IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
DODOMA DISTRICT REGISTRY
AT DODOMA

CIVIL CASE NO. 21 OF 2023

ANNEY SAFARI ANNEY.....PLAINTIFF

Versus

AIRTEL TANZANIA PLC.....1ST DEFENDANT
VODACOM TANZANIA PLC.....2ND DEFENDANT
NATIONAL IDENTIFICATION AUTHORITY (NIDA).....3RD DEFENDANT
TANZANIA COMMUNICATION REGULATORY AUTHORITY(TCRA).....4TH DEFENDANT
THE ATTORNEY GENERAL.....5TH DEFENDANT

RULING

Last Order: 16th January 2024.
Date of Ruling: 9th February 2024.

MASABO, J:-

The plaintiff's claim is to the tune of Tshs 100,000,000/= being general, specific and punitive damages against the defendants for blocking his mobile phone communications. He alleges that the 1st to 3rd Defendant blocked his number for want of biometric registration/verification which he could not complete owing to his disability. After being served, the defendants filed notices of preliminary objection challenging the competence of the suit. The notice of preliminary objection filed by the first defendant has the following two limbs: **First,** the suit is *res judicata* and **second**, this court has no jurisdiction to entertain the suit as it has been filed in contravention of Regulation 11(4)(5) and 7 of the Electronic and Postal Communications (Consumer Protection) Regulations, GN. No. 61 of 2018. The second defendant's preliminary objection has the

following two points: **First**, this court lacks jurisdiction to entertain the suit as it contravenes section 7 of the Civil Procedure Code, Cap 33 RE 2019 read together with the Electronic and Postal Communications (Consumer Protection) Regulations GN No. 61 of 2018 and **second**, the plaint is incurably defective for want of cause of action against the second defendant. Likewise, the 3rd, 4th and 5th defendants' raised a two limbed preliminary objection in which they allege that: **one** this court lacks jurisdiction to entertain the suit as it offends section 42(2) of the Tanzania Communication Regulatory Authority Act, 2003 read together with sections 84(1), 85(1)(c) of the Fair Competition Act, 2003 Cap 285 and Rule 3 of the Fair Competition Tribunal Rules, G.N No. 219 of 2012 and **two;** the suit is bad in law for non adherence to Section 6(2) of the Government Proceedings Act, Cap 5 RE 2019.

Thus, there are in total six (6) limbs of preliminary objection which can conveniently be consolidated into the following four points: **one,** the suit is *res judicata* against the first and fourth defendant. **Two,** this court has no jurisdiction to determine the matter. **Three,** the plaint is defective for want of cause of action against the second defendant. **Four,** the suit is bad in law for failure to serve a ninety (90) days' notice to the Solicitor General.

The hearing of the preliminary objection proceeded by way of written submissions as ordered by this court on 13th November 2023. All the parties had the service of legal minds in preparing and filing their submissions. Submissions by the 3rd, 4th and 5th defendants were drawn and filed by Ms. Jennifer Kaaya, Senior State Attorney. Submissions by the 1st defendant were drawn and filed jointly by Mr. Gaspar Nyika and

Ms. Sammah Salah, learned Advocates and the submission by the 2nd defendant was drawn and filed by Mr. Juvenalis J Ngowi, learned Advocate whilst those of the plaintiff were drawn and filed by Mr. Erick Christopher, learned counsel.

The first limb as regards the principle of *res judicata* was not supported by any submission and so was the third limb that the suit is defective for want of cause of action against the second defendant. Mr. Nyika and Ms. Salah who had raised the issue of *res judicata* rendered no support to it apart from reproducing it in their submission in chief. Similarly, Mr. Ngowi who had complained that the suit is incompetent for want of cause of action against his client, turned mute on this point. His submission was conspicuously silent on this issue thus suggesting that he found it unworthy of pursuit. In the foregoing, these two points are considered to have been silently abandoned and this leaves us with the second and the fourth limb.

