

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND CASE NO. 232 OF 2022**

**OSINGO CONSTRUCTION CO. LIMITED..... PLAINTIFF**

**VERSUS**

**ALOYCE JOHN MWASUKA.....DEFENDANT**

*07/12/2022 & 15/12/2022*

**RULING**

**A. MSAFIRI, J.**

On 7<sup>th</sup> September 2022 the above named plaintiff instituted the present suit against the defendant seeking against him assortment of reliefs including but not limited to declaration that the defendant's continuously invasion and unlawful demolition of the plaintiff's concrete fence wall plus destruction of the plaintiff's trees as well as building materials on landed property described as Plot No. 370 Block G Boko Dovya Street Kinondoni Dar es Salaam is unlawful, illegal, unprocedural and with no justification.

On filing his written statement of defense, the defendant disputed the plaintiff's claim and in addition he raised a total of five preliminary objections on points of law to the effect that;

*Adile*

- 1. That the plaintiff contravenes the provisions of Section 8 of the Civil Procedure Code Act [CAP 33 RE 2019] by being res subjudice as the parties have a similar matter before the Kinondoni District Land and Housing Tribunal.*
- 2. That the suit is un-maintainable for being filed without appending the Company's Board Resolution to the plaint as required under Section 147(1) (a) and (b) of the Companies Act, No 12 of 2002.*
- 3. That the plaintiff advocate acted without having been authorized by the company.*
- 4. That the suit is un-maintainable for relying on fraud without stating particulars sustaining the allegations as required under Order VI of Rule 4 of the Civil Procedure Code Act [CAP 33 R.E 2019].*
- 5. That the plaint did not disclose a cause of action against the defendant.*

The defendant therefore prayed for the Court to dismiss the suit with

costs.

*ALLS*

I ordered the preliminary objections be disposed of by way of written submissions whereas Mr. Silvanus Mayenga and Mr. Fredrick Msumali learned advocates represented the plaintiff and the defendant respectively. In determining the above preliminary objections, I propose to determine the 1<sup>st</sup> preliminary objection as it goes to the jurisdiction of this Court.

Submitting on the first preliminary objection, the defendant contended that the present suit is bad and unmaintainable in law as there is a same matter filed before the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Land Application No. 484 of 2019 and there was an order for injunction issued in favor of the plaintiff vide Land Application No. 834 of 2019 which was granted and still in force.

It was submitted further by the defendant that the matter is essentially on land ownership between two adjacent plots namely Plots No. 370 and Plot No. 393 and both parties have title to ownership of their respective plots of land and judgment is being waited for.

It was contended by the defendant that the present suit offends Section 8 of the Civil Procedure Code which bars the Court to proceed with

*Alls*

trial of any suit in which the matter in issue is also directly and substantially in issue in a previous instituted suit between the same parties.

According to the defendant, there are four conditions to establish plea of res subjudice, which are; firstly, there must be two pending suits one previously filed, secondly, 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 and fourth, the two suits must be pending in a court of competent jurisdiction.

The defendant contended that there are two pending suits one is Land Application No. 484 of 2019 at the DLHT and the other is Land Case No. 232 of 2022 at this Court. The suits involve the same parties. The defendant submitted further that the matter in issue are directly and substantially the same as shown in the pleadings. The plaintiff in the present suit specifically on paragraph 3 of the plaint prays for declaration that the defendant is in continuing trespass on his land through which the plaintiff claims to have built a wall that has been demolished. The defendant contended that the same issues are directly and substantially pending in the DLHT where the plaintiff claimed that the defendant trespassed into the land and issues of determination are whether the defendant did trespass on the plaintiff's land,

the rightful owner of the disputed land and whether two parties are separated by public street road.

On reply, the plaintiff readily conceded that there is a matter pending before the DLHT involving the same parties however they are two different cases bearing different and distinctive cause of action. The plaintiff contended that, in the subsequent suit before this court the cause of action is demolition of the wall done by the defendant on 16<sup>th</sup> September 2022 which is a tortious act and it is independent from the one involving encroachment which is a matter before the DLHT.

The plaintiff referred to several authors on Law of Tort such as **P. S. A Pillai**, Law of Tort, Eastern Book Company at page 103 where it is stated that, every continuance of a trespass in respect of which a new cause of action arises from day to day as long as trespass continues.

On further submission the plaintiff referred to the decision of **M and Five B Hotels and Tours Limited v Exim Bank Tanzania Limited** Commercial Case No. 104 of 2017 and **I and M Tanzania Limited v H Bros Canvas and Tents Limited & another** Commercial Case No. 03 of 2018 (both unreported). In the cited cases, it was emphasized that for the

*Alb-*

doctrine of res subjudice to succeed there must be evidence which shows that the two suits have similar subject matter and all other ingredients are to be met.

On rejoinder, the defendant essentially reiterated his submission in chief, he added that the matter before the DLHT is still pending and the plaintiff is claiming for trespass while in the present suit the plaintiff is claiming for continuing trespass and the issues for determination before the DLHT are whether the defendant is a trespasser and who is a rightful owner of the disputed land.

Having gone through the parties' submissions rival and in support of the first preliminary objection, the sole issue calling for the Court's determination is whether the present suit is res subjudice.

Section 8 of the CPC declares that no court should 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 the same title where such suit is pending in the same court or any other court which is competent to grant the relief sought. *Adls.*



The object behind the prohibition under Section 8 of the CPC 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 reliefs.

In the instant matter, from the parties' submissions it is not in dispute that there are two matters currently pending before this Court and at the DLHT involving the same parties, suing under the same title. The matter before the DLHT is Land Application No. 484 of 2019. What parties are at variance is on the nature of reliefs sought in both matters. The plaintiff contended that the reliefs claimed in this suit are not directly and substantially the same between the matters before this Court and at the DLHT. The defendant on the other hand contended that the reliefs are almost the same as in both cases the plaintiff is claiming for trespass on the disputed land.

I have keenly gone through the plaint filed in the present suit. Looking at the relief section, the plaintiff is mainly claiming for the declaration that the defendant is a trespasser on the disputed land and not actually demolition of the wall. The issue as to whether the defendant is a trespasser on the disputed land forms basis for determination of the matter before the

*Alk.*

DLHT. The term "substantially" used under Section 8 of the CPC does not mean "exactly" the same. There might be some minor differences. Hence, I hold that the relief of trespass in the present suit is substantially the same in the matter before the DLHT.

Moreover, in the course of his submission, the defendant contended that one of the issues for determination before the DLHT apart from trespass, is who is the lawful owner of the disputed land. This assertion has not been disputed by the plaintiff. Now in the instant matter the major relief claimed by the plaintiff is declaration that the defendant is a trespasser on the plaintiff's land. In the instant matter there is no relief regarding ownership of the disputed land rather going by the defendant's submission the question of ownership is to be determined by the DLHT.

The issue of trespass on the land in dispute cannot be determined before the issue of ownership is resolved. In order to establish trespass over the land, ownership of that land must be established first. Hence for the need to avoid conflicting decisions let the matter before the DLHT be determined first. I state so because determination of issue of ownership of the disputed land has direct impact in the present matter. Suppose none of

*Adle-*



the parties is declared a lawful owner of the disputed land would the present suit which the major cause of action is trespass still stand?

In upshot I proceed to sustain the 1<sup>st</sup> preliminary objection. The present suit is hereby struck out with costs.

It is so ordered.

  
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**A. MSAFIRI,  
JUDGE**

**15/12/2022**

