

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

COMMERCIAL CASE NO. 20 OF 2020

EXIM BANK (TANZANIA) LIMITED..... PLAINTIFF

VERSUS

DEOGRATIUS KATUNZI PETRO

T/a GEITA UPENDO DISPENSARY DEFENDANT

Date of Last Order: 23/07/2020

Date of Ruling:14/08/2020

RULING.

MAGOIGA, J.

This ruling is in respect of two preliminary objections on points of law formally raised and filed by the respondent on the maintainability of the above suit in that, this suit is res sub-judice, and that, in the absence of board resolution of the plaintiff authorizing the institution of this suit to sue, then, the suit is improperly before this honourable court.

In order to understand the basis of the preliminary objections, the facts leading to the institution of Commercial Case No. 20 of 2020 are imperative. The plaintiff in 2012 extended credit facility of Tshs.150,000,000/= to the defendant. The said facility was secured by legal mortgage in respect of

landed properties with C.T.No. 16556 LR Mwanza, Plot no 15 Block 'A' Tambukareli, Geita urban areas, C.T. No 25248 LR Mwanza, Plot No. 88 Block 'E' Bombambili, Geita Urban all in the name of Deogratias Katunzi and personal guarantee of Deogratius Katunzi. The facts go that, despite that arrangement, the defendant defaulted servicing the loan. Consequently, the plaintiff issued statutory notice in default to remedy the breach in vain. Further facts were that, by 31st January, 2020 the outstanding balance stood at Tshs.520,859,647.44, hence, this suit as recovery measures.

Upon being served with the plaint, the defendant filed a written statement of defence disputing all claims by the plaintiff and raised counter claim. Equally through separate formal notice, the defendant filed a notice of preliminary objection on points of law on the maintainability of the suit, subject of this ruling.

When this suit was called for orders, the plaintiff was enjoying the legal services of Mr.Wilson Mukebezi, learned advocate from Dar es Salaam based legal clinic of B & E Ako Law. The defendant had the legal services of Mr. Constantine Anthon Makala, learned advocate, from Dar es Salaam based legal clinic of Law House Associates. This Court ordered the learned advocates to argue the preliminary objections by way of written

submissions. The learned advocates complied with the order and direction of the court. I have had time to read carefully their rival written submissions on the points. I commend them for their insightful inputs captured therein. However, in the course of determining the preliminary objection filed, I will not be able to repeat each and every aspect argued, but it suffices to say, I have noted them and will accord them the weight they deserve.

The gist of the first limb of objection as gathered from the written submissions by the defendant is the pendency of Land Application No. 17 of 2015 before the District Land and Housing Tribunal of Geita, which was ordered by the High Court Mwanza vide Land Appeal No. 30 of 2017 to be retried starting from the framing of issues on 21st day of March 2019. According to the learned advocate for the defendant, this suit is res sub-judice to the Land Application No. 17 of 2015, hence, barred from proceeding under section 8 of the Civil Procedure Code, [Cap 33 R.E.2019] until the determination of the former suit. To bolt up his arguments on the first limb of objection, Mr. Makala cited the provisions of section 8, Sarkar, Code of Civil Procedure(11th Edition) and cases of WENGERT WINDROSE SAFARIS (TANZANIA) LIMITED v. THE MINISTER OF NATURAL RESOURCES AND TOURISM AND ANOTHER, MISC. COMMERCIAL CASE No. 89 OF 2016

(HC) DSM (Unreported) AND THE M & FIVE B HOTELS AND TOURS LIMITED v. EXIM BANK TANZANIA LIMITED, COMMERCIAL CASE No. 104 OF 2017 (HC) DSM (Unreported) in which and in their interpretation of section 8 agrees that four ingredients must exist for the application of section 8 of the CPC, which are:-

- i. That the matter in issue in the second suit is also directly and substantially in issue in the first suit;
- ii. That Parties in the second suit are the same or parties under whom they or any of them claim litigating under the same title;
- iii. That the court in which the first suit is instituted is competent to grant the relief claimed in the subsequent suit;
- iv. And that the previously instituted suit is pending.

