IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CIVIL APPEAL No. 127 of 2018
(Arising from the District Court for Kinondoni in Misc. Civil application No. 75 of 2017)

CIPEX COMPANY LIMITED.....APPELLANT
VERSUS
TANZANIA INVESTMENT BANK (TIB).....RESPONDENT

JUDGEMENT

MASABO, J.:

The appellant is aggrieved by a ruling which upheld a preliminary objection raised by the Respondent in Civil Application No. 75 of 2017 before Kinondoni District Court. The genesis of the appeal is a loan agreement between the parties. The said loan did not perform well. The Respondent invoked recovery measures whereby he filed a suit registered as Civil Case No. 27 of 2013 before Kinondoni District Court. The suit was concluded after the parties reached an amicable settlement whereby, they executed a Deed of Compromise detailing the amount payable and the terms of settlement. Upon the Deed being registered in court, a consent judgement and a decree thereto were pronounced on 13th January 2015.

On May 2017, the appellant herein lodged an application under section 38(1), 68(e) and 95 of the Civil Procedure Code [Cap 33 RE 2002] praying for two orders. **First**, that the court be pleased to issue an interim order staying the execution of the decree above pronounced; and **second**, the

variation of the amount and period of the payment of the decreed sum to the sum of Tsh 10,000,000/ per instalment. In reply to the application, the Respondent herein raised and successfully argued a preliminary objection that the court is *functus officio*, in that being the court that pronounced the decree it could not vary the terms of and conditions of the said decree.

The Appellant is not amused. He has appealed to this court armed with 4 grounds which can be summarized as follows: the court misdirected itself in failure to appreciate and find that it has full jurisdiction to vary the decree; that court erred in failure to appreciate the circumstances of the case, and especially, the fact that the appellant had already started to repay the dues faced difficulties which prevented him from satisfying the decree as per the schedule agreed.

In support of the appeal, Mr. Josephat Ndelembi, counsel for the appellant, submitted that the learned magistrate erred because his determination of the preliminary objection was based on factual issues, the Compromise Deed in particular. Hence it was beyond the scope of preliminary objection set in the **Case of Mukisa Biscuits Manufacturing Company Limited v West End Manufacturing Distributors Limited** (1969) EA 696. He cited the case of **Bibi Kisoko Medard v Minister for Lands** [1983] TLR 250 and argued that, in this case, it was held that a court had room to vary the decree in case of fraud, mistake or some other cause. Thus, in the instant case, the facts asserted in the affidavit, to wit, that the principal officer of the applicant fell ill which occasioned turndown of business, constituted what is described

in the above judgment "some other cause". Mr. Ndelembi further implored me to invoke the principle of overriding objective and step into the shoes of the trial court to determine the application for variation of the decree.

Mr. Francis Ramadhan, Counsel for the Respondent, sternly contended. He argued that there is no room for variation of the decree made out of compromise. In clarifying his point he added that pursuant to section 70(3) of the Civil Procedure Code [Cap 33 RE 2019], a decree arising from a consent judgment cannot even be appealed against. In further fortification of his argument he cited the case of **Karata and Others v Attorney General** Civil Case No. 95 of 2003. As for the case of **Bibi Kisoko v Minister for Lands, Housing and Urban Development and Another** [1993] TLR 250, he argued that, the phrase 'some other cause' can not be invoked in the instant application because, the application itself was tenable as it was neither an application for review or setting aside the award but rather, an application for variation of the award something which is legally impracticable. Besides, there was no execution proceedings filled in court.
In rejoinder Mr. Ndelembi argued that the application is tenable because, section 38(1); 68(e) and 95 of the Civil Procedure Code invites the court to apply the principle of overriding objective.

The grounds of appeal and the submission for and against the appeal revolves around two main issues, **first** whether the court was correct in entertaining the point of *functus officio* as preliminary objection or framed

otherwise, does the point of *functus officio* qualify as preliminary objection? The second is, was the court correct in holding that it was *functus officio*?

For the better appreciation of these two issues, I will first define the two terms upon which the determination in this appeal is predicated, namely, 'preliminary objection' and '*functus officio*'. The first term, 'preliminary objection' was defined in the following terms by Sr. Charles Newbold in **Mukisa Biscuits Manufacturing Company LTD v West End Distributors LTD (1969) EA 696**:

> "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 the exercise of judicial discretion." **Sir Charles Newbold**

In further explanation by the court, it was stated that:

> ".... a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which, if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving to the suit to refer the dispute to arbitration." [Emphasis added]

Thus, a point would not qualify as preliminary objection if it contains a mixture of law and fact or where it is based on factual issues, as in in law, there can be preliminary objection where there is a mixture of legal and

factual issues or where there are facts that require proof by evidence (see **Hezron M. Nyachiya Vs. 1. Tanzania Union Of Industrial and Commercial Workers, 2. Organization of Tanzania Workers Union** Civil Appeal No. 79 of 2001, Court of Appeal of Tanzania (unreported).

