

TANZANIA / JUDGMENT

exim bank tanzania limited vs national furnishers limited and another 2021 tzhclandd 6801 13 december 2021

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13 December 2021

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IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM MISC. LAND
APPLICATION NO. 527 OF 2021 (Arising from Land Case No.46 of 2020) EXIM BANK TANZANIA
LIMITED..... APPLICANT VERSUS NATIONAL FURNISHERS
LIMITED..... 1st RESPONDENT KAWE APARTMENTS
LIMITED..... 2nd RESPONDENT

RULING

Date of last order: 06.12.2021 Date of Ruling: 13.12.2021 A.Z.MGEYEKWA, J The application has been preferred under the provisions of Section 68

(d) and (e) and Order XXXVIII Rules 1 (a) (b) (c) (d) and 2 of the Civil Procedure Code Cap.33 [R.E 2019], Supporting the application is the affidavit of Edmund Aaron Mwasaga, the Principal Officer of the applicant, setting out grounds on which they seek this court to appoint a receiver of 1 the property at Plots No. 1353 and 1354 Msasani Peninsula Kinondoni Municipality Dra es Salaam. The application has encountered a formidable opposition from the both respondents, vide a joint counter-affidavit sworn by Bijal Jigar Kansara, the Principal Officer of the 1st and 2nd respondents. It transpired that the respondents Advocate raised three points of objection which for easy reference, I find it apt to reproduce as hereunder:-

1. The application is bad in law as the property subject of the application is still a subject of Execution No. 71 of 2016 which is pending.
2. The application is time barred.
3. The application is Res Subjudice it deals with a matter which is the intended Civil Appeal emanating from Misc. Land Application No. 963 of 2020 whose Notice of Appeal has been lodged. As the practice of the Court, I had to determine the preliminary objection first before going into the merits or demerits of the appeal. That is the practice of the Court founded upon prudence which I could not overlook. At the hearing date, the applicant enjoyed the legal service of Mr. Simoni Mnyele, learned counsel, learned counsel whereas

the respondents enjoyed the legal service of Mr. Seni Malimi, learned counsel. The parties 2 urged this court to dispose of the preliminary objection by way of written submissions whose filing was to conform to the court schedule. Whilst the respondents were to prefer his on or before 22nd November, 2021, the applicant was scheduled to file his on or before 02nd December, 2021, and a rejoinder if any on 06th December, 2021. The respondents Advocate waived his right to file a rejoinder. As the practice of the Court, I had to determine the preliminary objection first before going into the merits or demerits of the suit. That is the practice of the Court founded upon prudence which I could not overlook. In his submission in support of the preliminary objection, Mr. Malimi has begun by tracing the genesis of the matter which I am not going to reproduce in this application. The learned counsel for the respondents opted to combine the 1st and 3rd objections and argue them together. He decided to abandon the 2nd objection. On the 1st and 3rd limbs of the objection, Mr. Malimi contended that the application is bad in law as the property subject of the application is still a subject of Execution No.71 of 2016 which is pending in court. He added that Execution No.71 of 2016 is in respect of the judgment and decree in Land Case No. 210 of 2015 which is between the applicant and the 2nd 3 respondent. The learned counsel for the respondents submitted that there is an issue that is not disputed by parties. To support his stand he referred this court to the counter affidavit affirmed by Bijal Jigar Kansara. Submitting on the issue related to Notice of Appeal, the learned counsel claimed that a Notice of Appeal at the Court of Appeal, thus, it was his view that this court ceases to have jurisdiction in respect of the matter unless expressly provided so by the law. He went on to submit that this position is echoed by a plethora of authorities; in the case of Aero Helicopter (T) Ltd v F. N Jansen [1990] TLR 142, the Court of Appeal held that the High Court had no jurisdiction to order a stay of execution once an appeal to the Court of Appeal has been commenced. He also cited the case of M/S Law Associates, Advocates v M/S Independent Power (T) Ltd [2004] TLR 276. On the strength of the above submission, the learned counsel for the respondents submitted that the application is incompetent thus the same be struck out with costs. The applicants' learned counsel for the applicant confutation was strenuous. He came out forcefully and defended the applicant's application as proper. On the 1st limb of the objection, Mr. Mnyele, valiantly contended that it is wrong for the respondents to annex evidence 4 documents on submissions. He claimed that the submissions are meant for analysis of legal issues or factual issues as raised from evidence. Fortifying their submission they referred this court to the case of Tanzania Union of Industrial and Commercial Workers (TUICO) v Mbeya Cement Company Ltd and Another [2005] TLR 42 The learned counsel for the respondent contended that the said annexure needs to be expunged from the submission. Thus, it was his prayer that this court should expunge all the documents attached to the submission. He went on to state that the first limb of objection is a pure point of fact. He claimed that the preliminary objections must base on a particular point of law whose determination will not involve ascertainment analysis of facts. He went on to argue that a classic definition of the preliminary objection was given in the cases of Mukisa Biscuit Manufacturing Company Ltd v West End Distributors Ltd (1969) IEA 696 and Leo Didas and 171 others v Ardhi University and two others, Misc. Civil Cause No.34 of 2008. Mr. Mnyele urged this court to borrow the

