IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 237 OF 2020

OVERSEAS INFRASTRUCTURE ALLIANCE
(INDIA) PVT LTD AND PRATIBHA INDUSTRIES
LTD CONSORTIUM.....APPLICANT

VERSUS

DAR ES SALAAM WATER AND
SEWERAGE AUTHORITY (DAWASA)..... RESPONDENT

RULING

Date of Last Order: 01/7/2021

Date of Ruling: 02/12/2021

S.M. KULITA, J.

The applicant herein, filed an application for maintenance of *status quo ante* seeking for an order to restrain the respondent from utilizing the proceeds of the en-cashed bank guarantees pending institution of arbitration proceedings by invoking the provisions of sections 95 and 68 of the Civil Procedure Code [Cap 33 RE 2002], sections 2(3) and (5) of the Judicature and Application of the Laws Act [Cap 358 RE 2002] and other enabling provisions of the law.

In reply thereto thereto the Respondent raised the following preliminary objections;

1. That the court is *funtus officio* to entertain this application.
2. That the application is pre-mature for being filed without the main case.
3. That the application is defective for having been preferred under wrong provisions of the law.
4. That the application is disguised and abuse of court processes.
5. That the application is bad in law for want of company resolution.

The Applicant is represented by Mr. Yasin Maka, Advocate from Stallion Attorneys while the Respondent is represented by Hangi Matelekeza Chang'a, Senior State Attorney from the office of the Solicitor General.

In his submission in respect of the 2nd ground of the Preliminary Objection, that the applicant has filed this application in the absence of the main suit, Mr. Chang'a stated that the application is prematurely filed. He submitted that for an application of maintenance of *status quo* to be entertained there must be a main case. He further stated that the current application is hanging as there is no main case in this court nor anywhere else.

Replying that 2nd ground of Preliminary Objection Mr. Maka stated that, as it is for a *temporary injunction*, application for *maintenance of status quo* can be issued even in the absence of the pending suit. He cited some cases to support his argument, including that of NICHOLAS NERE LEKULE V. THE INDEPENDENT POWER (T) LTD. & ATTORNEY GENERAL, Misc. Civil Cause

No. 117 of 1996 (unreported). The said counsel prayed for the said Preliminary Objection to be dismissed with costs.

In my perusal over the submissions, I came across with the argument whether the application for *maintenance of status quo* or *interim order for temporary injunction* have the same legal effect in law. Before I start to analyze the 2nd limb of Preliminary Objection, I prefer to resolve this argument first, as the same has connection to the said ground of Preliminary Objection.

Actually, there is a difference between maintenance of *status quo* and interim order for *injunction*, though in my considered view, a limited one, an order to maintain *status quo* seeks to have the property/thing left/kept as it is as at the date of issuance of such order. It is always made on the basis of the nature of the surrounding circumstances and the property/thing sought to be preserved, contrary to an *interim injunction* order which is often issued after a full-scale hearing followed by a decision of the court. Perhaps this was put more succinctly by Utamwa, J. in **Acaste Corporation Ltd Vs. Maryflorent S. Mtetemela and 2 others, Land Case No. 24 of 2012 (unreported)** in the following terms:

> *" ... In law, such an order is not granted upon proof of rights. The proof of rights is demonstrated during the hearing of the case where both sides may bring evidence ..... if not granted under the circumstances the application may be rendered nugatory..."*

In that accord, where an order to maintain a *status quo* is made, parties are compelled to desist from dealing with the property subject of the said order

in any manner, irrespective of their titles thereto. Thus, the basis of the said two applications, Interim orders of *Temporary Injunction* and Maintenance of *Status Quo* is the same, that is preventing a property(s) from being destroyed, transferred etc. before the determination of the case involving the subject matter in dispute.

In between, before hearing and deciding upon the application for a *Temporary Injunction*, the court may grant an order of maintenance of *Status Quo*, upon the prayer by the applicant, so as to protect the suit property from being disposed of or anyway affected. Therefore, lifespan of an order to maintain *Status Quo* is extended to the date when another order in that respect, such as *Temporary Injunction* is made upon the determination of the application for interim order.

Thus, as it is for the interim order for Temporary *Injunction*, Application for Maintenance of *Status Quo* can be granted even in the absence of the main suit before the court, but this later one is used to be granted prior to the determination of the application for the interim order for Temporary Injunction.

Basically, application for Interim orders of Temporary Injunction and Maintenance of Status Quo must have the origin from another case (main case) which is pending before the court. But sometimes such application can be filed in the absence of the main case depending on the nature of the case. The said requirement can be waived, depending on the circumstances of the case, particularly in a situation where the main suit cannot be in a position of being filed prior to the said application, and denial to grant it by the court may lead to irreparable loss and/or subsequent filing of the

intended suit nugatory. We have what so called ***Mareva Injunction*** which is among the applications for injunction that can be granted in the absence of the main application under section 2(3) of the Judicature and Application of Laws Act [Cap 358 RE 2002]. A good example is a scenario in which the applicant intends to file a suit of urgent nature against the Government, like prohibiting Government from demolishing his house, but according to the law he is supposed to serve the Government a 90 days' notice before instituting the said suit. Waiting for maturity of the 90 days notice's period will render the said intended case nugatory, and if at all the said person has right, he may consequently suffer irreparable loss if the said house will actually be demolished.

