IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM REGISTRY)

AT DAR ES SALAAM

Civil Case No. 225 of 2012

THE GOVERNMENT OF LIBYA ..... PLAINTIFF

versus

MEIS INDUSTRIES CO. LTD. ..... 1ST DEFENDANT

MUSTAFA NYUMBAMKALI ..... 2ND DEFENDANT

TANZANIA INVESTMENT BANK ..... NECESSARY PARTY

Date of ruling: 18/11/2014

RULING

Twaib, J:

The plaintiff's case against the defendants, jointly and severally, is, primarily, for a declaration that the judgment and decree in Civil Case No. 124 of 2010 be declared null and void and for an order that the said judgment and decree, together with any subsequent rulings and orders emanating therefrom, be set aside. The basis of the action is an allegation to the effect that the said judgment, decree and orders were fraudulently procured, without service on the defendant in the said case, namely, the Government of the Great Islamic People's Libyan Arab Jamahiriya (the predecessor of the plaintiff in this case).

Other grounds upon which the plaintiff seeks to rely are that the 1st defendant committed various fraudulent acts of misrepresentation,

conspiracies and illegalities to procure and execute the judgment. In the "particulars of misrepresentations and illegalities", the plaintiff alleges that the 1st defendant Meis Industries Co. Ltd. sued on an alleged breach of a non-existent contract. The plaintiff also maintains that this court entertained the earlier suit without jurisdiction.

The particulars of conspiracies contain allegations to the effect that the judge who presided over the matter participated in the alleged conspiracy by not taking trouble to verify the truth of the statement, proceeding to hear the case the next day, finalizing the hearing within "a very short time", and delivering judgment thereon within six days. The process of taxation is also being challenged on the ground that the same was "filed and heard within seven days and a colossal amount of costs was granted, without affording the judgment debtor a right to be heard".

The defendants have raised numerous points of preliminary objection. Before hearing of submissions on those objections, Mr. Mnyele, learned advocate for the plaintiff, rose to address the court on two issues. One of them was not contested. It was only a proposal on the manner in which the preliminary objections were to be disposed of. This was resolved by consent of the parties. The other point, which was contested, was left to be determined by the court. It was a prayer to substitute the name of the plaintiff, "The Government of Libya", as appears in the plaint, with the name "The State of Libya". This prayer was made pursuant to Order I rule 10 (1) of the Civil Procedure Code, Cap 33 (R.E. 2002).

In the first paragraph of the plaint that instituted this case, the plaintiff is described as "a juristic person under international law having full authority

to rule and administer both Municipal and International Affairs of the country known as Libya, situated in the Northern Part of Africa."

Mr. Kamala, learned counsel for the 1st Defendant, objected, saying that the name of the plaintiff as appears in the plaint is one of the issues raised in the preliminary objections, and thus, Mr. Mnyele's prayer to substitute the plaintiff's name is meant to pre-empt the preliminary objection. I reserved the determination of this issue to be made in this ruling. I will come back to it after determining the defendants' points of preliminary objection.

The next issue, which needs instant determination, is the plaintiff's notice of preliminary objection against all three notices of preliminary objections filed by the defendants. Advocates for the plaintiffs assert that the defendants' notices "have been filed in clear violation of mandatory provisions of order VIII rule 2 of the Civil Procedure Act…read together with Order VI rule 1 of the Act." Order VIII rule 2 requires the defendant to raise every issue he intends to rely upon in his WSD. The defendants herein did not do so. They raised the preliminary points of objection in separate notices.

The defendants have thus come up in arms against these "preliminary objections against preliminary objections". Mr. Marando submitted that *Shahida's Case*, which was relied upon by the defendant's counsel, related to rule 100 of the then Court of Appeal Rules, which do not apply in proceedings before the High Court.

I agree with Mr. Marando that the principle in *Shahida's Case* is distinguishable for reasons he has advanced. However, in my respectful opinion, it is nonetheless a good principle. I am thus inspired to hold that it applies to the High Court and subordinate courts as well. However, even if

I am wrong in that regard, and if I was to decide his client's preliminary objections on the merits, I would still overrule them, for a different reason.

