IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM DISTRICT REGISTRY)

AT DAR-ES-SALAAM

CIVIL APPEAL NO. 50 OF 2022

FAUSTIN SUNGURA ..... APPELLANT

VERSUS

DAR-ES-SALAAM CITY COUNCIL ..... RESPONDENT

(Appeal from the ruling and drawn order of the District Court of Ilala at Kinyerezi)
(C.A. Mrema, RM)
Dated 25th day of October 2021
In
(Civil Case No. 11 of 2021)

JUDGMENT

Date: 06/04 & 29/05/2023

NKWABI, J.:

The appellant who was the plaintiff in the trial Court sued the respondent for defamation and therefore was seeking compensation. A preliminary objection was raised against the suit. The preliminary objection had two wings as follows:

1. That the applicant suit is bad in law as it contravenes section 106 of the Local Government (Urban Authorities) Act, Cap. 288) as amended by Miscellaneous Amendments Act No. 1 of 2020.

2. That the applicant suit is bad in law as it contravenes section 6 (3) & (4) of the Local (sic) Government Proceedings Act Cap 5 R.E 2002 as amended by Miscellaneous Amendments Act No. 1 of 2020.

The trial court deliberated the submissions of both parties and cited **Thomas Ngawaiya v. The Attorney General & 3 Others,** Civil Case No. 177 of 2013, CAT (unreported) where it was stated that:

> *"The provisions of section 6(2) of the Government Proceedings Act are express, explicit, mandatory, admit no implications or exceptions. They are imperative in nature and must be strictly complied with. Besides, they impose absolute and unqualified obligation on the court."*

The trial court then ruled that the 30 days' notice issued by the appellant to the respondent did not comply with the law, the suit was ruled to be incompetent for that reason.

The trial court also went on to determine the lack of joining the Attorney General in the suit and ruled that non joinder of the Attorney General renders the suit incompetent. The trial court referred to the decision in **ANL (2007)**

Ltd v. TIB Development bank LPT, Civil Case No. 11 of 2020 (unreported) where it was ruled that:

> *"The plaintiff's failure to join the Attorney General as necessary party is fatal, as it vitiates the suit pursuant to provisions of section 6 of the Government Proceedings Act, Cap. 6 R.E. 2019."*

Ultimately after the above discussion, the suit was struck out with costs. Then, the appellant rushed to this Court in an attempt to fault the ruling of the trial court. He has listed 11 grounds of appeal which are that:

1. That the trial magistrate erred in law and fact to hold that the suit before him (the court) of Faustin Sungura v. Dar-es-Salaam City Council was between a natural person (Faustin Sungura) against the Government.
2. That, the trial magistrate erred in law to frame the issues to determine the matter which was directing as if the case was against the Government and not the Local Government.
3. That the trial magistrate erred in law and fact for not taking into consideration that a local government is an entity which has independent locus to sue and to be sued.

4. That, the trial magistrate erred in law for not taking into consideration that the defendant (Dar-es-Salaam City Council) was not prejudiced of 30 days' notice given to them for they replied vide their letter with reference No, A.B.65/194/01/'PART' A/15 dated 19th August 2020.
5. That the trial magistrate erred in law, and failed to know the gist of the Article of the Constitution submitted by the plaintiff concerning dispensing the justice without being tied by technicalities.
6. That the trial magistrate erred in law and fact for not taking into consideration that the plaint before the court was not disclosing any cause of action against the Government, hence no right to be joined as a party.
7. That, the trial magistrate erred in law, to generalize the word Government to also mean local government authority, while the word was meant to a specific issue.
8. That the trial magistrate erred in law when held that the application of Civil Procedure Code, does not take precedent over the Government Proceedings Act in suit where the government is sued.
9. That, the trial magistrate erred in law to abandon the application of the Civil Procedure Code, hence to defeat my case by reason of non-joinder.

10. That the trial magistrate erred in law to entertain an alien person a stranger known as Ubungo Municipal Council to hijack the defence and take over the case.

11. That, the appeal is within the ambit of time as I was supplied with copies of corrected ruling and decree on 22nd December 2021. Copies to apply the copies and copies of ruling and the decree are attached as annexture SUNGURA 1 collectively.

I propose to swim with the current by determining the grounds of appeal as per the order of submission by the appellant.

The appellant argued the 1st, 2nd and 3rd grounds of appeal together contending that Dar-es-Salaam City is a legal entity which can sue or be sued. He therefore prayed the 1st, 2nd, and 3rd grounds of appeal be sustained.

