

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

**(IRINGA DISTRICT REGISTRY)**

**AT IRINGA**

**CIVIL CASE NO. 02 OF 2020**

**IRINGA RETCO (2000) COMPANY LIMITED ..... PLAINTIFF**

**VERSUS**

**PERMANENT SECRETARY OF**

**MINISTRY OF FINANCE AND PLANING ..... 1<sup>ST</sup> DEFANDANT**

**TREASURY REGISTRAR ..... 2<sup>ND</sup> DEFENDANT**

**ATTONEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

*Date of last order: 24/03/2022*

*Date of Ruling: 29/07/2022*

**MLYAMBINA, J.**

The Plaintiff cause of action against the Defendants jointly was for the breach of contract of sale of shares agreement of KAMPUNI YA UCHUKUZI IRINGA LTD, which was signed on 29/10/2001. The prayers by the Plaintiff were for the judgement and decree with the following orders:

(i) Defendants to be declared that are in breach of contract.

(ii) Plaintiff be compensated to the tunes of TZs 3,000,000,000/=

(Three Million Tanzanian Shillings).

(iii) General Damage to the tunes of TZs 700,000,000/= (Seven hundred million Tanzania Shillings).

(iv) Any other relief that this Honourable Court deems just and equitable to grant; and

(v) Costs of the suit.

In reply, the Counsel for the Defendants jointly filed a Counter Claim together with the point of preliminary objection against the Plaintiff as follows:

*The suit is bad in law for contravening section 6 (2) of the Government Proceedings Act [Cap 5 R. E. 2019].*

Furthermore, in reply to the Defendants' Counter Claim, the Plaintiff raised two points of preliminary objection against the Defendant Counter Claim, thus:

*i. The claims raised by the Plaintiff are over taken by event, and*

*ii. The claims are timed barred.*

By consent of the parties the points of preliminary objections were argued by way of written submission. All parties were represented. The Plaintiff was represented by Mr. Mpeli Mwakabungu assisted by Mr.

Omary Khatibu, learned advocates while the Defendants were enjoying the service of Mr. Bryson Ngulo, learned State Attorney.

Given the fact that there are two sets of point of preliminary objection raised by both sides against each other, this Court will deal with each set of point of preliminary objection in seriatim.

To start with the objection raised by the Defendants thus; the suit is bad in law for contravening *section 6 (2) of the Government Proceedings Act [Cap 5 R. E. 2019]*, the Defendants legal representative submitted that all notice of intention to sue the Government shall be submitted to the respective Government Minister, Department or Officer concerned and only copies be served to the Attorney General and Solicitor General. But the Plaintiff submitted the ninety days' notice direct to the Attorney General while the law requires otherwise.

Further, The Defendants argued that the use of the word 'shall' under *section 6 (2) of the Government Proceedings Act* implies that the requirement is mandatory in terms of section 53 (2) of the Interpretation of Laws Act [Cap 1 R. E. 2019]. He supported his argument with the case of **Florence Chacha v. TPB PLC**, Misc. Land Application No. 13 of 2021 where Kisanya J. at page 15 referred to the



case of **Thomas Ngawaiya v. Attorney General and 3 Others**, Civil Case No. 117 of 2013.

The State Attorney insisted that the Plaintiff was duty bound to submit the purported notice of intention to take legal action against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant whom he alleged to commit the said wrong. It was his view that the controversy has prejudiced the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as they were handcuffed to act.

On other hand, the Counsel for the Plaintiff conceded that the notice of ninety days and intention to sue was submitted to the 3<sup>rd</sup> Defendant who is the Government Legal Advisor and 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were just copied with the said notice.

After careful consideration of the parties' submission, I noted that there is no dispute that the ninety days' notice of intention to sue the Government was served. However, the issue is; *whether the requirement of the law under the provision of section 6 (2) of the Government Proceedings Act (supra) was complied with*. Before dealing with the preliminary objection, I will revisit the provision of *section 6 (2) of the Government Proceedings Act (supra)* which provides:

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*. [Emphasis mine]

From the afore quoted provision of the law there are few things which has to be complied with any party who want to sue the Government. *First*, a Claimant has to submit a notice of ninety days of intention to sue the Government to the Government Minister, Department or Officer concerned. There is no doubt that it is the Ministry or Public institution which generate the cases from their daily functions or mandates including the execution of public projects.

