

IN THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MOROGORO)
AT MOROGORO
LAND CASE NO 03 OF 2021

MEXON JAPHTA SANGA 1ST PLAINTIFF

MEXONS ENERGY LIMITED2ND PLAINTIFF

VERSUS

NMB BANK PLC DEFENDANT

RULING

Hearing date on:28/02/2022

Ruling date on: 11/03/2022

NGWEMBE, J.

This ruling is a result of preliminary objection raised by the defendant, while this case was at the stage of first pre-trial conference. The essence of the objection is not to strike it out, rather is to stay pending final determination of another suit at the High Court Commercial Division. The ground clothed in the Notice of Preliminary Objection is quoted hereunder:-

"The suit is unmaintainable as the matters in issue therein are issue in Commercial Case No. 102 of 2021 which is pending in the High Court of Tanzania (Commercial Division) at Dar es Salaam and thus, as such the matter is subjudice"



Having so raised and filed in this court, usually must first take precedent over other court proceedings. As such, parties were invited to appear in court and argue the objection therein. Both parties procured legal services of learned advocates. While the defendant (Objector) was represented by learned counsel Seni S. Malimi from K & M Advocates, the plaintiffs were represented by advocate Daniel Welwel from Asyla Attorneys.

Briefly, advocate Malimi argued his ground of objection by referring to the Commercial Case No. 102 of 2021, pending at the High Court of Tanzania Commercial Division – Dar es Salaam, which is related to the suit at hand. Therefore, in terms of section 8 of Civil Procedure Code Cap 33 R.E. 2019 this case should be stayed (*Res-subjudice*).

Argued further that, the similarities of the two cases are apparent because both are centered on credit facilities accessed by the plaintiffs from the defendant. Thus, the two cases are seeking for nullification of default notices issued by the defendant to the plaintiffs; and Credit facility secured by legal mortgages of the plaintiffs. Therefore, the two suits are dealing with the same subject matter, but instituted in two different courts of equal horizontal jurisdiction.

Since the Commercial case was filed in court on 28/9/2021 and the land case was filed on 02/12/2021, then the latter case is *subjudice*, he added.


Arguing on similarities of the two suits, Mr. Malimi expressed that paragraphs 5, 6, & 7 of the plaint at Commercial court are related to credit facilities. Likewise, paragraph 20, the plaintiff pleaded objection to the default notices, at the end the plaintiff seeks nullification of the



default notices. Comparing to the land case herein, in paragraphs 9 & 10 are specifically, deals with the same subject matter.

Concluded that the two suits are dealing with the same parties who are litigating on the same title. Proceeded to convince this court on the probable issues in Commercial case may be:- whether the default notices are issued in bad faith; and whether the plaintiff is indebted to the defendant. The same issues may be repeated in the Land case, which are:- whether the plaintiff did not create legal mortgages over their properties based on credit facilities advanced to them; and whether the notices of defaults are nullity for want of valid mortgages. Insisted that due to that similarities, one decision will affect another under the principle of res judicata.

To buttress his argument, he referred this court to **Mulla the Code of Civil Procedure** (16th Edition) at page 151 and in the case of **Peniel Loter Vs. Gabriel Tanaki & Others [2003] TLR 312**. Rested by a prayer that the land case be stayed pending final determination of the Commercial case.

Mr. Daniel Welwel responded by raising a valid legal point, that the objection defeats the principles of how to raise Preliminary Objections. Expressed that, since this objection is incapable of ending up the whole suit, it is irregular to raise it as preliminary objection. In any event the court in determining this objection will deal with factual issues prematurely. Thus, the notice of preliminary objection defeats the purpose of raising preliminary objections as per **Mkisa Biscut's** case. 

Admittedly, the principles of *res-subjudice* are properly argued by the defendant's advocate, however, he contradicted it by referring this court to the case of **Ahmed Mbaraka Vs. Nassoro Bafadhil and 2 others, Commercial case No. 10 of 2005** and to the Commentaries of **Sarkar Code of Civil Procedure (7th Edition) Vol. 1** at pages 88 to pages 96.

Proceeded to argue that the two suits are not identical even the parties are not the same. The plaintiffs are different with different capacities. Challenged that, the defendant's Written Statement of Defence (WSD) did not complaint on similarities of the two suits, if any. Even the defendant's WSD did not annex the plaint in commercial case, rather is wrongly annexed in the Notice of Preliminary Objection. Challenged rightly so, that Notice of Preliminary Objection is neither a pleading, which may be annexed with documentary evidences, nor evidence, thus contrary to legal procedure to annex documents.

Advanced serious objections on similarities of the two cases. Stressed that while the crux of the dispute in commercial case is summarized in paragraph 20 of the plaint, and at the end seeks 9 reliefs, in land case the issue is only one as per paragraph 12 that the plaintiffs have not created legal mortgages over their properties and the main prayers are declaratory orders. Insisted that the prayer for nullification of default notices are consequential not fundamental dispute. Even if the notices will be nullified in Land case, same will not render the commercial case *res judicata*.

