KUKUTIA OLE PUMPUN AND ANOTHER v ATTORNEY GENERAL AND ANOTHER 1993 TLR 159 (CA)

Court Court of Appeal of Tanzania - Arusha

Judge Kisanga JJA , Mnzavas JJA and Mfalila JJA

CIVIL APPEAL NO. 32 OF 1992 B

23 July, 1993

(From the judgment and decree of the High Court of Tanzania at Arusha, Munuo, J.) C

Flynote

Constitutional Law - Suits against the Government - Statutory provision requiring the Minister's consent to sue the Government - Whether constitutional - Section 6 of the Government Proceedings Act 1967. D

Headnote

The appellants sought to sue the Government. They applied for the Minister's consent to sue the Government as required by s 6 of the Government Proceedings Act 1967 but got no reply. They then E called upon the High Court to rule on the constitutionality of that provision of the law; it was null and void as it contravened the Constitution of the United Republic of Tanzania. The respondents did not wish to file a written statement of defence to the claim; instead they lodged with the Court a preliminary objection that the suit was incompetent for want of the Minister's consent to sue the Government. The learned Trial Judge ruled that section 6 of the Government Proceedings Act 1967 F was not unconstitutional and dismissed the suit as incompetent. The appellants to the Court of Appeal.

Held: (i) Section 6 of the Government Proceedings Act 1967 violates the basic human right guaranteed under arts 13(3) and 30(3) of the country's Constitution, of unimpeded access to the Court to have one's grievances heard and determined there; G

(ii) In considering any act which restricts fundamental rights of the individual, such as the right to free access to the Court of law in this case, the Court has to take into account and strike a balance between the interests of the individual and those of the society of which the H individual is part;

(iii) A law which seeks to limit or derogate from the basic right of the individual on grounds of public interest will not be declared unconstitutional if it satisfies two requirements:

(a) that it is not arbitrary; and

(b) that the limitation imposed by such law is not more than is reasonably necessary to I achieve the legitimate objective;

A (iv) Section 6 of the Government Proceedings Act, 1967, as amended by section 6 of Act No. 40 of 1974 is unconstitutional because it violates the basic human right, guaranteed under arts 13(3) and 30(3) of the country's Constitution, of unimpeded access to the Court to have one's grievances heard and determined there;

(v) Section 6 of the said Act is not saved by art 30(2) of the Constitution because it does not B meet the two requirements;

(vi) In terms of art 64(5) of the Constitution of the United Republic of Tanzania s 6 of the Government Proceedings Act, 1967, as amended by Act No. 40 of 1974 is void, and is accordingly struck out for being unconstitutional.

Case Information

C *Appeal allowed.*

Cases referred to:

1. *The Director of Public Prosecutions v. Daudi Pete* [1993] TLR 22.
2. *Peter Ng'omango v. Gerson M.K. Mwangwa and Attorney General,* [1993] TLR 77.
3. *Himid Mbaye v. The Brigade Commander* [1984] TLR 294.
4. *Shabani Khamis v. Samson Goa and Another,* High Court of Zanzibar, Civil Case No. 18 of 1983.
5. *Khalfan Abeid Hamad v. The Director of Civil Aviation,* High Court of Zanzibar, Civil Case No. 20 of 1986.

D

E *A. Mughwai,* for the appellants.

Mrs. A. Sumari, for the respondents.

Editorial Note: Section 6 of the Government Proceedings Act 1967 has since been repealed and replaced so as to conform with this judgment: Government Proceedings (Amendment) Act, 1994, F Act No. 30 of 1994.

Judgment

Kisanga, J.A., delivered the following considered judgment of the court:

G The appellants in this case sought to sue the Government in the High Court to recover damages for trespass assault and conversion. The plaintiff alleges, among other things, that the necessary fiat or consent to sue the Government had been sought but was withheld. The requirement for consent H to sue the Government is imposed by s 6 of the Government Proceedings Act 1967 as amended by Act 40 of 1974 (hereinafter to be referred to simply as s 6). Upon consent being withheld, therefore, the High Court was called upon by the appellants to rule on the constitutionality of s 6, and to hold that that provision was null and void as against the Constitution of the United Republic of Tanzania.

