IN THE HIGH COURT OF UNITED REPUBLIC OF THE TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION No.11 of 2020
(Originating from Commercial Case No.11 of 2020)

STARPECO LIMITED .....1st APPLICANT

FINE WOODS WORKS LIMITED .....2nd APPLICANT

PRASHANT MOTIBHAI PATEL.....3rd APPLICANT

DARSHANA PRASHANT PATEL.....4th APPLICANT

versus

AZANIA BANK LTD.....1st RESPONDENT

MARK AUCTIONEERS & COURT BROKERS CO.LTD.....2nd RESPONDENT

Last order issued on 06/02/2020
Ruling delivered on 10/02/2020

RULING

D.J.NANGELA, J.:

This application was made *interpartes* by way of a Chamber Summons under Rule 2 (2) of the High Court (Commercial Division) Procedure Rules 2012 (as amended), Order XLIII Rule 2; Order XXXVII rules (1) (a) and 2 (a); read together with sections 68 (c), (e) and Section 95 of the Civil procedure Code (the CPC), Cap.33 [R.E.2002]; Section 2 (3) of the Judicature and Application of Laws Act, Cap.358 [R.E.2002], and

Section 73 of the Land Registration Act, Cap. 334, [R.E. 2002]. The application was preferred under a certificate of urgency.

The Chamber Summons is supported by affidavits of Mr. Gratian Benedicto Nshekanabo, a Director of the 1st Applicant and Mr. Prashant Motibhai Patel, the 3rd Applicant and also a Director of the 1st and 2nd Applicants. The Applicants pray for the following:

(i) A Restraint Order, restraining the 1st Respondent, its appointees, agents, officials, workmen, or any other person acting on behalf of the 1st Respondent or claiming under the 1st Respondent, from transferring title and or ownership of that piece and parcel of land known as Plot. No.107 and 108, situated at Kipawa Industrial Area, along Nyerere Road, Ilala Municipality, within the City of Dar-es-Salaam (**the Suit Premises**), more particularly described in the Certificate of Title No.29427, jointly registered in the name of 3rd and 4th Applicants, to the successful bidder or to any person whomsoever, until the full determination of Commercial Case No.11 of 2020, currently pending in this honourable Court.

(ii) An Order restraining the Registrar of Titles, or any officer acting under or in the office of the Registrar of Titles, from receiving, considering and effecting a transfer of title, and, or transfer of ownership by operation of the law, in respect of

the Suit Premises registered under Certificate of Title No. 29427 from the 3rd and 4th Applicants' names, to any person whomsoever, until further orders of this Honourable Court.

(iii) An Order restraining the Respondents, jointly and severally, their officers, appointees, agents, assignees, allocatees, or any person instructed and claiming title under them, from evicting the 3rd and 4th Applicants, or from evicting any person in occupation of the Suit Premises under instruction of the 3rd and 4th Applicants, out of the Suit Premises registered under Certificate of Title No.29427 in the names of the 3rd and 4th Applicants, until further orders of this Honourable Court.

(iv) That, this Honourable Court be pleased to grant interim orders of temporary injunction restraining the Respondents, their agents, officials, workmen, or any other person acting on behalf of the Respondents, expressly or impliedly, from harassing, intruding, interfering, trespassing or interrupting the 3rd and 4th Applicants' peaceful enjoyment of the Suit Premises registered under Certificate of Title No. 29427, until the full determination of Commercial Case No. 11 of 2020, pending in this Honourable Court.

(v) Costs of this Application be provided for; and

(vi) Any other orders the Court may deem fit and just to grant.

The 2nd Respondent did not file a counter affidavit and never appeared before this Court. On the other hand, the 1st Respondent resisted the application by way of a counter affidavit filed on the 4th day of February 2020. Besides, the 1st Respondent filed a notice of preliminary objection praying that the Application be dismissed with costs. The preliminary objection raised two points of law, namely:

(i) That, the Application No.11 of 2020 is *res-subjudice*.

(ii) That, this honourable Court has no Jurisdiction to entertain this matter.

On 5th February, 2020, a day when this Application was called on for its hearing, the Applicants enjoyed the services of Mr. D.M., Duncan, and Mr E.N, Mwakingwe, advocates from FK-Law Chambers. The 1st Respondent was represented by Ms. Endaeli Mziray, learned advocate. As stated earlier, the 2nd Respondent did not appear in Court, and did not file any document to challenge the application.

Given the Certificate of urgency under which the application was filed, this Court, in agreement with the parties, resolved that the parties should argue both, the application and the two preliminary points of objection together and the Court will give its ruling thereafter.

In his submissions, Mr. Duncan submitted that the application before the Court was filed seeking for orders of this Court to, among others, restrain the 1st and 2nd Respondents or their agents or whomsoever, from evicting the 3rd and 4th Respondent or tenants occupying the Suit Premises, registered under Certificate of Title No. 29427, and, which the 1st Respondent purports to have been a mortgaged property, until the full determination of Commercial Case No. 11 of 2020 pending in this Honourable Court.

