

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM**

MISC.COMMERCIAL APPLICATION NO.88 OF 2020

(Originating from Commercial Case No.143 of 2014)

LAURA LUCAS CHOGOAPPLICANT

VERSUS

INTERNATIONAL COMMERCIAL

BANK (T) LIMITED1st RESPONDENT

EURO DESIGN LIMITED2nd RESPONDENT

Last Order: 20/10/2021.

Ruling date: 08/12/2021.

RULING

NANGELA, J.:

The Applicant herein filed this application by way of a chamber summons made under section 95 and Order XXI, Rule 57 (2) and 58 of the Civil Procedure Code, Cap.33 R.E 2019; section 59 (1) of the Law of Marriage Act, and Section 114 (1) (a) and (b) and section 2 of the Land (Amendment) Act 2004.

The Applicant prays for the following orders of the Court:

1. This Court be pleased to order a postponement of a sale of the Applicant's matrimonial property by issuance of a temporary injunction restraining the

Respondent itself, its agents or servants, or others from selling or alienating the Applicant's matrimonial property on Plot No.33 Block "C", Kunduchi Mtongani, Kinindini Municipality, registered under the CT. No. 80752, pending investigation of the claim and objection by the applicant herein.

2. This honourable Court be pleased to investigate the legality of the decree in respect of High Court Commercial Case No.143 of 2014 issued on May 13th 2015, as a compromise of suit executed on the 11th March 2015 and execution order dated 19th May 2020.
3. Any other order the Honourable Court may deem fit and just to grant and costs of this application be provided for.

Earlier on, this Court (Mruma, J) had dismissed this application for want of prosecution. However, upon filing an application for its restoration, the Misc. Comm. Appl. this No.74 of 2021, Court restored it, and, hence, this Court fixed a hearing date, which was the 20th day of October 2021.

On the appointed date of hearing, Mr. Heri Louis Kayinga, appeared as an advocate for the Applicant, while Mr Stanslaus Ishengoma, learned advocate appeared for the 1st Respondent. The 2nd Respondent was absent and, hence, the Court made an order to proceed *ex parte* against the 2nd Respondent. Before I go to its nitty-gritty,

I find it pertinent to set out the brief facts of this application.

It is on record that at some point in time and on a date undisclosed, the 2nd Respondent was registered as a Company under the directorship of three persons, namely: **Mr Richard Mtaita, Ms Tracy Mtaita and Mr Luganga Mapunda**. On 19th May 2012, the second Respondent applied for a loan from the 1st Respondent. As a result, the 1st Respondent advanced such overdraft facility (Secured Overdraft) vide Ref. ICBTZ/HO/2012/108, to the 2nd Respondent, worth **TZS 200,000,000/=**.

On the one part, the overdraft was signed by two officers of the 1st Respondent, namely, **Mr. Innocent Mushi**, being **Head of Legal Department** and the other **Mr. Avijit Banerjee**, being **the General Manager** of the 1st Respondent, and on the other part, it was signed by **Mr. Richard Reuben Mtaita** as well as **Ms. Tracy R. Mtaita**, being the Directors of the 2nd Respondent signed and stamped the memorandum of acceptance of the overdraft.

The overdraft facility advanced to the 2nd Respondent, was secured by 1st Party Mortgage over a property (a house) which was described as **CT. No.80752, Plot 33 Block "C", Land Office**

No.349657, Mtongani Area, Kinondoni Municipality, Dar-es-Salaam City, owned by Mr. Richard Reuben Mtaita. The same was valued at ordinary market value (**OMV**) equal to **TZS 364 Million** and a (FVO) forced value equal to **TZS 273 Million**. The second security was a joint and several guarantee of all directors (Richard Reuben Mtaita, Luganga Stanley Mapunda and Tracy Richard Mtaita).

The 2nd Respondent as the borrower defaulted payment and the 1st Respondent filed a case, **Commercial Case No.143 of 2014**. The case was against the 2nd Respondent, Mr. Richard Reuben Mtaita, Mr Luganga Stanley Mapunda and Ms. Tracy Richard Mtaita (as guarantors).

It is on record, however, that, on 13th March 2015, acting under Order XXIII Rule 3 of the Civil Procedure Code, Cap.33 R.E-[2002] and Rule 22 and 26 of the High Court (Commercial Division) Procedure Rules, GN. No. 250 of 2012, the parties in that case executed a Deed of Settlement which was duly filed in this Court.

