

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL CASE NO. 177 OF 2013

THOMAS NGAWAIYA.....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL.....1ST DEFENDANT

CHIEF EXECUTIVE DIRECTOR,

TANZANIA NATIONAL ROADS AGENCY.....2ND DEFENDANT

CHIEF EXECUTIVE,

DAR RAPID TRANSIT AGENCY3RD DEFENDANT

PROJECT MANAGER,

STRABAG INTERNATIONAL BmbH4TH DEFENDANT

RULING

23 Feb. & 2 March, 2018

DYANSOBERA, J:

This ruling is on a preliminary objection raised by the 1st, 2nd and 3rd defendants. The plaintiff, namely Thomas Ngawaiya is in his amended plaint claiming against the four defendants the following reliefs:-

a. The court be pleased to order the defendants severally and/or together pay the plaintiff:-

i. The sum of Tshs. 75,000,000/= being estimated replacement value of the damaged foundation of the building, the front portion thereof and the rest of the building.

ii. The sum of Tshs.15, 000,000/- being the value of the culverts destroyed.

iii. The sum of Tshs. 25,000,000/- being the value of the computers and printers destroyed by the dust,

iv. The sum of Tshs. 8,000,000/- being the value of the photocopiers destroyed

v. The sum of Tshs. 22,000,000/- being monthly loss of business. Tshs. being loss suffered by way of non-payment of rents.

b. Court be pleased to order interests at the rate of 21% on all pecuniary claims running from the date of cause of action till judgment.

c. Court to order interests at court's rate of 12% from the date of judgment and final settlement.

d. Costs of this suit be met by the defendants severally and / or collectively

e. Any other and further reliefs the court deems fit be granted.

The four defendants resisted the claims presented while at the same time the 1st, 2nd and 3rd defendants, as pointed out above did, on 3rd July, 2017 through Mr. Ntuli Mwakahesa, learned State Attorney, file a notice of preliminary objection of three points that:

- a) The suit is time barred
- b) The suit is bad in law for being preferred in contravention of section 6(2) of the Government Proceedings Act [Cap. 5 R.E.2002]
- c) The suit is bad in law for being preferred in contravention of the court order.

The preliminary objection was argued by way of written submission. In support of the first limb of preliminary objection, Ms Jacqueline Kinyasi, learned State Attorney submitted that the preliminary point of law raises a purely point of law as its base is found under the Law of Limitation Act, [Cap.89 R.E.2002] specifically the Schedule, Part I Column 1 item 1 of the Act. He pointed out that section 5 of the said Act provides that subject to the provisions of this Act, a right of action in respect of any proceeding shall accrue on the date on which the cause or action arose. According to him, the suit is on compensation of damages caused to the plaintiff's property comprised in Plot No. 1200/1202 Block "B" situated at Manzese area, Dar es Salaam. Learned counsel told this court that the cause of

action arose in March, 2012 as stated under paragraph 14 of the plaintiff's amended plaint. The plaintiff was, therefore, supposed to file his case on or before March, 2013 but, instead, he brought the suit on 13th December, 2016 that is three years beyond the statutory limit; hence time barred. Regarding the fate of the suit being time barred, learned State Attorney prayed the court to invoke the provisions of section 3 (1) of the said Act and dismiss the suit. A reference was made specifically to the case of **Yusup Vuai Zyuma v. Mkuu wa Jeshi la Ulinzi TPDF, Kamanda Mkuu wa Brigedia ya Nyuki-Zanzibar and Katibu Mkuu, Wizara ya Ulinzi na Jeshi la Kujenga Taifa** (unreported) where at p. 6 the court observed that the Appellant did not institute the suit within prescribed period of six months, that by instituting the suit beyond the time allowed by the law, the appellant was time barred and that the court below ought not to have entertained the matter. The court declared the lower court proceedings a nullity.

It is prayed for the 1st, 2nd, and 3rd defendants that the suit having been instituted beyond the prescribed time allowed by the law which is one year, the plaintiff is hopelessly time barred and the court should dismiss the same.

On the second limb of preliminary objection, it was submitted that the suit offends the provisions of section 6 (2) of the Government Proceedings Act [Cap.5 R.E.2002] which provides that:

6.-(1)..... (not relevant)

(2) 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 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.

It is learned State Attorney's contention that in the suit it is not pleaded that the said notice was served on the relevant Government officer, agent nor was the Attorney General served with a copy of the claim as per the requirements of law. He said that the amended plaint is incompetent for lack of statutory notice which is not a matter of choice but a mandatory requirement and therefore, calls for the court to have no option but dismiss the suit. This court was referred to the case of **Arusha Municipal Council v. Lyamuya Construction Company Limited** [1998] TLR 13.

