IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC.COMMERCIAL APPLICATION NO. 51 OF 2023

BETWEEN

EAST AFRICAN DEVELOPMENT BANK.....APPLICANT

VERSUS

NYAKIRANG'ANI CONSTRUCTION LIMITED.....1ST RESPONDENT

CHRISTMAS MUMANGI.....2ND RESPONDENT

NECESSARY PARTY

X-MAS NZAGI MATOBERA.....3RD RESPONDENT

NECESSARY PARTY

STEVEN M. NYAKIRANG'ANI.....4TH RESPONDENT

NECESSARY PARTY

NYANGULETA M. NYAKIRANG'ANI.....5TH RESPONDENT

NECESSARY PARTY

SIMON NZAGI.....6TH RESPONDENT

NECESSARY PARTY

RULING

Date of last Order: 16/11/2023

Date of Ruling: 25/03/ 2024

GONZI, J.

This application was brought under sections 12(7), 13(2) (b) and 13(4) (b) of the Financial Leasing Act, Cap 417 of the Laws of Tanzania. In the Chamber summons the Applicant prayed for orders that:

a) That the honourable Court be pleased to grant an order for recovery and repossession of the following leased equipment by the applicant in possession of the respondents, namely:

S.N	EQUIPMENT	MAKE	REGISTRATION	CHASSIS
1.	Tractor type Tractor D6G	Caterpillar	T600 AWK	C6GO1158
2.	JCB Backhoe Loader	Caterpillar	T621 AWL	SNL03689
3.	Liebherr hydraulic excavator	Liebherr	T810 AVV	18828
4.	JCB Hydraulic Roller	Caterpillar	T594 AWK	ASL03421

	Equipment	Make	Registration	Chasis	Engine
5.	Motor Grader	Changlin	T389 AQF	P19030540	C0504924
6.	Motor Grader	Changlin	T610 AQH	P19030541	C0504219
7.	Wheel Loader	Changlin	T379 AQF	3054394	69370011
8.	Road Roller	Changlin	T606 AQF	1400433	B7614000020
9.	Road Roller	Changlin	T612 AQH	1400443	B7614000040
10.	Excavator	Hyundai	T328 AQS	N60714773	26381845

b) Pursuant thereto the respondents be ordered jointly and severally to indicate and show the places where the referred assets/ equipment in prayer (a) are kept for the purpose of repossession/ recovery thereof by the Applicant.

c) The Respondents be condemned to pay the costs of this application.

The application is supported with an affidavit of one Donald Parmena Sumary, Principal Officer of the Applicant Company who in his affidavit stated that on about 12th June 2008, the Applicant entered into a financial lease agreement with the 1st Respondent whereby the Applicant purchased the 4 listed equipment in serial numbers 1 to 4 above for the purpose of leasing the same to the 1st Respondent. He stated further that in 2009, under the same arrangement, the 1st Respondent came into possession of 6 more equipment as itemized in serial numbers 6 to 10 above. The applicant annexed a copy of the Financial Lease Agreement with the 1st Respondent as annexture EADB-1. He also purported to have attached the registration cards of the equipment listed but the registration cards which were intimated to have been attached to the affidavit as annexture EADB-2, were actually not attached at all. Actually, there is no annexture EADB-2 to the affidavit. After annexture EADB-1, the list of applicant's attachments jumps to annexture EADB-3.

The applicant stated further that by the time the lease agreement was coming to an end after the agreed 48 months of its life, the Respondents were still indebted to the Applicant and retained and continued to use the

equipment to their benefits despite there being an obligation under the financial lease agreement to return the equipment to the applicant immediately. Consequently, the Applicant instituted in this court a case for recovery of the amount defaulted under the financial lease agreement. It was registered as Commercial Case No.107/2019 and copies of the Plaint and the WSD thereof were attached as annextures EADB-3 in this application. On 28th July 2021, this Court (as per Hon. Mruma,J.,) delivered its Judgment in Commercial Case No.107 of 2019. In that case, as it can be summed up from the Judgment, the Applicant had sued the 1st Respondent alone claiming for payment of USD 202,036.53 being: (i) Rental arrears amounting to USD 104,477.85; (ii)Interest on rental arrears USD 71,496.72; (iii) Default Interest accrued USD 19,983.15; (iv) Purchase Options (100%) USD 6078.81. Also, the Applicant had claimed for general damages, interest and costs of the case.

After full trial, this Court in its Judgment delivered on 28th July 2021, (as per Hon. Mruma, J.,) decided Commercial Case No.107/2019 in favor of the Applicant who was the Plaintiff therein against the 1st Respondent who was the sole defendant in the case, and issued the following orders:

(i) The Defendant shall pay to the Plaintiff USD 104,477.85.

(ii)The Decretal amount shall carry court's interest at the rate of 2% per annum from the date of Judgment till payment of the decreed sum in full.

(iii)The Plaintiff is awarded costs of the case which shall be taxed by the Taxing Officer.

It is from that background that the applicant subsequently filed the present application alleging that the decretal sum has not yet been settled by the 1st Respondent and that the purchase option has not been exercised. Therefore, the applicant claims that the Applicant is entitled to repossess the equipment whose title is still with the applicant and that the machines and equipment are not amenable to attachment in execution of the decree in Commercial Case No.107/2019 as they belong to the applicant. Copies of the Judgment and Decree in Commercial Case No.107/2019 were attached to this application as annexture EADB-4 and EADB-5. The applicant attached as annexture EADB-6 a series of demand letters and notices issued by the Applicant's lawyers requiring the Respondents to locate and return the leased equipment to the applicant.

When the Respondents were served with the Chamber application, the 1st, 4th and 6th Respondents filed a joint counter affidavit resisting the application. They stated that the lease agreement had an option of

purchasing the equipment and that in the Judgment of this court in Commercial Case No.107/2019 dated 28th July 2021, the 1st Respondent was ordered to pay the Applicant a total sum of USD 104,477.85 - a sum which the respondents are still organizing their resources so as to effect the payment thereof. They stated further in their joint counter affidavit that the claim for recovery of the machines or equipment was not one of the reliefs granted in the Court's judgment. They stated that as the applicant has won the decree in Commercial Case No.107/2019 against the 1st Respondent, the applicant is required to execute that decree as it is, and not to file the present application as the judgment and decree in commercial case No.107/2019 have no orders for recovery or repossession of the machines and equipment in dispute.

In the reply to counter affidavit, sworn by the Applicant's Counsel Mr. Gabriel Simon Mnyele, the Applicant stated that the present application for repossession of the equipment has nothing to do with the Judgment and Decree in Commercial Case No.107/2019, neither is it an alternative thereto as the right to repossess which is being pursued now is a contractual and legal right which has never been litigated upon before. He stated that the present application is a distinct one provided for under the law.

