

TANZANIA / JUDGMENT

mohammed enterprises tanzania ltd vs balangai estates limited 5 others 2023 tzhc 23220 4 september 2023

COURT
TZHCDECIDED
4 September 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (DAR ES SALAAM SUB
REGISTRY) AT DAR ES SALAAM CIVIL CASE NO. 95 OF 2022 MOHAMMED ENTERPRISES
(TANZANIA) LTD..... APPLICANT VERSUS BALANGAI ESTATES
LIMITED 1st RESPONDENT DINDIRATEA ESTATES
LIMITED..... 2nd RESPONDENT TUKUYU TEA ESTATES LTD..... 3rd
RESPONDENT AMBANGULU ESTATES LTD..... 4th RESPONDENT TUKUYU PACKING
COMPANY LIMITED..... 5th RESPONDENT BAHADURALI EBRAHIMU
SHAMJI..... 6th RESPONDENT

RULING

S.M. MAGHIMBI, J: This is a ruling on preliminary points of objection raised by the defendant in the Written Statement of Defence ("WDS") filed in this court on the 15th day of July, 2022. In their objection, the defendants are challenging jurisdiction of this court of this court to entertain the present suit on the ground that:

1. The validity and effect of the Deed of Settlement has been finally and conclusively determined by the Registrar of Titles, Moshi Land Registry. i
2. The Deed of Settlement is subject of consolidated Land Appeal No. 7 and 8 of 2018 against which an appeal preferred by the plaintiff is pending in the Court of Appeal.
3. The enforcement of the Deed of Settlement adjusting the judgment and decree has been adjudged by the High Court (Land Division) in Wise. Land Application No. 718 of 2021 for being time barred.
4. The litigate of the Deed of Settlement which, was made to vary the judgment and decree in Consolidated Land Case No. 53 of 2007 (DSM) and Land Case No. 2 of 2007 (Tanga) through a fresh suit is tantamount to reviewing, amending and varying the orders made by the High Court in Consolidated Land Case No. 53 of 2007 (DSM) and Land Case No. 2 of 2007 (Tanga). The Defendant prayed to this Court that the suit is dismissed with costs. On the 14th day of March, 2023, the submissions were ordered to be disposed by way of written submission.

The defendants⁷ were drawn and filed by Mr. Majembe Nduruma, learned Counsel while the plaintiff's submissions were drawn and filed by Ms. Regina Kiumba, learned Counsel. From the nature of the objections before me, the defendants are in attempt to convince this court to determine that the suit before me is *res judicata*, having the controversy finally determined through a series of litigations including without undermining the pending appeal before the 2 Court of Appeal against the decision of the High Court in Land Appeal No. 7 and 8 of 2018. From their very nature, before I go into the determination of the merits or otherwise, of the raised objections, I find it alluring that the brief background of the matter at hand be narrated. It is apparent from the plaint that the plaintiff and the defendants had been engaged in litigating in various suits in respect of receivership proceedings and ownership rights regarding the landed properties. A series of litigations include a Civil Case No. 20 of 2008 between the Plaintiff and Tukuyu Tea Estates Limited and Others and Land Cases No. 52 of 2007 and Land Case No. 2 of 2007 between the Plaintiff and 1st, 2nd and 3rd Defendants, respectively. In due course, sometimes on 9th day of December 2017, all parties herein executed a deed of settlement ("the Deed") wherefore all pending suits in all forums were amicably settled. The Deed was duly signed for and on behalf of the parties as follows such; Mr. Gulam Dewji signed in the capacity of Chairperson of the Plaintiff while the 3rd Defendant signed on his own behalf and in the capacity as Chairman of the 1st, 2nd, 3rd, 4th, and 5th Defendants. The terms of the Deed included that parties shall perform duties and obligations as therein among others namely:-

- (i) That the Plaintiff shall pay the sums of USD 300,000.00 TO Giro Commercial Bank of National Kenya for the benefit of the 3 Defendants and who shall cause CT No. 16066 owned by the 1st Defendant to be owned and transferred to the Plaintiff. (ii) The 1st and 3rd Defendants jointly, shall cause CT No. 7902 owned by the 2nd Defendant to be released and subsequently registered in the name of the Plaintiff as owner. (iii) Parties, the Plaintiff on the one side and Defendants on the other, shall cause to be withdrawn all pending litigations and or claims pending in all forums and shall have no claims against each other in relation to all pending cases and before any forums. (iv) The 1st and 3rd Defendants, jointly shall cause CT No. 16066 and 7902 owned by them respectively to be transferred to the Plaintiff upon compliance to the deed of settlement. It is further apparent on the record that in compliance to clause 1 of the Deed, the Plaintiff paid the sum of USD 300,000/- unto the 3rd Defendant's bank account and further withdrew all pending cases in compliance to clause 6 of the Deed. The litigations withdrawn included Misc. Land Application No. 838 of 2016 which was withdrawn on the 12th March, 2019 and on the 22nd July, 2020 the appeal processes initiated by filing notice of appeal lodged on 05th October, 2016 was formerly withdrawn. 4 In this particular suit, the plaintiff's grievance is inclined on the fact that despite his performance of all terms and duties as is required of her by the Deed; the Defendants have jointly and severally refused to perform any of their duties as contracted. He is also complaining that before and immediately after the Deed was executed, the Plaintiff, who was in possession of the properties, had marshalled financial resources and developed them a result of which substantially raised the value of the suit properties. As to

why he knocked the doors of this court, the plaintiff alleges that the conducts demonstrated by the Defendants attest that unless they are compelled by orders of this court, they are not willing and shall not perform any of their duties and terms contracted in a duly signed Deed which is binding on the parties. The plaintiff is therefore praying before this court for judgment and decree against the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants, jointly and severally as follows:-

