

**IN THE HIGH COURT OF TANZANIA**  
**DODOMA SUB-REGISTRY**  
**AT DODOMA**

**LAND CASE NO. 04 OF 2022**

**HAROLD AINEA CHING'HUNDI..... PLAINTIFF**

**VERSUS**

**FATUMA ABDI DIRIA.....1<sup>ST</sup> DEFENDANT**

**HUSSEIN MOHAMED BINDE.....2<sup>ND</sup> DEFENDANT**

**ANDREW WAZOEL MBWAMBO.....3<sup>RD</sup> DEFENDANT**

**REGINARD RADU MASSAWE** *(as the guardian of RIAN REGINARD*

*RABY).....4<sup>TH</sup> DEFENDANT*

**DODOMA CITY COUNCIL.....5<sup>TH</sup> DEFENDANT**

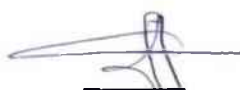
**ATTORNEY GENERAL.....6<sup>TH</sup> DEFENDANT**

**RULING**

*2<sup>nd</sup> August & 25<sup>th</sup> September, 2023*

**HASSAN, J.**

In this case the Plaintiff prays the court to make orders against the Defendant, thus:-



- a) *That this court to order that the plaintiff be given all his fifteen plots to wit plots No 91, 88, 85, 82, 75, 76, 79, 70, 328, 326, 324, 322, 320, 318, and 316 all at Block "C" Ilazo Extension as the 5<sup>th</sup> Defendant has breached the 2015 contract OR.*
- b) *This court order that the plaintiff be given all his five plots as per the 2015 contract to wit plots No. 79, 318, 307, 89 and 90 Block C Ilazo Extension and the 5<sup>th</sup> Defendant be ordered to cancel the illegal allocation done to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>d</sup> and 4<sup>th</sup> Defendants be ordered.*
- c) *Compensation of 100,000,000/= for the loss suffered.*
- d) *An order for permanent injunction against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>d</sup> and 4<sup>th</sup> Defendants from interfering the plaintiff's land.*
- e) *General Damages to be assessed by this court.*
- f) *Costs of this suit.*
- g) *Any other reliefs this court shall deem fit and just to grant.*

Before hearing commenced, the 5<sup>th</sup> and 6<sup>th</sup> respondents raised a preliminary objection on point of law to be determined by the court at the earliest as hereunder:-

*"1. That the suit is incompetent for contravening section 6(2) of the Government Proceeding Act, Cap 5."*

When the preliminary objection came for hearing on the 2<sup>nd</sup> day of August, 2023 the plaintiff was represented by Mr. Fred Kalonga, the matter was heard ex parte against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants who were served through publication, while the 5<sup>th</sup> and 6<sup>th</sup> Defendants enjoyed the service Ms. Agnes Makuba, Ms. Kumbukeni Kondo, Ms. Luciana Nyondo and Mr. Ilambona Makuba, all Learned State Attorneys.

Submitting in support of the preliminary objection, the 5<sup>th</sup> and 6<sup>th</sup> defendants Ms. Makuba argued that the suit is incompetent for contravening section 6 (2) of the Government Proceeding Act, Cap 5 [R. E 2019] which provides, thus;

*"(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."*

The learned state attorney went on submitting that, the notice which was issued by plaintiff does not show that the same was served and

received by Dodoma Municipality. That, the plaintiff was mandatorily required by law to comply with provision of section 6(2) (supra) which requires a copy of that notice to be served to the Attorney General and Solicitor General. Therefore, failure to serve the same means the Government was not properly served. That omission has deprived the 5<sup>th</sup> defendant to see if he could have solved the matter before being subjected to the court for trial.

The Learned state attorney added that, the purported notice ought to have been served to the AG bears only a signature of an unknown person and the date of service without having an official stamp and the name of the person who received it.

She further argued that, due to the defect it is to say that there was no notice which have been served. The 5<sup>th</sup> and 6<sup>th</sup> defendants prayed this suit to be struck out with costs.

On his part, the learned counsel for the plaintiff contested the preliminary objection by submitting that, the directives of **Mukisa Biscuits Manufacturing Company Limited v West Ends Distributors Limited (1969) EA 69 and 96** which provides that an objection has to be raised in pure point of law and it has not to be ascertained from the facts. That, what was submitted as a point of law is not a point of law but rather a fact. He stressed that, the notice was

addressed to the Municipal Director for Dodoma and he was served on the 11<sup>th</sup> day of October, 2021 and that the plaintiff has proof of service for the same to have been received by Director and a copy of which is attached in the plaint.

The learned counsel further submitted that they also served the Attorney General and Solicitor General on the 11<sup>th</sup> day of October, 2021. That, the Attorney General received the same notice by signing and marking the date, while the Solicitor General signed, stamped and marked the date, though it does not show who had received it. Therefore, it is in his view that service is a factual issue and where they are subjected to adduce evidence they will tender the letter that they have served them. And if the 5<sup>th</sup> and 6<sup>th</sup> defendants did not receive the notice they should come and testify before the court and testify for that allegation.

