

**IN THE HIGH COURT OF TANZANIA  
(LAND DIVISION)  
AT DAR ES SALAAM  
MISCELLANEOUS CIVIL APPLICATION NO. 499 OF 2021**

**SELEMANI LWENDA alias MACHO .....1<sup>ST</sup> APPLICANT  
SALUM NASOR MDAKI ..... 2<sup>ND</sup> APPLICANT  
NASIBU MAULID MSUBAZI ..... 3<sup>RD</sup> APPLICANT  
VALENTINE ATANASI SHIRIMA ..... 4<sup>TH</sup> APPLICANT  
STEVEN ISA HUNGU ..... 5<sup>TH</sup> APPLICANT  
EMMANUEL ZABRON MPUNGA ..... 6<sup>TH</sup> APPLICANT**

**VERSUS**

**DAR ES SALAAM RAPID TRANSIT**

**AGENCY (DART) ..... 1<sup>ST</sup> RESPONDENT**

**TANZANIA NATIONAL ROAD**

**AGENCY (TANROADS) ..... 2<sup>ND</sup> RESPONDENT**

**OFFICE OF THE SOLICITOR GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

*Date of Last Order: 08/11/2021*

*Date of Ruling: 19/11/2021*

**A. MSAFIRI, J:**

This Application is filed under a Certificate of Urgency whereby the applicants are seeking for a restraint order against the respondents, their servants and or agents from conducting survey and/or demolition of the applicants' business frames located within Mbagala Rangi Tatu Market (Plots No. 13 and

*Adls*

15 Industrial Area) adjacent to Kilwa Road. While filing their counter affidavit in opposing the application, the respondents raised Preliminary Point of Objections to wit;

- i) *The applicant's application is bad in law for non-joinder of the Attorney General contrary to Section 6 (4) and Section 10 of the Government Proceedings Act, Cap 5 as amended and Section 3(7) of the Executive Agencies Act, Cap 245.*
- ii) *The application is bad in law for contravening Section 6 (2) of the Government Proceedings Act for failure to issue 90 days' Notice of intention to sue the Government.*
- iii) *The application is bad in law for containing unattainable prayer of issuance of 90 days' Notice of intention to sue the Government.*

The preliminary objections were argued viva voce. The respondents were represented by Felix Chakila, State Attorney whilst Abdallah Shaibu, Advocate, represented the applicants.

In support for 1<sup>st</sup> preliminary objection, Mr. Chakila submitted that, according to sections 6(4) and 10 of the Government Proceedings Act, Cap 245 (as amended), all proceedings instituted against the Government are to be instituted in the High Court and must join the Attorney General as a necessary party. *ALLs.*

However, in this application, the applicants having sued the Government institutions which are the 1<sup>st</sup> and 2<sup>nd</sup> respondents, they have joined the office of the Solicitor General as the 3<sup>rd</sup> respondent instead of the Attorney General.

Mr. Chakila submitted further that this application is defective for failure to join the necessary party and hence it should be struck out. To cement his arguments, he referred this court to the case of **Peter Peter Junior vs. Daud Yona Kitua and 4 others**, Land Case No. 174 of 2020 High Court Dar es Salaam (unreported).

On 2<sup>nd</sup> preliminary objection, Mr. Chakila stated that the applicants have failed to issue the mandatory 90 days' Notice and there is no an Application before this Court for the dispensation of 90 days' Notice. He cited the case of **Aloyce Chacha Kiganya vs. Mwita Chacha Wambura & 2 others**, Civil Case No. 07 of 2019, High Court Musoma (unreported).

On the 3<sup>rd</sup> preliminary objection, Mr. Chakila argued that there is no application to waive a 90 days' Notice instead, the applicants has instituted this Application first before seeking the leave of the Court to dispense with the statutory 90 days' Notice. He prayed for this application to be struck out with costs.

Opposing the preliminary objections, Mr. Shaibu opted to submit first on the 2<sup>nd</sup> preliminary objection. He contended that the mandatory 90 days' Notice was duly served to the respondents and the 1<sup>st</sup> and 2<sup>nd</sup> respondents received

*Alle*

the same by stamping their official stamps. He stated that, this preliminary objection contains facts which have to be proved by evidence i.e. evidence to prove service, and hence it should be dismissed as it contravenes the principles set in the case of **Mukisa Biscuits Manufacturing Company Limited vs. West End Distributors Ltd** (1969) E.A 696, which emphasizes that objections should be on pure points of law and not facts which has to be ascertained.

On the 3<sup>rd</sup> preliminary objection, Mr. Shaibu stated that their application is brought under Section 2(1) and (3) of the Judicature and Applications of Laws Act, Cap 358 R.E. 2019 (herein as JALA) and Order XXXVII of Civil Procedure Act, Cap 33 R.E. 2019 which covers for the situation where an order of temporary injunction is been sought where there is no main suit (known famously as Mareva Injunctions). He averred that the Application is properly before this court.

On the 1<sup>st</sup> preliminary objection, Mr. Shaibu submitted that sections 6(4) and section 10 of the Government Proceedings Act (supra), has to be read together with Order 1 Rule 9 (1) and Order 1 Rule 10 (2) of the Civil Procedure Code (supra). Generally, the provisions states that a suit has not to be defeated for the reason of misjoinder or non-joinder of the parties. And under Order 1 Rule 10(2) of the Civil Procedure Code, the Court may at any stage issue an order of any party to be joined.



