

TANZANIA / JUDGMENT

willam said kitundu vs osmund makario kapinga and 3 others 2023 tzhc 23124 5 december 2023

COURT
TZHCDECIDED
5 December 2023

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IN THE UNITED REPUBLIC OF TANZANIA JUDICIARY HIGH COURT OF TANZANIA MOSHI
DISTRICT REGISTRY AT MOSHI LAND CASE NO. 05 OF 2023 WILLIAM SAID
KITUNDU.....PLAINTIFF VERSUS

1. OSMUND MAKARIOS KAPINGA
2. HAI DISTRICT COUNCILDEFENDANTS
3. COMMISSIONER FOR LANDS
4. THE ATTORNEY GENERAL

RULING

Date of Last Order: 12.10.2023 Date of Ruling : 05.12.2023 MONGELLA, J. The plaintiff herein sued the defendants over a plot of land located at Bomang'ombe within Hai district and Kilimanjaro region, registered as Plot No. 18 Block M Section HO, with Certificate No.

65765. Upon filing their written statements of defence (WSD), 1st defendant represented by Mr. Engelberth Boniphace raised the following objections:

1. That, the plaint is incurably defective for contravening the mandatory provisions of Order VII Rule 1 (i) of the Civil Procedure Code [Cap 33 R.E 2019]. Page 1 of 8
2. That, the suit at hand is incompetent as it contravenes the provisions of Section 6 of the Government Proceedings Act [Cap 5 R.E 2019]
3. That, the plaint is incurably defective as it is drawn by unqualified person in contravention of Section 41 of the Advocates Act [Cap 341 R.E 2019] The 2nd to 4th defendants represented by Ms. Glorian E. Issangya, raised one objection; to wit, "That, the plaint is premature as 90's days' notice has not been served as the requirement of the law." The preliminary objections were resolved by written submissions by the parties' legal counsels. Submitting on the 1st point of objection raised by the 1st defendant, Mr. Boniphace averred that the plaint is

incurably defective as the plaintiff has failed to disclose the value of the subject matter as required under Order VII Rule (1) of the Civil Procedure Code. He contended that the requirement to disclose the value of the subject matter is mandatory according to the interpretation of the word “Shall” as provided under Section 53 (2) of the Interpretation of Laws Act [Cap 1 R.E 2019]. Page 2 of 8 In an attempt to pre-empt the plaintiff in relying on the overriding objective principle, he argued that the overriding objective principle cannot salvage the omission as it cannot be used to defeat the mandatory provisions of the law. He supported his averment with the case of Ayubu Simkoko vs. Zela Robert (Misc. Criminal Appl. 77 of 2020) [2021] TZHC 2591 TANZLII. He further argued that the disclosure of value of the suit land is mandatory for ascertaining the jurisdiction of the court as well as the court fees. He wondered how the court charged the plaintiff the court fees in the absence of the value of the subject matter. Arguing on his 2nd point of objection, he averred that the suit was incompetent as it contravenes the requirement under Section 6 of the Government Proceedings Act [CAP 5 R.E 2019]. He contended that the plaintiff sued the 2nd and 3rd defendants who are government institutions and was thus required to serve them a notice of not less than 90 days. He added that the plaintiff was also to serve the Attorney General and the Solicitor General thereby specifying the basis of his claims against the government. That, such notice should have also been annexed to the plaint, but was not. In that respect, he had the stance that the plaintiff manifested failure in complying with the requirement to file notice. Mr. Boniphace finalized his submissions by praying that the suit be struck out with costs in favour of the 1st defendant. Ms. Issangya, arguing for the 2nd, 3rd and 4th defendants, submitted on the point of objection she had raised, which is similar to the 2nd Page 3 of 8 point by the 1st defendant. She averred that since the plaintiff has sued the government and its institutions, he had to comply with the mandatory requirement of filing notice to the government first so that the government makes necessary follow ups and see if it can resolve the dispute between parties prior to going to court. She referred to Section 6(2) of the Government Proceedings Act and Section 190 of the Local Government (District Authorities) Act CAP 287 read together with Section 31 of the Written Laws Miscellaneous Amendment Act No. 1 of 2020 as the relevant provisions guiding the procedure. She further argued that even though the case was once instituted at the trial Tribunal and dismissed upon restructuring of the office of the Solicitor General, still the plaintiff ought to have served a notice to the Attorney General since he joined him into the suit. Averring that the requirement to file notice cannot be dispensed with, she cited the case of Aloyce Chacha Kenganya vs. Mwitwa Chacha Wambura and Others (HC Civil Case 7 of 2019) [2020] TZHC 90 TANZLII. She finalized her submissions by asking this court to dismiss the case with costs and grant any relief it deems just. In reply to the 1st point of objection by the 1st defendant, the plaintiff averred that his plaint was properly drawn and served to the parties as required. He said contended that paragraph 11 of his plaint provides for the jurisdiction of the court and even though it lacks sufficient information, the omission does not prejudice the defendants, thus curable under Article 107 A (2) (e) of the Page 4 of 8 Constitution of the United Republic of Tanzania, 1977 and Section 3A and B of the Civil Procedure Code, Cap 33 R.E 2022, which requires courts to dispense justice without being tied by technicalities. As to

