

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND CASE NO.42 OF 2022**

JOSHUA ARTHAR MHAGAMA 1ST PLAINTIFF
ANNA JOSHUA MHAGAMA 2ND PLAINTIFF
HAKIKA JUMA ABDALLAH 3RD PLAINTIFF
SAIDI SAIDI MKALONGE 4TH PLAINTIFF
SALUM MBWANA KORWA 5TH PLAINTIFF
JOYCE SEBASTIAN CHENGULA 6TH PLAINTIFF
MBARAKA SULEIMAN MOHAMEDI 7TH PLAINTIFF

VERSUS

TANZANIA ELECTRIC SUPPLY COMPANY 1ST DEFENDANT
KISARAWA DISTRICT COUNCIL 2ND DEFENDANT
THE ATTORNEY GENERAL 3RD DEFENDANT

RULING

Date of last order: 19.05.2022

Date of Ruling: 20.05.2022

A.Z.MGEYEKWA, J

On 1st March, 2022 the Plaintiff herein, instituted this suit against Tanzania Electric Supply Company, Kisarawe District Council and the Attorney General, seeking five reliefs as follows:-

- a) *Judgment and Decree against the 1st defendant.*
- b) *The Court to order the 1st defendant to pay the plaintiffs Tshs, 105,921,489.68131 as total interest accrued due to late payment of compensation since January, 2016 up to September, 2021.*
- c) *General damages at the tune of 50,000,000 subject to assessment of this Honourable Court.*
- d) *Costs of this suit to be paid by the 1st defendant.*
- e) *Such other or further relief as this Honourable Court may deem fit to grant.*

The Defendants' State Attorney filed a Written Statement of Defence disputing the claims and the he also raised a point Preliminary Objection that:-

1. *The suit is incompetent for contravening section 6 (2) of the Government Proceeding Act, Cap. 5 [R.E 2019].*

When the matter was placed before me for hearing on 19th May, 2022 the Plaintiffs enjoyed the legal service of Mr. Stephen Mboje, learned counsel whereas the Defendants enjoyed the legal service of Mr. Erigh, learned State Attorney.

Submitting in support of the application, the learned State Attorney for the Defendants urged this Court to adopt the applicant's affidavit to

support his submission. He was brief and straight to the point. He contended that in accordance to Order IX Rule (6) of the Civil Procedure Code, Cap. 33, the litigant is required to serve the Institution a Notice of 90 days' and serve the Attorney General with a copy of the Plaint. He went on to state that the purpose of serving 90 days is to notify the Government and gave them ample time to prepare their case and in case the Government will find that the claims are genuine then they can initiate settlement procedure outside the court. Stressing on the point of issue a 90 days' Notice Mr. Erigh contended that there is no any evidence to proof of dispatch that the Attorney General was served to appear in court and to show that Queen received the notice since there is the document is not stamped.

Mr. Erigh continued to submit that the purported copy of 90 days' Notice issued to the Attorney General is incomplete since the name of the receiver and his signature are missing. He added that there is no proof whether Kisarawe District Council was served with a copy of 90 days Notice.

On the strength of the above submission, the learned State Attorney for the Defendants beckoned upon this court to strike out the suit.

In reply, the learned counsel for the Plaintiffs valiantly argued that there is no any provision which requires a litigant to issue a 90 days' Notice and attach a Plaint. He went on to submit that section 6 (2) of Government Proceeding Act only stated that a 90 days' Notice must be issued. The learned counsel for the Plaintiff submitted that they have no any cause of action against Kisarawe District Council. In his view, Kisarawe District Council were part and parcel of TANESCO, since they are the one who implementing the activity of TANESCO. He added that TANESCO is the 1st Defendant and they were served with the 90 days' Notice.

Mr. Stephen went on to submit that in case this Court will find that Kisarawe was required to be served with a notice then on their side they are treating it as misjoinder of parties. To support his stance, he cited Order I Rule 9 of the Civil Procedure Code that a suit should not be defeated for misjoinder of parties. He prayed for this court to expunged Kisarawe District Council from the Plaint and proceed to deal with the remaining two parties.

In his brief rejoinder, the learned State Attorney for the respondents reiterated her submission in chief. He insisted that the notice (annexure

D3) is defective because it is not stamped, the name of a person who received the purported notice is not stated and the same is not signed. He insisted that the Plaintiff were required to serve all institutions whom they intended to sue. The learned State Attorney for the Defendants submitted that the issuing of a 90 days Notice is vital with a purpose to allow the Government to solve the issues out of Court.

