

TANZANIA / JUDGMENT

RULING Ibihi Construction Co

COURT
TANZLII

DECIDED
11 December 2024

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA SONGEA
SUB-REGISTRY AT SONGEA CIVIL CASE NO. 21325 OF 2024 IBIHI CONSTRUCTION CO. LTD
..... PLAINTIFF VERSUS TUNDURU DISTRICT COUNCIL
..... 1ST DEFENDANT ATTORNEY GENERAL
..... 2ND DEFENDANT

RULING

25th November & 11th December, 2024. KAWISHE, J.: The plaintiff filed this suit alleging that there is a fundamental breach of contract by the first defendant. Among other claims the plaintiff prayed for the declaration that the first defendant has breached the contract and claims to be paid TZS. 153,878,943.00 as specific damages. After being served with the plaint, while filing their written statements of defence, the defendants filed their joint written statement of defence accompanied with 1 the notice of preliminary objection that, the suit is bad in law for failure to comply with section 6 (2) of the Government Proceedings Act (Cap 5, R.E 2019). As a matter of principle, when a preliminary objection is raised, it must be determined prior to proceeding with the main suit. Being guided with that principle, this court had to dispose of the objection first. During the hearing, the defendants were represented by Mr. Ibrahim Kabelwa, learned State Attorney. The plaintiff enjoyed the services of Mr. Edson Mbogoro and the hearing was conducted orally. When invited to argue on the preliminary objection, Mr. Ibrahim Kabelwa, learned State Attorney for the defendants submitted that in this suit, the plaintiff failed to abide to the provision of section 6(2) of the Government Proceedings Act (Cap 5, R.E 2019), which requires any person intending to sue the government to issue a 90 days’ notice to the institution stating his claim and a copy of the notice be served to the Attorney General and the Solicitor General. He added that, the plaint served to the defendant at paragraph 19, the plaintiff claimed that the defendants failed to show cooperation after issuing notice which was 2 served to the first defendant and its copy served to the second defendant and the Office of the Solicitor General. However, the notice attached to the plaint shows that, the copy of the notice was only served to the Office of the Solicitor General. He stated that, there is no proof showing that, the second defendant was served with the notice as required by the law. He concluded that, the plaintiff contravened the legal requirements which make the suit before this court incompetent and prayed for the same to be struck out. Replying to the submissions made by the defendants’ learned State Attorney, the plaintiff’s learned advocate argued that, the point of preliminary

objection raised by the defendants is not on point of law. That, the preliminary objection is based on facts which requires evidence to be proved. In that sense, he argued that, before instituting the suit, the plaintiff served the notice of intention to sue to all defendants and to the Office of the Solicitor General though in their written statements of defence, the defendants claimed that they were not served. Mr. Mbogoro insisted that, in the matter at hand the court has to be guided on what is a preliminary objection. He added that, it is a principle 3 that, a preliminary objection must be capable of disposing of a suit and must be clearly shown from the plaint and does not need evidence. He averred that, since the preliminary objection raised by the defendants in this suit needs evidence, it is disqualified from being a preliminary objection. To bolster his stance, he cited the landmark case of *Mukisa Biscuits vs. West End Distributors Ltd* (1969) EA 696. Moreover, Mr. Mbogoro submitted that, the Court of Appeal of Tanzania in the case *Shose Sinare vs. Stanbic Bank (T) Ltd and Another*, Civil Appeal No. 89 of 2020, insisted on the position set in *Mukisa Biscuits* (supra), that, a preliminary objection must be free from facts or evidence calling for its proof. He contended that, it is not correct to raise a preliminary objection basing on an attachment to a plaint. In the event, he concluded that the defendants were served with the notice of intention to sue though through different modes. That, while the first defendant and the Office of the Solicitor General were physically served, the second defendant was served by way of dispatch and there is evidence to that effect. Finally, he prayed for the preliminary objection raised by the learned State Attorney for the defendants to be struck out. 4 Rejoining to the submission made by the plaintiff's counsel, Mr. Ibrahim Kabelwa, insisted that, the requirement of the notice of intention to sue to be served to the second defendant is a legal requirement and it does not need evidence to be proved. He contended that, though the notice was served to the first defendant, the second defendant was not served with the copy of that notice as required by the law and that does not need evidence to prove that it was served. That it must be established by just looking on the plaint if it qualifies to make the suit competent before the court. He maintained that the plaintiff failed to comply with the mandatory provisions of section 6(2) of the Government Proceedings Act (supra) and this suit is to be struck out with costs. Having followed carefully the opposing submissions made by the learned counsel, this court is now duty bound to determine the merit or otherwise of the preliminary objection. The learned State Attorney for the defendants have claimed that the suit is incompetent for the reason that the second defendant, the Attorney General was not served with a copy of the notice of intention to sue before instituting the suit as provided under section 6(2) of the Government Proceedings Act (supra). He argued that, 5 failure to serve the copy of the notice of intention to sue to the second defendant makes the suit incompetent and its remedy is to be struck out. On his part, the plaintiff's learned counsel submitted that, the preliminary objection does not deserve to be called a preliminary objection as it needs evidence to prove that the notice of intention to sue was served to the second defendant. It is his claim that, the second defendant was served and there is a signed dispatch to prove the same. It is a settled law that, serving a copy of the notice of intention to sue when suing a government institution is a legal requirement. The same is provided under section 6 of the Government Proceedings Act (supra). For the purpose of clarity, I find it is apposite to quote section 6 (1) & (2) of the Government Proceedings Act (supra) which its applicability is at stake in the matter at hand. The provision reads as follows: 6.-(1) Notwithstanding any other

