

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

MISC. LAND APPLICATION NO. 352 OF 2023

(Arising from Misc. Land Application No. 207 of 2021)

THE MAARIFA INSTITUTE APPLICANT

VERSUS

TANZANIA COTTON BOARD 1ST RESPONDENT

GREENLIGHT AUCTION MART LIMITED 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

Date of Last Order: 07/09/2023

Date of Ruling: 12/10/2023

RULING

I. ARUFANI, J

The applicant filed the instant application in this court under section 95 of the Civil Procedure Code, Cap 33 R.E 2019, section 2 (3) of the Judicature and Application of Laws Act, Cap 358 R.E 2019 and any other enabling provision of the law seeking for the orders quoted hereunder: -

- 1. That this honourable court be pleased to order that the first respondent and the second respondent and their respective agents to immediately restore the applicant herein onto premises situated on Plot No. 91 Title No. 186038, located at Ada Estate – Kinondoni Municipality in Dar es Salaam Region consequent to unlawful and unjustifiable eviction conducted by the respondents’ officials on 19th day of May, 2023 without any reference to the court while there is a deed of settlement that buttress for the same.*

2. *That this honourable court be pleased to order that the first respondent and second respondent and their respective agents and/or assignees to immediately restore the applicant's damaged properties and the loss of property.*
3. *That this honourable court be pleased to make an order barring the first respondent and the second respondent with their respective agents and/or assignees, to undertake any act or activity in the suit premises until when this application shall be heard and determined.*
4. *Costs of this application be borne by the respondents*
5. *Any other order(s) this honourable court may deem fit to grant or be pleased to issue.*

After the respondents being served with the application of the applicant, the first and third respondents filed in the court their counter affidavit together with a notice of preliminary objection to oppose the application. The second respondent did not file counter affidavit in the court to oppose the application and the court was informed by its Principal Officer namely Bernard Kuweta that they are not opposing the application. The notice of preliminary objection filed in the court by the first and third respondents states as follows: -

"The application is incompetent for want of issuing 90 days' notice of intention to sue the Government as per the provision of section 6 (2) of the Government Proceedings Act Cap 5 R.E 2019."

While the applicant was represented in the matter by Mr. Aloyce Komba, learned advocate the first and third respondents were represented in the matter by Mr. Edwin Joshua Webiro, learned State Attorney and the second respondent was represented by Mr. Bernard Kuweta, Principal Officer of the second respondent. For the purposes of expediting determination of the application as it was filed under certificate of urgency, the court ordered the preliminary objection raised by the first and third respondents be argued together with the application by way of written submissions.

Before going to the submissions filed in the court by the counsel for the parties the court has found apposite to start with brief background of the matter as can be deduced from the affidavit, counter affidavit and the submissions filed in the court by the counsel for the parties. It is undisputed fact that the applicant was a tenant in the first respondent's suit premises located on Plot No. 91 with Certificate of Title No. 186038, Ada Estate Kinondoni Municipality in Dar es Salaam Region (henceforth; the suit premises).

It was stated on 31st July, 2021 the applicant was in outstanding rent arrears of Tshs. 72,320,334.07. After the applicant being served with notice of intention to evict her from the suit premises, the applicant filed in this court Misc. Land Application No. 207 of 2021 seeking for among

other orders that, the status quo in respect of the suit premises be maintained pending expiration of 90 days statutory notice to sue the first respondent in the court. Before hearing of the application, the parties executed a deed of settlement which they filed in the court and registered as a decree of the court.

One of the terms of the agreement reached by the parties in the stated deed of settlement was for the applicant to pay Tshs. 7,250,000/= per month to the first respondent after the first respondent issued a control number for payment of the stated sum of money on 28th of each month commencing from 28th July, 2021. It was also agreed the applicant should have paid to the first respondent the sum of USD 2,000 being monthly rent which should have been paid after the applicant being issued with control number by the first respondent.

The applicant averred in the present application that from October, 2022 the first respondent stopped issuing control number for payment of the rent as agreed in the deed of settlement and on 19th May, 2023 the respondents' officials evicted the applicant from the suit premises without resorting to the court as agreed in their deed of settlement. It is averred the stated eviction caused the applicant to suffer considerable damages to the office' furniture and equipment valued Tshs. 218,000,000/=. The

stated exercise caused the applicant to come to this court with the present application seeking for the orders listed at the beginning of this ruling.

Before going to the merit of the application I will start with the preliminary objection raised by the counsel for the first and third respondents because it is a trite law that where there is a preliminary objection raised in a matter the same is required to be determined first before going to the merit of the suit. If the preliminary objection will not dispose of the application the court will thereafter revert to the merit of the application.

