THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA

THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

MISCELLANEOUS CIVIL APPLICATION NO. 1 OF 2021.

1. UGUMBA IGEMBE.....1ST APPLICANT

2. MACHANYA NEMBA SINGU.....2ND APPLICANT

VERSUS

1. THE TRUSTEES OF THE
TANZANIA NATIONAL PARKS.....1ST RESPONDENT

2. THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

15. 01 & 18. 01. 2021.

UTAMWA, J.

This is a ruling on multi-issues. The issues involved those which arose from a preliminary objection (PO) against the application and those raised by the court *suo motu*. The application was made by the two applicants, UGUMBA IGEMBE and MACHANYA NEMBA SINGU (the first and second applicant respectively or the applicants collectively) under a certificate of urgency. It was against the two respondents, THE TRUSTEES OF THE TANZANIA NATIONAL PARKS and THE ATTORNEY GENERAL (henceforth the first and second respondent correspondingly or the respondents cumulatively). It was preferred by a chamber summons under section 2 (3)

of the Judicature and Applications of Laws Act, Cap. 358 R. E. 2019 (the JALA) and section 95 of the Civil Procedure Code, Cap. 33 R. E. 2019 (the CPC). It was supported by two affidavits affirmed by the two applicants.

Before going far, it is incumbent, in my view, to narrate the relevant facts to this ruling which constitute the brief background of the matter. This is for the sake of a proper understanding of this ruling. The facts go thus, according to the record and the undisputed facts in the arguments offered by the parties: the two applicants in this matter, lodged a suit (No. 38 of 2020) before the Court of Resident Magistrates of Mbeya, at Mbeya (the lower court) seeking for some reliefs. The suit is against the first respondent. That suit followed a claim that, the first respondent had unjustifiably detained 900 cows (henceforth the cattle) belonging to the two applicants. The suit was actually preceded by a 90 days' statutory notice to sue the first respondent dated 28th December, 2020 (hereinafter called the notice to sue in short). It was issued through the applicants' counsel, **Uphill Attorneys Company**. According to the counter affidavit opposing the present application, the respondents do not dispute the fact that the first respondent detained the cattle, but they contend that she did so lawfully.

Along with the civil suit, the two applicants filed an application No. 29 of 2020 before the same lower court and against the same first respondent. It was made by way of a chamber summons, supported by two affidavits. In that application, the two respondents sought three kinds of prayers; they firstly sought for what they termed as an *ex-perte* interim order directing the first respondent and/or her representatives to release

the cattle to them for grass, water and medication pending the determination of the main application *inter-partes*. Secondly, the two applicants moved the lower court to hear the application *inter-partes* and grant an interim order directing the first respondent and/or her representatives to release the cattle to the two respondents pending the determination of the main case. The third prayer in the said application was for the lower court to hear the application *inter-partes* and grant an interim injunction restraining the first respondent and/or her representatives from disposing of the cattle pending the determination of the main case.

The lower court ultimately made an order (*ex-parte*) on the 31st December, 2020, directing the first respondent to release the cattle to the two respondents pending the hearing and determination of the main suit (No. 38 of 2020) before it. The second respondent (or the AG in short) successfully applied before this court for a revision of the lower court's order through the Revisional Application No. 1 of 2021 the ruling of which was made on 11th January, 2021 (by Utamwa, J.).

Upon the revision of the lower court's order, the two applicants, on the same date (the 11th January, 2020) wrote a letter to the lower court praying for *inter alia*, the withdrawal of the Civil Suit No. 38 of 2020 which had been fixed for mention on the 19th January, 2021. However, before the lower court made any formal withdrawal order of the civil suit, the two applicants rushed to this court and filed the application at hand (on the same 11th January, 2020).

In the application at hand, according to the chamber summons, the applicants therefore, prayed for the following three orders:

1. For this court to issue interim orders against the respondents to grant temporary custody of the detained cattle to the applicants for grass, water and medication which said services are not provided to the cattle by the first respondent, pending the institution of a suit against the two respondents upon the expiry of the period of 90 days set in the notice to sue.
2. Costs of the application to follow the event.
3. Any other orders/reliefs this court will deem just and fit to grant.

The two respondents objected the application through a joint counter affidavit sworn by one Catherine Bernard Paul, learned State Attorney. They also lodged the preliminary objection (PO). The said PO is based on the following four grounds;

a. That, the application is incompetent and bad in law for being *res sub judice.*
b. That, the application is incompetent and bad in law for being prematurely filed.
c. That, the application is incompetent and bad in law for offending sections 25 (3) and 26 of the Written Laws (Miscellaneous Amendments) Act, No. 1 of 2020 that amended the Government Proceedings Act, Cap. 5 (hereinafter called the GPA).

d. That, the application is incompetent and bad in law for wrong citation of the name of this court.

As required by the law, this court had to firstly consider and determine the PO before it could hear the application. It thus, heard the parties on the PO orally. Upon hearing the parties on the PO, the court also raised legal issues and invited the parties to argue them orally as it will be demonstrated latter. This ruling is therefore, as hinted earlier, in relation to the issues arising from the PO and those raised by the court *suo motu*.

In this application, the applicants were represented by Mr. Faraji Mangula, learned advocate. The respondents were represented by Mr.Joseph Tibaijuka, learned State Attorney.

In supporting the first limb of the PO, the learned State Attorney for the respondents basically submitted as follows; the application at hand is *sub judice* following the existence of the civil suit No. 38 of 2020 before the lower court. It thus, offends section 8 of the CPC. The conditions for applying the principle of *res sub judice* are four as set by this court in the case of **Wengert Windrose Safaris (Tanzania) Limited v. the Ministry for Natural Resources and Tourism and the Attorney General, Misc. Commercial Case No. 89 of 2016, High Court of Tanzania (HCT), Commercial Division, at Dar es Salaam** (unreported). He listed such conditions as follows:

A. The matter in issue in the previous case must be directly and substantially in issue in the subsequent suit.

B. Parties in the previous suit must the same or parties whom they or any of them claim or litigate under the same title (in the subsequent suit).

C. The court in which the previous suit was filed must be competent to grant reliefs claimed in the subsequent suit.

D. The previously instituted suit must be pending.

The learned State Attorney further argued that, the first condition for applying the doctrine of *res sub judice*, has been met in the matter at hand. This is so because, the matter at issue in the civil suit No. 38 of 2020 is the detained cattle. The same matter is at issue in the application at hand. Regarding the second condition, he submitted that, the parties in the civil suit No. 38 of 2020 before the lower court and in the application at hand are also the same though the AG is not party to the civil suit.

Regarding the third condition, the learned State Attorney argued that, this court has jurisdiction to entertain the application at hand and the two applicants alleged in paragraph 21 of the plaint for the pending civil suit that, the lower court has jurisdiction to entertain that suit. He added that, the fourth condition is also met since the civil suit is still pending before the lower court and has been set to come before that court on the 19th January, 2020.

The learned State Attorney argued the second and third limbs of the PO cumulatively. He submitted that, this application has been filed prematurely and against the provisions of sections 25 (3) and 26 of the Act No. 1 of 2020 which amended the GPA. These provisions require proceedings against governmental institutions to be filed upon the expiry of

90 days from when the notice to sue is issue. The respondents were also not served with the notice to sue which was attached as an annexure (Ruaha-1) to the affidavits supporting the application at hand.

