

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND CASE NO.368 OF 2016

**KHERY AMOUR (Legal Representative of the
Estate of the Late Mwamvita Azidu)... ..PLAINTIFF**

VERSUS

MARY KAPINGA.....DEFENDANT

Date of last Order: 06.04.2018

Date of Ruling: 11.05.2018

R U L I N G

S.A.N.WAMBURA, J:

Upon being served with the plaint which was filed by the plaintiff **Khery Amour (Legal Representative of the Estate of the late Mamvita Azidu)** on 21st October, 2016, the defendant **Mary Kapinga** in filing her Written Statement of Defence raised a preliminary objection on a point of law to the effect that:-

That the Plaintiff contravenes the provisions of Section 8 of the Civil Procedure Code Act, Cap. 33 R.E. 2002 by being res subjudice as the parties have a similar matter before the Ilala District Land and Housing Tribunal.

In reply to the written statement of defence filed by the defendant, the Plaintiff also raised a preliminary objection on 31st July 2017 to wit:-

The written statement of the defendant is bad in law as *it contravenes the requirements of Order VI Rule 15 (3) of the Civil Procedure Code Cap 33 R.E 2002.*

The plaintiff was represented by Mr. Juma Nassoro Advocate whereas the defendant enjoyed the legal services of Mr. Rafael Lefi David learned counsel.

Pursuant to the Order of this court the preliminary objection was disposed by way of written submissions. I thank both parties for adhering to the schedule and for their submissions.

In his submission Mr. David argued that the purpose of the preliminary objection is to make the court consider the objection raised before going into the merits of a case. He stated that the defendant was the first to raise a preliminary objection against the plaintiff's suit that his case is res subjudice. He was of the view that the plaintiff's act of filing a preliminary objection on top of a

preliminary objection is to pre-empt a preliminary objection already raised and filed in court. He therefore prayed to this court to overrule the preliminary objection raised by the plaintiff.

Submitting on his objection he stated that Land Application No. 74 of 2013 filed by the defendant at the Ilala District Land and Housing Tribunal is identical with Land Case No. 368 of 2016 filed by the plaintiff in this court. He averred that the plaintiff knowing the existence of Land Application No. 74 of 2013 which was pending at the Ilala District Land and Housing Tribunal. That the plaintiff was the one who successfully moved the trial Chairperson on 28th May, 2014 to stay sine die Land Application No. 74 of 2013 pending the determination of the High Court Land Case No. 139 of 2014.

It is also argued that the plaintiff's case No. 139 of 2014 could not survive longer as Hon. Ndika J (as he then was), on 18th March, 2016 struck out that case. He therefore prayed to this court to struck out this suit filed by the plaintiff for being res subjudice.

In response, Mr. Nassoro contended that there is no law or a decided case which bars a party to the suit to raise a point of preliminary objection against the other party's pleading just because the other party has in his pleading raised a preliminary objection.

He further averred that the preliminary objection raised by the defendant is not on point of law as it based on facts. He was of the view that to know as to whether there is another pending suit or not is a matter of fact which needs evidence to prove. He further averred that the suit is not res subjudice because there are two different parties suing in a different title. He therefore prayed for the objection to be dismissed with costs.

Mr. Nassoro went further by submitting on the objection which he raised that the verification clause of the defendant's written statement of defence is defective for not indicating the date and place where the pleading were signed contrary to Order VI Rule 15(3) of the Civil Procedure Code Cap. 33 R.E. 2002.

He therefore prayed to this court to strike out with costs the written statement of defence dated 24/7/2017 for being defective.

Having considered the submissions of both parties in support for and against the preliminary objections, and upon perusal of the court records, this court observed that there are two preliminary objections raised by both the plaintiff and the defendant.

The court record shows that the first preliminary objection was filed by the defendant on **21st July, 2017** through exchequer receipt No. 16627687, and the second preliminary objection was filed by the plaintiff on **31st July, 2017** through exchequer receipt No. 16627900.

Now the question is whether it was proper for the plaintiff to lodge a notice of preliminary objection to counter the preliminary objection already lodged by the defendant.

In **Juma Ibrahim Mtate v KG Karmali [1983] TLR 50** it was stated that the essence of preliminary objection is to give prior notice that once there is a notice of preliminary objection there is no way the

other party can pre-empt it by filing an application or another preliminary objection.

Also in the case of **Mary John Mitchell Vs Sylvester Magembe Cheyo & Others**, Civil Application No. 161 of 2008 (unreported), the Court of Appeal of Tanzania held and beg to; I quote;

"This Court has said in a number of times that it will not tolerate the practice of an advocate trying to preempt a preliminary objection either by raising another preliminary objection or trying to rectify the error complained of".

This position of the law was also reiterated in the case of **African Marble Company Ltd (AMC) Vs Presidential Parastatal Sector Reform Commission (PSRC)** Civil Application No. 47 of 2007 CAT (unreported).

It is my belief that it is improper for a party to lodge a notice of preliminary objection to pre-empt the notice of preliminary objection already lodged by the opposite party.

With due respect to Mr. Nassoro his preliminary objection is improperly filed before this court and ought be entertained

because by doing so it pre-empts the objection which has already been raised by Mr. David. The same can be looked at after the 1st preliminary objection has been disposed off.

Having said so, I herein reserve the ruling on the notice of preliminary objection lodged by Mr. Nassoro learned Counsel for the plaintiff.

I now come to the notice of preliminary objection lodged by Mr. David learned counsel for the defendant on 21st July, 2017 that the suit is res subjudice.

Section 8 of the Civil Procedure Code Cap. 33 R.E. 2002 bars all courts to proceed if a similar suit of the same parties are involved in a similar matter to proceed with a trial while the previous one filed in a competent court is still pending. For this provision to be effective the following ingredients must exist.

Firstly, there must be two pending suits, one previously filed.

Secondly, the parties to the suit must be the same or must claim to be suing under the same title.

Thirdly, the matter in issue must directly and substantially be the same in the two suits.

Fourthly, the two suits must be pending in a court of competent jurisdiction.

Upon perusal of the court record and the proceedings of the District Land and Housing Tribunal of Ilala, it is shown that the alleged matter in Land Application No.74 of 2013 was between Mary Kapinga Vs Khery Amour. In the instant suit the parties are Khery Amour suing as a Legal Representative of the Estate of the late Mwamvita Azidu Vs Mary Kapinga.

It is in the court record that the late Mwamvita Azidu passed away on 2012, and in 2013 the plaintiff herein was appointed as the administrator of her estate. By 2014 when the matter was filed in the District Land and Housing Tribunal, the plaintiff herein Khery Amour was already an administrator of the Estate of the late Mwamvita Azidu hence he was sued as the administrator of the Estate of the late Mwamvita although the name in the proceeding did not indicate that he was an administrator. Now since the parties are the same then it is obvious that this suit is res subjudice.

In the premises, the preliminary objection raised by Mr. David is sustained. The suit is accordingly struck out with costs.


S.A.N. WAMBURA
JUDGE
11.05.2018