The counsel for the first and third respondents stated in relation to the preliminary objection they have raised in the matter that, after the matter being settled the applicant neglected again to effect payment of rent for other months as she continued to stay in the suit premises without paying rent. He stated it is due to the stated failure of the applicant to pay the rent caused the respondents to evict the applicant from the suit premises and rented the same to another tenant. He argued the applicant has lodged the instant application in the court purporting that it is arising from Misc. Land Application No. 207 of 2021. He submitted the stated application was completed in August 2021 and it is no longer pending in the court.

He argued that, the present application is contravening the dictates of section 6 (2) of the Government Proceedings Act which laid down the procedure to be followed when it comes to the question of suing the Government and its agencies in civil proceedings. He submitted the applicant lodged the instant application in the court without complying with the requirement of issuing 90 days' notice to sue the Government provided under section 6 (2) of the Government Proceedings Act.

He stated the applicant was required to comply with the requirement provided in the above cited provision of the law because this is a new matter which does not relate to Misc. Land Application No. 207 of 2021 which was settled amicably by the parties. The counsel for the first and third respondents tried to define the application at hand to show it is a suit which could have not been filed in the court without complying with requirement of the law provided under section 6 (2) of the Government Proceedings Act. The cited provision of the law requires before instituting a civil suit in the court against Government or its agencies, 90 days' notice of intention to sue the Government and its agencies must be issued to the Government and the concern agency.

He referred the court to various cases decided by the Court of Appeal and this court which define the term suit. The cited cases include the cases of **Tanzania Motor Service Ltd & Another V. Mehar Singh**

T/A Thaker Singh, Civil Appeal No. 115 of 2005, **Tanzania Posts Corporation V. Jeremiah Mwandu**, Civil Appeal No. 474 of 2020, **Tunu Mwapachu & Others V. National Development Corporation & Another**, Civil Appeal No. 155 of 2018 and **MSK Refinery Limited V. TIB Development Bank Limited**, Civil Application No. 307 of 2020 (All unreported). The above cases define the term suit to cover any proceeding in a court of justice which a person is pursuing for a remedy which the law affords him.

He argued that, failure by the applicant to issue to the Government notice of intention to sue the Government and its agency as required by the law renders the application before the court unmaintainable. He supported his argument with the case of **Arusha Municipal Council V. Lyamuya Construction Company Limited**, TLR 13 where it was stated failure to comply with section 106 (1) of the Local Government (Urban Authorities) Act which requires one month notice to be served to the urban authority before instituting a suit against it renders a suit unmaintainable. He also referred the court to the case of **Nderungo M.R.A @ Romuald Materu @ Romuald Matheru V. Mbeya City Council & Others**, Land Case No. 05 of 2022, HC Court at Mbeya (unreported) where it was stated failure to issue the required statutory legal notice strips off the court with requisite jurisdiction.

It was argued by the counsel for the first and third respondents that, as the word used under section 6 (2) of the Government Proceedings Act is the word "shall", then compliance with the requirement provided therein is mandatory. In supporting his argument, he referred the court to section 53 (2) of the Interpretation of Laws Act, Cap 1 R.E 2019 and the case of **Godfrey Kimbe V. Peter Ngonyani**, Civil Appeal No. 41 of 2014 where it was stated that, whenever the word "shall" is used in a provision of law to confer function to be performed, it means performance of the required function is imperative. He based on the above stated submission to implore the court to find the application is unmaintainable and urged the court to strike it out with costs.

In his reply the counsel for the applicant stated the cases cited by the counsel for the first and third respondents are purely on interpretation of what constitutes a suit which in real sense is not a contention before this court. He argued the contention before the court is whether the action by the respondents was warranted and whether the applicant has the right to challenge the same before this court while relying on the terms of the deed of settlement. He stated the authorities cited by the counsel for the first and third respondents are trying to mislead the court from main issues in the present application and argued they are distinguishable from the current application.

He submitted the current application is rooted from deed of settlement arising from Misc. Land Application No. 207 of 2021 whose 90 days' notice was served to the respondents by the applicant. He stated failure to satisfy the terms of the deed of settlement entitled either party and especially the first respondent to come to the court pursuant to clause 5 of the settlement deed. He argued the current application cannot be interpreted to mean it is a fresh suit. He referred the court to the case of **Oyster Bay Properties Limited and Another V. Kinondoni Municipal Council & Five Others**, Civil Revision No. 4 of 2011, CAT at DSM (unreported).

