IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 82 OF 2016

[Original Commercial Case No. 293 of 2002)]

MTIBWA SUGAR ESTATES LIMITED ..... PLAINTIFF

VERSUS

SIEMENS TANZANIA LIMITED
SIEMENS LIMITED } **..... DEFENDANTS**
SIEMENS (PROPRIETARY) LIMITED

9th November & 15th December, 2016

RULING

MWAMBEGELE, J.:

The plaintiff Mtibwa Sugar Estates Limited instituted the present suit against the three defendants praying against them jointly and severally for several orders enumerated in the plaint. In the Joint Written Statement of Defence, the defendants pleaded a counter-claim. The plaintiff has raised a preliminary objection against the counter-claim. The preliminary objection has two points couched thus:

1. The claims by the defendants in their counterclaim are *res subjudice* as there is a pending adjudication proceeding in respect of the same

subject matter before Hon. Kitururu, Adjudicator at the Dispute Adjudication Board, Dar es Salaam; alternatively

2. The claims by the defendants in their counterclaim are *res judicata* as the same has already been fully determined by a competent authority – the Arbitration Foundation of South Africa – and its award been delivered by Hon. CHJ Badenhorst on 13.02.2015.

Hearing of the preliminary objection was conducted on 31.10.2016 and 09.11.2016. It was Mr. Sylivatus Sylivanus Mayenga, learned counsel who appeared for the plaintiff on 31.10.2016, but later, on 09.11.2016, Mr. Edward Mwakingwe, learned counsel appeared for the plaintiff. On 31.10.2016 Mr. Mchome, learned counsel appeared for the respondents but on 09.11.2016, Mr. Mchome joined forces with Mr. Faraji, learned counsel, to represent the respondent. The learned counsel for the parties had earlier filed their respective skeleton arguments as dictated by the provisions of rule 64 of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012.

Mr. Mayenga and Mr. Mwakingwe, learned counsel, in both the skeleton arguments (which were adopted at the hearing) and oral submissions during the hearing, submitted on the first point that the claims by the defendants in their counterclaim are *res subjudice* as there is a pending adjudication proceeding in respect of the same subject matter before Hon. Kitururu, Adjudicator at the Dispute Adjudication Board, Dar es Salaam. They submitted that the reliefs sought in the arbitration proceedings are the same as the ones sought in the counterclaim. The learned counsel relied on several authorities to state that the suit must be stayed on account of its being *res subjudice*. The authorities relied upon are: ***Lotta Vs Tanaki and others***,

[2003] 2 EA 556, ***Karshe Vs Uganda Transport Co Ltd*** [1967] EA 774 and **Sarkar on Law of Civil Procedure**, 8th Edition, Volume 1 at p. 46.

On the second preliminary point which has been argued in the alternative, the learned counsel submitted that the counterclaim is *res judicata* as the same has already been fully determined by a competent authority – the Arbitration Foundation of South Africa – and its award was delivered by Hon. CHJ Badenhorst on 13.02.2015. On this ground, the learned counsel submitted, the award is in place and therefore the counterclaim should be dismissed.

Responding, Mr. Mchome, learned counsel, having adopted the skeleton arguments earlier filed, submitted on the second point of preliminary objection that the foreign judgment referred to was not conclusive; it cannot therefore be *res judicata*. He submitted that the arbitrator is not a court within the meaning of the CPC and therefore the doctrine of *res judicata* will not apply. He added that a suit is that commenced by a plaint; thus the doctrine will not apply to arbitration proceedings referred to by the learned counsel for the plaintiff.

On the first point, Mr. Mchome, learned counsel, argued that the proceedings before Kitururu, Esq. are not a suit envisaged by section 8 of the CPC as they were commenced by a Statement of Claim; not a plaint. He stated that the conditions in the ***Lotta*** case must be met for the doctrine of *res judicata* to apply and that they applicable in respect of a plea of *res subjudice*. He added that the second point of the preliminary objection does not qualify to be a preliminary objection as it will need evidence to prove it.

Rejoining, Mr. Mwakingwe for the plaintiff stated that the award by an arbitrator is final and conclusive between the parties. He elucidated that they filed Miscellaneous Commercial Cause No. 247 of 2015 for its enforcement.

The learned counsel added that the pleas of *res subjudice* and *res judicata* are pure points of law falling within the scope and purview of ***Mukisa Biscuit Manufacturing Co Ltd Vs West End Distributors Ltd*** [1969] 1 EA 696.

