

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL CASE NO. 159 OF 2020

CHARLES JAPHET MARO..... PLAINTIFF

VERSUS

BOARD OF TRUSTEES OF THE PUBLIC

SERVICE SOCIAL SECURITY FUND.....1. DEFENDANT

THE ATTORNEY GENERAL.....2. DEFENDANT

RULING

Last Order: 27th September, 2021

Ruling: 15th November, 2021

MASABO, J

This ruling is in respect of a preliminary objection raised by the respondents in their joint written statement of defence filed on 26th July 2021. The two limbs of this preliminary objection are as follows: **One**, the court does not have jurisdiction to hear and determine the matter as per section 44(1) of Social Security (Regulatory Authority) Act No. 8 of 2008 and **two**, the suit is bad in law and untenable for contravening the provisions of Section 6(2) of the Government Proceedings Act, Cap 5 RE 2019.

For a better appreciation of the preliminary object, the following abbreviated factual background is of essence. The plaintiff was employed

by TANESCO on permanent and pensionable terms. His employment lasted from 1st October 1986 to 1st August 2017. During his tenure at TANESCO he was a member of the Public Pension Fund, now Public Service Social Security Fund (PSSF), the 1st defendant herein. After the end of his tenure all his terminal benefits were paid by his employer save for pension which has remained unpaid to date in spite of tireless follow-ups. Seeking to enforce his right he has moved this court claiming his statutory retirement benefits at a tune of Tshs. 39,197,413.95/-, general damages for loss of use, frustration of his plans and distortion of his legitimate expectation for over 30 years and interests thereto.

At the hearing of the preliminary objection which proceeded in writing, Mr. Galus Lupogo and Sukaina Farouk, learned State Attorneys argued in support of the preliminary objection whereas Mr. Robert Rutaihwa learned counsel for the plaintiff opposed the preliminary objection.

Submitting in support of the first limb of the preliminary objection, Mr. Lupogo argued that section 44 (1) of the Social Security (Regulatory Authority) Act No,135 of 2018 provides that a dispute between a member or beneficiary and a scheme or a scheme and a scheme or a member and a manager shall be referred to the division. In view of this and the provision of section 53(1) of the Interpretation of Laws Act [Cap 1RE

2019], he argued that the suit has been improperly filed in this court as the use of the word 'shall' in the above provision implies that reference to the Division is mandatory. He proceeded that, since the subject matter of this suit as discernable from paragraph 4 of the plaint involves payment of statutory terminal benefits it falls under the ambit of section 44(1) of the Social Security (Regulatory Authority) Act which requires the parties to refer the matter to the internal forum before being brought to court. He concluded that, as there are remedies available for the plaintiff to resolve the matter, this suit cannot be entertained in court as articulated in **Attorney General v Lohay Akonaay and Another** [1995] TLR 80 (CA).

Moreover, Mr. Lupogo argued that, since jurisdiction is conferred to court by statute not by the parties (**National Bank of Commerce Limited v National Chicks Corporation Limited and 4 Others**, Civil Appeal No. 129 of 2015, CAT at Dar es salaam (unreported), this court has no jurisdiction to entertain the suit as the plaintiff has deviated from the procedure prescribed by the applicable statute.

In regard to the second limb of the preliminary objection, it was argued that the suit contravened the mandatory requirement for a 90 days' notice

as provided for under section 6(2) of Government Proceedings Act [Cap 5 RE 2019]. It was argued further that the purported notice was served to the 1st Defendant but no copy was availed to the Attorney General as required by law. Reinforcing his argument, Mr. Lupogo contended that the gist of the section 6(2) of the Government Proceedings Act was well stated in **Aloyce Chacha Kenganya v Mwita Chacha Wambura and 2 Others**, HC Civil case No. 7 of 2019 and in **Thomas Ngawaiya v Attorney General & 3 Others**, Civil Case No. 177 of 2013 where it was held that;

“The provisions of section 6(2) of the Government Proceedings Act are express, explicit, mandatory, admit no implications of exceptions. They are imperative in nature and must be strictly complied with. Besides, they impose absolute and unqualified obligation on the Court”.

