

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY

AT TABORA

LAND CASE NO. 2 OF 2021

MARIAM SOUD HUSSEIN.....APPLICANT

VERSUS

1. PIUS SOLANKI

2. TABORA MUNICIPAL

3. THE ATTORNEY GENERAL



..... RESPONDENT

RULING

Date: 22.6.2022&12.8.2022

BAHATI SALEMA, J.:

The plaintiff herein; **Mariam Sudi Hussein** filed a suit against the defendants claiming *inter alia* that her suit property has been trespassed by the defendants thus she prays among others for an order declaring her as a lawful owner of the suit property subject matter of this case.

The defendants strongly disputed the plaintiff's claim through their respective written statements of defence while the 2nd and 3rd defendants raised points preliminary objections as follows;

1. *This honourable court had no jurisdiction to entertain this suit in that plaintiff never issued a statutory 90 days' notice to the defendants before the institution of this suit.*

2. *The plaint instituting this suit is bad in law for contravening order VII Rule 1 (e) of the Civil Procedure Code, Cap. 33 [R. E 2019].*

It is the practice of the courts in our jurisdiction that, when a preliminary objection is raised, the court must dispose of the objection first. I, therefore, invited the parties to address the court on the objections raised. By leave of the Court, the P.O for and against the application were made by way of written submissions. I have duly considered the rival submissions.

Submitting in respect of the first ground of objection on the requirement of ninety (90) days notice of intention to sue the government, Mr. Merumba asserted that sections 6 (1) and (2) of the Government Proceedings Act, Cap. 5 [R.E 2019]

He asserted that the plaintiff did not comply with the requirement of the law. The purported notice (s) of intention to sue as attached by the plaintiff in paragraphs 15 and 16 of her plaint has to be disregarded and ignored by this court due to the following grounds; the thirty (30) days notice of intention to sue the Government, as annexure B4 to the plaint was prepared by one Mahukuku Sudi Hussein and not the plaintiff. Also, the ninety (90) days notice of intention to sue the Government annexed as B5 to the plaint which was prepared by Ally Yusuf Maganga, Advocate dully instructed to write the said notice by his client one Omary Kamulika.

Mr. Merumba further stressed that the plaintiff Mariam Soud Hussein had neither herself nor by her instruction instructed the advocate to write and submit the ninety days' notice to the defendants as required by the law. He stated that the law is clear as to who should issue 90 days' notice. The claimant is the one to issue 90 days' notice but none of the named persons instituted this suit as to the validity of the alleged notice. Therefore, since the plaintiff is not among the two individuals who issued the alleged 90 days' there is no notice ever issued by the plaintiff.

He also submitted that section 6 (2) of the Government Proceedings Act, Cap. 5 [R.E 2019] requires the said notice to be submitted to the defendants but there is no proof of whether the said notices have ever been submitted to the defendants; thus, it implies that the said notice has never been submitted to the defendants' failure of which amount to a violation of the provision of section 6 (2) of the Government Proceedings Act, Cap.5.

He asserted that they are alive and that a point of law needs no evidence to support it but at least in the instant case the plaintiff could have filed a copy of the said notice which is dully received and signed by the defendants to acknowledge the same was received by the Defendants if it is truly submitted to the defendants as averred in paragraphs 15 and 16 of her plaint.

Lastly, the plaintiff herein is neither a legal representative nor an attorney of either Mahukumu Sudi Hussein or Omary Kamulika whose notice (s) (that is the 30 days notice and 90 days' notice) have been attached to the plaint as per paragraph 15 and 16 respectively. In absence of such power, the plaintiff herein cannot benefit from the notice (s) of intention to sue the government filed by the two persons named herein above. She is not allowed to benefit from the notice (s) filed by another person because, in law, a claim of one person (plaintiff herein) cannot necessarily be a claim may arise from the same facts.

He contended that the essence of section 6 (2) of the Government Proceedings Act, Cap.5 specifically the words "*unless the claimant previously submits*" has to be construed to mean the plaintiff herself as the claimant in the instant case and not otherwise.

