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

COMMERCIAL CASE NO. 101 OF 2003

TANINGRA CONTRACTORS LTD.....PLAINTIFF
VERSUS
MAUNGU SEEDS COMPANY LTD.....DEFENDANT

JUDGMENT

KALEGEYA, J:

This is an interesting case.

On 30/7/2002, the parties executed a Sale Agreement (tendered as Exh.P7) by which the Plaintiffs sold their property on **Plot No. 27, Tom Estate Kurasini,** Dar es Salaam to Defendants at a consideration of USD 190.000. Let clause 2 – 13 of the Agreement detail other terms:

> *"2. That the payments will be made to the Vendor in the following manner or term namely:*
>
> *(a) That US Dollars One Hundred and Ten Thousand (USD.110,000) to be paid on the date of signing of this agreement.*
>
> *(b) That US Dollars Twenty Thousand (USD.20,000) to be paid on 1st day of August, 2002.*
>
> *(c) That US Dollars Twenty Thousand (USD.20,000) to be paid on 1st day of September, 2002.*

(d) *That US Dollars Twenty Thousand (USD.20,000) to be paid on 1st day of October, 2002.*

(e) *That US Dollars Twenty Thousand (UD.20,000) to be paid on 1st day of November, 2002.*

3. *That the Vendor will acknowledge receipt of the said installments by signing on appropriate space provided for below and to be witnessed by the Commissioner for Oaths.*

4. *On receipt of the last installment, the Vendor will immediately handover to be Purchaser all documents in their possession which relates exclusively to the plot and all existing improvements thereon including fixtures, fittings and generator to the Purchaser.*

5. *That the Vendor guarantees that the property sold to the Purchaser is free from all encumbrances whatsoever and further that its description is believed and shall be deemed to be correct as disclosed or as apparent on inspection or search by each of them. Furthermore, the Vendor knows no overriding interests regarding the property.*

6. *The Purchaser undertakes to process at his own costs, the transfer of the title from the Vendor's name into his soon after the last payment as provided for under paragraph 2 herein above.*

7. *That the Vendor undertakes to furnish to the Purchaser with all receipts indicating that all those charges, taxes, rents and rates have duly been paid to the relevant authorities up to the date of sale/transfer.*

8. *Further, once the Purchaser has taken over the possession of the property he will thereafter be liable to pay any future taxes, rents levies and other charges on the respective property either by the Central Government or local government authority.*

9. *That immediately after execution of this agreement by all parties hereto, the Vendor will deliver to the Purchaser, a*

resolution of the Board of Directors expressly authorizing the sale of its respective property as well as its approval to the term and conditions herein.

10. *That the Vendor and the Purchaser shall execute a Deed of Transfer in the form annexed hereto and that for purpose of the Stamp Duty Act, 1972, this Agreement shall be principal instrument chargeable with the* ***ad valorem*** *duty for the transfer.*

11. *That the Purchaser shall bear the costs of valuation, Stamp Duty, transfer and legal fee connected with preparation of all documents and completion of transfer.*

12. *That in event the Purchaser does not succeed to have full payment be honored as provided for – under paragraph 2 herein above the amount already paid will be considered as a rent and all parties will revert to their original positions.*

13. *This Agreement has been entered into by the parties on mutual understanding and any misunderstanding between themselves will be settled amicably by referring it to an impartial arbitrator agreeable to both of them."*

However, the down payment was never paid upon execution as agreed and subsequently parties varied the terms of the Agreement. Non – payment notwithstanding, Defendants went into possession of the property todate. The question of the variation: when, why and how, require a detailed analysis as it is seriously contested.

On 2/9/2002, the Defendants paid into Plaintiffs' account USD 100,000, followed by a letter (Exh.P3) promising to pay the balance within a week's time. Exh.P3 runs as follows:

"02 September 2002os/mw

Mr. Ivan Mrkobrad,
Managing Director
TANINGRA CONTRACTORS LTD,
P.O. BOX 23044
DAR ES SALAAM

Our Letter of 15 August 2002
Our First Payment (US$100,000), Eurafrican Bank

Dear Mr. Mrkobrad,

As, by now, you have received the first part – payment of approx. US$100,000 (United States Dollars one hundred thousand only) with a proportionally very slight deduction as bank charges, we wish to confirm that the next payment of US$100,000 shall be effected on 10 September 2002.

Having by then paid a total of US$200,000 as per agreement, we shall then sit together and compromise on the rate due of the short delay in fulfilling our contractual obligation on timely payment.