On the strength of the above reasons, Mr. Makala implored this court to uphold this limb of objection and ordered this suit be stayed until the previously instituted suit is determined to its finality.

On the second limb of objection, it was the argument of Mr. Makala that, this suit is bad in law for want of board resolution authorizing the plaintiff to mount the instant suit against the defendant. His view and stance was

pegged on the holding in the case of SOLOMON v. SOLOMON [1896] UKHL 1 [1987] AC 22 in which a company as a legal person can sue and be sued, as such the company has to authorize through its agencies anything that needs to be done on its behalf. Another case cited was the case of NATIONAL INVESTMENT COMPANY LIMITED (NICOL) v. THE REGISTERED TRUSTEES OF THE PUBLIC SERVICE PENSION FUND AND 4 OTHERS, MISC. COMMERCIAL APPLICATION No. 288 OF 2014 (HC) DSM (Unreported), in which it was held that, **'an action by the company in the company's name has to be authorized and sanctioned by the board of directors or members resolution passed at its special ordinary or extra ordinary meetings. I have not seen in the pleadings, as to who NICOL is in this application...hence, application dismissed with costs.'**

Based on the above arguments and holding in cases cited on this point, the learned advocates for the defendant prayed that this court be pleased to dismiss this suit with costs.

In response to the preliminary objections, Mr. Mukebezi started by inviting this court to determine whether the Land application No.17 of 2015 falls within the ambit of section 8 of the CPC as argued. The answer to this,

according to Mr. Mukebezi, is No. The reasons advanced by Mr. Mukebezi are that, the case alleged to be res sub-judice to the instant suit do not exists despite the documents annexed, and that, even if its exists, parties are different because it is between Geita Upendo Dispensary v. Exim Bank (T) Limited and Marcas Investment Co, Debtor Brokers and Auction Mart.

Mr. Mukebezi join hands with Mr. Makala that, for the principle of res sub-judice to apply, the four ingredients must co-exists but strongly pointed out and argued that, all the four ingredients as enumerated in the section do not fit in this suit when seriously scrutinized. In support of his stance, the learned advocate for the plaintiff cited two cases of I &M BANK (T) v. EMMANUEL JUSTINE NYERERE T/A MAFUTA DISTRIBUTORS & ANOTHER, COMMERCIAL CASE No. 14 OF 2015 (HC) MWANZA (Unreported) and THE M & FIVE B HOTELS AND TOURS LIMITED v. EXIM BANK TANZANIA LIMITED, COMMERCIAL CASE No. 104 OF 2017 all of which held that, the cases were not identical and reliefs were different, hence, the court. declined to stay proceedings.

On the strength of the above arguments and case laws cited, the learned advocate for plaintiff strongly urged the court to dismiss the first ground of objection.

On the second ground of objection, Mr. Mukebezi brief to the point dismissed the point and the arguments that they fall short of being point of preliminary objections on point of laws as are matters that require evidence. In support of his stance, Mr. Mukebezi cited the cases of MUKISA BISCUITS MANUFACTURING CO LTD v. WEST END DISTRIBUTORS [1969]EA 696 and INVESTMENT HOUSE LIMITED v. WEBB TECHNOLOGIES (T) LIMITED AND 2 OTHERS, COMMERCIAL CASE No. 97 OF 2015.

Mr. Mukebezi went to distinguish the cases cited by the learned counsel for the defendant and invited this court to find that, this point is devoid of merits and dismiss it as well.

In the totality of the above arguments and case law cited, Mr. Mukebezi urged this court to dismiss the two limbs of preliminary objection with costs.

In rejoinder, Mr. Makala brief to the pointed challenged the written arguments by Mr. Mukebezi as misleading and reiterated his earlier submissions and prayers.