On the second limb of the preliminary objection as regards jurisdiction, Ms Kaaya submitted that section 40 of the Tanzania Communication Regulatory Authority (TCRA) Act vests the TCRA with dispute resolution mandate by which it receives, investigates and resolves complaints arising from services and goods regulated by the Authority (TCRA). Section 42(2) of the same Act requires a party who is dissatisfied with the decision of the Authority in the exercise of its complaints mandate, to appeal to the Fair Competition Tribunal (FCT) which is mandated by section 85(1)(c) of the Fair Competition Act, 2003 to hear and determine the Appeal. Thus, having been dissatisfied by the decision of the 4th defendant (the Authority), the plaintiff had to appeal to the FCT and not to institute a

fresh suit in this court. While referring to the Court of Appeal decision in **Yazidi Kassim t/a Yazidi Auto Electric Repairs vs. The Hon Attorney General,** Civil Application No. 354/04 of 2019 [2021] TZCA 1 TanzLII and **Salim O.Kabora vs. TANESCO Ltd &Two Others** Civil Appeal No. 55 of 2014 [2020] TZCA TanzLII 1812, the learned State Attorney Concluded that the suit is incompetent and should be struck out.

On their part, Mr. Nyika and Ms. Salah, counsels for the first defendant submitted that this court has no jurisdiction to entertain the suit as it has been filed contrary to Regulation 11(4), (5) and (7) of the Electronic and Postal Communications (Consumer Protection) Regulations GN. No. 61 of 2018. They amplified that the suit arises from communication services regulated by the TCRA Act whose section 43(1) establishes a complaint mechanism for such disputes. The section read together with Regulation 11(4), (5) and (7) above requires that disputes arising from communication services should first be referred to the TCRA for resolution and in determining the same the TCRA is mandated to award costs, refunds and other reliefs it deems necessary and reasonable. The remedy available to the aggrieved party is to file an appeal before the FCT as per section 45(2) of the TCRA Act. They proceeded to argue that since the plaintiff's plaint shows that his claims have arisen from services regulated by the TCRA he was duty bound to comply with the procedure above. Relying on the case of **Adella Stanslaus Assey t/a Mount Kibo Pharmacy 2012 vs Vodacom Tanzania PLC and Another**, Civil Case No. 8 of 2023, [2023] TZHC 22054 TanzLII HC at Moshi and **Salim O.Kabora vs. TANESCO Ltd &Two Others** (supra), they submitted and prayed that the suit be struck out with costs for want of jurisdiction.

Mr. Juvenalis Ngowi, learned counsel for the 2nd defendant, had a similar view and placed his reliance on Regulations 11(3), (4) and (8) of the Electronic and Postal Communications (Consumer Protection) Regulations, GN No. 61 of 2018 read jointly with section 4(2) of the TCRA Act. He joined hands with Mr. Nyika and Ms. Salah in arguing that, the jurisdiction of a court being a statutory creature, it can neither be assumed nor exercised at the pleasure of the parties as stated by the Court of Appeal in **Tanga Cement Public Company Limited v Fair Competition Commission,** Civil Appeal No. 55 of 2016 (unreported) and **Commissioner General Tanzania Revenue Authority v TSC AtomredmeTZoloto (arm2)**, Consolidated Civil Appeals 78 of 2018 [2020] TZCA 306 TanzLII.

On the fourth limb, Ms. Kaaya learned Senior State Attorney, submitted that the suit is incompetent for offending the provision of section 6(2) of the Government Proceedings Act which requires that a suit against the Government should be preceded by a 90 days' notice and the copy of same must be supplied to the Solicitor General, a requirement which the plaintiff herein unjustifiably ignored. Referring to paragraph 11 of the plaint, Mr. Kaaya argued that the plaintiff issued and served the said notice to the 3rd, 4th, and 5th defendants but did not furnish the notice to the Solicitor General. She underscored that service of the notice to the Solicitor General is a mandatory requirement as the provision above is couched in mandatory terms. With reference to section 53(2) of the Interpretation of Laws Act, Cap 1 and the case of **Maswi Drilling Co ltd vs. Chato District Council and Another**, Civil Case No. 37 of 2022 [2023] TZHC 16555 TanzLII, she argued that the suit is incompetent for

being filed in contravention of a mandatory legal requirement. Thus, it should be struck out with costs.