- (i) For orders of declarations that the contract (Deed of Settlement) dated 9th December, 2016 constitutes a binding agreement on the Plaintiff on the one side and the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants on the other. (ii) For orders to compel the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants to perform all terms and conditions contracted in the said contract (Deed of settlement) 5 (iii) For payment of general damages for the embarrassment and disturbances caused to the Plaintiff (a mega business entry) on account of the Defendants breach and non-performance of the terms and conditions of the contract, jointly and severally. (iv) For payment of interest at court's rate from date of judgment until the date of full payment
- (v) For payment of the costs of the case (vi) Any other relief the Honourable Court shall deem just and fit to grant. It is on the basis of the history above and the settled litigations that the defendants have raised the aforementioned preliminary objections challenging the jurisdiction of this court. In his submissions to support the points of objection, Mr. Nduruma submitted that On 29th September 2016 Hon. Mugeta, J delivered a judgement and Decree in Consolidated Land Case No. 53 of 2007 (DSM) and No. 2 of 2007 (Tanga) and on 9th December, 2016 the parties executed a document titled "Deed of Settlement" document which Mr. Nduruma argued to be the founding document upon which the Plaintiff is suing. He then pointed out that in the last-but-one paragraph of page one, the Deed makes a keen reference to Consolidated Land Cases No. 53 of 2007 (DSM) and No. 2 of 2007 (Tanga) and makes specific reference 6 to the date on which the judgement was passed and that in the last paragraph of page one, the Deed states that the parties have agreed to record Deed as settlement of Decree of all cases referred to in the preceding paragraph (including Consolidated Land Cases No. 53 of 2007 (DSM) and No. 2 of 2007). He submitted further that annex TMA-1 was made after Judgment and Decree Consolidated Land Cases and was made in line to vary the terms of Judgment and Decree Consolidated Land Cases. By its name, nature, import and for intents and purposes, he argued, the Deed (TMA-1) was expressly intended to be read with reference to and within the context of Judgment and Decree Consolidated Land Cases, the Judgment and Decree Consolidated Land Cases No. 53 of 2007 (DSM) and No. 2 of 2007 (Tanga). Mr. Nduruma went on submitting that for some reasons stated in various pleadings in this and other Courts (attached to the Defendants' Joint Written Statement of Defense), the 6th Defendant who was signatory to the Deed, disowned it as an agreement entered into by the parties, reneged the performance of the Deed and expressly repudiated the terms thereof alleging lack of free consent. That he applied to the Registrar of Titles for revocation of his undertakings stating that the circumstances under which the Deed was signed were coercive and unconscionable. Further that at the motion of the 6th Defendant, the 7 Registrar of Titles lifted the Plaintiff's Caveats, Powers of Attorney

and Indemnity Bonds in respect of lands belonging to 1st and 2nd Defendants. He then pointed out that the effect of the decisions of the Registrar of Titles to refuse to accord weight and enforce the Deed made the Plaintiff take the remedial actions including seeking to enforce the Deed by filing Misc. Application No. 68 and 69 of 2018 at Tanga, applications which were consolidated and heard together. He went on submitting that after hearing the parties, the Court struck out the Applications on 13th July 2020 for want of jurisdiction and in its Ruling (at page 10-12) this Court, (Hon. Mkasimongwa, J) made a finding that the Deed by its nature and character was an agreement by the parties to adjust the Decree of the Court. That this Court laid down what should have mandatorily been done before the terms of Deed could be enforced as affecting the outcome in the Judgment and Decree. He concluded that the validity and effect of the Deed of Settlement (TMA-1) has been finally and conclusively determined by the Registrar of Titles, Moshi Land Registry. Mr. Nduruma submitted further that the nature and character of the Deed has been a subject of Misc. Application No. 68 and 69 of 2018 and this Court, (Hon. Mkasimongwa, J) conclusively interpreted the same in the terms contained in the Ruling of the Court. That the finding of this Court that the Deed is an adjustment of the Decree remains intact until 8 today as the Ruling of this Court has never been a subject of an Appeal, Reference, Revision, Review or any Court process that would nullify or affect its nature or import. He argued that the Court has already sealed the interpretation of the nature of the Deed by Ruling making this matter to be beyond individual election or amplification attempted by the Plaintiff to change the nature the Deed. That to be able to give the Deed any other meaning, this Court one in a timely taken application for the Review or the Court of Appeal in a timely taken application for Revision or Appeal, have to first vacate the ruling made by Hon. Mkasimohgwa, J dated 17th July 2020. He then concluded on this argument that since no such action has ever been taken by the Plaintiff, and the finding as to the nature of the Deed must remain intact. The Plaintiff shall be warned to refrain from doing anything that would re-characterize, rename or assign context to the Deed or deal with it any other way than a deed of adjustment of decree. Mr. Nduruma went on submitting that still unhappy with the decisions of the Registrar of Titles, the Plaintiff filed Land Appeals No. 7 and 8 of 2019. The Plaintiff had relied on the Deed as a base document that justified the filing of caveats, powers of attorney and indemnity bonds. That when the 6th Defendant presented evidence to prove that the Deed was not freely consented to, the Registrar of titles found in favour 9 of the 1st and 2nd Defendant and deregistered all the documents which were made in favour of the Plaintiff pursuant to the Deed. Aggrieved by the decision of the Registrar of titles, he submitted, pursuant to Section 102 (1) and (2) of the Land Registration Act, Cap 334 the plaintiff appealed to the High Court, Tanga District Registry seeking to challenge the decision of the Registrar of Title. The Appeals were consolidated and heard together. That the aftermath of the Consolidated Land Appeals No. 7 and 8 of 2019 was that the said Appeals were struck out with cost on 22nd September 2021. Further that in challenging the Ruling of this Court in Land Appeals No. 7 and 8 of 2019, the Plaintiff's Application for leave to Appeal to the Court of Appeal was dismissed on 16th March 2022. He went on submitting that in the year 2020, the 1st and 2nd Defendants filed in the land division of this Court at Dar es Salaam,

