

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND CASE NO.146 OF 2020**

Kawe Apartments Limited Plaintiff

VERSUS

Exim Bank Tanzania Limited Defendant

AND BY WAY OF COUNTER CLAIM

Exim Bank Tanzania Limited Plaintiff

Kawe Apartments Limited 1st Defendant

National Furnishers Limited 2nd Defendant

RULING

Date of last order: 14.09.2021

Date of Ruling: 17.09.2021

A.Z.MGEYEKWA, J

On 2nd September, 2021 Kawe Apartments Limited, the Plaintiff herein, instituted this suit against Exim Bank Tanzania Limited, praying for Judgment and Decree against the Defendants as follows: -

- a) A declaration that the purported sale of the mortgaged property registered under Certificate of Title No. 24442, Plot No. 124, Mbezi Beach, Dar es Salaam done by Defendant, is tainted with illegalities and/or fraud and hence null and void.
- b) In the alternative, a declaration that the Defendant having sold to itself the mortgaged property under Certificate of Title No. 224442, Plot No. 124, Mbezi Beach Area, Dar es Salaam, the same has liquidated and/or cleared all outstanding amounts owed to the Defendant from the Plaintiff have been fully paid by 20th August, 2016.
- c) Sequel to para(b), a declaration that by 20th August, 2016 no interests have been accruing as against the Plaintiff since the then-pending loans with the Defendant have been discharged off by the said auction done by the Defendant.
- d) Sequel to paragraph (b), payment of United States of America Dollars 5,297,488.00 being the balance of the sale proceeds of the mortgaged property under Certificate of Title No. 224442, Plot No. 124, Mbezi Beach Area, Dar es Salaam, sold by the Defendant to itself.
- e) Payment of general damages as may be assessed by the Honourable Court and Cost of this suit be paid by the Defendants.
- f) Costs of the suit; and
- g) Any other relief this Honourable Court may deem fit and just to grant.

The Defendant's Advocate for the Defendant filed a Written Statement of Defence disputing the claims and the learned counsel also lodged a counter claim against Kawe Apartments Limited and the National Furnishers Limited. The learned counsel for the Plaintiff / 1st Defendant in the Counter Claim raised an objection as follows:-

1. The Counter claim is constructively premature and/or *res sub judice* in respect of the following:

(a) *Execution No.71 of 2016 being execution of a decree in Land Case No. 210 of 2015.*

(b) *Civil Appeal No.100 of 2020 is pending at the Court of Appeal of Tanzania at Dar es Salaam.*

(c) *Intended Civil Appeal emanating from Misc. Land Application No. 963 of 2020 whose Notice of Appeal has been lodged.*

When the matter was placed before me for hearing on 14th September, 2021 the Plaintiff enjoyed the legal service of Mr. Seni Malimi, learned counsel assisted by Mr. Andrew Kombo, learned counsel whereas the Defendant enjoyed the legal service of Mr. Simoni Mnyele, learned counsel assisted by Mr. **Kagilrwa**, learned counsel.

As the practice of the Court, I had to determine the preliminary objection first before going into the merits or demerits of the suit. That is the practice of the Court founded upon prudence which I could not overlook.

Getting off the ground was Mr. Malimi, learned counsel for the Plaintiff. On the first preliminary objection that the counter claim is prematurely filed before this court and the same is *sub judice*. Mr. Malimi submitted that there are several proceedings are pending before this court; Execution No. 71 of 2016 is pending before this court, Civil Appeal No. 100 of 2020 is pending before the Court of Appeal as well as Notice of Appeal emanating from Misc. Land Application No. 963 of 2020. He contended that all of them are proceedings between the Plaintiff/ 1st Defendant in the counter claim and the 2nd Defendant in the counter claim. He went on to submit that the Plaintiff in the counter claim is claiming an amount in a tune of USD 3,102,87745 against the Plaintiff/ 1st Defendant and the 2nd Defendant in the counter claim.

The learned counsel for the Plaintiff further stated that the mentioned amount is a subject of dispute in Execution No. 71 of 2016, Civil Appeal No. 100 of 2020, and Notice of Appeal. To support his submission he referred this court to the further particulars of the notice of the preliminary objection dated 3rd August, 2021. Stressing, he stated that Execution No.

