

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND CASE NO.177 OF 2021**

**ASALEA LUJABIKO KIHUPI 1ST PLAINTIFF
ELESTA A. KIHUPI 2ND PLAINTIFF
ELDA G. MSENGI 3RD PLAINTIFF
CAROLINE E. MLAWA 4TH PLAINTIFF**

VERSUS

**THE ATTORNEY GENERAL 1ST DEFENDANT
KIBAHA DISTRICT COUNCIL 2ND DEFENDANT
KIGODA VILLAGE COUNCIL 3RD DEFENDANT
BENARD K. ZUGAZUGA 4TH DEFENDANT
IDDI HALFAN JAMKONDE 5TH DEFENDANT
SAIDI MRISHO 6TH DEFENDANT
ZAINABU OMARI HALILI (Being sued in her own capacity
and also as the administratrix of the estate of the late
MOHAMED K. MSISI) 7TH DEFENDANT
EKSAUDI SINGA 8TH DEFENDANT
SAID HUSEIN SALUM (Administrator of the
Estate of the late Hussein Salum) 9th DEFENDANT**

RULING

04.02.2022 & 08.02.2022

A.Z.MGEYEKWA, J

On 25th October, 2021 the Plaintiffs herein, instituted this suit against the Defendants, seeking nine reliefs as follows:-

a) *The 3rd Defendant be declared a trespasser.*

- b) *The 3rd Defendant be liable for Plaintiff's losses that are to say the cost for the unused equipment which was hired at shillings 6,300,000/= but was prevented by the said 3rd Defendant from being used as per the intention of the Plaintiff.*
- c) *The 3rd Defendant to pay General damages to each Plaintiff which shall be assessed by this Court at its discretion.*
- d) *The 3rd Defendant be ordered to compensate the loss of the Plaintiff (special damages) for causing the Plaintiffs to hire equipment for clearing the bush but the said 3rd Defendant prevented the Plaintiffs from clearing the said bush and from building the houses and warehouse therefore the said equipment was at the site already but the job of clearing and land scarping was not done as intended causing a loss of shillings 3,658,000/=.*
- e) *The farm be declared to be lawfully belonging to the Plaintiffs at every Plaintiff's size of the farm which he bought as per paragraph 5(f) (i) (ii) (iii) and (iv) of this Plaint.*
- f) *Permanent injunctive order against the 3rd Defendant, his agents, people from entering and doing anything within the boundaries of the Plaintiff's farms. "OR"*

g) If it will be held that the 4th to 9th Defendant wrongly sold farms to the Plaintiffs then this Honourable Court be pleased to order the said Defendants (4th to 9th Defendants) to pay and refund the Plaintiffs: -

(i) General damages and

(ii) To return back the money (in respect of prices for the pieces of land) which each plaintiff paid to each Defendant.

h) Cost of this Plaint be footed by the 3rd Defendant.

i) Any other relief as this Honourable Court will deem fit and just to grant.

The 1st to 3rd Defendants' State Attorney filed a Written Statement of Defence disputing the claims and the learned counsel also raised two points of Preliminary Objection that:-

- 1. The suit is bad in law for contravening section 190 (1) (a) and (b) 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.*
- 2. The suit is bad in law for contravening Order VI Rule 14 and 15 of the Civil Procedure Code Cap.33 [R.E 2019].*

When the matter was placed before me for hearing on 4th February, 2022 the Plaintiffs enjoyed the legal service of Mr.Kimwenda, learned

counsel whereas the 1st to 3rd Defendants enjoyed the legal service of Mr. Chakila learned State Attorney and Mr. Mundo, learned State Attorney.

In his submission, Mr. Chakila opted to abandon the second preliminary objection. In supporting his objection, Mr. Chakila the learned State Attorney for the Defendants was brief and straight to the point. He contended that the Plaintiff filed a suit against Kibaha District Council and Kigoda Village Council and both are Government institutions, supervised under the Local Government District Authorities Act, Cap. 287 [R.E 2019]. Mr. Chakila went on to submit that section 190 of the Local Government (Urban Authorities) Act, Cap. 287 [R.E 2019] requires any dispute against local Government Institution, the parties be served with a 90 days' Notice and copies to be served to the Attorney General and Solicitor General.

The learned State Attorney went on to submit that a 60 days' Notice dated 7th September, 2020 was directed to the Director of Kibaha Municipal, and a 30 days' Notice was issued to Kigoda Village. It was his view that the said 30 days' notice contravenes section 190 of Cap. 387 since the plaintiff was required to issue a 90 days' Notice. He insisted that the 30 days' Notice was issued after the enforcement of the Written Laws (Miscellaneous Amendments) Act No.1 of 2020. Fortifying his submission, Mr. Chikira cited the case of **Charles Mikera Benasisu v Commissioner**

for Land & 4 others, Land Case No.127 of 2020. Stressing on the point, Mr. Chikira contended that it is fatal for the Plaintiff to file a suit that did not comply with the requirement of the law.