Mr Duncan submitted further that, one of the major reasons that prompted the applicant to file this urgent application in this Court is that, there are third parties residing in the Suit Premises which the 1st Respondent alleges to have been a subject of a mortgage resulting from credit facilities advanced to the 1st and 2nd Applicants, and which the Applicants are unaware of.

Mr Duncan further submitted that, if the Court declines to grant the application and the various restraint orders sought by the Applicants, the 3rd parties lawfully occupying the suit premises, will be greatly affected and will suffer irreparable loss. He emphasized, on the balance of convenience, that, if the Court grants the reliefs sought by the Applicants, the Respondent will not suffer any harm because the suit

premises will still be where they stand. Moreover, he added that, if it is established that the Suit Premises were certainly mortgaged, then the Respondents can still resort to the normal processes of recovering their outstanding monies. In view of these, and the reasons contained in the affidavits, he implored this Court to grant the application with costs.

For her part, Ms Mziray, the learned advocate appearing for the 1st Respondent, strongly opposed the application. She requested this Court take into account the 1st Respondent's counter affidavit, in addition to the reasons she was about to advance, in opposition to the Application.

Starting with a response to Mr. Duncan's main submissions and prayers, Ms Mziray submitted that, the 1st Respondent was totally opposed to the Applicants prayers that the 1st Respondent be restrained from evicting the Applicants from the Suit Premises. She submitted that, the reasons to that effect are that, the Applicants are fully aware that the Suit Premise was mortgaged to the 1st Respondent to secure a loan facility advanced to the 1st and 2nd Applicants and, that, despite several demands, notices, meetings and a further statutory notice which gave them 60 days to pay the remaining balance, the Applicants have failed to do so.

She charged, further that, the 3rd Applicant knew the consequences of a non-repayment of the loan and the effects of mortgaging the Suit Premises to the 1st Respondent. As such, she pressed that, the 1st Respondent should be allowed to proceed with the processes it has commenced, as there is no loss which the Applicants will suffer. Instead, it is the 1st Respondent who is suffering and will continue to suffer due to the non-payment of the monies advanced to the Applicants. She requested the Court to further adopt the other grounds advanced in the Counter Affidavit of the 1st Respondent.

As regards the two preliminary points of law, which she had raised in objection to the application, Ms Mziray submitted that the application at hand is *re-subjudice* as there is currently a pending **Misc. Application No.19 of 2020**, which was filed earlier by the same Applicants in the High Court of Tanzania (Dar-es-Salaam District Registry), and which arises from a **Civil Case No.6 of 2020.** She submitted that the latter case and the **Misc. Civil Application No.19 of 2020**, are matters essentially the same as the one filed in this Court (i.e., **Commercial Case No. 11 of 2020**), from which this **Misc. Commercial Application No.11 of 2020** arose.

Ms Mziray submitted that, **Misc. Civil Application No.19 of 2020** was scheduled to be heard on 5th February 2020, before Hon. Madam Justice De Mello, J., at 9.00 am. Consequently, Ms. Mziray was of the view that, if this Court is to proceed with the granting of the orders sought, which are also similar to the orders sought in the **Misc. Civil Application No.19 of 2020**, the Court may find itself issuing two conflicting orders or decisions. She further pointed out that, the **Misc. Civil Application No.19 of 2020** was filed much earlier than the current **Misc. Commercial Application No.11 of 2020.** In fact, it was filed, on 10th January 2020, and, for that reason, being the one filed earlier, it should be heard first.

On the second point of objection, Ms Mziray submitted that, this Court lacks jurisdiction to hear the application because the matter involves a landed property known as Plot No.107 and 108, situated at Kipawa Industrial Area, along Nyerere Road, Dar-es-Salaam, and eviction matters in relation to occupants in such a property. As such, she maintained that, this Court does not have jurisdiction to entertain the matters before it since there is a specific forum for such cases.

Responding to the two objections raised by Ms Mziray, and, also, rejoining to her submissions regarding the granting of the prayers

sought in this Application, Mr. Duncan conceded that, truly the Applicants have also filed a **Misc. Civil Application No.19 of 2020,** and the same is pending in the High Court (Dar-es-Salaam District Registry) and, that, the same was due for hearing at 9.00am on the 5th of February 2020. (It should be noted that this was the same day when this application was scheduled for hearing, and was partly heard on that date at 8.30 am).

However, Mr. Duncan submitted that the said **Misc. Civil Application No. 19 of 2020** was different from this **Misc. Commercial Application No. 11 of 2020** because the former Application seeks to restrain the 1st and 2nd Respondents (who are same parties herein) from auctioning the Suit Premises and not for eviction orders.

However, Mr. Duncan was quick to add that, even if the two applications are to be found to be the same, then, the preferred position is to stay one in favour of the other. To further buttress his argument, he sought assistance from the decision of this Court in **Misc. Commercial Application No. 254 of 2017, Vodacom Tanzania PLC *vs* Planetel Communication Ltd** (unreported), to the effect

that the Court can make interim orders to prevent the ends of justice from being defeated.

