

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
LABOUR DIVISION
IN THE LABOUR COURT ZONE CENTER
AT MOSHI

LABOUR REVISION NO. 37 OF 2020

(Originating from Labour Dispute No MOS/CMA/M/129/2016
before H. T. Lukeha, Mediator delivered on 16th May 2016 in the
Commission for Mediation and Arbitration at Moshi)

- 1. EVANS .G. MINJA**
- 2. BARIKI .R. MINJA**
- 3. MELKIZEDECK .B. MOSHA**
- 4. CHARLES .K. SHIO**
- 5. ROBATH .H. LYIMO**
- 6. GODBLESS .Y. NGOWI**
- 7. EDWARD .T. MUSHI**

----- **APPLICANTS**

VERSUS

BODI YA WADHAMINI SHIRIKA LA HIFADHI
YA TAIFA (TANAPA) ----- **RESPONDENT**

RULING

MUTUNGI .J.

The applicants herein filed an application for Revision to challenge the decision of the Commission for Mediation and Arbitration of Moshi by H. T. Lukeha. The Application is made by Chamber Summons under section 91(1)(a), 91(2)(c) and section 94(1)(b)(i) of the

Employment and Labour Relations Act [CAP 366 R.E 2019; and Rule 24(1) and 2(a),(b),(c),(d),(e) and (f), and section 24(3)(a),(b),(c)and(d), Rule 24(11) and Rule 28(1),(c),(d) and (e)of the Labour Court Rules 2007 GN No.106 of 2007).

The Application is supported by the applicants' joint affidavit. Upon filing the counter affidavit, the respondent filed a notice of Preliminary Objection. The point of objection is failure to observe the mandatory legal requirement set out under Government Proceedings Act, Cap 5 as amended from time to time.

Mr. Benard Mganga learned advocate on the outset submitted, by virtue of section 8(1)(a) of National Parks Act, Cap 282 R.E 2002 the respondent (Tanzania National Parks) is a body corporate with the name styled Trustee of Tanzania National Parks. Further that, in terms of section 3 of the Public Corporation Act, Cap 257(the public Corporation Act) the respondent is wholly owned by the Government and under section 9 of the same is managed by Boards established under section 8(1)(a)(b) styled as "*the trustees of National Parks*". In his view such boards control, manage, maintain and administer TANAPA and so it is owned by the Government.

The learned advocate further contended that, under section 6(3) of the Government Proceedings Act, Cap 5 whenever a Public corporation is sued the Attorney General must be joined as a necessary party.

He went on to raise the question whether a suit includes an application as envisage under section 25 of the Written Laws (Miscellaneous Amendment) Act No 1 of 2020. He settled that the question has been answered in the case of **MSK Refinery Limited vs TIB Development Bank Limited and Another Misc Application No 307 of 2020 (HC at Dar es Salaam Unreported)** where the court defined a suit to mean any proceedings by a party or parties against another in a court of law.

That being the position, he was of the view the Attorney General in this Application is a necessary party who was not joined in this application. In that regard it offends section 6(3) of the Government Proceedings Act as amended by Laws (Miscellaneous Amendment) Act no 1 of 2020 and clarified as per the decision in the case of **Burafex Limited (formerly known as) AMETAA LIMITED VS REGISTRAR OF TITLES, Civil Appeal No 235 of 2019** that: -

"...non-joinder of the Attorney General in terms of section 6(3) of GPA will cause the government not to

be represented by his chief Legal Adviser and so vitiates the proceedings".

Conclusively the learned counsel prayed, since the applicant did not comply with the mandatory requirements of law, this application should be dismissed with cost.

In reply to this submission, Mr. Benedict Bahati Bagiliye representing the applicants submitted, the preliminary objection is grossly misconceived and proceeded to quote the wording of section 6(3) of Government Proceedings Act and underlined the words **upon the expiry of notice period**. He submitted before joining the Attorney General as a necessary party it is required to issue a 90 days' notice and upon expiring of it, is when the Attorney General is joined. The requirement of notice is under section 6(2) of the Government Proceedings Act. He also quoted **section 190(1) of the Local Government District Authorities Act Cap 287** as amended by **section 31 of the Written Laws (Miscellaneous Amendment Act No. 1 of 2020** and **section 106(1) of the Local Government Urban Authorities Act**, to support his point that, even in similar provisions against the Government, one has to file a ninety day's notice before commencement of a suit.

In a nutshell the suits referred under the above provisions are those which have not yet commenced or instituted in the court, but those which are about to be instituted in the court against the government. In his settled view the notice referred is the notice of intention to sue which is before the suit is lodged in a court of law and not before.

The Counsel for the applicants further expounded, the requirement of joining the Attorney General was not in operation when this suit was instituted way back in 2016. This being a labour revision which is the continuation of the labour dispute christened MOS/CMA/M/129/2016, then he was of the view, no party to the original dispute can be added as a party on appeal or revision. Be as it may, the Respondent was expected to cite the law which allows joining a new party on appeal or revision.

Commenting on the two cases cited by the Respondent's counsel, he submitted these are distinguishable from this application. In the case of **MSK REFINARY REFINARY LIMITED (supra)** the court struck out the same after the matter had been filed following the amendment of section 6(3) of Government Proceedings Act.

The learned advocate was of the view that, it was worth striking it out because, the Attorney General was not joined in the main suit and in the miscellaneous application as a necessary party according to the law which required a ninety day's notice before filing the main case. The same would go to the miscellaneous application emanating from the said suit.