It was argued, in reply submission by the respondent, that the appellant's view is misconceived as local government is defined to be government under the provisions of section 16 of the Government Proceedings Act as amended. It was also added that under section 6(3) of the Government Proceedings Act it is provided that in suits against the government, the Attorney General

shall be joined as a necessary party. The respondent cited **Burafex Limited (formerly known as) AMETAA Ltd v. Registrar of Titles,** Civil Appeal No. 235 of 2019 HC (unreported) where it was stated that:

> *"non-joinder of the Attorney General in terms of section 6(3) of the GPA will cause the government not to be represented by his Chief Legal Adviser and so vitiates the proceedings."*

I was also referred to the case of **Al Adawi Company Ltd v. TIB Development Bank Ltd & 2 Others,** Misc. Land Application No. 38 of 2020 HC (unreported).

In rejoinder submission, the appellant disputed the submission in reply by the respondent. He argued that since the respondent can be sued and can sue, the appellant's case cannot be against the government but a local government. He added, section 6(3) of the Government Proceedings Act should not be misconceived. It was also the view of the appellant that a person who does not desire to sue the Government for no cause of action arises out of the pleading but it is the local government that committed wrong. He insisted that his 1st, 2nd and 3rd grounds of appeal be found to be merited and be honoured.

With respect, I do not find the arguments of the appellant in respect of the 1st, 2nd and 3rd grounds of appeal to be merited. Instead, I find that the appellant is under a fallacy that the local government is not a government. Had the appellant taken a trouble to remember that even that government he is referring to as the Government is a "Central Government" he would have not taken so much effort to argue the 1st, 2nd and 3rd grounds of appeal and would have honoured the dictates of the law. Therefore, I hold that the Local Government is a government just as the Central Government is the Government. As to the joining of the Attorney General to this suit, that is the requirement of the law and the appellant cannot choose not to follow the law.

It is trite law that where there is a specific law which provides for a certain matter, that law has to be followed first. That is as per **Salim O. Kabora v Tanesco Ltd & 2 Others,** Civil Appeal No. 55 of 2014 CAT (unreported) where it was stated that:

> *"The import of the above quoted excerpt is that where a certain law provides for a specific forum to first deal with a certain dispute, a resort to it first is imperative before one*

seeks recourse to court. Where that is not observed, the attendant court's decision is rendered a nullity."

So, the appellant has to follow the dictates of the Government Proceedings Act in suing the respondent. He cannot hide behind the Civil Procedure Code. That said, the lamentations of the appellant in the 1st, 2nd and 3rd grounds of appeal are unmerited and are dismissed.

Next, the appellant argued the 4th and 5th grounds of appeal together. On them, he maintained that the trial court erred not noticing that writing 30 instead of 90 days' notice was mere a slip of the pen on his demand notice to sue the respondent. He added that the notice neither offended nor prejudiced the respondent because even the respondent responded to it. He was also of the view that though the Attorney General and the Solicitor General were not served with the copy of the demand notice, they knew of the existence of the suit or the demand notice as provided for under section 107(3) of the Local Government (Urban Authority) Act Cap. 288 R.E. 2010. He added that he sued the respondent after 180 days prior to instituting the suit in court. He cited **VIP Engineering & Marketing Ltd v. Said Salim Bakhressa Ltd,** Civil Application No. 47 of 1996 CAT (unreported) where it was stated that:

"There can be no rational dispute over the fact that, procedural rules are enacted to be complied with. Usually there is legal principle behind every procedural rule. But those rules differ in importance. Some are vital and go to the root of the matter; those cannot be broken. Others are not of that character; and can therefore be overlooked provided that there is a substantial compliance with the rules as a whole and provided no prejudice is occasioned."

He also referred me to Article 107 A(2) (e) and 107 B of the Constitution of the United Republic of Tanzania. He wondered if the court can strike out a suit just for non-existing provisions of the law.

In reply submission, the respondent maintained that the notice that was given by the appellant was not ninety days' notice rather 30 days' notice contrary to the law. He admitted there was a slip of the pen in citing section 6(3) and (4) of the Local Government Proceedings Act. It is added that in suing the Government, the appellant ought to have joined the Attorney General.

Maintaining his stance in the rejoinder submission, the appellant contended that his case was struck out by non-existing provision of the law.

I have deliberated the rival submissions in respect of the 4th and 5th grounds of appeal. The grounds of appeal are in respect that the suit was struck out because no 90 days' notice was issued to the respondent, only 30 days' notice was issued. Also, there is a claim that the appellant did not sue until 180 days had lapsed, so his suit ought to be saved. I do not agree with the appellant. Serving the 90 days' notice not only to the respondent but also to the Attorney General is the requirement of the law which the appellant has to obey. He cannot be heard to say that it was a slip of the pen while his words tell it all that it was a 30 days' notice. I quote the words for clarity:

> *... Do this within a month from 30th of July 2020 ... failure to heed ... then Court process will take its stance ..."*

The above words cannot be said it was a sip of the pen and the appellant intended 90 days' notice.

