THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF DODOMA

AT DODOMA

LAND CASE NO.38 OF 2023

ALLY HASSANI FALLA .....1ST PLAINTIFF
SHABANI BONDEI MASAKA.....2ND PLAINTIFF
ABBAKARI ATHUMANI JUKU .....3RD PLAINTIFF
HAMZA HUSSEINI MLUNGA .....4TH PLAINTIFF
MOHAMEDI HASSANI SAURI .....5TH PLAINTIFF
HUSENI ATHUMANI CHACHA .....6TH PLAINTIFF
MASHAKA RAMADHANI MBONGO .....7TH PLAINTIFF
SWALEHE RAMADHANI GORONYA .....8TH PLAINTIFF
MWANAHAMISI IBURAHIMU MBONGO .....9TH PLAINTIFF

VERSUS

KELEMA MAZIWANI VILLAGE COUNCIL .....1ST DEFENDANT
CHEMBA DISTRICT COUNCIL .....2ND DEFENDANT
ATTORNEY GENERAL .....3RD DEFENDANT
HASSANI HAMISI .....4TH DEFENDANT
HALIFA MTARI .....5TH DEFENDANT
MWINYI HASSANI .....6TH DEFENDANT
MERI KISENGI .....7TH DEFENDANT
HASSANI SIASA .....8TH DEFENDANT
HALIDI HASSANI .....9TH DEFENDANT
IDDI ALLY .....10TH DEFENDANT
JAFARI ABDI .....11TH DEFENDANT
PAULI PIYUSI .....12TH DEFENDANT
ALLY CHAI .....13TH DEFENDANT
HASSANI ALLY .....14TH DEFENDANT
JUMA NGILO .....15TH DEFENDANT
HARI JUMA .....16TH DEFENDANT
SALUM M. NDORI.....17TH DEFENDANT
RASULI MBARUKU .....18TH DEFENDANT
ZUBEDA CHAI .....19TH DEFENDANT
BILIE MANUELI .....20TH DEFENDANT
HASSANI PUTU .....21ST DEFENDANT
HAJI HASSANI .....22ND DEFENDANT

ZIADA NOTI .....23RD DEFENDANT
RASHIDI MJUNGU .....24TH DEFENDANT

RULING

Date of Ruling: 17/10/2023

Mambi, J.

This ruling emanates from the preliminary objection raised by the 1st 2nd and 3rd , Respondents(Defendatns). When the applicant filed his Plaint via land case No.38 of 2023, the respondents raised a preliminary objection basing on three points. One of the point or limb of preliminary objection was that the plaint didn't comply with section 6(2) of the Government Proceedings Act, Cap 6 [R.E2019]. The respondents arguments in this point is that as the Solicitor General was not served with ninety days notice.

They also argued that the District Executive Director of the District Council was not included in the suit as the necessary party.

In response the , plaintiff counsel briefly submitted that the points of preliminary objections have no merit . He argued that the word sufficient under the law is not defined. He was of the view that since

they served notice to the government all parties were served with such notice.

Having heard very brief submissions, I did not detain myself addressing the preliminary objection rather than going straight to the point of preliminary objection. The main issue in my view is whether the plaint contravenes section 6 (2) of the Government Proceedings Act, Cap 6 [R.E2019].

Looking at the records it is clear that the respondent sent the notice to the Attorney General but they omitted to copy the notice to the Solicitor General and the District Executive Director (DED) of the District Council contrary to the provisions of the law that is section 6 (2) of the Government Proceedings Act. The law mandatorily requires that all parties (the Government, the Department, Agencies and authorities) mention under section 6 (2) of the Government Proceedings Act to b served with ninety days notice. It is on the records that the plaintiff serve the Ninety days' notice to the first and second respondent but for unknown reason the plaintiff omitted to serve the same notice to the Solicitor General and DED as required by the law.

This in my view is contrary to the provision of the law that is section 6 of the Government Proceedings Act Cap 5 [R.E. 2019]. It is clear that the Law mandatorily requires parties to first file 90 days' notice before suing the government or any government agency or authority and that notice must be copied to the Solicitor General. For easy reverence the provision of the law (Cap 5) provides that;

> *"6(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 question is, did the Plaintiff the Solicitor General with ninety days' notice before filing his application?. My perusal from the records show that the plaintiff did not served the ninety days' notice to the Solicitor General. This as good as saying there was no prior ninety days' notice before filling an plaint which is a suit against the government.

