

**IN THE HIGH COURT OF TANZANIA
(MTWARA DISTRICT REGISTRY)
AT MTWARA**

LAND CASE NO. 4 OF 2017

**SAID MUSSA MTONYA
IBRAHIM SOMEA MSHANGANI & 18 OTHERS PLAINTIFFS**

VERSUS

**PERMANENT SECRETARY MINISTRY OF LANDS
HOUSING & HUMAN SETTLEMENTS DEVELOPMENT 1ST DEFENDANT**

**EXECUTIVE DIRECTOR OF NACHINGWEA
DISTRICT COUNCIL 2ND DEFENDANT**

**TANROADS REGIONAL MANAGER FOR
LINDI REGION 3RD DEFENDANT**

ATTORNEY GENERAL 4TH DEFENDANT

Date of last order: 29/08/2017

Date of Ruling: 31/10/2017

RULING

Twaib, J:

The plaintiff's claim against the defendants is for a declaration that they are the lawful owners of plots and unexhausted improvements thereon located at Nachingwea Town, along Masasi to Liwale via Nachingwea road, which has an estimate value of Tshs 1,390,750,000/=. They also pray for costs and an order directing the 3rd defendant to comply with due process before acquiring and demolishing the suit properties. The respondents filed a joint written statement of defence resisting the claim. They also filed a notice of preliminary of objection containing the following grounds:

- (a) That the suit is hopelessly time-barred.
- (b) That the suit is bad in law for contravening section 6 (2) of the Government Proceedings Act (Cap 5 R.E. 2002).
- (c) That the suit is bad in law for contravening section 190 (1) and (2) of the Local Government (District Authorities) Act (Cap 287 R.E. 2002)
- (d) That the plaintiffs have no *locus standi* for contravening Order I rule 8 of the Civil Procedure Rules (Cap 33 R.E. 2002).

When the preliminary objections came up for hearing, the plaintiffs were represented by Mr. Ngonyani, learned Advocate, while the respondents were represented by Mr. Mohamed, learned State Attorney. By consent, the court ordered the preliminary objections to be argued by way of written submissions.

I think we should not waste time on the merits or demerits of the last point of objection. I agree with the defendants that the names of the parties in the plaint have not been properly stated and the issue relating to the suit being a representative suit is somewhat problematic. But both these factors are not incurable. They can be cured by amendment. I will thus leave the issues to be dealt with depending on the outcome with regards to the first, second and third points of objection.

Submitting in support of the first point of objection, Mr. Mohamed argued that the parties to the suit are bound by their pleadings and cannot be allowed to depart from them. He supported this principle with a number of decided cases, including **Jani Properties Ltd v Dar es Salaam City Council** (1966) EA 281; **George M. Shambwe v Attorney General and Another** (1996) TLR 334 and **Juma Jaffer Juma v Manager, PBZ and 2 Others**, Civil Appeal No. 7 of 2002, CAT at Zanzibar (Unreported). He further cited section 3 (1) of the Law of

Limitation Act, Cap 89 [R.E. 2002], which provides that every proceeding which is instituted out of time shall be dismissed.

He submitted further that according to paragraph 13 of the plaintiffs' pleadings, the cause of action arose in 2013 and from the contents of paragraph 14 of the pleadings, the main complaint by the plaintiffs is to be paid compensation and the same is also emphasized by annexure NR-4. According to the first item of the First Schedule of the Law of Limitation Act, Cap 89 [R.E. 2002], a claim for compensation must be instituted within one year from the date the cause of action arose. He cited the cases of **Yussuf Vuai Zyuma v Mkuu wa Jeshi la Ulinzi and Another**, Civil Appeal No. 15 of 2009, CAT, at Zanzibar (Unreported) and **Tanga Cement Co. Ltd v Christopherson Co. Ltd**, Civil Appeal No. 133 of 2006 CAT at Arusha (Unreported) where it was held that a suit that is time-barred cannot be entertained by any court. He submitted that the instant suit has been instituted about four years from the date the cause of action arose, and thus, under section 3 (1) of the Law of Limitation Act the remedy is to dismiss the suit.

Arguing on the second and third objections together, Mr. Mohamed submitted that no suit against the Government or Local Government can be entertained unless the claimant has previously submitted a 90 days' notice of his intention to sue the Government or 30 days notice in case of a local government authority. As the authority for his submission, counsel relied upon section 6 (2) of the Government Proceedings Act, Cap 5 [R.E. 2002] and section 190 (1) and (2) of the Local Government (District Authorities) Act, Cap 287 [R.E. 2002], respectively.

