

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM**

COMMERCIAL CASE NO. 18 OF 2007

**JEREMY WOODS.....1ST PLAINTIFF/APPLICANT
CAMERON WOODS.....2ND PLAINTIFF/APPLICANT**

VERSUS

**ROBERT CHOUDURY.....1ST DERENDANT/RESPONDENT
CULLINAN CUT & POLISH LTD...2ND DEFENDANTS/RESPONDENT**

R U L I N G

MJASIRI, J.

Date of hearing of application March 28, 2007.

Date of ruling: April 4, 2007.

The Applicant/Plaintiff has filed an application against the Respondent/Defendant asking for an order for attachment of the Defendant's factory at Mikocheni, Dar es Salaam and all other equipment therein before judgment.

The application arises from the suit filed by the Applicant/Plaintiff against the Respondent/Defendant for a refund of USD 200,000. The Respondent/Defendant raised a preliminary objection on the following ground:

“ that the suit which the instant application is based is res sub judice as there is a matter pending in the Resident

Magistrate court at Kisutu based on the same subject matter between the same parties.”

The applicant is represented by Ms Kashonda Advocate and the Respondent is represented by Mr. Hyera Advocate.

The Respondent relied on section 8 of the Civil Procedure Act Cap.33 [R.E.2002] in support of the preliminary objection.

According to the Counsel for the Respondent there is a suit at Kisutu Resident Magistrate’s Court (Civil Case No.342 of 2006) between the same parties and upon the same subject matter. The learned Counsel for the Respondent submitted that the present suit should be stayed. If the applicants have any claim against the Respondents they should proceed by way of counter claim.

Learned Counsel for the Applicant opposed the preliminary objection. According to her:

- 1. The matter is not between the same parties.*
- 2. The matter in the Resident Magistrate’s court is based on a different subject matter.*

Section 8 of the Civil Procedure act 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 under whom they or any them claim litigating under the same title where such suit is pending in the same way or any of other court in Tanganyika having jurisdiction to grant the relief claimed.”

Upon reviewing the pleadings filed in this court and the pleadings filed in the lower court I would like to state as follows:

- 1. Even though the parties are the same, in the lower court the Defendants in this case are the plaintiffs.*
- 2. The claim in the lower court (according to the pleadings filed in the lower court) is for a declaratory order and an order for permanent injunction against the Defendants. The claim in this court is for a refund of USD 200,000 from the Defendants alleged to have been invested by the Plaintiffs in the Defendant’s business.*

In **Jadva Karsan V Harnan Singh Bhogal** (1953) 20 EACA 74, it was held as under:

Matter in issue in section 6 of the Civil Procedure Ordinance (now section 8 of the Civil Procedure Code) does not mean any matter in issue in the suit, but has reference to the entire subject matter in controversy. It is not enough that one or more issues are in common. The subject matter in the subsequent suit must be covered in the previous suit and not vice versa.

The Plaintiffs are also not litigating under the same title.

In view of what is stated hereinabove the preliminary objection is hereby dismissed with costs.

SAUDA MJASIRI

JUDGE

APRIL 3, 2007

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jd.

I Certify that this is a true and correct
copy of the original signed copy of the Ruling
Sign _____
Reg. Sec. Comm. of Court Desm.
Date 11/4/2007