IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CAUSE NO. 89 OF 2016

WENGERT WINDROSE SAFARIS (TANZANIA) LIMITED ..... APPLICANT

VERSUS

THE MINISTER FOR NATURAL RESOURCES AND TOURISIM
THE HONOURABLE ATTORNEY GENERAL ..... **RESPONDENTS**

30th May & 6th June, 2016

RULING

MWAMBEGELE, J.:

On 25.05.2016, the applicant Wengert Windrose Safaris (Tanzania) Limited filed this application under a Certificate of Extreme Urgency. The Chamber summons thereof seeks for the following orders:

> "**(a) Interim Order**;
>
> 1. That the Honourable Court be pleased to issue an interim injunctive order restraining the Respondents, its agents and assignees from evicting the applicant from Lake Natron Game Controlled Area (North-South) it currently occupies or taking any action

against the Applicant which will jeopardies (sic) the applicant's continued occupation and operation of the said Lake Natron Game Controlled Area (North-South) hunting block referred to by the 1st Respondent as Lake Natron Game Controlled Area (East) pending the hearing and determination of the application for injunction *inter partes*;

(b) Inter partes

1. That the Honourable Court be pleased to issue an interim injunctive order restraining the Respondents, its agents and assignees from evicting the applicant from Lake Natron Game Controlled Area (North-South) it currently occupied or taking any action against the Applicant which will jeopardies (sic) the Applicant's continued occupation and operation of the said Lake Natron Game Controlled Area (North–South) hunting block referred to by the 1st Respondent as Lake Natron Game Controlled Area (East) pending the expiry of the 90 days statutory notice of intention to sue the government which has been served to the Respondents on 24th May, 2016.
2. Costs; and

3. Any other relief(s) as this Honourable Court may deem fit and just to grant."

The matter landed on my desk on 26.05.2016 during which I made an order summoning the parties for an *inter partes* hearing on the following day during which I ordered the respondents to file a counter affidavit by 1300hrs of 30.05.2016 and a reply thereof, if any, by 1400hrs of the same date and slated the matter for hearing at 1415 of the same date as well. When making the order for the *inter partes* hearing, the respondents were represented by Mr. Beatus Malima, Ms. Linda Bosco and Ms. Burure Ngocho, learned counsel, while the respondents had the services of Mr. Paul Geoffrey Shaidi, learned Senior State Attorney. The applicant's counsel made attempts to pray for an order for maintenance of *status quo* pending hearing of the application but the same met a strong objection from the learned Senior State Attorney with promises that he would talk with the first respondent so that the intentions indicated in the letter of 09.05.2016 by the first respondent to the applicant threatening the latter to cease any operations in, and vacate Hunting Block known as Lake Natron Game Controlled Area (East) by 31.05.2016 would not be effected.

On 27.05.2016, the respondents filed a counter-affidavit as ordered by the court along with which they filed a Notice of Preliminary Objection putting the court and the applicant to notice that on the date slated for hearing of the application *inter partes*, they would raise such objection on points of law. The preliminary objection contained five points. As a preliminary objection is essentially a challenge on the competence of the application as well as a challenge of the jurisdiction of the court, I called upon the learned counsel for the parties to address me on it. I did so on the authority of ***Fanuel Mantiri Ng'unda Vs Herman Mantiri Ng'unda And Two Others*** [1995] TLR 155

in which the Court of Appeal at page 159 underlined the need for courts to be satisfied that it is properly clothed with the requisite jurisdiction before proceeding to determine suits on merits.

At the hearing, the applicant had the services of three trained minds; Mr. Gasper Nyika, Mr. Beatus Malima and Ms. Burure Ngocho, learned advocates, while the respondents were represented by Mr. Paul Geoffrey Shaidi, learned Senior State Attorney assisted by Ms. Janeth Bisanda, State Attorney Trainee. However, I must confess that the exigencies of the matter denied me the advantage of having in place skeleton written arguments from the learned counsel for the parties.

I heard the learned counsel for the parties on the preliminary objection and at the end of the arguments, upon the prayer by the learned counsel for the applicant which was strenuously resisted by the learned Senior State Attorney, I made an order for maintenance of *status quo* pending the delivery of this ruling today. This is a ruling in respect of the said preliminary objection against the application.

