

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
MISC. CIVIL APPLICATION NO. 432 OF 2020**

**HASSAN ABDALLAH KITIGI 1ST APPLICANT
UWESU ABDALLAH MOHAMED 2ND APPLICANT
FATUMA SAID WAZIRI 3RD APPLICANT
SELEMAN JUMA SALAMBA 4th APPLICANT**

VERSUS

TEMEKE MUNICIPAL COUNCIL RESPONDENT

RULING

28th October, & 30th November, 2021

ITEMBA, J;

This application has been filed under the provisions of section 2 (3) of the Judicature and Application of Laws Act, Cap 358 R.E: 2002, section 68 (e) and 95 of the Civil Procedure Code, Cap 33 R.E: 2019. The applicants herein above are praying for orders of injunction against the respondent from renting, demanding and collecting rents in the disputed business frames and cages pending determination of the main application.

The application was met with two points of preliminary objections as follows;

- 1. That the application is pre-maturely instituted as there is no main case pending before the Honourable Court.***

2. That the application is defective for non-joinder of a necessary party.

In arguing the objections, the applicants were represented by Mr. Juma Nassoro, learned advocate whilst the respondent was enjoying the services of Ms. Mariam Shellimoh learned solicitor. The hearing of the two objections was conducted by way of written submissions. Parties filed their submissions as per the schedule.

Arguing the 1st preliminary point, Ms. Shellimoh argued that there is no pending suit before the Court whilst in the instant application the applicants are seeking for orders of injunction pending determination of the main case. For that reason, the learned sister contended that the application is pre-mature.

As regard to the 2nd preliminary objection, Ms. Shellimoh, submitted that the application is defective for non joinder of a necessary party who is the Attorney General. She explained that the case of ***Abdullatif Mohamed Hamis vs. Meehboob Yusuf Osman & Fatma Mohamed***, Civil Revision No. 6 of 2017, CAT at Dar es salaam (Unreported) laid down two tests to determine whether a party is a necessary party to the proceedings which are; first, there has to be a right of relief against such a party in respect of the matters involved in the suit and second, the court must not be in a position to pass an effective decree in the absence of such party.

It was Ms. Shellimoh's contention that upon the applicants' decision to sue Temeke Municipal Council as a local government authority, it was necessary for them to join the Attorney General as a necessary party. She insisted the same to be a statutory requirement as provided under section 6 (3) of the Government Proceedings Act, Cap 5

which has been amended under section 25 (a) of the Written Laws Misc. Amendment Act, No. 1 of 2020. Ms. Shellimoh furthermore, cemented that failure to join the Attorney General vitiates any proceedings of any suit brought against the government as per section 25 (b) of the same provision of the law which reads;

"Non-joinder of the Attorney General as prescribed under subsection (3) shall vitiate the proceedings of any suit brought against the government..."

Basing on those reasons, the learned solicitor for the respondent prayed the application be dismissed with costs.

In rebuttal, Mr. Nassoro submitted on the 1st preliminary Objection that the cited laws under the chamber summons, that to say section 2 (3) of the Judicature and Application of Laws Act, Cap 358 R.E: 2002, section 68 (e) and 95 of the Civil Procedure Code, Cap 33 R.E: 2019, give mandate to this Court to grant mareva injunction which is a form of injunction application in the absence of the suit. He contended that the aim is to preserve the *status quo* of the dispute pending filing of the main suit. To bolster his preposition, he cited the case of **Sango Petrol Station Ltd & Others vs. Stanbic Bank Tanzania Ltd, Commercial Case No. 25 of 2013**, in which it was held that the main purpose of granting temporary injunction is to maintain the *status quo*.

Mr. Nassoro accentuated that the respondent cannot be sued without being served with 90 days notice to sue and therefore unless a temporary injunction is issued to preserve the *status quo* the intended suit will remain meaningless. To cement his argument, he cited the cases of **Abdallah H. Maliki & 545 others vs. AG & Another**, Misc. Land Application No. 119 of 2017 and the case of **Nyakilago Aloyce vs. Administrator General & Another, Land case No. 6 of 2019**

(both unreported) where in both decisions this Court had issued the orders of mareva injunction in the absence of the suit vide the provisions of section 2 (3) of the Judicature and Application of Laws Act (*Supra*).

In respect of the 2nd Preliminary Objection, Mr. Nassoro contended that section 6(3) of the Government Proceedings Act as amended by section 25 (a) of the Written Laws (Misc. Amendment) Act (*supra*) is all about suits and not applications. Thus, according to him the instant matter is an application while section 6 (3) gives requirement to join the Attorney General where one institutes a suit. He insisted suits are instituted by a plaint while applications are made by a chamber summons supported by an affidavit. He further invited the Court to read the provisions of Order XLII Rule 2 and Order IV Rule 1 of the Civil Procedure Code (*supra*).

In her rejoinder, Ms. Shellimoh persistently emphasised on what she had submitted prior in her submission in chief and she supplemented that under the circumstances of the case, the applicants were not supposed to file mareva injunction. They could apply for a normal temporary injunction as per Order XXXVII Rule 1 because they have not suffered any loss up to now.

In respect of the 2nd preliminary objection, she insisted that the meaning of the suit as explained in the decision of the Indian Supreme Court in **Pandurang Ramnchandra Mandalik vs. Smt Shantabai**, 1989 AIR 2240 is;

"Any proceedings in a Court of justice by which an individual pursues that remedy which the law affords."