Among the conditions that the court has to satisfy itself before granting *Mareva injunction* is that there must be a serious question to be tried ie. ***Prima facie case*** and the balance of convenience tilts in his favour as opposed to the defendant's. It must also be proved that the applicant has arguable case ie. that there is a great chance that he will obtain judgment against the defendant. Furthermore, there should be a likelihood that the applicant will suffer irreparable loss if the application won't be granted, and thus the suit/application intended to be filed will be nugatory.

As for the matter at hand the applicant's counsel submitted that the applicant was right to lodge this application in the absence of the main suit, meaning thereby he seeks for the *Mareva injunction*, the reason behind being that the parties have not yet initiated the arbitration proceedings, but he never submitted anywhere as to why the said arbitration was not initiated.

In my view, arbitration, as one of the means of resolving litigations, could have determined position of the parties' rights in respect of this matter without knocking this court's door.

Unless the applicant had special reasons for filing this application without prior filing of the main case, this court cannot determine this application for maintenance of *status quo* while nothing has been done to resolve the matter in arbitration.

Section 13 of the Arbitration Act, No. 2 of 2020 requires a person to take necessary steps including filing arbitration proceedings before seeking court's intervention to order maintenance of *status quo*. Since there are no steps that have been taken by the Applicant in doing so, this court is barred to issue the order for maintenance of *status quo.* I find this ground of Preliminary Objection meritorious.

In his submission on the 1st ground of Preliminary Objection Mr. Chang'a, State Attorney stated that the application at hand is ***functus officio*** for the reason that the applicant had ever filed the same application before this court which was determined to the conclusion. It was a Misc. Civil Application no. 182 of 2019, delivered on 17/4/2019 which is subject to Civil Review No. 5 of 2019. He said that in the said application the Applicant sought for an order for maintenance of *status quo ante* for the same subject matter.

Replying that ground of Preliminary Objection, the Applicant's Counsel, Mr. Yasin Maka, stated that for the matter to be declared *functus officio* it must have been disposed of to its finality. He cited the case of JOHN MGAYA AND 4 OTHERS V. EDMUNDI MJENGWA AND 6 OTHERS, Criminal Appeal No. 8(A)

of 1997 (unreported) to support his argument. The Counsel said that the application at hand is not functus officio because the previous applications were just struck out, not dismissed. He said that they were not fully determined by this court.

The counsel further argued that, the two applications are substantially different in terms of the enabling provisions, prayers sought by the applicant and circumstances of the case are different. As for the later one, the counsel submitted that the previous applications were made when the dispute was before the Dispute Adjudication Board (DAB), hence the court refused to interfere the DAB jurisdiction. He said that in the present case, the circumstances have changed because the DAB made a decision and the only remained remedy is Arbitration. However, parties have not initiated the said arbitration yet and hence it is a misconception of facts by the respondent. It is the submission of the Applicant's Counsel that the court's order in the Misc. Civil Application No. 182 of 2019 does not render this court *functus officio* to entertain the current matter.

The objection that this court is *functus officio* to entertain the matter at hand for being *Res Judicata* moved me to **section 9 of the Civil Procedure Code [Cap 33 RE 2019]** which states;

> *"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom* ***they or any of them claim litigating under the same title*** *in a court competent to try such subsequent suit or the suit in which such*

*issue has been subsequently raised and has been heard and finally decided by such court". **(emphasis is mine)***

The said provision tried to put some clarification *(explanations I to VI)* in respect of the circumstances under which the doctrine can be applied. All in all, the concept is that the matter which has already been determined by the court of competent jurisdiction should not be retried by that court, or any other court even if it has jurisdiction to try that said matter. The logic behind that procedural law is to avoid endless of litigations, the doctrine prohibits the losers to go back to the same court or any other court with competent jurisdiction to file the same matter which have already been determined.

As for the matter at hand the Applicant's Counsel submitted that this matter is different to the Misc. Civil Application No. 182 of 2019 which was fully determined by this court on the 17/4/2019. To support his argument the counsel relied on the issues of parties involved in that other case, that not all of them have been included in the current matter. In my view, the Plaintiff's Counsel misconceived the concept of *Res Judicata*. Despite the fact that one of the Respondent in the previous case (National Bank of Commerce PLC) has been excluded in the current case, the said Misc. Civil Application No. 182 of 2019 and this Misc. Civil Application No. 237 of 2020 are directly and substantially connected to each other, the Plaintiff is therefore estopped from bringing this later case.

In **GEORGE SHAMBWE V. TANZANIA PETROLEUM COMPANY LTD [1995] TLR 21** it was held;

"For res judicata to apply not only must it be shown that the matter directly and substantially in issue in the contemplated suit is the same as that involved in a former suit between the same parties but also it must be shown that the matter was finally heard and determined by a competent court"

The same was stated in **ZARUKI MBOKOMIZE V. SWAIBU OMARI AND ANOTHER [1988] TLR 60.**

Therefore, once a matter has been heard and determined by a court of competent jurisdiction, the parties to that case are estopped to file a similar suit in respect of the same dispute.

