IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM SUB-REGISTRY

AT DAR ES SALAAM

CIVIL CASE NO. 26443 OF 2023

CASE REFERENCE 20231130000026443

ZUWENA IDD KASABE.....PLAINTIFF

VERSUS

MUHIMBILI NATIONAL HOSPITAL.....1ST RESPONDENT

THE ATTORNEY GENERAL .... 2ND RESPONDENT

RULING

06th & 27th June, 2024.

KIREKIANO, J.:

The plaintiff filed a suit against the defendants claiming Tanzania Shillings, One Billion only (TZS.1,000,000,000.00), general damages arising from the alleged illegal and non-consensual hysterectomy conducted by the first defendant to the plaintiff. The other claims are (TZS. 500,000,000.00/=) medical expenses incurred by the plaintiff, interest, and costs of the suit. Upon being served with the plaint, the 1st and 2nd respondents through Miss. Grace Lupondo learned state attorney raised a preliminary objection on one point of law thus:

i) That this suit is premature and untenable in law for being accompanied by an improper ninety days (90) Notice of intention to sue the Government, which was not served contrary to Section 6(2) of the Government Proceedings Act (Cap 5 R.E 2019).

The preliminary objection hearing was conducted orally. Miss Grace Lupondo, learned state attorney, appeared for the defendants, while Miss Bertha Kitambi and Richard Limihagati, learned advocates, represented the plaintiff.

In support of the point of objection raised, Miss Lupondo underlined that it is a legal requirement for this Court to have jurisdiction to hear and determine suits against the Government; there should be prior notice of the intention to sue the government served to the department or officer of the Government concerned. A copy of the notice must be submitted to the Attorney General and Solicitor General as provided under section 6 (2) of the Government Proceedings Act, Cap 5 [R.E 2019].

She argued that given this provision, the plaintiff ought to have submitted the notice to Muhimbili National Hospital, and the copy of notice should have been submitted to the Attorney General and Solicitor General. According to her, the section above used the word "**shall**", which means the

same is compulsory in terms of Section 53(2) of the Interpretation of Laws Act, Cap 1.

Emphasising strict compliance with Section 6 (2), she cited the case of **Salim O. Kabora vs Kinondoni Municipal Council and three others (Land Case 10 of 2020) [2021] TZHC Land 574 (6 August 2021)** to the effect that the Attorney General and the Solicitor General should be adequately served with notice.

In this case, she said the first defendant was not served with notice as alleged in paragraph 18 of the plaint. In this paragraph there is a dispatch record suggesting service to the first defendant and Solicitor General. She submitted that having consulted the first defendant (MNH) they did not receive the alleged notice.

Whether the alleged service of notice at issue was proper, she argued that there must be evidence that the notice was served, evidenced with stamp, signature and dates of service. She submitted that the alleged service of notice at issue does not bear Muhimbili National Hospital's signature or stamp.

The learned state Attorney cited the case of **Arusha Municipal Council vs Lyamuya Construction Co. Ltd TLR 1998, on page 13,**

which held that suits against the government without notice are unmaintainable in law; in the end, Miss Lupondo prayed for the suit to be struck out with costs.

In their reply, Miss Kitambi argued that the point of preliminary objection posed is not a preliminary objection on pure point of law in the first place. She took a stance that the point raised as to proof of service of notice needs evidence, and the said pleadings and submission are not evidence to that effect. She submitted that the preliminary point ought to be purely based on law. Thus, the same fails to qualify as a preliminary objection since it must be proved by tendering of evidence.

It was Miss Kitambi's view that the argument that the dispatch attached to the plaint did not comply with Section 6 (2) of the Government Proceedings Act is a question of fact; thus, to make a finding, parties must bring evidence to prove this fact. She cited the case of **Ikizu Secondary School vs Kisarawe Village Council (Civil Appeal No. 163 of 2016) [2018] TZCA 444 (14 December 2018)** where the Court of appeal at pg. 6-9 citing **Mukisa Biscuits Manufactures Company Limited Vs West End Distributors Limited [1969] EA 696**, considered that the proof of

services which needed evidence failed to qualify as a preliminary objection and did proceed to determine the appeal.

She also cited the case of **Ibrahim Abdallah (The Administrator of the estate of the Late Hamisi Mwalimu Vs. Selemani Hamisi the Administrator of the estate of the late Hamis Abdallah, Civil Appeal No 314 of 2020 CAT (Unreported)** at pg. 10 -12 where the court of appeal faulted the high court in dismissing the suit on point of limitation and held that that pleadings and submission are not evidence, thus in this case the same cannot be used to know if the notice was served to the defendants. She stressed that whether the defendant complied with the requirement of issue and service of notice is a factual issue thus, factual issues cannot be determined without evidence be it by affidavit or oral evidence.

On other angle of her argument Miss Kitambi submitted that the case of **Salim Kabora (supra)** is distinguishable because the former case talks about the joining the necessary party that is Attorney General and service was not served and Attorney General was not party which is not the case here. She believed that the question of whether the notice is proper will certainly need evidence and that cannot be done without hearing both parties. She urged this Court to overrule the objection in want of merit.

In her rejoinder, Miss Lupondo added that the point raised is a point of law that goes to the root of the jurisdiction of the Court. Regarding the counsel for the plaintiff's arguments that the point contains mixed points of law and facts, she rejoined that from the cited case **of Mukisa Biscuits**, the Preliminary objection arose out of pleadings, thus looking at the pleadings paragraph 18 and attachment is enough to assist the Court in ascertaining if the notice is proper.

