

IN THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION
AT DAR ES SALAAM

MISC COMMERCIAL APPLICATION NO 235 OF 2016
(Arising from Commercial Case No 125 of 2016)

BETWEEN

AFRICAN BANKING CORPORATION
TANZANIA LIMITED-----APPLICANT

VERSUS

TANZANIA NATIONAL ROAD AGENCY(TANROADS)-----RESPONDENT

RULING

Dates 15/3/2017 & 30/3/2017

SONGORO, J

The is a ruling of two preliminary objections on point of law raised by Tanzania National Road Agency (TANROAD) the respondent to oppose the application for an order of temporary injunction filed by African Banking Corporation Tanzania Limited the applicant by contesting that;

- 1) The respondent has completely no sueable legal personality of its own therefore the suit therefore the Commercial Case No 125 of 2016 and Misc. Commercial Application No 125 of 2016 are not proper.
- 2) That, the suit and application are incurably defective and prematurely incompetent for lack of 90 days mandatory statutory notice envisaged under Section 6(2) of the Government Proceedings Act Cap 5 [R.E 2002].

Responding to the respondent`s preliminary objections on points of law, the applicant`s opposed the two preliminary objections on points of law and

stated that, the application is proper before the law and prays for dismissal of preliminary objections for lack of merit.

Since it is a rule of practice that, preliminary objections on points law must be determined first, before the main application, parties with the leave of the court were allowed to pursue the two objections by a way of written submissions.

Submitting in support of his first point of preliminary objection on point of law, Mr. Kenan Komba, Learned Advocate of the respondent stated that, the applicant has filed the main suit which was registered as Commercial Case No 125 of 2016.

Also, the respondent informed the court that, the applicant has filed Misc. Commercial Application No 235 of 2016 applying for an order of temporary injunction to restraining the respondent from selling equipment's plants and machinery which were involved in road construction.

Respondent's counsel then submitted that, the respondent is an Executive Agency and pursuant to Section 3(6) (b) and (C) of the Executive Agencies Act No 30 of Cap 345 R.E 2002] as amended by the Finance Act No 18 of 2002 the respondent "may sue or not be sued" in his own name except where he entered into the contract. In any other circumstances the respondent as an Executive Agency may be sued pursuant to the procedure

laid down in Section 6(4) and 10 of the Government Proceedings Act Cap 5 [R.E 2002]

The respondent`s counsel then explained that, since in the present suit and application are not based on contract signed by the respondent, TANROADS then he may not be sued on own name but may be sued in accordance with the Government Proceedings Act. 1967 and the Government and Attorney General has to be joined as parties.

To substantiate his point that, TANROADS as Executive Agency may not be sued on his own name , the respondent drew the attention of the court on several decisions of the High Court including a decision in Land Case No 31 of 2006 between Total Tanzania Limited Versus Tanzania National Roads Agency, (Unreported) and Civil Case No 2 of 2014 between Sebastian Abdallah Msola Versus The Njombe Regional Manager (TANROAD) Iringa Registry Unreported where the courts considered the provisions of Section 3(1) of the Executive Agencies Act Cap 245 [R.E. 2002] and decided that, TANROADs as Executive Agency may be sued . on its own name alone on matters not based on contract, and such suit the government has to be joined as a party

Finally, the respondent`s counsel explained that, bearing in mind TANROADS in the suit and the application is being sued alone and the suit and application are not based on contract signed by the respondent. He prayed to the court to uphold the first objection that, the suit is not proper

before the court and and dismiss the application because is barred by Section 3(6) (b) and (C) of the Executive Agencies Act No 30 of Cap 345 R.E 2002] as amended by the Finance Act No 18 of 2002.

Moving to the Second preliminary objection on point of law, Mr. Komba submitted that, the suit and application are improper before the court on the basis that, were filed in total disregard of Section 6(2) of the Government Proceedings Act Cap 5 [R.E 2002] which requires a prior 90 days' notice be issued. Therefore the court and the application are improper before the court are tenable in law. On the basis of the second preliminary objections raised by respondent, Mr. Komba also prayed that, objections be upheld and application be dismissed.

Responding to the two preliminary objections on points of law, Mr Kibatala, Learned Advocate of the applicant, firmly maintained opposed the two preliminary objections on the ground that, Section 3(6) (b) and (C) of the Executive Agencies Act No 30 of Cap 345 R.E 2002] as amended by the Finance Act No 18 of 2002 and the objection under Section 6(2) of the Government Proceedings Act Cap 5 [R.E 2002] are not maintainable on the application for an order of temporary injunction. Instead the two preliminary objections on points of law were supposed to be raised when commercial case No 125 of 2016 which is a suit is being heard and determined. Mr. Kibatala reminded the court at this moment the court is pre-occupied with Misc. Commercial Application No 125 of 2016 which is an interlocutory application and it early to determine if the application and the suit are based

on the contract. It was the views of the applicant's counsel that, the objections have been raised prematurely at this stage and the appropriate time to raise the two objections is when the suit will be under consideration because that, is the time the court may also assess if the suit is based on contract or not.