In relation to the fourth limb of the PO, the learned State Attorney submitted that, rule 8 (2) of the High Court Registries Rules, GN. No. 96 of 2005 (the HCT Registry Rules), provides that, where a matter is filed in a District Registry of the High Court, it must be titled thus, "IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA, IN THE DISTRICT REGISTRY OF..." However, in the application at hand the applicant did not title it in that manner. He further contended that, the irregularity was fatal. He supported the contention by citing the case of **Eliakunda Kukunda v. IBIS International Ltd, Land Case Appeal No. 26 of 2016, HCT, at Moshi** (unreported, by Mwingwa, J as he then was). He added that, in that case this court struck out the appeal for an improper citation of the title of this court.

The learned State Attorney for the respondents thus, urged this court to strike out the application with costs.

In his replying submissions, the learned counsel for the applicants contented (in respect of the first limb of the PO) that, the law requires a PO to be based on a pure point of law that arises from the pleadings. If such point of law is successfully argued, it must dispose of the matter. He supported this stance of the law by the case of **Mukisa Biscuits Manufacturing Company Limited v. West End Distributors [1969] E. A. 696.**

The learned counsel added that, the four conditions for applying the principle of *res sub judice* set in the **Wengert case** (supra) were not met in the matter at hand. This is so because, the reliefs sought in the civil suit No. 38 of 2020 before the lower court are different from the reliefs sought in the present application. In that case, the reliefs sought are a declaration that the two respondents (as plaintiffs) are the lawful owners of the cattle, a declaration that the first respondent's act (as defendant) was unlawful and inhuman, specific damages at the tune of Tanzania shillings (Tshs.) 110, 000,000/=, general damages worth Tshs. 800, 000,000/= and costs. In the present application, nonetheless, the applicants are making the prayers listed above pending the expiry of the 90 days set in the notice to sue and costs. Even the contents of the plaint in the civil suit and those of the affidavits supporting the application at hand are different.

The learned counsel for the applicants further contended that, the parties in the two matters are also not the same. The second respondent is not party to the civil case No. 38 of 2020 before the lower court. He further argued that, the fact that the applicants indicated in the plaint for the civil suit that the lower court has jurisdiction to grant the reliefs sought therein, does not matter. This is because, it is the law and not the parties, which determines the jurisdiction of that court. Actually, the lower court will not proceed to hear that civil case because, the AG was not joined thereto. This was the reason why this court in Civil Revision No. 1 of 2021 (supra) revised the interim order that had been made by the lower court. Besides, the applicants wrote a letter to the lower court through their counsel applying for withdrawal of the civil suit for technical irregularities. However,

they have not obtained any copy of the withdrawal order. Owing to the intended withdrawal of the civil suit the fourth condition mentioned above was not also met in the matter at hand.

It was also the contention by the applicants' counsel that, in law, even where the four conditions of the principle of *res sub judice* are met, the remedy is to stay the subsequent suit and not to strike it out as contended by the learned State Attorney for the respondents. He added that, the first limb of the PO is thus, untenable since its determination necessitates this ccourt to seek evidence from the lower court record regarding the said civil case No. 38 of 2020. Again, even if the same will be successful it will not dispose of the application at hand. The point on *res sub judice* does not thus, fit as a ground of a PO in law as per the **Mukisa case** (supra).

In relation to the second and third limbs of the PO, the learned counsel for the applicants submitted that, the present application is not premature and does not offend the provisions of the GPA as amended by Act No. 1 of 2020. This is so because, this court is legally empowered to issue an interim order even where no suit has been filed before it. This court can do so under what is called in law, the **Mareva injunctions principle**. This principle is based on common law practice and applies in our law where there is *lacuna* in the CPC.

The learned counsel added that, the CPC does not make any guidance related to the remedies available to the applicants in this matter pending the expiry of the 90 days set in the notice to sue the first respondent. Nevertheless, their cattle are in danger. Owing to this situation, the applicants are entitled to bring this application and obtain the sought

orders under the Mareva injunctions Principle. He based this particular contention on the decision of this court (Mgonya, J.) in the case of **Abdallah M. Malik and 545 others v. the Attorney General and another, Misc. Civil Application No. 119 of 2017, HCT, Land Division, at Dar es Salaama** (unreported). He also submitted that, this court (Mongella, J) also granted an interim order in circumstances similar to those applying to the matter at hand in the case of **MEK One Industries Ltd v. Rungwe District Council and the AG, Misc. Civil Application No. 08 of 2020, HCT, at Mbeya** (unreported).

Regarding the complaint by the learned State Attorney that the respondents were not served with the notice to sue, the applicants' counsel contended that, the same is a factual matter. The applicants actually served them with the notice as shown in the affidavit on 28th December, 2020. This contention is not thus, tenable as a ground of any PO in law according to the guidance in the **Mukisa case** (supra).

The arguments by the learned counsel for the applicants against the fourth limb of the PO were that, the irregularity in citing the title of this court is not fatal to the present application. It can be saved by the principle of overriding objective. It is more so since the learned State Attorney for the respondents did not explain as to how the irregularity in the title of this court affected the respondents. The principle of overriding objective restrains courts from putting overreliance on procedural technicalities. It has been recently introduced in our law through amending the CPC in 2016. In cementing this contention, the learned counsel urged this court to borrow wisdom from the decision of this court (Mlyambina, J.) in the case

of **Aliance One Tobacco Tanzania Ltd and another v. Mwajuma Hamisi and another, Misc. Civil Application No. 803 of 2018, High Court of Tanzania, at Dar es Salaam** (unreported). In that case, he contended, this court applied the principle of overriding objective and held that, the non-citation of enabling provisions of law in the application before it was not fatal.

In his rejoinder submissions, the leaned State Attorney essentially reiterated his submissions in chief. He added that, since the respondents received no order of the lower court withdrawing the civil suit No. 38 of 2020, it is considered that the suit is still pending. Again, the ruling of this court in Civil Revisions No. 1 of 2021 (Utamwa, J.) made no direction regarding the civil suit before the lower court. It only revised an order made by the lower court on the 31st December, 2020. The fact that the counsel for the applicants wrote a letter to the lower court praying to withdraw the civil suit does not suffice as the actual withdrawal of the same.

It was further the contention of the learned State Attorney that, the applicants' counsel could not argue that the present application is based on the Mareva injunctions principle. This is so because, there is already the pending civil suit before the lower court and the respondents did not receive any notice to suet them. He distinguished the **MEK case** (supra) and the **Abdallah case** (supra) on the ground that, the respective rulings in those cases were correctly based on the Mareva injunctions Principle since there were in fact, no pending suits in court. This is not the case in the present application following the existence of the civil suit before the

lower court. He further distinguished the **Tobacco case** (supra) because its decision was based on non-citation of enabling law in that application while in the present application the issue is on a wrong citation of the title of this court.

When prompted by the court, the learned State Attorney submitted that, the fact that civil suit No. 38 of 2020 exists in the lower court does not raise from the pleadings (the chamber summons, affidavits and the counter affidavit), but it is in the knowledge of the respondents. He also conceded that, the fact that the respondents were not served with the notice to sue the first respondent cannot be a legal basis for the PO because, it is stated in the affidavits supporting the application and disputed by the respondents in their counter affidavit. He further admitted that, the principle of *res sub judice* does not dispose of a matter before the court.

