

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 92 OF 2003

NATIONAL BUREAU DE CHANGE LTD....PLAINTIFF
VERSUS
TAI MILLING INDUSTRIES LTD.....1ST DEFENDANT
SALIM HAMDUN SAID.....2ND DEFENDANT
ASHURA SWEDI.....3RD DEFENDANT
SAID SALIM4TH DEFENDANT

R U L I N G

KIMARO, J.

Subsequent to the filing of the plaint, which was filed under as a summary suit under Order XXXV of the Civil Procedure Code, 1966, Dr. Lamwai, Learned Advocate appearing for the defendants filed a chamber application seeking for two orders:

"

- i) *Striking out the suit on the ground that the suit between the parties and the same matter was previously filed before the High Court at Dar-Es-Salaam Registry.*

- ii) *In the alternative, stay of this suit pending the final determination of the previously instituted suit between the same parties, and on the same subject matter which is pending before the High Court of Tanzania, Dar-Es-Salaam Registry;*

iii) In the alternative grant of unconditional leave to appear and defend the suit to the defendants."

Mr. Thadayo, Learned Advocate appearing for the plaintiff raised a preliminary objection that the defendants/applicants have no locus standi in respect of the prayers for the striking out, and of stay of the suit because the defendants have not yet obtained leave to appear and defend the suit.

Mr. Thadayo's brief submission is that in summary suits, the right of appearance by the defendant is not automatic. He referred to Order XXXV Rule 2 (3) arguing that since the defendants have not obtained leave to appear and defend, they can not at this point pray for such orders. It was his observation that the prayers relate to another suit which is pending in the High Court, Dar-Es-Salaam Registry and he wondered whether the application was brought as a preliminary objection or as part of their defence. His emphasis was that whatever the case could be, the defendants/applicants do not have locus standi to make any other application before they are granted leave to appear and defend.

Dr. Lamwai replied that the points on the existence of the previously filed suit, identified as civil Case No. 199 of 2003 is a point of both law and fact. The issue raised is whether the two suits can be prosecuted simultaneously and it is an issue which goes to the jurisdiction of this court. He said that according to order IV r.1 (3) of the Civil Procedure Code, the Commercial Division of the High Court does not have an exclusive jurisdiction over commercial matters and the order requires the Commercial

division not to litigate on same issues between same parties pending in another court. He prayed that the suit be struck out, citing the decision of **The Liquidator of Marangu Sisal Estate Ltd Vs George Nicholas Efstathiou and Others**, Commercial Case No. 20 of 2000 (unreported) where Hon. Nsekela J, as he then was, took such a measure.

In reply Mr. Thadayo made a comparison of the two cases in terms of the subject matter as well as the parties involved, and came to a conclusion that they are not related. He had no objection to the prayer for leave to appear and defend.

Dr. Lamwai's reply was only an emphasis that the parties and the subject matter in both suits are the same. He then prayed that this suit be either struck out, or be stayed pending the final determination of Civil Case No.199 of 2003.

I have closely gone through the subject matter in both suits. They are substantially based on the same subject matter which is the credit facility and the legal mortgages and the guarantees. They are not different. Even the prayers by the respective parties in the suits can not be used as a basis for making a comparison of the subject matter because the prayers depend to who has filed the suit.

Under the circumstances, both suits can not be litigated upon simultaneously. Dr. Lamwai submitted correctly, that Order IV rule 1(3) of the Civil Procedure Code 1966 shows that Commercial Division of the High Court does not have exclusive jurisdiction over commercial matters.

Order IV rule 1(3) says –

“ No suit shall be instituted in the Commercial Division of the High Court concerning a commercial matter which is pending before another court or tribunal of a competent jurisdiction or which falls within the competency of a lower court.”

This court having held that the two suits are substantially the same, it follows that this court cannot allow the litigation of the suit which has been filed in this court. It has not been disputed by the plaintiff that the suit which was filed in this court was filed subsequent to the suit which was filed at the Dar-Es-Salaam Registry. This means that it is the suit which was filed at the Dar-Es-Salaam Registry which should be litigated upon first.

On the light of what is given above and the decision in Civil Case No.20 of 2000 given above, which I fully agree with, I order the suit to be struck out with costs because it was not supposed to be filed in this court.

N.P.KIMARO,

JUDGE

18/12/2003

I Certify that this is a true and correct
of the original/order Judgement Rulling
Sign *[Signature]*
Registrar Commercial Court Dsm.
Date 22/12/03