IN THE HIGH COURT OF TANZANIA

AT TABORA.

CIVIL CASE No. 2 OF 2015

1. UVINZA HEIFER FARM LIMITED..... 1ST PLAINTIFFS
2. KWIYENHA SOLO.....2ND PLAINTIFFS
3. MABULA CHARLES..... 3RD PLAINTIFFS
4. GUMBA MATOBOKI..... 4TH PLAINTIFFS

Versus:

1. WENGERT WINDROSE SAFARI (T) LTD.....1ST DEFENDANT.
2. MINISTRY OF NATURAL RESOURCES AND TOURISM.....2ND DEFENDANT.
3. ATTORNEY GENERAL.....3RD DEFENDANT

RULING

09 & 10 /09/2014

Utamwa, J.

This is a ruling on a preliminary objection (PO) raised by the three defendants in this suit. WENGERT WINDROSE SAFARI (T) LTD. MINISTRY OF NATURAL RESOURCESAND TOURISM and the ATTORNEY GENERAL (first, second and third defendant respectively). The PO is against the suit filed by the four plaintiffs, UVINZA HEIFER FARM LIMITED. KWIYENHA SOLO, MABULA CHARLES and GUMBA MATOBOKI (first, second, third and fourth defendant correspondingly).The same was initially footed on several points of law, but upon the defendants dropping some of them, they remained with the following three limbs of the PO;

1. That the suit is incompetent for violating the provisions of s. 6 (1) and (2) of the Government Proceedings Act. Cap. 5 R. E. 2002.
2. That the suit is incompetent for want of the Board of Resolution or Meeting of Company Members Resolution authorising the first defendant (as a company) or her counsel to institute this suit.

3. That the plaint does not disclose any cause of action in favour of the plaintiffs and against the defendants.

The first point of PO was preferred by all the three defendants while the second and third were the anxiety for the first defendant alone.

For the sake of clarity and better understanding of this matter it is incumbent that I narrate, albeit briefly the background of this matter before the parties argued the PO. The same goes thus: in the suit the plaintiffs claim for the following orders as reliefs;

a) A declaration that the defendants are trespassers on the plaintiffs' land, i.e. farm No. 42 being part of land registered under title No. 22796 with separate title No. 25345, farm No. 44 being part of land registered under title No. 22796 with separate title No. 25349, farm No. 46 being part of land registered under title No. 22796 with separate title No. 22878 and farm No. 48 being part of land registered under title No. 22796 with separate title No. 22858 (herein after collectively called the disputed land).
b) That the act of trespassing to the disputed land is unlawful.
c) Declaration that the plaintiffs are legal owners of the disputed land.
d) Permanent injunction restraining the defendants, their agents or workmen or whoever works under them from continuing trespassing to the disputed land.
e) Declaration that the disputed land is not a game reserved area.
f) Payment of general damages for trespass, burning the plaintiffs' grazing area, killing their cattle which has occasioned disturbances, inconveniences and loss of income and future expectation to the tune of Tanzanian Shillings 8, 000, 000, 000, 00 (Eight Billion).
g) Interest in (f) at the rate of 12% from the date of judgment to the date of payment in full.

h) Costs of this suit be borne by the defendants.

i) Any other relief (s) as this court may deem fit and just to grant.

Along with this suit the plaintiffs filed a chamber summons supported by an affidavit applying for temporary injunction to maintain the status quo of the parties pending the hearing of the suit (Main suit). The same was registered as application No. 57 of 2015 (the application). The application also faced a PO on the grounds, *inter alia* that it offended s. 6 (2) of Cap. 5 like the main suit.

Apart from raising the PO against both the main suit and the application. the defendants also disputed liability in respect of the main suit and objected the application. It was thus agreed by the parties, and consequently ordered by the court thatthe PO against the main suit be argued first before issues related to the application are considered. This course was based on the ground that in case the PO against the main suit will be upheld, then the application will suffer natural death since it depends on the survival of main suit. But, in case the PO will be overruled, then there will be room to consider issues regarding the application.

In disposing of the PO against the main suit therefore, the pattern of representation was as follows: the first defendant was advocated for by Mr.Mgimba learned counsel while the second and third defendants were represented by Mr.Massanja learned Senior State Attorney (SSA). On the other hand, the plaintiffs enjoyed the services of Mr.Kyara learned counsel. The PO was argued orally, hence this ruling.

In supporting the firs point of the PO the learned SSA for the second and third defendants argued that according to s. 6 (1) of Cap. 5 it is mandatory for a suit against the Government to follow the procedure set under the whole of s. 6. He further submitted that s. 6 (2) of Cap. 5 provides that no suit against the Government shall be instituted, and heard unless the claimant previously submits to the Government Minister, Department or officer concerned a notice

of not less than ninety days (the ninety days' notice) of his intention to sue the Government, specifying the basis of his claim against the Government and he shall send a copy of his claim to the Attorney-General. The learned SSA further contended that in the matter under consideration what the plaintiff purports to be the ninety days' notice is, according to paragraph 19 of the plaint and annexture GA-3 thereto is a letter addressed to the Attorney General.

