IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 97 OF 2022

IN THE MATTER OF COMPANIES ACT

BETWEEN

JITESH JAYANTLAL LADWA

AND

IN THE MATTER OF PETITION FOR UNFAIR PREJUDICE

JITESH JAYANTILAL LADWA ..... PETITIONER

VERSUS

HOUSES AND HOMES LIMITED ..... 1ST RESPONDENT

BHAVESH CHANDULAL LADWA ..... 2ND RESPONDENT

AATISH DHIRAJLAL LADWA ..... 3RD RESPONDENT

NILESH JAYANTILAL LADWA ..... 4TH RESPONDENT

CHANDULAL WALJI LADWA ..... 5TH RESPONDENT

DHIRAJLAL WALJI LADWA ..... 6TH RESPONDENT

RULING

11th, & 28th April, 2022

ISMAIL, J.

The petitioner in this matter is a minority shareholder in a company trading in the name and style of Houses and Homes Limited, the 1st respondent herein. He is not amused with the manner in which some of the 1st respondent's operational decisions are reached and executed. The decisions complained about relate to access to credit facility from Tanzania Investment Bank using documents which purported that the applicant guaranteed the loan that he was not aware of. In his contention, the guarantee agreement that purported to bear his signature is forged.

In the instant application, the Court is called upon to issue a temporary restraint order which will prevent the respondents, directors, employees, servants, assignees and anybody appointed or instructed by the respondents, from dealing with the 1st respondent's affairs pending determination of the main petition. The reply to the application has been swift, accompanied by objections that question the competence of the application. This is by way of a notice of preliminary objections that has raised six grounds of objection. The grounds state as follows:

1. *The application before the Court is out of time and, as such the jurisdiction of the court to proceed with determination of the same is ousted.*

2. The application is a non-starter and therefore an abuse of the courts process in that, it amounts to forum shopping.
3. That, the application is *res-subjudice* to several court proceedings now pending in courts including;
    (i) In Commercial Case No. 120 of 2020 which is pending in the High Court Commercial Division, before Hon. Magoiga J, pertaining to the loan and the applicant's allegations of forgery are the subject of the suit therein.
    (ii) Misc. Civil Application No. 98 of 2019 whose application for leave is pending in this Court in Misc. Civil Application No. 18 of 2020, copies.
4. That, the matter is *res judicata* to the judgment on admission entered by the Court in Commercial Case No. 120 of 2020 and the ruling of the Court in the same Commercial Case.
5. That, the application is incompetent and therefore an abuse of the legal process for being drawn by an incompetent person contrary to the orders of this Court in Misc. Civil Application No. 98 of 2020.
6. That the Court has been wrongly moved and, as such the application is incompetent.

When the matter was called on for hearing, the applicant was represented by Messrs Jeremiah Mtobesya and Elly Msyangi, learned advocates, whilst the respondents were represented by Mr. Robert Rutaihwa, learned counsel.

When he rose to address the Court on the objections, Mr. Rutaihwa began by informing the Court that he had chosen to abandon ground six and part of ground three of the objections. Submitting on ground one, learned counsel argued that, while the applicant was aware of the complaints way back in 2018, he preferred no action until 10th March, 2020 when he instituted the instant application. Mr. Rutaihwa argued that this being an application that is based on the provisions of the Civil Procedure Code, Cap. 33 R.E. 2019, action intended to be taken can only be pursued within 60 days from the day he became aware of the existence of what he complains about. He argued that this is in terms of Item 23 of the Schedule to the Law of Limitation Act, Cap. 89 R.E. 2019. It was his argument that non-compliance of the cited law ousts jurisdiction of the Court. This is in terms of the case of the ***National Bank of Commerce & Another v. Bruno Vitus Swai***, CAT-Civil Appeal No. 331 of 2019 (unreported).

Mr. Rutaihwa further contended that the other anomaly is that it is not clear if there is any pending suit on which the instant application is based.

He argued that, apart from commercial case No. 120 of 2022, cited in passing in paragraph 22 of the supporting affidavit, it is not evident that any such matter exists. This, in his view, makes the application independent. It was his take that such failure justifies his argument that the application is time barred and liable to dismissal under sections 3 and 5 of Cap. 89.