My reason for taking that position is that objections are matters of law, and where an objection relates to matters touching upon the jurisdiction of the court, it can be raised at any time. The defendant's objections herein raise issues of the case being *res judicata* and the court being *functus officio*— matters which are, essentially, jurisdictional in nature.

I was once faced with a similar question in the case of *Mark AD & PR International (T) Ltd. v Stanbic Bank Tanzania Ltd.* Civil Case No. 91 of 2010 (unreported). In that case, the decision in *CRDB Bank Ltd. v Noorali K.J. Dhanani and Shiraz H.K.J. Dhanani*, High Court of Tanzania, Commercial Case No. 102 of 2001 was cited to me. In that decision, Nsekela J (as he then was), interpreted Order VIII rule 2 of the CPC to mean that a defendant must raise every preliminary issue in his written statement of defence. His Lordship stated:

> "My reading and understanding of this rule is that if Defendant wants to raise an issue that the suit is not maintainable according to law, then this point must be raised in the body of the Written Statement of Defence. It must be in the body of the defence and not otherwise.…A piece of paper called "NOTICE", in my humble view, contravenes Order VIII rule 2 of the Civil Procedure Code and should be discarded. It is not properly before me to adjudicate upon."

In *Mark AD & PR International,* after due consideration of the decision just discussed, I held as follows:

> "It is trite that certain matters of law may be so fundamental that they go the root of the case. These do not have to be raised in the defence. They

can be brought up at any time. Among them are matters of jurisdiction and limitation. **I do not think it is open to a court of law to decline to determine such matters simply because they have not been raised in the WSD**. In any case, the law enjoins us to ensure that we only entertain matters that are brought to us where we are satisfied that we have the requisite jurisdiction. Otherwise, in appropriate cases, we are even bound to raise the issue *suo motu*….Hence, **my interpretation of Order VIII rule 2 is that the requirement for raising every issue in the WSD cannot be insisted upon where the matter or issue touches upon the court's jurisdiction.**" [emphasis added]

With respect, I still hold the same views. I would thus overrule the plaintiff's objections against the defendants' notices of objection, and move to consider the merits of the defendant's points of preliminary objection.

Three separate notices were filed. It was agreed by all parties that they be argued together. They were so argued, but counsel for both sides based their submissions on the notice of preliminary objection filed by the 2nd defendant. Briefly, the points of objection are:

1. The court lacks jurisdiction to entertain the suit.
2. The suit is *res judicata*.
3. The court is *functus officio*.
4. The plaintiff lacks the requisite *locus standi* to sue.
5. The suit is an abuse of the court process.
6. Paragraph 8 of the plaint is embarrassing, vexatious and disrespectful to the court.
7. The plaint does not disclose any cause of action against the 2nd defendant, Mustafa Nyumbamkali.

Learned counsel who argued in support of the preliminary objections on behalf of both defendants were Mr. Mpaya Kamala and Mr. Martin Matunda. Mr. Peter Swai, who appeared for the Necessary Party, Tanzania Investment Bank, expressed the wish that his client would not take part in the proceedings relating to the preliminary objections. Mr. Mabere Marando, Mr. Gabriel Mnyele and Mr. Tahir Muccadam, appeared for the plaintiff.

Mr. Kamala argued the first, second and third points of preliminary objection together. The points raised are lack of jurisdiction, *res judicata*, and *functus officio*. I will start by letting Mr. Kamala speak for himself. He submitted:

> "The plaintiff's case…in essence…seeks to assail the proceedings and judgment of this court in Civil Case No. 124 of 2010, on the grounds that the judgment and decree therein was fraudulently obtained and for lack of service of court processes to the plaintiff: consequent and corollary to that, they seek relief for refund of all moneys that were paid to the 1st defendant as a result of execution processes and taxation of costs, and furthermore, the order for general damages in the sum of USD 200 Million..."