At that time, this Court, (Songoro, J., as he then was), registered the Deed of Compromise and, in accordance with the law, and, following that compromise of suit, entered a consent judgement and decree in favour of the 1st Respondent.

It appears, as the record seems to suggest, that, during the pendency and conclusion of the case, one **Mr Innocent Mushi**, appeared as an advocate for the Respondents! This is an alarming issue and I reserve it for consideration later, since the same person was, at the time when the loan was being processed, the Head of Legal Department of the 1st Respondent.

The suit having been compromised by the parties, it seems, however, that, the Defendants failed to satisfy the decree. Consequently, on 17th July 2019, the Decree Holder went ahead seeking for an execution order. A notice of execution was thereby served on the Applicant. According to her affidavit, she only became aware of the pending proceedings, the Deed of Settlement, the Compromise of suit, and the Judgement/Decree of the Court, for the first time, when she was served the notice.

On the 18th day of May 2020, a **Prohibitory Order** of this Court was issued as well as an **Order for Execution** in **Commercial case No.143 of 2014** dated 19th day of May 2020. Against that background, and, upon being served with the notices and relevant execution orders, the Applicant rushed to this Court and filed this application, seeking, inter alia, for the Courts intervention, in terms of the prayers contained in the Chamber Summons.

I set this application for its hearing and invited the learned advocates for both parties to make oral submissions before this Court. I will, therefore, summarize their submissions before I proceed to determine the merits or otherwise of this application.

In his submission before this Court, Mr Kayinga urged this Court to make a finding that the Compromise of suit which was registered by this Court as constituting the judgment and decree of the Court was void. Mr Kayinga submitted that, the Applicant was married to the late **Richard Reuben Mtaita** since 21st day of December 1996. He referred to this Court Annex.LLC-1 annexed to the Applicant's affidavit, which is her marriage certificate. According to Mr Kayinga, the Applicant's husband died on 8th July 2016. This Court was also referred to a death certificate attached to the affidavit as **Annex.LLC-2**.

It was Mr Kayinga's further submission that, in the Applicant's marriage, the couple were blessed with two issues, one of their kids being named **Tracy Mtaita**. Mr Kayinga submitted that, the couples had, as well, acquired properties, one being a matrimonial home, referred to as House on **Plot.No.33 Block "C", Mtongani Area, Kinondoni Municipality**, with a Certificate of Title **(CT) No.80752**.

The above named property is said to be the one which mortgaged by the 2nd Respondent as a security for the loan advanced by the 1st Respondent herein to the 2nd Respondent. The said loan was further jointly and severally guaranteed by the late **Richard Mtaita**, the applicant's husband and the said **Tracy** and **Mapunda**, as directors of the 2nd Respondent.

According to Mr Kayinga, the Mortgage Deed and the Overdraft Facility Agreement, were, altogether a product of forgery because they were **fraudulently signed** by unknown or fictitious persons. He contended that, the documents were a product of fraud because; firstly, the said Facility Agreement was signed by one **Tracy Mtaita** who, at the material time was a minor.

Secondly, and referring to Annex. LLC 10 attached to the affidavit, which is a **Police investigation Report**, Mr Kayinga, submitted that, the said Report made a finding that, the signature of the said **Ms Tracy Mtaita** appearing on the Facility Letter, was a forged.

Thirdly, Mr Kayinga submitted that, the Facility Agreement was void because it was signed by a person who purport to be a member and director of the 2nd Respondent, Mr Luganga Stanley Mapunda, signing as a director of the 2nd Respondent, while the information from the Business Registration and Licensing Authority

(BRELA) shows that, that person is neither a director nor a shareholder of the 2nd Respondent. He argued that, the person was thus an unauthorized to sign the document. He relied on the MEMARTS of the 2nd Respondent arguing that, according to BRELA records, the said Luganga Stanley Mapunda was fraudulently inserted in the transaction purportedly to be the true Luganga Mapunda.

Fourthly, Mr Kayinga submitted further that, even the compromise of suit filed in his Court to settle **Commercial Case No.143 of 2014**, a case filed after the 2nd Respondent defaulted in paying the overdraft facility, was signed by fictitious persons. The same seems to have been signed by **Ms Tracy Mtaita**, who, at the time of signing, was a minor, and, Mr Luganga Mapunda, who had no authority to sign it. Mr Kayinga argued that, the forensic evidence from Police firmly indicates that **Ms Tracy R. Mtaita** was never a party to the whole process of obtaining the loan advanced to the 2nd Respondent.

