

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

LAND CASE NO. 208 OF 2021

GENOVEVA MURO NDELIMBI 1ST PLAINTIFF
DOMYAMARI MARWA MUHUNDA 2ND PLAINTIFF
ALEX MASHISHANGA MAGANGA 3RD PLAINTIFF

VERSUS

TANZANIA COMMERCIAL BANK 1ST DEFENDANT
AFRIMAX ENTERPRISES LIMITED 2ND DEFENDANT

Date of last Order: 11/10/2022

Date of Ruling: 06/12/2022

RULING

I. ARUFANI, J

The plaintiffs filed in this court the suit at hand against the defendants alleging the first defendant has breached their loan agreement. It is alleged by the plaintiffs that, the default notice issued to the first plaintiff by the second defendant and copied to the second and third plaintiffs is misconceived in law. The plaintiffs are now seeking for declaratory order that the suit properties located at Kinyerezi Area and Farm No. 94 located at Kimara Michungwani Area are not subject of any mortgage in favour of the first defendant. They are also praying for general damages and costs of the suit.

The defendants vehemently disputed the plaintiffs' claims and raised in their joint written statement of defence a notice of preliminary objection that, the plaintiffs suit contravened provisions of the Government Proceedings Act, Cap 5 R.E 2019 (hereinafter referred in short as the GPA). By consent of the counsel for the parties the stated point of preliminary objection was argued by way of written submissions. Although the preliminary objection was raised in the joint written statement of defence of both defendants but the written submission filed in the court in support of the preliminary objection was the written submission of the first defendant only. No written submission from the second defendant was filed in the court to support the preliminary objection.

It was stated by the counsel for the defendant in the written submission of the first defendant that, the plaintiffs' suit is contravening mandatory provision of section 6 (2) of the GPA which requires issuance of ninety days' notice to the Government before instituting a suit in the court against Government. It was stated the first defendant was formulated after change of the name of Tanzania Post Bank PLC to the Tanzania Commercial Bank PLC. It was stated that, the majority shareholder of the Tanzania Commercial Bank PLC is the Government of the United Republic of Tanzania.

He argued that, as provided under section 16 (3) of the GPA as amended by Act No. 1 of 2020 the Government is defined to include public

corporation and public company. He stated that, section 6 (2) of the GPA requires a claimant to issue a ninety days' notice as a condition preceding filing of the suit in the court against the Government. He went on stating that, section 6 (3) of the same law requires the suit to be instituted in the court against the Government after expiration of ninety days and the Attorney General has to be joined in the suit as a necessary party. He submitted that, failure to comply with the procedures provided under section 6 (2) and (3) of the GPA vitiates the whole proceedings of the matter.

He submitted that, the matter at hand was filed in the court premature as the plaintiffs have not issued ninety days' notice to the Government and the Attorney General has not been joined in the suit as a necessary party as required by the law. To support his submission, he referred the court to the case of **Gladys Rogathe Metili V. TPB Bank PLC & Others**, Land Case No. 2 of 2020, HC at Arusha (unreported) where the suit was struck out after being found it was filed in the court without issuance of the ninety days' notice provided under the law and the Attorney General was not joined in the suit as a necessary party.

He submitted that, as the Government is a majority shareholder having 83.44% of all shares licenced to do banking business and as the first defendant is a public corporation the plaintiffs were required to comply with the requirements of the law stated hereinabove. He based

on the strength of the above stated submission to urge the court to uphold the defendants' point of preliminary objection and strike out the plaintiffs' suit with costs.

In reply it was stated in the joint written submission of the plaintiffs that, the defendants' preliminary objection is misplaced and are based on wrong interpretation of the law given in the case of **Gladys Rogathe Metali** (supra) cited in the written submission of the first defendant. He stated the court misconstrued the law and did not consider the principle of statutory interpretation and stated the court is not bound by the interpretation made in the cited case. He argued that, the first defendant is a company established under a Companies Act and it is neither the Government entity nor the Government as alleged by the by the counsel for the first defendant.

