

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM.**

**COMERCIAL CASE NO. 83 OF 2019**

**EXIM BANK (TANZANIA) LIMITED .....PLAINTIFF**

**VERSUS**

**M/S ACE DISTRIBUTORS (T) LIMITED.....1<sup>ST</sup> DEFENDANT**

**M/S MASAKI APARTMENTS LIMITED..... 2<sup>ND</sup> DEFENDANT**

**SHARMAPAL BIRCHAND AGGARWAL.....3<sup>RD</sup> DEFENDANT**

**ABDUL AZIZ LALANI.....4<sup>TH</sup> DEFENDANT**

**ANAND SATYAVAN CHANDE.....5<sup>TH</sup> DEFENDANT**

Date of Last Order: 27/07/2020

Date of Ruling: 28/08/2020

**RULING.**

**MAGOIGA, J.**

This is a ruling in respect of preliminary objection on points of law taken by Mr. Hillary Hassan learned advocate for 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> Defendants and Mr. Robert Rutaiwa learned advocate for the 5<sup>th</sup> defendant against the

incompetence of the Commercial case No 83 of 2019 in their written statements of defence to the effect that;

That this suit is res sub-judice to the Civil case No 255/2017 previously filed 29<sup>th</sup> December 2017 and now pending in the High Court of Tanzania, Dar –es-Salaam District registry.

The liability of the 5<sup>th</sup> defendant in the credit facilities the subject Matter in this suit, is being litigated in Civil case No 255 of 2017 now fixed for hearing on 24<sup>th</sup> October 2019 in High Court of Tanzani ,Dar –es-Salaam District registry.

On that predicament counsel for 1<sup>st</sup> to 4<sup>th</sup> defendants prayed that this suit be stayed with costs and counsel for the 5<sup>th</sup> defendant prayed that the preliminary objection be upheld and this present suit be stayed pending the determination of the previously suit with costs.

In order to have better understanding of the present ruling, I find it apt to narrate briefly the background facts leading to this ruling.

On 29<sup>th</sup> December 2017 the 5<sup>th</sup> defendant hereinabove instituted Civil Case No 255 of 2017 against the 1<sup>st</sup>, ,3<sup>rd</sup>, and 4<sup>th</sup> defendants in the High Court of Tanzania ,Dar –es-Salaam District registry, claiming several reliefs to wit: a declaration order that the purported board meeting allowing the transfer of

the plaintiff's shares to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were unlawful and has discharged the plaintiff as shareholder, a board member and guarantor of any liability, a declaration that the purported board resolution passed over the overdraft facility of (Tshs 1,500,000,000/=) of the 1<sup>st</sup> defendant obtained from the 4<sup>th</sup> plaintiff is null and void , an order that the second mortgage executed pursuant to the board resolutions of the 1<sup>st</sup> defendant be discharged to the 4<sup>th</sup> defendant, an order for payment of general damages, an order for payment of interest at court rate on the decretal sum from the date of judgment till payment of decretal sum; an order for payment of costs of the suit and any other relief the honorable court will deem fit to grant. Facts go that, the Civil Case No 255 of 2017 is still pending at the High Court of Tanzania, Dar –es-Salaam District registry to date.

Further facts are that, on 17<sup>th</sup> day of July 2019 the 4<sup>th</sup> defendant in Civil Case No 255 of 2017 instituted Commercial case No 83 of 2019 against the above named defendants in this court praying for several relief to wit; declaration that defendants are in breach of the facility agreements; payment of an outstanding loan balance to the tune of (Tshs 6,859,017,498.71); and an overdraft of (1,500,000,000/= interest at an

agreed commercial rate of 27% on the outstanding amount stated above from 1<sup>st</sup> June,2019 to the date of judgement ; interest on the decretal sum at court rate of 12% from the date of judgment to the date of full satisfaction; general damages for breach of contract to be assessed by this honorable court; cost of the suit; any other relief the honorable court will deem fit to grant.

It was against this background, the learned advocate for 1<sup>st</sup> to 4<sup>th</sup> defendants and learned advocates of the 5<sup>th</sup> defendant, upon served with the plaint, filed written statements of defence and formerly raised preliminary objections on point of law praying for the instant suit be stayed with costs hence, this ruling.

The counsel for parties equally filed written skeleton arguments for and against the preliminary objection and cited case law in support and against the preliminary objection.