Mr. Kamala then pointed to paragraph 7 of the plaint, which contains allegations as to false and fraudulent reporting on the manner of service to the plaintiff and the evidence adduced in proof of the claim. The particulars of falsehood are pleaded in sub-paragraphs (a), (b) and (c) of that paragraph. They state the following:

(a) The Ministry of Foreign Affairs and International Co-operation has no power to serve court summons to anybody under the Civil Procedure Code, Cap 33;

(b) No affidavit was sworn to show that service was done on the plaintiff, according to law;

(c) The recipient of the said summons was not known or identified.

Further on in that paragraph, the plaintiff alleges that the 1st defendant committed various fraudulent acts of misrepresentation, conspiracies and illegalities to procure and execute the judgment. The alleged "particulars of misrepresentations and illegalities", are:

(i) The 1st defendant represented that summons were duly served while they were not;

(ii) Through the plaint and during evidence the 1st defendant misrepresented to the court that the plaintiff had refused to disburse funds, while knowing that the said contract for disbursement had never been signed by the plaintiff's predecessor…;

(iii) The 1st defendant fraudulently represented to the court that there was breach of contract while no such contract had been entered by both parties.

Mr. Kamala argued that the mode of service used in the earlier case and "the court's finding as to due service" forms part of the judgment of the court, and appears on page 20 of the judgment. In the part of the judgment referred to by Mr. Kamala, the learned Judge states:

> "The hearing of this case, was directed to proceed one sidedly, pursuant to the provisions of Order VIII rule 14 (2) (b) of the Civil Procedure Code (Cap 33, R.E. 2002). The defendant was duly served. However, it did not present

its Written Statement of Defence within the required period of 21 days. Neither had the defendant entered appearance to pursue this matter…"

Mr. Kamala thus opines that in as much as the plaintiff herein wants this court to find that there was no due service, this court is not authorized to revisit the above finding by considering whether there was in fact due service. In other words, it is Mr. Kamala's view that the court has no jurisdiction to determine that question, on which it is *functus officio*.

Mr. Kamala referred the court to the judgment of the Court of Appeal in the case of *Mohamed Enterprises (T) Ltd. v. Masoud Mohamed Nasser*, Civ. Application No. 73 of 2012, at page 18, for the proposition that this court cannot re-open such a matter, and that only a higher court could to go through the proceedings and either confirm or reverse the finding. He contended that the same principle applies to *res judicata*.

However, Mr. Kamala was quick to concede that if the prior judgment is proved to have been obtained by fraud or collusion, the principle of *res judicata* cannot apply. Indeed, it is trite law that fraud vitiates everything. Even in *Mohamed Enterprises' Case*, the Court of Appeal recognized that one could challenge such a judgment or decision, only that such challenge could only be pursued by way of a suit, and not an application for review, as was the case therein.

Responding on this point, Mr. Marando submitted that the *Mohamed Enterprises* decision was against my decision, and that the Court of Appeal was not fair to me as it ought to at least have discussed the reasons that I gave in reaching my conclusions therein. With due respect to learned counsel Marando (and I believe he will agree with me), it is not up to me to

question the wisdom, the reasoning or the fairness of the Court of Appeal decision in that ruling. What is important is that it is a decision of the highest court of the land and I, like any other Judge or Magistrate in courts subordinate to it, am bound by it.

That said, however, it is perfectly in order to distinguish it, where appropriate. I think this is one such case, as it is not only distinguishable from, but allowable by, the Court of Appeal itself in its said decision. The error in which the Court of Appeal found me to have fallen in that case was that of re-opening and setting aside a judgment of a fellow judge of this court in a review application. On the other hand, the matter presently before me is **a suit, and not an application for review.** And, as earlier intimated, the Court of Appeal in *Mohamed Enterprises* accepted the position that one could challenge a judgment obtained by fraud by instituting a suit, which is what the plaintiff has done herein.

All these submissions amount to a plea of *res judicata* and *functus officio*. As Mr. Marando rightly put it, relying on *Sarkar on Evidence*, 15th edition, pp. 846-860, our section 46 of the Tanzania Law of Evidence Act (*in pari materia* with section 48 of the Indian Law of Evidence Act), has modified the rule as to *res judicata*, which does not apply if fraud is involved. As Lord Coke once said: "fraud avoids all judicial acts, ecclesiastical and temporal".