As to the second ground of preliminary objection, on violation of Order VII Rule 1 (e) of the Civil Procedure Code, Cap. 33 [R.E 2019] in the sense that failure to disclose a cause of action in her plaint, that the plaintiff's plaint violated the said Order VII Rule (1) (e). He submitted that the effect of the plaint which discloses no cause of action is provided under Order VII Rule 11 (a) of the Civil Procedure Code, Cap. 33 [R.E 2019], the plaint must be rejected for failure to disclose cause of action. This provision was elaborated in the case of **John M. Byombalirwa Vs. Agency Maritime International (Tanzania) Ltd** [1983] TLR 1. Based on the above submission the provision of Order VII Rule 1

(e) provides three main elements which must all be proved for a plaint to be taken to have a cause of action. These elements are; one, there must be a fact in a plaint showing the cause of action, two, there must be included in the said facts, a date or a statement showing when the said cause of action arose, and three, the said cause of action must be caused by the defendants. The plaintiff in her plaint does not state categorically when the cause of action arose failure which contravenes Order VII Rule 1 (e) of the Civil Procedure (supra). In **Antony Leonard Msanze and another Vs. Juliana Elias Msanze and 2 others**, Civil Appeal No. 76 of 2012.

In the upshot, these points of preliminary objection have merit and proceed to dismiss the case with costs.

Opposing to the first ground of preliminary objection that it is not true that the plaintiff has not issued a 90 days notice to the first and second defendants as provided under sections 6 (1) and (2) of the Government Proceedings Act, Cap.5. Since the dispute between the plaintiff and the defendant started since 2009 where the administrator of the estate of the late Soud Hussein Abdallah issued a 30 days' notice to the second defendant complaining trespass and allocation of the disputed land to the 1st defendant in which in the plaint have attached that 30 days notice as an evidence to prove compliance of the legal requirement of the law.

He further asserted that on 7th August 2020 the plaintiff through her legal representative who had a power of attorney wrote a 90 days notice to the second and third defendants in which the notice was received by signing to the dispatch dated 7 August 2020 acknowledging to have received that notice from the administrator of the estate of the late Soud Hussein, hence this preliminary objection does not hold water.

He further asserted that the plaintiff is the successor under the hand of the administrator of the estate of the late Soud Hussein and the two notices of 2009 and 2020 concern the same property that the plaintiff inherited from her father which lead to the writing of two notice of 2009 and 2020 by the administrators of the estate one Sheikh Mahukumu and Omary Kamulika.

He further stated this case has a long history and existed since 2009 which is why the power given to him instructed us to write the notice 90 days which was served to the 2 and 3 defendants as the prove of complying with the legal requirement of the law.

He further submitted that the argument of the 2 and 3 defendants should be dismissed for want of merit as the constitution of the United Republic of Tanzania 1977 at Article 107 A(2) (e) which requires the court in the dispensation of justice not to be tied with technicalities. Also the law under Section 3A of the Civil Procedure Code Cap.33 [R. E. 2019] which emphasizes that the court deals with the cases justly. As in

the case of **Alliance one Tobacco Tanzania Limited and Hamis Shoni Vs Mwajuma Hamisi** (as the Administratrix of the estate of Philemon R. Klenyi and Heritage insurance company (T) limited Misc. Civil Application No. 803 of 2018.

As to the second limb of preliminary objection that the plaintiff did not disclose the cause of action. He submitted that it is very clear in the plaint in paragraphs 9,10,14,15 and 16 as in the case of **Antony Leonard Msanze and Justine Elias Msanze Vs Juliana Elias Msanze and 2 others** Civil Appeal No. 76 of 2012 (unreported) where the court held;

“We laid down that for purpose of deciding whether or not a plaint discloses a cause of action, courts should not go far into written statement of defence or replies to the written statements of defence. But they should discover a cause of action by looking only at the plaint.”

As to the plaint, the said paragraphs 9,10,14, 15 and 16 are narrated very clearly when the dispute arose including writing 30 days notice and 90 days notice to the second defendant requesting cancellation of the certificate of right of occupancy issued to the first defendant.

He submitted further that in paragraph 20 of the plaint, the plaintiff directly stated that the cause of action arose within Tabora Municipality which is within the jurisdiction of this court hence the cited provision of Order VII Rule 1 (e) of the Civil Procedure Code is misconceived as in the plaint the cause of action was disclosed but the

defendant's counsel intends to delay dispensation of justice which is contrary to Article 107 A 2 (e) and the overriding objective principle provided under section 3A (1) and (2) of the Civil Procedure Code, Cap. 33 [R.E 2019], and in the case of **Yakobo Magoiga Kichere Vs Peninah Yusuph**, Civil Appeal No. 55 of 2017, CAT at Mwanza (unreported) it emphasizes that the court to deal with the case justly, speedily and to have regard to substantive justice by that means the court in the said case found the defendant's first ground of preliminary objection is off merit it should be decided accordingly to the reason given therein.

