

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(ARUSHA DISTRICT REGISTRY)**

**AT ARUSHA**

**CIVIL CASE NO. 6 OF 2022**

**BETWEEN**

**KONYAGI SHOP EXPRESS LIMITED.....PLAINTIFF**

**VERSUS**

**DEPOSIT INSURANCE BOARD.....DEFENDANT**

**RULING**

27/06/2023 & 24/07/2023

**MWASEBA, J.**

This ruling is in respect of the preliminary objection filed by the counsel for the respondent to wit:

1. That the suit is bad in law for contravening Section 6 (2) of the Government Proceedings Act, Cap 5 R.E 2019.
2. That, the suit is bad in law for contravening Section 6 (3) and (4) of the Government Proceedings Act (supra) as amended by Act No. 1 of 2020.



During the hearing of the raised preliminary objection, Mr. Leyani N. Mbise learned State Attorney represented the defendant while Ms. Dorah S. Mallaba, learned counsel represented the plaintiff. The preliminary objection was disposed of by way of written submission.

Submitting in support of the first point of preliminary objection, Mr. Mbise asserted that the defendant is the government institution as per **Section 37 (3) (a, b, c, and d) of the Banking Financial Institution Act** No. 5 of 2006. Therefore, the plaintiff was supposed to issue a 90 days' notice to the government and send a copy to the Attorney General and Solicitor General as per **Section 6 (2) of the Government Proceedings Act**. Thus, the suit is incompetent for failure to comply with the requirement of the law. His argument was supported by the case of **Aloyce Chacha Kangaya vs Mwita Chacha Wambura and 2 Others** (HC at Musoma) Civil Case No. 7 of 2019 (Unreported).

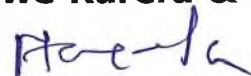
Responding to this point, Ms. Mallaba submitted that the suit against the defendant was not filed in its capacity as Deposit Insurance Board (DIB) but as the liquidator of the defunct Federal Bank of the Middle East (FBME), thus, it was not against the government. She argued further



that the defendant was appointed as a liquidator of the Federal Bank of The Middle East (herein FBME) on 8/5/2017.

She submitted further that as the suit was not against the government, the issuance of 90 days' notice and joining the Attorney General do not apply as no government body had committed wrong. Further to that, the plaintiff only failed to add the word "In its capacity as liquidator" on the title and put it in the plaint. So, she prayed for the court to order an amendment of the plaint to amend the name instead of striking out the suit, based on overriding principle as per **Section 3A and 3B of the CPC** to do away with technicalities and to render justice to the parties. She cited several cases including the case of **FBME Bank Tanzania Ltd (Under Liquidation) vs Cristal Resort Limited**, Civil Appeal No. 157 of 2018 (CAT at Zanzibar).

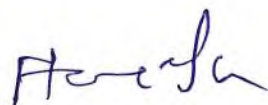
Coming to the second point of objection, Mr. Mbise submitted that an Attorney General was not joined as a necessary party as required by **Section 6 (3) of the Government Proceedings Act** as amended by Act No. 1 of 2020. He argued further that the consequence of failure to join the Attorney General as a necessary part vitiates the whole proceedings, and the application becomes incompetent. He supported his argument with the case of **Wambura Maswe Karera & 5 Others**



**vs Village Council of Mori & Another**, Civil Case No. 5 of 2020 (HC at Musoma, Unreported). He prayed for the suit to be struck out with costs.

Responding to this point, Ms. Mallaba stated that as the defendant was sued as the liquidator of FBME and not Deposit Insurance Board so, there is no need to join the Attorney General. She added that several cases also proceeded without joining the government and referred this court to the case of **FBME Bank Tanzania Ltd (Under Liquidation) vs Cristal Resort Limited** (supra). She argued further that whenever DIB appears it does not mean that it is the government which is a sued. The suit filed has to be looked at its content to ascertain the tenure and substance. Thus, she prayed for the preliminary objection to be overruled with costs.

In a brief rejoinder, Mr. Mbise reiterated what had been submitted in their submission in chief and added that the suit is very clear that the plaintiff sued DIB and not FBME. He also distinguished the cited case of **FBME Bank Tanzania Ltd (Under Liquidation) vs Cristal Resort Limited** (supra) as the facts differs from the present case.




Having heard the rival submissions in support and against the raised points of preliminary objection, this court will now determine the issue of whether the raised points of preliminary objection have merit or not.

Starting with the 1<sup>st</sup> point of preliminary objection, the learned state attorney for the defendant submitted that the suit was filed in contravention of **Section 6 of the Government Proceedings Act**, Cap 5 R.E 2019 as no notice was issued to the Government before the filing of the suit. On her side, Ms. Mallaba submitted that the defendant was sued not on her capacity but in the capacity of the Liquidator. She thus, prayed for the court to allow them to amend the plaint by changing the name of the defendant for the sake of justice to the parties.

**Section 6 (2) of the Government Proceedings Act** provides that:

*"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."*



Guided by the cited provision, the plaintiff was supposed to issue 90 days' notice to the government before suing the defendant as it was the Government institution as per **Section 37 of the Banking and Financial Institution Act**. On her side, Ms. Mallaba was of the view that the contents of the suit shows that no wrong was committed by the government institution, hence, there was no need to issue a 90-day notice to the government. She said that she sued the defendant not on her capacity but as a liquidator of FBME. So, she prayed for the court not to strike out the suit but to order an amendment of the plaint to amend the name of the defendant.

Regarding the prayer of the counsel for the plaintiff to be allowed to amend the pleadings to change the name of the defendant, it has been decided in several cases that a party is not allowed to pre-empt a preliminary objection to cure anomalies raised by the other party. The same was held in the case of **Method Kimomogoro vs Board of Trustees Tanapa**, Civil Application No.1 of 2005 (CAT-unreported), the Court reiterated the position this way:

*"This Court has said several times that it will not tolerate the practice of an advocate trying to pre-empt a preliminary objection either by raising another objection or trying- to - rectify the error complained of."*



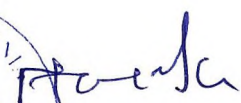

That being the legal position, the plaint is clear that the defendant is DIB who is a government institution. The prayer for effecting amendment to the plaint to rectify the name of the defendant will amount to pre-empting the preliminary objection. So, this court finds merit on the 1<sup>st</sup> point of preliminary objection.

Coming to the 2<sup>nd</sup> point of preliminary objection, the learned state attorney submitted that the plaintiff failed to join Attorney General as a necessary party to the case contrary to **Section 6 (3) and (4) of Cap 5, R.E 2019** as amended by Act No. 1 of 2020. As it has already been submitted in the 1<sup>st</sup> point of objection that the defendant herein is a government institution, hence an Attorney General was supposed to be joined as a necessary party. Thus, this point is found with merit.

For the foregoing reasons, the preliminary objection raised by the learned state attorney for the respondent is hereby sustained. The suit is hereby struck out with costs for being prematurely instituted.

It is so ordered.

**DATED at ARUSHA** this 24<sup>th</sup> day of July 2023.

  
 **N.R. MWASEBA**  
**JUDGE**