Following completion of filing of the affidavits, on 13th June 2023, the case was called for orders before the Predecessor Judge, (Hon. Nangela, J.). On that date the learned advocate for the Respondents Mr. Augustine Marten Kusalika, informed the Court that there was only a joint counter affidavit of the 1st, 4th and 6th Respondents and not for all the 6 Respondents. He addressed the court that he had been informed that the 2nd, 3rd and 5th Respondents were dead. This application therefore proceeded against the 1st, 4th and 6th Respondents only. The case was adjourned to 4th September 2023 when it was scheduled for Orders. On 29th September 2023 the court, (Hon. Nangela, J), ordered that hearing of this application should proceed by way of written submissions and issued a schedule therefor. On 16th November 2023, the parties completed filing their respective submissions and a date for Ruling was set for 16th February 2024 at 8:30 am after the Mid-December to February court vacation. Before the date set for Ruling, the Predecessor Judge, Hon. Nangela, J., was promoted and transferred to another duty station and hence this file was re-assigned to me as the Successor Judge to proceed with determination of the application on the basis of the court's records and the written submissions filed by the parties' counsel. The Ruling date was set for 21st March 2024, but neither party

appeared in Court in person or through their counsel. The date of delivery of the ruling was postponed to 22nd March 2024 and counsel were notified by the court via their contact details disclosed in the pleadings. On 22nd March, 2024 neither counsel attended the court. Delivery of the Ruling was adjourned to 25th March 2024 and the Court sent formal Notifications of date of delivery of the Ruling to both counsel and on 25th March 2024, Mr. Mnyele, learned advocate appeared for the applicant on one hand and held the brief of Mr. Kusalika, on the other hand for the 1st, 4th and 6th Respondents.

In the hearing of this application, the applicant enjoyed the services of Mr. Gabriel Mnyele, learned advocate, while the 1st, 4th and 6th Respondents enjoyed the services of Mr. Augustine Kusalika, learned Advocate. Mr. Mnyele, in his submissions, at the outset adopted the affidavit of Donald Parmena Sumary, the Principal officer for the Applicant and submitted that the orders sought in the Chamber Summons are directed at the 1st Respondent and Directors of the 1st Respondent company who have been joined as necessary parties, to show the places where the machines and equipment in question are placed or situated for the purpose of repossession by the applicant and costs of this application to be borne by the Respondents. He argued that the right to repossess the machinery and

equipment is both contractual and statutory. He submitted that under the Financial Lease Agreement attached to the affidavit as annexture EADB-1, the lessor has a right to repossess the equipment within 14 days if there is a default by the lessee and that under clause 16 of the financial lease agreement the lessor has a right to repossess the leased asset upon expiry or termination of the financial lease agreement.

Mr. Mnyele submitted further that under section 13(7) of the Financial Leasing Act, Cap.417 of the Laws of Tanzania, the lessee is required to return the leased equipment to the lessor upon expiry of the financial lease agreement, unless there is a renewal of the lease or the lessor agrees that the equipment may be purchased by the lessee. He argued that under section 13(2)(b) of the Financial Leasing Act, Cap.417, the lessor has a right to repossess the equipment upon expiry of the financial lease agreement. He submitted also that repossession can be effected by the lessor under section 13(4) of Cap 417 in the event of breach of the lease terms whereupon the lessor is required to give notice before repossessing the leased equipment. Mr. Mnyele submitted that there was a breach of the terms of the financial lease by the lessee (1st Respondent) that led to the Lessor's (Applicant) filing of Commercial Case No.107/2019. He argued that since the

applicant has exercised his right under section 13(3)(b) by filing the suit and recovering damages, the only reason now available to the Applicant for seeking repossession of the machines and equipment is the expiry of the financial lease agreement. He concluded that section 13 of the Financial Leasing Act Cap 417 provides two approaches for repossession of the leased assets by the lessor, namely direct repossession without the involvement of the court and indirect repossession through an order of the court. He submitted that the direct repossession is preceded by a condition that in doing so the lessor should not commit breach of peace. The second approach can be pursued by the lessor applying for court order for repossession or recovery of the leased assets. He argued that the applicant in this case has opted for the second approach to repossess the leased equipment and machines by seeking repossession through an order of the court.

In his submissions Mr. Mnyele relied on the cases of **Stanbic Bank Tanzania Limited versus Winners Company Limited,** Civil Appeal No. 12/22, High Court of Tanzania Musoma Sub-registry and **Kilimanjaro Truck Company Limited versus Tata Holding Tanzania Limited,** Commercial Case No.76/2015. These two cases were referred to show that

the lessor has the right to repossess and that the order of repossession is enforced under Order XXI of the Civil Procedure Code, Cap 33.

Mr. Mnyele further relied on the case of **Jonas Joshua Bunambali versus Equity For Tanzania Limited (EFTA)** DC Civil Appeal No.23 of 2020 where at pages 8 and 9 the Court held, and I quote verbatim, that:

> *Again the laws i.e section 13(4)(b) of Cap 417 has clearly provided for the right of the lessor in case of default that the lessor may seek from the court an order of repossession. That being the position therefore, since the appellant does not dispute the default and the fact that he has been served with the requisite notice the repossession, course taken by the respondent is not barred by an arbitration clause as parties have already agreed on the action to be taken and are bound by the relevant law.*

From another angle, in an attempt to distance the present application from the periphery of the Judgment and Decree in Commercial Case No.107/2019, Mr. Mnyele submitted that this is a stand-alone application and is based on statute, namely Cap 417 and thus it has nothing to do with the Commercial Case No.107/2019. He argued that the law under section 13(5) of the Financial Leasing Act, Cap 417 allows the lessor to repossess and seek "other remedies" including recovery of damages for loss caused by the non-

compliance with terms of the financial lease. Therefore, Mr. Mnyele argued that by the applicant having a decree in Commercial Case No.107/2019 at hand awaiting execution thereof, he is not thereby barred from filing the present application for repossession of the leased machines and equipment and from enforcing the order resulting from the present application.

Mr. Augustine Kusalika learned advocate for the 1st, 4th and 6th respondents submitted in reply that under section 13(4)(b) of the Financial Leasing Act Cap 417, a case like the present one should have been brought by way of a suit initiated by Plaint under the Civil Procedure Code, and not as an application brought by chamber summons. He argued that filing a suit would have enabled the court to receive evidence from witnesses as well as documentary evidence. Mr. Kusalika submitted further that all the cases relied upon by the Applicant's counsel as authorities were filed in court as suits or were appeals emanating from suits filed in the lower courts.

