IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISRTY OF MOSHI

AT MOSHI

MISC. CIVIL APPLICATION NO. 23 OF 2022

UDURU MAKOA AGRICULTURAL AND MARKETING

CO-OPERATIVE SOCIETY LIMITED

(UDURU MAKOA AMCOS) ..... APPLICANT

VERSUS

MAKOA FARM LIMITED..... 1ST RESPONDENT

ELISABETH STEGMAIER ..... 2ND RESPONDENT

DR. LASZLOGEZA PAIZS ..... 3RD RESPONDENT

10/8/2022, 29/8/2022

RULING

The applicant herein filed an application under Order XXXVII Rule 2(1), section 68(e) and section 95 of the Civil Procedure Code, Cap. 33 R.E. 2019 praying for this court to grant the following orders:

(1) That this Honourable court may be pleased to order restraining the respondents from continuing breach of the lease agreement of 2014 and or from continuing operating any activity whatsoever in the Applicant's farm with Certificate of Title No. NF 443

pending hearing of the Application via Misc. Civil Application No. 20 of 2022 and pending determination of Civil Case No. 04 of 2022 inter-parties and pending hearing and full determination of Arbitration cause filed by Respondents before the Registrar of Cooperative societies inter- parties.

(2) That, the Honourable Court may be pleased to order status quo ante preventing both parties from conducting any business whatsoever in farm No. C. T. No. NF 443 pending hearing of the Application via Misc. Civil Application No. 20 of 2022 and pending determination of Civil Case No. 04 of 2022 inter-parties and pending hearing and full determination of Arbitration Cause filed be Respondents before the Registrar of Cooperative Societies inter- parties.

(3) This court be pleased to issue any other orders as shall be deemed fit and just to order.

(4) Costs of tis suit shall be borne by the Respondents.

The application is supported by the affidavit sworn by Sael Mafue, the Chairman of the applicant in this application. The respondents are opposing the application and they have filed their counter affidavit jointly sworn by Elisabeth Stegmaier and Dr. Laszlo Geza Paizs, who are directors of the 1st Respondent. Together with the counter affidavit, the Respondent's counsel has filed a Notice of Preliminary objection, raising three points of objections as follows:

1. That this application is bad in law for being res subjudice and partly res judicata.
2. That this present application is defective for non-citation and wrong citation of enabling provisions.
3. That the supporting affidavit of this application is incurably defective and violating mandatory procedures of the law.

At the hearing of the preliminary objection the applicant was being represented by Mr. Englebert Boniphace assisted by Mr. Elisante Kimaro learned Advocates and the Respondent was enjoying the services of Mr. Henry Masaba Advocate assisted by Valerian Qamara, Mwaria George and Salvasia Kimario, Learned Advocates.

As a matter of procedure, the Respondents had the first right of audience as they are the side which had brought the objections. For the respondent Mr. Henry Masaba, learned advocate submitted for the respondent. In his submission, Mr. Henry Masaba, advocate prayed to argue the points of objection in sequence;

1. That, this application is bad in law for being *res sub-udice* and partly *res judicata*.

The counsel submitted that the present application emanates from Civil Case No. 4 of 2022 between the applicant and the respondent. In the main case the applicant is the defendant and the respondents are plaintiffs. The plaintiffs also have filed an application which is for temporary injunction in the Application No. 20/2022 wherein they are seeking temporary injunction against the applicants so that they are not evicted from the suit premises.

In it, the parties are as follows; the applicants herein are respondents and the respondents are the applicants.

The counsel submitted that it is their humble submission that this application is res *sub judice* to the application No. 20/2022. The basis of saying so is **Section 8 of the CPC** and various celebrated authorities/decisions of this court and the court of appeal. There is no doubt that the principles in Section 8 of CPC are clear in many cases. The counsel cited the case of **Wengert Windrose Safaries (Tanzania) Limited vs The Minister for Natural Resouserce and Tourism and A.G, Misc. Commercial Case No. 89 of 2016, High Court of Tanzania (Commercial Division) at Dar es Salaam** at page 12 the doctrine of ***res sub judice*** is defined;

> *"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 tittle where such suit is pending in the same or any other court in Tanzania having jurisdiction to grant the relief claimed."*

The court listed four essential conditions; **one**, that the matter in issue in the second suit is also directly and substantially in issue in the first suit; **two**, that the parties in the second suit are the same or parties under whom they or any of them claim litigating under the same title; **three**, that they court in which the first suit is instituted is competent to grant the relief claimed in the subsequent, suit; and the **fourth** is that the previously instituted suit is

pending *[See; Sarkar, Code of Civil Procedure (11th Edition) by Sudipto Sarkar and VR Manohar at p.93]*

