

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 10 OF 2020

SALIM O. KABORA PLAINTIFF

VERSUS

1. KINONDONI MUNICIPAL COUNCIL	} DEFENDANTS
2. KAIZA BALAMA		
3. HAPPINESS N. LUCAS		
4. WILLIAM J. MSUMI		

RULING

Date of Last Order: 18/06/2021 &

Date of Ruling: 06/08/2021

S.M. KALUNDE, J.:

Through a plaint dated 17th January 2020, the plaintiff, SALIM O. KABORA, filed Land Case No. 10 of 2020 (**"the suit"**) against Kinondoni Municipal Council; Kaiza Balama; Happiness N. Lucas; and William J. Msumi (**"the defendants"**). The plaintiff claimed to be the lawful owner of two plots of land identified as KND/KGG/MBY 1/27 with Residential Permit/Licence No. 002374 and KND/KGG/MBY 1/27 with Residential Permit/Licence No. 008849 located at Kigogo within Kinondoni Municipality (**"the suit property"**).

The plaintiff claimed that the defendants have fraudulently conspired to deprive him of the suit property. His claim was that though its employees, 2nd and 3rd defendants, the 1st defendant illegally re-surveyed the suit property and issued licences to the 4th defendant. The plaintiff prayed for judgment and decree against the defendants in the following terms: a perpetual injunction restraining the defendants from doing anything on the suit property; a declaration that a stop order issued to the plaintiff by the 1st defendant is null and void; an order for vacant possession; payment of compensation for illegal confiscation and payment of general damages.

The 1st, 2nd and 3rd defendants filed their joint Written Statement of Defence denying the plaintiffs allegation. In addition to that, they also filed a Notice of Preliminary Objection containing one preliminary objection that the plaint was incurably defective for failure to disclose a cause of action against the 2nd and 3rd defendants.

In their defence the 4th defendant claimed to be lawful owners of property identified as KND/KGG/MBY 1/27 with Residential Permit/Licence No. 7744 located at Kigogo within Kinondoni Municipality having been allocated by the Kinondoni Municipal Authority. Together with the Written Statement of Defence, the 4th defendant filed a Notice of Preliminary Objection containing four points:

1. That the suit is time barred in violation of **the Law of Limitation Act, Cap. 89 R.E. 2019;**
2. That the suit is Res subjudice to **Land Application No. 164 of 2013;**
3. The suit is Res Judicata to **Civil Case no. 212 of 1993;** and
4. That the Court lacks jurisdiction to entertain the matter.

I ordered the preliminary objections be argued by way of written submissions. The plaintiff was represented by **Mr. Abraham Hamza Senguji** learned advocate, **Mr. Daniel A. Lisanga** learned advocate appeared for the 4th defendant and the 1st, 2nd and 3rd defendants were being represented by **Ms. Leah Kimaro** learned Municipal Solicitor.

When Ms. Kimaro filed her submissions, she appeared to raise another very important point of law that the present suit was filed in contravention of **section 6 of the Government Proceedings Act, Cap. 5 R.E. 2019** as amended by **the Written Laws (Miscellaneous Amendments) Act No.1 of 2020**. The said Act No. 1 of 2020 brought amendments to the effect that in any suit against a Local Government the Attorney General must be joined failure of which vitiates the proceedings. in view of this new point, I ordered parties to file additional submissions addressing the legal point. That said, I will address

this point first as its disposal may affect the entire suit altogether.

In support of the point Ms. Kimaro submitted that the amendments brought about by **Act No. 1 of 2020** to section 6 of **the Government Proceedings Act** (supra) substituted subsection 3 with a new subsection that made mandatory to join the Attorney General in all proceedings against Local Government Authorities. She added that the section made it mandatory to the effect of failure to join the Attorney General vitiated the proceedings. The counsel reasoned that, since the new amendment brought a procedural requirement then that law would operate retrospectively to the present suit. in bolstering her position, she cited the Court of Appeal decisions in the case of **Lala Wino vs Karatu District Council** (Civil Appl. No.132 of 2018) [2019] TZCA 46; (01 April 2019 TANZLII) and **Henry Lubinza vs Agricultural Inputs Trust Fund & Others** (Civil Appl. No.114/11 of 2019) [2020] TZCA 1852; (16 November 2020 TANZLII). The counsel concluded with a prayer that the suit be struck out with costs.

