THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

DISTRICT REGISTRY OF MBEYA

AT MBEYA

LAND CASE NO. 8 OF 2020

GWABO MWANSASU AND 10 OTHERS.....PLAINTIFFS
VERSUS

1. **TANZANIA NATIONAL ROADS AGENCY.....1ST DEFENDANT**
2. **THE ATTORNEY GENERAL.....2ND DEFENDANT**

RULING

28/04 & 27/07/2021.

Utamwa, J.

In this land case, there are 11 plaintiffs. These are none other than Gwabo Mwansasu, Herbert Shao, Godwin Mwaisumo, Isack Mwakipesile, Jonas Mwasambili, Eden Kyungi, Samson M. Mkisi, Hebron M. Kasokela, Lucas John Mwasikili, Augenia Venance Msovela and Richard Mwambola. The plaintiffs sue the two defendants namely: the Tanzania National Roads Agency and the Attorney General, hereinafter called the first and second defendant respectively or the defendants cumulatively.

According to the plaint, the suit is based on a claim over a piece of land said to be a road reserve (henceforth the disputed land or suit land). The claim by the plaintiffs is that, the first defendant unlawfully, and without consultation with them, invariably issued a notice for them to vacate from the disputed land purporting to suggest that, they (the plaintiffs) had invaded the suit land, the fact which is not true.

The plaintiffs thus, seek the following reliefs against the defendants:

a) A declaration that the disputed land belongs to the Plaintiffs,

b) An order that the disputed land is subject to evaluation and the plaintiffs are entitled to fair compensation before its relocation or demolition of the plaintiffs' houses,

c) A declaration that the acquisition of the disputed land by the first defendant was unlawful,

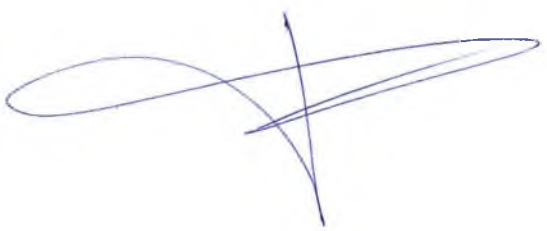
d) A permanent injunction restraining the first defendant from interfering with the disputed land without prompt and fair compensation to the plaintiffs,

e) Payment of Tanzanian shillings (Tshs.) 350, 000, 000/= to the plaintiffs,

f) Interest at court rate of 12% from the date the cause of action accrued to the date of judgment,

g) Costs of the suit,

h) Any other costs this court will deem just to grant.



The defendants, in their joint written statement of defence disputed the claim and urged this court to dismiss it. They also raised a preliminary objection (PO) based on the following two limbs:

1. That, the suit is incompetent and incurably defective for failure to declare the monetary value of the landed property owned by each plaintiff in the plaint which is subject to demolition.
2. The notice to sue the Government is in contravention with section 6(2) of the Government Proceedings Act, Cap. 5 R.E 2019 (the GPA).

When the suit came before the court, the court also suspected that, the plaintiffs had not adequately described all the pieces of the disputed land. It then ordered the parties to address it on the following two issues (court-issues):

i. Whether or not the plaintiffs adequately described all the pieces of the suit land.
ii. In case the answer to the first issue will be affirmative, then which orders should this court make?

The court further ordered that, the two court-issues shall be argued along with the issues arising from the PO.

It was agreed by the parties, and directed by the court that, the PO and the court-issues should be argued by way of written submissions. The plaintiffs in this squabble were advocated for by Mr. Boniface Mwabukusi and Ms Rose Kayumbo, both being learned counsel. On their part, the defendants were represented by Mr. Joseph Tibaijuka, learned State

Attorney. Both sides filed their respective submissions timely. The plaintiffs' submissions were signed by Mr. Mwabukusi only.

In this matter, I opt to firstly consider and determine issues arising from the second limb of the PO. This choice is based on the grounds that, according to the undisputed wording of the pertinent provisions of law, i. e. section 6(2) of the GPA on which this limb of the PO is pegged, a proper notice to sue the Government is among the conditions precedent for a suit against it. It can thus, be considered that, the notice is one of the legal foundation stones of a suit of this kind.

Regarding this second limb of the PO, it is not disputed that the plaintiffs indeed, issued the notice to sue the two defendants (henceforth the notice) who constituted the Government. However, the learned State Attorney argued that, the notice was incurably defective since it offended the provisions of section 6(2) of the GPA which requires, *inter alia,* for a copy of the notice/claim to be sent to the Solicitor General. Nonetheless, the plaintiffs in the suit at hand, did not serve any copy of their notice to the Solicitor General.