Mr. Kusalika further submitted that in Commercial Case No.107/2019 between the Applicant and the 1st Respondent herein, the applicant was awarded USD 104,477.85 and that the same subject matter like in the present case was in dispute in that case. He argued that the Applicant in the decree emanating from Commercial Case No.107/2019 was granted a sum

of USD 6078 as purchase options that made up the USD 104,477.85 to cover the whole claim. Therefore, he concluded, the Applicant is barred to re-open the same case based on the said judgment of this court. He prayed for dismissal of the application with costs.

In brief rejoinder, Mr. Mnyele, learned counsel for the applicant submitted that section 13(4) of the Financial Leasing Act provides for two options of seeking repossession of the leased equipment by the lessor. He argued that the section contains no requirement of filing a suit. He submitted that the Respondent's counsel was un-procedurally raising preliminary objections instead of making his submissions. He clarified that the case of **Kilimanjaro Truck Company Limited versus Tata African Holding Tanzania Limited** (supra) is relevant in that it was based on breach of an oral lease agreement wherein a party opted for the direct re-possession approach under section 13(4)(a) of Cap 417; while in the present case the Applicant is pursuing the other option of repossession through an order of the Court. So finished Mr. Mnyele with his rejoinder submissions.

I have keenly followed the rival arguments made by the learned counsel for the Applicant and the Respondent. I have gone through the authorities presented as well as the relevant court records constituting this application.

Unfortunately, as it will shortly unfold, the cited authorities are not related to the case at hand where there exists a prior decision of the same court in respect of the same subject matter in dispute and between the same parties. In essence, it is not disputed that there was a financial lease agreement dated 12th June 2008 between the Applicant as the lessor and the 1st respondent as the lessee whose life span was 48 months from the date of delivery of the first equipment by the Applicant to the 1st Respondent. Equally, it is not disputed that the 1st Respondent was the Lessee under the Financial Lease Agreement in respect of which the Applicant, as the Lessor, financed the acquisition by the 1st respondent, of the listed machines and equipment for the use of the lessee. The lessee under the Financial Lease Agreement which was attached to the affidavit as annexture EADB-1, had an obligation to pay monthly rental amounts for 4 years from the date of delivery of the first equipment to be leased. The financial lease agreement also had an option for the lessee to purchase the machines and equipment under Clause 22.0 thereof. Also, it is not in dispute that the 1st Respondent defaulted to pay some of the monthly rental amounts within the 4-years period of the lease agreement. That made the Applicant institute Commercial case No.107/2019 in this Court against the 1st Respondent only. Commercial

case No.107/2019 was decided in favour of the Applicant. Subsequent to the judgment and decree in Commercial Case No.107/2019, the Applicant has brought the present application claiming for the right to repossess the machines and equipment based on the same Financial Lease Agreement between the Applicant and the 1st Respondent - which agreement was also the subject of the judgment and decree in Commercial Case No.107/2019. The agreement has been attached in the affidavit as annexture EADB-1 and was tendered and admitted in the Commercial Case No.107/2019 as Exhibit P1. Inevitably, in determining the present application the court should ascertain the effect, if any, of the Judgment and decree in Commercial Case No.107/2019 to the present application. This is very crucial so as to avoid existence of two contradictory decisions of the same court in respect of the same matter. I have to navigate my way carefully so as to avoid collision between this decision and the already existing decision delivered by this very Court by Hon. Mruma,J., in Commercial Case No.107/2019 between the Applicant and the 1st Respondent. In case the present application collides with the decree in Commercial Case No.107/2019, that will mark the end of the journey of the applicant in his voyage on board the present application. Principles of res judicata, functus officio, estoppel, constructive res judicata

and issue estoppel would not permit a party to re-litigate the same subject matter or an issue of dispute which has already been litigated upon between the same parties in a court of competent jurisdiction. Hence my determination of the present application, inevitably, has to touch this particular aspect which has been extensively argued by the parties' learned counsel.

The imminent danger of collision between the present application on one hand and the Judgment and decree in Commercial Case No.107/2019 was felt by both parties. Thus, the learned counsel addressed me on that issue. On one hand Mr. Kusalika learned advocate for the 1st, 4th and 6th Respondents maintained the position that the subject matter of the current application is already dealt with in the judgment and decree of Commercial Case No.107/2019, while Mr. Mnyele, learned advocate for the Applicant maintains that the present application is a stand-alone application seeking to enforce specific statutory right of the lessor to repossess the leased equipment and machines- a right allegedly not litigated upon in the Commercial Case No.107/2019. This necessitated the court to scrutinize carefully the nature of the financial leasing contract between the Applicant and the 1st Respondent as well as the Judgment and decree in Commercial

Case No.107/2019 in order to see the extent, if any, that the Judgment and Decree in Commercial Case No.107/2019 may impinge on the present application.

The lease agreement between the Applicant and the 1st Respondent which is annexture EADB-1 to the affidavit in the present application as well as Exhibit P1 in the Commercial Case No.107/2019, is a Financial Lease. The uniqueness of a financial lease agreement is encapsulated by the Financial Leasing Act of Tanzania Cap 417 of the Laws of Tanzania which provides under section 5(2) that:

> *For avoidance of doubt, a financial lease agreement shall be a special contract that constitutes neither a rental, a sale, a rental-sale, a hire purchase, a sale with preservation of property rights, nor a credit sale or sale by payments made in installments all of which operations are excluded from the scope of the existing laws.*

The true nature of a financial lease was comprehensively explained by the Supreme Court of India in the case of **Asea Brown Boveri Ltd vs Industrial Finance Corporation of India**, (2005) AIR, Supreme Court 17, where the court held:

What is a lease finance? Financial lease has been defined by International Accounting Standards Committee as "a lease that transfers substantially all the risks and rewards incident to ownership of an asset. Title may or may not eventually be transferred." Lessor is only a financier and is not interested in the assets. This is the reason that financial lease is known as full payout lease where contract is irrevocable for the primary lease period and the rentals payable during which period are supposed to be adequate to recover the total investment in the asset made by the lessor.

In our opinion, financial lease is a transaction current in the commercial world, the primary purpose whereof is the financing of the purchase by the financier. The purchase of assets or equipments or machinery is by the borrower. For all practical purposes, the borrower becomes the owner of the property in as much as it is the borrower who chooses the property to be purchased, takes delivery, enjoys the use and occupation of the property, bears the wear and tear, maintains and operates the machinery/equipment, undertakes indemnity and agrees to bear the risk of loss or damage, if any. He is the one who gets the property insured. He remains liable for payment of taxes and other charges and indemnity. He cannot recover from the lessor, any of the above mentioned expenses. The period of lease extends over and covers the entire life of the property for which it

may remain useful divided either into one term or divided into two terms with clause for renewal. In either case, the lease is non-cancellable.