For easy reference, the preliminary objection, as already alluded to above, has five points couched thus:

1. This Honourable court has no jurisdiction to entertain this matter;
2. The application is bad in law for being *res sub judice*;
3. The application is incompetent and bad in law for want of proper citation of the enabling provision of law;
4. The application is incompetent and bad in law for being accompanied by a defective affidavit; and
5. The application is incompetent for being instituted without prior sanction of the company.

To appreciate the submissions of the learned counsel for the applicants and Senior State Attorney for the respondents, I find it appropriate to summarise them before going into the determination of the points of objection. It was Mr. Shaidi, learned Senior State Attorney who started to roll the ball. He kicked off by the onslaught on the first and second points which he consolidated in his arguments that the court has no jurisdiction to entertain the matter because there is a pending appeal in the Court of Appeal in respect of the same matter. That matter was filed in this court on 28.08.2013 and was registered as Commercial Case No. 113 of 2013. The parties in that case, the learned Senior State Attorney went on, were Wengert Windrose Safaris (T) Ltd as plaintiff and the Minister for Natural Resources and Tourism, Green Miles Ltd and the Attorney General as 1st, 2nd and 3rd defendants in that order. Among the orders prayed in that case, stated the learned Senior State Attorney, were:

(a) A declaratory order that the Plaintiff is a licencee and therefore in lawful occupation of a hunting Block Lake Natron Game Controlled Area (North South) also known as Lake Natron Game Controlled Area (East).

(b) A perpetual injunction restraining the defendants, their agents or assignees from interfering with the plaintiffs occupation of Lake Natron Game Controlled Area (North South) also known as Lake Natron Game Controlled Area (East).

The reliefs sought in the present application rhymes with the relief in (a) in the present application, and the same is stated in the affidavit at paragraph 13; particularly at subparagraphs (a) and (b). On that take, the learned Senior State Attorney submitted, to entertain the present applciation will be

an abuse of the court process because the previous matter has been decided by the court and the applicant appealed to the Court of Appeal.

That apart, the learned Senior State Attorney went one, on the same date; that is, 28.08.2013, the applicant filed an application seeking an order restraining the defendants, its agents or assignees from evicting the applicant and/or entering and taking possession of Lake Natron Game Controlled Area (North-South) also referred to as lake Natron Game Controlled Area (East). The learned Senior State Attorney added that it was the same Michel Allard who swore the affidavit in support of that application, like in the present application. That application was denied by this court. It was Miscellaneous Commercial Case No. 88 of 2013 (Nchimbi, J.).

On the 3rd point, the learned Senior State Attorney argued that the applicant has cited Section 2 (3) of the Judicature and Application of Laws Act, Cap. 358 of the Revised Edition, 2002 (hereinafter "the JALA") which is not enough to properly move the court. The learned Senior State Attorney cited an unreported decision of this court (Massati, JK as he then was – now Justice of Appeal) of ***Hashim Jongo & 28 others Vs Attorney General & another***, Miscellaneous Application No. 32 of 2008 (at pages 9 – 10) to drive home the point that an application must not only cite section 2 (3) of JALA but also cite an enabling legislation.

On the fourth point, the learned Senior State Attorney argued that the affidavit contains falsehood statements which render it defective. He gave examples of paragraph 1 of the affidavit in which Michel Allard is allegedly masquerading as a director of the applicant Company while in a letter dated 10.03.2011 bearing reference No. WWS/DOW/01/2011 by the applicant Company to the Director of Wildlife in the Ministry of Natural Resources and

Tourism and appended to the counter-affidavit of the respondent and marked "AGC 1" at page 2 where names of directors of the applicant Company are mentioned as Nyaga Mawalla, Ian Haynes ans Charles Lawrence Williams; the name of the deponent of the affidavit supporting the application (Michel Allard) does not appear in the list of names of directors of the applicant company.