Kindly issue us a preliminary receipt for this first payment, your lawyer should issue the final receipt after full payment.

We once again thank you for your kind understanding and remain,

Yours truly,
MAUNGU SEED COMPANY (T) LTD
Sgd
Babu Osman
Chairman"

That promise was not fulfilled.

Meanwhile, the Defendants (Maungu Seed Company (T) Ltd filed an action against Taningra Contractors Ltd in the High Court Registry, (DSM) in Civil Case No. 359 of 2002.

I should pose here and observe that though reference was made to some orders made in the said case none of the parties, at any given stage in this matter, bothered to avail the Court with the main pleadings therein. As I found them necessary during the composition of this judgment I called for copies thereof. For clarity I will quote them substantially.

Salient paragraphs of the Plaint in that case are as follows:

"3. That the Board of Directors of the plaintiff discussed and approved the purchase of a building including the plot located at 27 Tom Estate, Kurasini Dar es Salaam from the Defendant represented by one Mr. Ivan Mrkobrad as its Managing Director.

4. That the agreed price is United States Dollars 180,000 (One hundred and eighty thousand only) plus a stanbay generator of US $10,000 (Ten thousand only) and subsequently a sales agreement was prepared and duly signed on the 30th July 2002 by the respective Managing Directors of both Companies. This sale agreement is annexed hereto and marked Ann "A" which the plaintiff craves leave of the Honourable Court to refer to it as part of the pleadings.

5. That thereafter the plaintiff gave written instructions to Eurafrican Bank (T) to transfer from the credit with them the sum of US $ 100,000 (One hundred thousand only) to the said Defendant/Managing Director and to – date the amount of United States dollars 100,000 (One hundred thousand only) has been paid directly into the business account of the Defendant Company held and operated at the same Eurafrican Bank (T) Limited, Kivukoni/Ohio Street head office Dar es Salaam.

6. That to the plaintiff's surprise the said defendant presented to the chairman of the plaintiff company at the meeting at its

Kurasini Offices a "Deed of Variation" Signed by the Managing Director of the two companies on the 8th August 2002 without the prior approval of the plaintiff's Board of Directors.

7. *That the requirement of the plaintiff's Managing to obtain an approval from the Board of Directors to signing of the "Deed of Variation" was a necessary measure since the said "Deed of Variation" clearly invalidates the original agreement and is grossly illegal and alters or outright cancels the most essential components of the original sales agreement that had been approved by the Board of Directors.*

8. *The plaintiff's chairman had not any prior knowledge of the existence of such document and that the plaintiff contents that the existence of the said "Deed of Variation" is fraudulent and illegal and contrary to public policy and the business statues of the plaintiff's company and further that this "Deed of Variation" is unethical and indecent and in its totality should be declared null and void by this Honourable Court.*

9. *That the Board of Directors of the plaintiff has already paid more than 50% of the contractual price and is willing to finalise the differential amount subject to defendant received so far and this honourable Court should declare that the said "Deed of Variation" is illegal and null and void.*

10. *That on top of that the defendant is harassing and molesting the plaintiff and therefore the honourable court should issue an injunction to restrain the defendant his servants Workmen agents from evicting the plaintiff from the demised premises.*

11. *That there have several meetings requesting the Defendant to stop doing such activities and continue to respect the original agreement without success."*

with the prayers paragraph running as follows:

"WHEREFORE the plaintiff prays for judgment and decree against the defendant for:-

1. *To issue an injunction to restrain the Defendant, his servants, Workmen and agents from evicting the plaintiff from the demised premises.*

2. *To issue an injunction against the Defendant, his servants, workmen and agents from molesting and harassing the plaintiff.*

3. *That the Honourable Court should order both parties to revert and respect the original agreement.*

4. *The defendant be ordered to issue receipt of the first payment of USD 100,000 and the plaintiff be allowed to pay the remaining balance of the original sale price of the demised premises."*

The Defendants on the other hand, disputed the claims and counter – claimed. The written statement of Defence and the counter – claim are as follows:-

"2. That the contents of paragraph 3 of Plaint are denied. The Defendant submits that all discussions in relation to the said sale of Plot No. 27 Tom Estate were conducted between Mr. John P. Snell and Mr. Venance Mosha in their capacities as the Managing Director and Director of operations of Maungu Seed Company (T) Ltd respectively; and Mr. Ivan Mrkobrad on behalf of Taningra Contractors Ltd as the Managing Director.

