

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

**(KIGOMA SUB-REGISTRY)**

**AT KIGOMA**

**MISCELLANEOUS CIVIL APPLICATION NO. 12372 OF 2024**

**LUNYALAJA OMARI ..... 1<sup>st</sup> APPLICANT**

**LUZALIA MAYEKA ..... 2<sup>nd</sup> APPLICANT**

**MADUKA NHELEMO ..... 3<sup>rd</sup> APPLICANT**

**VERSUS**

**UVINZA DISTRICT COUNCIL ..... 1<sup>st</sup> RESPONDENT**

**WARD EXECUTIVE OFFICER OF KALYA WARD ..... 2<sup>nd</sup> RESPONDENT**

**VILLAGE EXECUTIVE OFFICER OF**

**KASHAGULU VILLAGE ..... 3<sup>rd</sup> RESPONDENT**

**WARD COUNCILLOR OF KALYA WARD ..... 4<sup>th</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 5<sup>th</sup> RESPONDENT**

**RULING**

Date: 29 & 30/05/2024

**NKWABI, J.:**

At the outset, I wish to indicate clearly that the counsel for the applicants withdrew the application for the 2<sup>nd</sup> and 3<sup>rd</sup> applicants. The Court permitted it. So, this application has only one applicant who appears, in this ruling, as the 1<sup>st</sup> applicant.

Be that as it may, the applicant before this is seeking for the following orders:

**Ex-parte"**

1. That, this Court to issue an ex-parte declaratory order/interim order to restrain respondents, their agents and workmen from withholding the applicant's 100 heads of cattle, also issue an interim order that the said heads of cattle be placed in custody of the applicant until the intended main suit is instituted.
2. Any other relief(s) or further orders as this Honourable Court may deem fit and necessary to grant.

On the inter-parte the orders sought are thus:

1. That, this Court to issue an exparte declaratory order/interim order to restrain respondents, their agents and workmen from withholding the applicant's 100 heads of cattle also issue an interim order that the said heads of cattle be placed in the custody of the applicants until the intended main suit is instituted.
2. That, this honourable court be pleased to dispense with requirement of notice of 90 days of intention to sue.
3. Costs of this application be provided for.
4. Any other relief(s) or further orders as this honourable Court may deem fit and necessary to grant.

On being served with the application, the respondents, through the services of Mr. Selestine Ngailo, learned State Attorney, lodged a notice of preliminary objections which comprised of three branches which are:

1. That, this application is unmaintainable in law for want of capacity (Locus Standi) to be sued with respect to 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents contrary to section 3(1), 12(1)(a), (b) & (c) of the Local Government (Urban Authorities) Act (Cap. 288 R.E. 2002).
2. That, this suit is unmaintainable in law for being prematurely instituted without issuing a statutory 90 days' notice of intention to sue the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents contrary to section 6(1), (2) & (3) of The Government Proceedings Act [Cap. 5 R. E. 2019 read together with section 190(1) (a) & (b) of the Local Government (District Authorities) Act [Cap. 287 R.E. 2002] as amended by section 31 of the Written Laws (Miscellaneous Amendment) Act No. 1 of 2020.
3. That, this application is unmaintainable in law for being overtaken by events.

Despite there being an application for ex-parte orders, I directed notice be served to the respondent for them to comment anything thereof. Service was effected and the respondents appeared by Mr. Selestine

Ngailo, learned State Attorney who informed the Court that they have lodged a notice of preliminary objection and urged me to hear first the preliminary objection prior to hearing the merits of the application. Despite protestation from Mr. John, I took the course suggested by Mr. Ngailo and heard the preliminary objection in order to pave way for the respondents to lodge a counter-affidavit if any.

The preliminary hearing was heard by way of oral submissions. Mr. Ngailo and Ms. Oliva Lukinja learned State Attorneys represented the respondents while the applicant was represented by Mr. Laurence John, learned advocate. I am grateful for their powerful submissions.

