IN THE HIGH COURT OF TANZANIA

LAND DIVISION OF THE HIGH COURT

AT DAR ES SALAAM

LAND CASE REVISION NO. 7 OF 2010

BETWEEN

GEZAULOLE HOTELS LTD. ..... APPLICANT

VERSUS

ISLAMIC CLUB..... RESPONDENT

(Originating from the District Land and Housing Tribunal at Temeke, Application No. 45/2009)

R U L I N G

05/06/2012 & 13/02/2013

S.M. Rumanyika, J.

This application is brought by Gezaulole Hotels Ltd. (the Applicant) under S. 43 of the Land Disputes Courts Act No. 2 of 2002, R.E. 2002. Whereby this court is asked to call for and inspect the records of the District Land and Housing Tribunal - Temeke (DLHT) in Original Application No. 45 0f 2009. With a view of examining the said records and establish their correctness, propriety and/or as usual, their legality. Such other appropriate reliefs (if any) and cost of the application form set of court orders being sought by the Applicant.

M/S LAW ASSOCIATES ADVOCATES appeared for the Applicants, while the Respondent had at different occasions, the legal services of M/S M.A. Ismail & Co. Advocates and AKSA ATTORNEYS.

As such, the material facts of this application are very brief and clear. That as the said Application No. 45 of 2009 (whereby the present Applicants, out of long list of reliefs, was mainly asking as against Respondents, for an order declaring them lawful owners of the suit plot No. 1 at Gezaulole - Temeke, Dar es Salaam), was about to take off, the Respondents lodged on 28/04/2009, basically a single ground preliminary objection namely; the suit was "res subjudice", as there was Civil Case No. 269 of 2002, still pending in the High Court of Tanzania. The DLHT sustained the preliminary objection and struck the application out. Which order irritates the Applicant. Here they are seeking for revisional orders.

However, like one would have been expecting in civil procedure, which one, by all standards is always cumbersome, the Respondents quickly registered herein, a preliminary objection. This time round attacking the Applicants' affidavit that the material verification clause was incurably defective for non disclosing which set of facts were in accordance with the deponent's personal knowledge. The ruling was reserved in such manner that it be incorporated in this "main" ruling. Which I am now set to give.

As such, counsel of both sides made lengthy but equally useful written submissions. However, what really bothered me is counsel for the Appellant attacking the substantive preliminary objection, even going as far as proposing for dismissal of the preliminary objection only with a single ground that the counter part counsel addressed the presiding Judge as "Honourable" instead of "His Lordship or Her Ladyship" (as the case may be I suppose). Long established good practice.

Civil procedure is undoubtedly cumbersome yes! But I just think that parties who take much of courts' precious time raising and arguing such trivial, relevant but otherwise irrelevant issues should be doing for the interest of their clients but more importantly for the interest of justice. Also for further development of law and jurisprudence. Time is now ripen, that courts of law strongly discourage such unpleasant trend. As I hereby do.

Now back to the said preliminary objection attacking the verification clause in the affidavit.

Indeed, I do not think this aspect would detain me. Counsel for the Respondent is true, and the requirement is mandatory. But respectfully his argument could only be valid but not true. Every affidavit should bear verification clause which stipulates clearly, source of information ie. which set of facts are based on information and which ones come out of personal knowledge. I agree! But counsel

may wish to remember that it is not always the case, that every verification have such malti sets of facts-according to origin. By all interpretations, the provisions of Order xix Rule 3 (1) of the Civil Procedure Code Cap. 33 R.E 2002 require that where there are, say two sets of facts one based on information and belief and the other one on personal knowledge, the verification clause should be so categorical. It follows therefore, that in the situation were all the facts deponed are solely dependent of personal knowledge like it is the case here, such other sources would only be stated for the sake of it. As no such facts will be existing.

All the facts deponed in material affidavit are within the fours the nine (9) paragraphs that the affidavit contains. The sole deponent Aloys Bahebe, who had the conducts of the case from day one, which fact was not controverted, surely was, and or had every reason to be vested with all the facts of the case. And so he deposed. I quote verbatim:-

"ALL WHAT IS STATED under paragraph 1 - 9 herein above is true to my knowledge, save as to matters deponed to information and belief, the sources and grounds whereof are respectively specified and set out herein above" [Emphasis added].

Now, having acknowledged and stated that all the facts deponed in his affidavit were within his personal knowledge, one was expected, as counsel for Applicant reasoned out very precisely and wisely in my

view, that all such words that appear immediately after the words "is true to my knowledge" to be redundant and disregarded. As such the affidavit was defect free. The preliminary objection is dismissed with no order of costs for want of merits.

Now back to the application proper. I will start with the course taken by the DLHT having sustained the preliminary objection and strike out the application. This respectively, was not proper. Because now that the DLHT was satisfied that the matter was sub judice, the Learned Chair ought have stayed the proceedings pending final determination by the High Court, of that suit (if any). As it was earlier proposed by the objector.