3. That the contents of paragraph 4 of the Plaint are denied. The Defendant submits further that the sale agreement was prepared and duly signed on 30th day of July 2002 but the Plaintiff failed to comply with the above mentioned sale agreement. Therefore in their letter dated 2nd day of August, 2002, the Plaintiff requested for variations hence preparation of a Deed of Variation and which was duly signed by the

Plaintiff and the Defendant on 6th day of August, 2002……

4. *That the contents of paragraph 5 of the Plaint are noted and the Defendant submits further that the Plaintiff had instructed the Euro African Bank to transfer the said amount of money but the same was transferred after deduction of the bank charges therefore the amount transferred was less than US Dollar 100,000 as stated.*

5. *That the contents of paragraphs 6,7 and 8 of the Plaint are denied. The Defendant submits that the said Deed of Variation was not signed on 8th day August, 2002 and without the prior approval of the Plaintiff's Board of Directors as stated, because the Plaintiff was aware of the existence of the said Deed of Variation and is the Plaintiff themselves who requested for preparation of the said Deed of Variation and in fact is the Managing Director who signed the original Agreement, is the same who signed the Deed of Variation.*

6. *That the Defendant submits further that during the execution of the original documents (the original agreement) the Plaintiff's Managing Director didn't produce approval from the Board of Directors authorizing him to sign the said agreement therefore this requirement can not be raised when the Deed of Variation is executed. Further that even the chairman was aware of the existence of the said deed of variation and the chairman's letter dated 2nd September, 2002 is an acknowledgement thereof. ……*

7. *That the contents of paragraph 9 of the plaint are denied. The Defendant submits that the Plaintiff could not pay according to his wishes and at the same time apply for orders to declare the agreements (original agreement and the deed of variation) null and void.*

8. *That the Defendant submits further that the Plaintiff has failed to pay according to the agreed terms conditions this case have been and filed only this case to facilitate their dilatory technique.*

9. *That the contents of paragraphs 10 and 11 are denied and the Defendant submits that they were pleaded to tarnish the good name of the Defendant as the Defendant had honestly allowed the Plaintiff to use the said premises before payment of any single cent.*

10. *That the contents of paragraph 12 and 13 are noted.*
……
……

COUNTER – CLAIM

11. *That by way of a Counter – Claim the Defendant claim against the Plaintiff as follows:*

12. *That the Plaintiff herein above failed to honor the said agreement and on 2nd day of August, 2002 through the Managing Director and its Director of operations wrote to the Defendant.*

13. *Request for additional time and for payment of voluntary penalty of US Dollar 10,000 and additional penalty equivalent to 10% of the total purchase price to be compounded on weekly basis until such time when the debt is settled in full……*

14. *That the Defendant out of courtesy and knowing the Plaintiff had itself imposed difficulty conditions as per into the said letter advised the Plaintiff to execute a Deed of Variations and which was duly accepted. The Deed was they duly signed on 6th day of August, 2002……*

15. *That in the said Deed Variation the Plaintiff agreed inter alia that in case of default it should effect payment of US Dollar 50,000 being rent and damages for breach of contract of sale and further agreed to vacate the said premises within 7 days from the date of default and payment of the above stated sum of money.*

16. *That the Plaintiff had defaulted and instead of paying the said rent and damages and vacate the suit promises, started to write several letters praying for extension of time though it managed to pay less than US Dollar 100,000 only. Later on the Plaintiff rushed to this court for injunctive orders.*

17. *That the Defendant's claim against the Plaintiff is for a declaration order that the agreements (original agreement and the Deed of variation) have been breached by the Plaintiff and the said breach is fundamental and therefore the parties be ordered to return to their original status and the amount paid be considered as a rent and damages.*

18. *That the Defendant honestly believing that the Plaintiff was an honest buyer and a serious one, allowed the Plaintiff to use the premises even before payment of a single cent.*

19. *That the Defendant did on severally and very politely requested the Plaintiff to vacate the said premises so that the Defendant could find another potential buyer as the Defendant wanted to settled his liability with the bank, but the Plaintiff has refused to vacate todate nor discharge its debt.*

20. *That due to the said refusal by the Plaintiff, the Defendant had suffered substantial loss being in terms of bank interest and embarrassment and which bank has issued notice to the Defendant's properties.*

21. *That the Defendant's claim is above 12 million and therefore this court has jurisdiction to entertain the counter – claim.*

