

TANZANIA / JUDGMENT

JUDGMENT MWAJI GROUP LTD VS CRDB BANK

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA
SUB – REGISTRY AT MBEYA LAND CASE NO. 44 OF 2022 CASE REFERENCE NO.
20221230000470712 MWAJI GROUP WORKSHOP LTD PLAINTIFF VERSUS
CRDB BANK PLC 1ST DEFENDANT MEM AUCTION
MART 2ND DEFENDANT ALLAN MWILE
MWAIGAGA 3RD DEFENDANT

JUDGMENT

5th November & 13th December 2024 NONGWA, J. This suit seeks to set aside consent judgment in Application No. 207 of 2018 of the District Land and Housing Tribunal for Mbeya. It is alleged that consent judgment was procured out of fraud, mistake and misrepresentation by the 3rd defendant. Facts of the case goes, the plaintiff obtained two loan facility on different occasions from the 1st defendant. The first loan was executed on 25th July 2014 at the tune of TZS 514,000,000/= and the second on 22nd May 2015 at TZS 100,000,000/=. The two loans were secured by Plot No. 18/2 Block “F” Uyole Area with certificate of title No. 7623MBYLR. The plaintiff did not repay the loan as agreed, the 1st defendant issued notice of default and intention to sale security. The 2nd defendant was appointed 1 to conduct auction of the mortgaged land. Application No. 207 of 2018 was instituted in the name of the plaintiff and 3rd defendant personally challenging the intended sale. Parties agreed to settle out of the tribunal by executing deed of settlement which was filed and consent judgment entered as between the plaintiff, 3rd defendant and 1st defendant. The application and deed of settlement were signed by Allan Mwaigaga as principal officer of the plaintiff. It was stated the plaintiff became aware of consent judgment when he was issued with notice of transfer of right of occupancy to Karimjee Jivanjee Limited from the Registrar of Titles. To salvage the situation, the plaintiff filed this suit for judgment and decree on the following orders;

- i. This honourable court be pleased to issue an order to set aside the consent judgment in Application No. 207 of 2018 on ground of fraud, mistake and misrepresentation; ii. This honourable court be pleased to restrain permanently the defendants or her agents or any person authorised by her from interfering with the quiet enjoyment of the land described above by the plaintiff or any person authorised by the plaintiff to use the land in dispute; iii.

This honourable court be pleased to order the defendants to pay the plaintiff the general damages; and 2 iv. This honourable court be pleased to order the defendants to pay costs of this suit. The 1st and 2nd defendants filed joint written statement of defence (WSD) in which they noted existence of deed of settlement and consent judgment. They alleged that the case was filed by 3rd defendant as principal officer with full powers to bind the plaintiff. Further that after institution of Application No. 207 of 2018, Patrick Allan Mwaigaga, 3rd defendant and his advocate were engaged in reaching the settlement and therefore there was no any fraud, mistake or misrepresentation in compromise of the suit. They prayed the suit to be dismissed with costs. The 3rd defendant in his written statement of defence admitted each and every allegation contained in the plaint and prayed the suit be allowed with costs. Mediation failed, the case went for Final Pre-Trial Conference and two issues were framed;

1. Whether the plaintiff has sufficient ground for setting aside consent judgment; and
2. To what reliefs the parties are entitled. The plaintiff was represented by Mr. Emmanuel Clarence, learned advocate whereas Mr. Baraka Mbwilo, also learned advocate appeared representing the 1st and 2nd defendants. Mr. Ramsey Mwamakamba, 3 learned counsel appeared for the 3rd defendant. Hearing of the suit was by witness statement. The plaintiff filed statement of one witness Patrick Allan Mwaigaga (PW1). In his statement PW1 stated that he was the director and principal officer of the plaintiff and appointed to handle the case, a board resolution was tendered and admitted as exhibit P2. PW1 narrated that they have filed the case to set aside consent judgment after being served with notice of change of name in title deed, consent judgment and decree was admitted as exhibit P3 and notice of change of name from registrar as exhibit P1. PW1 went on to state that the 3rd defendant instituted and signed deed of settlement in Application No. 207 of 2018 without authority from the plaintiff, deed of settlement was admitted as exhibit P5. That consent judgment was the result of fraud, mistake and misrepresentation from the 3rd defendant and the plaintiff had no any knowledge. PW1 went on to state that the memorandum and article of association of the plaintiff has names of directors and their signatures, the same was admitted as exhibit P4. On cross-examination, PW1 admitted that they had outstanding loan to the 1st defendant and they did not repay. He said they were not aware of the case until when was served with notice from the registrar of 4 titles. That when the case was filed, the 3rd defendant was the managing director of the plaintiff. In defence, four witness statements were filed and testified in the following order; Bathlomeo Anyingisye Kyando (DW1), Proches Agust Moshi (DW2), Hanse Mwasakenyi (DW3) and the 3rd defendant as DW4. In his statement DW1 stated was a business manager of the 1st defendant. He remembered to have granted loan at TZS 514,000,000/= and TZS 100,000,000/= to the plaintiff and the plot 18/2 Block "F" Uyole area as a security. He went on to stated that the plaintiff failed to repay the loan and was issued with default notice. DW1 stated they appointed 2nd defendant to auction the loan security and the plaintiff filed Application No. 207 of 2018. Further that the matter was settled out of court by executing deed of settlement which was filed in court and consent judgment entered. DW1 informed the court that the plaintiff did not heed to consent judgment and in 2021 they tried to auction but failed after wife of the

