

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
CIVIL CASE NO. 210 OF 2019**

AVIC SHANTUI TANZANIA LIMITED PLAINTIFF

VERSUS

STAMIGOLD COMPANY LIMITED.....DEFENDANT

RULING

Date of last Order: 04/06/2020

Date of Ruling: 08/07/2020

E.E. Kakolaki, J

The plaintiff in this case a company with limited liability incorporated under Company Act, [Cap. 202 R.E 2002] and engaged in repair, maintenance and sale of heavy trucks and other related equipment sued the defendant a company incorporated in Tanzania dealing in business of consultation in exploration, mining, processing and marketing of minerals. The claim against the defendant is for breach of lease agreement of SL50W WHEEL LOADER – T142DK for three months renewable automatically thus claiming payment of Tanzanian Shillings Five Hundred Ninety Million Six Hundred Sixty Five Thousand (Tshs. 598,665,000/=) being outstanding rental fees, general damages and payments of interest at Court rates of 21% per annum from the date of judgment till full payment. Costs of the suit is also sought.

In fending her case the defendant filed Written Statement of Defence denying the claims levelled against her and further to that raised a Notice of preliminary objection on points of law. Ms. Janeth Makondo learned Senior State Attorney who appeared for the defendant on the 14/03/2020 informed the court of the filed preliminary points of objection and prayed to have them disposed first. Later on the 23/04/2020 Mr. Edrick Rwimuka learned advocate for the plaintiff prayed to have the preliminary objection raised argued by way of written submission the prayer which was granted. Filing schedule of submission was entered and complied with save for the defendant who waived her right to file a rejoinder submission. However it is important to note that the plaintiff's written submission was prepared by one Bernad Stephen learned advocate.

The defendant raised two points of objection going as follows:

1. This Honourable Court does not have jurisdiction to entertain the matter.
2. The suit is incompetent for contravening section 6(2) of the Government Proceeding Act.

Submitting in support of the preliminary points of objection raised, Ms. Makondo opted to start with the second point. She presented that in this suit the plaintiff sued the Government, but she failed to comply with the requirement of the law under section 6(2) of the Government Proceedings Act, that makes it mandatory for the plaintiff to issue a ninety (90) days notice of intention to sue the Government before filing the suit in court. She reiterated there in nowhere it is stated in the plaint that the said notice was issued and that even if it was issued, the same was served to the Attorney General something which renders the whole

suit incompetent. She relied on the cases of **Arusha Municipal Council Vs. Lyamuya Construction Company** Limited (1998) TLR 13, **Machibya Mahambi and Others Versus Sheikh Mohamed Haidri** (1957) EA 778 and **Seiph Wanumbwa Vs. Muhimbili National Hospital/Muhimbili Medical Centre, Ministry of Labour and AG**, Civil Case No. 181 of 2003 (HC-Unreported).

Coming to the first ground she contended this Court has no jurisdiction to entertain the matter before it. She had it that the defendant has two residences; one at Dar es salaam in its registered office and the second one at Biharamuro District in Kagera Region where the mining site of the defendant and its principal business activities of mining and processing of gold and silver are carried out. That it is provided under section 18(a) and (c) of the Civil Procedure Act [Cap. 33 R.E 2019] every suit shall be instituted in a court within the local limits where one or more defendants are residing or where the cause of action wholly or partly arose. She contended the contract was executed by the Mine General Manager in his offices at Biharamuro and the said leased loader works at Biharamuro where the office of Finance Manager in-charge of all payments is located, thus the cause of action arose in Biharamuro and the case was supposed to be instituted there. She relied on the cases of **A.B.C Laminart Private Limited Vs. A.P Agencies, Salem** (1989) 2 SCC 163 (Supreme Court of India) and **Dr. F. Lwanyantika Masha Vs. Attorney General** (2005) TLR 46 (HC). She therefore invited the court to dismiss the suit with costs.

In opposing the preliminary points of objection raised Mr. Stephen for the plaintiff started with the second point of objection as it is in the order taken in the defendant's submission. He said the same does not

qualify the test of preliminary objection as defined in the celebrated case of **Mukisa Biscuit Manufacturing Company Ltd Vs. West end Distributers Ltd** (1969) E. A 696. He averred that, the plaintiff does not dispute existence of 90 days notice requirement under section 6(2) of the Government Proceedings Act, since the issues as to whether the same was prepared and served to the defendant and whether the defendant falls within the ambit of the Government entity are matters that require proof and need to be ascertained during hearing by evidence. Under the spirit of the case of **Mukisa Biscuit** (supra) the alleged point of objection is deemed to contain both point of law and facts thus lacks qualification of being objection on points of law, Mr. Steven submitted. He went further to distinguish the cases cited by the defendant in a bid to support her point of objection. He was of the submission that the said point of objection is unmerited and unfounded thus deserve dismissal.

