

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
MISC. CIVIL APPLICATION NO. 484 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, 2021 & 30th November, 2021

ITEMBA, J;

This application has been preferred under the provisions of Order 1 Rule 8 of the Civil Procedure Code, Cap 33 R.E: 2019. The applicants herein above are praying for leave of this Court to file a representative suit against the Temeke Municipal Council.

The application was met with three points of preliminary objections, however the respondent had prayed to abandon one of them and the remained objections were to the effect that;

- 1. The application is defective for non-joinder of necessary party.***
- 2. The application is incompetent for being accompanied with the defective affidavit***

In arguing the objections, the applicants were represented by Mr.

Juma Nassoro, learned advocate whilst the respondent was enjoying the services of Mr. Shafii Mshamu, learned solicitor. The hearing of the two objections was scheduled to be conducted by way of written submissions. The confronting parties filed their rival submissions respectively.

In respect of the 1st preliminary point, Mr. Mshamu submitted that the application is defective for non joinder of a necessary party who is the Attorney General. The learned brother argued that, there are two tests to determine whether a party is a necessary party to the proceedings which were laid down in the case of ***Abdullatif Mohamed Hamis vs. Mehboob Yusuf Osman & Fatma Mohamed***, Civil Revision No. 6 of 2017, CAT at Dar es salaam (Unreported). 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 Mr. Mshamu's contention that from the decision of ***Abdullatif Mohamed Hamis (Supra)***, determination of who is the necessary party to a suit would vary from case to case depending on the circumstances. He emphasized that the applicants in the instant application intend to sue the Temeke Municipal Council which falls under local government authority, therefore it was necessary for them to join the Attorney General as a necessary party. He 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. The counsel for the respondent 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..."

On the 2nd Preliminary Objection, Mr. Mshamu accentuated that the affidavit which was served to them was not signed by the registry officer to show it had been received by the Court.

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

In rebuttal, Mr. Nassoro submitted on the abandoned preliminary objection despite that he was aware on the relinquishment made by the counsel for the respondent; for that reason, I tend to ignore the submission in respect of the abandoned objection. As to the 1st 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) requires joining the Attorney General where one institutes a suit. He insisted that 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 respect of the 2nd preliminary Objection, the counsel for the applicant did not bother to counter it.

In his rejoinder, Mr. Mshamu persistently emphasised on what he had submitted prior in his submission in chief and he supplemented that the meaning of the suit can be found in the decision by the Indian

Supreme Court in **Pandurang Ramnchandra Mandalik vs. Smt Shantabai**, 1989 AIR 2240 that;

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

and that;

"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."

Relying on this position, on that the learned solicitor for the respondent vehemently insisted that the instant application is a suit and to buttress his argument, he 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 suit was defined to include applications.

Mr. Mshamu wound up by praying that the application is defective and it should be dismissed with costs.

I have carefully gone through the record and considered the arguments of the parties, the issue for determination here is ***whether the raised objections have merit.*** Upon digesting the submissions by the parties, the following are the observations which will assist me to easily determine the raised issue;

One, according to the prominent decision of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd** [1969] EA 699 which provides for the proper way of raising a preliminary objection, Sir Charles Newbold, P. stated as follows:

"Preliminary objection is in the 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 if what is sought is the exercise of judicial discretion..."

[Emphasis added]

The preliminary objection that attracts questions of "*why and how*" cannot be determined as pure points of Law. [see the case of **Merchmar's Corporation (Malaysia) Berhard (In liquidation) vs. VIP Engineering and Marketing Ltd & 3 Others**, Consolidated Civil Applications No. 190 and 206 of 2013, CAT at Dar es salaam (Unreported)].

The 2nd raised preliminary objection though not contested in the applicant's reply submission, the respondents' counsel contends that the respondent has been served with an affidavit which had not been signed by a registry officer to show that it has been received by this Court. It is unfortunate the learned counsel had not cited any provision of the law which has been violated. Again, it is unfolded truth that in determining this question, the Court will require evidence to ascertain the same. In parallel to that, questions as to "*why and how*" will be inevitable under the circumstances, which I find it dreadful to consider the second objection as a preliminary objection on the point of law. It is therefore my opinion that the same does not qualify as a preliminary objection. Hence, I tend to ignore it in it's entirety and it is hereby overruled.

Two; 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]*

Three, the matter at hand is an application for leave to file a representative suit 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 reservation that the provision is only applicable to the suits not applications.

I do not wish to subscribe to Mr. Nassoro's preposition because the meaning of a "suit" for purpose of actions against the government is not necessarily meant for matter instituted by a plaint as he had contended. 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 and duties of such persons"

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.**

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 coached in mandatory terms. The effect on the proceedings and judgment if a necessary party is not joined can be observed in the provision of section 6 (4) of the Government Proceedings Act (*Supra*) that is to vitiate the proceedings.

In the case of **National Housing Corporation v. Tanzania Shoe Company and Others** [1995] TLR 251 where the Attorney General was not summoned to the hearing before the High Court, the Apex Court of the Land 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."

Basing on the above reasons and the legal authorities cited, 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 first preliminary objection is hereby sustained, henceforth the application is hereby struck out in it's entirely with costs.

It is so ordered.



L. J. Itemba,

JUDGE

30/11/2021