As regards Ms. Mziray's second objection, that, this Court lacks jurisdiction to entertain the matters before it, Mr. Duncan was of the view that this Court is seized with powers to hear and determine the matters before it.

He submitted that, the issues surrounding the application, emanate from an alleged banking transaction between the 1st Respondent and the 1st and 2nd Applicants, in which it is purported that, the 3rd and 4th Applicants, mortgaged the Suit Premises to the 1st Respondent as a security for the loan advanced to the 1st Applicant.

Mr. Duncan further found support from Ms. Mziray's own submission, to the effect that, the matter before the Court was for eviction of the Applicants from a property which was a subject of a mortgage in a banking transaction. Consequently, he was of a solid view that, this was a commercial transaction befitting the definition given under **Rule 3 of the High Court (Commercial Division) Procedure Rules, 2012**.

In her brief rejoinder to the submissions by Mr. Duncan, regarding the two points of objection, Ms Mziray was emphatic that, because **Misc. Civil Application No.19 of 2020** was yet to be determined, and since the current **Misc. Commercial Application No.11 of 2020** is substantially the same as **Misc. Civil Application No.19 of 2020,** the orders sought should be declined.

Ms Mziray submitted that, the authority relied upon by Mr. Duncan was utterly distinguishable as it is totally based on a different set of facts and issues.

On the issue of jurisdiction of this Court, she insisted, that, this Court lacks jurisdiction over the matters before it because they are about an opposition to an eviction of the 1st and 2nd Applicants from a landed property known as Plot. No.107 and 108, situated at Kipawa Industrial Area, along Nyerere Road, Ilala Municipality, in Dar-es-Salaam.

Noting that this Court was not availed with a copy of the pleadings filed in the High Court of Tanzania (Dar-es-Salaam District Registry), in respect of the **Misc. Civil Application No.19 of 2020,** which is said to be pending, this Court reserved its ruling till the 6th of February 2020, and made the following orders:

(i) That, copies of the Misc. Civil Application No.19 of 2020 be made available for the Court on the same day (i.e., 5/2/2020) at 1.00pm. Further, the Court be informed of the outcome of the hearing of the said application (as the current application, Misc. Commercial Application No.11 of 2020 was heard at 8.30 am, while Misc. Civil Appl.No.19 of 2020 was due for hearing at 9.00am).

(ii) That, in the meantime, an interim order is made to the effect that the *status quo* in respect of the matters brought before this Court should be maintained until this Court issues its ruling on 6th February 2020, at 3.00pm.

In response to the first Order above, on the same day, the 5th of February 2020, this Court received two documents from the learned counsel for the parties. The first Document was a letter, dated 5th February 2020, from the learned counsel for the Applicants. The letter was addressed to the Honourable Registrar, High Court of Tanzania (Dar-es-Salaam District Registry). It sought to withdraw the **Misc. Civil Application No. 19 of 2020** from the Court, on the ground that it had been overtaken by events. In some way, the letter seems to indicate that the prayers were already made and were granted by Hon. Madam Justice De Mello, J., (although this Court came to learn, afterwards, that, no such orders were ever issued by Hon. Madam De Mello, J., on the particular day.)

The second letter was from the 1st Respondent's legal counsel, addressed to this Court and, supplying the Court with the pleadings as per its order issued on the 5th February 2020 at 8.45 am. In this letter, apart from availing to this Court the pleadings in respect of the **Misc. Civil Application No.19 of 2020** and its underlying **Civil Suit No. 6 of 2020**, the legal counsel for the 1st Respondent further submitted that, when the parties appeared before Madam Justice De Mello, for the purpose of hearing the **Misc. Civil Application No.19 of 2020**, the learned counsel for the Applicants sought to withdraw the same from the Court.

However, the legal counsel for the 1st Respondent informed this Court that, under that letter, that, immediately after such a prayer, the Applicants' legal counsels prayed to proceed with yet another **Misc. Civil Application No.44 of 2020**, filed by the same parties and against the same Respondents, and seeking for the same orders of injunction to restrain the Respondents from evicting the Applicants from Plot. No.107 and 108, Kipawa Industrial Area, Ilala Municipality, Dar-es-Salaam, with C.T. No. 29427.

According to the 1st Respondent's letter, this Court was informed that, before Hon. Madam De Mello, J., the Applicants were represented

by Mr. Mayenga, Advocate, and Mr. Jerome Msemwa, Advocate. The 1st Respondent was represented by Mr. Mugila, Advocate.

This Court was further informed that, noting that, the 1st Respondent was yet to be availed with copies of the **Misc. Civil Application No.44 of 2020**, despite the fact that, on 3rd February, 2020 the High Court Registrar had ordered that copies be availed to the 1st Respondent's Advocate, the High Court, De Mello, J., declined to grant the order of temporary injunction and orders of maintaining the *status quo*, directing the Application to be heard on 12th February, 2020.