3rd defendant filed Application No. 33 of 2021 claiming Plot 18/2 Block “F” to be a matrimonial home. DW1 stated in 2022 they sold the land to Karimjee Jivanjee Limited. Further evidence from DW1 was that PW1 was aware of Application No. 207 of 2018 by his involvement in settlement. He added there was no fraud in procuring settlement deed. He tendered Loan letter 5 dated 22/4/2014 loan of TZS 100,000,000/= (exhibit D1), Loan letter dated 25/7/2014 amount of loan TZS. 514,000,000/= (exhibit D2), Loan letter dated 22/5/2015 amount of loan TZS100,000,000/= (exhibit D3), Personal guarantee and Indemnity by Allan Mwaigaga of 25/4/2014 (exhibit D4), Personal Guarantee and Indemnity of Mwile Mwava Allan, Patrick Allan Mwaigaga and Veronica Mwile Ndenjela of 25/4/2014 6 (exhibit D5), Court decision dated 12/10/2022 (Exhibit D6), Copy of Certificate of sale by MEM Auctioneeres dated 21/10/2022 (exhibit D7), Piece of news paper Raia Mwema dated 23/9/2022 (exhibit D8) and a Copy of Bid Note dated 7/10/2022 by MEM (exhibit D9). Next was DW2 who in his statement stated was the operation manager of the 2nd defendant and informed the court that he knew the plaintiff, 3rd defendant and Patrick Allan Mwaigaga. He said the 3rd defendant and PW1 requested him to settle the case out of court and the negotiation was between him, DW1, PW1, 3rd defendant, advocate Rwekaza and Mbise, the negotiation which resulted into deed of settlement. DW2 went on to state that in 2021 got information from the 1st defendant that the plaintiff had not complied with deed of settlement, continued with recovery measures and the pledged plot was sold to 6 Karimjee Vijanjee Limited in 2022. He stated there was no fraud after the plaintiff through PW1 and 3rd defendant being involved in negotiation. DW3 Hanse Mwasakyeni, in his statement stated on 23rd November 2018 was called by late Rwekaza to his office where he was introduced to PW1 and 3rd defendant and was requested to witness deed of settlement. Further that he knew Patrick Allan Mwaigaga and Allan Mwile Mwaigaga personally. The 3rd defendant testified as DW4, in his witness statement stated that was one of the directors of the plaintiff and he lodged Application No. 207 of 2018. He said, the application was filed without written authorisation and knowledge of the plaintiff. Further that had no any authority to settle the matter which affected the company. DW1 stated consent judgment was procured by fraud, mistake and misrepresentation and prayed the suit be allowed. Mr. Mbwilo filed final submission in which he submitted that consent judgment can be set aside when there is fraud, collusion, no consensus between the parties, public policy or on any other reason. The argument was fortified with the case of Motor Vessel Sepideh & Another vs Yusuf Mohamed Yusuf & Others, Civil Application No. 237 of 2013

