

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND CASE NO. 116 OF 2018

**RAGINI CHANDRAKANT BORHARA.....PLAINTIFF
VERSUS
KINONDONI MUNICIPAL COUNCIL..... DEFENDANT**

R U L I N G

Date of last Order:15/09/2021

Date of Ruling:20/10/2021

T. N. MWENEGOHA, J.

On 3rd September 2018 the plaintiff filed this suit against the defendant praying for judgment and decree of this court against the defendant as follows: -

- a. Declaration that the plaintiff is the lawful owner of plot No. 617 Medium Density Kinondoni Hananasifu under letter of offer No. D/KN/A/29368/018/Som of 14/08/1989.**
- b. Specific performance by restoring the vandalized beacons and issuing of building permit.**
- c. Specific damages as per paragraph 10(i) and 10(ii) above.**
- d. General damages.**

- e. Interest on (c) above at the rate of 20% per annum from 2007, to the date of payment in full.**
- f. Interest at the court rate from the date of judgment to the date of payment in full.**
- g. Costs**
- h. Any other or further relief this court may deem fit and just.**

The plaintiff's case commenced on 13th September, 2021 while the defense case began on 22nd September 2021 after the plaintiff had closed his case (on 14th September 2022). When the matter was called for hearing on the 24th September 2021 Mr. Salehe Mohamed, Municipal solicitor for the defendant notified the Court that he has filled a letter regarding the competence of the case and prayed to be guided on the issue before he proceeded with his remaining witness. This was contested by the plaintiff's counsel, Mr. Kalolo Bundala. He informed the Court that even though Mr. Mohamed had given him a call at 11am that day, it was only upon his arrival in Court at 13 hours when he was issued with the said letter. He therefore proposed for the hearing to proceed so as save time of the Court and for the defendant to move the Court properly after examination of his witness. The Court gave order to the effect that hearing of the defence witness to proceed and further ordered a visit to locus in quo.

When the matter was called for mention on 30/9/2021 the defendant's counsel, Mr. Salehe Mohamed informed the Court that he had properly moved the Court with a preliminary objection and prayed for the Court to determine the same.

Mr. Mohamed's objection was to the regard that:

1. That, section 25(a) and 33 of the Written Laws (Miscellaneous amendments) Act, no. 1 of 2020- GN No. 8 Vol. 11 dated 21st day of February 2020 retrospectively affect the competence of this suit for want of joining the Attorney General as a necessary party and ninety days notice.
2. In alternatively, together with section 6(1) & (2) of Government Proceeding Act Cap 5 R.E 2019, Amendment of section 6(3), insertion of section 6(4) both of the Government Proceeding Act Cap 5 R.E 2019 and amendment of section 106 of the Local Government (Urban Authorities) Act cap 288 R.E 2002 by virtue of section 25(a) and 33 of the Written Laws Miscellaneous Amendments Act No. 1 of 2020 retrospectively affect the competence of this suit for want of joining the Attorney General as necessary party and ninety days' notice.

The preliminary objection was heard orally where it was Mr. Salehe's contention that since the amendment of the law requiring to join Attorney General in suits against governments is procedural, it affects all pending cases instituted before the amendment and after amendment. He further submitted that Section 6 (a) of Government Proceedings Act is to the effect that failure to join Attorney General as a necessary party vitiates the whole proceedings of this case.

He referred to the case of **Lala Wino vs. Karatu District Council Land Case No. 74/2014 & Salim Kabora Vs. Kinondoni Municipal Council & Another and Oseke TZ. LTD vs. The Board of Trustees of the**

Public Service. He submitted that all cases are with effect that amendment of procedural law in civil cases are of retrospect effect.

He added that this case was also affected by Section 6 (3) and (4) of the Government Proceedings Act for want of joining Attorney General as a necessary party. He also cited section 106 of the Local Government (Urban Authority Act Cap. 288 R. E. 2002 as amended under S. 33 of the Written Laws Misc. Amendment Act No. 1 of 2020 that issuing of 90 days notice is required before institution of civil suit against the Local Government Authorities in this case the Urban Authority and the copy to be served to Attorney General and the Solicitor General.

He therefore, prayed for the suit to be struck out or the plaintiff be allowed to make amendments to join the Attorney General after compliance of all prerequisite procedure.

In reply Mr. Bundala divided his submissions in two folds, one, in relation to propriety of the preliminary objection. He argued that it is on record that the final pretrial conference (PTC) scheduling order was held on 12/11/2020 and that it is the law that after final PTC no one is allowed to depart from the scheduling order without the leave of the Court as per Order VIII Rule (4) of Civil Procedure Code. It is was his submission that provision has been violated.