Execution Application No. 10 of 2020 and Execution Application No. 13 of 2020 to execute their respective portions of the Decree. That on 14th December, 2021 the Plaintiff filed Misc. Land Application No. 718/2021 and Misc. Land Application No. 719/2021. In the Misc. Land Application No. 718/2021 the Plaintiff (then Applicant) moved the Court to summon the Defendants (Respondents in the Land Application) to show cause why the terms and conditions in the Deed should not be certified and recorded as the Decree of this Court and make orders to adjust the judgement and io Decree to suit the terms contained in the Deed. That when filing this suit, the Plaintiff had in mind the Ruling and direction of the Court and that on 17th June 2022 the High Court of Tanzania (Land Division) presided over by Hon. Victoria Makani Judge, dismissed the Application for being time barred. Mr. Nduruma then argued that if successful in its quest, the Plaintiff's Consolidated Land Appeals No. 7 & 8 of 2019 shall be restored and heard by the High Court and we cannot predict the outcome of the appellate process in the Court of Appeal. That the proceedings in the Court of Appeal touch on the validity of the Deed and since the Plaintiff has not abandoned his pursuit under Consolidated Land Appeals No. 7 & 8 of 2019, this suit remains sub-judice to Consolidated Land Appeals No. 7 & 8 of 2019. That the action of the Plaintiff to bring this suit is among many intentions to defeat the purpose of Consolidated Land Appeals No. 7 & 8 of 2019 or ride two horses hoping to get a favourable result in either action. He termed the acts as forum shopping concluding that this Court should not adjudicate or reopen the rights of the parties in the Deed of settlement by a fresh suit while Consolidated Land Appeals No. 7 & 8 of 2019 are pending. He also argued that the plaintiff has concealed some facts in this suit including the mentioned litigations and bring a fresh suit as if no Court proceedings in the form of Consolidated Land Appeals No. ii 7 & 8 of 2019 and subsequent Court processes ever exist. This is an abuse of Court process which if allowed, argued Mr. Nduruma, may breed unsound judicial policy and occasion miscarriage of justice against the Defendants. Mr. Nduruma submitted further that the enforcement of the Deed of settlement as adjusting the Judgment and Decree has been adjudged in the High Court (Land Division) in Misc. Land Application No. 718 of 2021 for being time barred. That vide Consolidated Land Applications 68 and 69 of 2018, the court determined that Deed is not a normal conveyancing agreement for transfer of land between the Plaintiff and 1st Defendant or with the 2nd Defendant, but was a Deed for adjustment of the Decree and that the said finding still stands to the date of these submissions because the Plaintiff has not challenged it in any Court of competent jurisdiction. He submitted further that to litigate the Deed Settlement which was made to vary the Judgment and Decree in Consolidated Land Case No. 53 of 2007 (DSM) & Land Case No.2 of 2007 (Tanga), through a fresh suit is tantamount to reviewing, amending and varying the orders made by the High Court in Consolidated Land Case No. 53 of 2007 (DSM) & Land Case No.2 of 2007 (Tanga). Further that by the inviting the Court litigate the Deed, the Plaintiff is moving the Court to 12 reopen the Judgment and Decree of the Court in Consolidated Land Case No. 53/2007 (DSM) and No. 2 (Tanga). Further that by entertaining this suit based on the Deed (even without considering the previous Court orders); the Court runs a risk of coming up with a verdict that may vary and modify the terms of the Decree and render it impotent. He then argued that consistent with precedents in our jurisdiction,

an Appealable Decree cannot be amended, varied or rendered unenforceable by another Decree of the same Court in a different suit. If this suit is let to stand, he emphasized, it would be for the first time in our jurisprudence that the Court allows a Decree of the Court to be adjusted by a Judgment and Decree in a different suit. That in absence of an application for review of the Judgment and Decree in Consolidated Land Case No. 53/2007 (DSM) and No. 2/2007 (Tanga), this Court being the same that issued the Judgment and Decree is functus officio. Citing the case of Laemthong Rice Company Limited vs Principal Secretary Ministry of Finance at page 401, he submitted that the Court is tongue tied to utter anything that would contradict what has already been decided by His Lordship Mugeta J. In conclusion, he submitted that the purpose of the suit is to delay or completely defeat the Judgment and Decree in Consolidated Land Case No. 53 of 2007 (DSM) & Land Case No.2 of 2007 (Tanga) and the 13 proceedings for execution of the Decree or other subsequent Court process employed by the 1st and 2nd Defendant to realize the fruits of the Decree. His prayer was that the suit is dismissed with costs as this Court lacks jurisdiction to try the same under the circumstances submitted. In reply, Mr. Msuya started by challenging the validity of the raised PO in line with the principles governing determination and adjudication of P/O's as stated in the long time celebrated case of Mukisa Biscuits Manufacturing Co. Limited versus West End Distributors Limited,

