

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CAUSE NO 120 OF 2019

(Arising from Application for execution of the decree by Hon. Mruma A.R , a successor Judge dated the 16th September, 2015 issued on May 2018 emanating from court order dated 16 September, 2015 IN Miscellaneous Commercial Case No 213 of 2015 of the High Court Commercial division at DSM, by Hon.J.C.M Mwambegele J as he then was a High Court Judge)

BETWEEN

THE ATTORNEY GENERAL.....APPLICANT

VERSUS

ARDHI UNIVERSITY.....1st RESPONDENT

KIUNDO ENTERPRISES (T) LIMITED.....2nd RESPONDENT

Last order: 4th Dec, 2019

Date of Ruling 27th Feb,2020

RULING

FIKIRINI, J.

This is a ruling on two sets of preliminary points of the objections. On one hand; the 2nd Respondent had raised three points of preliminary objections against the Applicant as follow:

1. That, the application is bad in law for violating principle of *Res judicata* under section 9 of the Civil Procedure Code, Cap 33, R.E 2002 (the CPC)

2. That, the applicant has *no locus* to file the application filed under section 17(2) (a) & (b) of the Office of Attorney General (Discharge of Duties) Act Cap 268, and
3. That, the application is misconceived and in violation of Order XXI Rule 16 of the CPC.

On the other hand, the applicant as well filed a notice of preliminary point's objection namely:

1. That, the counter affidavit is sworn by the incompetent deponent.
2. That, the counter affidavit is containing statements of arguments and pleadings rather than facts contrary to order XIX Rule 3 (1) of the Civil Procedure Code, Cap 33 R.E 2002., and
3. That, the counter affidavit been sworn by the different person from the person who verified and deponed.

This application emanated from application of execution of decree in Commercial Case No. 213 of 2015. After hearing and determination of the suit the Court entered decision in favor of the 2nd Respondent (Kiundo Enterprises Limited) on 16th September 2015. Attempting to execute the decree in her favor, the applicant

raised objection in Miscellaneous Commercial Application No. 186 of 2018, the objection which was however, dismissed.

Undeterred, the applicant filed this application basically challenging the execution proceedings in respect of the Garnishee Order Nisi issued by this Court stopping withdrawal and transfer Tzs. 5,850,811,350.05 from Account No. 2081100034 registered in the name of the 1st Respondent held at NMB bank, being government property and hence this ruling.

When the matter was called for hearing and it was learnt there was a preliminary objection raised by the 2nd respondent and counter preliminary point of objection raised by the applicant, the Court directed they be disposed of by way of written submissions simultaneously. Since the 2nd respondent filed her notice first, logic dictates that I should start disposing it first, before embarking on the second notice which was as stated earlier raised by the applicant.

At the hearing Mr. Gabriel P. Malata - Deputy Solicitor General appeared for the applicant while Ms. Ster Nimerudi learned advocate appeared for the 1st respondent and Mr. Roman Masumbuko learned advocate appeared for the 2nd Respondent.

Submitting on the raised preliminary points of objection after dropping the 3rd point related to contravention of Order XXI Rule 16 of the CPC. It was Mr. Masumbuko's submission that the application was bad in law for violating

principle of *res judicata*. Expounding on that, he submitted that the present application was a second attempt by the applicant to interfere with the execution proceedings. The first attempt was through Miscellaneous Commercial Cause No. 186 of 2018, which had similar facts and prayers like in the present matter. In paragraph 16 of the affidavit in the present application the applicant acknowledges that, this Honorable Court delivered its ruling on 28th August 2019, in respect of similar matters. The applicant, if consider there was any errors in the said decision, should have prefer an appeal or revision but not coming back with similar application seeking to lift the garnishee order or set aside the attachment of the account, he submitted.

Continue submitting and making reference to **Mulla on Civil Procedure Code 14th Edition 2005 at page 100**, who stated that:

“.....in order to sustain the plea of res judicata, it is not necessary all parties to the two litigations must be common. What is necessary is that the issue must be between the same parties or between the parties under whom they or any of them claim.”

He submitted that Miscellaneous Commercial Case No. 186 of 2018 filed by the applicant against the same respondents was dismissed, thus making the present

application *res judicata*. Supporting his submission he cited the case of **Umoja Garage v NBC Holding Corporation (2003) T.L.R 339**, where the Court had a chance of illustrating on the principle by stating that, the matter is *res-judicata* if it is directly and substantially the same to the previous case.