Based on this, Mr. Lupogo urged this court to disregard the notice as it was not copied to the Solicitor General and Attorney General was not supplied with the same.

In reply, Mr. Mwesiga counsel for the plaintiff submitted that the issue between the plaintiff and the 1st defendant is delay of payment of

retirement benefits even after the plaintiff's forms were approved by his employer. He proceeded that, although section 44(1) & (2) of the Social Security (Regulatory Authority) Act Cap 135 RE 2018 requires a member or beneficiary to refer a dispute to the Division, the Division is inexistence as it has not been established. In the alternative he argued that, although the law does not define the term decision, a decision must be put in writing and should have been attached to the pleadings which is not the case as no decision has been availed to the plaintiff and none has been attached to the pleadings by any of the parties. Mr. Mwesiga argued further that the Social Security (Regulatory Authority) Act, requires each scheme to establish its own dispute mechanism but the Public Service Social Security Act does not provide the same.

Thus, under the premise, the dispute is properly before this court as the PSSSF has not complied with the mandatory requirement for establishment of an internal dispute resolution mechanism and, strictly, there is no dispute between the plaintiff and the defendant except for the delay of payment. He concluded that, the provision of section 53(2) of the Interpretation of Laws Act [Cap 1. RE 2019] has been inconceivably cited out of context as the suit is within the jurisdiction of this court and there

is no any contravention of Section 44(4) of the Social Security (Regulatory Authority) Act.

In regard to the requirement of a 90 days' notice. Mr. Mwesiga argued that this limb of the preliminary objection is misconceived as the plaintiff issued the notice which is attached to the plaint as annexure CMJ3. The notice was served to the 1st defendant as per section 72 (1) of the Public Service Social Security Fund Act and the Public Service Social Security Fund Act, 2018 read together with section 6(2) of the Government Proceedings Act [Cap 5 RE 2019]. He proceeded further that, Section 6(2) does not require service to the AG or Solicitor General thus service of the notice to 1st defendant suffices. Mr. Mwesigwa distinguished Kenganya's case from the instant one, as in Kenganya's case the 90 days' notice to the Commissioner of Minerals Musoma was not issued. Fortifying his argument, Mr. Mwesiga referred this court to **East Coast Oil and Fats Limited v Tanzania Bureau of Standards and Attorney General**, Commercial Case No.151 of 2017 where the court expounded that there is no need to copy the Attorney General with a copy if the claims of a complainant have been submitted to the respective department of the government.

In the alternative, Mr. Mwesiga argued that the preliminary objections raised by the defendants are not pure points of law as they require evidence from the 1st defendant, in respect of proof of service of the notice to Attorney General and Solicitor General. It was argued further that, both, the requirement for the plaintiff to refer the matter to the Division and the issuance of 90 days' notice include facts to be proved. Thus, they do not pass the test of **Mukisa Biscuit manufacturing Co. Limited vs West End Distributors Ltd** [1969] EA 694.

Concluding his submissions Mr. Mwesiga argued this court to invoke the principle of overriding objective principle under Section 3A, 3B and 3C of the Civil Procedure Code Cap 33 RE 2019 which enjoins the court to consider substantive justice and to dispense with the technicalities.

In rejoinder, Mr. Lupogo reiterated his submission in chief that the suit is filed in contravention of section 44(1) and (3) of the Social Security (Regulatory Authority) Act which imposes mandatory provision. In regard to the notice, Mr. Lupogo reiterated that the service of the notice to the Attorney General is a mandatory requirement hence cannot be ignored. He argued that, the case of **East Coast** (supra) distinguishable as the same was decided no 16th April, 2018, before the re-enactment of the Government Proceedings Act and the copy of notice was copied to Attorney General.

