

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KAJI, J. A., KILEO, J. A. and KALEGEYA. J. A.)

CIVIL APPEAL No. 104 OF 2003

CRDB BANK LIMITED.....APPELLANT

VERSUS

1. TANGA HARDWARE & AUTO PARTS LTD	}	RESPONDENT
2. BHRAT BHAGWANJI LAXIMAN		
3. ROYHIT BHAGWANJI LAXIMAN		
4. PUSHPA BHAGWANJI LAXIMAN		
5. HASSAN MOHAMED MSUO		
6. JOSEPHINE MBWANA GUGU		
7. BHAGWANJI MULJI LAXIMAN		

**(Appeal from the ruling of the High Court of Tanzania
(Commercial Division) at Dar es Salaam)**

(Bwana, J.)

**Dated the 15th day of October, 2003
in
Commercial Case No. 80 of 2003**

JUDGMENT OF THE COURT

KALEGEYA, J. A.

The High Court, Commercial Division (Bwana, J.) upheld a preliminary objection raised by the respondents to the effect that the matter before it (Commercial Case No. 80/2003) was "res sub-judice"

as there was a similar case pending before the High Court, Tanga registry (Civil Case No. 2 of 2002). Having so held, the said case (Commercial Case No. 80/2003) was dismissed. Aggrieved, the appellants appealed to this court fronting two grounds:

- "1. That the learned High Court judge erred in Law in deciding that the suit before him was substantially the same as Civil Case No. 3 of 2000 before the High Court, Tanga Registry and thus was res subjudice..*
- 2. That in the alternative, the Learned High Court Judge erred in dismissing the suit on the ground that it was res subjudice instead of staying it."*

At the hearing of the appeal however, the appellant abandoned ground one. Mr. Mwandambo, learned Advocate, represented appellants while Mr. Mngoya represented the respondents.

Mr. Mwandambo submitted that the Court having held that there was similar case pending before the High Court at Tanga, the only course open to it was to make an order for its stay and not dismissal; that what is barred is proceeding with the trial. Explaining further, the Counsel sought support from the marginal note to section 8 of the Civil Procedure Code which caters for this kind of situation and which provides the consequences thereof as *"Stay of suits"*. He insisted that under section 8 of the Civil Procedure Code

the Court has no jurisdiction to dismiss a suit. He prayed to have the Court's order reversed and an order for "*stay*" substituted for that of "*dismissal*."

Responding, Mr. Mngoya strenuously argued that Mr. Mwandambo has misunderstood the meaning of the marginal note to section 8 of the Civil Procedure Code. According to him, to "*stay*" is to "*stop*" and that the consequences thereof is to dismiss the suit. He insisted that the court cannot make a stop order without making an order for further consequences; that mere stay would serve no purpose as the appellant's rights, if any, will be determined in Civil Case No. 2 of 2002, at Tanga. Mr. Mngoya submitted further that if the Court is minded to uphold the appeal, respondents should be awarded costs.

In rejoinder, Mr. Mwandambo reiterated his earlier submission; insisted that Mr. Mngoya was either reading too much into section 8 of the Civil Procedure Code or has not grasped the import thereof adding that if he had taken pains to read the books in the list of authorities filed (**Mulla on the Code of Civil Procedure, and Sarker's Law of Civil Procedure**) he would not have submitted the way he did. On costs, he said that if his submission is upheld,

costs would naturally go to the appellant. Elaborating, he said that it is not the practice of this court nor is it the law, to grant costs to unsuccessful litigants, and that in any case the suit which is pending at Tanga was not filed by appellants but respondents.

Having carefully considered what transpired in the High Court, Commercial Division, in relation to the clear provisions of section 8 of the Civil Procedure Code, with respect to Mr. Mngoya, we are surprised by his stance.

We are of the settled view that the High Court, Commercial Division, erred in law in issuing a dismissal order.

Section 8 of the Civil Procedure Code provides as under:

"No court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigation under the same title where such suit is pending in the same or any other court in Tanzania having jurisdiction to grant the relief claimed."