On his part, the plaintiffs' counsel did not dispute the fact that the Solicitor General was not served with the copy. What he contended was that, at the time they served the notice (in the form of a demand notice) to the two defendants, it was not a legal requirement to also serve the notice to the Solicitor General. This was because, the notice at issue (marked as annexure A-2 to the plaint) was written on the 3rd day of September, 2019. It was served to both defendants, as per the law by then, on the 12th

September, 2019. Nevertheless, the requirement to serve the notice to the Solicitor General under section 6(2) of the GPA was enacted through the Written Laws (Miscellaneous Amendments)(No. 4) Act 2019 (henceforth the Amending Act).

The plaintiffs' counsel also argued that, before the amendments at issue, the law did not set any requirement to serve the Solicitor Generally with anything. The said Amending Act was assented by the President of the United Republic of Tanzania (the President) on the 19th day of September, 2019. The provisions of the current law setting the requirement under consideration were not thus, in force, at the time of preparing and serving the notice to the defendants. Such current provisions of law do not also have any retrospective effect.

The learned counsel for the plaintiffs further submitted that, even upon the pertinent provisions coming into force, the second defendant dully notified the Solicitor General on the plaintiff's notice. He further argued that, the fact that the learned State Attorney representing the two defendants comes from the office of the Solicitor General, clearly shows that the second defendant handled over the notice to the Solicitor General. He thus, urged this court to dismiss the second limb of the PO.

The learned State Attorney for the two defendants did not prefer any rejoinder submissions to the replying submissions by the plaintiffs' counsel, hence this ruling.

Now, owing to the arguments by the parties narrated herein above, the two issues for determination under this heading of the PO are these:

a. Whether the notice at issue was proper in law,
b. In case the answer to the first issue will be negative, then which will be the appropriate order/s for this court to make.

Regarding the first issue, I am of the view that, the position of the law highlighted by learned counsel for the plaintiffs is correct only to the extent that, the statutory requirement to serve a notice/clam to the Solicitor General under section 6(2) of the GPA came into force after the notice under consideration had already been served to the two defendants. This was because, the amending Act was assented to by the President on the 19th September, 2019 so as to become the law. At this time, the notice had already been served to the two defendants. In fact, the learned State Attorney for the defendants did not dispute these facts since he did not file any rejoinder submissions to counter them. Indeed, the proper citation of the Amending Act would be The Written Laws (Miscellaneous Amendments)(No. 4) Act No. 11 of 2019 [and not The Written Laws (Miscellaneous Amendments)(No. 4) Act 2019 as suggested by the learned counsel for the plaintiffs]. However, I do not take the miss-citation seriously for that minor and insignificant discrepancy.

In spite of my above agreement with the plaintiffs' counsel, I disagree with him that, the mere fact that the plaintiffs served the notice to the defendants before the Amending Act was assented to by the President rendered the notice at issue proper in law. This disagreement is irrespective of the fact that the learned State Attorney did not file any rejoinder submissions to counter the contentions made by the plaintiffs' counsel regarding his above highlighted position of the law. I take this

stance because, it is a firm and trite judicial principle that, courts of law are enjoined to decide matters before them in accordance with the law and the Constitution of the United Republic of Tanzania, 1977, Cap. 2 R. E. 2002 (the Constitution). This is indeed, the very spirit underscored under article 107B of the Constitution. It was also underlined in the case of **John Magendo v. N. E. Govan (1973) LRT n. 60**. It follows thus, that, I am obliged to decide the matter under consideration in that manner irrespective of the passive reaction of the learned State Attorney for the defendants though his abstinence from filing his rejoinder submissions.

This my above disagreement is based on the construction of the current provisions of section 6(2) of the GPA itself. The same reads thus, and I quote it for the sake of a readymade reference:

> "**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.**" (Bold emphasis is mine).

In my view, as observed earlier, a notice under these quoted provisions is among the legal foundation stones of a suit of the nature under discussion. It is thus, clear that, the law requires a suit of this nature to be instituted in this court after the expiry of a period of not less than 90 days computed from the date of submitting the notice to the Government (defendant). The notice/claim of this nature must also be sent to the Attorney General and the Solicitor General.

In determining the propriety of the notice at issue therefore, one must consider not only the date when the notice at issue was submitted to the defendants in this suits and the date when the current law came into force as the plaintiffs' counsel strived to envisage. It is also important to consider the date when the suit at issue was instituted in this court. The record of the suit at hand clearly shows that, the suit was presented in court on the 15th June, 2020. This is in according with the rubberstamp of this court appearing on top of the plaint showing the date of receiving it. The plaintiffs however, paid the necessary filing fees on the 17th June, 2020 vide a copy of the exchequer receipt No. 23485191-3 placed in the record. The suit under discussion was thus, duly filed on the 17th June, 2020 when the filing fees were paid in full. This is because, the law guides that, the date of filing a matter in court is the date when a complete payment of the necessary filing fees is made.

