

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IRINGA DISTRICT REGISTRY**

**AT IRINGA**

**LAND CASE NO. 09 OF 2017**

**JOEL MABULA SHIMBA ..... PLAINTIFF**

**VERSUS**

**THE NEW FOREST COMPANY .....1<sup>ST</sup> DEFENDANT**

**KILOLO DISTRICT COUNCIL ..... 2<sup>ND</sup> DEFENDANT**

**MAKUNGU VILLAGE COUNCIL .....3<sup>RD</sup> DEFENDANT**

**RULING**

*Date of last Order: 10/03/2022*

*Date of Ruling: 25/07/2022*

**MLYAMBINA, J.**

This is the ruling not in one of the unprecedented civil cases but it has its own uniqueness. It is in respect of the legal point of preliminary objection raised among and against the Defendants themselves. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants object the act of the 1<sup>st</sup> Defendant to lodge a Third-Party Notice in which he joined the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant before furnishing them with the ninety (90) days' Notice and for not joining the Attorney General as required by the law when the Government is being sued.

The brief facts of the case are to the effect that; the Plaintiff herein sued the 1<sup>st</sup> Defendant before this Court and prayed for the following orders:

- a) That the Defendant is liable for trespass.
- b) That every exhaustive development about ditches and tree planting in the farm at issue were made by Plaintiff.
- c) The declaration that the farm at issue lawfully belongs to the Plaintiff.
- d) This Honourable Court be pleased to issue eviction and demolition order.
- e) Permanent injunctive orders against the Defendant not to enter and/ or do any thing within the farm at issue.
- f) This Honourable Court be pleased to order the Defendant to pay the Plaintiff the general damages which shall be reasonably assessed by the Court notably as it has been pleaded.
- g) Cost of the suit.
- h) Any other relief (s) in favour of the Plaintiff.

The Defendant thought that it would be wise if he was allowed to join the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant to this case as he believes they are the ones who gave him the land in dispute. To that effect, he lodged the

Third-Party Notice. After being served with the said Notice, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant filed their Written Statement of Defence (WSD) accompanied with the legal points of preliminary objection against the 1<sup>st</sup> Defendant, thus:

- a) The 1<sup>st</sup> Defendant did not serve 90 days' Notice to the 2<sup>nd</sup> Defendant.
- b) The 1<sup>st</sup> Defendant did not include the Attorney General on his Third-Party Notice.

By consent of the parties, the points of preliminary objection were argued by way of written submission. All parties were represented. Mr. Saiwello T. J. Kumwenda, Advocate represented the Plaintiff. Mr. Adolf Temba, Advocate represented the 1<sup>st</sup> Defendant while Shamimu Ndazi, Learned State Attorney represented the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant.

The Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant submitted that the 1<sup>st</sup> Defendant failed to issue 90 days' Notice and did not join the Attorney General on his Third-Party Notice. The Counsel added that the 1<sup>st</sup> Defendant contravened the provision of *section 6 (2) of the Government Proceedings Act [Cap 5 R. E. 2019] as amended by Written Laws (Miscellaneous Amendments) Act No. 1 of 2020*. He also supported his argument with *Order 1 Rule 9 and 10 of the Civil Procedure Code [Cap*

*33 R.E. 2019*]. He prayed for the Court to strike out the suit for being incompetent.

In reply in relation to the first point of preliminary objection, the 1<sup>st</sup> Defendant averred that, it is his first time he has experienced preliminary objection where the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant raised the point of preliminary objection against their fellow Defendant. To his knowledge, it is very common to have legal preliminary objection against the Adverse Party. Mr. Adolf Temba, Advocate submitted further that, the Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant does not know the meaning and effect of preliminary objection when sustained is either dismissal or striking out of the matter. Mr. Adolf Temba, Advocate thought that the legal preliminary objection must be against the Plaintiff only.

The Counsel for the 1<sup>st</sup> Defendant added that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant have failed to submit on the consequences of not issuing the 90 days' Notice. It was his view that 90 days' Notice does not apply against the 1<sup>st</sup> Defendant because he was the one who was sued by the Plaintiff. In the application to issue Third Party Notice, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant were Respondents. They did not object the application. Before filling the application, he issued Notice as per *section 190 (1) of the Government (District Authority) Act [Cap 287 R. E. 2002]* at Kilolo

District Council. Therefore, Mr. Adolf Temba, Advocate thought that the first point of objection need evidence to prove if he filed the Notice and for that it can not be a point of preliminary objection. He contended to have a proof that he served the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant with the Notice to sue.

The Plaintiff in his reply to the first point of preliminary objection, did not see any cause of action against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant, that's why he sued the 1<sup>st</sup> Defendant alone. The 1<sup>st</sup> Defendant conceded that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant were drag to Court without being furnished with any Notice. It was not proper to sue or complain in any Court of law against the District and Village Council without Notice. Therefore, it was the view of the 1<sup>st</sup> Defendant that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant were wrongly joined in this case. He prayed this Court to exonerate the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant from this suit so that they can remain true parties.

