

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(LAND DIVISION)  
AT DAR ES SALAAM  
LAND CASE NO. 229 OF 2022**

**MACKRIMAN TRUST FUND LTD ..... PLAINTIFF  
VERSUS  
KENETH HERMANI WOISO ..... 1<sup>ST</sup> DEFENDANT  
NATIONAL BANK OF COMMERCE LTD ..... 2<sup>ND</sup> DEFENDANT**

*Date of last Hearing: 23/08/2023*

*Date of Ruling: 29/09/2023*

**RULING**

**I. ARUFANI, J**

On 31<sup>st</sup> July, 2023 when the matter came for final PTC, Dr Onesmo Kyauke, learned counsel for the second defendant invited the court to investigate and be satisfied whether it has jurisdiction to entertain the present suit. He told the court that there was Land case No. 215 of 2016 filed in this court by the plaintiff to challenge the intention of the second defendant and two others who are not parties in the present suit to sale the land in dispute in the present suit.

When the matter came for hearing the stated issue, the plaintiff was represented by Mr. Samuel Shedrack, learned counsel and while Mr. Nereus Mutongore and Jamaldin Ngolo, learned counsel represented the first defendant, the second defendant was represented by Ms. Hamisa Nkya and Mr. Daniel Masaga, learned advocate. Ms. Hamisa Nkya argued

the above stated point of law on behalf of the second defendant and stated the matter is *res sub judice*.

She argued that section 8 of the Civil Procedure Code Cap 33 R.E 2019 prohibits trial of any suit where the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties or between the parties under whom any of them claim litigating under the same title before the court having jurisdiction to grant the relief sought in the matter. She argued that, initially there was Land Case No. 215 of 2016 filed in the court by the plaintiff against the second defendant and two others who are not parties in the present suit.

She argued the stated suit was challenging the intention of the second defendant to sale the plaintiff's property which was pledged as a security for the loan issued by the second defendant. She said after hearing the stated case, the court dismissed the same and as the plaintiff was dissatisfied by the decision of the court, she filed Civil Appeal No. 330 of 2022 which is now pending before the Court of Appeal. She stated the relief sought in Land Case No. 215 of 2016 was a declaratory order that the intention of the first defendant to auction the suit land situated at Salasala Area, Kinondoni Municipality, Dar es Salaam Region was unlawful as the plaintiff was not involved in the extended banking facility issued by the second defendant.

She stated the plaintiff alleged in alternative that the auction of the suit land was unlawful as there was no formal notice issued to the plaintiff as required by the law. She stated after hearing the matter the court found the intention of the second defendant and its companion to sale the mortgaged property was lawful as all the required notices were served to the plaintiff and the second defendant and allowed the sale to proceed as required by the law.

She said the appeal pending before the Court of Appeal is challenging the foregoing decision of this court delivered in Land Case No 215 of 2016 on ground that there was no legal mortgage and there was no order of the court authorizing the first defendant to exercise his right of selling the mortgaged property. She said while the Court of Appeal is yet to deliver its decision the plaintiff has come to file the instant suit in the court urging the court to declare the act of the second defendant to sale the mortgaged property to the first defendant is null and void.

She argued that as there is an appeal pending in the Court of Appeal there is likelihood the decision which will be made by the Court of Appeal to be in conflict with the decision which will be made by this court in the present suit. She submitted that, the case before this court is supposed to be struck out because the reliefs sought in the suit at hand can be granted in the appeal pending in the Court of Appeal and to avoid making

two conflicting decisions in the same subject matter and between the same parties.

Mr. Nereus Mutongore concurred with the submission by the counsel for the second defendant and added that, as this court and the Court of Appeal are being called upon to determine the issue of sale of the suit property there is a possibility of the mentioned courts to come up with two conflicting decisions. He referred the court to the cases of **Angelo Fernandes & Another V. House and Homes Limited & Four Others**, Land Case No. 156 of 2020 where the court relied on the case of the **Attorney General V. Tanzania Ports Authority & Another**, Civil Application No. 467/17 of 2016. He submitted that, as what the plaintiff is doing is an abuse of court process the instant suit be struck out.

