

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 64 OF 2023

(Originating from Land Case No. 19 of 2019 before Hon. J.L. Masabo, J. dated 5th day of November, 2020)

JUNACO (T) LIMITED.....1ST APPLICANT

STOPH YUSUPH SANGA.....2ND APPLICANT

ADROFINA LASTON SANGA.....3RD APPLICANT

JUSTIN LAMBERT.....4TH APPLICANT

VEDASTINA LAMBERT.....5TH APPLICANT

VERSUS

EQUITY BANK (T) LIMITED..... RESPONDENT

RULING

31/03/2023 & 28/04/2023

L. HEMED, J.

In essence, I find it apt to narrate the genesis of this matter in support of the application before me, albeit shortly. It is this, the parties herein executed a Deed of Settlement which was recorded and a Consent Judgment being entered on 5th day of November, 2020 before Hon. J.L. Masabo, J. in respect to Land Case No. 19 of 2019.

In the said Consent Judgment it was ordered that, in the event, of any default by the plaintiffs to pay any instalment of the settlement amount agreed within the stipulated time, the usual default clause would apply. In that regard the whole settlement sum as set out in the deed of settlement should become payable immediately and the defendant should be at liberty to realize the guarantees and the mortgaged properties to liquidate the outstanding amounts and take other necessary measures to recover the said settlement sum.

It is undisputed that, outside the Court, there were efforts by parties to satisfy the Court's consent Decree that anent to Land Case No. 19 of 2019. However, the snags caused by the respondent's for not certifying the advanced payments from the applicants', the 1st applicant in particular, is what have necessitated the instantaneous application.

On 10th March, 2023, this Court directed parties to argue the present application by way of written submissions. Parties acted upon in conformity with the Court's order. The applicants enjoyed the services of Mr. Adronicus K. Byamungu, the learned advocate; while the respondent was duly represented by Mr. Emmanuel Daniel Saghan, the learned counsel.

In sustenance of the application, Mr. Byamungu adopted the contents of the affidavit as part of his submissions. He submitted that, the respondent, through a letter dated 9th August 2021 Ref. No. EBTL/HO/55600095577, agreed for payment of the sum of TZS 5,000,000,000/= (Five Billion Shillings Only) as full and final settlement of the decretal sum (Annexure A-2). He added that, on 25th day of August,

2022 the applicants, through a letter with reference No. JUN/EQUITY/0001/08/22 (Annexure A-3) informed the respondent about the partial payment of TZS 2,825,178,396/= and committed to settle the balance of TZS 2,174,821,604.00/= by 30th day of September, 2022 (annexures A-4 and EBTL-5).

The learned counsel for the applicants stated further that, the respondent acknowledged the payment received and confirmed the balance due as TZS 2,174,821,604. The respondent agreed to extend time for payment up to 30th day of September, 2022 whereby the applicants had cleared a total amount of TZS 3,499,178,396/= and hence, by January, 2023 the applicants had already paid the sum of TZS 4,289,856,361.37/=. To cement his assertions, he cited the case of **Commercial Bank of Africa vs. Ms. Shekha Nassor**, Misc. Commercial Application No. 129 of 2022, (HCT-COM. DIVISION-DSM), (Unreported) at page 3 and the case of **NCBA Bank of Tanzania Limited vs. M/S Black Gold Company Limited**, Execution No. 8 of 2022 (Unreported) at page 2, which discussed Order XXI Rule 2(1) on the obligations of the Judgment debtor and the Decree holder regarding payments under the decree made out of Court.

Mr. Byamungu also stated that, the respondent's own conduct and action entails that time was no longer of essence and therefore, the lumpsum amount was out of question as the respondent continued to extend time for payment and received those payments in piecemeal until when the compromised amount was almost fully paid with the outstanding balance of TZS 710,143,638.63/= which the respondents is now refusing to accept it by dwelling on the claims of delay.

He stressed that, the respondent is estopped, under the principle of estoppel, from retracting the adjustment of the decree freely done by the parties, considering the fact that the applicants have already and substantially acted on it. He amplified that, all payments are reflected in the bank account statements and the respondent does not deny the facts pertaining to payments enumerated by the applicants.

It was also submitted by Mr. Byamungu that, the agreement was in the nature of executory contract as stated in Mulla, The Code of Civil Procedure, 16th Ed.Vol. 3 at page 2488 that *if the decree holder enters into a fresh contract is legally enforceable, and though still executory, may amount to an adjustment of the decree.* He prayed that, this Court to direct the remaining balance to be deposited into the Court until such time the respondent will be willing to collect the same and costs of the application.

