

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY**

AT DAR ES SALAAM

LAND CASE NO. 19 OF 2020

**PHILIP KIMBWEREZA (Appointed
Attorney of ANUP BHIKU JETHWA).....PLAINTIFF**

VERSUS

INTERNATIONAL COMMERCIAL

BANK (TANZANIA) LIMITED1st DEFENDANT

CHAMPION AUCTION MART.....2nd DEFENDANT

YONO AUCTION MART CO. LIMITED.....3rd DEFENDANT

RULING

Date of Last Order: 2/7/2021

Date of Ruling: 08/03/2022

S.M. KULITA, J.

In his Written Statement of Defense the 1st Defendant, **INTERNATIONAL COMMERCIAL BANK (TANZANIA) LIMITED** through its Advocate, Mr. Frank Mwalongo raised the Preliminary Objection on the following points;

1. That the subject matter of this suit is *Res Sub judice* in the Civil Case No. 40 of 2020 between Asif Ally Riasat as the Plaintiff and Anup Bhiku Jetwa as well as the 1st Defendant as Defendants.
2. That the Plaint filed as Land Case is defective for containing cause of action on non-land matters.
3. That the court is not vested with pecuniary jurisdiction.

The matter was argued by way of written submissions. While the objector, 1st Defendant is represented by Mr. Juventus Katikiro and Mr. Frank Mwalongo, Learned Counsels from Apex Attorneys Advocates, the Plaintiff **PHILIP KIMBWEREZA (Appointed Attorney of ANUP BHIKU JETHWA)** is represented by Mr. Elisa Abel Msuya Advocate from Trustmark Attorneys.

In his written submission in support of the 1st ground of Preliminary Objection Advocate for the 1st Defendant, Mr. Juventus Katikiro submitted that the subject matter of this suit is *Res Sub judice* in the Civil Case No. 40 of 2020 between Asif Ally Riasat as the Plaintiff and Anup Bhiku Jetwa, as well as the 1st Defendant herein, as Defendants. He said that the said case is pending before Hon. Justice Rwizile, J. The Advocate submitted that the litigations in these two cases are the same ie. breach of loan agreement which led the 1st Defendant herein to attach and sell some of the plaintiff's

properties secured for loan. Mr. Juventus Katikiro further submitted that the parties in these two cases are almost the same. He clarified that, the said Civil Case No. 40 of 2020 in which the Plaintiff is a party (claimant) consists a counter claim and the reliefs claimed are the same. The counsel prays for this court to strike out the instant matter.

Replying the said ground of Preliminary Objection Advocate for the Plaintiff, Mr. Elisa Abel Msuya submitted that the doctrine of *Res Sub Judice* is governed by the provision of section 8 of the Civil Procedure Code [Cap 33 RE 2019] whose contextual meaning and applicability can be seen on section 10 of the Indian Code of Civil Procedure, Act V of 1908 at page 8, authored by Mulla, which is *pari material* with our section 8 of the Civil Procedure Code. Expounding the above said provisions Mr. Msuya submitted that the objective of the principle is to prevent the courts of the concurrent jurisdiction to try the parallel suits in respect of the same subject matter.

The counsel stated that in Civil Case No. 40 of 2020 the 1st Defendant (International Commercial Bank) is suing the Plaintiff for breach of the loan facility agreement, in particular failing to repay a bank facility advanced by the 1st Defendant to the Plaintiff. As for the instant matter, Land Case No. 19 of 2020 Mr. Msuya submitted

that the Plaintiff is suing the Defendant and 2 others on different cause of action, that is the 1st Defendant's act of selling the vehicle secured by the Plaintiff in the loan facility alleging that the said Plaintiff has breached the mortgage agreement.

The counsel submitted that looking on facts on those two cases they are not substantially the same at all, they are different. He therefore prays for this ground of Preliminary Objection to be overruled.

I have carefully gone through the submissions of both parties in respect of the 1st ground of Preliminary Objection and I have this to say; the pleadings in this case look to be the same with that of Civil Case No. 40 of 2020 in which the person namely Anup Bikhu Jetwa, through Mr. Philip Kimbwereza (Plaintiff) whom he has assigned powers of attorney to represent him for this matter, is among the two Defendants in the said Civil Case No. 40 of 2020 which is also pending before this court but under my fellow brother, Rwizile, J.

In both cases the issue is that Mr. Anup Bikhu Jetwa applied for a term loan facilities amounting USD 1,000,000 (One Million US Dollars) from the 1st Defendant herein, to wit International Commercial Bank (Tanzania) Limited to enable him to purchase 62

brand new cars. The loaned money hereof was repayable on payment of 36 equal monthly instalments of USD 31,567/54. Upon the Borrower (Plaintiff) defaulting to service the loan facility the 1st Defendant sold the Plaintiff's mortgaged chattel. In further exercising the legal powers under the mortgage instruments to sale the mortgaged properties the 1st Defendant, through Yono Auction Mart Co. Limited (3rd Respondent herein) was about to auction the Plaintiff's landed property located on Plot No. 573 Mindu Street, Upanga area, Ilala Municipality in Dar es Salaam, the act which the Plaintiff herein disputes, hence this suit.

It is my considered view that, as those named properties ie. chattels and the plot are also subject to the Civil Case No. 40 of 2020 which is also pending before this court, instead of challenging this matter by filing this Land Case No. 19 of 2020, the Plaintiff was supposed to do so in that said suit in which the Plaintiff herein lodged a counter claim seeking for the same reliefs.

I have noticed that the said case No. 40 of 2020 which is before Hon. Rwizile, J. has been registered as a Civil Case while this one has been registered as a Land Case. As it can be read in the plaint, it has been registered as Land Case No. 19 of 2020. However, upon going through the plaint, I have noticed that it doesn't contain land matters but commercial transaction between the Plaintiff and

the 1st Defendant. Notwithstanding the fact that the said two cases have different titles of registration, it is not a justification for them to be tried parallel by this court while they all consist the same subject matter. The picture that I can get from the scenario is that the Plaintiff was trying to instigate the court to believe that there is no *Res Sub judice* basing on the ground that this is a Land case while that other one is Civil. The fact that the pleadings in these two cases are almost the same, this matter should be regarded *Res Sub judice*.

This court is therefore precluded to entertain this suit while there is another case which is directly and substantially in issue with this one which pending before this same court.

In case the Plaintiff herein thinks that it was wrong for that case to be filed as a civil suit, the law is clear that he has to raise a Preliminary Objection in that said Civil Case 40 of 2020, and not to file a fresh suit, ie. this Land Case No. 19 of 2020.

The doctrine of *Res Sub judice* intends to avoid not only multiplicity of proceedings but also possibility of producing conflicting decisions. What has been done by the Plaintiff herein collides with the provision of Section 8 of the Civil Procedure Code [Cap 33 RE 2019] which states;

"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"** (emphasis is mine)

I therefore concur with the Defendant's Counsel in his argument on the 1st ground of Preliminary Objection that **the matter at hand is *Res Sub judice***, hence should be **dismissed** and I so order.

This ground of Preliminary Objection being meritorious and sufficient to dispose of the suit in entirety, I find it unnecessary to deal with the other grounds. The Plaintiff to bear the costs.



S.M. KULITA

JUDGE

08/03/2022

