

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**CIVIL CASE NO. 42 OF 2022**

**M/S GRACEFEM INVESTMENT LTD.....PLAINTIFF**

**VERSUS**

**TANZANIA NATIONAL ROADS AGENCY (TANROADS).....1<sup>ST</sup> DEFENDANT**

**ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**RULING**

**21/09/2023 & 30/10/2023**

**GWAE, J**

This ruling originates from a preliminary objection canvassed by the learned State Attorney one Mr. Mkama Musalama through the respondents' joint written statement of defence on the following point of law;-

*"That this suit is incompetent and bad in law for being contravening with section 6(2) of the Government Proceedings Act, [CAP 5, Revised Edition, 2019 (GPA) for failure of the plaintiff to serve a ninety days' notice to the office of Solicitor General".*

The plaintiff herein had filed the civil suit against the defendants on allegation of termination of the contract by the 1<sup>st</sup> defendant. Therefore, she is before the court praying for a judgment and decree against the defendants on the following reliefs;

1. An order of the Court to declare that the termination of contract No. AE/001/2017-18/AR/CON/W/11 by the 1<sup>st</sup> Defendant is unfair.
2. An order to compel the 1<sup>st</sup> defendant to fulfill his contractual obligation by paying to the plaintiff the outstanding balance of TZS 115,499,483.46.
3. An order for the payment of TZS 15,450,000/= to be paid by the 1<sup>st</sup> defendant being costs for material ordered.
4. An order for the payment of interest as per BOT fixed rate on late payment for each certificate paid in delay.
5. Interest on paragraph (ii) above at commercial rate of 21% from the date of the institution of this suit to the date of judgment.
6. Costs of this suit.
7. Any other reliefs this honorable court will deem fit to grant.

The defendants having raised a preliminary objection, the main suit had to be put to halt for the determination of the PO first. With leave of the

court, the Preliminary Objection was disposed of by way of written submissions, which are as follows;

Mr. Mkama Musalama in support of his preliminary objection relied his arguments in section 6 (2) of the Government Proceedings Act which provides as follows;

*"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."*

He went further to state that, the plaintiff herein had not plainly served a requisite copy of ninety' days' notice to General as required by the law. He supported his submission with the decisions of this Court in the case of **Gwabo Mwansasu & 10 others vs. Tanzania National Roads Agency and the Attorney General**, Land Case No. 8 of 2020 (unreported HC at Mbeya) and **Peter Joseph Chacha vs. The Attorney General & another**, Civil Case No.1 of 2021 (unreported HC-Arusha). Being guided by

the cited cases, it was his stand that this suit is incompetent. Thus, subject to a dismissal order.

Replying to the arguments advanced by the defendants' counsel supporting his PO, the plaintiff under the representation of advocate Benson Hamis Mhango was of a different view. According to him, this suit originates from the Government Agency. Hence, the law applicable is the Executive Agencies Act, Cap 245, Revised Edition, 2002 (Act). He went on arguing that, since the 1<sup>st</sup> defendant is an executive agency procedures of suing are laid down under section 3 (6) (b) of the Act as amended by the written Laws (Miscellaneous Amendments) Act, Act No. 1 of 2020.

Therefore, in his opinion, the Government Proceeding Act does not apply in such circumstances. The learned counsel went further to state that since this suit is founded on a contract entered by between the plaintiff and the 1<sup>st</sup> defendant who is an agency, then the said agency may be sued on its own name under Act (supra). He also paused a question that, had it been that the contract was not signed by the agency in question, then the Government Proceedings Act will be applicable.

Moreover, the plaintiff's counsel submitted that the law to which he refers requires the joining of the Attorney General as a necessary party and service the requisite notice to the Attorney General and not to the Solicitor General as contended by Mr. Mkama. Then, to him the Solicitor General is a stranger in this case and therefore not a necessary party to be served with the notice.

Lastly, it was Mr. Benson's submission that, if the provisions of the Government Proceedings Act were to be invoked, the PO raised by the defendants' council is not a pure point of law, as it will require evidence to prove service of the 90 days' notice to the Solicitor General. He therefore maintained that the preliminary objection raised lacks merit subject to being overruled.