Again, he submitted that in terms of Order VIII Rule (2) of Civil Procedure Code, an objection of law or fact, or both must be embodied in the written statement of defense, it cannot be introduced separately through notice of

preliminary objection. He therefore contended that the defendant has violated the tenancy and rights provided under the Civil Procedure Code.

He cited Commercial Case No. 102 of 2001 between **CRDB Bank vs. Norally Dhanani & Others** in which the Commercial Court of Tanzania considered a similar situation to this one and decided that it is inappropriate for a defendant to file a notice of preliminary objection separate from the Written Statement of Defense. It was his submission that if the defendant wanted to introduce the preliminary objection after filing a Written Statement Defense, the remedy or mode would have been for him first to move the Court for an Order to allow him amend his Written Statement of Defense so as to introduce the preliminary objection. He argued that this was not done, hence a violation of Order VIII of Civil Procedure Code supported by the case law submitted in Court.

He further submitted that they understand that the defendant cannot move the Court to amend the Written Statement Defense because such application should have been made during final PTC unless a formal application had been filed in Government for a leave to depart from scheduling order, and only then he would have sought leave to amend Written Statement of Defense and then add preliminary objection as per Order VIII a Rule (4) of Civil Procedure Code. He then cited the **Commercial Case No. 208/2002 between Heritage Al Insurance Co. LTD vs. Ultimate Security**; as well as **Commercial Case No. 44/2001 between NBC LTD vs. Nabro LTD & Another** which emphasize the need to seek leave of the Court to depart from the scheduling order.

Secondly, Counsel for the defendant submitted on the merit of the preliminary objection and it was his view that the provisions of Act No. 1 of 2020 which amends various laws, though procedural, is also subject to Section 14 of the Interpretation of Laws Act, Cap. 1. That Section 14 of Cap 1 specify on the date an Act of Parliament should take effect which is on the date when it is signed or gazetted as the case may be. Therefore, an Act cannot come into operation when it was passed, and therefore it cannot affect; the pending cases in Court, unless it specifically provides for retrospective application.

He submitted that when an Act of Parliament extends the right of parties in proceedings, such right will be applied retrospectively; but where it restricts that right as Act No. 1 of 2020 did, then in interpreting that Act the objectives of the overriding objectives principles must be applied. He argued that what is looked at is the intention of the parliament.

Mr. Bundala further argued that similarly, it cannot be used to take away the right, because that will be inconsistency with the intention of the parliament in passing that law. He submitted therefore that, the High Court cases cited by defendants that of **Salim Bakora** (supra) by Hon. Kalunde, J on 6/8/2021 and **COSEKE TZ LTD** (supra) decided by Hon. Justice Fikirini, J. on 22/4/2020 missed this reasoning.

He submitted that the decision on **Municipality of Mombasa** quoted at Page 5 of the **Lala Wino Case** (Supra) clearly provides for the position of the procedural law in relation to Court pending matters. He added that this is the importance of the decision of Lala Wino case which Hon. Justice Ndika,

J.A. considered. It was his argument that one cannot take away the rights already created by law through a procedural law retrospectively applied unless it clearly is stated that it will apply retrospectively to affect the existing rights, which is not the case with Act No. 1 of 2020.

It was the counsel's humble submission that both Judges made their ruling in forgetfulness of the provisions of Section 3A and 3B of Civil Procedure Act, Cap 33 of the laws on the principle overriding objective. That is why those 2 decisions are silence on the applicability of the overriding principle.

Mr. Bundala added further that in a similar situation; Hon. Bwana J, in **Commercial Case No. 35/2002** between **TANESCO vs. Muhimbili Medical Centre** decided to strike out a suit because it did not include a necessary party just as it is today as the Attorney General is a necessary party. That in a similar situation a preliminary objection was overruled.

Mr. Bundala was of the view that it is essential to take into account the stage at which this case has reached, namely that both parties have closed their cases and that in terms of Section 3A & 3B of Civil Procedure Code the Court is required to consider the effect of allowing this preliminary objection as it will go against those provisions. That the provisions should also be considered together with Section 14, 15 and 16 of Interpretation of Laws Act and the decision of the Municipality of Mombasa quoted at **Lala Wino's case** (Supra) at P.5. That the retrospective application of Act No. of 2020 will lead to the absurdity of the law.

He added that it will be recalled in the two cases of COSEKE and Kabora (Supra), the Judges did not consider the provisions of Order 1 Rule 9 of Civil Procedure Code which provides that no suit shall be defeated for non-joinder or misjoinder of suit party. That the non-joinder of the Attorney General was not in the picture when this suit was filed in 2019 as the law did not require his joinder to the proceedings against local Authorities or for service of 90 days notice. Hence this case cannot be defeated by Act No. 1 of 2020 as is a procedural law, just like Civil Procedure Code, just like Order 1 Rule 9 of Civil Procedure which is also a procedural law.

