

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC LAND APPLICATION NO. 43 OF 2022**

**UITDAGER CONSULTANCY AND  
BUSINESS INVESTMENT LTD ..... APPLICANT**

**VERSUS**

**TANZANIA POSTS CORPORATION ..... 1<sup>ST</sup> RESPONDENT**

**SUMAJKT AUCTION MART COMPANY LTD ..... 2<sup>ND</sup> RESPONDENT**

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

*Date of last Order: 28/04/2022*

*Date of Ruling: 10/06/2022*

**RULING.**

**I. ARUFANI, J**

The applicant in the present application, filed in this court an application seeking for an interim order to restrain the respondents, their workers, agents or any person acting under their instruction from evicting the applicant from the demised premises situated at Apartment No. 6, 1<sup>st</sup> Floor, Sokoine drive, Ilala Municipality in Dar es Salaam Region pending expiry of the statutory ninety (90) days' notice to sue the Government and filing of the intended suit.

The application is made under section 2 (3) of the Judicature and Application of Laws Act, Cap 2, R.E 2019, section 95 of the Civil Procedure Code, Cap 33 R.E 2019 and any other enabling provision of the law. After the application being served to the respondents, the respondents filed in

the court a notice of preliminary objection containing the following points of the law: -

- 1. The application is incompetent and bad in law for non-joinder of the Attorney General contrary to provision of sections 6 (5) and 10 of the Government Proceedings Act, Cap 5 R.E 2019.*
- 2. The application is incompetent and bad in law for being supported by a defective affidavit contrary to provision of Order XIX Rule 3 (1) of the Civil Procedure Code, Cap 33 R.E 2019.*

While the applicant was represented in the matter by Mr. Augustine Mathern Kusalika, learned advocate the respondents were jointly represented by Mr. Charles Mtae, learned State Attorney. The counsel for the parties prayed and allowed to argue the points of preliminary objection raised by the respondents by way of written submission.

The counsel for the respondents stated in relation to the first point of preliminary objection that, it is a principle of the law as provided under section 6 (3) of the Government Proceedings Act that, all suits against the entity of the Government alleged to have committed a civil wrong on which the civil suit is based shall be brought to the court after expiry of the notice period and the Attorney General shall be joined as a necessary party. He argued that, as the applicant intends to file a suit in the court against the first and second respondent which are the Government

entities, the Attorney General ought to be sued and not the Solicitor General. He argued that, the law is very clear that failure to join the Attorney General in the application vitiates the whole proceedings.

He argued that, as the word shall is used in the above cited provision of the law, then compliance of what is stated therein is mandatory pursuant to section 53 (2) of the Interpretation of Laws Act, Cap 1 R.E 2019. He submitted that, as the application has been instituted in contravention of the position of the law stated hereinabove the remedy available is for the application to be struck out. To support his submission, he referred the court to the cases of **Seleman Lwenda @ Macho & Five Others V. Dar es Salaam Rapid Transit Agency (DART) & Two Others**, Misc. Civil Application No. 499 of 2021, HC at DSM (unreported) and **Hussein Abdallah and Another V. Pravin Shah & Another**, Land Case No. 7 of 2021 HC at Mwanza (unreported) where it was stated the cited provision of the law is couched in mandatory term.

In arguing the second point of preliminary objection the counsel for the respondents reproduced what is provided under Order XIX Rule 3 (1) of the Civil Procedure Code in his submission and stated that, the applicant is the company duly registered under the law of Tanzania and has its legal personality. He submitted that, as the applicant has its legal personality the affidavit in support of the application ought to have been sworn and

signed by its principle legal officers, Directors or Secretary as they are persons who are aware of the internal affairs of the company. He stated the exception can only happen when there is a Board resolution warranting a third party to swear and sign affidavit on its behalf.

He argued that, the advocate representing the applicant in the instant matter is the one deposed the facts which are internal affairs of the applicant's company in the affidavit supporting the application at hand. He stated that, the facts deposed by the counsel for the applicant in the affidavit supporting the application cannot be in his personal knowledge. He referred the court to the case of **Tanzania Breweries Limited V. Herman Bildad Minja**, Civil Application No. 11/18 of 2019 and the case of **Lalago Cotton Ginnery & Another V. The Loans and Advances Realization Trust (LART)**, Civil Application No. 80 of 2002 (unreported) where it was stated an advocate can swear and file in court an affidavit in proceedings in which he appeared for his client on matters which are within his personal knowledge. He stated that the whole affidavit supporting the application contain hearsay save for what is deposed in paragraphs 1, 9 and 13 and prayed the application to be struck out with costs.

In his reply the counsel for the applicant stated in relation to the first point of preliminary objection that, the respondent's quarrel is based

on non-joining of the Attorney General in the application as required by section 6 (5) of the Government Proceedings Act. He stated that, paragraph 9 of the affidavit shows the Attorney General has been served with notice as required by the law but the same is yet to expire. He submitted that, as the notice has not expired the Attorney General cannot be joined in the matter under section 6 (3) of the Government Proceedings Act as the matter before the court is an application and not a suit.

