

TANZANIA / JUDGMENT

jamila hussein almansa vs the kigamboni municipal council another 2023 tzhclandd 16931 4 september 2023

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4 September 2023

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IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM MISC. APPLICATION
NO. 516 OF 2023 BETWEEN JAMILA HUSSEIN ALMANSA..... APPLICANT
VERSUS THE KIGAMBONI MUNICIPAL COUNCIL..... 1st RESPONDENT ATTORNEY GENERAL OF
THE UNITED REPUBLIC OF TANZANIA..... 2nd RESPONDENT

RULING

Date of last Order: 29/08/2023 Date of Ruling: 04/09/2023 A, MSAFIRI, J. This is an Application for Mareva Injunction brought by an applicant under Section 95 of the Civil Procedure Code, Cap 33 R.E 2019 (the CPC) and Section 2(3) of the Judicature and Application of Laws Act, Cap. 358 R.E 2019, (JALA). The Application is supported by an affidavit affirmed by Hassan Chande Hame, learned advocate of the applicant. The applicant is praying for this Court to issue temporary injunction in the nature of Mareva injunction restraining the respondents from trespassing in her property located at Plot No. 275 Haile Sellasie Road, i Msasani area within Kinondoni Municipality in Dar es Salaam, pending the expiry of 90 days' notice of intention to sue. On 29/8/2023, the parties appeared for the first time before the Court whereby Mr. Hassan Chande Hame, learned advocate appeared for the applicant while Mr. Stephen Kimaro, State Attorney was representing the respondents. Mr. Kimaro raised a point of law under proviso of Order XLIII Rule 2 of the CPC which allows for the Court where it considers fit, to entertain an application made orally. This Court granted the oral application as prayed and Mr. Kimaro submitted on two points of law as follows; first, that this Application is untenable in law as it contravenes Section 6(2) of the Government Proceedings Act, Cap. 5 R.E 2019. That the cited law provides that a Notice of Intention to sue the Government shall be not less than 90 days, shall be served to the intended Government institutions and a copy shall be sent to the Attorney General and Solicitor General. Mr. Kimaro argued that this is an application seeking for Mareva injunction pending the expiry of 90 days. However, he said that the respondents have not been served with 90 days' Notice of intention to sue but the said Notice is just attached in the Application. He maintained that 2 this is unprocedural and it makes the whole Application un maintainable and the same should be struck out with costs. On second point, Mr. Kimaro submitted that, the contents of the affidavit which is deponed by the advocate for the applicant are based on the hearsay. That the advocate can only

depone on the information which are on the advocate's knowledge only. That, in the affidavit supporting this Application, all the contents are from the applicant and are not within the knowledge of her advocate. To cement this point, Mr. Kimaro referred to the case of Giliard Mbonea Mbwanbo, Civil Application No. 449 of 2019, HC. (Unreported). He concluded by praying for the Application to be struck out with costs. In reply, Mr. Chande submitted that, the applicant is a widow, she has nowhere to live and has been threatened by the respondents to be evicted from her residence, hence it was necessary to issue Demand Notice with intention to sue until she could file the main case. Mr. Hame averred that, the applicant have served the Attorney General and the proof of service is the summons which they have produced in Court. He argued that the essence of Section 6 of the Government Proceedings Act, is so that the Government can be represented by the State Attorney which the respondents have done by appearing in Court J 3 He also urged the Court to base on dispensation of justice rather than on relying on technicalities. He cited Article 107 A of the constitution of the United Republic of Tanzania, of 1977. On the second point of objection, Mr. Chande responded that at the verification clause of the affidavit, it is stated that all the information are from the client, the applicant, hence the affidavit is proper before the law. He pray for the Court to disregard the points of observation which have been raised by the respondents through their Attorney. On rejoinder, Mr. Kimaro pointed that, the raised concerns are on point of law. That Section 6(2) of the Government Proceedings Act set a mandatory requirement for serving the Government institutions. He argued that the advocate for the applicant has not shown proof of Service of 90 days' Notice. That the applicant was supposed to serve the 90 days' Notice before the institution of the Application. He said that waiving of technicalities was not meant to waive mandatory provisions of law. He reiterated his submissions in chief and prayers. Having gone through the submissions of both parties to this matter, the major issue is whether the two points of objection raised by the counsel for the respondents, are meritorious. I\ t> I 4 On the first point of objection on whether the 90 days' Notice of Intention to sue was served, one has to look at Section 6(2) of the Government Proceedings Act. It provides that; 6(2): No suit against the Government shall be instituted, and heard unless the claimant previously submits to the Government Minister, Department of Officer concerned a notice of not 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). Mr. Kimaro has claimed that, the respondents were not served mandatory 90 days' Notice according to the requirements of Section 6(2) of the Government Proceedings Act. Mr. Chande, counsel for the applicant has contended that the Notice was served and the proof of service is the summons which have been produced in Court. From this submissions, it is obvious that the applicant had not previously served the respondents with the mandatory 90 days' Notice, but rather she has instituted this Application and served the respondents 5 with the Application documents among them being a Demand Notice with intention to sue. Hence, the respondents were served the 90 days' Notice for the first time when this Application has already been filed in Court. According to the provisions of Section 6 of the Government Proceedings Act, a Notice of Intention to sue has to be served prior to the institution of the suit and the application includes the suit. Although the Application is seeking for Mareva Injunction pending the institution of the main suit, still the applicant was

required to serve the 90 days' Notice to the respondents i.e. The Kigamboni Municipal Council and the copy to the Attorney General and the Solicitor General as per the requirement of the law. However, in this Application, the applicant has just instituted this Application and served it to the respondents. In this, I agree with Mr. Kimaro, State Attorney that the mandatory 90 days' Notice has not been served hence the applicant has contravened the provisions of Section 6 of the Act. In the circumstances, this Court cannot invoke the principle of overriding objection as the applicant has contravened mandatory provision of the law. I find the first point of law to have merit and I sustain it. 6 Since the first point of law has the effect of disposing of the Application, then I need not go into the second point of law. I proceed to struck out this Application with no order for costs since the respondents have not yet filed their counter affidavits. It is so ordered. 7

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