provision of this Act, civil proceedings may be instituted against the Government subject to the provisions of this section.

- (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. Therefore, the provision quoted entails that, it is a legal requirement that, before instituting any civil suit, notice of intention to sue must be served to the institution concerned and the copy be served to the Attorney General and the Solicitor General. This is a legal requirement that must be complied with prior to instituting a suit. In this suit, the records do not show that the notice was served to the second defendant in spite of the plaintiff's learned counsel allegations that, it was served and there is a dispatch to prove the same. In my view, if the same was served as alleged by the plaintiff's learned counsel, the dispatch used to serve the second defendant would have formed part of the plaint as the plaintiff did in respect to the notice of intention to sue served to the Solicitor General. At this juncture, the allegations that it was served and there is a dispatch to prove the service is unsubstantiated. The law is clear that, before suing a governmental institution, the copy of the notice must be served to the Attorney General. The plaintiff in instituting this suit was duty bound to show that the notice was served to the second defendant and the same be seen on the face of records and not by proving through evidence. In this suit, nowhere it is shown that the notice was served. This suggests that, the notice was not served. If it would have been served, it would have been reflected in the plaint instituting this suit. The statutory provisions of section 6 (1) & (2) of the Government Proceedings Act (supra) which is quoted above is clear and unambiguous in the requirement of serving the copy of notice of intention to sue to the Attorney General who is the second defendant in this suit. The omission of serving the second defendant contravenes the statutory prerequisite. This court in the case of *Audacity Intercon (T) Limited vs. Bukombe District Council & Another* (Civil Case 28 of 2021) [2022] TZHC 9662 (27 May 2022; TanzLII) and *Msafiri Makindi Mtigandi vs. Mwanza City Council and 2 Others*, (Land Case No. 56 of 2023) [2024] TZHC 6790 (8 July 2024; TanzLII), emphasized the mandatory legal requirement of serving the copy of notice to the Attorney General and Solicitor General and the failure to establish compliance renders the suit incompetent. Subsequently, the ninety days' notice to the Attorney General and the Solicitor General is a mandatory requirement of the law. Hence, in the case at hand, the copy of the notice to the Attorney General ought to be depicted in the plaintiff's plaint and annexed on pleading. It is a part of the initial legal requirements in filing suits against the government. Thus, it is important in ascertaining the jurisdiction of the court. The assertion by the plaintiff's learned counsel that this point of objection calls for evidence is far from defeating the objection as such facts ought to have been echoed in his plaint as the same confers jurisdiction to this court in entertaining the matter. The plaintiff's inability to plead and attach a copy of the served notice to the 2nd defendant, the Attorney General, renders the plaintiff's claim that the notice was served to

the Attorney General unsubstantiated. As such the suit at hand stands incompetent before this court. As I have stated earlier that, there is nothing showing that the Attorney General was served with the copy of the notice as alleged by the plaintiff's learned counsel. The said dispatch was not attached to the plaint as the same was done to the service to the Solicitor General and Tunduru District Council. It needed no evidence to prove, by looking on the records filed in court, nothing depicting that the plaintiff complied with the 9 provisions of section 6(2) and (2) of the Government Proceedings Act (supra). Since it is a statutory requirement, failure to comply with the same cannot be tolerated. Consequently, I find the preliminary objection raised by the defendant's learned counsel has merit on account of non-service of a copy of notice to the Attorney General. I am bound to hold that this suit is incompetent and its remedy is to struck out the same as I hereby do. In the upshot, the suit is hereby struck out for being incompetent before this court. Considering the circumstances of this matter, each party shall bear its own cost. It is so ordered. DATED and DELIVERED at SONGEA this 11th day of November, 2024. E. L. KAWISHE JUDGE 10 COURT: Ruling delivered in the presence of Mr. Edson Mbogoro, learned advocate for the plaintiff and in the presence of Mr. Eugene Kanje, learned State Attorney for the 1st and 2nd defendants. E. L. KAWISHE JUDGE 11/12/2024 11

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