He observed that in this case, the claims in the purported notice (which was marked as annexure NR-4) which is titled *Clarification on the red and green crosses on the house located along Masasi–Liwale via Nachingwea and Nanganga Kilimarondo via Nachingwea* are not found in the plaint and therefore the same renders the purported notice void. He added that the law under section 190 (2) of the Act requires the notice to state the reliefs claimed. The purported notice claim of claim is for Tshs 10,000,000,000/= as compensation. However, that amount is not stated in the plaint. He added that in paragraph 15 of the plaint the plaintiffs stated that NR-4 is a letter to the 3rd defendant which means according to the plaint the rest of the defendants were not served with either a notice nor a letter. On that basis, he opined that the plaintiffs' suit is unattainable for failure to serve a notice of intention to sue the government. He supported his position with a number of decisions including the case of **Seiph Wanumbwa v Muhimbili Medical Center or Muhimbili National Hospital and Two Others**, Civil Case No. 181 of 2003, HCT at Dar es salaam (Unreported); **Patrick Kilindi and Majaliwa Mvukie v Regional Police Commander for Morogoro Region and Two Others**, Civil Case No. 49 of 2006, HCT at Dar es salaam (Unreported); **Arusha Municipal Council v Lyamuya Construction Company Ltd** [1998] TLR 13 and **Mahibya Mahambi and Others v Shekh Mohamed Haidri** [1957] E.A 778. He concluded with a prayer that the suit must be dismissed with costs.

On his part, Mr. Ngoyani submitted, on the first point, that the suit is not time-barred. He quoted paragraphs 7 and 17 of his plaint, which according to him indicates that the plaintiffs claim to be declared the lawful owners of the suit land. He thus contended that the plaintiffs' claim is founded on land ownership and in terms of item 22 of the First schedule to the Law of Limitation Act the

limitation period is twelve years. In this case, the cause of action arose sometime in 2013 and the defendant filed his case on 2017—about four years later—which is within the twelve years. For that reason, he prayed for this point of objection to be dismissed.

On the second, third and fourth preliminary objections, Mr. Ngonyani submitted that the defendants were notified via Trinity Coast Attorney through the demand notice, which the 1st defendant received on 1st January, 2016. The letter is titled "TAARIFA YA SIKU 90 KUHUSU KUSUDIO LA KUFUNGUA SHAURI MAHAKAMNI....." while the 2nd defendant received the notice titled TAARIFA YA SIKU 30 KUHUSU KUSUDIO LA KUFUNGUA SHAURI MAHAKAMANI..." and the 3rd defendant received the said notice on 6th January, 2016. A copy was served on the 4th defendant. He concluded therefore that all the defendants were served with the notice of intention to sue and the defendants' allegation is unfounded. He prayed for the dismissal of the preliminary objection.

In his rejoinder, Mr. Mohamed reiterated what he earlier submitted, maintaining the suit is time barred. He viewed paragraph 7 of the plaintiffs' plaint as a mere clarification and not the basis of the plaintiffs' claim. Instead, to him, it is paragraph 14 of the plaint, together with prayer (ii), that constitutes the basis of the claim, which is compensation. As the limitation period for a suit for compensation is twelve months, this suit is time barred, and should be dismissed, he concluded on the point.

On the issue of notice, Mr. Mohamed conceded that there is no format for drafting a notice, but the law requires that the specific claim be reflected in the contents of the notice. Also, the court must be told, through pleadings, when the notice was served to the defendant. He added that even if the court may treat

annexure NR-4 as the Notice, still the problem is that the defendants were not served with such notice as there is no proof of the same in the plaint. On those submissions, he insisted that the suit be dismissed with costs.

Having carefully considered the rival submissions of the parties, the issues for determination are: One, whether the plaintiffs' suit is time barred; and two, whether the suit is incompetent for want of the notice of intention to sue.

In my considered opinion, looking at the plaint, one would arrive at the inevitable conclusion that the basis of the plaintiffs' claim is land ownership. This can be clearly seen in paragraph 7 of the plaint, which partly reads:

7. The plaintiffs claim against the defendants jointly and severally is for a declaration that they are the lawful owners of plots and exhaustive improvements thereon....

Even in the reliefs, the plaintiffs pray *inter alia* to be declared the lawful owners of the suit properties. Therefore, according to the plaint, the plaintiffs' suit is founded on land ownership, whose period of limitation in terms of item 22 of the First Schedule to the Law of Limitation Act is twelve years. Since the cause of action arose sometime in 2013 and the plaintiffs filed their case in 2017, it is well within the twelve-year period provided by the relevant law. This point of objection is therefore overruled.