On third point of preliminary objection; Mr. Masumbuko submitted that, the applicant had *no locus* to file this application, as she has never been a party to any contract or proceedings subject to the present application. 1st Respondent is a body of Corporate capable of suing and being sued on its own name as a rightly held by this Honorable Court in its ruling, in Miscellaneous Commercial Application No. 186 of 2018. The powers vested in the 2nd respondent by virtue of being a corporate body cannot be taken by any other person including the Applicant (Attorney General) unless a proper application for joining the applicant on the ground of public interest has been made and decided on merit. That is when the Attorney General can have a right to intervene and not to institute proceedings.

Intervening proceedings does not mean initiating proceedings, Mr. Masumbuko underscored. The Attorney General should first seek leave of the Court to intervene in the matter and given right of audience through section 17(2) (a) & (b) of the Office of the Attorney General (Discharge of Duties) Act. The Attorney General was supposed to make a formal application to intervene after 1st respondent had

initiated the appeal process. Supporting his submission cited the case of **Lujuna S. Balazi v Registered Trustee of Chama cha Mapinduzi (1996) T.L.R 203**

Opposing the submission, the applicant cited the case of the **Registered Trustees of Chama cha Mapinduzi vs Mohammed Ibrahim Versi and Sons and Alimohamed Mohammed Versi, Civil Appeal No. 16 of 2008 CAT - Zanzibar** (unreported) at page 8, the Court provided five conditions in determining *res judicata*, which are: **one**, the former suit must have been between the same litigating parties, **two**, subject matter directly and substantially in issue must be same matter with the former suit, **three** the party in the subsequent suit must have litigated under the same title in the former suit. **Four**, the matter must have been decided, and **Five**, the former suit must have been decided by the court of competent jurisdiction.

Extending his submission, he submitted that, when Miscellaneous Commercial Application No. 186 of 2018, was on, no any Garnishee order has already been issued at the time. In the present application that is Miscellaneous Commercial Application No. 120 of 2019 the applicant is seeking to lift the *garnishee order nisi* for attachment of Tzs. 5,850,811,350.05 from Account No. 2081100034. So the two applications have at some point different prayers although everything else is the same. Dissecting **Umoja** case (supra) cited by the 2nd respondent, it was the applicant's submission that it did not fit the circumstances of the present

application, arguing that, the appellant failed to raise a matter in the previous suit and the Court held that:

“it would be an abuse of the court process to allow the same matter to be subject of litigation in the subsequent case.”

Taking up on the issue of *locus standi*, challenging the point of objection, the applicant submitted that, the gist of the application was to raise an objection proceedings in respect to the attachment of government property pending determination of the application for the review, and that the objection proceedings against attachment of the 1st respondent's account which is public institution owned by the government is immune from attachment in execution proceedings as provided under section 16(3) of the Government Proceedings Act. It is also a fact that the 1st respondent is a public institution under the University Act No. 7 of 2005, therefore being a public institution only owns and runs the public accounts. The 1st respondent keeps neither private account nor money deposited including account no. 2081100034 which has been attached, to itself. Stressing on the point, the applicant submitted that the liability of the 1st respondent is the liability of the government and the Attorney General being a guardian of the public property and Chief Legal Advisor to the government has direct interest in the matter thus has *locus standi* to appear at any stage and defend the public interest.

To fortify their position, he cited number of cases **The Attorney General v Tanzania Ports Authority and Mr. Alex Msama Mwita, Civil Application No. 87 of 2016, Consolidated Holding Corporation v African Terminals Limited and 3 Others, Civil Application No. 144 of 2012 and Som Prakash Rekhi vs Union of India & Anr, AIR 212 1981** at page 3&5.

In rejoining submission, Mr. Masumbuko submitted that the applicant has failed to appreciate that the two applications have the same effect as they all seek to stop the execution process, by either dismissal, lifting or setting aside. The applicant had requested this Honorable Court in Miscellaneous Commercial Application No. 186 of 2016 to dismiss the execution resulting from decision in Miscellaneous Commercial Cause No. 213 of 2015 from attachment, withdrawing and/or transferring of Tzs. 5,850,811,350.05. It is also seeking to restrain the 2nd respondent and setting aside the *garnishee order nisi*. These all are substantially the same matters.

Regarding the issue of *locus standi*, the 2nd respondent submitted that there is a specific law which the applicant must comply with before intervening in any proceedings before the Court. The applicant's counsel has failed to reply to the gist of the respondent's submission that the applicant has no *locus standi* until it files an application for intervening and show public interest as required under section 17 (2) (a) & (b) of the said Act.

Finalizing the submission, it was submitted that the basis of the objection was on lack of *locus standi* which is provided under section 17(2)(a)&(b) of the Office of the Attorney General (Discharge of Duties) Act, Cap 268 and not section 7(2)(a) &(b).