In an attempt to further reveal the nature of a financial lease, I made reference to the scholarly work entitled **Lease Financing & Hire Purchase**, by Vinod Kothari (Second Edition, 1986, at pp. 6 & 7), who states that:

a finance lease, also called a capital lease, is nothing but a loan in disguise. It is only an exchange of money and does not result into creation of economic services other than that of intermediation.

The learned author has quoted T.M. Clark, one of the most authentic writers on the subject who defines lease and operating lease in the undergoing words:-

A financial lease is a contract involving payment over an obligatory period of specified sums sufficient in total to amortise the capital outlay of the lessor and give some profit.

An operating lease is any other type of lease that is to say, where the asset is not wholly amortised during the non-cancellable period, if any, of the lease and where the lessor does not rely for his profit on the rentals in the non-cancellable period.

The features of the financial lease are as under:

1. The asset is use-specific and is selected for the lessee specifically. Usually, the lessee is allowed to select it himself.

2. The risks and rewards incident to ownership are passed on to the lessee. The lessor only remains the legal owner of the asset.

3.Therefore, the lessee bears the risk of obsolescence.

4. The lessor is interested in his rentals and not in the asset. He must get his principal back along with interest. Therefore, the lease is non- cancellable by either party.

5. The lease period usually coincides with the economic life of the asset and may be broken into primary and secondary period.

6. The lessor enters into the transaction only as a financier. He does not bear the costs of repairs, maintenance or operation.

7. The lessor is typically a financial institution and cannot render specialized service in connection with the asset.

8. The lease is usually full-pay-out, that is, the single lease repays the cost of the asset together with the interest."

The Financial Leasing Act, Cap 417 of the Laws of Tanzania in a way reflects these peculiar features of a financial lease agreement under sections 4 and 5 thereof. Looking at the Financial Lease Agreement between the Applicant

and the 1st Respondent in this application, the same is a reminiscent of the typical features alluded to above. In particular Clause 22.0 thereof stipulates:

> *If the Lessee (having meanwhile duly observed all the terms and conditions of the Agreement whether express or implied) shall be desirous of purchasing the Equipment, it shall be at liberty to do so either at any time during the period of the lease after prepaying the rentals or at the expiration of the period of the lease. In either event the Lessee shall in addition pay the Lessor a purchase price representing 1.0% of the Lease amount. The Lessor shall cause to be done and do all such things as may be necessary to transfer the Title of the Equipment from the Lessor to the Lessee.*

Taking cue from the foregoing persuasive authorities, which I fully subscribe to, I am of the settled view that, ordinarily, a financial lease would be a lease which is born as a lease but ends as a sale of the once leased assets. Upon the lessee exercising the option of purchasing the leased asset, the lessor-lessee relationship under the financial lease agreement, which brought that transaction under the ambit of the Financial Leasing Act, ceases to exist and is replaced by a new relationship of Vendor and Purchaser which emerges consequent to the sale of the asset. The vendor-purchaser relationship will be governed by the ordinary law of contract, not by the Financial Leasing

Act anymore. It is worth to note again that under the financial lease the purchase option is normally exercisable at the instance of the lessee, whereupon the old relationship of lessor-lessee ceases to exist and a new relationship of vendor-purchaser is born. With the changed relationship, the legal regime governing it changes from the Financial leasing Act to ordinary law of contract and the mutual covenants of the lessor and lessee under the defunct financial lease agreement can only be enforced under the ambit of the ordinary law of contract as ordinary contractual liabilities in the form of debts, damages and penalties. When the lessor was still the legal owner of the leased asset, he could invoke the statutory and contractual powers to enforce his rights including repossession of his asset in case of breach of provisions of the financial leasing agreement. But once the lessee in a financial lease agreement activates the purchase option clause, the lessor cannot be able to claim repossession of the leased asset which does not belong to the vendor/lessor anymore but he can demand the purchaser/lessee to pay the outstanding rental payment arrears, damages and or balance of the outstanding purchase price (residual value) for the asset whose advance payments thereof were being made throughout the financial lease period as part and parcel of the periodic rental amounts.

With all that foregoing understanding of a financial lease in mind, I now proceed to answer the specific questions related to the claims of the Applicant against the Respondents herein. The first question that must be answered first as it affects the outcomes of the case at hand is whether or not on the face of the present application and the judgment and decree in Commercial Case No.107/2019, the lessee triggered-off the purchase option clause which is embedded in clause 22.0 of the Financial Lease Agreement dated 12th June 2008? On one hand Mr. Kusalika learned advocate for the 1st, 4th and 6th Respondents maintains the position that the subject matter of the current application is already dealt with in the judgment and decree of Commercial Case No.107/2019 wherein the purchase price of USD 6078 for the formerly leased asset was ordered to be paid by the 1st Respondent to the Applicant as part of the total debt of USD 104,477.85. On the other hand, Mr. Mnyele, learned advocate for the Applicant, maintains the position that the purchase option clause in the Financial Leasing Agreement has not yet been activated by the lessee as the agreed purchase price has not been paid by the lessee to the lessor for the residual value of the machines and equipment. He has argued that under section 13(7) of the Financial Leasing Act, Cap.417 of the Laws of Tanzania, the lessee is required to return the

leased equipment to the possession of the lessor upon expiry of the lease agreement unless there is a renewal of the lease or the lessor agrees that the equipment may be purchased by the lessee.

Whether or not purchase option under clause 22.0 of the financial leasing agreement between the Applicant and the 1st Respondent was triggered-off by the 1st Respondent, is an issue subject to proof. To answer this question, we need to look at the relevant clauses of the Financial Leasing Agreement in question in order to see how could the purchase option be activated. Again, we have to look at the judgment and decree in Commercial Case No.107/2019 in order to see what were the findings of the Court in respect of activation of the purchase option clause in the Financial Leasing Agreement.

