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

**(MBEYA SUB - REGISTRY)**

**AT MBEYA**

**CIVIL CASE NO. 16 OF 2022**

**ELIEZER JORAM SYABO..... 1ST PLAINTIFF**

**ABEID ADAM MWAMBAGA.....2ND PLAINTIFF**

**ALEX BAHATI.....3RD PLAINTIFF**

**TORATI ALOYSI NYWAGE.....4TH PLAINTIFF**

**LUGANO ANDREW.....5TH PLAINTIFF**

**ENOCK MWANGOSI.....6TH PLAINTIFF**

**EMMANUEL BURTON NSWILA.....7TH PLAINTIFF**

**RICHARD NASSON NZIKU.....8TH PLAINTIFF**

**BARTAZARI PHILIP MPONZI.....9TH PLAINTIFF**

**VERSUS**

**MBEYA DISTRICT COUNCIL.....1ST DEFENDANT**

**THE ATTORNEY GENERAL.....2ND DEFENDANT**

**RULING**

*5th & 27th March, 2024*

**POMO, J.**

This ruling addresses a preliminary objection raised by the defendants on 21.11.2023, asserting that:

> *1. The copy of the demand notice was not properly served to the parties as required by the law.*

2. *The plaintiffs did not exhaust the available remedies stipulated in the contract.*

In this suit, the plaintiffs were represented by Mr. Philip Mwakilima, a learned advocate, while the defendants were represented by Mr. Michael Fyumagwa, learned State Attorney from the office of the Solicitor General.

The preliminary objection was disposed of by way of written submissions.

Submitting in in support of the first preliminary objection, Mr. Fyumagwa argued that the suit is incompetent before the court for contravening Section 6 (2) of the Government Proceedings Act, [Cap 5, Revised Edition 2019] (the GPA), which states:

> *"S.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."*

He further submitted that the above-mentioned provision, read together with Section 31 of the Written Laws (Miscellaneous Amendment) Act No.1 of 2020, amending the Local Government (District Authorities) Act, Cap 287, Section 190, which provides:

*No suit shall be commenced against a Local Government Authority-*

*a) Unless a ninety days notice of intention to sue has been served upon the local government Authority and a copy thereof to the Attorney General and solicitor General and*

*b) Upon the lapse if ninety days period for which the notice of intention to sue relates.*

He contends that in any suit against the Local Government Authority, the complainant (Plaintiff) must, before instituting the suit, serve a copy of a ninety-day notice to the Attorney General and Solicitor General. In this case, he argued, the plaintiffs did not serve a copy of the statutory ninety-day notice to the Solicitor General as required by law. He averred that although the plaintiffs claimed in the plaint that they served statutory notice to the defendants, the attached statutory notice does not comply with the requirements of the law, as it lacks proof of service to the Solicitor General. He emphasized that there is no evidence indicating that the notice was served to the Solicitor General as mandated by law.

He stated that the service of the ninety-day notice could have been proven by a receipt, rubber stamp, or any other evidence demonstrating that the Solicitor General was duly served with the notice. To support his submission, he cited the case of **Raphael Ology Andrea vs. Musoma**

**Urban Water Supply and Sanitation Authority**, Civil Appeal No. 468 of 2020 CAT (Unreported).

He went on to argue that the law makes it mandatory for the Solicitor General to be served with a statutory notice who serves as the legal advisor and counsel representing the Government in courts and prepares defences in civil cases against the government. He averred that this violation renders the case premature and incompetent before the court, deserving to be struck out for contravening the provisions of the GPA and the Local Government (District Authorities) Act, Cap 287. In support of his stance, he cited the case of **Gwabo Mwansasu & 8 Others vs. Tanzania National Roads Agency & Attorney General,** Land Case No. 8 of 2020 HC (Unreported), where the court held that failure to serve notice to the Solicitor General renders the suit incompetent, as it violates the mandatory requirement of notice under Section 6(2) of the GPA. Also cited the case of **Arusha Municipal Council vs. Lyamuya Construction Company Limited,** 1998 TLR 13.

Addressing the second preliminary objection, regarding the plaintiffs' alleged failure to exhaust the available remedies stipulated in the contract, he submitted that it is imperative to revisit the contract concluded by the parties herein on various dates in 2018, as found in the

list of additional documents to be relied upon by the plaintiffs filed on 18.11.2023. He argued that clause 8 (ii) of the agreements, among other provisions, stipulates that any dispute arising between the parties to the contract shall be resolved amicably between them. If either party is dissatisfied with the amicable resolution of the dispute, they may refer the matter to the Regional Administrative Secretary. Thereafter, if the parties are still dissatisfied, the dispute could be referred to the court of competent jurisdiction.

