IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 67 OF 2020

SOLOHAGA COMPANY LIMITED..... PLAINTIFF

VERSUS

YARA TANZANIA LIMITED.....1ST DEFENDANT

SANTANA INVESTMENT LIMITED.....2ND DEFENDANT

Date of Last Order: 18/11/2020.

Date of Ruling: 18/12/2020.

RULING

MAGOIGA, J.

This ruling is in respect of two preliminary objection on points of law formally raised and filed by Mr. Nuhu Mkumbukwa, learned advocate for the 1st defendant against the competence of the Commercial case No 67 of 2020 to the effect that;(1) this suit is misconceived and unmaintainable for being brought prematurely and (2) that this suit is unmantainable in law for being an abuse of court process and is res sub-judice.

In order to understand the basis of the preliminary objections, I find apposite albeit briefly to give material facts leading to institution of Commercial case No 67 of 2020.

The 1st defendant filed Commercial Case No. 16 of 2017 against the plaintiff herein, claiming payment of unpaid money from the sale of fertilizers. The facts go that, parties agreed to settle the matter amicably out of the court by signing deed of settlement. On 30th November, 2017 the said deed of settlement was recorded and a decree of the court was subsequently issued. Among the terms of the deed of settlement was for the plaintiff herein to pay the 1st defendant Tshs. 845,756,100.00. The plaintiff failed to adhere to terms and condition of the deed of settlement. Consequently, 1st defendant filed an application for execution of decree by way of attachment and sale of the plaintiff's properties.

The application was granted and the 2nd defendant who is a court broker was appointed to proceed with attachment and sale of disputed properties. It is on record that when an execution was going on, plaintiff filed Misc. Commercial Application No. 11 of 2019 against the 1st and 2nd defendants praying for an order of stay of execution and an order to vacate decree of the court dated 30th November, 2017. Unfortunately to the plaintiff herein, her application was dismissed. On 18th June, 2020, Azania Bank Limited filed Misc. Commercial Application No. 92 of 2020 praying for extension of

time to file objection proceedings which it is still pending in this court before Hon Fikirini, Judge.

On 06th August, 2020, plaintiff instructed Mr. Alex Balomi, learned advocate, to instituted this suit against the 1st and 2nd defendants in this court praying for payment of business loss to the sum of Tshs. 2,550,000,000.00/= for wrongful attachment and sale of the 8 trucks and 8 trailers and 4 tippers under the possession of the plaintiff on behalf of the Azania Bank Limited.

It was against this background, upon being served with the plaint, the 1st defendant filed written statement of defence disputing all claims by the plaintiff and raised two preliminary objections on points of law praying for the instant suit be dismissed with costs.

When this suit was called for orders, plaintiff was enjoying the legal services of Mr. Alex Balomi, learned advocate. On the other adversary part, the 1st defendant was enjoying the legal services of Mr. Erick Denga, learned advocate.

This court ordered the learned advocates to argue the preliminary objections by way of written submissions. The learned Advocates complied with the order and directions of the court .I have had time to read carefully

their rival written submissions on the preliminary points of objection. I commend them for their insightful inputs captured therein. However in the course of determining the preliminary objection filed, I will not be able to repeat each and every aspect argued, but it suffices to say, I have noted them and I will accord them the weight they deserve.

Submitting in support of the preliminary objection, counsel for the 1st defendant started his submission by giving out the historical background of this matter and told the Court that, this suit is res sub-judice, hence, abuse of court process. To bolt up his argument cited the provision of Section 8 of the Civil Procedure Code [Cap 33 R; E 2019], Sarkar, On Code of Civil Procedure (11th edition) discussing the provision of section 8, pointed out that four ingredient must exist for the application of the doctrine of res sub judice; which are: (1) the matter in issue in the second suit is also directly and substantially in issue in the first suit,(2) That parties in the second suit are the same or parties under whom they or any of them claim litigating under the same title,(3) that the court in which the first suit is instituted is competent to grant the reliefs claimed (4) that the previously instituted suit is pending.

