

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF DAR ES SALAAM**

AT DAR ES SALAAM

CIVIL CASE NO. 103 OF 2022

TIB DEVELOPMENT BANK LIMITED 1ST PLAINTIFF

ATTORNEY GENERAL 2ND PLAINTIFF

VERSUS

GLOBAL PACKAGING (T) LIMITED 1ST DEFENDANT

WANDE PRINTING AND PACKAGING

COMPANY LIMITED 2ND DEFENDANT

RULING

4th April and 20th June, 2023

KISANYA, J.:

The plaintiffs sued the defendants claiming for repayment of the total sum of TZS 11,764,225,355.56 being outstanding loan amount plus interests, penalty and charges thereof.

It is depicted from the plaint that, the plaintiff's case is founded on the credit facility agreement entered into by the 1st plaintiff and the 1st defendant on 17th April, 2015, and amended facility dated 20th June, 2017. Basing on the said agreements, the 1st plaintiff issued the 1st defendant with a credit facility of USD 1,630,500 being long term loan facility and USD 700,000 being short term facility. The said facility was secured, among others, by a corporate guaranteed of the 2nd defendant.

In their joint written statement of defence, the defendants vehemently disputed the plaintiffs' claim. They further raised a counter claim in which they prayed, *inter alia*, for judgment and decree against the plaintiffs in the main case/defendants in the counter claim, as follows;

- (a) *Declaration that the 1st plaintiff failed to discharge its statutory obligation and contractual obligation duty to supervise, monitor and evaluate and nurture the 1st defendant's investment as expected of as a National Investment Bank in the country;*
- (b) *Declaration that the 1st Defendant's report to the Credit Reference Bureau that the Plaintiff had defaulted its repayment obligation to the 1st Defendant under the CFA (as amended) was malicious and unjustified, hence unlawful.*
- (c) *Declaration that the 1st Defendant's report to the Credit Reference Bureau (CRB) that the Plaintiff had defaulted its repayment obligation to the 1st Defendant under the CFA (as amended) was reckless, negligent and unjustified, hence unlawful.*
- (d) *An order enjoining the 1st Defendant to refute in public and countermand and lift the report it had made to the CRB that the Plaintiff had defaulted its repayment obligation to the 1st Defendant under the CFA (as amended).*
- (e) *Perpetual injunction retraining the Plaintiff and their agent, assignee and officials from further interfering with the Plaintiff's right and peaceful ownership and*

running their business save in accordance with the law and CFA (as amended).

- (f) An order enjoining the 1st Defendant to pay the Plaintiff, jointly and severally, a sum of TZS 31,194,605,987 being special damages for the business, economic and financial losses the Plaintiff sustained as a result of the 1st Defendants unlawful acts, perpetrated against the Plaintiffs and their business as averred in paragraph 29 hereof.*
- (g) An order enjoining the 1st Defendant to pay the Plaintiffs, jointly and severally, general damages as may be assessed by this Court as averred in para 30 and 31 hereof.*

Apart from filing their written statement of defence to the counterclaim, the defendants to counterclaim filed a notice of preliminary objection on the following point of law:

"The counter claim is untenable and incurable defective for being preferred in contravention of section 6(2) of the Government Proceedings Act, Cap. 5, R.E. 2019."

The preliminary objection was argued by way of written submissions filed by Ms. Jacqueline Kinyasi, learned State Attorney for the defendants in the counterclaim and Mr. Alex Balomi, learned advocate for the counterclaimants or defendants in the main case.

Ms. Kinyasi prefaced her submission by contending that the 1st plaintiff in the main case is a parastatal organization within the meaning of section 2 of the Parastatal Organization (Financial Supervision and Control) Act, No. 16 of 1976. To support her contention, she cited the case of **Luhama Katoto Ranchco and Another vs Tanzania Investment Bank Ltd and Another**, Land Case No. 3 of 2021, HCT at DSM (unreported).

Ms. Kinyasi went on submitting that the counterclaim raised by the defendants is a civil proceeding against the Government and thus, governed by the Government Proceedings Act, Cap. 5, R.E. 2019 (henceforth the "GPA"). Making reference to section 6(2) of the GPA, she argued that, it is a mandatory requirement that a 90 days' notice must be issued before instituting any proceedings, counterclaim inclusive, against the Government.

As far as the instant counterclaim is concerned, Ms. Kinyasi contended that the defendants/counterclaimants did not plead to have issued the notice of intention to sue the Government and thus, in contravention with the law. To amplify her argument, she referred the Court to its decision in **Emmanuel Titus Nzunda vs Arusha City Council**, Land Case No. 28 of 2020, HCT at Arusha (unreported). Citing further the provision Order IX, rule 6(2) of the CPC and the case of

Runway (T) Limited vs Wia Company Limited and Another, Civil Appeal No. 59 of 2015 (unreported), the learned State Attorney argued that the counterclaim is a cross suit. Therefore, she prayed for this Court to strike the counterclaim with costs for want of ninety days' notice of intention to sue the Government.