I The respondent Republic did not wish to file any written state-

ment of defence to the claim; instead it lodged with the Court a preliminary objection that the suit was A incompetent for want of the Attorney-General's consent to sue the Government. The case was then adjourned, upon application by Counsel, for written submissions after which the Court (Mrs J Munuo) ruled that s 6 was not unconstitutional, and proceeded to dismiss the suit as being B incompetent. It is from that ruling that this appeal now arises. Arguing the appeal before us were Mr *A Mughwai* , learned Advocate, for the appellants, and Mrs *A Sumari* , learned State Attorney, for the respondent Republic.

In the course of hearing the appeal, and during the submission by Mrs *Sumari* , some doubt arose C whether consent to sue had, in fact, been sought and withheld as

claimed by the appellant's Counsel. However, this doubt was resolved when Counsel for the appellants furnished the Court with documentary evidence that consent was in fact sought and refused. Upon receipt of this information D Mrs *Sumari* stated that hitherto she had been acting on wrong information sought from and supplied by the Attorney-General's Chambers, Dar es Salaam that the appellants had not applied for any consent to sue the Government. She added the because of such misinformation she did not E address the real issue which was before the High Court, namely, the constitutionality of the requirement of consent; instead she had concentrated on the contention that the suit was incompetent for want of consent. Asked what course she proposed to adopt, now that she was informed of the true position, she readily replied that the hearing of the appeal should continue, F adding that during the short adjournment, she had prepared herself sufficiently to respond to Mr *Mughwai's*submissions.

We continued with the matter even though we felt that the learned State Attorney needed more preparation in order to assist the Court in proceeding with the appeal which raised an important G constitutional issue.

The memorandum of appeal raised two grounds:

1. The Honourable Judge erred in law in not determining the real issue before the Court, ie

The interpretation and Constitutionality of the provisions of s 6 of the Government H Proceedings (Amendment) Act 10 of 1974 *vis-à-vis*the Constitution of Tanzania.

2. The Honourable Judge erred in failing to hold that s 6 referred to in para 1 herein is unconsitutional, obsolete and that where there is a dispute between a citizen and the Executive, the Executive cannot lawfully impede or obstruct access to High Court. I

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A On the first ground that the Trial Judge failed to consider and determine the issue before her, that is, the constitutionality of s 6, we think that there is merit in the complaint. Upon reading her brief ruling on the matter, covering just about two pages, it becomes apparent that the learned Judge either did not comprehend the issue before her or, if she did, she deliberately evaded it. Paragraph B 11 of the plaint states, *inter alia* , that:

`The plaintiffs will contend at the trial that it is not in law necessary to obtain the fiat as such requirement is null and C void as it seeks to contravene the basic structure of the Constitution of Tanzania and its specific provisions.'

The appellants specifically called upon the Court to consider the validity of s 6 as against arts 4(1), 108 and 13(6) *(a)* of the Constitution. These articles make provisions for separation of powers, confer D jurisdiction on the High Court to hear and determine complaints and provide for the basic right to a fair hearing. Counsel had submitted that s 6 contravened these provisions of the Constitution and accordingly invited the Court to declare that section null and void.

E In disposing of the issue very briefly the Trial Judge simply said:

`Considering that the Government Proceedings Act 40 of 1974 was properly enacted by Parliament as stipulated in article 97 of the Constitution of the United Republic of Tanzania, it is sound law and does not infringe the provisions F of article 13 and/or article 108 of the Constitution.'

In our view this was, to say the least, a very superficial way of dealing with the issue

which was before the Court. for, the fact that s 6 was duly enacted by a competent Legislature is no answer to G the question whether that section is valid or not as against the Constitution. It is one thing for a provision of the law to be properly or validly enacted by competent Legislature, but quite another for it to be constitutional; the two are not the same.

H The appellant did not allege or even suggest that s 6 was improperly enacted by the Legislation. Their claim was that s 6, although properly and duly enacted by the Legislature, offended some provisions of the Constitution, the supreme law of the land. It did so, the appellants continued, in a number of ways, primarily by denying them the opportunity of having their grievances heard and I determined by the High Court which was duly vested with such jurisdiction. There-

fore what the appellants were asking for was a declaration under article 64(5) of the Constitution that A s 6 was null and void because it was inconsistent with the supreme law of the land. The learned Judge in merely stating that s 6 was sound law because it was properly enacted by a competent Legislature, did not address herself squarely to that issue, and to the extent of such omission she was clearly in error. B

