IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

CIVIL CASE NO. 37 OF 2022

MASWI DRILLING CO. LTD ----------PLAINTIFF

VERSUS

CHATO DISTRICT COUNCIL---------- 1st DEFENDANT

THE ATTORNEY GENERAL----------2nd DEFENDANT

RULING

Last Order: 30.03.2023
Ruling Date: 05.04.2023

M. MNYUKWA, J.

This Ruling is in respect of the preliminary objection raised by the defendants through the learned state attorney, Ms. Sabina Yongo to move this Court to strike out the suit by sustaining the preliminary objection raised and argued by the parties that:

That this suit is prematurely brought before this Honourable Court without prior 90 days' notice to Defendants and Solicitor General contrary to section 6(2)&(3) of the Government Proceedings Act, Cap 5 R.E 2019 and section 190(1)(a)(b) of the Local Government (District Authorities) Act,

Cap 287 as amended by the Written Laws (Miscellaneous Amendment) Act No. 01 of 2020).

The notice of preliminary objection was filed in this Court on 11/10/2022 along with the joint written statement of defence of the defendants.

As a rule of practice demand, the preliminary objection was argued first and it was argued orally.

Briefly, the background of the suit goes that; the plaintiff and the 1st defendant entered into contract No LGA/039/2013/2014/RWSSP/01 for execution of Geophysical surveys, drilling of productive boreholes and related civil works for Mnekezi water supply within Chato District. The contract was entered on 12th February 2014. Upon the plaintiff to complete part of the work, raised a certificate and the payment was done with the deduction of Tsh 30,846.935 as a retention money. On 16th June 2018, parties again entered into an addendum agreement to contract No. LGA/039/2013/2014/RWSSP/W/01 for execution of Geophysical surveys, drilling of productive boreholes and related civil works for Mnekezi water supply for execution of addendum works valued Tsh 310,000,000 and it was agreed that the retention money that was in in the hand of he 1st defendant would serve the same purpose in the addendum agreement.

Upon completion of the works, the plaintiff was paid the contract amount and again the retention money was not paid and it was said that the same would be paid after the lapse of the defect liability period which was 180 days to be counted from December 2018 and therefore, the due date for payment was June 2019. That up to now, the 1st defendant did not make any payment despite follow-ups.

The plaintiff now instituted the case and prays for judgement and decree for the following:

i. *This honourable Court be pleased to order the defendants to pay the plaintiff a principal sum of Tsh 42,935,770 being unpaid retention money and interest arising therefrom*

ii. *This honourable Court be pleased to order the defendants to pay the plaintiff general damages*

iii. *Costs and incidental of this suit be paid by the defendant and*

iv. *Any relief(s) this Honourable Court may deem just and fit to grant*

When the preliminary objection was argued, the plaintiff enjoyed the legal services of the learned counsel, Maligisa Sakila while the 1st and 2nd defendants were represented by Ms. Sabina Yongo,the learned state attorney.

Arguing in support of the preliminary objection, the defendants' counsel quickly asserted that, the suit is prematurely brought without being served with the 90 days' notice to the defendants as it is required by the law. She argued that, it is the requirement of the law that any person who wished to institute a suit against the Government or Government department must issue a 90 days' notice to him and serve copy of the notice to the Attorney General and Solicitor General as it is provided for under section 6(2) of the Government Proceedings Act, Cap 5 R.E 2019 and section 190(1)(a)(b) of the Local Government (District Authorities) Act, Cap 287 as amended by Written Laws Miscellaneous Act No 1 of 2021 under section 31.

She went on that, the section is couched with the mandatory condition for the suit not to be heard or instituted to the court unless the copy of the notice is served to the Attorney General and Solicitor General. She added that, the 1st and 2nd defendants are the Government institutions whereby the 90 days' notice must be served to them. The learned state attorney was of the view that, the importance of serving notice is to give the Government time to look at the nature of the claim so as to see the possibility of resolving the dispute before resorting into the court of law to defend it.

