

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)
AT DAR ES SALAAM**

MISC. CIVIL APPLICATION NO. 568 OF 2021

(Originating from Civil Case No. 127 of 2021)

CAMEL OIL (T) LIMITED.....APPLICANT

Vs

BAHDELA COMPANY LIMITED..... RESPONDENT

Date of Last Order: 11/10/2022

Date of Ruling: 10/02/2023

R U L I N G

HON. MGONYA, J.

The Applicant has imposed before this Court an Application under the provisions of **Order XXXVI Rule 6 (i)(a) and XXXVII Rule 8 (1)(a) of the Civil Procedure Code Cap. 33 R.E 2019**. In due process of proceedings, the Respondent raised **2 Points of preliminary objections** to the effect that:

- ***The matter is res judicata.***
- ***The application is embarrassingly and legally vague and parts company with the main suit to which it purports to be interlocutory.***

The parties in this Application are each enjoying the services of legal Counsel whereby the Applicant is being represented by **Mr. John James** learned Counsel and the

Respondent is represented by **Mr. Samson Mbamba** learned Counsel. The two raised preliminary objections were ordered to be disposed of by way of written submissions. After complying with the Court's scheduled order on filing the submissions, I am now at the position to determine the same.

The Respondent submitted that he prays to begin with the **second objection** which is divided into two subheadings. Arguing the **first subheading**, the Respondent averred that the first prayer by the Applicant is for an order to stall and suspend business operations at the petrol station subject of the suit. The plot described is plot No. 1 and 336/365 Buguruni Dar es Salaam.

It is the Respondent's submission that the application is titled "**arising from Civil Case No. 127 of 2021**". In reference to Paragraph 3 of the Plaintiff in the original suit is titled **Civil Case No. 127 of 2021** of which does not describe the subject matter of the suit to be plot No. 1 and 336/365 Buguruni Dar es Salaam. Not even the location has been pleaded. Therefore, it can be noted that the plots which are the subject matters in the suit and the application are different. Hence making the application to be vague.

Submitting further on the **Second subheading** the Respondent contends that, the application parts company with the main suit to which it purports to be interlocutory. That is to

say prayer 2 and 3 in the Chamber Summons are not interlocutory to the main suit. They are completely strangers to the suit. The said orders prayed for are not preservatory in that they seek the Court to go extra mile to establish issues that are pending in the main suit which are sub judice and have not been pleaded in the main suit.

With regards to the **first objection**, the Respondent claimed that, in the present Application the applicant is seeking for an order “**stalling and suspending business operations in the petrol station**”, this is essentially seeking the same order refused in **Misc. Application No. 337 of 2021** except this time by the use of a different language. Since the said prayer was already denied. The Applicant may not come up with the same prayer in this application. Hence the Respondent prays that the matter be dismissed for being *res judicata*.

In reply the Applicant begun by submitting on the **second objection** that the same does not qualify to be an objection in respect to the case of **Mukisa Biscuits**. An objection is mainly known to be a point of law unlike what has been raised by the Respondent in the second objection.

However, the Respondent also failed to show how this application parts ways with the main suit and how the prayers

set therein are interlocutory. There is no law that has been cited or case law to show that the said objection is on point of law.

Moreover, arguing the **first objection**. The Applicant stated that the matter is not Res *judicata*, the Respondent has failed to clearly point out as how the application is parting ways with the main suit, and how the prayers sought herein are not interlocutory.

It is the Applicant's submission that, the gist of the application is basically intended to seek the orders of the Court to preserve the petrol station. The said petrol station is the main source of funds for Respondent to refund the money that was due. The prayer sought is aimed at preventing the same from being tempered or transferred as there is no any other asset known to the Applicant which can settle amount pending hearing of the main suit.

It is stated further, that the application before this Court has been preferred under the provisions of **Order XXXVI Rule 6 (i)(a) and Order XXXVII Rule 8(1)(a) of the Civil Procedure Code**, with prayers addressed in the Chamber Summons. The alleged application which is said to be similar with the one at hand was preferred under the provisions of **sections 68 (e), 95 and Order XXXVII Rule (a) and (b) and 2(1) of the Civil Procedure Code**.

Moreover, the Applicant contends that if looking at the provisions cited in these two applications not only are the different prayers but they also do not serve the same purpose. In **Miscellaneous Application No. 377/2021** orders sought were for temporary injunction while the Applicant was still supervising the petrol station. This current application comes when the Applicant has been already forcefully chased from the petrol station. Therefore, these two applications are different and the Applicant prays the objection to be overruled.

After having gone thoroughly through the submissions of both parties, I will align in determining the objections as submitted by the parties in their submissions beginning with the second objection followed by the first objection.

Beginning with the **second objection** stating that **the application is embarrassingly and legally vague and parts company with the main suit to which it purports to be interlocutory**, which was again at the time of submission broken down into two subheadings. One, being **impropriety of the application for being vague** and two, **the application parts company with the main suit to which it purports to be interlocutory**.

From the above objections, I am aware of the principle underlying as to what is a preliminary objection. It has been stated in a number of cases that a preliminary objection has

always to be *purely on a point of law*. And the same can be determined where you find *it does not need evidence so as to be proved*. The case of ***MUKISA BISCUIT MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD (1969) EA 696***, Justice Law rendered himself as follows: "***A preliminary objection consists of a point of law which has been pleaded or which arises clear by clear implication out of pleading and which if argued as a preliminary point, may dispose of the suit***".

In considering the second objection and its sub headings as broken down by the Respondent, I am of the firm view that the said objection lacks the qualities of being a preliminary objection for not being purely on a point of law and the same to be determined on merit calls for evidence to be adduced. It is from that circumstance that the said purported preliminary objection will not detain this Court for determination for the reasons stated above.

In determination of the **first objection** where the Respondent claims that the application filed by the Applicant herein is *res judicata*, and that the prayers sought are the same prayers as was in **Misc. Application No. 377 of 2021** that was before this Court. The only difference is that the language used is different hence this application is not fit for being entertained.

The Applicant on the other side argued for this instant application stating that first the laws used to move the Court in **Misc. Application No. 377 of 2021** and this one before this Court is different and the prayers prayed for are distinct and serve two different purposes.

Having gone through the records it has come to my knowledge that the Respondent at a certain particular time filed **Misc. Application No. 377 of 2021** which was an application for Temporary Injunction which was dismissed. This instant application is based on the prayers propounded in the Chamber Summons under **paragraph (a) to (c)**. Having carefully gone through **Misc. Application No. 377 of 2021** and the records of the instant application before me; I have observed that the parties in the said Applications are the same, the subject matter is the same but the orders sought and the intensions of the said orders are different and serve a different purpose as regarded to the circumstance of the two applications.

Res judicata is also known as claim preclusion it is where a case has been finally determined that is no longer subject to appeal and the doctrine meant to bar (or preclude) relitigating a claim between same parties again in the same Court. In *res judicata* the matter once heard and determined the same cannot be raised again. Having different orders between the two applications which serves a different purpose taking into

consideration the contents of the provisions of the laws used to move the Court lacks the matter before this Court to be rendered as *Res judicata*.

It is here then this Court finds that the 1st objection for the reasons stated above has no merits and is hereby overruled.

It is so ordered.

Costs to follow the event.



L. E. MGONYA

JUDGE

10/02/2023