

**IN THE HIGH COURT OF TANZANIA  
IN THE DISTRICT REGISTRY OF SHINYANGA  
AT SHINYANGA**

**LAND CASE NO. 03 OF 2020**

**1.MASHAKA ABDALLAH**

*(The Administrator of the Estate of the late Mhoja Juma)*

**2.JULIUS BONIPHACE MAGUMBA**

*(The Administrator of the Estate of the late Boniphace  
Magumba Gisema)*

..... **PLAINTIFFS**

**VERSUS**

**1.BARIADI TOWN COUNCIL**

**2.THE MINISTRY OF HOME AFFAIRS**

**2.THE ATTORNEY GENERAL**

.....**DEFENDANTS**

**RULING**

**27<sup>th</sup>August & 10<sup>th</sup>September,2021**

**MDEMU, J.:**

This ruling is in respect of preliminary objections raised by the Defendants regarding the suit filed by the two Plaintiffs. The latter two who are administrators of the estates of the late Mhoja Juma and the late Boniphace Magumba Gisema for the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs respectively prayed to this court for judgment and decree in the following version:

- 1.The declaration that the 14 acres of land located at  
Somanda in Bariadi Township-Simiyu Region form part and  
parcel of the estates of the late Mhoja Juma and Boniphace*

*Magumba Gisema which is being administered by the Plaintiffs.*

*2. That, the Defendants be permanently restrained from either allocating to themselves or planning the said disputed land to any person other than designating the same to form part and parcel of the estates being administered by the Plaintiffs and likewise be restrained from obstructing the plaintiffs from using the same.*

*3. Payment of general damages at the court's discretion.*

*4. The costs of the suit.*

In the course of filing written statement of defence, the Defendants filed the following preliminary objections regarding the suit so filed; for the 1<sup>st</sup> defendant it was raised that:

*1. That the plaintiffs suit is hopelessly time barred as it has been lodged in court more than 41 years in contravention of part 1, Item 22 of the Schedule to the Law of Limitation Act, Cap.89 RE 2019.*

- 2. The Plaintiffs' suit has been filed in contravention of section 33(1)(a) of the Written Laws (Miscellaneous Amendment) Act No.1 of 2020.*
- 3. The Plaintiffs have no any cause of action against the 1<sup>st</sup> Defendant.*

As to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, the preliminary objections were:

- 1. That, the plaint is prematurely instituted.*
- 2. That, this suit is hopelessly time barred.*

On 22<sup>nd</sup> of July, 2021, parties appeared before me for hearing of the preliminary objections. It was agreed that, hearing of the preliminary objections be by way of written submissions. Parties complied with the scheduling order.

Mr. Maganiko Msabi, learned Solicitor for the 1<sup>st</sup> Defendant was the first to file his written submissions on 6<sup>th</sup> of August, 2021. After restating facts and the objections raised, Mr. Msabi submitted that, the raised preliminary objections are on points of law within the principles stated in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) E.A.** He thus summed up that in terms of Part 1 item 22 of the Schedule to the Law of Limitation Act, the suit filed by the

two Plaintiffs after 41 years from the demise of the two deceased persons is out of time.

For the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, Mr. George Kalenda, learned State Attorney filed his written submissions in support of the preliminary objections on 6<sup>th</sup> of August, 2021. Regarding an objection on filing the suit prematurely, his view was in three fold. **One**, the notice of intention to sue was instituted in contravention of the provisions of section 31(1)(a) of the Written Laws (Miscellaneous Amendment) Act No. 1 of 2020. The section demands whoever wants to sue the Government to file a 90 days' notice; a copy of which be served to the Attorney General and the Solicitor General respectively. He thus attacked the filed notice for want of proof if at all it was served to the Attorney General and the Solicitor General respectively as legally required.

**Two**, as the notice was not served, in terms of the law as stated above, there is no cause of action against the Defendants as the notice is also supposed to state the cause of action. He added that, the notice (annexure C) shows the cause of action and correspondences of the 1<sup>st</sup> Defendant and the Plaintiffs but has not shown the place of abode of the Plaintiffs and reliefs claimed.



In his view, the notice was relevant to be served to the Government for notification and also for the Government to redress the claims if the same are genuine. He thus attacked the said notice as being defective. He submitted on the **third** reason by citing the case of **Rose Rozer & 3 Others vs. National Insurance Corporation of Tanzania & Another, Land Case No. 126 of 2019** (unreported) and also Order VII Rule 11(a) of the Civil Procedure Code, Cap.33 that, the plaint be rejected for want of disclosure of cause of action.

On the second limb of preliminary objection, that is, relating to time limitation, the learned State Attorney made reference to the provisions of Item 22 of Part I of the Schedule to the Law of Limitation Act, Cap.89 that, as operation Vijiji occurred around 1974, an action instituted in the year 2020 is out of the prescribed limit of 12 years. He thus prayed the instant suit be dismissed.

In reply, Mr. Julius Mushobozi filed his written submissions on 20<sup>th</sup> of August, 2021. Regarding time limitation to institute the instant suit, his view was that, the provisions of section 9(1) of the Law of Limitation Act and not Item 22 of Part I of the Schedule to the Act is applicable. In this he said, the right of action accrued in 2020 after the defendants' action to discontinue

the plaintiffs' peaceful possession of the 14 acres' land. Alternatively, he thought, even when the cause of action accrued in 1975 and 1985 respectively, yet there would be no action taken by the Plaintiffs as they were appointed as administrators of the estates on 22<sup>nd</sup> of January, 2020, for the 1<sup>st</sup> Plaintiff and for the 2<sup>nd</sup> Plaintiff was on 14<sup>th</sup> of May, 2020.

