IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

LAND CASE NO.5 OF 2021

(Originating from the Resident Magistrate Court of Songea in Civil Application No.05 of 1998)

MURSALLA RASHID (Administrator of the Estate of the Late RASHID MWENYEHEREI NDIMBO) .....PLAINTIFF

VERSUS

NAMTUMBO DISTRICT COUNCIL..... 1ST DEFENDANT

TANZANIA ELECTRIC SUPPLY COMPANY LIMITED.....2ND DEFENDANT

SOLICITOR GENERAL.....3RD DEFENDANT

ATTORNEY GENERAL .....4TH DEFENDANT

RULING

05th August 2022 & 18th August 2022

U. E. MADEHA, J.

Mursulla Rashid Ndimbo sued the Namtumbo District Council, Tanzania Electric Supply Company Limited, Solicitor General and Attorney General for judgement, and decree on the following orders; *first,* a declaration that, the selling of the suit land between the first Defendant and the second Defendant is null and void. *Second*, a declaration that the second Defendant is a trespasser. *Third*, that ownership of the suit land be

transferred back to the Plaintiff. *Fourth*, costs of the suit. *Fifth,* any other reliefs this Honorable Court may deem fit to grant.

In reply, through their joint written statement of defense of the Defendants raised three points of preliminary objection to wit:

i. *The Plaintiff has no locus stand.*

ii. *The suit is bad in law for failure to issue the statutory notice of intention to sue against the government.*

iii. *The Defendant is improperly in this suit.*

During hearing of the Preliminary Objection, the Plaintiff had no representation whereas the Defendants enjoyed the services of the following Learned State's Attorneys; Mr. Edigy Mkolwe, Emmanuel Bakari, Bolence Kateme and Venancy Hanje who in unison joined forces to represent the Defendants.

Mr. Edigy Mkolwe on behalf of his fellow Counsel began his submission with a prayer to abandon the first (1st) point of the preliminary objection. Thus, his submissions were based on the second (2nd) and third (3rd) preliminary objections. Concerning the second (2nd) preliminary objection the Learned Counsel submitted that the suit is bad in law for

failure to issue a statutory demand note of intention to sue the government. He made reference to *section 6(2) of the Government Proceedings Act Cap 5 [Revised Edition 2019]* which states that:

> *"(2) 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 his]*

To fortify his point, Mr. Egidy requested the Court to make reference cases of **Alyce Chacha Kenganya v. Mwita Chacha Wambura**, Civil Case No. 7 of 2019, High Court of Tanzania at Musoma (unreported) and **Thomas Ngawaiya v. the Attorney General and three (03) others**, Civil Case No. 177 of 2013, High Court of Tanzania at Dar es salaam (unreported) where the Court had an opportune to explain *section 6(2) of the Government Proceedings Act* (supra). He averred that in **Thomas Ngawaiya case** (supra) the Court stated that:

"The provision of section 6(2) of the government proceedings Act are express, explicit, mandatory, admit no implications or exceptions. They are imperative in nature and must be strictly complied with, besides, they impose absolute and unqualified obligation on the Court."

Based on the above, the Counsel insisted that the suit against the government must be instituted after specifying the basis of his claim. He argued that though the Plaintiff served the required ninety (90) days' notice by serving the demand note to the first (1st), second (2nd), third (3rd) and fourth (4th) Defendants there was no intention to settle the matter amicably. The Counsel stated that when reading the content, it does not relate to the Plaintiff's claim. That, it speaks about two different things. That, by reading paragraph four (04) of the notice it states that in the year 2012 the Defendants unlawfully transferred ownership of ten (10) acres of land to Tanesco for the construction of the power project. He contended that, however, when reading the plaint, it mentions that nineteen (19) acres of land were discovered by clearing the virgin forest. Thus, he further claimed that annexure P1 as attached in a plaint contains an irregularity

which is lack of specifying the basis of the Plaintiffs' claim. On that noting, he prayed that the Court be pleased to dismiss the case.

Concerning the third (3rd) Preliminary Objection that the third Defendant is improperly joined in this suit. The Counsel argued that by reading *section 6* together with *section 10 of the Government's Proceedings Act (supra)* there is no requirement to join the solicitor general as a co-defendant. Thus, he asserted that the solicitor general must be removed otherwise there could be consequences. Finally, he prayed that the suit be dismissed.

