

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

LAND CASE NO. 44 OF 2022

MWAJI GROUP WORKSHOP LTD PLAINTIFF

VERSUS

CRDB BANK PLC 1ST DEFENDANT

MEM AUCTION MART 2ND DEFENDANT

ALLAN MWILE MWAIGAGA 3RD DEFENDANT

RULING

Date of hearing: 25/5/2023

Date of ruling: 16/8/2023

NONGWA, J.

The plaintiff Mwaji Group Workshop Ltd has filed this suit against the defendants for an order to set aside the consent judgment arising from application no. 207 of 2018 of the District Land and Housing Tribunal for Mbeya at Mbeya, on ground of fraud, mistake and misrepresentation. The plaintiff also prays for the court to restrain permanently the defendants or her agents or any person authorised by her from interfering the quite enjoyment of the land by the plaintiff, general damages and costs.

Upon the 1st and 2nd defendants being served with the plaint, they filed joint written statement of defence together with preliminary point of objection that;

- 1. The whole suit is incompetent as the plaint is showing to have been signed by the plaintiff a party which cannot sign a pleading;*
- 2. The suit is incompetent before this court as the plaintiff has no locus standi to file this suit against the 1st and 2nd defendant;*
- 3. That the suit is incompetent for non-joinder of a necessary party who is Karimjee Jivanjee Limited;*
- 4. The suit is incompetent for suing a wrong party who is a 2nd defendant; and*
- 5. That the whole suit is incompetent for abusing court processes.'*

In a nutshell, the background of the impugned consent judgment is that, the plaintiff and 3rd defendant were the applicants in the application no. 207 of 2018 which for nullification of sale of a house in plot no. 18/02/Block F Uyole area within Mbeya City which was mortgaged to the 1st Respondent to secure a loan worthy Tshs. 614,000,000/= a sale allegedly done without issuing notice, that resulted to the consent judgment. The 1st and 2nd defendants were the respondents, respectively.

It is alleged that the said consent judgment was procured through fraud, mistake and misrepresentation on ground that 3rd defendant was

not authorised to institute and had no mandate to represent the plaintiff in settlement of the dispute.

It is a practice that when preliminary objection is raised, the same to be disposed first ahead of merits of the main case. On consensus of the parties, disposal of the objection was in form of written submissions, parties conformed to the scheduling order.

Written submission of the 1st and 2nd defendant has been prepared and filed by Mr. Baraka Mbwilo learned counsel of Baistar Advocates. In his submission dropped the fourth objection thus remaining with first to third grounds of preliminary objection. The plaintiff's reply submission is drawn and filed by Mr. Emmanuel Clarence also learned counsel of Zest Law Attorney.

Submitting for the preliminary objection, Mr. Mbwilo started with the fifth objection on abuse of court process. He submitted that the plaintiff was required to file review instead of new fresh suit to challenge consent judgment. The case of **ARUSHA PLAINTERS vs. TRADERS LTD & OTHERS vs. EURO AFRICAN BANK (T) LTD**, Civil Application No. 78/2001 was cited to support the argument. It was contended that the Plaintiff had discovered new evidence which could better be used to

file review under Order XLII Rule 1 of the Civil Procedure Code [Cap 33 R: E 2022] "the Code".

According to defendants' counsel, he argued that holding in **Arusha Planter's** case (*supra*), it was only the justices of appeal views that consent judgment can be challenged by instituting a separate suit which to his stand is contradicting with the express provision of Order XLII Rule 1 of the Civil Procedure Code Cap 33 R.E 2019 and that as such the law should prevail. He did not cite any law or case law to support this position. He added that even if the consent judgment can be challenged by filing a separate suit yet the Plaintiff was required to exhaust all remedies. He cited the case of **Dangote Industries Ltd Tanzania vs Warnercom (T) Ltd**, Civil Appeal No. 13/2021 (Unreported) in which it was held *ex-parte* judgment cannot be challenged on merits and an order for *ex-parte* hearing. He said the Plaintiff being party to consent judgment was supposed to go for review and not filing the present suit.

As to the first objection on signing of a plaint by a company. It was submitted that the plaint does not show who signed it. He said the Plaintiff being a legal entity cannot sign document but secretary, director or principal officer as per Order XXVIII Rule 1 of the Code. He submitted, failure to show who signed the Plaint is fatal. He referred this court to

the case of **Bansons Enterprises Limited vs Mire Artan**, Civil Appeal No. 26 of 2020 (Unreported) in which it was stated that plaint must be signed by one of the principal officers of the Company who are the company secretary, the directors of a company and any principal officer of the company who is able to depose to the facts of the case.

