

**THE UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF TANZANIA
JUDICIARY
DODOMA DISTRICT REGISTRY
AT DODOMA**

MISC. LAND APPLICATION NO. 7 OF 2023

AVODIA ANTIPAS SWAI..... APPLICANT

VERSUS

ASHA AHMED JAMA.....1st RESPONDENT

DODOMA CITY COUNCIL.....2nd RESPONDENT

THE COMMISSIONER FOR LANDS.....3rd RESPONDENT

THE REGISTRAR OF TITLES.....4th RESPONDENT

HONOURABLE ATTORNEY GENERAL.....5th RESPONDENT

RULING

Date of Last Order: 06/02/2023

Date of Ruling: 17/02/2023

Mambi, J.

This ruling emanates from the preliminary objection raised by the defendants that the matter at this court is res-sub judice. The learned counsel for the first respondent Mr. Nassoro Juma and the State Attorney Jenifer Kaaya for the 2nd, 3rd, 4th and 5th respondents jointly submitted that the application filed by the applicant is an abuse of court

process since there is another application Rev. No. 9 of 2020 which is pending at the High Court Dar es Salaam as indicated under para 6 of the applicant's affidavit. They averred that the records show that there is an application with similar subject matter that is pending at the High Court Dar es Salaam challenging the decision of the Kisutu RM's court. Mr. Nassoro was of the view that since in that application at the High Court-Dar Es Salaam, the applicant is praying to be declared the owner, the intended suit in this court shows similar prayers. The learned counsel further submitted that the applicant in his affidavit (para 9) indicated he has had filed 90 days' notice to sue the 2nd, 3rd, 4th and 5th. Mr. Nassoro argued that the land in dispute in this court is the same subject matter at the High Court Dar es Salaam. The counsel was of the view that this show that the matter in this court is res-sub judice. He argued that it is trite law that one cannot ride two horses at a go, meaning that in law a party is not allowed to file two similar cases in the court or different courts that may result into conflicting decisions. The learned counsel was of the view that even if some of the respondents in this matter at this court are not the same with those in Dar es Salaam, but there are similar orders applied for in two different courts qualifying this application to be res-sub judice. He referred the decision of the Court in **Martha Iswalwile Kahabi vs Marietha Salehe and 3 Others** Civil Application No. 5 of 2012 at page 4.

Mr. Nassoro went on submitting that the applicant was required to file his injunction in Dar Es Salaam instead of filing an application in this court. He averred that the applicant on the records has intended to file the suit on the subject matter that has the decree in Dar Es Salaam that declared the owner and the said decree is subject for an application for review in the High Court at Dar Es Salaam. In this regard, the counsel

was of the view that this application and the intended suit is a try and error exercise and form shopping. The counsel referred this Court to the decision of the court in **Sosthenes Bruno and another Vs. Flora Shauri**, Civil Appeal No. 249 of 2020.

On the other hand, the Learned State Attorney Ms. Jennifer supported the submissions made by the counsel for the first respondent and briefly added that the applicant's application was based on the intended suit to be filed after 90 days. She argued that since the intended suit to be filed in this Court is similar with an application pending in Dar es Salaam, it means that this application at this court was res-sub judice. The learned State Attorney was of the view that even if the parties between the two suits are different nonetheless the subject matter is the same, therefore this application according to her, was res-sub judice. Ms. Jennifer went on submitting that this application was both res-sub judice and res-judicata since the matter was already decided by the court of competent jurisdiction in Kisumu via Civil Case No. 69 of 2021 and another was pending in the High Court in Dar es Salaam.

Submitting for the applicant against the preliminary objection, the learned counsel, Mr. William Fungo contended that the learned counsels for the respondents had mis directed themselves with regard to an application in this court. Mr. Fungo argued that this was a mareva injunction as the applicant had not yet filed the main suit as she intend to do so after expire of 90 days. The learned counsel contended that there were no two "horses" being ridden since there was no any party in the case at Dar es Salaam that had been implicated in this matter.

Mr. Fungo contended that this application was neither *res-sub judice* nor *res-judicata* since the cause of action the applicant intends to trigger in the intended suit has nothing to do with ownership of lands. Mr. Fungo went on contending that the only way for the applicant to stay any action by the respondents is by way of application as she has had done in this case. The counsel referred this Court in the decision of the court in **Karori Chogoro Vs. Waitihache Merengo** Civil Appeal. No. 164 of 2018 at page 10. In his final submissions, Mr. Fungo argued that, the applicant could have not filed the application in Dar es Salaam since the respondents at the case in Dar es Salaam are not concerned with what is being done by the respondents in this matter at Dodoma. The counsel added that all cases referred by the counsels for the respondents are distinguishable with the matter at hand.

I have carefully gone through the submissions by both parties on the preliminary objection raised by the respondents. I have also keenly gone through all records especially the judgment and decree made by the Kisutu Rm's court that has led to an application for revision pending at the High Court in Dar Es Salaam. I am also aware that the applicant has filed ninety days' notice with an intention to file the suit in this court.

The question to be answered is whether the matter in this court is *res- sub judice* or not? Before I determine as to whether the matter is *res-sub judice*, let me first briefly highlight the concept on the doctrine of *res sub judice* as found in our law, case studies and other writings and books.

,I wish to briefly address as to what the word *sub judice* means. Generally, "*Sub Judice*" in Latin means "Under Judgement". It denotes

that a matter or case is being considered by a Court or Judge. When two or more cases are filed between the same parties on the same subject matter, in two or more different Courts, the competent court has power to "Stay Proceedings" of another Court. This term demarcates the discussion of any matter that is before the court prior its determination. In other words, Res Sub Judice, operates as a stay from the same subject matter in issue being parallel instituted in two different Courts.

