

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM
MISC.COMMERCIAL APPLICATION NO. 28 OF 2020**

STANDARD CHARTERED BANK (T) LTD.....PLAINTIFF

versus

INCAR TANZANIA LIMITED1st DEFENDANT

SHIVA IMAGES TANZANIA LTD.....2nd DEFENDANT

STEFNAT ENGINEERING & TECH.

SERVICES.....3rd DEFENDANT

SHIVACOM (TANZANIA) LIMITED.....4th DEFENDANT

ULTIMATE SECURITY TANZANIA LTD...5th DEFENDANT

SHIVACOM GROUP OF

COMPANIES LTD.....6th DEFENDANT

TANIL SOMAIYA.....7th DEFENDANT

RULING

Date of the Last order: 10/12/2020

Delivery of the Ruling: 26/02/2021

NANGELA, J.:

This ruling is in respect of preliminary objections raised by both parties to this case. Initially, the suit was filed as "summary suit." However, following an application by the Defendants (**Misc. Application No.72 Of 2019**) the Defendants were granted leave to defend the suit.

On 1st September 2020, the 1st, 2nd, 3rd, 4th, 6th and 7th Defendants filed their *Joint Written Statement of Defence* ("**JWSD**") and raised a preliminary objection to wit, that:

The subject matters of suit are subjudice Civil Appeal No. 97 of 2020 ("the appeal") currently pending before the Court of Appeal, arising from Commercial Case No.105 of 2019 ("the Previous suit") which the 1st, 2nd and 3rd Defendants instituted against the Plaintiff. Copies of the previous suit, judgement and decree thereon and memorandum of appeal are all annexed hereto collectively marked "TAB- 1/" "

On the 11th September 2020 the Plaintiff filed a reply to the "**JWSD**" and raised therein two preliminary objections. The two objections were as follows, that:

- 1. The Defence is non-compliant with the provisions of rule 19 (1) and rule 66 (2) of the High Court (Commercial Division) Procedure Rules- GN No.250 of 2012 as amended by GN No. 107 of 2019 (the 'Commercial Court Rules'), and ought to be rejected pursuant to the provisions of rule 19 (2) of the Commercial Court Rules' for, among others, be more than ten pages;*
- 2. The Defence has not been signed properly and verified as required by law, and/or if so signed and verified, Tanil Somaiya, the*

pleader, has not stated his capacity in signing and verifying the Defence for and on behalf of the 1st, 2nd, 3^d, and 6th Defendants, and whether he is acquainted and able to depose facts of the case, nor did he state to have been duly authorised to defend the suit on behalf of the 1st, 2nd, 3^d, 4th, 5th and 6th Defendants contrary to the requirements of the provisions of Order VI rules 14 and 15 read together with the provisions of Order XXVIII rule 1 of the Civil Procedure Code- Cap.33 R.E 2019 ("the CPC").

It is also worth noting, that, in their "**JWSD**", the 1st, 2nd, 3rd, 4th, 6th and 7th Defendants counter-claimed against the Plaintiff's claims as well. That being the case, in course of responding to the Counter-claims by way of filing a *Written Statement of Defence to the Counterclaim* ("**WSDC**"), the Plaintiff raised four preliminary points of law in objection to the filing of the counterclaim.

In particular, the preliminary points of law were as follows, that:

1. *"The Defendants' claims made in the Counterclaim were determined by this Honourable Court- Madam Justice B.K. Phillip- in Commercial case No.105 of 2020 ("the Previous suit"), instituted by the 1st, 2nd and*

4th Defendants against the Plaintiff, and whose plaint and judgement are referred and attached in paragraph 1 of the Defendants' joint defence marked TAB-1 and are therefore res-judicata and could not be re-litigated.