[1968] EA at p. 700 where the erstwhile East Africa Court of Appeal held: - 'M preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion' He then argued that on the basis of the above cited decision, when a party raises and argues a P/O he/she should keep in mind that the same is raised on the assumption that all what is pleaded by the opposite party is true and that scrutiny and or examination of facts pleaded by that opposite party is not allowed. He then attacked the Defendants' submission arguing that they have exhaustively relied on the written statement of defence and the documents attached to the defence in 14 support of the P/O's raised, which according to him, is contrary to the law and the principles and in Mukisa Biscuit case. He hence invited the Court to reject and expunge all submission and materials referred contrary to law and which are in violation of the legal principle above. Mr. Msuya then acknowledged that Section 59(1) (i) of the Evidence Act, Cap 6 RE 2019 allows this Court to take judicial notice of court pronouncements which includes Judgments and Decrees; Rulings and Orders. In that regard he informed the court that his submissions shall only refer to the judgments and decree/rulings and orders and which are on the records only. On the substance of the objection, Mr. Msuya initially submitted that to a large extent, the Defendants have either deliberately or by design misrepresented facts relating to this case and mostly lied to the Court. Pointing to the deed of settlement, he termed it as an agreement entered into by and between the Plaintiff on the one side and the Defendants on the other. That the 6th Defendant is the Chairman of all 5 companies sued as 1st - 5th Defendants and he signed the Deed of Settlement on this capacity and for

himself. Further that the parties in the deed are First Part (the Plaintiff); Second Part (1st-5th Defendants) and Third Part (the 6th Defendant). According to clause 6th of the deed of settlement, he submitted, parties agreed to withdraw any other litigations/claims 15 pending in all forums and agreed further that no party shall have any other claim against another. Mr. Msuya went on submitting that under the deed, the Plaintiff was in particular required to withdraw Civil Case No. 33 of 2005 then pending in the High Court of Tanzania Dar es Salaam and 1st - 6th Defendants were to assure that they shall not challenge purchase of assets of Tukuyu and Ambangulu from the Receiver/Manager appointed by Backlays Bank in Civil Case No. 33 of 2005. The 6th Defendant was also to personally guarantee release and transfer CT No. 16066 and CT No. 7902 to Plaintiff and the transfer processes were to be effected by assigning power of attorneys which were particularly prepared and handed over to the Plaintiff for transfer purposes. He went on submitting that when the Plaintiff submitted the power of attorneys to the Registrar of Titles - Moshi for registration, the 6th Defendant applied for their revocation alleging that they were obtained by coercion and intimidation. That according to annex "BDA-26" - the statutory declaration submitted with the caveats, the 6th Defendant only submitted the following documents to the Registrar of Titles - Moshi: - (i) Judgement in Consolidated Land Cases No. 53 of 2007 and 2 of 2007 specific power of attorneys appointing Aarif Shariz Panjwani as attorney of 2nd Defendant in respect of property registered as CT 7902 and indemnity bond signed by 6th Defendant and Late Derecky 16 Tweedley. These documents were attached to the statutory declaration and marked as Annex "DT-2" and "DT-3" respectively. He then pointed out that the same documents; caveat, statutory declaration, judgment, power of attorney and indemnity bond were submitted in respect of CT No. 16066 belonging to the 1st Defendant. That according to the Defendants own pleadings, it is evident that the Deed of Settlement was never placed before the Registrar of Titles - Moshi and in that regard no decision of the Registrar was ever made in respect of the deed of settlement as the Defendants are now trying to mislead this Court. Mr. Msuya when on submitting that given the above state of affairs the Defendants' submission are a lie because the 6th Defendant has never placed the deed of settlement which is the basis of the cause of action in the present suit. On similar vein, he submitted, it is no true that the 6th Defendant had ever disowned the deed of settlement as submitted in the Defendants' submission. That first; the deed of settlement was never placed before the Registrar of Titles - Moshi and in that regard, he could not make any decision over a subject matter which is not before him. Second; the Registrar's decision was made under S. 99(1), (d) and (f) of Cap 334 which specifically deals with rectification of Land Registers and Indemnities. 17 That under such powers, the Registrar of Titles could not deal in anyhow and or make any decision to affect the validity or otherwise of the deed of settlement as the deed of settlement is an agreement made by the Plaintiff on the one side and the Defendants on the other and involves more than the power of attorneys and indemnity bonds which were a subject matter before the Registrar. He went on submitting that the decision of the Minister is the one appealed in Land Appeals No. 7 and 8 of 2019 and Misc. Land Applications No. 68 and 69 of 2018. On the defendants' submission that in his Ruling

Mkasimongwa J, "laid down what should have mandatorily been done before the terms of the deed of settlement could be affected and that this Court conclusively held that the deed of settlement is a deed of an adjustment of a decree; Mr. Msuya's reply was that the submission is misleading because there is no holding in any of the Rulings/Orders referred which decided on the merits of the deed of settlement. He further argued that the decision of the Registrar of Titles comprised in the letter dated 29th January, 2019 does not even mention the deed of settlement. That the submission that the Registrar made a finding that the deed was made without free consent is lie. He also brought to the attention of this court that there is a pending notice of appeal against the decision of Hon.

