IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 468 OF 2021

(Arising from Civil Case No.166 of 2020)

ALLEN MAGESA t/a ALLCOT TANZANIA.....APPLICANT

VERSUS

CRDB BANK PLC.....1ST RESPONDENT

DARCO NEGOCESA.....2ND RESPONDENT

RULING

Date of last order: 22nd June, 2022

Date of judgment: 29th July, 2022

E.E. KAKOLAKI J.

Upon being served with a chamber summons supported with an affidavit deponed by the Applicant, the 1st respondent filed a preliminary point of objection on point of law to the effect that:

(i) This application is incompetent and bad in law for failure to move the court properly by not citing proper enabling provisions of the law in the chamber summons.

(ii) The application is unmaintainable before this honourable court.

It is the practice of the court that, where there is preliminary objection raised before it, the same must be determined first before going into the substance of the case or application. It is from that accepted practice, the

Court ordered parties to address it on said preliminary objections. By consensus of both parties, the points of objection were disposed orally.

Briefly the 1st respondent and applicant who also holders a bank account No. 0252054306300 in the 1st respondent's Bank since 2007, are jointly and severally sued by the 2nd respondent in Civil Case No. 166 of 2020, for recovery of USD 249,042.00 allegedly wrongly deposited by the 1st respondent into the applicant's account in which USD 124,533.62 is already spent by the account holder. Having noted the said money was wrongly deposited into applicant's account and partly spent, the 1st respondent froze the account, hence the present application by the applicant seeking to unfreeze it and return of the remaining balance of USD 124,508.38, which application has met objection from the 1st respondent as alluded to above.

At the hearing both parties were represented, as the applicant hired legal services of learned counsel Ms. Jacquiline Rweyongeza while the 1st respondent had the services of Mr. Nzaro Kachenje and Ms. Ruqaiya Al-harthy, both learned counsels. The second respondent had no interest in this application therefore opted not to pursue it.

Arguing in support of the first point of preliminary objection, Mr. Kachenje submitted that, the court is improperly moved for none citation of specific

enabling provision as required by law. He said, the applicant wrongly moved this court under section 95 of the Civil Procedure Code (the CPC), seeking to unfreeze his account which is freezed by the 1st respondent, the provision which is general and used in instances where the provision for the relief sought by the party is not provided for in the CPC, instead of invoking the provisions of Order XXXVII Rule 2(1) of the CPC providing for maintenance of status. To fortify his stance he cited the case of **Abdallah Omary Vs. Serikali ya Kijiji cha Mwanza Buliga**, Misc. Land Application No. 29 of 2020 (HC), page 8 where it was held that;

> *"non-citation or improper citation renders the application incompetent therefore deserve to be struck out".*

He argued that, this application cannot be rescued by the principle of overriding objective as it was stated by the Court of Appeal as referred in the cited case of **Mondorosi village Counsel, and Others Vs. Tanzania Breweries Ltd and Others,** Civil Appeal No. 66 of 2017 (CAT-unreported) on overriding objectives, as non-citation of the enabling provision goes to the root of the matter and affects the jurisdiction of the court. As a result he prayed the application be struck out with costs on this ground.

On the second point that the application is unmaintainable before this court, he referred the court to the counter claim raised by the applicant in which the prayers are that, this court be pleased to order the 1st defendant/1st respondent to re-open his account and return the amount of USD 124,506.38 which had been withheld by the 1st respondent, on the ground that it was wrongly deposited in the said account. Mr.Kachenje argued that, the prayer in the counter claim is exactly the same sought by the applicant in this application. According to him, in all intention and purpose the application is premature as it seeks to pre-empty the proceedings of Civil Case No. 166 of 2020, more particularly the counter claim by the applicant which is a suit too. He contended, this approach is an abuse of the court process as the application stands to be interim in nature but orders sought in this application are final in nature as per wording of the chamber summons. It was his submission that, if the prayer is granted the counter claim which is a suit too will be rendered nugatory, hence the application be struck out with costs, for being incompetent.