The learned SSA further submitted that the said letter offends s. 6 (2) of Cap. 5 for two grounds; in the first place it is addressed to the Attorney General and copied to the second defendant. The law would require the notice to be directed to the second defendant and copied the Attorney General as third defendant and not vice versa. He also argued that since the letter was used as the ninety days' notice in another case, Miscellaneous Land Application No. 20 of 2014 before this same court (previous case), and since the previous case was struck out, then the letter was also struck out with the previous case and it could not be used as a notice in the present case. He added that the plaintiffs had thus the duty of filing a fresh notice therefore. He thus concluded that for the two grounds there was no notice at all. He supported his arguments by citing the cases of **Bweru Village Council .v. Attorney General and another, High Court Land Case No. 14 of 2014, at Tabora** (unreported) and **Patrick Kilindi and another v. Regional Police Commander for Morogoro Region and two others, Civil Case No. 49 of 2006, at Dar essalaam** (unreported). For these grounds he urged this court to strike out the main suit.

Mr.Mgimba learned counsel for the first defendant adopted and fully supported the arguments advanced by the learned SSA in respect of the first point of the PO. He also argued in support of the second limb of the PO thus; the law makes a requirement that a company like the first plaintiff institutes legal proceedings only after obtaining a Board Resolution or a Resolution by a meeting of Company Members authorising it to do so. The resolution must be

attached to the plaint or it must be stated in that plaint that it exists. He fortified the contention by citing decisions in the cases of **Bugerere Coffee Growers Ltd v. Sebaduka and another [1970] 1 EA 147** and that in **Msikimwe Investment Co. Ltd v. Temeke District Football Association (TEFA) and another, High Court Civil Case No. 2009 of 2012, at Dar esalaam**(unreported) which I made sometimes in Dar es salaam High Court Registry. The learned counsel thus argued that since the plaintiffs in the matter at hand did not comply with this requirement, the suit is incompetent and liable to be struck out.

Regarding the third limb of the PO the learned counsel for the first defendant submitted that according to paragraphs 5 and 6 of the plaint, the claim by the plaintiffs is based on the alleged trespass by the defendant on the disputed land for which the plaintiffs claim ownership. However, paragraph 7 of the same plaint shows that the plaintiffs were mere sub-lessees (in the disputed land) of the National Ranch Company Limited (NARCO). He thus argued that the cause of action on trespass to land exists only where the claimant is true owner of the land not a mere sub-lessee as shown under paragraph 7 of the plaint. The suit is thus also liable to be struck out for lack of cause of action. he concluded.

In replying submissions to the first arm of the PO Mr.Kyara learned counsel for the plaintiffs argued that, the first defendant was incompetent in arguing matters related to the previous suit since he was not party thereto. He added that, since the previous case was only struck out (with leave to re-file) and was not dismissed, the letter which served the purpose of the ninety days' notice in that case was still valid and the defendants received it. The notice could thus as well be used in this present suit as the notice under s. 6 (2) of Cap. 5. He also submitted that there is a distinction between striking out a matter on one hand and dismissing it on the other citing the Court of Appeal of the

Tanzania (CAT) decision in **Cyprian MamboleoHizza v. Eva Kioso and another, CAT Civil Application No. 3 of 2010, at Tanga** (unreported) to enhance the argument. He also submitted that in that case, the CAT held that where a matter is truck out no appeal follows and a dismissal of a matter means that a competent appeal has been decided.

The learned counsel for the plaintiffs opted to react against the third limb of the PO before he could do so for the second. He contended that the plaint disclosed the cause of action since the plaintiffs are the true owners of the disputed land and the defendants committed illegal acts of trespass to the land. He based the argument on the definition of the term "cause of action" as offered in the book of Mullar, the Code of Civil Procedure, 16th edition, Volume 1, at page 412 where it was stated that cause of action is a bundle of facts which if taken with the applicable law entitles the plaintiff a relief against the defendant. He thus submitted that illegal acts of the defendants entitles the plaintiffs in the matter at hand of the reliefs sought.

As to the second point of the PO the learned counsel for the plaintiffs argued that, there was a Board Resolution authorising the institution of this suit. The same was mentioned in the reply by the plaintiff to the Written Statement of Defence (WSD) for the first defendant and he acknowledged receipt of the same. He thus prayed for the court to dismiss the entire PO with costs.

In rejoinder submissions, the learned SSA reiterated the contents of his submissions in chief and added that the CAT decision in **Cyprian MamboleoHizza**(supra) supports the argument that where a matter is struck out, the party who instituted it may start the same afresh, and this means issuing a fresh ninety days' notice in matters of this nature. He added that the plaint does not even show that the defendants were served with the notice.

