

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA
AT MUSOMA**

CIVIL CASE No. 12 OF 2019

1. MUGETA TOROKOKO1ST PLAINTIFF
2. ERNEST MKULI KUSOYA2ND PLAINTIFF

VERSUS

**1. MINISTRY OF LANDS, HOUSING
AND HUMAN SETTLEMENT1ST DEFENDANT**
**2. THE STATE ATTORNEY
ATTORNEY GENERAL'S CHAMBERS MUSOMA2ND DEFENDANT**
**3. TANZANIA NATIONAL ROADS AGENCY
MUSOMA (TANROADS)3RD DEFENDANT**

RULING

29th April, 2020

Kahyoza, J.

The plaintiffs sued the defendants claiming for -

- i. an order of payment to the 1st plaintiff a total of Tshs. 50,000,000/= being general damages;
- ii. an order of payment to the 2nd plaintiff a total of Tshs. 80,000,000/= being general damages;
- iii. costs ; and
- iv. any other relief(s) this Court may deem it fit to award.

The defendants resisted the claim by filing their defence and raising a preliminary objection that –

"The suit has been filed in contravention of Section 6(3) and (5) of the Government Proceedings Act. No. 16 of 1967 (Cap. 5) of the Revised Edition 2002 being brought against the State Attorney of the Attorney General Chambers, in which the Plaintiffs have no Locus Standi to sue."

Ms. Subaira, Learned State Attorney and Mr. Saddy advocate, represented the defendants while the plaintiffs appeared in person during the hearing of the preliminary objection.

Mr. Saddy advocate for the defendants submitted in support of the preliminary objection that the plaint was instituted in violation of the requirements of S. 6(3) and (5) of the Government Proceedings Act No. 16 of 1967 [Cap 5. RE 2002]. That the provisions of the law require such cases to be filed against the Attorney General. He added that by virtue of sub-section (5) of section 6, if the Government department is sued the Attorney General has to be joined in that case.

The defendants' advocate submitted further that, the suit before this Court was instituted against the State Attorney, Attorney General's Chambers Musoma. By virtue of the **Office of the Attorney General (Discharge of Duties), Act No. 4/2015**, the term Attorney General is construed as per the definition provided under Article 6 of the Constitution of the United Republic of Tanzania [Cap. 2 R. E 2002].

Furthermore, the defendants' advocate stated that the term **State Attorney** is defined as a person appointed under S. 24 and 25 of **Office of the Attorney General (Discharge of Duties), Act** (*supra*). He concluded that the suit was not instituted against the Attorney General but the State Attorney and that the plaintiffs have no claims against the State Attorney. He prayed the suit to be struck out with costs.

The plaintiffs conceded to the preliminary objection. The second plaintiff submitted that they discovered that the suit was wrongly instituted and applied to amend the plaint on the previous date that is on the 24th March, 2020. They prayed to be allowed to amend the plaint.

In his rejoinder, the defendant's advocate Mr. Saddy advocate, emphatically impressed upon the Court to strike out the suit with costs.

I, totally agree with both parties that S. 6(3) and (5) of Cap 5 provides that suits against the Government have to be instituted against the Attorney General and the Government officer or department, alleged to commit the civil wrong. It provides-

"6.-(1) N/A

(2) N/A

(3) *All suits against the Government shall, after the expiry of the notice be brought against the Attorney-General, and a copy of the plaint shall be served upon the Government Ministry, Department or Officer that is alleged to have committed the civil wrong on which the civil suit is based.*

(4) N/A.

(5) Notwithstanding the provisions of subsection (3), 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”.

The instant suit was brought against the Ministry of Lands, Housing and Human Settlement, **the State Attorney, Attorney General’s Chambers** Musoma, Tanzania National Roads Agency Musoma (TANROADS). It is instituted against a wrong person **the State Attorney, Attorney General’s Chambers**, in violation of the clear previsions of the Law. The remedy is to strike it out. The suit cannot survive against the other parties as the **Attorney General** is a necessary party. The law states that when the Government department is sued the **Attorney General** has to be joined. See **section 6(5) of Cap. 5 quoted above**. The Attorney General is a person different from a State Attorney.

The plaintiffs prayed to amend the plaint on 24/3/2020. It is not disputed that the plaintiffs on the 24/3/2020 prayed to amend their plaint to rectify the error. The prayer was not granted as on that day the case was coming for mention. I considered the prayer, unfortunately, I cannot grant it. It is rite law that amendments of pleadings should not be allowed to pre-empt the preliminary objection. See **Method Kimomongoro V. Board of Trustees of TANAPA**, Civ. Application NO. 1/2005 (CAT Unreported) where the Court stated -

"This Court has said in a number of times that it will not tolerate the practice of an advocate trying to pre-empt a preliminary objection either by raising another preliminary objection or trying to rectify the error complained of".

The Court of Appeal took a similar position in **Noel Palangayo V. Tanga Cement Co. Ltd.** Civ. Appl. No. 4/2015 (CAT unreported). In that case the applicant conceded to the preliminary objection and sought to withdraw his application. The Court of Appeal (Mugasha J.A) held that –

"To grant a withdrawal is tantamount to pre-empting a preliminary objection. More so, the remedy of the incompetent application is to strike it out. As such the application is accordingly strike out".

There is yet another decision of the Court of Appeal where a similar stance was taken. In **Bahandurahi E. Shanji and Another V. the Treasured Registrar Ministry of Finance and 4 others Civ. Appeal No. 4/2003** (CAT unreported), the Court of Appeal rejected an invitation to allow the amendment after preliminary objection was filed. It held –

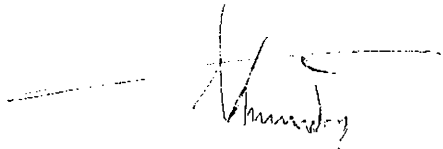
*"If the appellants were serious we think in the light of the Court's decision in **Ndaweka** they could have rectified the defect before notice of the first preliminary objection was lodged on 30/4/2007. Rectification after that date would amount to pre-empting the objection."* (emphasis supplied)

The plaintiffs' prayer to amend the plaint was made on the **24/3/2020** whereas as the preliminary objection was raised through the written statement of defence filed **on 25th November, 2019**. It is this Court's decided view that, the intended amendment was for the purposes

of pre-empting the preliminary objection. For that reason, I cannot grant the requested amendment without violating the established practice of this Court and the Court of Appeal. The prayer for amending the plaint to sue the proper party is rejected.

In the upshot, I uphold the preliminary objection and strike out the suit. Basing on the circumstances of this case, which are that the plaintiffs being old persons without means even to engage an advocate in a serious claim like this one and they are in the danger of losing their property, I find it just each party to bear its own costs.

It is so ordered.

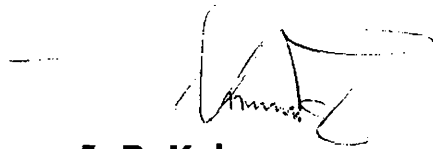


J. R. Kahyoza

JUDGE

29/4/2020

Court: Ruling delivered in the presence of the parties. B/C Charles present.



J. R. Kahyoza

JUDGE

29/4/2020