According to the letter by the 1st Respondent's advocate, his efforts to get hold of a copy of the **Misc. Civil Application No.44 of 2020,** which was yet to be served to him by the Applicants' legal counsel, did not materialize, and, for that reason, he was unable to avail a copy of it to this Court as he did, in respect of the **Misc. Civil Application No.19 of 2020** and the **Civil Case No.6 of 2020**.

The above factual position meant that, there has been three applications, *viz:* **Misc. Civil Application No. 19 of 2020**, **Misc. Civil Application No.44 of 2020** and **Misc. Commercial Application No.11 of 2020** (which is the current Application before me), and, all these are in respect of the same parties, the same issues and seeking for

similar orders. In my view, this is an upsetting situation as the Applicants seem to be forum-shopping and, perhaps, indulging in acts that constitute a grave abuse of the process of this Court. However, I did not want to make own conclusions before hearing from the learned counsel for the parties.

In view of the above observation, on 6th February, 2020, when the parties appeared before me at 3.00pm, the time I had set for the delivery of my ruling, I tasked them to address this Court regarding what transpired before Hon. Madam Justice De Mello, as well as the pending **Misc. Civil Application No.44 of 2020** and, whether, what is being done by the Applicants, i.e., the filing of multiple/duplicate applications in different Court registries, does not constitute forum-shopping and an abuse of the process of the Court. I will try to summarize their submissions on the point raised by the Court *suo motu*.

To begin with, Mr. Duncan was of the view that the filing of the several applications was not an abuse of the process of the court. In short, he informed this Court that, when the parties appeared before Hon. Madam De Mello, J., in regard to the **Misc. Civil Application No.19 of 2020**, the Applicants offered a prayer to withdraw the Application from the Court, and, although no Order was issued to that effect, the Court scheduled the matter to 12th February 2020. He further

submitted, that, the Applicants have also written a letter **intending** to withdraw **Misc. Civil Application No.44 of 2020** from the High Court, (Dar-es- Salaam District Registry).

Mr. Duncan, who was accompanied by Senior Advocate, Mr. Jerome Msemwa, and Advocate Mayenga as counsels for the Applicants, further submitted that, in view of the Applicants' intention to withdraw the pending Applications from the Court, as shown herein above, the Applicants will therefore be left with only one Application, the current **Misc. Commercial Application No.11 of 2020**. In view of this, he argued that, there cannot be an issue of abuse of the process of the Court.

Besides, Mr. Duncan submitted, as regards the filing of multiple Applications and of a similar nature and effect, that, the Applicants did so because their interests were prejudiced following the auction which took place on 21st January 2020, a day when they were due to appear in Court, and, noting that the Suit Premise had been auctioned, they resorted to the filing of the **Misc. Commercial Appl. No.11 of 2020** in this Court.

Mr. Duncan maintained that, such acts were not an abuse of process of the court, but rather they were acts of desperate Applicants seeking for judicial remedy to protect their interests. He further prayed

that the current matter be adjourned to await the ruling of Madam Justice De Mello regarding the fate of **Misc. Civil Application No.19 of 2020**. I do not think of granting such a prayer at this stage for the reasons that shall be advanced later herein.

For his part, Senior Advocate, Mr. Msemwa, who appeared together with Mr. Duncan, was in full association and supportive of Mr. Duncan's submissions. He observed that, since there has been a prayer to withdraw **Misc. Civil Application No.19 of 2020** from the Court, there is nothing pending in the High Court, Dar-es- Salaam District Registry as of now, meaning that even the issue of *res-subjudice* does not hold.

Mr. Msemwa further submitted that, since the Applicants have shown their intent to withdraw the pending matters before the High Court, Dar-es- Salaam District Registry, the issue of an abuse of the process of the Court cannot arise because, by 12th February 2020, when the parties will appear before Hon. Madam Justice De Mello, J., the position regarding the pending applications (i.e., **Misc. Civil Application No.19 of 2020** and **Misc. Civil Application No.44 of 2020**), will be known.

For her part, Ms. Mziray, the learned counsel for the 1st Respondent, was emphatic that, as regards the **Misc. Civil Application**

No.19 of 2020, the Court has not delivered its ruling on that Application, and there is no evidence that it has been withdrawn from the Court. Secondly, as regards the **Misc. Civil Application No.44 of 2020,** the same is also pending before Hon. Madam Justice De Mello, J., and all these were scheduled for hearing on the 12th February 2020.

Even so, Ms Mziray lamented that, to-date, the Applicants have deliberately failed or refused to serve the 1st Respondent with a copy of pleadings regarding **Misc. Civil Appl. No.44 of 2020.** She maintained further that, even if the 1st Respondent was in receipt of a letter informing him that the Applicants intend to withdraw the application No.44 of 2020 from the Court, there is no order of the Court to that effect.

She submitted further, that, it is not true that all proceedings have been withdrawn from the Court, because, the Order given by Hon. Madam Justice De Mello, J., on 5th February 2020, was for the Applicants to ensure that they serve the Respondents with the copies of the **Misc. Civil Application No. 44 of 2020**, and the hearing of both applications (**Nos. 19 and 44 (both of 2020)**) was scheduled to be held on the 12th day of February 2020.

