

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND APPLICATION NO. 687 OF 2022**

(Arising from Land Case No. 286 of 2022)

**CHARLES WERONGO.....1<sup>ST</sup> APPLICANT**

**MABIBO CONSTRUCTION CO.LTD.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**CRDB BANK.....1<sup>ST</sup> RESPONDENT**

**ADILI AUCTION MART.....2<sup>ND</sup> RESPONDENT**

**AFRIMAX ENTERPRISES LTD.....3<sup>RD</sup> RESPONDENT**

**R U L I N G**

*Date of last Order: 10 November 2022*

*Date of Ruling: 07 December 2022*

**K. D. MHINA, J.**

This Application is brought under certificate of urgency by way of chamber summons made under the provisions of Order XXXVII Rules 2 (1) and 4, Sections 68 (c) and (e) and 95 of the Civil Procedure Code [ Cap. 33 R. E. 2019] ("**the CPC**")

The orders being prayed are for this Court;

- (i) Ex-parte to issue an interim order against the respondents or their servants and agents restraining them from selling or

disposing of by tender process the 1<sup>st</sup> Applicant's properties which are situated at plot No 566 Kawe Medium Density Area Kinondoni with Title Deed No 36364, Plot No. 70 Block D Kigogo Area, Farm No. 44 situated at Mbezi, Farm No. 2171 situated at Mbezi Temboni Kinondoni District, Plot No. 518 Block D Kigogo Area and Plot No. 633/1 Block D Mabibo Area within Dar es salaam Region pending determination of the application inter-parties.

- (ii) Inter-parties to issue an interim order against the respondents or their servants and agents restraining them from selling or disposing of by tender process the 1<sup>st</sup> Applicant's properties which are situated at plot No 566 Kawe Medium Density Area Kinondoni with Title Deed No 36364, Plot No. 70 Block D Kigogo Area, Farm No. 44 located at Mbezi, Farm No. 2171 situated at Mbezi Temboni Kinondoni District, Plot No. 518 Block D Kigogo Area and Plot No. 633/1 Block D Mabibo Area within Dar es salaam Region pending determination of the 1<sup>st</sup> and 2<sup>nd</sup> Applicants' suit therein and

- (iii) Any other relief (s) the Court may deem fit and equitable to grant.

The application is supported by the affidavit disposed of by Charles Werongo, the applicant and principal officer of the 2<sup>nd</sup> respondent.

On 1 November 2022, when the Hon. Deputy Registrar submitted the certificate of urgency before me for necessary orders. I directed that both parties involved in the matter should be notified, and they should appear before the Court on 4 November 2022.

After being served with the application, the first and second respondents confronted the application with a notice of preliminary objection to thus;

- (i) The application is Res-subjudice as it contravenes section 8 of the Civil Procedure Code, Cap33 R: E 2019

The preliminary objection was argued by way of oral submissions. The applicant was represented by Mr. Augustine Kusalika, a learned advocate, while the first and second respondents, Nzaro Kachenje and Ms. Edna Mwankenja, also learned advocates. The third respondent was

absent despite being duly served with the summons. According to the process server affidavit, one Mbaruk Barakat, the Managing Director of the third respondent, duly received and signed the summons.

At the hearing, Mr. Kachenje submitted that the application contravened section 8 of the CPC, which read that;

*"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".*

He further submitted that when this application was filed, a similar application was also in existence, i.e., Misc. Civil No. 102 of 2022 at the Resident Magistrate Court of Dar es salaam at Kisutu ("Kisutu") with the same parties.

Further, he submitted that the subject matter being the landed property was also the same and prayers sought were the same.

To substantiate his submission, he cited **Khery Amour v. Mary Kapinga, Land Case No. 368 of 2016** (HC-Land Division) at page 7, where it was held that;

*"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."*

He concluded his submission by citing **Karori Chogoro v. Waitihache Merengo, Civil Appeal No. 164 of 2018** (TanZlii), where the Court of appeal held that;

*"The doctrine of res-subjudice prevents a court of Tribunal from proceeding with the trial of any suit in which the matter in issue is directly and substantially pending before the same or another court with jurisdiction to determine".*

Therefore, he prayed for the application to be struck out with costs

In reply, Mr. Kusalika submitted that the remedy for res-subjudice is to stay in the proceedings rather than strike out the matter.

