

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

COMMERCIAL CASE NO. 41 OF 2023

EAST AFRICA DEVELOPMENT BANK LIMITED.....PLAINTIFF

VERSUS

PANACHE LIMITED.....1ST DEFENDANT

CLOTHILDA MONA PUNDUGU.....2ND DEFENDANT

PHOENIX OF TANZANIA ASSURANCE

COMPANY LIMITED.....3RD DEFENDANT/

1ST NECESSARY PARTY

TANZINDIA ASSURANCE COMPANY LIMITED...4TH DEFENDANT/

2ND NECESSARY PARTY

RULING

Date of last order: 17/11/2023

Date of ruling: 24/11/2023

AGATHO, J.:

The Plaintiff, **EAST AFRICA DEVELOPMENT BANK** on 14th April 2023 filed the suit against the 1st and 2nd Defendants, and the 3rd and 4th Defendants as necessary parties. In her suit the Plaintiff is seeking for declaratory order that she is entitled to the payment of decree amount in Commercial Case No. 67 of 2009 to the tune of USD 608, 491 plus

accrued interest thereupon or any other amount as may be adjudicated by the Court of Appeal in Civil Appeal No. 111 of 2020, and for an order directing the 3rd and 4th Defendants to pay directly to the Plaintiff the decree money in Commercial Case No. 67 of 2009 amounting to USD 608,491 plus accrued interest or such other amount as may be adjudicated by the Court of Appeal among other orders. This ruling dealt with issues of jurisdiction, assignment of decree, res judicata, res sub judice, cause of action, locus standi, and procedural irregularities and incompetency of suit.

Having been served upon with a copy of plaint, the 1st and 2nd Defendants filed their Written Statement of Defence prefaced with a notice of Preliminary Objections. The 4th Defendant too raised Preliminary Objections (POs) against the Plaintiff's suit. The court ordered the hearing of the POs be heard by way of written submissions. Appreciatively, the parties filed their submissions timely.

In terms of legal representation, the Plaintiff was represented by advocate Gabriel Simon Mnyele whereas advocate Jovinson Kagirwa appeared for the 1st and 2nd Defendants. The 3rd Defendant was represented by Michael Kabekenga, and Ms. Hamida Sheikh, learned counsel represented the 4th Defendant. It suffices to point out at this juncture that the 3rd Defendant never raised any preliminary objection.

Regarding the POs raised, these are of two sets. First, the POs raised by the 1st and 2nd defendants, and a second set comprises of the POs raised by the 4th Defendant. To begin with the first set, the POS were:

- a. That the suit is hopeless statutorily barred for being filed out of time in violation of Section 3 and Part I item 7 of the schedule of the Law of Limitation Act [Cap 89 R.E. 2019];
- b. That the suit is Res Judicata;
- c. That the suit is Res Sub-judice.
- d. That the Court has no jurisdiction to entertain this matter following the initiation of Appeal before the Court of Appeal in Civil Appeal No. 192 of 2023 emanating from Commercial Case No. 35 of 2022 between the Plaintiff and the 2nd Defendant.

The set of POs raised by the 4th Defendant were:

- (a) The plaintiff has no cause of action against the 4th Defendant.
 - (b) this suit has been filed prematurely as the decree in High Court Commercial Case No. 67 of 2009 which forms the basis of the Plaintiff's claim is before the Court of Appeal in Civil Appeal No. 111 of 2020.
- that the suit is res sub judice.

(c) The inherent vice of the equipment means that the equipment was not insurable.

(d) the 1st Defendant did not have an insurable interest to insure the equipment in its name as they had just leased it from the Plaintiff and it was only the plaintiff itself, the owner of the equipment who was legally competent to insure the equipment.

(e) the Plaintiff named/joined the 4th Defendant as a necessary party erroneously as the 4th Defendant cannot be a necessary party. That means the Plaintiff has sued a wrong party.

It suffices to restate at this juncture the prayers in the plaint, namely:

- (a) A declaratory order against the 1st and 2nd Defendants that the plaintiff is entitled to receive and be paid the decree amount to the tune of USD 608, 491.
- (b) An order directing the 3rd and 4th Defendants to jointly and together to pay all sums in prayer (a) to the Plaintiff.
- (c) The 1st and 2nd defendants be ordered to pay general damages to the Plaintiff.
- (d) The 1st and 2nd Defendants to pay costs of the suit.

