

IN THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION
AT DAR ES SALAAM
COMMERCIAL CASE NO. 115 OF 2019

ALLAWI RAJAB KASSIM.....PLAINTIFF

VERSUS

EFATHA BANK LIMITED under RECEIVERSHIP

OF THE DIRECTOR, DEPOSIT

INSURANCE BOARD..... 1ST DEFENDANT

MARK AUCTIONEERS AND

COURT BROKERS CO. LTD.....2ND DEFENDANT

KILEO MSONGORYU EDMOND.....3RD DEFENDANT

GLORY EDMOND KILEO.....4TH DEFENDANT

Date of Last Hearing: 09/08/2023

Date of Ruling: 18/08/2023

RULING

MKEHA, J:

The proceedings in this case were ordered to be stayed in the year 2020 because of pendency of a land dispute between the parties. When the parties appeared for resumption of the stayed proceedings, the court probed them to address it on competence of the suit in circumstances

whereby there was non-joinder of the Attorney General in a suit involving the Government`s Agency as one of the defendants.

Mr. Emmanuel Mbuga learned advocate for the plaintiff submitted that, joinder of the Attorney General was not a mandatory requirement since the suit had been instituted on 04th October 2019 when there was no legal requirement of making the Attorney General a necessary party in all suits involving Government Agencies. The learned advocate went on to submit that, although he was aware that procedural amendments would have retrospective effect, that was not the case in respect of an amendment to the Government Proceedings Act which in section 22 suggests that, matters which had been instituted in court before 2020 would survive the retrospective effects of the 2020 amendments if any. Alternatively, the learned advocate prayed for leave to amend the plaint, thereby simply adding the Attorney General as a necessary party.

Mr. Amiri Mshana learned advocate for the 3rd and 4th defendants submitted in reply that, the suit ought to be struck out so as to start afresh by issuing a notice of intention to sue the Government. According to the learned advocate, there was no dispute; the 2020 amendments had retrospective effect. According to the learned advocate, in the event the

Government opts to resolve the dispute upon being served with notice there would be no necessity of coming back to court. According to the learned advocate, considering the stage at which the suit had reached, before commencement of hearing, the plaintiff would suffer no harm by starting afresh as the right to sue survived at all times when the suit remained pending in court.

The only issue for determination is whether sections 24 to 26 of the Written Laws (Miscellaneous Amendments) Act No. 1 of 2020 provide for an exception to the effect that the procedural amendments made to the Government Proceedings Act would not operate retrospectively. To be able to respond to this issue, it is necessary to reproduce sub-sections (3) and (4) of section 25 of the amending Act. They provide as hereunder:

"(3) 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.

(4) Non-joinder of the Attorney General as prescribed under subsection (3) shall vitiate the proceedings of any suit brought in terms of subsection (3).....”

It was the submission of the learned advocate for the plaintiff that, since the requirement for joining the Attorney General as a necessary party came after the suit had been instituted; the same ought not to apply in the said suit. Much as the learned advocate was mindful that procedural amendments ought to apply retrospectively, he was of the considered view that, section 22 of the Government Proceedings Act saved his client`s suit.

In the case of **THE DIRECTOR OF PUBLIC PROSECUTIONS VS. JACKSON SIFAEI MTARES AND 3 OTHERS**, Criminal Appeal No. 2 of 2018, the Court of Appeal cited with approval the following passage by A.B. Kafaltya, in his book titled “Interpretation of Statutes” 2008 Edition, Universal Law Publishing 6, New Delhi-India:

“When the legislature alters the existing mode of procedure, the litigant can only proceed according to the altered mode. It is well settled principle that “alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should

*not be". The rule that "retrospective effect is not to be given effect to laws" does not apply to statutes which only alter the form of procedure or the admissibility of evidence. **Thus amendments in the civil or criminal trial procedure, law of evidence and limitation etc, where they are merely the matters of procedure, will apply even to pending cases.** Procedural amendments to a law, in the absence of anything contrary, are retrospective in the sense that **they apply to all actions after the date they came into force even though the action may have begun earlier or the claim on which the action may be based accrued on an anterior date.** Where a procedural statute is passed for the purpose of supplying an omission in a former statute, the subsequent statute relates back to the time when the prior statute was passed. All procedural laws are retrospective, unless the legislature expressly says "they are not". See also: **SHEAR ILLUSIONS LIMITED VS. CHRISTINA ULawe UMIRO**, CIVIL APPEAL NO. 114 OF 2014, CAT, AT DAR ES SALAAM.*

Therefore, according to the position of the law as indicated hereinabove, the requirement for joining the Attorney General as a necessary party in all suits in which the Government has interest, being a procedural

requirement, applies to all such suits including those instituted before the coming into force of Miscellaneous Amendment Act No. 1 of 2020. In terms of sub-section (3) of section 25 of an Act that amended the Government Proceedings Act in 2020, as correctly submitted by Mr. Amiri Mshana learned advocate for the 3rd and 4th defendants, the Attorney General has to be joined as a necessary party after expiry of the notice period. It has been observed that, a statutory notice to the Government before filing a suit gives the Government the opportunity to settle the claim before a lawsuit is filed and that, it enables the Government to investigate the claim so that it can properly defend itself or correct the conditions or practices that led to the claim. I subscribe to this observation. That being the position, the submission in the alternative by the learned advocate for the plaintiff, that, the plaintiff be allowed to amend the plaint by merely joining the Attorney General without prior statutory notice to him, if given effect, would deny the Attorney General an opportunity to attain these important objectives in serving notice before suing. Besides, doing so would amount to breach of mandatory provisions of the Government Proceedings Act that, a suit be filed upon expiry of statutory notice to the Government.

The learned advocate for the plaintiff was of the view that, the present suit is saved by the provisions of section 22 of the Government Proceedings Act. I respectfully disagree. In terms of the said provision of the law, only proceedings which were instituted before the commencement of the Government Proceedings Act are exempted.

For the foregoing reasoning, the suit is struck out for being incompetent. Should a need arise to re-institute the suit; the fees previously paid by the plaintiff in respect of this suit will be deemed to have been paid in respect of the new suit. The reason for waiver of fees on part of the plaintiff is the fact that, filing of a fresh suit is not in any way attributed to the plaintiff's fault but changes in law. I make no order as to costs.

DATED at DAR ES SALAAM this 18th day of AUGUST 2023.

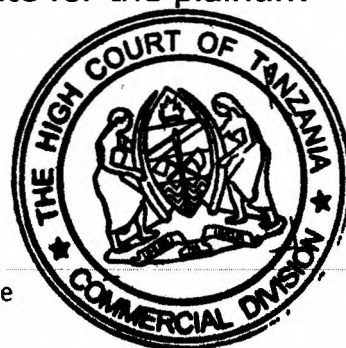



C. P. MKEHA

JUDGE

18/08/2023

Court: Ruling made in the presence of Mr. Emmanuel Mbuga learned advocate for the plaintiff.




C. P. MKEHA

JUDGE

18/08/2023