IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KISANGA, J.A., RAMADHANI, J.A., And MFALILA, J.A.)

CIVIL APPEAL NO. 48 OF 1994

BETWEEN

NATIONAL HOUSING CORPORATION. . . APPELLANT

AND

TANZANIA SHOE COMPANY And
28 OTHERS. . . . . RESPONDENTS

AND

THE ATTORNEY GENERAL . . . NECESSARY PARTY

(Appeal from the Judgement and Decree of the High Court of Tanzania at Dodoma)

(Mwalusanya, J.)

dated the 22nd day of July, 1994

in

Misc. Civil Cause No. 1 of 1993

JUDGEMENT OF THE COURT

KISANGA, J.A.:

This appeal arises from the decision of the High Court (Mwalusanya, J.) granting orders of certiorari and prohibition against the appellant, The National Housing Corporation (N.H.C.), for having effected rent increases to its tenants to the tune of 800% per annum. Before the matter proceeded to hearing the trial judge, following representations from the Bar, ruled that in terms of Section 17A (2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions Ordinance) Cap. 360 as amended by Act No. 27 of 1991, the Attorney-General be served to appear. The case was then adjourned a number of times between 23.7.93 and 16.6.94 because the Attorney-General could not be served. The record shows that when the case came on for hearing on 16.6.94 Mr. Mussa, the Senior State Attorney Dodoma, communicated the following information

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to the Court:-

> "Mussa - Senior State Attorney: We do not like to be heard. Counsel for the defendants will take care of our interests."

Following receipt of such information the Court proceeded to hear the case at the conclusion of which it granted orders of certiorari and prohibition as indicated above.

In this appeal the appellant corporation is represented by a team of three advocates, namely, Mr. N. Rweyemamu, Mr. E.D. Kisusi and Mr. N. Mselem. The respondents are represented by Mr.D.C. Mbezi, learned advocate, while the Attorney General was at first represented by Mr. E. Kifunda and later by Mr. S.B. Salula, learned State Attorney and Senior State Attorney, respectively.

On behalf of the appellant, a memorandum of appeal was filed containing a total of 13 grounds of appeal. But at the commencement of the hearing we directed counsel for both sides to address us first on grounds 3 and 4 only which raise the issue of jurisdiction or competence of the trial Court, it being apparent that should those grounds succeed, that was sufficient to dispose of the entire appeal, and it would serve no practical purposes to argue the rest of the grounds. The two grounds allege as follows:-

> "3. That the learned trial judge erred in law in holding that the Attorney-General was duly served without considering the question whether the Attorney-General or his representative

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designated by him for that purpose was summoned to appear as a party to the proceedings in the trial Court.

4. That the learned trial judge erred in law in commencing and continuing the proceedings in the trial Court without summoning the Attorney-General or his representative designated by him for that purpose to appear as a party to the proceedings in the trial Court."

Essentially these grounds are alleging non-compliance with the provisions of Section 17A (2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance Cap. 360, as amended by Act No. 27 of 1991. That sub-section provides that:

"17A (2). In any proceedings involving the interpretation of the Constitution with regard to the basic freedoms, rights and duties specified in Part III of Chapter I of the Constitution, no hearing shall be commenced or continued unless the Attorney-General or his representative designated by him for that purpose is summoned to appear as a party to those proceedings; save that if the Attorney-General or his designated representative does not appear before the Court on the date specified in the summons, the court may direct that the hearing be commenced or continued, as the case may be, ex-parte."

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The sub-section requires that the Attorney General be summoned as a party in the proceedings which involve the interpretation of the Constitution with regard to basic rights and freedoms enshrined in the Constitution.

Mr. Mbezi seemed to doubt the applicability of this provision to the facts of the present case which, in his view, did not raise the question of interpretation in the sense of clarifying some provision or provisions of the Constitution. With due respect however, we think that this argument is misguided. The case seeks to challenge the constitutionality of Government Notice No. 41 of 1992 which, it is alleged, is discriminatory in its effect and which denied the respondents their right to be heard before the appellant corporation, their land lord, effected rent increases unilaterally and arbitrarily. We are of the settled view that these are matters which fall squarely within the purview of the sub-section, and we can find no justification for counsel's misgivings on that point. It seems that a question might arise whether or not claims of unconstitutionality can be remedied or redressed upon application, as in this case, for certiorari and prohibition, but that of course is a different matter; the point here is that the issue of constitutionality of a subsidiary legislation was raised, in which case sub-section (2) above quoted was applicable.