The learned Senior State Attorney did not stop there, he went on to attack the falsehood of the statements in the affidavit of Michel Allard arguing that the deponent has referred to in para 3 of the affidavit 17.11.2016 as the date when he made an application to the National Investment Steering Committee (NISC) which he argues is false as we have not reached that date yet.

On this premise, the learned Senior State Attorney states that the affidavit is defective for containing false information and thus should not be relied upon. The learned Senior State Attorney cited and supplied the case of ***Kidodi Sugar Estates & 5 others Vs Tanga Petroleum Company Ltd***, Civil Application No. 110 of 2009 (CAT unreported at page 4) to buttress this argument.

In respect of the final preliminary point of objection, the learned Senior State Attorney stated that the application has been instituted without prior sanction of the Company. He argued that it is trite law that an officer suing on behalf of a Company must have a permit to do so from the Company as was held by this court (Kalegeya, J. as he then was) in ***St. Benard Hospital Vs Dr. Linus Maemba Chuwa***, Commercial Case No. 57 of 2007 where it was stated at page 6 that such authority was relevant. This is a mandatory requirement, argued the learned Senior State Attorney, which Mr. Michel Allard ought to have complied with before filing the present application.

On the above arguments, the learned Senior State Attorney submitted that the application should be dismissed on the first four points and that it should be struck out on the last point of preliminary objection. He also prayed for costs.

On points 1 and 2, Mr. Nyika, lead counsel for the team of lawyers for the applicant rebutted that the court has jurisdiction to entertain the matter because it is not *sub-judice*. The learned counsel clarified that the matter before me is not substantially and directly in issue in the pending appeal before the Court of Appeal. The issue before the Court of Appeal is the refusal by this court to grant some prayers in a default judgment against the respondents herein and one Green Miles Ltd. In that case, submitted Mr. Nyika, the applicant was challenging attempts by the first defendants to change the name and demarcations of the Hunting Block. In this case the applicant is seeking an injunction pending expiry of 90 days statutory notice following a letter by the first respondent which required the applicant to stop operations and vacate the Hunting Block.

The learned counsel added that the intended suit is based on a Concession for Investor Status as per the letter of the first respondent (Annexture 2 to the application). Thus, the learned counsel stated, the set of facts in the present matter and the one pending in the Court of Appeal are totally different.

The learned counsel added another point that the parties in the matter pending in the Court of Appeal and the ones in the present application are also different - in the matter in the appeal before the Court of Appeal Green Miles Ltd is one of the respondents while she is not a party in the present application.

The learned counsel added a third point in attack of the first two grounds of the preliminary objection that for the doctrine of *res sub-judice* to apply, the Court of Appeal must be able to grant the orders sought in the present application. The Court of Appeal cannot grant an injunction in that appeal. He submitted that the three tests which test the applicability of the doctrine of *res sub-judice* have not succeeded here in that the applicant alleges breach of the Strategic Investor Status in the present application and seek an injunction while in the matter pending in the Court of Appeal they challenge the order of this court asking the applicant that it ought to have filed originals so as to award them some prayers in the default judgment.

In response to the third point of preliminary objection, the learned counsel submitted that the power to grant injunction is a practice under Common Law and has been held to be applicable in Tanzania by various decisions. One such decision is ***Tanzania Electric Supply Company (TANESCO) Vs Independent Power Tanzania Ltd (IPTL) and Two Others*** [2000] TLR 324 in which it was held that the High Court has jurisdictions to grant injunction pending the filing of the suit. He also cited Richard Kuloba's **Principles of Injunction** at page 73 thereof to underline the practice in cases of this nature.

The learned counsel distinguished the ***Hashim Jongo*** case that the court had already ruled that the Crown Office Rules were applicable on Judicial Reviews which is not the case in the instant case whose situation there is no provision applicable but common law practice. The ***Kidodi*** case cited by the learned Senior State Attorney did not escape the missiles from Mr. Nyika as being not applicable here because the case was delivered when dealing with the application on merits; not in a preliminary objection like in the present instance. He urged this court to have a glance at page 4 of the judgment.

