

THE UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
COMMERCIAL DIVISION
DAR ES SALAAM
COMMERCIAL CASE NO.145 OF 2023

JAMES LUGMEBE PLAINTIFF

VERSUS

DEPOSIT INSURANCE BOARD (D.I.B)

LIQUIDATORS OF FBME BANK LTD DEFENDANT

RULING

Date of Last Order:07/02/2024

Date of Ruling:19/04/2024

GONZI, J.

On 30th November 2023 when the case was called for orders Mr. Paul Elias learned Advocate prayed to amend the Plaintiff so as to rectify some contradictions therein. The Defendant was absent despite having been duly served and notified of the date of appearing in Court. I granted the prayer for the Plaintiff to amend paragraphs 8 and 10 of the Plaintiff which were contradictory. I directed that the amended plaint be served upon the Defendant for necessary steps together with notice of the date to appear in Court. On 8th February, 2024 when the case was called again in court, Ms. Salma Abdallah learned Advocate appeared for the Plaintiff and Ms. Debora

Mchau learned advocate appeared for the Defendant. The learned counsel addressed the Court that all the pleadings had been filed and served accordingly subsequent to the amendment of the Plaint. They informed the court further that in the Amended Written Statement of Defence the Defendant had raised two preliminary points of objections in law to wit:

- 1. The suit is bad in law for contravening Section 6(2) and 6(3) of the Government Proceedings Act, Cap 5 RE 2019.**
- 2. The suit is bad in law for contravening Section 41(a) of the Banking and Financial Institutions Act, Act No.5 of 2006 and section 288 of the Companies Act Cap 212 RE 2019 which prohibits commencement of actions or proceedings against the Company except by leave of the Court and subject to such terms as the court may impose.**

With leave of the Court, the preliminary objections were disposed of by way of written submissions pursuant to the schedule given by the court.

The Defendant's learned counsel Ms. Jacqueline Kinyasi, State Attorney submitted in respect of the first preliminary objection that the suit is against the Deposit Insurance Board as the official Liquidator for the FBME Bank Limited. She argued that DIB is a statutory Body established under section

36 of the Banking and Financial Institutions Act, 2006 and is charged with the role of liquidator for banks and financial institutions in Tanzania. She argued that under section 37 of the Banking and Financial Institutions Act, the Deposit Insurance Board is under control of the Government notwithstanding its capacity to sue and be sued. She submitted that the Chairman and Vice Chairman of the board are Presidential appointees and the Board members are appointees of the Minister for Finance. She reasoned that in the case of **Attorney General versus Tanzania Ports Authority and another**, Civil Application No.87 of 2016 (unreported) the Court of Appeal of Tanzania used the same principles of constitution of the Management of the Statutory Board to hold that the entity in question is a Government Institution or entity.

Ms. Kinyasi submitted further that in terms of section 6(2) of the Government Proceedings Act no suit against the Government shall be instituted and heard unless the Claimant previously submitted to the Government Minister, Department or Officer a 90 days' notice of intention to sue the Government and sends a copy thereof to the Attorney General and the Solicitor General. She argued further that in terms of section 6(3) of the Government

Proceedings Act, non-compliance with the legal requirement of issuing a 90 days' notice vitiates the proceedings or suit brought.

The learned counsel for the Defendant relied on the case **of Oysterbay Properties Limited and another versus Kinondoni Municipal Council and others** (Civil Revision No.4 of 2011 decided by the Court of Appeal to buttress her argument that there is a mandatory requirement to serve 90 days' notice to the Government department concerned and the Attorney General as well in terms of section 6(2) of the Government Proceedings Act. The learned State Attorney submitted further that in the case of **Wambura Maswe Karera and 5 others versus Village Council Mori and the District Executive Director of Rorya District**, Civil Case Case No. 5 of 2020 decided by the High court, the suit was struck out for non-joinder of the Attorney General and non-issuance of the 90-days statutory notice of intention to sue. She prayed that the present suit also be struck out.

