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S.S. MAKORONGO *v.* SEVERINO CONSIGILIO

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COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM

(Ramadhani, Munuo and Nsekela, J.A.)

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CIVIL APPEAL No. 6 OF 2003

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam, Kalegeya, J., dated 19 July 1998 in Civil Appeal No. 105 of 1998)

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Statute – Retrospective Effect – Statute is amended to take away right of appeal – Whether the amendment has effect on an appeal that was already pending – Section 5(2)(d) of the Appellate Jurisdiction Act 1979, as amended by

F *Act Number 25 of 2002.*

Appeal – Court of Appeal Rules – Notice of Appeal signed for and on behalf of the Registrar.

G *Whether the notice is valid – Rules 15 and 76 of the Tanzania Court of Appeal Rules 1979.*

This was an appeal against the decision of the High Court, a decision which did not finally determine the matter. In this appeal to the Court of Appeal the issue was

H whether the appeal was competent in view of the amendment to section 5(2)(d) prohibiting appeals against preliminary of interlocutory decisions that do not render a case finally determined; the amendment prohibiting such appeals was made after the Notice of Appeal against the High Court decision had been lodged. Another issue concerned the validity of the Notice of Appeal signed not by the Registrar but signed

I for and on behalf of the Registrar.

Held: (i) An Act of Parliament should not be given restrospective construction unless the subject matter or the wording of the Act clearly indicates that intention;

(ii) The right to appeal which the appellant had at the time of instituting the appeal was not taken away by Act Number 25 of 2002 which was passed subsequently;

(iii) A Notice of Appeal not signed by the Registrar but signed "for the Registrar" is not invalid;

Orders accordingly

Cases referred to:

(1) *Municipality of Mombasa v. Nyali Ltd* [1963] EA 371

(2) *Yew Bon Tew v. Kendaraan Bas Mara* [1983] 1 AC 553

(3) *Garikapati Veeraya v. Subbiah Choudhry* AIR 1957 SC 540

(4) *Societe General de Surveillance S.A. v. VIP Engineering and Marketing Ltd,*[2004] T.L.R. 120

(5) *William Loitiame v. Asheri Naftali,* [2003] T.L.R.

(6) *Tanzania Revenue Authority v. Al Naeem Enterprises Ltd,* Civil Appeal Number 8 of 2001 (unreported)

(7) *21st Century Food and Packaging Ltd v. Tanzania Sugar Producers Association and two others* [2005] T.L.R. 1

Statutory provisions referred to:

(1) Appellate Jurisdiction Act 1979, sections 5, 5(2)(d)

(2) Interpretation of Laws and General Clauses Act 1972 Chapter 1, sections 10(2), 14(c)

(3) Companies Ordinance, section 331

(4) Tanzania Court of Appeal Rules 1979, rules 15, 8391), 86 and 76

(5) Written Laws (Miscellaneous amendments) Act Number 25 of 2002

Mr El-Maamry, for the Respondent

RULING OF THE COURT

(Dated 11 March 2004)

Nsekela, J.A.: This is an appeal against the decision of Kalegeya, J. in Civil Appeal Number 105 of 1998. the court *suo moto* invited the parties to address the court on the effect on the appeal of section 5(2)(d) of the appellate Jurisdiction Act 1979 (the Act) as amended by the Written Laws (Miscellaneous Amendments) Act Number 25 of 2002 which now provides:

> No appeal or application for revision shall lie against or be made in respect of any preliminary or interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the criminal charge or suit.

The appellant, Mr S.S. Makorongo appeared in person and unrepresented. He did not have anything useful to contribute on this legal point. Mr El-Maamry, who advocated for the respondent, very briefly submitted that the decision of Kalegeya, J. did not finalize the suit and that no evidence had been adduced in the Lower Courts. As such the appeal before the court was premature in terms of section 5(2)(d) of the Act as amended by Act Number 25 of 2002.

The decision of the High Court (Kalegeya, J.) that is being appealed against was delivered on the 19 July 1999 and the appellant filed Notice of Appeal on the 26 July 1999. Act Number 25 of 2002 came into force on the 20 December 2002, the day it was published in the Gazette. In his decision, the learned judge concluded as under:

> The case to be heard and determined on merits before another Magistrate.

It is clear to us that the appeal before the learned judge was not finally determined and was remitted to the Lower Court to be determined on the merits. The question which now arises is, did the amendment to section 5(2)(d) of the Act cover this appeal? Put differently, did the amendment have retrospective effect? The amendment came into

force during the pendency of the appeal section 10(2) of the Interpretation of Laws and General Clauses Act 1972 Chapter 1 provides as follows:

> Subject to the provisions of subsection (1) every Act shall come into operation on the date of its publication in the Gazette or, if it is provided either in such Act or any other written law that it shall come into operation on some other date, on that date.

