

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
LAND CASE NO. 16 OF 2020**

**SALIM A. WALLI (Suing as an Administrator
of the Estate of late Gulbanu Abdul Rasul Walli).....PLAINTIFF
VERSUS
NATIONAL HOUSING CORPORATION.....DEFENDANT**

RULING

Date of Last Order: 29/03/2022

Date of Ruling: 22/04/2022

E.E.KAKOLAKI, J.

This is a ruling on preliminary points of objection raised by the defendant against the plaintiff's suit going thus:

1. This Honourable court has no jurisdiction to hear and determine this suit in terms of Section 10(3) of the Acquisition of Buildings Act, No. 13 of 1971 and Section 102(1)(a) of the Land Registration Act, Cap 334 R.E 2002.
2. This suit is incompetent for failure to comply with Section 16(3) and (4) of the Government Proceedings Act as amended by Act No. 8 of 2019.

Briefly the plaintiff in this matter, who is also the administrator of the estate of the late **Gulbanu Abdul Rasul Walli**, allegedly the former owner of the suit premises in Plot No. 3, Block E, Msimbazi/Magila Street within Ilala District, Dar es salaam Region is suing the defendant on the said landed property. He is claiming ownership and peaceful enjoyment of the suit property which claims are vehemently disputed by defendant through her Written Statement of Defence that, the same was lawfully acquired by the Government under the Acquisition of Building Act No. 13 of 1971 and vested into Registrar of Buildings vide GN. No. 24, Vol. LII of 4th June, 1971, before it was transferred to her (the Defendant). The plaintiff is therefore seeking among other orders the declaration that, he is the rightful owner of the suit premises and that, the defendant and her agents are trespassing into the said premises.

With leave of this court the said preliminary points of objection were argued by way of written submissions and both parties proceeded represented. The Mr. Marcel Costantine Kanoni, Advocate represented the plaintiff while the defendant enjoyed the services of Mr. Aloyce D. Sekule, learned Principal State Attorney.

In his submission in chief on the first ground of objection, Mr. Sekule for the defendant kicked the rolling ball by narrating a brief background of how she acquired ownership of the suit premises. He then contented that, this honourable court has no jurisdiction to entertain this suit in terms of Section 10(3) of the Acquisition of Buildings Act, No.13 of 1971 and Section 102(1)(a) of the land Registration Act, Cap 334 R.E 2002. He argued, it is a statutory requirement under Act No.13 of 1971 that, a person aggrieved by the acquisition of any buildings under the Act has to refer his grievances or appeal to the Appeals Tribunal and not otherwise. And that, the decision of the said Appeals Tribunal shall be final and conclusive. He said, in this matter where the plaintiff is claiming back ownership of the suit premises or challenging the mode of its acquisition, the only available remedy for her is to appeal to the Appeals Tribunal and not prefer a suit before this court which has no jurisdiction to entertain or determine it. To cement his argument he invited the court to be persuaded with two the cases of **Adnan Kitwana Kondo & 2 Others Vs. National Housing Corporation**, Land Case No.267 of 2014 (HC-unreported) and **Nizarali Fazal Gangji (as executor of the estate of the late Ashak Fazal Gangji) Vs.National Housing Corporation**, Land Case No.166 of 2018 (HC-unreported), where

this court said that, when the decision of the Registrar is challenged the remedy available is to appeal to this court and not to come by way of suit.

Turning to the second point of objection Mr. Sekule submitted that, the suit is incompetent for failure to comply with a statutory requirement under section 6(3) and (4) of the Government Proceedings Act, Cap 5 R.E 2019 as amended by the Written Laws (Miscellaneous Amendments) Act No.1 of 2020 that, in all suits brought against the government or government department, institution, ministry, agency, public corporation or company the Attorney General must be joined as a necessary party. He argued, the plaintiff in this case has failed to comply with the requirement of the law by joining the Attorney General in this suit. To fortify his stance the defendant's counsel cited the case of **MSK Refinery Limited versus TIB Development Bank Limited and Yono Auction Mart and Co.Ltd**, Civil case No.80 of 2020 (HC-unreported), where this court held it is mandatory to join the Attorney General in every suit against the government institution.

