

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 138 OF 2022

MS MWANAISHA KITWANA KEJO ..... PLAINTIFF

VERSUS

EFC TANZANIA MFC LIMITED .....DEFENDANT

RULING

*Date of last Order: 11.082022*

*Date of Ruling: 12.08.2022*

**A.Z.MGEYEKWA, J**

On 22<sup>nd</sup> June, 2022, the Plaintiff herein, instituted this suit against the Defendant seeking the following six reliefs as follows:-

- a) *An order for refund of Tanzania shillings three hundred and fifty million (Tshs. 350,000,000/=) being the money she paid to the Defendant to buy a Hotel situated on Plots Nos 646 – 655 Block N, Majengo area Bagamoyo Urban and Money used in the process of being handed over the property after the purchase had been completed.*
- b) *Damages to be assessed by the Court.*

- c) *Interest at the rate of 12% per annum from the date of purchase to the date of judgment.*
- d) *Interest at the rate of 7% from the date of judgment to the date of satisfying the decree.*
- e) *Costs of the suit be paid by the Defendant.*
- f) *Any other relief (s) this Honourable Court may deem fit and just to grant.*

The Defendants filed a Written Submission Defence and they raised a point of Preliminary Objection as follows:-

1. *This suit is res sub judice as there is a pending notice of appeal to the Court of Appeal in respect of Land Case No. 54 of 2019*

When the matter was called for hearing of the preliminary objection on 11<sup>th</sup> August, 2022, the Plaintiff enjoyed the legal service of Mr. Abraham Senguji learned counsel whereas, on the Defendant had the legal service of Mr. Cleoplace James, learned counsel.

As the practice of the Court has it, we had to determine the preliminary objection first before going into the merits or demerits of the suit.

The learned counsel for the Defendants started his onslaught by submitting that the suit before this court is *res sub judice* as there is a pending Notice of Appeal at the Court of Appeal of Tanzania in respect to

Land Case No. 54 of 2019. He went on to submit that the Judgment was delivered by Hon. Makani, J whereas the Defendant was the 1<sup>st</sup> Defendant and the Plaintiff was the 2<sup>nd</sup> Defendant. He went on to submit that the subject matter in the previous matter was the sale of the landed property on Plot No. 646/655 Block 'N' located at Majengo Bagamoyo Urban with Certificate of Title No. 54158. He added that the Defendant was aggrieved hence on 16<sup>th</sup> November, 2021 he lodged a Notice of Appeal to the Court of Appeal and the same is pending before the said court. Therefore, it was his view that this court ceases jurisdiction to determine the instant suit. To buttress his contentions he cited the cases of **Arcado Ntagazwa v Buyogera Buunyambo** (1997) TLR 242, **Exaud Gabriel Mmari v Yona Setti Akyo & 9 Others**, Civil Appeal No. 91 of 2019. He insisted that the suit landed property in the matter at hand is the subject matter in the intended appeal.

On the strength of the above submission, the learned counsel for the Defendant's counsel beckoned upon this court to dismiss the suit for being *res subjudice* with costs.

In his reply, the learned counsel for the Plaintiff, Mr. Senguji contended that the Plaintiff is not served with a notice of appeal. He added that Mwanaisha was not summoned to appear at the Court of Appeal of

Tanzania, thus, in his view, the summons was only served to one party in exclusion of Mwanaisha. The learned counsel for the Plaintiff went on to submit that the doctrine of *res subjudice* cannot be filed as a suit, thus, in his view the preliminary objection raised by the learned counsel for the Defendant is misplaced. To support his submission he referred this court to section 8 of the Civil Procedure Code Cap. 33. He went on to state that if there is a pending notice of appeal at the upper court then the suitable remedy is to stay the suit instead of dismissing it. He also added that the matter at hand is in regard to jurisdiction and not *res subjudice*. Mr. Senguji distinguished the cited cases by stating that the appeal does not concern the Plaintiff and the subject matter is not the same.

In conclusion, the learned counsel for the Plaintiff beckoned upon this court to dismiss the preliminary objection with costs.

In his rejoinder, the counsel for the Defendant reiterated his submission in chief. He stressed that the Defendant has lodged a Notice of Appeal at the Court of Appeal against the Plaintiff and two others and the Plaintiff under paragraph 13 of the Plaint has mentioned the same property which is the subject matter at the matter pending before the Court of Appeal of Tanzania. Ending, Mr. James maintained that the instant suit is *res subjudice*, hence he urged this court to dismiss the suit with costs.

I have carefully summarized the submissions made by learned counsels for the Plaintiffs and Defendant and the main question for consideration at this juncture is whether the doctrine of *res subjudice* is applicable in the situation at hand. In section 8 of the Civil Procedure Code Cap. 33 [R.E 2019], *res subjudice* is explained. For ease of reference, I reproduce section 8 of the Civil Procedure Code, Cap. 33 [R.E 2019]:-

*“8. (1) 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 to litigate 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.*

Guided by the above provision of the law, this will ascertain whether the Defendant has lodged a Notice of Appeal to the Court of Appeal, if the answer is yes then the question for determination will be whether the subject matter before this court and the matter pending at the Court of Appeal of Tanzania are the same or not.

In the instant suit, the subject is Plot Nos. 646-655 Block 'N' Majengo area, Bagamoyo Urban with Certificate No. 54158. The Plaintiff in his Plaint attached a Judgment of this court and the matter was related to the suit

land property in regard to Plot Nos. 646-655 Block 'N' located at Majengo area, Bagamoyo Urban with Certificate No. 54158. The Defendant in his Written Statement of Defence has attached a Notice of Appeal against the decision of this court in Plot Nos. 646-655 Block 'N' Majengo area, Bagamoyo Urban with Certificate No. 54158.

I have pondered on the submission of Mr. Cleoplace that the Defendant lodged the said Notice of Appeal on 15<sup>th</sup> November, 2021 and the appeal is against the same parties as in Land Case No.54 of 2019 while the Plaintiff is a party to the previously intended appeal. At the time when the Plaintiff lodged the instant suit, the Notice of Appeal was already been lodged at the Court of Appeal of Tanzania. As rightly pointed out by Mr. Celoplace once a Notice of Appeal is lodged at the Court of Appeal of Tanzania then this court ceases to have jurisdiction over the same subject matter. The Court of Appeal of Tanzania in the case of **Arcado Ntagazwa** (supra) TLR 242 held that:-

*“Once the formal notice of intention to appeal was lodged in the Registry the trial Judge is obliged to halt the proceedings at once and allow the appeal process to take effect or the until that notice was withdrawn or was deemed to be withdrawn”*

See also the cases of **Milcah Kalondo Mrema** (supra) and **Exaud Gabriel** (supra).

As long as the Notice of Appeal was lodged first before the instant suit then the submission of Mr. Senguji that this court is required to halt the proceedings or suit cannot apply because from the first place the Plaintiff was bound by the pending Notice of Appeal which is lodged at the CAT.

As all is said and done, I sustain the preliminary objection and proceed to strike out Land Case No. 138 of 2022. Based on the Defendant's counsel attendance on record, the Plaintiffs will pay half the costs of the case taxable by the Taxing Master.

Order accordingly.

DATED at Dar es Salaam this 12<sup>th</sup> August, 2022.



A.Z.MGEYEKWA

JUDGE

12.08.2022

Ruling is delivered on 12<sup>th</sup> August, 2022 via video conferencing whereas the Plaintiff and Mr. Cleoplace James were remotely present.



A.Z.MGEYEKWA

JUDGE

12.08.2022