On his part Mr. Lisanga argued that **Act No. 1 of 2020** amended **s. 6 of the Government Proceedings Act** (supra) and **s. 106 of the Local Government (Urban Authorities) Act, [CAP.288 R.E. 2002]** to the effect that no suit may be brought against an urban authority unless a 90 days' Notice has

been issued to the Attorney General. The counsel added that, since the newly imposed obligation was procedural, then the plaintiff was bound to observe the same. In support of his position, he cited the case of **Lala Wino vs Karatu District Council** (supra) and **Henry Lubinza vs Agricultural Inputs Trust Fund & Others** (supra). The counsel invited me to struck-out the suit.

Disputing the assertion, Mr. Senguji submitted that the present suit was filed on 17th January 2019 before the said amendments which were published in a Government Gazette almost a month later, on 21st February 2019. He argued that the said amendments cannot be used to throw-out the case which nearing hearing. Further to that, Mr. Senguji reasoned that, it was not the spirit of **Act No. 1 of 2020** to punish or do injustice to parties who instituted their suits prior to the amendment. He argued that the new amendment did not in any manner affect the substantive rights of the plaintiff and at best he was required to proceed under the new procedure. To support his view, he cited the case of **Lala Wino vs Karatu District Council** (supra) at page 6 where the Court (**Ndika, J.A**) quoted the Courts quotation in **the Director of Public Prosecutions v. Jackson Sifael Mtares & Three Others**, Criminal Application No. 2 of 2018 (unreported) where it was stated thus:

"When the legislature alters the existing mode of procedure, the litigant can only proceed according to the altered mode."

On another limb Mr. Senguji argued that amendments affecting the forum of a pending proceeding before a court are not merely procedural as they affect the vested substantive right of a litigant. To support this view, he cited a persuasive decision of the Supreme Court of India in Criminal Appeal No. 67 of 2011, **Securities and Exchange Board of India vs. Classic Credit** where it was stated that:

"Every statute which takes away or impairs vested rights acquired under existing Law creates a new obligation or imposes a new duty, or attaches a new disability in respect of a transaction already past must be presumed to be intended to have a retrospective effect."

Based on the above authority, Mr. Senguji reasoned that the new amendment imposed a duty by requiring a Notice be issued to the Attorney General. He also added that filing a fresh suit was a disability on the part of the plaintiff. He concluded with an opinion that the present amendment should not be applied in the present case.

I have carefully considered the submissions from both parties and the question for my determination is whether the preliminary objection is merited.

From submissions it appears that both counsels agree that; **first**, the present suit was filed on 17th January 2019 prior to the amendments to s. 6 of **the Government Proceedings Act** (supra) and **s. 106 of the Local Government (Urban Authorities) Act** (supra) which came a month later, on 21st February 2019; **secondly**, that the respective amendments require a 90 days' Notice be issued to the Attorney General prior to instituting a suit against an urban authority; **thirdly**, that the requirement did not exist when the present suit was filed; and **fourthly**, that amendment to procedural laws, unless otherwise stated, operates retrospectively.

However, parties appear to be at loggerhead on what should be the effect of the said amendments to the present suit. In view thereof, I am faced with two important questions to respond to, firstly, whether, given the present circumstances, it is important to join the Honourable Attorney General in the present suit. Directly connected to that is a question whether joining the Attorney General can operate retrospectively.

Admittedly, through **the Written Laws (Miscellaneous Amendments) Act No.1 of 2020** published in a Government Gazette on 21st February 2019, section 6 of **the Government Proceedings Act** (supra) was amended to introduce a new subsection 3 and 4. The new subsections reads:

"(3) All suits against the Government shall, upon the expiry of the notice period, be brought against the Government, ministry, 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)." [Emphasis mine]

Through section 33, **Act No. 1 of 2020** amended also amended **s. 106 of the Local Government (Urban Authorities) Act** (supra) in the following terms:

"(1) No suit shall be commenced against an urban authority-

(a) unless a ninety days' notice of intention to sue has been served upon the urban authority and a copy thereof to the Attorney General and the Solicitor General; and

(b) upon the lapse of the ninety days period for which the notice of intention to sue relates." [Emphasis mine]

My understanding of the above cited sections is that, in all suits against the Government, Ministry, Government

Department, Local Government Authority, Executive Agency, Public Corporation, Parastatal Organization or Public Company the Attorney General shall be joined as a necessary party. Further to that, the sections connoted that, unless a ninety days' notice of intention to sue has been served upon the urban authority and a copy thereof to the Attorney General and the Solicitor General, no suit shall be commenced against an urban authority. Failure to join the Attorney General vitiates the proceedings in any suit against a Government entity envisaged under section 6 (3) of Cap. 5.