It follows therefore, that, in the matter at hand, it is not disputed that the three significant events for consideration occurred sequentially as follows: the notice at issue was served to the defendants on the 12th September, 2019, the statutory requirements to serve the claim to the Solicitor General came into force on the 19th of September, 2019 and the suit at hand was instituted on the 17th June, 2020. It follows further that, by simple arithmetic, the suit was filed after the expiry of about nine moths computed from when the legal requirement to serve the Solicitor General with the notice/claim became operational.

My construction of section 6(2) of the GPA in relation to the suit at hand is, therefore, that, since the plaintiffs filed it in court long time after the

statutory requirement to serve the Solicitor General with the notice/claim had come into force, their notice to the defendants was crippled. Upon the amendments of the law, the plaintiffs were enjoined to comply with the new law by serving the defendants with a fresh notice/claim that would also be served to the Solicitor General as long as they had not filed their suit in court. This is because, the notice according to the provisions under discussion is intended for filing a suit in court and not for any other purpose. Under the circumstances of the case, the plaintiffs could not peg the suit at hand on the notice they had served to the defendants prior to the amendment of the law. This view is also supported by the provisions of section 27 of the Interpretation of Law Act, Cap. 1 R.E. 2019. These provisions are couched thus, and I reproduce them for a quick reference:

> "Where one Act amends another Act, the amending Act shall, so far as it is consistent with the tenor thereof, and unless the contrary intention appears, be construed as one with the amended Act."

These pasted provisions of law compels me to hold that, in the matter at hand, the provisions of the Amending Act which introduced the requirement to serve the Solicitor General with the notice/claim in section 6(2) of the GPA were one with the provisions that section which existed prior to the enactment of the Amending Act. Such provisions of the Amendment Act were therefore, binding to the plaintiffs as long as they had not instituted the suit at hand when the Amending Act came into force. In my opinion, it would have been a different case had the Amending Act came into force after the plaintiffs had instituted the suit under discussion in court.

Again, the argument by the learned counsel for the plaintiffs that the law was complied with in this case since the Attorney General might have served the notice/claim to the Solicitor General that is why the learned State Attorney from his office represented the defendants in court, is weightless. This is because, according to the current section 6(2) of the GPA, it is the plaintiffs, and not the Attorney General as the second defendant, who has the duty to serve the Solicitor General with the notice/claim. It cannot thus, be argued that, the legal conditions were met.

Furthermore, I am of the opinion that, the contention by the learned counsel for the plaintiffs that the Amending Act did not have any retrospective effect, is misplace. This opinion is based on the fact that, section 6(2) of the GPA and its many other provisions are essentially procedural provisions. The long title of the statute itself speaks in favour of this view. The same refers to this piece of legislation as follows, and I reproduce it for a handy perusal:

> "An Act to provide for the rights and liabilities of the Government in civil matters, for **the procedure in civil proceedings by or against the Government** and for related matters." (Bold emphasis is provided).

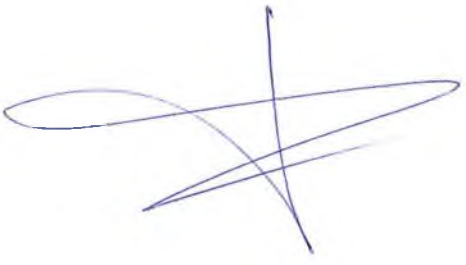
Moreover, PART III of the GPA encompasses section 6(2) (which is under discussion) to section 14. This part is titled "JURISDICTION AND PROCEDURE." The heading thus, also supports the above highlighted opinion that the provisions under discussion are procedural.

It is a trite legal principle that, amendments of procedural laws have retrospective effects, unless such consequences occasion injustice. This was the stance underlined by the Court of Appeal of Tanzania (the CAT) in

the case of **Felix H. Mosha and another v. Exim Bank Tanzania Limited, Civil Reference No. 12 of 2017, CAT, at Dar es Salaam** (unreported). In the case at hand I do not detect any danger of injustice on the part of the plaintiffs in applying the legal principle just highlighted above to the case. It cannot for example, be found that upholding the principle would delay the filing of the suit by the plaintiffs by requiring them to file a fresh notice following the amendment of the law discussed above. This is because, even after the amendments of the law, the plaintiffs took about nine months before they could file the suit in this court.

Having observed as above, I agree with the general contentions against the notice made by the learned State Attorney for the defendants, though on some different reasons. I consequently, answer the first issue under the second limb of the PO negatively that, the notice at issue was improper in law. This answer calls for the examination of the second issue under this same second limb of the PO.

Regarding the second issue under this limb of the PO (on the appropriate order to be made by this court), I find that, since I have held above that the notice under section 6(2) of the GPA is among the foundation stones of a suit of the nature under discussion, the violation against it committed by the plaintiffs was fatal to the notice at issue and the suit. Indeed, neglecting the violation will render the Amending Act nugatory.