In their rejoinder, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant reiterated their submission in chief and added that they cannot raise the point of preliminary objection against the Plaintiff because he was not the one who sued them.

After carefully consideration of the arguments from the parties, this Court is of the findings that there is no dispute as to the

requirement to furnish the 90 days' Notice before suing the Government entities. The issue is; *whether the requirement of 90 days' Notice and joinder of the Attorney General is required when the Government entities are joined as Third Party to the case.*

The requirement of serving 90 days' Notice before suing the Government is governed under *section 6 (2) of the Government Act (supra)* which provides:

*No suit against the Government shall be instituted and heard, unless the claimant previously submits to the Government Minister, Department Office concerned a Notice of not less than ninety days for his intention to sue the Government, specifying the basis of his claim against the Government.*

From the above quoted provision of the law, it follows very clear and mandatory that no any suit against the Government shall be instituted without prior 90 days' Notice. Also, *section 16 (4) of the same Act* provides for the interpretation of the word Government as follows:

*For the purpose of subsection (3) the word "Government" shall include a Government Ministry, Local Government authority, Independent*

*Department, Executive Agency, Public Corporation, Parastatal Organisation or a Public Company established under any law to which the Government is a majority shareholder.*

The provisions of section 16 (4) (supra) clearly expresses that the Local Government is part and parcel of the Government entities. The 1<sup>st</sup> Defendant was, therefore, mandatorily required to furnish the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants with the 90 days' Notice before serving them with the Third-Party Notice and not the Plaintiff because he was not the one who sued the Local Government but the 1<sup>st</sup> Defendant. The effect of not serving the mandatory Notice is to struck out the suit. In the case of **Zeno Clement Matanda v. Gloria Alfayo Lema and 3 Others**, Land Case No. 157 of 2021, High Court of Tanzania at Dar es Salaam (unreported), the Court struck out the case for failure to serve the Defendant with the 90 days' Notice.

Furthermore, joining a party to a suit as a Defendant is the same as suing that party. The 1<sup>st</sup> Defendant argument that he never filed a suit against the Government and that *section 6 (2) of the Government Proceedings Act (supra)* apply only to a party who institutes the case against the Government is not valid. Indeed, it is a meaningless

statement. The word suit means; to bring an action or to initiate a legal proceeding in a suit. **Osborn's Concise Law Dictionary**, Eighth Edition defines the word "suit" to mean; *any legal proceedings of a civil kind brought by one person against another*. Therefore, the Third-Party Notice lodged by the 1<sup>st</sup> Defendant against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant is one among the legal proceedings of a civil nature. For that reason, the 1<sup>st</sup> Defendant was obliged to comply with the requirement provided under *section 6 (2) of the Government proceedings Act (supra)*.

On the failure to join the Attorney General as party to the Third-Party Notice, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant submitted that; it is the rule of the thumb that requires the 1<sup>st</sup> Defendant to join the Attorney General under *section 6 (4) of the Government proceedings Act (supra)*. They buttressed their arguments with the case of **MSK Refinery Limited v. TIB Bank Limited and Another**, Misc Civil Application No. 307 of 2020 (unreported).

In reply, the 1<sup>st</sup> Defendant submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant misdirected themselves for failure to take into consideration that the way to challenge the decision/order is not by way of preliminary. They are not aware of what they have submitted against their fellow Defendant. It was the view of the 1<sup>st</sup> Defendant that the



points of preliminary objection were supposed to be directed to the Plaintiff who has failed to join the Attorney General. The 1<sup>st</sup> Defendant submitted further that, by the time when he filed the application, the requirement of joining the Attorney General was not in force.

The Plaintiff on his side insisted that it was the 1<sup>st</sup> Defendant's duty not only to serve the 90 days' Notice but also to join the Attorney General as party to the Third-Party Notice.

In his brief rejoinder, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant insisted that there will not be any chaos if the amended law is applied retrospective. He supported his argument with the case of **Felix H. Moshia, Anna Felix Moshi v. Exim Bank of Tanzania Limited**, Civil Application No. 434 of 2016 in which it was held that:

The general rule is that unless there is clear indication either from the subject matter or from the working of the Parliament, the Act should be given a retrospective construction. One of the rule of Construction that a Court uses to ascertain the intention behind the legislation affects substantive rights, it will not be construed to have retrospective operation, unless a clear intention to that effect is

manifested, where if it affects procedures only, prima facie it operates retrospectively unless there is good reason to the contrary.

The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants prayed the Third-Party Notice to be struck out with costs.

All said, as it is for the normal proceedings or other proceedings of civil nature, the 1<sup>st</sup> Defendant was mandatorily required not only to furnish the 90 days' Notice but also to join the Attorney General as party to the suit as required by *section 6 (4) of the Government Proceedings Act (supra)*. Failure to comply with the said requirement render the suit incompetent.