Ms Mziray was further of the views that, the letters intending to withdraw the pending proceedings before Hon. Madam Justice De Mello,

J., are nothing but an afterthought, following the interim orders of this Court, which were made on 5th February 2020, regarding the maintenance of the *status quo* pending the ruling which was earlier expected to be delivered on 6/2/2020.

As regards the issue raised *suo motu* by the Court, Ms Mziray was of an affirmative view that, what the applicants are doing from one Court to another, opening same applications, (i.e., **Misc. Civil Appl. No.19. Misc. Civil Appl. No.44** and **Misc. Commercial Appl. No.11,** all of 2020), amounts to an abuse of the process of the court. Ms Mziray noted that all these applications are based on the same parties, and are substantially in respect of same matters and same issues, as they seek for injunctive orders to restrain the Respondents from evicting the 1st and 2nd Applicants from the Suit Premises.

In a brief rejoinder, Mr. Duncan rejoined that, the Suit Premises were auctioned on 21st January 2020, even after the Respondents were served with the pleadings regarding the **Misc. Civil Application No.19 of 2020**. He stated that, it was in view of that fact that, the Applicants had to find for an effective form of remedy to preserve their interests, and, after filing the **Misc. Commercial Application No.11 of 2020**, the Applicants have prayed to withdraw the applications filed in the High

Court, Dar-es- Salaam District Registry, before Hon. Madam Justice De Mello, J., though unfortunately, the Court order is yet to be given.

He was of a further view that, the Applicants are *bona fide* litigants seeking to protect their interests. Besides, Mr. Duncan submitted further, that, having dual proceedings in the same court does not amount to an abuse of the process of the Court, since under section 8 of the CPC, what should be done is to stay one of the proceedings.

I have given due consideration to the rival submissions by the legal counsel for the parties herein and have, as well, considered the pleadings filed in this Court. I have as well considered the new revealed information obtained from the High Court, Dar-es-Salaam District Registry, regarding **Misc. Civil Application No.19 of 2020** and **Misc. Civil Application No.44 of 2020.**

Clearly, as correctly stated by Ms Mziray, learned counsel for the 1st Respondent, even if a prayer has been made seeking for the withdrawal of **Misc. Application No. 19 of 2020**, there is no evidence, in the form of a Court order or a ruling to the effect that the Application has been marked by Hon. Madam Justice De Mello, J., as "**Withdrawn**". What is observed from the submissions is that, **Misc. Civil Application No.19 of 2020** and **Misc. Application No.44 of**

2020, are still pending and were scheduled for hearing on 12th February 2020.

From the above look of things, there are three pertinent questions which arise from the two objections filed by the 1st Respondent and generally, the entire application, and I am tasked to address them. These are:

(1) *whether this Court has jurisdiction to entertain an application or a matter which involve a landed property mortgaged to bank as a security for a loan facility advanced to a party to the case; and*

(2) *if the first issue is in the affirmative, whether this Court should continue to entertain this Misc. Commercial Application No.11 of 2020, taking into account the fact that there are two other pending applications, Nos.19 and No.44 of 2020, filed in the High Court, Dar-es-Salaam District Registry.*

(3) *Whether, the Applicants' acts of filing multiple/duplicate application in the different Court Registry, and before different Judges, amounts to an abuse of the process of the Court.*

As regards the first issue, Mr. Duncan submitted that, this Court has jurisdiction to hear and determine the application before it. His

reasons were anchored on the fact that, the current application is closely linked to a purported banking transaction which the 1st Respondent argues that was secured by a mortgage. For her part, Ms Mziray submitted that, the Court lacks jurisdiction to hear this matter because it is one regarding eviction from a landed property and, thus, there is an appropriate forum for that.

In my view, I am in agreement with Mr. Duncan, that, this Court has jurisdiction to hear and determine a matter which involves a landed property mortgaged as a security for a loan facility advanced to a party to the case.

In particular to the law, paragraphs (c) (d) and (e) of Rule 3 of the High Court (Commercial Division) Procedure Rules, 2012 (as amended) is clear that, where a dispute between the parties arose out of a contractual relationship relating to business, restructuring or payment of commercial debt, such a dispute is considered to be a commercial case.

Basically, a number of cases have once decided whether a particular matter should be categorized as falling under the purview of the Land Division of the High Court or the Commercial Division. Such cases include: **The National Bank of Commerce Ltd v National Chicks Ltd & 4 Others, Civil Appeal No.129 of 2015 (CAT),**

(Unreported), Per Lilla, JA; **Britania Biscuits Ltd v National Bank of Commerce Ltd & 3 Others, Land Case No.4 of 2011, (HC),** (Ngwala, J.); **and Exim Bank (T) Ltd v Agro Implex and Two Others, Land Appeal No.29 of 2008,** per Mziray, J., (as he then was).

Consequently, as Mr. Duncan correctly said, the matter at hand fits squarely within paragraphs (c) (d) and (e) of Rule 3 of the High Court (Commercial Division) Procedure Rules, as amended. That means, this Court, therefore, has jurisdiction to hear and determine it and, the objection raised by the 1st Respondent challenging the jurisdiction of this Court, is without merit and is hereby dismissed.

