IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL CASE NO. 89 OF 2022

MARTINAIR HOLLAND N.V.....1ST PLAINTIFF

KONINKLIJKE LUCHVAART MAATSCHAPPIJ N.V.....2ND PLAINTIFF

VERSUS

TANZANIA CIVIL AVIATION AUTHORITY.....1ST DEFENDANT

TANZANIA AIRPORTS AUTHORITY.....2ND DEFENDANT

ETHIOPIAN AIRWAYS.....3RD DEFENDANT

THE ATTORNEY GENERAL OF TANZANIA.....4TH DEFENDANT

RULING

Date of last Order: 8th September,2022

Date of Ruling: 21st October, 2022.

E.E. KAKOLAKI, J.

The plaintiffs herein filed a civil case against the above-named defendants claiming for declaratory orders and damages arising from an aircraft collision that occurred on the 16th June, 2019 at Julius Nyerere International Airport apron involving an aircraft Boing B787-800 with registration ET-ATH operated by the 3rd Defendant and aircraft Boing B747 with registration PH-CKA owned by the 2nd plaintiff and operated by the 1st plaintiff. When served with the plaint, the 1st, 2nd and 4th defendants filed their Written Statement

of Defence together with the notice of preliminary points of objection to the effect that:

(1) The suit is incompetent for contravening section 6 (2) of the Government Proceedings Act

(2) The suit is incompetent for want of Companies board of resolution authorize to sue.

As per courts' practice, whenever there is a preliminary objection raised, the same is to be determined first before going into substance of the case thus, this Court ordered parties to submit on the said preliminary objections in writings with slotted schedule, the time which was well followed save for the 3rd defendant who filed none. The submission for the 1st 2nd and 4th defendants were drawn by Erigh Rumisha, State Attorney, while those for the plaintiffs were prepared and filed by Tumaini Sekwa Shija, learned advocate.

Arguing in support of the grounds of objection, Mr. Rumisha gave a brief background of the case, before he addressed on the principles of law governing preliminary objections as enunciated in the case of **Mukisa Biscuit Manufacturing Company Ltd Vs. West End Distributors Ltd** (1969) E.A 696, particularly at page 700, and **the COTWU (T) Ottu Union**

and Another Vs Hon. Idd Simba, Minister of Industries and Trade and Others TLR [2002] page 88 (CAT). On that note he submitted that, the raised objections here qualify under the definition of what amount to preliminary objection as stipulated by the cases above.

With regard to the first preliminary objection, Mr. Rumisha submitted that, section 6 (2) of the Government Proceeding Act [Cap 5 R.E 2019], mandatorily provides that, no suit against the Government shall be instituted and heard unless the claimant previously submitted 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 sent a copy his claim to the Attorney-General (the AG) and the Solicitor General (the SG). He went on arguing that, though the purposes for which that requirement of sending copy of the notice is not provided, it is not difficult to understand as the Attorney General is chief legal advisor to the Government, guardian and custodian of the Government and public properties and the SG is by virtue of office under the Solicitor General (Establishment) Order, 2018, GN 50/2018 duty bound to take and conduct all civil litigation and arbitration on behalf of the government. In view thereof, he submitted, sending a copy of the said notice to the AG and

SG before filing a suit gives the government an opportunity to settle the claim before a law suit is filed and investigate the claim so that the relevant government department, local government authority, executive agency, public Corporation, parastatal organization or public company alleged to have committed civil wrong it can be properly advised to use other alternative means of resolving dispute, so as to avoid costs to the said institution including the Government. He added that, ultimately that helps in reducing backlogs of many cases before the courts, and avail parties to the case with reserved time to engage in other economic activities contributing to national economy instead of misusing precious of both time of the court and parties.

It was Mr. Rumisha's argument that, for the Court to be satisfied the notice of intention to sue was sent as per the requirement of the law under section 6(2) of the Government Proceedings Act, the same must bear the name, signature of the person who receive it and official stamp of the office of AG and SG. In his view, in absence of those proof that entails that, the document did not reach the AG and the SG something which conflicts the provisions of section 6(2) of the Government Proceedings Act. In this matter Mr. Rumisha contended, the plaintiff failed to dully serve the copy of the said notice to

the office of the AG and SG as the purported notice attached to the plaint does not show the name of the person who received such document, but contains only the signature of the person whose name is unknown. He said, much as the law imposes the requirement of the said notice to reach the AG and SG, annexure MA-8 to the plaintiff's plaint misses the name of the person who received the purported notice of 90 days at the office of solicitor General. He went on elaborating that, the same does not have even the official stamp of the SG. He further argued the omission was not on SG's office only but also the AG's office as the said notice does not bear the name and the signature of the person who purportedly received it. In his view, the signature of unknown person alone doesn't serve the intended purpose on the mandatory requirement of serving such notice to both AG and SG. On that note Mr. Rumisha argued that, it becomes difficult to ascertain that the notice was duly served to AG's and SG' offices.To buttress his point, he cited the case of **Arusha Municipal Council Vs. Lyamuya Construction Company Limited** TLR (1998) where the suit was filed in Court without issuing statutory notice as per requirement of section 97 (1) of the Local Government (Urban Authority) Act, and the Court of Appeal ruled that, the suit was incompetent. He said the same principle was followed by this Court

in the case of **Joshua Mhagama and 6 others Vs. Tanesco and Another**, Land Case No. 42 of 2022 and proceeded to strike out the suit. In view of the above submission Mr. Rumisha prayed this Court to uphold the objection with costs.

