

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. 109 OF 2021;

BETWEEN

ECO BANK TANZANIA LIMITED.....PLAINTIFF

VERSUS

- 1. DOUBLE A COMPANY LIMITED.....1st DEFENDANT**
- 2. A. A. TRANS LIMITED.....2nd DEFENDANT**
- 3. AKBER BASHIR VERSI.....3rd DEFENDANT**
- 4. ASGER BASHIR VERSI.....4th DEFENDANT**

RULING

MRUMA, J.

There are four points of Preliminary Objections for determination. The said Preliminary Objections are contained in a Notice of Preliminary Objection filed by the Defendants and dated 6th September 2021 and they are based on the following grounds;

1. That the suit is fatal incompetent as it violates the laws for being *Res- subjudice* and hence contravenes Section 8 of the Civil Procedure Code;
2. That the causes of actions contained in the plaint are time barred;
3. That the suit has been un-procedurally filed before this court and;

4. The whole suit frivolous and vexatious.

They urged the Court to dismiss the suit with cost.

The Preliminary Objections were canvassed by way of written submissions. The defendants through the service of Mr Raphael Dismas, advocate of DIRM Attorneys filed their submissions in support of the preliminary objections on 13th July, 2022, while the Plaintiffs through Mr Deogratias W. Ringia of Safari Africa Arbitration & Legal, filed their submissions on 25th July, 2022.

Starting with the first preliminary objection, it was submitted for the Defendants that the Plaintiff instituted this matter despite the fact that there is another matter on the same cause of action and between the same parties which was registered in this same registry as Civil Case No 191 of 2019. According to Mr Dismas, in Civil case No.191 of 2019 the parties are **Eco BANK Tanzania Limited** (as the Plaintiff) Versus **A.A. Trans Limited, Double A Company Limited, Asgher Bashir Versi and Akber Bashir Versi** as Defendants. The subject matter of the suit is a loan agreement and collaterals used to secure it are Motor vehicles with the following registration numbers:-

- i. T. 565 BMW
- ii. T. 514 BQB
- iii. T.516 BQB
- iv. T. 360 BRS
- v. T. 951 BSF
- vi. T.451 CHV
- vii. T.426 BRE
- viii. T. 474 CHV
- ix. T.420 CBJ

- x. T. 373 CHV
- xi. T. 462 CHV
- xii. T. 237 CAJ
- xiii. T. 388 BTB
- xiv. T. 188 BRM
- xv. T. 349 BRS
- xvi. T. 748 BTE
- xvii. T. 433 BRK and;
- xviii. T. 966 BSF

As regards to Civil Case No 109 of 2021 (i.e. the present suit), it is the submission of the learned counsel for the Defendants that parties are the same i.e. Eco Bank versus Double A. Company Limited and three others (who are the same as the Defendants in Civil Case No. 191 of 2019) and that the cause of action is founded on the failure of the Defendants to pay the amount of loan debt together with interest which loan is the cause of action in Civil case No 191 of 2019.

For the Plaintiff it is submitted that the objection on whether the suit is subjudice as raised by the Defendants does not meet the threshold of as Preliminary Objection as required by **Section 8 of the Civil Procedure Code**. The Plaintiff's counsel relied on the case of **WENGERT WINDROSE SAFARI (TZ) Limited Versus The Minister For Natural Resources & Tourism And The Attorney General (Commercial Case No 39 of 2016** and contended that the amounts and the dates placed in subsequently plaint differs, which means that these two banking loan facilities took effect on different dates that is to say the amount due originates from different sources. The learned counsel submitted further that the cause of action pleaded in the two

suits arose in different dates namely 31st June, 2018 31st July 2018 and reliefs prayed for are different. According to the counsel Section 8 of the Civil Procedure Code applies when causes of actions are identical.

I beg to deal with this preliminary objection first because in my view it is capable of completely disposing of the matter before me. Section 8 of the Civil Procedure Code [Cap 33 R.E. 2019], provides that:-

"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 previous instituted suit between the same parties or between the parties under whom they are 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 reliefs claimed"

The effect of having two similar matters having common question of law and fact in which documents which will be relied on in one suit will also be required in another suit and shall require similar interpretation from the same court if that other suit is heard separately is that the evidence submitted by the parties will be duplicated in both.

The Court has carefully read and considered this Preliminary Objections together with the rival written submissions and renders itself as follows, that a Preliminary Objection was described in the **Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696** to mean:-

"So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by

clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

Further Sir **Charles Nabbold, JA** stated that:-

"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

The above being the description of a Preliminary Objection, it is not in doubt that a Preliminary Objection raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained from elsewhere or if the court is called upon to exercise judicial discretion. When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings. In determining a Preliminary Objection, Court will also take into account that the Preliminary Objection must stem from the pleadings and raises pure point of law [See the Kenyan Case of **Avtar**

**Singh Bhamra & Another Vs Oriental Commercial Bank, Kisumu
HCCC No.53 of 2004],**

The Defendants have in their Preliminary Objection averred that the suit herein is subjudice to another suit namely Civil case No 191 of 2019 which is pending before myself. The Plaintiffs in their submissions have disputed that fact that the suit herein is Subjudice.

I have considered the first preliminary objection as raised by the Defendants and the submissions made for and against it. It does qualify to be raised as a Preliminary Point. Having determined whether the issues herein is directly and substantially in issue with the other suit, it is my considered view that court will not have to ascertain facts and probing of evidence. It is not disputed that parties are the same and the cause of action is the same in both cases therefore this suit is sub-judice. It does not need to ascertain facts presented to find that the two cases stem from the same cause of action on the same subject matter which is loan facilities granted to the Defendants and secured by the same security or properties. Therefore, this Court holds and finds that Civil Case No. 109 of 2021 is subjudice to Civil Case No 191 of 2019 and that point alone may dispose of the suit. In another Kenyan case of **Quick Enterprises Ltd Versus Kenya Railways Corporation, Kisumu High Court Civil Case No.22 of 1999** the Court held that:-

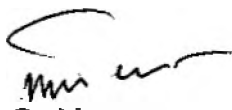
“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone.”

This is the reality in the present case.

The Upshot of the foregoing analysis is that Defendants' 1st Preliminary Objection is merited and the same is sustained. Civil suit No 109 of 2021 is strike out with costs. The Plaintiff's may seek to amend Civil Case No. 191 of 2019 to incorporate any reliefs which are contained in that suit but were no included in Civil Case No 191 of 2019.

Order accordingly,




A.R. Mruma,

Judge

Dated at Dar Es Salaam this 24th October 2022.