WHEREFORE, the Defendant prays for judgment and decree against the Plaintiff as follows:

1. *That the Plaintiff be ordered to vacate the suit premised located at Plot No. 27 Tom Estate Kurasini, Dar es Salaam and the amount paid be considered as a rent and damages for breach of contract.*

2. *That Plaintiff be ordered to pay for electricity, water and telephone before vacating the premises and leave the premises to its original state (when the entered).*

3. *That the alternative to (a) and (b) above the Plaintiff be ordered to pay the balance of US Dollar 150,000 as agreed in the Deed of variation.*

4. *That the Plaintiff be ordered to pay damages due to the breach of contract to the tune not less than Tshs.20 million or as may be assessed by the Honourable Court.*

5. *That the Plaintiff be condemned to pay costs of this suit.*

As to what transpired in that case let us travel through the following.

The said Civil Case was filed on 7/10/2002 while the written statement thereof was filed on 15/11/2002.

On 22/1/2003 the following order was made:-

"22/01/2003:
Coram: Ihema J.
Bwahama: For the Applicant/Plaintiff
Msuya/Kaluwa: For the Respondent/Defendant
CC: Komba

Order:
By consent the applicant/plaintiff undertakes to pay the balance of USD100,000 on or before 17/02/2003. In the event of default each party to revert to own position, i.e. repossession of the suit premises and refund of USD100,000 paid in advance. No order for costs.

Mention in chambers on 1/2/2003.

Sgd:

S. Ihema
Judge
22/01/2003"

As the said order was not complied with, Taningra Contractors Ltd threatened for eviction by way of execution. This prompted Maungu Seed Company (T) Ltd to apply for an order for stay and which they secured on 21/2/2003 in the following wording:

"Order:
Upon hearing Mr. Bwahama, advocating for the Applicant/Plaintiff, and in absence of the Respondent/Defendant for the orders that the execution by way of eviction be stayed pending the refund of US dollars 100,000 by the Defendant/Respondent to the Applicant/Plaintiff, and further that the Respondent/Defendant be restrained from executing the decree till the refund, by the respondent of US dollars 100,000, as ordered on 21/1/2003. This Court having considered the merits of the application hereby grants the same as prayed.

Matter to be mentioned in Court on 24/2/2003 at 1 p.m. sharp. The Respondents to be served and in meanwhile the status quo to be maintained.

Sgd:
A.G. Bubeshi
Judge
21/2/2003"

The said Civil Case No. 359/2002 went on simmering till 22/8/2003 when the following order was entered by the Court,

"Order
Coram: Ihema, J.
Kapulata: For the Plaintiff

Msuya: For the Defendant

Msuya:
My Lord we pray to withdraw the counter – claim with leave to file a fresh suit. We contend that the counter claim is based on a different subject matter altogether.

Order:
Leave to withdraw the counter claim with liberty to file a fresh suit in terms of Order XXIII Sub Rule 1 (b) is granted as prayed. Mention in Chambers on 1/10/2003."

Sgd:
S.E. Ihema
Judge
22/8/2003"

Thus licensed, on 24/10/2003, the present Plaintiff (who was Defendant in cc No. 359 of 2002) instituted the present suit whose gist of the claims can properly be grasped from para. 11 up to the prayers' paragraph in the plaint which run as under:-

"11. That subsequent to payment of USD.100,000 the Defendant rushed to this court, at the Dar es Salaam Registry, at Dar es Salaam, for injunctive orders and which were granted ex – parte.

12. That after institution of the said case, Civil Case No. 359 of 2002 the court issued a consent order to the effect that the Defendant pays the Plaintiff the sum of USD 100,000 on or before the 17th day of February, 2003 or else vacate the premises and if fails the parties to revert to their original position. ……

13. That the Plaintiff since then, had on several times and very politely requested the Defendant to vacate the said premises so that the Plaintiff could find another potential buyer in order to

enable it settle its liabilities with the bank as had informed the Defendant before, but the latter has refused neither to vacate the said house nor discharge its debt todate.

