IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 34 OF 2021

(Arising from Civil case No 92 of 2018)

LEO LOGISTICS CO LIMITED........................... ...APPLICANT

VERSUS

EQUITY BANK TANZANIA LIMITED..................... RESPONDENT

RULING

23rd Nov 2022 & 17th February 2023

MKWIZU, J.:

The Applicant Leo Logistics Limited has preferred this application under Order XXXVII Rules 2(2) and section 95 of the Civil Procedure Code, (Cap 33 R.E 2019). The brief background facts gathered from the pleadings and parties' submissions are simple, the applicant had in 2018 obtained loan facilities from the respondent in which motor vehicles, land, and buildings owned by the applicant and her guarantors were pledged as security. The applicant defaulted on servicing the loan. He was issued with a default notice by the respondent expressing an intention to sell the mortgaged properties.

Unhappy with the notice of default, the Applicant approached the court with Civil Case No. 92 of 2018 through which a compromise deed exhibited by the parties' deed of settlement dated 31st May 2018 filed in court on 7th August 2018 was reached, and the decree thereon was issued by the court with an obligation for each party to comply. It seems the decree was not fully satisfied. It is the applicant's complaint that the

respondent has failed to comply with the court decree hence this application seeking the following orders: -

1. This honorable court is pleased to make a finding that there exists reasonable and sufficient cause to find the Respondent liable for breach of a lawful court order issued on 9th August 2018 by this Honourable Court.
2. That this Honourable court summons the Respondent's Managing Director to show cause why he or she should not be committed to prison or ordered to pay a fine for the intentional disobedience of the court order of this Honourable Court.
3. That this Honourable court is pleased to order restoration of the status quo before the breach of the Court order and order the Respondent and her agents to stop disposing of the Applicant's properties pending determination of this Application.
4. Costs of this application be provided for
5. Any other relief that the Court deems fit and just to grant.

The application is supported by the affidavit sworn on 22nd January 2021 by Keval Dinesh Bhik DIRECTOR OF THE Plaintiff's Company. In opposing the application, the respondent filed a counter Affidavit sworn on **10th June 2022** by **LUCKY TITUS KAGUO,** described as the principal officer of the respondent's Company.

This matter was initially handled by my sister, Hon Mgonya J who granted the parties leave to proceed with the hearing via written submissions.

Unfortunately, she could not finalize the process after her transfer to another Court registry. The application was then reassigned to me at the late stage of filing the written submissions by the parties.

When the parties appeared before me for the first time on 23/11/2022, the court notified them of the reassignment and the stage of the application and had no reservations for me to proceed with the next stage on the reason that the records are complete, and their evidence is embodied in the affidavits and the written submissions for the court's consideration.

I have carefully read the parties' submissions. Arguing in support of the application, the counsel for the applicant prayed to adopt the affidavit of the applicant and urged the court to consider four issues namely, whether there was a court order issued in Civil Case No 92 of 2018; whether there was a lawful court order issued by the Court in the execution No 6 of 2019; whether respondent contravened the two orders above and what are the reliefs parties are entitled to.

On the first and second issues, counsel submitted that there was in fact an order by the High Court of Tanzania, Dar es salaam in Civil case No. 92 of 2018 resulted from a compromise judgment with several terms to be complied with by the parties. And the order dated 27th July 2020 striking out execution proceedings No. 6 of 2019 by the respondent with the effect of ending the respondent's intention to sell the Applicant's properties unless the respondent filed another application for execution showing the terms of the deed of settlement which were breached by the Applicant.

Elaborating on the instances exhibiting contravention of the two courts orders by the respondent, the applicant's counsel said, (i) the respondent, acted unilaterally to sell one bus with Reg No T438 DFL at 70,000,000 below TZS 105,000,000/= established by the valuation report and without involving the applicant contrary to the terms of the consent judgment in Civil Suit No. 92 of 2018. (ii) That respondent failed to release the three buses impounded by his agent (BILO DEBT COLLECTORS) contrary to the court order ii in the consent judgment hence blocking the process by the applicant to sell the said buses at a price of 450,000,000 contrary to item V of the consent judgment. (iii)Respondent has unlawful and contrary to order Vii of the consent judgment sold Applicant's guarantor landed property No. CT No. 126192, Lo No. 487760, Plot No. 260 Block "PO" and threatened to sell other Applicants' mortgaged properties.