In rebuttal on the 1st limb of preliminary objection and while admitting the fact that the provisions of section 10(3) of the Acquisition of Buildings Act, provides avenue for the aggrieved party to the acquisition procedures to

appeal to the Appeal Tribunal, Mr. Kanoni for the Plaintiff countered that, that option is not a mandatory requirement as the word used is "may" and not shall. To him when subjected to section 53(1) of the Interpretation of Laws Act, [Cap 1 R.E 2019], the word "may" does not provide for mandatory performance of the function imposed or pursuit of the right provided but rather is discretionary for the party to choose either perform or exercise it or do otherwise. It was his submission therefore that, given the fact that this is a land matter and its value falls within the jurisdiction of this court, the provision of section 10(3) of The Acquisition of Buildings Act, No. 13 of 1971, does not come into play as the plaintiff has chosen not to exercise his right under it. It is his view that, this court is vested with jurisdiction to hear and determine this case, thus, this preliminary objection should be dismissed with costs.

Responding to the second limb of objection regarding competence of the court to entertain the suit for non-compliance of the provision of section 6(3) and (4) as amended, he said the same is not applicable in the circumstances of this case. He noted that, the defendant in this case is established under section 3(1)(2) of, the National Housing Corporation Act, 1990 as revised in 2002. According to him the defendant as a corporation is capable of suing

and being sued in its corporate name without joining anyone else. Thus the suit is competent before this honourable court and should be determined to its finality something which will be in compliance of the provisions of 3A of the Civil Procedure Code, [Cap. 33 R.E 2019], providing for the overriding objective of the Act, which is aiming at to facilitating just, expeditious, proportionate and affordable resolution of civil disputes, without being bound by technicalities. It was his submission therefore that, should the court find the objections to have merit, then it is prayed to cure the same by invoking the principle of overriding objectives which is well incorporated in our laws. It is was his prayer that the preliminary objections raised by the defendant be dismissed with costs.

In rejoinder, the defendant's counsel reiterated what he had submitted earlier on in his submission in chief. The counsel insisted that, this court has no jurisdiction and also the suit is incompetent for failure to comply with section 16(3) and (4) of the Government Proceedings Act as amended by Act No.8 of 2019.To fortify his stance he cited the case of **Coseke Tanzania Limited versus The board of Trustees of the public Service Social security Fund**, Commercial case No.143 of 2019(unreported).

Having heard the fighting submissions from both parties, the only contentious issue for determination by this court is **whether the raised preliminary objections are meritorious or not.**

To start with and for the reasons to be apparent soon I have chosen to start with the 2nd limb of objection where it is claimed the suit is incompetent for plaintiff's failure to comply with the provisions of section 16(3) and (4) of the Government Proceedings Act, [Cap 5 R.E 2019] as amended, for not joining the Attorney General as necessary party to the suit. From the facts of the case it is not a controverted fact and I agree with Mr. Kanoni that the defendant is a public corporation owned by the Government duly established under the Act of Parliament capable of suing and being sued. I only distance myself from his proposition that by virtue of being public corporation the defendant is excused from the requirement of joining the Attorney General as a necessary party as rightly submitted on by Mr. Sekule. The law provides categorical and without ambiguity under section 6 (3) of Government Proceedings Act that, all suits against the Government shall be brought against the party alleged to have committed a civil wrong which in this matter is the defendant (public corporation) and the Attorney General shall be made a necessary party failure of which vitiates the proceeding under

section 6 (4) of the Act. For easy reference I find it worth to quote relevant part of the said provision of section 6(3) and (4) of the Act which reads:

*"S.6(3) **All suit 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, parastatal organisation or public company that is alleged to have committed the civil wrong on which the suit is based, and the Attorney General shall be joined as a necessary party.***

*(4) **Non-joinder of the Attorney General as prescribed under subsection (3) shall vitiate the proceedings of any suit brought in terms of subsection (3).** (Emphasis added)*

In this suit there is no dispute that the Attorney General is not joined as a necessary party contrary to the provision of section 6(3) of the Government Proceedings Act quoted above in which the word "shall" is used to mean the function conferred therein must be performed, as rightly interpreted under section 53(2) of the Laws Interpretation of Laws Act(Cap 1 R.E 2019) which provides that:

*"Where in a written law the word "**shall** " is used in conferring a function, such **word shall be interpreted to mean that the so conferred must be performed**" (Emphasis supplied)*

In light of the above discussion Mr. Kanoni's proposition that the mere fact that the defendant is public corporation and therefore capable of suing and being sued without joining anyone else lacks legs to stand on she (defendant) is also subjected to such requirement under section 6(3) of the Government Proceedings Act, and its non-compliance render the suit incompetent. This Court adjudicating on the same provision of the law in the case of **MSK Refinery Limited** (supra) where the applicant had failed to join the Attorney General as a necessary party had the following to say:

"As the applicant in this application failed to meet the mandatory condition of joining the Attorney General as the necessary party, I hold the views that such omission renders the present application incompetent."