14. *That the Defendant's breach of the said agreements and the order of the court as stated herein above have led the plaintiff to suffer specific loss as follows:-*

    (i) Loss of utility bills
    (a) Electricity Bills 6,113,062.60 cts as of 28th day of August, 2003
    (b) Reconnection fee, penalty & VAT – 372,783.60 cts
    (c) Telephone Bills 17,347,322.68 cts

    (ii) Accumulated bank interest Tshs.93,537,121,40 cts as of August 2003
    That the total amounts to the sum of Tshs.117,370,290.20 cts……

15. *That following such breach the Plaintiff has suffered and wherein claims for general and punitive damages.*

16. *That the Plaintiff further claims that part of the purchase price already paid by the Defendant be considered and used to offset the claimed sum under paragraph 14 herein and the Defendant be ordered to vacate the said premises in terms of the order of this court dated 17th day of February, 2003, and that it be ordered to pay the whole of the balance thereof in terms of paragraph 14 herein.*

17. *That the Plaintiff's claim is above 100.0 million and therefore this court has jurisdiction to entertain the matter.*

WHEREFORE, the Plaintiff prays for judgment and decree against the Defendant as follows.

1. *That the Defendant be ordered to vacate the premises in compliance with the order of this court dated 17th day of August, 2003.*

2. *For orders as per paragraph 16 herein*

3. *For payment of damages; general and punitive as will be assessed by this Honourable Court.*

4. *That the Defendant be condemned to pay costs of this suit.*

5. *Any other relief that this Honourable Court deems just and fit to grant."*

The Defendant challenged the filing of this suit on the strength of the Court order of 22/1/2002 (already quoted), invoking the res judicata principle but the resistance was dismissed (Kimaro, J) on 8/12/2003. It was held that a counter – claim being a separate suit in itself and as it was withdrawn with leave to re – institute, the course taken by the Plaintiffs was legally proper.

During the final pretrial and scheduling conference, issues framed are:

"1. Whether the agreement entered on 30th July 2002 by parties was varied on 6th August 2002.

2. If the answer is in the affirmative, what were the terms of the varied agreement?

3. Whether the defendant breached any of the terms?

4. If the answer is in the affirmative, whether the plaintiff suffered loss as the result of a breach.

5. To what reliefs are parties entitled?"

The Plaintiff called 4 witnesses (PW1 – Ivan, Plaintiffs' Managing Director; PW2 – Shaibu, Plaintiffs' Gardener who doubles at times as a messenger; PW3 – Tecla, Plaintiffs' Accounts Clerk and PW4 – Patricia, Plaintiffs' Secretary). They also tendered 8 documentary Exhibits (Exh.P1 – Defendants' letter to Euro African Bank instructing them to issue a cheque in Ivan's name; P2 – an order in cc 359/2002 dated 22/1/2003; P3 – letter by Defendants promising to pay the balance and hold compromise on other terms; P4 – Plaintiffs' dispatch book; P5 – TTCL bills; P6 – Electricity bills; P7 – Sale Agreement and P8 – Deed of variation).

The Defendants called a sole witness (DW1 – Babu), their Chairman who disputed his company being part of the authorship of the Deed of Variation (Exh.P8) branding it a hatchment of PW1 and an un authorized Snell but adds that there were oral understandings between the parties which changed the terms of Exh.P7 but not to the extent reflected in the said Exh.P8. That apart, he insisted that they are not liable in anyway as the Plaintiffs breached Exh.P7 by failing to disclose incumbrances on the plot including the fact that the Area had been declared by the President to be a Re development Area and that one Mohsin was having a claim thereon as well as changes in plot numbers. Further to the above, the witness (DW1) insisted that Plaintiffs breached Exh.P7 by refusing to provide their Board Members' Resolution; failure to issue a receipt acknowledging the payment of US $100,000 and also that they came to realize that the official land use of the plot was residential and not commercial. On telephone and electricity bills they insisted that they have been paying all those brought to their attention and that those disclosed in this case were incurred by Plaintiffs before the sale agreement was executed. He prayed for dismissal of the suit.

In their final submissions, the Defendants reiterated DW1's testimony, adding that non – disclosure of the incumbrances and other matters referred to amounted to fraud in terms of **The Law of Contract Ordinance** and that this entitles them to rescind the contract (making reference to **Millen Richard vs Ayubu Bakari Hoza [1992] TLR 385;** that as the area was declared Redevelopment Area [Vide The Land Acquisition (REDEVELOPMENT AREAS) KARIAKOO AND KURASINI AREA] Redevelopment Area, GN 202/94, in terms of s. 23 of **The Law of Contract Ordinance** the Plaintiffs had no power to sell the property as they were prohibited by the Government. They again resurfaced with the question of res judicata. They urge that they are entitled to loss and damages caused by the misrepresentation in terms of s. 73 of **The Law of Contract Ordinance,** and, seeking assistance from **Zakaria Barie Bura vs Theresia Maria John Mubiru [1995] TLR 211** they urged for refund of the US $.100,000 paid and interest thereon.