In a rejoinder, Mr. Merumba reiterated his submission in chief with regard to the first limb of objection that the plaintiff violated Section 6 (1) and (2) of the Government Proceedings Act, Cap.5 [R. E 2019] for failure to issue 90 days' notice to the 2nd and 3rd defendants. He further submitted that since the plaintiff is neither the legal representative of either person whose names appear in the purported notices or the lawful attorney of the said person, then she can not benefit from the said notices.

He stated further that the plaintiff's arguments have no merit because;

"15. That, the plaintiff legal represented has written notice of thirty (30) days of intention to sue the second defendant in 2009..."

16. That, on another occasion, on 7th August 2020 the plaintiff through her attorney wrote a ninety (90) days notice of intention to sue the second defendant..." (Emphasis is added)".

This implies that the plaintiff never wrote and submits her notice of intention to sue the government as required by the law. Furthermore, since the plaintiff is still living, she cannot benefit from the thirty (30) days notice issued by Mahukumu Sudi Hussein because, in law, a legal representative is appointed upon the death of the person. In that, such allegation (notice) would only be useful to the plaintiff if she had died and the administrator issued such notice in the course of administering her estate.

Mr. Merumba stated that with regard to ninety (90) days' notice, the plaintiff had not attached **the said power of attorney to prove her allegation** the plaintiff ought to have issued her notice of intention to sue the government. The said 90 days' notice as we pointed out earlier in our submission in chief was prepared by Ally Maganga under instructions of Omary Kamulika who never suggested she was acting as an attorney of the plaintiff.

Two, the plaintiff's story seems to have two versions of a different character. This is because, despite the fact she averred in paragraphs 15 and 16 of her plaint, she never pleaded in her plaint to be the success of the administrator of the estate of late Soud Hussein Abdallah as she allege in her written submission on page 2 that,

“The plaintiff herein above is the successor in under the hand of the administrator of the estate of the late Soud Hussein ...”
(Emphasis is added).

It is trite law that parties together with the court are bound by the pleadings. See the case of **Juma Jaffer, Juma Vs Manager of the People's Bank of Zanzibar Ltd and two others** [2004] TLR. 332 at page 341. Therefore, the plaintiff's version of the story stated in her written submission that she is the successor of the administrator of the estate of the late Soud Hussein, cannot bind this court as it seems like a mere statement from the bar or an afterthought.

The plaintiff also relied on the overriding objective principle, enshrined under Article 107A (2) of the Constitution of the United Republic of Tanzania of 1977 as amended from time to time read together with section 3A of the Civil Procedure Code, Cap. 33 [R. E 2019] to convince this court to overrule the preliminary objections. He submitted that since section 6 (2) of the Government Proceedings Act is couched in mandatory word this court cannot invoke the overriding objective principle to cure the plaintiff's omission of failure to issue statutory notice. Therefore, the case of **Alliance one Tobacco Tanzania Ltd and Hamis Shori (supra)** cited by the plaintiff is distinguishable from the case at hand.

As to the second limb o objection, the plaintiff failed to disclose the cause of action in her plaint apart from stating the cause of action,

she must show when such cause of action arose. In her reply, the plaintiff argued that cause of action arose when 30 days notice was served to **the 2nd defendant in 2009**. Be it as it may, this statement does not hold water since it does not show when the cause of action arose. Service of notice by itself does not categorically show when such cause of action arose.

The plaintiff further submitted that the cause of action arose at **Tabora Municipality** but such an argument lacks merit because what is required by the law is to state **WHEN** not **WHERE** the alleged cause of action arose. Also the cited case of **Yakobo Magoiga Kichele Vs. Peninah Yusuph** Civil Appeal No. 55 of 2017 cited by the plaintiff is distinguishable from the case at; one in the instant case the plaintiff has 'both violated the mandatory provisions of Section 6 (2) of the Government Proceedings Act, Cap. 5 [R.E 2019] and order VII Rule 1(e) of the Civil Procedure Code, Cap. 33 R.E. 2019] which together touches the jurisdiction of the court to try this case. Two, it is a settled position of the law that, where there is a conflicting decision of the Court of Appeal, this honorable court is bound to follow the recent decision in the case of **Puma Energy Tanzania Limited** (supra).

Having heard from both parties, the issue for determination is whether the objections raised are meritorious.

To start with the first limb of objection is that *the court had no jurisdiction to entertain this suit in that plaintiff never issued a statutory 90 days' notice to the defendants before the institution of this suit.*

According to Section 6(2) of the Government Proceedings Act, Cap. 5 [R.E 2019] which provides that;

*"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."*

As correctly submitted by the defendant's counsel that the essence of section 6 (2) of the Government Proceedings Act, specifically the words "unless the claimant previously submits" has to be construed to mean the plaintiff herself as the claimant in the instant case and not otherwise.