In my view, failure to serve the 90 days' notice is as good saying there was no prior ninety days' notice to sue the government. More specifically, Section 6 (2) of the Government Proceedings Act mandatorily requires that before any civil suit that involve the government the party suing the government must first file the ninety

day notice. In my view, the court can not at any rate "dispense with the issuing of the notice to the respondents" where the party has failed to comply with the mandatory requirement of section 6 (2) of the Government Proceedings Act. My reasoning are based on the fact that because the said provision makes mandatory that before suing the government or its agencies, the plaintiff or applicant must serve a prior 90 days' notice to all government agencies or department that form part of the case and the copy must be served to the Solicitor General.

The word '***shall***'that appears in this section in my view means it is mandatory to serve the government a 90 days' notice before filing any suit or application. Reference can be made on s. 53(2) of the Law of Interpretation Act, Cap 1 [R: E 2019].

The word **"shall"** under the provision of the law implies mandatory as per the Interpretation of Law of Interpretation Act Cap 1 [R.E.2019]. This means that the Solicitor General who apereas in the court on behalf of the Attorney General to represent the government was required to be served with the ninety days' notice before commencing any suit. In this regard, this section bared the plaintiff from filing the suit that was against the government authorities since the plaintiff did not serve ninety days' notice of intention to commence the suit. It is also on the records that the plaintiff failed sue the DED as necessary party.

In this regard it was necessary for the Attorney General. to be joined as necessary party. It should be noted that a necessary party is one

whose presence is indispensable to the constitution of the suit, against whom the relief is sought and without whom no effective order can be passed. In other words, in absence of a necessary party no decree can be passed. His presence, however enables the court or Tribunal to adjudicate more "effectually and completely". See also ***Shahasa Mard vs Sadahiv ILR (1918) 43 Bom 575 at p 581*** and ***Kasturi v Iyyamperumal (2005) AIR 2005*** at P.738. Two tests have been laid down for determining the question whether a particular party is a necessary party to a proceeding:

(i) There must be a right to some relief against such party in respect of the matter involved in the proceeding in question; and

(ii) It should not be possible to pass an effective decree in absence of such a party.(See also ***C.K.Takwani on Civil Procedure at page 162-163***)

(iii) The term necessary party is defined in the **Black's Law Dictionary**, 8th Edition to mean;

(iv) "a party who, being closely connected to a law suit should be included in the case if feasible, but whose absence will not require dismissal of the proceedings"

(v) It is also common ground that, over the years, courts have made a distinction between necessary and non-necessary parties. The Court of Appeal in **Tang Gas Distributors Limited vs Mohamed Salim said & 2 Others,** Civil

Application for Revision No. 68 of 2011 (unreported), when considering circumstances upon which a necessary party ought to be added in a suit stated that:-

(vi) "…….an intervener, otherwise commonly referred to as a **NECESSARY IPARTY**, would be added in a suit under this rule…….even though there is no distinct cause of action against him, where:-

(vii)

(a)……

(viii) *(b)* ***his proprietary rights are directly affected by the proceedings and to avoid a multiplicity of suits, his joinder is necessary so as to have him bound by the decision of the court in the suit.***

(ix) Again, in **Abdullatiff Mohamed Hamis vs. Mehboob Yusuf Osman and Another**, Civil Revision No. 6 of 2017(unreported), the Court of Appeal when faced with an akin situation, it stated that:-

(x) *'The determination as to who is a necessary party to a suit would vary from a case to case depending upon the facts and circumstances of each particular case. Among the relevant factors for such determination include the* ***particulars of the non-joined party, the nature of relief claimed as***

well as whether or not, in the absence of the party, an executable decree may be passed."

(xi)

(xii) Similarly, the Court of Appeal in **Juliana Francis Mkwabi Vs Lawrent Chimwaga**, Civil Appeal No. 531 of 2020(unreported), when confronted with the issue of whether the Dodoma Municipal Council was a necessary party in the circumstances of the case, it found that the Council was not a necessary party who ought to have been joined in the proceedings, because;

(xiii) "in the circumstances of the case subject of this appeal, Dodoma Municipal Council was not an indispensable party to the constitution of a suit and in whose absence no effective decree or order could be passed."

(xiv)

In this regard, the absence of the DED meant that it should not be possible to pass an effective decree if any.