He stated the question to address in this matter is whether the application at hand is a suit and stated the answer is in negative. He stated the position would have been correctly if the applicant were to lodge a suit upon expiry of notice without joining the Attorney General as a necessary party. He stated that, the application at hand is not a suit but a mareva injunction application which the law is silent on joining the Attorney General as a necessary party in a suit against Government. He argued that, in order to join the Attorney General in a suit against Government there are some conditions required to be fulfilled.

He stated that, there must be a suit and the Attorney General must have been served with notice and the notice issued has expired. He submitted that, none of the above stated conditions has been fulfilled in the application at hand and stated the point of preliminary objection raised by the counsel for the respondent is premature and deserve to be

overruled with costs. He distinguished all the cases cited in the submission of the respondents by stating they are basing on none joinder of the Attorney General in the suit and not in the application.

In arguing the second point of preliminary objection the counsel for the applicant referred the court to the case of **Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd**, [1969] EA 696 where what constitutes preliminary objection was stated. He stated that, from what is stated in the above cited case, the second point of preliminary objection has been misplaced as it does not qualify to be a preliminary objection. He stated that, he sworn the affidavit supporting the application after being authorized by the applicant. He stated that the deponent has not offended the provision of Order XIX Rule 3 (1) of the Civil Procedure Code as he has demonstrated the sources of the information deposed in the affidavit. He stated that, the second point of preliminary objection is devoid of merit and the same should be overruled.

He went on arguing that, currently there is an overriding objective principle which he prayed the court to employ the same in order to attain justice to both parties. He cited section 3A (1) and (2) together with section 3B (1) and (2) of the Civil Procedure Code which provides for the principle of overriding objection. At the end he submitted that the points of preliminary objection raised by the learned State Attorney for the

respondents is devoid, unfounded and meritless and prayed the same to be overruled with costs.

In his rejoinder the learned State Attorney told the court in relation to the submission made by the counsel for the applicant in respect of the first point of preliminary objection that, joinder of the Attorney General in the application was of utmost important in compliance with the provision of the Government Proceedings Act. He submitted that the requirement provided under the mentioned law does not only apply to suit as suggested by the counsel for the applicant but also extend to application. To support his argument, he cited in his submission some applications filed in this court seeking for the similar order of mareva injunction whereby the Attorney General was joined as a necessary party.

He referred the court to the cases of **Hotels and Lodges Tanzania Ltd V. Conservation Commissioner, Ngorongoro Conservation Authority and The Attorney General**, Misc. Commercial Application No. 136 of 2021 and **Board of the Registered Trustees of Lawate Fuka Water Supply V. RUWASA Siha District, CRDB Bank Siha Branch and the Attorney General**, Misc. Civil Application No. 27 of 2021 (both unreported) where the Attorney General was joined as a necessary party.

He also referred the court to the case of **Seleman Lwenda alias Macho** (supra) where a similar objection was raised and determined by the court. In addition to that he referred the court to the case of **Zena Theopista Mpenda and 12 Others V. Ubungo Municipal Council**, Misc. Land Application No. 238 of 2020, HC Land Division at DSM (unreported) where the application for mareva injunction was struck out because of non-joinder of the Attorney General in the application as a necessary party.

As for the second point of preliminary objection the learned State Attorney stated that, the submission by the counsel for the applicant that the objection will require proof which make it to fail to meet the test set in the famous case of **Mukisa Biscuit Manufacturing Co. Ltd** (supra) is misconceived. He argued that, it is true that the cited case requires preliminary objection to be on point of law. He stated that, they have cited Order XIX Rule 3 (1) of the Civil Procedure code in their submission and went on stating that, in determining any preliminary objection the court is required to look on the law and the pleadings filed in the court by the parties.

He stated further that, the court is required in the matter at hand to look into the affidavit supporting the application and added that the preliminary objection they have raised in the present application qualifies



the test laid in the above cited case. As for the prayer made by the counsel for the applicant that, the court be pleased to invoke the principle of overriding objective in the matter at hand the learned State Attorney argued that, the principle should not be invoked to act as a shield to cover the mistakes of the applicant. He prayed the court to find the affidavit is defective and strike out the same.

Having carefully considered the rival submission from both sides the court has found the issues to determine in this matter are whether the application is incompetent and bad in law for non-joinder of the Attorney General and whether the application is incompetent and bad in law for being supported by a defective affidavit. Starting with the first issue which is derived from the first point of preliminary objection raised by the respondents the court has found the learned State Attorney argued the application is incompetent and bad in law because the Attorney General has not been joined in the application as a necessary party.

The court has found the requirement to join the Attorney General in all suits brought to the court against the Attorney General as necessary party is provided under section 6 (3) of the Government Proceedings Act which the learned State Attorney argued in his submission was violated in the present application. In order to be able to appreciate what is the gist of what is provided in the above cited provision of the law it is to the view

of this court pertinent to have a look on what is provided under section 6 (2) of the Government Proceedings Act. The cited provisions of the law 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."*

*"6 (3) 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".*

From the wording of the above quoted provisions of the law it is crystal clear that before any suit is filed in the court against any Government entity, the claimant is required to issue a notice of ninety days to the Government entity alleged it has committed a civil wrong causing the claimant to sue the same in court. The claimant is also required to give copy of the notice issued to the Government entity to the Attorney General and the Solicitor General who are overseers of all legal proceedings filed in the court against the Government.