Another authority cited is Civil Application No. 37/01 of 2021, between the ***Managing Director ABSA BANK LTD Vs Felician Mhandiki, CAT (DSM***) at page 13;

Two applications between the same parties and on the same subject matter could not exist simultaneously. This position is well pronounced in the case of ***Malugu Sisal Estates Limited vs. George Nicholaus efstathiou & 2 others [2003] T.L.R. 22*** cited by Mr. Mgale, though a High court decision but the reasoning is sensible, that:

> *"...Both cases were commercial matters, both revolved around the same issue, the parties in both cases were the same or litigating under the same title, and as the Tanga Case was prior in time, the suit in the Commercial Division must be struck out."*

Also at page 16; the court was inspired by the decision in the case of ***East African Development Bank Vs Blue Line Enteprises Ltd, Civil Appeal No. 101 of 2009*** (Unreported) and dismissed the appeal after concluding that the applicant's action of having two applications simultaneously was equivalent of forum shopping and thus an abuse of the court process.

The counsel submitted that the facts of this case squarely fit the principles in the cited cases herein. The parties are the same the subject matter is the same and the court is competent on both application and therefore they humbly submit that this court finds this application is ***res subjudice*** to Misc.

Civil Application No. 20/2022. The counsel for the respondent also submitted that they also humbly submit that by filing this application knowing there is another application, the applicant engaged herself in a forum shopping and intended to mislead the court and lead it to the potential contradiction and thus an abuse of court process.

The counsel submitted that in the chamber summons one of the prayers is for this court to dispense with the orders made in Misc. Civil Application No. 1 of 2022 in view of granting prayer No. 2 and 3. He submitted that this is an attempt of approaching this court via this application as a clandestine way of appealing against orders made in Misc. Civil Application No. 1 of 2022, between the parties in this application. In that application, this court made a final decision and therefore it is *functus officio*. The proper way of challenging the decision is to seek review or appealing to the Court of Appeal of Tanzania. Bringing this matter (Misc. Civil Appl. No. 1 of 2022) into the present application is tantamount to gross magnificent abuse of court process because this application is *res judicata* to application No. 1/2022 and *res sub-judice* to application No. 20/2022.

On the 2nd ground of preliminary objection, the Respondent has argued that this present application is defective for non-citation and wrong citation of the enabling provisions of law. The counsel sought the assistance of Order XXXVII Rule 2(1) of CPC. The same provides as follows:

> *"(2) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at*

any time after the commencement of the suit and either before or after Judgement, apply to the court for a temporary injunction to restrain the defendant form committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating the same property or right:

Provided that, no application shall be made for a temporary injunction where the defendant is the Attorney General but, in such case, the plaintiff may apply to the court for an order declaratory of the rights of the parties."

The provision which has been used by the applicant has been supported by many cases.

The counsels submitted that in principle they elaborate that the provision is applicable where the plaintiff seeks an order against the defendant; and that the provisions available for the defendant is order XXXVII Rule 1 of CPC. As submitted earlier in Civil Case No. 4 of 2022, the applicant is the defendant and the respondents are the plaintiffs.

The counsel submitted that it is their humble submission that this application is incompetent for wrong citation and non-citation of the law. He referred this cour to the case of ***Kennedy Mhoro vs Clementina Koma and John Mkinga, Misc. Land Application No. 12/2020, High Court of Tanzania, - Songea.***

The counsel submitted that this application is incompetent beyond repair and prayed it be dismissed with costs.

On the 3rd preliminary objection, that the supporting affidavit is incurably defective and violating mandatory procedure of law under Order XXXIII of the Civil Procedure Code, Cap. 33 R.E.2019.

Mr. Henry Masaba, advocate drew the attention of this case in Civil Application No. 31/2000, ***Benedict Kiwangwa Vs Principal Secretary Ministry of Health,*** in that case it was observed that:

> *"If an affidavit mentions another person, then that other person has to swear an affidavit. However, that is so whenever the information from the person is material evidence as without an affidavit from that person it would be a hearsay."*

He invited this court to look at the affidavit supporting the application at paragraph 7, (the fact mentioning respondents), 8, 9, 11, 12 and 13, 14, 15. If the document is found to be this way, the remedy is to expunge it and lack of an affidavit there won't be any application. He therefore, proceeded to submit that this court be pleased to dismiss the whole application with costs.