The pertinent question now, therefore, is whether or not the trial was conducted in contravention of Section 17A (2) of Cap. 360 as amended by Act No. 27 of 1991. For the appellant corporation it is alleged that it was, and the Attorney General is in agreement.

However, the advocate for the respondents maintains that it was not. In an attempt to resolve this question we recorded additional evidence from a number of witnesses. Mr. K.M. Mussa, Senior State Attorney Dodoma in his evidence before us seriously disputed the indorsement on the Court record by the trial judge on 16.6.94 to the effect that they did not wish to be heard and that counsel for the defendants/appellant corporation would take care of their interests. Mr. Mussa denied making any such statement and indeed went on to say that on the day in question i.e. 16.6.94 he was on safari away from Dodoma where the proceedings were being conducted.

Further additional evidence from witnesses confirms that on the day in question Mr. Mussa did not, in fact, attend the Court in Dodoma to state therein what has been attributed to him. On the evidence, what appears to have happened was that when on 16.6.94 the Attorney General did not appear, and indeed there is no indication whatsoever that he was summoned for this date, the trial judge adjourned the case briefly with instructions to his clerk, one Mr. B.S. Kihame, to contact the office of the Senior State Attorney Dodoma to find out what was the position of the Attorney General in the matter. According to Mr. Kihame who gave additional evidence before us, he spoke to Mr. Mussa over the telephone, and the gist of that conversation as reported back by Mr. Kihame is contained in the judge's endorsement on the file as reproduced earlier.

In a farther attempt by Mr. Mussa to establish his absence from Dodoma on the particular day, he stated that between 12.6.94 and 22.6.94 he was away in Singida on a special assignment by the

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Minister for Justice, that he had taken out an imprest for his subsistence allowances covering that whole period, that he returned to Dodoma on 19.6.94, and finally he referred to a document dated 30.6.94 against which he had retired the said imprest. He therefore maintained that he could not have been in Dodoma on 16.6.94 to state what he is alleged to have told the judge's clerk over the phone.

It is not conclusive that on 16.6.94 Mr. Mussa was not, or could not have been, in Dodoma. While Mr. Mussa maintains that he was away on that day and that he returned to Dodoma only on 19.6.94, Mr. Kihame, the judge's clerk, equally maintains that he spoke to him over the phone in Dodoma that day and got from him the information which he relayed to the judge. Thus it amounts to one man's word against another, and there is really no good reason for preferring the one to the other. As the evidence stands, it is possible that Mr. Mussa could have returned to Dodoma before 19.6.94 and thus could have spoken on the phone to Mr. Kihame on 16.6.94.

However, even assuming that this is what, in fact, happened, does it amount to saying that there was compliance with the provisions of sub-section (2) above quoted? In order to comply with that sub-section, it was necessary to show that the Attorney General or his representative designated for that purpose was summoned to appear as a party to the proceedings. Mr. Mbezi contended that the Attorney General was duly summoned, and in support of this submission he relied on a summons dated 19.10.93

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sent to the Attorney General and requiring him to appear for mention of the case on 12.11.93. However, in that summons the Attorney General is not cited as a party. He is summoned merely as the Attorney General, while the only parties to the case are shown to be Tanzania Shoe Company Ltd. and 28 Others (Plaintiffs) and National Housing Corporation (Defendant).

In this connection reference was made to the case of Lausa Alfan Salum and 106 Others v. Minister for Lands Housing and Urban Development and National Housing Corporation Civil Appeal No. 15 of 1994 (Unreported) in which, as in the present case, the constitutionality of Government Notice No. 41 of 1992 was challenged. It was contended that in that case the Attorney General was not cited as a party, and yet this Court proceeded to deal with the appeal on the merits. It seems to us, however that that case is distinguishable. In the first place in that case no objection was raised that the Attorney General was not cited or summoned as a party. In the present case, however, the non-summoning of the Attorney General was objected to from the very beginning of the trial. Indeed as shown above, Lausa's case cited the Minister for Lands, Housing and Urban Development as a party, and at the hearing the Minister was represented by the Senior State Attorney. The clear object of sub-section (2) above quoted is to make sure that the Government is afforded the opportunity to be heard upon an application for a prerogative order. Thus it seems to us that the citing of the Minister instead of the Attorney General was not an irregularity which went to the root of the matter. For, one case say that the Government was, in a real sense, a party to the case especially as the Senior State

Attorney on behalf of the Attorney General and representing the Minister for Lands Housing and Urban Development, appeared and participated in the proceedings. In other words the Government was, in a true sense, afforded the opportunity to be heard. There was compliance with the spirit, though not with the letter, of the sub-section, and had the Attorney General been cited instead of the Minister, it would not have made the slightest difference in the conduct of the proceedings.