I have carefully gone through the parties' submission, now therefore I am duty bound to determine on; whether the Preliminary Objection is meritorious. In doing so, I shall start by definition of the term *an executive agency* as defined in the statute. Section 3 (1) of the Executive Agencies Act (supra) 2002 provides;

*"3 (1) Where a Minister is of the opinion that, having regard to the provisions of this Act, it is appropriate to establish an*

*Executive Agency for the purpose of carrying out the functions of a department of his Ministry he may, after obtaining appropriate authority, by Order published in the Gazette, establish such an Agency.”*

Pursuant to the above quoted section of the law, the 1<sup>st</sup> defendant is among the agencies established under the said section and in accordance with the Tanzania National Roads Agency “TANROADS” Establishment Order 2000. The 1<sup>st</sup> defendant is therefore a legal body which among others can enter into contracts in its own name and can sue or be sued in contract without joining Attorney General, that was prior to an amendment of 2020 in Act No. 1 of 2020.

My further reading of the said order has gathered the following; **First;** the Chief Executive of the 1<sup>st</sup> defendant is appointed by the Minister on advice of the Civil Service Commission and **Second;** the chairperson of the Roads Fund Board is an appointee of the President and **thirdly** the Board shall be accountable to the Minister. In view of the stated position of the law, it is with no doubt that the 1<sup>st</sup> defendant is the Executive Agency, which unquestionably under the control of the Government of the United Republic of Tanzania.

I have however careful revisited section 18 and 19 of the Written Laws (Miscellaneous Amendments) Act, (Act No. 1 of 2020 amending section 3 (1) of the Executive Agencies Act (supra). Section 18 and 19 of the Act No. 1 of 2020 read;

*"18. This Part shall be read as one with the Executive Agencies Act hereinafter referred to as the "principal Act.*

*19. The principal Act is amended in section 3 by adding immediately after subsection (6) the following:*

*"(7) In any proceedings by or against an Executive Agency, the Attorney General shall be joined as a necessary party, and a notice to that effect shall be served to the Attorney General.*

*(8) Where a decree is to be executed against property in possession of an Executive Agency, procedure to execute decrees against Government property under the Government Proceedings Act shall apply."*

According section 19 (7) of the Act, it entails that in any proceedings by or against an Executive Agency, the Attorney General shall be joined as a necessary party, and a notice to that effect shall be served to the Attorney General. Hence, in ordinary sense, it can be said the provision dispenses away with the requirement of serving the Solicitor General with the statutory notice of 90 days as per section 6 (2) of the Act. However, after enactment

of Act No. 1 of 2020, in my view, since the Attorney General is a necessary party in a case by or against the executive agency (1<sup>st</sup> defendant), it follows therefore the procedures stipulated under section 6 (2) of the GPA shall apply by serving the Solicitor General with the requisite notice. It should be noted that, by virtue of section 5 (2) of the Office of Attorney General (Discharge of Duties Act), Cap 268, Revised Edition, 2019, it is the Solicitor General who is bestowed with powers to conduct civil cases by or against the Government and its institutions. Hence, it sounds clumsily if the provisions of section 6 (2) of GPA should not read together with section 19 (7) of the Executive Agencies Act (*supra*). In that regard, I am therefore in agreement with the learned state attorney for the respondents.

In line with the above section and taking into account that the 1<sup>st</sup> defendant despite being the executive agency it is also a Government body in which the Attorney General has interest and therefore is subject to section 6 (1) of the Government Proceedings Act Cap 5, Revised Edition, 2019. Thus, the requirement of notice of not less than ninety days of the intention to sue the Government, specifying the basis of the claim against the Government, and the copy of the claim shall be sent to the Attorney-General and as well



as to the Solicitor General as required under sub-section (2) of section 6 of the GPA (supra).

In view of the foregoing, I am of the decided view that, the lawsuit at hand has been filed prematurely. The Solicitor General who is the key player in civil litigations for the Government of the United Republic of Tanzania, her institutions, agencies and Corporations ought to be served with the requisite 90 days' notice. Thus, the preliminary objection raised by the defendant is hereby sustained. Consequently, the matter is struck out with no order as to costs.

It is so ordered.

**DATED at ARUSHA this 30<sup>th</sup> October 2023**

**MOHAMED R. GWAE**

**JUDGE**