In addition, the deponent in this affidavit has verified presupposing that he can verify all the facts averred in the affidavit. However, as he has just submitted on the 3rd point, the counsel concluded that the affidavit turns to be untrue. When the affidavit contains untruthfulness, the only remedy is not to rely on it. Or the document to be expunged from the record. The

counsel submitted by praying that the court sustains this preliminary objection and dismiss the entire application with costs.

In reply to the submission in chief, Mr. Englebert Boniphace, learned Advocate submitted in series as submitted in chief by Mr. Henry Masaba, the counsel for the respondent. On the 1st point of preliminary objection, he prayed to divide it into two parts. One, is *res sub-judice* and the other *res judicata*. The principle of *res sab-judice* means that a certain trial is under judgment or a case is being considered by the court or by the judge. In order for the doctrine to be there it is a mandatory requirement under the provisions of Section 8 of the CPC that there must be two suits filed in a court of competent jurisdiction and those two suits must have the same subject matter. This was well postulated in the case of ***Malugu Sisal Estate Vs George Nicholaus Efstathiou & two others [2003] TLR 22***. In the case it was held that:

> *"Any court is prohibited from proceeding with trial of any case in which a matter in issue is directly and substantially in issue in a previously instituted suit between same parties under whom they or any of them claim under the same title where such case is pending in the same or any other court having jurisdiction to grant the relief."*

From the holding, the counsel for the applicant prayed that the following be taken into consideration:

1. That to date it is only Civil Case No. 4/2022 which is instituted in this court and no any other suit whatsoever as has been contended by the respondent's counsel

2. That Misc. Civil Application No. 20/2022 filed by the Respondents in this court is all about seeking temporary injunction restraining the applicant from evicting the respondents from the farm which belong to the applicant.

3. That Misc. Civil Application No. 23/2022 filed by the applicants is all about maintenance of *status quo*.

Taking these two applications, as one is wrong; they do not have same substance. They are different. Misc. Civil Application No. 20/2022 was filed Under Order XXXVII Rule 1(a) & (b) but the application No. 23/2022 was filed Under Order XXXVII Rule 2(i), Section 68(e) and Section 95 of CPC. These are difference.

The doctrine of *res sub-judice* is not at all applicable for the following reasons:

1. The matters in issues between the two miscellaneous applications are not substantially in issue in each of the application.

2. There is no any previously instituted suit between the parties seeking the orders for maintaining status quo

3. The reliefs are quite different.

Having taken that into consideration, the test of res sub-judice does not meet the criteria mentioned. The cited case of ***Wengert Windrose Safaris (Tanzania) Ltd Vs The Minister for Natural Resources and tourism & another*** (supra) at page 12 there are four conditions applicable under Section 8 of CPC. None of them has been met for the counsel for Respondent to qualify that the present application is *res sub-judice* to Miscellaneous Application No. 20 0f 2022 filed by the plaintiffs against the defendant.

On the 2nd limb of preliminary objection that the application is partly res judicata. When we say the term res judicata we mean "***a matter once adjudicated cannot be re-adjudicated***". In order for one to claim the presence of the situation of res-judicata there must be a litigation fully determined and a decision has been pronounced by a court of competent jurisdiction.

It is a kind of the sort that the counsel for the respondent is trying to mislead this court by mere allegation of the presence of Misc. Civil Application No. 1 of 2022. Because the same is an application of which did not determine the rights of the parties. The same was pronounced pending adhering to the orders granted. Among them was instituting a Civil Suit. By itself it did not conclude matters between parties. In that sense I pray to refers ***Kashe Vs Uganda Transport Ltd [1967] E.A. 774*** where the Honourable Udo Udoma CJ had this to say: -

> *"In general terms the impression I form from these cases seems to be thus that a decision has been given by a court of competent*

jurisdiction between two persons of the same parties, neither of the parties would be allowed..."

There is no any application whatsoever for maintenance of status quo between the parties. The two applications are not the same thus the principle of *res judicata* cannot apply.

In conclusion, the counsel submitted that the preliminary objection is unmaintainable due to the reasons adduced. He prayed that the first point of objection be dismissed with costs in favour of the applicant.

On the 2nd point of preliminary objection:- That the application is wrong for non-citation and wrong citation of the enabling provision of law.

