

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MWANZA SUB-REGISTRY)**

AT MWANZA

LAND CASE NO. 10 OF 2022

GAMBA NYAKIBAI MATIMU.....PLAINTIFF

VERSUS

1. MWENYEKIT WA SERIKALI YA MTAA WA NYASAKA 2. OMARY BAKARI 3. HALIMASHAURI YA WILAYA YA ILEMELA 4. WAKILI MKUU WA SERIMKUU WA SERIKALI	}	...DEFENDANTS
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RULING

3rd & 4th May, 2023

DYANSOBERA, J.:

The plaintiff herein has sued the four defendants above claiming the following reliefs, namely, an order declaring him as the lawful owner of the suit premises, a declaration that the 1st and 2nd defendants are trespassers, and order directing the defendants to pull down the building on their own costs, payment of Tshs 50, 000,000/= as general damages and costs.

In resisting the claims, the 1st, 3rd and 4th defendants have filed a written statement of defence prefaced with a notice of preliminary objection. The preliminary objection is grounded on the following points:

1. That the suit is improperly filed or incompetent before this Honourable Court for the failure by the plaintiff to issue a 90 days' statutory notice of intention to sue the Government;
2. The suit has not complied with the legal requirement of joining the Attorney General as a necessary party to this suit.

At the time of hearing of the preliminary objection, the 1st and 3rd defendants were represented by Mr. Patrick Muhere, learned Senior State Attorney while Ms. Sabina Yongo, learned State Attorney stood for the 4th defendant. On his part, the plaintiff was represented by Mr. Kavula Kimila, learned Advocate.

Supporting the first limb of preliminary objection, Mr. Patrick Muhere argued that the suit has contravened the legal requirements of submitting to the Government Minister, Department or Officer concerned a notice of not less than ninety days of the plaintiff's intention to sue the Government specifying the basis of his claim against the Government, and send a copy of the claim to the Attorney General. He supported his argument by making reference to the provision of Section 6 (2) of the Government Proceedings Act [Cap. 5 R.E.2019] and section 106 (1)(a) and (b) of the Local Government (Urban Authorities) Act [Cap. 288 R.E.2002]. Civil Case No. 7 of 2019 between **Aloyce Chacha Kenganya v. Mwita Chacha Wambura**

& 2 Others in which it was observed that the provisions of Section 6 (2) of Government Proceeding Act are express, explicit, mandatory and admit no implication or exceptions was also cited to reinforce his argument.

With regard to the second limb of preliminary objection, Mr. Muhere contended that the suit cannot be maintained for failure to have the Attorney General joined. He prayed the suit to be dismissed with costs.

Supporting the argument by Mr. Muhere on this second limb of preliminary objection, Ms. Sabina Yongo, citing the provisions of section 6(3) and (4) of the Government Proceedings Act as amended of the Written Laws (Miscellaneous Amendments) Act, No. 1 of 2020, pointed out that failure to join the Attorney General is fatal as the non-joinder vitiates the whole proceedings. Both Mr. Muhere and Ms. Yongo prayed the suit to be struck out with costs.

With regard to the first limb of preliminary objection, Ms. Yongo submitted that the plaintiff claims to have served 90 days' notice. It is her argument that the mentioned notice has no stamps of 1st defendant, the Solicitor General and that the stamp of the 3rd defendant is dated 8.3.2023. According to Ms. Yongo, the notice is immature.

Responding, Mr. Kavula Kimila had the following to submit. With respect to the first limb of preliminary objection, he urged this court to find it devoid of any substance. He was confident that they served them a 90 days' notice as the law requires. Clarifying on this point, he told this court that on 7.2.2022 they served Ilemela Municipal Council on behalf of the Director and the notice was received. As to the Attorney General, Counsel for the plaintiff argued that it was the Solicitor General who was served on the same day and Ms. Sabina Yongo received and signed the notice after the Attorney General had directed that all notices had to be served on the Solicitor General.

Respecting the second limb of preliminary objection, Mr. Kavula Kimila maintained that his client went to serve the Attorney General but was directed to serve the notice to the Solicitor General, the directions he duly complied with.

