THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

LAND CASE NO. 1 OF 2023

TUBONE MWAMBETA .....PLAINTIFF

VERSUS

MBEYA CITY COUNCIL .....1ST DEFENDANT

ELVIS KAMARA .....2ND DEFENDANT

KHEBANZA MARKETING CO. LTD .....3RD DEFENDANT

SOLICITOR GENERAL .....4TH DEFENDANT

THE ATTORNEY GENERAL .....5TH DEFENDANT

RULING

Date of Hearing: 14th June 2023
Date of Ruling: 4th July 2023

NGUNYALE, J.

This ruling emanates from the preliminary objection raised by the State Attorney to the effect that;

1. *This matter is unmaintainable in law for contravening section 6(3) of the Government Proceedings Act [Cap 5 R: E 2019] "the GPA" ;*
2. *The plaintiff's case is unmaintainable in law for contravening order VI rule 14 and 15(1)(3) of the Civil Procedure Code [Cap 33 R: E 2019] "the CPC".*

As the practice of the court when preliminary objection is raised, it is to be disposed first ahead of merits of the appeal. The preliminary objection was disposed through written submission, submission of the 1st , 4th and

5th defendants was filed by Davis Mbembela whereas reply submission of the plaintiff by Ezekiel Mwampaka, learned counsel.

Submitting in respect of the first objection, Mr. Mbembela divided it into two limbs **one**, issuing statutory ninety days to the government and **two**, mis joinder of the 4th defendant. In arguing limb one, it was submitted that no statutory notice was issued to the government as required by to section 106(1) of the Local Government (Urban Authorities) Act, Cap 288 to the effect that ninety days' notice must be issued to local authority and a copy served to Attorney General and Solicitor General.

It was submitted that the plaint is not annexed with a copy of statutory days' notice apart from a document titled "HATI YA MADAI" which is not pleaded and not a statutory notice known in law. On the other hand, it was argued that if the said HATI YA MADAI is assumed to be the ninety days statutory notice it was not served to the solicitor general as required by the law. He said that HATI YA MADAI was served to 1st and 5th defendants and not the 4th defendant. The case of **Arusha Municipal Council vs Lyamuya Construction Company Limited** [1998] TRL 13 was cited to bolster the point that failure to issue statutory notice before instituting the suit against the government makes the suit unmaintainable.

In limb two of the objection, Mr. Mbembela submitted that the solicitor general has been wrongly joined to the suit and the name has to be struck out in terms of order 1 rule 10(2) of the Civil Procedure Code [cap 33 R: E 2019].

On the second objection it was submitted that the plaint is not signed by the plaintiff as required by order IV rule 14 of the CPC which requires the plaint to be signed by the plaintiff and advocates if any. It was further submitted that the plaint is only signed by the advocate hence making it defective. He cited the case of **Hamza Omari Mpandamilango & 48 Others vs Namera Group Industries (T)Ltd**, Land Case No. 42 of 2019 to support the argument.

The state attorney went on to submit that verification clause was defective for it does not indicate the name of a person verifying it contrary to order IV rule 15(3) of the CPC.

From the submission made the state attorney prayed the suit to be struck out.

In reply, Counsel for the plaintiff submitted that a preliminary objection must be on pure point of law which is capable of disposing off the suit. He said that the objection raised is of roman era before the judiciary had moved to modern era where substantive justice prevail over technicalities.

On whether ninety days' notice was issued, he stated that the document titled ILAN YA MADAI addressed to the **Mbeya City Council** has all qualities of being a notice to sue. He submitted that the submission that the document attached is not pleaded is untenable because pleading a document and tendering it in court are two different things and does not bar from introducing it in evidence.

On serving the notice to 4th defendant it was the plaintiff's counsel reply that the same does not make it a preliminary objection in view of the **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd** [1969] 1 EA 696. He added that the issue of service of statutory notice has to be considered during hearing of the case. The case of **Arusha Municipal Council** (supra) relied by the defendant was distinguished in that point, the former no notice was issued while in the present case notice has been issued.

On failure for the plaintiff to sign the plaint as required by order VI rule 14(1) of the CPC, the counsel for the plaintiff conceded to the point but pointed that the suit cannot be dismissed. He cited the case of **Mwaitenda Ahobokile Michael vs Interchick Co. Ltd**, Civil Application No. 218 of 2016, CAT. Mr. Mwampaka beseeched the court to strive to substantive justice because the defendant will not be prejudiced

if amendment of the plaint is ordered to be made. The overriding objective principles which were introduced via **Written Laws (Miscellaneous Amendments) Act** No. 03 of 2018 was called to the aid of the plaintiff. He said that the first object was more on format of the notice to sue hence making it not pure point of law.

Having considered the objection and rival submission for and against, the only issue is whether the two objections are meritorious.

Before I embark into merits of the objection, I will start with the issue raised by the plaintiff's counsel on whether the first objection is pure point of law. What constitutes preliminary objection was given in the celebrated case of **Mukisa Biscuilt** (supra) that;

> *"A preliminary objection is in the nature o f what used to be a demurrer. It raises a pure point of law which is argued on assumption that ail 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."*

The objection of the State Attorney is that section 6(3) of the Government Proceedings Act was not complied for failure to issue a ninety days statutory notice. In my view counsel for the plaintiff missed a point, by its nature the objection is pure point of law for it is the law referred by the State Attorney in the objection that a competent suit against the

government must be preceded by statutory ninety days' notice. I therefore find the complaint without merits.