He insisted that the Plaintiffs must serve all parties/institutions. He lamented that the prayer of Plaintiffs' counsel the prayer intends to preempt their preliminary objection. He stated that the matter before this Court is not misjoinder or non-joinder but the issue is whether Kisarawe District Council was served with a 90 days' Notice? Mr. Erigh contended that the prayer to remove Kisarawe District Council from the case does not suffice since the TANESCO was not properly been served to enable the institution to do enter mechanisms to solve the matter.

In conclusion, the learned State Attorney urged this court to strike out the suit with costs.

Having digested the learned counsels' submission and the pleadings therein on the sole preliminary objection raised by the Defendant's learned

counsel, I am settled that the issue for consideration is *whether the case is appropriately filed before this Court.*

Gleaning from the pleadings it comes out, quite clearly, that the 2nd defendant, Kisarawe District Council, was impleaded in the pending. See paragraph 6 Plaintiff and reading the Plaintiff in general Kisarawe District Council is the one who issued a notice to the Plaintiff. To find out whether it is mandatory to issue a 90 days to a District Council, section 25 of the Written Laws (Miscellaneous Amendments) Act No.1 of 2020 gives a proper guidance. For ease of reference, I reproduce section 25 of the Written Laws (Miscellaneous Amendments) Act No.1 of 2020 hereunder:-

“25. 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. [Emphasis added].*

Applying the above provision, it is vivid that issuing of 90 days' Notice is mandatory when suing the Government including the District Council. I have gone through the 90 days' notice which was issued to TANESCO, it shows the same was received by Queen who signed the said notice on 21 October, 2021. In my view, the signature and date suffice to accept that the notice was received by TANESCO.

However, I have noted that the notice copied to the Attorney General, is not clear. I say so because what is purported to be a 90 days' Notice i.e. annexure P3 shows the receiver signature only, the receiver is unknown. The document is not dated was not stamped, I find it is difficult to confirm that it was a proper notice. Thus, the omission was a serious contravention of the imperative requirements of the law. I am in accord with Mr. Erigh that the 90 days' Notice was not issued the Attorney General. The law that has been infringed does not provide for any exception or leeway to what section 33 of the Act No. 1 of 2020 as amended under 106 of the Local Government (Urban Authorities) Act, Cap. 288 [R.E 2019] as amended by the Written Laws (Miscellaneous Amendments) Act No.1 of 2020 provides. For ease of reference, I reproduce section 33 of the Written Laws (Miscellaneous Amendments) Act No.1 of 2020 as here under:-

" 33. The principal Act is amended in section 106, by deleting subsection (1) and substituting for it the following:

(1) 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; and

(b) upon the lapse of the ninety days period for which the notice of intention to sue relates." **[Emphasis added]**

Similarly, the 'must do' position was emphasized in the case of **Thomas Ngawaiya v Attorney General & 3 Others**, HC-Civil Case No. 177 of 2013 (unreported), in which it was held that:-

"The provisions of section 6 (2) of the Government Proceedings Act are express, explicit, mandatory, admit no implications or exceptions. They must be strictly complied with. Besides, they impose absolute and unqualified obligation on the Court."

As rightly pointed out by the learned State Attorney, the requirement to copy the Attorney General and Solicitor General with a copy of 90 days Notice is to notify them of the impending suit against the Government entity. The purpose of issuing a 90 days' Notice is to notify the Attorney General and Solicitor General among other thing to consult the relevant authorities and collect relevant information from the Government

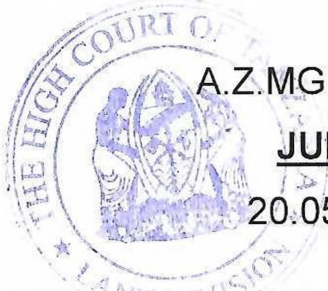
authorities who are party to the case. Also to allow the Attorney General and Solicitor General to find whether there are any amicable settlement of the dispute with the relevant entity. This position was well articulated by my brother Hon. Kalunde, J in the case of **Salim O Kabora v Kinondoni Municipal Council & 3 others**, Land Case No. 10 of 2020.

Based on the above findings, I hold that failure to serve the Attorney General and Solicitor General with a copy of 90 days' Notice vitiates the institution of the suit at hand.

In the upshot, I find that the Preliminary Objection raised by the learned State Attorney is laudable. Thus, I hold that this suit is incompetent before this Court. I accordingly proceed to strike out the Land Case No. 42 of 2022 with leave to refile. No order as to costs.

Order accordingly.

DATED at Dar es Salaam this 20th May, 2022.

A.Z.MGEYEKWA
JUDGE
20.05.2022

Ruling delivered on this 20th May, 2020 in the presence of the Plaintiffs and Mr. Erigh Rumisha, learned State Attorney for the Defendants.



A.Z.MGEYEKWA

JUDGE

20.05.2022