Act Number 25 of 2002 came into force on 20 December 2002. Before that date the appellant had a right to appeal against such decisions of the High Court and the appellant had indeed exercised that right by filing the Notice of Appeal on the 26 July 1999. This takes us to section 14(c) of Chapter 1 which provides:

> 14. Where an Act repeals any provision of another Act, then unless the contrary intention appears, the repeal shall not:
>
> (c) affect any right, privilege, obligation or liability acquired, accrued, or incurred under the provision so repealed.

The general rule of law is that unless there is a clear indication either from the subject matter or from the wording of an Act of Parliament, that Act should not be given a retrospective construction. In the case of *Municipality of Mombasa v. Nyali Ltd.* (1), Newbold, J.A., had this to say at page 374:

> 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 to 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.

Some twenty years later, the Privy Council, speaking through Lord Brightman, in *Yew Bon Tew v. Kendaraan Bas Mara* (2) articulated this principle in the following terms, at page 558 F-G:

> Apart from the provisions of the interpretation statutes, there is at common law a *prima facie* rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in regard to events already past. There is, however, said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed.

Appeals in civil proceedings to this court are governed by section 5 of the Appellate Jurisdiction Act 1979 and rules of court regulating appeals to the court are governed by the Tanzania Court of Appeal Rules 1979 made under the Act. The appellant's right to appeal was in existence at the passing of Act Number 25 of 2002. It was not an amendment to a course of procedure for this would have entailed an amendment to the Court Rules. It did not alter the form of procedure. The amendment affected the appellant's substantive right to appeal which was vested in him when he instituted the suit. The question for our consideration and determination is whether or not section 5(2)(d) of the Act, as amended by Act Number 25 of 2002 takes away the vested right of appeal which the appellant had at the time of the institution of the suit. This vested right of appeal can be taken away only by a subsequent enactment if it so provides expressly or by necessary intendment and not otherwise; see: *Garikapati Veeraya v. Subbiah Choudhry* (3), at page 553. If Parliament intended to bar appeals from decisions of the High Court that did not finally determine the suit, there was an opportunity to do so when enacting the now amended section 5(2)(d). By virtue of Act Number 10 of 1999, subsection 2(d) prohibited appeals against any preliminary

or interlocutory orders of the Commercial Division unless such decision or order had the effect of finally determining the suit; see; Civil Application Number 84 of 2000 between *SGS Societe Generale De Surveillance S.A. and VIP Engineering and Marketing Ltd.* (4). Second, Act Number 25 of 2002 has amended about sixteen (16) different laws including the Appellate Jurisdiction Act 1979. In the same Act however, section 331 of the Companies Ordinance has been amended so as to have retrospective effect. It provides as under:

> The amendment of subsection (3) shall be read as one with the Written Laws (Miscellaneous Amendments) Act 1998 and shall be deemed to have come into force on the 27 March 1998.

Act Number 25 of 2002 came into force on the 20 December 2002, but in the same Act the amendment to the Companies Ordinance has retrospective effect. This is a clear manifestation that the amendment to the Appellate Jurisdiction Act was not intended to have retrospective effect.

There is however another matter which has caused concern to us namely the validity of the Notice of Appeal which is to be found on page 132 of the record. In a number of cases decided by this Court including *William Loitiame v. Asheri Naftali* (5) and *Tanzania Revenue Authority v. Al Naeem Enterprises Ltd.* (6), we have consistently held that a Notice of Appeal which has been signed on behalf of the Registrar of the High Court offends rule 76(6) and Form D of the first Schedule to the Court Rules and is, therefore, invalid. Recently, a panel of this court revisited this stand in *21st Century Food and Packing Ltd. v. Tanznaia Sugar Producers Association, The Minsitry of Finance and The Hon. Attorney General* (7), and after taking into account rule 15 of the Court Rules as well which had not previously been subjected to close scrutiny, concluded, *inter alia*, as follows:

> We find, therefore: One, rules 76 and 86 basically deal with how a Notice of Appeal and a memorandum of appeal, respectively, should be and what they should contain. Two, the lodging of a document is distinct from the endorsement of a document though the two are closely related. Three,

A the lodging of a Notice of Appeal is dealt with rule 76(1) while that of a Memorandum of Appeal is the subject matter of rule 83(1). Four, the endorsement of documents that have been lodged under the respective rules is done under rule 15 by the Registrar or the Registrar of the High
B Court, as the case may be. So, any transgression against rule 15 is committed by those authorities and cannot be imputed on an advocate or an appellant.

We therefore, are of the considered opinion that we ought to depart, and we so do, from all the previous decisions treating notices of appeal or
C memoranda of appeal as invalid because they were not signed by the Registrar or the Registrar of the High Court under rules 76 and 86. We do so because, we believe, that had rule 15 been cited to them, our learned brothers would have decided as we hereby do.

D Admittedly, the Notice of Appeal dated 26 July 1999 was signed "for Registrar," but as explained above, this does not invalidate the Notice of Appeal.

E In the result, the appeal is properly before the court and should proceed on to hearing as soon as it is practicable. Costs to be in the cause.

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