 40 of 2021 on page 9. Mr. Dennis went on to

argue that, the implementation of the court of Appeal order was directed to the trial tribunal and not to parties and the same ought to have been complied with. He likewise invited this court to the case of Kaunguza Machemba Vs. R Criminal Appeal No. 157B of 2013 on page 8. Where the court referred to the case of Fatahel Manji Vs. R [1966] EA 343 which stated that in general a retrial will be ordered only when the original trial was illegal or defective. Lastly, he prayed this appeal be allowed with cost, and that the trial tribunal decision in Application No. 121/2015 be quashed and set aside. An order for the rehearing of Application No. 121 of 2015 by another Chairman is made. In response, Mr. Mtewe's advocate contended that there are two existing schools of thought on this issue before this court. One is that section 22 of the Government Proceedings Act does not affect pre-filed proceedings in the DLHT. The second one considers the amendment of 3 the Government Proceedings Act to have procedural effect that is it accordingly operates retrospectively. Therefore, all the cases filed before the tribunal before the amendment must align with a new legal architecture. For the suit to be instituted against the respondent herein the AG should be joined as a necessary party. Hence DLHT lacks jurisdiction on the second limb of thought to entertain land dispute by or against the Government. Section 6(4) of the GPA reading together with Section 6A (1) and Section 7 of GPA provides that all such kinds of matters should be filed before the High Court. But also provides for the right of AG to intervene in pending proceedings. Section 17 (1) (a) and 2(a) of the Office of AG Discharges of Duties Act, Cap. 268 R.E 2019 provides that AG has the right of audience in the proceedings which he considers to have public interest. Therefore, section 6A and section 7 of GPA renders section 22 of GPA absolute. To support his submission, he invited this court to the case of Zainabu Hamis Vs. Shani Rashid and another Land Reference No. 26026/2023 on page 9 at line 9 in which the court inter-alia held that irrespective of whether such proceedings commenced before or after enactment of amendment the new legal order supersedes. 4 In his concluding remarks, Mr. Mtewe's advocate stated that since the instant case is in the preliminary stages, in his opinion the trial tribunals' decision was right. Owing to the nature of this case he prayed this appeal be dismissed without cost. On the other hand, Mr. Vungwa SA had this to say. On page 9 of the cited case of Adjane (supra) states that retrial is as if there were no trial at all. Therefore the appellant ought to have filed a new case before a competent court. In the case of Bwire Nyamwero & another Vs. NMB & Four Others Land Appeal No. 113 of 2021 on page 6, it was emphasized the need to join AG in suits against the Government. In case of any dispute between a court order and the law, the case of NBC Vs. JM Cimzo Bakwira 1978 LRT 39 provides an answer by stating that the law normally prevails in case of any dispute between the two. Lastly, on the cited section 22 of the GPA, it was his submission that the appellant never stated what kind of case resulted in the said proceedings referred under section 22. But also according to Mr. Denni's advocate, this section is an exemption to the requirement of section 6 of GPA. Section 6 was amended in 2019 and the original case was filed in

2015. Going by the wording of the section, the section does not involve proceedings before 2019 but that from 2019 to date. In the cited case of 5 Kaunguza(supra), Mr. Vungwa admitted the proceedings were defective in the proceedings subject to this appeal. If the same were defective there were no cases resulting in retrial. Hence the appellant had to file a new case