In his reply the counsel for the plaintiff said the submission by the counsel for the defendants is devoid of merit as they have failed to interpret what is provided under section 8 of the Civil Procedure Code. He argued the cited provision of the law does not provide for the suit to be struck out but the suit to be stayed. He stated the doctrine of *res sub judice* is similar to the doctrine of *res judicata* and referred the court to the case of **Shengena Ltd V. National Insurance Corporation & Another**, Civil Appeal No. 9 of 2008 CAT at DSM quoted in the case of **Maureen George Mbowe Jiliwa & Another V. Twiga Bancorp Ltd**

**& Five Others**, Misc. Land Application No. 100 of 2018 where it was stated that, for the doctrine of *res judicata* to stand all the conditions for the stated doctrine to stand must be established conjunctively.

He stated in the present case the plaintiff is challenging the sale of the suit land and there is no relief touching mortgage. He stated the relief claimed in the present suit is that the sale between the defendants is null and void for failure to follow the required procedures. He said in the Land Case No. 215 of 2016 and in the Civil Appeal No. 330 of 2022 pending before the Court of Appeal the plaintiff is challenging the sale the second defendant was intending to conduct which had not been conducted. He said in the present suit the plaintiff is challenging the sale which has already been conducted.

He stated the first defendant in the present suit was not a party in the Land Case No. 215 of 2016 and is not a party in the Civil Appeal No. 330 of 2022 pending before the Court and that shows the parties in two matters are different. He argued that, even the decision given by the court in Land Case No. 215 of 2016 states the sale may proceed by following the procedures provided under the law and the gist of the suit before the court is challenging the procedure which was followed in selling the suit property.

He went on arguing that, although there is an appeal pending in the Court of Appeal but what the plaintiff is seeking from the stated appeal and what is being sought in the case pending in this court are not similar. He submitted the present suit cannot be stayed because the principle provided under section 8 of the Civil Procedure Code is not applicable in the present suit. He prayed the court to proceed to entertain the present suit so as to enable the plaintiff to prove the illegality involved in the sale of the suit land conducted by the second defendant. He argued it was stated in the **Mulla; The Code of Civil Procedure**, 16<sup>th</sup> Edition Vol. I, R.E 2001 at page 151 that where there are two contracts where the parties are different it cannot be said parties are similar.

In her rejoinder the counsel for the second defendant argued that, if the Court of Appeal will find there was no legal mortgage it is definitely that even the sale which the plaintiff is challenging before this court will be illegal. She stated if the Court of Appeal will find the mortgage was legal and this court declare the sale of the mortgaged property to the first defendant is null and void as prayed by the plaintiff there will be two conflicting decisions. She stated to avoid conflicting decisions the suit before this court should be struck so as to leave the appeal before the Court of Appeal to proceed.

She stated the case of **Maureen George Mbowe Jiliwa** (supra) cited to the court by the counsel for the plaintiff is distinguishable to present suit because what was stated in the cited case is different what was stated by the counsel for the plaintiff. On his side the counsel for the first defendant reiterated what he stated in his submission in chief and added that, as the decision in the appeal pending before the Court of Appeal will have direct impact on the case at hand, the present suit is supposed to be struck out.

After considering the submissions advanced to the court by the counsel for the parties the court has found the issue to determine in the matter at hand as raised by the counsel for the second defendant is whether the suit before the court is *res sub judice*. The court has found as rightly argued by the counsel for the defendants it is a principle of law that, courts are not required to proceed with trial of a suit which the issue in dispute is the same as the issue in a previously instituted suit where the parties are the same or any of them is litigating under the same title and the court where the previously instituted suit is pending has jurisdiction to grant the relief claimed.

The stated principle of the law, as rightly stated by the counsel for the second defendant is known as "*res sub judice*". The stated term "*res sub judice*" is a Latin Maxim which means "matter is before a court" or

"matter is under a judge or under a judgment". The object of the stated principle of *res sub judice* as stated in a book titled **Civil Procedure with Limitation Act**, 1963 by C. K. Takwani, 7<sup>th</sup> Edition at page 66 is to prevent courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action, the same subject matter and the same relief.