Since the plaintiff in this suit failed to join the Attorney General as a necessary party to the suit as per the requirement of section 6(3) of the Act, this court finds the raised preliminary objection meets the tests laid down in the celebrated case of **Mukisa Biscuits Manufacturing Co. Ltd V. West End Distributors Ltd [1969] EA 696**, hence force the raised issue is

answered in affirmative. This ground therefore is enough to dispose of the suit and therefore I see no pressing reasons to venture into discussion and determination of the remaining ground of objection.

Now the above being the position of the law the next question is what is the fate of the suit instituted in contravention of the provision of section 6(3) of the Government Proceedings Act. It is Mr. Sekule's submission that the same is rendered incompetent and therefore should be dismissed, while Mr. Kanoni for the plaintiff is of the contrary view urging this court to invoke the overriding objective principle if it finds merit on the raised preliminary objections by allowing the plaintiff to amend the plaint. With due respect to Mr. Kanoni, I am not debating that the provision of section 3A of Civil Procedure Code Cap 33 R.E 2019 is there to facilitate the just, expeditious, proportionate and affordable resolution of Civil disputes since the same is not aimed to circumvent clear mandatory provision of the law but rather to assist the court not to be bound by technicalities. It is in clear and unambiguous terms under of section 6 (4) of the Act, [Cap 5 R.E 2019] that non-joining of the Attorney General as a necessary party in the circumstances like the one at hand is fatal for vitiating the proceedings. Any attempt to apply overriding principle under the circumstances of this case in

my opinion is tantamount to allowing a party to cure every non-compliance of mandatory provision of the law which is not the spirit of the provision of section 3A of CPC. The court of Appeal of Tanzania in the case of **Juma Busiga vs. Zonal Manager, South Tanzania Postal Corporation** (Civil Appeal 273 of 2020)[2021]TZCA 522 (27 September 2021); www.tanzlii.go.org, when considering application of the principle of overriding objective held thus:

"This court observed that the principle of overriding objectives cannot be applied blindly to cure every failure to comply with mandatory provision of law"

Borrowing and invoking the above cited principle in this case where the defendant failed to comply with mandatory provision of the law under section 6(3) of the Government Proceedings Act, I refrain from accepted Mr. Kanoni's offer to invoke the principle of overriding objective in this matter. In the event, I uphold the preliminary objection and proceed to find the suit is incompetent for non-joinder of the Attorney General as a necessary party. Lastly Mr. Sekule urged this court to dismiss the suit should it uphold the preliminary objections raised. I am not intending to accept Mr. Sekule's call to have this suit dismissed. The reason is not far-fetched as the matter is

being dismissed when heard on merit, but when it is incompetent before the court then it is being struck out. The distinction between the terms **"dismissal"** and **"striking out"** the matter were well adumbrated by the Court of Appeal when entertaining the appeal in the case of **Cyprian Mamboleo Hiza Vs. Eva Kioso and Another**, Civil Application No. 30 of 2010 (CAT unreported) on whether the lower court was proper to dismiss the case or not. The Court said:

*"...This court, accordingly, has no jurisdiction to entertain it, what was before the Court being abortive and not properly constituted appeal at all. What this court ought strictly to have done in each case was to **"strike out" the appeal as being incompetent**, rather than to have **"dismissed" it**; for the latter phrase implies that a competent appeal has been disposed of, while the former phrase implies there was no proper appeal capable of being disposed of."*
(Emphasis added)

In this matter having found the suit is incompetent before this court hence not determined on merit, I hereby proceed struck it out with costs.

It is so ordered.

DATED at Dar es salaam this 22nd day of April, 2022.

E. E. KAKOLAKI

JUDGE

22/04/2022.

The Ruling has been delivered at Dar es Salaam today on 22nd day of April, 2022 in the presence of Ms. Elizabeth Kifai , State Attorney for Defendant and Ms. Asha Livanga, Court clerk and in the absence of the Plaintiff.

Right of Appeal explained.

E. E. KAKOLAKI

JUDGE

22/04/2022

