IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 200 OF 2015

INDEPENDENT POWER TANZANIA LIMITED ..... 1ST PLAINTIFF

PAN AFRICAN POWER SOLUTIONS TANZANIA LIMITED ..... 2ND PLAINTIFF

VERSUS

TANZANIA ELECTRIC SUPPLY COMPANY LIMITED ..... DEFENDANT

RULING

S.M. MAGHIMBI, J.

At the onset of his submissions to support the point of objection, Mr. Webiro prayed to drop the second point of objection and submitted on the first point of objection only. The objection is to the effect that this court is functus officio to determine the matter before it because in the Civil Case No. 90/2018, the court conclusively determined the rights of the parties arising from or in connection to the power purchase agreement and the implementation agreement. He argued that proceeding with another claim relating to power purchase and implementation agreement is improper.

He then elaborated that in the suit at hand, the reliefs sought by the plaintiffs are arising from or in connection to power purchase agreement as well as implementation agreement which was executed between the plaintiff and the defendant for the purposes of generating electricity. That in the Civil Case No. 90/2018 both the first plaintiff and the Government (through the Attorney General and the Permanent Secretary, Ministry of Energy) concluded a deed of settlement which was recorded as a decree of this Hon. Court. That in the said deed, among the terms which were agreed upon by the parties as gathered on para 13-15 of the decree, parties voluntarily agreed that the defendant who is the first plaintiff in this matter (IPTL); was to withdraw all pending cases instituted against the Government of the United Republic of Tanzania (URT) or TANESCO in any court or outside the URT arising from or in connection with power purchase agreement ("PPA") entered between IPTL and TANESCO on 26th May 1995 and the implementation agreement ("IA") entered between IPTL and TANESCO on 08th June, 1995.

He went on elaborating that parties agreed further that IPTL, the 1st plaintiff in this suit, shall have no any future claim/dispute whatsoever against the government and TANESCO or other third party arising or in connection to the power purchase agreement entered between IPTL and

TANESCO on 26th May 1995 and the implementation agreement entered between IPTL and TANESCO on 08th June, 1995. Further that it was further agreed, notwithstanding the provisions of the PPA relating to expiration and termination, the PPA shall terminate and discharge TANESCO of all its obligations whatsoever borne from the said PPA.

He then argued that because this deed of settlement was recorded as a decree of this Hon. Court, the court is now functus official first to proceed with the hearing of the case while parties had agreed that all pending cases relating to PPA filed by the plaintiff against the defendant have to be withdrawn. That it will not be proper because the court is functus officio to hear a case which parties had agreed that the plaintiff would have no further claims against the defendant and the government arising from or in connection to the power purchase agreement. The court is also functus officio between parties had agreed that the PPA is terminated and the defendant was discharged of all his obligations in relation to the PPA, he emphasized.

Mr. Webiro went on submitting that the court has stated times and again that if it has disposed a case or has granted orders which finally disposes the case, it becomes functus officio to determine the matter. He supported his submissions by citing the decision of the Court of Appeal of

Tanzania (CAT) in the case of **Karori Chogoro vs Waitihache Merengo (Civil Appeal 164 of 2018) [2022] TZCA 83 (1 March 2022)** whereby at page 8, the court cited with approval the case of TTCL & Others Vs. Tree Telecommunication Tanzania Limited, 2006 Vol I EALR 393 where the court had this to say:

> *"a further question arises when does a magistrate's court becomes functus officio and agreed with the reasoning in the Manchester City Recorder case that this case only be when the court disposes of the case by a verdict of not get or passing sentence or some orders finally disposing off the case."*

Mr. Webiro then submitted that although the holding is making reference to Magistrate Court, it can be simply termed as a court. As for the case at hand, his submission was that since the issue relating to liability and rights of the parties in relation to the PPA and Implementation Agreement where conclusively determined by this court in Civil Case No. 90/2018, the cited case is relevant to the matter at hand. He hence urged the court to be pleased to follow the holding in this decision and find that in this matter, it is functus officio. That the relief sought at page 125 of the plaint, relief No. iiijjjkkk, and all of them just to mention a few they relate to PPA. That the entire plaint is arising from or is in connection to the PPA.