The second ground is really an amplification of the first one. It specifies the matters which the Trial Judge had failed to deal with and to decide upon.
Mr *Mughwai*submitted that s 6 is null and void and should be struck down because it violates the guaranteed right, under the Constitution, of unimpeded C access to the Courts to have one's grievances heard and determined. In this respect he specifically referred to arts 13(3) and (6) *(a)* and 30(3) of the Constitution, the provisions of which we reproduce hereinbelow for case of reference. D

`13(3) The civil rights, obligations and interests of every person and of the society shall be protected and determined by competent courts of law and other state agencies established in that behalf by or under the law. E

(4) . . .
(5) . . .
(6) For the purpose of ensuring equality before the law, the state shall make provisions:
(a) that every person shall, when his rights and obligations are being determined, be entitled to a fair hearing by the court of law or other body concerned and be guaranteed the right of appeal or to another F legal remedy against the decisions of courts of law and other bodies which decide on his rights or interests founded on statutory provisions.
30(3) Where any person alleges that any provision of this part of this chapter or any law involving a basic right or duty G has been, is being or is likely to be contravened in relation to him in any part of the United Republic, he may, without prejudice to any other action or remedy lawfully available to him in respect of the same matter, institute proceedings for relief in the High Court.' H

Learned Counsel submitted that the combined effect of violating these provisions has far reaching consequences. It means that s 6 places an obstacle or obstruction to access to the Courts of Law. The section offends the principle of separation of powers by enabling the Government to exercise a judicial function of deciding upon its civil liability or the extent of such liability and hence to I

A decide whether or not it should be sued at all. It enables the Government to be the judge in its own cause. It also seeks to limit Government liability at the expense of the rights of the individual. It offends against the principle which requires the

Government to be responsible and accountable to its people. It goes against the principle of openness or transparency.

B Referring to article 30(2) *(b)* of the Constitution which permits derogation from human rights in certain circumstances, learned Counsel was of the view that s 6 is not saved because it is too general in its application.

C Replying to these submissions Mrs *Sumari* supported the decision of the High Court that s 6 was not unconstitutional. If we understood her correctly, the thrust of her argument was that although s 6 violates arts 13(3) and 30(3) of the Constitution, that by itself did not make the said section unconstitutional because the complainant of the violation has remedies open to him, such as orders D of *mandamus* and *certiorari*. In other words, if the Government withheld the consent, the appellants could always seek remedy for this by asking for an order of *mandamus* or *certiorari*compelling the Government to give consent or not to withhold consent.

E With due respect to the learned State Attorney, this amounts to evading the issue. It does not really grapple with and answer the question before us. The argument merely echoes the provisions of article 13(3) of the Constitution. That article says that on aggrieved person may seek redress in the High Court, and that this is without prejudice to any other remedy which may be available to him. F This means that the complainant of a violation of a basic human right is free to seek redress under article 30(3) although he could equally well have sought relief by way of *mandamus* or*certiorari* . Therefore if the appellants in this case chose to seek remedy, as they did, under article 30(3) they G were exercising their constitutional right as to which procedure to follow in seeking redress. There can be no justification whatsoever for saying that because s 6 presents an obstacle, the complainant of a violation of this basic human right should be restricted to other forms of remedy. A complainant Hshould be free to choose the best method legally open to him to prosecute his cause.

This is so under article 30(3) of the Constitution. Section 6 which denies this constitutional right cannot be said to be valid merely because the applicants could have remedy elsewhere; that would amount to going around the problem instead of striking at it directly. Our firm view is that the I offending section must be held and tested directly against the Constitution itself.

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Mrs *Sumari* also claimed that s 6 was justified on grounds of public interests. By this we understood A her to say that the section was saved by article 30(2) of the Constitution which permits derogation from basic human rights in certain circumstances. She contended that s 6 was necessary because it enabled the Government to regulate and control the suits which are brought against it. She was of B the decided view that if s 6 were to be removed, that would open flood gates of frivolous and vexatious litigation which would embarrass the Government and take up much of its time that could be better spent on matters connected with the development and welfare of the members of the society generally. In this regard the learned State Attorney urged that the Government and the C individual are not, and cannot be, equal because the Government has the responsibility of looking after the wider interests of the society at large.