Clause 22.0 of the Financial Leasing Agreement provided that the options available to the lessee to purchase the leased asset could be exercised in two alternative ways that is either **"at anytime during the period of the lease"** but subject to prepayment of all periodic rental arrears or **"at the expiration of the period of the financial lease".** It should be noted that in either case, there is the attendant precondition of the lessee having observed all the conditions of the lease. Expiry of the financial lease

agreement is therefore one of the agreed instances which would activate the right of the 1st respondent to purchase the once leased equipment and machines at the agreed amount of residual value thereof of USD 6078. In the case at hand, the second option seems to have been pursued whereby the financial lease agreement expired in 2012 or 2013. The Applicant has supplied the answers to the question of expiry of the financial lease agreement when he stated in his submissions that **"since the applicant has exercised his right under section 13(3)(b) by filing the suit and recovering damages, the only reason now available to the Applicant for seeking repossession of the machines and equipment is the expiry of the financial lease agreement".** A similar stance is seen in the affidavit of the applicant where he stated that **"by the time the lease agreement was coming to an end, the Respondents were still indebted to the Applicant and retained and continued to use the equipment to their benefits despite there being an obligation under the financial lease agreement to return the equipment to the applicant immediately."**

The affidavit of the applicant and the submissions made by the applicant's counsel leave no doubt that the financial lease agreement between the

applicant and the 1st Respondent has expired or come to an end. Further, from the affidavit of the applicant's Principal Officer, it is shown that the first batch of 4 machines and equipment were leased in 2008 while the second batch of 6 equipment were leased in 2009. Since the period of the financial lease was 4 years (48 months) from delivery of the leased asset, it means that the financial lease between the parties herein had expired by 2012 for the first batch of 4 equipment and by 2013 for the second batch of 6 equipment. It follows therefore that upon the expiry of the financial lease, the option to purchase the leased assets existed at the instance of the lessee. Therefore, what really matters is activation of the purchase option clause which can be activated by the lessee only. It depends on how the parties agreed on how the purchase option clause could be actived. Upon activation of the purchase option clause, the former lessor, having sold the leased asset to the lessee, cannot demand to take repossession of the asset.

It is worth noting that although the actual transfer of title of the leased asset occurred upon expiry of the financial lease agreement, the actual value of the leased assets (which constitutes partial consideration for the sale) was already substantially paid by the lessee through the periodic rental amounts which were embedded in it the purchase price for the leased asset, interest

for the loan and profits for the sale of the asset to the lessee. While payment of the periodic rental amounts became an instant obligation imposed upon the lessee in favour of the lessor from the commencement of the financial lease, on the other hand, payment for the residual value of the asset upon expiry of the financial lease agreement, became a contingent future obligation on the part of the lessee to have paid by the time of the sale of the leased assets the residual value of the asset at the end of the lease period. Upon activation of the purchase price by the lessee, both the outstanding periodic rental amounts and the payment for the residual value of the asset became recoverable as debts emanating from the former financial leasing agreement. As such, the Applicant cannot enforce recovery of debts by way of claiming repossession of the assets after being sold to the 1st Respondent.

In ascertaining activation of the purchase clause and its implications under the Financial Lease Agreement between the applicant and the 1st respondent herein, I had to re-read the judgment in Commercial Case No.107/2019 once again. The aim was to see what the court might have decided as a finding in respect of activation of the purchase option under Clause 22.0 of the Financial Leasing Agreement. The pertinent findings by the Court are at

pages 6 and 8 of the Judgment of Hon. Mruma, J., sitting in this very court in Commercial Case No.107/2019. At page 6 of the Judgment he stated his findings thus:

> *From the evidence adduced in this case and particularly the four motor vehicles registration cards, there can be no doubt that all the equipment was registered in the joint names of the plaintiff and the Defendant. This reflects condition 22.0 of the Agreement which give the Defendant an option to purchase the leased equipment.*

My understanding of the above wording by his Lordship is that that the Defendant in that case who is the 1st Respondent herein had invoked or activated the purchase option under clause 22.0 of the Financial Leasing Agreement between the Applicant and the 1st Respondent herein. The Honourable Judge reached that conclusion based on the fact that there was joint ownership of the assets as disclosed by the registration cards of the motor vehicles. This means that the lessee had already activated the purchase option by the time of filing Commercial Case No.107 of 2019. This, again, means that there is no pending purchase option anymore to be activated now contrary to what Mr. Mnyele has submitted. This is because the properties sought to be repossessed by the applicant in the present application, are no longer the property of the applicant but are already in

the ownership of the 1st respondent. The agreement containing condition 22.0 which his Lordship, Mruma, J., was talking about in his judgment was admitted in commercial case No.107 of 2019 as Exhibit P1 and ironically it is the same Financial Leasing Agreement brought in this application as Annexture EADB-1 to the applicant's affidavit. I find that the Financial Leasing Agreement has already been litigated upon.

In further proof that the purchase option clause 22.0 of the Financial Leasing Agreement between the Applicant and the 1st Respondent herein was activated, I had to refer to what His Lordship Mruma, J., had to say at page 8 of the Judgment in Commercial Case No.107/2019. I quote verbatim:

> *There is no dispute that, by 19th October, 2015 the outstanding amount of rental arrears was at USD 127,477.85, penalties stood at USD 57,728.665 and purchase option of USD 6,078.81 which made the total outstanding payable to be USD 191,285.31 (see the Defendant's letter with reference number DAR/PS/16F/703/II which was admitted as part of Exhibit P1). The Defendant admitted indebtedness to that extent in her letter dated 21 September 2015 (also admitted as part of Exhibit P1) in which she was responding to the Plaintiff's letter referred to above. At the date of filing the case the plaintiff was claiming USD 104,477.85 as rental arrears*

which means some payments were done to reduce the outstanding amount from USD 127,477.85 which were being claimed in October 2015 to USD 104,477.85 due at the time of filing this suit. No evidence was offered challenge this amount. This court therefore finds that the Plaintiff is entitled to the claim of USD 104,477.85 as rental arrears as claimed in the Plaint."

In my understanding, the above reproduced passage shows that firstly, this Court in Commercial Case No.107/2019 made a finding that the purchase option clause was already activated by the lessee (1st Respondent) and that the purchase price was USD 6,078.81. This is the residual value of the leased assets representing 1% of the leased amount of USD 644,000.00 which weas described under Clauses 1(d) and 3(a) of the financial lease agreement. Secondly, the above passage reveals that the USD 6,078.81 being the purchase price payable by the lessee to the lessor for buying the residual value of the leased assets, was combined with the then outstanding rental arrears under the lease agreement to form the total debt that the 1st respondent was indebted to the Applicant.

It is my finding in the present application therefore that since the purchase option clause was exercised and activated by and in favour of the 1st respondent, it means the ownership of the residual value in the leased

machines and equipment effectively passed from the Lessor (Applicant) to the Lessee (1st Respondent) herein. As such the contractual and statutory remedy of repossession under the lease agreement or the Financial Leasing Act, respectively ceased to vest in the Applicant with immediate effect from the date the purchase option clause was activated in favour of the 1st Respondent. This application therefore is misplaced and therefore bound to fail.