However, should this Court continue to grant the application and the orders sought or should it agree with the legal counsel for the 1st Respondent that the matter at hand is **Res-subjudice**? If it agrees that the matter is *Res-subjudice*, what are the effects? Should the application be dismissed, struck out or merely stayed?

Section 8 of the Civil Procedure Code provides for the doctrine of **Res-subjudice**. The section provides as follows:

> "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."

As already pointed out in this Application, the 1st Respondent had informed this Court that, there was a **Misc. Civil Application No.19 of 2020** which was substantially the same as the Application at hand, and, that, the same was pending before Hon. Madam Justice De Mello, J., in the High Court, Dar-es-Salaam District Registry. It was in this regard, that, the issue of *Re-subjudice* arose. And, as noted earlier, the legal counsels for the Applicants conceded that, indeed there was such a matter filed by the Applicants in the High Court, Dar-es-Salaam District Registry, and which is pending hearing before Hon. Madam Justice De Mello.

Earlier I pointed out that, the legal counsel for the 1st Respondent availed to this Court a copy of **Misc. Civil Application No. 19 of 2020**. It has been submitted by the legal counsels for the Applicants that that application was a subject of withdrawal at any time. As such, they held a view that, since the objection was based on this application which is subjected to a prayer for its withdrawal from the Court, then the objection has no merits.

In my view, and essentially so, had the legal counsels for the Applicants proved that the **Mic. Civil Application No.19 of 2020** was no longer pending in Court, that would have been the position. However, no evidence was submitted to that effect and, as correctly stated by Ms. Mziray, there was no ruling delivered by Hon. Madam Justice De Mello, J., on the 5th of February 2020, to that effect. The Applications are, therefore, still pending in the Court.

Mr. Duncan, the legal counsel for the Applicants, further prayed for an adjournment of this ruling pending the hearing of the Application No.19 of 2020 on 12th February 2020 by Hon. Madam Justice De Mello. I am not prepared, as I said, to grant such a prayer because, to me, granting such a prayer means holding the Respondents at the mercy of the Applicants. This Court is not prepared to do so, given that, doing so would be prejudicial to the ends of justice.

Indeed, while it is true that this Court acts in the interest of justice for both parties, safeguarding the ends of justice is not a one-sided affair. It applies to and caters for all parties to the case, including whoever may be inconvenienced, including even witnesses, if any. That is indeed what upholding ends of justice means. In this case, the Respondents are already inconvenienced by a multiplicity of similar applications, a fact which is, by itself prejudicial to the ends of justice.

As observed earlier, this Court was also informed about the pendency of yet another **Misc. Civil Application No. 44 of 2020** in the High Court, Dar-es- Salaam District Registry, seeking for interim injunctive orders of similar nature, same parties and essentially similar issues as those litigated herein by the Applicants. Further, that, the application is pending hearing, and it was scheduled to be heard by Hon. Madam Justice De Mello, J., on 12/02/2020.

Ordinarily, under such a circumstance, the Court, acting under Section 8 of the CPC, would issue an order for a stay of the latter case in favour of the previous one, on the ground that the doctrine of *res-subjudice* applies. This is the practice, since, essentially, section 8 operationalizes a legal policy which seeks to confine a litigant to one litigation, thus precluding the possibility of there being two contradictory decisions by one and the same court in respect of the same relief.

In the case of **Wengert Windrose Safaris (Tanzania) Ltd v The Minister for Natural Resources and Tourism & the AG, Misc. Commercial Cause No.89 of 2016, (Unreported),** this Court (Mwambegele J., as he then was), stated that, for section 8 of the CPC to be operationalized, the following conditions must be satisfied, that:

(i) The matter in issue in the subsequent suit must be directly and substantially in issue in the previous suit.

(ii) The parties in the second suit are the same, or parties or under whom they, or any of them claim, litigating under the same title.

(iii) The court in which the first suit is instituted is competent to grant relief claimed in the subsequent suit; and,

(iv) The previously instituted suit is pending in the same court in which the subsequent suit is brought or in any other court in Tanzania.

I have no doubt, that, the four conditions set out herein above, apply to this case. I arrive at such a conclusion, having looked at the pleadings constituting **Misc. Civil Application No.19 of 2020,** and **Misc. Commercial Application No.11 of 2020** (the application which is the subject of this ruling), and, having heard both parties' submissions, it is also clear to me that, even **Misc. Civil Application No.44 of 2020,** will fall under the same basket. Moreover, I have also taken into account the submissions by Mr. Duncan, the learned counsel for the Applicants, which were to the effect that, the multiple applications, including **Misc. Civil Application No. 44 of 2020**, were filed out of the Applicants desperation for justice.