- 2. And/or, alternatively, as held by this honourable Court- page 14 of the judgement, that, the Defendants prayers in the counterclaim cannot be legally enforced as they have an ultimate effect of coercing and compelling the Plaintiff to enter into a transaction with a third party contrary to its will thereby interfering with the party's freedom to contract;*
- 3. E-mails exchanged between FK Law Chambers (FK Law), and the Plaintiff, and between FK Law and ATZ Law Chambers (ATZ), referred to in paragraph 32, 38 and 39 of the Counterclaim (TAB -5, TAB - 7 and TAB - 10) are privileged communications between Advocates and their respective clients, and between Advocates inter se, and cannot, therefore, be called into evidence and relied upon in any other legal proceedings; and*

4. *The Defendants' institution of the Counterclaim is intended to deny the Plaintiff of its statutory rights, powers and remedies conferred upon mortgagees for recovery of the moneys advanced by the Plaintiff to the 1st, 2nd, and 3^d Defendants, the repayment of which the 1st, 2nd and 3^d Defendants defaulted; and or alternatively, the Defendants' joint and several action of bringing this Counterclaim against the Plaintiff is an action by wrongdoers to protect their own defaults under the terms of the Facility Agreements and the relevant Security Documents in which the Plaintiff granted the banking facilities to the 1st, 2nd, and 3^d Defendants.*

I also take note that the Plaintiff has filed a reply to the 5th Defendant's Written Statement of Defence ("**WSD**") and raised two preliminary objections therein. However, since I have not seen any such "**WSD**" filed by the 5th Defendant in the case file and have not seen even a written submission by the 5th Defendant, I take it that the 5th Defendant did not file its Defence and will not address further the preliminary objections raised by the Plaintiff against the 5th Defendant's (non-existing "**WSD**").

On the 10th day of December 2020, this Court made an order requiring the parties to dispose of the preliminary objections by way of written submissions. A schedule of filing of their written submissions was given and the parties herein duly complied with it. In view of that, what I am called upon to address is whether the preliminary objections filed by both parties are meritorious.

To start with, I will address the Defendants' submission in respect of their preliminary objection filed in this Court. The same was to the effect that:

"the subject matters of the suit at hand are subjudice Civil Appeal No. 97 of 2020 ("the appeal") currently pending before the Court of Appeal, arising from Commercial Case No.105 of 2019 ("the Previous suit") which the 1st, 2nd and 3^d Defendants instituted against the Plaintiff."

In their joint written submission, the 1st, 2nd, 3rd, 4th, 6th and 7th Defendants have maintained that the suit at hand is *subjudice* Civil Appeal No. 97 of 2020.

Stating the facts and circumstances that prompted the filing of the **"previous suit"** i.e., *Commercial Case No.105 of 2019* from which the appeal emanated, the learned counsel for the Defendants submitted that, the 1st, 2nd and 3rd Defendants are part of the 4th Defendants' group of

companies and were the ones to whom the 2015 and 2016 banking facilities were advanced, and hence were the **"borrower companies"**.

It was contended that, as borrower companies, they are the ones that lodged the **Civil Appeal No. 97 of 2020** (as the Appellants) while the Plaintiff (who was the Respondent in the previous suit) is now the Respondent in the pending appeal. The Defendants have put forth five reasons to support their submission that the matter at hand is subjudice the Civil Appeal No.97 Of 2020.

In the **first** place, it was submitted that, looking at the facts of the **"previous suit"**, the banking facilities sued on in that suit are one and the same as those sued on the suit; **second**, the mortgaged properties that formed one of the various securities to cover the banking facilities sued on are the same ones the Plaintiff seeks to enforce recovery in the present suit; **third**, the borrower companies are parties to this suit as the 1st, 2nd and 3rd Defendants.

Their **fourth** reasoning is that, following dismissal of the previous suit, two of the borrower companies and Shivacom Tanzania preferred the appeal challenging this Court's findings of fact and law, and, **fifth**, the reliefs sought in the counter claim in the present suit are the same ones as those sought in the previous suit but now pending before the Court of Appeal.

Making reference to section 8 of the Civil Procedure Code, Cap.33 R.E.2019, ("**CPC**") the learned counsel for the 1st, 2nd, 3rd, 4th, 6th and 7th Defendants submitted the matters pleaded in the present suit are directly and substantially the same as those pleaded in the previous suit from which the appeal emanates. It was also noted that, even the Plaintiff does admit in its reply to the **JWSD**.

