

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 115 OF 2019

ALLAWI RAJABU KASSIM.....PLAINTIFF

VERSUS

EFATHA BANK LIMITED under THE

RECEIVERSHIP OF THE DIRECTOR

DEPOSIT INSURANCE BOND..... 1ST DEFENDANT

MARK AUCTIONEERS & COURT BROKER CO. LTD.... 2ND DEFENDANT

KILEO MSONGORYU EDMOND.....3RD DEFENDANT

GLORY EDMOND KILEO.....4TH DEFENDANT

Date of Last Order: 04/08/2020

Date of Ruling: 28/08/2020

RULING

MAGOIGA, J.

This is a ruling in respect of preliminary objection on points of law taken by Ms. Glory Edmond Kileo, the 4th Defendant, against the competence of the Commercial Case No. 115 of 2019 in her written statement of defence to the effect that;

- i) This suit is filed contrary to Section 8 of the Civil Procedure Code ,1966 [Cap 33 R.E 2019] as revised through the Law Revision Act, Cap 4, published through G.N No.140 of 2020 dated 28th February ,2020 as is it res sub-judice to the Civil Application No. 370 of 2017 which is pending at the Land and Housing Tribunal for Kinondoni
- ii) That this court is not seized with jurisdiction to entertain the suit
- iii) That the plaintiff has sued a wrong party
- iv) That the suit is bad in law for non-joinder of necessary party defendant, one Anna Lesle Kileo or Anna Leslie Kileo
- v) That the suit is defective as the plaint has not adhered to Order VII rule 1 (f) of Cap 33 R.E 2019 as at paragraph 12 the place where the cause of action arose has not been mentioned as a fact conferring jurisdiction to the Court.

In order to have better understanding of the present suit, I find it apt to narrate briefly the background facts leading to this ruling. That sometimes in February 2015, the 3rd defendant guaranteed a loan facility granted to Anna Lesle Kileo by the Efatha Bank Limited by deed of Mortgage over the right of occupancy on plot No. 155, Block D, with Certificate of Title No. 49936 at Mbezi Area-Kinondoni Dar es salaam. Facts go that, it was parties'

agreement that, in case the borrower fails to pay the loan, the Bank shall have mandate to sale the property in dispute. Further facts were that, following the borrower's failure to pay the loan as agreed and after various correspondences, under the instructions of the 1st defendant and the 2nd defendant, on 18th November, 2017, conducted public auction whereby the plaintiff became successful bidder at consideration of Tshs 112,000,000/=.

Nevertheless, up to the institution of this suit, the defendants have refused to handover the property to plaintiff, hence, this suit. It is against this back ground, when the defendants were served with the plaint in their joint written statement of defence, raised the above preliminary objections on points of law, the subject of this ruling.

The plaintiff at all material time has been enjoying the legal service of Mr. Jonathan Mbuga learned advocate from Legis Attorneys. The 4th defendant as well at all material time has been enjoying the legal services of Mr. Sudi Rwebangila learned advocate from Global Law Chamber.

Mr. Rwebangila learned advocate for the defendants when stood up to argue the preliminary objections informed the court that, he prays to drop three grounds of objection, namely grounds 2, 3 and 4 and he will argue ground 1 and 5 alone. Same were marked abandoned as prayed.

Submitting in support of preliminary objections the learned counsel for 4th defendants started his submission by adopting the contents of his skeleton argument and submitted that this matter is res sub -judice because there is similar matter pending at the District Land and Housing Tribunal for Kinondoni at Mwananyamala. To cement his point he referred this court to Section 8 of the Civil Procedure Code [R: E 2002] and the case of **Exim Bank (Tanzania) Limited vs. Bhesania Garage Limited and four others (2006) TLSLR, at pg 440** in which it was held that, for the doctrine of res sub judice to apply the four conditions enshrined under that section must be established. These are: - **one**, there must be two pending suits, one previously filed, **two**, the parties to the suit must be the same or any of them must claim to be suing under the same title, **three**, the matter in issue must be directly and substantially be the same in the two suit and **four**, the two suits must be pending in a court of competent jurisdiction.