Mr Kayinga submitted further that, the filing of the **Commercial Case No.143 of 2014**, and further the filing of the Deed of Settlement which compromised the suit leading to the issuance of a consent judgment and decree of this Court, were all perpetrated by fraud.

In defence of his submissions, Mr Kayinga argued that, as per **Annex. 6** to the affidavit of the Applicant, it

is shown clear that, **Mr Innocent Mushi**, who was, at the time of issuance of the Overdraft Facility the Head of Legal Department of the 1st Respondent, was the same person who acted as an advocate representing the **2nd Respondent** in the Commercial **Case No.143 of 2014**, leading to a compromise of suit. He contended, therefore, that, the said learned advocate, **Innocent Mushi**, was the same person who witnessed the signing of the documents by all people who were involved not only in obtaining the loan advanced to the 2nd Respondent but also in the compromise suit.

In those premises and under such circumstances, the Compromise Suit was as well void and the same should be set aside by this Court, so argued Mr Kayinga.

For his part, apart from adopting the counter affidavit of the 1st Respondent, Mr Ishengoma, made a very brief submission. He submitted that, the alleged issue of signing of the Deed of Settlement by the alleged minor (**Ms Tracy**) and **Mr Luganga Mapunda** as shareholders of the 2nd Respondent are matters he would wish to leave to this Court to decide on.

He submitted, however, that, the loan was indeed issued to the 2nd Respondent and, that, one of the securities offered was a mortgage of a house, for which spouse consent was obtained on 19th May 2012. He

submitted, therefore, that, the objection proceedings arose when the 1st Respondent sought to attach a matrimonial property and sell it to recover the loaned money.

He admitted, however, that, having gone through the Deed of Settlement in respect of the **Commercial Case No.143 of 2014**, it is clear that, one **advocate Mr Innocent Mushi** was involved in attesting the Deed of Settlement, and that, he appeared as an advocate for the 2nd Respondent while knowing very well that he was as well involved in the transaction, at the time when the loan was being processed, as an employee of the 1st Respondent. He concluded that, legally, that was wrong. At the end of Mr Ishengoma's submission, Mr Kayinga had no rejoinder submission to offer.

I am now left with the issue whether I should grant the prayers sought by the applicant. In this particular application, this Court is being asked to investigate the legality of its decree issued in respect of Commercial Case No.143 of 2014, following a compromise of suit entered into by the parties to that case.

The Application is brought under section 95 and Order XXI Rule 57 (2) and 58 of the Civil Procedure Code, Cap.33 R.E 2019; section 59 (1) of the Law of Marriage Act, and Section 114 (1) (a) and (b) and section

2 of the Land (Amendment) Act 2004. The gist of the matter is that fraud was at the centre of the compromise suit and the transactions leading to the filing of the Commercial Case No.143 of 2014.

According to Order XXI Rule 57 (1) and (2) the law provides that:

"Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector and in all other respects, as if he was a party to the suit: Provided that, no such investigation shall be made where the court considers that the claim or objection was designedly or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the court ordering the sale may postpone it pending the investigation of the claim or objection."

Order XXI Rule 58 provides that:

"The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached."

Primarily, where there is an allegation of fraud in a civil matter, be it a suit or an application as the one at hand, the party alleging fraud has the burden to prove it.

The standard to be applied, however, is that applicable in civil actions generally, namely, proof on the balance of probability. See **Silayo vs. CRDB (1996) Ltd** [2002] 1 EA 288 (CAT).

In this present application, Mr Kayinga has endeavoured to establish that, the signing of the Facility Agreement which was the basis for the **Commercial Case No.143 of 2014**, which later gave rise to the Compromise Suit and Decree whose legality is being questioned were all tainted with fraud. He contended that, one of the persons purported to have been signatory of the relevant documents, i.e., the *Facility Letter (Agreement)* and later on the *Deed of Settlement* (the Compromise of Suit), was a minor who had lacked capacity to sign such documents.