In reply, Mr. Christopher admitted that indeed there exist a special dispute resolution mechanism for disputes arising from goods and services regulated by TCRA. However, he quickly retorted that the mechanism is only mandated to resolve disputes between consumers and providers of such goods and services. Thus, the special mechanism articulated by the counsels can only apply where, for example, the dispute is between a consumer such as the plaintiff herein and a service provider such as the 1st and 2nd Defendant or between service providers. The dispute herein is not within the purview of the mechanisms above as it involves such parties as the TCRA, The National Identification Authority and the Attorney General who are neither consumers nor service providers. He added that, much as the dispute was at first referred to the TCRA, such a reference was misguided as the TCRA being herself a party to the dispute could neither mediate nor decide the same nor award reliefs. Furthermore, it was argued that as this court is the first instance court for suits involving the Government as per section 7 of the Government Proceedings Act, the argument that this suit was wrongly filed has no merit.

As regards the notice to the Solicitor General, the plaintiff's counsel conceded that indeed service of the notice to the Solicitor General is, indeed, mandatory. He proceeded that in the present case although the Solicitor General is not listed amongst the recipients of the letter, it does not mean that he was not served. The Solicitor General and all the defendants above listed were all served and there is proof of service although the same has not been appended to the pleadings. In the

foregoing, he invited this court to ignore the contention and to find the suit not offensive of the law. He conclusively prayed that the suit should not be dismissed or struck out.

Mr. Ngowi filed a rejoinder which by large reiterated his submission in chief. Mr. Nyika and Ms. Salah did not file a rejoinder.

I have carefully considered the submissions by the parties. I will now proceed to determine the preliminary objection. The following two issues need to be resolved. One, whether this suit is unmaintainable for want of jurisdiction and two, whether the suit is offensive of section 6(2) of the Government Proceedings Act. Before determining these two issues, I think, it is apposite and prudent at this outset to revisit the concept of preliminary objection as set out in **Mukisa Biscuit Manufacturing Company Ltd. v. West End Distributors Ltd** (1969) EA 696 and endorsed by the Court of Appeal in a plethora of authorities (see for example **Hezron M. Nyachiya vs Tanzania Union of Industrial and Commercial Workers & Another,** Civil Appeal No. 79 of 2001,[2005] TZCA 66 TanzLII CAT, **Karata Ernest and others vs the Attorney General**, Civil Revision No. 10 of 2010 [2010] TZCA 30 TanzLII and **Mount Meru Flowers Tanzania Ltd vs Box Board Tanzania Ltd** (Civil Appeal 260 of 2018) [2019] TZCA 434 TanzLII). From these and many other authorities, it is now trite that a preliminary objection need be on a pure point of law as opposed to facts or mixture of law and facts. In **Karata Ernest and Others** (supra) the Court of Appeal instructively stated that:

> "At the outset, we showed that **it is trite law that a point of preliminary objection cannot be raised if any fact**

has to be ascertained in the course of deciding it. It only "consists of a point of law which has been pleaded, or which arise by clear implication out of the pleadings". Obvious examples include, objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal has been lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from etc." [the emphasis is mine]

With this guidance, I will now move to the issues for determination starting with the second one. Ms. Kaaya has passionately argued that the requirement to send a copy of the notice to the Solicitor General is a mandatory legal requirement. Since the Solicitor General was not served with the 90 days' notice before the institution of the present suit the suit has been rendered unmaintainable for offending a mandatory legal provision and should consequently be struck out with costs. The prayer was sternly disputed by Mr. Christopher who while conceding that there is indeed a requirement to issue the notice to the Solicitor General has invited this court not to strike out the suit as the notice was issued and served upon the Solicitor General but the plaintiff inadvertently omitted to append the proof of delivery and receipt of the same by the Solicitor General. He has, in addition, told the court that, service of the letter to the Solicitor General which is currently at issue is a factual issue. It requires proof which if the plaintiff is given a chance, he can produce as it is readily available.

Section 6(2) of the Government Proceedings Act which is the epicentre of this point, states that:

> 6(2) 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** [emphasis added].

Luckily, this is not the first time this provision has been tested. It has been litigated in numerous cases and it has been consistently held that the provision above imposes mandatory requirements. Thus, it must be strictly followed prior to the institution of the suit. Non compliance renders the suit unmaintainable. For instance in **Aloyce Chacha Kenganya vs Mwita Chacha Wambura and Others** (HC Civil Case 7 of 2019) [2020] TZHC 90 TanzLII this court while reckoning its previous decisions held as follows:

> It is the position of the law as stated in **Thomas Ngawaiya Vs the Attorney General and 3 others,** Civil Case No 177 of 2013 that section 6 of the Government Proceedings Act is mandatory and unambiguous. It requires a person intending to sue the Government to issue a notice to the relevant Government officer or institution and copy of the same to the Attorney General specifying the basis of his claim. This Court stated that-
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> > "The provisions of section 6 (2) of the Government Proceedings Act are express, explicit, mandatory, admit no implications or exceptions. They are imperative in nature and must be strictly complied

with. Besides, they impose absolute and unqualified obligation on the court."