I have subjected the learned rival arguments of the learned counsel for the parties to proper scrutiny. There are two million dollar questions which, in my view, this ruling must answer. First, is whether the proceedings before Kitururu, Esq. may be described as a suit to which the doctrine of *res subjudice* is applicable. And the second respects the second point which has been argued in the alternative and it is; whether the arbitral award by the arbitrator in South Africa amounts to a suit to which the doctrine of *res judicata* is applicable.

The issues will not detain me, the doctrine of *res subjudice* is embodied in section 8 of the CPC. The object underlying this provision is to prevent courts of concurrent jurisdiction to simultaneously try two suits in respect of the same subject matter. For easy reference, I reproduce the secetion hereunder:

> "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 catch words here are **pendency of a suit on the same matter which is substantially in issue in the same court or any other court in Tanzania.**

The term "court" appearing in the above section is defined under the interpretation section of the CPC as:

> "'court', except in the expression 'foreign court', means the High Court of the United Republic, a court of a resident magistrate or a district court presided over by a civil magistrate and references to a district court are references to a district court presided over by a civil magistrate".

And the term "foreign court" is defined under the same section to mean:

> "... a court situated beyond the limits of Tanzania which has no authority in Tanzania".

This provision is *in pari materia* with section 10 of the Indian Code of Civil Procedure. Commenting on the scope and application of section 10 of the Indian Code of Civil Procedure, **Sarkar: Code of Civil Procedure**, 11th Edition Reprint 2011 by Sudipto Sarkar and VR Manohar has this to say at p. 88:

> "The language of S. 10 suggests that it is referable to a suit instituted in the Civil Court and **it cannot apply to proceeding of other nature instituted under any other statute**".
>
> [Emphasis supplied].

In view of the above, juxtaposing the authorities with the facts of the instant case, I have no scintilla of doubt that the Dispute Adjudication Board is not a court within the meaning of the CPC to which the doctrine of *res subjudice* is applicable under section 8. Thus it is apparent that the proceedings now pending in the Dispute Adjudication Board before Kitururu, Esq., their not being pending in court, do not attract the applicability of the doctrines of *res subjudice*.

Likewise, in the alternative ground of objection, the principle of *res judicata* is embodied under section 9 of our CPC. The section provides:

> "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court."

The above section is *in pari materia* with section 11 of the Indian Code of Civil Procedure on which, again, **Sarkar: Code of Civil Procedure** (supra) has this to say at p. 103:

> "**The principle of *res judicata* operates on the Court.** it is the Courts which are prohibited from trying the issue which was directly and substantially in issue in the earlier proceedings between the same parties provided that the Court

> tying the subsequent proceeding is satisfied that the earlier Court was competent to dispose of the earlier proceedings and that the matter had been heard and finally decided by such Court".
>
> [Emphasis added].

Flowing from the above, it is apparent that the doctrines of *res subjudice* and *res judicata* are applicable to **suits** in **court**. **Mulla: the Code of Civil Procedure** by Sir Dinshah Fardunji Mulla, 18th Edition, 2011, defines the term "suit" at p. 163 as follows:

> "The word 'suit' is important for our purpose. As per the provisions of O 4, r 1 of the Code of Civil Procedure every suit shall be instituted by presenting a plaint to the court or such officer as it appoints in its behalf. Therefore, **the word 'suit' ordinarily means a civil proceeding instituted by presenting a plaint.**"
>
> [Emphasis supplied].

The proceedings which the learned counsel for the plaintiff argues should apply as, respectively, res *sub subjudice* and *res judicata* are those before Kitururu, Esq. at the Dispute Adjudication Board and in respect of award by the Arbitration Foundation of South Africa. Basing on the above discussion, I have no iota of doubt that they are not suits to which the two doctrines may apply because they were not commenced by a plaint. Neither are they (the Dispute Adjudication Board and the Arbitration Foundation of South Africa) courts envisaged by the provisions of sections 8 and 9 of the CPC. In the

premises, I find both point of the preliminary objection; the first one on *res subjudice* and the second one on *res judicata* argued in the alternative, wanting in merit. I will therefore not indulge myself in deciding on other arguments fronted by the learned counsel for the parties, for, that endeavour will be but an academic exercise which can be done at another opportune moment.

The above said and done, the two-point preliminary objection is overruled in its entirety with costs.

Order accordingly.

DATED at DAR ES SALAAM this 15th day of December, 2016.

J. C. M. MWAMBEGELE
JUDGE