Submitting on second objection Mr. Mbwilo explained that the Plaintiff has no *locus standi* to sue referring to the case of **Lujuna Shubi Ballonzi, Senior vs Registered Trustees of Chama Cha Mapinduzi** [1996] TLR 203. He said Board resolution contains names of person who are not directors in the Memorandum and Article of Association of the Company. He contended Patrick Allan Mwaigaga is not dully instructed to file the suit and board resolution be ignored.

In regard to third objection on non-joinder of necessary party, it was submitted that the suit land is owned by **KARIMJEE JIVANJEE Limited** referring to ruling of this court in Misc. Land Application No. 116 of 202 between the parties herein. He said the buyer has to be joined to the suit by virtue of being a necessary party. He cited the case of **Juma B. Kadala vs Lawrent Mnkambee** [1983] TLR 103 to support the argument that a seller is a necessary party and must be joined to the suit.

Mr. Mbwilo beseeched the objection to be sustained and the suit be struck with costs.

In his reply to the above submission, Mr. Clarence, learned counsel for the plaintiff submitted that, as a general rule consent judgment is challenged by separate suit. He cited the case of **Arusha Planters** (supra), that fresh suit is the proper way where consent judgment is procured by fraud and misrepresentation. To support the proposition, the case of **Mohamed Enterprises (T) Limited vd Masoud Mohamed Nasser**, Civil Application No. 33 of 2012 [2012] TZCA 67 (23 August 2012) was referred to.

The Plaintiff's counsel argued further that, it has been pleaded that consent judgment is the result of fraud, mistake and misrepresentation which vitiates the consent judgment, and the contention that there is discovery of new evidence is not founded and is misleading. Mr. Clarence distinguished the case of **Dangote Industries** (supra) for it dealt with challenging *ex-parte* judgment which is not the case here.

Countering the 1st objection, the suit is incompetent for the plaintiff showing to have been signed by the plaintiff a party which cannot sign a pleading, the counsel for the plaintiff argued that, the case of **Bansons Enterprises Limited** (supra) is distinguished in that the issue rose after

the court had received evidence. He contended that the Plaint is signed by Patrick Allan Mwaigaga as the Principal Officer of the Plaintiff authorised by a board resolution attached to the plaint. He added that omission to insert principal officer in the signing part is curable by amendments.

Responding to the second objection that the plaintiff has no locus standi to file this suit against the 1st and 2nd defendant, Mr. Clarence argued that the objection needed evidence to determine if Patrick Allan Mwaigaga is a director or not. That the moment evidence is required to prove, it ceases to be preliminary objection.

On third objection, the plaintiff's counsel submitted that the present suit is only filed to assail consent judgment to which the said Karimjee was not a party. He said no issue of ownership will be determined in this case to make her a necessary party. Alternatively, he argued the court may order her to be joined in terms of Order 1 Rule 9 of the Code if it will find it proper.

On rejoinder, Mr. Mbwilo maintained that the statute provides review in circumstance of this case. He said factual setting in the case of **Mohamed Enterprises**(supra) was different with the present one. He added that allowing to assail consent judgment through fresh suit the

court will open Pandora box. On whether there was discovery on new evidence it was submitted that the plaintiff was aware of the case and therefore claim of fraud falls under the ambit of review.

On failure to indicate the title in which Partick Allan Mwaigaga signed the plaint, it was argued that allowing amendment will amount to pre-empting the objection. It was further submission that the principle in case of **Bansons Enterprises Limited** (supra) was applicable to the present case.

On issue of *locus standi* of the plaintiff, it was argued that on raising and arguing preliminary object it is the plaint and annexures which must be perused. To this end Mr. Mbwilo was of the view that no further evidence was required on the point.

Re-joining on non-joinder of Karimjee Kavinjee Limited, it was argued that should this suit succeed the interest of the person in occupation will be affected as ownership will revert to the plaintiff. Thus, maintained earlier prayer that the objection be sustained and plaint be struck out with costs.

I have considered the rival submission on whether the consent judgment may be challenged by way of fresh suit. From the submissions parties are at once that consent judgment may either be challenged by

review or filing fresh suit, both parties relied on the case of **Arusha Planters & Traders Ltd & Others vs Euro African Bank T. Ltd**, Civil Appeal No. 78 of 2001 [2007] TZCA 154 (28 December 2007). Their point of departure is whether fresh suit is the viable way in circumstances of this case. I have read the case of **Arusha Planters** above, the rule in that case was that consent judgment can be challenged by filing fresh suit. The court held;

'Drawing inspiration from these authorities, we are of the view that, in a proper case, a consent judgment can be challenged by instituting a separate suit.'