The above quoted section needs no interpolation at all. Even without looking at the marginal note it is difficult to extract therefrom a "dismissal" as an order that the court is required to give once it is established that there is a similar case pending in terms of section 8

of the Civil Procedure Code. We are gratified however, that Mr. Mngoya at least came closer to the obvious meaning of the word "*stay*" by stating that the matter should be "*stopped*". Having so conceded we fail to comprehend why he went on to raise quarrels with what is provided for by the clear letter of the law "*stay of a suit*" and which Mr. Mwandambo is rightly asking for. We don't subscribe to Mr. Mngoya's stretched attachment to the section that once it is "stopped", if we employ his terminology, a further order should be made for its dismissal. Even going by his reasoning it would not be logical to have two stages: stopping the process and then dismissing it. If the meaning was as he suggests only dismissal would have been provided for.

Nor do we go with him when he suggests that a mere stay would serve no purpose as the appellant's rights would be determined in the other previously filed suit. That previously filed suit may terminate prematurely for one reason or the other. For example, the plaintiff may decide to withdraw it. In our considered view, if he so acts then the stayed suit becomes activated. We think the legislature's wisdom here was to bar unnecessary filing of suits by such parties who had been netted by orders of stay.

And, as rightly pointed out by Mr. Mwandambo, even in India, section 10 of their Code of Civil Procedure which is in pari materia with our section 8 provides for stay and not dismissal. **Mulla, on the Code of Civil Procedure, 5th Edition, by P.M. Bakshi,** at page 87 has the following commentary regarding the words "*shall not proceed with the trial*":

"These words indicate the action to be taken by the Court under this section. The second suit is not to be dismissed as barred: it is only the trial of the suit that is not to be proceeded with".

That exposition above disposes the appeal. We should however, before concluding, make one observation.

Although the appellant's Counsel abandoned ground one in his memorandum of appeal, noting that the record of appeal does not contain the plaint in Civil Case No.2 of 2002 instituted at Tanga, we inquired as a matter of curiosity whether indeed a copy thereof was availed to the High Court when the preliminary objection was lodged or when it was being decided. Both Counsel were honest enough to inform the Court that it was not. This element attracted our attention because of the obvious reason we shall shortly explain.

Since the object of the section " *is to prevent courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigation in respect of the same cause of action, the same subject matter and the same relief*", and as the " *provisions of the section are mandatory*" and " *the Court before which the subsequent suit is pending ought to stay it where all the conditions laid down in the section exists*" (Mulla, Supra, to which observations we wholly subscribe) it is imperative that the one who intends to rely on it must avail the Court with full particulars of the pleadings in the previously instituted case unless the opposite party concedes. We note here that the High Court acted just on submissions and the written statement of defence. It was necessary that the plaint be also availed. Only then would the Court be in a position to fully compare the two suits and be able to decide on the similarity or otherwise.

Since however the first ground of appeal was dropped we cannot legally go further than this. We shall end at this, our observation being aimed at future guidance.

The above said, we are of the settled view that the High Court erred in issuing a dismissal order instead of stay as clearly provided for under section 8 of the Civil Procedure Code. The appeal has

Merit and it stands allowed. The High Court order of dismissal is quashed and set aside and substituted thereof is an order for stay.

As for costs, with respect, we cannot go with Mr. Mngoya's novel formulation. As rightly submitted by Mr. Mwandambo, the normal consequence is that costs follow event and unless for reasons which have to be reflected on record the court decides that each party should bear own cost, a losing party should bear the burden. The respondents are accordingly condemned in costs.

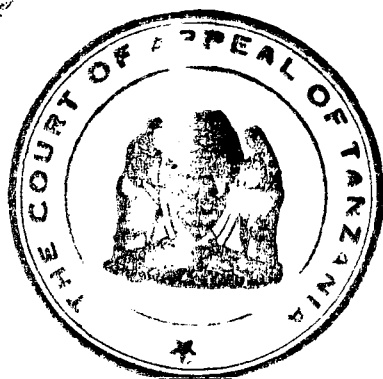
DATED at DAR ES SALAAM this 17th day of August, 2007.

S.N. KAJI
JUSTICE OF APPEAL

E.A. KILEO
JUSTICE OF APPEAL

L.B. KALEGEYA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.




I.P. KITUSI
DEPUTY REGISTRAR