Then why revisional proceedings! Given the circumstances of the case I have found no reason why did the Applicant not prefer appeal. It needs no one to cite any authority to show that, unless the appellate process is blocked or otherwise legally barred, revisional proceedings can not be taken as appeal in disguise. The Applicant has shown no cause why should this application not be struck out as the only remedy available at law. As such, that ground only would sufficiently dispose this application.

As I said earlier, the DLHT disposed the suit for being res subjudice. Then what does the doctrine entail. It is only pleaded successfully, as correctly submitted by counsel for the Respondents,

where one of the following factors (not limited to), are provenly existing:-

(a) there are more than a suit pending in different courts of law with competent jurisdiction.

(b) subject matter of the suit is one and the same involving same parties.

In other words by analogy, "re subjudice" and res judicata" are sister doctrines. In that whereas in the later case, no retrial of suit already conclusively determined is permitted, as that one would amount to endless litigations hence abuse of court process, there would be no control of flows of litigations wee suits involving same subject matters and same parties entertained in deferent courts simultaneously. The central governing factor here is "the same parties" because it is common knowledge that identity of a case includes parties thereto.

It is not disputed, and that is born out throughout the records, that the only parties were Gezaulole Hotels Ltd. and Islamic Club as Applicants and Respondents respectively. While in the suit pending in the High Court involved G.M. Majira and Islamic Club. The Plaintiffs and Defendants respectively. Nor is it a deniable fact that both were courts of competent jurisdiction. To decide on the common subject matter. I will come to this very important aspect at a later stage.

I think it is compelling to state it uprightly here, that the Learned Trial Chair for no reasons, leave alone good reasons, embarked in the process, upon merits of the suit in as far as who was lawful owner of the suit plot was concerned. Leaving the preliminary objection in abeyance for quite sometimes. For whatever reason one might have had, it was gravely erroneous on the part of the DLHT.

There might be several definitions of a preliminary objection. Granted! But the list includes, a pure point of law, which if brought about at a preliminary stage of a matter, and without court inviting evidence and proof, that matter would be disposed of. That is to say that where is, in the real sense of the word, like it was the case here, court is mandatorily required to dispose it (preliminary objection) first before attempting to embark upon any merits of the case. Because, not only this one may eliminate chances of pre-empting the preliminary objection but also, it barrs the court from abusing its own process.

In blacks and whites the Learned trial chair is on record to have said:-

> Before dwelling unto the parties arguments (obviously on the preliminary objection). I wish to draw the tribunals' attention to ..... there is no dispute of all ..... that the original owner of the suit land ..... is G.M. Majira Reisen Ltd. In the present application the applicant never

revealed how and when ownership of suit land has been transferred from G.M. Majira Reisen Ltd. to the applicant.

In deed from the quotation above, what the DLHT did was a clear day light predetermination of the preliminary objection and therefore, some clear attempts to abuse the process.

I promised to come back to the pivotal issue of res subjudice. Here I am. From the impugned typed ruling para 2, page 3, from the bottom will reveal that the Learned Trial Chair very much dwells on submissions by Respondents' counsel. Like acceptedly saying that what matters is neither mere parties names nor physical identity but their legal status. But whatever the case might be all those were facts whose truth and existence needed evidence and proof.

Surely, that procedure the Learned Chair went by, could not have room at such preliminary stage. The trial DLHT thus ought to have over ruled the preliminary objection and proceed to a full trial. Whereby among other facts to be proved should have been that of whether the Applicants herein were legally one and the same as the G.M. Majira Reasen Ltd. Also involved in the other suit reportedly pending in the High Court at the same time.

I wish to add that list of factors to be considered when applying the doctrine of res subjudice needs not to be exhausted. Only a single factor/test suffices to qualify or not qualify matter as sub judice.

Last is my comment on whether, when determining if subject matter involved in the suit is one and the same, court should go as far as to its monetary value. I will hasten to hold that on that context its value or use value, and all such details are by all means immaterial.

With all attemptedly said, I may now order in a nutshell as follows:-

(a) The DLHT struck out Application No. 45 of 2009 illegally.

(b) DLHT decision and subsequent orders are quashed and set aside accordingly.

(c) Application No. 45 of 2009 to be heard on merits by another competent chairperson other than the Learned Mlyambina.

(d) The Respondents to bear costs here and in the tribunal below.

Right of appeal explained.

S.M. Rumanyika
JUDGE
01/02/2013

Delivered under my hand and the seal of the court in chambers this 13/02/2013 in the absence of the parties.

S.M. Rumanyika
JUDGE
13/02/2013

Date: 13/02/2013

Coram: Hon. S.M. Rumanyika, Judge

Applicant: Absent

Respondent: Absent

CC: Salehe.

Court: Delivered under my hand and the seal of court this 13/02/2013 in chambers, in the absence of the parties.

S.M. Rumanyika
JUDGE
13/02/2013