Further, he submitted that, the subsequent suit and previously suit parties are claiming over plot No. 155, Block D, with certificate of title No. 49936 at Mbezi Area-Kinondoni Dar es salaam and the relief sought in previously suit is similar to Commercial Case No 115 of 2019. Expounding on the point learned counsel for the 4th defendant submitted that, applicant is seeking an order for declaration that the purported mortgage was illegal null and void,

while the plaintiff in the subsequent suit is seeking an order that plaintiff is lawful bonafide purchaser for value of property. On that predicament counsel for 4th defendant prayed that this matter be stayed pending determination of the application.

As to the fifth point of objection it was the brief argument of Mr. Rwebangila that, this plaint was filed in contravention of Order VII Rule 1(f) Civil Procedure Code [R: E 2002].Expounding on the point he submitted that, paragraph 12 of the plaint does not indicate the place where the cause of action arose. More to the point he submitted that, the description of the jurisdiction of the court was not done in details. To buttress his point Mr. Rwebangila cited the case of **Fanuel Mantri N'gunda vs Herman Msantiri and 2 others (1995) TLR 155** where the principle was echoed.

On the above points, Mr. Rwebangira he prayed that this suit be dismissed with costs.

In response Mr. Mbuga also prayed to adopt his skeleton argument and submitted that for the court to determine if Commercial case No 115 of 2019 is res sub judice to application No 370 of 2017 there is a need of this honorable court to be subjected on the evidence which was not presented before this court. Submitting further on the point, the learned counsel

submitted that, even if were presented before this court cannot be done by way of preliminary objection rather by filling an application.

On the second limb of preliminary objection, that plaint filed does not comply with Order VII Rule 1(f) Civil Procedure Code [Cap 33 R. E 2002]. The learned counsel for the plaintiff referred this court to paragraph 5,9,10 of the plaint which shows where the cause of action arose to be in Dar-es-salaam and that this court has jurisdiction. Submitting further on the point, Mr. Mbuga submitted that, several annexures have been attached showing that the disputed property is located in Dar-es-Salaam and the cause of action arose in Dar-es-Salaam. To cement his point learned counsel for the plaintiff cited the case of **Abdalla Ally Selemani t/a Ottawa Enterprises (1987) Vs. Tabata Petro Station Co. Limited and Another Civil Appeal No. 89 2017 at pg 18-19** whereby the court held that "we firmly think that only suits for immovable property were meant to be filed within the local limits in which such property is situated. Any other suits as provided under section 18 of the Civil Procedure Code are to be filed where the cause of action arose or where defendant resides or works for gain."

Furthermore, he contended that there is no formula on compliance with Order vii Rule 1(f) of the Civil Procedure Code but the clear interpretation

one has to read the entire plaint to identify if one has stated the same. The learned advocate referred this court to the following cases of **Michael Ngaleku Shirima vs African Banking Corporation (T) Ltd Commercial Case No 54 of 2016 (Unreported)**. And the case of **Investment House Limited Vs Webb Technologies (T) Ltd & 2 others, Commercial Case No 97 of 2015 at pg 20 (Unreported)**.

The learned counsel for the plaintiff in strong terms urged this court to find and hold that, the raised preliminary objections are baseless and be overruled with costs and the suit to proceed to its determination to finality.

In rejoinder, Mr. Rwebanagila

This marked the end of hearing of the preliminary objection

The task of this court is to determine the merits or otherwise of the preliminary objections. I have dutifully listened and considered the hotly contested arguments of the learned counsel for and against the first limb of objection along with the case law cited in particular the decisions in the case of **Exim Bank (T) Limited Vs. Bhesania Garage (supra)** on the interpretation, Section 8 of the Civil Procedure Code, which I subscribe to. For easy reference I find it apposite to reproduce the said section hereunder;-

Section 8 -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 any of them 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”

(Emphasis mine)

