

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 307 OF 2020

(Arising from Civil Case No. 80 of 2020)

MSK REFINARY LIMITED APPLICANT

VERSUS

TIB DEVELOPMENT BANK LIMITED1ST RESPONDENT

YONO AUCTION MART AND CO. LTD2ND RESPONDENT

RULING

29th June & 30th June, 2020.

E. E. KAKOLAKI J

Under certificate of urgency and at the instance of Mnyere, Msengezi and Company Advocates for the applicant this application has been preferred under Section 68(c) and (2) and order XXVII Rule 1(a) and (2) of the Civil Procedure Code,[Cap. 33 R.E 2019]. It is supported by affidavit of **Yohana Mswahili** a principal officer of the applicant. The applicant is seeking for the following reliefs. First, an interim order to prevent the respondents or their agents, assignees, workmen and employees from selling the property on Plot No. 82 Block 'A' Nyashishi Usagara Trading Centre, Misungwi District, pending the determination of the application. Secondly is an injunction to prevent the respondents or their agents,

assignees, workmen and employees from selling the property on Plot No. 82 Block 'A' Nyashishi Usagara Trading Centre, Misungwi District, pending the determination of the Civil Case No. 80 of 2020 between the parties. And lastly, costs be provided in the course.

Having perused the documents when the case file was placed before me on the 26/06/2020, I noted that there was a notice of auction planned to be executed on the 29/06/2020 by the 2nd respondent against the appellant's property thus ordered the applicant to effect service to the respondents and appear before me on the 29/06/2020 at 8.00 hours. On that date and time Mr. Gabriel Simon Mnyere learned advocate appeared for the applicant whereas Miss. Tausi Sued learned State Attorney appeared for the 1st respondent and for the 2nd respondent was the Director of the company Mr. Stanley Kevela.

Before the applicant could be heard on her application Miss Sued for the 1st Respondent raised a preliminary point of objection against the applicant which was supported by the 2nd Respondent. She presented that the applicant's application is incompetent for contravening the provisions of section 6(3) and (4) of the Government Proceeding Act, [Cap. 5 R.E 2019] as amended by the Written Laws (Miscellaneous Amendments) Act No. 1 of 2020. That the provision makes it mandatory that any suit brought against the Government or government department, institution, ministry, agency, public corporation or company must join the Attorney General as a necessary party. She said since joining of the Attorney General is mandatory and the applicant has failed to comply with the requirement of the law by joining him in both main suit and in this application then this application is incompetent and prayed the court to dismiss it with costs.

In response to Miss Sued's submission in support of the preliminary objection Mr. Mnyere was of the contention that the preliminary objection taken by the 1st respondent is misconceived. He had it that before the court there are two sets of proceedings. There is a main suit Civil Case No. 80 of 2020 and this application Misc. Civil Application No. 307 of 2020. He echoed that the amendment of subsection (3) of section 6 of the Government Proceedings Act, did not or was not meant to cover applications like this one but rather main suits. He said there is no definition of the term suit but under section 22 of the Civil Procedure Code, [Cap. 33 R.E 2019] suits are normally instituted by plaint or in such other manners as may be prescribed. And that if the legislature intended the chamber applications to be called suit it could have provided so expressly as the provision governing the filing of applications is quite different and is provided under Order XLIII Rule 1(3) of the CPC. This means that suits and applications are two distinct proceedings, he reiterated.

Mr. Mnyere argued further that the amendment of section 6(3) of the Government Proceedings Act, refers to main suit only and not application. That, applications for temporary injunction are meant to prevent the respondent from committing or further commit any wrong and therefore the provisions of section 6(3) and (4) of the Government Proceedings Act, do not apply here as the objection taken could have been raised in the main suit and not in this application. He therefore prayed the court to overrule the objection. In rejoinder submission Miss Sued stressed on her point that the amendment was intended to cover all kind of matters including suits and applications otherwise she reiterated what she had submitted in her submission in chief and prayers thereto.