With regards to ground two, the contention by Mr. Rutaihwa is that the application ought to have been filed in the Commercial Division of the Court and not in this Court. This is in view of the fact that matters in respect of the loan are pending in Commercial Case No. 120 of 2020. He considered the applicant's action as an abhorrent forum shopping. He buttressed his contention by citing the decision of the superior Bench in the ***Registered Trustees of Kanisa la Pentekoste Mbeya v. Lamson Sikazwe & 4 Others***, CAT-Civil Appeal No. 210 of 2020 (unreported).

Submitting on grounds three and four, the respondents' advocate argued that the application is *res judicata* because the question of loan was determined in Commercial Case No. 120 of 2020, and that the applicant is bound by the judgment on admission, passed in that decision. Learned counsel argued that, though the decision was entered against the respondent, it covered the applicant as well. He argued that explanation 6 of section 9 of the CPC binds him.

On *res-subjudice*, Mr. Rutaihwa argued that there is a pending Commercial case No. 120 of 2020, and that the prayers in the application are meant to halt the pending case. He argued that facts in the application are the same as those pleaded in Commercial Case No. 120 of 2020. Parties were also the same and the Court before which the matter is pending is competent. On this, he cited the case of ***Wengert Windrose Safaris (Tanzania) Ltd v. Minister for Tourism & Natural Resources and Another***, HC-Comm. Case No. 89 of 2016 (unreported). Mr. Rutaihwa contended that it does not matter that the matter at stake is for temporary injunction as long as issues involved are the same.

In his submission on the last limb of objection, counsel for the respondents took the view that competence of the application is on the line. This is on account of the fact that the same has been drawn by advocates who were disqualified to represent the petitioner, the respondents and their joint companies. He picked a leaf from the decision of the Court (Hon. Mlyambina, J) in Misc. Civil Application No. 98 of 2020, which dismissed the application on similar grounds. He argued that the ruling is still valid and applies in the instant case. He was insistent that orders of the court must be obeyed unless varied. He fortified his contention by citing the decision in ***KMJ Telecommunication Ltd v. Airtel Tanzania***, HC-Misc. Comm. Cause

No. 384 of 2017 (unreported). He urged the Court to dismiss the application, consistent with the decision in ***Standard Chartered Bank (T) Ltd v. Best Travel Solution Ltd & 3 Others***, HC-Comm. Case No. 16 of 2020 (unreported).

Mr. Mtobesya took a swipe at the submissions made by his counterpart, and his rebuttal followed the same sequence. Regarding ground one, the argument is that this is an application for injunction whose intention is to preserve the status quo or the subject matter in the main case. He argued that, since the application is predicated on the petition in Misc. Civil Application No. 98 of 2022 – on unfair prejudice – then its filing was done simultaneously, on 10th March, 2022. That is when time began to run and that is reckoning ought to have started from that time. In any case, he contended, the provisions of Cap. 89 cannot apply in applications of this nature. He argued that cases cited talk about the main suit and, in view thereof, the same are irrelevant.

With regards to ground two, counsel's contention is that in Civil Case No. 120 of 2020, the applicant and the respondents were both the defendants and that the plaintiffs were Tanzania Investment Bank and the Attorney General. He argued that the cause of action in that matter was loan recovery while the instant matter is simply a petition for unfair prejudice, an

unrelated matter to the previous proceedings. Mr. Mtobesya denied that the applicant was a party to the judgment on admission, contending that the latter was relieved from the proceedings the same day judgment on admission was entered. He argued that matters in the instant application have never been an issue for discussion in any other forum. He argued that the ***Kanisa la Pentekoste case*** was distinguishable as reliefs in that case were the same as those in the previous case. He argued that even the rights in the two matters flew from different pieces of legislation, one on unfair prejudice while the other was on loan recovery.

Submitting on grounds three and four, learned counsel argued that issues in Misc. Civil Application No. 98 of 2020 and Commercial Case No. 120 of 2020 are different and so are the causes of action. The parties are also different, and that differences make the objection misconceived. He implored the Court to reject the respondents' contention out of hand, relying on the decisions in ***Zaruki Mbokenize v. Swaibu Omari & Another*** [1988] TLR 160; ***Dr. Mwikwabehi H. Magere v. Attorney General*** [2001] TLR 286; and ***Nduke v. Mathayo*** (1970) HCD 96.