[2015] TZCA 346 (1 July 2015; TanzLII). 7 He submitted that the plaintiff pleaded fraud, mistake and misrepresentation. That there was no fraud as PW1 and his advocate were involved in negotiation to settle the matter out of court which resulted to deed of settlement being drawn. He contended these arguments were not countered by the plaintiff, in support of the preposition referred the court to the case of Eco Bank Tanzania Limited vs Benbros Motors Limited and 3 Others, Commercial Case 113 of 2018) [2021] TZHCComD 3318 (13 August 2021; TanzLII) and Ramadhani Mohamed Kihango (an Administrator of the estate of the late Hawa Mohamed Jabiri vs Ahmed Jumbe Kihago & Another, Land Case No. 8 of

2022 [2022] TZHC 11706 (10 August 2022; TanzLII). Mr. Mbwilo went on to submit that the plaintiff is a company and is incontrovertible that was unaware of the case. That per evidence of DW1, DW2 and DW3, Patrick Mwaigaga was involved in procuring deed of settlement. He contended if 3rd defendant filed a case without involving other directors the plaintiff was supposed to file a petition on unfair prejudice under section 233 of the Companies Act. He submitted that evidence of DW4 be disregarded because he had interest to serve. Further submission was that consent judgment benefited the plaintiff as it extended time to repay the loan though defaulted once again. He added that sale of the mortgaged land was not a result of deed 8 of settlement but default to pay loan after consent judgment. Counsel referred to section 45 of the Land Disputes Courts Act, Cap 216 and the case of Yakobo Magoiga Gichere vs Penina Yusuph, Civil Appeal No. 55 of 2017 [2018] TZCA 222 (10 October 2018; TanzLII) on deciding suit on substantive issue rather than technicalities. After summary of evidence of both parties and relevant part of final submission by counsel for the 1st and 2nd defendants, it is now time for this court to delve in resolving the two issues which were framed before hearing the suit. Starting with the first issue whether the plaintiff has sufficient ground for setting aside consent judgment. There is consensus that this suit is a result of consent judgment. A consent decree can be set aside on any ground which would invalidate an agreement, such as misrepresentation, fraud or mistake. In *Brooke Bond Liebig (T) Ltd v Mallya* [1975] EA 266 it was stated; 'The compromise agreement was made an order of the court and was thus a consent judgment it is well settled that a consent judgment can be set aside only on the ground of fraud or collusion that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract.'⁹ See also; *Arusha Planters & Traders Ltd & Others vs Euroafrican Bank T. Ltd*, Civil Appeal No. 78 of 2001 [2007] TZCA 167 (21 December 2007; TanzLII) and *Mohamed Enterprises T. Limited vs Masoud Mohamed Nasser*, Civil Application No. 33 of 2012 [2012] TZCA 219 (27 August 2012; TanzLII). In this suit the plaintiff in the plaint alleges that Application No. 207 of 2018 was filed in the tribunal through fraud, mistake and misrepresentation. The term fraud is defined under section 17(1) of the Law of Contract Act [Cap 345 R: E 2019] in the following manner; 'Fraud means any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract-

- (a) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;
- (b) the active concealment of a fact by one having knowledge or belief of the fact;
- (c) a promise made without any intention of performing it;
- (d) any other act fitted to deceive; or
- (e) any such act or omission as the law specially declares to be fraudulent.' ¹⁰ PW1 stated that 3rd defendant had no capacity to act for the plaintiff, he relied on exhibit P4. Further that Application No. 207 of 2018 was instituted without plaintiff knowledge and authority. A

company is a legal person who is living only in the eyes of law. It is a formulation of law which lacks both body and mind. It cannot act on its own. It can act only through some human agency. Directors, secretary or any principal officer duly authorised are those persons through whom a company acts and does business. Section 181 of the Companies Act, Cap 212 provides; 'Subject to any modifications, exceptions, or limitations contained in this Act or in the company's articles, the directors of a company have all the powers necessary for managing, and for directing and supervising the management of, the business and affairs of a company. ' This principle has been restated by the Court of Appeal in Tanganyika Land Agency and Others vs Manohar Lal Aggrawal, Court of Appeal, Civil Application No.26 of 2003 (Unreported) where the Court, quoting with approval the case of H.L Bolton (Engineering) Co. Limited vs T.J. Graham & Sons (1957) 1 QB at page 179 the holding of Lord Denning L.J that: 'A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which are tools and act in accordance with directions 11 from the centre. Some of the people in the company are nothing more than hands to do work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.' Section 181 has to be read together with sections 38 and 39 of the Companies Act, which provides; '38. A contract may be made -