It was argued further that, much as the 3rd, 5th, 6th and the 7th Defendants were not parties to the "**previous suit**", (and are not so in the appeal), yet their joinder in the present suit is derived from the same transactions that are agreed to constitute the matters in the "**previous suit**" and in the present suit, hence covered as well by section 8 of the CPC. For that matter, it was submitted that, this Court should stay the current suit pending the determination of the **Civil Appeal No. 97 of 2020** by the Court of Appeal.

Digressing from the reliance on section 8 of the CPC, the Defendants have submitted further that, since the Plaintiff does admit that the matters in issue both in the present suit and in the pending appeal emanate from the same transaction, this Court will no longer be seized with jurisdiction to entertain the same matter while the same issues in it await determination before the Court of Appeal.

To support their position, the Defendants have placed their reliance on the decisions of the Court of Appeal in the case of **Sylvester Lweriga Bandio & Another v National**

Bank of Commerce, Consolidated Civil Appeal No.95 of 2009 & No.29 of 2010, CAT (DSM) (Unreported); as well as **Mohamed Enterprises Tanzania Ltd v The Chief Harbour Master & Another, Civil Appeal No.24 of 2015, CAT (DSM) (Unreported).**

Briefly stated, in the two cited cases above, the Court of Appeal was emphatic that, once a Notice of Appeal is lodged in the Court of Appeal, then the High Court will no longer be seized with jurisdiction to entertain the matters before it. It was thus the prayer of the Defendants that the matter at hand should be stayed.

In its reply submission, the Plaintiff Bank opposed the 1st, 2nd, 3rd, 4th, 6th and 7th Defendants' preliminary objection. The Plaintiff Bank contended that, unlike in the **"previous suit"** which was dismissed by this Court, what is being enforced in this present suit is the terms and conditions of the Facility Agreements and Security Documents. The learned counsel for the Plaintiff submitted that, the **"previous suit"** was about enforcing a settlement agreement between the parties but the agreement had already been overtaken by events and, hence, the Court dismissed the suit.

It was a further Plaintiff's submission that, despite the fact that **"previous suit"** and the present one emanate from the same transactions, the two are different as they contain different reliefs as evidenced by the pleadings

instituting/defending the two. The Plaintiff further conceded that the origin of the parties' relationship is the same as in the "**previous suit**" but disputes the fact that the origin of the claims in that suit is the same as in the current suit and what is in the appeal has nothing to do with the Plaintiff's pursuit of its rights by way of instituting the current suit.

The Plaintiff submitted, referring to section 8 of the CPC, that, the contention that the matter at hand is *res-subjudice* is misconceived. Placing reliance on the decision of this Court in the case of **M & Five B Hotels v Exim Bank Tanzania Limited, Commercial Case No, 104 of 2017 (unreported)**, the Plaintiff's counsel submitted that, for the doctrine of *res-subjudice* to apply, all elements under section 8 of the CPC must be independently established. In short, what the Plaintiff is arguing is that, the requisite elements under section 8 of the CPC do not apply to the present case where one compares it to the previous case, and, hence, the two suits should be treated separately.

I have examined the rival submissions. Before I venture to address the issue regarding whether the subject matters of the suit at hand are *subjudice* or not, I find it pertinent to commence my analysis and discussion by responding to the issue regarding the jurisdiction of this Court, a point which I find vitally connected to the *subjudice* issue.

Essentially, it now a settled legal position that, once a matter has been instituted in the Court of Appeal, no other court will have jurisdiction to entertain such a matter. The same will have to be stayed. In the earlier cited cases of **Sylvester Lweriga Bandio (supra)**; as well as **Mohamed Enterprises (supra)**, that position of the law was made clear. In the latter case, the Court of Appeal had the following to say, at page 12:

"From the authorities cited above, save for specified applications..., institution of a notice of appeal deprives the High Court of its power to entertain the proceeding giving rise to the notice of appeal. In our considered view, by party of reasoning, although the suit, which is the subject matter of this appeal is a different proceeding, since the cause of action is founded on the 1st Respondent's conviction, determination of the intended appeal is essential for the purpose of accrual of a cause of action and existence of the suit."

