

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

COMMERCIAL CASE NO 03 OF 2018

I & M BANK TANZANIA LIMITED PLAINTIFF.

VERSUS

HI BROS –CANVAS AND TENTS LIMITED 1ST DEFENDANT.

PARVEZ ABDULHUSSEIN HIRJI 2ND DEFENDANT.

Date of Last Order:20/08/2019

Date of Ruling:20/09/2019

RULING.

MAGOIGA, J.

This ruling is in respect of the preliminary objection on points of law raised by Mr. Godwin Mganyizi, learned advocate for defendants on the incompetency of the Commercial Case no 03 of 2018 in their written statement of defence to the effect that: (1) this suit is res sub judice vide Civil Case no. 144 of 2017 in the High Court of Tanzania, Dare s Salaam District Registry, and (2) that the plaint does not conform to the mandatory requirement of Rule 19 of the High Court (Commercial Division) Procedure Rules,2012. Mr. Munganyizi prayed that on that predicament this suit be struck out with costs.

Briefly, the facts pertaining to this suit are that by a loan agreement dated 19th September 2016 the plaintiff extended credit facility to the 1st defendant

a term loan of Tshs. 1,000,000,000/= and an overdraft facility of up to Tshs. 1,500,000,000/=. Both the term loan and overdraft were to attract an interest rate of 17% per annum. The facts go that the said facilities were secured by deed of mortgage dated 9th April 2012 made between 1st defendant and plaintiff over right of occupancy on plot no. 11 Block "D" Nyerere Road, Temeke Municipality, Dar es Salaam with C.T. no. 90220. Other securities to the said facilities were Plot no. 138 Block "G" Kunduchi area, Kinondoni Municipality, Dar es Salaam with C.T. 53301, plot no. 146 Block "G" Kunduchi Village area, Kinondoni Municipality, C.T. 53302, plot no. 1395 Block "A" Buguruni area, Ilala C.T.48905.

Further the facts go that despite the agreement that the defendant will pay the money advanced but the defendants have defaulted paying the money as agreed and at the institution of the instant suit the money due was Tshs. 2,590,240,074.08 being principal sum and interests due. Despite demand notice and notice of intention to sue, the defendants have neglected, refused and failed to pay the amount outstanding due under the mortgage deeds, hence this suit claiming the payment of the money due. It is against this background, when the defendants were being served with the plaint, in the

joint written statement of defence, raised the above preliminary objections on points of law, the subject of this ruling.

The plaintiff is at all material time enjoying the legal services of Ms. Hamisa Sheikh, learned advocate and the defendants are enjoying the legal services of Mr. Godwin Muganyizi, learned advocate. The learned advocates filed their respective written skeleton arguments for and against the preliminary objection which will be the basis of the determination of the instant preliminary points raised after several attempts for oral hearing has not been possible inter parties.

The learned counsel for defendants was brief and to the point by arguing that the effect of the doctrine of res sub judice is to stay proceedings. According to Mr. Muganyizi the aim of the of the doctrine of res sub judice as provided under section 8 of the CPC is to prevent Courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations with respect of the same cause of action, same subject matter and same reliefs claimed.

Mr. Muganyizi pointed out strongly that parties in Civil Case no. 144 of 2017 and in this Commercial suit are the same, the matter in both cases involve

the two facilities that were extended to the defendants. Specifically, pointed out Mr. Muganyizi, that the act of the plaintiff freezing the account of the defendant amounts breach of the terms of the loan and overdraft facilities thereby incapacitating the defendants' business. Also, it was the arguments of Mr. Muganyizi that, the plaintiff in Commercial Case no 03 of 2018 is claiming the sum plus interest from the defaulted facilities. It was therefore, the considered view of Mr. Muganyizi that these two suits cannot proceed concurrently.

As to the second point of objection it was brief argument of Mr. Muganyizi that the plaint filed was filed in contravention of Rule 19 (1) of this Court's Rules for failure to abide with "times new roman". According to Mr. Muganyizi the requirement in that Rules are mandatory and same deserves to be rejected. To buttress his point Mr Muganyizi cited the cases of PUMA ENERGY TANZANIA LIMITED v. DIAMOND TRUST BANK, COMMERCIAL CASE NO. 149 OF 2013 (UNREPORTED) AND ERNEST NDUTA NYORORO v. NATIONAL BANK OF COMMERCE LTD AND ANOTHER, COMMERCIAL CASE NO. 1 OF 2015 (UNREPORTED) in which both cases the plaint was rejected. But unfortunately, the learned counsel for defendant did not annexed any of the

ruling or judgement to this Court for its consideration. This will be covered when dealing with this limb of objection in due course

In the circumstances, the learned counsel urged this court to reject the plaint or struck it out with costs.