Regarding the 1<sup>st</sup> branch of the preliminary objection, Mr. Ngailo submitted in chief that the 2<sup>nd</sup> – 4<sup>th</sup> respondents have no capacity to be sued under their capacity as pleaded. They are under two different councils, explained Mr. Ngailo and added that their preliminary objection is brought under the provisions of the law that are indicated in the notice of the preliminary objection.

It was a further contention by Mr. Ngailo that the applicant ought to have sued the council be it the district council or the Village council. He referred me to the decision of this Court in **Jonathan Tumain Mbwambo v.**

**Petro Joseph Keto & Another**, Land Appeal No. 32 of 2023 HC at Moshi to reinforce his stand view. He accordingly prayed that this application be struck out.

On the 2<sup>nd</sup> branch of the preliminary objection which is that 90 days' notice has not been served to the respondents. Mr. Ngailo elaborated that notice ought to have been issued to the 1<sup>st</sup> to 4<sup>th</sup> respondents but the applicant has not done so. If this application is mareva injunction there ought to be the notice issued first, Mr. Ngailo pressed.

Mr. Ngailo too elucidated the 3<sup>rd</sup> branch of preliminary objection, which is that the application has been overtaken by events. He was of the view that if this Court accepts that notice has been issued, then the application has been overtaken by events as the notice to have been issued. So, dispensation cannot apply, stated Mr. Ngailo and added that the other point is that the applicant is praying for. The cows are already in the custody of the respondents, it cannot be restrained for the respondents. Mr. Ngailo also underscored that it ought to be prayed for restraining of sale. It is his further assertion that the deeds have been done, they cannot be undone. Mareva injunction is done pending expiry of 90 days' notice, pointed out Mr. Ngailo. He finally stated that the application is misconceived and prayed the application be struck out with costs.

The reply submission by Mr. John was firm. He preferred to start to argue the 2<sup>nd</sup> branch of the preliminary objection. It was his view that the 2<sup>nd</sup> branch of the preliminary objection has not any relevance in the law, because the notice is annexed to their affidavit M1 with the receipt which has been sent to the Attorney General by way of Post. He said they are praying for a suit to be opened before expiration of the notice under paragraph 6 of the affidavit.

Mr. John too advanced that they have served the intention to sue the government. He referred me to the decision in **Johari Ibrahim Chata v. Mpanda Municipal Council**, Land Case No. 4 of 2021, HC. where it was ruled that it was not ruled that non-service was not fatal.

Concerning the claim that the respondents had no locus standi, Mr. John argued that it is for the applicant to establish locus standi. He further explained that it is the plaintiff (applicant) who has the right to choose who to sue, as stated in **Equity Bank Ltd & Another v. State Oil Tanzania Limited**, Civil Appeal No 294 of 2022 CAT at DSM at page 14 where it was held that the plaintiff is entitled to sue a person he wants to sue. He further stated that whether they were doing official duty, that is a question of fact. So, it does not qualify to be a preliminary point of objection, avowed Mr. John.

It was his further submission that the case cited by his learned brother was decided at appellate stage, there was sufficient evidence thus, the case is distinguishable. Mr. John further pointed out that still the law allows a Court to remove a person improperly joined under Order I rule 10 (2) of the Civil Procedure Code.

On the 3<sup>rd</sup> limb of the preliminary objection, Mr. John was brief in his submission in reply. He categorically stated that this application is not overtaken by events. He beefed up on that argument that they are praying that the heads of cattle be placed in the custody of the applicant until the intended main suit is filed. He also added that they have asked to be allowed to file a suit before the expiry of 90 days' notice. He finally prayed the preliminary objection be overruled for having no merit in law, costs for disposition of the preliminary objection and any other reliefs as the court deems fit to grant.

It was Mr. Ngailo's view, in rejoinder submission, on the 1<sup>st</sup> limb of the objection that the 2<sup>nd</sup> to 4<sup>th</sup> respondents have no capacity to be sued. If they were sued in personal capacity that would be correct, he conceded. He explained that this preliminary objection does not require any evidence

based on the name that is sued on the application, else they ought to have been sued in their own name.

