

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**CIVIL CASE NO.14 OF 2021**

**EVETHA MOSHA.....PLAINTIFF**

**VERSUS**

**ARUSHA CITY COUNCIL.....1<sup>ST</sup> DEFENDANT**

**HEAD OF KIJENGE MARKET.....2<sup>ND</sup> DEFENDANT**

**ATTORNEY GENERAL .....3<sup>RD</sup> DEFENDANT**

**RULING**

*Date of last Order:30-3-2022*

*Date of Ruling: 2-5-2022*

**B.K.PHILLIP, J**

Brief facts of this case are as follows; That the Plaintiff claims that she rented a room at Kijenge Market place for conducting her commercial activities. She had been paying rent for the room and conducting her business peaceful until 2016 when she fell sick. She was taken to Killimanjaro Christian Medical Center ( "KCMC") for treatment. Upon recovery, on 22<sup>nd</sup> December 2018, she went back to her workplace only to find out that the room where she used to conduct her business was demolished by the 2<sup>nd</sup> Defendant and her properties were destroyed while she had a valid contract for conducting her business in the said room at Kijenge market. The plaintiff alleged that she lodged her complaint

to the 1<sup>st</sup> defendant and showed him her contract for the said room, but the 1<sup>st</sup> defendant told her that her contract was fake. She reported the matter to the District Commissioner who tried to issue some directives in order to settle the matter amicably but in vain. Thereafter she filed a case against the defendants at the Primary Court of Arusha at Arusha vide Civil Case No 288 of 2019, which was decided in her favour. However, that decision was overturned in an Appeal filed by the defendants at the District Court of Arusha at Arusha on the ground that plaintiff was at fault for failure to serve a 90 days' notice to the defendants. Following the the decision of the District Court of Arusha at Arusha the applicant decided to start the process of filing her case afresh by issuing the 90 days notice and finally she lodged the instant case.

In this case the plaintiff prays for judgment and decree against the defendants as follows;

- i. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendant to pay the Plaintiff Tanzanian shillings 14,939,000/= as compensation for destroyed properties and for being restricted to conduct business.*
- ii. That the acts of destroying Plaintiff's properties and restricting her to conduct business at Kijenge market was unlawful.*
- iii. Payment of interest on the decretal amount at court's rate from the date of judgment to the satisfaction of the decree.*
- iv. Payment of general damages to be assessed by the court*
- v. Costs of the suit*
- vi. Any other reliefs this court may deem fit and just to grant*

In their joint written statement of defence the defendant disputed the plaintiff's claims and raised three points of preliminary objection to wit;

*i) That this suit is hopeless time barred.*

*ii) That the plaintiff's plaint is incompetent and unmaintainable in law for not being signed by the registry officer.*

*iii) That, this suit is bad in law and incompetent for contravening section 6(2) of the Government proceeding Act,[cap 5 R.E 2019]*

I ordered the points of preliminary objections to be disposed of by way of written submissions. The learned State Attorney Mkama Musalama filed the submission for the defendants whereas the submissions for the plaintiff was filed by the learned advocates from the Legal and Human Rights Center, Arusha .Mr Musalama started his submission by pointing out that he abandoned the 2<sup>nd</sup> point of preliminary objection. He went on submitting for the 1<sup>st</sup> point of preliminary objection as follows; That according to the provisions of item 1 of Part 1 to the schedule to the Law of Limitation Act ( Cap 89, R.E. 2019) , the time limit for filing for a case for Compensation is one year. Relying on the provisions of section 5 of the Law of Limitation Act, ( Cap 89 , R.E.2019), Mr Mukama contended that the right of action in respect of any proceedings accrues on the date on which the cause of action arises. It was Mr Mukama's stance that this case is time barred because the plaintiff's cause of action arose on 22<sup>nd</sup> December 2018 and this suit was filed in Court on 15<sup>th</sup> September 2021, hence it is time barred pursuant to item 1 of part I to the schedule to

the Law of Limitation Act,[cap 89 R:E 2019]. To cement his arguments, Mr. Mukama cited the case of **Tanzania National Road Agency and another Vs Jonas Kinyagula , Civil Appeal No. 47 of 2020 ( CA) , Kigoma** ( Unreported). Mr. Mukama contended that the plaintiff was supposed to apply for extension of time for filing this case as the time prescribed by the law for instituting the same had already expired. He insisted that this suit is time barred and pursuant to provisions of section 3 (1) of the Law of Limitation Act, it deserves to be dismissed with costs.

