

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 95 OF 2021

ALIASGHAR HALAI (AS THE LEGAL REPRESENTATIVE

NILOFER RAFIK HALAI.....PLAINTIFF

VERSUS

EXIM BANK(TANZANIA) LIMITED.....1st DEFENDANT

HALAIS PRO-CHEMIES INDUSRTIES LIMITED.....2nd DEFENDANT

RAFIK HALAI.....3rd DEFENDANT

ALIASGHAR HALAI.....4th DEFENDANT

RULING.

Date Last order 02/03/2022

Date of Ruling 23/03/2022.

MARUMA J.

The Plaintiff is before this Court seeking for an order to nullify or set-aside a decree entered and passed by the High court of Tanzania (Commercial Division) at Dar es salaam in Commercial Case No.64 of 2017.

In the cause of exchanging pleadings, the 1st Defendant filed a written statement of defense (WSD) included the notice of preliminary objection on the point of law that:

- (a) This Honorable court is not vested with the jurisdiction to nullify or set aside its own Decree.
- (b) This Hon. Court is functus officio to nullify its own Decree.

The facts leading to the filling of the plaint by Mr. **ALIASGHAR HALAI (As the Legal Representative of NILOFER RAFIK HALAI,** Plaintiff herein derived from Commercial case no.64 of 2017. The decision of the said case was concluded through a deed of compromise dated 12th day of October 2017. The Plaintiff alleges that by the time of signing the said deed of compromise the Plaintiff herein one Nilofer Halai was already a deceased person died on 17th July 2016 as shown in his death certificate. Beside the Plaintiff alleges that, the deed of compromise which led to the judgment and decree in Commercial Case No.64 of 2017 was obtained fraudulently. Hence, filling of this case to nullify the deed of compromise and set aside judgment and the decree in Commercial Case No.64 of 2017.

The hearing of the preliminary objection viva voce was set on 2nd March 2022. The Plaintiff was represented by Mr. Mpaya Kamara, learned advocate while the 1st Defendant had the service of Mr. Zakaria Daudi, learned advocate.

Arguing in support of the first preliminary objection, the learned advocate for the respondent submitted that, this court does not have jurisdiction to set aside its own judgment and decree which was passed

in Commercial Case No. 64 of 2017. He further submitted that the gist of this preliminary objection is found under paragraph 9 of the plaint whereby the Plaintiff herein claiming for an order to nullify or setting aside the decree passed by this Court in Commercial Case No.64 of 2017 following a Deed of Compromise entered between the Plaintiff (deceased) and the Defendants. To support his argument, the learned advocate referred this Court to the case of **MWASITI ALLY VERSUS. DIAMOND TRUST BANK TANZANIA LTD**, Civil Case No.53 of 2016 in which the Court was called to quash the decision presided by the Judge of the High Court through a different charge by way of a fresh suit. The learned advocate for the Defendant further clarified that, on the above decision the Court was relying on the decision of the Court of Appeal of Tanzania in the case of **Mohamed Enterprises Tanzania Limited Versus Masoud**, Civil Application No.33 of 2012. At page 27-28 of the decision the Court observed that,

"...There has been no room open to the High court and courts subordinate thereto whereby one Judge would enter a judgment and draw a decree (thus bringing a suit to a finality only to find another judgment and decree and substituting therefore with a contrary judgment, and to do so amounts to gross abuse of the court process..."

The said decision also referred the case of **Zuliat Sued Versus Isack Issa & Others**, Civil Reference No. 2 of 1997 where the Court observed that “Every judgment whether obtained by fraud or given without a jurisdiction remains effective and binding and is capable of being executed, until it is reversed by a higher court. A judgment may be reversed either on appeal or revision”. He submitted that on those cases the Court findings was that the High Court lacks jurisdiction to nullify its own Judgment and Decree.

On the **second limb of preliminary objection, the learned advocate** submitted that, it is a trite law that once a decision has been passed by the Judge or Magistrate of that Court **that court becomes functus officio**. Clarifying this, he argued that the only remedy available is to appeal to the Higher court that is the Court of appeal as it was stated in the case of **Salum Mohamed Kaluona & Another Versus. Republic**, Misc. Criminal Application No.24 of 2020 at page 2,3 and 4. The court referred the case of **Mohamed Enterprises (supra)** and the case of **Bibi Kisoko Medard Versus the Minister for Lands, Housing and Urban Development and Another, (1983) TLR 250 (HC)**. Winding up his submissions, the learned advocate submitted that since the decision in Commercial Case No.64 of 2017 was passed by the judge of this court, this court becomes functus officio and cannot sit and nullify

the decree which had already passed by this court. He prayed for this case to be dismissed with costs.