What is discerned from both parties' submissions is that there is no dispute that the law under section 6(3) of the Government Proceedings Act, puts it in mandatory terms that in suing the Government, Ministry, government department, local government authority, executive agency, public corporation, parastatal organisation or public company that is alleged to have committed a civil wrong the Attorney General shall be joined in that suit as a necessary party. What remains in contention is whether the term suit includes applications like the one at hand or not and whether non-compliance of subsection (3) of section (6) of the Government Proceedings Act, as amended vitiates the proceedings as provided under subsection (4). In order to appreciate the point under discussion I quote the said subsections:

"S.6 (3) All suits against the Government shall, upon the expiry of the notice period, be brought against the Government, Ministry, government department, local government authority, executive agency, public corporation, parastatal organisation or public company that is alleged to have committed the civil wrong on which the suit is based, and the Attorney General shall be joined as a necessary party.

(4) Non-joinder of the Attorney General as prescribed under subsection (3) shall vitiate the proceedings of any suit brought in terms of subsection (3)" and

It is true as submitted by Mr. Mnyere that there is no definition of the term suit under Government Proceedings Act or Civil Procedure Code. However I distance from his contention that the amendment of section 6(3) of the Government Proceedings Act, made by the Written Laws (Miscellaneous Amendments) Act No. 1 of 2020, was meant to cover suits

only and not application as the CPC provides distinct procedures of instituting proceedings between them. The BLACKS LAW DICTIONARY, Bryan A. Garner, 8th Edition at page 4499 defines the term suit as follows:

"Any proceeding by a party or parties against another in a court of law."

Given the definition above cited which I fully subscribe to, defines a suit to cover any proceedings by any party or parties against another or others instituted in the court of law and I would add in any competent tribunal. The application instituted by the applicant being part of the proceedings arising from the main suit Civil Case No. 80 of 2020 in my considered view cannot be excluded from the definition of suit under section 6(3) of the Government Proceedings Act, as Mr. Mnyere would want this court to believe. I am at one with Miss Sued's submission that the same intended and covers not only main suits but also all applications emanating from the main suits or made independently against the Government or its departments, institutions, ministries, parastatal organisation, local government authorities or public corporations and companies.

It is elementary that whenever the word "shall" is used in a provision, it means that the provision is imperative. This is stated under section 53(2) of the Interpretation of Laws Act, [Cap. 1 R.E 2019] and it reads:

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

This position was also well spelt in the case of **Godfrey Kimbe Vs. Peter Ngonyani**, Civil Appeal No. 41 of 2014, where the Court of Appeal had this to say:

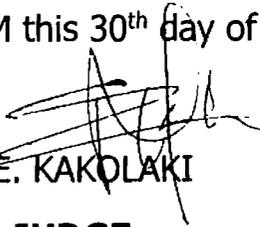
"The foregoing section, by the use of the word "shall", has been couched in mandatory terms. It is elementary that whenever the word "shall" is used in a provision, it means that the provision is imperative. This is by virtue of the provisions of section 53(2) of the Interpretation of Laws Act, [Cap. 1 of the Revised Edition, 2002]."

As the applicant in this application failed to meet the mandatory conditions of joining the Attorney General as the necessary party, I hold the views that such omission renders the present application incompetent.

In the circumstances and for the foregoing reasons, I am inclined to hold that this application is incompetent and is hereby struck out with costs.

It is so ordered.

DATED at DAR ES SALAAM this 30th day of June, 2020.


E. E. KAKOLAKI

JUDGE

30/06/2020

Delivered Dar es Salaam today on 30/06/2020 in the presence of Mr. Gabriel Simon Mnyere advocate for the applicant. Miss. Tausi Sued learned State Attorney for the respondent and Ms. Lulu Masasi, court clerk.

Right of appeal explained.


E. E. Kakolaki

JUDGE

30/06/2020