

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC COMMERCIAL CAUSE NO. 9 OF 2007

IN THE MATTER OF THE COMPANIES ACT
(CAP.212) R.E.2002

AND

IN THE MATTER OF JIVAT CHANDULAL
LAXMAN DAHYA YADAVE.....PETITIONER

AND

IN THE MATTER OF LAXMAN SHOE
MANUFACTURES LIMITED.....1ST RESPONDENT

AND

THE REGISTRAR OF COMPANIES..2ND RESPONDENT

R U L I N G

Date of final submission August 20, 2007.

Date of ruling September 7, 2007.

MJASIRI, J.

The petition has been filed by Jivati Chandulal
Yadave against Laxman Shoe Company and the Registrar
of Companies seeking the following orders:

- i. An order directing the first Respondent to convene a General Meeting at which Directors of the second Respondent will be appointed including the Petitioner and the changes effected be entered into the first Respondent's register.*

- ii. An order directing the second Respondent to rectify and regularise the Register of the first Respondent so as to show the correct shareholders, and the number of shares held by each and the directors of the company.*

Both Respondents filed answers to the petition. The Petitioner was represented by Mr. Ngalo Advocate. The first and second Respondents were represented by Mr. Byamungu and Mr. Kakwezi Advocates.

The first Respondent raised the following preliminary objection through a notice filed in court:

That the matter presently in dispute in this petition, specifically, the petitioner's shareholding and

directorship is directly and substantially in issue in the *High Court Land Division at Arusha, Land Case No.9 of 2006* between the petitioner and the first Respondent and the Directors of the first Respondent. Consequently the matter is subjudice in the competent court and there is a danger and likelihood of reaching two conflicting decisions on the same issue. Copies of the pleadings, i.e. the plaint, written statement of defence and reply thereto are annexed hereto and marked **“Annexure R3.”**

Counsel for the first Respondent Mr. Byamungu Advocate submitted as under in support of the Preliminary objection raised. According to Counsel for the first Respondent the matter presently in dispute in this petition is directly and substantially in issue in a High Court (Land Division) at Arusha Land Case No.9 of 2006 in which the Petitioner, the first Respondent and Directors of the first Respondent are parties. The petition before this court is centred on the issue whether or not the petitioner is a shareholder and director of the first Respondent. The petitioner will be granted the reliefs

sought in the Arusha case if the court determines that she is a shareholder and director of the first Respondent. Counsel relied on section 8 of the Civil Procedure Act.

Counsel further submitted that in Land case No.9 of 2006 one of the issues to be determined by the court is whether or not the petitioner is a shareholder and director of the first Respondent.

Counsel for the first Respondent made reference to Sarkar on the Code of Civil Procedure, 9th edition 2000 at page 71 which provide for the conditions for stay of a suit under section 8 of the Civil Procedure Act:

- i. The matter in issue in the second suit is also directly and substantially in issue in the first suit.*
- ii. The parties in the second suit are the same or parties under whom they are or any of them litigating under the same title.*
- iii. The court in which the first suit is pending is competent to grant the relief claimed in the subsequent suit.*

iv. That the previously instituted suit is pending:

- (a) in the same court in which the subsequent suit is brought.*
- (b) In any court in Tanganyika which has jurisdiction over the matter.*

Counsel for the first Respondent further submitted that the test for determining whether the matter in issue in the second suit is directly and substantially in issue in the first suit is whether the final decision in the previous suit would operate as res judicata in the subsequent suit. According to *Jinnat V HJ Mills* 36 CWN 667 it does not matter that the subject matter and cause of action of the two suits are not the same Sarkar (supra).

Counsel also cited Mulla, the code of Civil Procedure 16th Edition Vol. I at page 142 which stated as follows in respect of section 10 of the Indian Civil Procedure Code which is in pari materia with section 8 of the Civil Procedure Act Cap 33 [R.E.2002]:

“The object of the section is to prevent courts of concurrent jurisdiction from simultaneously trying

two parallel suits in respect of the same matter in issue. That the underlying object is to avoid two parallel trials on the same issues by courts and to avoid recording of conflicting findings on issues which are directly and substantially in issue in previously instituted suit.”