The plaintiff at all material time has been enjoying the legal service of Messrs William Mukebezi and David Chilo learned advocate from B & E Ako law. On the other hand, the 1<sup>st</sup> to 4<sup>th</sup> defendants' as well at all material time have been enjoying the legal services of Ms Angel Paul and Mr. Hilary Hassan all from East African Law Chambers and the 5<sup>th</sup> defendant has been

enjoying the legal service of Messrs Robbert Rutaiwa and Theodory Primus from RK Rweyongeza & Co Advocates.

Submitting in support of the preliminary objection the learned counsel for 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants started his submissions by adopting the contents of his skeleton written arguments to form part of his oral submission. It was the learned counsel submissions that, this matter is res sub -judice because there is similar matter pending at the High court of Tanzania, Dar es salaam District registry, registered as Civil Case No 255 of 2017. He went on to cite the provision of Section 8 of the Civil Procedure Code [Cap 33 R.E 2002] and forcefully submitted that the said section prohibits courts with the same jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue.

According to Mr.Hassan, the issue involved in Commercial case No 83 of 2019 is similar to commercial case No 255 of 2017 clarifying on the point, he submitted that, issues involve are credit facility extended to 1<sup>st</sup> defendant by Exim Bank, the legality of the new loan which was never sanctioned by 1<sup>st</sup> -4<sup>th</sup> defendants and was taken by 5<sup>th</sup> defendant illegally in the name of 1<sup>st</sup> defendant and the liabilities of the 3<sup>rd</sup> and 4<sup>th</sup> defendants on the loan facility.

In the fine, the learned counsel conclusively surmised that this is a fit case to order stay pending determination of the suit pending in the High court of Tanzania, Dar es salaam District registry so as to avoid two conflicting decision.

The learned advocate for the 5<sup>th</sup> defendant submitting in support of the preliminary objection, subscribed to the submissions made by the learned counsel for 1<sup>st</sup> to 4<sup>th</sup> defendants and added few points to what has been submitted by Mr.Hillary Hassan. He argued that, in this suit parties' relationship arises from contractual obligation created way back 2006 and this was the basis of Commercial case No 255 of 2017 and this matter which is before this honorable court. Submitting further on the point, the learned counsel for the 5<sup>th</sup> defendant pointed out that factors to consider when an issue of sub judice is raised are;-

Matter in issue should directly and substantially be in issue in the pending suit,

Parties must be the same to the previously suit or any of them claims litigating under same title.

The Court in which the first suit is instituted is competent to grant the relief claimed in the subsequent suit.

The previously suit must be pending

Expounding further on the four conditions to consider on issue of sub judice, Mr.Rutaiwa submitted that the first principle that matter in issue should directly and substantially be same with the pending suit, he contended that, the claim of an overdraft facility of 1 .5 billion on paragraph 9 of Civil case No 255 of 2017 is similar to paragraph 21 of the Commercial case No 83 of 2019. Apart from that, he contended that, if Commercial case No 83 of 2019 will be determined in favour of the 5<sup>th</sup> defendant, the 5<sup>th</sup> defendant will not be compelled to pay the money and more to point he submitted that, in the previously suit the 5<sup>th</sup> defendant alleges duress which need to be determined before Commercial case No 83 of 2018.

On the second principle that parties must be the same to the previously suit, Mr.Rutaiwa submitted that, there is no doubt that the parties are the same, but the only different is that, the 2<sup>nd</sup> defendant in Commercial case No 83 of 2019 was added as one of the guarantors.

On the 3<sup>rd</sup> principle that the court in which the first suit is instituted is competent to grant the relief claimed in the subsequent suit, Mr.Rutaiwa submitted that, both court have same jurisdiction to grant the relief claim.

On the last principle, the previously suit must be pending. Counsel for the 5<sup>th</sup> defendant submitted that it is not disputed that Civil case No 255 of 2017 is pending at the High court of Tanzania, Dar es salaam District registry. He referred this court to the case of **Wengert Windrose Safaris (Tanzania) Limited versus The Minister of Natural Resources and Tourism & The Attorney General Misc Commercial Cause No 89 of 2016**, which underscores the importance of section 8 of the Civil Procedure code.

On that note, Learned Counsel argued the court that, this suit meets all these requirements and we pray that this matter be stayed.