Looking at the evidence as per the affidavit of the Applicant, it is indeed established that, **Ms Tracy Mtaita**, purportedly said to have signed the Compromise of Suit, (attached to the Applicant's affidavit **Annex.LLC-5**) was not a true signatory of it. That finding is supported by **Annexure LLC-10**, a letter from forensic department of the Police which shows that Ms Tracy Mtaita's signature was forged signature as it does not bear resemblance with the samples taken before the Police.

It is also clear that, at the time when the loan was taken, the said **Tracy Mtaita** was a minor, as she was born on 25th November 1999, per **Annexure LLC -3** (birth certificate), while the Facility Agreement shows to be signed by her on 19th May 2012, when she was just 13 years old and the Memorandum of Acceptance was dated and signed by Mr Richard Mtaita and Ms Tracy Mtaita on the same date. In the first place, it is the law that, a minor lacks capacity to contract. As such, even if it were to be said that, she signed the Facility agreement, she lacked capacity to do so before the eyes of the law. Secondly, the fact, however, is that, she never signed it but that, her signature was fraudulently procured. That fact further makes things worse.

In the case of **Aziz vs. Bhatia Brothers Ltd** [2001] 1 EA-7 (CAT), the Court of Appeal was of the view that, a court would adhere to the observing of a sanctity of an agreement in a situation where there was no incapacity, no fraud (actual or constructive) or misrepresentation and no principle of public policy prohibiting enforcement.

In this particular application before me, the facts and the evidence relied on by the Applicant's Counsel, does show that, fraud played part in the course of signing the Facility letter let alone the incapacity of the said Ms

Tracy Mtaita who was involved in the signing of the Facility letter as one of the directors of the 2nd Respondent.

But that alone is not the end of the story. When **Mr Innocent Mushi** signed the Facility letter, he did so as an employee of the bank. He is also the one who introduced Mr Richard Mtaita (now deceased) before a Commissioner for Oath one Hadija Kinyaka, Advocate, when executing the Mortgage Deed in respect of House on **Plot.No.33 Block "C", Mtongani Area, Kinondoni Municipality**, with a Certificate of Title (**CT**) **No.80752** used as a collateral to secure the loan advanced to the 2nd Respondent.

In addition, it was the same **Mr. Innocent Mushi** who introduced persons purported to be **Ms Tracy Richard Mtaita** and **Mr Luganga Stanley Mapunda** to the Commissioner for Oath to attest their signing of the **Directors' guarantee** which was as well one of the collaterals offered to secure the loan. It means, therefore, that, even the guarantee document was tainted with forgery, since **Ms Tracy** was a fictitious person, and, all this was well know by the 1st Respondent or ought to have been known by the 1st Respondent. I hold so because; the said Mr Innocent Mushi was acting for the 1st Respondent as its Head of Legal Department.

To cap it all, when the 2nd Respondent failed to repay the loan and a suit was preferred by the 1st Respondent (i.e., **Commercial Case No.143 of 2014**), the Advocate who appeared to witness the signing of the bMataita, Luganga Stanley Mapunda and Tracy Richard Mtaita (**Defendants**) was again Mr. Innocent Mushi, (now as an Advocete).

The said Deed of Compromise of Suit was, again, signed by two persons **purported to be Ms Tracy Richard Mtaita**, and **Luganga Stanley Mapunda**, on 12th March 2015, before **Advocate Mr Innocent Mushi**. However, at that time, the real Ms Tracy Mtaita was 16 years old, having been born on 25th November 1999, as per **Annexure LLC -3** (the birth certificate).

The same also means, therefore, that, even the Deed of Settlement which was registered by this Court as having wholly compromised the suit under Order XXII Rule 3 of the Civil Procedure Code, by this Court leading to a decree of this Court being subsequently issued, was as well tainted with fraud. With all such revelations, what is the legal position then?

In this application, the Applicant is challenging the legality of the decree issued in respect of the High Court **Commercial Case No.143 of 2014**, the same having been issued on 13th May 2015, a Compromise of Suit

executed on 11th March 2015 and the execution Order dated 19th May 2020. As it may be observed from the above, it is clear that the whole processes involved, starting from the procuring of the loan up to the obtaining of orders of this Court, were tainted with fraud, and the Applicant has been able to demonstrate how fraud was at the centre of all such process.