In his reply, Mr. Balomi submitted that the defendants are not required to issue a ninety days' notice of intention to sue before raising the counterclaim. He referred the Court to Order IX Rule 2 of the CPC which provides that the counterclaim shall be treated as a cross-suit and the Black's Law Dictionary, 9th Edition, in which the word "cross-suit" is defined as follows:

"A claim asserted between co-defendants or co-plaintiffs in a case and that relates to the subject of the original claim or counterclaim."

The learned counsel further submitted that the counterclaim at hand is in respect of the same parties and relates to the subject of the main case. He submitted that the defendants raised the counterclaim or cross-suit on the basis of the main case brought by the Government. He was of the humble view that, had the defendants brought the main case in court it would have been mandatory to issue the notice of intention to sue the plaintiff (defendants to the counterclaim).

Commenting on the authorities cited by the learned State Attorney, Mr. Balomi submitted that all cases are irrelevant and inapplicable in the circumstances of this case. His argument was based on the fact that, the Government was the defendant and not the Plaintiff in the said cases. It was his further contention that the case of **Runway (T) Limited** (supra) supports the defendants' position that a counterclaim is dealt together with the main suit unless the Court finds it appropriate for it to be dealt with separately. He was of the further view that, this Court has not issued an order deeming the defendants' counterclaim to be dealt separately. On that account, he reiterated his contention that the 90 days' notice to the Government was not required.

Mr. Balomi was of the further view that in the event the Court finds merit in the plaintiffs' argument, the defendants will be barred in law to institute their suit for being *subjudice* or *res-judicata*.

The learned counsel went on to submit that the preliminary objection is hanged on the counterclaim raised in the written statement of defence. Referring this Court to the definition of counterclaim by Dr. Julius Clement Mashamba in **Civil Litigation-Practitioner Manual**, at page 94, he submitted that the objection raised at this stage is not tenable. He was of the view that the counterclaim and written statement of defence will both have the same effect as plaint in a cross suit.

Mr. Balomi further contented that the preliminary objection is not tenable for defeating the underlying judicial policy which is to settle all dispute between the parties at one time. He submitted that if the Court finds merits in the preliminary objection, the suit will be stayed pending issuance of 90 days' notice. On the foregoing reasons, the learned counsel submitted that, the preliminary objection is misconceived on the ground that the counterclaim preferred under Order IX rule 9 of the CPC is not subject to the requirement of ninety days' notice. To support his argument, he cited the case of **Sion Gabriel Jones vs Minister of Home Affairs and Two Others** (2005) TLR 36, where it was held that:

"There is no provision under the Basic Rights and Duties Enforcement Act, 1994 which requires a petitioner to submit to the Government any notice before institution of the petition."

Submitting in alternative, Mr. Balomi argued that the word "may" used in section 6(1) of the GPA connotes that the legislature did not intend that all proceedings against the Government shall be instituted subject other provision of that Act. He further urged this Court to invoke the overriding objective provided for under section 3A of the CPC. In conclusion, the learned counsel asked the Court to dismiss the preliminary objection with costs.

Having carefully considered the rival arguments from the counsel for the parties, the main issue is whether the objection is meritorious.

As the preliminary objection suggest that the counter-claim is incompetent for being preferred in contravention of section 6(2) of the Government Proceedings Act, Cap. 5, R.E. 2019 (the GPA), I find it appropriate to quote the provision of section 6 of the GPA, as hereunder:

**"Civil proceedings
against Government,**
etc. Acts Nos. 40 of
1974 s. 2; 30 of 1994
s. 2 11 of 2019 s. 21

*6.-(1) Notwithstanding any other provision
of this Act, civil proceedings may be instituted
against the Government subject to the
provisions of this section.*

*(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 of his claim to the Attorney-
General and the Solicitor General.***

*(3) All suits against the Government shall,
after the expiry of the notice be brought
against the Attorney-General, and a copy of
the plaint shall be served upon the Solicitor
General, Government Ministry, Department or*

Officer that is alleged to have committed the civil wrong on which the civil suit is based."
(Emphasize supplied)

It is glaringly from the section 6(2) of the GPA that, any suit against the Government must be instituted after complying with two conditions as follows: *One*, issuing a ninety days' notice to the Government, ministry, government department, local government authority, executive agency, public corporation, parastatal organization or public company which committed the civil wrong leading to the suit. *Two*, serving a copy of the said notice to the Attorney General and the Solicitor General. This position was stated in the case of **Gwabo Mwansasu and 10 Others vs Tanzania National Roads Agency and Another**, Land Case No. 8 of 2020 (unreported) in which this Court (Utamwa, J., as he then was) held that:

"... a notice under these quoted provisions is among the legal foundation stones of a suit of the nature under consideration. It is thus, clear that, the law requires a suit of this nature to be instituted in this court after the expiry of a period of not less than 90 days computed from the date of submitting the notice to the Government (defendant). The notice/claim of this nature must also be sent to the Attorney General and the Solicitor General."