On the second issue, the defendants maintain that the purported notice which was marked as annexure NR-4 is not found in the plaint. He added that in paragraph 15 of the plaint the plaintiffs stated that NR-4 was served on the 3rd defendant, meaning that according to the plaint neither a letter nor the notice was served to rest of the defendants. On that basis, he insisted that the

plaintiffs' suit is unmaintainable for failure to serve a notice of intention to sue the government.

As Mr. Ngonyani submitted, the defendants were notified via Trinity Coast Attorney through a demand notice, entitled "TAARIFA YA SIKU 90 KUHUSU KUSUDIO LA KUFUNGUA SHAURI MAHAKAMNI....." The 2nd defendant received the notice titled "TAARIFA YA SIKU 30 KUHUSU KUSUDIO LA KUFUNGUA SHAURI MAHAKAMANI..." and the 3rd defendant received the said notice on 6th January, 2016 and the copy was served to 4th defendant. He viewed therefore that all the defendants were served with the notice of intention to sue.

I agree with the defendants that in view of the cited provisions a notice of intention to sue the government and/or its local authority is a mandatory requirement. I also agree with the learned State Attorney and the plaintiffs that the law does not provide for the format of the notice, but simply the contents thereof. In the present case, paragraph 15 of the plaint makes reference to two letters collectively appended therein as annexure NR4. One of the letters dated 17/9/2013 addressed to the 3rd defendant and copied to the 1st, 2nd and 4th defendants partly read as follows:

"We have been fully instructed by 57 people from Nachingwea district who are all the victims of the above mentioned crosses on their houses....

1. *That the names of our client are hereby attached and forming part of the letter dated 14th Sept. 2013 that was addressed to you by our clients. For easy reference we further attach it **as part of this demand letter.***

2.N/A

3.N/A

4.N/A

5. *That due to the development that is underway carried on by TANROADS Lindi region their houses have been marked as the whole or part of the house with either red x or green x.*

6.N/A

7. *That our client have tried effortless to find the right answers which they have not got so far neither from the local authority nor TANROADS*

8.N/A

9. *With all the above scenario case and facts our client do hereby demand from you as follows,*

i. That since they acquired this land legally and they have been owning it for long time let the matter and way forward be communicated to them on how they are going to be compensated and when will the valuation be done.

ii. That since the Nachingwea District authority was involved in providing these plots and even facilitating the issuance of title deed let her be responsible to make good all the loss that will soon get incurred by our clients.

iii.N/A

iv.N/A

Get further information that if no any action taken to remedy the situation within 90 days counting day one on the day of receiving this letter, there will be no further notice and rather this will stand as the (90) ninety days statutory notice..... [Emphasis supplied]

The second letter, which is addressed to the 1st defendant and copied to the 4th defendant, is titled "TAARIFA YA SIKU 90 KUHUSU KUSUDIO LA KUFUNGUA SHAURI MAHAKANI DHIDI YA SERIKALI JUU YA MGOGORO WA ARDHI" and the plaintiffs' claims against the defendants are specified therein. Mr. Mohamed

argued that the notice did not specify the claim against the defendants, and that the claim for Tshs 10,000,000,000/= as compensation is not stated in the plaint.

Looking at the plaint, I am unable to agree with Mr. Mohamed. I am of the view that, the letters appended to the plaint under paragraphs 15 essentially meet all the requirements of notices of intention to sue. The purpose behind the requirement of a notice of intention to sue is to avoid unnecessary litigation. Through such notices, public officers are given reasonable time to examine the claim being levelled against them, so that, if possible, the dispute may be amicably settled and public funds and time may not be wasted. Therefore, the provisions relating to notice of intention to sue should only be used for advancement of justice. They should not be used as booby traps against claimants: See **Musangang'andwa v Chief Japhet Wanzagi and Eight Others** [2006] T.L.R 351. Similar observations were made in the case of **Pope v Clarke** [1953] 2 ALL. ER 704 where it was held:

“...the purpose of the notice was to call the respondent attention to the fact that he was to be prosecuted while the circumstances were still fresh in his mind. The purpose has been fulfilled and therefore the incorrect statement as to the time of the collision did not invalidate the notice”

Consequently, having found that the two letters meet the requirements of notice of intention to sue as required by law, any complaints on whether the claims in the notice are not reflected in the plaint or that the notice was only served on the 3rd defendant and not to all the defendants, are questions that will require evidence as they are disputes as to fact. They cannot be resolved at this stage.

It suffices to state that the defendants' first, second and third points of preliminary objections are devoid of merits. Consequently, they are overruled. There shall be no order as to costs.

DATED and DELIVERED at Mtwara this 31st day of October, 2017

F.A. Twaib

Judge

31st October, 2017