On the fourth point, the learned counsel stated that to prove whether the deponent is a director of the applicant company or not, or whether the date referred to in paragraph 3 of the affidavit supporting the application is appropriate, is a matter of evidence thus needing factual proof. It cannot be a point of law. He relied on the oft-cited ***Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd*** [1969] 1 EA 696 for this proposition.

Regarding the last point of preliminary objection, the learned counsel, like his arguments on the fourth point, submitted that that is a question of evidence. He argued that the stance in ***St Bernard Hospital*** has since been departed by courts in this jurisdiction in many decisions. Such decisions include ***Audax BV. Geneva Branch Vs Kigamboni Oil Company Ltd*** Commercial Case No. 72 of 2008 and ***Kilombero North Safaris Ltd Vs Registered Trustees of Mbomipa Authorized Association***, Commercial Case No. 63 of 2013; both unreported decision of this court. The court was thus urged not to follow ***St. Bernard's Hospital.***

Mr. Nyika, learned counsel for the applicant beckoned this court to dismiss the five point preliminary objection with costs.

In a short rejoinder, Mr. Shaidi, Senior State Attorney for the respondents rejoined that the fact that Green Miles is not part of this application does not take out the fact that this matter is *sub judice* on two respondents herein. About the breach of Concession of the Investor Status he stated that this is a statement from the bar and therefore should not be accepted. He stressed that the cause of action in the present matter can be decipherable from the letter from the Ministry; requiring the applicant to stop operations and vacate the relevant hunting block. This Concession of Investor Status is not the cause of action, he argued.

On enabling provisions, the learned Senior State Attorney stated that there were sections in the ***Hashim Jongo*** case which gave power to the court; there were sections 68 (e) and 95 of the CPC and 2 (2) of the JALA. The learned Senior State Attorney conceded that a court can grant injunction before filing a suit and added that Richard Kuloba's **Principles of injunction** (at 73) does not speak of enabling provisions; it just states that reliefs for temporary injunction can be filed in court before the filing of the suit, which argument is not disputed.

On the fourth point of preliminary objection he submitted that the court is entitled to determine the truthfulness of the affidavit and that that does not need facts to prove it.

On the last point of preliminary objection, the learned Senior State Attorney submitted that the argument that a person would need a sanction of the Company to institute a matter can only hold water in a suit; not in an application like the present. It was his argument that the fifth point of objection is an approprate preliminary objection. The learned Senior State Attorney reiterated his prayers to dismiss the application on all the points of objection save for the last point on which he prayed to have it struck out and costs to follow the event.

I have considered the learned rival arguments by the trained minds for the parties with the weight they deserve. In determining the points of objection, like the learned counsel for the parties did in the course of their arguments, I shall consolidate the 1st and 2nd points because they seem so intertwined. The question which this ruling must answer in respect of the 1st and 2nd points is whether this court lacks jurisdiction to entertain and hear this application on account that it is *sub judice*.

The doctrine of *res sub judice* is enshrined in section 8 of the CPC. For easy reference, let me reproduce the section here:

> "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."

There are four essential conditions upon which this section applies. These are:

1. That the matter in issue in the second suit is also directly and substantially in issue in the first suit;
2. That the parties in the second suit are the same or parties under whom they or any of them claim litigating under the same title;
3. That the court in which the first suit is instituted is competent to grant the relief claimed in the subsequent suit; and
4. That the previously instituted suit is pending
   [See; **Sarkar, Code of Civil Procedure** (11th Edition) by Sudipto Sarkar and VR Manohar at p. 93]

The learned counsel for the parties seem to be at one on the last element. They are in a serious tug of war on the rest. The learned Senior State Attorney for the respondents argues that the matter the subject of this application is in the Court of Appeal. He states that among the prayers sought in the matter whose decision was appealed by the applicant are also

in the prayers sought in this application. According to him, these proceedings will be an abuse of court process. On the other hand, Mr. Nyika, learned counsel for the applicant, maintains a different view. To him, the matter before this court and the one in the Court of Appeal are not substantially and directly in issue.

The issue in my considered opinion that requires determination on this particular point is whether the subject matter or the issue in this application is directly and substantially in issue in the matter in the Court of Appeal.