Resisting the application, Mr. Saghan contended that, the applicants' submissions are misplaced, lacks merits, or any legal support and the case of **NCBA Bank Tanzania Limited** (supra) is irrelevant to this matter. He averred that, the issue for determination before this Court is whether the Decree following the consent of parties has been fully satisfied to the satisfaction of the respondent as the decree-holder, which they submit to the contrary. He explained that, the respondent cannot therefore certify any payments which have not paid to its satisfaction as the applicants have not paid the decretal amount to the satisfaction of the respondent by an amount of TZS 3,393,821,604/= exclusive of interests and other costs.

He argued that, parties cannot agree to vary the lawfully decree of the Court as once the decree of the Court is passed, it is not open for the parties to vary the terms of it without notifying the Court, which when properly moved can do the same. To buttress his argument, he referred this Court to the decision in **Leamthong Rice Co. Ltd vs Principal Secretary Ministry of Finance Zanzibar**, Civil Appeal No. 259 of 2019, (CAT), (Unreported) and **Karori Chogoro vs Waitihache Marengo**, Civil Appeal No. 164 of 2018, (CAT-MWZ), (Unreported). He asserted that the applicants have failed to meet the conditions that were put forward in their own undertaking as the applicants defaulted in paying the agreed amount up to 23rd day of August, 2022.

He maintained that, such breach of the purported agreement is against the principle of sanctity of contract which envisages that parties are bound by their agreements. To support his stance, he cited the decisions in **Caledonian Insurance Co. vs Ramkissoo** [1985] LRC 143; **Simon Kichele Chacha vs. Avelyn M. Kilawe**, Civil Appeal No. 160 of 2018, (CAT), (Unreported) and that in **Puma Energy Tanzania Limited vs Ruby Roadways (T) Limited**, Civil Appeal No. 287 of 2020, (CAT), (Unreported).

The counsel for the respondent went on saying that, the doctrine of equity will only be applicable where there is a gap in our laws as elucidated in the case of **Moshi Mustapha & Others vs. Ilemela Municipal Council**, Civil Appeal No. 117 of 2020, (CAT), (Unreported) at page 12 and 13. He ended that, the respondent is not satisfied with the payment made thereat, and the consent decree of the Court remains payable at an outstanding amount of TZS 5,631,281,403.42/=.

In his rejoinder submissions, Mr. Byamungu reiterated his submissions in chef and confidently stated that, the respondent is not denying in her counter affidavit and submissions thereof having received the last payment of the sum of TZS 741,525,423.00/= on 31st day of January 2023 to make up a total of TZS 4,289,856,361.37/=. He asseverated that, under Order XXI, rule 2(3) of the Civil Procedure Code [Cap 33 R.E 2019], a payment or an adjustment which has not been certified or recorded by the Court in terms of sub rule (1) and (2) shall not be recognized by any Court executing the decree as the respondent is fighting for. He insisted more that, the respondent seeks to pocket the amount received and revert to the execution of the decree shall unjustly entitle the respondent to the full amount in disregard of the adjusted amount already paid.

Having gone through the applicants' affidavit respondents counter affidavit and the written submissions thereof, I am of the considered view that the centre of contention between the parties is on the certification of the payments advanced by the 1st applicant in adjusting the consent decree subject to Land Case No. 19 of 2019.

Order XX1, rule 2 of the Civil Procedure Code [Cap. 33 R.E 2019], provides that: -

"(1) Where any money payable under a decree of any kind is paid out of Court or the decree is otherwise adjusted in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the court whose duty it

is to execute the decree and the Court shall record the same accordingly.

(2) The judgment debtor also may inform the Court of such payment or adjustment and apply to the court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified: and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the court shall record the same accordingly”.

In the light of the above provision of law, it is incontrovertible that, the Court [Hon. J.L. Masabo, J.] delivered a Consent Judgment with its Decree on 5th day of November, 2020 in respect to Land Case No. 19 of 2019. Again, it is truly that, parties did undertake to compromise the said decree outside the Court to the tune of TZS 5,000,000,000/= (Five Billion Shillings Only).

Equally, it was demonstrated in the case of **Irene Madeja Mlola vs Masudi Iddi Shomari & 2 Others**, Misc. Land Case Application No. 235 of 2020, (HCT-LAND DIV – DSM), (Unreported) at page 4 of the Ruling of my sister, Hon. Makani, J. that:

"Parties having agreed to the adjustment of the decree and correction in the Register of Lands to the satisfaction of the decree in the Land Case No. 90 of

2010, the Court cannot refrain from granting this application”.