The cited provisions of the law and specifically section 6 (3) of the Government Proceedings states further that, after expiration of the stated period of ninety days the claimant can institute a suit in the court against the concerned Government entity but with a condition that the suit is required to be brought against the Attorney General. The position of the matter at hand as can be deduced from what is stated in the affidavit supporting the application is that, the applicant has filed the present application in the court before expiration of the ninety days given in the notice issued by the applicant to the respondents in the matter at hand.

The order the applicant is seeking in the application he has filed in the court is for an order to restrain the respondents, their workers, agents or any other person acting under the instruction of the respondents from evicting the applicant from the demised property which is Apartment No. 6, 1<sup>st</sup> Floor, Sokoine Drive within Ilala District in Dar es Salaam Region pending expiry of the statutory ninety days' notice to sue the Government and file the intended suit in the court. It is because of the above stated position of the law the respondents came up with the point of preliminary objection that, as the Attorney General has not been joined in the application at hand, the application is incompetent and bad in law for contravening the requirement provided under section 6 (3) of the

Government Proceedings Act which requires the Attorney General to be joined in all suit against the Government as a necessary party.

The court has found the counsel for the applicant contended that, the application at hand has not contravened the above cited provision of the law because the matter before the court is not a suit but an application for mareva injunction order and the Attorney General is required to be joined in suit and not in application like the one before the court. That being the position of the argument from the counsel for the applicant the court has found the question to determine here is what is a suit. The court has found the term "suit" was defined in the case of **Tanzania Motor Services Ltd & Another V. Mehar Singh t/a Thaker Singh**, Civil Appeal No. 115 of 2005, CAT at Dodoma (unreported) where the court quoted the definition given in **Law Lexicon, The Encyclopaedic & Commercial Dictionary**, 2002 (Reprint) at page 1831 where it is stated that: -

*"The term "suit" is a very comprehensive one and is said to apply to any proceeding in a Court of Justice by which an individual pursues a remedy which the law affords him. The modes of proceedings may be various; but if the right is litigated between the parties in the Court of Justice the proceeding is a suit".*

The term "suit" is also defined in the **Black's Law Dictionary**, 8<sup>th</sup> Edition at page 1476 to mean *"any proceedings by a party or parties*

*against another in a court of law*". From the definition of the term "suit" given hereinabove it is the view of this court that, as rightly argued by the State Attorney representing the respondents in this matter the word suit used under section 6 (2) and (3) of the Government Proceedings Act can also be construed to govern even application like the one filed in the court by the applicant. The court has arrived to the above finding after failing to see any logic in the argument by the counsel for the applicant that it is not a requirement of the law to join the Attorney General in the matter at hand as the application is not a suit.

The court has also come to that finding after failing to see why the Solicitor General was joined in the application while there is no any provision of the law requiring the Solicitor General to be joined in any proceeding filed in court against the Government and leave out the Attorney General who as provided under section 6 (3) of the Government Proceedings Act, the suit the applicant intends to file in the court is supposed to be brought against the Attorney General and not the Solicitor General who has been joined in the application at hand.

To the view of this court the Attorney General was supposed to be joined in the application at hand and as stated in the cases of **Seleman Lwenda alias Macho** and **Hessein Abdallah** cited in the submission of the State Attorney failure to join the Attorney General in the application

renders the application defective for failure to join the necessary party. The argument by the counsel for the applicant that the above referred cases are distinguishable from the application at hand as they were suits has been found by this court that, as they were dealing with the issue of non-joinder of the Attorney General in the suits and the court has already found for the purpose of the matter at hand the term suit covers also application at hand, they are relevant to the application at hand.

The court has found the issue of the Attorney General to be joined in the application for an order of mareva injunction like the one at hand was considered in the case of **Zena Theopista Mpenda**, cited in the rejoinder of the State Attorney and found that, non-joinder of the Attorney General in the application was an irregularity which vitiates the application and it renders the whole proceedings void. In the light of all what I have stated hereinabove the court has found the first point of preliminary objection raised by the respondents deserve to be upheld.

Having upheld the first point of preliminary objection the court has found there is no need of belabouring to deal with the second point of preliminary objection as it will not save the application filed in this court by the applicant. Consequently, the first point of preliminary objection raised by the respondents in the application at hand is hereby upheld and

the application is struck for being incompetent and the costs to follow the event. It is so ordered.

Dated at Dar es Salaam this 10<sup>th</sup> day of June, 2022



I. Arufani

**Judge**

10/06/2022

**Court:**

Ruling delivered today 10<sup>th</sup> day of June, 2022 in the presence of Mr. Augustine Mathern Kusalika learned counsel for the applicant and assisted by Mr. Nixon Tugara, learned advocate and Mr. Augustine Mathern Kusalika is also holding brief of Mr. Charles Mtae, learned State Attorney for the respondents. Right of appeal to the Court of Appeal is fully explained.



I. Arufani

**Judge**

10/06/2022