

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO.128 OF 2022

(Originating from Civil Appeal No.162 of 2021 Kinondoni District Court)

MARY HERRIET CHIBIBI STELLA LONGWAY..... 1ST APPELLANT

AMINA MARTIN BAGULE.....2ND APPELLANT

VERSUS

TUJIJENGE TANZANIA LTD.....1ST RESPONDENT

SEPCO DEBT COLLECTION AND

AUCTIONEERING CO. LTD.....2ND RESPONDENT

JUDGMENT

09/02/2023 & 24/03/2023

POMO, J

The appellants are aggrieved with the decision of Kinondoni District Court (the trial court) delivered on 11/08/2022 Hon. H.S. Msongo – SRM by upholding the preliminary objection on point of law raised by the first Respondent to the effect that the Appellants’ suit before that court was *res*

– *subjudice* in that Land Application No.129 of 2021 is pending before the District Land and Housing Tribunal of Kinondoni (the DLHT). In so upholding, it dismissed the suit with costs as it also found it to be an abuse of court process. The single ground of appeal preferred reads as follows: -

1. That, the trial Magistrate erred both in law and fact by dismissing the suit on ground of being res subjudice instead of staying the proceeding

On 9/2/2023 the appeal came for hearing. Ms. Agnes Mastajabu, learned counsel appeared for the Appellants holding brief for Ms Jacqueline Kitwenga, learned advocate while Ms. Brenda Godwin Mahimbo, learned counsel appeared for the Respondents. I ordered the appeal be argued by way of written submission the order which is complied with by the parties. I thank them for the well-researched and industrious submissions for and against the appeal

Submitting in support of the ground of appeal, the appellant argued that the matter before the trial court ought to be stayed pending determination of the matter before the DLHT which is Land Application No.129 of 2021 instead of dismissing it. That, by dismissing the suit entailed

the matter was heard on merit which is not the case. In support of the argument the case of **Yahya Khasim Versus Hamida Haji Idd and Two Others, Civil Appeal No.225 of 2018 CAT at Bukoba (unreported)** pp. 6-7 is cited.

It was the appellant's further argument that the trial magistrate overlooked the whole doctrine of *res subjudice* conditions which are four. On this, she cited the case of **Wengert Winfroze Safaris (Tz) Limited Versus The Minister For Natural Resources And Tourism And Another, Misc. Commercial Cause No.89 Of 2016 HC (Commercial Division) At Dar Es Salaam (Unreported)** pg.12 and 17 where this court held that the fundamental test to the doctrine of *res subjudice* is embodied in section 8 of the Civil Procedure Code Cap.33 R.E.2019 that whether on final decision being reached in a previous suit, such decision would operate as *res judicata* in a subsequent suit.

The appellants rested the submission contending that the trial magistrate being of the opinion that the suit, civil suit No.162 of 2021, was *res subjudice* she ought to have stayed the proceeding pending determination of Land Application No.129 of 2021 before DLHT rather than dismissing it. She then prayed the appeal be allowed with costs

In reply, the respondents, while supporting the trial court findings, argued that staying the appellants' suit would amount to having two cases pending in courts involving the same subject matter and parties. To bolster the argument they cited the case of **Twaha Said Massawe Vs Teresia Damian & Others, Land Case No.48 of 2019 HC at Dar es Salaam (unreported)** pp.5 – 6 where this court held that: -

"Outrightly, this court can not condone fishing expedition done by the plaintiff considering that foreclosure is sanctioned by the law. In essence what the plaintiff is claiming is the recovery of his purchase price as a result he is filing multiple cases to see where the egg nests. While I agree that the two courts have different jurisdictions, I am still with the 1st defendant that the act by Plaintiff is an abuse of court process and goes contrary to the spirit of preventing multiplicity of litigation".

That, in the cited **Twaha** case (**supra**) this court having so found, went ahead to struck out the suit in avoidance of multiplicity of unnecessary cases and abuse of court process. In line to the findings, the respondents are of the argument that the trial court didn't error in law and fact by dismissing the suit on the ground of being **res subjudice** contending that it

saved both the court's time and that of the respondents in dealing with two pending disputes on the same subject matter and that even the appeal herein is an abuse of court process. Again, have cited the case of **Osingo Construction Co. Limited Vs Aloyce John Mwasuka, Land Case No.232 of 2022 HC at Dar es Salaam (Unreported)** at page 8 where this court observed, referring to section 8 of the CPC, that no court should proceed with a trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted pending suit

In the end, it was the respondents' prayer the appeal be found unmerited and it be dismissed with costs

In determining this single ground of appeal preferred by the appellants, I have given due scrutiny the rival submissions made by the parties for and against the appeal, the impugned ruling of the trial court dismissing the Appellants' suit and the Appellants' plaint filed before the trial court

It is evident from the parties' submissions that in this appeal they are not in dispute on the findings by trial court that the appellants' suit, Civil Case No.162 of 2021 the subject matter therein is substantially in issue in a

pending Land Application No.129 of 2021 before the DLHT for Kinondoni. The appellants clearly pleaded so under paragraphs 9; 10; 11 and 12 of the plaint. Starting with paragraph 12, the plaint reads thus: -

*"12. The acts of the Defendants amount to abuse of the law **by taking one of the securities** to defeat the ends of justice while the matter is still before the tribunal and has not yet been determined on merit".*