Before submitting on the point raised, the counsel prayed to be guided by the principle that:

"Where an application omits to cite any specific provision of the law or cites a wrong provision but the jurisdiction to grant the order exist, the irregularity may be ignored and the court can order that the correct law be cited."

This principle was pronounced in the case of ***Director General-LAPF Vs Paschal Ngalo Civil Application No. 78/8 of 2018 CAT Mwanza*** (unreported – extracted from Tanzlii).

The applicability of Order XXXVII Rule 2(1) is based on the 1st prayer of the inter-parte hearing sought in the chamber summons. And the applicability of Section 68(e) of Civil Procedure Code is based on interlocutory application

while Section 95 of CPC is for the inherent powers of the court. The two Section of the law are for second prayer of the inter-party's application. The reasons for employing them is that there is no specific law for orders for maintenance of status quo ante.

These two provisions of law are only exercisable where the Code is Silent on certain procedures. The counsel prayed to refer to ***TANZACOAL EAST AFRICA MINING LTD VS MINISTER FOR ENERGY AND MINERALS [2016] TLS LR 152*** where it was held as follows: -

> *"Section 95 of Civil Procedure Code does not confer any jurisdiction on the High Court or subordinate courts thereto rather it provides for inherent powers of the High Court and subordinate courts to be exercised where the Code is silent or certain procedure."*

The counsel submitted that he is opposing and actually has a different view with the respondent's counsel that the applicant would have applied the provisions of Order XXXVII Rule 1 of the CPC due to the reasons that the applicability of the said order is for temporary injunction while the applicability of Order XXXVII Rule 2(1) is where there is continued breach. The counsel prayed and submitted that the provisions are relevant. He therefore prayed that the 2nd point of preliminary objection be dismissed with costs.

On the 3rd point of preliminary objection is on the incurability of the affidavit and violation of procedural law. In arguing this point, the counsel for the

applicant prayed to be guided by the case of ***Hon. B. P. Mramba vs. Lcons S. Ngalai & A. G. [1986] TLR 182*** in which it was held that the function of the particulars is to carry into operation the overriding principle that litigation between the parties and particularly the trial should be conducted fairly, openly and without surprise, and incidentally to reduce costs.

Taking the gist of the third point raised Preliminary Objection and as it was admitted by the respondent's counsel that this Preliminary Objection is of general terms. When we talk about the defectiveness of an affidavit the same might be in a verification clause, attestation clause or may be the content of an affidavit contains opinion or may be the contents are false or the commissioner for oath is not mandated to administer the oath. Not specifying the defectiveness of the affidavit curtails the applicant's right of being heard. As the applicant is curtailed the right to prepare himself before the litigation commences.

In the case of ***Juma and Others vs. The Attorney General [2003] E.A 461*** where it was held: -

> *"Justice is better served when the element of surprise is eliminated from the trial and the parties are prepared to address issues on the case to be made."*

In order to avoid all these encumbrances, the counsel prayed that the matter be adjourned so that he may have an ample time to prepare to argue the third point of objection so that applicant is heard properly.

The prayer was objected to by Mr. Henry Masaba, advocate for the applicant and after a brief exchange of argument and counsels for the respondent to consult each other they decided to drop the third point of objection. They had the view that the same would be heard at the hearing of the main application. The decision prompted Mr. Englebert to rest his case.

In rejoinder to the submissions made by the counsel for the applicant, Mr. Henry Masaba, learned advocate submitted that he has noted with concern that the provisions of section 8 and 9 of the Civil Procedure Code, Cap. 33 R.E 2019 are only applicable to the suits. He also reiterated the contents of submission in chief. The counsel insisted the holding of the court in the case of ***Managing Director – ABSA BANK vs. Felician Mhandiki, Civil Application No. 37/01 of 2021***. In that case the Court had observation on dealing with two applications at page 14 that.

> *"The position which I share, in the circumstance of what is before me, what matters is the principle and not necessarily the application of the Civil Procedure Code. It is evident that Misc. Civil Application No. 231 of 2020, was lodged before the current application. The application before this Court was thus essentially res-judicata prior to the dismissal of the application before the High Court."*

Status quo is a common law term that describes the power that the Judges and the Court have to temporarily protect or maintain a situation. It has been defined as "the existing state of affairs." The relief or reliefs are found in Order XXXVII Rules and sub-rules and 68(a – e) and section 95. The Court

exercises powers under the provision where there no way. There is no way the Court will exercise powers under the provisions where there is no specific provisions.