Responding to the first preliminary objection, the learned counsel for the Plaintiff Ms. Salma Abdallah submitted that the Plaintiff was prompted to file the present suit by a 14 days Demand Notice served upon the Plaintiff by an auctioneer who was acting as an agent of the Defendant for the Plaintiff to pay the claimed sums or risk his properties being sold in public auction. The **MISC. COMMERCIAL**

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Plaintiff's Counsel admitted that the suit was filed without issuance of 90 days' notice of intention to sue the Government and without joining the Attorney General as a party to the suit because there is no requirement to do so in the circumstances of the present case. She argued that the requirement under section 6(2) of the Government Proceedings Act dies a natural death where the Attorney General through the Solicitor General intervenes in a suit. She submitted that in terms of Sections 6A (1) and 6A (2) the Government Proceedings Act where the Attorney General through the Solicitor General intervenes in a suit, there is no requirement of 90 days' notice. She submitted that the Attorney General can intervene in a suit by filing an application to be joined as a necessary party in the suit or by filing a defence or counter affidavit in defending the suit against the Government. She argued that while in the Complaint, the Plaintiff had sued the Defendant alone and specifically effected service of the amended complaint upon the defendant alone, in its Amended Written Statement of Defence, the Defendant indicated that its address of service would be under the office of Solicitor General of the Government and therefore it means that the Attorney General through the Solicitor General had thereby intervened in the suit by filing the Written statement of defence for and on behalf of the government entity. She submitted that even the learned State Attorney representing the

Defendant in the present case always introduces herself as coming from the office of the Solicitor General. This means that the Defendant has informed the Attorney General of the pendency of this suit and that the Attorney General has intervened and therefore the intervention displaces the need to comply with section 6(2) of the Government Proceedings Act.

The learned counsel for the Plaintiff submitted that joining the Attorney General in this suit was not mandatory because in order to join the Attorney General, the other government agency or entity sued should have been given a 90 days' statutory notice and then the Attorney General could come into play. In the case at hand the 90 days' notice was not issued as to attract the joining of the Attorney General in the case. Also, she argued that the Attorney General through the office of the Solicitor General are aware of the presence of this suit because the Solicitor General works under instructions of the Attorney General in terms of Section 17(2) of the Government Proceedings Act. She referred the court to the decision of the Court of Appeal of Tanzania in **Attorney general versus Mkongo Building and Civil Works Contractors Limited and another Civil** Application No. 166/16 of 2020 where it was held that:

“From the foregoing, we hold that as the applicant was made aware of the pending proceedings before the High Court in respect of Misc. Commercial Case No.409 of 2017, she was bound to comply with the provision of section 17(2)(a) and (b) of Cap 268 by seeking to join to safeguard the public interest”.

The learned counsel for Plaintiff therefore submitted that the law was not violated for the non-joinder of the Attorney General and non-issuance of the 90 days’ notice of intention to sue. And that in case the court finds that the law was violated, then the court should resort to Order I Rule 10(3)(2) of the CPC and order joinder of the Attorney General as a necessary party. She relied on the case of **Johari Ibrahim Chata and David Kagoma bahangaza versus Mpanda District Council and 3 others** Land Case No. 4 of 2021(unreported) as her authority for this holding. She called to her help Article 107A(2)(e) of the Constitution of the United Republic of Tanzania that in the interest of substantive justice the court makes an order that the Attorney General be joined as a party to this case.

In her rejoinder submissions, Ms. Kinyasi, State Attorney learned counsel for the Defendant submitted that it is clear that the Plaintiff admits the non-issuance of the 90 days’ notice and non-joinder of the Attorney General to this suit. She went on to submit that the intervention by the Attorney

General, through the Solicitor General, in a suit, is regulated by section 17(1) of the Government Proceedings Act. She submitted that the intervention envisaged under that section is not to be done by the mere attendance in court or preparation of court documents like what was done in the present case rather it can only be done by the Attorney General, through the Solicitor General, giving official notification by formal application to court of his intention to be joined and proving that the case involves public property or public interest at stake. She argued that before the court now there is no such application to intervene by the Attorney General. She argued that in the case at hand, even though the Attorney General's office is sending lawyers to defend the defendant, the Attorney General is not a party; rather it is sending lawyers to defend the defendant Government entity in this suit in discharge of its legal mandate under article 59 (4) of the Constitution and section 5 of the Government Proceedings Act. She submitted that under section 6A (3) the law imposes the duty upon the entity sued to notify the Attorney General, but that in no way absolves the duty upon the Plaintiff to issue the 90 days' notice. She argued that after expiry of 90 days' notice, in terms of section 6(3) of the Government Proceedings Act, joinder of the Attorney General was mandatory. She concluded by distinguishing the case of Mkongo Builders that the case was a revision by the Attorney General

complaining about his nonjoinder in the High Court when an arbitral award had been filed for recognition.