to the High Court. He urged this appeal be dismissed without cost. In his rejoinder submission, Mr Denni's advocate contended that the referred case is not binding to this court. But also, in the case of NBC V JM Sinzobakwila (supra). The cited case of Zainabu (supra) contravenes Article 13 (2) of the URT Constitution on the retrospective effect of the law. Since GPA was amended in 2019 and other subsequent amendments never amended section 22 of the GPA. The suit subject to this appeal was instituted in 2015 and the amendment was in 2019. The decision of the Court of Appeal was made while aware of section 22 of GPA. Since there were defects in application No 121 of 2015 leading to a retrial order directed to the trial tribunal, not the parties, then the matter ought to have been heard afresh as ordered. But the case of Bwire (supra) does not bind this court but also differs from this appeal because this appeal is a result of the court order for retrial, unlike the cited cases which were not retrial cases. He reiterated his submission in chief that the Court of Appeal order was executable. This Appeal is with merit. 6 Having considered the ground of appeal and submissions of both parties this court is duty-bound to determine whether this appeal is or not meritable. From the parties' submission, it is evident that they all at once that the Written Laws (Miscellaneous Amendment) Act No. 1 of 2020 amended section 6 of the Government Proceedings Act Cap 5 R..E 2019 and introduced a mandatory procedural requirement for the Attorney General to be joined in all civil suits where the government and its allied departments or organs are involved. The pertinent question here is whether such an amendment affects the matter filed before the referred amendment rendering a retrial ordered by the Court of Appeal unexecutable. According to Mr. Denni's advocate, the answer is negative, unlike Mr. Mteuele's advocate and Vungwa State Attorney who supports the trial tribunal's verdict on the ground that the trial tribunal had no jurisdiction to entertain the matter. Mr. Denni's advocate at the outset admitted the mandatory requirement of joining the Attorney General in all proceedings in which the Government is a party that renders such suit to be instituted before the High Court. He however pointed out that it is a general rule and its exception is under section 22 of the Government Proceedings Act. Section 7 22 provides for exemption to the requirements under section 6 cited above which reads; "Except as is otherwise provided in this Act expressly provided, the provisions of this Act shall not affect proceedings which have been instituted before the commencement of this Act". The matter subject to this appeal was instituted in 2015 and the amendment of the Government Proceedings Act is of 2019 and under the same law section 22 remained unamended to date giving exemption to the matters filed before the commencement of the Act. And that the decision of the court of Appeal that ordered retrial ought to have been complied with by the trial tribunal which I also join hands with. On the other hand, Mr. Mteuele's advocate appeared to admit the existence of section 22 of the Act cited by Mr. Denni's advocate but to him, that was one school of thought. He added the second school of thought implying that the amendment is a procedural that applies retrospectively. This stance was held in the case of Benbros Motors Tanganyika Limited Vs. Ramanlal Aribhai Patel (1967) HCD 435 where the court inter-alia stated that: "When a 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 8

procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act.” (Underscoring is mine). Guided by the above position Mr. Mteweale argued that all cases filed at the tribunal before the amendment must align with a new legal architecture. To support his submission, he invited this court to the case of Zainabu Hamis Vs Shani Rashid and another Land reference No.26026/2023 on page 9 at line 9 in which the court inter-alia held that irrespective of whether such proceedings commenced before or after enactment of amendment the new legal order supersedes. I distance myself from the submission of Mr. Mteweale because if the amendment affects vested rights the position changes. Reference is made in the case of Municipality of Mombasa Vs. Nyali Limited [1963] EA 371 that: “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 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.” (underscoring is mine). Maxwell on Interpretation of Statutes, 10th Edition, on page 213, speaking of retrospective operation of statutes, says; “A retrospective operation is not to be given to a statute to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment”. On retrospective operation regarding vested rights, the author states; “Every statute...which takes away or impairs vested rights acquired under existing laws, creates a new obligation or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be presumed, out of respect to the legislature, to be intended not to have a retrospective operation. Where vested rights are affected, prima facie it is not a question of procedure”. 10 Going by the above position, even if I were to follow the second school of thought imposed by Mr. Mteweale's advocate still the parties in the impugned decision had an accrued right which to date is unattended. The matter subject to this appeal was instituted in 2015 and the amendment of the Government Proceedings Act is of 2019. And that the Court of Appeal in Civil Case No. 343 of 2020 ordered retrial due to anomalies encountered in the trial tribunals' proceedings namely failure of the Chairman to administer oath or affirmation to all witnesses in Land Case No. 121 of 2015. Since the Court of Appeal made the referred order while aware of the existing amendment and that the proceedings subject to this appeal were instituted prior to the said amendment, the trial tribunal had no other option than adhering to the superior court's order. This means that retrials ordered in cases filed before the Act's commencement will generally proceed under the law that was in force at the time those cases were initiated which is the import of the cited section 22 of the Act by Mr. Denni's advocate. The above stance goes contrary to the submission of Mr. Vungwa SA who stated that the appellant ought to have filed a new case before a competent court. He

based his submission on the case of Adjane (Supra) where it was held that retrial is as if there were no trial at all. Mr. Vungwa admitted the proceedings were defective in the proceedings subject to 11 this appeal. If the same were defective there were no cases resulting in retrial. Going between the lines the submission of Mr. Vungwa State Attorney appears to have an element of going against the Court of Appeal order a position which I will not even try to align with for the reasons herein above endeavoured. In light of the above analysis, I find this appeal with merit. And I proceed to allow it without cost. I quash all proceedings resulting to an order dated 7.8.2024 and set aside its order in application No. 121 of

2015. I order the application be heard a fresh by another tribunal Chairman in compliance with the retrial order ordered by the Court of Appeal in Civil Appeal No. 343 of 2020. It is so ordered. DATED at MWANZA this 20th day of November, 2024. W.M.CHUMA JUDGE 12 The judgment delivered virtually in court in attendance of Mr. Dennis Kakere advocate for the appellant, Mr. Fidelis Mteweale advocate for the first respondent, and Mr. Joseph Vungwa State Attorney for the second respondent this 20th day of November, 2024. W.M. CHUMA JUDGE 13

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