71 of 2016 has never been finalized. He went on to state that the property of the 1st Defendant in the counter claim was auctioned and the successful buyer is the Plaintiff in the counter claim. He added that there is a dispute between the Plaintiff and 2nd Defendant on the payment of auction property. Insisting he argued that the dispute involves the amount payable which is raised in the counter claim. He went on to state that the disputable amount in the Execution has been settled and the balance payable to the 2nd Defendant has been withheld by the Plaintiff in the counter claim.

Mr. Malimi continued to state that the Plaintiff filed a Civil Appeal No. 100 of 2020 and the 2nd Defendant filed a Misc. Land Application No. 963 of 2020 is a subject in the intended appeal. For that reason, he insisted that the counter claim is *res sub judice*, the same subject matter is litigated in the Court of Appeal with the same parties. He added that the amount which is claimed cannot be ascertained in the proceedings since the Plaintiff in the counter claim is claiming the same amount, same facts that have been pleaded in the counter claim and are the subject matter for litigation in the proceeding; Fortifying his contention, Mr. Malimi referred this court to the case of **Wengert Winrose Safaris (TZ) Limited v The Minister for Natural Resource & Tourism & Attorney General**, Commercial Cause No. 39 of 2016. The learned counsel threw his last jab by contending that pursuant to section 8 of the Civil Procedure Code Cap.

33 [R.E 2019] the counter claim be stayed awaiting the determination of the said proceedings. He added that as per Order VIII Rule 12 of the Civil Procedure Code Cap. 33 [R.E 2019] the court can order a separate trial of a counter claim if the counter claim ought to be disposed so.

In reply, Mr. Mnyele, learned counsel for the Defendant started by outlining that the preliminary objection contains two limbs; 1st limb, the counter claim is prematurely before this court, and 2nd limb; the counter claim is *res sub judice*. He argued that the two limbs are distinct. He contended that the matter is premature before the court if there is a condition present and the same must be fulfilled before the filing of a suit. The learned counsel for the Defendant refuted that all proceedings are pending, he stated that a matter is deemed to be pending if there is pending proceeding or anticipated proceedings before the court.

Mr. Mnyele contended that there is no execution proceeding pending before the court. He submitted that in Misc. Land Application No. 963 of 2020 the Plaintiff lost the matter and has filed an appeal. He referred this court to item 5 item. He stated that the Misc. Land Application No. 963 of 2020 is not pending since it was finalized and no one initiated the appeal process. He added that item 3 is an application for review, it was determined and no one initiated an appeal. Mr. Mnyele admitted that the

Civil Appeal No. 100 of 2020 is pending before the Court of Appeal. He added that Misc. Land Application No. 963 of 2020 is not pending before the Court of appeal but virtue of Notice of Appeal. He went on to submit that Kawe apartment in counter claim appearing as Kawe Apartment is not a party. The dispute is between the 2nd Defendant and the Plaintiff in counter claim.

Mr. Mnyele continued to submit that the background of disputes is quite different from the Doctrine of *res sub judice* as provided under section 8 of the Civil Procedure Code Cap.33 [R.E 2019]. He stated that for a person to plea successfully the Doctrine of *res sub judice* he must establish four matters; must establish the pendency of two matters. He argued that the Civil Appeal No. 100 of 2020 is pending and was heard first before the counter claim. He went to submit that by virtue of Notice of Appeal arising from the Misc. Land Application No. 963 of 2020 there is a pending matter, the Counter Claim was filed on 05th June, 2020, and the Notice of Appeal was filed at CAT on 29th July, 2021 after the instant suit. It was his view that the Notice of Appeal was lodged later thus it is the one to be stayed.

Submitting on the second condition that the parties must be litigating under same capacity. He added that in Civil Appeal No.100 of 2020 the

parties are the Plaintiff and the 2nd Defendant, Kawe Apartment is not a party. Thus parties are not the same. On the third condition, the party had to prove that the matter in issue must be directly and substantially in issue in a previous suit pending and the suit is instituted last and must constitute the same matter. It was his submission that the Civil Appeal No., 100 of 2020, and the Notice of Appeal are not similar and the same in counter claim. He added that in the Civil Appeal No. 100 of 2020 the issue is on return of 25% amount which was deposited in court and withdrawn by the Plaintiff, he added that the subject matter in the intended appeal is whether the payment of USD 923,882 on which the Plaintiff claimed to be set off the Decree in the suit between the Plaintiff and Defendant. He added that on counter claim the cause of action is gravity demonstrated under paragraph 24 of the counter claim, the Plaintiff is claiming a payment of a loan balance which remain payable after the mortgage of sale which constitute an issue in this matter. Mr. Mnyele valiantly argued that the matter in counter claim has nothing to do directly and substantially what is pending before the CAT.