He averred that the plaintiffs do not dispute the contract entered into by each plaintiff with the 1st defendant herein. Therefore, he argued, the plaintiffs are bound by the terms and conditions stipulated, and each party has to fulfill their obligation under the contract entered with the 1st defendant, which is to settle the matter amicably or to refer the dispute to the Regional Administrative Secretary before instituting this case. Unfortunately, he stated, the plaintiffs did not comply with the requirement of their own contract, which they freely entered into with the 1st defendant. He contended that it is settled law that parties are bound by the agreement they freely entered into, and this is the cardinal principle of contract law. To support his submission, he referenced the case of **Harold Sekite Levira and Another vs. African Banking**

**Cooperation Tanzania Limited (Bank ABC) and Another**, Civil Appeal No. 64 of 2022 CAT at Dar es Salaa(unreported) pp. 5 - 6.

He stated that from the pleadings filed by the plaintiff, there is no indication whatsoever suggesting that the plaintiff complied with clause 8 (ii) of the contract with the defendants. This act renders the case incompetent and unmaintainable, necessitating it to be struck out. To buttress his submission, he referenced the case of **Yuko's Enterprises (E.A.) Ltd vs. Regional Administrative Secretary of Mwanza Region and Another**, Revision No. 6 of 2019 HC at Mwanza (unreported) at page 3.

Lastly, he concluded that in view of the foregoing submissions, it is without doubt that this suit is unmaintainable due to the statutory notices contravening Section 6(2) and 31(1) of the GPA and the Written Laws (Miscellaneous Amendment) Act No.1 of 2020, which amends section 190 of the Local Government (District Authorities) Act [Cap 287 R.E.2019]. He prayed for the case to be struck out with costs.

In response to the first Preliminary Objection, Mr. Mwakilima conceded that Section 6(2) of the GPA provides, among other things, that a 90-days notice needs to be served to the Attorney General, the Solicitor

General, and the Local Government Authority as per Act No. 1 of 2020. He acknowledged that the 90-days notice was not served to the Solicitor General. However, he argued that the court must consider whether the failure to serve the Solicitor General is fatal. He pointed out that the court, on several occasions, has applied the principles of overriding objectives brought by the Written Laws (Miscellaneous Amendments) (No.3) Act, 2018 (Act No. 8 of 2018), which now require the court to deal with cases justly and have regard to substantial justice.

He further submitted that the principle of overriding objective is to determine whether the absence of the notice served to the Solicitor General would render the final decision of the court unenforceable, to which he answered in the negative. He argued that even if the Solicitor General were served, they could not be a party to the case, as the office of the Solicitor General operates on behalf of the Attorney General. He emphasized that another test should be whether the absence of the notice on the side of the Solicitor General would render the final decision of this court inexecutable, to which the answer is no.

He argued that it is evident from the record, particularly at paragraph 8 of the plaint, where the plaintiffs have pleaded how they attempted to exhaust external administrative remedies. He submitted that

what is required at the moment is to prove the alleged fact mentioned at paragraph 8 of the plaint. He cautioned that deciding this issue at this moment would amount to condemning a party unheard, which is against the principles of natural justice. He asked the court to consider the case of **Cotwu (T) Ottu Union & Another vs. Hon. Iddi Simba, Minister of Industries and Trade & 7 Others,** 2002 TLR 88

He argued that what is important is to examine the plaint to see whether the plaintiffs have pleaded that they exhausted internal administrative remedies. He noted that the court has faced a similar issue in the case of **Idd Haruna vs. The Permanent Secretary President Office and 3 others**, Misc Cause No. 59 of 2022 High Court at Dar es Salaam (unreported), where, at page 9, the court held: -

> *'...The law under Rule 4 of the law reform (Fatal Accident ans Miscellaneous provisions) Judicial review Procedure and fees Rules of 214 clearly of any act, omission, proceedings or matter. This, in my view, is not confined on decisions entered after conducting a hearing. Besides it is not in every dispute between an employer and an employee that a hearing must be conducted. Other disputes, like the one at hand does not involve disciplinary issues, thus it is a misconception."*

He averred that the cited cases of **Raphael Ology Andrea and Gwao Mwansasu (supra)** would not be applicable in the current

circumstance, as there exists a decision of the Court of Appeal which is binding on this court. Additionally, he argued that the case of **Arusha Municipal Council v. Lyamuya Construction (supra)** is irrelevant because in this case, there is no dispute that the local authority, which is the Mbeya District Council, was served together with the Attorney General, both of which are suable entities. He emphasized that the Solicitor General is not a suable entity; rather, it is a procedural requirement that has no effect on affecting the suit.