Elaborating on the first ingredient, the learned counsel for 1st defendant submitted that, the matter in issue in the second suit is also directly and substantially in issue in the first suit. He, therefore, argued that the main claim in this instant suit is wrong attachment and sale of plaintiff property as per paragraph 8 of the plaint which is directly and substantially in previously application filed by Azania Bank Limited.

As regards second ingredient that, parties in the second suit are the same or parties under whom they or any of them claim litigating under the same title, counsel for 1st defendant submitted that, parties to this suit are similar to the pending application and the fact that Azania Bank Limited is not a party to this suit does not make in itself the doctrine of res sub judice inapplicable. To cement his position he cited **Wengert Windrose Safaris (Tanzania) Limited Vs The Minister of Natural Resources and Tourism and Another, Misc .Commercial Case No. 89 of 2016 (unreported) and** Mulla: Code of Civil Procedure,(18th edition) on the case of **Ashok Kumar lavad vs. Noble Designs Pvt Limited; AIR 2006 Cal 237.**

On the third ingredient, the learned advocate argued that, the court in which the first suit is instituted is competent to grant the reliefs claimed.

Mr. Denga contended that if the application filed by the Azania Bank Limited is granted or assuming objection proceeding fail, the plaintiff may resort to Order XX1 Rule 62 of the Civil Procedure Code [Cap 33 R; E 2019] and if granted,the plaintiff my file objection proceedings in which the court may grant reliefs similar to what plaintiff is seeking under paragraph 10, 20, 21 and 27(1).Therefore according to him, the reliefs claimed in this suit can be granted in the previously suit as both courts are competent to grant the reliefs claimed.

On the last ingredient that, the previously instituted suit is pending, counsel for 1st defendant submitted that, Misc. Commercial Application No 92 of 2020 is still pending in this court before Hon Fikirini, J.

On the strength of the above reasons Mr. Denga implored this court to uphold this limb of objection and prayed this suit be stayed until the previously instituted suit is determined to its finality.

On the second limb of objection, it was the argument of Mr. Denga that, this suit was preferred prematurely. Unless Misc. Commercial Application No. 92 of 2020 is determined, the question as to whether there was wrong attachment and sale of those properties the possibility of having two conflicting decisions on one issue cannot be overruled. Order XX1 Rule 62

of the Civil Procedure Code [Cap 33 R. E. 2019], provides for alternative remedies but not the instant suit. Therefore, bringing this suit at this time is abuse of court process and it may lead to conflicting decisions. On that regard, he argued the court to use its power under Section 95 of the Civil Procedure Code [Cap 33 R; E 2019] to prevent such abuse.

Concluding his submission, counsel for the respondent urged the court to dismiss the suit for being brought prematurely or in alternative the suit be stayed pending determination of the pending application.

On the other hand, Mr. Balomi, learnd advocate for the plaintiff commenced his submission by giving introductory remarks and submitted that the preliminary objections filed in this court are not points of law or for fall short of requirement to be considered a preliminary objection on point of law as envisaged in the case of **Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) EA 969** and the case of **Karata Ernest& Others versus Attorney general, Civil Revision No 10 of 2010(unreported).** According to Mr. Balaomi, the preliminary objections that the suit is res sub judice and abuse of court process was improperly raised as it is not capable of disposing out the suit. According to him, what was required is for the 1st defendant to file a formal application

under Section 8 of the Civil Procedure Code [Cap 33 R; E 2019] and not by way of preliminary objection. Elaborating further his point, he argued that a preliminary objection do not meet the aim of saving the precious time of the court and cost to parties. To cement his point referred this court to the case of **Shahida Abdul Hassanali Kasam vs Mahed Mihamed Gulamali Kanji, Civil appeal No 42 of 1999 and the case of Chama Cha Walimu Tanzania Vs Ezekia Tom Oluoch Misc application No. 49 of 2020** where the court noted that the aim of preliminary objection is to save time of the court and parties by not going into the merits of the application because there is a point of law which will dispose of the matter. Next, the learned counsel for the plaintiff urged the court to use its inherent powers to do away with technicalities raised by defendant. He referred the court to **Article 107A (2) (e) of the constitution, the case of Judge In charge High Court at Arusha and the AG vs Nin Munuo Ng'uni(2004)T.L.R.44, The written laws (Miscellaneous Amendments) (No 3) Act No 8 of 2018** where the court noted that the sole purpose of substantive justice is to ensure and facilitate expedition and proportionate and affordable resolution of all matters.