In the instant case the summons which was addressed to the Attorney General was returned with an indorsement on it that:-

> "Attorney General is not a part of (sic) this suit. I think this notice was to be served to the Secretary, National Housing Corp."

It seems plain to us that by such indorsement the Attorney General refused, and rightly so in our view, to accept service. Thus we could find no justification whatsoever for the view that the Attorney General was duly served for the purpose of the present case. Furthermore it should be noted that the said summons was asking the Attorney General to appear on 12.11.93 for the purpose of mentioning the case only. But as intimated earlier, there is not the slightest evidence or suggestion that any process was ever sent out to summon the Attorney General for the hearing of the case either on 16.6.94 when the hearing commenced or any day subsequent thereto.

Once we hold, as indeed we do, that the Attorney General was not summoned as a party to appear for the hearing on 16.6.94, then

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there can be no basis for saying that Mr. Mussa, the Senior State Attorney Dodoma, was summoned as the Attorney General's representative designated for the hearing on 16.6.94. For, the Attorney General cannot have designated Mr. Mussa to take part in the proceedings on 16.6.94 to which proceedings the Attorney General himself was not summoned and to which he was not a party. In which case, therefore, the calling by the Court upon Mr. Mussa on 16.6.94 and what Mr. Mussa is alleged to have said on that day that they did not wish to be heard etc. etc. even if it be true, all this becomes wholly irrelevant for the simple reason that Mr. Mussa was not the representative of the Attorney General within the meaning of the sub-section. In other words, in terms of the sub-section Mr. Mussa had no authority to be contacted or to say anything on behalf of the Attorney General in this matter, especially after the Attorney General had expressly stated on the summons which was sent to him that he was not a party to the case.

It is true that the sub-section under consideration empowers the Court, in certain circumstances, to commence or continue hearing the case ex-parte if the Court so directs. But in this case the Court did not direct that the hearing be commenced or continued ex-parte. Indeed, if we may say so in passing, the circumstances of the case could not have warranted any such direction.

The available evidence, therefore amply demonstrates that on 16.6.94 the Attorney General or his representative designated for the purpose was not summoned as a party to the case before the Court. Indeed the Attorney General was not summoned at all on that day or on any day thereafter. Nor did the Court direct that the

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proceedings be commenced or continued ex-parte. Section 17A (2) of Cap. 360 as amended by Act No. 27 of 1991 reproduced above is couched in mandatory terms, and in the light of the foregoing the hearing of the case was commenced and continued in contravention thereof. The trial was commenced and continued in the absence of the necessary party and in the absence of any direction by the trial Court to do so. Thus the Court proceeded without authority and that constituted a major defect which went to the root of the trial. It rendered the proceedings null and void. In the event, the appeal succeeds. The proceedings before the High Court are declared null and void and are accordingly set aside.

As regards costs, Counsel for the appellant corporation asked us to certify costs for three Counsel on the ground that the appeal raised complicated issues and that it involved the calling of a number of additional witnesses to give evidence during the appeal.

Although a total of 13 grounds of appeal were filed, only 2 grounds were argued, namely grounds 3 and 4. These grounds raise the issue of commencing and continuing the proceedings in the absence of the necessary party i.e. the Attorney General. That issue had surfaced from the very beginning. Indeed at some stage before the hearing started the trial Court had to rule, following representations from the Bar, that the case be adjourned until the Attorney General was served. In other words the necessity of having the Attorney General participating in the proceedings was clearly seen and appreciated from the very start. However, as it transpired, the Attorney General was never served and yet the trial commenced and proceeded without any direction by the trial Court to proceed without him.

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It ought to have been quite clear to the advocate preparing, or counselling the preparation of, the memorandum of appeal that the Attorney General's lack of participation in the proceedings must be made a ground of appeal. Upon a glance through the proceedings, it should have been equally easy to see that the appeal stood great chances of succeeding on that ground alone. In our considered view it was not really necessary to mobilize or enlist the services of three Counsel to see or discover these points; a single advocate would do for the purpose. It is on that account that we find ourselves unable to certify costs for three Counsel.

In the event, we allow the appeal with costs for one Counsel only.

DATED at DAR ES SALAAM this 26th day of October, 1995.

R.H. KISANGA
JUSTICE OF APPEAL

A.S.L. RAMADHANI
JUSTICE OF APPEAL

L.M. MFALILA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(M.S. SHANGALI)
DEPUTY REGISTRAR