I subscribe to the above position of the law the law must be complied with. Parties cannot be allowed to circumvent the mandatory procedural requirements. This was the position adopted by the Court of Appeal in **SGS Societe Generale de Surveillance SA and another v. VIP Engineering & Marketing Ltd and another** (Civil Appeal No. 124 of 2017) (unreported).

I fully subscribe to this view. The plaintiff was duty-bound to strictly comply with the mandatory provision above by sending a copy of his notice to the Solicitor General. While scanning through the pleadings, I observed that two notices were issued and both were dated on 3/3/2023. The first was addressed to the 3rd, 4th and the 1st defendant and the addressees of the second notice were the 3rd, 4th, and the 2nd defendant. At the bottom of both letters it shows that the copies of the notice had to be sent to the Attorney General and the Solicitor General. Thus, what remains to be determined is whether the letters were indeed sent/delivered to the Solicitor General. For the 3rd, 4th, and 5th Defendant, it has been argued that they were not served while for the plaintiff it has been argued that, they were sent and there is evidence to it only that it was inadvertently omitted . While contemplating these arguments I have asked myself whether, in the interest of justice, it would be prudent to determine this issue as a preliminary objection. After some reflection and guided by the authorities above, I have entertained a negative answer because much as the requirement to send the copy of the notice to the Solicitor General is purely legal what stands to be determined in this case appears to be a mixture of law and facts. Since the notice issued by the

plaintiff has listed the Solicitor General as a recipient of the two copies, the question whether or not the copies of the notice were indeed delivered to the Solicitor General is, in my firm view not a purely legal issue. It is a factual issue requiring evidence to ascertain and hence cannot be resolved at this stage as no preliminary objection exists where there are factual issues requiring evidence to ascertain. That said, I reserve this issue to be determined after the parties have adduced their evidence and preferably in my view, as the first issue of determination.

Having resolved the second issue, I will now revert to the first issue. Unlike the second issue, this limb is certainly a pure point of law and must be resolved at this earliest opportunity else the court would risk proceeding with the matter in the assumption that it has jurisdiction. As stated by the Court of Appeal in **Fanuel Mantiri Ng'unda Vs Herman Mantiri Ng'unda & 20 Others,** Civil Appeal No. 8 of 1995, [1995] TZCA 6, TanzLII had held thus: -

> "The question of jurisdiction for any court is basic, it goes to the very root of the authority of the court to adjudicate upon cases of different nature... (T)he question of jurisdiction is so fundamental that courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial.... It is risky and unsafe for the court to proceed with the trial of a case on the assumption that the court has jurisdiction to adjudicate upon the case.

Several provisions have been cited in support of this limb of objection. I need not reproduce them. Basically, the plaintiff's counsel has disputed neither the content of such provisions nor the existence of the special complaint mechanisms established by such provisions. His argument is that his claim is a *sui generis,* so to speak, as it concerns parties other

than those regulated by the TCRA hence outside the purview of the special complaint mechanism. His subsequent argument is that the TCRA which presides over the complaint mechanism is itself a party to the complaint. Hence, she cannot be an arbiter in her own case as that would offend the principles of natural justice.

I have painstakingly read the provisions cited. Indeed, there is a special complaints' resolution mechanism for disputes arising in the communications sector. The same is established under part VIII of the TCRA Act. Section 40 of this Act sets the scope of the complaint mechanism and states that;

> 40. - (1) This section shall apply to **any complaint against a supplier of regulated goods or services** in relation to any matter connected with the supply, possible supply or purported supply of the goods or services [emphasis added].

The terms "regulated goods" and "regulated services" are defined under section 3 of the Act to mean;

> "regulated goods" means any equipment produced, supplied or offered for supply or for use in a regulated sector and includes any goods the Authority declares under section
>
> "regulated services" means any **services supplied or offered for supply in a regulated sector** and includes services which the Authority declares to be such services under section 46. [the emphasis is added].