Mr. Shayo contended that the non-release of the applicant's vehicle was maliciously done to frustrate the applicant's efforts to pay the outstanding loan as per the agreed terms. And further, the selling of the Guarantors property by the respondent was without a valid order of attachment especially after the striking out of her application for execution by the Court. He lastly invited the court to find the respondent in contravention of the orders in the consent judgment and the orders in execution No. 6 of 2019.

On his party, the respondent's counsel shifted the blames to the applicant. He said, the applicant is in total breach of her obligations under the loan agreement executed between her and the Respondent, deed of

guarantee, and the mortgage deed and has to date failed to reservice the loan despite several reminders by the defendants.

He asserted that, the orders in Civil Case No 92 of 2018 were a result of the parties' amicable settlement where the Applicants had agreed to deposit a fixed amount of instalments at the rate of 15,000,000/= per month and find buyers for the vehicles agreed to be sold to repair the situation but the applicant has failed to comply with the court order entitling the respondent to exercise her right over mortgage under clause 9 of the terms of the settlement deed which entitles the respondent to treat the remaining loan as unpaid and proceed to enforce their contractual rights under the mortgage deed. And that what the respondent did was to comply with the deed of settlement after a further breach of the terms of the deed of settlement by the applicant.

Submitting on the order in execution No. 6 of 2019, respondent counsel said, the execution proceeding was struck out for failure by the decree Holder to demonstrate why the court should execute the Decree. This, according to the respondent's counsel did not bar the respondent from exercising her rights over the mortgage deed enshrined under the laws. He cited to the court sections 116 and 124 (1) (a) 127, 132, and 133(1)of the Land Act (Cap 113 RE 2019) and the case of **Mariam Christopher V. Equity Bank Limited & Another**, Land Case No 441 of 2017(HC) (unreported) stressing that the Notice of default on plots with CT No. 126192, LO No. 487760, Plot No. 260 Block P; CT No. 81385 LOT 283583 Plot 69 Block T; CT No. 109461 L.O No. 353403 Plot 130 Block 29 was done legally as the sale of the mortgaged properties is one of the remedies available to the Mortgagee where the Mortgagor is in default under section

126(d) of the Land Act. The case of **CRDB Bank Limited V Issack B Mwamasika and 2 Others** Civil Appeal No 139 of 2017 was also cited on this aspect.

Mr. Rwegasira went further to submit that, the call for the mortgagee to exercise her right was initiated by the Applicant's failure to honour the terms of the loan agreement and the court's decree signed by both parties without justification. He also urged the court to find the issue of maintaining the status quo pending the determination of this matter without merit as the matter has already come to an end.

Mr. Rwegasira has as well submitted at length on the legality of the loan agreement by the Applicant stating that it was an unlawful contract entered into by the parties through fraudulent misrepresentation by the Applicant's Director who declared that he only had one wife contrary to his evidence given in, Land Case No. 121 of 2021. He for the above reason invited the court to find the application without merit.

Re-joining, the plaintiff's counsel said the issue of illegality of the loan contract raised in the respondent's written submissions is an afterthought as did not form part of the proceedings in Civil Case No. 92 of 2018, execution proceedings No. 6 of 2019 nor counter affidavit by the respondent and therefore this court has no power to address the issues. The rest of his submissions are reiterations of his submissions in chief and therefore I will not reproduce them here.

In this matter, this court is invited to *inter alia,* find the respondent in breach of the two court orders, a consent judgment date 9/8/2018 and the ruling of this court in execution No. 6 of 2019, summon her managing

director to show cause why he should not be detained as a civil prisoner or be ordered to pay fine for intentional disobedience of the Court orders.