Mr. Ngailo also stated that the claim that the plaintiff chooses who to sue, it is true, but the person chosen should have capacity. He explained that their objection is not on misjoinder or non-joinder, and stressed that their objection is on capacity of the respondents. He also stated that if the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents are removed, then the application would not stand because the ones alleged to have committed the offences would have been removed.

Mr. Ngailo had a witty remark on the reply on the 2<sup>nd</sup> branch of the preliminary objection. He informed the Court that the prayers ought to be on the chamber summons while the affidavit should contain the evidence or grounds. He elaborated that the chamber summons is not praying for filing a suit prior to expiry of the 90 days' notice. He stated that the case of **Johari** cited by his learned brother is distinguishable to the present case and elucidated that in this case, the wrong doers (the 1<sup>st</sup> to 4<sup>th</sup> respondents) have not been issued with the notice.

In respect of the 3<sup>rd</sup> branch of the preliminary objection, Mr. Ngailo rejoined that the nature of the application is, *mareva* injunction but the



applicant is praying for movement of custody from respondent to custody of the applicant. He also stated that, the chamber summons does not pray for filing a suit prior to issuing the notice. He added that if notices were issued, then why bring the prayer. Mr. Ngailo concluded by praying that the preliminary objection be sustained with costs.

I have paid deserving attention to the rival submissions. I am of the considered view that the 1<sup>st</sup> branch of the preliminary objection disposed of this application. Over this branch, Mr. Ngailo was of the stance that the 2<sup>nd</sup> – 4<sup>th</sup> respondents have no capacity to be sued under their capacity. It was his further expression that the applicant ought to have sued the council be it the district council or the Village council.

However, Mr. John, learned counsel for the applicant was of a firm view that, it is for the applicant to establish locus standi. He also entertains a view that it is the plaintiff who has the right to choose who to sue, see **Equity Bank Ltd & Another v. State Oil Tanzania Limited**, Civil Appeal No 294 of 2022 CAT at DSM at page 14 where it was held that the plaintiff is entitled to sue a person he wants to sue. Whether they were doing official duty, that is a question of fact. So, it does not qualify to be a preliminary objection.

The case cited was decided at appellate state, there was sufficient evidence. The case is distinguishable. Still the law allows a Court to remove a person improperly joined. That is under Order I rule 10 (2) of the Civil Procedure Code.

Indeed, I have failed to comprehend the argument of the counsel for the applicant. Mr. John has not cited to me any provision of the law that approves his avenue of suing an officer in his/her a title (position). Mr. Ngailo cited the provisions of the law that backs his stand point and in addition to that has cited the decision of this Court which supports that stance. I rule that this is a pure point of law, unlike the view held by the counsel for the applicant that its determination entails determination of facts.

Mr. John has suggested that this Court may permit him to amend the chamber summons and the affidavit to remove the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents and this Court proceeds with the hearing of the application on merits. That position held by the counsel for the applicant is erroneous, in view of **Standard Chartered Bank & Another v. VIP Engineering & Marketing Ltd & Others**, Civil Application No. 222 of 2016, CAT (unreported) where the Court of Appeal stressed that:

*"Having so found, we now proceed to determine ground (b) of the preliminary objection. It is trite principle that where a party has raised a preliminary objection in a case, the other party cannot be allowed to rectify the defect complained of by the other party who raised the objection. This is because, to do so would amount to pre-empting that preliminary objection."*

Thus, I agree with Mr. Ngailo that this application is incompetent on account of wrongly suing the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents under the positions of employment (ranks) instead of suing the respective councils in which they work which councils are body corporates able to sue and being sued. I need not address the rest of the branches of the preliminary objection. Consequently, I strike out this application with costs.

It is so ordered.

**DATED** at **KIGOMA** this 30<sup>th</sup> day of May, 2024.



A handwritten signature in blue ink, appearing to read "J. F. Nkwabi".

**J. F. NKWABI**  
**JUDGE**