She further argued that, upon going through paragraph 11 of the Plaint, the plaintiff pleaded that, he served 90 days' notice to 2nd defendant and Solicitor General as shown in Annexure MSD 5 which form part of the Plaint. And that, he did not plead if he served the 90 days' notice to the 1st defendant. Referring to Annexure MSD 5. The learned state attorney submitted that, the same does not show if the notice was served as there is no official stamp, signature and the date to show that the parties were served and no dispatch book to show that service was done. She went on by stating that, paragraph 11 does not show if the 1st defendant was served. She therefore concludes that, the 90 days' notice was not served to the defendants and Solicitor General.

She refers to the decision of this case in **Audacity Intercom (T) Ltd v Bukombe District Council & Attorney General,** Civil Case No 28 of 2021 which emphasizes on the proof of service to the defendants. She therefore prays the matter to be struck out with costs.

Responding, the counsel for the plaintiff submitted that, the 90 days' notice was issued as shown on paragraph 11 of the Plaint which introduce Annexure MSD 5 which show that the notice was issued on 18th January 2022 and the case was filed on 25th August, 2022.

The counsel was of the view that, the objection raised by the defendants is not pure point of law as it requires evidence that is proof of service. He referred to the land mark decision of **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd** (1969) EACA 699. He added that, in our case at hand what is lacking is proof of service but the notice was prepared and annexed as seen in the Plaint. He argued that, the service was done by post and that the proof can be brought during the hearing of the case to ascertain that facts.

Admittedly, the counsel for plaintiff submitted that, the 90 days' notice can serve the purpose of settlement. He was of the view that the same purpose can be served even if the case is in court through the Court Annexed Mediation. He prays the Court to disregard the cited case because each case is determined on its own fact. He therefore prays the preliminary objection to be overruled.

Re-joining, the counsel for the defendants opposed the submission of the counsel of the plaintiff and argued that, the case of **Mukisa Biscuit Manufacturing Co. Ltd** is misapplied because even in the above case it was held that, objection must arise from the pleadings and attachment is part of the pleadings. She attacked Annexure MSD 5 to insist that, the same does not show if 90 days' has been served.

Insisting, the learned state attorney submitted that, the plaintiff's counsel did not plead if he had served the 1st defendant who is the main party and therefore, the evidence cannot brought or proved later on because parties are bound by their pleadings. She retires by stating that, ascertainment of proof during the hearing is contrary to section 6(2) of Cap 5 R.E 2019 which requires the suit to be instituted and heard after 90 days' notice has been served to the defendants as it is the requirement of the law which need to be ascertained first before the hearing of the case. She therefore insists the suit to be struck out with costs.

From the above-competing arguments from the counsels of both parties, the main issue for consideration and determination is whether the preliminary objection is merited or not.

In the very beginning, it has to be noted that, the objection is based on the 90 days' notice for want of service of intention to sue to the 2nd defendant and Solicitor General as well as the 1st defendant who is the main party in this case. The learned state attorney argued that, the pleaded facts does not show at all if the 1st defendant was served with the notice. On his part, the plaintiff's counsel argued that, the 90 days' notice which is annexed as Annexure MSD 5 was issued and the same was served through posts to the 2nd defendant and Solicitor General.

To put it clear, I find it wise to reproduce part of paragraph 11 of the Plaint which reads:

> *"That, again the plaintiff through the service of an advocate was obliged to write a 90 days' notice statutory demand letter dated 18th January 2022 and the same was copied and served to the 2nd defendant and the Solicitor General....."*

In the same spirit, I find it pertinent to reproduce part of the Notice which is annexed as Annexure MSD 5 addressed to the 1st defendant and alleged to be served to the 2nd defendant and the Solicitor General which reads as follows

Cc:

1. *THE ATTORNEY GENERAL*
2. *THE SOLICITOR GENERAL*

C/O NATIONAL PROSECUTION SERVICE

P.O.BOX .....

GEITA

3. *Maswi Drilling Company Limited " Our Client"*✓

Reading between lines paragraph 11 of the Plaint, it is clear that, the plaintiff wrote the demand notice to the 1st defendant, but it was not pleaded that the same has been served to him and nothing on records

shows that the same was served. Likewise, as it is shown in Annexure MSD 5, the notice was copied to the 2nd defendant and Solicitor General. The question which tasked this Court is whether the same has been served to them as the law requires?