His conclusion was that under the circumstances, he reiterates his prayer that the court be pleased to find that it is functus officio and consequently thereto struck out the suit with costs.

In reply, Mr. Manyama, started by denying at the onset that in this case at hand, this court is functus officio. His argument was that there is no court whatsoever, even this Hon Court which has heard the parties in this case at hand and determine the case and the reliefs sought on merits. He then submitted that the court becomes functus officio when it has previously determined the same case, between the same parties on merits to finality and on the same subject matter. He cited the case of **Karori Chogoro** (Supra) whereby these conditions were well expounded by the Court of Appeal, particularly at page 9 third paragraph where the court elaborated how it becomes functus officio and held:

> *"This inevitable made the Chairman functus officio meaning he could not entertain the same parties over the same subject matter."*

Mr. Manyama then submitted that there is no decision which has been reached by this court regarding this case whose parties are IPTL and Pan Afican Power Solutions Limited (PAP) and Tanesco who is the defendant. He submitted further that the alleged Civil Case No. 90/2018 was just between

the Attorney General and the Permanent Secretary-Ministry of Energy as plaintiffs against IPTL as defendant and the plaintiffs in the said case are not parties in this case. Further that Pan African Power Solution, the 2nd plaintiff herein and Tanesco were not parties in the Civil Case No. 90 of 2018, neither did they sign the said deed because they were not a party therein and therefore they cannot be bound by a decree recorded thereto.

Mr. Manyama went on submitting that the said decree in Civil Case No. 90/2018 is now subject of revision in the Court of Appeal in Civil Application No. 917/01 of 2023 where one of the shareholders of IPTL who is Urassia Holdings Limited challenges the legality of the said deed of settlement as well as the decree. The substance of the challenge, he submitted, is that in the deed attached as Annexure OSG-2 to the WSD, it was only one shareholder, Habinder Singh Seth, who signed the deed while under coercion in Ukonga Civil Prison.

To sum up, Mr. Manyama submitted that the PO that has been raised is purely baseless and does not qualify to be a PO as it requires some evidences to justify the allegations. For example, he pointed, Mr. Webiro submitted on the content of PAP of 1995 of which to ascertain the content, we need to look at the PAP and the same has to be tendered in evidence hence cannot be raised at this stage of the proceedings. He argued that a

PO must be on pure point of law without evidence, supporting his argument by citing the case of **Mathew P. Chawanga & Another vs Major Timoth Magege & Others (Land Case No. 69 of 2016) [2017] TZHC 2177 (21 March 2017),** this case was almost facing similar circumstances as in this case, whereby at page 4 and 5 of the ruling as the court held that:

> *"The PO must be on pure point of law without requiring any evidence to justify some allegations".*

He further cited the decision of the Court of Appeal in **Mohamed Enterprises (T) Limited Vd Masoud Mohamed Nasser (Civil Application 33 of 2012) [2012] TZCA 67 (23 August 2012)** whereby at page 10-11 the Court insisted that a PO must be pure point of law without proof of evidence. He concluded by a prayer that the PO be dismissed with costs because some of the alleged facts require evidence and that it does not meet the requirement of doctrine of functus officio.

In his rejoinder submissions Mr. Webiro started with Mr. Manyama's last submission, where he counter argued that this PO is pure point of law which requires no evidence. He contended that all the reliefs sought in the claims are in connection with power purchase agreement and implementation agreement between the plaintiff and the defendant, the facts which have been pleaded by the parties. Further that all the reliefs are

arising and are in connection to PPA. That all the reliefs are arising from and some are in connection with PPA and implementation agreement. He pointed out that this court has recorded the plaintiffs in which the plaintiffs had agreed to voluntarily withdraw all cases relating to PPA and implementation agreement. The plaintiff had agreed that the plaintiff will have no further claim or dispute against the defendant arising from or in connection to PPA.