It has been long established that, *"fraud is an extrinsic collateral act which vitiates the most solemn proceedings of Courts of Justice."* If practised on the court, fraud becomes a ground for vacating its judgment, decree or orders. This is due to the fact that, had it not been that the Court was deceived or misled as to material circumstances, or its process was abused, the Court's judgment, decree or order would not have been given if the whole conduct of the case had been fairly brought to the attention of the Court.

However, it is a long established proposition of law, that:

"a judgment, decree or an order obtained by fraud upon a Court, binds not such Court nor any other, and its nullity upon this ground, though it has not been set aside or reversed, may be alleged in a collateral proceeding."

See Willes, J., in the old case of **the Queen v. Saddlers Company (1863) 10 H.L.C, 404(431)**. See

also the decision of the Indian Supreme Court in the case of **A.V. Papayya Sastry & Ors vs. Govt. of A.P. & Ors**, (2007) 4SCC 221.

If the above legal proposition is to be contextualised in the present application before me, it will mean, therefore, that, since, as demonstrated earlier here above, fraudulent acts or acts suggesting collusion were indeed involved in obtaining the consent judgment and the decree in **Commercial Case No.143 of 2014**, that is a sufficient ground for vacating the compromise suit and its decree. The same were obtained in a circumstance wholly shrouded before the Court and, had it been revealed to the Court that any of those who signed the Deed of settlement which was the basis of the Compromise of Suit registered by the Court under Order XXIII Rule 3 of the C.P.C, was a fictitious person, the Court would not have proceeded the way it did.

In view of the above, I am wholly convinced that, the Decree issued by this Court on 13th May 2015 in respect of the **High Court Commercial Case No.143 of 2014**, the same having been based on the Compromise of Suit executed on 11th March 2015 and registered on 13th March 2015 by this Court marking the suit as having been settled, is a nullity having been tainted with fraud. It follows, therefore, that, the

execution Order dated 19th May 2020, cannot stand. All these are hereby set aside.

I would have stopped here, but for one thing I will make further comments, findings and orders in respect of the conduct of Mr. Innocent Mushi, the Advocate who seems to have been implicated in perpetrating the fraudulent acts that have affected the proceedings. In particular, as it was shown in this case, Mr Mushi was involved at the time of obtaining the loan facility in 2012 as an officer of the bank.

However, in 2015 when the 2nd Defendant failed to repay the loan, he was again involved as an advocate, but acting and in favour of the Defendants in respect of the **High Court Commercial Case No.143 of 2014**), by witnessing the signing of the Deed of Compromise of the Suit, meaning that, he was acquainted with the persons who all along purported to be **Luganga Mapunda** and **Tracy R. Mtaita**.

Since he had earlier acted for the bank as its employee I do not find it proper that he should have again acted or witnessed the execution of the Deed of Compromise. When I was hearing this application I did not summon Mr Innocent Mushi to appear before me.

But having gone through the entire record of this application I find apposite that this Court should as I

hereby do, issue an order directing that Mr Innocent Mushi, Advocate Roll No.2103 to be summoned and appear before this Court and show cause why he should not be referred to the Advocate's Committee where he can show cause why disciplinary proceedings should not be carried out against him for the conducts which were hitherto exhibited in this ruling.

For that matter, I do hereby direct the Registrar of this Court to do issue the requisite summons to the Advocate Mr. Innocent Mushi who should appear before me on 16th December 2021 at 9.00am. In the upshot, this application succeeds and this Court settles for the following orders:

1. That an injunction is hereby issued permanently restraining the Respondents, its agents or servants, or any other person from selling or alienating the Applicant's matrimonial property on Plot No.33 Block "C", Kunduchi Mtongani, Kinindini Municipality, registered under the CT. No. 80752.
2. That, the Compromise of Suit and the Decree issued in respect of **High Court Commercial Case No.143 of 2014**, was obtained

by fraud. Since the decree was obtained by fraud, the same is illegal, null and void.

3. It is hereby ordered that, **Mr Innocent Mushi, Advocate Roll No.2103**, be summoned and be made to appear before this Court and show cause why he should not be referred to the Advocate's Committee for disciplinary action in respect of the conducts which were hitherto exhibited in this ruling.
4. The Respondents are to pay costs of this Application.

It is so ordered.



DATED AT DAR-ES-SALAAM ON THIS 08TH DAY OF
DECEMBER, 2021

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DEO JOHN NANGELA
JUDGE,

High Court of Tanzania (Commercial Division)
08 /12/2021