Learned Counsel was of the view, however, that if at all there was no proper service as argued, then he prayed to withdraw the suit with leave to re-file it.

On the absence of stamps on the documents, Counsel for the plaintiff informed the court that the service was by way of a dispatch. Clarifying on when the service was effected, Counsel for the plaintiff said that the notice was served on Sabina Yongo on 7.2.2022 and not

on 8.3.2022 as claimed by the learned State Attorney. Counsel for the plaintiff was emphatic that all parties were served as required by law.

Learned State Attorneys, in their brief rejoinder, made the following submissions. Mr. Patrick Muhere maintained that there was no proper proof of service to either of the parties though had no objection to the plaintiff's withdrawing the suit with leave to re-file it. He argued that the Advocate has admitted to have not served the Attorney General and that Counsel's claims that the Attorney General directed the service to be effected to the Solicitor General had not been proved. Ms. Yongo joined hands with her fellow State Attorney and had nothing to add.

I have considered the preliminary objection and the submissions in support and in opposition. In actuality, in February, 2020, the Parliament of the United Republic of Tanzania enacted the Written Laws (Miscellaneous Amendments) Act, No. 1 of 2020 which was assented to by the President of the United Republic of Tanzania on 14th February, 2020 and came into operation on 21st day of February, 2020 as per the *Gazette of the United Republic of Tanzania No. 8 Vol. 101 dated 21st February, 2020*. This Act included all suits against Public Corporations, Parastatal Organizations, Executive Agencies and Local Government Authorities in the list of government suits.

However, prior to the amendment, suits by or against the public corporations and parastatal organizations were not bound by the procedure under the Government Proceedings Act. The Executive Agencies had semi-autonomous power to sue or be sued in their own without joining the Attorney General in disputes arising from contracts. Likewise, the Local Government Authorities were free to sue or be sued without joining the Attorney General.

Nonetheless, after the amendment any suit by or against such legal entities are treated like Government suits and the procedure for institution of such proceedings must conform to the provisions of the Government Proceedings Act regardless of the nature of the claim.

Under the current procedure, before suing a public corporation, parastatal organization, executive agency or local government authority the plaintiff has to serve such legal entity with a 90 days' notice of intention to sue. The notice should articulate the factual basis of the claim and reliefs sought. Further, a copy of the notice must be served upon the Attorney General and Solicitor General. The plaintiff may institute the suit after the expiration of the notice period and a copy of the plaint should be served on the defendant and the Solicitor General. Besides, according to section 6 (5) of the Act, any

government suit should be instituted in the High Court. This is the legal position echoed by this court in the cited case of **Aloyce Chacha Kenganya v. Mwitwa Chacha Wambura & 2 Others** (supra).

As Mr. Patrick Muhere and Ms. Sabina Yongo rightly submitted, the plaintiff has not complied with the mandatory provisions of the law. This, Counsel for the plaintiff, has admitted and prays that if that is so, then he be permitted to withdraw the suit with leave to re-file.

Although the defence has no objection to this prayer, I think the court has to approach it with some reluctance. The endeavour to withdraw the suit comes from the preliminary objection raised by the 1st, 3rd and 4th defendants. By praying to withdraw the suit, Counsel for the plaintiff signifies that he concedes to the preliminary objection raised. In such circumstances, the only remedy is for the court to uphold the preliminary objection and strike out the suit. Since this means that no substantive suit has been placed before the court and no decision has been made thereat, the plaintiff is still at liberty to file a fresh suit provided the law is complied with.

Since the plaintiff and his Counsel have been frank and candid to admit the error and seek rectification, I do not think an order for costs against the plaintiff would be appropriate and just.

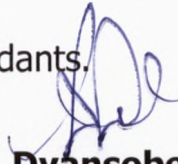
Accordingly, the suit is struck out with no order as to costs.

Order accordingly.



W.P. Dyansobera
Judge
4.5.2023

This ruling is delivered this 4th day of May, 2023 in the presence of Mr. Kavula Kimila, learned Counsel for plaintiff and Mr. Patrick Muhere, (SSA) for 1st, 3rd and 4th defendants.



W.P. Dyansobera
Judge