IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE No. 340 OF 2022

NASSORO MBARUKU NASSORO (The Administrator

of the estate of KURWA ABDALLAH SALUM) .....PLAINTIFF

VERSUS

MAKUBI HAMISI MWINYIHIJA .....1ST DEFENDANT

THE ATTORNEY GENERAL .....2ND DEFENDANT

COMMISSIONER FOR LANDS.....3RD DEFENDANT

RULING

Date of last Order:21/08/2023
Date of Ruling:05/10/2023

K. D. MHINA, J.

House No. 64, attached to the land described as Plot No. 10 Block 7, located at Magomeni Mapipa, Dar es Salaam, is the subject of the battle between the parties.

The plaintiff, Nassoro Mbaruku Nassoro(Administrator of the estate of the late Kurwa Abdallah Salum), alleges that the house is an estate left behind by the deceased Kurwa Abdallah Salum.

He further alleges when he instituted a Probate Cause No. 77 of 2020 at Kinondoni Primary Court to apply to administer the estate of the deceased Kurwa Abdallah Salum, the first defendant appeared and claimed that the house belonged to him. Due to that, the Primary Court directed the parties to file their dispute at the District Land and Housing Tribunal ("the DLHT") for Kinondoni.

At the DLHT, the 1st defendant revealed that he owned the house by the letter of Offer dated 18 February 1964 and a Certificate of Right of Occupancy dated 23 June 2020.

This triggered the plaintiff to seek relief from this Court. He now prays for Judgment and Decree against the defendants for the following reliefs;

i. Declaration that the disputed house No. 64, Plot No. 10, Block 7, Magomeni Mapipa, Dar es Salaam belongs to the deceased Kurwa Abdallah Salum and not the 1st Defendant

ii. The commissioner for lands, i.e., 3rd Defendant, revokes the right of occupancy granted to 1st Defendant

iii. Cost for the suit.

On their side, the defendants vehemently disputed the claim in their Written Statements of Defence. Further, 2nd and 3rd defendants countered the plaint by a notice of preliminary objection canvassed two grounds, namely;

i. *The Plaintiff has no locus Contrary to Section 33 of the Probate and Administration of Estate Act [Cap.352. R.E 2002]*

ii. *The 90 days' notice is defective Contrary to Section 6(2) of Government Proceedings Act] Cap. 5 R.E 2019]*

The preliminary objection was argued by way of written submissions. The plaintiff was represented by Professor Abdallah J. Saffari, learned advocate, while the 2nd and 3rd respondents were presented by Urso Luoga, learned State Attorney. The 1st defendant appeared in person, unrepresented.

Mr. Luoga abandoned the first ground of preliminary objection and proceeded with the second only.

In supporting the second ground of objection, Mr. Luoga cited section 6 (2) of the Government Proceedings Act ("the GPA")[Cap 5 R: E 2019], which makes it mandatory for a person who wishes to institute a suit against the Government to issue a 90 days' notice.

He stated that the requirement is mandatory because of the word "shall" used in the provision of law. Explaining the word shall, he said that

as per section 53 (2) of the Interpretation of Laws Act [Cap 1 R: E 2019], the word defined meant that the function so conferred must be performed.

Furthermore, he submitted that paragraph 11 of the plaint indicated that the notice of intention to sue was issued and attached. But the attached notice had been issued and received by the Solicitor General. It was never issued and served to the 2nd and 3rd defendants as per the requirement of law.

He further submitted that the notice also had been addressed to the Attorney General and the Department concerned, i.e. the Commissioner for Lands, as per the requirement of law.

Therefore, he prayed that the suit be struck out for being filed in contravention of section 6 of the GPA.

In response, Professor Safari submitted that the disputed Notice to Sue was clearly addressed to the Attorney General and copied to the Commissioner for Lands. But it was received by the Solicitor General on behalf of the Attorney General, as clearly shown by the official stamp of the Solicitor General dated 23 September 2022.