Turning to ingredient of res sub judice, the learned counsel for plaintiff was at one with the counsel for defendant that for doctrine of res sub judice to apply, four conditions must co-exist, however, he submitted that some of the ingredients are not met in instant matter.

Elaborating his submission on the four conditions, he pointed out that parties are totally different as in the instant suit, Azania Bank Limited is not a party, thus, the doctrine of res sub judice cannot apply. On the case of **Wengert Windrose Safaris (supra)** is distinguishable as it was erroneously arrived, because the trial judge invoked the provision of Section 95 of the Civil Procedure Code [Cap 33 R. E. 2019] while there is specific law to that effect. To strengthen his point he cited the case of **Shaku Haji Osman Juma VS AG & 2others (2000) T.L.R. 49** and the case of **Bunda District Council vs Varian Tanzania Limited [2000] T.L.R 385** in which the court noted that, the inherent jurisdiction should not be invoked, where there is specific provision. Apart from that, learned counsel submitted that even Mulla: On Code of Civil procedure, (18th edition) and the case of **Ashok kumar lavad (supra)** are just persuasive which does not bind this court.

On the condition that, the previously instituted suit is pending, learned counsel for plaintiff, submitted that, there is no previously suit filed. According to him, the previously suit was Commercial case No 16 of 2017 which was determined on 30th November, 2017 and what is pending is Misc. Commercial Application No 92 of 2020 which is not a legal suit and has been overtaken by event as execution has been done.

Turning to the cause of action pleaded in two suits which are before the court, Mr. Balomi submitted that the matter in issue in the Commercial Case No 67 of 2020 has partly risen from wrong attachment and sale of the properties by 1st and 2nd defendants which caused frustration of agreements of the plaintiff with Mbeya Cement Ltd, while Misc. Commercial Application No. 92 of 2020 is for extension of time to file objection proceeding out of time, and therefore, the second suit is not directly and substantially in issue in the first suit .

Submitting on the second limb of objection counsel for the plaintiff contended that, Misc. Commercial Application 92 of 2020 was made known to plaintiff on 6thAugust, 2020 while the plaintiff had already filed and paid for the suit in this court. Therefore, the allegations that the intended objection proceedings my result into confusion of the decisions of the

similar court, is apprehension of fear by the 1st defendant with no legal legs to stand. To cement his position he cited the case of **Mvita Construction Company vs. Tanzania Hobours Authority [2006]T.L.R. 22** where the court held that " as the two judges of the High Court ,dealt with different aspects of the case, the question of res subjudice did not arise and there were no conflicting decisions. Therefore, the prayer to dismiss the suit is misconceived in terms of Section 8 of CPC the remedy is to stay the suit.

The learned counsel for the plaintiff in strong terms urged this court to dismiss the raised preliminary objections because are baseless and therefore be overruled with costs and the suit to proceed on merits.

In rejoinder submission, the counsel for defendant reiterated his earlier submissions in chief and submitted that the submission on the tests of preliminary objection, issues on overriding objectives, issue of technicalities are mere academic and have nothing to do with the gist of this matter.

On the argument that, the defendant was required to file fresh application under Section 8 CPC, it was brief rejoinder of the counsel for the defendant that, it is not a requirement under the cited provision and the issue on whether the matter is res sub judice or not it is a pure point of law which

can be raised as a preliminary objection. To further fortify his submission, he argued that the assertion that fresh application has to be filed it is misconceived as it is not supported by any authority.

The counsel for defendant went on to submit in reply that, the contention that application filed by Azania Bank Limited is not a suit, counsel for 1st defendant submitted that, the counsel for plaintiff is trying to mislead the court, because the word suit in the context of res sub judice may also include the application or appeals. To cement his position he referred the court to the case of **Wengert Windrose Safaris (supra)**

As regard to the second limb of objection, the learned counsel for 1stdefendant reiterated his formal submission in chief and added that the case of **Mvita Construction Company (supra)** cited by counsel for plaintiff is distinguishable as it relates to issues of res judicata.

