

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

AT DAR ES SALAAM

COMMERCIAL CASE NO. 94 OF 2023

BETWEEN

EXIM BANK (TANZANIA) LIMITED PLAINTIFF

VERSUS

KAWA APARTMENTS LIMITED1ST DEFENDANT

NATIONAL FURNISHERS LIMITED.....2ND DEFENDANT

NATIONAL FURNISHERS INVESTMENT LIMITED...3RD DEFENDANT

**SUDESH KUMARI VARMA (AS ADMINISTRATRIX OF THE ESTATE
OF THE LATE BALDEV NORTARAM VARMA.....4TH DEFENDANT**

SUDESH KUMAR VARMA5TH DEFENDANT

JOSEPH ARTHUR RUGUMYAMHETO.....6TH DEFENDANT

RULING

Date of last order: 15/12/2023

Date of ruling: 16/02/2024

AGATHO, J.:

This ruling is in respect of the Preliminary Objections (POs) raised by the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants against the suit on the points of law that:

- (i) The suit is res sub judice to Land Case No. 146 of 2020 between the 1st Defendant and Plaintiff herein in the main suit and by way of counter claim between the Plaintiff and the 1st and 2nd Defendants. The same were struck out for want of board resolution on 10 May 2023. The 1st and 2nd Defendants herein have appealed to the CAT to challenge the order striking out the suit and counter claim.
- (ii) That in as far as matters at issue in this suit are directly and substantially in issue in Land Case No. 146 of 2020 currently pending appeal to the CAT as detailed in (i) above, this suit is an abuse of court process.

Going through the pleadings and submissions of the parties on the POs one noticeable thing dividing the parties is whether this suit is res sub judice to Land Case No. 146 of 2020 that was struck out by the court, against which an appeal is pending before the CAT. Parallel with that there is the issue of whether the failure of the plaintiff in the present suit to appeal against the order striking out the counterclaim gives her leeway to file a fresh suit (that is Commercial Case No. 94 of 2023). Whether that is not an abuse of court process? Yet another controversy is a question what

if the CAT allows the appeal and set aside the striking out order will that rescue the counter claim as well or the counter claim will have demised because there was no appeal against its striking out?

These issues have not got satisfactory answers from the parties. However, the plaintiff has maintained that she has never appealed against the striking out of her counter claim in Land Case No. 146 of 2020. And that the said counter claim is an independent suit that entitled her from filing the present suit after the counter claim was struck out. These arguments assume that even if the CAT allows the appeal, it will not touch upon the counter claim that was struck out. But that is an assumption which may as well not be the case.

But what does the law say about these issues? Order VIII rule 9(2) of the Civil Procedure Code provides that a counter claim which is set up in a WSD shall be treated as a cross suit. It states:

"Where a counter claim is set-up in a written statement of defence, the counter claim shall be treated as a cross-suit and the written statement shall have the same effect as a plaint in a cross-suit, and the provisions of Order VII shall

apply mutatis mutandis to such written statement as if it were a plaint."

From above provision of the law we get a glimpse of what the counter claim is. It also clarifies the application of Order VII to counter claim. The WSD turns to be a plaint. That said, one now may ask if the CAT decides to quash the HCT order striking out the suit, the Land Case No. 146 of 2020 will that not restore the WSD as well? The plaintiff tried to impress the court that the counter claim was struck out, and if the CAT allows the appeal, it will not extend to the counter claim (a cross-suit) because the Plaintiff herein did not challenge the order striking out the counter claim.

Suffice to state here that in Land Case No. 146 of 2020 the 1st Defendant was challenging the sale of the mortgaged property by the Plaintiff. And she sought payment of USD 5,297, 488 as remaining balance from the proceeds of sale of the said mortgaged property. The plaintiff on her side raised a counter claim seeking payment of USD 3, 102, 877 being the amount due and outstanding on account of the credit facilities advanced to the 1st defendant and secured by the rest of the defendants.

While the plaintiff resists the preliminary objections (POs) the defendants support the POs. It is the defendants' contention that the suit

at hand is res sub judice to Land Case No. 146 of 2020 as there is a pending appeal at the CAT. The appeal at CAT was initiated by notice of appeal. The defendants have already filed the notice of appeal at the CAT. Looking at the plaint in the present case, the claims levelled by the plaintiff are directly and substantially in issue in the Land Case No. 146 of 2020.

I have also noted that the plaintiff's act of referring to her counter claim in Land Case No. 146 of 2020 as a separate suit is misleading. As for the defendants' side, they have rightly opposed the supposition that counter claim is a separate suit. Looking at the law, Order VIII rule 9(2) of the CPC, it is conspicuous that a counter claim is a cross-suit and not a separate suit. A cross-suit in the counter claim is often tried or heard jointly with the main suit. The purpose here is to avoid multiplicity of suits. Nevertheless, Order VIII rule 12 of the CPC contemplated situations where the Court may allow the counter claim to be tried separately.