The doctrine of *Res Sub Judice* is of critical importance to appreciate that the rule is limited in its operation. It does not apply unless the necessity of its operation has become quite clear. It applies, when it does, only to prevent the discussion of the precise issue of a suit before the court, not to prevent general discussion of collateral or related matters. I wish to make reference to a persuasive decision in ***Ex parte Bread Manufacturers Ltd; re Truth and Sportsman Ltd and another* [1937] SR (NSW)** where it was held:

"it is of extreme public interest that no conduct should be permitted which is likely to prevent a litigant in a Court of Justice from having his case tried free from all manner of prejudice."

The common law principle of *res sub judice* is incorporated in section 8 of CPC, Cap 33 [R.E.2019]. It applies when a second suit is instituted by the same title in the court of competent jurisdiction with regard to the same matter directly and substantially in issue in a previous suit which is pending. Thus by applying section 8 of the CPC; the court orders for the stay of the second suit, if the legal requirements are met. Section 8 reads as follows:

*"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”.

The word “shall” under the law of Interpretation Act, Cap. 1 [R: E 2019] implies mandatory and not optional. Reference can also be made to another persuasive decision in **Escorts Const. Equipments Ltd V Action Const Equipments Ltd 1998** where the court in India held that: The conditions requisite to invoke S.10 CPC (which is parameter with section 8 of our CPC, Cap 33) are:

- *Matter in issue in both the suits to be substantially the same.*
- *Suit to be between the same parties or parties litigating under them*
- *Previously instituted suit to be in the same Court or a different Court, which has jurisdiction to grant the relief asked.*

It should be noted that the doctrine of res sub-judice deals with stay of suits. This means that the rule applies to trial of a suit and not the institution thereof. It also does not preclude a court from passing interim orders, such as, grant of injunction or stay, appointment of receiver, etc.

The object of the rule contained in section 8 is to prevent courts of con-current jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action, the same subject-matter and the same relief. The Policy of law is to confine a plaintiff to one litigation, thus obviating the possibility of two contradictory verdicts by one and the same court in respect of the same relief. See ***Takwani. C. K on Civil Procedure With Limitation 1963 7th Edition 2014 at pages 65-68.***

Indeed, the conditions of res-sub judice under section 8 of the CPC, Cap 33 which is in pari materia to section 10 of the Indian Civil Procedure Code can be briefly summarized as follows;

- (i) There must be **two suits**, one previously instituted and the other subsequently instituted.
- (ii) The matter in issue in the subsequent suit **must be directly and substantially in issue in the previous suit.**
- (iii) Both the suits must be **between the same parties** or their representatives.
- (iv) The **previously instituted suit must be pending** in the same court in which the subsequent suit is brought or in any other court in Tanzania.
- (v) The court in which the previous suit is instituted must have jurisdiction to grant the relief claimed in the subsequent suit.
- (vi) Such parties **must be litigating under the same title** in both the suits.

My considered view on this section (8) of the CPC is that it intends to protect a person from multiplicity of proceedings and to avoid a conflict of decisions. The very provision also aims to avert inconvenience to the parties and gives effect to the rule of res judicata.

Furthermore, *the doctrine of res sub judice* under section 8 of Cap 33, in my view, applies when a second suit is instituted by the same title in the court of competent jurisdiction with regard to the same subject matter directly and substantially in issue in a previous suit which is

pending. The main conditions for the doctrine that can make the court to invoke the above section 8 are that the matter in issue in both cases are to be substantially the same and the previously instituted suit must be pending in the same or any other court competent to grant relief claimed in the suit and relief claimed in subsequent suit.

This rule applies to trial of a suit not the institution thereof. In other words, when two or more cases are filed between the same parties on the same subject matter, the competent court has power to stay proceeding.

The question is, are there two subsequent suits with similar subject matter in two different courts? In my view, the answer is Yes, since the subject matter in this Court is the same subject matter at the High Court of Dar Es Salaam. This implies the matter at this Court is res sub judice. I am of the considered view that the conditions and principles on the applicability of the doctrine of res-sub judice have been met in our case at hand. In other words, there are **two parallel litigations** with respect to the **same subject matter** pending at this Court and High Court Dar Es Salaam.

Then the question which follows is; what are the remedies or orders to be made by this Court?

Reference can be made to the decision of the court in ***Joseph Ntongwisangue another V. Principal Secretary Ministry of finance & another Civil Reference No.10 of 2005*** (unreported) where it was held that:

"in situation where the application proceeds to a hearing on merit and in such hearing the application is

*found to be not only incompetent but also lacking in merit, **it must be dismissed**. The rationale is simple. **Experience shows that the litigations if not controlled by the court, may unnecessarily take a very long period and deny a party in the litigation enjoyment of rights granted by the court.**"*

Reference can also be made to the decision of the court of Appeal of Tanzania in ***The Director of Public Prosecutions v. ACP Abdalla Zombe and 8 others*** Criminal Appeal No. 254 of 2009, CAT (unreported) where the court held that:

*"this Court always first makes a definite finding on whether or not the matter before it for determination is competently before it. **This is simply because this Court and all courts have no jurisdiction, be it statutory or inherent, to entertain and determine any incompetent proceedings.**"*

From the foregoing discussions and observations, I am of the settled mind that the purported application in this Court is fatally incompetent and cannot stand as a valid application. Therefore, I am of the firm considered view that this application has no merit since it has been prematurely filed and is in the contravention of the principle of res-sub judice. In the view of aforesaid, this application is entirely dismissed.

It is accordingly ordered so





A. J. MAMBI

JUDGE

17/2/2023

Court: Judgment delivered in Chambers this 17th day of February, 2023
in presence of both parties.

A. J. MAMBI
JUDGE
17/2/2023