However, had that been the end of our contemplations regarding the matter before this Court, I would have stopped here and issue a stay order, given that, the provisions contained under section 8 of the CPC are of mandatory nature. This Court has, nevertheless, gone a step

further, especially when it noted the pendency in the High Court, Dar-es-Salaam Registry, of yet a third an application, (**Misc. Civil Application No.44 of 2020**) by the same Applicants, against the same respondents, and, as the parties alluded to me in their submissions, the Applicants are also seeking for similar orders.

It is from the above observations that, this Court raised, *suo motu*, the issue of forum-shopping and abuse of process of the court, and called upon the learned advocates for the parties to address the Court on that issue. This Court did so because it was deeply concerned with the manner the Applicants were conducting themselves before this Court, and the *bona fide* nature of their actions, in particular the fact that they deliberately filed such different applications, suing the same Respondents and for matters that are substantially the same.

The learned counsels for the parties made submissions on this third issue, and, I have given due considerations to their submissions. Basically, it is trite law that courts of law have an inherent or implied jurisdiction to prevent their processes from being abused. What amounts to an abuse of the process of the Court, however, does not have an exhaustive definition.

In the case of **Sh. Ranbir Singh and Another vs Sh. Naresh Kumar and Others, (2019)** High Court of Himachal Pradesh, (India), Tarlok Singh Chauhan, J., stated, that:

> "**The Supreme Court Practice 1995,** published by Sweet & Maxwell, in paragraph 18/19/33 (page 344) explains the phrase "abuse of the process of the Court" thus: "This term connotes that the **process of the Court must be used bona fide and properly and must not be abused. The Court will prevent improper use of its machinery and will in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation** . . . . The categories of conduct rendering a claim ... an abuse of process, are not closed, but, depend on all the relevant circumstances. And for this purpose, considerations of public policy and the interests of justice may be very material."(**emphasis added**).

In other cases from Nigeria, the case of **Central Bank of Nigeria v Saidu H. Ahmed & Ors (2001) 5 SC (Part 11) 146**; and the case of **Edjerode v Ikine (2001) 12 SC (Part 11) 125**, the Supreme Court of Nigeria, was of the view that, an abuse of Court process means that the process of the Court **has not been used *bona fide* and properly**.

As it may be observed in the above quoted Indian Case, the concept of abuse of Court process is imprecise and involves

circumstances and situations of infinite variety and conditions. What is worth noting, however, is that, the concept has a common feature, which is: **an improper use of the judicial process by a party in litigation to interfere with the due administration of justice.** Such interference includes, but is not limited to, a situation where a party **deliberately** files a multiplicity of suits in court.

Indeed, in another persuasive Nigerian case of **Saraki v Kotoye (1992) 9 NWLR (Part 264) 156 at 188**, the Nigerian Supreme Court held, on the issue of abuse of court process, that:

> "..... the employment of [the] judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. **This will arise in instituting a multiplicity of action on the same subject matter against the same opponent on the same issue.**" (Emphasis added).

In the instant application, it is an uncontroverted fact, that, apart from it being deliberately filed in this Court, there are, currently, two other pending Applications before the High Court Dar-es-Salaam, District Registry, i.e., **Misc. Civil Application No.19 of 2020** and **Misc. Civil Application No.44 of 2020** by the same Parties, and, same issues as the issues raised in this Application.

When the counsel for the Applicants was asked by this Court regarding why all these Applications, which are essentially similar in all respects, were filed, he submitted that they were filed **as an act of desperation on the part of the Applicants**, and were in no way intended to be an abuse of the process of the Court. The learned counsels for the Applicants were also quick to add that, after all, the Applicants intend to withdraw from the Court all proceedings filed in the High Court, Dar-es-Salaam District Registry.

I totally fail to be in agreement with the two senior learned counsels for the Applicants. As I stated earlier, and as correctly submitted by Ms. Mziray, the legal counsel for the 1st Respondent, there was no evidence that the proceedings, in respect of **Misc. Civil Applications No.19 and 44 of 2020,** were withdrawn from the Court.

To me, a mere intention to do a certain legal act remains to be a wish, a fantasy of legal reality. It is yet to materialize and no prudent Court can confidently rely on it as evidencing a factual position. It is, as well, a very unfortunate situation indeed, to receive a submission from senior counsels, that the filing of duplicate applications in the same Court was a *bona fide* act of desperate litigants seeking to protect their interests. These Applicants were enjoying the services of very senior and well versed advocates in matters of law and the processes of the Court.

They did not file the applications on their own advise and were not being represented by a junior advocate.

Essentially, it is clear that, the role of an advocate, who is also an officer of the Court, include rendering proper guidance to the parties regarding the right legal course to be taken, either in the search for or in the defence of their rights. In particular, all advocates are expected to avoid carrying out acts or omissions that will derail the due process of the court, especially on issues such as multiple institutions of actions, frivolity or reckless actions, acts amounting to forum-shopping, or institution of different/multiple applications on the same subject matter.

In this application, since the Applicants are enjoying the services of very senior and experienced advocates, the expectation of this Court is that, such advocates should have properly guided their clients and refrain from inundating this Court's registries with duplicate cases. Failure to do so, amounts to a flagrant involvement in acts constituting an abuse of the process of the Court. Such acts cannot be condoned at any rate by this Court, leave alone at such a time as this when the Courts in this country are striving hard to do away with the backlog of cases.