Having heard the parties' arguments on the PO the court noted that, the existence or otherwise of the civil case No. 38 of 2020 in the lower court was a very material fact in this matter. However, it was apparent that, parties were not sure as to whether the lower court had actually made a formal order withdrawing the suit upon the applicants' counsel writing the letter to it praying for the withdrawal. This court thus, adjourned the matter for some minutes so as to afford the parties ample time to peruse the lower court's record for verifying whether the suit still exists. This was for purposes of enhancing the parties with the tools for addressing the court on the issues that it could raise *suo motu* depending on their discovery from the lower court's record regarding the existence or otherwise of the civil suit that had been filed before it. The parties indeed,

took their time and perused such record of the lower court. Indeed, for the sake of justice, this court also called the record for its own inspection in view of satisfying itself on the existence or otherwise of that suit.

When the parties re-appeared before this court for submitting on their discovery from the lower court's record, both sides were in a consensus. Their representatives submitted that, there is, in fact, no any formal court order of the lower court that had withdrawn the suit. They however, maintained that, the letter by the applicants' counsel applying for the withdrawal is in that record. Upon the court hearing the submissions of the parties on the status of the suit before the lower court, and upon it perusing the same record of the lower court, this court was of the view that, it was incumbent for the parties to address it on the following two issue;

i. Whether or not it was proper for the two applicants to file the application at hand before the civil suit No. 38 of 2020 in the lower court was formally withdrawn, in which said suit, the applicants (as plaintiffs) are claiming for reliefs that are related to the reliefs mentioned in the notice to sue the first respondent.
ii. In case the answer in the first issue will be negative, then which orders should this court make?

The court took this course, since the parties had not addressed themselves to these two issues. The reasons for resorting to this course were that, the court had sniffed a legal impropriety in the course taken by the applicant. It actually, suspected that, it was irregular for the applicants to issue the statutory notice to sue the first respondent, file the civil suit before the

lower court, and then file this application while the lower court had not formally made an order withdrawing the suit. It is more so because, the reliefs claimed in the civil suit are related to the reliefs mentioned in the notice to sue the first respondent mentioned above. The said reliefs (in the notice to sue) are intended to be claimed through the suit that the applicants intend to file before this court upon the expiry of the 90 days set in the notice to sue. It is further more so because, according to the nature of the present application, it is based on the suit that will be filed by the applicants upon the expiry of the 90 days of the notice to sue.

Certainly, the court was entitled to opt for the course shown above since it is a firm and trite principle of our law that, courts are enjoined to decide cases according to law and the constitution. This is irrespective of reaction by the parties to court proceedings. This stance of the law is indeed, underscored under article 107B of the Constitution of the United Republic of Tanzania, 1977, Cap. 2 R. E. 2002 (the Constitution). It was also underlined in the case of **John Magendo v. N.E. Govan (1973) LRT n. 60**. It was thus, legitimate for this court to raise the two issues listed above and invite the parties to address it on them. This step also afforded the parties the right to be heard on the issues raised by the court for the purposes of promoting their respective rights to fair trial before the court could decide on the issues. The right to fair trial/hearing is a fundamental right and is well enshrined under article 13(6)(a) of the Constitution. This right has been graded by the Court of Appeal of Tanzania (the CAT) as one of the corner stones of the process of adjudication in any just society like ours, in both civil and criminal

proceedings: see the decision by the CAT in **Kabula d/o Luhende v. Republic, CAT Criminal Appeall No. 281 of 2014, at Tabora** (unreported).

The applicants' counsel was given the right to begin in addressing the court on the issue it had raised *suot motu*. This was because, the issues basically challenged the competence of his clients' application at hand.

In arguing the first court-issue the learned counsel for the applicants contended that, the application at hand is proper in law because the applicants have shown the intention to withdraw the civil suit pending before the lower court vide their letter mentioned above. The suit cannot thus, proceed in any way because no one can compel them to conduct it. The learned counsel however, blamed the lower court for not been punctual in withdrawing the application. It ought to have withdrawn the suit immediately upon receiving the applicants' letter applying for the withdrawal. The applicants could not interfere the internal process of that court. He also submitted that, to him, the suit died upon the lower court receiving the applicants' letter for withdrawing it. Besides, it is the practice of courts to withdraw matters from them following mere letters of the parties applying for the withdrawal.

It was also the contention by the learned counsel for the applicants that, though it is true that the reliefs claimed in the civil suit before the lower court are related to the claims mentioned in the notice to sue, the actual legal position is that, when one issues the 90 days' notice to sue a governmental institution, the intention is always to see the suit being heard by this court and not by the lower court. This is the reason why the

applicants opted to withdraw the suit from the lower court. This withdrawal was also prompted by the ruling of this court (Utamwa, J.) in the Civil Revision No. 1 of 2021 before this court, which said ruling indirectly touched the civil suit No. 38 of 2020 before that lower court and made it ineffective.

In relation to the second court-issue, the learned counsel for the applicants submitted that, in case the court answers its first issue negatively, it may stay the proceedings of this present application pending the formal withdrawal of the civil suit from the lower court. He urged this court not to strike out the present application. Alternatively, the learned counsel submitted that, this court may proceed to hear the present application even without any formal withdrawal of the civil suit. This is because, the applicants have prayed for the withdrawal of the same through their counsel's letter.

On the other hand, in his replying submissions, the learned State Attorney for the respondents contended that, it was improper for the applicants to file this application before the formal withdrawal of the civil suit from the lower court. This is so because, the reliefs sought in that suit are related to the reliefs mentioned in the notice to sue. What matters is the formal withdrawal order of the lower court and not the mere letter by the applicants' counsel applying for the withdrawal. The civil suit is thus, considered as existent since the respondents still have the order directing them to file a written statement of defence (WSD) and to appear on the 19th January, 2021 before the lower court for the civil suit.

The contention by the learned State Attorney for the respondents regarding the second court-issue was that, the application at hand is an abuse of court process. Its proceedings should thus, be stayed so as to avoid having two contradictory orders of this court and of the lower court. He thus, urged this court to make orders to that effect.

When this court inquired into the representatives for both sides, the learned counsel for the applicants, submitted that, the two applicants had in fact, filed before this court, an application of similar nature to the nature of the present application. The said application (No. 71 of 2020) was against the same two respondents. The two applicants however, withdrew that application because they did not have any interests to proceed with it. On his part, the learned State Attorney for the respondents submitted that, he is not aware of the application which was filed by the applicant in this court and withdrawn by them later.

Now, having considered the arguments of both sides, the record and the law, I will firstly consider the issues related to the PO raised by the respondents against the application at hand.

Regarding the first limb of the PO, and according to the parties' arguments, the issues are two as follows:

a) Whether the first limb of the PO actually, fits to support the PO in law.
b) If the answer is affirmatively, then whether or not the application at hand is *res sub judice* in law.

As to the first issue under this limb of the PO, I am convinced by the arguments advanced by the learned counsel for the applicants. In fact, the **Mukisa case** (supra) described the properties of a true PO in law. In fact, these properties must be in place cumulatively and not alternatively. They include the following; the PO must be based on a pure point of law and not of fact, it must base on matters emanating from or implied from the pleadings, it must be on matters pleaded by one party and agreed by the other, it must not base on facts needing evidence to prove it and it must be of the nature which once successfully argued, it disposes of the matter before the court. The position was also underscored by the CAT in the cases of **Karata Ernest and others v. Attorney General, TCA Civil Revision No. 10 of 2010, at Dar es Salaam** (unreported) and **COTWO (T) OTTU Union and another v. Honourable Idd Simba, Minister of Industries and Trade and others [2002] TLR 88.** This position is therefore, among the legal principles of this land set through case law.