As to whether the subject matter in this application is directly and substantially in issue with that in the Court of appeal, the first hurdle to clear is what actually is a matter "directly and substantially in issue".

Unfortunately, the Civil Procedure Code particularly section 8 which imports the common law doctrine of *res sub judice* does not provide an explanation. Rather, a direction is obtained from section 9 which is on *res judicata*. The commonality of these sections is that they both bar continuation of a suit which is directly and substantially in issue with either a previously filed suit or previously filed and determined suit. Therefore, in looking at what can be considered as directly and substantially in issue, reference can be made at explanation IV at section 9 which provides:

> "Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit".

To elaborate on this, the learned authors of **Sarkar: Code of Civil Procedure** observe at p 94:

> "'Matter in issue' does not mean any matter in issue in the suit but has reference to the entire subject in controversy."

And in ***Jadva Karsan Vs Harnan Singh Bhogal*** (1953) 20 EACA 74, it was held:

> "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. "
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> [Quoted in ***Laxmandahya Yadave Vs Laxman Shoe Manufactures Limited & Anor,*** Misc. Commercial Cause No. 9 of 2007 (unreported). Emphasis supplied].

In my considered view, the substantiality and directness of the suits is not to be determined on the basis of the remedies sought in either of the suit but on the subject matter or key issues in both suits; that is, the one before the Court of Appeal and the one before this court. It is therefore evident, as provided in explanation IV (Supra), that where elements for defence or claim are identical in both the matter before the Court of Appeal and the matter

before this court, the same will be held to be directly and substantially in issue and the doctrine of *res sub judce* will operate.

Mr. Nyika, learned counsel, though not disputing the fact that in the suit which is subject of appeal one of the orders sought was injunctive in nature as sought in this application, argues that what is sought in the intended suit is on Investor Status. In my considered opinion, this fact, if at all is what is intended plus the fact that the applicant is currently seeking for injunctive relief similar to the orders sought in the matter which is subject of the appeal makes the present one *sub judice*.

On the second element, there has been raised the point by the learned counsel for the applicant that the parties in the two suits; the intended suit to be triggered by the present application and the one pending in the Court of Appeal are different, in that Green Miles in the latter suit is not a party in the intended suit. To this, Mr. Shaidi is of the view that that fact does not make the doctrine of *res sub judice* inapplicable. I think Mr. Shaidi is right. Relying on ***Ashok Kumar Ladav Vs Noble Designs Pvt. Ltd.***, AIR 2006 Cal 237, Sir Dinshah Fardunji Mulla the learned authors of **Mulla: the Code of Civil Procedure** (18th Edition, 2011) has this to say on the "between the same parties" appearing in section 10 of the Indian Civil Procedure Code which is *in pari materia* with our section 8 of the CPC:

> "For determining whether the matter in issue in the subsequently instituted suit is directly and substantially in issue in the previously instituted suit absolute identity of the parties in both the suits is not a consideration."

Clarifying, the learned author, relying on ***SK Rungta & Co. Vs Naval Kishore Debi Prasad***, AIR 1964 Cal 373, ***Rup Chand Vs Basant Lal***, AIR 1975 P & H 171***, Arun General Indust Ltd Vs Rishabh Manufacturers Pvt Ltd.***, 1972 Cal 128 and ***Shorab Merwanji Vs Mansata Film Distributors***, AIR 1957 Cal 727, goes on:

> "The mere fact that the first suit is between *Z* and *J* as plaintiff and *W*, *X* and *Y* as defendants, and the second suit is between *W* as plaintiff and *Z*, *J* and *S* (not a party to the first suit) as defendants, will not take the case out of the operation of this section if the other conditions of the section are satisfied. It is sufficient if there is a sufficient identity of parties. If the additional defendants in the subsequent suit, who are all directors of the plaintiff company in the earlier suit do not raise any separate and substantial issue as between them and the plaintiff in the subsequent suit, the addition of such defendants does not make the subsequent suit any less a suit between the same parties. **The expression 'the same parties' means the parties between whom the matter substantially in issue has arisen and also has to be decided.** It has been held that the section does not become inapplicable by reason of there being a party against whom no separate and substantial issue is raised."
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> [Bold supplied].

