

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

LAND CASE NO. 06 OF 2022

ALI S. MANDUNDA PLAINTIFF

VERSUS

THE ATTORNEY GENERAL 1ST DEFENDANT

TUNDURU DISTRICT COUNCIL 2ND DEFENDANT

OMARI RASHIDI MISOYA 3RD DEFENDANT

RULING

Date of last Order: 04/08/2022

Date of Ruling: 06/10/2022

MLYAMBINA, J.

The Plaintiff, Ali S. Mandunda has sued the Defendants severally and jointly for trespass to land praying for the judgement and decree on the following orders:

- (i) That, the Plaintiff to be declared the lawful owner of the disputed piece of land and the Defendants are trespassers.
- (ii) Declaration that the act of the 3rd Defendant to register the ownership of the said land is unlawful and the same be nullified.
- (iii) Declaratory order that the Plaintiff herein be registered as the lawful owner.

- (iv) Order of demolition of building erected therein and the suit land be handled over to the Plaintiff.
- (v) The Plaintiff claims from the Defendant TZs 15,000,000/= (Fifteen Million Tanzania Shillings only) being general damages resulting from destruction, inconveniences, psychological and economic hardship suffered by the Plaintiff as a result of the trespass committed by the Defendants.
- (vi) Costs of the suit be condemned to Defendants.
- (vii) Any other relief(s) as the Court may deem fit and just to grant.

The Counsel for the Defendants lodged their Written Statement of Defence separately. Thereafter, the Counsel for the 1st and 2nd Defendants filed a notice of point of preliminary objection against the Plaintiff, thus:

The suit is bad in law as the Plaintiff failed to issue a competent statutory notice of intention to sue.

At the date scheduled for the mention the parties consented the point of preliminary objection to be argued by way of written submission. All parties were represented. Mr. Zuberi Maulid learned

Advocate represented the Plaintiff while the 1st and 2nd Defendants were represented by Mr. Emmanuel Bakari, learned State Attorney.

The Counsel for the first and second Defendants reminded this Court that the Plaintiff's suit is against the Government of the United Republic of Tanzania. He mentioned the Attorney General and Tunduru District Council as the 1st and 2nd Defendants in this suit. For that reason, it was his submission that; it is mandatory requirement for the 90 days' notice to sue to be complied with the provision of *section 6 (2) of the Government Proceedings Act [Cap 5 Revised Edition 2019]*. Counsel Bakari went further and listed the four requirements which can be deduced from the provision of *section 6 (2) of the Government Proceedings Act (supra)*.

Counsel Bakari submitted further that; the provision is mandatory which admits no implications, imperative and must strictly be complied with. It imposes an absolute and unqualified obligation on the Court. Once a notice is issued under *section 6 (2) of the Government Proceedings Act (supra)*, the said notice has to contain all four elements as established, contrary to that, renders the Court incompetent to try the matter.

Furthermore, Counsel Bakari told this Court that; there is a difference figure of the Plaintiff claim between the Plaint and the 90

days' notice to sue. He revealed that at paragraph 6 of annexure A-2 the Plaintiff claimed the loss of Ten Million Tanzania Shillings Only (10,000,000/=) but that amount does not reflect anywhere in his Plaint. For that reason, Counsel Bakari was of the view that the Plaintiff failed to specify the basis of his claim against the Government as provided under the provision of *section 6 (2) of the Government Proceedings Act (supra)*. He supported his argument with the case of **Thomas Ngawaiya v. The Attorney General and Others**, Civil Appeal No. 177 of 2013, High Court of Tanzania at Dar es Salaam (unreported).

Counsel Bakari insisted that; there was no specific claim stated by the Plaintiff as required under *section 6 (2) of the Government Proceedings Act (supra)*. Thus, in his annexure A-2, the Plaintiff specified the loss of Ten Million Tanzania Shillings Only but in his Plaint, he claimed general damage of Fifteen Million Tanzania Shillings Only (15,000,000/=) which was not specified in a notice to sue. Therefore, it was Counsel Bakari's views that the notice which was filed by the Plaintiff is incompatible with the claim in the Plaint and it does not form party of the Plaint before this Court.

Counsel Bakari alleged that; TZs 5,000,000/= claimed by the Plaintiff as general damage contradict with the requirement of the provision of *section 6 (2) of the Government Proceedings Act (supra)*.