- (a) by a company, by writing under its common seal, or
 - (b) on behalf of a company, by any person acting under its authority, express or implied, and any formalities required by law in the case of a contract made by an individual also apply, unless a contrary intention appears, to a contract made by or on behalf of a company. 39.-(1) A document is executed by a company by the affixing of its common seal. A company need not have a common seal, however, and the following subsections apply whether it does or not
- (2) A document signed by a director and the secretary of a company, or by two directors of a company, and expressed (in whatever form of words) to be executed by the company has the same effect as if executed under the common seal of the company.' 12 The above provision unambiguously insists the company function are legally recognised to be done by the company through hands of directors, secretary and principal officers dully authorised. For purpose of court proceeding, pleadings must be signed by secretary, directors or any principal officer. Order XXVIII rule 1 of the Civil Procedure Code, Cap 33 provides; '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.' Our laws do not have a definition of principal officer, in Basons Enterprises Limited vs Mire Artan, Civil Appeal No. 26 of 2020 [2023] TZCA 90 (9 March 2023; TanzLII) the court referred to the Black's Law Dictionary, 11th Ed, at page 1308, in corporate law, the term refers to a person elected or appointed by the board of directors to manage the daily operations of a corporation, such as a CEO, president,

secretary or treasurer. In this suit, exhibit P4 which is a memorandum and article of association, directors of the company are Mwile Mwabha Allan, Patrick Allan Mwaigaga and Veronica Mwile Ngenjela. By their names being in the memorandum and article of association which are accessible by the public 13 through registrar of companies, their acts are expressly recognised by the law for being of the company. The name of Allan Mwaigaga 3rd defendant is nowhere in exhibit P4 and there is no any evidence that the 3rd defendant was authorised to execute and sign documents for the plaintiff. Deed of settlement, exhibit P5 which resulted into consent judgment exhibit P3 is signed by Allan Mwaigaga (3rd defendant) who is not the principal officer of the plaintiff. Thus, in *Bansons Enterprises Limited vs Mire Artan*, Civil Appeal No. 26 of 2020 [2023] TZCA 90 (9 March 2023; TanzLII) the court was faced with the issue of the plaint being filed and signed by a person who was not a secretary, director or principal officer of the company. It stated; 'It should be emphasised that a plaint by a company cannot be duly presented to the court and a suit duly instituted unless it is duly signed and verified by persons listed under Order XXVIII rule 1 of the Code. Where a plaint is not duly signed and verified in accordance with the law, there is no suit which the court can legally try. It is also not out of place if we restate that the object of duly signing a plaint is not only to prevent fictitious suits but also prevent disputes as to whether the suit was instituted with the plaintiff's knowledge and authority.' [Emphasize supplied.] In this matter deed of settlement is signed by a person who was not the director, secretary or principal officer dully authorised to act on behalf 14 of the plaintiff, whatever he did was in his individual capacity and not binding the company. I am persuaded by the observation made by Makaramba, J. in the case of *Great Vision Africa Ltd vs Planetel Communication Ltd*, Commercial Case No. 98 of 2009 [2011] TZHCComD 2048 (8 April 2011; TanzLII) when he stated; 'Since Mr. John Noni plainly signed the Deed for Settlement as Training Manager, the Plaintiff ought to have made enquiry why the Training Manager was signing the deed of settlement. The Plaintiff was supposed to refer to the Memorandum and Articles of Association of Planetel Communication for the simple reason that these are public documents and usually contain the list of the Directors of a particular registered company. Neither of the parties in this suit tendered in this Court Memorandum and Articles of the Defendant's Company to establish the competency of Mr. John Noni to sign the deed of settlement. On the basis of the deed of settlement and other evidence on record, this Court finds that a Training Manager is not recognized by the Companies Act as being capable of entering into any transaction on behalf of the company.' [Emphasis supplied.] I associate my self with the above reasoning, the plaintiff denied that the 3rd defendant was authorised to institute and sign deed of settlement, that is evident in exhibit P4 for not the director of the plaintiff and defendants did not have any evidence to the contrary. Mr. Mbwilo relied on evidence of DW1, DW2 and DW3 that PW1 was involved in the 15 settlement of the matter out of court. During submission submission that this was not denied by the plaintiff. The plaintiff might not have filed reply to WSD that he was involved in the negotiation to settle the matter in Application No. 207 of 2018 out of court. However oral evidence of DW1, DW2 and DW3 contradicts with exhibit P5 which is signed by the 3rd defendant only for the plaintiff and himself. If DW2 and DW3 knew that PW1 was the