Mkasimongwa J, "which has not been vacated to date. Citing the case of Mohammed Enterprises 18 Tanzania Limited Vs. Chief Harbour Master of Tanzania Ports Authority and Another, he argued that notice of appeal will only be withdrawn where the Court formerly issues an order to that effect Replying on whether the validity of the Deed of Settlement has been finally and conclusively determined by the Registrar of Titles - Moshi Land Registry., Mr. Msuya reiterated his submission that the deed of settlement was never placed before the Registrar of Titles as alleged and the decision of the Registrar of Title - Moshi is very clear on what was decided. His argument was that a deed of settlement is an agreement because it bears all features of a valid contract/agreement and that it is this contract/agreement which the Plaintiff now seeks this Court to order the Respondents to specifically perform. He went on submitting that it is evident in both, Rulings & Orders that this Court never heard the two matters on the merits. That Consolidated Misc. Land Application 68 and 69 of 2018 was struck out for want of jurisdiction and Consolidated Land Appeals No. 7 and 8 of 2019 were struck out because they were incompetent. He went on submitting that the law is settled on what happens when a case is struck out as held in the case of Semeni Issa vs. The Republic, Criminal Appeal No. 156 of 2019, CAT Tabora (Unreported) at pg. 8/9 the CAT held the following: - 19 "It is glaring that, after the learned High Court Judge had struck out the appeal, then he proceeded to re-open the case filed purporting to revise what transpired before the trial subordinate court. In the purported revision, the learned High Court Judge proceeded to re- evaluate the evidence, make own conclusions and ultimately did set aside the sentence imposed by the trial court with option of a fine and enhancing it to a term of four years' imprisonment. With respect, we think he followed a wrong path because apart from being functus officio, he had no jurisdiction to entertain the matter considering that, after the appeal was struck out there was nothing before the High Court to warrant the learned High Court Judge to invoke revisional jurisdiction". He then argued that in both matters (Consolidated Misc. Land Applications No. 68 and 69 of 2018 and Consolidate Land Appeals no 7 and 8) were struck out, the position is simply that none existed on the eyes of law and cannot be referred or at all. That the holdings suggested by the Respondents are mere fabrications of their own and finds no any legal support neither here nor there. On Mr. Nduruma's submissions that the Ruling of Hon. Mkasimongwa, J in Consolidated Misc. Land Applications No. 68 and 69 of 2018 where the Court says the deed is "in the nature and character of a deed to adjust the decree of the court" - at pg. 10-12 and propose that this is the holding of the Court, Mr.

Msuya denied such a holding. He submitted that Section 20 3 of the CPC defines an order to mean "the formal expression of any decision of a civil court which is not a decree". That a decree is defined to mean:- "the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final and it shall be deemed to include the rejection of a plaint and the determination of any question within section 38 or section 89, but shall not include: -

- (a) An adjudication from which an appeal lies as an appeal from an order; or
- (b) Any other of dismissal default. He then submitted that residing the Ruling of this Court there is nowhere the Court formerly declared that the deed of settlement is made under Order XXI Rule 2. For instance, he pointed, at p. 10, the Court simply expresses its view on what the deed is. That at pg. 11 the Court clearly declares that the deed had no any legal effect since it was not certified therefore it could not change the decree in consolidated Land Cases No. 2 and 53 of 2007 and whose judgment was rendered on 29th September, 2016. He argued that in fact, it is on the above context, the Court proceeds to hold that since there was a notice of appeal pending, the deed of settlement could not be certified because the court had no jurisdiction. That constructively this Court held that the deed was not a deed of adjustment of a decree because during the material date no decree could be adjusted on account of the pending notice of appeal and also because the Court had no jurisdiction to act on the same. In the circumstances therefore, he concluded this Court cannot at one point hold that this deed was an agreement to adjust decree and at another hold that the deed could not be certified because the Court has no jurisdiction. Mr. Msuya then moved to the Defendant's reasoning that since the Plaintiff has not appealed against the decision of this Court in Consolidated Misc. Land Applications Nos. 68 and 69 of 2018 therefore that deed is an adjustment of a decree, replying that the argument is also void. He argued that this Court never held that the deed of settlement is a deed to adjust the decree and that clause 6 of the deed of settlement, the crucial part of the deed, is very specific on the terms of the settlement as it states inter alia, the settlement was in respect of all pending litigations and matters. He then argued that the mere fact that the ruling annex 34 was not challenged does not change the agreement made in the deed (settlement of all pending litigations and matters). That in the notice of appeal, it is evident that the judgment/decreed appealed in one issued in respect of the Land Case NO 53 and 2 of 2007 decided by Mugeta, J and the said suits have nothing to do with the deed of settlement. 22 Further that the Consolidated Land Appeals No. 7 and 8 of 2019 were struck out because the consolidated petitions of appeals were accompanied with more documents than those prescribed under S. 102(3) of the Land Registration Act Cap 334 RE 2019 and Order XXXIX rule 27(1) of the CPC, and not any other. That the decision of the Registrar of Titles never decided on the validity/merits or otherwise of the deed of settlement. He urged the court to overrule the objection. On the second point of objection that the Deed of Settlement is a subject of a pleading appeal against consolidated Land Appeals No. 7 and 8 of 2019, Mr. Msuya reiterated his submissions that the Deed of Settlement was never decided by the Registrar of Titles as he has no powers as