Reading the submission of the state attorney, it is more on format of the ninety days statutory notice if it is accepted that there is HATI YA MADAI served to 1st and 5th defendant. The State Attorney submitted that Hati Ya Madai is not a notice to sue while the plaintiff's counsel has contrary view he said that ILANI YA MADAI is a statutory notice to the defendants. I have given due weight to submission of the parties, first, according to the particular law there is no any format of the ninety days' notice to sue the government. Indicating notice to sue has been a practice established by usage and not the requirement of the law. The State Attorney accepts that there is HATI YA MADAI served to the 1st and 5th defendant, and that it is annexed to the plaint. I have gone through the contested document attached to the plaint addressed to the Mbeya City Council, copies were to be served to the Attorney General. Looking the contents of the said letter is has put the defendants on notice to the intended claim of the plaintiff and at the end it is inserted "*utekelezaji huu ufanyike kabla ya siku 90 kupita*", hence the HATI YA MADAI is the ninety days' notice to sue the government

The other limb is that the HATI YA MADAI was not served to the 4th defendant. the plaintiff reply was that it was not a pure point of preliminary of objection worth a word. As I held at the beginning of this ruling, the objection of the defendants is on pure point of law. Section 6(2) of the Government Proceedings Act provides 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 and the Solicitor General."*

The plaintiff's counsel conceded to this limb of objection it is why he did not make any reply in alternative. It is also common knowledge that, the office of the Solicitor General has been recently established vide paragraph 2(1) of The Office of the Solicitor General (Establishment) Order, 2018 (GN. No. 50 of 2018). It takes over some statutory duties of the Attorney General. The law for example, provides that, notwithstanding any written law to the contrary, the Attorney General shall, through the Solicitor-General have the right to audience in proceedings of any suit, appeal or petition in court or inquiry on administrative body which the Attorney General considers to be of public interest or involves public property, the legislature, the judiciary or an independent department or

agency of the Government. It is thus, conclusive that, the legislature of this land intended to amend its laws so as to inter alia, involve the Solicitor General in cases of the nature just mentioned above from the pre-trial stage to their finality. The above discussed violation against section 6(2) of the Government Proceedings Act as amended by the Amending Act tends to exclude the Solicitor General from the pre-trial process of the case at hand. If such violation is condoned by this court, it will frustrate the above significant arrangement of the laws which was intended for an effective management of such cases. I agree with the learned State Attorney that the notice under discussion is incurably defective. The incurably defective notice also renders the suit at hand incompetent. It has been the law that, a suit filed in contravention of section 6(2) of the Government Proceedings Act is bad in law.

Moving to the second objection that the plaint is not signed by the plaintiff which was conceded by Mr. Mwampaka sought hide in overriding objective principled. I have considered the arguments, order VI rule 14 of the CPC provides

> *"Every pleading shall be signed by the party and his advocate (if any); provided that, where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorised by him to sign the same or to sue or defend on his behalf."*

Although the above provision is permissive in that a pleading may be signed by a person having knowledge but when a party cannot in one way or another sign the pleading, the authority must be given expressly. In the case of **Massawe and Co. vs Jashbai P. Patel and 18 Others** [1998] TLR 445, considered rule 14(1) of order VI of the CPC and stated;

> *"As the law stands, an advocate or a recognized agent of a party must be a one of express authority to sign pleadings, and where the authority to sign is given to the advocate, only the advocate will' sign on behalf of the party."*

In the present case no such authority was given to the advocate to sign the plaint even through the insertion of certification of agency, the net effect is that the suit is improperly before the court. in the case of **Bansons Enterprises Limited vs Mire Artan**, Civil Appeal No. 26 of 2020 [2023] TZCA 90 (www.tanzlii.org.tz; 9 March 2023) the court stated that;

> *"Where a plaint is not duly signed and verified in accordance with the law, there is no suit which the court can legally try. It is also not out of place if we restate that the object of duly signing a plaint is not only to prevent fictitious suits but also prevent disputes as to whether the suit was instituted with the plaintiff's knowledge and authority. Finally, we find that in the instant case, the ailment in the plaint for not being duly signed and verified go to the root of the plaint and vitiates it as well as the whole suit. As we have alluded to above, there was no suit for the High Court to try."*

From the foregoing, the argument that the court has to invoke overriding principles to salvage the plaint on the above authority becomes redundant and need no more consideration by the court because it will be for academic purpose.

From the discussion above, the first objection is partly sustained to the extent that a copy of notice of intention to sue as to be served directly the Solicitor General as per section 6(2) of the **Government Act**, Cap 5. Equally the second objection is sustained entirely.

In the end result, the suit is struck out with costs for being incompetent.

DATED at MBEYA this 04th July 2023.

D.P. Ngunyale
Judge

Ruling delivered this 4th day of July 2023 in presence of the plaintiff represented by Ms. Tumaini Amenye learned Counsel and Mr. Michael Fyumagwa & Ladislaus Kisambo learned State Attorneys for the 1st, 4th, & 5th defendants while Mr. Gerald Msegeya learned Counsel appeared for the 2nd defendant.

D.P. Ngunyale
Judge