the 2nd point of objection raised by the 1st defendant, as well as, the sole objection by the 2nd, 3rd and 4th Defendants, he disputed the allegation that the parties had not been served the relevant notice. He also alleged that the objection was not a pure point of law as it requires evidence to ascertain whether the said notice was filed or not. He cemented his argument with the case of Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA

701. He finalized his submissions by praying that the court dismisses the objections with costs. After considering the rival submissions by the parties, I find that Mr. Boniphace abandoned his 3rd and last point of objection. As such there remains two points of objection for determination. One, on the competence of the pleading (plaint) filed in this court for failure to disclose the value of the subject matter; and two, on the competence of the suit for failure to issue the statutory 90 days' notice to the 2nd to 4th defendants, particularly the Attorney General and the Solicitor general. I shall first the issue regarding 90 days' notice which is shared by all defendants and of need be deliberate on the 1st issue. It is well settled that suits against the government and its institutions are to be filed after a ninety days' notice being served to the Page 5 of 8 government. This requirement is provided under Section 6 (2) of the Government Proceedings Act which states: "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." Further, Section 190 (1) of the Local Government (District Authorities) Act, as amended by section 31 of the Written Laws (Miscellaneous Amendments) Act, 2020 requires any person suing local government to serve the relevant authority a ninety days' notice and the copy of the notice to be served to the Attorney General and Solicitor General. The provision reads: "190 (1) No suit shall be commenced against a local government authority-
- (a) unless a ninety days' notice of intention to sue has been served upon the local government authority and a copy thereof to the Attorney General and the Solicitor General;" Page 6 of 8 In this matter, the 2nd defendant is a local Government authority, the 3rd defendant an officer of a government department and the 4th defendant is the Attorney General. I have observed the plaint and contrary to the assertion by Mr. Boniphace, there is a notice attached therein on the intention to sue the office of the 3rd defendant at Hai and at the end of the notice it is stated that a copy thereof to be issued to the Attorney General and the Solicitor General. The notice was issued on 12.09.2022, but strangely stamped as received on 09.09.2022 by the office of the 2nd defendant. There is no any other stamped document attached showing that the 2nd defendant was served or that any of the copies were served to the Attorney General and Solicitor General. Noting that the Attorney General has been joined as a necessary party and that an officer of a government department was joined, clearly the plaintiff was supposed to comply with the directive of both Section 190 (1) of the Local Government (District Authorities) Act and Section 6 (2) of the Government Proceedings Act whereby he was supposed to serve notice to all defendants. The ninety days'

notice to the Attorney General and the Solicitor General is a mandatory requirement of the law and thus ought to be disclosed in the plaintiff's pleadings and annexed on pleading. This is because this is part of the initial prerequisites in filing suits against the government and is important in ascertaining the jurisdiction of the court. The assertion by the plaintiff that this point of objection calls for evidence fails to stand at this point because such facts Page 7 of 8 ought to have been reflected in his pleadings as the same provides for the jurisdiction of this court in entertaining the matter. For failure to plead and attached a copy of the served notice to the 2nd defendant, the Attorney General and the Solicitor General, renders plaintiff's claim that the notices were served to all relevant persons unsubstantiated. As such the suit at hand stands incompetent before this court. Since this point of objection suffices to dispose of this matter, I find no need to resolve the 1st point of objection by the 1st defendant. In the foregoing, I sustain the 2nd point of objection by the 1st defendant and the objection by the 2nd to 4th defendant. The suit is thus struck out, with costs. Dated and delivered at Moshi on this 05th day of December, 2023. X L. M. MONGELLA JUDGE Signed by: L. M. MONGELLA Page 8 of 8

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