Similar stance has been underscored in a number of cases, including the cases of **Luhama Katoto Ranchco** (supra) and **Emmanuel Titus Nzunda** (supra) referred to this Court by Ms. Kinyasi. In another case of **Steven G. Malipula and Another vs Tanzania Revenue Authority**, Civil Appeal No. 50 "B" of 2008 (unreported), the Court of Appeal quoted section 6(2) and (3) of the GPA and went on to hold as follows:

"Since the procedure of issuing a ninety days' notice to the Government before suing it is a mandatory requirement and that had not been complied with.... the application to join for joining the Attorney General was rightly refused by the learned trial judge."

Being guided by the above position of law, I find no merit in Mr. Balomi's argument that the legislature did not intend that every suit against the Government must be preceded with the notice of intention against it. This is when it is considered that section 6(1) of the GPA relied upon by the learned counsel does not support his contention. The said provision recognizes existence of other written laws and provides further those civil proceedings brought against the Government is subject to the provisions of section 6 of the GPA, including subsection 2 thereto on the mandatory requirement of issuing a ninety days' notice before the institution of a suit.

The next question is whether the requirement of issuing a ninety days' notice applies to a counterclaim which is raised against the suit

instituted by the Government. At the outset, I hold the view that this question must be answered in the affirmative due the following reasons:

First, as rightly submitted by both counsel, it is trite law that, a counter claim is treated as cross-suit. That is why the position of law is to the effect that, the counterclaim can be determined even if the main case has been struck out or dismissed and the *vise-versa*.

Two, Order IX rule 2 of the CPC provides that a written statement of defence with counterclaim have the same effect as plaint in a cross-suit. Therefore, being a plaint in a cross-suit, the written statement of defence with counter claim against the Government must comply with procedure governing civil proceedings against the Government as it is for the plaint in the main case.

Three, as rightly observed by Ms. Kinyasi, the phrase "proceedings against the Government" is defined by section 2 of the GPA to mean "*a claim by way of set-off or counterclaim raised in proceedings initiated by the Government.*" It follows therefore that, a counterclaim raised in the proceedings initiated by the Government is one of the proceedings against the Government. For that reason, counter claim is subject to the provision of section 6 of the GPA, including the requirement for issuing a ninety days' notice to the Government.

Four, pursuant to section 6(2) of the GPA, a notice of intention to sue the Government is required to specify the basis of the claim against the Government. Nothing to suggest that the plaintiffs herein (Government) were made aware of the defendants' claim raised against them in the counterclaim. As shown herein, the plaintiffs' claims in the main case are for payment of outstanding loan amount, penalty and charges arising from the Credit Facility Agreement entered by the 1st plaintiff and 1st defendant. In the counterclaim, the defendants pray for distinct reliefs which are premised on the grounds that the 1st plaintiff acted negligently, recklessly and unlawful in the discharge of her duties. Therefore, in view of section 6(2) of the GPA, the basis of the claims by the counterclaimant ought to have been known to the plaintiffs through the ninety days' notice of intention to sue the Government.

Now that it is not disputed that the defendants did not serve the 1st plaintiff with a ninety days' notice before raising the counterclaim, their cross-suit (counterclaim) is incompetent before this Court.

Mr. Balomi urged this Court to invoke the principle of overriding objective which is provided for under section 3B of the CPC. I am mindful of the fact that the said provision requires courts to deal with cases justly, speedily and to have regard to the substantive justice. However, it is a settled position and I need not cite any authority that the principle of

overriding objective cannot be applied blindly to disregard the mandatory provision of procedure laws which go to the root of the case. Having held herein that section 6(2) of the GPA is coached in mandatory terms, I am of the view that the counterclaim cannot be salvaged by invoking the principle of overriding objective.

In the upshot of the foregoing, I find merit in the preliminary objection and uphold it. Applying the provision of Order VIII, rule 2 of the CPC, I hereby strike out the counterclaim with costs. The defendants are at liberty to file a separate suit founded on the facts and claims stated in the counterclaim, but in accordance with law.

It is so ordered.

DATED at DAR ES SALAAM this 20th day of June, 2023.



S.E. KISANYA
JUDGE