In reply to the submissions by the Defendant Counsel, the laymen Plaintiff conceded to all the preliminary objections and requested to withdraw the case with leave to refile. He requested to withdraw the case so that he may correct those mistakes. He further pleaded to be granted such withdraw leave without costs.

In rejoinder Mr Egidy briefly contended that they have incurred costs in preparation of the defense to be specific in terms of stationeries and collection of exhibits. Thus, he requested the suit to be struck out with costs.

First and foremost, I find it imperative to state that I do find merits in both the second and third point of preliminary objection as argued by the Defendant Counsel. Thus, in consideration to the fact that the Plaintiff conceded to all the argued points of preliminary objection, I am of the settled view that the main issues for determination are: First, whether the Court can order for amendment of the plaint and second whether or not costs should be granted.

In response to the first issue, it is the Court's finding that it cannot under the circumstances order for amendment of the plaint. This is because, primarily, once a preliminary objection is raised, the same must be disposed first before the case or an application continues. This is stated under *Order XIV Rule 2 of the Civil Procedure Code [Cap 33 Revised Edition]* which provides that:

> *"Where issues both of law and of fact arise in the same suit, and the court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined".*

Further to that, although misjoinder of parties as provided under *Order I Rule 9 of the Civil Procedure Code* is not fatal and the remedy for such error is expressly stated under Order I Rule 10 which is to struck out the name of the wrongly joined party and that as per Order VI Rule 17 of The CPC amendment of pleading is permissible at any stage, I have however found that, under the circumstances of this case allowing amendment will amount to preempting the Preliminary Objection as raised and argued by the Defendant a practice that has been forbidden by the Court. In the case of **Job Mlama and 2 Others v. Republic,** Criminal Application No. 18 of 2013 (unreported) Court of Appeal of Tanzania held that: -

> *"Respondent raised a Preliminary Objection, And the Applicant admitted but prayed to withdraw the Application so that they may refile afresh. The Court had this to say; On the basis of the above stated reasons, we uphold the Preliminary Objection and find the application incompetent. The Applicants had prayed to withdraw their application with the view to refile a competent one. The prayer is not tenable. It is now trite law that, a prayer which has the intention of rectifying a defect in matter cannot be sustained after a preliminary objection*

has been raised. This is so because, to do so would amount to pre-empting the raised objection".

Additionally in the case in **Thabit Ramadhan Maziku& Another v. Amina Khamis Tyela** & **Another**, Civil Appeal No 98 of 2011, the Court of Appeal of Tanzania at Zanzibar (unreported) it was held that:

"Once an objection is raised one cannot apply to amend otherwise it will amount to pre-empting Respondents Preliminary Objection already raised. It is a trite law that, under Order VI Rule 17 of the CPC the Applicant had a right to amend pleadings at any stage of the suit. However, that right ceased when the Preliminary Objection was taken against her by the Respondent".

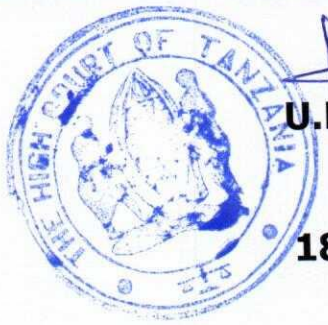
In light of the afore guidance, a prayer to withdraw the suit after a preliminary objection is raised cannot be entertained by the Court for the reason that the same will amount to pre-empting the Preliminary Objection. The right approach is to dismiss the suit, which I will do shortly.

On the second issue whether or not costs should be granted, it is my considered view that this suit deserves to be struck out with costs. This is because the institution of proceedings in Court against a wrongful party as the plaintiff has done in this case renders the suit incompetent since the

proceedings themselves stands incompetent. Reference to this can be made from the case of **Juma Mganga Lukobora and Seven Others v. Tanzania Medicine and Medical Devices Authority (TMDA) and Three Others** Misc. Civil Application No. 642 of 2020, High Court of Tanzania at Dar es salaam (unreported). In that application, the Court awarded costs to the government since the proceedings were incompetent for misjoinder of a party.

To sum it up, I therefore sustain the second and third points of Preliminary Objection. Henceforth proceed to struck out the purported suit with costs. Order accordingly.

DATED at **SONGEA** this 18th Day of August 2022



U.E. MADEHA

JUDGE

18/08/2022