Concluding his rejoinder, learned counsel for the defendant urged the court to uphold the preliminary objection and dismiss the suit for being brought prematurely or in alternative the suit be stayed pending determination of the application.

This marked the end of hearing of the preliminary objection. The task of this court is now to determine the merits or otherwise of the preliminary

objections. I find it apposite to start with the second limb of objection, *that this suit is not maintainable in law for being an abuse of court process and res sub-judice.*

The serious contention of the trained legal minds for parties herein is whether the preliminary objection is meritorious? The learned counsel for plaintiff has argued that a preliminary objection raised by the defence counsel are not pure point of law and cannot dispose off the suit; while the counsel for 1st defendant has challenged the submission and urged that, the issue on whether the matter is res sub judice or not it is a pure point of law which can be raised as a preliminary objection.

I have carefully considered the rival arguments on the points argued on preliminary objection, the pleadings and gone through the law, and I am inclined to I associate myself with what has been stated by the learned counsel for the 1st defendant that, abuse of the court process and res sub judice both are pure points of law but with different consequences to a suit. The former can lead to dismissal of the suit and the later for stay of the proceedings.

Having carefully listened, considered and traversed through the pleadings of the parties herein, I am certainly convinced that the objection that this

suit is an abuse of the court process is merited and it suffices to dispose of this suit. The reasons I am taking stance are not far to fetch. **One,** there is no dispute that, this suit traces its origin from Commercial Case No.16 of 2016 between the plaintiff and the 1st defendant which culminated into the deed of settlement executed between the plaintiff and 1st defendant, dully filed and recorded and a decree of the court was issued on 30th November, 2017. **Two,** there is equally no dispute that, in the deed of settlement the plaintiff herein (defendant in that suit) promised to pay the decreed amount of Tshs.845,756,100.00 by June, 2018 but failed and the 1st defendant filed execution proceedings which was granted and the 2nd defendant was appointed to execute the decree of the court. **Three,** the is further no dispute that, the plaintiff in her pursuits to block execution made Misc. Commercial Application No.11 of 2019 praying for stay of execution and for court to vacate the Agreement/Deed of settlement dated 30th November, 2017 but his application was rejected and the execution has been complete a fact which the plaintiff admits in paragraph 7.6 of his written submissions. **Four,** the plaintiff is not even disputing the existence of deed of settlement and decree of the court but is now seriously armed to challenge execution by way of a suit pegged on remote contracts with

Mbeya cement, to my considered opinion is an abuse of the court process that this court cannot entertain.

Further, is my considered opinion that, to peg the instant suit on wrongful attachment and sale of properties whose objection was rejected execution amounts to abuse of the court process.

Further, to my understanding of the law, the remedy of the plaintiff, if any, was to institute a suit under Rule 62 of Order XXI of the Civil Procedure Code(supra) to establish her right, if any, on the disputed properties. I have equally noted that in Misc. Commercial Application No.11 of 2019 the plaintiff cited Rule 57 (1) and (2) and upon the court rejecting his application, the only remedy available for him was to institute a suit to establish the right which he claims to the property in dispute as provided for under Rule 62 of Order XXI. The said Rule provides as follows:

"Rule 62. Where a claim or objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive."
(emphasis mine)

The question that quickly arises is whether the instant suit, is a suit to establish the right which the plaintiff claims to the property in dispute or not? I am sure this is not. Therefore, guided by the provisions of Rule 62 above the order rejecting the stay and to vacate the agreement was conclusive subject to one exception of instituting suit to establish the right which he claim in the property in dispute. Therefore, since this suit do not fall into suit establishing the right of the plaintiff in the disputed property, in my considered opinion, is barred and seriously abuse of the court process.

On account of the above limb of objection, I find no reasons to discuss other grounds as they become obsolete.

That said and done this suit is hereby dismissed with costs for being an abuse of the court process.

It is so ordered.

Dated at Dar es Salaam this 18th day of December, 2019.

S. M. MAGOIGA
JUDGE
18/12/2020