

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT MWANZA**

**COMMERCIAL CASE NO. 14 OF 2015**

**I&M BANK (T) LIMITED.....PLAINTIFF**

**VERSUS**

**EMMANUEL JUSTINE NYERERE T/A**

**MAFUTA DISTRIBUTORS.....1<sup>ST</sup> DEFENDANT**

**REVINA JOSEPH MHONGE.....2<sup>ND</sup> DEFENDANT**

**RULING**

**MRUMA, J.**

This is a ruling on a preliminary point of objection raised by the counsel for the Defendants against the Plaintiff's suit in that the suit is *res sub-judice*. The counsel is inviting court to dismiss it on that ground.

At the hearing of the preliminary objection, Ms. Marina Mashimba, Advocate appeared for the Plaintiff and Mr. Kweka, Advocate appeared for the Defendants. Both counsel made oral submissions for and against the preliminary objection.

Mr. Kweka submitted that the matter before this court is *Res sub-judice* because there is another matter between the same parties. He

said that in the High Court Mwanza registry there is a filed Civil Case No 2 of 2015 between Revina Joseph Mhonge who is the second Defendant in the present suit versus the first Defendant and the Plaintiff herein.

It is further contention of the counsel that Civil Case No 2 of 2015 was filed on 17<sup>th</sup> March, 2015 while the present suit was filed on 27<sup>th</sup> March, 2015. According to the learned counsel the parties are the same and the cause of action is the same. Mr. Kweka contended that, in terms **Section 8 of the Civil Procedure Code [Cap 33 R.E 2002]**, courts are prohibited to proceed with a trial in any issue which the matter in issue was previously instituted before any court. He accordingly prayed for dismissal of this suit for being ***Res-subjudice***.

On her part, Ms. Marina, counsel for the Plaintiff submitted that the preliminary objection is misplaced or misconceived because for a matter to be ***res- subjudice*** in terms Section 8 of the CPC, the matter in issue in the present case must be substantially the same as the matter in issue in the previously instituted suit, which she averred is not the case in the two cases referred by the counsel for the Defendant. Ms Marina insisted that in Civil Case No 2 of 2015 which is pending in the High Court District Registry at Mwanza the Plaintiff seeks to default the procedures in granting the loan by the I&M Bank (T) Ltd to Emmanuel Justine Nyerere on the ground that she was induced and was made to sign a consent form by the spouse to mortgage their property in securing a loan granted to Emmanuel Justine Nyerere without knowing the repercussions thereof, while in the case at hand the Plaintiff seeks to recover the outstanding amount from the

Defendants Emanuel Justine Nyerere and Revina Joseph Mhonge plus interest and costs.

It is Ms Marina contention that the cause of action in the two cases are not similar, therefore that the matter do not meet the conditions set out under Section 8 of the CPC, under which according to her for the matter to be sub judice parties in the two cases must be claiming and or litigating under the same title, which is not the case in the present case. She accordingly prayed for dismissal of the preliminary objection with costs

Essentially the main borne of contention by the counsels for the parties is whether the two matters pending in two courts are substantially the same for the doctrine of res subjudice to come into play. The issue which this court is required to determine is, ***whether the matter in issue in Commercial Case No 14 of 2015 is also directly and substantially in issue in previously instituted suit between the same parties pending at the High Court, District Registry at Mwanza that is ,Civil Case No.2 of 2015.***

I have carefully followed the submissions made by the counsels for parties, it is my conviction that in terms of Section 8 of the Civil procedure Code, this matter is not res-subjudice to Civil Case No 2 of 2015 now pending in Mwanza registry of this court.

The said section provides:-

***"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".[Emphasize mine].*

*Explanation: The pendency of a suit in a foreign court does not preclude the courts in Tanzania from trying a suit founded on the same cause of action.*

My reading of Section 8 of the CPC suggests two conditions to be there for a matter to qualify to be termed as a sub judice so as to bring the doctrine into play. Firstly the matter in issue in the second suit must be directly and substantially in issue in the first suit, and secondly that; the suit must be for the same relief as that claimed in the first suit.

Going through the submissions of counsel for the parties and having perused the records in Civil Case 2 of 2015 which is forwarded to this court for perusal, there is no dispute that the present matter was instituted after Civil Case No 2 of 2015 was instituted at High Court at Mwanza Registry. Civil Case No 2 of 2015 at Mwanza District Registry was instituted on 17<sup>th</sup> march, 2015 while the present suit was instituted on 27<sup>th</sup> March, 2015. What is of interest here is the Plaintiff in Civil Case No.2 of 2015 pending at Mwanza High Court Registry is the wife of the first Defendant in Commercial Case No. 14 instituted in this court.

The basic object of Section 8 of CPC is to protect filing of multiple proceedings between the same parties on the same cause of action. **Mulla** in his book the **Code of Civil Procedure, Volume 1, 18<sup>th</sup> Edition** at page 162 -166 discussing Section 10 of the Indian Code of Civil Procedure which is pari materia with Section 8 of our code (CPC), had this to say;

*"the object of the doctrine of res sub judice is to prevent competent courts of concurrent jurisdiction from having to try parallel suits in respect of the same matter in issue. Also that for the doctrine of res sub judice to apply; the two suits should be identical meaning thereby that the whole subject matter in both the proceedings is identical and the relief claimed in both suits should be identical".*

Looking at the two matters complained of by the counsel for the Defendants to be the same, I have no flicker of doubt that they are distinctly different. In the matter before this court the Plaintiff is complaining of breach of contract by the two Defendants in respect of Term Loan and Overdraft facility advanced to them by her. In the Civil Case No 2 Of 2015, the Plaintiff therein who is the 2<sup>nd</sup> Defendant herein is complaining that the acts of the First Defendant and Second Defendant herein are null and void. Reading of the Plaint in the suit pending in Mwanza District Registry, the Plaintiff therein is complaining of being induced to enter into agreement which she did not know its repercussions. Thus, though parties in the two suits are the same but the matter in issue in the present suit is not directly and substantially in issue in the suit pending at the High Court, Mwanza Registry.

I also find that the reliefs claimed in the two cases are different. From the foregoing findings and reasons, I find that the preliminary objection lacks merit and it is hereby dismissed with costs.



A.R. Mruma,

Judge.

8/6/2018

Dated at Mwanza this 8<sup>th</sup> day of June, 2018.