I should perhaps by way of emphasis restate a settled principle of the law that "***a Court order must be obeyed as ordered unless set aside or varied.***" This principle is based on the idea that a court order is binding and that any infringement should be treated seriously. In other words, parties to an order of the court have no option than doing what precisely the order requires them to do within the specified timelines. The rationale behind this principle is to preserve the respectability of the court order and guarantee the confidence of litigants in the administration of justice. And to make this materialise, the court is under Order XXXVII, rule 2(2) of the Civil Procedure Code [Cap 33 R.E 2019] equipped with control measures . The provisions plainly read:

> *"(2) In case of* ***disobedience or of breach of any such terms, the court granting*** *an injunction may order the* ***property of the person guilty*** *of such disobedience or breach to be attached and* ***may also order such person to be detained as a civil prisoner*** *for a term not exceeding six months unless in the meantime the court directs his release." (Emphasis added)*

As couched, the court under the above provision has two mandates*, (1) to compel obedience* of the court order by ordering attachment and fine and/or *(2) punish the disobedient party* by detaining him as a civil prisoner for being guilty of such defiance.

The detail of the provision above suggests that to hold the defying part responsible for breaking the terms of a court's order in an application of this nature, proof of the alleged "*disobedience or breach of any such terms"* by the complained party is a must. Thus, the important question to be answered by this court here should be whether there is such a breach and the extent to which it has been wilful before embarking into what should be an appropriate order under the circumstances.

At least parties counsel agrees that Civil Case No 92 of 2018 was finalized by a deed of settlement filed by the parties and adopted as a court decree. And that, the respondents' application for execution was struck out for failure by the respondent to demonstrate why the court should execute the Decree. The respondent in this application is condemned for contravening clauses 1,2, 3,5, and 7 of the deed of settlement. I will for convenience reproduce the terms of the consent judgment referred to by the parties:

> *"NOW THEREFORE THIS DEED OF SETTLEMENT WITNESSETH AS FOLLOWS THAT:*
>
> *(1) BOTH Plaintiff and Defendant shall jointly sell one bus with Registration Number T. 438 DFL being one of the four impounded buses in an open auction or private sale to obtain the market price (the market price shall not be below Tshs 105,000,000/- which is forced value as per valuation made on June 2018) and the money obtained shall be used to settle the outstanding loan amount, the*

cost of storage and auction the bus. The costs of storage and auctioning the bus shall be negotiated by Plaintiff and debt collectors, failure to reach an amicable soliton, the defendant will proceed to make payment to the debt collector by debiting the plaintiff's account.

(2) *The three remaining businesses impounded by the defendant agents (Bilo debt collectors) shall be released forthwith to the Plaintiff to continue with the business without further conditions upon signing and filing in court this Deed of Settlement.*

(3) *The Plaintiff Company shall within thirty (30) days from the date of signing and filling in Court this Deed of settlement continue to ensure the remaining seven buses comprehensively and shall make sure that the same are road worthy.*

(4) *The Plaintiff shall be allowed to make payment of Tanzania Shillings Fifteen million (TZS. 15,000,000/-) per month to reduce the outstanding loan for the period of six months from the date of recording of this settlement in court.*

(5) *The plaintiff Company shall sell three buses within six months from the date of signing and filing in court this Deed of Settlement at a price of not less than four hundred and fifty Million (Tshs. 450,000,000/-) and the obtained amount will be used to reduce the loan. After the reduction of the loan, the process of rescheduling the loan shall have b made by both parties to agree on new installments payable and period of payment.*

(6) *The Defendant Bank shall make a monthly inspection of all the buses to ensure that the same are comprehensively insured and roadworthy.*

(7) *The Defendant's notice to sell the Guarantor's properties (properties of KEVEL DINESH BHIKHA, RAJAB OMARY LIMEI and JAYVANT DHANJI BHIKA) issued and published in the Daily Newspaper of 1st June, 2018 is hereby vacated upon signing and filing in court this Deed of settlement and subject to fulfillment of all conditions of this Deed.*

(8) *All other previous securities issued by the Plaintiffs jointly and severally in respect of payment of the credit*

facilities extended to the Plaintiff before this suit shall remain valid and binding on the Defendants accordingly.