Mr. Webiro went on submitting that the plaintiffs have not disputed that the claims in the plaint are arising and in connection with PPA and that is why he has not commented on that issue. His argument was that by not commenting on that he has impliedly admitted that all what has been pleaded in the plaint are arising from or in connection to the PPA and that the deed of settlement was recorded as a decree of this court hence it is not evidence as submitted by Mr. Manyama because the court takes judicial notice of its previous decision. On that limb of argument raised by the plaintiff, Mr. Webiro reiterated his submission in chief and insisted that this is a point of law which requires no evidence.

In the submission that the court is Functus Officio, Mr. Webiro rejoined that although he has not mentioned on parties and subject matter, he is aware that the subject matter in this suit is the same and is on PPA and Implementation Agreement. He reiterated his argument that all issues of

liability and rights of the parties regarding those two agreements was finally determined by the court in Civil Case No. 90/2018 whereby it was decreed that the said agreements were to terminate and the defendant would have no future claim against the government as well as the defendant.

Mr. Webiro also submitted that since the subject matter was the same and the court had decided on the issue, the court is functus officio to determine issue relating to power purchase and implementation agreement while the court had already stated that the same had terminated and there will be no future claim against the defendant in relation to that agreement. That the two agreements are not in force due to a decree of this court in Civil Case No. 90 of 2018 and the plaintiffs are barred from enforcing all the rights arising from those two agreements because it was agreed that the two agreements should terminate.

On the issue that the parties are not the same, he argued that the issue is not relevant, the court should take issue of subject matter and even if reliefs are different or parties are different, if the court has decided on the subject matter then it is functus officio. With regard to the issue of different parties, he submitted that although TANESCO was not a party to the suit, she was the one referred in the deed of settlement. He then argued that although TANESCO was not a party, in the decree of the court, para 13-15

TANESCO was mentioned to be discharged from obligation and the plaintiffs were barred from bringing a suit against the defendant herein hence the issue of parties being different can easily be resolved. He therefore argued that the case has met all the condition of functus officio because Tanesco was a party in the decree of the court and the subject matter is the same.

On the last issue of a decree being challenged, Mr. Webiro submitted that as long as the same is not reversed by the court as no decision has set it aside, the same is still in force and the court be pleased to find that it is functus officio to determine issues which were already agreed upon and decreed by the court. He concluded by reiterating his prayer that the suit be struck out with costs.

Having heard the parties, I find that the first issue I have to determine is whether the PO at hand qualifies to be determined as a preliminary point of law or whether it requires some facts to be determined. It was Mr. Manyama's argument that does not qualify to be a PO as it requires some evidences to justify the allegations. He pointed the content of PAP of 1995 of which to ascertain the content, we need to look at the PAP and the same has to be tendered in evidence hence cannot be raised at this stage of the proceedings. He cited the case of Mathew **P. Chawanga & Another vs Major Timoth Magege & Others (Land Case No. 69 of 2016) [2017]**

TZHC 2177 (21 March 2017), where the Court of Appeal emphasized that a PO must be on pure point of law without requiring any evidence to justify some allegations.

With respect to the learned Counsel, there is nothing in this PO which requires evidence to be ascertained. The essence of Mr. Webiro's point of objection is that there is a decision of this court arising from a settlement agreement which was Decreed by this court in the Civil Case No. 90/2018. His emphasis was that in the Decree, both the first plaintiff and the Government (through the Attorney General and the Permanent Secretary, Ministry of Energy) concluded a deed of settlement which was recorded as a decree of this Hon. Court. In the said deed, among the terms which were agreed upon by the parties as gathered on para 13-15 of the decree, parties voluntarily agreed that the defendant who is the first plaintiff in this matter (IPTL); was to withdraw all pending cases instituted against the Government of the United Republic of Tanzania (URT) or TANESCO in any court or outside the URT arising from or in connection with PPA entered between IPTL and TANESCO on 26th May 1995 and the IA entered between IPTL and TANESCO on 08th June, 1995. Therefore, all I have to do at this point is scrutinize the decree of this court in Civil Case No. 90/2018 and see whether what was decreed therein makes this court functus officio in determining this suit.

