

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO. 02 OF 2022**

**A1, OUTDOOR (T) LTD.....PLAINTIFF**

**VERSUS**

**EURO CONSULTANCY LIMITED.....DEFENDANT.**

**RULING.**

**Date of last order 31<sup>st</sup> March 2022.**

**Date of Ruling 5<sup>th</sup> May 2022.**

**Z.A MARUMA, J.**

This ruling is in respect to the preliminary point of objections raised by the defendant herein on the issue of jurisdiction and res-judicator.

On 21<sup>st</sup> March 2022, the application was called on for hearing of the preliminary objection raised. The plaintiff was represented by Mr. Hardson B. Mchau, Advocate accompanied by Ms. Maria Kimwaga, Advocate while the defendant had a service of Mr. Gidion Opanda, Advocate.

Mr. Gidion Opanda for the defendant started to argue on the first point of objection that, this Court has no jurisdiction as provided under rule 5 (1) of the High Court (Commercial Division) Procedure Rules of 2012. He clarified that this Court has two jurisdictions, original and

appellate jurisdiction. He further stated that, this matter has already entertained by the District Court of Ilala in Civil Case No. 175 of 2018 and the judgment was delivered on 21<sup>st</sup> August 2021 in favour of the defendant in this matter. Thereafter, the plaintiff opted to file an appeal at the High Court of Tanzania DSM registry, Civil Appeal No.7 of 2022 which is pending before Honorable Mgonya J. He argued that so long as per the rules of this Court the same matter should not be file as original suit otherwise, the plaintiff could come to this Court by way of an appeal.

He winded up that, on the basis above this Court lacks jurisdiction to entertain this matter as it will cause conflict of decisions and confusion in administration of justice because the plaintiff is ridding two horses at the same time. To support his argument, he referred this Court to the case of **Isidori Leka Shirima & Another Versus The Public Service Social Security Fund & 3 Others**, Civil Application No.151 of 2016. Page 11,12 and 13 the position is very clear on position of parties to bring two matters. He also submitted that section 7 of the Civil Procedure Code, Cap 33 R.E 2019 (CPC) also talked about cognizance which barred this court to entertain the matter. He said this puts jurisdiction of this Court into question in the line of legal point that the Court lacks jurisdiction.

Responding to the first point of objection, Mr. Hardson for the plaintiff started to acknowledge jurisdiction of this Court as provided under rule 5 (1) and (2) High Court (Commercial Division) Procedure Rules of 2014.

However, he submitted that the submission made by his learned friend mislead the Court that the plaintiff could come to this Court by way of an appeal and not the fresh matter. He submitted that the Case No. 175 of 2018 was a civil case and not a commercial case as provided under this Judgment. He said the plaintiff herein was also a plaintiff in the counter claim which was struck out by the trial court at page 11 and 12 of the judgment of the Civil Case No. 175 of 2018. He further submitted that, the law under Order VIII rule 9 (2) of the CPC termed a counter claim as a separate suit. He added that the counter claim was not determined in its finality so, there is no decision on the counter claim. He also pointed out that, the decision of the District Court was against 1<sup>st</sup> defendant only. He argued that this Court has jurisdiction over commercial case as per rule 3 and this suit being a commercial suit is complied with rule 3. He further said that, the case cited is irrelevant because that was based on abuse of the Court and the case was not determined in its

finality. He also argued that section 7 is in applicable as he did not address which law barred this Court to determine the suit.

Making a rejoinder to this point, Mr. Ogunde submitted that, there was no dispute that there is a matter in the district Court or at the High Court. So long they have admitted that there is a decision of the district Court which is subject to appeal at the High Court against all judgment and the orders therefore. Also, the plaintiff's advocate admitted that counter claim is a separate suit which its decision is subjected to the appeal. The same was determined in its finality and struck out on merit. He said the difference of dispute is the same regardless it is commercial or normal civil suit. The issue of removing defendant will not change the nature of dispute which will remain the same. He therefore, retreated his submission in chief on the issue of jurisdiction of the court.

Determining the first point of objection based on the two counsels' submissions above, Section 7 of the CPC is very clear on the issue of cognizance that, the Court is barred to entertain the matters of cognizance either expressly or impliedly. The consequence for the same is provided under section 8 of the Code that bars jurisdiction of the court to proceed with the matter under the circumstances provided therein, I quote,

***"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.”***

In the submission from the both counsel, there is no dispute that the parties in the present case where the parties in the Civil Case No. 175 of 2018 in the District Court of Ilala whereby, the plaintiff in the present case was a 2<sup>nd</sup> defendant therein and the defendant was the 2<sup>nd</sup> plaintiff. The subject matter in Civil Case No. 175 of 2018 was on a claim of general damages against the defendants at a tune of TZS. 600,000,000/= resulted from the claim of outstanding amount of USD 130,761.70. The 2<sup>nd</sup> defendant in replying the plaint also raised a counter claim among them the prayers were a claim of general damage at a tune of TZS. 200,000,000/= however, the counter claim was not determined in its finality and was stuck out. Also, there is no dispute that there is a Civil Appeal No. 7 of 2022 at the High Court of Dar es salaam against the decision of the District Court delivered on 22<sup>nd</sup> October 2021. Lastly, there

is no dispute that the basis of the appeal is against the whole judgment and orders thereto meaning including the counter claim which was struck out as admitted by the plaintiff.