(9) *In the event the Plaintiff Company fails to fulfill any of the above terms, Defendant shall have the right to treat the remaining loan as unpaid and proceed to enforce their contractual rights under the mortgage deed. That any single default of payment of installments by the plaintiff as shall be provided in the compromise deed of settlement shall entitle the Defendant right to claim and enforce the entire outstanding amount as contracted in the loan contract together with costs and interest less actual repayments since the date of settlement.*

(10) *The parties agreed that upon signing, filing and adoption of this deed by the Court, the deed shall settle all the matters pending between the parties in relation to CIVIL CASE NO. 92 OF 2018 AND Misc. Application No. 228 of 2018 pending in this Court.*

(11) *The Plaintiff shall pay Defendant TZS 8,000,000/- plus VAT which will be charged from the account of the plaintiff as legal fees/costs In respect of costs of the CIVIL CASE NO. 92 of 2018 AND Misc. Application NO. 288 of 2018 pending in this coaurt and filing of this deed of Settlement.*

(12) *This Deed is given and accepted for the purpose of amicable settlement of the CIVIL CASE NO. 92 OF 2018 and Misc. Application No. 288 of 2018 pending in this court and avoiding the further incurrence of expense, and inconvenience of litigation. Nothing contained in this Deed, nor any consideration given pursuant to it, shall constitute, be deemed by, or be treated by any party for any purpose as an admission of any wrongful act, position, omission liability, or damages.*

(13) *Upon signing this Deed of settlement, the parties shall apply to the court and have this deed filed in court, and the matter marked settled as between the Plaintiff and the Defendant and the terms of this deed are recorded as a final non- appealable decree of this Honorable Court and to be enforceable as such.*

Z. G. Mruke
JUDGE

9/8/2018

ORDER:

i. *Perusal of court records reveals that there is deed of settlement filed on 07/08/2018 as correctly submitted by plaintiff and defendant counsel.*

ii. *In terms of Deed of Settlement filed vide exchequer receipt number 24489963 dated 7th August 2018 Civil Case Number 92 of 2018 is marked settled.*

iii. *Decree to be issued in terms of deed of settlement.*

iv. *Each party to bear own costs.*

Z. G. Mruke
JUDGE
9/8/2018"

Undoubtedly, the judgment above gave each party to this application obligations. The parties were required by the first clause of the settlement to jointly sell the vehicle with Registration. N0. T. 438 DFL at a price not below Tshs 105,000,000/-. Respondents counsel said the selling of the vehicle in question was resorted to in the exercise of the respondent's right over the mortgage deed after failure by the Applicant to honour both the Loan agreements and the consents agreements terms. This point was supported by the respondent's averment in paragraph 10 of the counter affidavit filed in court on 10th June 2022 in which two correspondence letters between the parties were attached to illustrate what commanded the selling of the Applicant's vehicle.

I have read the letters. As stated herein above, the applicants' complaint is the selling of the bus with Reg No T438 DFL at 70,000,000 below TZS 105,000,000/= established by the valuation report and without involving the applicant and failure to release the three buses impounded by his agent (BILO DEBT COLLECTORS) contrary to the consent judgment. This complaint, in my view, is well answered by the correspondence letters

attached to paragraph 14 of the applicant's affidavit in support of the application (LEO 7) and two letters attached to the counter affidavit.

It is evident from the records that, the respondent had on 12th November 2018, three months after the recording of the consent judgment by the court, written a letter to the applicant on the status of the implementation of the decree by the parties with a specific note to the applicant on the available buyer of the bus with Reg. No. T 438 DFL at a purchase price less the agreed price and their failure to get the Applicants Director to discuss the issues regarding the fulfillment of the decree. The letter also condemned the applicant for taking no action towards satisfying their obligation in the decree particularly clauses 1,3,4 and 5. The Applicant was also reminded of the express provisions of clause 9 of the compromise suit that provides for the consequence in default. The applicant was in the end required to afford the respondent a customer for the vehicle with Reg. No T438 DFL Dragon Bus fulfills its obligations under clause 1,3,4, and 5 of the consent judgment and justify why the respondent should not execute the entire decree. This letter was served to Brass Attorneys-Applicants counsel' on 14/11/2018 at around 10.40 am.