Although the above referred book is talking of courts of concurrent jurisdiction but to the view of this court the stated principle is equally applicable in a situation where there is an appeal pending in the higher court and the issue intended to be determined in the said appeal is directly and substantially the same as the issue in the matter filed in the subordinate court by the same parties or parties litigating under the same title. The stated principle of the law is provided under section 8 of the Civil Procedure Code, Cap 33 R.E 2019 which 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."*



The conditions required to be established for the principle of *res sub judice* to stand were stated by C. K. Takwani in the book I have cited hereinabove. When the Author of the cited book was discussing about applicability of section 10 of the Code of Civil Procedure of India which is in *pari materia* with section 8 of the Civil Procedure Code of Tanzania quoted hereinabove, he listed the conditions required for establishing a suit is *res sub judice* at page 67 of the cited book to be as follows: -

- (i) *There must be two suits, one previously instituted and the other subsequently instituted.*
- (ii) *The matter in issue in the subsequent suit must be directly and substantially in issue in the previous suit.*
- (iii) *Both the suits must be between the same parties or their representative.*
- (iv) *The previously instituted suit must be pending in the same court in which the subsequent suit is brought or in any other court.*
- (v) *The court in which the previous suit is instituted must have jurisdiction to grant the relief claimed in the subsequent suit.*
- (vi) *Such parties must be litigating under the same title in both the suit."*

The court has found as rightly argued by the counsel for the plaintiff the above listed conditions are almost similar to the conditions governing establishment of the principle of *res judicata*. The major difference

between the principle of *res sub judice* and *res judicata* is that, while the principle of *res sub judice* is invoked where both matters are pending in courts the principle of *res judicata* is invoked where the previous matter has already been adjudicated by the court.

While being guided by the position of the law stated hereinabove the court has found the record of the matter before the court shows there is no dispute that the plaintiff filed in this court Land Case No. 215 of 2016 against the National Bank of Commerce Ltd, Lesheya Investment Co. Ltd and Sadock Dotto Magai challenging the intention of the defendants to auction the suit land. It is also not disputed that the suit filed in the court by the plaintiff was decided against her and the court ordered the first defendant to proceed with its recovery process as prescribed by the law.

It is also undisputed fact that the plaintiff was aggrieved by the decision of the court and lodged Civil Appeal No. 330 of 2022 in the Court of Appeal to challenge the foregoing stated decision of this court and the appeal is still pending in the Court of Appeal. The dispute is whether it was proper for the plaintiff to file the suit at hand in the court to challenge sale of the suit land while the appeal filed in the Court of Appeal is still pending in the Court of Appeal. The court has found while the counsel for the defendants argued it is not proper, the counsel for the plaintiff argued it is proper.

The court has found the counsel for the defendants argued it was not proper because there is a possibility of getting conflicting decisions from the Court of Appeal and from this court. On the other side the counsel for the plaintiff argues there is no possibility of having conflicting decisions because the issue decided in the case filed in this court by the plaintiff which is now being challenged before the Court of Appeal is different from the issue before the court. The court has found in order to be able to say the matter pending in the Court of Appeal is *res sub judice* to the matter pending in this court it is pertinent to have a look on both matters and see whether the conditions stated hereinabove have been established in the matter at hand.

The court has found one of the claims of the plaintiff in the Land Case No. 215 of 2016 was a declaratory order that the defendants' intention to auction the plaintiff's suit land was unlawful, unjustified and therefore null and void. The decision made by the court in the stated case is that the plaintiff's suit was dismissed and the court allowed the first defendant to proceed with recovery process as prescribed by the law.

The court has found that, although it is true that the plaintiff is challenging validity of the mortgage deed entered by the plaintiff and the first defendant in the appeal pending in the Court of Appeal but the plaintiff is also challenging the decision of the court which held the second

defendant was justified to proceed with sale of the mortgaged property. The stated assertion can be seen in the ground number 3 of the memorandum of appeal filed in the Court of Appeal which its copy was supplied to this court by the parties which states as follows: -

*"The honourable trial judge erred in law in holding that the 1<sup>st</sup> respondent was justified to exercise the right of sale over the mortgage without proof of the amount disbursed and the amount of default."*

The wording of the above quoted ground of appeal caused the court to find that, as the major claim of the plaintiff in the matter at hand is for a declaratory judgment that the sale of the suit land between the defendants is null and void for lack of procedure, then as rightly argued by the counsel for the defendants the ground of appeal quoted hereinabove is substantially and directly the same as the issues involved in the matter pending in this court. That being the position of the matter the court has found as rightly argued by the counsel for the defendants there is a great likelihood of the decision which will be made by the Court of Appeal in the ground relating to the sale of the suit property to be in conflict with the decision which will be rendered by this court in the issue involved in the matter before the court.