On the material before us we have no difficulty in holding that s 6 violates the basic human right of D unimpeded access to the Court to have one's grievances heard and determined there. That right is guaranteed under arts 13(3) and 30(3) of the country's Constitution reproduced earlier in this judgment. Indeed the Republic's view was that the violation did not invalidate s 6 (the requirement of consent to sue) because where such consent was withheld, the victim was not without remedy, he Ecould apply for orders of *mandamus* or *certiorari* . However, we have rejected that argument for the reasons given earlier in this judgment.

The more difficult question is whether s 6 is saved by arts 30 or 31 of the Constitution which permit F derogation from basic human rights in certain circumstances. Article 31 which relates to measures taken during the period of emergency is obviously inapplicable here. And as far as article 30 is concerned, only sub-art (2) is relevant; it provides that: G

`30(2) It is hereby declared that no provision contained in this part of this Constitution, which stipulates the basic human rights, freedoms and duties, shall be construed as invalidating any existing law on prohibiting the enactment of any law or the doing of any lawful act under such law, making provision for - H

(a) ensuring that the rights and freedoms of others or the public interest are not prejudiced by the misuse of the individual rights and freedoms;

(b) ensuring the interests of defence, public safety, public order, public morality, public health, rural and urban development planning, the development planning, the development and utili- I

A zation of mineral resources or the development of utilization of any other property in such manner as to promote the public benefits;

(c) ensuring the execution of the judgment or order of a Court given or made in any civil or criminal proceedings.

(d) the protection of the reputation, rights and freedoms of others or the private lives of persons involved in any Court proceedings, prohibiting the disclosure of confidential information, or the safeguarding of the dignity, B authority and independence of the courts;

(e) imposing restrictions, supervision and control over the establishment, management and operations of societies and private companies in the country; or

C *(f)* enabling any other thing to be done which promotes, enhances or protect the national interest generally.'

This Court had occasion to deal with a similar situation in the case of *The Director of Public* D *Prosecutions v Daudi Pete* (1) where it considered the validity of s 148(5) *(e)*of the Criminal Procedure Act denied bail to the accused in a criminal case in certain circumstances. In that case it was recognised that because of the co-existence between the basic rights of the individual and the collective rights of the society, it is common nowadays to find in practically every society limitations E to the basic rights of the individual. So that the real concern today is how the legal system harmonizes the two sets of rights. In trying to achieve this harmony, the view has been that in considering any act which restricts fundamental rights of the individual, such as the right of free access to the Court of law in this case, the Court has to take into account and strike a balance F between the interests of the individual and those of the society of which the individual is a component.

Thus consistent with that approach, the Court in *Pete's* case laid down that a law which seeks to G limit or derogate from the basic right of the individual on grounds of public interest will have special requirements; first, such a law must be lawful in the sense that it is not arbitrary. It should make adequate safeguards against arbitrary decisions, and provide effective controls against abuse by those in authority when using the law. Secondly, the limitation imposed by such law must not be H more than is reasonably necessary to achieve the legitimate object. This is what is also known

as the principal of proportionality. The principle requires that such law must not be drafted too widely so as to met everyone including even the untargeted members of the society. If the law which infringes a basic right does not meet both requirements, such law is not saved by article 30(2) of the I Constitution, it is null and void. And any law that seeks

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to limit fundamental rights of the individual must be construed strictly to make sure that it conforms A with these requirements, otherwise the guaranteed rights under the Constitution may easily be rendered meaningless by the use of the derogative or clawback clauses of that very same Constitution.

We shall now apply the two tests to s 6 to see if it is saved by article 30(2) of the Constitution. B Section 6 provides that:
`6. Notwithstanding any other provisions of this Act, no civil proceedings may be instituted against the Government without the previous consent in writing of the Minister.' C

The section carries a proviso which is not relevant to the facts of the present case.

It is most apparent that the law is arbitrary. It does not provide for any procedure for the exercise of the Minister's power to refuse to give consent to sue the Government. For instance, it does not D provide any time limit within which the Minister is to give his decision, which means that consent may be withheld for an unduly long time. The section makes no provisions for any safeguards against abuse of the powers conferred by it. There are no checks or controls whatsoever in the exercise of E that power, and the decision depends on the Minister's whims. And, to make it worse, there is no provision for appeal against the refusal by the Minister to give consent. Such law is certainly capable of being used wrongly to the detriment of the individual. F

Turning now to the requirement that the law must not be drafted too widely, it is obvious once again that s 6 does not pass that test either. The section applies to all and sundry including even those against whom it was never intended. If, as contended by Mrs *Sumari* , the object is to exclude or discourage the bringing of frivolous and vexations litigation against the Government, it is not shown G how that object is achieved without also limiting the right of persons who have genuine and legitimate claims against the Government.

