

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

CIVIL CASE NO. 166 OF 2019

DAUDI MFINANGA (as administrator of the
estate of the late Habibu Hamadi Hamisi)**PLAINTIFF**
VERSUS
THE ATTORNEY GENERAL**RESPONDENT**

RULING

13/04/2022 & 6/5/2022

MASABO, J.:-

The subject of this ruling is a preliminary objection premised on four limbs, that is, the suit is untenable for being hopelessly time barred; the suit is premature and untenable for not issuing the mandatory 90 days' notice of intention to sue the government; the plaintiff has neither a cause of action against the defendant nor a locus standi to institute this suit.

The facts of the suit as averred in the plaint which is being contested by the defendant is that, the suit emanated from an accident occasioned by one Mujibu Bahati Mwege, an employee of the Occupational Health and Safety Authority (OSHA) who on 6th October 2017 while driving a motor vehicle

owned by OSHA, along Mivinjeni road in Dar es Salaam knocked dead one Habibu Hamadi Hamisi (the deceased). The driver was charged and convicted of negligence driving. The plaintiff herein being an administrator of the estate of the deceased has come to this court claiming from the defendant a sum of Tshs 2,000,000 being funeral expenses for the deceased; Tshs 100,000,000/= for loss of income, love, company and for mental torture and shock he suffered as result of the deceased's brutal death.

Hearing of the preliminary objection proceeded in writing. Both parties had representation. Ms. Grace Lupondo, learned State Attorney appeared for the Defendant and the plaintiff was represented by Mr. Richard Mbuli, learned counsel.

In support of the first limb of the preliminary objection it was argued that the suit is for compensation and as per item 1 of Part I of the Schedule to the Law of Limitation Act [Cap 89 RE 2019] the time limitation within which to institute it in court is one year. Thus, this suit ought to have been filed within one year reckoned from 22/11/2017 when the driver was convicted for negligent driving. In support, the counsel cited the case of **Stanbic**

Finance Tanzania Ltd v Giuseppe Trupia and China Malavasi [2002]

TLR 221 which defines the cause of action. Based on this authority and the provision of section 5 of the Law of limitation Act, he invited this court to invoke the provision of section 3(1) of the same Act which states that a time barred suit should is unmaintainable.

On the second limb of the preliminary objection, he submitted that the suit offends the provision of section 6(2) of the Government Proceedings Act [Cap 5 RE 2019] which imposes a mandatory requirement for a 90 days' notice of intention to sue Government, which has to be served upon the Government institution being sued and the Attorney General. He proceeded that, much as the plaintiff issued the notice but he did not comply with the mandatory requirement of the law as the notice was only served upon the Attorney General and not OSHA whose driver is the alleged wrong doer. The failure to notify OSHA, is tantamount to the taking it by surprise something which the law sought to address. Buttressing the submission, he cited

Arusha Municipal Council v Lyamuya Construction Limited [1998]

TLR 13, where the suit was adjudged incompetent for failure to issue the

statutory notice. He conclusively argued that this point be upheld and the suit be dismissed.

On the last limb of the preliminary objection, he argued that the plaintiff has no cause of action against the defendant as the plaintiff does not in any way implicate the Attorney General. The offender as appearing in the plaint is OSHA who is for no good reason not sued. The omission to implead OSHA is wrong and has rendered the suit incompetent and should be struck out.

Mr. Mbuli sternly rebutted. Much as he did not dispute the definition of the cause of action and its accrual, he argued that Ms. Lupondo's submission in support of the first limb of the preliminary objection is misconceived and a lucid misdirection as the cause of action in the instant suit is negligent driving which caused the untimely death of Habibu Hamadi Hamis. Hence, it is a tortious liability whose time limitation, as per item 6 of part I of the Schedule to the Law of Limitation Act of the Law of Limitation Act, is three years and not one year.

On the second limb of the preliminary objection, he argued that the plaintiff complied with the mandatory requirement of the Government Proceedings Act by issuing the ninety days' notice to sue the Government and the notice was served to OSHA. The argument that the plaintiff disregarded this requirement or offended it is unfounded. In fortification he produced a paper extract from a dispatch book intended to show that the notice issued to the Attorney General and OSHA.

Regarding the last limb of the preliminary objection that the plaintiff has neither a cause of action against the defendant nor a locus standi, he replied that the plaintiff has a cause of action against the defendant because as the matter originates from negligent driving by one Mujibu Bahati Mwege, an employee of OSHA which caused the death of Habibu Hamad Hamis. OSHA being an employer of the driver and the owner of the motor vehicle which caused the accident is liable and as per section 10 of the Government Proceedings Act the Attorney General is liable as OSHA is a government institution. On locus standi, he cited the case of **Lujuna Shubi Balonzi Senior v Registered Trustees of Chama Cha Mapinduzi** [1996] TLR 203 and argued that the plaintiff being an administrator of the estate of the

late Habib Hamad Hamis, he has locus standi. This limb of the preliminary objection is therefore lucidly misconceived and without merit.