Now, since the learned State Attorney himself conceded in his submissions when prompted by the court that the existence of the civil suit was not part of the pleadings in the present application, and this particular fact is actually vindicated by the record of the present application, then he was not legally entitled to raise that point as a PO. This view is based on the following grounds; that, the point he raised lacks the properties of a true legal PO according to the **Mukisa case** (supra), the **Karata case** (supra) and the **Cotwo case** (supra). This is so because, **one**; it is not embodied in the pleadings of this matter, **two**; it is not pleaded by one part and agreed by the other and, **three;** it needs to be proved by

evidence through perusing the lower court's record. As hinted above, the properties of a PO listed earlier need to be available cumulatively in a point to be used as the basis of the PO. Lack of any one or more of them therefore, disqualifies a raised point as a true PO before the eyes of the law.

Furthermore, it is my settled opinion that, one cannot base a PO, legally so called, on the principle of *res sub judice.* The term *sub-judice* is not defined by the CPC or any other written law. It was however, described by the CAT in the case of **Phantom Modern Transport (1985) Ltd v. D. T. Dobies (Tanzania) Limited, Civil Reference Nos. 15 of 2001 and No. 3 of 2002, CAT, at Dar es Salaam** (unreported ruling date 10th December, 2002). The CAT in that precedent, took strength from the Osborn's Concise Law Dictionary, 5th edition and defined the term to mean "in course of trial" or "under investigation."

My view that the principle of *res sub judice* cannot base any PO in law follows the fact that, where the four ingredients or conditions of this principle (listed earlier by the learned State Attorney, which I also agree to them) are met in a matter, the remedy is not to dispose of that subsequent matter by striking it out or by dismissing it. The only legal remedy is to stay the proceedings of such subsequent matter; see the context under section 8 of the CPC as applied in various court decisions. Such decisions include the following: **Georgia Pantelakis Penessis v. Marino Anatolia Costack, Civil Case No. 2 of 1995, HCT** (unreported order by Lugakingira, J as he then was), **Nelson Msuya and another v. Tanzania Fisheries Development Company Limited and 4 others,**

Commercial Case No. 41 of 2010, HCT Commercial Division, at Dar es Salaam (unreported ruling by Mruma, J.), **Solohaga Company Limited v. Yara Tanzania Limited and another, Commercial Case No. 67 of 2020, HCT Commercial Division**, (unreported ruling by Magoiga, J.) and the **Wengert case** (supra). In my further view, a court order staying proceedings of a matter is a distinct phenomenon from an order disposing it of. It is indeed, the disposal order, and not the staying order, which is among the elements of a PO according to the **Mukisa case**, the **Karata case** and the **Cotwo case.**

The point I want to bring home by my view just highlighted above, is **not** that, a party cannot raise a point of *res sub judice* in any other way. My emphasis is only that, such party **cannot** do so by way of a PO. Nonetheless, he/she can do so in opportune situations, through other acceptable ways like applying to the court seizing jurisdiction on the subsequent matter for stay of its proceedings. He/she can do so under section 8 of the CPC.

Owing to the reasons adduced above, I answer the first issue under the first limb of the PO at issue negatively that, the first limb of the PO does not actually, fit to support a PO in law. This finding would have relieved me from testing the second issue under this first limb of the PO under consideration. However, for better future practice, I feel indebted to make some findings related to that issue.

Actually, even if it is presumed (without deciding) that a point of *res sub judice* can base a PO in law, the circumstances of the present matter

would not favour all the four ingredients of that principle. This is because, in the civil suit before the lower court the applicants (as plaintiffs) are claiming for final reliefs as listed above. The reliefs include declaratory orders, specific damages and general damages. However, in the present application, they are moving this court for an order of a mere temporary release of the cattle pending the expiration of the 90 days set in the notice to sue the first respondent for the final reliefs. I do not thus, think if I would find that the matters in issue in the previous case (civil suit before the lower court) are directly and substantially in issue in the subsequent matter (being the present application). It could not thus, be found that, the first condition for applying the doctrine of *res sub judice* has been met in the present application.

Again, as hinted above, ingredients/conditions for applying the principle of *res sub judice* have to be satisfied cumulatively and not alternatively. Now, that the first condition is not satisfied, I would not need to test the rest of the conditions. I would thus, answer the second issue regarding the first limb of the PO negatively that, the application at hand is not *res sub judice* in law.

All having been said, I agree with the learned counsel for the applicants that, the first limb of the PO (on *res sub judice* principle) is not meritorious and I accordingly overrule it.

Certainly, the finding I have just made on the first limb of the PO does not necessarily mean that the applicants properly filed this application. The finding only exonerates the application from the

applicability of the principle *of res sub judice.* The propriety or otherwise of the application as regarding other legal reasons will be determined latter in considering the two issues raised by the court *suo motu* as mentioned previously.

Regarding the second and third limbs of the PO, the issue is *whether or not the application at hand was filed prematurely and in violation of the provisions of the GPA as amended by Act No. 1 of 2020.* Actually, I hasten to agree with the learned counsel for the applicants that, the application was not filed prematurely and against the provisions of the GPA as amended by Act No. 1 of 2020. This is because, our law is now settled that, this court can grant interim orders under section 2 (3) of the JALA in appropriate situations. It can do so under circumstances that are not specifically covered by the CPC. Such circumstances include where there is no suit pending in court. The practice is based on the common law principle of **Mareva injunctions** as submitted earlier by the learned counsel for the applicants. This position of the law was underlined in the **Abdallah Case** (supra) that followed a decision of the CAT in the case of **Tanzania Electric Supply Company (TANESCO) vs. Independent Power Tanzania Ltd (IPL) and 2 others [2002] TLR. 324.** The same position was underscored by this court (Galeba, J.) in **Daud Mkwaya Mwita v. Butiama District Commissioner and the Attorney General, Misc. Land Application No. 69 of 2020, HCT, at Musoma** (unreported).

It follows thus, that, the Government and institutions in which it has interests, as parties to court proceedings, do not enjoy any exception of

the applicability of the legal principle just highlighted above where justice so permit to apply it. Courts of this land can thus, issue temporary injunctions against them even where the 90 days of the statutory notice to sue have not expired. Indeed, in the **MEK case** (supra) this court also granted a temporary injunction against a District Council (as a governmental institution) though there was not any pending suit against it. The court in that case had been moved under the same provisions of the JALA cited above.

Moreover, the learned State Attorney was not entitled to distinguish the **Abdallah case** and the **MEK case** as part of his arguments in supporting the PO. He distinguished them on the ground that, in such precedents the **Mareva Injunctions** principle properly applied because, there were no pending suits in court unlike in the present application where there is the pending suit before the lower court. However, as discussed earlier, the existence of the civil suit was not among the facts embodied in the pleadings and thus, needed evidence. The same is not thus, a good argument for basing the PO under the second and third limbs.

Due to the reasons shown above, I answer the issue regarding the second and third limbs of the PO negatively that, *the application at hand was filed neither prematurely nor in violation of the provisions of the GPA as amended by Act No. 1 of 2020.* I therefore, find that, the second and third limbs of the PO are not meritorious. I consequently overrule them.