On the basis of the above provision, in my considered view that, for the court to make an order of stay of proceedings, there must be proof that, the matter in issue in the subsequent suit is directly and substantially the same in the previously instituted suit between the same parties or one of them who are litigating under the same title. Counsel for plaintiff has argued that, this court was not availed with the copy of the application so as to ascertain if at all Commercial Case No 115 is res sub judice to Land Application No. 370 of 2017. With due respect to counsel for plaintiff that is not the case, this court is duty bound to take judicial notice of the pendency of application No 370 of 2017 before the Kinondoni District Land Housing Tribunal. However the issue for determination is whether the subject matter or the key issue in Commercial Case No 115 of 2019 is directly or substantially the same in application No 370 of 2017. It is trite law that, directness and substantiality of the suit is not to be determined on the basis of the remedies sought in

either suit but on the subject matter or key issues in both cases as it was stated in the case of **Wengert Windrose Safaris (Tanzania) Limited Vs The Minister of Natural Resources and Tourism and Another, Misc .Commercial Case No 89 of 2016 (Unreported)**. Having considered the rival arguments of the learned advocates for the parties, I find that, the subject matter in both suits is the sale of auction of the house standing on plot No. 155, Block D, with certificate of title No. 49936 at Mbezi Area-Kinondoni Dar es salaam. I am saying so because the said house was mortgage to the plaintiff as a means of securing repayment of loan and recovery in case defendants defaulted to pay the loan. Now it is my further considered opinion that, if application No 370 of 2017 would be decided in favour of the defendants in this suit, that decision will have impact in Commercial case No 115 of 2019. On that note and without much ado the first ingredient in this suit benefits the doctrine of res sub- judice.

On the second ingredient that parties must be the same, or any of them claiming on the same title. The parties are the same and one. The credit facility and mortgages attached to the amended plaint show that it was Anna Lesle Kileo who was the borrower and Kileo Msongoryu Edmond was the guarantor. So it is my considered view that the absence of the borrower in the subsequent suit, does not take the case out of operation of section 8

of the Civil Procedure Code. It has held in the case of **Wengert Windrose Safaris (Tanzania) Limited (supra)** that the expression "same parties means the parties between whom the matter substantially in issue has arisen and also has to be decided. This suit is against the guarantors, Court Broker, Efetha Bank Limited and Alawi Rajabu Kassim who are directly litigating on the same title.

On the third ingredient that, the court in which the first suit instituted is competent to grant the relief sought. There is no dispute that, Kinondoni District Land Housing Tribunal has no jurisdiction to entertain application No 370 of 2017.

On the last ingredient that, that the previously suit instituted is pending, this ingredient has been settled by this court, that the court is duty bound to take judicial notice that application No 370 of 2017 is still pending in the Kinondoni District Land Housing Tribunal when the counsel was trying to mislead the court that the copy of the said application was not attached to the written statements of defence of the 4th defendant. So I find this ingredient has merit in this suit.

On the totality of the above holding, I find the first limb of objection merited.

This takes me to the second limb of objection that the plaint in question is incompetent for failure to comply with Order VII Rule 1 (f) of the Civil Procedure Code. Counsel for 4th defendant has contended that, paragraph 12 of the plaint does not indicate place where the cause of action arose, and description of the court jurisdiction was not done in details. On the other hand, counsel for plaintiff has strongly contended that paragraph 5,9,10 of the plaint shows where the cause of action arose, matters as to jurisdiction of this court and that several annexure has been attached show that the disputed property is located in Dar-es-Salaam and the cause of action arose in Dar-es-Salaam.

I have read the said plaint particularly paragraph 5,9,10 and 12 between the lines, the annexures and found that the plaint contain particulars and fact showing that this court has jurisdiction and there is no failure by the plaintiff to plead facts showing jurisdiction in the amended plaint. The fact that paragraph 12 did not contain all matters including the description of court jurisdiction in my opinion does not make the plaint defective as argued. In my further view that in determining if the court has jurisdiction on the subject matter, the court does not look only at one paragraph pleaded but the has to look at all the statement of facts pleaded in the plaint and its annexure .This instance was stated in the case of **Investment House**

Limited (Supra) where the court said Order VII Rule 1(f) of the Civil procedure talks to entire plaint and not a particular specific clause, and when reading a plaint one has to read the annexure attached to the plaint as well.

On the above reasons, the second limb of all set of objection on point of law is hereby overruled.

That said and done the 1st limb of objection succeeds and the 2nd limb of objection fails.

In the fine the instant suit is hereby ordered to be stayed pending the outcome of Land Application No 370 of 2017 pending by District Land and Housing Tribunal of Kinondoni. Given the finding above, each party is to bear his own costs.

Order accordingly.

Dated at Dar es Salaam this 28th August, 2020.




S. M. MAGOIGA

JUDGE

28/08/2020