In his rejoinder submissions regarding the third point of the PO, the learned counsel for the first defendant underscored his arguments in submissions in chief. Regarding the second limb of the PO he argued that since the plaint did not indicate that the Board Resolution existed, it was immaterial for the plaintiffs to indicate so in the reply to the WSD of the first defendant.

As my adjudication plan, I will first examine the first limb of the PO. The main issue under this limb is therefore, whether or not the plaintiff offended the provisions of s. 6 (1) and (2) of Cap. 5. Under this arm of the PO I will firstly consider the aspect related to the argument that the notice used in the previous case could not be used as the notice in the present suit. In case I will overrule this argument, I will test the other aspect related to the argument that it was wrong to address the notice to the Attorney General and copy it to the second defendant. However, in case I uphold the argument in the first aspect (of the first point of the PO), then I will consider if there will be any legal need to test the second aspect (in that same first point of the PO) and the other two limbs of the PO.

Regarding the first aspect in the first point of the PO, and according to the arguments by both sides, I am settled in mind that the following facts are not disputed by the parties: that s. 6 (2) of Cap. 5 requires a plaintiff who sues the Government to serve the ninety days' notice as rightly argued by the two counsel for the defendants and I accordingly find so. This position is also supported by the **Patrick Kilindi**case (supra). It is also not disputedthat according to paragraph 19 of the plaint the plaintiffs consider the letter (annexture GA-3) as the ninety days' notice required under s. 6 (2) of Cap. 5, and that the letter was in fact used as the ninety days' notice in the previous case which was in fact struck out by this same court. The sub-issue regarding the first aspect of the first limb of the PO is therefore reduce to what was the legal consequences (to the letter) of striking out the previous case? While the

defendants argued that the legal effect was to render the notice inoperative for being struck out together with the previous case. the plaintiffs contended that despite the fact that the previous case was struck out. the letter survived as a valid ninety days' notice in the present suit.

In my settled view. the effect of striking out a matter before the court is that. the struck out matter and every instrument or order related to it becomes non-existent. The parties thus revert to their former positions as if no matter had been filed in court before. It follows therefore that. even if the matter was struck out with the leave to re-file (as claimed by plaintiff's counsel in the matter at hand) the matter that will be re-filed (if any) will be a new creature and distinct from the one struck out though it may be pegged on the same cause of action. It is more so since the re-filed matter has to be registered afresh and has to bear a distinct registration and reference numbers. Partiesin the re-filed matter will not thus be entitled to rely upon any instrument or orders related to the struck out matter.

I am of the further view that. the same position applies even where the matter is dismissed. The argument by the counsel for the plaintiff that the previous case was only struck out and not dismissed is thus weightless since the effect is the same. The CAT decision in **Cyprian MamboleoHizza**case(supra)is thus not helpful enough to the plaintiffs. In fact the same adds weight to the defendants arguments as rightly argued by the learned SSA since it was suggestive that where a matter is struck out. the party who instituted it may start it afresh if s/he wishes. That meant. in matters of the nature under discussion a ninety days' notice must be re-filed afresh. I will go further and find that the same position applies where a matter is withdrawn whether with leave to re-file or not. I will also add that the arguments by the counsel for the plaintiffs in this matter at hand cannot be viable since re-filing a struck out matter is neither a restoration of the previous matter nor an amendment of the same. It was

therefore. necessary for the plaintiff to file a fresh ninety days' notice in the matter at hand.

In another case of **Benedict Mkasa v. Board of Trustees of Medical Stores and two others, High Court Civil Case No. 12 of 2007, at Dar es salaam** (unreported ruling dated 22/05/2013), I dealt with a similar issue to the one under discussion though that one related to a notice which had been used to serve the purpose of s. 6 (2) of Cap. 5 in a previously withdrawn suit. In that case I took inspiration from **S. C. SARKAR** in his book titled Sarkar's Code of Civil Procedure, Lexis ButterworthsWadhwa Nagpur (Publishers), 11th Edition, 2006, (reprint 2010) at page 1972 and 1981which followed Indian cases of **T. K Namboodri v. T. D. Namboodri, AIR 2005 Ker 328 (335, 336)** and **Permanand v. Prescribed Authority (Munsif City), Meerut, 2002 AIHC 15 (18).** In this respect Sarkar discussed the provisions of Order XXIII rules 1 and 3 (a) and (b) of the Indian Code of Civil Procedure 1908 as amended by the Civil Procedure Code (Amendment) Act 1999 and the Civil Procedure Code (Amendment) Act 2002 which are in *par material* with Order XXIII rule 1 and 2 (a) and (b) of our Cap. 33. Sakar supported the stance I demonstrated above as far as the effect of a withdrawn matter. The CAT underscored in the case of **Tanzania Cotton Marketing Board v.Cogecot Cotton Company SA [1997] TLR 165** (at page 171) that it is trite principle in common law jurisdictions that statutes which are in *par materia* are interpreted similarly. I thus approved the above highlighted remarks by Sarkar in the **Benedict Mkasa**case (supra).