On *res-subjudice*, Mr. Mtobesya had the same argument on the difference of the issues, causes of action and the parties. He argued that a matter cannot be stayed where issues at stake are different. He urged the

Court to follow the path taken in ***M & 5B Hotels & Tours Ltd v. Eximbank (T) Limited***, HC-Comm. Case No. 104 of 2017 (unreported).

Regarding the last objection, Mr. Mtobesya argued that the same argument was raised in the case of ***Jitesh Ladwa v. TIB & 8 Others***, HC-Misc. Comm. Application No. 15 of 2021 (unreported). He added that conflict of interest would only arise where an advocate is called to testify in a case that he advised on. He contended that, in this case, there is no indication that any of the advocates would be called to serve as witnesses. He argued that, in any case, the decision is not binding. He bolstered his submission by citing the case of ***Hasmuh Valabdas v. Attorney General & 3 Others*** [1999] TLR 326; and ***Marangu Sisal Estate Ltd v. George Nicholaus & 2 Others*** [2003] TLR 21. Learned counsel argued that Messrs Ngalo & Co. Advocates who featured in the said proceedings do not appear in this case, adding that, in this case, the application was drawn and filed by two firms, meaning that exclusion of one would not affect the application. That makes the decision distinguishable, he contended.

Mr. Mtobesya urged the Court to find no merit in the objections and overrule them with costs.

Rejoining on ground one, Mr. Rutaihwa implored the Court to shrug off the applicant's contention since the same is not backed up by any law.

Regarding ground two, counsel's view is that the causes of action were the same in both matters.

With respect to *res-judicata,* Mr. Rutaihwa maintained that paragraph 22 of the affidavit makes reference to the 1st respondent against whom the judgment on admission was passed. He took the view that decisions cited are distinguishable and that none of it challenges the explanations in section 9 of the CPC.

Mr. Rutaihwa maintained that decisions cited with respect to the last objection are old and were pronounced prior to amendments of the Rules in 2018. He concluded that presence of the 2nd law firm would not change the legal position.

Disposal of this application will follow the same sequence adopted by counsel in their submissions.

The respondents' contention ground one is that the application falls under the provisions of the CPC for which no time frame for filing is specifically prescribed. In such a case, it falls under Item 23 of the Schedule to Cap. 89. This has laid down the time prescription of 60 days. Mr. Mtobesya holds the view that if time is to be computed, then such computation starts from the day the petition was filed, which is 10th March, 2022.

Let me state here and now, that I know of no provision of the law that imposes prescription of time in respect of applications which are prompted by events, some of which are unpredictable. One would even be tempted to ask, when would time start to run? Simple logic dictates that temporary injunction is a restraint order or relief that is sought and granted when the need to do so arises. Such need would arise where the applicant senses that danger of suffering an irreparable loss as a result of the respondent's conduct is looming large. One would not tell, with any semblance of mathematical precision or certainty, that the danger sought to be averted would occur on such and such date. It should also be noted that not every pending associated with suit that is instituted, a danger which would require moving the court to forestall through restraint orders.

But even assuming, just for the sake of argument, that this is an application in respect of which the sixty-day time prescription applies, I would still buy into Mr. Mtobesya's reasoning and hold that, since the petition on which the application is anchored was filed on 10th March, 2022, then reckoning of time would commence on that date. This would bring us to the conclusion that the application is perfectly timeous, it having been filed on 10th March, 2022, as well.

It is with immense respect, that I find Mr. Rutaihwa's contention in this respect flawed, and I choose to disassociate with it.

Ground two of the objections decries what respondent's counsel considers to be the applicant's act of cherry picking. Mr. Rutaihwa has attempted to show that the applicant's decision to institute the instant application, in this Registry, is a clear demonstration of a forum shopping that borders on an abuse of the court process. He takes the view that, since there are pending court proceedings in the Commercial Division of the Court, then that is the appropriate forum in which the instant application ought to have been instituted. This contention has been shrugged off by Mr. Mtobesya, and the contention is that the pending matter in the Commercial Court is distinct from the instant matter, and that causes of action in these matters are substantially different.