leaf from the cited dictum and reject the preliminary objection on that reason. Insisting he contended that the respondents' Advocate has argued on the merit. 5 Regarding the issue for Res Subjudice, the learned counsel for the applicant contended that the respondent in paragraph 2 has tried to demonstrate the application is sub judice the pending notice of appeal against the ruling in Misc. Land Application No.693 of 2020. It was his view that the respondents' objection is misconceived. He went on to submit that the question of sub judice may arise in two situations; first when the suit is pending and another when the suit is filed in the same court or other court involving the same parties and same subject matter. Fortifying his submission he cited the case of Exim Bank (T) Ltd v Bhesania Garage Ltd and four others [2016] TLR 440. Mr. Mnyele contended that there is no similar application that is pending elsewhere. He went on to submit that the sub judice in the cases of Aero Helicopter (T) Ltd (supra) and M/S Law Associated, Advocates (supra) are different from the sub judice under section 8 of the Civil Procedure Code Cap.33 [R.E 2019]. It was his view that the ratio decidendi of the two cases is that once a notice of appeal is filed against the decision of the High Court, the matter becomes sub judice in the Court of Appeal by virtue of Notice of Appeal and the High Court can no longer deal with the same except where the law allows. He continued to argue that no formal decision has been made in this application and no notice of appeal emanating from this application, thus, the matter is not under 6 consideration in the Court of Appeal instead the issue of appointment of a receiver is still pending in the High Court. On the strength of the above submission, Mr. Mnyele urged this court to dismiss the preliminary objections with costs. Having digested the learned counsels' submission and the pleadings therein on the sole preliminary objection raised by the Plaintiff/ Defendant's learned counsel in the counter claim, I should now be in a position to confront the points of objections on which the learned counsels locking horns. The main issue for determination is whether the counter claim is appropriately filed before this Court. On the first limb of the objection, that the application is bad in law as the property subject of the application is still a subject of Execution No.71 of 2016 which is pending in this court. He added that Execution No.71 of 2016 is in respect of the judgment and decree in Land Case No. 210 of 2015 which is between the applicant and the 2nd respondent. This Court wishes to set the record straight, concerning the appropriate practice and procedure to adopt when faced with an application for a Preliminary Objection. And, the learned counsel for the applicant gave heed to the proper procedure for entertaining such preliminary objections. 7 The procedure was firmly established by the East African Court of Appeal in the celebrated case of Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696. It was held that: "Objection must be on pure point of law, as in this case it would require calling evidence to prove whether there was board meeting properly constituted, the agenda and the resolution passed so as to prove the said preliminary point of objection." Applying the above holding in the instant matter, I fully subscribe to the submission of Mr. Mnyele that the point raised by the learned counsel for the respondents does not qualify as a point of preliminary objection as the same requires evidence to prove if Execution No. 71 of 2016 is pending in this court. As to the third objection, that the application is Res Subjudice it deals with a matter which is the intended Civil Appeal emanating from Misc. Land

Application No. 963 of 2020 whose Notice of Appeal has been lodged. In his submission, Mr. Mnyele submitted that there is no any notice of appeal emanating from the instant application, however, he did not deny or agree that there is a notice of appeal emanating from Misc. Land Application No. 963 of 2020 which is related to the same subject 8 matter Plot No. 1353, Certificate of Title No. 41332, and Plot No. 1354 Certificate of Title No. 41285, Kinondoni Municipality, Dar es Salaam. On the other hand, the learned counsel for the respondents submitted that there is a pending appeal, Misc. Land Application 693 of 2020 before the Court of Appeal of Tanzania on the same subject matter. There is no dispute that the same subject matter is involved in the instant application and in the Misc. Land Application 693 of 2020 whereas the issue involved is to seek confirmation of the auction sale of the property at Plot No. 1353, Certificate of Title No. 41332, and Plot No. 1354 Certificate of Title No. 41285, Kinondoni Municipality, Dar es Salaam. The Doctrine of Res sub judice prevents a court from proceeding with the trial of any suit in which the matter in issue is directly and substantially the same with the previously instituted suit between the same parties pending before same or another court with jurisdiction to determine it. I understand that the Doctrine of Res sub judice prevents a court from proceeding with the trial of any suit in which the matter in issue is directly and substantially the same with the previously instituted suit between the same parties pending before same or another court with jurisdiction to determine it. However, in the instant application prejudice the case before 9 the Court of Appeal of Tanzania, entertaining this matter might affect the decision of the Court of Appeal of Tanzania. Again, I fully subscribe to Mr. Malimi submission that once a Notice of Appeal is lodged in respect of any matter at the High Court, this court ceases to have jurisdiction in respect of the matter unless expressly provided in law. The same position ricocheted in the cases of Aero Helicopter (T) Limited (supra) and M/S Law Associates, Advocates (supra). I fully subscribe to the learned counsel for the respondents that the same subject matter; the property at Plot No. 1353, Certificate of Title No. 41332, and Plot No. 1354 Certificate of Title No. 41285, Kinondoni Municipality, Dar es Salaam is in multiple proceedings. It is my view that as long as the subject matter is the same and the Notice of Appeal is pending before the Court of Appeal of Tanzania then this court as per the authority of M/S Law Associates, Advocate (supra) finds that these matters cannot be separated. Therefore, it is obvious that this application will not serve a purpose, the same is an abuse of court process. In the upshot, the Court finds and holds that the third objection has merit. The Misc. Land Application No.527 of 2021 is incompetent and the same is hereby struck out with costs. Order accordingly. 10 Dated at Dares Salaam this 13th December, 2021. A.Z.MGEYEKWA JUDGE 13.12.2021 Ruling delivered on 13th December, 2021 in the presence of Ms. Anna Dismasi, learned counsel for the applicant and Ms. Christabella Madembwe, learned counsel for the respondents. A.Z.MGEYEKWA JUDGE 13.12.2021 11

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Prepared on 13 October 2026 · Esheria