I now test the fourth limb of the PO. Regarding this limb, the applicants' counsel conceded to the irregularity in citing the title of this

court in the documents instituting the application at hand. He however, contented that the same is not fatal. The chamber summons and the two affidavits supporting it are titled thus;

"IN THE HIGH COURT OF TANZANIA

(MBEYA DISTRICT REGISTRY)

AT MBEYA"

The learned State Attorney wanted the title of this court on such documents to appear as guided under rule 8 (2) of the HCT Registries Rules as follows;

"IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA,

IN THE DISTRICT REGISTRY OF MBEYA"

The issue here is *whether or not the wrong title of this court on the documents at issue was fatal to the present application.* In my view, the circumstances of this matter do not attract an affirmative answer to this issue. This view is based on the following reasons; in the first place, this defect is only on the title of this court and does not affect the substance of the documents themselves. In fact, the irregularity alone will not affect the jurisdiction of this court to entertain the application and does occasion any miscarriage of justice. It is more so since the learned State Attorney himself did not explain as to how the abnormality prejudiced the two respondents as rightly contended by the learned counsel for the applicants.

In my further view, such a minor blunder can be saved by a mere amendment of the documents at issue for purposes of putting the record clear. This is because, the slip does not go to the root of matter. It is more so considering the introduction into our laws of the principle of overriding objective highlighted by the learned counsel for the applicants in his submissions. In fact, due to this principle, the contemporary approach of courts of this land is to avoid disposal of matters before them through procedural technicalities. This principle has been recently underlined in our law vide the Written Laws (Miscellaneous Amendments Act) (No. 3) Act, No. 8 of 2018. It essentially requires courts to deal with cases before them justly, speedily and to have regard to substantive justice. It was underscored by the CAT in the cases of **Yakobo Magoiga Gichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017, CAT, at Mwanza** (unreported) and many others. The principle thus, works in tandem with the requirement set under Article 107A (2) (e) of the Constitution. These provisions require courts to avoid procedural technicalities in deciding cases.

Owing to the principle of overriding objective, I will not follow the decision of my brother Judge (Mwingwa, J as he then was) in the **Eliakunda Case** (cited supra by the learned State Attorney). The overriding objective thus, justifies my departure from the **Eliakunda case**. Besides, his decision does not bind me since I enjoy concurrent jurisdiction with him by virtue of the doctrine of *stare decisis* (precedents). Furthermore, the decision in the **Yakobo case** (supra) that emphasised on the principle of overriding objective in appropriate situations was decided

by the CAT. Decisions of this court, as the highest court in our court hierarchy, are binding to this court, other courts and tribunals subordinate to the CAT. This is due to the same doctrine of *stare decisis*; see the decision by the CAT in **Jumuiya ya Wafanyakazi Tanzania v. Kiwanda Cha Uchapishaji cha Taifa [1988] TLR. 146.** I must thus, follow the **Yakobo case** (supra) and not the **Eliakunda case** (supra) decided by this court.

It is also common ground that, the **Eliakunda case** was decided on the 14th December, 2016 well before the CPC was amended in 2018 for purposes of introducing the principle of overriding objective as shown above. One cannot not thus, know if my brother Judge who decided that case would stick to his stance had the amendments been effected before he could decide the case. In my view, he would have followed the **Yakobo case** for the obvious reason that it binds this court as demonstrated above.

Indeed, I am aware that, this useful principle of overriding objective did not mean that procedural rules should not be observed at all. It was not also meant to be a broad spectrum panacea for every breach of procedural rule; see the spirit underscored by the CAT in the case of **Mondorosi Village Council and 2 others v. Tanzania Breweries Limited and 4 others, Civil Appeal No. 66 of 2017, CAT at Arusha** (unreported). In that case, the CAT declined to apply the principle of overriding objective following a breach of an important rule of procedure. Nonetheless, my point is that, the blunder related to the fourth limb of the

PO attracts the applicability of the principle of overriding objective for the reasons shown previously.

Furthermore, the **Tobacco case** (cited supra by the counsel for the applicants) is very persuasive to me. In that case the court (Mlyambina, J.) decided that, wrong and non-citation of enabling laws in applications are not fatal where the court is seized with the requisite jurisdiction to try the application. That decision was reached upon considering the principle of overriding objective. Though the court in that case dealt with a wrong citation of enabling provisions of law in applications unlike in the present application where the issue is on wrong citation of the title of this court, the precedent is still a good decision to follow. This is because, it underlines the applicability of the doctrine of overriding objective and the need for courts to dispense substantive justice.

Now, since the fourth limb of the PO cannot lead to the disposal of the application at hand as shown above, it also lacks one of the ingredients of a true PO as per the **Mukisa case** (supra), the **Karata case** (supra) and the **Cotwo case** (supra). This fourth limb cannot thus, support the PO under consideration.

Owing to the reasons shown above, I answer the issue in relation to the fourth limb of the PO negatively that, the wrong title of this court on the documents at issue was not fatal to the present application. The fourth limb of the PO thus, lacks merits and I accordingly overrule it.

Having overruled all the four limbs of the PO, I accordingly overrule the entire PO for want of merits. This finding attracts the examination of the two legal issues raised by the court *suo motu*.

In regard to the first court issue (related to the propriety of the applicants' act of filing the present application before the civil suit in the lower court was formally withdrawn), I am of a firm view that, though this court has overruled the PO raised by the respondents, that does not necessarily mean that the course taken by the applicants in filing this application was proper in law. This view is based on a different reason from those advanced by the learned State Attorney when arguing the PO. The major reason for this view is that, the course opted by the applicants and their conduct have all the indications of abusing the due process of the court, hence a wastage of time of the court and the respondents. This abuse can be traced from the background of this friction between the two applicants and the first respondent, especially when the applicants issued the 90 days' notice to sue the first respondent. The abuse is exemplified by various factors shown below.

In the first place, according to the record (affidavits supporting the application) and the submissions by the applicants' counsel, the two applicants issued, through their counsel, the 90 days' notice to sue the first respondent. The notice was annexed to the affidavits supporting the application. This was indeed, because, the applicants were aware of the reality that the first respondent is a governmental institution. That course was thus, apparently an endeavour to observe the requirement set under section 6(2) of the GPA as amended by Act No. 1 of 2020. In the notice to sue, the applicants clearly indicated that, following what they considered to be an unjustifiable detention of the cattle, they were demanding, *inter alia*, for the first respondent to direct her park-rangers to work professionally

and lawfully in exercising their duties, for the release of the cattle, for Tshs. **110, 000, 000/=** as compensation and for **Tshs. 800, 000, 000/=** as general damages. These reliefs are actually, directly related, and substantially similar to the reliefs claimed in the civil suit before the lower court. Such reliefs were listed above by the learned counsel for the applicants in his submissions regarding the PO. In fact, the applicants and their counsel do not also dispute the fact that the reliefs in the notice to sue are related to the reliefs claimed in the civil suit.

It is also worth noting at this juncture that, the reliefs mentioned above also tally with the reliefs listed in the intended plaint to be filed before this court (after the expiry of the 90 days of the notice to sue). A copy of the intended plaint was attached to one of the affidavits supporting the present application as an annexure. In that intended plaint however, there is an additional claim. This one is for the release of the cattle to the applicants.