She maintained the position in the case of **Salim Nassoro** that the court may go through the annexure and decide the point raised.

Having heard the opposing submissions by the learned state Attorney for the defendants and learned counsels for the plaintiff, the issue for the determination is whether the filing of the suit at hand complied with law as provided under section 6 (2) of the Government Proceedings Act. To put it in other way, whether, compliance of this section is a pure point of law.

It is a settled principle of law that a preliminary objection, being a defence in nature, is raised on the assumption that all facts pleaded by the other party are correct. The objection must be a pure point of law capable of disposing of the matter. The objection should be implied from the pleadings and cannot be raised where facts are to be ascertained by

evidence. This is the position in the cited case of See **Mukisa Biscuit Manufacturing Company Limited Vs. West End Distributors Limited, [1969] EA 696**, where the Court held that examples of such objections are the point of jurisdiction of the court or a plea of limitation. The section at issue provides;

> *"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**." (Emphasis supplied)*

What can be discerned from this section is that the institution of suits against the government and the jurisdiction of the court to hear the same depends on the submission of ninety days' notice? As such the notice must be submitted to the respective government department and copy to the **Attorney-General** and the **Solicitor General.**

I will start with the first aspect of submitting ninety days' notice to the government department, in this case, the Muhimbili National Hospital. From the pleading, the same suggests under paragraph 18 of the plaint, the

plaintiff annexed the copy of "statutory notice and proof of service", which is the central issue posed by the defendant that the same was not served to Muhimbili National Hospital (MNH). While addressing this issue. I have taken note of the submission by Miss Kitambi, whether proof of service in this aspect is a point of law that can be resolved without evidence.

As I have pointed out above, the way section 6 (2) of the Government Proceeding Act is drafted, submission of a notice of intention to sue and proof thereof is a pre-requisite to be ascertained before this court assumes jurisdiction to hear a matter against the government. Emphasis is drawn from the wording that no suit against the Government shall be **instituted and heard** unless the claimant has previously submitted notice.

I have read and considered the decisions in **Karata Ernest & Others** but also **Ibrahim Abdallah (Admini Estate of Hamis Mwalimu vs Hamis Abdallah v (Admi estate of Hamis Abdallah,** in the latter case at page 10-12, the court of appeal found that the high court was in error in determining the objection as it ought to be resolved by evidence and that submissions and pleadings were not evidence for that purpose. It was thus directed that the high court decide the matter on merit.

I find this case distinguishable from the case at hand because, in the case **Ibrahim Abdallah** the high court had jurisdiction **and could decide the issue in trial.** In this case the issue of notice and service determines the jurisdiction of this court. In this, I am persuaded by the position taken by this court **(**Mongela J) **in Willam Said Kitundu Vs Osmund Makario Kapinga and 3 Others (Land Case No. 05 of 2023) [2023] TZHC 23124 (5 December 2023) at page 7 that;**

> *The ninety days' notice to the Attorney General and the Solicitor General is a mandatory requirement of the law and thus ought to be disclosed in the plaintiff's plaint and annexed on pleading. This is because this is part of the initial prerequisites in filing suits against the government and is important in ascertaining the jurisdiction of the court.*

This court can not assume jurisdiction to entertain the matter unless the issue of service is sorted. It follows that the issue of notice and proof of service as provided under section 6 (2) of the Government Proceeding Act is a question of law touching the jurisdiction of this court in dealing with suits against the government.

Now with regard to service of notice at issue, I have examined the pleading, specifically paragraph 18 of the plaint, which shows that a notice

of intention to sue was addressed to the executive director of MNH, and the annexure shows it was signed by an unknown person. As such, concerning the notice to the solicitor general, the same, according to the annexure, appears to be addressed to the solicitor general and signed by an unknown person.

Considering the dispute that the same did not reach the first respondent, it thus remains for the court to assess whether purported service can suffice to make that finding that service was sufficient. I**n Nassoro Mbaruku Nassoro** (**The Administrator of the estate of the late Kurwa Abdallah Salum) vs Makubi Hamisi Mwinyi Hija & 2 Others (Land Case No. 340 of 2022) [2023] TZHCL** and D 16981 (5 October 2023) my brother Mhina J, at page 8 held;

> *As a standard of proof of service, there must be a signature receiving officer, the stamp of the concerned Government entity and a date indicating the date of receipt.*

In addition, other evidence, such as acknowledgement of reception of notice by email or otherwise, may suffice. In this case, based on the annexure signed by an unnamed person, the same can not suffice.

On the other hand, the law under section 6 (2) of the Government Proceeding Act requires the notice to be served to the attorney general. Thus, the plaintiff was expected to plead explicitly that the notice was served to the attorney general as mentioned under section 6 (2) of the Government Proceeding Act. Since this was not done, the plaintiff did not comply with section 6 (2) of the Act; thus, the jurisdiction of this court to entertain the suit is wanting. Consequently, the preliminary objection raised by the counsel for the defendants has merit. The suit is thus struck out with costs.

A.J. KIREKIANO

JUDGE

27.06.2024.

COURT:

Ruling delivered in chamber in the presence of Miss Bertha Kitambi Wilson and Mr Salehe Manoro, state attorney for the respondent

A.J. KIREKIANO

JUDGE

27/06/2024.