All orders sought are covered under Order XXXVII Rule 1 of Civil Procedure Code. In the case of ***Erick Raymond Rowberg and Two vs. Elisa Marcos and another, Civil Appeal No. 571/2 of 2017, Court of Appeal of Tanzania at Arusha.*** The counsel argued that the provisions of law, namely, Section 68(e) and section 95 cannot be applied where there is specific provision of law. He prayed that the application be dismissed with costs.

I have heard the submission by the counsel for the applicant and that for the respondent. But before I embark on my findings after consideration of the submission, I would like to register my observation on the way the case is being conducted.

It will be recalled on the 9th August, 2022 when the application was called for mention, I gave time to the counsels for the parties herein to have time and discuss their case in order to see if they need to proceed with any argument as to whether there was no need of the application or not. They spent a substantial amount of time and when they came back in court, they decided to proceed with the hearing of the objection which was yet to be filed on the same date. That was an opportunity to iron out what was foreseen by the counsels before hearing.

It will be observed that the objections were raised in disregard to the need for expeditious determination of the disputes and or achievement of substantive justice for the parties without undue delay. I draw this from the very submission by the counsel for the respondent. From the record of the submission made in this application, the counsel for the respondent submitted that they are dropping the third ground of objection and they will deal with it at hearing of the main application. In a way, the counsel knew the outcome of the objection. I think it is not a wise use of resources of the court.

Coming back to the preliminary objections raised, on the first ground of objection, the respondent is of the view that the present application is *res sub-judice* and partly *res-judicata*. On the basis of the argument, they are praying the same be dismissed with costs. Without going back to the arguments raised, I have a view, that Miscellaneous Application No. 20 of 2022 is for temporary injunction whereby the applicant (respondent herein) seeks to restrain the applicant in this application from evicting the respondents from the dispute premises; which premises are the subject of lease agreement between the parties. While this application is for an order to restrain the respondent from continuing breach of the contract between the parties pending hearing of the Main case (Civil Case No. 4 of 2022) and Miscellaneous Civil Application no. 20 of 2022), both filed by the respondent, the application No. 20 of 2022 has been filed by the Respondent herein to restrain the applicant (defendant) from evicting the respondent from the suit premises. In any case, there is no need to be trained in law to know that the nature of the cases is different. Though the parties are the same but the

subject in issue is not the same. Under the circumstances the submission by the counsel for the respondent is in order and basically, the respondent has not been able to convince this court on the point for the court to sustain it.

As to the citation of law, according to the second point of objection, that the application is defective for non-citation and wrong citation of the enabling provision of the law, I think the case of ***Director General-LAPF V. Paschal Ngalo, Civil Application No .78/8 of 2018*** is a good law to follow. The counsel for the respondent has not complained that this court has no jurisdiction to grant orders sought. But that the provisions of law cited are not applicable to the defendant in the case. I was asking myself, suppose the defendant knows his case and is sure to defend successfully, however, while awaiting an opportunity to defend he has the opinion something wrong being done to the property he believes he has interest. Should he sit down and wait guiding angels to rescue the situation or follow up by seeking an intervention of the court for a restraint order. And where the provision has not been cited but it is in the statutes what should be done by the court. According to the case I have just cited herein above, the court has power to order parties to insert the correct provision of law provided the jurisdiction of the court has not ousted. In the just referred case the court cited the case of ***Amani Girls Home Vs Isack Charles Kenela, Civil Application No. 365/08 of 2019*** (unreported) where it was held that:

> *"The law is settled, whenever such omission occurs the Court has power to order parties to insert the omitted provision."*

Under the circumstances, I have a firm view that the provisions cited cannot vitiate the application at hand. Thus, there is no effect where there is wrong citation of the provision of law and the court has jurisdiction. What the court has to do is to order parties to insert a correct provision of law. It is therefore hereby directed to the parties to rectify the omission so that the main application is heard as envisioned by the counsel for the Respondent.

For the reasons and since the respondent dropped the third ground of objection, I do not see any need to work on it. I therefore overrule the objections raised with costs. It is ordered accordingly.

Dated and delivered at Moshi this 29th day of August, 2022.

T.M. MWENEMPAZI

JUDGE.

Ruling delivered on the 29th day of August, 2022 in court in the presence of Ms. Coroline Nkya, Sael Mafue and Mr. Englebert Boniphace being Secretary, Chairman and Advocate of the applicant respectively and Mr. Qamara Valerian, Advocate for the Respondent.

T.M. MWENEMPAZI

JUDGE.