Indeed, the defendants have raised a valid argument that the HCT never ordered the counter claim to be tried separately. Besides, the suit was not at the hearing stage when it was struck out.

In the defendants' view the appeal preferred at the CAT incorporates both the main suit and the counter claim despite the plaintiff not appealing

against striking out of the counter claim. The defendants submit that if the appeal at CAT is determined and allowed then Land Case No. 146 of 2020 will proceed and the present case will be res judicata. They thus beseech the court to stay this case as it is res sub judice to Land Case No. 146 of 2020.

Now, turning to what is res sub judice, parties have converged in its conditions. One, the matter in issue is also directly and substantially in issue in the previous suit instituted between the same parties. Two, there is a pendency of the previously instituted suit in a court of competent jurisdiction. Three, and lastly jurisdiction of the court in which a previous instituted suit is pending to grant the relief sought.

The next point of PO was abuse of court process. The defendants have submitted that since there is a pending appeal at the CAT, the present case is an abuse of court process. The plaintiff has sternly denied such allegation. Instead, she has argued that she has not appealed against the striking out of the counter claim. Being a separate suit, the counter claim struck out can be refiled as a fresh suit as done here. The discussion on abuse of court process was elaborated in the case of **Mexon Energy Limited v NMB Bank PLC, Commercial Case No. 102 of 2021 HCCD.**

Needless to restate what was held in that case, abuse of court process may briefly be regarded as the improper use or setting process with *malafide*. Failure to act *bonafidely* when mounting an action against a party. The abuse of court process may mean to act contrary to interest of justice. It is a mockery of justice. In the present suit it difficult to say the plaintiff filing of this case is the abuse of court process. I have taken that stance because the plaintiff did not appeal against the order striking out the counter claim.

Nonetheless, I am not convinced that it was proper to file the present suit. The matter in dispute in the present case is directly and substantially in issue in Land Case No. 146 of 2020 including the counter claim therein. Moreover, it is possible that the CAT may allow the appeal, which will resurrect the Land Case No. 146 and the WSD together with the counter claim. To cure this malaise, this court orders the stay of the present suit pending the determination of the appeal at the CAT. The order is made under provisions of Section 8 of the CPC, which provides:

"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.”

I have also been persuaded by the decision of this court in **Wengert Windrose Safaris (Tanzania) Limited v The Minister for Natural Resources and Tourism and Attorney General, Misc. Commercial Cause No. 89 of 2016**. In fact, if the matter at hand is allowed to proceed it may conflict with the decision in Land Case No. 146 of 2020 should the CAT allow the appeal and the case proceed to be determined to finality at the HCT.

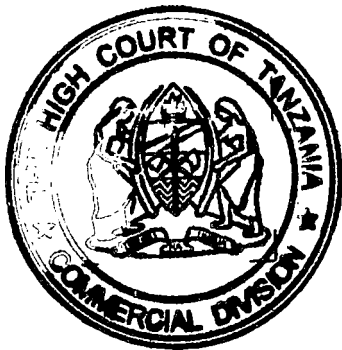
I have no hesitation that the issues in the present suit are directly and substantially in issue in Land Case No. 146 of 2020. It thus qualifies to be res sub judice. I have not been impressed with the argument that the plaintiff has not appealed against the order striking out the counter claim. It is important to remember that the counter claim referred got life from the Land Case No. 146 of 2020. It is not a separate suit as the plaintiff suggested.

That said and done the first PO is sustained. The suit is stayed pending determination of the appeal at the CAT.

Given the nature of the POs raised and circumstances of this case, each party shall bear its costs.

Order accordingly,

DATED at DAR ES SALAAM this 16th Day of February 2024.



U. J. AGATHO

JUDGE

16/02/2024

Date: 16/02/2024

Coram: U. J. Agatho, J

For the Plaintiff: Idrissa Juma, Ndehorio Ndesamburo, Advocates

For the 1st Defendant:

For the 2nd Defendant:

For the 3rd Defendant:

For the 4th Defendant:

For the 5th Defendant:

For the 6th Defendant:

James Bwana, Advocate

BC: E. Mkwizu

Court: Ruling delivered today, this 16th February 2024 in the presence of Idrissa Juma and Ndehorio Ndesamburo, counsel for the Plaintiff, and James Bwana, the 1st – 6th Defendants' Counsel.



U. J. AGATHO

JUDGE

16/02/2024