In response, Ms. Rweyongeza while admitting to have moved the Court under section 95 of CPC, hastened to insist the application was properly before the Court as the cited provision empowers the court to entertain

the prayers sought as it was defined in the case of **Transport Equipment Ltd Vs. Devram P. Valambhia**, (1998) TLR 89. She said, as the applicant was seeking to unfreeze the account which was already freezed by the 1st respondent the submission by Mr. Kachenje that the proper provision to be invoked was Order XXXVII Rule 2(1) of the CPC, is misplaced, as status of the already performed action could not be maintained. She added even the cited case of **Abdallah Omary** (supra) by the 1st respondent is distinguishable in the circumstances of this case and invited the Court to be inspired by its decision in the case of **Elesi Majinge Vs. Ndigwake Kajeba,** Misc. Land Application No.86 of 2019 (HC) on its holding that, non citation or wrong citation of the provision is no longer fatal as long as the court has prerequisite jurisdiction to entertain the prayers made before it, after appreciating and following the Court of Appeal decision in **Beatrice Mbilinyi vs. Mabukhut Shabiry**, Civil Application No.475/101 of 2020 (CAT). She therefore prayed the Court to dismiss the ground and order the application to be heard on merit. To bolster her stance and prayer she invited this court to read the case of **Abubakar Mlenda Vs. Juma Mfaume** (1984) TLR 145.

On the second point she argued that, the application is maintainable as the same has to be determined first before the matter or prayer made in

the counter claim (main suit), therefore cannot be treated as subjudice under section 8 of the CPC. If the prayer to unfreeze the account is granted in this application then the applicant's claim against the 1st respondent in the counter claim will be resolved conclusively. In her view this point of objection does not qualify to be a purely point of law as per the case of **Mukisa Biscuits**. Henceforth, she prayed the raised preliminary objection be overruled with costs.

In his brief rejoinder Mr. Kachenje reiterate what he had submitted in his submission in chief that, Order XXXVII Rule 1(1) of the CPC, is the fit provision to be invoked by the applicant for a prayer for status quo and not the one preferred. With regard to the cited case he submitted that all then are distinguishable as they all refer to wrong citation of enabling provision while in this case there is non-citation of the proper provision to move the court for the orders sought.

With regard to the second point of preliminary objection, he insisted that, this application seeks to pre empty the counter claim which is a suit, as well as main suit Civil Case No. 166 of 2020, pending before this Court and if the same is entertained and determined on merit by unfreezing the applicant's account then, the main suits will be rendered nugatory. Hence the application is subjudice, under section 8 of the CPC as the suit

(counter claim) against the 1st respondent (CRDB) in which this application is stemmed is for return of money to the plaintiff/applicant's account and the relief which is also sought in this application. He then prayed the application be dismissed with costs.

I have keenly examined the rival submissions by both parties as well as the records. The issue for determination before this court is whether the point of objections raised are meritorious. However, before I venture into determination of the raised preliminary objections, it is worth noting that, this application was preferred before the applicant had filed his Written Statement of Defence. While preparing to compose this ruling the Court suo motu raised the issue as to whether the applicant could legally prefer this application stemmed in the main suit Civil Case No. 166 of 2020, without filing his WSD. After being addressed by both parties on 27/07/2022, it was to both parties understanding and Court's agreement and satisfaction that, the same could competently be preferred and therefore found it safe to proceed with determination of the said raised points of objection.

Now back to the two raised point of objections, I prefer to start with the second one which in my profound view if well addressed is enough to dispose of the application. It is Mr. Kachenje's argument that this

application is unmaintainable before this Court as it seeks to pre-empty the main suit, thus res subjudice to the counter claim in Civil Case No. 166 of 2020 for seeking similar relief, while Ms. Rweyongeza is if the contrary view that, the same if entertained will conclusively determine the applicant's claim of unfreezing his account No. 0252054306300 and return his money USD 124,508.38. Now the issue is whether the matter is unmaintainable for being sub-judice.

