

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM SUB REGISTRY

AT DAR ES SALAAM

Civil Case NO. 172 OF 2023

ZAKARIA ATHANAS CHENSE..... PLAINTIFF

VERSUS

ADOLF MSANGI.....1st DEFENDANT

CHARLES (MPENDA SIFA)2nd DEFENDANT

CHACHA ZOGOTI.....3rd DEFENDANT

SABIAN WASONGA.....4th DEFENDANT

KIBAHA TOWN COUNCIL(KTC).....5th DEFENDANT

THE ATTOREY GENERAL.....6th DEFENDANT

RULING

22nd April & 17th May 2024

MKWIZU, J:-

The Plaintiff claim is for Tsh 150,000,000/= being special damages and Tshs 50,000,000/= general damages a result of a physical attack, severe pain and psychological torture, inflicted by the by the Defendants intentionally during the course of their employment . The claim is resisted by the 1st ,5th and 6th defendants who apart from their written statement

of defence, they have also raised three points of preliminary objections on point of law against the suit that;

- 1. The suit which seeks for compensation is hopelessly time barred.*
- 2. The suit is incompetent hence defective for contravening section 106(1) and (2) of the Local Government (Urban Authorities) Act, Cap 288*
- 3. The suit is incompetent for suing 1st defendant.*

On 22nd April 2024, Mr. Christopher Singa, learned advocate appeared for the Plaintiff while Mr. Revocatus Thadeo the State Attorney was in court for the 1st, 5th, and 6th defendants. The matter proceeded *ex-parte* against the 2nd, 3rd and 4th defendants whose attendance was not secured even after a substituted service.

The 1st objection was abandoned by the State Attorney maintaining the two. Arguing the 2nd objection the State Attorney said, the notice to sue is defective for being served to a wrong person. His contention was that the law requires the Notice of Intention to sue to be served upon the authority, in this case the Notice was served to the Director Kibaha Town Council instead of Kibaha Executive Director. Courts attention was drawn to the case of **Iringa Municipal Council Vs Ally Yusuph Mngidange and 11 Others**, Land Appeal No. 5 of 2014(unreported)

Regarding the 3rd objection, Mr Revocatus submitted that, the suit is incompetent for suing the 1st defendant, an officer of Kibaha Town Council for mistake allegedly committed in the course of his employment as stated in paragraph 9 of the plaint. He cited to the court the case of **Deonatus Mkumbo Vs Robert K. Luamuzigu**, Civil Case No 14 of 2009 to bolster his argument. He contended that the 1st defendant is an accounting officer executing the orders of his employer as specifically pleaded in the pleading and therefore cannot be sued personally. He invited the court to strike out the suit with costs.

In his reply, Mr Christopher Singa was of the view that the provisions of section 106 of the Local Government Urban Authority Act must be read together with section 108 of the same Act. And that the address of the notice to the Director Kibaha Town council was a correct mode of service.

He also challenged the 3rd objection on the capacity of the 1st defendant to be sued. His position was that being the one who issued the executed orders to the reserved army that resulted to the claimed damages, the 1st defendant was properly sued. He on this banked on Order 1 rule 3 of the Civil Procedure Code cap 33 RE 2019. He lastly prayed for the dismissal of the preliminary objection with an invitation to have sections 3A(1) and(2) of the Civil Procedure Code and Article 107A (2)(e) of the

Constitution of the United Republic of Tanzania considered in determining the matter.

I have considered the oral arguments advanced by both parties and the record of the case. Section 106(1) and (2) and 108 of the Local Government (Urban Authorities) Act, Cap 288 will accurately assist the court on the 1st objection. The section reads:

*106(1) "No suit shall be commenced against an urban authority until one month at least after written notice of intention to commence the suit has been served upon **the authority** by the intending plaintiff or his agent".*

106(2) the notice served under this section shall state the cause of action, the name and place of abode of the intending plaintiff and the relief which he claims".

And section 108(1) of the same Act reads;

*"Subject to subsection (2), the notice referred to in section 106 and any summons, notice or other documents required or authorised to be served on an authority shall be served by delivering it to, or by sending it by registered post addressed to the **Chairman or the***

chief executive officer of the authority at the principal office of that authority”.

As rightly submitted by the plaintiff's counsel, in terms of section 108(1), the notice of intention to sue is to be served upon the chief executive officer of the authority at the principal office of that authority. In this case, the Authority is Kibaha Town council normally manned by the Town Director who is the Chief Executive Officer, and the notice was addressed and served upon the Director Kibaha Town Council. I do not see any misdirection here. The Learned State Attorney's arguments that the Notice was to be served to Kibaha Executive Director instead of the Director Kibaha Town council is to me a semantic formation without any legal value. The 2nd preliminary objection is therefore overruled.

On the third objection the plaintiff is attacked for suing 1st defendant in his personal capacity. I have perused the Plaintiff. It places the 1st defendant as an employee of the 5th defendant, Kibaha Town Council and that in evicting the plaintiff, he was acting under normal course of his employment.

It is also a common knowledge that Kihaba Town council is one among the many urban authorities established under the Local Government (Urban Authorities) Act, a body corporate capable of suing or being sued

in its own name. This is the expression given by section 14 of the Local Government (Urban Authorities Act) which reads:

“14 (1) Every urban authority established or deemed to have been established under this Part, and in respect of which there is in existence a certificate of establishment furnished under section 9, shall, with effect from the date of commencement of the establishment order, be a body corporate, and shall–

(a) have perpetual succession and an official seal;

*(b) **in its corporate name be capable of suing***

or being sued;

(c) subject to this Act, be capable of holding and purchasing, or acquiring in any other way, and disposing of any movable or immovable property” (Emphasis added)

Meaning that Kibaha Town Council is a legal person capable of suing and being sued in her own name. And since it is the 5th defendant who had issued an eviction order and under whose authority the eviction was conducted by the 1st, defendant , then I agree with the learned State Attorney that the 1st defendant could not be sued on his individual

capacity for the actions of his employer. The suit against the 1st defendant is thus incompetent. The 3rd objection succeeds.

Next is on the way forward. The State Attorney has invited the court to strike out the suit with costs. Would this be a viable order under the circumstances? I think not. To me, this is a case purely on misjoinder of parties where the 1st defendant was needlessly joined in the suit. By virtue of Order 1 Rule 9 of the Civil Procedure Code, [Cap 33 R.E. 2019] (the CPC), misjoinder or non-joinder of parties by itself does not render a suit incompetent and especially where there are other defendants. The rule says:

"9. A suit shall not be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the right and interests of the parties actually before it."


And the procedure on how to go about in case of misjoinder and non-joinder of parties is expressed under Order 1 Rule 10(2) That:

*"10(2) The court may, at any stage of the proceedings, either upon or without the application of either party and on such terms as may appear to the court to be just, **order that the***

name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

There is no doubt that the plaintiff's case is against several defendants the 1st defendant inclusive. And having ruled that 1st defendant was wrongly impleaded as a defendant, the option available under Rule 10 (2) above is to order for the striking out of his name from the plaint and this is only possible by an order for amendment of the plaint by the plaintiff as I hereby order leaving the suit against other defendants intact. The third objection succeeds to the extent explained above. Each party to bear owns costs.

DATED at ES SALAAM this 17th Day of May 2024.



E.Y. MKWIZU
JUDGE
17/ 5/2024