Next Mr. Kibatala contested that, since the application is pegged to commercial case No 125 of 2016 which is the main suit, and is still pending, the court has to wait and stay the two objection and find out whether the main suit is on contract and the suit falls under the ambit of provisions of Section 3(6) (b) and (C) of the Executive Agencies Act No 30 of Cap 345 R.E 2002] as amended by the Finance Act No 18 of 2002

Mr Kibatala further pointed out that, both the preliminary objections on point laws raised on the application has been raised prematurely because the said objections were supposed to be raised at the time when the main suit is being considered.

The counsel then explained that, even if the court considers the objection raised by the respondent, going by paragraphs 9.0, 11.0 and 12.0 of the plaint and affidavit in support of the application they clearly shows that, there are contractual issues in the main suit.

While on this point, the applicant's counsel explained further his point that, contract relations are cited in paragraphs 9.0. 11.0. and 12.0 are between

TANROADS and Progressive Construction Limited and equally there are contractual relationship between TANROADS and the Applicant as per Annexure TAL -4 and TAL 5 to the plaint and affidavit.

On the cited cases of Land Case No 31 of 2006 between Total Tanzania Limited Versus Tanzania National Roads Agency, (Unreported) and Civil Case No 2 of 2014 between Sebastian Abdallah Msola Versus The Njombe Regional Manager (TANROAD) Iringa Registry Unreported by the respondent, the applicant`s counsel maintained that, the facts are distinguishable and prayed to the court disregard them.

Also on the cited case **of** TANROAD Manyara Versus GURBAX Singh Sandhu Civil Appeal No 18 of 2012 it is a matter which was at the appellate level.

The applicant`s counsel alerted the court that, TANROADS may be sued on his own capacity like in the present case and without legal requirement of issuing a 90 days` notice, envisaged under the Government Proceedings Act Cap 6 . So the respondent objection of 90 days` notice is also redundant. So, Mr. Kibatala insisted and prayed that, objections raised be dismissed for lack of merit.

In his rejoinder the respondent counsel reiterated and maintain the objections raised and prayed for the dismissal of application.

The court has considered objections raised by the respondent and reply given of the applicant and find it is important to address the first preliminary objection on points of law which is based under Section 3(6) (b) of the Executive Agencies Act, Cap. 245 as amended by the Finances Act No. 18 of 2001.

I have had time to peruse the cited sections of the Executive Agency Act and find they contemplate that, there are two distinct procedure of suing the Executive Agency like TANROADS.

The first procedure is the one stipulated in Section 3(6) (b) of the Executive Agencies Act, Cap. 245 as amended by the Finances Act No. 18 of 2001 where the Executive Agency may be sued on its own name without joining the Government and Attorney General. For the procedure stipulated by the above mentioned section to apply and the agency to sued on its own name there must be a contract signed by the agency. The second procedure of suing the agency is where the suit is not based on contract and is on any other matter, then the Agency may sued in accordance with the Government Proceedings Act and the Government and Attorney General has to be joined as parties

So, Mr Kibatala is contesting that, a preliminary objection was raised prematurely and was supposed to be raised when the main suit is called for hearing and not at this juncture when the court is pre-occupied by application for an order of temporary injunction. So for reason which was

explained that, the objection has been raised prematurely, he prayed that, the two preliminary objections be dismissed.

I have given full weight to the applicant `s argument that, the first preliminary objection on point of law has been raised pre-maturely and was supposed to be raised when the court is pre-occupied with the main suit but I find courts generally encourages that, preliminary objections on point of law be raised at the earliest possible time and be determined first. The rationale behind of courts insistence the preliminary objection be raised first and at the earliest possible time is that, they may lead to disposal of the application or suit at earliest stage and save the valuable time of the court , and if not raised at the earliest possible time the court will go into the merit of the application or suit and waste its useful time on pursuing a defective application or suit

The above mentioned legal position was stated in the case of **Shahida Abdul Hassanali Kasam v. Mahed Mohamed Gulamali Kanji** – Civil Application No. 42 of 1999 (unreported) where this court , expressed its view on the following terms that, ;-

The aim of a preliminary objection is to save the time of the court and of the parties by not going into the merits of an application because there is a point of law that, will dispose of the matter summarily.”

So guided with the decision in the case of Shahida Abdul Hassanali Kasam v. Mahed Mohamed Gulamali Kanji (Supra) I find the respondent`s

preliminary objection has to been raised at appropriate moment and the applicant`s arguments that, the objection has been raised prematurely has no basis at all.