The bottom line whether review or fresh suit is a viable way, it all depends on circumstances of each case mainly prayer in the plaint. In the present case, prayers in the plaint does not suggest that the order has to be granted by the tribunal which heard the suit as was the case in **Arusha Planters** (supra) in which one of the prayers was order to set aside consent order and make the order to proceed with hearing.

Mr. Mbwilo argued that the plaintiff has discovered new evidence which has to be placed before the tribunal which made the decision. In reply it was submitted that fraud and misrepresentation can only be resolved upon presentation of evidence. On this I agree with the plaintiff's

counsel based on the authority of **Mohamed Enterprises (T) Limited vs Masoud Mohamed Nasser**, Civil Application No. 33 of 2012 [2012] TZCA 67 (23 August 2012) cited also by the plaintiff, where the court held that;

'We agree with Dr. Lamwai that matters of fraud, coercion or misrepresentation do vitiate a consent decree. It is imperative therefore that evidence be adduced in support of such factual claims. Proof by affidavit is not sufficient.'

From the above authority the present case follows the same path, the alleged fraud, mistake and misrepresentation cannot be resolved in an application for review as suggested by counsel for the 1st and 2nd defendants. The case of **Dangote Industries** (supra) is in applicable to this case because it concerned remedies where aggrieved by *ex-parte* judgment which is not the case here, all submission on that regard dies naturally.

It was submitted that there is statute which provide the leeway and the case of **Arusha Planters** (supra) conflicts with the law. Unfortunately, Mr. Mbwilo did not cite such law and show how the holding in Arusha Planters conflicted with that statute. To clear doubts of the counsel in **Arusha Planters'** Case the court made it clear that there was

no law which provided ways of challenging consent judgment, as the position obtained in India and Kenya. Having so considered the court resolved that in a proper case, a consent judgment can be challenged by instituting a separate suit. Although this was not the decision in that case as already explained above. The counsel for the defendants having brought to the attention of this court the case of **Arusha Planters** (supra) together with that of **Mohamed Enterprises** (supra) cited by the plaintiff counsel, I expected from him as the officer of the court to bring to the fore the provision of the statute he was referring to support the argument which conflict with the two cases I have just mentioned above. From the authority of **Arusha Planters** and **Mohamed Enterprises** (supra), I hold that the present suit is properly before the court to challenge consent judgment. The fifth objection is overruled.

Coming to the first objection that plaint is not signed by authorised person, Mr. Mbwilo submitted that the plaint is signed by the plaintiff who being a company cannot sign pleadings. Counsel for plaintiff has opposite view, he submitted that it is pleaded that Partrick Allan Mwaigaga has been authorised to sign pleadings. He also distinguished with the case of **Bansons papers printers** (supra) in that plaint being improperly signed was raised after reception of evidence.

I have given due weight to the submissions and authorities relied upon. In terms of Order VI rule 14, pleading must be signed by a party or agent if duly authorised to do so. It provides that

'Every pleading shall be signed by the party and his advocate (if any); provided that, where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorised by him to sign the same or to sue or defend on his behalf.'

For suit by or against corporations or companies as the case here, a plaint may be signed and verified by the company secretary or by any of its directors or other principal officer of the company who is able to depose to the facts of the case. Order XXVIII rule 1 of the Code, provides that;

'In suits by or against a corporation any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case.'

The above provision was considered in the case of **Bansons Enterprises Limited vs Mire Artan**, Civil Appeal No. 26 of 2020 [2023] TZCA 90 (CAT at Dar es Salaam; www.tanzlii.org.tz; 9 March 2023), the court stated;

*'In accordance with Order XXVIII rule 1 of the Code, a plaint for the institution of a suit by a corporation or company must be signed and verified by three categories of persons: **One**, the company secretary, **two**, any of the directors of a company and **three**, any principal officer of the company who is able to depose to the facts of the case.'*

In the present case under paragraphs 1 of the plaint, it is pleaded that Partrick Allan Mwaigaga has been authorised to file the suit which principally includes signing pleadings. The same is echoed in verification clause, that the said Partrick is authorised to sign pleadings and verify it. Circumstances in the case of **Bansons Enterprises Limited (supra)** is distinguishable to the case at hand because in that case the incompetence of a person to sign the plaint was discovered after evidence being adduced. That above in the present case there is a board resolution authorising Patrick Allan Mwaigaga to sign the pleadings. In that accord the authority to sign pleadings has been specifically pleaded in the plaint and omission to put a title below the signature of the plaint does not invalidate the plaint in circumstances of this case. Based on the above alternative argument for amendment in a fit case could be ordered in the awake of the overriding principles under section 3A and 3B of the Code.