In their notice to sue, the applicants also threatened to institute civil proceedings in case the first respondent did not heed to their demands before the expiry of the 90 days. The notice to sue was accordingly copied to among other persons, the second respondent, the Solicitor General and the Minister for Livestock and Fisheries.

The two applicants nevertheless, filed the civil suit before the lower court even before the expiry of the 90 days set in the notice to sue. They did not even join the second respondent in that suit. They also filed it before the lower court and not before this court. As rightly conceded by

the learned counsel for the applicants himself in his submissions, the suit was thus, filed in total violation of the provisions of section 6(2)-(5) of the GPA as amended by the Act No. 1 of 2020 (supra).

The applicants also successfully moved the lower court (through an application No. 29 of 2020) and obtained an interim order directing the first respondent to release the cattle to them pending the final determination of the suit before it. The interim order was however, revised by this court on the 11th of January, 2021 through the Revisional Application No. 1 of 2021 mentioned above. The revision was at the instance of the second respondent herein.

Upon the revision of the interim order of the lower court, the applicants rushed to this court and instituted the present application. They did so without even obtaining any order of the lower court terminating the proceedings of the civil suit before it. In my view, therefore, the applicants have instituted the present application amid the existence of the civil suit before the lower court. The contention by the applicants' counsel that the civil suit automatically died following his letter applying for its withdrawal, is not tenable as correctly contended by the learned State Attorney for the respondents. In my concerted opinion, the letter was a mere expression of the applicants' intentions and prayers. In law, once proceedings like the suit before the lower court are lodged in court, they are regarded as existing and live until formally terminated or disposed of by court orders. Mere intentions and prayers by the parties which are not blessed by court orders do not have such effect.

There are in fact, various kinds of court orders that can terminate or dispose of matters before courts. They include orders for striking out, dismissal orders and withdrawal orders. Each order ending court proceedings has its consequences that may be different from another order depending on the nature of the proceedings and the circumstances of each case. An order for striking out a matter for example, is different from a dismissal order or a withdrawal order. A party may thus, pray for an order, say for withdrawal of a matter, but the court may refute it and make a different order with different consequences. It is more so considering the guidance by the law that, a matter proved to be incompetent can neither be withdrawn nor dismissed nor adjourned. It can only be struck out. Again, a matter pending in court cannot only be presumed incompetent before it is declared so by the court seizing jurisdiction to do so and in an appropriate forum. Owing to this position of the law, the applicants could not be entitled to presume that their suit before the lower court was automatically withdrawn following their letter expressing their intention and prayers.

Furthermore, the contention by the applicants' counsel that the ruling of this court in Revision No. 1 of 2021 had an impact of making the suit before the lower court non-existent is also fragile. This is because, as accurately contented by the learned State Attorney for the applicants, that ruling did not make any direction regarding that suit. It only revised the interim order that had been given by the lower court in the Application No. 29 of 2020. In fact, the court expressly stated at page 22 of the typed

version of the ruling thus, and I quote the pertinent paragraph for a readymade reference:

> "As to the main suit before the lower court, I will make no any order in relation to it. This is because, it was not subject to this revisional matter. It is thus, upon the applicant, if he still wishes, to take necessary legal steps so as to see that the law is being observed."

Owing to the above quoted express observation of this court in that ruling, the applicants and their learned counsel could not pretend that they belied, the ruling had made the suit before the lower court ineffective. Admittedly, the word "applicant" in the above quoted paragraph of the said ruling referred to the AG who had moved this court for the revision. Nonetheless, for the same quoted observations of this court, the two applicants herein and their counsel ought to have taken note of the fact that, the suit was still intact and pending before the lower court. They were thus, duty-bound to take appropriate steps and obtain a court order terminating the proceedings of the suit if they wished to do so.

On the other hand, I agree with the learned counsel for the applicants that, in law, no one can compel the applicants to proceed with the suit anymore. Nonetheless, under the same legal spirit, no one can obstruct them from withdrawing their letter from the lower court and proceed with the suit. Besides, according to the contents of the letter, one cannot not firmly believe that the applicants are intending to permanently withdraw the suit. This is because, in that letter (dated 11th January, 2021 with reference No. UAC/UGUMBA/2021/10) the applicants' counsel expressed the following three indications; **one**, to withdraw the suit (see

paragraph 3), **two;** to be exempted from paying costs (see paragraph 3) and **three**, to seek for leave to refile the suit afresh upon rectifying some discovered technical irregularities (see paragraph 2).

The impression that one gets from the contents of the letter of the applicants' counsel is that, the applicants' prayers attracted a judiciously exercise of the lower court's discretion and the hearing of both sides of the suit. This situation thus, enhances the above highlighted view that it was not open for the applicants to presume that their prayer for the withdrawal of the suit through the letter was automatically realized. Another impression one gets from the contents of the letter is that, the applicants are not intending to drop their efforts for pursuing the suit before the lower court. This is so because, the prayed withdrawal is for the intention to refile it upon rectifying some detected procedural abnormalities.

Upon considering all the factors narrated above, my finding is that, the suit before the lower court is still pending and live before the eyes of the law.

Now, despite the existence of the suit before the lower court and the express intention of the applicants to proceed with it according to the contents of the letter, the applicants surprisingly rushed to this court and filed the present application without firstly obtaining the prayed withdrawal order or any other order that would terminate the proceedings of that suit. As indicated earlier, the application at hand was based on the suit that will be filed before this court against the respondent upon the expiry of 90 days set in the notice to sue. The application is thus, founded on the

applicants' intention to sue expressed in their said notice. Again, as hinted above, according to the notice to sue and the intended plaint, the reliefs they intend to seek in the suit to be filed before this court are substantially similar to those already sought in the pending suit before the lower court.

It follows thus, that, the applicants are trying to set two alternative traps at a time and see which will catch first so that they can abandon the other. Our law does not recognise such procedure of riding two horses at a time. A genuine justice seeker sticks to one firm and legally authorised process of pursuing his rights, if any.

It follows further that, the intention to file the suit before this court upon the expiry of the 90 days of the notice to sue and the suit before the lower court cannot coexist in law. The applicants cannot, at any point of time maintain the two phenomena. They are enjoined to choose which way to follow by opting to only one line of pursuing their rights (if any). They can thus, either retain the suit before the lower court (if they think the law permits them to do so) or cause it to be formally terminated by a court order and pursue their intention to file the suit before this court upon the expiry of the 90 days of the notice to sue. Indeed, the second option is seemingly viable to them since even their counsel admitted in his submissions that, the suit before the lower court was improperly instituted there. The applicants' act of maintaining such both intentions thus, affects the genuineness of the present application.

Due to the above narrated circumstances of the matter at hand, one would expect a serious litigant put into the shoes of the applicants to do

the following; upon discovering that the suit before the lower court was wrongly filed as their counsel submitted before this court, to apply and obtain the formal withdrawal order or any other order that would have the effect of finally terminating the proceedings of that suit. They could thus, be expected to file this application only upon obtaining such order and not before.

In fact, the learned counsel for the applicants also tried to blame the lower court for its failure to make the prayed withdrawal order punctually. However, that blameworthiness is not founded. This is because, as I observed earlier, the nature of the prayers in the letter attracted a hearing of both sides of the suit and the exercise of the judicial discretion of the lower court. Indeed, the record of the lower court indicate that, the lower court had already made orders for summoning the first respondent. The summons was accordingly issued requiring her to file her WSD as correctly submitted by the learned State Attorney for the respondents. Such orders are still enforceable and binding. This is so because, it is our law that, any court order or decision remains enforceable until, and only until legally set aside or made inoperative; see the CAT decision in the case of the **General Manager K. C. U. (1990) LTD v. Mbatama Rural Primary Cooperative Society, CAT (BKB) Civil Application No. 1 of 1999, at Mwanza** (unreported, at page 2 of the typed version).