Replying to the learned State Attorney's submission, counsel for the plaintiff informed this court that he was in total disagreement with the objections raised by the 1st, 2nd and 3rd defendants. He reasoned

that the objections are elementary which carry no legal weight and cogency but mere unsubstantiated allegations. He submitted that the defendants who have raised the objection have totally failed to grasp what the cause of action in this case is. According to him, the cause of action in this case is not compensation for doing or not doing any act but compensation for damages caused to the plaintiff's property. He said that the plaintiff has suffered loss of his property through the alleged damage caused by the road contractor who damaged his culverts and caused cracks etc. it is learned counsel's contention that the suit falls under Schedule I, Part 1 Item 24 of the Law of Limitation Act which is about any suit not otherwise provided for which is six years. Counsel therefore argues that the suit is not time barred. He admits that the cases cited by learned State Attorney are good cases but explains that they are not relevant to the case in issue.

As to the third point of objection, after quoting section 6 (5) of the Government Proceedings Act, counsel for the plaintiff stated that the requirement in sub-section (3) and (2) of the said Act applies only in a situation where Government only is being sued but that where there are other defendants to be sued together with the Government, the notice is dispensed with. That the same applies where the Government is to be joined in a suit where there are other defendants, the requirement of notice is dispensed with. In elaborating this position, counsel cited the provision section 4 of the said Act contending that

even in some executions, the Government is considered as an ordinary person and that if that is the position, then the defendants have not commented on the fate of the 4th defendants.

• As to the application of section 97 (1) of the Local Government (Urban Authorities Act) a notice is mandatory only where the authority is sued alone.

As far as the first issue of limitation, the relevant paragraphs of the plaint which indicate the cause of action are paragraphs 6, 10 and 11 which run as follows:

6. The plaintiff's claims against the defendants generally and severally is for the compensation for the damages caused to the plaintiff's property comprised in Plot No. 1200/1202, Block "B" situated at Manzese area, Dar es Salaam, and the restoration and repair of the damaged culverts making the entrance to the plaintiff's premises, restoration and repair of the damaged drainage systems in the surrounding area now causing blockage of the drainage system.

10. In the course of the aforementioned road constructions, the 3rd defendant herein who is he contractor and aware that it was bound by the principle of strict liability carried out extensive excavation outside the road reserve up to the plaintiff's building in the course destroying the culverts the plaintiff had constructed for

draining rain water into the general open drainage passing in front of his building and in the course of destroying the culverts the heavy machine hit the walls of the plaintiff's building thus causing extensive damages.

11. Besides the above mentioned damages the 3rd defendant through his drives using his heavy duty compacting machines, loading and offloading trucks in the course of making the repair of the damages caused to the plaintiff's culverts as above mentioned, knocked and /or banged the foundation walls of the building at various points and caused further cracks on the building and its foundation and the cracks are becoming prominent with time.

The issues for determination according to the preliminary objection raised by the 1st, 2nd and 3rd defendants are two. First, whether this suit is time barred and whether the suit is bad in law for being in contravention of section 6 (2) of the Government Proceedings Act [Cap.5 R.E. 2002].

As far as the first issue on time bar is concerned, it is the argument of the first three defendants that the suit is time barred as the cause of action falls under Item 1, Part I, Column 1 of the Schedule to the Law of Limitation Act whose limitation period is one year. On that premise, this court is invited to invoke the provisions of

section 3 (1) of the Law of Limitation Act and dismiss the suit. The plaintiff, on the other hand, argues that the suit falls under Item 24, Part I Schedule 1 to the Law of Limitation Act. Section 3 (1) of the Law of Limitation Act provides that:

3.-(1) subject to the provisions of this Act, every proceedings described in the first column of the Schedule to this Act and which is instituted after the period of limitation prescribed therefor opposite thereto in the second column, shall be dismissed whether or not limitation has been set up as a defence.

According to those provisions, the law imposes mandatory obligation on the courts to dismiss the proceedings instituted after the prescribed period of limitation.

However, in determining the question of limitation, two principles must be considered. In the first place, the court must look at the whole suit framed including the reliefs sought and see if the suit combines more than one claim based on different causes of action as one of them may be found to be time barred while the others may not. In such circumstances, it is not proper to dismiss the whole suit as time barred. Second, the court, in interpreting the provisions of a law, should read in its context as a whole and not one section in isolation.

Guided by those principles, a close look at the plaint, paragraph 14 in particular, shows that the period of limitation cannot be that which learned State Attorney for the 1st, 2nd, and 3rd defendants is trying to convince the court to accept, that is one year.

The said paragraph runs as follows:

14. The situations above mentioned have been running since March, 2012 and without any ending as a result the plaintiff was forced to lose business greatly and the defendants never gave any explanation to the plaintiff, his servants and/or the tenants in the said premise. The plaintiff therefore deserves compensation by way of damages.