On their part, the Plaintiffs submitted that it was the Defendants who asked for variation and the making of Exh.P8 as they did not pay as per terms of Exh.P7 and that they cannot disclaim knowing it as it was duly signed by their own Managing Director (Snell) who had signed Exh.P7; that Exh.P3 by DW1 proves the assertion wrong; that legally Exh.P7 could not orally be varied **[Referring to E.S. Mamuya vs A.J. Mbala (1983) TLR 410];** that for the breaches committed by Defendants they are entitled to avoid the contract in terms of **s. 55 (1) of The Law of Contract Ordinance;** that they are entitled to mesne profits or general damages due to delay in performance (Referring to **Mamuya case; Shah vs Abdulla [1964] EA 742;**

Chitty on Contract, para. 1588) including accumulated interest of US$ 93,537,121.40 at Euroafrica Bank as at August, 2003 as the property was being sold to offset the Bank overdraft; that they are entitled to punitive or exemplary Damages because Defendants have refused to pay and yet continue to occupy the said premises blocking any other utility thereof and made reference to **Angela Mpanduji vs Ancilla Kilinda [1985] TLR 16; Davies vs Mohanlal Karamshi Shah [1957] E.A. 352 and Jowitt's Dictionary of English Law, 2nd Edition** and that the Defendants are supposed to meet telephone and electricity bills dispatched to them as per the evidence of PW2 – 4.

On GN 202 of 94, they submitted that it cannot be said to be an incumbrance because only new plot Nos. were issued but ownership as such remained as it was before; and that the Defendants have mixed **acquisition of land by the President in the Public interest** under s. 3, 4 and 8 of **The Land Acquisition Act (No. 47 of 1967)** which automatically transfers the land to the President and **acquisition for Redevelopment purposes under s. 34 – 36** whereby the Minister simply sets new redevelopment conditions and holders remain with ownership provided conditions are met, making **reference to NBC versus N.S. Ally [1989] TLR 67** and **the Report of the Presidential Commission of Inquiry into land matters, Vol. 1 on Land Policy and Land Tenure Structure, published by the Ministry of Lands, Housing and Urban Development;** that Mohsin's complaint is irrelevant as it is just an assertion and not proof of ownership; that there is no evidence that the property was Mortgaged to the Bank; that Exh.P8 changed conditions such that the Board Resolution could not be surrendered before payment of the purchase price; that the plot was simply renamed from No.

27 Tom Estate Kurasini to 316 Kurasini hence there is no fraud and that they cannot claim compensation which is not pleaded and concluded,

> *"We submit that whatever he paid to the Plaintiff and whatever he is entitled to by virtue of the Order of the High Court in Civil Case No. 359 of 2003 is to be reconned with the Plaintiffs rights in this Commercial Court Civil Case No. 101 of 2003. That we submit would be justice."*

At the beginning of this judgment I categorically stated that this is an interesting case. And, it is because of this interesting element that I have found it necessary to detail the background thereof including all pleadings and relevant orders as well as detailed argument herein.

Branding this case "interesting" is not cosmetic. And I must confess that it has tasked my brain a great deal. This is so, not because of the complexity of the evidence or issues of law raised therein but because of just one legal question, resulting from the inter – relationship with what transpired in Civil Case No. 359 of 2002.

The more I scan the pleadings in both cases (this case and Civil Case No. 359 of 2002); the orders in the latter case and the evidence and arguments offered in the present case, the more and more I am convinced that this case should not have been filed in the first place and further that any decision on merits will create confusion and make the justice machinery a mockery. The following are my reasons.

If I decide on prayer 1, vacant possession, will I not be deciding on something embedded in the order passed on 22/1/2003? Is vacant possession or otherwise of the disputed premises now not a question just of execution and not trial? And, I should add that I think the Plaintiffs inadvertently referred to an Order dated 17/8/2003 as the relevant order is dated 22/1/2003.

Similarily, if I decide on prayer 2 (as per claims in paragraph 16) will I not have interfered with the substance of the consent order? Supposing I hold that the US $ 100,000 already paid be treated as rent for the period the Defendants have so far been in occupation of the disputed premises and that the balance should be paid as well, would such an order not have overturned the Consent Order of 22/1/2003?