It is also common knowledge that, the office of the Solicitor General has been recently established vide paragraph 2(1) of The Office of the Solicitor General (Establishment) Order, 2018 (GN. No. 50 of 2018). It takes over some statutory duties of the Attorney General. The law for example, provides that, notwithstanding any written law to the contrary, the Attorney General shall, through the Solicitor-General have the right to audience in proceedings of any suit, appeal or petition in court or inquiry on administrative body which the Attorney General considers to be of public interest or involves public property, the legislature, the judiciary or an independent department or agency of the Government; see section 17(1)(a) and (b) of The Office Of The Attorney General (Discharge of Duties) Act, Cap. 268, R.E 2019 as amended by Act No. 7 of 2018 and Act No. 8 of 2018. It is thus, conclusive that, the legislature of this land intended to amend its laws so as to *inter alia*, involve the Solicitor General in cases of the nature just mentioned above from the pre-trial stage to their finality. The above discussed violation against section 6(2) of the GPA as amended by the Amending Act thus, tends to exclude the Solicitor General from the pre-trial process of the case at hand. If such violation is condoned by this court, it will frustrate the above significant arrangement of the laws which was intended for an effective management of such cases as evidenced under paragraph 3(a)-(c) of the GN. No. 50 of 2018 cited earlier.

By virtue of the above reasons, I agree with the learned State Attorney that the notice under discussion is incurably defective. The incurably defective notice also renders the suit at hand incompetent. It has been the

law that, a suit filed in contravention of section 6(2) of the GPA is bad in law; see for example the holding of this court (Dyansobela, J.) in the case of **Thomas Ngawaiya v. The Attorney General and 3 others, Civil Case No. 177 of 2013, High Court of Tanzania, at Dar es Salaam** (unreported ruling date 2nd March, 2018).

In fact, I am live of the fact that, our contemporary law cherishes the principle of overriding objective. This principle has been recently underlined in our laws; see for instance, section 6 of the Written Laws (Miscellaneous Amendments Act) (No. 3) Act, No. 8 of 2018. The principle essentially requires courts to deal with cases justly, speedily and to have regard to substantive justice without being overwhelmed by procedural technicalities. The principle was also underscored by the CAT in the case of **Yakobo Magoiga Kichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017, CAT at Mwanza** (unreported).

Nonetheless, the principle of overriding objective cannot be applied blindly or mechanically to suppress other significant laws on procedure like the one discussed above. This is the envisaging that was recently articulated by the CAT in the case of **Mondorosi Village Council and 2 others v. Tanzania Breweries Limited and 4 others, Civil Appeal No. 66 of 2017, CAT at Arusha** (unreported). In that case, the CAT declined to apply the principle of overriding objective amid a breach of an important rule of procedure. Indeed, in the said **Mondorosi case** (supra) the CAT categorically held that, the principle of overriding objective cannot be applied blindly against the mandatory provisions of procedural law which go to the very foundation of the case. In so deciding, the CAT

followed its previous decision in **Njake Enterprises Limited v. Blue Rock Limited & Another, Civil Appeal No. 69 of 2017** (unreported). The CAT thus, distinguished the **Yakobo Magoiga case** (supra) in which the principle of overriding objective had been applied.

Due to the aforesaid reasons, the above discussed violation of section 6(2) of the GPA in the case under consideration, cannot be saved by the doctrine of overriding objective.

I am settled in mind that, the only legal remedy for an incompetent matter before a court of law is to strike it out. This is the proper order which this court may make against the suit at hand since I have found already found it incompetent for the reasons shown earlier. This order will meet the justice of the case. This particular finding therefore, saves as the answer to the second issue under the second limb of the PO.

Having made the above findings, I consider myself relieved from the legal obligation to consider the first limb of the PO and the two court-issues. This is because, the findings I have made are forceful enough to dispose of the entire matter. I therefore, strike out the suit with costs for the incompetence. It is so ordered.

J.H.K. Utamwa
Judge
27/07/2021.

Date: 27.07.2021

Coram: Hon. P.R. Kahyoza-DR.

Plaintiffs:

1st
2nd
3rd
4th
5th
6th — Absent.
7th
8th
9th
10th
11th

For Plaintiffs: Mr. Kelvin Kuboja, Advocate.

1st Defendant

2nd Defendant

For Defendants: Mr. Tibaijuka, State Attorney.

C/C: Mr. S. Saanane.

Mr. Kelvin: This matter is coming today for ruling.

Court: Ruling delivered in the presence of Mr. Kelvin Kuboja Gamba, Counsel for the Plaintiff and Mr. Joseph Tibaijuka Learned State Attorney for the defendants.

P.R. Kahyoza

Deputy Registrar

27.07.2021