such. Further that Land Appeals No. 7 and 8 of 2019 were against the decision of the Registrar as appearing in the letter dated 29th January, 2019 and that the deed of settlement is a subject of the Ruling on Appeal before this Court. He hence prayed that this P/O to be overruled and for costs. He concluded that even if it were to be decided that the suit is sub judice the remedy is to stay the suit and not strike it out. On the third objection that the enforcement of the Deed of Settlement as Adjustment of the Decree (BDA-2) has been adjudged in the High Court (Land Division) in Misc. Land Application No. 718 of 2021 for being time barred. Mr. Msuya submitted that the argument in support of this point 23 of law is similar to those submitted in respect of the 1st objection and hence adopted all what he submitted in opposition to the 1st objection as forming part of these submission. He then added that there is no holding in any of the decision (Rulings/Orders) of this Court where the Court holds that the deed of settlement is not normal conveyance as submitted by the Defendant. As said before, the deed of settlement could not be decided on appeal by this Court and or in Misc. Land Applications 68 and 69 of 2019 because it was never placed before the Registrar of Titles as what was filed in this Court were appeals under S. 100 and 102 (a) and (b) of the Land Registration Act and since the deed of settlement was never placed before the Registrar, it could not be acted upon by this Court on appeal unless the conditions stated under Order XXXIX rule 27(1), (a) of the CPC are complied. That since the deed of settlement was never produced on appeal as required under Order XXXIX rule 27 of the CPC, this Court could not issue any decision on the same. He then argued that parties in Misc. Land Application No. 718 of 2021 were Plaintiff and 1st, 2nd and 3rd Defendant. And that the present suit involves different parties. That Misc. Land Application No. 718 of 2022 is matter only involving certification of decree in Consolidated Land Case No. 52 and No. 2 of 2007 while in the instant suit the court is invited to order performance of various obligations contained in the deed of 24 settlement. The terms and conditions sought to be performed by the Defendants are different altogether, he prayed that the PO be overruled. On the objection that to litigate the Deed of Settlement which was made to vary the Judgment and Decree in Consolidated Land Case No. 53 of 2007 (DSM) and Land Case No. 2 of 2007 (Tanga) through a fresh suit is tantamount to reviewing, amending and varying the orders made by the High Court in Consolidated Land Case No. 53 of 2007 and Land Case No. 2 of 2007; Mr. Msuya submitted that in arguing this point the Defendant are essentially alleging that this Court is functus officio because of the Ruling in Consolidated Misc. Land Application No. 68 and 69 of 2018, referring this Court to the decision of Leamthong Rice Company Limited versus Principal Secretary of Finance. He counter argued that a court becomes functus officio once it pronounces a verdict which finally and conclusively determines the issues before the Court. He cited the case of Mohamed Enterprises (T) Limited vs Masoud Mohamed Nasser, Civil Application No. 33 of 2012 where one High Court Judge entertained proceedings touching the judgment/deed of a fellow Judge, the Court of Appeal condemned the conduct in its strongest terms at page 14 - 18 as follows: - "I4fe would like, however, to note with considerable apprehension as to what would be the appropriate procedure 25 to be adopted. We do so bearing in mind that there should be no room open to the High Court and courts subordinate thereto whereby one judge would enter judgement