Mr. Kamala was however of the opinion that this case is not based on fraud, but on an alleged error on the court's part, which would not constitute fraud. Mr. Marando disagreed with him, stating that the allegations stated in the plaint do constitute fraud.

With due respect, I find it difficult to agree with Mr. Kamala that the allegations contained in the plaint, if proved, will not constitute fraud, but mere errors (whether of law or fact) on the court's part. These are allegations of misrepresentation (or false presentations) that to me amount to allegations of fraud.

But Mr. Kamala qualified his statement and reduced its generality. He submitted that it matters not whether the previous adjudication was tainted with perjured evidence. Instead, he introduced the concept of the distinction between *extrinsic fraud* as opposed to *intrinsic fraud.* This dichotomy, in my considered opinion, constitutes the key to the determination of the matters calling for determination in this ruling. Counsel Kamala maintained that an extrinsic fraud is an essential ingredient for any successful challenge of a court judgment or decree in a subsequent suit. An intrinsic fraud, on the other hand, cannot be the basis for a challenge of a court judgment or decree. He maintained that the allegations of falsehood cited in the plaint are intrinsic and not extrinsic, and cannot, therefore, sustain the suit.

At this point, it is pertinent to explore the distinction between the two terms, "intrinsic fraud" and "extrinsic fraud". Elaborating on the distinction, Mr. Kamala cited the renowned author *Sarkar on the Code of Civil Procedure*, 10th edition, at p. 136-137. Sarkar discussed the subject and wrote:

> "…fraud must be extrinsic. It must be fraud that is extrinsic or collateral to everything that has been adjudicated upon, but not one that has been dealt with by the court….**A mere averment in the plaint that previous adjudication was because of perjured evidence adduced by the successful party or was because of procuring of commission report which was accepted by the court by improper means would not be**

> **a ground** to enable the court to ignore the finality of the prior adjudication or to set it aside in a subsequent suit on the ground that the prior adjudication was vitiated by fraud." [emphasis mine]

Mr. Kamala further referred the court to Black's Law Dictionary. In its 9th edition [2009], p. 732, *extrinsic fraud* (also known as *collateral fraud*) is defined as:

> "Deception that is collateral to the issues being considered in the case; intentional misrepresentation or deceptive behavior **outside the transaction itself** (whether a contract or a lawsuit), **depriving one party of informed consent or full participation…Deception that prevents a person from knowing about or asserting certain rights**." [emphasis mine]

Taking Sarkar's propositions and the definition in Black's Law Dictionary as correct, and I accept them to be so, the issue is whether the alleged fraudulent acts or omissions constitute *intrinsic* or *extrinsic* fraud. The latter would be an appropriate subject of a suit of this nature, while the former would not.

In the American case of *Bennett v. Hibernia Bank*, (1956) 47 Cal.2d540, 558, it was held that extrinsic fraud does not mean merely lying or perjury, nor misrepresentations nor matters that could have been raised during the proceeding. It must involve matters *collateral to and outside of the proceedings*. To use the Judge's words:

> "A trial court has an inherent equity power under which, apart from statutory authority, it may grant relief from a default judgment obtained through extrinsic fraud or mistake. **While the grounds for an equitable action to set aside a default judgment are commonly stated as being those of extrinsic fraud or mistake, the terms are given a very broad meaning which tends to encompass all**

> **circumstances that deprive an adversary of fair notice of hearing whether or not those circumstances would qualify as fraudulent or mistaken in the strict sense. Thus a false recital of service although not deliberate is treated as extrinsic fraud or mistake in the context of an equitable action to set aside a default judgment."** [emphases mine]

See also *Carroll v. Abbott Laboratories* (1982) 32 Cal. 3d 892, 901-902. In the case of *The United States v. Throckmorton* (1878) 98 U.S. 61, 65-66, the US Supreme Court held:

> "Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, **as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff**; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side—these, and similar cases which show that **there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing**." [emphasis mine]

The same position was taken in the Indian case of *Kulchar v. Kulchar* (1969) 1 Cal.3d 467, 47, where it was held:

> "Extrinsic fraud usually arises when a party is denied a fair adversary hearing because he has been '**deliberately kept in ignorance of the action or proceeding, or in some other way fraudulently prevented from presenting his claim or defense.**'" [emphasis mine]

Further, extrinsic fraud occurs when:

> "…the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff."