With regard to the first ground of objection he submitted that the jurisdiction of filing a suit is only limited to where the defendant resides or place where the cause of action arose as per Rule 7 of the High Court Rules, [Cap 358 R.E 2002]. That in this case the defendant's office as registered in BRELA is located at Upanga area within Ilala District, Dar es salaam Region as rightly admitted by the defendant. And that the agreement between the plaintiff and defendant (Stamigold Company Limited) was performed and executed at Dar es salaam and not Biharamuro as alleged by the plaintiff. He therefore was of the view that it was correct for the plaintiff to institute a suit in Dar es salaam.

Further to that Mr. Stephen urged the Court to apply the principles of overriding objectives under section 3A(1) of the Civil Procedure Code to

avoid to be caught up by procedural technicalities which not only delay dispensation of substantive justice but also results into huge backlogs of cases in the name of preliminary objections. He rested his reply submission by stating that the defendant's raised points of objection are matters of facts which need to be ascertained during the hearing of the suit by way of evidence hence do not raise pure points of law and should be dismissed with costs.

In considering both parties submission which were in written form I found some material facts missing in the pleadings and/or in parties' submissions to assist the court to determine the preliminary points of objection raised. The court had no option than to call the parties in order to address it and supply the said facts. The court wanted to know whether the defendant is a state owned company and if yes whether notice of intention to sue was issued or not by the plaintiff.

On the 03/07/2020 both parties appeared before the court to address it and supply the material facts as noted above. For the plaintiff it was Mr. Benard Steven learned advocate and for the defendant appeared Miss Luciana Kikala learned State Attorney. When asked to take the floor Miss Kikala informed the court that the defendant is Government owned company by one hundred percentage (100%) and therefore subjected to application and compliance of the provisions of Government Proceedings Act. She said **Stamigold** is a subsidiary Company of the State Mining Corporation (STAMICO) established under Public Corporation (State Mining Corporation) (Establishment) (Amendment) Order, 2015, GN. No. 171 of 2015 the order made under The Public Corporation Act, [Cap. 257R. E 2002]. That the shareholders of the said **Stamigold** are **STAMICO** that owns 49,999 shares and 1 share by the

Treasury Registrar of the total 50,000 subscribed shares. She made available to court the copies of Government Notice No. 171 of 2015 and the MEMARTS of **Stamigold**. With regard to the notice of the intention to sue she presented that none was issued to the defendant nor copied to the Attorney General as per the requirement of the law. She therefore prayed the court to dismiss the suit.

Mr. Steven in reply to Miss Kikala's submission explained that the defendant is a company incorporated under Company's Act limited by shares. And that its affairs are governed and regulated by Company's Act therefore acquires the status of suing and being sued on its own name. and that, that why he even failed to follow the Public Procurement Act which is Governing the Public Corporations in all matters related to procurement especially on the powers to enter into contract or agreement. With regard to the issue of Notice of intention to sue the Government he said the same was not issued as it was not a requirement but rather issued several demand notices as pleaded in paragraph 9 of the plaint. However, when perused the plaint the alleged annexed demand notices were missing as a result Mr. Steven promised to make them available to court by 06/07/2020. He therefore invited the court to find the preliminary objection raise unmerited and dismiss it with costs. In rejoinder submission Miss Kikala disputed the assertion that **Stamigold** did not follow the procedure when entering into agreement. She insisted that even if the procedures of entering into contract by **Stamigold** were defaulted the disregard does not remove the fact that **Stamigold** is a Government entity since it is owned 99.99% by **STAMICO** a Government corporation. Hence the plaintiff ought to have complied with the requirement of the law under section

6(2) of the Government Procedure Act. She reiterated her prayers and rested her submissions.