In response, the learned counsel for the plaintiff prayed to adopt the skeleton written arguments to form part of his oral submissions. Disputing on the applicability of section 8 of the Civil Procedure Code [R: E 2002], he submitted that for the doctrine of res sub judice to apply, four conditions enshrined under that section must be established. Expounding further on conditions set out in Section 8 of the Civil Procedure Code [Cap 33 R.E 2002] Mr. Mukebezi submitted that, the matter in issue should directly and substantially be the same with the previously suit. Elaborating this ingredient, Mr. Mukebezi strongly argued that, the cause of action in



commercial Case No 83 of 2019 is breach of term loan agreement and overdraft issued to 1<sup>st</sup> defendant while in Civil Case No 255 of 2017 claims arose out of the decision of the board meeting of 1<sup>st</sup> defendant director regarding loan facilities and shares of the 5<sup>th</sup> defendants. Further on the point, Mr. Mukebezi submitted that, even the reliefs sought are different in Commercial Case No 83 of 2019, in which plaintiff is seeking payment of an outstanding amount of Tshs 6,859,017,498,71 while in Civil Case No 255 of 2017 plaintiff is seeking declaration that the resolution passed by the board are null and void. To buttress his point Mr. Mukebezi cited cases of the **M& Five B Hotel and Tours Limited vs Exim Bank Tanzania Limited Commercial case No 104 of 2017** and **I & M Bank (T) Limited vs Emmanuel Justine Nyerere T/A Mafuta Distributors & Another Commercial case No 14 of 2015**, where by the court held that section 8 of the Civil Procedure Code suggests four conditions to be there for the matter to qualify to be termed as sub-judice, **one** the matter in issue in the second suit must be the directly and substantially in issue in the first suit and **two** the suit must be of the same relief, **three** same parties **four** pending of the suit in competent court.

On the second condition that parties in the second suit must be the same as previously suit, the learned counsel for the plaintiff submitted that, these two cases parties are not the same and they claim under different title, expounding on the point, Mr. Mukebezi submitted that, parties in Commercial Case No 83 of 2019, M/s Masaki Apartment Limited is not party to civil case No 255 of 2017 which is pending in High Court Dar-es-Salaam District Registry.

On the third condition that the courts in which the first suit is instituted is competent to grant the reliefs claimed in the subsequent suit. Mr. Mukebezi admitted that High Court of Tanzania Dar-es-salaam District registry has competent jurisdiction to grant the reliefs sought in Civil case no 255 of 2017 but it has no jurisdiction to entertain Commercial case no 83 of 2019 because it is commercial matter. Mr.Mukebezi implored this court to hold that these two cases are very different and so do not bear any nexus that allow res sub judice. To cement his position he referred this court to the case of **Exim Bank (Tanzania) Limited vs Bhesania Garage Limited and four others (2006) TLS at pg 440**, where the court held that for a suit to be res subjudice the four ingredient must co-exist.

Submitting on the last condition counsel for plaintiff admitted that it is true that, there is pending suit in High Court of Tanzania Dar-es-salaam District registry with competent jurisdiction to grant relief sought in the previously suit. However, he was quick to point out that, the existence of this ingredient only in the absence of other ingredients does not suffice to make this suit to be subjected to res sub judice principle.

Concluding his submission the learned counsel for the plaintiff submitted that, the learned counsel for 1<sup>st</sup> to 4<sup>th</sup> defendants has implored the court to dismissed the suit with costs, if the matter will be res sub judice but according to him, this is misconception, because the remedy for the doctrine of res sub judice, is to order stay of the suit pending determination of previously suit.

On the totality of the reasons advanced above, the counsel for the plaintiff prayed that this preliminary objection dismissed with costs.

In rejoinder counsel for 1<sup>st</sup> to 4<sup>th</sup> defendant retaliated what he submitted earlier and added that it is not necessary that all parties be the same but one of them must be claiming on the subject matter in issue.

In rejoinder, the learned counsel for the 5<sup>th</sup> defendant replied that, making reference to paragraph 7 of the plaint only is misconception, but the facts

are to be looked as whole. On the issue of parties, he maintained his former position that it is not necessary parties to be the same.

I have dutifully read and considered the skeleton written arguments by the learned advocates for and against this preliminary objection on points of law raised and have given them the respect they deserve .I recommend them for their insightful contribution in making this court to be able to deliver this ruling.