He stated it is not the intention of the Parliament that all companies in which the Government owns shares would be construed as the Government and fall under the provision of section 6 of the GPA. He argued if that was the intention of the Parliament it would have stated so in plain language in the respective law. He stated to hold so it would have caused many companies like NMB Bank PLC, CRDB Bank PLC, Mining Companies and all Telecommunication Companies to be construed as Government simply because the Government owns shares therein.

He submitted that, the first defendant is not a Public Corporation and the issue of shareholding structure is a matter of evidence. He stated the official search annexed in the written submission in support of the preliminary objection does not feature anywhere in the pleadings of the defendants that the first defendant is a Public Corporation. He argued that, as it is a matter of evidence, preliminary objection raised by the defendants is not pure point of law as defined in the case of **Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd**, [1969] EA 696. He argued further that, the search report annexed in the submission in support of preliminary objection cannot be considered at this stage.

He stated it is an established principle that documents other than authorities cannot be annexed to a submission and they cannot form part of the submission. To fortify his submission, he referred the court to the case of the **Registered Trustees of the Archdiocese of Dar es Salaam V. Chairman, Bunju Village Government and 11 others**, Civil Appeal No. 147 of 2006 cited in the case of **Rosemary Stella Chambejairo V. David Kitundu Jairo**, Civil Reference No. 6 of 2018, CAT at DSM (unreported) where it was stated submissions are not evidence.

He argued that, as there is no any averment in the defendants written statement of defence in respect of the status of the first defendant

as a Public Corporation it is their submission that the preliminary objection raised by the defendants in their written statement of defence is devoid of merit. At the end he prays the preliminary objection raised by the defendants be overruled with costs.

The court has painstakingly considered the point of preliminary objection raised by the defendants and the rival submissions filed in the court by both sides in relation to the point of preliminary objection raised by the defendants. The court has found that, as stated at paragraph 2 of the plaintiffs' plaint and noted at paragraph 1 of the joint written statement of defence of the defendants it is not disputed that the first defendant is a limited liability company established under the laws of Tanzania (Companies Act, Cap 212) and licensed to do banking business.

The court has found that, as rightly argued by the counsel for the first defendant and not disputed by the counsel for the plaintiffs, the first defendant was formulated after the Tanzania Postal Bank PLC changed its name to the Tanzania Commercial Bank PLC. The court has found as the counsel for the defendants argued the first defendant is a government corporation which cannot be sued without complying with procedural requirements provided under section 6 (2) and (3) of the GPA and the counsel for the plaintiffs argued it is not, the issue to determine here is whether the first defendant is a government institution which cannot be sued without complying with procedural law provided under the afore

cited provision of the law. The cited provision of the law as amended by section 25 of the Act No. 1 of 2020 states as follows: -

"6 (2) 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.

(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."
[Emphasis added].

From the wording of the above quoted provision of the law it is apparent clear that, there are agency, corporations and companies which are the Government's entities. To the view of this court the agency, corporations and companies which are Government's entities cannot be sued without involving or joining the Government in the suit preferred against the Government's entities. The question to determine here is whether the first defendant is a Government entity or institution which

cannot be sued without complying with the procedural requirements provided under section 6 (2) and (3) of the GPA quoted hereinabove.

The court has found the counsel for the plaintiffs argued that, the interpretation made by the court in the case of **Gladys Rogathe Metili** (supra) that the Tanzania Postal Bank PLC which has now changed its name to the Tanzania Commercial Bank PLC could have not been sued without involving and joining the Government in the suit was done without considering the principles of statutory interpretation as the Tanzania Postal Bank PLC was not Government or a Government Company.

The counsel for the plaintiffs did not state which principle was not considered but he argued that, to hold the first defendant is a government company will lead into absurdity as handful of companies like NMB Bank PLC, CRDB Bank PLC, mining companies and almost all telecommunication companies will be construed as Government's entities. The court has failed to see any merit in the stated arguments because the criteria for knowing an institution is a government entity can be found in our laws. The stated criteria can be drawn from section 16 (4) of the GPA as amended by Act No. 1 of 2020 which states as follows: -

"For the purposes of subsection (3) the word "Government" shall include a Government ministry, local government authority, independent department, executive agency, public corporation, parastatal organization or a public company established under

any written law to which the Government is a majority shareholder."