On the other adversary part, Ms. Sheikh was not moved by the arguments in support of the preliminary objections on points of laws and equated them as frivolous and urged this court to overrule them straightaway. On the first limb of objection, it was the strong submission of Ms. Sheikh that in order for section 8 to apply there has to be identical matter in issue to both suits thereby the whole of the subject matter in both proceedings is identical and not merely one of the issues raised for the determination. To buttress her point, the learned counsel cited the Mulla: On the Code Civil Procedure at page 170 and submitted that in the instant suit the issues are totally different. According to Ms. Sheikh, there is no dispute that the parties are the same but quickly pointed out that there are based on different cause of action and prayers in the suit are different. Further to the point, Ms. Sheikh pointed that this suit is a suit based on mortgage instituted under summary procedure and the other suit is a tortuous suit based injuries allegedly caused by the plaintiff to the defendant.

Furthermore, Ms. Sheikh sought to show that even the prayers are different in substance in both suits, and surmised the cases are by and large different in nature and are based on different cause of action. Lastly, the learned counsel for plaintiff strongly urged this Court to hold that summary suits are not covered under the provisions of section 8 and cited Mulla at page 165 when discussing section 10 of the Indian Civil Code which is in pari material with section 8. Therefore, on this point she urged the objection be overruled.

On the second point for non-compliance with Rule 19, the learned counsel for plaintiff conceded to the defect but was quick to point out that it is mere procedural irregularity which does not go to the root of the suit, and urged this Court to overlook the same for the interest of justice. To buttress her point, the learned counsel cited the case of NATIONAL HOUSING CORPORATION v. ETIENES HOTEL, CIVIL APPLICATION NO 10 OF 2005 (CAT) DSM (Unreported) in which it was held **"that non-compliance with Rule 52 (1) of the Tanzania Court of Appeal Rules, 1979 does not go to the root of the application and is a mere procedural irregularity that does not go to root of the case and should be overlooked and give way to substantive justice on the issues in the suit."**

In the same case, the Court of Appeal went further to observe and hold that **“the rules of procedure are handmaid of justice and not mistress of justice. They should not be elevated to fetish. Their aim is to facilitate the administration of justice in a fair, orderly and predictable manner, not to fetter or choke it.”**

The learned counsel implored this Court to be guided by the provisions of Rule 4 of this Court’s Rules which provide and state categorically that “the Court in administering these Rules, have due regards to the need to achieve substantial justice in a particular case.

Eventually, the learned advocate for plaintiff in strong terms urged this Court to find the raised point of objections are frivolous and vexatious and overrule them with costs and order that the suit to proceed to trial inter parties.

The task of this Court now is to determine the merits or otherwise of the objections raised. I have dutifully listened and considered the hotly contested arguments of the learned counsel for and against the first limb of objection alongside with case law cited. I have further had an opportunity to read the copy of the plaint annexed in written statement of defence, and in the totality of the above this court is of the considered opinion that the first limb of

objection has to fail. The reasons I am taking this stance are not far to fetch.

One, the pending suit in the Dar es Salaam registry is tortious suit and this one is a suit arising from mortgages. **Two**, the principle of res sub judice is not new in our Courts. In the case of EXIM BANK (T) LIMITED v. BHESANIA GARAGE LIMITED AND FORU OTHERS [TSLR] 440 it was held that for the principle to apply the following factors are to co-exist, namely:-

1. there are two pending suits, one previously filed.
2. The parties to the suit must be the same or must claim to be suing under the same title.
3. The matter in issue must be directly and substantially be the same in the two suits
4. And lastly the suit must be pending in Court of competent jurisdiction to try them.

There is no dispute that the three factors in this case befit the requirements as decided in the above case, which I fully subscribe to it. However, the factor that the suit must be directly and substantially be the same is missing in the instant suit. While the other suit Civil case no 144 of 2017 is for tortious claims, the instant suit is in respect of mortgages arising from

defaulted facilities. The failure of this ingredient or rather factor suffices to render this suit not to fit to apply the principle of res sub judice.

On that note and without much ado the first limb of objection stands to fail and is hereby overruled.

This takes me to the second limb of objection that the plaint in question is incompetent for failure to comply with the Rule 19 (1) of the High Court (Commercial Court) Rules, 2012 by being presented in format not envisaged in the Rules "times new roman". The stance of the learned counsel for defendant is that any pleading represented in contravention of Rule 19 (1) is to be rejected as provided for under sub rule 2 of the same Rule. The learned counsel for defendants to buttress his point cited several decisions but which unfortunately were not annexed thus this Court and as such will not consider them at all.

On the other hand, the learned counsel for defendant admitted that the format of the plaint offended the said Rule but was quick to point out that this is just a procedural defect that do not go to the root of the matter and same can be ignored guided by the overriding objective principle.

This point will not detain this Court long. The raised point of objection is to be overruled. The rejection, if any, was to be done at admission stage. Since no prejudice is cried for and the defect as correctly submitted by the counsel for plaintiff is a procedural defect that did not go to the root of the matter, as such I hereby ignore it guided by the overring objective to do substantial justice to parties.

That said and done all set of preliminary objections on point of law raised are hereby overruled with costs. It is further directed that the matter should proceed to another stage of the proceedings.

It is so ordered.

Dated in Dar es Salaam this 20th-day of September, 2019.




S. M. MAGOIGA
JUDGE
20/09/2019