90 days' notice is given to give sufficient time to the Government to consider the allegations and determine whether to settle the claim before a suit is filed or to prepare for legal action in court. That is clearly stated in **Musanga**

Ngándwa v. Chief Japhet Wanzagi & 8 Others, [2006] TLR 351 (HC) in the following convincing words:

> *The object of the Notice contemplated by section 80 of Civil Procedure Code is to give the concerned Government and Public Officer opportunity to consider the legal position and make amends or settle the claim if so advised without litigation. The Legislative intention behind that section is that public money and time should not be wasted on unnecessary litigation and the Government and the public officers should be given a reasonable opportunity to examine the claim made against them lest they should be drawn into avoidable litigation. The provisions of sec. 80 are not intended to be used as booby traps against ignorant and illiterate persons.*
>
> *.... Section 80 is not doubt imperative. Failure to serve notice complying with the requirements of the statute will entail dismissal of the suit. ..."*

So, the appellant did not comply with mandatory provision of the law, his suit was bound to be struck out. That is not all, the appellant ought to have served the notice to the Attorney General as well. He did not do so;

therefore, the suit could not stand. That said, the 4th and 5th grounds of appeal crumble to the ground.

Arguing the 6th and 7th grounds together, the appellant contended that since the respondent can sue or be sued under section 106(1)(a) of the Local Government (urban Authority) Act Cap. 288 as amended then the respondent was properly sued without joining the Attorney General. He added that the trial court erred in law and fact in misconceiving to interpret section 16(4) of the Government Proceedings Act which was mainly for a specific issue or matter and not to mean the Local Government to mean the government. The appellant asked this Court to allow the 6th and 7th grounds of appeal since section 16(4) purports to prohibit to enforce payment by government, execution attachment or similar process to the government entities.

The respondent reply to the submissions of the appellant is that the answer to the 1st, 2nd, and 3rd grounds of appeal has bearing to grounds 6 and 7. He added that the appeal is incompetent in view of **Abdallah Omari Ndogondogo & Others v. Soap and Allied Industry & 2 Others,** Land Case No. 78 of 2020 HC (unreported) where it was ruled that:

"Suing the local Government authority without joining the Attorney General is fatal. To me this connotes that any suit against the local government authorities touches the interest of Central Government, thus, such interest or right of the Central Government must be effectively defended or protected by the office of the Attorney General."

The appellant reiterated his stance in submission in chief in his rejoinder submission.

The complaints in ground 6 and 7 of the petition of appeal cannot detain me much. The law provides that whenever the government is sued, the Attorney General has to be joined as a necessary party. That is the requirement enacted by the law, the appellant cannot choose to evade. His 6th and 7th grounds of appeal and submissions thereto are unmerited. They are dismissed. The above determination, disposes ground number 8 and 9 as per the submission in chief of the appellant himself.

On the 10th ground of appeal, the appellant complains that Ubungo Municipal Council hijacked the defence and took over the case due to Dar-es-Salaam City Council being cancelled. He added the summons issued on 10th May 2022 was received by Municipal solicitor for Ubungo Municipal Council who

is not a party. He further maintained that the preliminary objection was argued by the stranger, a person not a party in the trial suit. He thus, for that reason prayed that the decision on the preliminary objection be overruled.

It was the response of the respondent that in this case, Ubungo Municipal Council being in this case is not a stranger since after defunct Dar-es-Salaam City Council all the assets and liabilities which are within the jurisdiction of Ubungo Municipal Council were shifted to Ubungo Municipal Council. He added that all the activities or business that were happening in the former Ubungo bus terminal are done now at Magufuli Bus Terminal. He further maintained that the claims of the appellant he was assaulted happened in bus terminal which is now under Ubungo Municipal Council that is why the respondent is appearing in the suit. It is prayed that the ground of appeal be dismissed.

In rejoinder submission, the appellant insisted the Ubungo Municipal Council hijacked the case. He was of a firm view that Ubungo Municipal Council is stranger and alien person and not a party to the suit and argued the preliminary objection.

I have considered the arguments of both parties in respect of the 10th ground of appeal. I find the ground of appeal unmerited. In the first place, it is for the appellant to ascertain of the person he is suing or appealing against. If he finds that the respondent is defunct he ought to have asked for amendment of pleadings. Secondly, the one who argued the preliminary objection on the part of the respondent is a State Attorney. The preliminary objection is on pure point of law which can be argued by the lawyer representing a party, it is not necessary for the party herself or himself to appear. But in this case, be that as it may, non-joinder of the Attorney General is fatal and therefore the proceedings were incompetent. The points of law could be raised suo motu by the Court and the appellant could be asked to argue them even if they were in the absence of the counsel for the respondent and yet the court could have struck out the case for that incompetence. The complaint is thus unmerited and it fails.

In the end, I find the appeal wanting in merits. It is dismissed with costs.

It is so ordered.

DATED at **DAR-ES-SALAAM** this 29th day of May, 2023.

J. F. NKWABI

JUDGE