It must be recalled that Third Party Notice; refers to a legal document which the Defendant is required to file when his application to join the Third Party is granted by the Court. It is a procedure entertained where a party who was not original party to a suit can be brought or added and thereby be made a party to the suit. In this procedure a Court can make a decision in favour of the Defendant against the Third Party especially when the Defendant is found liable. In the light of the decision of this Court in the case of **Advent Contribution Limited v. Tansino Quarries Limited and Another,**

Misc. Commercial Application No. 02 of 2021, High Court of Tanzania [Commercial Division] at Dar es Salaam (unreported), a Third-Party is neither a Plaintiff nor a Defendant. In our jurisdiction, the Third-Party Notice and its procedure are provided under the provision of *Order 1 Rule 14 to 23 of the Civil Procedure Code [Cap 33 R. E. 2019]*.

In terms of *Order 1 Rule 14 (1) of the Civil Procedure Code (supra)*, the Third-Party Notice is available to the Defendant who has to establish that he is entitled to contribution or indemnity. In order for the application for leave to issue a Third-Party Notice to be granted, the Applicant must satisfy the Court on the following conditions: *One*, the Applicant has sufficient grounds to join the Respondent/Defendant as a Third Party. *Two*, the subject matter between the Applicant and Respondent/Defendant is the same as the subject matter between the plaintiff and the defendant and the original cause of action. *Three*, the Applicant claims indemnity or contribution from the Respondent/Defendant. *Four*, the Plaintiff will not suffer any prejudice if the application is granted.

A Third Party has to be supplied with adequate facts in relation to the case to make him know the nature of the claim so that he can prepare a defence. Once he has been served with the Third-Party

Notice, he/she becomes a party to the proceedings and for that reason his/her liability depends on Defendant's liability. In the cases of **Kagwa v. Costa (1963)** EA 213, and **Sango Bay Limited v. Dresdner Bank Limited (1971)** EA 307 the Court held as follows:

"the general scope of a Third-Party procedure is to deal with cases in which all disputes arising out of the transaction as between the Plaintiff and the Defendant and the Third Party can be tried and settled in the same action. This means that in order for a Third party to be lawfully joined, the subject matter between the Third Party and the Defendant must be the same as the subject matter between the Plaintiff and the Defendant and the original cause of action must be the same. In addition, Court can only exercise its discretion to issue a Third Party Notice upon evaluation of the allegations of the Plaintiff in terms of his or her claim and the orders sought from Court, it is also imperative that Court evaluate the defendant allegations against the Third Party."

In terms of *Order 1 Rule 17 and 18 of the Civil Procedure Code (supra)*, a Third Party can challenge the Plaintiff's case and he may

defend himself/herself against the Defendant that the Defendant is not entitled to any contribution or indemnity. The judgement against the Third Party is then limited to the extent of the contribution or indemnity claimed in the Third-Party Notice.

It follows a host of legal questions with the key one being; *whether a Third-Party can raise a point of preliminary objection against the Defendant*. The starting point of answering such issue is to know; what does a preliminary objection mean? Preliminary objection refers to the legal issues raised by one of the parties in a case which requires Court determination before proceeding to the main case. Anything that contravene the law in any case may be a good ground for raising a legal point of preliminary objection. In the case of **Hezron M. Nyachiya v. Tanzania Union of Industrials and Commercial Workers and Another**, Civil Appeal No. 79 of 2001, Court of Appeal of Tanzania at Dar es Salaam; the Court defined preliminary objection to consist of; a point of law which has been pleaded or which arises by clear implication out of the pleadings which if argued as a preliminary objection may dispose of the suit. The Court went further to state that; the aim of preliminary objection is to save the time of the Court by not going into

the merit of an application because there is a point of law that will dispose of the matter summarily.

The purpose of the Third-Party procedure is to serve cost and precious time of the Court. Through a Third-Party procedure, the Court entertains two suits at par, which means: *First*, there is a suit between the Plaintiff and the Defendant. *Second*, there is a suit between the Defendant and the Third Party. More so, the law under *Order 1 Rule 17 Civil Procedure Code (supra)* allows the Third Party to defend himself against the Defendant and the Plaintiff.

As it applies to another normal suit, a Third Party can defend himself against the Opponent Party upon an order of the Court. The Third- Party can file Written Statement of Defence, Counter Claim or even a point of preliminary objection when there is any matter in contradiction with the law of which, if entertained, may dispose of the case at early stage.

Resultantly, I hereby find the Third-Party Notice is incompetent for failure to furnish the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant with the 90 days' Notice and for failure to join the Attorney General. Therefore, the Third-Party Notice is hereby struck out with costs. It is so ordered.



**Y. J. MLYAMBINA**

**JUDGE**

**25/07/2022**

Ruling delivered and dated 25<sup>th</sup> day of July, 2022 through Virtual Court in the absence of the Plaintiff; presence of Mr. Mosses Ambindwile, Advocate for the 1<sup>st</sup> Defendant and in the absence of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant. The 1<sup>st</sup> Defendant was stationed at the High Court of Tanzania Iringa District Registry's premises. Right of Appeal fully explained.



**Y. J. MLYAMBINA**

**JUDGE**

**25/07/2022**