But before examining the POs raised, it is worthwhile to restate briefly the facts of this case. The suit is based on financial leasing and insurance. According to paragraph 7 of the plaint on 27th August 2004 and 28th November 2005 the Plaintiff entered into two lease agreements with the 1st Defendant. It was agreed that the Plaintiff would purchase a total of 28 Tread Steer Bogie Wagons for the purpose of leasing the same to the 1st Defendant. The 2nd Defendant who was and still is a visible director of the 1st Defendant executed a deed of guarantee guaranteeing the payment of the rentals to the Plaintiff. It was the term of the lease agreements that the 1st Defendant would insure the Wagons and the Plaintiff will be designated as a sole beneficiary of the insurance policies. In June 2007 the insured Wagons were involved in an accident at Salanda, Dodoma Region. Being a risk covered by the insurance policy, however the 3rd and 4th Defendants repudiated the claim. That forced the 1st Defendant to file a Commercial Case No. 67 of 2009 whose judgment was delivered on 10th April 2019 in favour of the 1st Defendant. While the Commercial Case No. 67 was still pending in court, the 1st and 2nd Defendants acknowledged the liability towards the Plaintiff and agreed to use the decree Money to discharge it. Along that there was another case filed, that is Commercial Case No. 35 of 2022 which was dismissed on 26th October 2022. While that suit was pending

in court the 1st and 2nd Defendants committed yet again to pay the Plaintiff all the decree amount in Commercial Case No. 67 of 2009. That agreement was concluded on 3rd November 2022. Ever since the 1st and 2nd Defendants have refused to cede the decree money to the Plaintiff.

Prior to analysing the POs raised, one preliminary point eluded the parties mind but somewhat connected to the PO (b) raised by the 4th Defendant is worth pondering. That is the assignment of decree. Among the POs raised by the 4th Defendant is that the present suit has been filed prematurely as the decree in High Court Commercial Case No. 67 of 2009 which forms the basis of the Plaintiff's claim is before the Court of Appeal in Civil Appeal No. 111 of 2020. That is linked with competence of the suit. The court has on a different angle regarded that PO being intertwined with the question of assignment of a decree. Whether in the case at hand there was an assignment of 1st Defendant's decree to the plaintiff? The reason for raising this point is that the basis of the Plaintiff's claim is the 1st Defendant's decree, which she claims to have contracted to be paid from it. But does that entitle the Plaintiff to front her claim directly from the decree? The facts in the plaint states that while the Commercial Case No.67 was still pending in court, the 1st and 2nd Defendants acknowledged the liability towards the Plaintiff and agreed to use the decree Money to discharge it. In the India case of

Dhani Ram Gupta & Others v Lala SRI Ram & Another (1980)

AIR 157 the Supreme Court of India dealt with the issue of assignment of a decree and held that assignment of decree is possible, but one has to follow the procedures laid in the law.

Back to the case at hand, there was yet another case filed, that is Commercial Case No. 35 of 2022, which while still pending in court on 3rd November 2022, the 1st and 2nd Defendants concluded an agreement to pay the Plaintiff all the decree amount in Commercial Case No. 67 of 2009. Even after entering into that agreement committing to pay the Plaintiff, the 1st and 2nd Defendants have refused to cede the decretal sum to the Plaintiff. As a preliminary question, this court is asking itself whether the said agreement is an assignment of a decree? Whether the 1st defendant assigned her decree to the Plaintiff to entitling the later suing on the decree or applying for execution of the same.

Indisputably, a decree can be assigned. In Tanzania the assignment of decree is provided for under Order XXI Rule 14 of the CPC [Cap 33 R.E. 2019]. It provides that the transferee can apply for execution of the decree assigned to him. As held in **Gupta's case** (supra), a decree being in a form of receivables it can be assigned. But in this case if it was assigned then the Plaintiff could not have sued the 1st Defendant as they had concluded the decree assignment contract.

Instead, she could have applied for execution. Moreover, and as rightly pointed out by the 4th Defendant the suit is premature and incompetent.

Indeed, the Plaintiff is at liberty to assign her decree to even a third party. But here there is no application for execution filed. It is incompetent. Instead of filing of a fresh suit, the assignee of a decree ought to have filed an application for execution. Further, the decree is premature as there is a pending appeal at the CAT. It is thus contingent.

Turning to the POs, the court began examining the issue of res judicata. In Commercial Case No. 35 of 2022 the Plaintiff was suing the 2nd Defendant in attempting to enforce the guarantee. This makes the case at hand in terms of subject matter to be different. In the present case the plaintiff is asserting her right over the decree amount in Commercial Case No. 67 of 2009 subject of appeal, in Civil Appeal No. 111 of 2020 pending at the CAT. While that eliminates the PO on res judicata, yet the propriety of this case is questionable. First the decree is subject of appeal at the CAT, and second the plaintiff is not a decree holder. Even if she has interest, the way to realize it in the decree is by way of seeking an order for attachment of the decree (execution proceedings) not to file a suit claiming a right over the decree as done in the present suit. This has been the contention of the 4th Defendant.