Forum shopping is derived from the practice in the United States of America, and it refers to a party's attempt to file a lawsuit so that it will be heard by the court most favorable to the party filing the suit. It also involves having a suit that is already in court moved to a different forum or a friendly jurisdiction in order to gain a more favorable outcome. It is abhorred in most jurisdictions across the globe, and Tanzania is no exception. The decision in ***Registered Trustees of Kanisa la Pentekoste Mbeya v. Lamson***

Sikazwe & 4 Others (supra), cited by Mr. Rutaihwa is a case in point, plus the case of ***East African Development Bank v. Blue Line Enterprises***, CAT-Civil Appeal No. 101 of 2009 (unreported), from which the upper Bench borrowed a leaf in deciding the cited decision.

While the legal position attracts no query, the question is whether the filing of the instant application in a registry different from the Commercial Division of the Court amounted to a forum shopping which is also an abuse of the court process. My hastened answer to this question is in the negative. Proceedings in the Commercial Division, on which the respondents' counsel clings, as the basis for his contention, involve different parties and different points of contention. The points of contention arise from the claim of breach of a loan agreement. It pits the respondents and the applicant, on one side, against Azania Bank Limited and the Attorney General, on the other. They cannot anchor the instant application which is bred from a matter that is solely concerned with the manner in which the affairs of the 1st respondent are run. The application emanates from the petition for unfair prejudice by a minority shareholder, against majority shareholders. The prayers sought are, a company law remedy which is substantially distinct from a contract law remedy that is at stake in loan recovery cases such as the pending proceeding in the Commercial Division of the Court. This claim, which is

limited to shareholders has nothing to do with other parties in Commercial Case No. 120 of 2020, pending in the Commercial Division of the Court, and the two are not in sync.

It is my conviction that this objection is destitute of merit and I overrule it.

There is yet another contention, raised in grounds three and four, that the instant application is both *res-judicata and res-subjudice*. With respect to *res-judicata*, the argument is that the finding on loan recovery in Commercial case No. 120 of 2020 determined the loan question against the applicant and the respondents and they abound by it. The view held by Mr. Mtobesya is that these two cases carried different causes of action.

I need to emphasize that the doctrine of *res-judicata* can only be successfully invoked if key conditions set out under section 9 of the CPC are met. These conditions are:

> *(i) There must be records to show that the judicial decision was pronounced by a court of competent jurisdiction;*
>
> *(ii) That the subject matter and the issues decided were the same or substantially the same issues in the subsequent suit;*
>
> *(iii) That the judicial decision was final; and*

(iv) That it was in respect of the same parties litigating under the same title.

See: Mulla, the Code of Civil Procedure, 16th Edn., Vol. I at p. 173; ***Umoja Garage v. NBC Holding Corporation*** (supra); ***Peniel Lotta v. Gabriel Tanaki & Others*** (supra); and ***Esso Tanzania Limited v. Deusdedit Rwebandiza Kaijage*** [1990] TLR 102 (CA).

The narrow question arising from the foregoing is whether the subject matter and issues in the decided case are the same or substantially the same in the instant matter. The answer given by Mr. Rutaihwa is that they both relate to loan recovery. While the answer may sound correct, the truth of the matter is that, whereas the loan facility serves as the common denominator in both of the matters, its application in these matters is profoundly varied. The expression of merits in these two cases is different and it can hardly be said that these two cases are at the same stage of litigation.

I am fortified in my view by the holding in the Indian case of ***Erach Boman Khavar v. Tukaram Sridhar Bhat & Others*** AIR 2014 SC 544, in which it was guided as follows:

"It is clear as crystal that to attract the doctrine of res judicata it must be manifest that there has been a conscious

adjudication of an issue. A plea of res judicata cannot be taken the aid of unless there is an expression of opinion on the merits. It is well settled law that principle of res judicata is applicable in between the two stages of the same litigation but the question or issue involved must have been decided at earlier stage of the same litigation."

