

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

CIVIL CASE NO. 37 OF 2023

VEDASTUS RUGACHWA.....PLAINTIFF

VERSUS

CAMUSAT-TANZANIA LTD1ST DEFENDANT

TANROAD.....2ND DEFENDANT

BUKOBA MUNICIPAL COUNCIL.....3RD DEFENDANT

JORDA ABELA NELSON KASHUZI.....4TH DEFENDANT

C.P.L RASHID.....5TH DEFENDANT

MABRUCK ZUBERI.....6TH DEFENDANT

THE ATTORNEY GENERAL.....7TH DEFENDANT

RULING

*21/11/2023 & 01/12/2023
E. L. NGIGWANA, J.*

The herein above mentioned plaintiff claims that on 10/02/2023, the 4th, 5th and 6th defendants; being street chairpersons working under the 3rd defendant; approached and asked him to show them where the first defendant who was given tender by the 2nd defendant; should dig a trench for erecting telecommunication systems. He further claims that he showed them the place but they refused; and as a result, they dug a trench at the place of their own choice within the plaintiff's land.

The plaintiff further claims that in that exercise, a path to his home and grocery was damaged but also his banana trees, coffee trees and cocoyam were destroyed. Therefore; he instituted this case against the defendants herein, individually and severally claiming for compensation amounting to Tshs. **40,000,000/=**, punitive damages amounting to **Tshs. 20,000,000/=**, Mesne profit amounting at **Tshs. 20,000,000/=**, decratal sum at the rate of 9% from the date of judgment until the date of payment in full, costs of the suit and any other relief(s) at the discretion of the court.

Upon being served with the plaint, the 2nd, 3rd and 7th defendants through Mr. Victor Joseph Mhana learned State Attorney from the office of the Solicitor General; filed a Joint Written Statement of Defence (W.S.D) and raised therein one preliminary objection on point of law that this suit is incompetent for contravening the mandatory provisions of section 6 (2) of the Government Proceedings Act, [Cap.5 R.E 2019]

When the P.O is called on for hearing, Mr. Joseph Victor Mhana leaned State Attorney appeared for the 2nd, 3rd and 7th defendants while the plaintiff appeared in person; unrepresented.

Submitting in support of the objection, Mr. Mhana stated that a suit against the government cannot be instituted without first giving a 90 days' notice as per section 6 (2) of the Government Proceedings Act, [Cap.5 R.E 2019]. He added that, it is not enough to prepare the 90 days' notice; the same must be duly served to the Government Minister, Department, Officer concerned but also to the Attorney General and Solicitor General. He added that, the fact that the plaintiff has pleaded under paragraph 8 of his plaint that he served the 90 days' notice to the Attorney General is not sufficient. He ought to have attached the copy of the notice bearing a receiving stamp of the office of the Attorney General and the date of receipt. The learned State Attorney drew the attention of this court through the case of **Yara Tanzania Limited versus Ikuwo General Enterprises Limited**, Civil Appeal No.309 of 2019 CAT at Dsm (Unreported) that parties are bound by their pleadings, and urged this court to be guided by that principle in the case at hand.

He further submitted that any suit which is instituted against the government in contravention of section 6 (2) of the Government Proceedings Act, [Cap.5 R.E 2019] is incompetent thus must be struck out. To support his stance, the learned State Attorney referred this court to these cases; **Selemani Lwenda@ Macho and 5 others versus Dar es Salaam Rapid Transit**

Agency (DART) & two others, Misc. Civil Application No.499 of 2021 HC.LD Dsm, **Faustine Theobald versus Christina Mrema and Another**, Land Appeal No.19 of 2021 HC-Mwanza and **Joel Mabula Shimba versus The New Forest Company**, Land Case No.09 of 2017 HC-Iringa (All unreported).

Mr. Mhana ended up his submission praying to the court to strike out this suit for being incompetent.

In reply, the plaintiff submitted that before instituting this case, he prepared and served a 90 days' notice to the office of the Attorney General, therefore; he was shocked to meet a preliminary objection in relation to non-compliance of section 6 (2) of the Government Proceedings Act, [Cap.5 R.E 2019]. He added that, before the hearing of this P.O, he went to the office of the Attorney General and met one Edina Masumbai who confirmed to him that the notice was there. He added that, while there, Mr. Mhana learned State Attorney arrived and witnessed the said notice in the file. He ended up his submission urging the court to overrule the objection for being devoid of merit.

In his rejoinder, Mr. Mhana stated that since parties are bound by their pleadings and since the copy of the notice attached to the plaint does not

indicate that the notice was received by the office of the Attorney General, there is no way we can say that the notice was duly served as per the law.