In the case at hand there are two preliminary objections:

1.The suit is bad in law for contravening Section 6(2) and 6(3) of the Government Proceedings Act, Cap 5 RE 2019.

2. The suit is bad in law for contravening Section 41(a) of the Banking and Financial Institutions Act, Act No.5 of 2006 and section 288 of the Companies Act Cap 212 RE 2019 which prohibits commencement of actions or proceedings against the Company except by leave of the Court and subject to such terms as the court may impose.

I granted both sides an opportunity to address me on both preliminary objections and they duly filed in court their respective submissions in respect of both preliminary objections. However, before determining the second preliminary objection, I found it prudent to firstly consider the first preliminary objection because, if successful, it could terminate the matter at hand and render the second preliminary objection superfluous. In the case

at hand it is not disputed that the Defendant is a Government entity. Also, it is not disputed that 90-days' Notice of intention to sue the Government was not issued to the Defendant nor the Attorney General and the solicitor General. Further it is not disputed that the Attorney General was not joined as a party in a suit against the Government.

The Plaintiff's counsel maintains that despite all those omissions to involve the Attorney General's office in the case at hand, still on the part of the Plaintiff, the suit at hand is competent because the Plaintiff had only 14 days to take judicial action or his assets would be sold by public auction following the receipt of a demand notice from an agent of the Defendant. In my view, that exigency did not absolve the Plaintiff from fulfilling the legal requirement of issuing the 90 days' Notice to the Defendant and the Attorney General and joining the Attorney General in this suit. Upon issuance of the 90 - days' notice of intention to sue the Government and joining the Attorney General as a necessary party, the Plaintiff could very well institute the suit before the expiry of the 90 - days' notice period by pleading with the court to dispense with the 90 - days' notice period, in order to ensure that ends of justice are not defeated for the reason that he had been given only 14 days to take judicial action against the Government or risk his assets being sold

by the defendant by public auction. There were legal avenues for the Plaintiff to do so but only after having issued the 90 days' notice, served it to the required persons and impleaded the Attorney General as a necessary party to the suit.

The Plaintiff has argued that the Attorney General has intervened in this suit through the Solicitor General's office because State Attorneys from the office of the Solicitor General have been appearing in court for the defendant. This argument does not hold water. The intervention presupposes joining and becoming a party to the suit. The Attorney General has not made any application to be joined as a party to the suit. The Lawyers from the office of the Solicitor General are attending the case for and on behalf of the Defendant which it is not disputed that she is a Government entity. The pleadings in this case contain only one defendant. The Attorney General is not a party.

The Plaintiff's learned counsel submitted that due to the fact that the Lawyers from the Office of Solicitor General have been attending the case for the Defendant, then they are aware of this case and thus the case should continue as it is. This argument is wrong. Lawyers, whether private practitioners or Government Lawyers, appear in Court to represent the

clients. They do not “appear” in their own capacities as if they were parties to the case. The judgment and decree will ultimately attach to the party to the suit, not to the lawyer representing such party (except for orders as to costs, which under exceptional circumstances, may be imposed upon a lawyer guilty of some misconduct in filing or handling the case.) In this case the State Attorneys from the Office of the Solicitor General have been appearing as legal counsel for their client who is the Attorney General; but this has been so, not because the Attorney General has been sued, but because the Defendant who has been sued by the Plaintiff is a government entity and the Attorney General has the constitutional and legal mandate to represent the government entities, as submitted by Ms. Jacqueline Kinyasi, State Attorney and learned Counsel for the Defendant. The Attorney General in this suit has engaged the Solicitor General to defend the suit filed against the Defendant for and on behalf of the Attorney General. That involvement by Attorney General and Solicitor General’s officials, *ipso facto*, does not make the Attorney General a party to the case at hand which was explicitly filed against Deposit Insurance Board alone. From another perspective, even if it were to be accepted that the Attorney General through the Solicitor General, is aware of existence of this case and that she has sent her representatives to attend, that could not prevent her upon attending the

case under resistance, from raising a preliminary objection that no 90 days' notice was issued prior to the institution of this case in court. The argument therefore does not hold water.