Would a decision on damages (general and punitive) launched under prayer 3 be not in violation of the consent order which was amicably reached by parties who even decided that each party should bear own costs?

While I appreciate that legally, a counter – claim is a separate case as clearly provided under O. VIII, Rule 9 (2) CPC in the following wording:-

> *"Where a counterclaim is set – up in a written statement of defence, the counterclaim shall be treated as a cross – suit and the written statement shall have the same effect as a plaint in a cross suit, and the provisions of Order VII shall apply mutatis mutandis to such written statement as if it were a plaint",*

and, that generally, finalisation of the Plaintiff's case does not bar trial of the action in the counter – claim, I am of the considered opinion that in certain situations a decision on the main suit, in effect, closes the counter – claim because of removal of the very basis upon which it is otherwise pegged. And this is what I consider to be the case here.

In Civil Case No. 359 of 2002 both parties were warring over a Sale Agreement gone sore. The Plaintiffs (Defendants in the present case) sought an order restraining Defendants (Plaintiffs in here) from harassing them and a further order that they be ordered to revert to Exh.P7 enabling them to pay the balance (US $ 100,000). In other words, they were disputing Exh.P8 (Deed of Variation). The said Deed of Variation has the following:

> *"DEED OF VARIATION*
> *This DEED OF VARIATION is made this 6th day of August, 2002.*
> *BETWEEN*
> *TANINGRA CONTRACTORS LTD of P.O. Box 23044, Dar es Salaam, (which expression shall where the context so admits, includes the persons deriving title under it and herein referred to as where the context so admits, includes the persons deriving title under it and herein referred to as the "SELLER") of the one part,*
> *AND*
> *MAUNGU SEED COMPANY (T) LTD of P.O. Box 9753, Dar es Salaam (which expression shall where the content so admit includes the persons deriving title under it and herein referred to as the "PURCHASER") of the other part.*
>
> *WHEREAS the Seller and the Buyer had taken cognizance and acknowledge that they executed a sale agreement for sale/purchase of Plot No. 27 Tom Estate, Kurasini, Dar es Salaam: and which the same was duly executed on the .....day of July, 2002 before a Commissioner for Oaths (hereina called the "Agreement").*

AND WHEREAS the Purchaser pursuant to their letter dated 2nd day of August, 2002, duly signed by Mr. John P. Snell and Venance J. Mosha as a Managing Director and Director of Operations respectively, has requested for variation of modality of payment (annexed to this Deed of Variation as Addendum – 1)

AND WHEREAS, the parties hereto are agreeable to preparation and execution of this Deed of Variation to vary the terms covenanted in the Agreement.

NOW THEREFORE THIS DEED OF VARIATION WITNESSETH as follow:

1. *That clause (1) one of the Agreements in varied to the extent that the purchase price will be US Dollars 200,000 (United Stated Dollars Two Hundred Thousand) only.*

2. *That clauses 2 (a) to 2(c) are deleted are replace by the following;*
   - *(i) That the Purchaser will pay a total sum US Dollars Two Hundred Thousand only (USD 200,000).*
   - *(ii) That the above stated amount of money in paragraph 2 (i) herein above will be paid by 15th day of August, 2002.*
   - *(iii) That in case of default the Purchaser will pay USD 50,000 (United States Dollars Fifty Thousand) only, being rent and damages for breach of contract of sale.*
   - *(iv) That after default in addition to the payment of the above state amount in paragraph 2 (iii) the Purchaser will vacate the premises within seven (7) days from the 15th day of August, 2002.*

3. *That paragraph 3 of the Agreement is deleted.*

4. *That paragraph 12 of the Agreement is deleted and substituted by paragraph 2 (iii) and 2 (iv) herein above.*

5. *That this Deed of Variation shall be read together with the Agreement and if any conflict arises as to the meaning or*

interpretation between the two, the meaning and interpretation of the Deed of Variation shall prevail.

6. *This Deed of Variation is only limited to the clause so far varied and/or deleted and not otherwise.*

7. *That in the event any disputed arise in relation to this Deed of Variation the parties are at liberty to seek redress in the court of Law in which case in Tanzania Laws will apply.*

IN WITNESS WHEREOF, the parties herein have set their hands on this document on the date and manner herein after appearing."