The amendments were brought about to regulate the conduct of proceedings against Government entities following the restructuring of the office of the Attorney General and introduction of the office of the Solicitor General. The restructuring was brought about by **the Constitution of the United Republic of Tanzania (Office of the Attorney General ((Restructure)) Order, 2018 Government Notice No. 48** published on 13th February 2018. The amendments brought about by **Act No.1 of 2020** introduced a procedural requirement to join the Attorney General in all proceedings involving urban authorities. In accordance with the amendment a litigant seeking to institute civil proceedings against an urban authority is required to serve the relevant authority with a 90 days' Statutory Notice and a copy of which must be served to the Attorney General and the Solicitor General.

The amendments brought by **Act No.1 of 2020** were meant to provide a procedure for the Attorney General and Solicitor General to be notified of the impending suit against a government entity. Through the said amendment it was intended that all suits against the "Government" were to be defended by the Attorney General through the office of the Solicitor General. See **Wambura Maswe Karera and 5 Others vs. The Village Council of Mori and the District Executive Director of Rorya District** (Civil Case No 5 of 2020) [2020] TZHC 4069; (18 November 2020).

The objective of notifying the Attorney General and the Solicitor General is to *inter alia*, **one**, to enable the Attorney General and the Solicitor General to consult the relevant authorities and mobilize the relevant information in organizing further discussions and preparing a formidable defence, **two**, service permits the Attorney General and the Solicitor General to engage the would-be plaintiff in seeking an amicable settlement of the dispute with the relevant entity where possible; **three**, it affords the Attorney General, a necessary party, an opportunity to be heard when the suit is finally filed. Finally, in terms of section 6 (4) of Cap. 5, failure to join the Attorney General vitiates the proceedings in any suit against a Government entity. It is therefore in the interest of the plaintiff that the Attorney general is joined in the present suit. I am also aware that, both

sections use the word “**shall**” which means the requirement so imposed must be complied with without failure.

Having said, I am satisfied that, joining the Attorney General at this stage is not only important but equally indispensable. See **Coseke Tanzania Limited v The Board of Trustees of the Public Service Social Security Fund** (143/2019) [2021] TZHCComD 2047; (22 April 2021 TANZLII)

Next, I will consider the retrospective operation of procedural laws. As rightly pointed out by both counsels, it is a trite position of the law that amendments in the civil or criminal laws, where they are merely procedural, will apply retrospectively even to pending cases. That position was stated in **Director of Public Prosecutions v. Jackson Sifael Mtares & Three Others (supra)**; **Lala Wino vs Karatu District Council (supra)** and **Henry Lubinza vs Agricultural Inputs Trust Fund & Others (supra)**.

In his submissions Mr. Senguji admitted that “***When the legislature alters the existing mode of procedure, the litigant can only proceed according to the altered mode.***” However, he went on to argued that the new amendments imposed a new duty and disability to the plaintiff and that, the amendment affects the substantive rights of the plaintiff. With respect, I do not agree with him on that line of argument for a very simple reason that the said amendment do

not interfere with the plaintiff rights or claims that accrued prior to the enactment of the amendments. As stated above, the amendment has brought a new procedural requirement that needs to be complied with when a litigant intends to sue a local authority. That is by no means interfering with the plaintiffs' substantive rights. That said, the persuasive case of **Securities and Exchange Board of India vs. Classic Credit** cited is not applicable in the present circumstances. After all the counsel attached an incomplete version of the case.

I took a liberty to revisit the plaint and went through **Annexure K-6**, a letter titled "**STATUTORY NOTICE OF 30 DAYS TO COMMENCE A SUIT AGAINST THE KINONDONI MUNICIPAL COUNCIL**". The said letter is notice required by law properly called. **First**, the notice was issued for thirty (30) days instead of the ninety (90) days prescribed. **Second**, the Attorney General and the Solicitor General were not copied with the said notice as required by section 6 of Cap. 5 and section 106 of Cap. 288. Proceeding with the suit in its present form would not only deny the Attorney General, a necessary party, a right to be heard, but may also vitiate the proceedings at best render the decree inexecutable.

The next question is, in the circumstances, what is the way forward. The defendants insisted that the suit be struck out for failure to join a necessary party. Mr. Senguji had other


ideas; his view was that the amendments did not apply to the present suit. On this, I agree with the counsel for defendants that the suit ought to be struck out so that the plaintiff may comply with the mandatory requirements of section 6 of Cap. 5 and section 106 of Cap. 288.

On that account, the suit is struck out. In the circumstances, each party shall bear its own costs.

Order accordingly.

DATED at DAR ES SALAAM this 06th day of August 2021.




S.M. KALUNDE
JUDGE