Contented that the parties are different in the two different cases with different capacities, while the 1st plaintiff in land case has sued in his



personal capacity, the 2nd plaintiff is a legal entity whose one of the directors is the 1st plaintiff, but qualified that in Land case, the 1st plaintiff has sued the defendant on his personal capacity as opposed to his director ship of the 2nd plaintiff. Rested by insisting that the two suits are different with different parties and purpose. Therefore, the objection should be dismissed forthwith with costs.

In rejoinder, the defendant's advocate reiterated to his submission in chief and added that, the objection is based on section 8 of CPC. Insisted that the latter suit is *res subjudice*. Thus, prayed the objection be granted as prayed.

Having summarized extensor the arguments of learned counsels, I find compelled to quote section 8 of CPC verbatim 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 litigation 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"

Basically, this section codified the rule of *res subjudice* into our laws with a purpose to protect integrity of our courts from an apparent danger of entering into conflicting decisions arising from the same parties and same subject matter, but in different courts of similar horizontal jurisdiction. The basic principles governing application of *res subjudice* were discussed extensor by Judge Bwana (as he then was) in the case of **Ahmed Mbaraka Vs. Nassoro Bafadhil (Supra)** at page 3, where he pointed out five ingredients of *res subjudice* namely:- **first,**

there must be two suits one filed after the other; **second**, the two suits must concern a matter which is directly and substantially the same; **third**, the parties involved in the two suits are the same or any one of them claims under the same title; **fourth**, both courts are competent to try the matter; and **fifth**, the said matter must have been alleged in the former suit by one of the parties and either denied or admitted by other party. In order for the rule of *res subjudice* to apply, all five ingredients must be satisfied. Fundamentally, the best test is whether the decision of one case may operate as *res judicata* to the case yet to be decided.

The legal purpose of having *res subjudice* or stay of suit was discussed in detail by **Sarkar, Code of Civil Procedure (Supra):-**

"The object of res subjudice is to avoid simultaneously trying two parallel suits in respect of the same matter in issue, to avoid two parallel trials on the same issue by two courts and to avoid recording conflicting findings on issues which are directly and substantially in issue in previously instituted suit"

Sarkar proceeded to give three ingredients which are *imparimateria* with the ingredients underscored by Judge Bwana in the above suit. For clarity, Sarkar came up with three ingredients namely:- **First**, the matter in issue in the second suit is also directly and substantially in issue in the first suit; **second**, the parties in the second suit are the same or parties under whom they or any of them claim litigating under the same title; **third**, the court in which the first suit is instituted is competent to grant the relief claimed in the subsequent suit.

The main tests discussed by Sarkar is whether the two suits are directly and substantially in issue in the previous instituted suit. Whether the



final decision in the previous suit would operate as *res judicata* in the subsequent suit, and whether the cause of action is identical in both cases.

Having pointed out these ingredients, the question remains, that is, whether they are applicable in the objection at hand? To answer this question, I need to revisit the two complaints, if the similarities are vividly seen without laboring much on legal interpretations. Also, whether the decision in one case may operate as *res judicata* to the subsequent suit.

Considering deeply the Commercial suit, parties therein are only two; namely Mexons Energy Limited and NMB Bank PLC, while the Land case No. 3 of 2021, there are three parties namely: Mexon Japhta Sanga who is an individual and Mexons Energy Limited versus NMB Bank PLC. In this ground alone, obvious the parties are different.

Considering other ingredients, the plaintiff in Commercial case seeks nine (9) reliefs, while in Land case the plaintiffs are seeking only seven (7) reliefs. Obvious, the two suits have different number of reliefs. However, the contents of those reliefs should as well be considered. It is clear in Commercial case, the contents of the reliefs are purely related to credit facilities advanced to the plaintiff by the defendant and the plaintiff is seeking annulment of default notices, while the land case is purely related to plots of land owned differently by each plaintiff. Also, the plaintiffs are seeking nullification of default notices and permanent injunction to the defendant from issuing any further default notices.

With serious consideration on the contents of the two complaints, the two suits are not directly and substantially in issue. Therefore, I agree with



the plaintiff's advocate that the two suits are not similar and the decision of one may not necessary render another suit *res judicata*.

While I am approaching the end of this ruling, I need to point out on the danger apparent to the trial judge in determining objections of similar nature, that may end up predetermining the main suit prematurely. Having that in mind, I have looked generally on the alleged similarities and differences of the two plaints without going into details with a view to avoid prejudging the case.

Having so said and done, I am settled in my mind that the preliminary objection lacks merits same is struck out with costs.

It is so ordered.

Date at Morogoro this 11th March, 2022.



A handwritten signature in blue ink, appearing to be "P.J. Ngwembe".

P.J. NGWEMBE

JUDGE

11/03/2022

Court: Ruling delivered today on 11th day of March, 2022 at Morogoro, in the presence of Mr. Daniel Welwel advocate for the Plaintiffs and Mr. Zuriel Kazungu for the defendant.



A handwritten signature in blue ink, identical to the one above.

P.J. NGWEMBE

JUDGE

11/03/2022