Arguing on the fourth condition, he submitted that the reliefs must be the same. He submitted that the Court of Appeal can order the Defendant to return to the court account and in the appeal is to return the money. He valiantly argued that the declaratory orders cannot be claimed at the Court

of Appeal of Tanzania. Insisting, he argued that the four conditions must be all established. To bolster his position he referred this court to the case of **Safari** (supra).

The learned counsel for the Defendant continued to submit that there is no statutory requirement to separate the matter. He stated that the main suit and counter claim can be determined together because the matters are intertwined, he added that the Plaintiff in the main suit and 2nd Defendant are sister companies with the same Directors and transactions that led to the filing of the main suit. He added that in the main suit the Plaintiff claims that the Defendants sold his property illegally and at a low price and in the counter claim the Plaintiff claims for balance after the sale.

On the strength of the above submission, Mr. Mnyele urged this court to dismiss the preliminary objections and the costs are upon the Advocate personally.

In his rejoinder, Mr. Malimi reiterated his submission in chief. Accentuating, he stated that in counter claim the Defendant seeks return of money which is the subject matter in the appeal. He added that in case Court of Appeal of Tanzania will grant his prayers then the Defendant will receive more than USD 3,000,000/=. It was his view that the counter claim is premature since the claimed amount should be determined first. He

claimed that a Notice of Appeal is continuation of proceedings thus the same is not a separate cause of action. Stressing he contended that it is impossible to stay a Notice of Appeal.

Insisting, he said that the counter claim can be brought as a separate suit after the resolution of the said proceedings. He claimed that the issue of costs to be paid by the Advocates is not fair since the objection is not vexatious. In conclusion, he urged this court to allow the preliminary objection.

Having digested the learned counsels' submission and the pleadings therein on the sole preliminary objection raised by the Plaintiff/ Defendant's learned counsel in the counter claim, I should now be in a position to confront the points of objections on which the learned counsels locking horns. The main issue for determination is *whether the counter claim is appropriately filed before this Court*.

on the first limb of objection, the learned counsel for the Plaintiff objection is premised on the assertion that the Defendant's claim is *res sub judice* in view of **Safaris (TZ) Limited** (supra). The *res sub judice* rule is codified in section 8 of the Civil Procedure Code Cap.33 [R.E 2019] as follows:-

“ 8. 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.”

The above section 8 of the Civil Procedure Code Cap.33 [R.E 2019] will guide this court in finding out whether the counter claim is *res sub judice* or not. The Doctrine of *Res Sub Judice* prevents a court from proceeding with the trial of any suit in which the matter in issue is directly and substantially the same with the previously instituted suit between the same parties pending before same or another court with jurisdiction to determine it. As rightly pointed out by Mr. Mnyele, the purpose of the Doctrine of *res sub judice* is to bar continuation of a suit that is directly and substantially in issue with either previously filed suit or previously filed and determined suit.

In support of his objection, the Plaintiff's Advocate filed copies of Execution No.71 of 2016 and Memorandum of Appeal in respect to Civil Appeal No. 100 of 2021. On the face of it, the issue in dispute in this cause is the disbursement of Tshs. 2,253,813,753/=.

I hereby fully subscribe to the submissions made by both learned counsels that section 8 of the Civil Procedure Code Cap.33 [R.E 2019] have four ingredients. However, the serious contention of the trained legal minds for the learned counsels is whether the instant suit is *res sub-judice* to the three proceedings. In interpreting section 8, this court in the case of **The M & Five B Hotels & Tours Limited v EXIM Bank Tanzania Limited**, Commercial Case No. 104 of 2017 at DSM (unreported) this court agreed that four ingredients must exist for the application of section 8 of the Civil Procedure Code, Cap.33 [R.E 2019] are as follows:-