The rule of sub-judice in our jurisdiction is governed by section 8 of the CPC which provides thus:

> *8. 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 litigating 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 object of the above rule is to prevent courts of concurrent jurisdiction from simultaneously entertaining and adjudication upon two parallel litigations in respect of the same cause of action, the same subject matter and the same relief. The policy of the law is to confine a plaintiff to one litigation, thus obviating the possibility of two contradictory verdicts by one and the same court in respect of the same relief. See also C.K.

Takwani in his book **Civil Procedure with Limitation Act**, 1963, 8th Ed, 2017 at page 63. For the party to rely on this rule must establish that four conditions are existing as stated in plethora of decisions of this Court, to mention few the case of **Wengert Windrose Safaris (Tanzania) Limited Vs. The Minister for Natural Resources & Tourism and The Honourable Attorney General**, Misc. Commercial Cause No. 89 of 2016 and **The M & Five Hotels & Tours Limited Vs. EXIM Bank Tanzania Limited**, Commercial Case No. 104 of 2017 (both HC-unreported). In **Wengert Windrose Safaris (Tanzania) Limited** (supra) this Court on the necessary conditions in proof of rule of sub-judice mentioned them to be:

> *(a) That the matter in issue in the second suit is also directly and substantially in issue in the first suit;*
>
> *(b) That the parties in the second suit are the same or parties under whom they or any of them claim or litigating under the same title;*
>
> *(c) That the court in which the first suit is situated is competent to grant the relief claimed in the subsequent suit; and*
>
> *(d) That the previously instituted suit is pending.*
>
> *[See; Sarkar, Code of Civil Procedure, 11 Ed. by **Sudipto Sarkar** and **V.R Mahohar** at page 93].*

Now in an attempt to respond to the above issue against the lucid submissions by the learned legal minds, this court had a glance of an eye to the main suit in which this application originates from and in particular the counter claim by the plaintiff/applicant. What is gleaned therefrom is the undisputed fact that, the applicant's cause of action therein is against the 1st respondent's act of freezing his bank account No. 0252054306300. And the relief sought is for re-opening it and return of USD124,508.38, which are the basis and relief sought in the present application, then the matter in dispute in the counter claim is directly and substantially the same to the one in this application. Similarly the parties in these two matters are the same, the same are litigating over re-opening of applicant's account No. 0252054306300, for return of USD 124,508.38 and Civil Case No. 166 of 2020 in which this application is stemmed the case which is still pending before this court. In view of the above undisputed factual evidence, I am satisfied and therefor hold that, the four conditions enshrined in section 8 of the CPC have been established by the 1st respondent.

Having so established, I am in agreement with Mr. Kachenje that, an attempt of this Court to let this application survive and proceed to determined on merit will definitely render the suit in the counter claim

nugatory. As such the applicant's act of preferring this application in pendency of his counter claim on the same reliefs in my considered view does not only pre-empt the suit in his counter claim, but also is an abuse of court process, the practice which this Court is not prepared to condone. I there disagree with Ms. Rweyongeza proposition that, the application should be left to survive and be heard on merit so that to determine conclusively the applicant's claims in the counter claim. I so disagree as the withheld amount in the account is also the subject matter in which both the applicant and 1st respondent are sued for by the 2nd respondent in main suit Civil Case No. 166 of 2022. So to allow this application to be entertained on merit is tantamount to determine the main suit, the course which this Court is not prepared to take.

Having said and done this court finds the 2nd point of objection raised by the 1st respondent is meritorious and sustains it by declaring that the application is unmaintainable before this court. That being the position the only course this court would take against the application at hand is to strike it out, which order I do hereby enter with costs.

It is so ordered.

DATED at DAR ES SALAAM this 29th day of July 2022.

E. E. KAKOLAKI

JUDGE

29/07/2022.

The Ruling has been delivered at Dar es Salaam today 29th day of July, 2022 in the presence of Ms. …… for the Applicant, Ms. …….. for the 1st Respondent and Mr. Asha Livanga, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI

JUDGE

29/07/2022.