With regard to the 2<sup>nd</sup> point of preliminary objection, Mr. Mukama submitted that the Plaintiff did not serve a 90 days' notice to the Solicitor General as required under the provisions of section 6(2) of the Government Proceeding Act,[Cap 5 R.E 2019] which provides as follows;

*"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 was Mr. Mukama's contention that since the word used in the above quoted provision of the law is "*shall*", then the requirement stated in the law is mandatory. He cited the provisions of section 53(2) of the Interpretation of the Laws Act , ( Cap, 1 R.E.2019) to bolster his argument. Also, he cited the case of **Gwabo Mwansansu and 10 others Vs Tanzania National Roads Agency and the Attorney General, Land Case No.8 of 2020, ( HC) Mbeya**, ( unreported), in which this

Court held that failure to comply with the requirements stipulated in section 6(2) of the Government Proceedings Act, is fatal and proceeded to strike out the case.

In rebuttal, the Plaintiff's Counsel submitted that the suit is not time barred since the computation of time for filing the case is supposed to be reckoned from the year 2020, the time when Civil Appeal No. 15 of 2020 which was lodged at the District Court of Arusha at Arusha was decided. They further submitted that it is very wrong to start counting the time limit for filing this suit from December 2018 while the plaintiff took the necessary steps timely by instituting her case before the Primary Court of Arusha at Arusha in 2019 vide Civil Case No. 288 of 2019. The only mistake which she did was the failure to comply with the legal requirement of serving the 90 days' notice to the defendants as provided under the Government Proceedings Act.

With regard to the 2<sup>nd</sup> point of preliminary objection, the advocate for the plaintiff submitted that the same has no merit because the plaintiff served to the 1<sup>st</sup> and 2<sup>nd</sup> defendants a 90 days' notice and the copy of the said notice was served to the Attorney General but mistakenly was not served to the office of the Solicitor General. They further submitted that, since the Attorney General was served with the copy of the 90 days' notice it is as good as the same was served to the Solicitor General. The omission to serve the notice to the Solicitor General is not fatal. They contended that the Solicitor General is just a legal Counsel of the Attorney General. Thus, a party to a case can either serve the document to the party himself or his advocate. They argued further that since the Solicitor General filed the

written statement of defence it means that he is aware of the existence of the case. Not only, that the plaintiff's advocates insisted that so long as the Attorney General who is the party to this case was served with the 90 days notice, nothing wrong was committed.

In rejoinder, Mr. Mukama insisted that the Plaintiff contravened item 1 of part I to the schedule to the Law of Limitation Act,[Cap 89 R.E 2019] which requires suits for compensation to be filed within a period of one year from the date the cause of action arose but the plaintiff filed her case after the expiry of more than one year. He pointed out that in paragraph 9 of the plaint the plaintiff stated categorically that it was in December 2018 when she found the room in which she used to conduct her business locked with new padlocks and her properties destroyed. Mr. Mukama contended that parties are bound by their pleadings. Thus, from what is pleaded in the plaint, it is crystal clear that the plaintiff's cause of action arose in December 2018.