It was his submission that if this suit is struck out, it will bring unnecessary hardship to the plaintiff, as he will be affected by the Law of Limitation Act, if the time to file a suit has lapsed in-between. The plaintiff would be required to go through a cumbersome process of seeking leave for no fault of his. He prayed for this Court to apply the decision by Hon. Mutungi J in **Labour Revision No 37 of 2020** which overruled the preliminary objection and proceed with adjudication of this matter.

In rejoinder Mr. Mohamed submitted that the preliminary objection is properly before this Court. He referred to Order VIII rule 2 of the Civil Procedure Code Cap. 33 R. E. 2019, that the defendant is to raise a preliminary objection in Written Statement of Defense, however, that provision of the law is not exhaustive as it limits only the defendant, because the coaching of the provision is not monitoring the plaintiff or the Court itself on how to rise a preliminary objection. He added that there are decisions to the effect that the defendant may append preliminary objection in Written

Statement of Defense or in a separate paper; and again, a defendant may raise a preliminary objection orally. He referred to the case of **A/S NOREMCO vs. DAWASA, Commercial case No. 47/2009** unreported; and the case of **Abdallah Shani Sekomba vs. The District Executive Director, Civ. Case No. 17/1997 High Court Iringa unreported**

He submitted that the scheduling order is not limiting defendants to raise a preliminary objection at any time before pronouncement of Judgment as see in the cases of **Justin M. Malya vs. Director Kinondoni Municipal Council & Land Case No. 152/2015** High Court (unreported) and in the case of **Hanoni H. Kijaji vs. Municipal Director Kinondoni Land Case No. 258/2012** High Court unreported; where preliminary objections were raised during final written submissions and the Court entertained them on merit.

It was his submission that the case of **CRDB vs. Norally KJ Kanani Commercial Case No. 102/2001** cited by the plaintiff, Hon. Nsekela J., though had noted Order VIII Rule 2 on modality of raising preliminary objection, went further and heard the preliminary objection raised in a separate suit.

On the merit of objection, Mr. Mohamed cited Section 6(4) of Government proceeding Act, Cap. 5 R. E. 2019 that it is explicit that failure to join the Attorney General as necessary party vitiate all proceedings. He cited the case of **Gabriel Ngowi vs. Deo James Kuranda, Land Revision No. 10 of 2018**, Unreported at p.3 – p44 and in **Abdullatif M. Hamis vs. Mehboob Yusuf Osman, Land Case No. 329/2015** where the issue of

definition of necessary party and effect of non- joinder of necessary party have been well elaborated. Further in the Abdullatif's case in addressing the non- joinder of necessary party, the Court had to invoke Order 1 Rule 10(1) – (5) of Civil Procedure Code Cap 33 R.E 2019, which has the effect of whether to struck out a suit or ordering an amendment.

Regarding the state where the case is reached, he submitted that it does not concern the procedural issue and parties are bound to raise this issue at any stage as it concerns the proper proceeding of the Court. He concluded that section 3A & 3B of Civil Procedure Code on Oxygen Principle does not have anything to do with the procedures. It was his prayers that the Court consider the defendant's preliminary objection on merit and either struck out the suit or order the amendment of plaint as fit and appropriate to the interest of justice.

Having gone through both submissions, the issue for determination is whether it is important to join Attorney General in present suit given the presence of the amended law requiring one suing the government authorities to do so.

It is evident that parties are not in dispute on the requirement to join Hon. Attorney General in the suit against government. The said requirement has been introduced by Section 25 (a) and 33 of the Written Laws (Miscellaneous Amendments) Act No. 1 of 2020- G.N No. 8 Vol. 101 dated 21st day of February 2020. Section 25 provides that,

The principal Act is amended in section 6, by- (a) deleting subsection (3) and substituting for it the following-

"(3) All suits against the Government shall, upon the expiry of the notice period, be brought against the Government, ministry, government department, local government authority, executive agency, public corporation, parastatal organization or public company that is alleged to have committed the civil wrong on which the civil suit is based, and the Attorney General shall be joined as a necessary party. (4) Non-joinder of the Attorney General as prescribed under subsection (3) shall vitiate the proceedings of any suit brought in terms of subsection (3)."

