IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA FIRST INSTANCE DIVISION

(Coram: Yohane Masara, PJ; Audace Ngiye, DPJ: Charles Nyachae, Richard Muhumuza and Richard Wabwire Wejuli, JJ)

APPLICATION No.1 OF 2021

THE ATTORNEY GENERAL OF

THE REPUBLIC OF SOUTH SUDAN.....APPLICANT

VERSUS

YU SUNG CONSTRUCTION ..... RESPONDENT

26TH SEPTEMBER 2022

RULING OF THE COURT

A. INTRODUCTION

1. This Application arises from Reference No. 21 of 2019 filed by the Respondent against the Applicant. The Application seeks to review and set aside a Consent Judgment recorded and endorsed by this Court in respect thereof, on grounds that the Consent was fraudulently entered without authority of the Applicant (Respondent in the Reference).

2. The Applicant is the Attorney General of the Republic of South Sudan, duly appointed to represent the Government of South Sudan, a partner state of the East African Community. His address of service is; **The Office of the Attorney General & Ministry of Justice, State Law Office, Juba, Republic of South Sudan.**

3. The Respondent is a limited liability company registered under the Companies Act of Kenya and its address of service for purposes of this matter is **M/s Semuyaba, Iga & Co. Advocates, Plot 65 Buganda Road, P.O. Box 12387, Kampala**.

4. The Application was brought under Articles 35(3), 39 and 27 of the Treaty for the Establishment of the East African Community ("the Treaty") and Rules 4, 5, 21(3), 52, 83 and 84 of the East African Court of Justice Rules 2019 ("the Rules").

B. REPRESENTATION

5. The Respondent was co-represented by Counsel Justine Semuyaba of M/s Semuyaba, Iga & Co. Advocates and Professor Patrick Lumumba from Lumumba & Lumumba Advocates while Counsel Elijah Mwangi from the law firm of Macharia - Mwangi and Njeru represented the Applicant.

C. BACKGROUND

6. Briefly, the background to the Application is that the Respondent filed Reference No. 21 of 2019 seeking to recover US$46,403,228.26 allegedly owed to them pursuant to the Applicant's failure to pay them for performance of a construction contract.

7. Sometime in 2008, the Respondent was granted a contract to build a military training complex known as Dr John Garang Memorial Military Academy and Natinga Warehouses in the Republic of South Sudan. The Applicant was paid an advance sum of US$ 24 million against the contract sum.

8. Along the way, the parties disagreed. While the Applicant (Respondent herein) claimed for outstanding sums of money, the Respondent (Applicant herein) alleged non-performance of the contract. The disagreement culminated into Reference No. 21 of 2019 filed by the Respondent seeking to recover an outstanding sum of USD$46,403,228.26 from the Applicant.

9. In the Reference, the Respondent did not file a Response at all. However, on the 31/8/2021, Mr Biong, who appeared in Court on their behalf made an oral Application to file a Response out of time and was granted leave to do so. Instead, on the 26/11/2020, the parties filed a Consent and extracted a Decree signed by Mr Biong on behalf of the Respondent (Applicant herein). The Decree was recorded and endorsed by the Court.

D. THE APPLICANT'S CASE

10. The Applicant submitted that Mr Biong did not have the mandate to enter into a consent agreement on their behalf and that this Court did not satisfy itself that the agreement was reached lawfully. It also

contended that the agreement was entered into fraudulently without any proper authority. That this Court is enjoined to prevent any unlawful judgment and that the Court has the jurisdiction to review and or set aside the impugned judgment and Decree.

11. The Applicant seeks for the following orders:

    a) **That the Application be certified as urgent and be heard *ex parte;***
    b) **That the Applicant be granted leave to change Advocates from Mr Biong Pieng Juol Arop to the law firm of Macharia – Mwangi & Njeru Advocates;**
    c) **That pending hearing and determination of this Application *inter partes*, there be a stay of execution of the Consent Judgment entered on 26th November 2020, the resultant Decree and further enforcement proceedings other than the hearing hereof;**
    d) **That this Court be pleased to review and or set aside the Consent Judgment and Decree issued on 26th November 2020 and all subsequent enforcement proceedings pursuant to the judgment and Decree; and**
    e) **That the time for filing the Response to the Respondent's Reference No.21 of 2019 be extended and the Applicant be granted unconditional leave to file its Response to the Reference.**

E. THE RESPONDENT'S CASE

12. The Respondent contended that the matter having proceeded on default of the Applicant filing a Response in the main Reference, they had no *locus standi* in the matter and cannot therefore be heard.