Now, under the circumstances shown above, this courts asks itself some questions the answers of which are lacking. The questions include these: how could the applicants and their counsel believe that their mere letter applying for the withdrawal of the suit could put off the orders made

by the lower court? Again, how could they expect that a sober court of law could grant their prayer for waving costs through a letter and without hearing parties for both sides of the suit? Furthermore, how could the lower court entertain a prayer made in a mere letter for withdrawal of the suit with the leave to refile it without giving audience to both sides of the suit? I do not think if that course envisaged by the applicants and their counsel could be condoned by any court of this land if at all, the parties rights to fair trial are to be promoted in our courts.

In fact, the learned counsel for the applicants ought to have known and appreciated the legal requirements just envisaged herein above following the nature of the prayers in the letter and the circumstances of the case before the lower court. This is because, advocates in our jurisdiction are expected to be acquainted with laws of the land, especially basic rules of procedure that are intended to promote the parties' rights to fair trials, which said right is fundamental and among the corner stones of the adjudication process as I observed earlier, and as underscored by the CAT in the **Kabula case** (supra). It follows thus that, before filing a matter in court, a counsel is duty bound to know the law on *inter alia*, where, when and how to file it.

It should also be born in mind that, when the present application was filed in this court on the 11th January, 2021 the lower court had already fixed the date for mentioning the civil suit (to wit 19th January, 2021), but the applicants still filed this application even before that date. It may be true that, the applicants intended to file this application with urgency as they actually did. Nonetheless, it is not shown anywhere that the lower

court had knowledge of their urgency since the same was not disclosed in the letter. It was thus, the applicants' duty to file this application upon successfully making their prayer and obtaining an order of the lower court to withdraw the suit. They could thus, do so on the said 19th January, 2021 when the case had been fixed for mention. Alternatively, if they believed that they were truly in hurry, they could have moved the lower court for an earlier audience even before the date set by it for the mention of the suit (i. e. 19th January, 2021). This is because, it is legitimate for a court to entertain parties on a date earlier than the one set before, if justice demands so. In practice, courts of this land have been doing so when so move as long as no injustice is occasioned to the parties. Moreover, the practice shows that, advocates of this land have been also successfully moving courts in that manner. Nonetheless, the applicants and their counsel did not submit before this court that, they had attempted to seek for the earlier audience from the lower court and the same was denied.

Owing to the above demonstrated circumstances under which this application was brought, it is even difficult for this court to believe that the applicants will actually file the intended suit before this court upon the expiry of the 90 days fixed in the notice to sue. This uncertainty thus, shakes the competence of the present application since it is purported to be founded on the said intention to sue the respondents before this same court upon the expiry of the 90 days. This view is enhanced by the averment of the applicants' counsel that, the applicants had previously filed an application (No. 71 of 2020) of this same nature before this court upon issuing the notice to sue the first respondent. However, the applicants

withdrew the same as they were not interested with it (see the order of this court dated 5th January, 2021). Indeed, this is a conduct that is incompatible with a serious justice seeker.

Again, it is obvious from the record and arguments by the parties that, the order sought in the present application, is substantially similar to the interim order of the lower court that had been revised by this court through Revision No. 1 of 2021 (mentioned above). The interim order of the lower court had directed the first respondent to release the cattle to the applicants pending the determination of the suit before it. The order sought in the application at hand is also for the first respondent to release the cattle to applicants pending the institution of the suit before this court upon the expiry of the 90 days fixed in the notice to sue.

Now, owing to the earlier finding that the suit is still pending before the lower court and the intention of the applicants to terminate the proceedings for such suit is uncertain since they intend to refile it upon their prayer to withdraw it being granted, then the following two propositions are, in my view, precise; **one**; that, the application at hand is currently before this court pending the determination or termination of the suit before the lower court. **Two**; the same application is also pending the filing of the suit before this court upon the expiry of the 90 days set in the notice to sue. **Three;** that the applicants intend to resume the revised order of the lower court through a disguised mechanism of filing the present application before this court. This is so because, the application has been filed though the suit before the lower court is live and the intention by the applicants to terminate its proceedings is faint.

Owing to the dual intentions of the applicants just demonstrated above (i. e to pursue the suit before the lower court and to file a suit before this court upon the expiry of the 90 days of the notice to sue), it cannot be firmly argued that the application at hand is made under the **Mareva injunctions principle** as argued by the applicants' counsel. This is so because, this principle applies only where there is no suit pending in court as observed previously. Nonetheless, in the matter at hand, there is already the pending suit before the lower court seeking reliefs that are related to the reliefs which the applicants intends to seek in the suit to be filed before this court upon the expiry of the 90 days of the notice to sue. Again, as observed above, the present application is founded on that same intention to sue the respondents before this court upon the expiry of the 90 days of the notice. I therefore find that, bringing this application under the Mareva injunctions principle amid the survival of the suit before the lower court, is mockery to justice. It is so because, the application does not fit in the circumstances suitable for applying the Mareva injunctions principle.

It is in fact, notable that, the learned State Attorney for the respondent had raised the argument that the application at had does not fit to be brought under the Mareva injunctions principle due to the existence of the suit before the lower court. This court discarded that contention of the learned State Attorney because, it was not legally open to him to raise it during the arguments supporting the PO. This was because, the fact on the existence of the suit had not been embodied in the pleadings of the present application and could need proof by evidence

from the lower court record. The point was thus, not qualified to support the PO. This was in accordance with the guidance in the **Mukisa case** (supra) and the **Karata case** (supra).

However, the same view (that the present application cannot be brought under the Mareva injunctions principle for the existence of the suit before the lower court) is relevant and viable at this juncture of the ruling. This follows the fact that, at this stage the court is not considering any PO, but it is discussing the first issue raised by it *suo motu*. Besides, upon arguing the PO, parties were given ample opportunity to peruse the lower court record as hinted earlier. They are thus, in agreement that there is no any court order which terminated the proceedings of the suit before the lower court. Certainly, the learned State Attorney did not re-raise this point at the stage of arguing the first court issue, but this court is entitled to raise it *suo motu* as it has done here in above. This is due to the firm principle I underscored above that, courts of law are enjoined to decide matters before them accord to law irrespective of the attitude taken by the parties to court proceedings.

Owing to the above reasons, I find that, the application at hand is in fact, not brought under the Mareva injunctions principle as argued by the applicants' counsel. This finding is supported by the holding of this court (Galeba, J.) in the **Daud case** (supra). In that case, the court underlined the following three properties of the Mareva injunction, **first**; a Mareva injunction cannot be applied or be granted while a suit is pending in court, **second**; it is an application pending obtaining a legal standing to institute a suit and **third**; it may be applied where an applicant cannot institute a

law suit because of an existing legal impediment for instance, where law requires that a statutory notice be issued before a potential plaintiff can institute a suit.

