

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF BUKOBA)**

AT BUKOBA

CIVIL CASE NO. 41 OF 2023

**MSELLE CIVIL ENGINEERING COMPANY LTD JV PROACTIVE
INDEPENDENT GROUP LTD..... PLAINTIFF
VERSUS**

**THE DISTRICT EXECUTIVE DIRECTOR,
BIHARAMULO DISTRICT COUNCIL..... 1ST DEFENDANT
THE ATTORNEY GENERAL 2ND DEFENDANT**

RULING

15th May & 17th May 2024

A.Y. Mwenda, J.

The plaintiff has instituted this suit claiming from the 1st Defendant the total amount of Tanzanian Shillings Eight Hundred and nine million eight hundred twenty-six thousand Four hundred twelve thousand five hundred and sixty (809,826,412,560) (sic) being the interest in failure to effects full payments from the construction of car parking bay at Nyakanazi Road Junction District Council.

Having served the pleadings to the defendants, the written statement of defence was filed by the office of the Solicitor General. This document was accompanied with a notice of preliminary objection listing three grounds. The same read as follows, that:

1. That, this Honorable Court has no jurisdiction to entertain the matter as the plaintiff did not exhaust all remedies to refer this matter to the National Construction Council (NCC) as per the agreement between the parties.
2. That, the plaint incurable bad in law for being filed prematurely as the 1st plaintiff did not serve the defendants with the ninety (90) days' notice as the requirements of law.
3. That, this plaint is incurably defective as it sued non-corporate body whom cannot be sued Court of Law this offends provision of law section 12(b) Cap 287 RE LAWS OF TANZANIA.

With the said Notice of preliminary objection, the court fixed the matter for hearing. The Defendants were represented by the office of Solicitor General through Mr. LAMECK BUTUNTU, Senior State Attorney and Mr. NESTORY LUTAMBI, State Attorney whilst the plaintiff had the services of Mr. NERIUS RUGAKINGIRA, learned Advocate.

Both sides aired their respective submissions whose summary shall be referred to in the cause of deciding the matter at hand. Having considered the submission by both sides the court raised the issue for determination which is whether the points of objections raised by the defendants are meritorious.

In a bid to provide answer to the raised issue, the court found it prudent to start with the second point of objection because once the answer to that point is in affirmative, there would be no need to delve into the remaining preliminary points No. 1 & 3.

Regarding the 2nd point of objection, Mr. NESTORY LUTAMBI submitted to the effect that the present suit is filed prematurely. According to him, the plaintiff filed the present suit without filing a prior 90 days' notice contrary to section 6(2) of the Government proceedings Act, [CAP 5 R.E 2019]. The learned State Attorney stressed that while the plaintiff ought to have served the notice to Biharamulo District Council and send a copy to the Attorney General and Solicitor general , he opted to merely serve the Attorney General and the solicitor General. With such anomaly, the learned State Attorney prayed the present suit to be strike out with costs.

In response to submission in support of the second preliminary point of objection, Mr. RUGAKINGIRA had it that, this point is not a pure point of law as it call for evidence. According to him, Biharamulo District Council was served with the said notice and the District Executive officer acknowledged receipt by endorsing his signature in a dispatch book which, according to him, is nowhere to be seen. According to him, since the Attorney General and Solicitor General received the notice, that by itself suffice to be a proof that Biharamulo District Council was also served. The learned counsel stressed further in that since the dispatch is a proof

that notice was served, then that by itself is a call for evidence which is contrary to principles stated in MUKISA BISCUIT V. WEST END DISRIBUTORS LTD [1969] EA. With his submission, the learned counsel prayed the second preliminary objection to be overruled.

In rejoinder, Mr. Nestory had it that since the learned counsel for the plaintiff concedes that the notice to Bihamulo District Council is not annexed to the plaint, then that by itself is a proof that he did not send the notice as required by the law. According to him, the principles in MUKISA BISCUITS (SUPRA) cannot apply in this case because the preliminary objection arises from the plaintiff's pleadings where the law obliged him to annex a proof of issuance of notice which was not the case. He concluded by praying this suit to be struck out with cost and that marks the end and summary of what was submitted by the parties in for and against the 2nd point of objection.

Principally, legal proceedings for and against the Government are covered under the Government proceedings Act, [cap 5 RE 2022]. Under the act, any proceedings against the Government shall be preceded by issuance of the 90 days' Statutory Notice of intention to sue. This is covered under section 6(2) of the Act which state as follows,

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 manner in which the 90 days’ notice is to be communicated by virtue of Section 6(2) of the Act is by submitting the same to the defaulting Government Ministry Department or officer concerned specifying the basis of his claim. Having performed the above, the intending plaintiff is obliged to send a copy of his claim to the Attorney General and Solicitor General.

In this suit, the pleadings are not accompanied by the 90 days’ notice to sue to the 1st defendant. What is annexed to the plaint is the copy of the purported notice to the Attorney-General and Solicitor General. This, by itself entails that the plaintiff did not send the notice to the 1st Defendant, the Department/officer concerned. Failure to do so was fatal because the 1st defendant was denied opportunity to assess the nature of the plaintiffs’ claim and negotiate the same during pendency of the notice. The plaintiff is kindly reminded that one of the aims of sending the 90 days’ notice of intention to sue to the Department or officer concerned is to provide an opportunity to negotiate or see the possibility of complying to the tabled claims thereby serving time and costs of fending cases.

In his submissions Mr. RUGAKINGIRA opined that the preliminary point regarding issuance of the 90 days’ notice to sue the Government is not a pure point of law

as it calls for evidence. The reasons for his stance is that since they managed to send it to the 1st defendant who signed in the dispatch book which was later misplaced, that by itself call for evidence. Having considered Mr. RUGAKINGIRA's argument I think, with due respect, his stance is incorrect. This is because what is gathered from the plaint, Notice was not send to the 1st plaintiff which is contrary to the dictates of Section 6(2) of the Act. If what he alleges was true, he was expected to state as such in the plaint, but that was never the case. I join hands with the learned state Attorneys that the point in question is a pure point of law; thus the principles as set in the case of MUKISA BISCUIT (Supra) cannot apply as their circumstances are distinguishable.

That said, I find merits in the second point of objection and is hereby sustained. This is because the present suit was filed prematurely for failure to send the 90 days' statutory notice of intention to sue to the 1st defendant. Since the 2nd point of objection suffices to dispose this matter, I find no reasons to discuss the 1st and 3rd points of objection.

In the upshot, this suit is hereby struck out with costs for being incompetent.

It is so ordered.


A.Y. Mwendu
Judge

17.05.2024

Ruling delivered in chamber under the seal of this court in the presence of Mr. Nestory Lutambi learned State Attorney for the Defendants and in the presence of Mr. Nerius Rugakingira learned Advocate for the Plaintiff.



A.Y. Mwenda
A.Y. Mwenda
Judge

17.05.2024