In their defence however, the Defendants insisted that Exh.P8 is genuine and authentic and that what the Plaintiffs were doing was to simply justify their failure to abide by the terms of the Agreement. They then counter – claimed, treading on what they have fronted above and prayed for vacant possession; settlement of electric bills by Plaintiffs; treatment of US $100,000 already paid as rent; payment of not less than Tshs.50 million as damages for breach of contract, and in the alternative, payment of US $ 150,000 being the balance as per variation Deed. The pleadings quoted in full above bear testimony to this summary.

Now, in my view, both the main claim and the counter – claim in cc 359 of 2002 are intertwined as they concern a Sale Agreement; alleged variation thereon, breaches, alleged damages and related.

In my considered opinion and without claiming authority to overturn the decision of a brother judge on same level of the Bench, the Order of 22/1/2003 (Exh.P2) completely disposed of the action. There was nothing

left to be tried by way of counter – claim. Although quoted already, for ease of reference, let me reproduce it again. It runs:

> *"22/01/2003:*
> *Coram: Ihema J.*
> *Bwahama: For the Applicant/Plaintiff*
> *Msuya/Kaluwa: For the Respondent/Defendant*
> *CC: Komba*
>
> *Order:*
> *By consent the applicant/plaintiff undertakes to pay the balance of USD 100,000 on or before 17/02/2003. In the event of default each party to revert to own position, i.e. repossession of the suit premises and refund of USD 100,000 paid in advance. No order for costs.*
>
> *Mention in chambers on 1/02/2003.*
>
> *Sgd*
> *S. Ihema*
> *Judge*
> *22/01/2003"*

Now, looking at the said order in relation to pleadings and prayers therein, one cannot entertain an idea that it relates only to the action by the Plaintiffs and that it excluded the counter – claim. **The order is by consent**. Both parties were represented and the Defendants had two Advocates for that matter. In my considered opinion, this consent order sealed whatever claim that had been launched by parties in their pleadings in cc 359 of 2002. Of course, I should hurriedly add that that position does not change with the inclusion in the order of the words *"Mention in chambers on 1/2/2003"*.

For sure, this schedule for *"mention"* could not have aimed at continuation of the action (i.e. the counter – claim) as such because

procedurally, once pleadings are complete as was the case here, the next schedule could not have been a mention but 1st pretrial and scheduling conference for purposes of fixing a speed track and a mediation date. This *"Mention"* schedule should be taken to have had a different purpose though not disclosed on record.

In the same vain, I am of a further opinion that the Order of 22/8/2003, withdrawing the counter – claim, was superflous because there was no counter – claim to be withdrawn as it had already been disposed of by the Order of 22/1/2003.

I have asked myself numerous questions without answers as to how the present Plaintiffs could be part of the consent Order of 22/1/2003 if at all they had the present claims at the back of their mind! The order was by consent and the Defendants (then) were not lightly represented as they had two Advocates. Are they disowning the consent order? A consent order is not appealable. If they intended to challenge its authenticity, and if they have valid grounds, the way out is not to file a fresh case but to apply for review.

Having reached the above conclusion, I was then faced with a question of what course I should take for ends of justice.

As already said, I can only observe but I cannot now determine the question of res judicata as my Sister, Madam Justice Kimaro decided on it on 8/12/2003. I cannot overturn that decision. I should hurriedly add however that the Counsel did not avail copies of the pleadings to the Court

then. It is my view that had they done so, possibly, the Court would have reached a different finding.

Having considered all the above in totality, I have formed an opinion that **this is a fit case where I should defer the judgment as I hereby do and certify the following issues to the Court of Appeal for guidance.** I hereby frame the said issues as follows:-

1. *Whether the consent Order of the High Court (Ihema J.) in cc 359 of 2002 finalised the dispute between the parties or whether it left out the counter – claim intact capable of being tried separately.*

2. *If the answer to the 1st part is in the affirmative, how should this Court proceed with the matter in view of the order of 22/8/2003 which permitted the withdrawal of counter – claim which in turn led to the institution of the present case, and so is also the decision of this Court on res judicata dated 8/12/2003.*

L.B. KALEGEYA

JUDGE

Order:

The record and deferred judgment to be placed before the Court of Appeal for guidance on the two issues above framed.

L.B. KALEGEYA

JUDGE

15/2/2005

6,600 words

Delivered in the presence of Mr. Mnzavas and Mr. Ntonge.

L.B. KALEGEYA

JUDGE

15/2/2005

I Certify that this is a true and correct of the original/order Judgement Ruling
Sign .....
Registrar Commercial Court Dsm.
Date 15/2/05