The argument by the Plaintiff's counsel that the Court can use Order I of the Civil Procedure Code to order the Attorney General to be joined as a necessary party, is misconceived. Suits against the Government are regulated by a specific law that is the Government Proceedings Act. The application of the provisions of the Civil Procedure Code, which is a general law, to defeat an explicit requirement of the Government Proceedings Act which is the specific law in this regard, would not be legally correct.

The learned counsel for the Plaintiff submitted that joining the Attorney General in this suit was not mandatory because in order to join the Attorney General the Government agency or entity sued should have been given a 90 days' statutory notice and then the Attorney General could come into play. To accept this argument would be tantamount to accepting that two wrongs make a right. The Plaintiff was supposed to send a 90 days' notice to the defendant and serve it to the Attorney General and the Solicitor General and then institute the case against the Defendant herein as well as the Attorney General. The first omission could not justify the second omission.

The Plaintiff's learned counsel has pleaded with the court to invoke the overriding objective principle and condone the defect of non-issuance of the 90 days' notice and non-joinder of the Attorney General to a suit against the Government. I am not persuaded. In the case of **Leticia Mwombeki v. Faraja Safarali and 2 Others**, Civil Appeal No. 133 of 2019, CAT at Dar es Salaam, at page 10 of the judgment stated inter alia that:

"Thus, we decline Mr. Mrindoko's invitation to invoke the overriding objective principle to remedy a fatal omission which cannot be glossed over as it goes to the root of the matter and occasion a failure of justice. See MONDOROSI VILLAGE COUNCIL AND TWO OTHERS VS TANZANIA BREWERIES LIMITED AND FOUR OTHERS, Civil Appeal No. 66 of 2017 and NJAKE ENTERPRISES LIMITED VS BLUE ROCK LIMITED AND ANOTHER, Civil Appeal No. 69 of 2017."

In the present case the plaintiff committed fatal omissions.

Therefore, it is my finding that the first preliminary objection succeeds and is hereby upheld. The law is loud and clear under section 6(3) and (4) of the Government Proceedings Act, Cap 5 of 2019 as amended by Written Laws (Miscellaneous Amendment) Act No. 1 of 2020 which provides that:

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

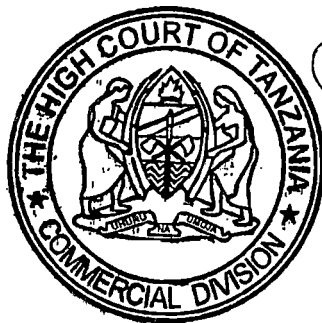
(4) Non-joinder of the Attorney General as prescribed under subsection (3) shall vitiate the proceedings of any suit brought in terms of subsection (3)."

I have considered the cases cited and relied upon by the learned counsel for the Plaintiff but I find that she has misconstrued them. There is no authority in them that a suit against the Government can be instituted in Court without issuance of the 90-days' notice and without joining the Attorney General in that case as a necessary party.

Having upheld the first preliminary objection which, in terms of Section 6(4) of the Government Proceedings Act, is enough to vitiates the present suit, I

find it unnecessary to determine the second limb of preliminary objection raised by the Defendant. Its determination is inconsequential to the outcome of this Ruling.

I find that the suit at hand is bad in law for contravening Section 6(2) and 6(3) of the Government Proceedings Act, Cap 5 RE 2019. Ms. Jacqueline Kinyasi, State Attorney, learned counsel for the Defendant, in her submissions, prayed that the suit be struck out with costs. I hereby strike out the suit with costs.



A. H. GONZI

JUDGE

19/04/2024

Ruling is delivered in court this 19th day of April 2024 in the presence of Mr. Paul Elias, learned advocate for the Plaintiff and Ms. Kaose Killonzo learned State Attorney for the Defendant.



A. H. GONZI

JUDGE

19/04/2024