Even if the limitation imposed by s 6 could be selective, the pertinent question to ask is whether there was really a compelling need for such limitation. In other words, in what way is the limitation justified H in public interest so as to bring it within the purview of article 30(2) of the Constitution? As noted before,
Mrs *Sumari's* contention was that the lifting of the limitation will encourage vexatious suits against the Government such as to embarrass the Government and to take up much of its valu- I

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A able time which could be better spent elsewhere. But, apparently anticipating Mrs*Sumari* , Mr *Mughwai* in his address earlier on, had argued that there was no such limitation imposed in relation to suits against local governments where the only

requirement is a month's notice to sue, and yet the Courts have not been flooded with suits against local governments. When we asked Mrs *Sumari* , to B respond to that argument she was still at ease to do so.

On this same point Mr *Mughwai* had submitted that the law in Zanzibar did not impose such limitation, and yet it is not shown or claimed that the Courts in Zamzibar have flooded with frivolous C and vexatious litigation against the Government. In another dimension the learned Counsel charged that in this context s 6 was discriminatory and hence unconstitutional. He referred us to the decision of the High Court (Mwalusanya J) in the case of *Peter Ng'omango v Gerson M K Mwangwa and Attorney-General* (2) in which this same issue of Ministerial fiat or consent had been raised. There D the learned Judge cited three cases of the Zanzibar High Court in which no consent, but only a month's notice, was required to sue the Union Government. The three cases are: *Himidi Mbayo v The Brigade Commander*(3); *Shabani Khamis v Samson Goa and Another* (4) and *Khalfan Aboid* E *Hamad v The Director of Civil Aviation* (5). Mwalusanya J took restriction based on which Court, in the United Republic, one goes to seek remedy against the Government of the same United Republic. We entirely agree with the learned Judge that this is violative of arts 13(1) and (2) of the Constitution which provide that:

F `13 (1) All persons are equal before the law and are entitled without any discrimination, to equal opportunity before and protection of the law.

G (2) Subject to this Constitution, no legislative authority in the United Republic shall make any provision in any law that is discriminatory either of itself or in its effect.'

On a similar reasoning we reject Mrs *Sumari's* submission that because the Government is H responsible for the wider interests of the society, then it should not be placed on an equal footing with an ordinary person. We can find no justification for the distinction. We think that the equality before the law envisaged in article 13(1) above embraces not only ordinary persons but also the Government and its officials; all these should be subjected to the same legal rules.

I While advancing the argument of a compelling need for limita-

tion, Mrs *Sumari* again claimed that the requirement of consent was necessary in order to give A Government the opportunity during which to study the proposed claims and, where warranted, to consider settlement out of Court. This, she said, spares the Government of the embarrassment of appearing in Court and saves its valuable time to serve the wider public. We could find no substance B in this argument. The Government can achieve all this within the normal procedures of bringing civil suits. Ordinarily before a person decides to sue the Government, there must be some prior communication between the person intending to sue the Government and the Government in which C the former will have indicated sufficiently the nature and grounds of his claim. Thus if the Government so wishes, it can assess the claim and, where warranted, consider settlement out of Court during such pre-suit communication. The requirement of consent to sue is really not necessary for the purpose of affording the Government time to assess the claim and consider settlement out of Court. On the other hand we agree with the learned Judge in *Ng'omango's* case D above that such restriction militates against the principles of good governance which call for accountability and openness or transparency on the part of Governments.

Therefore, unlike the learned Judge from whom this appeal arises, we find that s 6 of the E Government Proceedings Act 1967 as amended by s 6 of Act 40 of 1974 is unconstitutional for the reasons we have amply demonstrated above. The Republic has totally failed to show that the said section is saved by the provisions of the Constitution which allow for derogation from basic human F rights. In the circumstances we have no alternative but to hold, in terms of article 64(5) of the Constitution of the United Republic of Tanzania that s 6 of the Government Proceedings Act 1967 as amended by Act 40 of 1974 is void. It is accordingly struck down for being unconstitutional. G

The appeal is allowed with costs, and the preliminary objection having failed, the suit is to proceed in accordance with the law.

1993 TLR p170

A