I hold that the Applicant lost his right to the remedy of repossession of leased assets when he sold the assets to the lessee but retained his right to claim the outstanding rental arrears and the unpaid purchase price of the residual value of the machines and equipment. The Applicant has made allegations in this application that he has not yet been paid by the 1st Respondent the decretal sum consisting of the composite debt of USD 104,477.85. This is constituted of rental arrears of USD 127,477.85, penalties of USD 57,728.665 and purchase option of USD 6,078.81, minus USD 17,000 which were rental arrears payments effected by the 1st Respondent that reduced the outstanding amount from USD 127,477.85 as of October 2015 to USD 104,477.85 as reflected in the Judgment and decree. In other words, the applicant is trying to show in this application that the preconditions under

clause 22.0 of Financial Lease Agreement that required the 1st respondent as the lessee to observe all conditions of the lease financial lease before he could activate the purchase option was not complied with as to entitle the 1st Respondent the right to exercise the purchase option. I am afraid that this issue is judicially settled by vide the Judgment and decree of this court in Commercial Case No.107 of 2019. What is contained therein is the position of the law and of this court so far as that issue is concerned, whether the applicant accepts it or not, that judgment has established it as a fact that the 1st Respondent, at the expiry of the financial lease agreement with the applicant, did exercise the purchase option hence purchased the machines and equipment at USD 6978 which is now a debt due the Applicant as part of the decretal sum of USD 104,477.85 in Commercial Case No.107 of 2019. In that regard, I am of the settled view that the applicant's remedy now in his new position as a creditor is not to repossess the once leased assets which are no longer his property. As correctly submitted by Mr. Augustine Kusalika, learned advocate for the Respondents, the applicant's remedy now, is to claim for payment of the outstanding sum of USD 104,477.85 made of rental arrears, penalties and purchase option as contained in the decree in Commercial Case No.107/2019 by way of execution of the decree against

the 1st Respondent. The Applicant argued that the formerly leased assets cannot be attached to satisfy the decree entered in his favour because they still belong to the applicant in his capacity as the former lessor. This argument is not tenable, it seeks to, once again, contradict the established decision of this very court delivered by Hon. Mruma, J., in Commercial Case No.107/2019. Filing the present application, instead of executing the decree, is a misuse of court resources- a practice that is highly discouraged. This Court now cannot make any decision in favour of the argument that the purchase option has not been exercised at all or that it has been exercised improperly and thus the machines and equipment still belong to the applicant. Whether founded on contract of statute, such a claim is bound to fail as it seeks to contradict the settled decree of the court in the same matter between the same parties.

For the sake of certainty and repose, I should clarify further why I cannot reach a different finding to that reached by my brother Judge in Commercial Case No.107/2019 involving the applicant and the 1st Respondent herein. The Judgment and decree of this Court in Commercial Case No.107/2019 between the Applicant and the 1st Respondent standing intact, this court is functus officio to determine, once again, the same issues. In the Blacks Law

Dictionary, Nineth Edition, the term functus officio is defined at page 743 as follows:

> *"[Latin having performed his or her office"] (19c) of an officer or official body without further authority or legal competence because the duties and functions have accomplished.....From the definition given above for the doctrine of functus officio to apply, the court must have fulfilled its function by determining the question in dispute, and therefore, subject to the power of review and correction of errors, of no further force or authority on the question determine.* "

The Court of Appeal for Eastern Africa in **KAMUNDI V R** (1973) EA 540, had the occasion to enlighten on the doctrine of functus officio. The Court of Appeal for Eastern Africa among others, stated:

> *A further question arises, when does a magistrate's court become functus officio and we agree with the reasoning in the Manchester City Recorder case that this case only be when the court disposes of a case by a verdict of not guilty or by passing sentence or making some orders finally disposing of the case (emphasis added).*

Under the doctrine of functus officio, I have no jurisdiction now to determine the issue as to whether or not the purchase option in the Clause 22.0 of the

Financial Lease Agreement between the Applicant and the 1st Respondent has been properly activated or activated at all. This court has already made a final order in respect of that issue in Commercial Case No.107/2019. Consequently, I am also unable to reopen the matter and determine as to whether or not the applicant has the right to repossess the machines and equipment because that question necessarily involves determining whether the machines and equipment were actually sold to the 1st Respondent or not. This is a question which has already been answered in previous proceedings involving the same parties. In the absence of an application for review or rectification of clerical and arithmetical errors, this court cannot alter a single letter in the decision in Commercial Case No.107/2019.

Further, like I have stated earlier in this Ruling, the doctrine of issue estoppel would debar this Court to re-open and determine again the issue of activation of purchase option in the financial lease agreement between the applicant and the 1st respondent. In **Issa Athumani Tojo Versus The Republic,** Criminal Appeal No.54 Of 1996, Court of Appeal of Tanzania at Dar Es Salaam at page 7, the Court quoted with approval the finding in **Regina v Hogan,** [1974] 1 Q. B. 398, at P. 401:

"Issue estoppel can be said to exist when there is a judicial establishment of a proposition of law or fact between parties to earlier litigation and when the same question arises in later litigation between the same parties. In the later litigation the established proposition is treated as conclusive between those same parties. It can also be described as a situation when, between the same parties to current litigation, there has been an issue or issues distinctly raised and found in earlier litigation between the same parties."

In order to invoke the doctrine of issue estoppel the parties in the two trials must be the same and the fact-in-issue proved or not in the earlier trial must be identical with what is sought to be reagitated in the subsequent trial. The present application is seeking to enforce the right of repossession of the leased assets which the applicant alleges to own even now in terms of the Financial Leasing Agreement between the applicant and the 1st respondent and in terms of the provisions of section 13 of Financial Leasing Act, Cap 417 of the Laws of Tanzania. The right to repossess the equipment and machines is sought to be enforced with respect to the relationship of the applicant and the 1st Respondent as lessor and lessee respectively, in respect of their financial lease agreement. The basis of the Applicant's claim is that the

purchase option under clause No.22 of the financial lease agreement has not yet been activated by the 1st Respondent. Inevitably, therefore, the current application raises the issue as to whether or not the purchase option has been properly activated by the lessee, if at all, and therefore whether or not the lessee owns the assets in question? But this Court in Commercial Case No.107/2019 made findings at pages 6 and 8 of the Judgment that the purchase option under clause 22.0 of the Financial Leasing Agreement between the Applicant and the 1st Respondent has already been activated by the lessee (1st Respondent) and that the contractual purchase price of the residual value of the leased asset payable by the 1st Respondent to the Applicant is USD 6,078. The court held that the 1st Respondent is indebted to the Applicant for this amount and other amounts as rental repayment arrears. Under the doctrine of issue estoppel, this court is debarred now from re-opening the same issue of activation or non-activation of the purchase option under Clause 22.0 of the Financial Leasing Agreement between the Applicant and the 1st Respondent. The application at hand is therefore bound to fail from this perspective.