And, the "regulated sector" is defined to mean:

> 'telecommunications, broadcasting, postal services, allocation and management of radio spectrum and converging electronic technologies including the internet

and other Information Communication and Technologies (ICT) applications."

From these definitions, there can be no doubt that the present suit having arisen from the supply of mobile telephone communication services is squarely within the realm of disputes envisioned under section 40. With regard to procedures, section 40(2),(3),(4) and (5) of the TCRA read together with Regulation 11(2),(3),(4) and (5) of the Electronic and Postal Communications (Consumer Protection) Regulations, 2019 require that such disputes be first referred to the Authority (TCRA) which is mandated to investigate the complaint and resolve it amicably. For a consumer complaint such as the one at hand the law directs that it be referred to a special unit/committee for investigation and for an amicable resolution which should be finalized within 60 days. If the complaint remains unresolved after these days the committee shall present its findings and recommendations to the Authority and based on such recommendations, the Authority may make orders as to the supply of goods or services for specified periods and terms, payment of costs, refunds, fines, specific performance etc. As per section 42(2) of the TCRA Act, appeals from such award lie to the FCT whose decision, as correctly submitted by the defendants' counsels, is equivalent to a judgment or order of this court (see section 84, 5(1) (c) of the Fair Competition Act of and Rule 2 and 3 of the Fair Competition Tribunal Rules).

The law is now settled that although the courts and this court in particular is clothed with the jurisdiction to determine all suits of a civil nature and its exclusive jurisdiction need not be lightly interfered with, such exclusivity is not free from limitation. Such limitation is permitted under

section 7 of the Civil Procedure Code, Cap. 33 R. E. 2019 which provides that:-

> The courts shall subject to the provisions herein contained have jurisdiction to try all suits of civil nature **except suit of which their cognizance is either expressly or impliedly barred.** [emphasis added]

The import of this provision has been extensively canvased and applied in many cases and the consensus in these cases is that, the jurisdiction of this court to deal with a certain matter can be limited by the Constitution or a specific law expressly stating that a certain matter be dealt with by a specified mechanism/forum. In **Salim O. Kabora v TANESCO& 2 Others,** Civil Appeal No. 55 of 2014, (supra), the Court of Appeal while echoing its previous decision in **Tanzania Revenue Authority vs Tango Transport Company Ltd,** (Civil Appeal No. 84 of 2009) [2016] TZCA 84 TanzLII, concluded that:

> ".....where a certain law provides for a specific forum to first deal with a certain dispute, a resort to it first is imperative before one seeks recourse to court. Where that is not observed, the attendant court's decision is rendered a nullity."

This being the position of the law as it stands today, it is obvious that the complaint mechanism stipulated under the provisions above is the first resort for disputes arising from the supply of telecommunications goods and services, the complaint herein being among them. Therefore, the sole issue for determination is whether, in view of the two arguments raised by the plaintiff's counsel, the present suit is an exception. In my view the argument that the procedure above does not apply in the present case as

the 3rd defendant is the arbiter is merely an afterthought. The plaint shows vividly and Mr. Christopher has admitted that before instituting the present suit, the plaintiff knocked on the doors of the TCRA in pursuit of the special dispute resolution mechanism above stated. He only came to this court after his pursuit ended futile and it was at this stage when he became wiser and changed his gear. Instead of pursuing the appeal to the FTC, he came to this court and impleaded his former arbiter, the TCRA. As the appeal had to be lodged before the FTC and not the TCRA, the argument that the TCRA would have been an arbiter of his case is lucidity misconceived and without merit as the complaint was already past the TCRA stage.

What I find convincing and valid is the impleading of NIDA and the Attorney General who, in the context of section 3 of the TCRA Act, are neither consumers nor suppliers of communications and information goods and services. Hence, not within the scope of section 40 of the TCRA Act and cannot, therefore, be subjected to the special complaint mechanism. For this sole reason, I agree with Mr. Christopher that the suit is properly before this court.

That said and done the preliminary objection, is to the extent above stated, overruled.

DATED at **DODOMA** this 09th day of February 2024.

THE HIGH COURT TANZANIA

J. L. MASABO

JUDGE