In response, Mr. Tumaini Shija started by attacking the competence of this ground of objection when submitted that, the same does not fit the definitions of what constitutes as preliminary objection as per **Mukisa Biscuits case** and **COTWU (T) OTTU Union and Another** (supra) cited by the defendants for inviting evidence to prove it. On the mandatory requirement of section 6(2) of the Government Proceedings Act, he conceded that its wording are coached in mandatory terms that a copy of notice must be sent to AG and SG. He however noted that, the provision does not specify the modality or fashion or medium, through which the notice is to be sent and the modality of delivering it to the AG's and SG's office. He said in absence of established statutory rules or procedures on how to effect service, one cannot avoid diving into and examining evidence, as the question on the modality or fashion or means used to effect service can only be answered after hearing of the testimonial from witnesses. In his further view, in absence of a statutory known rules or established procedures the

AG and SG offices, remain with unfathomable the powers and discretion to fashion the modality of receiving the notice to the detriment of persons who have claims against the Government.

In his view, the question for determination by this Court is whether there is any breached statutory requirement that requires the name and signature of the receiving officer of the Solicitor General and Attorney General and a stamp be appended on the notice to show that the notice was received. Mr. Shija referred the court to page 5 of annexure MA 8, where the office of the AG appended the receipt stamp only to the notice while the SG's office appending only the signature and date. He explained that, the stamp of the AG's office does not have the provision of inserting the name and signature of the officer receiving the notice, hence to him no signature or name is required as if there was such statutory requirement both AG and SG would have received the notice in the same manner. He invited the court to see the manner in which the 1st defendant, 2nd defendant and the Solicitor General accepted the services of the plaint. Mr. Shija then attacked the cases of **Arusha Municipal Council** (supra) and **Joshua Mhagama and 6 other** (supra) cited by Mr. Rumisha and argued that, the facts in **Lyamuya's case** are quite different from the ones in the present matter, as

in the former case the Court of Appeal among other issues was called upon to determine whether the trial Judge was correct in holding that, noncompliance with the provisions of section 97 of the Local Governments (Urban Authorities) Act No 8 of 1982 was simply a procedural or technical error which does not invalidate the suit. He said, in **Lyamuya's case,** the plaintiff was supposed to issue 30 days' notice, but he filed his suit before expiry of 30 days' notice, while in this case, the case was filed after expiry of 90 days' notice. Concerning **Mhagamas case**, he argued, similar objection was raised and the court ruled out that, signature and date were sufficient to conclude that, the notice was received by TANESCO. He went on to argue that, in the present case, the Attorney General used the document receiving stamp which is properly dated and in the case of the office of Solicitor General, the notice is signed and dated, hence the law was complied with to the letters. He said, in absence of the statutory requirements, rules or procedures for delivery of notice of intention to sue to the Government, and in presence of evidence that the notice of intention to sue the Government was on the face of it duly delivered and received by the offices of AG and SG as substantiated by the presence of the official rubber stamp and signature of receiving officer and date, this Court cannot

determine the validity of delivery and receipt of the notice without production of evidence, hence disqualification of the raised preliminary objection from qualifying as point of law in light of the principles under **Mukisa Biscuits' case**. On that note, he prayed the court to dismiss the 1st limb of the preliminary objection.

In a short rejoinder, Mr. Rumisha reiterated his submission in chief and maintained that, signature alone without showing the name of the particular person who received and sign the same, and in the absence of the official stamp of the office of SG, it cannot be concluded that, such document was dully served on part of the SG. He submitted that, since the plaintiffs have admitted such notice truly does not show the name of the person who received the same nor does it contain the official stamps of the office of the SG, the requirement of section 6(2) of the Government Proceedings Act was not duly complied. He also attacked the submission that, there is no statutory rules or established procedures for service terming it as misplaced. To him, the notice speaks for itself that is was not properly served to the office of SG for want of official stamp among others proof. He relied on the case of **Joshua Arthar Mhagama** (supra), at page 7 where this Court held that, the fact that receiver's signature was of unknown person and absence of

date and stamp confirmed the document was served, he submitted that, since in this matter the plaintiffs are admitting that the plaint was received at the SG's office by inserting official stamp, and since the said stamp is missing in the said notice, that is a clear proof that, the mandatory notice was not duly served to SG's office hence none compliance of the law. He thus maintained his earlier prayers.