In response thereto, Applicant's counsel wrote a letter dated 15/11/2018 stating that they are still looking for a potential buyer of the bus in question. On the monthly instalment of the loan this was their response:

> *"As far as the monthly loan repayment or instalment is concerned our client has been doing all the efforts to make sure he honours the terms of the Deed of settlement entered on 7th day of August 2018, as of today he managed to repair the buses and put new tyres but also he has already paid the*

Insurance for all three buses and immediately they are going to start the business as usual.

Therefore, we expect to pay all the arrears from the Decree was passed and also continue to make the current instalment and it is our great hope that by 30th January, our client will be on current repayment or instalment".

There is nothing in the applicants' submissions disowning the authoring of the above letter. A close look at the quoted part of the Applicant's letter contains a clear admission of his involvement in the process of selling the vehicle in question and her failure to comply with the mandatory terms of the court decree.

If that is not enough, the two parties had a meeting at the Respondent's HQ offices deliberating among other issues, the selling of the Bus in question (Bus No. T 438 DFL) and the reservicing of the loan by the Applicant. Their discussions were unveiled to the court by the Applicant's counsel letter to the respondent dated 7th December 2018, (attached to the applicant's affidavit) which is partly coached thus:

"Now in respect of the first issue herein above, we appreciate the efforts done by your good Bank to secure the Prospective buyer for the bus with registration No. T438DFL, at the price of TZS 70,000,000/= however, in regard to clause 1 of the Decree the court ordered the said bus to be sold at a price not below TZS 105,000,000, ***therefore we beg your good Bank to extend time for selling the said bus to 31st December 2018*** *as our client is about to secure one customer at a price of TZS 100,000,000.* ***That if will be no***

progress up to 31st December 2018 our client will decide otherwise.

As regard, to the second issue, we ***admit that our client promised to deposit TZS 15,000,000 by December but very, unfortunately, he managed to deposit TZS 3,368,000*** *but this is* ***due to a business crisis*** *which they have faced but our client is of good motive and* ***is working hard to make sure that he honours the Decree of the court****. And we beg to be allowed to deposit TZs 7,000,000 by the 14th of December 2018.*
Lastly, we humbly ***appreciate the tolerance of your good Bank to our client****…" (bold is mine)*

The cooperation in the selling of the bus in question is conspicuous from the above-quoted part of the applicant's letter. As stated, apart from her notice to the applicant about the available buyer of the vehicle at a less value, the two had a meeting to discuss the same issue. The Applicant went ahead to set the deadline within which to provide a better offer. She gave herself time up to 31st December 2018. Neither his affidavit nor written submissions give details on whether he was able to get the better offer or not and how the respondent was to proceed thereafter. What is clear however from the affidavit in support of the application is that on 4th September 2019, the vehicle was yet to be disposed of. This is exhibited by the applicant's own letter dated 4th September 2019 addressed to the respondent itemizing the vehicle with Reg. No T 438 DFL as one of the Applicants assets with a market value of 90,000,000/=. The obvious here

is, the selling of the complained vehicle was after all efforts to have it sold at the initial set value had failed. I do not under the explained circumstances find validity in the applicant's complaint relating to the contraventions of clause 1 of the compromise decree.

The next discussion will be on whether clause 2 and 5 of the compromise decree was contravened. It is evident from the records that applicants were all along in control of the buses. In his letter dated 15/11/2018, Applicant has no claim over the three buses complained of, instead, she requested for the release of the one bus with Reg No T 438 DFL. The paragraph of the letter connected to this fact is phrased:

> *"But also we humbly request for the one bus with registration No. T438 DFL to be released to our client so that he can also continue to make repayment for the same"*

Again, the settlement proposal dated 4th September 2019 by the Applicant's counsel, listed all the applicants' properties pledged as security to the respondent with their market value. At all this time, no complaint was registered to the respondent on the non-release of the three complained buses, the fact which is just featured in this application. This means that the applicant had in her possession all her properties. The evidence adduced in this matter contradicts the complaint on the refusal by the respondent to release the buses to the extent of blocking the selling process contrary to items 2 and 5 of the consent judgment. This complaint is as well lacking proof. It is as well dismissed.

