

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

MISC. CIVIL APPLICATION NO. 380 OF 2021

(Arising from Civil Case No. 123 of 2011)

ALMANIAH HEAVY EQUIPMENT (E. A) LTD.....APPLICANT

VERSUS

AL OUTDOOR.....1ST RESPONDENT

**THE TANZANIA NATIONAL ROADS AGENCY
(TANROADS).....2ND RESPONDENT**

ATTORNEY GENERAL.....3RD RESPONDENT

RULING

15/12/2021 and 12/08/2022

LALTAIKA, J.

Almaniah Heavy Equipment (E.A) Ltd filed this application before this Court under a certificate of urgency. The applicant prays for this court's order of temporary injunction restraining the 1st and 2nd respondents and their agents, servants and or assignees from putting or allow putting of advertisement boards on a bill board tower situated in a road reserve land adjacent to the applicant's land/office and yard premises, to wit: Plot No.234/1 Pugu Road Kipawa area in Ilala District, pending hearing of this application inter-parties. Alternatively, an order of maintenance of status quo in the suit property.

The Application is made under **Order XXXVI1 Rule 2(1) Section 68(c) and (e) and S.95 of the Civil Procedure Code Cap 33 R.E 2019**. The application is supported by an affidavit sworn by Simone Geisseir, principal officer of the applicant. Upon receiving the Chamber Summons Mr. Baraka Nyambita, State Attorney for the 2nd and 3rd respondents, filed a notice of Preliminary Objection that this Application is incompetent for failure to issue 90 days' notice to the 2nd and 3rd respondents contrary to **Section 6(2) of the Government Proceedings Act, Cap 5 R.E 2019**.

The raised preliminary objection had to be disposed of first before going to the merits of the application. It was heard by way of written submission pursuant to the request of parties hitherto granted by this court.

Supporting the preliminary objection, counsel for the 2nd and 3rd respondents submitted that issuance of 90 days' notice to the Government and its institutions is a fundamental precondition for instituting a case against the Government or its institutions. The learned counsel reproduced in extenso the contents in **section 6(2) of The Government Proceeding Act (supra)**. The learned counsel for the respondents averred that the applicant did not comply with the

requirement of Section 6(2) of Cap 5 R.E 2019 which provides for the mandatory requirement to issue 90 days' notice. To bolster his argument Mr. Nyambita invited this court to the holding of the Court of Appeal in **Aloyce Chacha Kenganya Versus Mwita Chacha Wambura and 2 others**, No.07 of 2019, Civil Case No.07 of 2019 and the case of **Arusha Municipal Council v. Lyamuya Construction Company Limited** [1998] TLR 13.

Mr. Nyambita concluded his submission by beseeching this court to strike out this application with costs.

Mr. Charles Alex, Advocate from Sasa Advocates, arguing for the preliminary objection on behalf of the applicant submitted that the respondent's preliminary objection did not qualify the tests of what amounts to a preliminary objection under the law. It is Mr. Alex's contention that the raised preliminary objection requires evidence to prove it contrary to the cardinal principle of the law laid down in the landmark case of **Mukisa Biscuits Manufacturing Co. Ltd Versus West End Distributors [1969] EA 696** where it was stated that a preliminary objection does not require evidence it should be on pure point of law.

The learned counsel submitted further that, the assertion of the applicant at paragraph 12 of his affidavit that "the applicant has used amicable means to let the billboard towers be removed from the reserved land but in vain." Signified that the applicant has issued a demand /statutory notice.

The learned counsel contended further that on 3/8/2021, the applicant filed Civil Case No.123 of 2021, in this court against the respondents herein. In that case, the learned counsel averred, the plaintiff who is the applicant in this application had clearly pleaded/stated that "On 26th February 2021, Plaintiff served a Demand letter dated 22nd February 2021 to the Defendants but the same has not been complied with to date".

On top of that, the Counsel after quoting the words of section 6(2) of The Government Proceedings Acts, Cap 5 R.E 2019, contended that this is an application and not a suit. The mentioned provision requires that before instituting a suit against the Government 90 days' notice must precede. Therefore, the Provision which form the base of the preliminary objection does not support the same as it states about the suit and not an application.

Mr. Alex expounded his argument further that the respondents were served with the demand notice in February 2021 whereupon the 2nd

respondent received it on 26th February and the 3rd respondent's copy was received on 25th February 2021. It is Mr. Alex's submission that the main case and this application were filed in this court in August 2021 after the expiration of more than 6 months which since the demand notice was issued which was beyond the 90 days' notice.

Mr. Alex emphasized that proof of service of the demand notice /statutory notice to the 2nd and 3rd respondents was a matter of fact asserting that the same could be well proved or deliberated upon during the determination of the main case.

It is Mr. Alex's submission that at this stage, this court is vested with the duty to decide whether there are sufficient grounds warranting it to issue orders prayed for in chamber summons.

The learned counsel concluded his presentation that the preliminary objection raised by the 2nd and 3rd respondents was misplaced and the court be pleased to dismiss it with costs.

I have carefully gone through the record and considered the arguments of the parties. The issue for my determination here is whether the raised objections have merit.

From the submissions made by counsels, it is undisputed that section 6(2) of the Government Proceedings Act, Cap 5 R.E 2019, requires a ninety days' notice to be issued before instituting a suit against the Government. This section 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."

It is crystal clear the said notice must specify the basis of the claim.

From what has transpired in this application the issue is whether a suit also implies an application?

The Civil Procedure Code, Cap 33 R.E 2019 is silent on what a suit is. For that purpose, I would like to embrace the position of this Court when interpreting the word suit. Hon. Mlyambina, J. in **BURAFEX Ltd (Formerly known as AMETAA Ltd) vs. Registrar of Tittles**, Civil Appeal No. 235 of 2019, HCT at Dsm (Unreported), a "suit" was defined to include applications. The learned Judge stated that;

*"Suit is a proceeding of civil nature in various forms such as petition, **application**, appeal, review, revision or as referred in the Civil Procedure Code (supra) filed in a Court of Law between two or more parties for determination of rights and duties of such persons"*

From the above position I do agree with my learned brother Mlambina, J. that, an application is a form of a suit. Although an application mostly originates from a main Civil Case, the same is a suit also since the aim of filling it is to seek court orders in relation to the subject matter in a civil proceeding.

I understand that the applicant had filed this application under a certificate of urgency but his urgency is not an excuse for failure to comply with the legal requirement of filing notice as highlighted above.

From the above findings I find that the Preliminary Objection raised by the respondent has merit. Having upheld the preliminary objection, this application is hereby struck out. I make no orders as to costs.

It is so ordered



E.I. LALTAIKA

JUDGE
12/8/2022