I have dispassionately considered rival arguments by the two legal minds and thoroughly perused the pleadings and the annexures as well as the law applicable in an urge to answer the issue as to whether the plaintiffs infracted the provisions of section 6(2) of the Government Proceedings Act. However, before embarking into determination of the merits or demerits of this ground of objection, I find it apposite to address first its competence whether it does not qualify to be a point of law on the ground that it requires evidence to prove it as submitted by Mr. Shija. I do not embrace Mr Shija's contention that, the same does not qualify to be a point of law for want of evidential materials. The requirement for issuing and serving a 90 days' notice is a legal requirement, and its compliance needs be established by revisiting the filed pleadings. It is not something that needs evidence to prove as alleged by the counsel for the Plaintiff as the same can be conspicuously spotted from

document concerned. It is therefore my settled position that, what is raised by the counsel for the 1st, 2nd and 4th Defendants is a pure point of law.

Reverting back to the merit or otherwise of the ground of objection, it is common fact between parties that, the law under section 6(2) of Government Proceedings Act is coached in mandatory terms that, when suing the Government, the claimant has to submit 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 that shall send a copy his claim to the Attorney-General and the Solicitor General. To appreciate this point, the section 6(2) of the Government Proceedings Act is quoted hereunder:

> (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 his claim to the Attorney-General and the Solicitor General****. (Emphasis supplied)*

What remains as controversy point amongst them is whether the notice of 90 days was sent or served to the AG and SG as per the requirement of the law. Mr. Rumisha say it was not served for want of proof of name of receiving office on AG's part and official stamp and name of the receiving officer on the SG's part, while Mr. Shija is of contrary view in that, it was served as there is no known statutory rules or procedures or modality on the manner in which proof of service could have been drawn, hence what is seen in the said notice in annexure MA 8 of the plaint is sufficient to prove service. It is true and I agree with Mr. Shija that, there is no modality or specific manner provided by the law on proof of service. I however distance from his contention that, by appending the signature and date in the said notice on the part of the office of the SG, then the SG was dully served. The reasons am holding so are not farfetched. A glance of an eye to annexure MA-8 shows that, the notice was signed and dated. Nevertheless, it is unknown who signed the same leave alone absence of official stamp of that office to ascertain whether the said notice was indeed receive by the SG's office and not sent to unknown office. In absence of that stamp, in my profound view, it is unsafe to conclude that the notice was served to SG's office whom the law puts it mandatory that he has to be served with the same.

It is elementary that when the word shall is used in a provision, it means that the provisions is imperative. This is stated under provision of section 53 (2) of Interpretation of Laws Act No 1 R. E 2019.The same states that:

> *(2) Where in a written law the word "shall" is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed.*

Therefore, since serving notice is a mandatory requirement, it was upon plaintiffs to attach a notice showing that the provision of section 6(2) of the Government Proceedings Act was duly complied with, that is the very notice which was dully served and received by the SG. In this case since the plaintiffs failed to effect service to SG, I hold the omission is incurable and renders this matter incompetent before the Court for want of service of 90 days' notice. Similar view was aired by my sister Mgeyekwa, J in the case of **Joshua Arthar Mhagama** (supra) when held thus:

> *"…, I hold that failure to serve the Attorney General and Solicitor General with a copy of 90 days' Notice vitiate the institution of the suit at hand."*

In another case of **Emmanuel Titus Nzunda Vs. Arusha City Council and Others**, Land Case No 28 of 2020 (unreported), this Court explaining

on the importance of complying with the requirement of 90 days' notice, had this to say:

> *"The 90 days' notice being a mandatory legal requirement, the same need be complied with before instituting suit or joining the government into any suit. It is upon the Plaintiff to attach a notice showing that the same was duly served and received. The claim that there is an officer of the second Defendant who received the notice but refuse to stamp it is unjustified. It cannot be said that the Attorney General refused to stamp the document while the Solicitor General received and stamped the same. To me filing an affidavit to prove the refusal is an afterthought as the same could have been pleaded from the beginning. Even a copy alleged to be sent to the Attorney General was not attached to the pleadings. It is therefore my settled mind that, the 2nd Defendant was not served with a mandatory 90 days' notice."*

Having found the suit to be incompetent, the remaining question is whether this court should continue labouring on the remaining limb of objection. The quick answer is no, as it determination will only be relevant for academic purposes, since it won't change the already arrived conclusion. I therefore better reserve some energy for other useful purposes.

Accordingly, the objection is sustained and for that reasons I am inclined to hold that, this suit is incompetent. The same is hereby struck out with leave to refile.

No orders as to costs.

It is so ordered.

Dated at Dar es Salaam this 21st October, 2022

E. E. KAKOLAKI

JUDGE

21/10/2022.

The Ruling has been delivered at Dar es Salaam today 21st day of October, 2022 in the presence of Mr. Tumaini Shija, advocate for the Plaintiffs, Ms. Lightness Msuya, State Attorney for the 1st, 2nd and 4th Defendants, Mr. Baraka Msama, Advocate for the 3rd Defendant and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI

JUDGE

21/10/2022.


IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY