

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

COMMERCIAL CASE NO. 63 OF 2022

PETRFUEL (T) LIMITED.....PLAINTIFF

Versus

BAHDELA COMPANY LIMITED.....DEFENDANT

Date of Last Order: 20/03/2023

Date of Ruling: 28/04/2023

RULING

MKEHA, J:

After the defendant had been served with a summons to file Written Statement of Defence, a notice of preliminary objection was filed. The notice filed by the defendant was to the following effect:

That, there is a dismissal order of a claim vide Misc. Commercial Cause No. 42 of 2021 which is directly substantially the subject matter of this suit. It has not been vacated. Civil Appeal No. 318 of 2022 to challenge it is pending in the Court of Appeal. This Court therefore lacks jurisdiction to entertain the claim.

According to Mr. Samson Mbamba learned advocate for the defendant, before filing the present suit, the plaintiff had filed a Petition for winding up of the defendant company for amongst other reasons, the defendant`s failure to pay the plaintiff`s debt. In view of the learned advocate, this suit is similar with the dismissed Petition in terms of cause of action, which is the defendant`s indebtedness.

The learned advocate for the defendant hinted that, in the former action, the ground for dismissal of the Petition was that, the debt was found to be a disputed one and that, the first action under the circumstances ought to be, proving the debt first and taking winding up of the company as a next action upon failure to satisfy the decree. The learned advocate submitted that, since a notice of appeal had been filed against this court`s order dismissing the plaintiff`s former Petition over the same subject matter, and given the fact that the said notice is still pending before the Court of Appeal, this court lacks jurisdiction to entertain the plaintiff`s suit for recovery of the same debt in respect of which Miscellaneous Commercial Cause No. 42 of 2021 was filed.

Mr. Ishengoma learned advocate submitted in reply that what had been preferred as a preliminary point of objection was not a pure point of law as per the position in **Mukisa Biscuits Case**. According to the learned advocate, to determine the objection, one had to refer to the Winding up Petition, ruling in respect of the Petition, the notice of appeal against the ruling and the said Civil Appeal No. 318 of 2022 allegedly pending before the Court of Appeal. According to the learned advocate, it is trite law that, where there is a mixture of facts and law one cannot prefer a preliminary objection but the issue is to be argued normally in the course of deliberating on merits. **Ernest Karata`s case** was cited.

The learned advocate further submitted that, the remedy of recovery of money through a civil suit is distinct from winding up of a company for non-payment of a debt. In his considered view therefore, even where a civil suit is filed; there is no bar for the creditors to file a petition for winding up of the defaulting company. Reliance was put on a foreign precedent to wit, **KHAITAIN OVERSEAS AND FINANCE LTD, 2004, CL C223**.

The only determinative question is **whether in the circumstances of this case, the plaintiff can be considered to be barred from**

pursuing a civil suit merely because a petition for winding up of the defendant company was dismissed by this court and that, a notice of appeal aimed at challenging the said decision is still pending. The principle is, a later claim will not be barred where the remedies are cumulative. Therefore, where a judge declines winding up a company for non-payment of a debt and directs that an ordinary suit be preferred first, there is no *res judicata* because there has not been adjudication on the actual claim in the order declining to wind up the company. Neither does pendency of notice of appeal to challenge the decision of this court which declined winding up the defendant company make the present suit *sub judice* for the two cases are entirely distinct. I hold that, this court has jurisdiction to hear and determine the present suit.

See: **TELE MING CO LTD VS. YEE SANG METAL SUPPLIES CO (1973) 1 WLR 300, PC.** See also: **TECHLONG PACKAGING MACHINERY LTD & ANOTHER VS. A-ONE PRODUCTS AND BOTTLERS LTD, CIVIL APPEAL NO. 517 OF 2018, CAT AT DSM.**

For the foregoing reasoning, I hold the objection to be unmeritorious. The same is dismissed. Costs to be in the main cause.

Dated at DAR ES SALAAM this 28th day of April 2023.

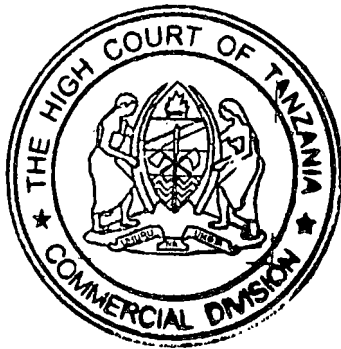



C. P. MKEHA

JUDGE

28/04/2023

Court: Ruling is delivered in the presence of the parties' advocates.




C. P. MKEHA

JUDGE

28/04/2023