Having heard and considered submissions by the learned State Attorney for the 2nd , 3rd and 7th defendants and the plaintiff in person; the issue for determination is whether this suit was instituted in contravention of section 6 (2) of the Government Proceedings Act, [Cap. 5 R: E 2019] which provides that;

No suit against the Government shall be instituted and heard unless the claimant previously submits to 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 General Attorney”

It must be noted that compliance of this section is not optional but mandatory since its non-compliance renders the suit incompetent for being prematurely filed. It was stated by this court in the case of **Thomas Ngawaiya versus Attorney General 3 Others, Civil Case No. 177 of 2013** that; section 6 of the Government Proceedings Act is mandatory. It requires a person intending to sue the Government to issue a notice to the

relevant Government Officer or Institution and copy the same to the General Attorney.

The essence of giving notice to the Government before filing a suit is to give the Government an opportunity to settle the claim before a law suit is filed and to investigate the claim so that it can properly defend itself or to correct the conditions or practices that led to the claim. See **Aloyce Chacha Kenganya versus Mwita Chaha Wambura & 2 others, Civil Case No.07 of 2019 HC-Musoma.**

In the case at hand, it goes without saying that the 90 days' notice before filing the suit against the 2nd, 3rd and 7th defendants was imperative. It means that serving the notice to the 2nd, 3rd and 7th defendants precedes the filing of the suit, and filing a suit is not possible before serving the notice.

The notice which was attached to the plaint has no **receiving stamp** of 2nd, 3rd, 7th defendants or Solicitor General. Also the same has no **signature of the receiving officer** and the **date of receipt**.

It is essential that there must be proof that the notice is served to the concerned Government entity, the Attorney General and the Solicitor General. In the absence of evidence of service, then the notice cannot be taken into consideration. In **Emmanuel Titus Nzunda versus Arusha**

City Council and Others, Land Case No 28 of 2020 HC-Arusha (Unreported) this Court insisted on the compliance of the requirement of 90 days' notice in these words.

"The 90 days' notice being a mandatory legal requirement, the same need be complied with before instituting suit or joining the government into any suit, it is upon the Plaintiff to attach a notice showing that the same was duly served and received"

Similarly; in the case of Nassor **Mbaruku Nassoro (Administrator of the Estate of Kurwa Abdalah Salum) versus Makubi Hamisi Mwinyihija & 2 others**, Land Case No.340 of 2022 HCLD Dsm (Unreported) my learned brother Mhina J while addressing compliance of section 6 (2) of the Government Proceedings Act, [Cap. 5 R: E 2019], had this to say;

"The plaintiff/applicant must provide such a notice showing that it was duly served and received. As a standard of service, there must be a signature of a receiving officer, the stamp of the concerned government entity and a date indicating the date of receipt"

Indeed, I subscribe to the position taken by this court in the herein above two cases as depicting the correct position of the law in relation to proof of service of 90 days' notice.

As I have said earlier, in this suit, the 90 days' notice attached to the plaint does not indicate that it was served to and received by the 2nd, 3rd and 7th defendants since there are no signatures, stamps or the date indicating whether the 2nd, 3rd and 7th defendants were served and received the notice, and the effect is that; there is no 90 days' notice served to them.

Indeed; I shake hands with the learned State Attorney that parties are bound by their pleadings, therefore; the plaintiff's argument that he saw the copy of the notice in the office of the Attorney General bearing a stamp and the date of receipt; cannot stand because such a copy was not attached to the plaint to form part of the pleadings. In the case of **Masaka Musa versus Rogers Andrew Lumenyela**, Civil Appeal No.497 of 2021 CAT at Kigoma, the Court of Appeal had this to say regarding pleadings;

"It is also our observation that it is not only the parties who are bound by their pleadings but the courts are also bound by the said pleadings of the parties. As it is for the parties to suits, who are not allowed to depart from their pleadings and set up new cases, courts are also bound by the parties' pleadings and they are not allowed to depart from such pleadings and create their own case"

Before I pen off, I would like to state that; any party who seeks to sue the government must; **one;** prepare a notice of not less than 90 days of intention to sue the government. **Two,** the notice must specify the basis of the claim. **Three;** notice must be addressed and served to the concerned Minister, Department or Officer and **Four;** the Attorney General and the Solicitor General must be duly served with a copy of the notice. That is what section 6 (2) of the Government Proceedings Act requires.

For reasons stated above, I find that this suit was prematurely instituted for failure to serve a mandatory 90 days' notice of intention to sue the 2nd, 3rd and 7th defendants.

In the event, I sustain the preliminary objection and strike out the suit. No order as to costs entered.

It is so ordered.



E. L. NGIGWANA

JUDGE

01/12/2023

Court: Ruling delivered this 1st day December, 2023 in the presence of Mr. Victor Joseph Mhana learned State Attorney for the 2nd, 3rd and 7th

defendants, Plaintiff in person, 6th defendant in person, Hon. E .M. Kamaleki,
Judges' Law Assistant and Queen Koba, B/C.




E. L. NGIGWANA

JUDGE

01/12/2023