Now turning to the respondent`s objection that, has been wrongly sued and the application and suit is not legally maintainable, I find that, requires assessment of the statutory instruction stipulated in Section 3(6) (b) of the Executive Agencies Act, Cap. 245 as amended by the Finances Act No. 18 of 2001.

Thus when I perused Section 3(6) (b) of the Executive Agencies Act, Cap. 245 as amended by the Finances Act No. 18 of 2001, and the court find its states as follows

(6) Notwithstanding any other law, an Executive Agency shall-
*Be capable of suing and being sued
in its own name only in contract;*

So reading between the lines of Section 3(6) (b) of the Executive Agencies Act as amended by Finance Act No 18 of 2002, it appears there are precise and unambiguous words which states that, Executive Agency like TANROADS may not "be sued" in its own name except on matter based on contract.

I have tried to follow long arguments of Mr Kibatala that, that, the objection actually target the suit, and not the application, but honestly the words used in the cited provisions of Section 3(6) (b) of the Executive

Agencies Act as amended by Finance Act No 18 of 2002, do not make any demarcation line that, only is suit is barred , and the institution of the application is allowed. It appears to me that, the cited section of the Executive Agency provides demarcation lines if the suit is based on contract entered by the agency then the Agency may be sued on its own name. Also the same words in the Executive Agency Act , impliedly states if the suit is not on contract signed by the Agency, then the procedure laid down in the Government Proceedings Act has to be applied.

It seem to me in order for a suit or revision or application, to be instituted in the name of the Executive Agency alone to be legally tenable and within the ambit of Section 3 (6) (b) of Executive Agency Act must be based on contract signed by Agency . Also in the Plaint or Application there has to be a statement to that, effect or a copy of the contract has to be annexed to the suit or revision or application.

That, being the legal position I revisited the applicant's application together with affidavit of Mr. Imani John Bgoya the Principal officer of the Applicant company and find the applicant stated that, has filed a Commercial Case No 125 of 2016 and present application which is based on the suit

Further perusal of the affidavit I find the applicant has stated that, in the main suit is applying for a judicial reliefs including a declaratory orders that, the intended sale by way of public auction of motor vehicles,

equipment's, plants, generators and materials testing equipment be declared null and void.

With the above set of pleadings found in the applicant's affidavit, I did not gather any statement which establishes that, the applicant's application is based on a contract signed by the respondent.

The facts pleaded in paragraph 5.0 of the applicant affidavit that, there was loan of USD 9,217,808 granted to Progressive Construction Limited which do not in any way establish if the respondent entered into any contract with the applicant.

In the absence of any statement in the application for an order of temporary injunction which establishes that, the respondent application is based on the contract signed by TANROADS, I find it was improper for the applicant to file an application for an order of temporary injunction on the name of TANROADS alone without joining the Government and Attorney General.

It seems to me that, the easiest and simplest way of suing or filing an application in the name of respondent alone is to annex a copy of the relevant contract signed by the respondent or make statement in the affidavit which may persuade the court that, the application is based on contract and fall under the ambit under Section 3(6) (b) of the Executive Agencies Act, Cap. 245 as amended by the Finances Act No. 18 of 2001.

Quite frankly I agree with the submission of Mr. Komba, that, where the application is not based on contract signed by TANROADS the , the suit or application on the name of TANROADS alone is not legally maintainable

I find and decide that, for reasons which have been stated above the first preliminary objection that, the application contravened the provision of Section 3(6) (b) of the Executive Agencies Act, Cap. 245 as amended by the Finances Act No. 18 of 2001, has merit and been established. The court finding and decision on the first preliminary objection on point of law is sufficient enough to disposal of the application, and I see no plausible reasons to deal with the remaining objections and arguments. In respect of the pending commercial case No 125 of 2016, the court will consider it on its own merit on another appropriate time.

Consequently, I hereby dismiss the application with costs in favour of the respondent on the basis that, is the name of TANROADS but doesn't fall with the ambit of Section 3(6) (b) of the Executive Agencies Act, Cap. 245 as amended by the Finances Act No. 18 of 2001 therefore it is improper before the court. Further the court vacates its previous orders issued on 12th day of October, 2016. The applicant is at the liberty to file another application subject to the laid down procedure.

Dated at Dar es Salaam this 30th day of March, 2017


H.T, SONGORO
JUDGE

Delivered at Dar es Salaam this 30th day of March 2017


H.T, SONGORO
JUDGE

The Ruling was delivered in the presence of Mr. Omari Msemu, Learned Advocate for the Applicant and Mr. Jurisha Mwanga , Learned Advocate of the respondent.