

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

**AT DAR ES SALAAM**

**CIVIL CASE NO.164 OF 2020**

**VICENT MSUMARI SHEMSANGA**

**(as the next friend of Kiondo Vincent Shemsanga .....PLAINTIFF**

**VERSUS**

**DR. SAMUEL PETER SWAI .....1<sup>st</sup> DEFENDANT**

**DR.BRYSON MCHARO.....2<sup>nd</sup> DEFENDANT**

**DR.INNOCENT MOSHA.....3<sup>rd</sup> DEFENDANT**

**THE EXECUTIVE DIRECTOR**

**MUHIMBILI NATIONAL HOSPITAL .....4<sup>th</sup> DEFENDANT**

**THE ATTORNEY GENERAL .....5<sup>th</sup> DEFENDANT**

**RULING**

**MRUMA,J.**

The Plaintiff Vicent Msumari Shemsanga instituted a suit against the Defendants Dr. Samwel Peter Swai, Dr. Bryson Mcharo, Dr. Innocent Mosha, the Executive Director Muhimbili National Hospital and the Attorney General for payment of Tshs 900,000,000/ (say Nine Hundred

Million) being compensation for damages caused as a result of an alleged professional negligence by the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Defendants while in the course of employment of the 4<sup>th</sup> Defendant. The 5<sup>th</sup> Defendant the Attorney General is being sued as a necessary party according to the law.

On being served, the Defendant filed a joint written statement of Defence. Together with that defence they raised preliminary objection contending that:

1. The suit is bad in law for being instituted without notice to 4<sup>th</sup> Defendant contrary to the provision of section 6(2) of the Government Proceedings Act, cap 5 RE 2019.
2. The suit is incurably time barred for being instituted out of time contrary to the provision of contrary to the provision of section 3(1) read together with Part 1, item 6 of the Law of Limitation Act (cap 89 RE 2019)
3. The suit is bad in law for contravening the provision of Order 1 Rule 3 of the Civil Procedure Code [cap 33 RE 2019]
4. The suit is bad in law for containing an incurably defective verification clause contrary to the provision of Order VI Rule 15(2) of the Civil Procedure Code.

At the hearing of these preliminary objections the Plaintiff was represented by Mr. Kevin Luambano, learned advocate while the Defendant were represented by Mr. Galus Lupogo and Ms. Judith Kyamba, learned state attorneys. The Preliminary Objection were argued by way of written submissions. I am grateful for the counsel's brilliant submissions.

Submitting in support of the first preliminary objection Mr. Gallus Lupogo learned state attorney submitted that since Muhimbili National Hospital is a government institute and the Executive director has been sued in his capacity as as executive Director of a government institute and the Attorney General has been joined as a principal government legal adviser, the Plaintiff ought to have given ninety (90) days' notice before instituting the suit. The learned attorney cited the provisions of section 6(2) of the Government Proceedings Act [Cap 5 RE 2019] which is to the effect that before suing any public corporation, parastatal Organisation, executive agency and/ or local government authorities' one must give ninety (90) days' notice. The learned state attorney cited the case Aloyce Chacha Kengonya Vs Mwita Chacha Wambura and 2 others High Court Civil Case No.7 of 2019 [unreported] and Thomas Ngawaiya Vs the Attorney General Civil Case No. 177 of 2013 High Court.( unreported) to cement his argument.

Submitting on the second point of preliminary objection, the learned state attorney contended that the Plaintiff's suit is incurably time barred because the tortious act complained of is based on the alleged negligence apprehension of treatment leading to the amputation of the leg of the Plaintiffs son. He stated that the present case the cause of action arose between 19<sup>th</sup> May 2015 when the Plaintiff's son was amputated and 7<sup>th</sup> July 2015 when he purported report from laboratory in Ireland was out or printed out and the plaintiff became aware. He submitted that when the Plaintiff instituted the suit in December 2012 he was incurably time barred for more than two years.

The learned State Attorney also submitted strongly on the remaining two preliminary objections namely.

3. that the suit contravenes the provisions of Rule 3 of Order 1 of the Civil Procedure; and
4. That the suit contains incurably defective verification clause contrary to the provisions of Rule 15(2) of Order VI of the Civil Procedure Code.