Arguing against the submissions on preliminary objections made by the advocate for the 1st Defendant, Mr. Kamara, advocate for the Plaintiff submitted that, the gist of this case is the deed of compromise which was registered as the decree of this Court in Commercial Case No 64 of 2017. He said that the compromise was fraudulently procured. He clarified that the legal representative of the estate of the late Plaintiff was appointed on 23rd 2020 as indicated at paragraph 10 of the plaint. The deed of settlement as per paragraph 15 of the plaint was signed on 12th October 2016 and it was recorded on 13th October 2016 as a court decree as per paragraph 14 of the plaint. He further submitted that the recording, signing, filling, all of these happened before the appointment of the legal representative of the estate of the deceased (The Plaintiff herein). He further submitted that the Defendants herein filed the deed of compromise without even informing the judge about the death of the Plaintiff herein of which implies that there was an element of fraud. He argued that, thus why the Plaintiff is invited this Court to set aside its own judgment and decree in commercial case no.64 of 2017 as it was held in the cited case of **Masoud** (supra). He added that finding the consent decree was procured by fraud, such matters of functus officio and lack of

jurisdiction do not apply. He concluded his submission by requesting this Court to overrule and dismiss the preliminary objections raised with costs.

The counsel for the 1st Defendant rejoined that, the gist of this case is to set aside the decree passed in Commercial case no. 64 of 2017 by the High court of Tanzania and not a deed of compromise as can be seen under paragraph 9 of the plaint. The same situation as in the decision of **Mohamed Enterprises** (supra). However, based on the contents of facts at paragraph 15 of the plaint, there is no room for this Court to set aside the judgment and decree and substitute contrary another judgment and decree. He concluded his submission that it will be an abuse of court process and prayed for this court to dismiss this case with costs.

Analysing the arguments made by both parties and reading the contents of paragraph 9 of the plaint which states that: -

"..The Plaintiff claims against all Defendants, jointly and severally are for (a) an order nullifying or setting aside a decree (deed of compromise) entered passed by the High court of Tanzania (Commercial Division) at Dar es salaam in Commercial case no.64 of 2017 (Hence force the case) ;(b) Costs of this suit and (c) Any other reliefs as the Hon. Court may deem fit and just to make or issue the premises...".

It is apparent clear that, there is no doubt that the Plaintiff's intention is to nullify and set aside the decree resulted from the Commercial Case No.64 of 2017.

The only issue to be determined is on whether the instituted fresh Commercial Case no. 95 of 2021 can re-open the matter which had been concluded and there is a decree drawn by this Court in Commercial Case no. 64 of 2017.

As argued by the learned advocate for the 1st Defendant, the law is very clear on the consequences and the power of the Court determined the matter in its finality. The consequences are as stated in the decision of **Mohamed Enterprises** (Supra) that;

"...There has been no room open to the High court and courts subordinate thereto whereby one Judge would enter a judgment and draw a decree (thus bringing a suit to a finality only to find another judgment and decree and substituting therefore with a contrary judgment, and to do so amounts to gross abuse of the court process..."

Bearing in mind that the Plaintiff in the present suit was a Defendant in Commercial case no. 64 of 2017 together with the 2nd,3rd and 4th Defendants while the 1st Defendant herein was a Plaintiff in Commercial case no. 64 of 2017. Also, the fact that, the decree claimed to be nullified and set aside was resulted from the deed of compromise

between the Plaintiff and the Defendants in this present case. I concur with the arguments raised in respect of preliminary points of objection based on the finding that, this Court is disqualified itself from entertaining a matter which had been determined and passed a decree.

The basis of this finding is under section 3 of the Civil Procedure Code, Cap 33 RE of 2019 which defines clearly that a decree is a formal expression of an adjudication which conclusively determines the rights of the parties.

The claim that the deed of compromise was fraudulently obtained thus why the Plaintiff invited this Court to set aside its own judgment and decree in commercial case no.64 of 2017. The argument has no legal basis as observed in the case of **Zuliat Sued vs Isack Issa & Others**, Civil Reference No. 2 of 1997 where the Court observed that, "Every judgment whether obtained by fraud or given without a jurisdiction remains effective and binding and is capable of being executed, until it is reversed by a higher court." Meaning the decision may be reversed either on appeal or revision.

In view of the above position in law. The court cannot sit over a judgment and decree it passed previously. So, once the court has conclusively determined the rights of the parties it cannot deal with the judgment and decree again because it becomes functus officio. The

remedy for an aggrieved party in the circumstances would be to appeal and not otherwise.

On the consequences of this present case based on the prayer of dismissal with cost as prayed by the 1st Defendant's learned advocate. I am of the view that, this Court cannot dismiss what is not proper before it as the preliminary objections justified the competence of the present case before this Court. This is also discussed in the case of **Cyprian Mamboleo Hiza v. Eva Kioso and Mrs. Semwaiko, Civil Application No. 3 of 2010 Court of Appeal of Tanzania at Tanga**, cited with approval the Court of Appeal of Eastern Africa in the celebrated case of **Ngoni Matengo Cooperative Marketing Union Ltd. vs AN Mohamed Osman (1959) EA 577 at page 580**, whereby the Court discussed the meaning of "*dismissing*" an appeal, thus:

"...This Court, accordingly, had no jurisdiction to entertain it, what was before the Court being abortive, and not properly constituted appeal at all. What is this Court ought strictly to have done in this case was to "strike out" the appeal as being incompetent, rather than to have "dismissed" it, for the latter phrase implies that a competent appeal has been a proper appeal capable of being disposed of..."

In the result, I find the preliminary objections on the point of law have merit and are accordingly sustained. The Commercial Case No. 95 of 2021 is hereby struck out with costs.

It is so ordered.

Dated at Dar Es Salaam this 23rd day of March 2022



Z. A. Maruma.

JUDGE