As far as the **Burafex** case is concerned it was submitted, it was an appeal against the decision of the Registrar of titles for not registering the petitioner. For that, it was a statutory appeal which does not originate from any proceedings of a court or tribunal nor were there proceedings between parties to the suit. The Registrar gave his decision while conducting his normal duties of registration. On appeal he was being sued in his capacity for the first time hence a notice of intention to sue a Government employee had to be served on the Attorney General and on the expiry of the notice the Attorney General was not joined.

The learned advocate was of the view, the suit at hand is not commencing rather it is the continuation of the lower dispute. That is why the respondent did not raise the issue of joining the Attorney General as it was not the

legal requirement when the suit was instituted at the CMA.

The learned Counsel was of the settled opinion that even if the court finds the preliminary objection meritorious, the remedy is not to struck out the application, taking into account that this is Labour revision which is governed by Labour Court Rules and not Government Proceedings Act. Under Rule 44(8) of the Labour Court Rules GN 106 of 2007 which provides a suit shall not be defeated by reason of mis-joinder or non-joinder of parties.

The advocate for the applicant concluded by praying the preliminary objection be overruled and the court to proceed with the hearing of the revision.

In rejoinder, it was contended that non-joinder of the Attorney General is fatal as per section 6(3) of Government Proceedings Act. The said section is coached with the word **shall** and under **section 53(2) of Law of Interpretation Act, Cap 1 R.E 2002** this means the function must be performed. The preliminary objection is premised under **section 6(3) of the Government Proceedings Act** for non-joinder of the Attorney General and not section 6(2) of the same Act as submitted by the applicant's advocate. Further the counsel had submitted

that, under **section 25(3) and 26(4) of the Written Laws Miscellaneous Amendment Act No.1 of 2020** The Trustee of the Tanzania National Parks is the Government. The learned advocate contended that section 6(3) as cited by Respondent is trying to pre-empt the Preliminary Objection. Not all suits against the Government will be instituted upon expiry of 90 days. He submitted that joining of the Attorney General has no exception and the rationale behind is provided for under **Article 59(3) and (4) of the Constitution of United Republic of Tanzania** as amended from time to time.

Under the already cited sections, The Applicants were required to join the Attorney General in this Application. The circumstance suggests that the Applicants were ignorant of the amendment of No. 1 of 2020 Government Notice No. 8 of Vol. I. He concluded by stating non joinder of the Attorney General in all matters pertaining to the Government is a mandatory requirement and is fatal. Not even by complying with section 6 (3) of the Government Proceedings Act could cure the defect without specifically mentioning so in the pleadings.

I have considered the submissions of the parties, the law and concluded that, the parties are not disputing the

legal requirement of **section 6(3) of the Government Proceedings Act**. I have narrowed down and found, the issue in controversy between the parties is ***whether the requirement of section 6(3) of Government Proceedings Act, Cap 5 R.E. 2019 as amended by Act No.1 of 2020 applies to this Application.***

The amendment itself was to the effect that: -

*"..(3) **All suits against the Government shall**, upon 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.**" (Emphasis mine)*

Having synthesized the foregoing rival submissions, it is undisputed that this application emanates from the CMA and it is also undisputed that in the CMA the Attorney General was not party to the dispute. The initial dispute was instituted in 2016 and the requirement to join the Attorney General was through **Act No. 1 of 2020**. The sub

issue would then be ***whether this amendment has retrospective effects.***

It is settled that every Act comes into operation on the date of publication or other date as provided for in the same Act. Under **section 14 of the Interpretation of Laws Act, Cap 1 R.E 2019** provides: -

“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 date, on that date.”

Under section 15 of the same act provides: -

“Where any written law, or portion of a written law, comes into operation on a particular day, it shall come into operation at the beginning of that day.”

From the above provisions the Act is not expected to act retrospectively. In the case of the **Director of Public Prosecutions vs Jackson Sifael Mtares and 3 Others, Criminal Appeal No 2 of 2018 at pg. 27 (unreported):** -

“Normally, it may not be made to apply retrospectively where the said legislation

affects the substantive rights of the potential victims of that new law."

From the above provisions of law, joining the Attorney General at this point in time will affect the whole suit filed in the CMA way back in 2016.

Coming back to the matter at hand, this is not the original suit, meaning that it emanates from the Commission of Mediation and Arbitration where the Attorney General was not a party. Joining the Attorney General at this point of the revision would not only be fatal to the applicants but to justice itself.

Moreover, this court supports the submission made by Applicant that, even if the Attorney General was to be joined as a necessary party still the preliminary objection cannot dismiss the entire application for revision taking into consideration the overriding objective principle which requires courts to consider substantive justice and **Rule 44 (8) of the Labour Courts Rules G.N 106 of 2007** which states: -

"No suit shall be defeated by reason of mis-joinder or non-joinder of parties and the court may in every suit

deal with the matter in controversy as regards to the right and interest of the parties actually before it."

It follows, it will not be in the interest of justice to dismiss the entire application just because of non-joinder of the Attorney General.

All said and done, the Preliminary Objection is found to have no legs to stand and for that, I dismiss the same and the Application for Revision to proceed on merits.



B. R. MUTUNGI
JUDGE
18/3/2021

Ruling read this day of 18/3/2021 in presence of Mr. Benedict Bagiliye for the Applicant and Mr. Benard Muganga for the Respondent.

B. R. MUTUNGI
JUDGE
18/3/2021

RIGHT OF APPEAL EXPLAINED.