In that basis and circumstances of this case, It raised a doubt on whether this Court has been barred to entertain the present case for the lack of jurisdiction as provided under section 7 and 8 of the CPC. The above position is also applied in the case of **Isidori Shirima** (Supra), whereby the Court at page 11 referred the case of **Attorney General Versus Hammers Incorporation Co. Ltd & Another**, Civil Application No.270 of 2015 (Unreported) in page 12 held that;

*“ We are of the considered view that even in this case , the confusion that was envisaged in the cited case above (Attorney General’s case) could be imminent. Since the appeal process was actively being pursued, it would be improper for the Court to allow the parties to invoke the revisional jurisdiction which would amount to riding two horses at the same time. Looking at the grounds raised in the application for revision, it is no doubt that they could be sufficiently dealt with in the appeal as they hinger on substantive decision not on procedural matters. So, to allow*

***the applicants even if were not parties in the original matter to prosecute the application for revision while one of its parties has already initiated the appeal processes is likely to bring confusion in the administration of justice.”***

In the light of the precedent above, which its principle laid down therein applies “***mutandis mutandis***” with the circumstances of the present case. I am of the settled view that this Court has no jurisdiction over the present suit. This is based on the fact that, the subject matters in Civil Case No. 175 of 2018 in the District Court of Ilala, the grounds of appeal in Civil Appeal No. 7 of 2022 at the High Court of Dar es salaam against the decision of the District Court and the subject matters in the present case are almost similar with slight differences in changing of the party’s positions between the two cases and exclusion of some parties but still claiming several reliefs resulted for the same subject matters. I am therefore of the settled view that to allow this present case will end up causing confusion in administration of justice and unnecessary conflicting decisions.

As discussed above the consequences of the cognizance matters under section 7 is to stay the suit as provided under section 8 of the CPC. However, in the present situation to stay this Commercial Case No. 2 of

2022 will amount to the abuse of the court processes considered the fact that, the pending appeal at the High Court of Dar es Salaam will determine the substantive issues in the present case.

The distinction made by the plaintiff that the case at the district court subject to appeal at the High Court of Dar es Salaam was a civil case while the present case is the Commercial case has no basis at all. This is said so because the first criteria for a commercial case is that the case should be of the civil category with a commercial nature as specified under interpretation clause that;

***"Commercial Case" means a civil case involving a matter considered by the Court to be of commercial significance".***

At this juncture, I think it is prudent to put the concept of establishment of Commercial Court be clear so to cure misconception as in the present matter. The Commercial Court was established in the year by virtue of GN 141 of 1999. Rule 5A of the said Rules which provides as follows: -

***"There shall be a Commercial Division of the High Court within the registry at Dar es Salaam and at any other registry or sub-registry as may be determined by the Chief***



***Justice in which proceedings concerning commercial cases may be instituted."***

The objective of establishing the Commercial Court was to resolve disputes of a commercial nature expediently, effectively and efficiently in order to strengthen a positive climate for investments and strength confidence within the business community in the country's judicial system. In that perspective the Commercial Court is a Division of the High Court like other several Divisions established under The High Court of Tanzania.

It should also be this court has no exclusive mandatory jurisdiction to hear and determine commercial dispute. This is clearly guided under Order IV rule 4 of the Civil Procedure Code, 1966 (as amended) which provides:-

***"It shall not be mandatory for a commercial case to be instituted in the Commercial Division of the High court."***

Therefore, a litigant has the option of instituting a commercial case either in the ordinary court as the parties herein did before the District Court or Registry of the High Court or in the Commercial Division of the High Court. However, this does not mean the litigant can exercise this option with abuse of court processes as it has transpired in this present

matter where the plaintiff having the knowledge of an appeal concerning the same matter before the High Court registry DSM opted to institute a fresh case before this Court. Thus, why section 7 and 8 of the CPC have been introduced to cure mischiefs like this so to avoid confusion in administration of justice and unnecessary conflicting decisions.

Therefore, the jurisdiction of this Court in the present case should not only being limited to the scope of the rule 5(1) of the Rules, but also based on the circumstances stipulated under section 7 and 8 of the CPC which also barred this Court to entertain this suit.

In the event the first preliminary objection is upheld and since this concerns the issue of jurisdiction, it is sufficient to dispose the matter with no need to labour to determine the other preliminary objections raised. The Civil Case No. 2 of 2022 is hereby struck out for the lack of jurisdiction. Costs to follow the event.

It is so ordered.



**Z. A. MARUMA**

4/5/2022