Mr. Shaibu is of the opinion that the non-joinder of the Attorney General does not render the Application incompetent rather it gives an avenue for the parties to join the necessary party. He prayed that in consideration of parties' rights, the court should invoke a principle of overriding objection and grant leave for the applicants to join the Attorney General and then proceed with the hearing.

On rejoinder Mr. Chakila restated his submissions in chief and added that the Court should be cautious on the use of the principle of overriding objective because the same cannot be used where the mandatory procedures have not been adhered.

I have considered the submissions made for and against the objection and read the authorities referred in support of the arguments made by counsel for both parties. The major issue here is whether the preliminary objections raised by the defendants has merit.

It is trite law that preliminary objections must be on point of law which has been pleaded or which arises by clear implication out of pleadings. This principle was set in the famous case of **Mukisa Biscuits (supra)**. Also in the case of the **Soitsambu Village Council vs. Tanzania Breweries Ltd and TZ Conservation Ltd**, Civil Appeal No. 105 of 2011, it was observed by the Court of Appeal that the Court will treat as preliminary objection only those points that are pure law, unstained by facts or evidence, especially disputed points of facts or evidence.

*Aelle*

In the determination of the present application, I will start with determination of the 2<sup>nd</sup> objection which the defendants claims that the application is bad in law for contravening section 6(2) of the Government Proceedings Act for failure to issue 90 days' notice of intention to sue.

Mr. Shaibu is contending this objection stating that the statutory 90 days' Notice was issued to the 1<sup>st</sup> and 2<sup>nd</sup> respondents, as per annexure attached to the applicant's affidavit and noted by the respondents in their counter affidavit.

I agree with Mr. Shaibu that, this preliminary objection raises facts which have to be proved through bringing evidence. I am of the view that this objection raises mixed points of law and facts which require proof and hence does not qualify to be raised at this stage of proceedings. For the above reasons I overrule this preliminary objection.

On the 3<sup>rd</sup> preliminary objection, the respondents claims that there is no application before this court for the leave to waive a 90 days' Notice instead the applicants have instituted this Application before seeking leave of the court to dispense with statutory 90 days' Notice. That the Application is brought under Section 2(1) and 3 of JALA, Section 68 and Order XXXVII Rule 2(1) and Section 95 all of the Civil Procedure Code.

*Alle*

Mr. Shaibu stated that the application is brought under Sections 2(1) and (3) of JALA and Order XXXVII so it is competent before the Court.

I am satisfied that the Application has been brought under proper provisions as required by the law. Mr. Chakila argued that had the applicants intended to bring the Application under Mareva Injunction, they would have filed it under Section 2(3) of the JALA. However, with respect to Mr. Chakila, I am of the view that the citations of other provisions is not fatal to the application as long as the required provisions has been used and properly cited. And in this Application, Section 2(3) of the JALA which is important and required provision under circumstances has been referred to in this application. I also overrule this objection.

On the 1<sup>st</sup> objection, the respondents are claiming that this application is bad in law for non-joinder of the Attorney General.

Section 6 (30) of the Government Proceedings Act reads;

*"S. 6 (3): All suits against the Government shall, upon 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 suit is based, and **the Attorney General shall be joined as a necessary party** (Emphasis added)."*

*Alls.*

***"(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)" (Emphasis added).***

The provisions quoted above is coached in mandatory term that, in suing the Government and her institutions that is alleged to have committed a civil wrong, the Attorney General should be joined as a necessary party.

It is an obvious fact that, the Attorney General was not made a party to the application at hand. The issue for my determination is on what should be the consequences. In his submission, Mr. Chakila has asked the Court to strike out this application with costs. Mr. Shaibu has maintained that the non-joinder of the Attorney General does not render the application incompetent rather under Order 1 Rule 10(2) of the Civil Procedure Code, the Court may issue an order for any party to be joinder. He pleaded for the court to invoke the principle of overriding objection and grant leave for the applicants to join the Attorney General.

Indeed, non-joinder of the Attorney General renders the application incompetent and liable to be struck out. This is as per the mandatory provisions of the Government Proceedings Act as herein above cited.

On the plea of the court to invoke the principle of overriding objective, it was decided by the Court of appeal in the case of **Mondorosi Village Council & 2 others vs. Tanzania Breweries Limited & 4 others**, Civil Appeal No. 66 of 2017, CAT – Arusha (unreported) that; the overriding objective

*Alle*

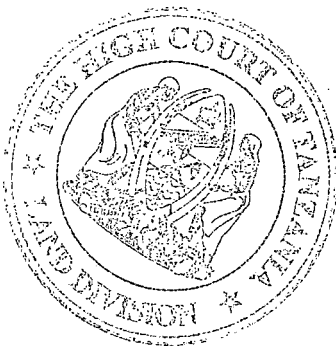


principle cannot be applied blindly against mandatory provisions of procedural law.

This being the case, I am therefore constrained to sustain this ground of objection and strike out the Application as I hereby do. Should the applicants wish, they may file a fresh Application joining the Attorney General as a party. No order as to costs.

It is so ordered

Dated at Dar es Salaam, this 19<sup>th</sup> day of November, 2021.



  
**A. MSAFIRI,**  
**JUDGE**