In regard to competence of the preliminary objections, Mr Lupogo submitted that they are competent as the principle laid down in **Mukisa's** case presupposes that the preliminary objection can be discerned from the pleadings.

Having considered the submissions for and against the preliminary objection, I will now proceed to consider and determine the preliminary objection. However, before venturing on the merit of the preliminary objection, I will preface my determination with the point raised by Mr. Mwesiga in the course of his reply submission whereby he questioned the status of the two points raised by the defendant argued the court to overrule them as they do not qualify as preliminary objections. In addressing this point, regard must have to the landmark case of **Mukisa Biscuits Manufacturing Company v West End Distributors LTD** (1969) EA 696 which defined and set the following parameters of preliminary objection when it defined a preliminary objection as;

" .. Consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which, if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a

submission that the parties are bound by the contract giving to the suit to refer the dispute to arbitration.”

“A preliminary objection is in nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is the exercise of judicial discretion”.

The query to be answered is whether the two limbs of the preliminary objections raised by the defendants pass the test/fall within the above parameters. Having carefully considered the two points, I have found them to have passed the test as they are not premised on factual issues but on compliance of statutory provisions, hence purely point of law. Both concern prerequisite requirements for filing civil suits. By their nature, they border on the issue of jurisdiction which is a purely legal issue and does not require the court to delve into facts and evidence to establish it. For these reasons, I decline the invitation.

Revering to the merits of the preliminary objection, I have taken the liberty to start with the second limb of the preliminary objection as regards compliance with section 6(2) of the Government Proceedings Act [Cap 5 RE 2019]. This provision states that:

(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 and the Solicitor General.

From its plain meaning this provision imposes two mandatory requirements namely issuing a notice of 90 days to the Government Minister, Department or the respective officer prior to institution of the suit against and *second*, sending a copy of the said notice to the Attorney General and the Solicitor General. As the two are not mutually exclusive, the plaintiff's duty under this provision is not discharged by issuing of the notice and serving it upon the government department only. The notice so issued must be copied to the Attorney General and the Solicitor General. As articulated in **Thomas Ngawaiya vs Attorney General & Others** (Supra):

"The provision of Section 6(2) of government Proceedings Act are express, explicit, mandatory, admit no implications or exceptions."

Since the plaintiff has conceded that the notice was not copied to the Attorney General and Solicitor General, the suit cannot be sustained as it has been rendered incompetent by such omission. With regard to the case

of **West Coast's Oil and Fat Limited** (supra), I have found it to be inconceivably cited as its facts are sharply distinguishable from the instant case. Unlike in the instant case where the notice which is appended to the plaint as annexure MJ3 was not copied to the Attorney General, **West Coast's Oil and Fat Limited** (supra), the Court having perused the notice it observed that the notice was duly issued to the Government Department and copied to the Attorney General as per the requirement of section 6(2) of the Government Proceedings Act.

I have considered the invitation fronted in the alternative by Mr. Mweasiga that the principle of overriding objective be invoked to cure the omission but I respectfully decline as the requirement to copy the notice to the Attorney General is not a mere technicality. It is a legal requirement which must be duly complied by the parties. Needless to add that, the principle of overriding objective is not a panacea to every defect or omission. As held by the Court of Appeal in **Juma Busiya vs Zonal Manager, South Tanzania Postal Corporation**, Civil Appeal No.273 of 2020 (unreported);

The Principle of Overriding Objective is not the ancient Greek goddess of universal remedy called Panacea, such that its objective is to fix every

kind of defects and omissions by parties in courts.

The second limb of the preliminary objection is, therefore, sustained on the reason above demonstrated. Having upheld the second limb of the preliminary objection, I see no need to revert to the 1st limb as the finding on the 2nd limb of the preliminary objection sufficiently disposes of the matter.

Accordingly, the suit is struck out with costs.

DATED at DAR ES SALAAM this 15th day of November 2021.

X



Signed by: J.L.MASABO

J.L. MASABO

JUDGE