I do subscribe to the position posed by Hon. Makani, J. and point out that, the rationale of the adjustment executed by the parties herein, implied to depart from the decree of the Court. Henceforth, with the given circumstances, I am of the opinion that the separate arrangements evidenced to have adjusted the consent decretal sum, binds the parties.

Under the prevailing circumstances of this matter, the respondent is estopped from reneging the agreement she executed with the 1st applicant. Facts reveal that up to 25th day of August, 2022 the outstanding balance was TZS 2,174,821,604.00/= (Two Billion One Hundred Seventy Four Million Eight Hundred Twenty One Thousand Six Hundred and Four Shillings Only).

Furthermore, the applicants through the letter dated 12th December 2022, Ref. No. JUN/EQUITY/0001/12/22, had applied for extension of time for loan settlement. Impliedly was conceded by the respondent and responded *vide* a reminder notice for loan settlement as indicated in letter dated 2nd December 2022, Ref. No. EQUITY/HQ/DRU/3004511656235/2022/12/02 which did pit the 1st applicant into notice of payment of the amount due to the tune of TZS 1,500,821,604/= within seven (7) days from the date of receipt of that letter.

I am at one with Mr. Saghan that, it is a settled law that parties are bound by the agreements they freely entered into and this is the cardinal principle of the law of contract. That is, there should be a sanctity of the

contract as lucidly stated in the prominent case of **Abualy Alighani Azizi vs. Bhatia Brothers Ltd** [2000] TLR 288 at page 289 thus: -

“The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement”.

Undoubtedly, the respondent's accepting or receiving deposits apropos to the amount due up to 31st day of January, 2023 leaving the balance of TZS 710,143,638.63/= which she refused to accept it was not commented by the company secretary of the applicants in her affidavit. Therefore, she is estopped from denying the same.

In the case of **Bytrade Tanzania Limited vs Assenga Agrovet Company Limited & Another**, Civil Appeal No. 64 of 2018, (CAT – MOSHI), (Unreported) at pages 6 and 7 of the Judgment, of the Court amplified that: -

"The true principle of promissory estoppel is where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or effect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party, the promise would be binding on the party

making it and he would not be entitled to go bad upon it."

Also, the same was well restated in the case of **Trade Union Congress of Tanzania (TUCTA) vs. Engineering Systems Consultants Ltd & 2 Others**, Civil Appeal No. 51 of 2016, (Unreported) to cement on the aforesaid.

I do agree with Mr. Byamungu that, the respondent is not denying in her counter affidavit and submissions to have received the last payment on 31st day of January, 2023 in the sum of TZS 741,525,423.00/= to make up a total of TZS 4,289,856,361.37/= so far paid. The respondent, however, is deliberately avoiding to acknowledge receipt of the said monies without any plausible reasons thereof.

In the case of **YARA Tanzania Limited vs. Charled Aloyce Msemwa & 2 Others**, Commercial Case No. 5 of 2015 (HCT- COMMERCIAL DIVISION-DSM), (Unreported), it was held that: -

"It is a cardinal principle of law of civil procedure founded upon prudence that parties are bound by their pleadings. That is, no party is allowed to present a case contrary to its pleadings".

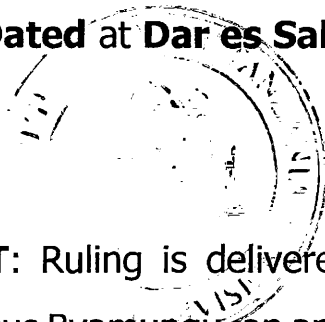
Question to pose is, does justice allow the respondent's to be shielded under the umbrella of the consent decree after having received the three quarter (3/4) of the amount due from the 1st applicant and refute to receive a quarter (1/4) of the remaining balance so as to satisfy the Court's compromised decree to its finality? In my firm view, the answer is NO! This

is a Court of law and justice; I am thus not prepared to bless the acts of the respondent either way.

For those reasons, the applicants are obliged to pay the respondent the remaining balance of **TZS 710,143,638.63/= (Seven Hundred Ten Million One Hundred Fourty Three Thousand Six Hundred Thirty Eight Shillings and Sixty Three Cents Only)**. Parties shall bear their respective costs.


Order accordingly.

Dated at Dar es Salaam this 28th day of April, 2023.




L. HEMED
JUDGE

COURT: Ruling is delivered this 28th April, 2023 in the presence of Mr. Adronicus Byamungu, an applicant's advocate and Mr. Elly Mkwawa advocate for the respondent. Right of appeal is explained.



L. HEMED
JUDGE
28/04/2023