Before I proceed, I must make it clear that when the issue in court is the judgment or decree of the court, the law requires us to take judicial notice of the existence of decree and judgment of the court hence it is not a matter which can be categorized as the one requiring evidence to be determined. The case would have been different if the plaintiff herein denied the existence of the said decree or any PPA or IA that was pleaded and argued by Mr. Webiro. That does not seem to be the case and the obvious is that in his submissions, Mr. Manyama did not deny the existence of the said Decree in Civil Case No. 90/2018. His argument was that the parties herein were not parties in the Decreed suit because there it was just between the Attorney General and the Permanent Secretary-Ministry of Energy as plaintiffs against IPTL as defendant. His emphasis was that he plaintiffs in the said case are not parties in this case and that Pan African Power Solution, (the 2nd plaintiff herein) and Tanesco the defendant were not parties in the Civil Case No. 90 of 2018, neither did they sign the said deed. He also argued that the said decree in Civil Case No. 90/2018 is now subject of revision in the Court of Appeal in Civil Application No. 917/01 of 2023.

As pointed out, the Plaintiffs' advocate did not deny the existence of the said Decree in Civil Case Ni. 90/2018 hence we do not require evidence or long drawn argument to prove that there is in deed a Decree that may

render this court functus officio. Therefore, the point raised by Mr. Webiro can very well be determined as a preliminary point of objection.

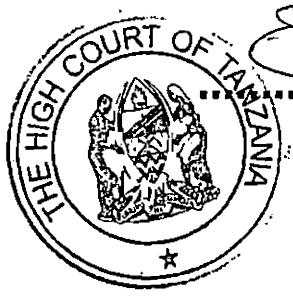
Having said the above I will now proceed to determine the point of objection as raised. That this court is functus officio to determine the current matter having in existence the decree in Civil Case No. 90/2018. Since the plaintiffs did not deny the contents of the said agreement, nor the decree, the only thing remaining is to look at the decree therein to see whether the contents of what was decree have the effect of barring the determination of this suit in relation to the parties in the two suits, issues directly or substantially in controversy and the subject matter.

In the previous suit, the 1st plaintiff herein was the defendant, who was sued by the Attorney General and the Permanent Secretary, Ministry of Energy as the 1st and 2nd plaintiffs respectively. However, in the said suit, the defendant herein was the main subject of which the losses incurred in Arbitration proceedings against the plaintiffs were based. It is undisputed as gathered on para 13-15 of the decree, parties voluntarily agreed that the defendant who is the first plaintiff in this matter (IPTL); was to withdraw all pending cases instituted against the Government of the United Republic of Tanzania (URT) or TANESCO in any court or outside the URT arising from or in connection with PPA entered between IPTL and TANESCO on 26th May

1995 and the IA entered between IPTL and TANESCO on 08th June, 1995. Since the suit at hand involves the second defendant and mentioned in the decree and the first plaintiff who was a party to the said decree, then as per the settlement decree, the plaintiffs are precluded from bringing any action against the defendant herein. The argument that there is a pending revision on the decree which was filed in the Court of Appeal just last year, which is five years after the plaintiffs were to withdraw any pending matter between the parties, does not confer jurisdiction to this court to determine the current suit as the terms of the decree are still intact and the suit should have long been withdrawn as per the agreement. On that note, I sustain the first point of objection that the court is functus officio to determine the current suit while the same has already been decreed in Civil Case No. 90/2018.

In conclusion therefore, since the agreement was reached during the pendency of this suit which was filed in 2015, the same ought to have been withdrawn as decreed by this court. That being the case, the suit beforehand is hereby struck with no order as to costs.

Dated at Dar-es-salaam this 07th day of May, 2024



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S.M. MAGHIMBI

JUDGE