The Applicant's Counsel stated that in these two cases the claims are different, but upon going through the chamber summons and affidavit of this case in comparison with the records for the Misc. Civil Application No. 237 of 2020 I have noticed that in both cases the basic claim was the maintenance of *status quo* that the respondent (DAWASA) be restrained from utilizing the proceeds of the en-cashed bank guarantees of the applicant.

In his written submission the Applicant's counsel also argued that the matter cannot be regarded *Res Judicata* as the parties between the two cases are different, that they are not the same. As pointed out earlier that, parties are almost the same but number of Respondents have been reduced from 2 in the Misc. Civil Application No. 182 of 2019 to 1 in this application, the National Bank of Commerce PLC who was the 2nd Respondent has not been included in the current application. The issue is whether that position

disqualifies the matter from being regarded *Res Judicata.* Actually not, as the matter in question has already been determined by the court of competent jurisdiction.

Section 9 of the Civil Procedure Code prohibits the same parties or some of the parties who had litigated under the same tittle to refile the same matter which has already been determined. As for the addition of the parties in the subsequent case, it was stated in Mulla, The Code of Civil Procedure, by Solil Paul and Anupan Srivastava, 16th Edition, Volume 1 at page 151, in which the authors stated;

> *"The expression 'the same parties' means the same parties as between whom the matter substantially in issue has arisen and also has to be decided. It has accordingly been held that* ***the section does not become inapplicable by reason of there being in addition a party*** *against whom no separate and substantial issue is raised"* ***(emphasis is mine)***

This principle operates in the same way in cases where some parties have been left out in the subsequent case, as it happened in this matter.

In **ZANZIBAR SHIPPING CORPORATION V. MKUNAZINI GENERAL TRADERS, Civil Application No. 3 of 2011, CAT at Zanzibar (unreported)** it was held that once a matter has been dismissed, it cannot be brought back to the same court for the same prayers, the court becomes *functus officio* against such orders.

Counsel for the Applicant, Mr. Yasin Maka is of the view that the Misc. Civil Application No. 182 of 2019 does not render this court *functus officio* to

entertain the current matter as the same was struck out, not dismissed. My comment on that issue is that, the basic concept on this issue is whether the matter was determined to finality, either by dismissal or struck out. For example, the said Misc. Civil Application No. 182 of 2019, among the reasons for it to be struck out is the fact that it was filed in the absence of the main suit, which means that the said application could have been re-filed if the Applicant had then lodged the said main suit. Under that circumstance such application was subject to struck out and not dismissal. Furthermore, the fact that the same application has been refiled but under the same fault, ie. in the absence of the main suit, it is *res judicata*, hence this same court is *functus officio* to entertain.

Submitting on the 4th ground of Preliminary Objection that the application is disguise and ***abuse of the court process*** Mr. Chang'a, State Attorney stated that the Applicant has been filing similar applications in this court which have been eventually struck out with costs. He mentioned those cases being Misc. Civil Application No. 182 of 2019 which was followed by Civil Review No. 5 of 2019. The Counsel further alleged that the Applicant also filed Misc. Civil Application No. 571 of 2019 which was also struck out. In that regard Mr. Chang'a argued that, for the interest of justice this application should be dismissed.

Replying that argument Mr. Maka, Advocate submitted that there is no disguise nor abuse of court process by the applicant. He reiterated that the current application is not *res judicata*, hence this court is not *functus officio* to entertain.

The concept of *abuse of court processes* was extensively discussed and defined in **Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229** and in **R-Benkay Nigeria Ltd Vs. Cadbury Nigerian PLC SC 29 of 2006**. In these two cases which are highly persuasive, the concept of abuse of court process was defined to encompass the following scenarios:

i. ***Institution of multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.***

ii. *Institution of different actions between the same parties simultaneously in different courts even though on different grounds.*

iii. *Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.*

iv. *Where there is no iota of law supporting a Court process or where it is premised on frivolity or recklessness.*

v. *Where an application for adjournment is sought by a party to an action to bring an application to court for leave to raise issues of fact already decided by a lower court.* ***(emphasis is mine)***

From the series of events pertaining to the instant case, as narrated by the Respondent's counsel, I have observed with deep concern, that institution of multiple applications by the applicant, including **Misc. Civil Application No. 182 of 2019,** followed by **Civil Review No. 5 of 2019** which were

fully determined by this court, and the same involve the same subject matter with the current application, tantamount to an abuse of court processes. It is intolerable and highly detested.

The above analysis in respect of the Preliminary Objections no. 1, 2 and 4 are sufficient to dispose of this matter. For avoidance of further abuse of court processes, the applicant is precluded from further filing this kind of application in the absence of the main suit. In upshot, I find the Preliminary Objection meritorious, hence sustained. The application is therefore struck out with costs.

S.M. KULITA

JUDGE

02/12/2021