Strangely, and as read from paragraph six of the plaint the plaintiff pegged the reliefs dependent upon the determination of the appeal at the CAT. This is a contingent suit. It implies that the Plaintiff is aware of existence of the appeal at the CAT.

Turning to the POs raised by the 1st and 2nd Defendants. The counsel for these Defendants abandoned the first PO on time limitation, and remained with three POs (b, c, and d). These POs were submitted together as they intertwined that when one talks of res-judicata he will certainly touch upon court jurisdiction. Hereinabove a hint on res-judicata has been given.

The law on res judicata is not had to grasp. Section 9 of the CPC imposes a bar on courts to try any suit or issue in which the matter is directly and substantially in issue in a former suit between the same parties or between the parties under whom they or any of them claim or litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court. See **Stephen Masatu Wassira v Joseph Sinde Warioba and A.G. [1999] TLR 334**. The matter at hand is not res judicata because the parties are not the same.

Besides the res-judicata there is an allegation of res sub-judice. The latter under the provision of Section 8 of the CPC means that courts are barred from proceeding 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 or litigating under the same title where such suit is pending in the same or any other court in Tanzania having jurisdiction to grant relief claimed.

In addition to the two doctrines, the PO on jurisdiction was raised. Jurisdiction is the power of the court to hear and determine matters which are litigated before it. In **M/S Tanzania China Friendship Textile Co. Ltd v Our Lady of the Usambara Sisters [2006] TLR 70** it was held that jurisdiction as an objection based on pure point of law can be raised any time even on appeal. The court in considering whether it has jurisdiction it looks at:

- (1) Whether the subject in issue is the same
- (2) Whether the parties between whom the issue is joined are the same or litigating under the same title.
- (3) Whether the reliefs claimed are the same.

In the case at hand as the pleadings bear witness, there was Commercial Case No. 67 of 2009 that was finally determined. It

prompted an appeal, Civil Appeal No. 111 of 2020 at the CAT. There is also Commercial Appeal No. 35 of 2022 which culminated into Civil Appeal No. 192 of 2023.

But who were the parties to Commercial Case No. 67 of 2009. What was the subject matter? What were the issues? What were the reliefs sought therein? Do all these matches or substantially related to what is claimed in the present case? Are the parties in both the same? Answering these questions disposes the issue of res-judicata, and hence jurisdiction point. The 1st and 2nd Defendants have fiercely contended that this court lacks jurisdiction to entertain the matter since in the present case the issues raised in the plaint, the parties and the reliefs sought and those in Commercial Case No. 35 of 2022 are one and the same. That renders the case at hand res judicata or albeit re sub judice.

Clearly, there were two cases that were before the HCCD, and they were finally determined. These are Commercial Case No. 67 of 2009 and Commercial Case No. 35 of 2022. The decisions in these cases are subject of appeal at the CAT. In Commercial Case No. 67 of 2009 like the present case, it was on insurance agreement in which the 1st Defendant (in the case at hand) was claiming for breach of the said agreement for failure to indemnify her. She thus claimed inter alia for specific damages to the tune of USD 574,000.83 due to railway accident

where 11 out of 18 wagons were damaged. The case ended in favour of the 1st Defendant. But it is apparent that the plaintiff was not a party to Commercial Case No. 67 of 2009. Nevertheless, in the present case, the Plaintiff claims for payment of USD 608, 491, a decretal amount in Commercial Case No. 67 of 2009 which was awarded to the 1st Defendant (in the present case). This confirms that the matter was finally determined. But as rightly raised by the 4th Defendant, how can the plaintiff claim rights or enforcement of decree that was not given in her favour much less the reality that the decree is subject of appeal in Civil Appeal No.111 of 2020 which is pending at the CAT. In the court's view, the plaintiff's filing of this suit is an alien procedure. The plaintiff is conspicuously not a party to Commercial Case No. 67 of 2009 HCCD, and the Civil Appeal No. 111 of 2020 CAT. Thus, the plaintiff appears to lack locus standi to sue the 4th Defendant on the decree that was awarded to the 1st defendant. It is noticed that the 4th Defendant has submitted that the Plaintiff wrongly sued the 3rd and 4th Defendants as she has no cause of action against them. She has sued wrong parties. Nor could she execute the decree that was not granted in her favour unless there same was assigned to her. Moreover, and as above observed even if there was a decree in her favour, its execution is not commenced by presentation of a plaint.