Argument that allowing amendment would pre-empt objection no longer holds water. The first objection is also overruled.

The second objection is that the plaintiff has no *locus standi*. It was submitted that persons who composed the board resolution are not directors of the company. On the opposite side it was argued that the point cannot be disposed as preliminary objection. Having considered the contending submissions on the point, a standard definition of what constitute preliminary objection was given in the celebrated case of **Mukisa Biscuit Manufacture Ltd vs West End Ltd** (1969) EA 697 that preliminary objection to be successfully argued, it should be capable of disposing of the suit without evidential proof. Where a preliminary objection raised contains more than a point of law, say, law and facts it must fail. Likewise, in **OTTU and Another vs Iddi Simba, Minister for Industries & Trade and Others** [2000] TLR 88. Should factual issues require proof, be it by affidavit or oral evidence the whole purpose of a preliminary objection is defeated.

Applying the above principle to the case at hand, it cannot be said the objection is a *lemine litis* because to know whether board resolution was made by directors or not, it calls for more evidence to prove. Mr. Mbwilo relied on the Memorandum and Articles of Association of the

company to mould the point. In my, view the memorandum and article of association of a company is not only the document to look on who are directors or shareholders of the company considering that the law permits changes of directors or shareholders of the company to be made in different documents.

Assuming the 1st and 2nd defendants' counsel to be right, in the authority of the case of **Simba Papers Converters Limited vs Packaging & Stationery Manufacturers Limited & Another**, Civil Appeal Case 280 of 2017 [2023] TZCA 17273 (CAT at Dar es Salaam; www.tanzlii.org.tz; 23 May 2023) where the court said the company can sue or be sued in its own name without board resolution so long as the conflict is with the outsiders. The argument becomes redundant because the company has powers to institute suit in its name with the outsiders as the case here without having board resolution authorising so to do. This is what is provides for under section 15(2) of the Companies Act, Cap. 212 that upon incorporation of a company it becomes a body corporate with power to sue or be sued in its own name. The requirement of board resolution is only applicable to internal conflicts of the company as put clear in the case of **Simba Papers Converters Limited** (supra). I therefore dismiss the second objection.

The last objection is on non-joinder of necessary party who is Karimjee Jivanjee Limited. Before I take a sail on this point, I will first address Mr. Mbwilo's reference to my own ruling in **Mwaji Group Workshop Ltd vs CRDB PLC & Another**, Misc. Land Application No. 116 of 2022) [2023] TZHC 18812 (HCT at Mbeya; www.tanzlii.org.tz; 24 March 2023) to the effect that ownership belongs to Karimjee Jivanjee Limited. Mr. Clarence did not make any comment on this point. With respect to counsel for the 1st and 2nd defendants my decision in Misc. Land Application No. 116 of 2022 did not confer title to any person rather I declined to grant temporary injunction because the process of changing ownership had already been completed, thus no *status quo* could be maintained. Bringing the said ruling to support the argument that Karimjee Jivanjee Limited is a necessary party is out of context and misinterpretation of that ruling.

Back to the point, it was argued by the defendant that Karimjee Jivanjee Limited is the owner and has not been joined. In rebuttal the plaintiff replied that the suit is only intended to challenge consent judgment to which the said Karimjee Jivanjee Limited was not a party. I have considered the arguments, as rightly submitted by the plaintiff's counsel, under paragraph 4 of the plaint cause of action is to set aside

consent judgment which is said to have been procured through fraud, mistake and misrepresentations. Looking how the plaint is crafted issue of ownership is not at issue at all to make the buyer a necessary party. see **Barreto Hauliers T. Ltd & Another vs Mohamood Mohamed Duale**, Civil Appeal 7 of 2018 [2022] TZCA 829 (CAT at Dar es Salaam; www.tanzlii.org.tz; 21 December 2022). At any rate no order of this court will be passed which will affect the interest of the said Karimjee Jivanjee Limited. The argument that once this suit succeeds the interest will revert to the plaintiff is not borne in the pleading. In that accord I find third objection unmerited and is overruled.

In the end, following the discussion above, all preliminary objections raised by the 1st and 2nd defendants are overruled. Costs to follow events.

DATED and DELIVERED at MBEYA this 16th day of August, 2023.




V.M. NONGWA
JUDGE