In those situations, there would not have been a real contest in the trial or hearing of the case. The judgment may thus be set aside to open the case for a fair hearing.

Having traversed the law on the subject as laid down by earlier decisions in common law jurisdictions (there being, to my humble knowledge, no authority in our own jurisdiction), I would put the principle, in a nutshell, as follows:

> **"Only extrinsic fraud can be employed to sustain a suit that seeks to annul an earlier suit in subsequent litigation. Extrinsic fraud is a fraudulent act or omission on the part of the plaintiff that keeps a party from obtaining information about his/her rights to defend against an action at law. It is distinguished from 'intrinsic fraud', which is fraud that is the subject of a lawsuit."**

Being a cause of action, there must be an allegation in the plaint which, if proved, would constitute *extrinsic fraud*. Paragraph 7 (i) alleges that the 1st defendant "represented that the summons were duly served while they were not." The issue arising from this would be "whether the summons were duly served as represented to the court". When was the alleged fraud committed? At the time of service, or in court proceedings? If it was during the service, then it would be extrinsic and therefore capable of subsequent inquiry in a case of this nature. If it was in Court, it would be intrinsic and, therefore, incapable of such an enquiry.

Was the judgment in Civil Case No. 124 of 2010 procured by extrinsic fraud? In my respectful view, this question cannot be adequately answered without evidence. The dispute stems from the fact that the court's finding was based on representations made and/or evidence adduced by one party (the plaintiff therein, or 1st defendant herein), without the participation of the other party (the defendant therein). The plaint alleges that the lack of participation by the defendant was procured by fraud as there was no due service on the defendant, and it is for this reason that the plaintiff herein seeks to have the judgment and decree set aside.

Mr. Marando argued in line with the principle as I have attempted to explain above. He maintained that the alleged fraud took place *outside* the court, by use of an *improper service* on the part of the 1st defendant. Applying this principle, I am increasingly of the view that the allegations contained in paragraph 7 (1) of the plaint relate to matters that can either be intrinsic or extrinsic. The issue whether or not there was proper service is a question of fact. It needs proof by way of evidence. As such, it cannot be the subject of a preliminary objection: see *Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd.* [1969] EA 696. This position is now settled law in our jurisdiction, and has been adopted in various decisions of our courts, including that of the Court of Appeal of Tanzania in *Karata Ernest and Others v. Attorney General*, CAT (DSM) Civil Revision No.10 of 2010.

It has been argued on behalf of the defendants that the fact that there was due service was decided by the court on page 20 of its judgment. However, the record shows that the matter was not contested and even if it was, the fraud is alleged to have taken place outside the court through lack of service or improper service. It would thus be extrinsic and, as per the principle enunciated above, it is capable of having prevented the defendant therein from defending itself.

Again, the question as to whether the above, whether in combination or any of them, if successful, are capable of rendering the previous case, in its entirety, a nullity—which will re-open the earlier case for a fair hearing, is a question of fact. Even though this is not to say that all (or any) of the matters alleged in paragraph 7 of the plaint will be open for re-litigation to determine the rights and liabilities of the parties, it will be presumptuous at this point, and certainly not within the principles of *Mukisa Biscuits* for me to dismiss them off-hand at this preliminary stage without a hearing.

Looked at from this perspective, the principle that requires fraud in such a case to be extrinsic can be more easily understood by approaching the issue from the viewpoint of what will ultimately be the expected decision of the court after the suit (this suit) is heard on merit. In other words, it is like setting aside an *ex parte* judgment. Hence, contrary to what counsel for the defendants have contended, what the court looks at is not the merits of the judgment, but how it was obtained. The process thus becomes not an inquiry into ***what*** *was decided*, ***but how*** *was the decision procured*. With due respect, I am unable to see any reason why, in a case such as the present, that cannot be done.