In this present suit, the question that follows is whether the notice of appeal which was lodged in the Court of Appeal and initiated the **Civil Appeal No.97 of 2020** has anything to do with this suit. There is no doubt that the previous suit, ***Commercial Case No.105 of 2020***, emanated from the borrowing transactions which took place in 2015 and 2016, involving the 1st, 2nd and 3rd Defendants as borrowers and the Plaintiff as the lender.

It is worth noting, in the first place, that, there is no dispute that the facilities advanced to the borrowers were, in consideration, secured by a number of securities in the form of mortgages, corporate guarantees and personal guarantees. There is also no dispute that the parties did, at some point, entered in a "settlement agreement" wherein a proposal to pay **USD 5000,000.00** was floated as full and final repayment of the outstanding loans.

Further, there is no dispute that later on Commercial case No.105 of 2020 ("**the previous suit**") was filed in this Court in relation to the enforcement of the Settlement Agreement and that, that "**previous suit**" was dismissed by this Court and an appeal was preferred, and the same is pending in the Court of Appeal.

Looking at all those instances, and reading from the current suit in which the same issues regarding the payment of the outstanding amount arising from the facilities advanced to the borrowers, I have no reasons to hesitate in

holding, as what the Court of Appeal held in the case of **Mohamed Enterprises (supra)**, that, although the pending appeal is a different proceeding, nevertheless, since its origin is founded on the same **Facility Agreements** from which the **Settlement Agreement** which was the basis of the previous suit emanates, it is clear that, should the Court of Appeal uphold the appeal, its decision will definitely have a far reaching consequence on the current suit.

That being said, it is my finding that, the Notice of Appeal filed in respect of **Civil Appeal No 105 of 2020**, takes away the jurisdiction of this Court in entertaining the current matter, the reason being that, the origin of both the previous suit and the current suit is the same, *i.e.*, the **Facility Agreements** between the 1st, 2nd, and 3rd Defendants and the Plaintiff Bank.

If this Court will continue with the hearing of the present case at hand and it happens that the Court of Appeal decides in favour of the Appellants, this Court will definitely be "guilty" of apparently flouting the obvious legal position already put in place by the Court of Appeal to guide Courts and the tribunals subordinate it as stated in the **Mohamed Enterprises case (supra)**.

In view of the above, I see no reasons which I should address the issue regarding whether the suit is *subjudice* or not, since, even if it were, that issue is to a large extent

intertwined with the question regarding whether this Court can still exercise its jurisdiction. That being said, it is clear, therefore, that, the same fate would befall on it since the Notice of Appeal filed in respect of Civil Appeal No.97 of 2020 has excluded the jurisdiction of the Court and the Court cannot entertain the current suit. The fate of the current suit, therefore, is that, it must be stayed.

Having determined the sole preliminary objection which was raised by the Defendants, let me as well, consider and determine the **two points of law** raised by the Plaintiff in its reply to the **JWSD**. The first preliminary objection which the Plaintiff raised was that:

"The Defence is non-compliant with the provisions of rule 19 (1) and rule 66 (2) of the High Court (Commercial Division) Procedure Rules- GN No.250 of 2012 as amended by GN No. 107 of 2019 (the 'Commercial Court Rules'), and ought to be rejected pursuant to the provisions of rule 19 (2) of the Commercial Court Rules' for, among others, be more than ten pages."

In its submissions, the Plaintiff Bank has called upon this Court to strike out the JWSD. The Defendants have counteracted such a submission contending that the same was raised in **Misc. Commercial Application No.72 of**

2020 involving the same parties and was overruled. I have looked at the objection and for the same reasons as those I stated in **Misc. Commercial Application No.72 of 2020**, which involved the same parties; I will likewise proceed to overrule the first objection.