Reverting to the second point of preliminary objection, he stated that it is based on the analysis of the contract, which is yet to be admitted in evidence. He argued that delving into the analysis of evidence renders the preliminary objection meaningless. He further contended that cases such as **Harold Sekiete Levira and Another and Yuko Enterprises** all pertain to the analysis of the contract/evidence, which should be conducted during the hearing. He emphasized that his submission was supposed to be made at the final stage or during final submissions, rather than at this preliminary stage.

Rejoining on the first preliminary objection, Mr. Fyumagwa reiterated that the plaintiffs' counsel conceded their failure to serve the statutory 90-days' notice to the Solicitor General as provided for under

Section 6(2) of the GPA, read together with Section 31 of the Written Laws (Miscellaneous Amendment) Act No. 1 of 2020, which amended section 90 of the Local Government (District Authorities) Act [Cap 287 R.E.2019]. He humbly submitted that failure to serve the Solicitor General with the 90-days' notice is indeed very fatal, as argued in their submission in chief, and reiterated herein.

He emphasized that the principle of overriding authority cannot be invoked to rectify failures to comply with the mandatory legal requirements, as held in the case of **Juma Busiya vs. Zonal Manager, South Tanzania Postal Corporation,** Civil Appeal No. 273 of 2020, where the Court of Appeal held at page 9 that:

> *"with due respect to learned counsel, we cannot invoke that principle. The principle of overriding objectives is not the ancient Greek goddess of universal remedy called Panacea, such that its objective is to fix every kind of defects and omissions by parties in courts.....**the principle of overriding objective cannot be applied blindly to cure every failure to comply with mandatory provisions of law.**"*

Therefore, he asserted that the omission to serve the 90-days statutory notice to the Solicitor General is indeed very fatal, and thus it cannot be cured by invoking the principle of overriding objectives.

Regarding the argument of the second preliminary objection, he contended that it is not purely a point of law. He argued that in determining a preliminary objection, the court only needs to consider the plaint and annexures, as held in the case of **Moto Matiko Mabanga vs. Ophir Energy Plc & Others**, Civil Appeal No. 199 of 2021 CAT at Dodoma (unreported) at page 14.

He contended that the claim by the plaintiffs' counsel that the second preliminary objection is not based on a pure point of law is unfounded. This objection asserts that the plaintiffs prematurely filed this suit in contravention of the terms of the contract entered with the 1st defendant, as they did not exhaust the available local remedies stipulated in the contract.

Having given due scrutiny and consideration of the rivalry submissions for and against the raised objections, the issue for determination is if the same are merited.

I will begin with the first objection regarding the failure to serve the Solicitor General with the 90-days' statutory notice. On this issue, it is a legal requirement that the Solicitor General must be served with the notice. Section 6(2) of the Government Proceedings Act (GPA) uses the

word *"shall,"* and according to section 53(2) of the Interpretation of Laws Act, Cap 1, Revised Edition 2019, whenever the word "shall" is used conferring a function, then the function becomes mandatory. This was affirmed in the case of **Peter Joseph Chacha vs. The Attorney General and the Minister for Home Affairs,** Civil Case No. 1 of 2021 HC (unreported).

In the above-mentioned case, with facts resembling the present matter, the court held that failure to comply with the said position of the law deprives the court of jurisdiction to entertain the matter. Furthermore, it was held that the lack of fulfillment of a mandatory legal requirement cannot be cured by the principle of overriding objectives, as provided under section 3B of the Civil Procedure Code, Cap 33, Revised Edition 2019.

Regarding the second preliminary objection, it should not detain me much. The plaintiffs are well aware that parties are bound by the contract they entered into, as submitted by the defendants. Nowhere in the pleadings have the plaintiffs exercised their internal remedies, as stated in paragraph 8 of the plaint, citing annexure LM1, which is not on the record. Therefore, the plaintiffs should have pursued this remedy before initiating the case.

Considering all these circumstances, as explained above, the preliminary objections, in my view are merited, and therefore I hereby uphold them.

In the upshot, I hereby struck out this suit with costs on the bases of such incompetence.

It is so ordered

Right of Appeal explained

DATED AT MBEYA this 27th March, 2024

**MUSA K. POMO**

**JUDGE**

**27/03/2024**

Ruling delivered in presence of the plaintiffs represented by Ms. Beatrice Kessy, learned advocate and Mr. Michael Fyumagwa, learned state attorney for the defendants

**SGD: J.T. LYIMO**

**DEPUTY REGISTRAR**

**27/03/2024**