- i. That the matter in issue in the second suit is also directly and substantially in issue in the first suit;*
- ii. That Parties in the second suit are the same or parties under whom they or any of them claim litigating under the same title;*
- iii. That the court in which the first suit is instituted is competent to grant the relief claimed in the subsequent suit;*
- iv. And that the previously instituted suit is pending.*

I have examined the Defendant's Memorandum of Appeal in Civil Appeal No.100 of 2020, that Parties in the second suit are the same or parties under whom they or any of them claim litigating under the same title. There is no dispute that the Civil Appeal No. 100 of 2020 is pending

before the Court of Appeal of Tanzania and the parties are Exim Bank Tanzania Limited v National Furnishers Limited. It is obvious that parties are not the same since Kawe Apartments Limited is not a party to the suit. In fact, this Court is unable to see any relationship between the Memorandum of Appeal in Civil Appeal No. 100 of 2020, Execution No. 71 of 2016, and the Misc. Land Application No. 963 of 2020 since parties to the disputes are not the same.

With respect to the third ingredient; relief. The prayers sought are diametrically different from those sought in the Counter Claim. I have looked at the Defendant's Memorandum of Appeal in the Civil Appeal No.100 of 2020 and find that these are two different suits in the sense that the matter in issue in the counter claim is related to the return of money to a tune of USD 3,102,877.45, while in the Civil Appeal No. 100 the Defendant's grounds for appeal are related to the amount of the claims in a tune of Tshs.2,253,813,753 two billion two hundred fifty-three million eight hundred thirteen thousand seven hundred fifty-four. Therefore the reliefs are offbeat.

On the fourth ingredient, the issue of pending matters; I have scrutinized the proceedings listed by Mr. Malimi and found that Execution No. 71 of 2016 was determined to its finality, the Civil Application is

pending before the Court of Appeal of Tanzania and Misc. Land Application No. 963 of 2020 was determined and the same was finalized. Thereafter, the Defendant filed a Notice of Appeal to the Court of Appeal of Tanzania.

I have examined the proceedings listed by Mr. Malimi and found that Execution No. 71 of 2016 was determined to its finality and a Decree order was issued. Therefore, it is my considered view that the contention that Execution No. 71 of 2016 is pending is not correct, as long as a decision was made and a Decree was issued, the same means the Execution was finalized. The Misc. Land Application No. 963 of 2020 was determined to its finality and a Decree was issued. In view of the foregoing, it is my considered view that, it cannot be said that Execution No. 71 of 2016, and Misc. Land Application No. 963 of 2020 are pending before the court. Though it is indisputable fact that the Civil Appeal No. 100 of 2020 is pending before the Court of Appeal of Tanzania and it arises from the matter which was already been determined by this court.

For aforesaid reasons, the two proceedings do not fall under the legal definition of *res sub judice*. For the Doctrine for *res sub judice* to stand there must be a pending case before the court as it is with Civil Appeal of No. 100 of 2020.

On the first ingredient, that the matter in issue in the second suit is also directly and substantially in issue in the first suit. This issue is already been determine earlier that the matter in issue at the fCourt of Appeal of Tanzania in Civil Appeal No.100 of 2020 and the one raised in counter affidavit are not the same.

In the upshot, the second limb of preliminary objection has not met the requirements under section 8 of the Civil Procedure Code Cap.33 [R.E 2019].

On the second limb of objection, without hesitation, this objection cannot stand, I am saying so because the ground of *res sub judice* is rejected by this court. It is my view that the counter claim is not prematurely as per the instant suit, there is no any condition stated by Mr. Malimi that it is met. Instead, he is referring to proceedings that are not directly related to the instant matter at hand. Therefore the counter claim cannot be terminated based on the ground that the counter claim is prematurely before this court.

In the upshot, the Court finds and holds that the Plaintiff has failed to establish a case of *res sub judice* and to convince this court that the counter claim is prematurely before this court. Thus, the Plaintiff's

Preliminary Objection is without basis and is overruled. Costs to follow the event.

Order accordingly.

Dated at Dar es Salaam this 17th September, 2021.




A.Z.MGEYEKWA

JUDGE

17.09.2021

Ruling delivered on 17th September, 2021 in the presence of Mr. Seni Malimi, learned counsel for the Plaintiff also holding brief for Mr. Mnyele, learned counsel for the Defendants.




A.Z.MGEYEKWA

JUDGE

17.09.2021