Having closely examined the submissions by the counsels for the parties and as intimated earlier logic requires me to determine the first set of the preliminary objection raised. And that would be for this Court to determine: **One**, is whether the suit is barred by *res judicata*, and **two**, whether the applicant has *locus standi* to institute this proceedings.

Starting with the first issue whether the suit is barred by *res judicata*, both cases cited that of **Umoja Garage and Registered Trustees of CCM** (supra) have eloquently illustrated when the matter can be said to be *res judicata*. Careful examination of the differences and similarities of the two applications: Miscellaneous Commercial Cause No. 186 of 2018 and Miscellaneous Commercial Cause No. 120 of 2019 in light of section 9 of the CPC and the two cited cases above and adding to the list the case **Gerald Chuchuba v Rector Itaga Seminary (2002) T.L.R 213**, I am convinced that the two application are basically the same. The applicant's submission that two applications are different as in the present application, the applicant is seeking to lift the *garnishee order nisi* while in the previous application there was no such application has no logic. The cause of

action which was breach of contract is directly and substantially the same. The two applications both germinated from the same Miscellaneous Commercial Cause No. 213 of 2015. While in Miscellaneous Commercial Cause No. 186 of 2018 the Court dismissed the application and ordered execution to proceed in the Miscellaneous Commercial Cause No. 120 of 2018 was seeking for the same Court to set aside the execution order already made. With due respect, to the applicant, the 2nd respondent's submission carries the day, that though in one application it was before the garnishee order nisi has been issued while in the second application it was after, but the facts are similar albeit with different terminology.

In the case of **Tanzania Electric Supply Co Ltd v Mufungo Leonard Majura and Others, Civil Application No. 210 of 2015 (unreported)**, Court of Appeal of Tanzania stated that:

“The request by the applicant to lift garnishee order nisi is part of the process of execution because in essence it entails moving the court to stop the process of execution.”

[Emphasis mine]

The decision has cemented my stance that the two applications are similar and have fully satisfied the criteria set in the cited case of **Umoja Garage, Registered Trustees of Chama cha Mapinduzi and Gerald Chuchuba** (supra).

I, without a flicker of doubt, find this present application being barred under *res judicata*, principle. Adding to the conclusion, even if the Court would not have concluded so, still this Court would have been *functus officio* as it had determined the matter to its finality. The possible options are either review which is subject to compliance to the requirement, appeal or revision to the higher Court, since it is the only one which can reverse the order made by this Court when it delivered its ruling on 28th August, 2019.

The first point of objection raised by the 2nd Respondent is worth sustaining and according sustained.

Coming to the issue of *locus standi*, on whether the applicant has *locus standi* to institute these proceedings. It is uncontroverted fact that the Attorney General has a right of audience to appear at any stage of proceedings before any court to represent the government in any suit which the government is a party or has interest. This admitted, there is however the manner and procedure applicable for the Attorney General to be part of the proceedings either as intervener or a party. The Attorney General under section 17(2) (a) and (b) of the Attorney General (Discharge of duties) Act, has been provided with ammunition and manner how the Attorney General can have audience. For easy of reference the provision is provided below:

- (a) *“notify any court, tribunal or any other administrative body of the intention to be joined to the suit, inquiry or administrative proceedings, and*
- (b) *Satisfy the court, tribunal or any other administrative body of the public interest or public property involved”*

The law provides that the Attorney General to comply with any direction of the Court on the nature of the pleadings or measures to be taken for the purpose of giving effect to the effective Discharge of Duties of the Office of the Attorney General. Highly respecting that the Attorney General is a legal custodian but the responsibility comes with compliance to the procedures in place such as to when intervention is necessitated. And that has been clearly provided that it has to be by a way of an application, which the Attorney General has not complied with. Once the Court is satisfied that there is ground of allowing application it the by the Attorney General it will then give directives as to how to proceed. In other words the statutory right of audience of the Attorney General is not automatic.

Presently, the Attorney General is not conferred with those rights as far as this application is concerned.

This application and the other one for review Commercial Review No. 02 of 2019 are both before me. Knowing that, I considered it prudent to exercise Court's wisdom, that despite striking order I am about to make, let the status quo be maintained pending hearing and determination of the application for review scheduled for hearing on 27th February, 2020.

Otherwise, the two preliminary points of objection raised are sustained resultant of which this application is struck out. The second set of preliminary points of objection is considered overtaken by events. It is so ordered.



A handwritten signature in black ink, appearing to read "P.S. FIKIRINI".

P.S FIKIRINI

JUDGE

27th FEBRUARY 2020