One could assume for a moment (without deciding) that the plaintiff is right in his assertions and he can prove them in evidence—namely, that the 1st defendant (and/or its advocate) had made false presentations to the court, which presentation the court wrongfully accepted; that the judgment was obtained by perjured evidence; that there was no contract in the first place which the defendant in that case could have breached entitling the 1st defendant to judgment in its favour; that there were conspiracies in which

the court itself participated by hurriedly determining the matter and without taking the trouble to satisfy itself that summons had been duly served.

However, all these questions arise where the judgment is being assailed for having been procured by extrinsic fraud. In such a case, this court in the present suit would not be considering the merits or demerits of the earlier decision. The court would have to stop at the point of deciding the question as to whether there was extrinsic fraud, and no more. It will not be looking into the correctness or otherwise of the decision. That can only be done once the earlier decision is set aside and re-opened for fair hearing. And that is the essence of this case: it seeks to have the earlier decision annulled, and re-open it for contested litigation.

It is for this reason, I suppose, that the law requires that for one to successfully challenge an earlier judgment of the court in another suit on grounds of fraud, the fraud alleged must be extrinsic and not intrinsic. Only then could one get around the rules as to *res judicata* and *functus officio*— because the issues raised would not have been the subject of proceedings and decision in the earlier case.

A false presentation, perjured or manufactured evidence, error of law or fact on the part of the Judge, etc., cannot be the basis for such a cause, because these matters would require the later judge to sit in judgment of his/her fellow judge. To accept such a possibility would be tantamount to opening a pandora's box that would allow losing parties to come back to have earlier unfavourable decisions annulled on the grounds that the earlier Judge was misled, lied to, etc. The rules of *res judicata* and *functus officio* would lose their meaning.

Now for the allegations of conspiracies in paragraph 8 (iv) to (ix) of the plaint. Whether the particulars of conspiracies are *vexatious/scandalous*, an issue that the 1st and 2nd defendants have also raised, cannot be determined in this ruling. Those are allegations of fact whose truthfulness or otherwise will need proof.

In that paragraph, the plaintiff alleges that "during the hearing and before and after judgment" the first defendant committed various acts of misrepresentation, conspiracies and illegalities to procure and execute the said judgment. The plaintiff explains:

> *"(i) upon being addressed on the service of summons, the court never took trouble to verify the truth of the statement and proceeded to hear the suit the next day.*
>
> *(ii) The suit was heard within very short time and judgment given within six (6) days.*
>
> *(iii) The application for taxation was filed and heard within seven (7) days and colossal amount of costs were granted, without affording the judgment debtor a right to be heard, regard being that the application for taxation was already time barred."*

At face value, these matters will require this court to determine the propriety of what happened in court during the hearing and the manner in which the presiding judge handled them. Those are, however, matters reserved for the higher court. They cannot form the basis for overturning the court's earlier decision. Hence, they cannot be determined by this court. It would actually be superfluous to have them litigated upon in this suit.

As already found, the main issue in a case of this nature is: "whether or not in his plaint, the plaintiff alleges facts sufficient to constitute fraud, extrinsic in nature, committed by the defendant that would vitiate the proceedings and the resultant judgment, decisions and orders in the earlier case."

In defending the inclusion of these allegations in the plaint, counsel Marando and Mnyele submitted that this court has not previously performed the task it is being called upon to perform in this case. That is true to a certain extent. As earlier intimated, however, that role must be strictly limited to matters that cannot be examined on appeal or review. It will thus not be the court's role in this case to look at all the findings of the court in the earlier case and overturn them. All that it may be called upon to consider is the manner in which the judgment was obtained and if satisfied that it was obtained fraudulently (and, I would add, through extrinsic fraud) nullify it.