This application, yet from another angle, would offend the rule of constructive res judicata. In **Akber Merali Alibhai v. Fidahussein and**

Comp. Ltd and others (1969) H.C.D. 270, an earlier suit between the same parties was dismissed in the defendant's favour on a preliminary point raised that as the plaintiff was a partner he could not sue his co-partners as debtors until such time as the partnership had been dissolved and accounts taken. The plaintiff then instituted a new suit seeking, inter alia, a declaration that the partnership he entered into with the defendants be dissolved. The defendants argued that as the new claim could have been raised in the earlier proceedings even as an alternative, the claim for dissolution of the partnership was barred by Section 9 of the Civil Procedure Code, as being res judicata. In sustaining the objection, Duffus, J., had the following to say:

> *The Indian authorities relied on by Mr. Lakha support the contention that where a previous suit is dismissed a subsequent suit on the same cause of action is not maintainable. They also indicate that parties to litigation are required to bring forward their whole case and are not permitted, except under special circumstances, to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest (in the earlier case) but which was not brought forward through negligence, inadvertence or even accident vide Henderson v. Henderson, 67 E.R. 313 at P. 319). With these principles I respectfully agree.".*

Looking at the present application, the applicant is claiming for the right to repossess the formerly leased assets from the 1st Respondent pursuant to his rights as a lessor and therefore the legal owner of the leased assets on the allegations that the 1st Respondent failed to perform its obligations, including the obligation to pay rental amounts as agreed under the Financial Lease agreement entered between them in 2008 and failure to pay the purchase price for the residual value of the leased assets. But the same applicant earlier on in 2019 instituted Commercial Case No.107/2019 against the 1st Respondent. He filed the case as a lessor and legal owner of the leased assets on the allegations that the 1st Respondent had failed to perform its obligations, including the obligation to pay rental amounts as agreed under the Financial Lease agreement entered between them in 2008 and failure to pay the purchase price for the residual value of the leased assets. The applicant claimed for 100% of purchase option. The cause of action for commercial case No.107/2019 and for the present application is the same. It arises from the alleged breach by the lessee of the terms of the 4-years Financial Lease Agreement between the Applicant and the 1st Respondent entered into by them in 2008. In Commercial Case No.107/2019 according to the Plaint and the Judgment attached to the affidavit, the applicant

claimed for payment of USD 202,036.53 being: (i) Rental arrears amounting to USD 104,477.85; (ii)Interest on rental arrears USD 71,496.72; (iii) Default Interest accrued USD 19,983.15; (iv) Purchase Options (100%) USD 6078.81. Also, the Applicant was claiming for general damages, interest and costs of the case.

After full trial, this Court in its Judgment delivered on 28th July 2021, (as per Hon. Mruma, J.,) decided in favor of the Applicant who was the Plaintiff therein against the 1st Respondent who was the sole defendant in the case, and granted the following reliefs:

(i) The Defendant shall pay to the Plaintiff USD 104,477.85.

(ii)The Decretal amount shall carry court's interest at the rate of 2% per annum from the date of Judgment till payment of the decreed sum in full.

(iii)The Plaintiff is awarded costs of the case which shall be taxed by the Taxing Officer.

It is apparent that the cause of action upon which the Applicant sued the 1st Respondent for the above-mentioned reliefs, is the same cause of action upon which the applicant is suing the 1st Respondent and others in the present application. It was submitted by the learned counsel for the applicant

that this is a stand-alone application and is based on statute, namely Cap 417 and thus it has nothing to do with the Commercial Case No.107/2019 which was based on contract only. He argued that the law under section 13(5) of the Financial Leasing Act, Cap 417 allows the lessor to repossess and seek "other remedies" including recovery of damages for loss caused by the non-compliance with terms of the financial lease. He submitted that there was a breach of the terms of the lease by the lessee (1st Respondent) that led to the Lessor's (Applicant) filing of Commercial Case No.107/2019. He argued that since the applicant has exercised his right under section 13(3)(b) by filing the suit and recovering damages, the only reason now available to the Applicant for seeking repossession of the machines and equipment is the **expiry of the lease agreement**. In other words, Mr. Mnyele's argument is that the Applicant under section 13 of the Financial Lease Agreement had several alternative remedies in the event of breach by the lessee of the terms of the financial lease; and he admits that by filing the Commercial case No.107/2019, the applicant has already enforced some of his remedies like recovering damages and therefore, now by filing the present application, the applicant is enforcing his other batch of reliefs namely the right to repossess the leased equipment. It is not disputed that the alternative reliefs sought in

the present case and those already sought in Commercial Case No.107/2019 emanate from the same circumstances, transaction and cause of action namely breach of the financial lease agreement by the lessee. What is being asserted by the applicant is that the relief of repossession of the leased asset which is being pursued now by the applicant has never been pursued nor litigated upon in the previously instituted and concluded proceedings in Commercial Case No.107/2019 involving the same parties and based on the same cause of action. Can a person who becomes vexed with several reliefs arising from the same transaction be allowed to bring his claims as bits and pieces in different suits against the same other party? My answer is in the negative. The practice is not allowed under the doctrine of constructive res judicata. As reflected in the case of **Akber Merali Alibhai v. Fidahussein and Comp. Ltd and others** (supra), the rule is that where the same transaction entitles a person to several reliefs, he should frame his suit in such a way that he brings to court his entire claim emanating from the same transaction. Any relief which is not included in an earlier suit, and which could have been brought as part of the earlier suit, would be debarred if it is subsequently brought separately and it will thereby be rendered res judicata constructively. The logic behind this prohibition is not far to see.

Courts abhor multiplicity of proceedings. That is why the plaintiff is given an avenue under the Civil Procedure Code to join several causes of actions or claims emanating from the same transaction. The rule prohibiting splitting of reliefs founded on the same cause of action is firmly entrenched under Order II Rules 1, 2 and 3 of the Civil Procedure Code, Cap 33 of the Laws of Tanzania which provide:

> *1. Every suit shall, as far as practicable, be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.*
>
> *2.-(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court.*
>
> *(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.*
>
> *(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for all such reliefs, he shall not afterward sue for any relief so omitted.*

It follows therefore that when the Applicant instituted Commercial Case No.107 of 2019 against the 1st Respondent, which was founded on breach of the Financial Lease Agreement between them, he should have also combined in that case all his claims and reliefs arising from and incidental to the rights and obligations of the applicant and the 1st Respondent under the financial lease agreement and as enshrined in the Financial Leasing Act Cap 417.