It is my considered view that this is not a fit case in which the doctrine of *res-judicata* applies. Equally inapplicable is the contention that this matter is *res-subjudice*. This is precisely in view of the fact that there exists no application similar to the instant application, between same parties and in respect of the same cause of action. The contention of the pendency of the proceedings in the Commercial Division of the Court fails to resonate because parties in that case are not the same as parties in the instant matter. Absence of the similarity between what is before me and anything else, elsewhere, is what emboldens my resolve to hold that the matter is not *res-subjudice*.

Mr. Rutaihwa has pitched a tent on a contention of conflict of interest that arises from Mr. Msyangi's alleged past engagement with the parties' family, and that such ties disqualify him from taking part in the instant proceedings as counsel. The decision of the Court in Misc. Civil Application No. 98 of 2020 has been cited as the basis for the contention. Mr. Mtobesya

has seen none, and the contention is that, if anything, the documents that instituted the application were drawn jointly, involving his firm as well.

It is true that the Court (Hon. Mlyambina, J) ruled that a conflict of interest existed because of involvement of counsel constituting Lawgical Attorneys, who are said to have had a stint at Ngalo & Co. Advocates. While it is not in my remit to discuss the plausibility or otherwise of the decision, I wish to express my deviation from my brethren's reasoning. I do so, not because the decision does not have a force of law. My decision is informed by what was guided by the Court of Appeal held in the case of ***Arcopar (O.M) S.A. v. Hubert Marwa & Family Investments Ltd & 3 Others***, CAT-Civil Application No. 294 of 2013 (unreported). In the cited decision, the superior Court drew inspiration from an Article by Paul M. Perell on *Stare decisis* and Techniques of reasoning and argument, (1987) 2.23 Legal research Update II; and the cases of ***Young v. Bristol Aeroplane Company Limited*** [1944] 1 KB 718; and ***Dodhia v. National Grindlays Bank Ltd & Another*** [1970] EA 195. In its conclusion, the upper Bench guided that a court is justified to decline to follow the path taken by a court of record, where any or all of the following is likely to occur:

i. In Criminal cases, following the precedent case would result in an improper conviction;

ii. ***It does not stand for the legal preposition for which it has been cited*** *or;*

iii. *It articulates the legal preposition for which it has been cited, the preposition was obiter dicta or, the ratio decidendi is too wide or obscure or;*

iv. *The precedent case has been effectively overruled by a new statute or given per incurium; or*

v. *The case has a built in public policy factor or based on the customs, habit and needs of the people prevailing at the time, and the public policy or the customs, habits and needs of the people have since changed;*

vi. ***The ratio decidendi of the precedent case is in conflict with fundamental principle of law****;*

vii. *There are conflicting decisions of equal weight that stand for the opposite preposition."* [Emphasis is added]

In my unfleeting view, the decision cited by Mr. Rutaihwa did not take into consideration the fundamental principle of law that is to the effect a preliminary objection must be on a pure point of law and not one that would require calling for evidence to prove its existence. In my view, the alleged involvement of members of the Lawgical Attorneys in the case is a factual issues which was given prominence based on some factual allegations in that case. In our case, successful pursuit of this point would require leading in a semblance of evidence to prove that:

(i) The said counsel were, singly or jointly, involved in the handling of the affairs of the Ladwa family as to be conflicted in the conduct of the present matter; and

(ii) That counsel who now constitute Lawgical Attorneys were in employment and active service when the firm in which they served was consulting and acting for the Ladwa family.

Proof of this is what would justify application of the provisions dealing with conflict of interest and disqualify counsel for the applicants. Nothing, in the entirety of the application or Mr. Rutaihwa's submission, has this contention been evident.

One more thing on this relates to the argument raised by Mr. Mtobesya. That conflict of interest would arise if Mr. Msyangi was to be lined up for testimony by either of the parties. Nothing conveys that feeling in this matter. I also take the position that, in any case, the present application is an architecture of two law firms one of which is not said to have been involved in any past dealings with the disputants' family. Disqualification, if any were to be ordered, would only cover one firm without scathing the joint work by the firms. Overall, I find this objection hollow and I resist the invitation to associate myself with it.

In the upshot of all this, I hold and find that the objections are barren of fruits and I overrule them. Costs to be in the cause.

It is so ordered.

DATED at **DAR ES SALAAM** this 28th day of April, 2022.

M.K. ISMAIL

JUDGE

28/04/2022