The court has considered the argument by the counsel for the plaintiff that, as the issue which was before the court in Land Case No.

215 of 2016 was in relation to the intended sale of the suit land while the issue in the suit before the court is challenging the sale which has already been conducted then they are two different issues and they can be entertained by the courts but failed to agree with his argument. The court has come to the stated finding after seeing the issue before the court is stemming from the decision made by the court which allowed the second defendant to proceed with the process of recovery of their unpaid loan and the stated decision is now being challenged in the appeal pending in the Court of Appeal.

It is the view of this court that, if the Court of Appeal will find the decision of the court in Land Case No. 215 of 2016 to hold the second defendant was justified to exercise the right of sale of the mortgaged property was not right, then automatically the issue of the validity of the procedure of selling the mortgaged property pending in this court will be superfluous as the sale will automatically be rendered null and void. If the court of Appeal will find the decision of this court was right and this court find the sale of suit land is null and void, the decision of this court will be in conflict with the decision of the court of Appeal. As it cannot be speculated what will be the decision of the Court of Appeal in relation to the ground of appeal quoted hereinabove the court has found the case pending in this court was improperly filed in the court.

The court has found the counsel for the plaintiff argued further that the suit at hand is not *res sub judice* because the parties in the appeal pending before the Court of Appeal and the parties in the present suit are different. The court has found that, although it is true that some of the parties in the appeal pending in the Court of Appeal are not parties in the present suit and the first defendant in the present suit is not a party in the appeal pending in the Court of Appeal but the first defendant was simply joined in the suit before this court because he is a bonafide purchaser of the suit land. Under that circumstances the court has found the decision which will be made in the appeal pending in the Court of Appeal might have direct impact to the claim of the plaintiff against the first defendant in the present suit. The above stated findings caused the court to come to the conclusion that the conditions for the doctrine of *res sub judice* to be invoked have been established in this matter.

The court has found as stated in the case of **Hector Sequiraa V. Serengeti Breweries Ltd**, Civil Appeal No. 395/18 of 2019 quoted in the case of **Angelo Fernandes** (supra) to file the present suit in this court while there is an appeal pending in the Court of Appeal on an issue which is substantially and directly the same in both cases is to turn the court's proceedings to be game of chances in finding lee way to succeed by filing the same matters in two different courts. The court has found it

was also stated in the case of **Hamis Said Mkuki V. Fatuma Ally**, Civil Appeal No. 147 of 2017, CAT at DSM (unreported) that the law does not allow riding two horses at the same time because it amounts to an abuse of court process.

The court has found the counsel for the plaintiff said if the court will find the suit is *res sub judice* the remedy is for the court to order the suit to be stayed to await the appeal pending in the Court of Appeal to be decided. The court has found as the appeal in the Court of Appeal and the present suit were filed in the court by the same party it cannot be said the present suit is supposed to be stayed to await decision of the Court of Appeal. The court has come to the stated finding after seeing the matter before the court is not only suffering from being *res sub judice* but it was also an abuse of court process to lodge the matter which has direct bearing with the appeal already filed in the Court of Appeal.

In the premises the court has found the matter cannot be stayed to await decision of the Court of Appeal. In lieu thereof the court has found the observation raised by the counsel for the second defendant and argued by the counsel for the defendants is meritorious and it is hereby sustained. The plaintiff's suit is accordingly struck out for contravening the principle of *res sub judice* and for abusing the court process and costs to follow the event. It is so ordered.

Dated at Dar es Salaam this 29<sup>th</sup> day of September, 2023



  
I. Arufani  
**JUDGE**  
29/09/2023

**Court:**

Ruling delivered today 29<sup>th</sup> day of September, 2023 in the presence of Mr. Paulo Mtui, learned advocate for the plaintiff and in the presence of Mr. Nereus Mutongore, learned advocate for the first defendant and holding brief for Dr. Onesmo Kyauke, learned advocate for the second defendant. Right of appeal to the Court of Appeal is fully explained.



  
I. Arufani  
**JUDGE**  
29/09/2023