Flowing from the above discussion, I am confident that the fact that Green Miles is not a party in the present suit does not make the suit any less for being *res sub judice* as between the parties to the intended suit. As was stated in several Indian cases cited at page 163 of Mulla (supra) the fundamental test to attract the doctrine of *res sub judice* embodied in section 8 of the CPC is whether on final decision being reached in the previous suit, such decision would operate as *res judicata* in the subsequent suit. Thus, if the appeal now pending in the Court of Appeal succeeds, the orders sought in the present application will certainly be nugatory. Luckily, the learned counsel for the parties are at one that the "suit" referred in the section includes an appeal – see also Mulla at page 173 where it is stated that a suit within the meaning of this section includes a pending appeal.

The suit the subject of the appeal to the Court of Appeal commenced with an application like the present one. My brother Nyangarika, J. granted the application on 26.06.2013. Reading that ruling, it is not hard to find that the same questions relating to occupation and use of the very block; that is, Lake Natron Game Controlled Area (North-South) were deliberated on in issuance of an interim injunction. As a result of the said ruling; later, the said suit which is subject of appeal was instituted. It goes without saying that the Investor Status upon which the applicant purports to peg the intended suit cannot be dealt with in isolation of the question of lawful occupation and use or otherwise of the said Lake Natron Game Controlled Area (North-South).

I am thus convinced by the facts and circumstances of this case before me that the issues are identical with the said matter which is before the Court of Appeal and as such, being substantiality and directly in issue thereby qualifying for the applicability of the principle of *res sub judice*. Thus, the issue of whether the Court of Appeal can or cannot grant injunction does not

arise. I say so because what is sought in the Court of Appeal is rather directory as to the propriety of the decision of this court on the same matter. As such, assuming, for the sake of argument, that the appeal will be upheld, it is not doubtable that the applicant's remedy will eventually be granted. But assuming that this court proceeds with the grant of an order sought in the present application and the Court of Appeal upholds the decision of this court, the contradiction in the two decisions is apparent.

I am constrained to state at this stage that the court has discretion to apply this doctrine even where the issue is not substantially the same in the former and subsequent suits. I find this fortification in Mulla at page 173 where it is stated:

"Even in cases where the issues may not be the same in both the suits, courts can exercise its discretion to stay the subsequent suit to secure the ends of justice."

And **Sarkar: Code of Civil Procedure** states at pp 97 - 98:

> "Where S. 10 does not strictly apply, for ends of justice suits may be stayed under S. 151 ... Where the matter in issue in the two suits are not similar and section 10 is not applicable, the High Court in exercise of inherent jurisdiction can grant stay of trial of the subsequently instituted suit."

For the avoidance of doubt, section 151 of the Indian Code of Civil Procedure is *in pari materia* with our section 95 of the CPC.

It is for these reasons that I am inclined to agree with the learned Senior State Attorney that the present application is nothing but an abuse of court

process. Since the basis of claim in this matter is substantially and directly in issue to the suit which is subject of appeal, it is prudent that this court desists from entertaining the same on the same prayers until and after the Court of Appeal makes its decision on the appeal. This consolidated point of objection is therefore sustained. But, I wish to state at this stage that, even assuming that I am wrong in sustaining the 1st and 2nd points of objection raised by the learned Senior State Attorney for the respondents, I would, in the interest of justice and given the peculiar nature of this matter, have arrived at the same conclusion using the inherent powers bestowed upon me by the provisions of section 95 of the CPC. It is this course which, I think, will avoid multiplicity of proceedings as well as avoid the court making conflicting findings on the same subject matter.

In the upshot, since the objection raised by the respondents in the consolidated 1st and 2nd points of preliminary objection is sufficient to dispose of the application, I need not address the rest of the preliminary points of objection. I find myself constrained to sustain the 1st and 2nd preliminary points of objection raised by the respondents and order that this application be stayed pending the determination of the appeal by the Court of Appeal in the former suit. Costs shall be in the cause.

Order accordingly.

DATED at DAR ES SALAAM this 6th day of June, 2016.

J. C. M. MWAMBEGELE

JUDGE