The second objection was to the effect that:

"The Defence has not been signed properly and verified as required by law, and/or if so signed and verified, Tanil Somaiya, the pleader, has not stated his capacity in signing and verifying the Defence for and on behalf of the 1st, 2nd, 3^d, and 6th Defendants, and whether he is acquainted and able to depose facts of the case, nor did he state to have been duly authorised to defend the suit on behalf of the 1st, 2nd, 3^d, 4th, 5th and 6th Defendants contrary to the requirements of the provisions of Order VI rules 14 and 15 read together with the provisions of Order XXVIII rule 1 of the Civil Procedure Code- Cap.33 R.E 2019 ("the CPC").

I have considered the submissions by the rival parties. In my view, I tend to be in agreement with the submissions made by the learned counsel for the Defendants that, the above objection falls outside the parameters set out in the

case of **Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) EA 969**. The reason is simply that, this preliminary objection is not a pure point of law and cannot dispose of the matter without first calling for further evidence. In **Mukisa Biscuits case**, (supra) the Court made it clear that,

"a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion."

Further, in the case of **Karata Ernest & Others v Attorney General, Civil Revision No.10 of 2010 (CAT) (unreported)**, the Court of Appeal further stated that:

"Where a point taken in objection is premised on issues of mixed facts and law, that point does not deserve consideration at all as a preliminary objection. It ought to be argued in the normal manner when deliberating on the merits or otherwise of the concerned legal proceedings."

Moreover, as it was stated by this Court in the case of **Kiganga and Associates Gold Mining Ltd v Universal**

**Gold N.L. Commercial Case No.24 of 2000
(unreported),**

In suits involving companies, verifications endorsed with Phrase "Principal Officer of the Defendant conversant with the facts of the case" are duly signed and are not defective at all entailing an order for amendment. Of course, even if has held that the clause is defective this would not have resulted into throwing out the whole pleading, save that it would have attracted an order for amendment."

Conclusively, for the stated reasons here above, I find that, the second objection should fail and I hereby overrule it.

Turning to the objections raised in respect of the counterclaim, I find that, although a counter-claim is a separate suit on its own, looking at it and the preliminary objections filed against it, I find, for the same reasons as those I advanced when disposing the objection raised by the Defendants, that, the objections cannot be entertained.

On the contrary, I lean towards overruling them, given that, both the main suit and the counterclaim are to a large extent linked to the "**previous suit**" whose fate is still pending at the Court of Appeal. For that matter, the

jurisdiction of this Court cannot be invoked until when the Court of Appeal makes its decision in respect of the Civil Appeal No.97 of 2020.

In the upshot, this Court settles for the following orders, that:

1. *the Preliminary objection raised by the Defendants seeking for the stay of this suit pending the hearing and determination of the Civil Appeal No.97 of 2020 is hereby upheld, but for a different reasoning that, since the pending Appeal which emanates from "the previous suit" is to a large extent based on matters based on same origin as in the present suit, in case a decision of the Court of Appeal grants the appeal, that decision will have far reaching consequences on this suit. To avoid confusion, prudence would call for stay of the present suit on the ground and reasons as stated herein. The suit is therefore stayed pending the hearing and determination of the Civil Appeal No.97 of 2020.*
2. *The objections raised by the Plaintiff against the Joint Written Statement of Defence are hereby overruled and dismissed.*
3. *The objections raised by the Plaintiff in respect of the Counter Claim are hereby overruled and dismissed on the similar grounds as those stated in No.1 above, (i.e., that they touch on*

a "**previous suit**" which is a subject matter of the Court of Appeal).

4. In the circumstances of this matter, I make no orders as to costs.

It is so ordered.

DATED at DAR-ES-SALAAM this 22nd February, 2021.



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DEO JOHN NANGELA
JUDGE,
High Court of the United Republic of Tanzania
(Commercial Division)
26 / 02 / 2021

Ruling delivered on this 26th day of February 2021, in the presence of the Advocates for the Plaintiff, and the Defendants.

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DEO JOHN NANGELA
JUDGE,
High Court of the United Republic of Tanzania
(Commercial Division)
26 / 02 / 2021