

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

CIVIL CASE NO. 59 OF 2022

RAVJI CONSTRUCTION LIMITED PLAINTIFF

VERSUS

MOHAMED ENTERPRISES (TANZANIA) LTD 1ST RESPONDENT

MURTAZA ALI HUSSEIN DEWJI 2ND RESPONDENT

RULING

21st July, & 15th August, 2022

ISMAIL, J.

The plaintiff has instituted a suit for several reliefs against the defendants, jointly and severally. Mainly, the prayer is for declaration that the sale agreement between the plaintiff and the 1st defendant is void for impossibility of performance on the part of the defendants. There is also a prayer for refund of monies constituting the purchase price, and such other payments that are incidental to the main claim.

The subject matter of the parties' disputation is a piece of land, known as Plot No. 105, Mbezi Light Industrial Area, Kinondoni, Dar es Salaam, purportedly belonging to the 2nd defendant. The sum that changed hands

was USD 600,000.00, advanced to the 2nd defendant as part of the purchase price of the said piece of land. After execution of the transfer, the plaintiff took possession of the suit land and effected unexhausted improvements thereon. As the plaintiff did that, she came to be embroiled in a legal tussle that pitted her against the Eugenia Rutatora and Wilson Rutatora (Land Case No. 141 of 2012). The duo was declared the rightful owners of the suit land, effectively terminating the plaintiff's interest in the suit land. This informed the decision to institute the instant suit, seeking the orders sought in the plaint.

The defendants are resisting the claim. Besides the denials, the contention by the defendants is that the matter is *res-subjudice*.

Hearing of the preliminary objection saw Mr. Nobert Mlwale, learned advocate, represent the plaintiff, while Ms. Regina Kiumba, learned counsel, featured for the defendants.

Addressing the Court on the point of objection, Ms. Kiumba argued that there is a notice of appeal instituted to the Court of Appeal of Tanzania, seeking to challenge the decision in land Case No. 72 of 2020. The impugned decision was instituted by the 2nd defendant's attorney against the plaintiff, and that the said matter was struck out. She argued that the subject matter of the said proceedings is a suit land which was sold to the plaintiff and is

also a subject of contention in these proceedings. In Ms. Kiumba's view, determination of the impending appeal will have a direct bearing on the instant suit. She, consequently, argued that the matter is *res-subjudice* and it ought to be stayed, consistent with section 8 of the Civil Procedure Code, Cap. 33 R.E. 2019 (CPC).

In reply, Mr. Mlwale was not convinced that the matter is *res-subjudice*. This is because none of the five criteria set out in section 8 of the CPC fits into the facts of the matter, as the parties are different; not litigating under the same title. He argued that issues are not directly and substantially the same. His further contention is that, whereas the claim in the instant matter is that of refund of monies paid, the impending appeal is on the claim of land ownership. He took the view that causes of action are dissimilar in the matters.

In rejoinder, Ms. Kiumba maintained that both matters touch on the Mbezi plot, adding that the outcome of the impending appeal will have a bearing on the instant matter. She argued that parties in both of these matters are the same as the plaintiff features as the 3rd appellant in the impending appeal.

From the brief submissions, the narrow and direct question for determination is whether the suit is *res-subjudice*.

The doctrine of *res-subjudice* is predicated on the legal policy that is intended to limit a plaintiff to a single lawsuit, avoiding the possibility of two contradicting decisions from the same court on the same issue. As counsel rightly submitted, this doctrine is entrenched in our law through the enactment of section 8 of the CPC. For ease of reference, it is apt that the same be quoted, as hereunder:

"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. Explanation: The pendency of a suit in a foreign court does not preclude the courts in Tanzania from trying a suit founded on the same cause of action."

The import of section 8 is, therefore, that the matter in issue must be directly and substantially in issue in a previously instituted suit. When it isn't the same, the section isn't applicable. Expounding the rationale of having section 10 of the Indian Code of Civil Procedure, 1908, that is in *parimateria* with section 8 of the CPC, an Indian Court held in ***Guru Prasad Mohanty & Others v. Biyoj Kumar Das***, AIR 1984 I OLR 447, held as follows:

"The purpose of this clause is to safeguard a person from several legal proceedings and to prevent a conflict of decisions. It also tries to minimize the parties discomfort and effect to the law of res judicata."

Thus, the essential conditions for applicability of the doctrine of *res-subjudice* must be prevalent, lest the doctrine's potency is rendered suspect. These are: **One**, that there must be two suits, one previously instituted and the other subsequently instituted; **two**, Issues must be directly and substantially the same in both suits; **three**, the pending matters must involve the same parties; **four**, courts in which the matters are pending must be competent to grant the reliefs; and **five**, That the parties should be litigating under the same title.

Glancing through the counsel's submissions, it comes out clearly that, while the claim the matters cited by Ms. Kiumba touch on the ownership of the suit land - including the impending appeal to the Court of Appeal – none of it is related to a claim for refund of any sums of money advanced as a purchase price or at all. This means, and I subscribe to Mr. Mlwale's reasoning, that issues in these matters are neither directly nor are they substantially the same. Questions to be posed in determining ownership of the property cannot be same as those that are to be posed where the matter involves a prayer for refund of monies advanced to the defendant. It cannot

be said that a conflict of decisions would arise if the matters were left to run concurrently.

Ms. Kiumba has contended that the outcome of the appeal instituted by the plaintiff is likely to have an impact on the pending suit in this matter. With respect, I disagree with this contention. A claim for refund would not be extinguished or be taken care by the reliefs that may be granted by the Court of Appeal of Tanzania through the impending appeal. The latter's significance is on the ownership of the property and nothing more.

It is also clear, and Ms. Kiumba has not controverted this fact, that in none of the cited matters is the plaintiff pitted against the defendants or any person claiming under their title.

Overall, I am not persuaded that this matter is *res-subjudice* to the impending appeal, or any other pending matter. Consequently, I find and hold that the objection is barren of merits and I overrule it. Costs to be in the cause.

Order accordingly.

DATED at **DAR ES SALAAM** this 16th day of August, 2022.



M.K. ISMAIL

JUDGE

16/08/2022