director of the plaintiff and involved in negotiation to settle the matter amicably that would be reflected in exhibit P5. I am not losing sight that DW4 said was the director of the plaintiff, but he does not feature in exhibit P4 as such. The defendants are barred from adducing oral evidence to contradict exhibit P4 and P5. See *Joseph F. Mbwiliza vs Kobwa Mohamed Lyeselo Msukuma (Legal Representative/ Administratrix of the Estate of the Late Rashid Mohamed Lyeselo) and Other*, Civil Appeal No. 227 of 2019 [2022] TZCA 699 (10 November 2022; TanzLII) and *Catherine Honorati vs CRDB Bank & 2 Others*, Civil Appeal No. 314 of 2019

[2023] TZCA 17985 (15 December 2023; TanzLII). Connected to the above, it was evidence of DW1, DW2 and DW3 that during negotiation PW1 and his advocate whose name was not disclosed were involved but when exhibit P4 is read in its four corners, witness for the plaintiff and 3rd defendant was DW3 who in his evidence 16 said was called by Rwekaza to witness deed of settlement, implying was not advocate for the plaintiff and 3rd defendant. I am aware that parties in Application No. 207 of 2018, deed of settlement and consent judgment are Mwaji Group Workshop Ltd as first applicant and Allan Mwaigaga as second applicant. This means there were two separate persons. DW1 tendered exhibit D4 to show that 3rd defendant was a personal grantor of the plaintiff on the advanced to the plaintiff. This implies that the 3rd defendant had own interest in instituting Application No. 207 of 2018 but not for the plaintiff. It follows therefore that deed of settlement in Application No. 207 of 2018 purported to be signed by Allan Mwaigaga on behalf of the plaintiff was entered into by a person who had no any authority to negotiate and sign deed of settlement for the plaintiff nor there is any oral or documentary proof that he was authorized to institute the case and enter into settlement on behalf and in the name of the plaintiff. In that sense fraud has been proved by the plaintiff. Having held that the 3rd defendant had not authority to institute and sign deed of settlement for binding the company, arguments that deed of settlement was beneficial to the plaintiff cannot stand the wrath of the law for it was void abinitio. 17 In final submission Mr. Baraka sought refuge to overriding objective principles. The issue of instituting the case and signing documents for the company touches issue of capacity to enter into the contract. As already discussed, it is only directors, secretary and principal officer dully authorised who can execute and sign documents on behalf of the company and become binding. The 3rd defendant having no authority to make contract for the plaintiff, it cannot be said is a technical issue to be cured by overriding principles. In *Humphrey Jomo Tumbo vs Jane Elias Tumbo*, Civil Appeal No. 249 of 2022 [2023] TZCA 17683 (2 October 2023; TanzLII) the court stated; 'In this case the defect that we drew the parties' attention to is jurisdictional, therefore touching the very foundation of the case. Needless to say, the overriding objective principle is not meant to give legitimacy to proceedings conducted by a court or person without jurisdiction.' In the same vein the 3rd defendant although had locus to enter and sign deed of settlement for himself by virtual of being party to Application No. 207 of 2018, had no such powers and authority to enter into negotiation and conclude deed of settlement which would bind the plaintiff. I will not discuss issue of consent judgment

not being signed by parties and board resolution to file the case raised by Mr. Mbwilo in his 18 final submission for not being borne out of pleading and evidence of the parties. Equally it was not issue for determination in this suit as seen in the framed issue. Coming to the second issue to what relief parties are entitled. The plaintiff claimed variety of reliefs, however after considering nature of the suit, the second prayer of permanent injunction against the defendants to interfere with the disputed land is out of place. The suit has nothing to do with ownership of Plot 18/2 Block "F" Uyole area. Equally award of general damages cannot be granted in this suit. In the premises from the discussion of the first issue, I allow the suit and order as follows;

1. Consent judgment in Application No. 207 of 2018 is set aside on ground of fraud.
2. The plaintiff will have her costs of this suit to be paid by the 3rd defendant. V.M. NONGWA JUDGE 13/12/2024 19 DATED and Delivered at Mbeya this 13th December 2024 in presence of Mr. Emmanuel Clarence, Mr. Ezekiel Ndambasya and Mr. Ramsey Mwamakamba learned counsels for the parties. V.M. NONGWA JUDGE 20

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