He stated the respondents acted on the deed of settlement while purporting breach and enforcing the content of the agreement which in reality they did not comply to. He submitted the respondents breached the deed of settlement at its purported enforcement and they have knowledge that the current application is not a new issue. He submitted further that, it is from the same transaction or breach of the said deed of settlement that the applicant has premised the claims before the court. He contended that, the matter before the court calls upon the court to ascertain whether execution proceedings against the Government calls or demands 90 days' notice or filing of a new suit from the applicant.

He stated it is his considered submission that the execution or enforcement of decree does not call for compliance with the provisions of section 6 (2) of the Civil Procedure Code. He submitted the current application is within the purview of the law and prayed the preliminary objection raised by the counsel for the first and third respondents to be dismissed for want of merit and the application to be heard on merit for the purpose of attaining justice to all parties.

In his rejoinder the counsel for the first and third respondents argued that, there is no pending application before this court upon which the present application can be said it is originating. He stated the purported Misc. Application No. 207 of 2021 was settled and the decree of the court was issued hence conclusively determined the application. He stated the assertion by the applicant that the application is still pending in the court is misleading. He argued clause 5 of the deed of settlement permits the first respondent to file application for execution against the applicant in the event of default by the applicant to pay the amount agreed and not otherwise.

He stated after the deed of settlement being recorded as the decree of the court it ceased to exist hence the purported prayers by the applicant of enforcing the deed of settlement are misconceived. He argued the applicant was evicted from the suit premises for failure to pay rent

which is a breach of Lease Agreement and not deed of settlement. He stated the eviction was not in relation to the decree of the court but due to default in paying rent. He argued the rental arrears resulted into eviction of the applicant from the suit premises accrued after settlement of the said application and all arrears before the issuance of the decree of the court were included in the stated decree.

He argued that, after the deed of settlement being executed and recorded it ceased to exist. He stated the application at hand is not an application for execution but rather a fresh suit filed by the applicant to challenge the eviction done by the first respondent. He went on reiterating what he stated in his submission in chief that the applicant ought to comply with the provision of section 6 (2) of the Government Proceedings Act which requires 90 days' notice to be issue prior instituting in the court a suit against Government. At the end he reiterated his prayer that the application be struck out with costs.

After carefully going through the affidavit and counter affidavit filed in this court by the parties and after considering the rival submissions filed in this court by the counsel for the parties the court has found the issue for determination in the present application is whether the applicant has right to challenge the action of the respondents of evicting her from the suit property by relying on the terms of the settlement deed entered by

the parties or she ought to have followed the procedure of suing the Government provided under section 6 (2) of the Government Proceedings Act.

The court has found in order to be able to determine the stated issue it is apposite to start by having a look on what was agreed by the parties in the deed of settlement which was registered by the court as a decree of the court. The court has found the deed of settlement signed by the parties and recorded by the court as a decree of the court annexed in the affidavit of the applicant has the terms of the agreement entered by the parties. One of the terms agreed by the parties was for the applicant to pay to the first respondent the outstanding rent arrears which until 31st July, 2021 was at the tune of Tshs 72,320,334.07.

The parties agreed at clause 2 of the same part of the deed of settlement that, in payment of the stated outstanding rent arrears the applicant would have paid Tshs. 7,250,000/= per month and the stated payment would have been made to the first respondent after issuing control number on 28th day of each month commencing from 28th August, 2021. It was also agreed by the parties at clause 3 of the deed of settlement that the plaintiff would have paid to the first respondent USD 2,000/= as monthly rent upon issuance of control number.

The court has found the counsel for the first and third respondents argued that, eviction of the applicant from the suit premises was not done because of the applicant's failure to comply with what was agreed in the settlement deed which was recorded as the decree of the court. He submitted the reason for the applicant to be evicted from the suit premises is because the applicant neglected to effect payment of rent of other months and she continued to occupy the suit premises which is a breach of lease agreement.

The court has found it is deposed at paragraph 5 of the affidavit supporting the application that, the payment made by the applicant from the date of signing the deed of settlement was Tanzanian Shillings forty-five million. It is also deposed at paragraph 6 of the affidavit supporting the application that, from October, 2022 to date, the first respondent failed to issue to the applicant control number for payment of the outstanding rent and monthly rent as agreed in their registered deed of settlement. It is also deposed at paragraph 7 of the same affidavit that the applicant was evicted from the suit premises on 19th May, 2023.