The amount of TZs 5,000,000/= can not form party of a specific claim. The amount of TZs 15,000,000/= stated by the Plaintiff as a general damage are always given under the discretion of the Court. He prayed for the Court to dismiss the case for failure to comply with the mandatory requirement of *section 6 (2) of the Government Proceedings Act (supra)*. He further cited the case of **Aloyce Lyenga v. Inspector General of Police and Another** (1997) TLR 101.

In his reply, Counsel Zuberi Maulidi for the Plaintiff submitted that; the point of preliminary objection raised by the Counsel for the 1st and 2nd Defendant is not a preliminary objection but rather the facts in form of complaints. He supported his arguments with the cases of **Shose Sinare v. Stanbic Bank Tanzania Limited and Another**, Civil Appeal No. 89 of 2020, Court of Appeal of Tanzania at Dar es Salaam (unreported) at page 11-14 and **Sentamu Village Council v. Tanzania breweries Ltd and Another**, Civil Appeal No. 105 of 2011 (unreported). He added that; an allegation of differences of amount raised by the Counsel for the 1st and 2nd Defendants need proof to determine. Counsel Maulid averred further that; the issue of loss which a person is likely to incur are not static rather it depends on many factors to include time market value. He mentioned the issue of trespass to be the specific basis of his claim.

Moreover, Counsel Maulidi submitted that annexure A-2 from paragraph 1 to 6 clearly specifies the basis of claim against the Defendants and it is reflected at his Plaint from paragraph 5 to 10. Therefore, the argument of the 1st and 2nd Defendants is baseless as he failed to cite a specific law which require that the claimed amount in statutory notice should be the same claim in the Plaint otherwise the notice becomes incompetent and render the suit to be bad in law.

Counsel Maulidi reminded the Court the aim of issuing the notice as per *section 6 (2) of the Government Act (supra)* is to advance justice and securing public good by settling disputes out of Court amicably, to avoid unnecessary litigation against the Government and to alert the Government and afford the opportunity to reconsider the matter and take appropriate decision in accordance with the law. He buttressed his argument with the case of **Aloyce Chacha Kengaya v. Mwita Chacha Wambura and Others**, Civil Case No. 07 of 2019 High Court of Tanzania at Musoma (unreported) and of **Thomas Ngawaiya (supra)**.

It was Counsel Maulidi's views that the Defendants were aware of the basis of the claim yet they neglected to honour the demand for reason known to them and they stated nothing on what efforts were taken in compliance of demand to avoid subsequent cost likely to

increase. He claimed further that the case of **Thomas Ngawaiya** (*supra*) and the case of **Aloyce Chacha Kengaya** (*supra*) and **Aloyce Lyenga** (*supra*) are distinguishable to the circumstance of this case and does not support what was submitted by the 1st and 2nd Defendant's Counsel. He insisted that the notice and annexure A-2 complied with all mandatory requirement as per the law. He played the point of preliminary objection be dismissed for being baseless and for lack of merits.

In his rejoinder, Counsel Emmanuel Bakari for the 1st and 2nd Defendants reiterated what he submitted in his submission in chief. He added that; the point of preliminary objection raised is pure point of law based on *section 6(2) of the Government Proceedings Act (supra)*, which do not need any additional facts to ascertain. He supported his assertion with the case of **Mukisa Biscuits Manufacturing Company v. West End Distributors Limited** (1969) EA 696. He averred that the Plaintiff's Counsel submissions are misconceived and misplaced.

Counsel Emmanuel Bakari submitted further that; annexure A-2 is part of the Plaint which to be considered without going to the merits of the case. He backed up his assertion with the case of **Stanbic Finance Limited v. Giuseppe Trupia and Chiara Malavasi** [2002] TLR 222.

Before going to the merits of the matter, it has to be noted that the point of preliminary objection raised by the Counsel for the 1st and 2nd Defendants is based on the provision *of section 6 (2) of the Government Proceedings Act (supra)* 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.

Being guided by the above provision, the parties who wish to sue the Government or its Ministries or Departments has to file a 90 days' notice of the intention to sue the Government to the Government Ministry or Department and serve the copy of such notice to the Attorney General. It is evident from the record and there is no dispute that the Plaintiff had served the 90 days' notice of intention to sue to the Government. The notice was served as required by the law and the copy

served to the Attorney General respectively as per *section 6 (2) of the Government Proceedings Act (supra)*.