Counsel for the Plaintiff filed a counter submissions. Save for preliminary Objection regarding time limitation of the Plaintiff's cause of action

(ground2), counsel for the Plaintiff did not address the rest of the preliminary objections raised.

On the Limitation period, the learned counsel cited among other laws, the provision of section 15 of the Law of Limitation Act [cap 89 RE 2019] which provide as follows;

15 "if on the date on which a right of action for a suit or an application for execution accrues, the person to whom the right accrues is under disability, the action may be brought at any time before the period of limitation prescribed for such action, computed from the date when the person ceases to be under a disability or dies whichever event first occasion.

I beg to start with this point of period of limitation. Under the provisions of section 5 of the Law of Limitation Act the right of action accrues on the date the cause of action arises. In the present case the plaintiff is suing on the tort of negligence. The alleged negligence occurred on 19<sup>th</sup> May 2015. The alleged negligence is, however, a professional negligence. The tortfeasors are all medical practitioners. After the alleged negligence they were charged before a professional body namely the medical Council of Tanganyika. The ruling of the Medical Council was handed down on 14<sup>th</sup> day of February 2018. In my view the right to bring action accrued on the date the Medical Council of Tanganyika delivered

its ruling. I so hold because in my view it would have unreasonable for the plaintiff to institute this suit at a time when the doctors were facing professional misconduct charges before a competent tribunal And it could have been stressful, and unfair for the charged doctors to defend two actions at ago.

Thus, while the cause of action on the date the alleged negligence occurred, on 19<sup>th</sup> May 2015 the night to sue became ripe on the date the proceedings before Medical Council of Tanganyika passed its verdict on the matter that is on 14<sup>th</sup> February 2018. In computing the period of limitation the time during which the plaintiff has been prosecuting in good faith his claim in a court should be excluded (see S.21(1) of the Law of Limitation) The term court is not defined in the Law of Limitation Act. But Black's Law Dictionary 9<sup>th</sup> Edition Bryan A Gaviner defines court to include a tribunal. I thus, find that preliminary objection No.2 was raised without any substance and it lacks merit.

Back to preliminary objection No.1, in February 2020 the parliament passed the Written Laws (Miscellaneous Amendment Act No.1 of 2020) to include all suits by or against public corporations, parastatal organizations, executive agencies and local government authorities in list of government suits. Under the consent procedures, before suing a public corporation, parastatal organization, executive agency or local government authority ,


the Plaintiff has to serve such public legal entity alleged to have committed civil wrong with the (90) days' notice of intention to sue. Failure to issue such notice vitiates the proceedings.

In the case at hand admittedly no notice was served on the 4<sup>th</sup> Defendant the Executive Director of Muhimbili National Hospital who is being sued in his capacity as a person mandated to oversea and supervise the day to day activities at the Muhimbili National Hospital, and the 5<sup>th</sup> Defendant, the honourable Attorney General and as these two Defendants are jointly and severally (which means both together and separately) sued together with the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants the entire proceedings is vitiated for non-issuance of ninety (90) days' notice.

That said, I find no reason to proceed to discuss the remaining preliminary points of objection. I sustain the 1<sup>st</sup> preliminary objection. I sustain the 1<sup>st</sup> preliminary objection raised by the Defendants and strike out the suit.

Order accordingly.



  
A. R. Mruma

**Judge**

**25/5/2022**

**25/5/2022**

Coram: Hon. A. R. Mruma,J

For the Plaintiff: Mr. Kelvin Luambanofor Plaintiff

For the 1<sup>st</sup> Defendant

For the 2<sup>nd</sup> Defendant

For the 3<sup>rd</sup> Defendant

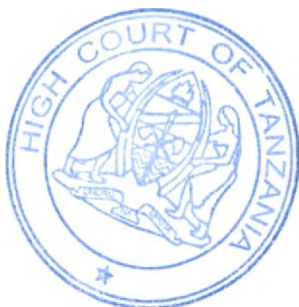
For the 4<sup>th</sup> Defendant

For the 5<sup>th</sup> Defendant

Absent

Cc: Delphina.

Court: Ruling delivered.



  
**A. R. Mruma**

**Judge**

**25/5/2022**