The provision under section 33(1) of the written Laws (Miscellaneous Amendment Act No.1 of 2020 provides; -

*"No suit shall be commenced against an urban authority-
(a) unless a ninety days' notice of intention to sue has been served upon the urban authority and a copy thereof to the Attorney General and the Solicitor General;"*

It is also found in Section 6 (3) of the Government Proceedings Act, Cap 5 R. E. 2019 that,

All suits against the Government shall, after the expiry of the notice be brought against the Attorney-General, and a copy of the plaint shall be served upon the Solicitor General, Government Ministry, Department or Officer that is alleged to have committed the civil wrong on which the civil suit is based.

Therefore, it is certain that the suit against Government, Ministry, government department, urban authority etc requires for the Attorney General to be joined as a necessary party and ninety days notice of intention to sue to be served upon the urban authority and a copy thereof to be served upon urban authority and a copy thereof to the Attorney General and the solicitor general. Whereas Section 3(1) of The Local Government (Urban Authorities) Act Cap 288 of 1982 defines "urban Authority" as follows; -

"urban authority" means a town council, a municipal council or a city council;"

It is essential I highlight Hon. Kalunde, J's decision in the case of Salim O. Kabora vs. Kinondoni Municipal & 3 Others, High Court of Tanzania Land Division at Dar es salaam in Land case No. 10 of 2020 where he had this to say on objective of notifying Attorney General:

"one; to enable the Attorney General and the solicitor General to consult the relevant authorities and mobilize the relevant information in organizing further discussions and preparing a formidable defense. Two; service permits the Attorney General and the Solicitor General to engage the would- be plaintiff in seeking an amicable settlement of the dispute with relevant entity where possible. Three; it affords the Attorney General, a necessary party, an opportunity to be heard when the suit is finally filed."

Thus, there is no doubt that joining Attorney General is vital to any case involving the government/ urban authorities. Now the question here is whether this preliminary objection is proper before me. It is Mr. Bundala's argument that the objection has to be brought in the Written Statement of Defense and thus it is contrary to Order VIII Rule 4 of the Civil Procedure Code, Cap 33 R. E. 2019. He also invited this court to apply the overriding objective principle in term of section 3A and 3B of Civil Procedure Code. And lastly whether this amendment can be applied to the case that has been filed before its introduction.

The above issues won't take much of my time as it is a trite law that the amendments in the civil or criminal laws, where they are merely procedural, will apply retrospectively even to pending cases, as held the case of **Lala Wino** (supra). So, the argument that the amendment will not apply retrospectively cannot stand. The same applies to the applicability of overriding objectives, the fact that this is a provision of a law, the overriding objective principle cannot be applied against it. This position has been stated in the case **Mondorosi Village Council & 2 Others vs. Tanzania Breweries Limited. 66 if 2017 & 4 Others, Civil Appeal No. 66 of 2017 (CAT-Arusha)** (unreported). The Court of Appeal was of the view that overriding objective principle cannot be applied blindly against mandatory provisions of the **procedural law** which goes to the foundation of the case.

The plaintiff counsel's concerns are also to the fact that this objection has not been introduced in the Written Statement of Defense and the stage which this case has reached.

I have taken enough time to revisit the authorities cited above especially on the objective of joining Attorney General. One of the objectives is that so that he gets an opportunity to be heard. This include time to prepare for the case as well as opportunity to communicate with the said authority so as prepare his defense. He may also use the same opportunity to settle the said claim out of court. However, such opportunity has not been given to the Attorney General in this case. Moreover, the Attorney General is much needed in this case, as in the event that the matter is concluded in favour of the plaintiff, then the plaintiff should have an executable decree against the government.

The Court has been strictly in deciding cases where there is discovery of procedural irregularity such as the one in the case at hand. In instances where irregularities are discovered, the Court would order for a retrial of the case or for the case to be struck out (see the **Salim O. Kabora's case** (supra)).

The argument that the court have to consider the stage where the case has reached have no leg to stand also as the question of non-joinder of necessary party is a critical procedural irregularity. The rationale here is that the government is still represented by Attorney General and determining the case in which he was not joined may render the decree to be inexecutable.

Further, it is noted that the defendant had raised his objection before hearing of his last witness, however, it was suggested by the plaintiff and agreed upon that hearing should proceed to rescue time of the Court and give room for plaintiff to respond on the same.

I am certainly in the agreement that a preliminary objection should be raised at the earliest possible opportunity. However, I am of the view that as the preliminary objection raised in this case touches the competence of the Court, it is prudent that it is determined as it goes to the root of the matter. After determining the objection, I find that this case contain irregularity of failure to join Attorney General.

With aforesaid, I strike out this suit for being incompetent. No order as to costs.

It is so ordered.




T. N. MWENEGOHA

JUDGE

22/10/2021