My other line of legal thinking is that, since section 6(2) of the GPA guides that a suit against a governmental institution is filed in this court upon the expiry of not less than 90 days and following the statutory notice to sue, and since the applicants had issued the 90 days' notice to sue the first defendant, and since they sued the first defendant before the lower court after issuing the notice to sue, and since the reliefs listed in the notice to sue are directly related to those sought in the suit before the lower court, and since the suit before the lower court is still pending and the applicants maintain the intention of withdrawing it and re-filing it, it is legally presumed that, the applicants have already exercised their right to sue the first respondent (envisaged in the notice to sue) though wrongly so. Such improper filing of the suit before the lower court was conceded by the applicants' counsel himself as demonstrated earlier.

My further view is that, the fact that the applicants have wrongly sued the first respondent before the lower court, without joining the second respondent and the fact that they have done so prior to the expiry of the 90 days of the notice to sue, will not entitle them to pursue their intention to sue her again before this court upon the expiry of the 90 days of the notice to sue. This is because, they have already exercised their right to sue though wrongly. They cannot exercise it twice. They can exercise the said right (to sue the respondents before this court upon the expiry of the 90 days of the notice to sue) if, and only if, the proceedings

of the suit before the lower court are formally brought to an end by a court order.

It follows therefore, that, the application at hand lacks legs to stand since it purports to seek orders pending the filing of the suit before this court upon the expiry of 90 days of the notice to sue, which said course I have just found, is not available anymore to the applicants following the pending suit before the lower court.

Due to reasons just shown above, I am entitled to also find that, the application at hand was filed prematurely. This is not because the 90 days set in the notice to sue have not expired as contended by the learned State Attorney in his submissions to support his PO, but because, the suit before the lower court has not been legally brought to an end.

Having observed as above, I answer the first court issue negatively that, it was improper for the two applicants to file the application at hand before the civil suit No. 38 of 2020 in the lower court was formally withdrawn. This finding attracts the examination of the second court issue.

Regarding the second court issue (related to the orders that this court can make upon finding the first issue negatively), I am of the following opinion; by way of a recap of the circumstances surrounding this matter, the above discussion has demonstrated that; the applicants have clearly depicted an intention of scattering court proceedings related to the detained cattle in different courts (the lower court and this court). In fact, they have demonstrated an advanced stage of executing their strategy as shown earlier. They issued the notice of intention to sue the first

respondent before this court upon the expiry of 90 days set in the notice. They however, sued her before the lower court. They admit that they wrongly sued her, but they have shown an intention to withdraw and re-file the suit. They successfully moved the lower court and obtained an interim order that was later revised by this court at the instance of the second respondent. They then rushed to this court to file the present application without even ensuring that the suit before the lower court had been firstly brought to an end by a formal court order. This is regardless of the fact that their counsel concedes that the suit was wrongly instituted before the lower court. Yet again, it has been shown that, prior to the filing of the present application, the applicants had filed an application of this same nature before this same court, but they later withdrew it.

In my settled view, therefore, the trend just shown above, constitutes a pure abuse of court process as hinted earlier and wests the time of this court and the respondents. In fact, courts of law in this land do not have time to west. It is a common knowledge that, they have case-backlog to clear. Furthermore, abusing the due process of the court is intolerable in law. This court in the **Wengert case** (supra) held that, filing two matters of the same nature in this court and in courts below is an abuse of court process and discarded that trend. Again, in the **Solohaga case** (supra), this same court held that, proceedings which abuse court process are liable to dismissal. In my further view, a matter graded as an abuse of court process cannot be saved by the useful principle of overriding objective discussed earlier. This is because, the applicants have

opted to approach this court in a manner that needlessly bypasses important rules of procedure as demonstrated above.

Indeed, I appreciate that, the applicants have their own right of access to justice which is fundamental and enshrined by the Constitution. This is in fact, one of the important elements of the right to fair trial discussed above. However, that right of access to justice must be exercised seriously and according to the rules of procedure set by our law.

As I underscored in my ruling in Revision No. 1 of 2021 (supra), the rules of procedure were made to be followed since they are intended to aid justice by setting procedures that assist courts to reach into fair and just decisions, otherwise they will be rendered nugatory. The CAT also underlined the importance of respecting procedural rules in the case of **Zuberi Mussa v. Shinyanga Town Council, Civil Application No. 100 of 2004, CAT at Mwanza,** at page 8 (unreported). It held that, even article 107A (2) (e) of the Constitution which prohibits courts from being overwhelmed by procedural technicalities is not a warrant for ungrounded disregard to procedural rules.

Again, in the case of **Mohamed Iddi Mjasiri v. Mr. Jayalami J. Joshi [1995] TLR 181,** the CAT held that, it could not be reached via such a breach of procedure. The procedure had to be followed since that would afford the other party opportunity to prepare himself appropriately. The CAT also underscored the respect to procedural rules in the cases of **Bahadir Sharif Rashid and 2 others v. Mansour Sharif Rashid and another, Civil Application No. 127 of 2006, CAT at Dar es Salaam**

(Unreported) and **Thomas David Kirumbuyo and another v. Tanzania Telecommunication Co. Ltd, Civil Application No. 1 of 2005, CAT at Dar es Salaam** (unreported).

Due to the reasons shown above, I find it justifiable to find that, the present application is incompetent for being classified as a violator of various important procedures highlighted above. As to the appropriate remedy I am of the opinion that, though my brother Judge in the **Solohaga case** (supra) was of the view that a matter that abuses court process is liable do dismissal, the circumstances of this case do not attract such a remedy. This is because, the application has not been heard on merits. I have only graded it as incompetent for the reasons shown above. In my view, courts dismiss matters which have been heard on merits or which are time barred. But, matters that are found incompetent are only liable to be struck out.

Again, the learned counsel for the applicants urged this court to make an order for staying the proceedings of the present application pending the formal withdrawal of the suit before the lower court. He alternatively urged this court to proceed with the hearing of the application though the suit is pending before the lower court. The prayer for staying the proceedings was conceded by the learned State Attorney for the respondents. However, with due respect to counsel for both sides, in my view, the two prayers by the learned counsel for the applicants are untenable. A matter which is assessed as incompetent for abusing court process can neither be stayed nor heard. This is so because, such matter is as good as a non-existent creature before the eyes of the law. I

consequently refute both prayers. It follows thus, that, the proper order to make under the circumstances of this matter is to strike out the present application. This finding therefore, constitutes an answer to the second court issue.

Having observed as above I underscore that, the PO raised by the learned State Attorney for the respondents remains overruled on the grounds adduced earlier. I however, strike out the present application for its incompetence due to the reasons shown above in examining the first court issue. Each party shall bear his own costs since the issue that has brought the present application to an end was raised by the court *suo motu*. It is so ordered.

JHK. UTAMWA.
JUDGE.
18/01/2021.

18/01/2021.
CORAM; JHK. Utamwa, J.
For applicants: present applicant No. 2 and Mr. Faraji Mangula, advocate.
For respondents: Mr. J. Tibaijuka, and Mr. B. Mganga, State Attorneys.
BC; Mr. Charles Mapunda, RMA.

Court: ruling delivered in the presence of the second applicant, Mr. Faraji Mangula, learned counsel for both applicants, Mr. Joseph Tibaijuka learned State Attorney for both respondents assisted by Mr. Bernard Mganga, learned State Attorney, in court, this 18th January, 2021.

THE HIGH COURT OF TANZANIA

JHK. UTAMWA.
JUDGE.
18/01/2021.