I have noted the argument by Mr. Mnyele in his submissions that the Commercial case No.107/2019 was based on breach of the financial lease agreement while the present application is based on statutory reliefs under section 13 of the Financial Leasing Act. In my settled view, that argument cannot stand. The terms of the Financial Leasing Agreement between the Applicant and the 1st Respondent are what subjected the applicant and the 1st respondent to the application of the Financial Leasing Act, Cap 417. Law does not operate in vacuum. It was due to the alleged breach of the terms of the financial lease agreement that the aggrieved party resorted to the legal protection under the Financial Leasing Act, Cap 417. One cannot choose to enforce a particular statutory provision out of the blue. There must be in existence the necessary circumstances which make the particular statutory

provision applicable to the defined legal relationship of the parties that gives rise to the dispute calling for application of the particular provision of a particular law. In this regard, the Financial Leasing Act, Cap 417, categorically provides under section 2(2)(a),(b),(c) that the Act **"shall only apply to any financial lease"** of an asset if the asset is within the United Republic of Tanzania; if the lessee's main center of business is within the United Republic of Tanzania; or if the financial leasing agreement provides that Tanzanian law governs the transaction. Therefore, the Financial Leasing Act, Cap 417 and the remedies therein including the remedy of repossession which the applicant is seeking to enforce in the present application, cannot operate or resorted to in absence of a financial lease agreement. The argument that the present application seeks to enforce merely the statutory right of repossession of leased asset, in total isolation of the financial leasing agreement which has been litigated upon, is misconceived. There is no way a person can pursue a statutory remedy under the Financial Leasing Act, Cap 417 without a financial lease agreement, past or present, being in place under the circumstances stipulated under section 2(2) of the Financial Leasing Act, Cap 417 of the Laws of Tanzania.

I therefore hold that Commercial Case No.107/2019 instituted by the applicant against the 1st Respondent, was founded on breach of the Financial Lease Agreement between the Applicant and the 1st Respondent in the same way the present application traces back its roots to the same financial lease agreement which was tendered as Exhibit P1 in the earlier suit and as an annexture EADB-1 in the present application. Disputes arising out of financial leasing agreements are governed, inter alia, by the Financial Leasing Act Cap 417. Therefore, when the dispute arose out of the Financial Leasing Agreement of 12th June 2008 between the Applicant and the 1st Respondent, and the Applicant instituted Commercial Case No.107/2019 to recover damages and outstanding rental arrears, the applicant ought to have also included and impleaded in the same suit his purported other, further or alternative claim or relief for repossession of the leased assets. By choosing to split the claims, thereby suing only in respect of partial claim for rental arrears and damages, the Applicant thereby forfeited his right to subsequently bring in court the present claim for repossession of the leased assets.

The claim which the Applicant brought to Court in Commercial Case No.107 of 2019 and the decision of the Court thereon were broad enough that they

also covered the narrow issue which has now been presented in this application. In Commercial Case No.107/2019 this court held as a fact that the purchase option under clause 22.0 of the Financial Lease Agreement had been activated and that the machines and equipment which were the subject matter of the former lease agreement are the properties of the 1st Respondent. This means that from the date of that judgment there is no lessor-lessee relationship under a financial lease agreement between the applicant and the 1st Respondent since the machines and equipment are now the property of the 1st Respondent (former lessee) and hence the former lessor has no assets on lease. It was the activation of the purchase option which effectively ended the lessor-lessee relationship between the Applicant and the 1st Respondent and turned them into Creditor-Debtor relationship in respect of the unfulfilled obligations which they had under their former financial lease agreement. Cessation of the lessor-lessee relationship under the financial lease, effectively ended the applicability of the Financial Leasing Act to the Applicant as against the 1st Respondent. Now the Applicant cannot go back in time and step in his former shoes as a lessor and attempt to invoke the provisions of the Financial Leasing Agreement which give the lessor the right to repossess the leased assets simply because the applicant

is no longer a lessor nor does he own anymore the assets that were once leased to the lessee during the lifetime of their financial lease agreement.

Repossession is an intermediate remedy available to the lessor during the pendency and validity of the financial lease agreement and at a time when the lessor is still entitled to the ownership of the leased assets. After the financial lease agreement comes to an end and after the lessee has purchased the formerly leased assets, the remedy of repossession cannot be available to the former lessor in the financial lease agreement. He cannot repossess what is no longer his! The irrevocability and non-cancellable nature of the financial lease agreement are only true during the lifetime of the financial lease. Going back to the basics, "a financial lease is one which is born as a lease but **ends as a sale** of the once leased assets." Thus, upon the lessee activating the purchase option, thereby buying the once leased assets, the financial lease comes to an end. The intermediate remedies like repossession of the leased assets, which are available specifically to a lessor qua lessor under the Financial Leasing Act, Cap 417, cannot be enforced as such once the financial lease agreement comes to an end as a sale by the lessee purchasing the leased equipment.

As it happened in this application, the applicant earlier on sued the 1st Respondent for the final remedies of damages and payment of outstanding rental amounts and left out his intermediate remedy of seeking repossession of the leased assets. The decision made in that suit coincidentally had the effect of also determining the foundation and legal basis of the applicant's intermediate remedy of repossession when the court held that the lessee had activated the purchase option in respect of the leased assets and that the same had thereby been transferred to the lessee leaving the applicant entitled only to amounts of unpaid debts for rental payment arrears and purchase price for the residual value of the once leased assets. In that regard, the Applicant by seeking for and obtaining the final remedies while omitting to claim for intermediate remedies, inadvertently, shot himself on the leg and therefore the present application can go nowhere.

Mr. Kusalika, learned advocate for the 1st, 4th and 6th Respondents attempted to challenge the tenability of the application in that it has been brought by way of a chamber application instead of a suit. In my view, Mr. Kusalika was supposed to bring that argument as a preliminary objection at the earliest possible time before the hearing started. I therefore desist to determine that

point. At any rate, its outcome would not anyhow change the doomed fate of the present application.

In fine, all relevant legal rules and practical considerations militate against granting the application at hand. It is an application which is really stuck between a rock and a hard place! In the upshot I hereby dismiss the application with costs.

A.H.GONZI

JUDGE

25/03/2024

Ruling is delivered in Court this 25th day of March 2024 in the presence of Mr. Gabriel Simon Mnyele, learned advocate for the Applicant also holding brief for Mr. Augustine Kusalika, learned advocate for the 1st, 4th and 6th Respondents.

A.H. GONZI

JUDGE

25/03/2024