Having perused through the plaint of the plaintiff and the records submitted in this matter, the law is clear as to who should issue 90 days' notice. The claimant is the one to issue 90 days' notice but none of the above-named persons instituted this suit as to the alleged notice. As correctly submitted, the plaintiff is neither a legal representative nor an Attorney of either Mahukumu Sudi Hussein or Omary Kamulika

whose notices that is the 30 days' notice and 90 days' notice have been attached to the plaint as per paragraphs 15 and 16 respectively.

In my considered view in absence of such power, the plaintiff herein cannot benefit from the notices filed by the two persons. I agree with the defendants' view that since the plaintiff is not among the two individuals who issued the alleged 90 days' there is no notice ever issued by the plaintiff. I find merit in this.

As to the second limb of objection that the plaint instituting this suit is bad in law for contravening Order VII Rule 1 (e) of the Civil Procedure Code, Cap. 33 [R. E 2019].

The substantive argument raised by Mr. Merumba is that the plaint violated the said Order VII Rule (1) (e) as there is no disclosure of a cause of action against the 1st defendant. According to Mr. Merumba, the Court should reject the plaint under the authority of **John M. Byombalirwa Vs. Agency Maritime International (Tanzania) Ltd [1983] TLR 1** where the Court of Appeal of Tanzania struck it out with costs and held that;

"Under O.VII r. 11 (a) of the Civil Procedure Code, where the plaint discloses no cause of action the court is to reject it and not dismiss it".

Mr. Maganga, the learned counsel for the plaintiff attacked the preliminary objection as devoid of merit that, the cause of action

arose as revealed in the plaint in paragraphs 9,10,14,15 and 16 as in the case of **Antony Leonard Msanze and Justine Elias Msanze Vs Juliana Elias Msanze and 2 others** Civil Appeal No. 76 of 2012 (unreported) where the court held;

"We laid down that for purpose of deciding whether or not a plaint disclose a cause of action, courts should not go far into the written statement of defence or replies to the written statements of defence. But they should discover a cause of action by looking only at the plaint."

As to the plaint, the said paragraphs 9,10,14, 15 16 and 20 narrated very clear when the dispute arose within Tabora Municipality including writing 30 days' notice and 90 days' notice to the second defendant requesting cancellation of the certificate of right of occupancy issued to the first defendant hence the cited provision of Order VII Rule 1 (e) of the Civil Procedure Code is misconceived.

Having read the rival argument by the parties, attempts have been made to define the term "cause of action". Attempts have been made to define a term "cause of action" to mean a fact or facts committed or attributed to one person which gives rise to a claim by another. It follows, therefore, that such other person must state those facts and attribute them to the defendant to disclose a cause of action against the defendant. That is sheer simplicity which is a summary of the quotation from **Mulla's Code of Civil Procedure (13th Edn)**.

Upon perusal of the plaint, I find the cause has been revealed as noted from the plaint. The act or conduct complained of by the plaintiff and which is a fundamental cornerstone of the suit is that stated in paragraphs 9, 10, 14, 15, and 20. It refers to the first and second defendants. According to this paragraph, the material facts are clear. The person involved here is the 1st and 2nd Defendants. The material involved is Land located at Miemba Malolo within Tabora Municipality. Conduct pleaded is trespass. The 1st and second defendants mentioned to have been involved is a material fact which is, by the provisions of the Code should or ought to be pleaded.

I am aware that the cause of action as defined above must be found in the plaint and the plaint alone. I cannot attempt to go to the written statement of defence or wait for proof by evidence to find a cause of action and associate it with the plaint. This is the essence of the decision of the Court of Appeal (Nyalali, CJ; Makame and Kisanga JJA) in **John Byombalirwa V Ami**(supra) cited by Mr. Merumba in his submissions.

Hence, the defendants didn't have to have raised the preliminary objection. I find no merit in this.

All said and done, I hold that failure to comply with the law requirement, as it is in this case renders the suit incompetent before the court, I thus proceed to strike out, in the circumstances of this suit, I order each party to bear its costs.

Order accordingly.

A. BAHATI SALEMA

JUDGE

12/8/2022

Ruling delivered under my hand and seal of the court in the Chamber, this 12th day of August, 2022 in the presence of both parties.

A. BAHATI SALEMA

JUDGE

12/8/2022

Right to appeal is hereby explained.

A. BAHATI SALEMA

JUDGE

12/8/2022