It is clear from the wording of section 31(1)(a) of the (Miscellaneous Amendments) Act, 2020 the plaintiff was required to serve a 90 days' notice on the 1st defendant and also serve its copy to the 2nd defendant and Solicitor General before instituting a suit to this Court. That provision is couched in mandatory terms. It states as follows:

> *"No suit shall be commenced against a local government authority unless a ninety days' notice of intention to sue has been* ***served upon the local government and a copy thereof to the Attorney General and Solicitor General."***

This Court when interpreting the above section in the case **Mashaka Abdallah and Another v Bariadi Town Council and 2 others** (Land Case No 3 of 2020) [2021] TZHC 6534 (10 September 2021), the Court pointed out that:

> *"From the above position of the law, serving a copy of the notice of intent to sue the Government to the Attorney General and the Solicitor General is a legal requirement. In*

it therefore, parties intending to commence a suit against the Government be it central or local government have not given the option to skip this requirement. It is also being noted that mere composition of the address or the title "the Attorney General and Solicitor General" in the notice without evidence that they were served in itself cannot be proof of service. There must be evidence that the said notice reached the Attorney General and Solicitor General respectively."

In his submission, the plaintiff argued that, the ascertainment of proof of service can be done during the hearing of the case and that the preliminary objection does not met the requirement of the law because the same need ascertainment of fact.

With due respect from the learned counsel of the plaintiff, I wish to state that, it is the trite position of the law that in determining the preliminary objection, the court has to look to the pleadings and its annexure only without requiring more evidence.

The wording of the section 31(1)(a) of Act No 1 of 2020 is very clear, a suit shall not be commenced against the local government authority unless a ninety days' notice of intention to sue has been served upon the local government authority. Nothing on record shows that the defendants and the Solicitor General were served with the notice. The facts gathered

in paragraph 11 of the Plaint as it is, does not state the mode in which the ninety days' notice was served to the defendants. Since serving the defendants is one of the legal requirement, this Court place reliance on evidence found in the pleadings. To my view, in the first place the plaintiff was expected to show that service was done to the defendants, and by which mode. That facts were supposed to be backup with the records showing proof of service in order to prove the pleaded facts rather than a mere words stated in the submissions as the same does not prove if the service was done by posts as alleged.

The plaintiff's argument that the proof of service will be ascertained during the hearing of the case is misplaced, because apart from going contrary to the requirement of the law which requires the defendants to be served before a suit commenced, it also denied the defendants a chance to resolve the dispute before defending it in the Court. As it is well articulated in the case of **Mashaka Abdallah and Another** (supra) that:

> *"... In fact, the Attorney General being the Chief Legal Adviser to the Government in terms of the provision of Article 55 of the Constitution of the United Republic of Tanzania, 1977 and also as legislated in the office of the Attorney General (Discharge of Duties) Act No 4 of 2005 is*

clothed with mandate to decide whether the intended suit subject to the notice of intention to sue is meritious or otherwise. In orderly way of executing government businesses, the duty is exercised in liase with the Ministry, Government Institution or independent department of Government to whom the claim are directed."

I therefore, agree with the learned state attorney representing the defendants that the case of **Mukisa Biscuits Manufacturing Co. Ltd** (supra) is misapplied because it is the holding of that case the preliminary objection must arise from the pleadings and its attachment. I equally agree with her that the plaintiff's counsel did not submit if the 1st defendant was served and the Plaint also did not plead if the 1st defendant was served with ninety days' notice.

As it was rightly submitted by the learned state attorney that serving the defendants gives them opportunity to see if there is need to settle the matter before it is filed to court or to defend the case by preparing the written statement of defence. The argument that Mediation can be done through Court Annexed Mediation does not serve the purpose of the notice as it was intended by the Legislature.

All said and considered, since there is noncompliance of the legal requirement of serving the defendants and Solicitor General with a 90

days' notice, it renders the instant suit incompetent. In the event, I uphold the preliminary objection and struck out the suit with no order as to costs.

It is so ordered.

M.MNYUKWA
JUDGE
5/4/2023

Court: Ruling delivered on 5th April 2023 in the presence of the counsel for both parties.

M.MNYUKWA
JUDGE
5/4/2023