He explained that the Attorney General is advocate number one in terms of the Advocates Act, Cap. 341, is the advocate who represents all

Government Departments, including the 2nd defendant. Therefore, as per the Doctrine of Constructive Notice, the 2nd and 3rd defendants are deemed to have received the notice under the circumstances of this case. On this, he cited **Black's Law Dictionary p.1090, 8th Edition, Thomson West, 2004,** where a doctrine of constructive notice is defined to mean;

> *"Notice arising by presumption of law from the existence of facts and circumstances that a party had a duty to take notice of, such as a registered deed or a pending lawsuit, notice presumed by law to have been acquired by a person and this imputed to that person."*

He cemented his position by stating that the quotation regarding the doctrine of constructive notice is akin to section 122 of the Law of Evidence Act, Cap.6, which provides that:

> *"A court may infer the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case."*

And argued that since the Attorney General had raised a preliminary objection concerning the Commissioner for Lands conclusively, that indicates that there was correspondence between the two defendants regarding that notice to sue.

In addition to the above, Professor Safari invited this Court to invoke Article 107(2)(e) of the Constitution of the United Republic of Tanzania and the "oxygen doctrine", which demands courts not be unnecessarily bound by technicalities in the course of their duties. To substantiate his argument, he cited **D.T. Dobie (T) Ltd vs. Phantom Modern Transport [1985] Ltd**, Civil Application no 141 of 2001, and **Essaji v. Solank [1968] EA 218**

In conclusion, he submitted that the 2nd and 3rd defendants were not prejudiced for any error that may have been occasioned while serving them with a notice to sue them.

The 2nd and 3rd defendants did not file the rejoinder.

Having gone through the pleadings, the 90 days' notice to sue attached to the plaint and the submissions for and against the P.O., the issue that has to be resolved is whether or not the 90 days' notice to sue is proper.

The entry point in determining the above issue is Section 6 (2) of the Government Proceedings Act, Cap 5, R: E 2019.

The provision reads;

"(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****".* [Emphasis provided]

Therefore, from the cited provision of law, there must be proof that the notice is served to the concerned Government entity/ department, the Attorney General and the Solicitor General.

In **Emmanuel Titus Nzunda vs. Arusha City Council and Others**, Land Case No. 28 of 2020, Tanzlii (HC-Arusha), this Court insisted on the compliance of the requirement of 90 days' notice by holding that;

"The 90 days' notice being a mandatory legal requirement, the same need be complied with before instituting suit or joining the government into any suit. It is upon the Plaintiff to attach a notice showing that the same was duly served and received".

Therefore, from the cited provision of law and case law, the following are essential for a party who seeks to sue the government.

One, there must be notice of not less than 90 days indicating the intention to sue the Government.

Two, the notice shall be addressed and served to the concerned Government Minister, Department or officer.

Third, the notice must specify the basis of the claim against the Government and

Fourth, the Attorney-General and the Solicitor General shall be served and received with a copy of the notice.

In addition to the above, there must be evidence that the notice was served to the concerned Government Minister, Department or officer. The plaintiff/ applicant must provide such a notice showing that it was duly served and received. As a standard of proof of service, there must be a signature receiving officer, the stamp of the concerned Government entity and a date indicating the date of receipt.

The four above are the necessary elements of the 90 days' notice to sue the Government and the proof of service. In the absence of the above, the notice shall be treated improperly and not properly served. Therefore, it cannot be considered as it means there was nothing to initiate proceedings to sue the Government.

In the instant suit, it is quite clear that the notice was directed to the Attorney General with the intent to sue the Commissioner for Lands and the Attorney General (Annexure "F" to the plaint)

But as the notice itself reveals, it was directed to the Attorney General and the Commissioner for Land was copied. However, it was presented and served to the Solicitor General.

From above, the following can be gleaned;

One, the notice was never addressed and served to the concerned Government entity, i.e. the Commissioner for Lands.

Two, though the notice indicated that the Commissioner for land was copied, but he was never served.

Third, the notice was addressed to the Attorney General, but he was never served; instead, the plaintiff served the Solicitor General.