I have seriously examined the pleadings in Commercial Case No 83 of 2019 and Civil case No 255 of 2017, the submission by Parties' learned counsel and their respectively written skeleton arguments, in the light of the principle of res sub judice as enshrined in Section 8 of the Civil Procedure code [Cap 33 R; E 2002] which for easy reference, provides as follows;-

**Section 8-No court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in the issue in a previously instituted suit between the same parties, or any of the 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"**

This provision was interpreted in the case of **Exim Bank (Tanzania) Limited (supra)** which I hereby fully subscribe to that the section have four ingredients upon which the section applies as cited above. The learned counsel for parties herein joined hands that there is no dispute on pending of the of the Civil case No 255 of 2017 and that the court in previous suit has jurisdiction to try suit, but they are in dispute on the two remaining ingredients that, the subject matter in issue are directly and substantially to the former suit and parties are not the same. Then if that is the case, then issue for determination is, whether the subject matter in Commercial Case No 83 of 2019 is directly and substantially in issue in Civil Case No 255 of 2017.

Having carefully read the pleadings in both suits, obviously the answer is to ingredient number one is yes! This is so because Civil Case No 255 of 2017 and Commercial Case No 83 of 2019 have common subject matter which is the loan facility of Tshs 1,500,000,000/= . This amount of loan is directly and substantially in both suits and it has been an issue in the previously suit .So at any rate the decision in Civil case No 255 of 2017 on this amount has direct impact on the decision in Commercial case No 83 of 2019. Mr. Mukebezi contended that the remedies sought in subsequent suit

are different from the previously suit, but with due respect to him, the directness' and substantially of suits is not to be determined on the basis of the remedies sought in either of the suit but on the subject matter and key issue in both suits as it was stated in the case of **Wengert Windrose Safaris (Tanzania) limited (supra)** that directly and substantially are not gauged on relief claimed but on the subject matter in issue.

I subscribe to the above holding and as such find that the claim of Tshs 1,500,000,000/= billion is in controversy to both suits. Plaintiff in Civil case No 255 of 2017 is contesting the legality of the new loan which is an overdraft facility of Tshs 1,500,000,000/= billion and plaintiff in Commercial case No 83 of 2019 he is demanding repayment of Tshs 1,500,000,000/= billion. It is therefore, my determination that, the amount in both suits, if not stayed, may result into conflicting decision on the same point.

Whereas I am in agreement with Mr. Hassan, that the issue involved in Commercial Case No 83 of 2019 are credit facility extended to 1<sup>st</sup> defendant by Exim Bank and the legal mortgage created on the property with certificate title no 24235, but I hold that the same does not derogate the fact that subject matter in both suits is the loan of Tshs

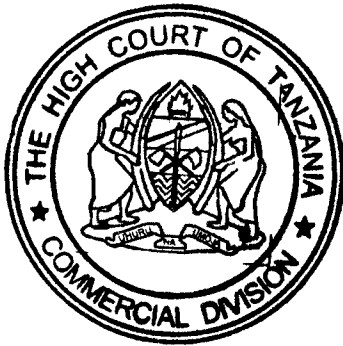
1,500,000,000/=which has reference to the entire subject matter in controversy not only that but also the similarity of the claim in paragraph 21 of commercial case 83 of 2019 and paragraph 9 of the plaint in Civil case No 255 of 2017 are enough to make this matter res sub judice because they are making reference to entire matter in controversy.

Therefore, determination of this issue in favour of the plaintiff in Civil Case No. 255 of 2017 will change the course of claim in the subsequent suit and the amount claimed and may necessitate the amendment of the plaint. Hence, Section 8 of the Civil Procedure Code was intended to bar courts from giving conflicting decisions on the same subject matter in controversy. On the third ingredient that parties must be the same or any of them claims or litigate under the same title. This issue will not detain this court much. It is true that 2<sup>nd</sup> defendant was not pleaded in the previous suit, but this alone cannot take the case out of Section 8 of the Civil Procedure Code, because is sufficient if there is identity of parties and the additional of the 2<sup>nd</sup> defendant who is a guarantor in the loan which is directly and substantially in the subject matter to me, do not fetter the ingredient. The additional of such defendant, in my opinion does not make the subsequent suit any less as a suit between the same parties.

In the totality of the reasons stated above, the preliminary objections by the defendants is merited and consequently I order stay of the instant suit pending the determination of Civil Case No 255 of 2017, cost be in cause.

It is so ordered.

Dated at Dar es Salaam this 28<sup>th</sup> August, 2020.



A handwritten signature in black ink, appearing to read "S. M. Magoiga".

**S. M. MAGOIGA**  
**JUDGE**  
**28/08/2020**