This is the principle. However, it is a principle that will mean that the particulars of conspiracies, misrepresentations and illegalities in paragraph 8 of the plaint cannot be determined in this case. It will not be proper to allow them to remain on record. For that reason, they are struck off the plaint. Having done that, there would be no need to consider whether they are frivolous, vexatious or disrespectful to the court.

Before I wind up on this issue, I wish to say something about Mr. Marando's contention that even a subordinate court can set aside a judgment of the High Court on grounds of fraud (presumably if the subject matter is within the subordinate court's jurisdiction). I would not go into the intricacies of such an eventuality as it would be purely presumptuous and an *obiter dictum*. I would thus leave the question to be decided when it actually arises. There is a time and place for everything.

I will now return to the question relating to the name of the plaintiff. Mr. Mnyele had asked the court to substitute the name "The Government of Libya" with the name "The State of Libya". I do not agree with Mr. Kamala that there is anything fundamental about this. It is trite that the court has the power to order the substitution of parties in order to ensure that the right parties are before it: order I rule 10 (1) and (2) of the CPC.

Hence, in order to be able to determine all the issues that arise between the parties in this case, I would grant Mr. Mnyele's prayer. An order is thus made that the Plaintiff's name be substituted for "The State of Libya." For the purposes of the issue as to whether the State of Libya has the capacity to sue herein, the plaintiff would be reminded that the issue is a contested question of both fact and law: see *Njau & Others v City Council* [1979-85] EA 249 and *Registered Trustees of Catholic Archdiocese of Nyeri and another v Standard Ltd. and others* [2003] 1 EA 257 (HCK).

As to whether the plaintiff is a recognized person in international law, I would also hold that that is also a question of fact, subject to evidence. The alleged Hansard that was brought to the court's attention purports to be a piece of evidence that the court should take judicial notice of. Mr. Marando challenges its validity, and asks: Is this the Hansard? He says that the Hansard Report may be a report of what was said in Parliament, but not the truth about the status of the Government of Libya or its recognition by the Government of Tanzania. As held in The Registered Trustees of Nyeri's *(supra)* it is a question of both law and fact. So long as such questions call for answers as to issues of fact, they cannot form part of a preliminary objection. They thus cannot be answered at this stage. It would be uncalled for me to attempt to answer them this way or that. Since the defendants

have raised them in their defence, the plaintiff will need to provide proof of its status as an international legal person, and its recognition by the Government of Tanzania in accordance with international law.

As for the action against the 2nd defendant, Mr. Kamala submitted that the fraud alleged by the plaintiff is its plaint does not touch the 2nd respondent at all. Counsel further submitted that a cause of action is a bundle of facts which would entitle the plaintiff to the relief prayed. The relief in this case is the nullification of the judgment and decree and orders of this court in the previous case due to fraud, which the plaintiff claims was committed by the 1st defendant. The 2nd defendant was not privy to the alleged ground, as there is not even an allegation to that effect.

Mr. Mnyele, on the other hand, submitted that if what is pleaded in paragraph 11 of the plaint is proved (presumably upon proof of the main cause of action against the 1st defendant), the 2nd defendant will be jointly and severally liable in prayer (d) to the plaint. Paragraph 11 alleges that that the 2nd defendant's accounts at NMB Temeke Branch were credited with Tshs. 24.2 Billion, and thus the 2nd defendant is liable to refund the moneys to the plaintiff. Prayer (d) wants the court to direct that the 1st and 2nd defendants refund and pay "a total of Tshs. 29.5 Billion to the plaintiff. It is true, as Mr. Mnyele has submitted, that the plaint mentions the 2nd defendant in paragraph 11, alleging that the moneys were deposited into his account. But that was pursuant to a court order, and whatever the 2nd defendant did with the money was pursuant to those orders. But again, these are matters that require evidence. They cannot form the basis of a preliminary objection.

In the result, the preliminary objections are overruled, with the exception of those relating to paragraph 8 of the plaint, which, as earlier ordered, is struck off the plaint. There shall be no order as to costs.

DATED and DELIVERED at Dar es Salaam this 18th day of November, 2014.

F.A. Twaib

JUDGE