Fourth, though the notice was served to the Solicitor General, he was neither addressed nor copied the same.

Therefore, the notice was never served to the Commissioner for Land and the Attorney General.

Flowing from above, the requirements of section 6 (2) of the GPA were not complied with.

In his submission, Professor Safari argued that since the notice was served to the solicitor general, who is the advocate for the Government and represents all government departments, including the 2nd defendant, the situation is covered by the doctrine of constructive notice.

On this, my views are the submission is a misconception because constructive notice is a doctrine under the Company Law.

The House of Lords first introduced the doctrine in 1857 in the case of **Ernest vs. Nicholls**, 10 ER 1351. The doctrine intends to protect the companies at the expense of third parties by implying that the persons dealing with the company are deemed familiar with the contents of the Articles of Association and Memorandum of Association because they are available for public inspection. Under the doctrine, the documents are considered to be known by outsiders who seek to hold a relationship with a company so that later, they cannot claim ignorance of the company.

Therefore, the doctrine of constructive notice is a misconception and not applicable under the Government Proceedings Act.

Professor Safari convinced this Court to consider Article 107(2)(e) of the Constitution of the United Republic of Tanzania and the Oxygen principle because 2nd and 3rd defendants were not prejudiced for any error that may have been occasioned in the process of serving them with notice to sue them.

From above, I have the following;

One, as rightly submitted by Mr. Luoga, section 6 (2) of the GPA is couched in mandatory terms because of the word "shall," which is imperative and obligatory to perform an act.

The word shall have been interpreted under Section 53 (2) of the Interpretation of Laws Act, Cap 1 [RE: 2019] to mean and apply:-

"53 (2) Where in a written law the word "shall" is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed."

Further, this Court in **Thomas Ngawaiya vs. The Attorney General and 3 Others,** Civil Case No. 177 of 2013 Tanzlii (HC-DSM) at page 15 held that;

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

Therefore, there is no shortcut in compliance with section 6 (2) of the GPA.

Two, failure to serve the concerned Government Minister, Department or officer will prejudice them. They would not know the nature of the claims the party intends to sue them.

Three, admittedly, Article 107(2)(e) of the Constitution of the United Republic of Tanzania and the Overriding or Oxygen principle are enjoined to administer justice according to law only without being unduly constrained by rules of procedure and technical requirements. But also, the Courts should not turn blind to the mandatory provision of the procedural law, which goes to the root of the case.

The Court of Appeal in **SGS Societe Generale de Surveillance SA and Another vs. VIP Engineering & Marketing Ltd and Another, Civil Appeal No. 124 of 2017 (Tanzlii)** held that;

> *"The amendment by Act no. 8 of 2018 was not meant to enable parties to circumvent the mandatory rules of the court or turn blind to the mandatory provision of the procedural law which goes to the foundation of the case".*

Further, in the **Union of Tanzania Press Clubs and another vs. The Attorney General**, Civil Appeal No. 89 of 2018 (Tanzlii), the Court of Appeal held that;

> *"Moreover, in terms of Article 107B of the Constitution, in exercising the powers of dispensing justice, all courts are enjoined to observe the provisions of the Constitution and laws of the land, which includes the procedural laws".*

From the above-cited cases, the oxygen principle is not a "helping hand" in case of a failure to conform with the mandatory procedural laws that go to the root of the case.

Therefore, as I mentioned earlier, the notice must state clearly and specify which Government authority a person intends to sue. This is key to informing the concerned authority about the intention of the party and the nature of the claims. Also, to alert and notify the Government through the Attorney General of the intent to sue its entities so that he can join the proceedings. In the absence of the above, it renders the notice defective."

In conclusion, I hold that the notice of intention to sue in this suit is defective for the reasons discussed above. It goes to the root of the case, i.e. competence before this Court; thus, it affects the suit as a whole and renders it improper.

In the upshot, I find that the preliminary objection raised by the 2nd and 3rd defendants has merits. Consequently, the suit is struck out with costs.

It is so ordered.

K. D. MHINA
JUDGE
05/10/2023