Having read the rival submissions of the learned advocates for parties as summarized above, I find it apposite to start with the second limb of preliminary objection for obvious reasons. The second limb of objection as

correctly argued by the learned advocate of the plaintiff, and rightly so in the opinion of this court, it will not detain this court much because it is a point that require evidence and as such do not meet the test of preliminary objection in the light of famous and celebrated case on preliminary objections on points of law of MUKISA BISCUITS MANUFACTURERS LIMITED (supra).

With that note, the second limb of objection hereby fails for want of merits.

Now back to the first limb of objection. I have dispassionately considered the rival arguments of the trained legal minds for parties on this point and the case laws cited very careful (in particular the decisions in the case of WENGERT WINDROSE SAFARIS (T) LIMITED (supra) on the interpretation of provisions of section 8 of the CPC, which I hereby fully subscribe to that the section have four ingredients upon which the section applies as cited above. However, the serious contention of the trained legal minds for the parties is, whether the instant suit is res sub-judice to the Land Application No. 17 of 2015. While the advocate for the plaintiff argued that, there is no existence of pending land application before District Land and Housing Tribunal of Geita, but with due respect to him, that is not the case. The judgement of the High Court Mwanza District Registry is obvious on this

point and I am entitled to take judicial notice that and hold that there is pending suit before the impugned Tribunal of Geita.

Now let me test if the first condition is directly and substantially the same in both suits. The advocates for parties have diametrical different view to this ingredient. This court in the case of WENGERT (supra) held that, the substantiality and directness 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. I agree with that holding and I find that the subject matter in both suits is the sale by auction of house standing on Plot No. 15 Block 'A' Tambukareli area, Geita District, which house was mortgaged to the plaintiff and the repayment of loan and recovery which to my opinion if decided in favour of the defendant, directly and substantially have effect to the claim of the present suit. With that note, therefore, the first ingredient in this suit, no doubt in my mind befits the doctrine of res sub-judice.

Now to the second ingredient that parties in second suit are the same or parties under whom they or any of them claim litigation under the same title. This ingredient will not take much of this court. The parties are the same and one. The credit facility and mortgages attached to the plaint shows that indeed it was Geita Upendo Dispensary who was the borrower

and Deogratias was the guarantor. This suit is against the guarantor and the former suit is against Geita Upendo Dispensary. In this suit the plaintiff pleaded the defendant as Deogratius Katunzi t/a Geita Upendo Dispensary. So it is my firm considered opinion that the parties are the same and claim from each other and the cases as held above are directly and substantially have same bearing.

This takes me to consider the third ingredient that, the court in which the first suit instituted is competent to grant the relief claimed. The ingredient like the second one will not detain this court much. In Land Appeal No.30 of 2017, the issue of the District Land and Housing Tribunal of Geita having no jurisdiction was raised and the High Court in its reasoned judgement determined this point in favour of the appellant (now defendant in this suit). At pages 7-8 of that judgement, the court held that the District Land Housing Tribunal had jurisdiction to entertain the case before it for one reason that the amount in dispute is 36,040,493.14 and not Tshs.150,000,000/=. So the issue of jurisdiction was once settled in that appeal and need not waste this court's precious time. This ingredient has merits.

This trickles down to the last ingredient that, the previous suit instituted is pending. This ingredient will not as well detain this court much. This ingredient was settled at the beginning when, Mr. Mukebezi wanted to mislead this court that no pending suit. So, I find this ingredient has merit in this suit.

In the circumstances, therefore, the arguments by the learned advocate for the plaintiff are far from convincing me to hold otherwise.

That said and done, the first limb of objection is hereby sustained. In the event, I further direct that this suit be stayed until the determination of the pending Land Application No. 17 of 2015 in District Land and Housing Tribunal at Geita is finalized . Costs be in the cause.

It is so ordered.

Dated at Dar es Salaam this 14th August, 2020.



A handwritten signature in black ink, appearing to read "S. M. Magoiga".

S. M.MAGOIGA
JUDGE
14/08/2020