Looking at the pleadings, the present case is almost a replica of **East African Development Bank Ltd v Panache Ltd and Mona Pundugu**, Commercial Case No. 35 of 2022 HCCD. Hence that could have been res sub judice. However, the Plaintiff's claim in Commercial Case No, 35 of 2022 was for guarantee against the 2nd Defendant herein. Yet, it is surprising that the Plaintiff sued the 2nd Defendant in this case while she is aware that the 2nd Defendant has filed an appeal, Civil Appeal No 193 of 2023 CAT challenging the decision in Commercial Case No. 35 of 2022. But unlike in that case, the present case is for decretal sum awarded to the 1st Defendant in Commercial Case No. 67 of 2009. Hence res judicata and res-sub judice does not apply.

The court is of considered view that Commercial Case No. 67 of 2009 was cited out of context. But it is worth noting that the appeal is pending at the CAT which has ordered this court to take additional evidence on the aspect concerning ownership of Wagons so that the appeal at CAT can eventually be determined. As it stands now, the appeal at CAT is still pending. It is impossible to predict the outcome of that appeal.

Aside from Commercial Case No. 67 of 2009, it is undisputed that the Plaintiff knows that there is a pending appeal at the CAT as she rightly pointed out in the plaint. Moreover, in Commercial Case No. 35 of

2022 the plaintiff sued for payment of USD 1,102, 244.17 being money due and payable by the 2nd Defendant (Clothilda Pundugu) pursuant to the default of 1st Defendant (Panache Limited) herein as of 19/02/2013. The appeal against that HCCD decision in Commercial Case No. 35 of 2022 is Civil Appeal No. 192 of 2023 is still pending before the CAT. In the present case (Commercial Case No. 41 of 2023) the plaintiff is claiming for payment of the decree amount USD 608, 491 awarded in Commercial Case No. 67 of 2009.

The proof that there is an appeal at the CAT is existence of notice of appeal. It is also the law that once there is notice of appeal at CAT this court lacks jurisdiction to entertain the matter. The decisions in Commercial Case No. 35 of 2022 has been appealed against via Civil Appeal No. 192 of 2023 at CAT which is still pending.

The court finds that the present Commercial Case is somewhat res judicata of Commercial Case No. 35 of 2022, the variation in terms of amount does not make these cases dissimilar. But the former was on guarantee, whereas the present is on decree amount. To make matters worse there is an appeal that is still pending at the CAT, for that reason this Court is barred from entertaining the present suit.

As rightly held in **Exaud Gabriel Mmari v Yona Seti Akyo and Nine Others, Civil Appeal No. 91 of 2019 CAT** that:

"...once a notice of appeal to this Court have been duly lodged, the High Court ceases to have jurisdiction over the matter."

Moreover, it should be emphasized that since the plaintiff has been kind enough to state in the plaint that the court be pleased to grant the relief sought as will be determined by the CAT, that clearly confirms that there is an appeal pending at the CAT. The court is prohibited to entertain matters that have been appealed against at the CAT. And assuming that the 1st Defendant assigned her decree to the Plaintiff by agreement that would be invalid as the decree is subject of appeal at the CAT.

That said and done, the suit at hand has been brought in contravention to law for it is not execution proceedings in which one is seeking to attach the 1st defendant's decree. That aside, from the above analysis, the suit is not res judicata. Moreover, the plaintiff is not party to the appeal pending at the CAT. However, the filing of a suit before this court claiming the decretal amount is contingent as the CAT has not determined the appeal and considering that the plaintiff is not a decree holder in Commercial Case No. 67 of 2009 meaning that he cannot execute the same. The present suit is thus alien and incompetent before

this Court. It is struck out. The Defendants who raised and prosecuted the POs shall have their costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 24th Day of November 2023.



U. J. AGATHO

JUDGE

24/11/2023

Date: 24/11/2023

Coram: Hon. U.J. Agatho J.

For Plaintiff: Absent

For 1st and 2nd Defendants: Thomas Mathias, Advocate

For 3rd Defendant: Michael Kabekenga, Advocate

For 4th Defendant: Michael Kabekenga, Advocate, holding brief

Hamida Sheikh, Advocate.

C/Clerk: Beatrice

Court: Ruling delivered today, this 24th November 2023 in the presence of Thomas Mathias, advocate for the 1st and 2nd Defendants, also present was Michael Kabekenga, advocate for the 3rd Defendant also holding brief of Hamida Sheikh, advocate for the 4th Defendant, but in the absence of the plaintiff.



U. J. AGATHO

JUDGE

24/11/2023