On my side, I have considered the submission as summarized above and the pleadings filed in court by the parties. I have done so, guided by the principle in **Mukisa Biscuit Manufacturing Co. Ltd. V West End Distributors Ltd** [1969] E.A. 696 which now forms part of our law and which I prefer to preface my ruling with. In this case, the court held thus:

" A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. **Sir Charles Newbold**

It further proceeded that:

".... a preliminary objection consists of a point of law which has been pleaded or which **arises by clear implication out of the pleadings**, and which, if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a

submission that the parties are bound by the contract giving to the suit to refer the dispute to arbitration.” **Law, J.**

With this preface, I now proceed to the three limbs of the preliminary objection. Starting with the first limb of the preliminary objection, institution of suits in courts of law are regulated by different laws, the Law of Limitation Act [Cap 89 RE 2019] being among them. As correctly submitted by Ms. Lupondo, the time limitation within which to institute a suit for “*compensation for doing or for omitting to do an act alleged to be in pursuance of any written law*” is one year. Also, as correctly submitted by Mr. Mbuli, item 6 of Part 1 of the Schedule to the same law sets 3 years as the time limit within which to institute a suit based on tort. The question to be determined in this limb of the preliminary objection is fundamentally premised on the nature of the suit. The defendant is of the opinion that, the suit is for compensation whereas for the plaintiff it has been argued that it is based on tortious liability hence within the scope of item 6.

I will not allow myself to be detained by this point as the plaintiff is at odds with the argument advanced by the learned State Attorney. The pleadings in the plaint vividly demonstrate that the plaintiff’s suit is premised on the

doctrine of vicarious liability simply understood as the tortious liability by which an individual, usually an employer, is held responsible for the wrongs committed by his employee (see Salmond on Torts, 1st ed. Pg 83). Needless to say, since 1907 when Sir John Salmond contextualized vicarious liability into what it is understood today, the doctrine has remained as a cornerstone of the common law of tort. It is, therefore, crystal clear as a blue sky clear that time limitation stipulated under Item 1 part I of the Schedule to the Law of Limitation Act was misapprehended as the applicable law is Item 6 of Part of the same law which regulated suits premised on tort.

It follows that, since the cause of action in this suit accrued on 6th October 2018 when the life of Habibu Hamad Hamis was untimely terminated as a result of an accident caused by negligent driving, the time limitation within which to file the suit expired on 5th October 2021. Therefore, when the instant suit was instituted in court on 18th September 2019 it was well within the time as the duration of three years had no lapsed. The first limb of the preliminary objection, is therefore without merit.

Coming to the second limb, it is a mandatory legal requirement that a party who intends to sue the Government must issue a 90 days' notice expressing his intention to sue the Government. The requirement is stipulated under Section 6 (2) of the Government Proceedings Act which states 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. [emphasis added]

A close scrutiny of the above provision indicates that it is couched in obligatory terms meaning that issuance of the issuance of the notice prior to institution of the suit is mandatory and the omission of which vitiates the proceedings. As held by my learned brother, Ndyasobera, J in **Thomas Ngawaiya v The Attorney General and 3 Others**, Civil Case 177 of 2013, HC Dar es Salaam (unreported).

The statutory notice, is in my view, not an empty formality. It is a measure of public policy; the underlying purpose being advancement of justice and securing public good by avoidance of unnecessary litigation. Its

intention is to alert the Government and afford it opportunity to reconsider the matter in the light of the settled legal position and take appropriate decision in accordance with the law. The rationale of the statutory notice is that the Government being the largest institution with a number of activities for the public good, cannot be taken into court by surprise.

In scrutiny of the pleadings, I have observed that there is a notice purported to be issued to the Attorney General and the OSHA. As the copy of the notice appended to the plaint bears a stamp of the Attorney General Chambers, there is no doubt that the notice was submitted to the Attorney General as per the requirement of the law. On the contrary, nothing shows that it was submitted to the OSHA. Much as the notice contains the address of OSHA in its addresses list the absence of any proof that it was submitted to OSHA signifies that there was no compliance to the mandatory requirement of law. It need not be overemphasized that, as held in the above cited case, the requirement imposed by section 6(2) is not a mere formality and this evident in its contents which are precise and entertain no implications or exceptions. The anomaly is fatal and has rendered this suit unmaintainable.

Before I pen off, I will briefly address the annexure to the submission in reply. In his attempt to convince the court that there was compliance to the law, Mr. Mbuli appended to his reply submission, a paper purportedly extracted from a dispatch book. I, respectfully, decline the invitation as it offends the law. The position of law as stated in **Tanzania Union of Industrial and Commercial Workers (TUICO) at Mbeya Cement Company Ltd v. Mbeya Cement Company Ltd and National Insurance Corporation (T) Limited** [2005] TLR 41, is that, annexures should not to be appended to the submission save where the said annexure is an extract of a judicial decision or a text book. If the annexure appended to the submission is other than an extract of a judicial decision or text book, it should be expunged from the submission and totally disregarded. In line with this principle, I hereby expunge the annexure and totally disregard it.

I may also add that, even if such conducts were permissible, in the present case, it would not have been acceptable as that would offend the law on preliminary objection. As held in **Mukisa Biscuit Manufacturing Co. Ltd. V West End Distributors Ltd** (supra) which demands that preliminary objections should be determined based on the pleadings filed in court and

not otherwise. In the foregoing, I find merit in the second limb of the preliminary objection and I upheld it.

Having found the suit unmaintainable for noncompliance with section 6(2) of the Government Proceedings Act, I see no need to proceed to the third limb of the preliminary objection as this finding sufficiently disposes of the suit.

Accordingly, I strike out the suit. Looking at the circumstances of the case, and especially the duration it has taken in court for reasons not solely attributable to the plaintiff, it is fair and just that the costs be shared.

DATED at DAR ES SALAAM this 6th day of May 2022.

X



Signed by: J.L.MASABO

J.L. MASABO

JUDGE