It is even irritating to note, as submitted by Ms. Mziray, that, the learned counsel for the Applicants did not bother to serve copies of the

Application No.44 of 2020 filed in the High Court, Dar-es-Salaam District Registry to the Respondents, a fact which, having been raised by the Respondent's counsel, made the High Court, Hon. Madam Justice De Mello, J., to order the Applicants' counsel to supply copies to the Respondents. What is the motive behind that delay of service by the Applicants remains an unanswered question in my mind best known to them and which can hardly conjure.

What I can only hasten to add, is that, such an act, by its nature, and in the circumstances of this and the rest of the Misc. Applications pending in the Court, constitutes a further indication of an abuse of process of this court. I find it to be so, because, it is trite that, a party should not improperly use the avenues of free access to the judicial process to the irritation and annoyance of his opponent. The law and justice demand that, where a matter is filed before a Court, the other party to the case should be availed with all necessary documents promptly to allow him/her respond accordingly to any allegation raised against him/her.

As regards the current scenario and the applications referred to in this ruling, worse still, when appearing before this Court, Mr. Duncan did not, in his main submissions, alert the Court that there was a pending matter of a similar nature before Hon. Madam Justice De Mello, J.

Had it not been the vigorous submissions made by Ms. Mziray, to the effect that such other applications were pending before the High Court, Dar-es-Salaam registry, the integrity of this Court would have been thrown into a disrepute, and, the judicial system would have been in the danger of being ridiculed for delivering conflicting judicial decisions on the same matter.

Overall, it should be noted by all litigants that, while it is in the interest of the public and justice, that every person's rights are protected by the Court, multiplicity of suits is not an act to be condoned at any rate, and especially so when it transcends into a flagrant act constituting an abuse of the process of the Court.

Such an abuse of the process of the Court, especially where it is occasioned in the manner exhibited in this ruling, act against the public policy which, as it was stated by Lord Bingham, in ***Johnson v Gore Wood & Co*** **[2000] UKHL 65; [2002] 2 AC 1, at 30-1**,:

> *"is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole*".

Essentially, such an abuse of process of the court hampers efficiency and economy of the court processes, because it leads to wastage of the courts' and the opposing party's precious resources,

which, in all fairness, ought to be used prudently. It also deliberately vexes the other opposing party to the case, and stands as a fact which is inimical and an affront to the ends of justice.

In view of the above, a Court, correctly exercising its inherent powers, and in a proper case, **can either struck off** or **dismiss** any of such multiple suits or applications which constitute an abuse of its judicial process, and, may even direct that punitive costs be awarded against such an offending litigant.

That being said, in my view, and taking into account the circumstances of this application, I find that this is a proper case for which stringent measures, meant to deter others from the practice of abusing the judicial process are highly desirable. In particular, I find that, the filing of this application in this Court, while the Applicants had, through their well and highly seasoned senior legal counsels, already filed other similar applications against the same Respondents, and with similar issues, before Madam Justice De Mello, J., amounts to an abuse of the judicial process of this Court.

I hold so, because, it cannot be said that, the actions of the Applicants through their very well seasoned senior legal counsels, were actions done in *bona fide,* as their learned counsel, Mr. Duncan would like this Court to believe. Instead, there is a clear indication that, the

Applicants and their legal counsel, were knowingly acting in *a* manner that was not only bent to bring confusion and disrepute to the Court, but also was vexing the Respondents with unnecessary multiple applications. Such actions cannot be condoned.

In conclusion, therefore, I also find that, since the remedies sought by the Applicants can still be obtained in the earlier applications pending before Madam Justice De Mello, J., (if the Applicants will prove before her that they are entitled to such reliefs sought), there is no reasons why this application should be stayed and create an unnecessary back-log of cases in this Court. Consequently, having found that the actions of the Applicants in relation to the filing of the duplicate applications, not only unnecessarily inundates the court registries with multiplicity of case files, but also constitutes acts akin to forum-shopping, they are as well exhibiting a gross or flagrant abuse of the process of the Court.

In the upshot, this **Misc. Commercial Application No.11 of 2020** Court is **hereby dismissed** in its entirety on the ground that its filling exhibits flagrant abuse of the process of the Court. The Applicants are hereby condemned **to pay all costs** incurred by the 1st Respondent.

It is so ordered.

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DEO JOHN NANGELA

JUDGE, HIGH COURT OF TANZANIA (COMMERCIAL DIVISION)

10/02/2020

Ruling delivered on this 10th day of February 2020, in the presence of Mr. Duncan and Mr. Mwakingwe, the Advocates for the Applicants, and Ms. E. Mziray, Advocate for the 1st Respondent. The 2nd Respondent did not show up in Court.

THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION

.....

DEO JOHN NANGELA

JUDGE, HIGH COURT OF TANZANIA (COMMERCIAL DIVISION)

10/02/2020