

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

COMMERCIAL CASE NO. 18 OF 2015

EXIM BANK (TANZANIA) LIMITED PLAINTIFF

VERSUS

**BHESANIA GARAGE LIMITED
TIMBERTONE (T) LIMITED
RAMESH RAMJI BHESANIA
BHARAT RAMJI BHESANIA
KISHORE RAMJI BESANIA** } **DEFENDANTS**

15th September & 3rd November, 2015

RULING

MWAMBEGELE, J.:

This is a ruling in respect of a preliminary objection raised by the defendants against the suit filed by the plaintiff. The preliminary objection is to the effect that the suit is *res subjudice* with Land Case No. 25 of 2014 which is still pending in this court.

This preliminary objection was argued by way of written submissions the parties having so prayed to the court and the court, having granted the

prayer, proceeded to schedule the written submissions dates. Both parties have been timeous in presenting their written submissions.

The defendants submit in support of the preliminary objection that before this case was instituted on 11.02.2015 claiming against the 1st, 3rd, 4th, and 5th defendants jointly and severally for payment of USD 927,427/86 and Tshs. 37,982,702/12 being term loan and overdraft facilities extended to the defendants and for USD 1,286,648/77 and Tshs. 1,334,559/16 being the amount of term loan facility extended to 2nd defendant and guaranteed by the 3rd, 4th and 5th defendants, there had previously been instituted Land Case No. 25 of 2014 in this court; the High Court of Tanzania (Dar es Salaam, Main Registry) on the same subject matter and between the same parties. That suit was instituted on 30.04.2014 seeking for, *inter alia*:

“a declaration that the defendants acts of offering a erroneous and unfair investment advice adversely impacted upon the defendant and caused substantial business loss occasioning failure on the part of the defendants to repay the loan and for an order invalidating the allegedly outstanding loan amount for being erroneously factored on irrational considerations”.

The defendant submit further that in that suit, there have been pleaded issues of misrepresentation, forgery and other categories of fraud to be determined by the court and the court and that the findings and judgment, if issued, will render the instant case *res judicata*. The defendants thus pray

that this suit be stayed pending the decision in Land Case No. 25 of 2014. The case of ***Rugambwa Cyrill John Pasha Vs Harbinder Singh Sethi and others***, Commercial Case No. 105 of 2014 (unreported) has been cited to buttress this proposition.

On the other hand, the plaintiff strenuously resists the preliminary objection and states that in order for the doctrine of *res subjudice* to be applicable, as enshrined under section 8 of the Civil Procedure Code, the following four components must exist:

- (i) There must be two pending suits, one previously filed;
- (ii) The parties to the suit must be same or must claim to be suing under the same title
- (iii) The matter in issue must directly and substantially the same in the two suits; and
- (iv) The two suits must be pending in a court of competent jurisdiction.

According to the plaintiff's submissions the first and last requirements in the above four ingredients have been met. That is to say, it is not disputed that here are two pending suits in courts of competent jurisdiction. However, the respondent seriously disputes the existence of the second and third ingredients.

On the second ingredient, it is averred that the first defendant in Land Case No. 25 of 2014 is the plaintiff and the plaintiffs in Land Case No. 25 of 2014 are the first and second defendants herein. Thus the second and third

defendants in Land Case No. 25 of 2014 are not parties in this case. And the third, fourth and fifth defendants herein are not parties in Land Case No. 25 of 2014. On this premise, the plaintiff submits, the doctrine of *res subjudice* cannot apply.

As to the third ingredient, the plaintiff aver that the matter in issue in Land Case No. 25 of 2014 is not directly and substantially the same in the present case. It is submitted further that in order to determine whether the doctrine of *res subjudice* to apply, regard must also be had to causes of action in the two suits and the issues involved.

Rejoining, the learned counsel for the respondents has reiterated what he stated in his submissions in chief.

The present matter will not detain me. As rightly stated by the learned counsel for the plaintiff, in order for an application of this nature to succeed, there must be proof to the satisfaction of the court of the following four ingredients:

- (i) There must be two pending suits, one previously filed;
- (ii) The parties to the suit must be same or must claim to be suing under the same title
- (iii) The matter in issue must directly and substantially be the same in the two suits; and
- (iv) The two suits must be pending in a court of competent jurisdiction.

The four ingredients must co-exist in order for the doctrine of *res subjuce* to apply. Likewise, the cause of action and issues involved in the two suits must be taken into account. I propose to resolve the preliminary objection by the third ingredient as appearing in the list above.

The subject matter in the present suit, as already alluded to above, is the loan facility advanced to the 1st, 3rd, 4th, and 5th defendants jointly and severally for USD 927,427/86 and Tshs. 37,982,702/12 being term loan and overdraft facilities extended to the defendants and for USD 1,286,648/77 and Tshs. 1,334,559/16 being the amount of term loan facility extended to 2nd defendant and guaranteed by the 3rd, 4th and 5th defendants. The plaintiff wants to recover the loan so that the lending process, which is the main line of business, is not curtailed.

For easy reference, let me reproduce the provisions of section 8 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002. The section provides:

“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 provisions of section 8 of the CPC would, *inter alia*, apply only if the whole of subject matter in both suits is identical and not merely one of many issues in the two suits is identical. Sir Dinshah Fardunji Mulla in **Mulla: the Code of Civil Procedure** (18th Edition, 2011) states at page 168 on the commentary to section 10 of the Indian Code of Civil Procedure (which is *in pari materia* with our section 8) as follows:

“The words ‘directly and substantially in issue’ are used in contra-distinction to the words ‘incidentally and collaterally in issue’. That means that section 10 would apply, only if there is identity of the matter in issue in both the suits meaning thereby, that the whole of the subject matter in both the proceedings is identical and not merely one of the many issues arising for determination.”

And in simpler terms, it was stated by the Supreme Court of India in **National Institute of M.N & S.N Parameshwara**, AIR 2005 SC 242 at 244 as follows:

“S 10 would apply only if there is identity of the matter in issue in both the suits, meaning thereby that the whole of the subject matter in both the proceedings is identical”.

[Referred to at page 95 of **Sarkar: Code of Civil Procedure**, Sudipto Sarkar and VR Manohar, 11th Edition Reprint 2011].

In our jurisdiction it was held by this court [Mjasiri, J. (as she then was)] in **Jeremy Woods & Anor Vs Robert Choudury & Anor**, Commercial Case No. 18 of 2007 (unreported) in which the following holding from **Jadva Karsan Vs Harnan Singh Bhogal** (1953) 20 EACA 74 was quoted:

“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*’.

I have read between the lines the pleadings in the present suit and the plaint in Land Case No. 25 of 2014 which was appended with the defendant’s written statement of defence in support of the preliminary objection. Having so read, I am satisfied on a balance of probabilities, that the subject matter in Land Case No. 25 of 2014 is not wholly directly and substantially in issue in the present case. I also find and hold that the final decision in Land Case No. 25 of 2014 will not have the effect of operating as *res judicata* in the present suit. In the premises, the doctrine of *res subjudice* cannot be applicable.

In the final analysis, the preliminary objection by the defendants without merit and is consequently overruled with costs. This suit in which the plaintiff wants to recover the loaned money from the defendants should proceed for hearing on merits on a date to be slated today.

Order accordingly.

DATED at DAR ES SALAAM this 3rd day of November, 2015.


J. C. M. MWAMBEGELE
JUDGE