It is possible, as learned State Attorney argues, the cause of action arose in March, 2012 but the said paragraph is clear that wrongs did not end in that year but continued.

This brings me to the second principle of looking at the Law of Limitation Act in its context and as a whole. Although section 3 (1) of the Law of Limitation Act bars causes whose limitation period has expired, the said is clear that “subject to the provisions of this Act”. That phrase was not a decorative luxury but was inserted in the section purposely. It means that the section should not be used in isolation of other section of the same Act. As the law stands, there are other sections which qualify the working of other sections. For

instance, there is section 7 of the Law of Limitation Act which stipulates that:

7. Where there is a continuing breach of contract or a continuing wrong independent of contract a fresh period of limitation shall begin to run at every moment of the time during which the breach or the wrong, as the case may be, continues.

This, therefore, means that the contention by learned State Attorney for the 1st, 2nd and 3rd defendants that the proceedings described in the first column of the Schedule to the Law of Limitation Act apply to the present suit, is misconceived as the application of section 3 (1) of the Act has, in the present case, been qualified by section 7 of the same Act. The first limb of the preliminary objection fails.

Turning to the second point of preliminary objection, the law is clear as stipulated under section 6 (2) of the Government Proceedings Act [Cap.5 R.E.2002] that:

6.-

(2) 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 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.

• A close scrutiny of the above provision indicates that before suing the Government, there are at least four requirements that must be fulfilled. These are:

1. A notice of not less than ninety days should have been submitted to the Government Minister, Department or officer concerned
2. Expressing intention to sue the Government
3. Specifying the basis of the claims against the Government
4. Serving a copy of the notice to the Attorney General

The statutory notice, is in my view, not an empty formality. It is a measure of public policy; the underlying purpose being advancement of justice and securing public good by avoidance of unnecessary litigation. Its intention is to alert the Government and afford it opportunity to reconsider the matter in the light of the settled legal position and take appropriate decision in accordance with the law. The rationale of the statutory notice is that the Government being the largest institution with a number of activities for the public good, cannot be taken into court by surprise. The requirement of serving a statutory notice to the Attorney General which acts as a demand notice is to create awareness to the Attorney General for the compliance or else prepare the necessities for the suit including but not limited to

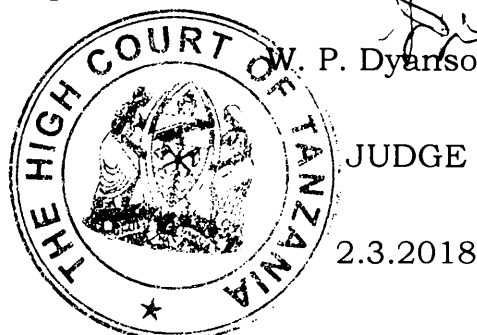
advising the Government Ministries, departments or other Government Agents. This is so because, it is common knowledge that the Attorney General is the Principal Legal Advisor to the Government Ministries, Departments and other Government Agencies.

The provisions of section 6 (2) of the Government Proceedings Act are express, explicit, mandatory, admit no implications or exceptions. They are imperative in nature and must be strictly complied with. Besides, they impose absolute and unqualified obligation on the court. the argument by counsel for the plaintiff that the requirement in section 6 (2) of the Government of Proceedings Act applies only in a situation where the Government is being sued but that where there are other defendants to be sued together with the Government, the notice is dispensed with is attractive but cannot be swallowed without a pinch of salt. There is not where the law has said so and Counsel for the plaintiff has cited no authority for that legal proposition. I have considered the provision of sub-section (5) of section 6 of the Government Proceedings Act refereed to me by Counsel for the plaintiff but with respect, the said provision does not talk of dispensing with the statutory notice of ninety days' notice, rather it says that notwithstanding the provisions of **sub-section (3)** (not sub-section (2)), the Attorney General may, unless another person ought to be sued, be sued or be joined as a co-defendant in proceedings against the Government.

I must admit that most often, the administration is unresponsive and shows no courtesy to the ninety days' notice when presented the Government and a copy served on the Attorney General. This is unhealthy for the Government which is entrusted by its subjects but that in no way condones the non-compliance with the law.

For the reasons I have stated, I uphold the second limb of preliminary objection and find that the suit against the Government having been prematurely instituted before the Court before complying with the mandatory provisions of section 6 (2) of the Government Proceedings Act is bad in law and incompetent.

In that respect, I strike it out with no order as to costs.



Delivered this 2nd day of March, 2018 in the presence of the plaintiff in person and Ms Lydia Thomas, learned State Attorney assisted by Ms Bertha Nanyaro, legal officer from TANROADS and Mr. Cyprian Mbugano, Legal Service Manager from DAR RAPID TRANSPORT AGENCY (DART) for the 1st, 2nd and 3rd defendants and Mr. Gerald Riwa, learned Counsel for the 4th defendant.