13. They also contend that under the Rules, a stay of execution is not available for an Applicant who has neither filed a Notice of Appeal nor in fact filed an actual Appeal and that since the time for the Applicant to have done so has long lapsed, the Applicant does not demonstrate any sufficient (*sic)* cause for this Court to grant a stay of execution. The Respondent cited various municipal court decisions of the High Courts of Tanzania and of Uganda to brace their submission.

14. They submitted that the Reference had been wholly adjusted by a lawful agreement which was recorded under Rule 62 of the Rules. That Mr Biong who signed on behalf of the Applicant was the duly and lawfully mandated Counsel for the Respondent.

15. The Respondent also contended that under Rule 21(1), (2), (3), (4) and (5) of the Rules, the Applicant cannot effect a change of Advocates without having filed an application to do so and without an order of the Court. That the instant Application having been filed by lawyers who were not previously on Record is incompetent and should be struck out.

16. Counsel further contended that this Court was *functus officio* and no longer has jurisdiction over this matter since the Consent Judgment in issue acted as a constructive final judgment. They sought to rely on a Botswana Court of Appeal decision in the case **Magdeline Makinta vs Fostina Nkwe, Court of Appeal No. 26/2001** in which it was held that once Court has duly pronounced a final judgment or order it has no authority to correct, alter or supplement it.

17. The Respondent prayed that the Application be dismissed on the premise of the foregoing preliminary grounds.

F. ISSUES

18. The fundamental question for this Court to determine is whether the Consent Judgment can be set aside, notwithstanding that it was duly endorsed and recorded by the Court.

19. The other issues raised by the Respondent as preliminary objections are in respect of the change of Advocates by the Applicant to the law firm of Macharia-Mwangi & Njeru Advocates to wit, Whether the Applicant has *locus standi* in this matter, whether the Application is *res judicata* and whether the Court is *functus officio* and therefore has no jurisdiction over this matter.

20. The Parties filed written submissions, all of which we considered. Counsel also graciously provided copies of the authorities upon which they relied to brace their respective arguments.

21. We also note that the Application and justification to certify this Application as urgent and to hear the Application *ex parte* have both been over taken by events. For that reason, these two aspects of the Application do not require any pronouncements from the Court.

G. DETERMINATION OF ISSUES BY COURT

22. All questions raised regarding *res judicata* and *functus officio* also interrogate this Court's jurisdiction over the Application. We shall first address the question of jurisdiction. However, given that the rule of *functus officio* is part of the broader doctrine of *res judicata, we* shall canvas the questions of *res judicata* and of *functus officio* jointly. We shall also address the question of *locus standi* raised by the Respondent against the Applicant.

23. Should it then be necessary, contingent upon how the foregoing questions are resolved, we shall then proceed to determine the

question of Change of Advocates and finally determine the merits of the Application.

(i) Whether the Matter is *Res Judicata* and whether the Court is *Functus Officio*

24. Counsel for the Respondent submitted that the Consent Judgment was a final judgment in the matter, that it was therefore *res judicata* and that the Court is, in the circumstances, *functus officio*. He cited a South African case of **Odneste Monanyana vs The State, Criminal Appeal No. 8 of 2021** for its persuasive merit on the position that once a Court has duly pronounced a final judgment or order, it has no authority to correct, alter or supplement it. It becomes *functus officio*, its jurisdiction in the case is fully and finally exercised and its authority over the subject matter ceases. They also cited the case **Magdeline Makinta vs Fostina Nkwe** (supra) in which it was held that once Court has duly pronounced a final judgment or order it has no authority to correct, alter or supplement it.

25. With due respect to Counsel, the decision in the case **Magdeline Makinta vs Fostina Nkwe** (supra) does not seem to take cognizance of the slip rule, which is embedded in the Rules and judicial practice of this Court. The authority does not therefore correctly anchor his case.

26. A matter is *res judicata* once a decision has been given by a judge or tribunal with jurisdiction over the cause of action and the parties and that the decision disposes off the matter with finality so that it cannot be re-litigated by those bound by the judgment, except on appeal. The purpose of the doctrine is to provide finality to litigation and to protect parties from being vexed twice by the same matter. Indeed, if an issue is barred by *res judicata*, having been heard and determined by the

same Court, then the Court has no jurisdiction on principles of *functus officio* to go into that question or to decide that question over again.

27. Be that as it may, Courts have realized the potential risk of injustices that could be occasioned upon litigants if Courts without interrogation, only have strict reliance on the doctrine of *res judicata*. This is so because the doctrine is intended to promote the orderly administration of justice and therefore its mechanical application could potentially create an injustice.

28. In **Moyo vs Rex (469 of 2015) [2016] SZHC 35,** a persuasive decision of the High Court of Swaziland (Eswatini), the Applicant sought to impugn the operation of the doctrine of *res judicata*, it was held that the operation of *res judicata* can be impugned upon new facts or circumstances being established or pleaded provided such facts are realistic and not merely conjured to defeat *res judicata* or the *functus officio* principle.