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

In reply thereto, the learned counsel for the Plaintiffs was brief and straight to the point. He valiantly submitted that the Plaintiff issued a 90 days' Notice to Attorney General, Solicitor General, Director of Kibaha District and Kigoda village. To support his submission he referred this court to annexure 'H1' Mr. Kumwenda argued that the Attorney General and Solicitor General received the 90 days' Notice on 3rd December, 2020. Supporting his submission he referred this court to the attached copy of dispatch, annexure H2. He claimed that the Plaintiff served the District Executive Director of Kihaba District with a 90 days' Notice. The learned counsel for the Plaintiffs continued to argue that the 30 days' Notice was issued before the introduction of the amendments then later they issued a 90 days' Notice. Stressing on his point, Mr. Kumwenda insisted that the 90 days' Notice was issued thus he urged this court to disregard the learned State Attorney objection.

He did not end there, he urged this court to be guided by the overriding objectives; not to rely on technicalities that do not determine the matter to its finality.

In his brief rejoinder, Mr. Chakila reiterated his submission in chief. He strongly contended that the overriding objective cannot be applied blindly to cover every failure. To bolster his submission he referred this court to the case of **Juma Masia v Zone Manager South Tanzania Post Cooperation**, Civil Appeal No. 273 of 2020. He urged this court to decline the learned counsel's prayer. Stressing on the point of 90 days' Notice he argued that the Plaintiff was required to issue a 90 days' Notice to the District Executive Director. Insisting that the 30 days' Notice did not comply with the requirement of section 190 of the Local Government (Urban Authorities) Act, Cap. 288 [R.E 2019].

In conclusion, he prayed for this court not to strike out the suit instead he urged this court to dismiss the preliminary objection 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 preliminary objection is meritorious.*

The respondent's State Attorney claimed that the application is untenable in law for want of the Attorney General to be joined in this application as a requirement of the law under Government Proceedings Act, Cap. 5 [R.E 2019]. The learned counsel for the Plaintiffs does not dispute that they issued a 30 days' notice to the District Executive Director of Kibaha District council. In his further submission he stated that after noting that there was an amended provision of law that required the party who wants to sue the Government to issue a 90 days' Notice, they complied with the amended law. To prove his submission he referred this court to a copy of dispatch book which state that a 90 days' Notice was issued to DED.

From the outset I have to state that, the point of objection has merit. Guided by section 190 (1), (a) and (b) of the Local Government Proceedings Act, Cap.5, as amended by the Written Laws (Miscellaneous Amendments) Act No.1 of 2020. For ease of reference, I reproduce section 31 of the Written Laws (Miscellaneous Amendments) Act No.1 of 2020 which state that:-

“ Section 31. The principal Act is amended in section 190, by deleting subsection (1) and substituting for it the following: “(1) **No suit shall be commenced against a local government authority- (a) unless a ninety days’ notice of intention to sue has been served upon the local government authority and a copy thereof to the Attorney General and the Solicitor General; and (b) upon the lapse of the ninety days period for which the notice of intention to sue relates.**” [Emphasis added].

Applying the above provision it is clear that in any suit which involves the local government authority the Attorney General shall be joined as a necessary party. Reading the application at hand, both respondents to this application are executive agencies therefore it was mandatory for the Plaintiffs to issue a 90 days’ Notice to the District Executive Director.

With due respect, a dispatch book cannot replace a 90 days’ Notice rather the same could be a proof of whether the District Executive Director received the said notice or not. The learned counsel for the Plaintiffs was required to show the 90 days’ Notice which was issued to the District Executive Director not otherwise. For that reason, I fully subscribe to the

learned State Attorney that the Plaintiffs did not issue a 90 days' Notice to the local government authority.

In his submission, Mr. Kumwenda relied on overriding objectives, introduced by the Written Laws (Miscellaneous Amendments) (No.3) Act, No. 8 of 2018. I am aware that the principle of overriding objective is a vehicle for the attainment of substantive justice. However, I hesitate to subscribe to the Plaintiff's Advocate contentions on overriding objectives since the applicability of overriding objective principle, needs to be applied with reasons and without offending clear provisions of the law. In other words, it must be raised at the proper forum. See the case of **Yakobo Magoiga Gichere v Peninah Yusuph**, Civil Appeal No. 55 of 2017.

Therefore, the principle of overriding objective does not apply in the instant case, since section 190 of the Local Government (Urban Authorities) Act, Cap. 288 [R.E 2019] clearly state that no suit shall be commenced against local government authority unless a 90 days' notice of intention to sue has been served upon the local government authority and a copy thereof to the Attorney General and the Solicitor General.

All in all, I find that the application before this court is improper since the applicant failed to meet the mandatory condition of joining the Attorney General as a necessary party.

Based on the above findings, I am of the settled view that the Preliminary Objection raised by the learned State Attorney is laudable. Therefore, I proceed to strike out Land Case No. 177 of 2021 for being incompetent without costs.

Order accordingly.

DATED at Dar es Salaam this 8th February, 2022.




A.Z.MGEYEKWA

JUDGE

08.02.2022

Ruling delivered on this 8th February, 2022 in the presence of Mr. Saiwello Kumwenda, learned counsel for Plaintiffs and Mr. Chakila, learned State Attorney for the 1st, 2nd, and 3rd Defendants.




A.Z.MGEYEKWA

JUDGE

08.02.2022