The provision of *section 6 (2) of the Government Proceedings Act (supra)* uses the ordinary and clear word as to whom and where the notice has to be submitted. The purpose behind is to inform the Government Department as to the claim and legal action, the Plaintiff is about to take and its consequence thereto. Also, they can communicate



with the Attorney General for the necessary step to be followed including preparation of the defences and evidences, if any.

Apart from the above, it will help the Ministry or Department of the Government to make follow up for the expediency of the matter. *Second*, the Claimant shall send a copy of his claim to the Attorney General and the Solicitor General. As the Government Legal Advisor, the law requires the Attorney General to be joined in any suit against the Government as per *subsection 3 of the same section of the Government Proceedings Act* and it is mandatory.

The purpose to serve the Attorney General with the copy of the claim is to notify him about the suit which will be filed before Court of law so that he can communicate with the mentioned Ministry or Department so that he can prepare for the necessary document and other procedure for the interest of the Government.

Therefore, at this juncture, the Court is of the firm position that the requirement of *section 6 (2) of the Government Proceedings Act (supra)* has to be complied as it is. In the case of **Thomas Ngawaiya v. The Attorney General and 3 Others**, Civil Case No. 117 of 2013, High Court of Tanzania at Dar es Salaam, my brethren Ndyansobela J. at page 13 of his judgement has this to say:

*The provision of section 6(2) of the Government proceedings Act are express, explicit, mandatory, admit no implication or exceptions, they are imperative in nature and must be strictly complied with.*

As the matter of fact, laws are enacted to be obeyed, the procedure to be followed and not otherwise. The Court has been vested with the mandate to interpret the law and make sure that the purposes are achieved. The society has to bare in mind that the Attorney General, as a Government Legal Advisor has to be made a party to the case against the Government. This Court is of the findings, as rightly as stated by the learned State Attorney, the Plaintiff's notice of intention to sue was improperly served to warrant this suit to proceed.

As regards the first objection by the Plaintiff as against the Counter Claim, I observe outrightly that in terms of *section 26 of the Written Laws (Miscellaneous Amendments) Act No. 1 of 2020*, the Defendants herein are the Government entities. Indeed, a Counter Claim is a cross suit to the main suit. So, it is a separate suit from the initial or main suit. The time limit for the Government to lodge its claim before the Court of law is sixty years regardless of the nature of the case.



*Section 3 (1) read together with Item 23, Part I of the Schedule of the Law of Limitation Act [Cap 89 R.E. 2019] provides for the time limit whereby; suit by or on behalf of the Government is sixty years.*

In any case, the arguments by the Defendant/Plaintiff that the claims raised by the Government are overtaken by events are not pure points of law. The Plaintiff submitted *inter alia* that the 2<sup>nd</sup> Defendant sometimes in 2005 issues a Certificate of transfer. Thus, it marks that the claim raised in 2020 on contract which have furnished already are overtaken by events through certificate of transfer of shares which was issued by the Government to the Plaintiff sometimes in 2005 whereby in coloration to the issue that the claims raised by the Defendants which are time bared and already overtaken by events.

I find the above arguments by the Plaintiff to be not valid. Instead, I do agree with the Counter Claims' Defendants that the fact that the 2<sup>nd</sup> Defendant issued a Certificate of transfer of shares attracts the need of evidence. As such, the objection is not a pure point of law in terms of the decision in the case of **Mukisa Biscuits Manufacturing Co. Limited v. West End Distributors Limited** [1969] EA 169.

As regards the second point of objection, I have gone through paragraphs 9, 10, 11 and 12 of the Plaint. I noted, the claim between



the Plaintiff and the Defendant started on 12<sup>th</sup> July, 2019. As such, the cause of action arose in the year 2019 which is well within the time required under the law.

In the circumstances, I hereby strike out the main suit for being filed pre maturely. The Counter Claim shall proceed on merits. Costs shall follow events. It is so ordered.



**Y. J. MLYAMBINA**

**JUDGE**

**29/07/2022**

Ruling delivered and dated 29<sup>th</sup> day of July, 2022 through Virtual Court in the presence of Mpeli Mwakabungu, Advocate for the Plaintiff and Ms. Ansila Mwakyao learned State Attorney for the Respondent. Both parties were stationed at the High Court of Tanzania Iringa District Registry's premises. Right of Appeal fully explained.



**Y. J. MLYAMBINA**

**JUDGE**

**29/07/2022**