and draw up a decree in one case (thus bring such a case to a finality) only to find another judge of the high court soon thereafter setting aside the said judgement and decree and subsisting therefore with a contrary judgement and decree in a subsequence application. To do so in our considered opinion, amounts to a gross abuse of the court process. Such abuse should not be allowed to win ground in this jurisdiction.....Once judgement and decree are issued by a given court, judges (or magistrates) of that court, judges (or magistrates) of that court become "functus officio in so far as that matter is concerned. Should a new fact arise which should have been brought to the attention of the court during trial, then Cap 33 provides for procedure for review (Order XUI) and where appropriate, revision before a higher court..... Twaib J, would have been right to invoke S. 95 of Cap 33 (concerning inherent powers of the court) if the matter before him had not been finally concluded by a fellow judge of the same court or if the decision of the Mwarija J, was interlocutory in nature. The facts before us however clearly establish that civil Case No.124 of 2011 had been finally determined..... Thereafter, therefore, the high Court became functus officio in so far as this matter was concerned. Both Mwarija J and Twaib JJ were not competent to handle the subsequence Application. Although there is no statutory law 26 (to the best of our knowledge) which bars one judge from setting aside a decision of a fellow judge of competent jurisdiction, rules of practice, prudence and professional conduct impose such restrictions. A judge of the High Court in our Jurisdiction is or should know and respect that code of conduct. Failure to do so is to open up a pandemonium of unprofessional, hitherto unknown in this jurisdiction. The procedure adopted by Twaib, J, therefore is very much detested. We hope that the High Court leadership will see to He then submitted that the verdict in Consolidated Misc. Land Application No. 68 and 69 of 2018 was merely to strike out the applications. He referred this Court to the decision of Semeni Issa vs. The Republic {supra}, where the CAT held that when a matter is struck out the position returns to a status quo ante (prior to intuition of a suit) and that a party is not barred to file another suit. He then submitted that the Defendants' argument is impotent and should be dismissed. That since Consolidated Misc. Land Applications No. 68 and 69 of 2018 and Consolidated Land Appeals No. 7 and 8 of 2019 were not decided to finality and conclusively the principle of functus officio does not apply at all. On the defendant's submission that Misc. Land Application No. 718 of 2021 by Hon. Makani J which was dismissed by this Court, he submitted that it is on the record that this application was dismissed because it was 27 time barred and that it was an application for certification of the deed of settlement. He then posed a question whether the cause of action in the dismissed application is the same as the one pleaded in the present suit so that the doctrine of res-judicata shall apply? His answer was that it is obvious from the pleadings that the two matters are distinct suits and each is founded on a separate cause of action. That in the present case the Plaintiff is praying the Court to compel the Defendants to perform part of their bargain and that parties in the two matters are not the same and that the terms and conditions contained in deed of settlement now prayed to be performed are also not similar with the application for certification requested in the dismissed application. That the issue as to whether the deed is valid or not is a subject for determination during hearing of the case on the merits and cannot be raised

it this early stage. He concluded that unless there is a valid decision which declares the deed of settlement "invalid" the Plaintiff's suit requesting this Court to order specific performance remains intact home and dry. Having heard the parties' submissions for and against the raised objection, since the issue for determination is whether the issue in controversy have finally been determined before, I must first appreciate the principles of res sub judice as laid down under Section 9 of the Civil Procedure Code, Cap. 33 R.E 2019 ("CPC"). The Section provides: 28 "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court." Obviously, the law prohibits a court to try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in the same court competent to try such subsequent suit. On the underlying importance of the principle of res judicata, the Court of Appeal explained this in the case of Peniel Lotta vs Gabriel Tanaki and 2 Others (Civil Appeal 61 of 2001) [2001] TZCA 16 (14 September 2001), when it held: "the doctrine of resjudicata is provided for in Section 9 of the CPC

1966. Its object is to bar multiplicity of suits and to guarantee finality of litigations. It makes conclusive a final judgment between the same parties or their privies on the same issue by a court of competent jurisdiction in the same subject matter of the suit." 29 From the above findings, we pick two important points, first is that the purpose is to avoid multiplicity of proceedings and second is that which is found under the public policy that there should be an end to litigations. This spirit was again emphasized by the same Court in the case of Jebra Kambole vs The Attorney General (Civil Appeal 236 of 2019)

[2022] TZCA 377 (15 June 2022) where the object of res judicata was Having so established the principles of res judicata, the issue before me is whether the claims of the plaintiff against the defendants have already been finally determined and whether there is a pending matter in any court in relation to the current subject matter. I will make a finding on these issues based on, inter alia, the relief(s)/prayers of the plaintiff in his plaint particularly the 1st and 2nd reliefs to which the plaintiff is praying for judgment and decree against the defendants jointly and several for orders declaring that the contract (Deed of Settlement) dated 9th December, 2016 constitutes a binding agreement on the Plaintiff on the one side and the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants on the other and a further order to compel the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants to perform all terms and conditions contracted in the said contract (Deed of settlement). From the submissions of the parties, I have gathered that Mr. Msuya seeks to move the court to make a finding that before me is a suit for 30 breach of contract which is in form of a deed of settlement and that it has no connection with the previous litigations outlined by Mr. Nduruma. It is undisputed by parties that the litigants herein were involved in consolidated Land Appeal No. 7 and 8 of