Further, he submitted that the application was not res-subjudice therefore, not offended section 8 of the CPC. He elaborated that in this application, five plots have been involved, while in the application at Kisutu, only one plot was concerned.

Elaborating further, he submitted that the parties were also different in the sense that there was an addition of a 3rd respondent in this application.

Furthermore, he submitted that the case at Kisutu was already dismissed for want of jurisdiction.

In conclusion, he submitted that the authorities cited had not been violated by the presence of this application because;

One, the two suits differ regarding the parties and properties involved, and two, the cases at Kisutu were already dismissed. Therefore, he prayed for the preliminary objection raised to be dismissed.

In a brief rejoinder, Mr. Kachenje submitted that by including Plot No 566, which is at issue in this application and also at Kisutu, the

matter violates section 8 of the CPC. This might result in conflicting decisions.

Regarding the issue that the matter was dismissed at Kisutu, he submitted that the written ruling was supposed to be brought as evidence of what was submitted by the counsel.

Court process.

Having heard the submissions from both parties, I now turn to determine preliminary objection raised on the point of law.

The entry point is section 8 of the CPC, which is relevant in analyzing the principle of Res-subjudice. For convenience, it is necessary to reproduce the said section. It reads;

*"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."*

By looking at the cited provision of law, it is quite clear that the objective of the principle of res-subjudice is to prevent courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action, the same subject matter, and the same relief. Further, as the provisions of the section are mandatory, the Court before which the subsequent suit is prevented from proceeding with the matter where all the conditions laid down in the section exist.

Canvassing through the records, what I gather regarding the background of this application is as follows. The same applicants lodged an application at Kisutu. At Kisutu, the respondents are CRDB Bank and Adili Auction Mart; the subject matter is Plot No. 566, located at Kawe medium density.

In the application at hand, the applicants are the same as at Kisutu, and the respondents were CRDB Bank, Adili Auction Mart, and Afrimax Enterprises Ltd. The subject matters are the five plots, including Plot No. 566, located at Kawe medium density. In both applications, the applicants prayed for the interim order and injunction.



It is from the above background that Mr. Kachenje stated that the matter is res- subjudice because the parties, the relief claimed, and the subject matter were the same while on his part, Mr. Kusalika contended that the application is not res-subjudice because while at Kisutu, there was only one property but in this application were five properties in dispute.

From the above, this matter should not detain me long; by looking at what I indicated above, it is clear that Plot No. 566, located at Kawe medium density, is a subject matter in both applications, at Kisutu and before this Court. The applications were both filed by the same applicants claiming the same reliefs. The addition of other properties on top of Plot No. 566, located at Kawe medium density, and the third respondent in this application cannot escape the provisions of section 8 of the CPC. The danger is that the two courts may pronounce conflicting decisions on the subject matter and reliefs.

On the submission that the application was already dismissed at Kisutu, as rightly submitted by Mr. Kachenje for the respondent, the counsel for the applicant had failed to bring that evidence by tendering that decision which dismissed the application. Further, he did not even

submit it on the date when the application was dismissed. Therefore, his submission is not substantiated by any cogent evidence apart from mere words.

Therefore, the fact that the two proceedings exist simultaneously in two different courts with the same parties, reliefs, and subject matter, it is undeniably res subjudice. The law does not permit riding the same horse in two different courts. Therefore, the preliminary objection raised has merits.

As to what the remedy is on his part, Mr. Kachenye submitted that the remedy is to strike out the application. In contrast, Mr. Kusalika submitted that the remedy is to stay the proceedings. In the cited case of **Khery Amour** (Supra), this court struck out the suit after finding that the same was res-subjudice.

In this application, as I said earlier, the nature of the reliefs sought are the interim order and temporary injunction; therefore, to stay proceedings of that nature, as Mr. Kusalika had suggested, is of no meaning. Why should the court stay the application for an injunction and interim orders when it found the same be res-subjudice? The

parties should first settle their scores at Kisutu, where the applicants previously lodged the application.

Basing on the fundamental reasoning behind the principle of res subjudice as the shield to avoid two contradictory decisions, to prohibit repetitive suits on the same cause of the action, to prevent the wastage of courts resource, and reduce the burden on courts in the circumstances of this application.

In conclusion, I struck out the application with costs.

It is so ordered.



  
**K. D. MHINA**  
**JUDGE**  
**07/11/2022**