That the Court went further to say;

"The modes of proceedings may be various but that if a right is litigated between parties in the Court of Justice, the proceedings by which the decision of the Court is sought may be a suit."

The learned solicitor for the respondent vehemently insisted that the instant application is a suit and to buttress her argument, she cited the case of **BURAFEX Ltd (Formerly known as AMETAA Ltd) vs. Registrar of Tittles**, Civil Appeal No. 235 of 2019, HCT at Dsm (Unreported) in which a suit was defined to include applications.

Ms. Shellimoh concluded by praying that the application is defective and it should be dismissed.

having gone through the record and considered the arguments of the parties, the issue for determination here is ***whether the raised objections have merit***. I propose, at first, to deal with and determine the second Preliminary objection by the respondent that there is non joinder of a necessary party, for the very reason that this ground attracts the possibility of a party to be condemned unheard in violation to the Constitutional principles.

It should be noted that whether or not the party ought to have been joined in the suit depends upon whether he was an interested party or necessary party.

The law on joinder of the Attorney General in all proceedings involving the government has no exception. Section 25 of the Amendment of the Government Proceedings Act, Cap 5 (The Written Laws Misc. Amendment Act) 2020 amended section 6 by deleting subsection (3) and substituting for it the following for ***ex tenso***:

(3) All suits against the government shall, upon the expiry of the notice period, be brought against the government,

*ministry, government Department, **Local Government, Authority, Executive Agency, Public, Corporation, Public Company** that is alleged to have committed a civil wrong on which the civil suit is based, and **the Attorney General shall be joined as a necessary party.*** [Emphasis is added]

The matter at hand is an application for mareva injunction which has been instituted by the applicants against the respondent which is the local government authority. The applicant's counsel has conceded to the provision of the Law under section 6 (3) of the Government Proceedings Act (supra) that it requires joining of the Attorney General in suits against the government, however he had contested that the provision is only applicable to the suits not applications.

I believe my learned brother, Mr. Nassoro has contradicted himself here and this is because the meaning of a "suit" for purpose of actions against the government is not necessarily meant to a matter instituted by a plaint as he contended. The rationale behind joining the Attorney General is actually derived from **Article 59 (3) and (4) of the Constitution of the United Republic of Tanzania of 1977 (as amended time to time)**. The said article reads;

(3) The Attorney-General shall be the adviser of the Government of the United Republic on matters of law and for that purpose shall be responsible for advising the Government of the United Republic on all matters of law, and to discharge any other functions pertaining to or connected with law which are referred or assigned to him by the President and also to discharge such other duties or

functions which shall be entrusted to him by this Constitution or by any law.

*(4) In the discharge of duties and functions in accordance with this Article, **the Attorney-General shall be entitled to appear and be heard in all courts in the United Republic.***

From the content of the above provision, the Attorney General is the Chief Legal adviser of the Government and representative of the Government in Courts of Law in all matters involving the Government, henceforth, it is illogical to commence any proceedings of civil nature in whatever form without joining him as a necessary party. This can also be evidenced under the functions entrusted to the office of the Attorney General stipulated under **section 8 of the the Office of The Attorney General (Discharge of Duties) Act, Cap 268 R.E: 2019.**

To strengthen on this aspect, I would like to embrace the position of this Court on what is the meaning of the word "suit" when interpreting the same against the Government, the definition by my learned brother Hon. Mlyambina J in **BURAFEX Ltd (Formerly known as AMETAA Ltd) (Supra)** when he was confronted with similar situations as of this case; the learned Judge stated that;

"a suit is a proceeding of civil nature in various forms such as petition, application, appeal, review, revision or as referred in the Civil Procedure Code (supra) filed in a Court of Law between two or more parties for determination of rights an duties of such persons"

It is therefore prudent to state at juncture that the Attorney General ought to have been joined in the instant proceedings as a

necessary party as the provision of section 6 (3) (supra) is couched in mandatory terms. The effect on the proceedings and judgment if a necessary party is not included can be observed in the decision in the **Bank of Tanzania v. Said A. Marinda & 30 Others and the Attorney General**, Civil Application No. 74 of 1998 (unreported), in which the Apex Court found the failure to give a necessary party the opportunity to be heard vitiates the proceedings and the decision thereon.

I find it apt to reproduce the relevant holding as hereunder:

"We are in agreement with Dr. Tenga's submission that that failure to afford an opportunity to the applicant to be heard as a necessary party to the proceedings, seriously affected the proceedings. This is so, because, it violates the basic fundamental principle of natural justice – Audi alteram partem. That is, before a decision affecting an individual is made such an individual shall be afforded an opportunity of being heard. The rationale behind this principle is not far too seek, that is, after hearing both the parties involved, then on balance, upon consideration of both sides, a fair decision is made either way."

In another decision by the Court of Appeal in **National Housing Corporation v. Tanzania Shoe Company and Others** [1995] TLR 251 where the Attorney General was not summoned to the hearing before the Court, it was held that:

"Since the trial commenced and continued in the absence of a necessary party the court proceeded without authority and that constituted a major defect which went to the root of the trial thus rendering the proceedings null and void."

Given the circumstances and guided by the above decisions, I am of the settled view that the instant application is defective for non-joinder of a necessary party, consequently, the issue is answered affirmatively, the second preliminary objection is hereby sustained. The second preliminary objection being enough to censure the competence of the application, I see no reason to delve into the other one, henceforth the application is hereby struck out in it's entirely with costs.

It is so ordered.



A handwritten signature in blue ink, appearing to read "L. J. Itemba".

L. J. Itemba,

JUDGE

30/11/2021