On the other hand, the term *functus officio* in judicial context simply connotes that once a judge or magistrate has performed his official duty, he is precluded from reopening the decision. The Court of Appeal for Eastern Africa in **KAMUNDI V R** (1973) EA 540 stated the following with regard to this phenomenon.

> A further question arises, when does a magistrate's court become functus officio and we agree with the reasoning in the Manchester City Recorder case that this case only be when the court disposes of a case by a verdict of not guilty or by passing sentence **or making some orders finally disposing of the case** [emphasis added].

Correspondingly, in **Malik Hassan Suleiman Vs S.M.Z.** [2005] T.L.R. 236, the Court of Appeal of Tanzania Court held that:

> "**A court becomes functus officio when it disposes of a case by a verdict of guilty or by-passing sentence or making orders finally disposing of the case, in this case**, the learned judge became functus officio when he passed the judgment on 19th February 1998 and he was not

clothed with the necessary jurisdiction to review his own decision subsequently;" (Emphasis added)

From these definitions, it is crystal clear that the issue of *functus officio* is a jurisdictional issue. Therefore, it falls squarely under the description of preliminary objection. As it could be vividly seen in the definition in **Mukis Biscuits**, an objection to the jurisdiction of the court, is one among the issues specifically mentioned as issues that qualify as points of preliminary objection. Needless to say, jurisdiction is a most fundamental issue and once it is raised, it must be determined to finality because, as stated in **Fanuel Mantiri Ng'unda v. Herman M Ngunda**, Civil Appeal No. 8 of 1995, Cout of Appeal of Tanzania (unreported)

> "The jurisdiction of any court is basic, it goes to the very root of the authority of the court to adjudicate upon cases of different nature....the question of jurisdiction is so fundamental that courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial. It is risky and unsafe for the court to proceed on the assumption that the court has jurisdiction to adjudicate upon the case."

Therefore, in the instant case the approach taken by the trial court was correct because, had it not addressed itself to the issue of *functus officio,* which as stated earlier, is a jurisdictional issue, it would have assumed the risk of usurping the jurisdiction it is not vested with.

The argument raised by the appellant counsel that the court erred by perusing the court order/decree emanating from the compromise deed, is also devoid of any merit. The law is settled that, for a preliminary objection to be upheld, it had to be successfully argued on the assumption that all the facts pleaded by the other side, the appellant in this case, were correct. Therefore, in the instant case the court was correct in consulting the decree because it was part of the appellant's pleadings as it was annexed to the affidavit filed by the appellant in support of his application. In any case, the court was entitled to take judicial notice of the decree. The first issue is therefore, answered in the negative.

Regarding the second issue as to the correctness or otherwise of the ruling/order of the court, upon scrutinizing the record in the case file, I have found that the trial magistrate correctly found and held that it was *functus officio* and that it was not clothed with the requisite jurisdiction. As held in **Malik Hassan Suleiman Vs S.M.Z.** when a judge entertains which he had previously pronounced a judgment, he automatically becomes functus official and devoid of jurisdiction. In **Bibi Kisoko v Minister for Lands, Housing and Urban Development and Another (supra),** the court held as follows:

> 'I agree with Mr. Mahatane that in matters of judicial proceedings once a decision has been reached and made known to the parties, the adjudicating tribunal thereby becomes 'functus officio'.'

In **Scolastica Benedict V Martin Benedict** [1993] TLR 1 (CA), Nyalali CJ has this to say:

> As a general rule, a primary court, like all other courts, has no jurisdiction to overturn or set aside its own decisions as it becomes functus officio, after making its decisions. That is why the proceedings subsequently instituted in the primary court by the appellant in civil case No 36 of 1972 above mentioned were faulted by both the District Court of Bukoba and the High Court at Mwanza. The only exceptions to this general rule include the setting aside of ex-parte decisions, and reviews of decisions induced by fraud or misinformation.

The applicant in the instant case had applied for variation of the decree, a prayer which as correctly submitted by Mr. Ramadhan was seriously misguided as the application was not one for review which could have given the court room to review its decision.

In view of the above, I find no reason to fault the decision of the district court and I dismiss the appeal in entirety for lack of merit. Costs on the appellant.

DATED at DAR ES SALAAM this 16th day of October 2020.

J.L. MASABO

JUDGE