As to the cause of action, he cited the case of **John M. Byombalirwa vs Agency Maritime International (Tanzania) (1983 TLR 1** that, in determining the cause of action, it is the plaint that should be considered. He thus thought that, the notice annexed and copied to the Attorney General and the Solicitor General in paragraphs (a), (b) and (c) highlighted the cause of action and the reliefs sought. He also referred to the annexed KLC/D for proof of service to of the notice to the Defendants within the prescribed time of 90 days. He that sought the provisions of Order VII Rule 11(a) of the Civil Procedure Code, Cap.33 are irreverent and also distinguished the case of **Rose Rozer & 3 Others vs. National Insurance Corporation of Tanzania & Another** (supra) on the principle that, each case be decided on its own peculiar facts. He urged me, under the premises, to have the preliminary objections all dismissed.

In rejoinder, Mr. Maganiko and Mr. George Kalenda filed their written submissions on 27<sup>th</sup> of August, 2021. They all thought section 9(1) of Cap.89 should not apply because the land was to be recovered soon after the death of the two deceased persons in 1975 and 1983 respectively. They also reiterated want of proof of serving the notice to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and that, the notice has not disclosed cause of action.

I have duly considered submissions of both sides together with authorities cited to that effect. On the objection relating to want of service of the notice of intention to sue the 1<sup>st</sup> Defendant, parties are in agreement that the plaintiffs served the notice to the 1<sup>st</sup> Defendant Bariadi Township Council. The Notice which got annexed to the plaint as annexure C in paragraph 10 of the plaint got copied to the following, among others:

*COPY TO BE SERVED*

*1. The Attorney General,*

*C/o State Attorney In charge/Solicitor General In charge*

*Attorney General's Office*

*P.O.BOX*

*Bariadi.....We have issued the demand notice to sue  
kindly advise the Council Accordingly to  
avoid unnecessary litigations.*



On this notice, it is obvious that the same was copied to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. Is that a proof that the said notice was duly served to the two Defendants? Act No. 1 of 2020 which amended section 190 of the Local Government (District Authorities) Act, Cap. 287 provides that:

*(1) No suit shall be commenced against local authority-*

*(a) Unless a ninety days' notice of intention to sue has been served upon the local authority and a copy thereof to the Attorney General and the Solicitor General.*

From the above position of the law, serving a copy of the notice of intent to sue the Government to the Attorney General and the Solicitor General is a legal requirement. In it therefore, parties intending to commence a suit against the Government be it central or local government have not given the option to skip this requirement. It is also being noted that, mere composition of the address or the title "the Attorney General or the Solicitor General" in the notice without evidence that they were served, in itself, cannot be proof of service. There must be evidence that the said notice reached the Attorney General and Solicitor General respectively.



The fact that the 1<sup>st</sup> Defendant who is in breach, according to the plaint, received the notice is only evidence that the requirement to commence a suit against the Government preceded by notice has been met. This however is not evidence that the Attorney and the Solicitor General were duly served. The obligation to ensure the notice is duly served as legally require is with the Plaintiffs. There is no evidence in the instant notice that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were served for want of endorsement in the notice that they received.

Equally, the annexed KLC/D in the reply to the Written Statement of Defence submitted by Mr. Mushobozi to be proof of service, in my opinion it is not. It is just evidence that they commissioned TPC to deliver unknown documents to the Attorney General. It is not stated if the document the complained notice of intention to sue the Government. Of importance, there is evidence of receiving the document at TPC but there is no evidence that TPC posted the document to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. Again, as it is therefore, it is not known if the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were served at Dar es Salaam as per KLC/D or at Bariadi as indicated in the unendorsed notice.

I therefore agree with the Defendants' Counsel that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have not been served. This in my view, is a mandatory legal

requirement and wasn't meant to be a mere fashion. Had the parliament intended so, then it wouldn't have legislated so.



As submitted by Mr. George Kalenda, copying the Attorney General intimates the need for the Government to redress the claimant if it sees the claim a genuine one and in event it decides otherwise, then it remain an opportunity to prepare a defence. This being a legal requirement, noncompliance of the same, renders the instant suit incompetent. Infact, the Attorney General, being the Chief Legal Adviser to the Government interms of the provisions of article 59 of the Constitution of United Republic of Tanzania, 1977 and also as legislated in the Office of the Attorney General (Discharge of Duties) Act, No. 4 of 2005 is clothed with mandate to decide whether the intended suit subject to the notice of intention to sue is meritorious or otherwise. In orderly way of executing government businesses, the duty is exercised in liase with the Ministry Government Institution, or independent department of Government to whom the claims are directed.

On that stance, this preliminary objection alone suffices to dispose of the matter thus the suit is hereby rendered incompetent and is accordingly struck out. No order as to costs prescribed.

It is so ordered.

  
**Gerson J. Mdemu**  
**JUDGE**  
**10/9/2021**

**DATE at SHINYANGA** this 10<sup>th</sup> day of September, 2021.

  
  
**Gerson J. Mdemu**  
**JUDGE**  
**10/9/2021**