In the said **Benedict Mkasa**case (cited above) I held, and I underscore the same position in the matter at hand that: the argument that the defendant Government gets knowledge of the instituted suit by virtue of the ninety days' notice filed in respect of the previous withdrawn or struck out suit is not tenable. This is because, it cannot be expected that the defendant Government would keep on waiting and believing that the plaintiff will definitely re-file the

suit for, the plaintiff has the liberty to do so or not. Moreover, it cannot be expected that the defendant Government can predict as to when the plaintiff will wake-upand exercise his right to re-file the fresh suit so that it can prepare itself for defence. It is more so considering the fact that in the matter at hand the plaintiff impleaded a new party, the first defendant. This fact is explicit in the plaintiffs' counsel submissions that the first defendant was not party to the previous suit.

I am also worried that if the interpretation of the law offered in the plaintiff's counsel submissions will be adopted that construction will put the defendant Government in suspense all the time waiting for a fresh suit to be filed in an uncertain time. This will not be proper in the process of justice administration. I am entitled to presume and infer the existence of these facts regard being had to the common course of natural events, human conduct, public and private business in their relation to this matter under s. 122 of the Evidence Act, Cap. 6, R. E. 2002.

My further considered views are that, the legislature purposively set the requirement of the notice under s. 6 (2) of Cap. 5 for the Government to afford it an ample opportunity for preparation of the defences in suits (upon receiving the notice), considering its peculiar broad area of operations (being the whole country) and its diversified ministries, departments and other institutions performing its statutory duties. Again, I am entitled to presume and infer these facts under s. 122 of Cap. 6 as I have just done herein above. To agree with the plaintiff's counsel submissions will thus defeat the whole legislative purpose, which this court cannot do. The stance in the **Benedict Mkasa** case which I have just underscored in this case at hand was also echoed by another Judge of this court in the **Bweru Village Council** case (supra).

For the foregoing reasons. the answer to the sub-issue regarding the first aspect of the first limb of the PO is that, the legal consequences in striking out the previous case was that, everything in the previous case, including the letter which served as the ninety days' notice in the previous case was struck out and was rendered inoperative. There is thus no any ninety days' notice before the eyes of the law in respect of this present suit. By this finding I have no need to test the second aspect of the first limb of the PO since its examination depended much on the first aspect being determined in favour of the plaintiff, which is not the case now. The main issue is therefore, determined affirmatively to the effect that the plaintiffs in fact offended the provisions of s. 6 (2) of Cap. 5 by their failure to file the ninety days' notice before instituting it. The effect of the omission by the plaintiffs is that the suit is rendered incompetent and liable to be struck out as rightly argued by the defendants. I so hold despite the fact that the suit would proceed with first defendant who is not the Government. But according to the pleadings, it is impossible to separate the trials in respect of the first defendant on one hand and the rest of the defendants. This is evident under paragraph 8 of the plaint which alleges that it was the second defendant who allocated the disputed land to the first defendant.

The finding I have just made herein above is forceful enough to dispose of the entire PO. I am thus not legally bound to test the second and third points of the PO since that will amount to superfluous exercise of kicking a dead horse or toiling for an academic exercise which is not the objective of the adjudication process.

I therefore, strike out the suit. For avoidance of doubts, I also declare that the application also follows suit since its existence depended much on the survival of the main suit. I also order the plaintiffs to pay costs for both the main suit and the application. This order follows the understanding that it is settled law of this land now that: costs follow event unless the court records

reasons for not following that general rule, see s. 30 of Cap. 33 and the CAT decision in the case of **Njoro Furniture Mart Ltd v. Tanzania Electric Supply Co Ltd [1995]TLR 205**. In the matter at hand, I lack reasons for supporting my departure from that general rule and the counsel for the plaintiffs did not suggest one. It is accordingly ordered.

JHK. UTAMWA

JUDGE

10/9/2015

10/9/2015

CORAM: Hon. Utamwa, J.
For plaintiffs; Mr. Kyara advocate
For Respondents: Mr. JumaMassanja, Senior State Attorney.
BC: M/s. DottoKwilabya.

Court; ruling delivered in the presence of Mr.JumaMassanja, learned Senior State Attorney for the second and third respondents who also holds briefs for Mr.Mgimba for the first respondent and Mr.Kyara advocate for the plaintiffs, in court this 10th day of September, 2015.

J.H.K. UTAMWA

JUDGE.

10/9/2015