And paragraph 9 of the plaint reads as follows: -

*"9. That, inspite of the second (2nd) Plaintiff and the 1st defendant several attempts to settle the matter amicably but the dispute between the second (2nd) Plaintiff and the 1st Defendant failed that it necessitated the second (2nd) Plaintiff to file an **application No.129 of 2021** and as a result the said application, **the Tribunal issued an injunctive order restraining the 1st Defendant and its agent from auctioning the securities of the credit facility enjoyed by the second (2nd) Plaintiff.** Attached hereto and collectively marked as MHCSL-4 are **copies of pleadings** and the plaintiff shall crave leave of this honourable court to adopt it as forming part of this plaint".*

That being the case, I subscribe to the findings by the trial court as a correct position that under the requirement of section 8 of the Civil Procedure Code, [Cap 33 R.E.2022] the appellant's suit, Civil Case No. 162 of 2021 is *res subjudice*.

The area where the parties are in disagreement is, having found the appellants' suit to be *res subjudice*, what was the way forward to be taken by the trial court? Was it correct for the court to dismiss the suit instead of staying the proceeding? This is the centre of the Appellants' ground of appeal which reads that: -

"That, the trial Magistrate erred both in law and fact by dismissing the suit on ground of being res subjudice instead of staying the proceeding".

On this, need arise as to what was the findings by the trial court. Let the impugned trial court findings speak by itself, per page 6 of the typed ruling, where the trial court stated as follows: -

"Regarding the prayer to stay the suit again I find that, this will amount to having two pending suits regarding the same subject matter for the same parties in this

court and the tribunal having jurisdiction to grant the relief claimed. This will again contravene section 8 of the Civil Procedure Code (supra) and **abuse of court process**

I therefore find that, the point raised have merit and it is upheld.

*Consequently, **therefore the suit is dismissed with costs.***

It is so ordered”.

As pointed out earlier; the position taken by the trial court in dismissing the Appellants’ suit is being supported by the Respondents who are of the argument that staying the appellants’ suit would amount to having two cases pending involving the same subject matter and parties and bolstered the argument by citing the case of **Twaha Said Massawe Vs Teresia Damian & Others, Land Case No.48 of 2019 HC at Dar es Salaam (unreported)** pp. 5 – 6 where this court held that: -

"Outrightly, this court can not condone fishing expedition done by the plaintiff considering that foreclosure is sanctioned by the law. In essence what the plaintiff is claiming is the recovery of his purchase price as a result he is filing multiple cases to see where the egg nests. While I agree that the two courts have different jurisdictions, I am still with the 1st defendant that the

act by Plaintiff is an abuse of court process and goes contrary to the spirit of preventing multiplicity of litigation”.

On the other hand, the Appellants contention is that instead of dismissing the suit the trial court ought to have stayed it pending determination of the matter before the DLHT asserting that dismissing the suit entailed the matter was heard on merit which is not the case and **Yahya Khamis** case (**supra**) is referred to support the argument.

In my view, although the learned trial magistrate didn't cite the Court of Appeal decision in **The Managing Director, ABSA Bank Tanzania Limited (Formerly known as Backlays Bank (Tanzania) Limited Versus Felician Muhandiki, Civil Application No.37/01 of 2021 CAT at Dar es Salaam (Unreported)** but she decided in a similar way. In **Felician Mhandiki** case (**supra**) the Court of Appeal was confronted with akin objections that , *the application before it was res subjudice* and two, *it was an abuse of court process*. It upheld the objections and struck out the application. In so finding, the Court of Appeal, at page 13, stated as follows:

*"Although CPC is not applicable as we have our own Rules governing proceedings before this Court, in principle, the present application before this court was **res subjudice**, at one point*

since the two applications between the same parties and on the same subject matter could not exist simultaneously.

The Court of Appeal firmly explained, at page 14, thus:-

*"...there was no need to have two applications on the same subject matter and between the same parties but before different courts, albeit with concurrent jurisdiction. **Under no circumstances the two applications could have procedurally co-existed".***

And at page 15, the Court of Appeal went on stating that: -

*"By keeping both applications alive, **the applicant was indeed riding two horses, the practice abhorred by the courts and, aside from being unprocedural, was also an abuse of the court process**".*

The Appellants' cited case of **Yahya Khamis (supra)** sought to guide this court to reverse the dismissal order meted instead of staying the suit, that caselaw is distinguishable to the scenario at hand. In that case there were no two pending cases rather one case in which the validity of the Last

Will was in issue and needed to be resolved by another court hence stay of proceedings pending the resolving the same

Likewise, the case of **Wengert Winfroze Safaris (Tz) Limited** cited (supra) which is the decision of this court can not supersede the position of the Court of Appeal decision, the **Felician Mhandiki** case (supra) for that matter.

Guided by the above court of appeal decision in Felician Mhandiki case, it is my view that the appellants' appeal is unmerited as I find nothing to fault the trial court findings save for order dismissing the Appellants' suit instead of striking it out in the manner the court of appeal did. I thus substitute the dismissal order to that of striking out the suit.

In the upshot, I dismiss the appeal with costs. It is so ordered.

Right of Appeal explained to any aggrieved party.

Dated at Dar es Salaam this 24th day of March, 2023.



MUSA K. POMO

JUDGE

24.03.2023

Judgment delivered on this 24th March, 2023 in presence of the Appellant
and in absence of the Respondent and her advocate



MUSA K. POMO

JUDGE

24.03.2023