2018 ("the appeals") and against which an appeal preferred by the plaintiff is pending in the Court of Appeal. There are also Consolidated Land Cases No. 53 of 2007 (DSM) and No. 2 of 2007 (Tanga) ("the consolidated suits"). It is undisputed that in all the previous litigations, the centre of contention was on receivership proceedings and ownership rights in respect of landed properties. This is averred on para 8 of the plaint. It is further pleaded that parties executed deed of settlement in respects of all pending suits in all forums. The terms of the Deed of settlement placed an obligation on the plaintiff to pay a sum of USD 300,000/- to a Bank in Kenya for the benefit of the defendants and in return the defendants were to cause of CT No. 16066 owned by the 1st defendant to be transferred to the plaintiff and the 1st and 3rd defendants to cause a CT No. 7902 owned by 2nd defendant to be released and registered in the name of the plaintiff. It would appear that plaintiff did her part of bargain by paying the amount and withdrawing the suits. The claim in this case is that the defendants have failed to perform their duties as per the Deed which is clear as daylight, that the plaintiff moves the court to compel the defendants to effect the transfer of the two landed properties contained in CT No. 16066 and CT No. 7902. That is the centre of controversy, no matter how Mr. Msuya would wish to serve his food, whether hot or cold, but at the end of the day, the plaintiff seeks to compel the defendants to effect the transfer. Having that in mind, the issue is therefore whether the current suit was a proper remedy and the effect of the preceding litigations. To begin with, we have the Consolidated Land Appeals, the judge noted that the petitioner therein (plaintiff herein) was notified of a caveat and a notice of revocation of a power of attorney in favour of Mr. Aarif Shwaz Panjani filed by the first respondent (1st defendant herein). Upon receipt, the plaintiff unsuccessfully applied before the Registrar of Title for rectification of the registrar by expunging a notice of revocation of power of attorney. In his submissions, Mr. Msuya did not dispute the fact that the issue on the landed properties has surfaced at the office of the Registrar of Titles, his only escape route was that the Land Appeals were struck out, taking the parties to the position as if no appeal was filed. Mr. Nduruma has established the fact that the issue of the landed properties was determined at the Registrar of Titles and just looking at the pleadings, Mr. Msuya's client is moving the court to go round and compel the parties (defendants) to transfer the titles to the plaintiff. 32 The plaintiff also argued that it is evident in both, Rulings & Orders that this Court never heard the two matters on the merits. Consolidated Misc. Land Application 68 and 69 of 2018 was struck out for want of jurisdiction and Consolidated Land Appeals No. 7 and 8 of 2019 were struck out because they were incompetent. He then argued that the law is settled on what happens when a case is struck out; citing the case of *Semeni Issa vs. The Republic*, Criminal Appeal No. 156 of 2019, CAT Tabora (Unreported) at pg. 8/9 the CAT held the following: - "It is glaring that, after the learned High Court Judge had struck out the appeal, then he proceeded to re-open the case filed purporting to revise what transpired before the trial subordinate court. In the purported revision, the learned High Court Judge proceeded to re-evaluate the evidence, make own conclusions and ultimately did set aside the sentence imposed by the trial court with option of a fine and enhancing it to a term of four years' imprisonment. With respect, we think he followed a wrong path because apart

from being functus officio, he had no jurisdiction to entertain the matter considering that, after the appeal was struck out there was nothing before the High Court to warrant the learned High Court Judge to invoke revisionary jurisdiction". He wants the court to take a position that since the same were struck out, it is as good as no application was ever filed. He also submitted that the issue as to whether the deed is valid or not is a subject for 33 determination during hearing of the case on the merits and cannot be raised at this early stage. At this point again is another evidence of pure abuse of process and forum shopping. The fact that the two matters were never heard on merits in this court takes the position back to what is laid at the Registrar of Titles. Furthermore, there is no plausible explanation as to why the plaintiff abandoned the appeal route and chose to deal with the matter in this way because the fact that the appeal was struck out does not defeat the fact that the issue of Registrar of Title and revocation of caveat and power of attorney in relation to the change of name of Titles still has to be determined by way of appeal under Section 102 of the Land Registration Act, As submitted by Nir. Nduruma, the plaintiff had moved the Land Division in Misc. Land Application No. 718 of 2021 where she prayed for the court to summon the defendant to show cause why the terms and conditions in the Deed should not be certified and recorded as the Decree of the court. The application was dismissed for being time barred, hence so far as the declaration of the deed of settlement as a binding agreement for the purpose of enforcing it (1st prayer in the plaintiff for declaring the deed as a binding agreement), an attempt has already been made and dismissed by the High Court Land Division as being time barred. 34 Mr. Msuya also attempted to distinguish between the cause of action in the dismissed application and the one pleaded in the present suit so that the doctrine of res-judicata shall apply? In my strong view, the answer is yes. In both the dismissed application and the current suit, the plaintiff is moving the court to validate his deed of settlement in order to compel the defendants to perform their part of the bargain, which is to release the two certificates of titles. The argument by Mr. Msuya that each is founded on a separate cause of action is misconstrued. No matter what kind that he uses in that bread, the truth and the underlying cause of action is the plaintiff's quest for ownership of the landed property which formed substantial part of the deed of settlement. As for the parties, they overlap in all the cited litigations hence they remain the same parties. The argument that after the land appeal was struck out the situations remained as if no appeal was filed does hold water, however, the situation that the striking out of appeal takes us back to is that the registrar of title rectified the register and the property is in the name of the defendants. The appellant has that avenue of having the appeal refiled, but he did not use that avenue instead, he is forum shopping on the kind of door that he should use to enter the court premises. Unfortunately, no matter which door he uses to enter the theatre, there is one stage in the court premises that is founded on 35 jurisdiction and principles of natural justice and equity that litigations must come to an end. In the cited case of Jebra Kambola (Supra), the court held at page 24: "Speaking of the above provision, it is, perhaps, pertinent to observe that, the law in this country, like the laws of other jurisdictions, recognizes that, like life, litigation has to come to an end. Those who believe that litigation

may be continued as long as legal ingenuity has not been exhausted are clearly wrong." Back to the case at hand, although the door used is from the side of the stage, but at the stage, with the undisputed fact that the dispute has been litigated in different forums and came to an end, it cannot be brought in the same court, between the same parties and on the same cause of action. Having considered the above and the fact that the avenue of appeal and execution was still open for the plaintiff subject to time limitation, I find the matter before is nothing but a pure abuse of court process. The same is hereby struck out with costs. JUDGE 36

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