Although subsection (3) of section 16 of the GPA referred in the above quoted provision of the law deals with execution against the Government but the court has found the criteria for knowing a company is a government institution provided therein which is number of shares hold by the Government in an institution can be used to know a company is a Government institution or not. That being the position of the law the court has found as the Government is a majority shareholders in the first defendant's bank as it owns about 83.44 % of the shares in the first defendant's bank then it is apparent clear that the first defendant is a government company.

The argument by the counsel for the plaintiffs that the structure of shareholders in the first defendant's bank is an issue which need evidence to prove the same and as per the definition of the term preliminary objection given in the case of **Mukisa Biscuit Manufacturing Co. Ltd** (Supra) the point of preliminary objection raised by the defendants does not qualify to be a preliminary objection but failed to accept his argument. The court has found that, although it is true as stated in the case of the **Registered Trustees of the Archdiocese of Dar es Salaam** (supra) that submission is not evidence but the point of preliminary objection raised by the defendants is not a point which depends on evidence perse

to establish the Government is a majority shareholder in the defendant's institution. To the view of this court that is an issue which can be determined by looking into the law established the defendant's institution.

Having found the first defendant is a government institution, the court has come to the settled finding that, the first defendant cannot be sued without involving the government and follow the procedure of suing Government provided under section 6 (2) and (3) of the GPA. Since the plaintiffs sued the first defendant without issuing ninety days' notice of their intention to sue the Government as provided under section 6 (2) of the same law, it is apparent clear as submitted by the counsel for the first defendant that, the present suit was filed in the court premature and in contravention of the requirement provided under section 6 (2) and (3) of the GPA. The need to comply with the requirement provided under section 6 (2) of the GPA was emphasized in the case of **Thomas Ngawaiya V. the Attorney General & Three Others**, Civil Cause No. 177 of 2013 where it was stated that: -

"The provision of section 6 (2) of the Government Proceedings Act is express, explicit, mandatory, admit no implication or exceptions. They are imperative in nature and must be complied with. Besides, they impose an absolute and unqualified obligation on the court".

In the light of what was stated in the above quoted excerpt it is crystal clear that compliance with the procedural requirements provided therein are mandatory and not optional. The court has also found that, it is not only that the procedural requirements provided under section 6 (2) of the GPA was not complied with but as also argued by the counsel for the defendants the Attorney General was not joined in the suit as a necessary part as required by section 6 (3) of the same law. The effect of failure to join the Attorney General in a suit against the Government is well provided under section 6 (4) of the GPA as amended by Act No. 1 of 2020 which states categorically that, non-joinder of the Attorney General as prescribed under subsection (3) shall vitiate the proceedings of any suit filed in the court against the Government or its institutions.

Since the present suit was filed in the court against the first defendant which is a Government institution without issuing statutory notice provided under section 6 (2) of the GPA to the first defendant and the Attorney General was not joined in the suit as a necessary party as required by section 6 (3) of the same law, then as provided under section 6 (4) of the same law and as rightly argued by the counsel for the first defendant, the plaintiffs' suit was filed in the court prematurely.

Consequently, the point of preliminary objection raised by the defendants is hereby found is meritorious and deserve to be upheld. In the upshot the point of preliminary objection raised by the defendants is

hereby upheld and the plaintiffs' suit is accordingly struck out with costs for being filed in the court without complying with the legal requirements provided under section 6 (2) and (3) of the GPA. It is so ordered.

Dated at Dar es Salaam this 06th day of December, 2022



I. Arufani

JUDGE

06/12/2022

Court:

Ruling delivered today 06th day of December, 2022 in the presence of Mr. Edward Chuwa, learned advocate for the plaintiffs and in the presence of Mr. Epafro Mwego, learned advocate for the defendants. Right of appeal to the Court of Appeal is fully explained.



I. Arufani

JUDGE

06/12/2022