

, IN THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION
AT DAR ES SALAAM

COMMERCIAL CASE NO. 104 OF 2017

BETWEEN

THE M& FIVE B HOTEELS AND TOURS LIMITED ----- PLAINTIFF

VERSUS

EXIM BANK TANZANIA LIMITED ----- DEFENDANT

RULING

SONGORO, J

The plaintiff M & Five Hotels and Tours Limited filed a suit against claiming that, Exim Bank Tanzania Limited, the defendant has wrongfully, negligently and fraudulently withdrawal from the plaintiff Account a sum exceeding USD 1,435,757.25.

He then prayed for court order that, a forensic audit be conducted to determine the actual amount which was wrongful collected.

Secondly the plaintiff also prayed that, he be allowed to offset the amount fraudulently collected from his account and the amount be used to pay for plaintiff's bank loan to the Defendant's bank.

In response to the plaintiff suit, Exim Bank Tanzania Limited the defendant filed a written statement of defence and opposed the plaintiff claim.

In addition, the defendant bank filed a preliminary objection on point of law that, the plaintiff`s Commercial case No 104 of 2017 is “ *Res-Subjudice* ” because there is a pending Commercial Case No 109 of 2016 which involves similar issues and parties case in the same court and Division.

In view of the above preliminary objection which was raised, the court invited the plaintiff as well as defendant`s counsels to pursue the preliminary objection on point of law. Therefore Mr. Mpaya Kamala, Learned Advocate appeared for the plaintiff and Mr Tairo Makarios, Learned Advocate for the defendant.

In pursuing the preliminary objection on point of law, Mr Makarios for defendant`s bank informed the court that, the present suit is Res-Subjudice because there is a Commercial Case No 109 of 2016 which was filed which involves the same subject matter and the same parties pending in this Commercial Court.

The Counsel then indicated the Commercial Case No 109 of 2016 is before Hon Judge Mruma and it was filed by Exim Bank Tanzania Limited who is the plaintiff and defendant in this suit of Commercial Case No 104 of 2017.

The counsel further clarified that, M & Five B Hotels and Tours Limited who is the plaintiff in the matter is also the defendant in the Commercial Case No 109 of 2016

Next the Mr Makarios submitted that, the bank account which are subject of litigation on Commercial Case No 109 of 2016 are the same bank accounts which are subject matter of litigation in the present suit Also he stated even the defence in two cases looks similar.

The defence counsel drew the attention of the Court to the plaintiff's plea in this matter and pray that, since it involves the same subject matter, it is ideal if the court may stay the present Commercial Case No 104 of 2017 pending the hearing and determination of Commercial Case No 109 of 2016 on the ground that, the present suit is Res Subjudice.

Finally, Mr Makarios prayed that, since the Commercial Case No 104 of 2017 involves the same matter in issues which appears in Commercial Case No 109 of 2017 previously instituted suit between the same parties, and litigating under the same title it is ideal if the present suit may be stayed

On his part Mr Mpaya Kamala for the plaintiff argued that, the so called preliminary objection which was raised by the defence counsel that, the suit is “Res *Sub judice*” it fall short of requirement to be considered a preliminary objection on point of law as envisaged in the case of Mukisa Biscuit Co Versus West End Distributors Ltd 1969 EA p701

Elaborating further his point, Mr Kamala argued that, a preliminary objection on point raised by the defence counsel of Res subjudice is not capable of disposing out the suit. The counsel then added that, the only remedy which is available if a suit is Res Subjudice at least the court may order a stay of proceedings.

Next, Mr Kamala also contested that, the defence counsel did not lead any evidence which shows the two suits their subject matter are similar to each other. The counsel also indicated that, according to Sarkar Law of Civil Procedure 8th Edition the test of Res subjudice is whether the cause of action are identical

Then, turning to the cause of action pleaded in two suits which are before the court, Mr Kamala stated that, in the previous Commercial Case No 109 of 2017 the cause of action is breach of contract of guarantee while in the present suit the cause of action is on tort committed in the commercial transaction and the matter to be tried are issues of negligence recklessness and fraudulently withdrawals of monies. So Mr Kamala indicated that, the cause of action and reliefs prayed are different.

Then, it was the argument of Mr. Kamala that, indeed Section 8 applies where the cause of action are identical. He prayed to the court to dismiss the objection on the ground that, the present suit is not Res subjudice because its cause of action is based on tort while the previous suit its cause of action is on breach of contract...

The court has subject all argument from both parties under serious consideration and find indeed Section 8 of the Civil Procedure Code Cap 33 which set out essential ingredient of a suit which is Res subjudice states as follows;

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.

So guided by Section 8 of the Civil Procedure Code Cap 33 the court finds the essential ingredient of the doctrine of “**Res subjudice**” the present suit must have, matter in issues like issues in the previous case, issues being litigated must be between the same parties, and the parties must be litigating under the same title and there has to be a pending suit.

In line with what is provided in Section 8 of the Civil Procedure Code, I revisited a plaint and a cause of action in the Commercial Case no 104 of 2017 and easily find from paragraph 3 that, the plaintiff is suing on wrongful, negligent and fraudulently conversion of the plaintiff current and Loan Accounts. It seems to me the suit is based on tort.

Further I perused the cause of action in Commercial Case No 109 of 2016 and easily find from paragraph 4 of the plaint, its cause of action is on breach of Term Loan and overdraft facility thus is based on Law of Contract.

So quite frankly I find in the present suit a cause of action and issues involved are of wrongful, negligent and fraudulently conversion bank account which purely a “*tort*” claim and in the previous suit the claim is that, , of breach of terms of loan and overdraft facilities

The two cases involves two distinct causes of actions and issues involved may not be the same to justify a plea of Res sub judice. Quite frankly, I find the two cause of actions and issues involved in two cases are quite distinct, and a plea that, the present suit is “*Res Subjudice*” is not legally tenable and has not been established. Consequently I dismiss the objection raised on the ground that, it lacks merit. The costs to follow the event.

Dated and Delivered at Dar es Salaam on this 24th May, 2018


H.T. SONGORO
(JUDGE)

The ruling was delivered in the presence of Ms. Christine Ilumbe Learned Advocate of the Defendant also holding a brief of Mr. Mwakingwe Learned Advocate of the Plaintiff.