In addition to the above, Mr. Mukama submitted that the plaintiff cannot rely on the provisions of Order VII Rule 6 of the Civil Procedure Code ( "CPC") to exclude the period which she spent prosecuting the aforesaid Civil Case 288 of 2019 and Civil Appeal No.15 of 2020 because she did not plead in the plaint that her case is time barred, thus under the circumstances of the case the provisions of Order VII Rule 6 of the CPC should be invoked to exempt her from the limitations in filing her case. To cement his arguments, Mr. Mukama referred this Court to the case of **M/S P&O International Ltd Vs The Trustees of Tanzania National**

**Park, Civil Appeal No. 265 of 2020** , (unreported ) in which the Court of Appeal held as follows;

*" ..To bring into play the exemption under Order VII Rule 6 of the CPC , the plaintiff must state in the plaint that the suit is time barred and state facts showing the grounds upon which he relies to exempt him from limitation .."*

Having analyzed the submission made by the learned State Attorney and the learned advocates, I hastened to say that both points of preliminary objections have merits as I shall elaborate hereunder.

Starting with the 1<sup>st</sup> point of preliminary objection, it is a common ground that time limit for instituting a suit for compensation is one year reckoned from the date the cause of action arose. The plaint reveals that the plaintiff's cause of action arose in December 2018 and the advocates for the plaintiff do not dispute that. However they contend that in computation of the time limit for filing this case, the days spent by the plaintiff in prosecuting the said Civil case No.288 of 2019 and Civil Appeal No.15 of 2020 should be excluded. In other words, as correctly submitted by Mr. Musalama the plaintiff's advocates want to rely on the exemption provided under Order VII Rule 6 of the CPC.I am in agreement with Mr. Musalama that under the circumstances of this case, the exemption provided under Order VII Rule 6 of the CPC cannot be invoked in the instant case because the plaintiff's plaint does not contain the necessary facts for the application of the exemption provided in the provisions of Order VII Rule 6 of the CPC. [ see the case of **M/S P&O International Ltd**]. In fact the way the plaint is drafted does not indicate that the case is time barred and that the same should be exempted from the limitation.

With regard to the 2<sup>nd</sup> point of Preliminary objection, there is no dispute that the provision of section 6 ( 2) the Government Proceedings Act, provides that , before instituting a suit against the Government, a notice of not less than 90 days of the intention to sue the Government has to be served to the Attorney General and the Solicitor General. In this case the advocates for the plaintiff have conceded that no such notice was served to the Solicitor General. But they came up with a defence to the effect that the failure to serve the 90 days' notice to the Solicitor General is not fatal so long as the Attorney General was served with the notice. With due respect to the learned Advocates for the plaintiff, I total disagree with their stance because the law states clearly that both the Attorney General and the Solicitor General should be served with the said 90 days' notice. Had it been that it is no necessary to serve the notice to both, that is, the Attorney General and Solicitor General, then the legislature would have stated that the said 90 days' notice could be served to either the Solicitor General or the Attorney General or both. Blatant failure to comply with the law cannot be condoned by this Court. As correctly submitted by Mr. Musalama failure to comply with the law mistakenly cannot be an excuse and justification to ignore the same. I entirely associate myself with the position held by my brother Hon Utamwa , J in the case of **Gwabo Mwansasu and 10 others** ( Supra) that the amendment effected by the legislature in the Government Proceedings Act aims at involving the Solicitor General in cases involving the Government from the pre-trial stage to the finality of the case. Thus, violation of the provisions of section 6 (2) of the Government Proceedings Act by not serving the 90 days' notice



to the Solicitor General, tends to exclude the Solicitor General in the pre-trial process of the case. If such a violation is condoned by this Court, the amendment of the law which provides that the 90 days notice has to be served to the Solicitor General will be rendered nugatory and the intention of legislature will be frustrated. Thus, the failure to serve 90 days' to the Solicitor General is fatal.

From the foregoing, both points of preliminary objections are hereby upheld. This case is struck out. I give no order as to costs since this case has been filed without payment of Court fees under the legal aid scheme.

Dated this 2<sup>nd</sup> day of May 2022



A handwritten signature in blue ink, appearing to read "B.K. Phillip", is written over a horizontal line.

**B.K.PHILLIP**

**JUDGE.**