I have paid regard to both parties' submissions. It is Mr. Steven contention that the second point of objection does not qualify to be objection on point of law as per the requirement of the case of **Mukisa Biscuits** (supra) as whether the notice was prepared and served to the defendant and whether the defendant falls within the ambit of the Government entity are matters that require proof and need to be ascertained during hearing by evidence. Miss Kikala is of the opposite view in that it is a point of law. I disagree with Mr. Steven that the issue as to whether the Notice of intention to sue the defendant was issued or not requires proof of evidence during hearing of the suit as well as to the issue of whether defendant is a Government entity. When submitting Mr. Steven explained that what was issued were demand notices only though failed to present them in court the submission that proves none issuance of the 90 days notice of intention to sue the defendant and for that matter Government. As to whether the defendant is a Government entity the same also is a fact which was either known or ought to have been known by the plaintiff when engaging into agreement with the defendant. It was expected of her to conduct due diligence search to satisfy herself to the status of the party she intended to venture into business with.

The other point raised by the plaintiff is that the defendant being a company incorporated under Companies Act disregarded application of Public Procurement Act governing all public corporations thus ought to have not treated as Government entity. Miss Kikala responded that, that disregard notwithstanding the plaintiff was still bound to follow the

procedure under Government Proceedings Act. I agree with Miss Kikala in this point. The alleged disregard of application of Public Procurement Act by the defendant is not an excuse for the plaintiff to comply with the requirement under section 6(2) of the Government Proceedings Act.

From the facts and evidence supplied in court by both parties it is clear that the defendant is a public company owned by the Government 100% and subsidiary to the State Mining Corporation a Government owned public corporation. The two are inseparable thus I hold that **Stamigold** is qualifying to be treated under the section 6(2) of the Government Proceeding Act. The section provides:

"S. 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 claims against the Government, and he shall send a copy of his claim to the Attorney General."

From the records available in court there is no evidence to prove that the notice of 90 days was issued to the defendant and a copy served to the Attorney General by the plaintiff thus violation of the above cited provision. The provision above cited is coached in mandatory terms by using the word *shall*. The provision imposes two functions to be performed by the claimant (plaintiff). One, is for the plaintiff to issue a notice of 90 days to the ministry, department or officer alleged to have committed civil wrong. Secondly, the plaintiff to notify the Attorney General by sending him a copy of the said notice. This position of the

law was also stated in the case of **East Coast Oil Fats Limited Versus The Tanzania Bureau of Standards and the AG**, Commercial Case No. 151 of 2017 (HC – unreported). The court stated:

“The above provision of the law is crystal clear that before a party institutes a suit against the Government such party must have previously issued a notice of not less than ninety days to the Government Minister, department or Officer and a copy of it to the Attorney General. The said notice must specify the basis of claim.”

What the plaintiff allege to have done before suing the defendant was to issue her with several demand notices. The alleged demand notices issued to the respondent which have not even presented to court by any stretch of imagination could not serve the purpose of the notice of 90 days of intention to sue the defendant or the Government.

It is elementary law that whenever the word “shall” is used in a provision, it means that the provision is imperative. This is stated under section 53(2) of the Interpretation of Laws Act, [Cap. 1 R.E 2019] and it reads:

“Where in a written law the word “shall” is used in conferring a function, such word shall be interpreted to mean that the so conferred must be performed”

This position was also well spelt in the case of **Godfrey Kimbe Vs. Peter Ngonyani**, Civil Appeal No. 41 of 2014, where the Court of Appeal had this to say:

"The foregoing section, by the use of the word "shall", has been couched in mandatory terms. It is elementary that whenever the word "shall" is used in a provision, it means that the provision is imperative. This is by virtue of the provisions of section 53(2) of the Interpretation of Laws Act, [Cap. 1 of the Revised Edition, 2002]."

As the plaintiff in this suit failed to perform the functions conferred to her or meet the condition by the provisions of section 6(2) of the Government Proceedings Act of issuing the 90 days notice of intention to sue the defendant and send a copy of the said notice to the Attorney General, I hold the views that such failure renders the present suit incompetent. The second preliminary point of objection is therefore upheld.

Having determined the second preliminary point of objection positively which in fact disposes of the matter I see no compelling circumstances to require me determine the first point of objection.

In the circumstances and for the foregoing reasons, I am inclined to hold that this suit is incompetent and is hereby struck out with costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 03rd day of July, 2020.



E. Kakolaki
JUDGE

03/07/2020

Delivered at Dar es Salaam this 08th day of July, 2020 in the absence of both plaintiff and the defendant and the presence of Ms. Lulu Masasi, court clerk.



E. E. Kakolaki

JUDGE

03/07/2020