In this regard, it was necessary the issue of misjoinder or non joinder to be raised at the earlier stage as done by the learned State Atorney In my view there was non-joinder of the parties. This means that it was necessary to join the Attorney General as necessary party since the plaintiff has sued the Kelema Maziwani and Chemba District Council which are the government organ that is supposed to be represented

by the Attorney General. It is trite law that failure to join necessary party can be regarded as non-joinder. Indeed the law requires that matters of non-joinder or mis-joinder of parties to be raised at earliest possible opportunity. Reference can be on Order 1 Rule 13, it provides;

> *"All objections on the ground of non-joinder or mis-joinder of parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived"*

In a persuasive decision of the court of Kenya in **Queensway Trustees** (*supra)* rightly cited by the counsel for the 1st defendant the court held;

> *"Where a receiver is appointed out of court, as Mr. Birnie was by the Debenture Stockholders on July 5, 1978, the management and control of the Company's assets are taken out of the hands of the directors and the secretary of the company"*

It is my considered view that the law intends to avoid unnecessary inconveniences to a party who is not regally responsible in the suit to be exonerated at earliest possible moment. That said, it is the finding of this Court that the question of no-joinder of the Attorney General. was rightly raised. It should be noted that where a person like the

Attorney General in our case is a necessary party to a suit has not been joined as party to the suit, it is a case of non-joinder. In our case at hand fit was wrong to sue the first defendant hence misjoinder

Having observed that the plaintiff failed to comply with the mandatory legal requirements, I am constrained to hold that the preliminary objection raised by the respondents has merit. Since there was no valid ninety days' notice served to the defendants means that there is no suit before this court.

Reference can also be made to the decision of the court of Appeal of Tanzania in ***The Director of Public Prosecutions v. ACP Abdalla Zombe and 8 others*** Criminal Appeal No. 254 of 2009,

CAT (unreported) where the court held that:

> *"this Court always first makes a definite finding on whether or not the matter before it for determination* ***is competently before it****. This is simply because this Court and all courts have no jurisdiction, be it statutory or inherent, to entertain and determine any incompetent proceedings."*

Reference can also be made to the decision of the court of Appeal in ***KJ Motors and Three Others Vs. Richard Kashamba and others, Civil Appeal 74/1999*** where the court held that:

> *"The rationale for this view is fairly apparent. Where for instance, a person comes forward and seeks to sue on behalf of others persons, those other persons might be dead, non-existent, or otherwise fictitious. Else he might purport to sue on behalf of persons who have not in fact authorized him to do so. If this is not checked it can lead to undesirable consequence. The court can exclude such possibilities only by granting leave to the representative of sue on behalf of persons whom he must satisfy the court*

that they do exist and that they have dully mandated him to sue him on their behalf..."

From the foregoing brief discussion, I am of the settled mind that the suit before this court is unsuitable and untenable, and it could not have founded a proper suit before this court. I thus entirely agree with the learned State Attorneys that failure to serve the Solicitor General with mandatory notice to sue was bad in law which renders the application at this court untenable.

For reasons I have given above, I am of the settled view that the preliminary objection beforehand is meritorious and is accordingly upheld. I thus find that the preliminary objection on the requirement of ninety days' notice is meritorious and is accordingly upheld and sustained. In the premises and from the foregoing reasons, the suit filed by the plaintiff is hereby struck out. I make no order as to costs.

Order accordingly.

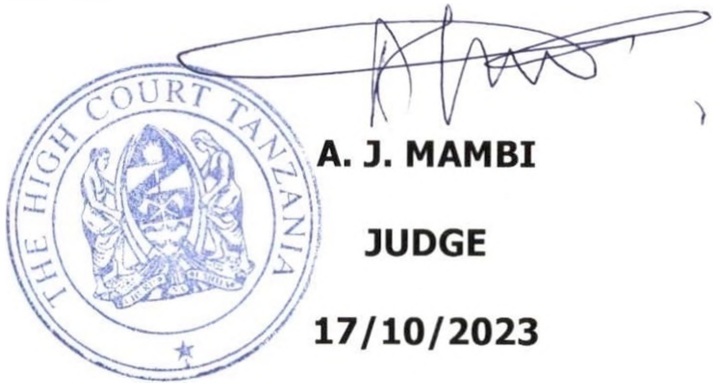
THE HIGH COURT TANZANIA

A. J. MAMBI

JUDGE

17/10/2023

Ruling delivered in Chambers this 17th of October 2023 in presence of both parties.



A. J. MAMBI

JUDGE

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