Counsel also made reference to the cases of **Hamidu Ahmad Pandit versus Munsiff Pulwama** 1997 SLJ 95, 102 and **Vrinda versus Indra Devi** 1994 (1) KLT 448 cited in Sarkar (supra) where it was stated that it is not necessary for the application of section 10 (of the Indian CPC) that all the parties should be the same on both suits.

It is enough if there is substantial identity of the parties.

Counsel prayed that the suit be stayed pending the final determination of the High court (Land Division) Case No.9 of 2006 at Arusha.

Counsel for the second Respondent did not file any written submissions. Counsel for the Petitioner in opposing the preliminary objection submitted as follows.

According to Counsel for the Petitioner the preliminary objection raised by counsel for the 1st Respondent does not meet the test of *Mukisa Biscuits Manufacturing Limited V West End Distributors* 1969 EA 696 as it does not consist of a pure preliminary point of law.

Counsel further submitted that the ground of objection raised though a legal one, would not in the circumstances of this case dispose of the petition. Counsel further stated that the arguments raised by Counsel for the first Respondent made reference to the pleadings and annexures.

Counsel therefore asked the court to dismiss the preliminary objection with costs.

Counsel also further submitted that first Respondent's objection should have been brought by way of an application and not by way of preliminary objection.

The Counsel for the Petitioner also submitted that the reliefs claimed in the petition before this court and in the suit before the High Court Land Division are different. Counsel further submitted that the ingredients required for the doctrine of res subjudice do not exist.

In relation to the matters in issue Counsel cited Mulla. The Code of civil procedure 16th Edition at page 142 to 147 where it was stated:

“the mere fact that one issue is identical in two suits is not enough to attract section 10 of the Indian CPC.”

In relation to the same parties Counsel for Petitioner submitted that none of the Respondents in this petition is a Defendant in the High Court Land Division Case.

In relation to the court to which the first suit is pending, Counsel submitted that the jurisdiction of the two courts is distinct and different from one another.

After reviewing the submissions made by Counsels for the Petitioner and the Respondent and the law

applicable I would like to make the following observations.

On looking at the petition and the suit filed in the Land Division of the High Court the pertinent issue is the establishment of the rights of the Petitioner as a director and shareholder of the company (the first Respondent). Whereas the company is the first Respondent in the petition, the company is the second Plaintiff in the Land case, this fact has been denied by the Counsel for the Petitioner, though this is how the pleadings are set.

Section 8 of the Civil Procedure Act Cap 33 [R.E. 2002] provides as under:

“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 Tanganyika having jurisdiction.”

According to Sarkar on the Code of Civil Procedure. *“Section 10 is clear, definite and mandatory. The court in which the subsequent suit is instituted is prohibited from proceeding with its trial in certain specified circumstances.”*

Section 10 of the Indian civil procedure Code is in pari materia with our section 8 of the Civil Procedure Act.

The test is not whether the subject matter is the same but whether the cause of action is identical.

The applicability of the subjudice rule is not intended to give neither a permanent or a temporary relief to any party in a suit, but to stay proceedings of a subsequent suit. I am inclined to agree with the submissions made by the Counsel for the first Respondent in view of the prevailing circumstances.

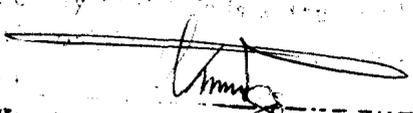
In view of what has been stated hereinabove, the petition is hereby stayed pending the outcome of the case filed in the High Court Land Division. It is so ordered.

Sauda Mjasiri
Judge
September 6, 2007

Ruling delivered in chambers this 7th day of September in the presence of Mr. Ngalo Advocate for the Petitioner and Mr. Byamungu and Kakwezi Advocates for the 1st and second Respondent.

Sauda Mjasiri
Judge
September 7, 2007

2035 words
Jd.

I Certify that the above is a true and correct copy of the original.
Signature: 
Reg. No. _____
Date: 21/10/07
Court Dsm.