That being the position of the matter the court has found that, since the agreement of the parties as per their deed of settlement was for the applicant to pay to the first respondent the sum of Tshs. 7,250,000/= per month from 28th August, 2021 and the total outstanding rent arrears was

Tshs. 72,320,334.07 it is crystal clear that, as submitted by the counsel for the first and third respondents the last instalment for payment of the stated outstanding rent arrears would have been made by May, 2022.

That means by October, 2022 when the applicant states the first respondent failed to issue control number for payment of the instalments of the outstanding rent, the period for payment of the stated instalments had already passed from May, 2022. Since the eviction of the applicant from the suit premises was done on 19th May, 2023, which is after the elapse of one year from when the last instalment was required to be made, there is a great likelihood that the reason for eviction of the applicant from the suit premises was not because of failure to comply with the terms of the settlement deed recorded by the court as the decree of the court. The court has found as argued by the counsel for the first and third respondents it might be it is because of the applicant's default to pay rent of the other period as she continued to occupy the suit premises.

The court has also found that, although clause 3 of the settlement deed and the decree of the court shows it was agreed the applicant should have pay USD 2,000 to the first respondent upon being issued with control number but the court has found the applicant could have not based on the settlement deed recorded as the decree of the court to seek for the remedies is seeking from the court against the respondents in the instant

application. The court has come to the stated finding after seeing there is no clause in the settlement deed or decree recorded from the settlement deed showing the applicant is entitled to come to the court to seek for the remedy is seeking from the court against the respondents.

The court has found that, although the counsel for the applicant argued in his submission that clause 5 of the settlement deed provides for the avenue of the parties to resort to the court where there is a failure to satisfy the terms of the settlement deed signed by the parties but the court has found the stated clause shows it is only the first and third respondents who are entitled to come to the court to enforce the agreement entered by the parties if the applicant has failed to make the agreed payment or default in any instalment of the outstanding debt of the rent arrears. For clarity purposes the stated clause read as follows: -

*"That, should the plaintiff (Applicant in the present applicant) fail to make the required payments on the time as agreed herein above, or default in any instalment, then **the 1st and 3^d respondents shall move the court to enforce this agreement as the court decree.**"* [Emphasis added].

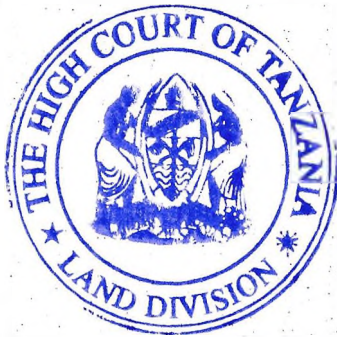
The court has found the wording of the above quoted clause and specifically the bolded words are very clear that the person who can move the court to enforce the agreement entered by the parties is the first and second respondents. There is no any other clause in the deed of

settlement showing where the respondents breached the terms of the agreement like the allegation that the first respondent failed to issue control number from October, 2022 or anything else, which procedure the applicant should follow to seek for the reliefs, she thinks she is entitled. Since there is no such a clause in the deed of settlement signed by the parties the court has found as rightly submitted by the counsel for the first and third respondents the claims of the applicant are new claims and not the claims covered in the deed of settlement, they entered in Misc. Land Application No. 207 of 2021.

If it is a new claim then as rightly submitted by the counsel for the first and third respondents the applicant was required to abide to the procedure provided under section 6 (2) of the Government Proceedings Act. The applicant cannot rely on the settlement deed they signed and registered in Misc. Land Application No. 207 of 2021 as the decree of the court to claim for the reliefs is seeking from the court against the respondents because there is no clause in the deed of settlement allowing the applicant to do so. In the premises the court has found it is not only that the application before the court has been wrongly preferred by the applicant but also the application is incompetent for want of 90 days' notice of intention to sue the Government provided under section 6 (2) of the Government Proceedings Act.

Having arrived to above stated finding, the court has come to the conclusion that, there is no need of going to the merit of the application because the point of preliminary objection raised by the first and third respondents has managed to disposed of the application. Consequently, the point of preliminary objection raised by the mentioned respondents is hereby upheld and the application is accordingly struck out for being incompetent and the costs to follow the event. It is so ordered.

Dated at Dar es Salaam this 12th day of October, 2023



I. Arufani
I. Arufani
JUDGE
12/10/2023

Court:

Ruling delivered today 12th day of October, 2023 in the presence of Mr. Aloyce A. Komba, learned advocate for the applicant, in the presence of Mr. Mathew Fuko, learned State Attorney for the first and third respondents and in the absence of the second respondent. Right of appeal to the Court of Appeal is fully explained.



I. Arufani
I. Arufani
JUDGE
12/10/2023