The plaintiff finalized his submission by arguing that, a notice has complied with requirement of section 6(2) of the Government Proceeding Act (supra). Thus, he prayed that the preliminary objection be overruled with costs.

In rejoinder, the learned state attorney submitted against the issue that the preliminary objection is based on the matter of law and not fact by citing **Martinair Holland N. V & Another v Tanzania Civil Aviation**

**Authority & 3 Others** (unreported). That the 90 days notice is a point of law.

As regards to the signing and stamping, the learned State Attorney cited **Martinair Holland N. V** (supra). That, not only should a notice be served but also a procedure should be followed to see that notice was served. That, on the part of the AG, it cannot be ascertained who had signed the same. That, on the Municipal Director there is no official stamp, date, sign or a word showing the notice was received as to the copy attached to the plaint. Thus, the plaintiff has failed to comply with legal requirement to serve a 90 days notice before the suit is instituted. The 5<sup>th</sup> and 6<sup>th</sup> defendants prayed the suit to be struck out with costs.

Having keenly considered the submissions from the counsel for both parties, the issue for determination is whether the suit has contravened the provisions of section 6 of the Government Proceedings Act, Cap 5.


I should take off by stating that it is trite law that any suit against the Government shall be instituted upon presenting and expiry of a ninety days of intention to sue the Government.

I have carefully gone through the record specifically the 90 days notice attached to the plaintiff's plaint in court which is disputed by the 5<sup>th</sup> and 6<sup>th</sup> Defendants. The notice is addressed to the Director of Dodoma Municipal and the copy thereto to the Attorney General and the Solicitor

General. On the part of the Director of Dodoma Municipal, the notice is blank, it is not signed, stamped nor dated to show acknowledgement of its service. On the part of the Attorney General the notice has a signature only and it is dated and on the part of the Solicitor General it has a stamp which is very bale, as it does not show its contents clearly. The court is inclined to agree with the 5<sup>th</sup> and 6<sup>th</sup> defendants that the notice was not properly served to the director of Dodoma Municipal. There is clearly no proof of service, on the part of the Attorney General there is also no proof as to who received the notice and when was it, and on the part of the Solicitor General also there is no proof as the stamp is not clearly seen, there is only a signature without showing the name of the person who received the notice. The plaintiff ought to have attached a copy of notice which is clearly seen or a dispatch but there is no any.

The consequence of not serving 90 days notice was explained in **Peter Joseph Chacha vs. The Attorney General & Another, Civil Case No.01 of 2021**, High Court at Arusha (unreported)

*"I find it to be a condition precedent that, for the suit against the government to be filed and heard, a notice or claim must be served to the government department or an officer against whom the suit is intended to be brought and a copy of it, be served to the Attorney General and the*



*Solicitor General. This means, a suit against government should not be admitted and entertained before the plaintiff has proved to have issued the notice of intention to sue and serve the copy to the Attorney General and the Solicitor General. It is therefore the duty of the plaintiff to prove before he is entitled to file the said suit that the provision of section 6(2) of the Government Proceedings Act (supra) as amended, has been complied with"*

Since it is a trite law that parties are bound by their own pleadings, I am of the position that the notice attached to the plaintiff has no proof of service to the 5<sup>th</sup> and 6<sup>th</sup> Defendants. In **NBC Bank Limited & Another vs Bruno Vitus Swalo, Civil Appeal No.331 of 2019 CAT**, (unreported), the court held;

*"We feel compelled, at this point, to restate the time honoured principle of law that parties are bound by their own pleadings and that any evidence produced by any of the parties which does not support the pleaded facts or is at variance with the pleaded facts must be ignored...."*



From the above provision of the law, the court can not take into account the Plaintiff's allegation of proof of service in variance with the attached copy of the 90 days notice.

As regards to the plaintiff's submission that, the Preliminary Objection is not based on a point of law, I am of the firm position that, it is the law which imposes a mandatory requirement of serving the Government 90 days notice prior to instituting a suit against her. Thus, the preliminary objection by the 5<sup>th</sup> and 6<sup>th</sup> defendants is purely on the point of law as analyzed above.

That said, the suit is incompetent for contravening the provision of section 6(2) of the Government Proceedings Act, Cap 5, thus, the meritorious preliminary objection on point of law by the 5<sup>th</sup> and 6<sup>th</sup> is hereby sustained. The remedy for failure to comply with the provisions of section 6(2) is to strike out the suit, as it was decided in **Ghati Methusela vs Matiko W/O Marwa Mariba, Civil Application No.06 of 2006 CAT**, (unreported).

The suit is therefore struck out for failure to serve the 5<sup>th</sup> and 6<sup>th</sup> defendants a 90 days notice as required by the law. Each party to bear its own costs.

It is ordered.

**DATED** at **DODOMA** this 25<sup>th</sup> day of September, 2023.



A handwritten signature in blue ink, appearing to read "S. H. Hassan", is written over a horizontal line.

**S. H. HASSAN**

**JUDGE**