The last question arising from this application is whether the respondent's disposition of the Applicant's guarantor landed property No. CT No. 126192, LO No. 487760, Plot No. 260 Block "PO" was contrary to the Court's order. The evidence available on duration and reasons for the alleged sale will help the court in resolving this issue.

On the duration of the auction, paragraphs 11, 12, and 14, of the applicant's affidavit depose that the selling of the said plot was advertised in the Mzalendo Newspaper dated 6th December 2020 followed by the actual auctioning and a 30 days' notice to evict the guarantor from the suit premises issued on 16 January 2021. Thus, the auctioning of the complained plot was done almost three years after the recording of the compromise decree by this court.

I have keenly revisited the consent judgment. The Applicant was among other orders, required to make a monthly payment of Tanzania Shillings Fifteen million (TZS. 15,000,000/-) for the period of six months from the date of the judgment. It is also obvious from the party's affidavit that applicant was in breach of the terms of the consent decree which she freely consented to. This is exhibited by her own letters dated 12/11/2018 and 7/12/2018 quoted above. Admitting this fact, the Applicant's counsel went further in his letter dated 7/12/2018 to appreciate the Respondent's tolerance to the applicant's apathies. And the respondent's counsel has maintained that the sale was properly done in terms of clause 9 of the consent decree after the failure of the applicants to honour the terms of the loan agreement and the consent judgment. Clause 9 reads:

> *"In the event the Plaintiff Company fails to fulfil any of the above terms,* ***Defendant shall have the right to treat the remaining loan as unpaid*** *and* ***proceed to enforce their contractual***

> ***rights under the mortgage deed.*** *That **any single default of payment of instalments by the plaintiff** as shall be provided in the compromise deed of settlement **shall entitle the Defendant right to claim and enforce the entire outstanding amount** as contracted in the loan contract together **with costs and interest less actual repayments since the date of settlement."** (Emphasis added)*

There is no gainsaying therefore that the complained sale by the respondent was mandated by the consent decree as stipulated above. It should be remembered that the main point brought for this court's determination is the ***"breach of the court's order***" by the respondent. My evaluation has failed to find any clause of the consent decree that was disobeyed by the respondent. All that the respondent did was within the dictates of the court's order. This ground is as well without merit.

But before I pen off, I find it pertinent to say a word on the issue of the legality of the loan agreement raised by the respondent's counsels in his written submissions. I have revisited the affidavit both for and against the application. There is no mention of that issue which respondent counsel is inviting this court to determine through a back door. As rightly stated by the applicant's counsel, the fact that the loan agreement is tainted with illegality- fraudulent misrepresentation as named, came erroneously into the court records through the respondent's written submissions which is not a pleading.

The settled principle of law states that parties are bound by their pleadings. See for instance the decision in **NHC vs. Property Bureau (T) Ltd**, Civil Appeal No. 91 of 2007 (unreported) where the Court of Appeal held:

"It cannot be overstated that for an issue to be determined by the Court it must have been specifically raised in the pleadings. The rationale to this is not hard to discern; pleadings are designed to facilitate the setting out of the plaintiff's claim sufficient particularity to enable the defendant to respond. Accordingly, a party may not be permitted to raise a ground which is not pleaded because the respondent will not have had an opportunity to rebut".

And in **Yara Tanzania Limited vs Ikuwo General Enterprises Ltd**, Civil Appeal No. 309 of 2019 where a parallel decision was taken with the following observations:

"O. VI R. 7 of the CPC requires that all material facts constituting the claim should be founded on pleadings and that new facts not pleaded cannot unless by way of amendment of pleadings, be relied upon in determining the case."

I will for the foregoing reasons, refrain from deciding the raised point.

All said and done, the application is dismissed for lacking of merit. Respondent to have her costs. Order accordingly.

DATED at **Dar es salaam** this 17th day of **February** 2023.

E.Y. MKWIZU
JUDGE
17/02/2023