The issue to be determined is; *whether the 90 days' notice of the intention to sue served by the Plaintiff in compliance of section 6 (2) of the Government Proceedings Act (supra) complied with the four mandatory requirements stipulated by the said provision of the law. These are:*

1. A claimant has to submit a notice of ninety days of intention to sue the Government to the Government Minister, Department or Officer concerned.
The notice must express the intention to sue the Government.
2. The notice must specify the basis of his claim against the Government, and;
3. A copy of his claim must be sent to the Attorney General and the Solicitor General.

After careful consideration, as rightly submitted by the Counsel for the 1st and 2nd Defendant, a Plaint has to be considered within its four corners including its annexures (if any). Counsel Bakari for the 1st and

2nd Defendants assertion that the Plaintiff failed to specify his claim against the Government is contradictory by itself. The reading of annexure A-2 gives the meaning that the basis for Plaintiff's claim is trespass to his land. It was claimed by the Plaintiff that the Defendants re-allocated his land unlawfully. It is the said trespass which the Plaintiff claims to suffer a loss of TZs 10,000,000/= and TZs 5,000,000/= as a general damage. In total the Plaintiff in his Plaint claimed to be paid TZs 15,000,000/=.

Furthermore, Counsel Bakari told this Court that; the Plaintiff claims to be paid TZs 15,000,000/= as a general damage. According to him, the said amounts are paid at the Courts discretion. Counsel Bakari was of the view that the Plaintiff failed to specify his basis of claim against the Government. He cited the case of **Thomas Ngawaiya** (*supra*) where 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.

It is the finding of this Court that the Plaintiff 90 days' notice of intention to sue the Government complied with all four requirements depicted from the provision of *section 6 (2) of the Government Proceedings Act (supra)*. The specific claim is on trespass to land. The point of preliminary objection raised by the Counsel for the 1st and 2nd Defendants has no merit rather than a delay tactic.

Even if the objection raised would have merits, I noted the notice of objection raised by the 1st and 2nd Defendants did not abide with the law because it was not pleaded. My brethren Nsekela J (as he then was) in the case of **CRDB v. Noorally K.J. Dhanani and Another**, High Court of Tanzania at Commercial Division, Commercial Case No. 102 of 2001 (unreported) had these to observe:

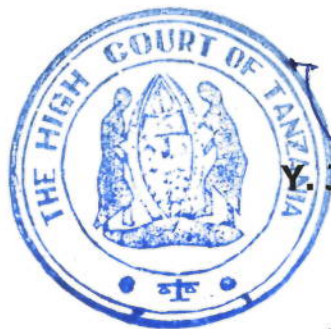
This "Notice" I have referred to is not part and parcel of the Defendants pleadings. It is my considered view that whatever preliminary point of law the Defendant wanted to raise for the Court's consideration should have been in the Written Statement of Defense. This piece of paper called "Notice" in my humble view contravenes *Order VIII Rule 2 of the Civil Procedure Code* and should be

discarded. It is not properly before me to adjudicate upon."

The same sentiments were reached by my learned Sister Hon. Judge Longway (as she then was) in the case of **Ernest A. Mosha v. Cyriacus Katunzi and Another**, High Court of Tanzania Land Division, Land Case No. 109 of 2004 (unreported) in which she observed:

"I see nothing in the nature of the objections in the notice, pleaded as required by *Order VIII Rule 2 of the Civil Procedure Code, 1966*, so the said notice of preliminary objection being improperly before the Court is therefore discarded and dismissed..."

In the end result, I hereby dismiss the point of preliminary objection for want of merits and for contravening the requirement of *Order VIII Rule 2 of the Civil Procedure Code [Cap 33 Revised Edition 2019]*. Costs be shared. It is so ordered.

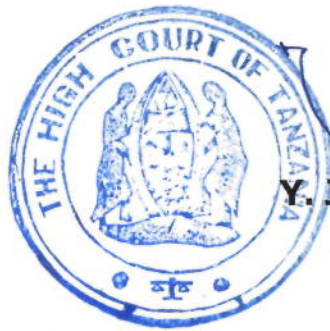


Y. J MLYAMBINA

JUDGE

06/10/2022

Ruling delivered and dated 6th day of October, 2022 in the presence of learned Counsel Zuberi Maulidi for the Plaintiff, learned State Attorney Emmanuel Bakari for the 1st and 2nd Defendants, learned Counsel Lazaro Simba holding brief for Aggrey Ajetu for the 3rd Defendant.



Y. J MLYAMBINA

JUDGE

06/10/2022