29. In another persuasive decision in the case of **Bafakeng Tribe vs Impala Platinum Ltd & Others, 1999 (3) SA 517** it was held that the principle of *res judicata* must be carefully delineated and demarcated in order to prevent hardship and actual injustice to the parties. This position was more emphatically echoed in the Canadian case of **Amtim Capital vs Appliance Recycling Centre of America (2012) 298 O.A.C 75,** where the Court of Appeal of Ontario held that the purpose of *res judicata* is to balance the public interest in the finality of litigation with the public interest of ensuring a just result on merits.

30. Our understanding of the import of these decisions is that Court is therefore not completely always bereft of every request to revisit a Consent Judgment/Decree by barrier of *res judicata*, because the principle of *res judicata* is not cast in stone. The application and

operation of the doctrine is not without exception where the consent is underpinned by fraud, mistake or any form of misrepresentation. This therefore means that Court would have the mandate to revisit the matter to establish the veracity of such allegations.

31. We find the progressive jurisprudence reflected in the cases of **Moyo vs Rex** (supra), **Bafakeng Tribe vs Impala Platinum Ltd & Others** (supra) and **Amtim Capital vs Appliance Recycling Centre of America** (supra) instructive and we are persuaded to adopt, as we hereby do, the rationale therein in the instant case.

32. The preliminary contention therefore, that this matter is *res judicata* and that this Court is *functus officio* is accordingly over ruled.

33. It is therefore imperative for this Court to determine whether the Consent Decree was properly and lawfully derived and construed or not, which is a matter of mixed law and fact. This will, however, be done after we have resolved the next issues which concern *locus standi* and the change of Advocates.

(ii) Whether the Applicant has *Locus Standi*

34. The submission by the Respondent that the Applicant has no *locus standi* in the matter is self-defeating. By participating in the impugned Consent Judgment with the Applicant, the Respondent acquiesced to the position that the Applicant had locus to co-participate in the process of resolution of the dispute. The Respondent vacated the option to seek a *Default Judgment* and opted for a *Consent Settlement* thereby acknowledging the Applicant's entitlement to participate in resolving the dispute. The Respondent is closed out by the doctrine of approbation and reprobation. They cannot seek to benefit from a consent agreement which they entered with the Applicant and yet also

argue that the Applicant had no *locus standi* to participate in the process of entering that same Agreement, the challenge to the legality of that agreement in the instance notwithstanding. Should the contention that the Applicant had no *locus standi* be upheld, then the Agreement is without a doubt, void *ab initio*.

35. The contention of lack of *locus standi* is therefore without merit. The Court finds that the Applicant has *locus standi* in this Application.

(iii) Whether the Change of Advocate should be allowed

36. The Respondent contended that the Application was incompetent for having been filed by lawyers who were previously not on the Court Record and that it should be dismissed. That under Rule 21(1), (2), (3) and (5) of the Rules, "*a change of Advocate cannot be effected without an order of Court upon an Application with notice to the Advocate on record.*"

37. The Respondent further submitted that the Application for change of Advocates cannot be granted pending hearing of the Application *inter partes* because this Court is *functus officio*. Counsel further argued that any change of advocate under the said Rule 21 requires that an Advocate who desires to cease acting for any party shall notify the Registrar in writing.

38. In reply, Counsel for the Applicant contended that initially, the Applicant was self-representing through Mr Biong by virtue of his employment and that therefore the initiative to file an application for change of Advocates was only done out of abundance of caution. However, he pointed out that in the instant Application, the Applicant indeed seeks leave as envisaged under Rule 21(3) of the Rules.

39. This case poses very peculiar circumstances regarding the change of Advocates. Mr Biong who should have filed the requisite Notice under Rule 21(5) of the Rules is the one from whom the Applicant had to change from and was also allegedly working against the Applicant's interests. This would therefore explain the non-compliance with that particular requirement.

40. In his submissions, Counsel Elijah Mwangi who presented this Application, contended that the Application was indeed in service of the requirements of Rule 21(3).

41. It is this Court's view that the requirement for communication of change or instruction of Advocates as stipulated in the Rules was not intended to be used as a sword against the litigant but rather as a shield to protect them. It is inconceivable that the framers of the Rules could have intended to deny a litigant legal representation simply because he or his lawyers did not in a timely manner comply with the requirement to notify the other party about the intent of an Advocate to withdraw from the matter or about a change of Advocates nor could it have been intended to expose a litigant to the possibility of being denied access to professional legal services.

42. After carefully considering the peculiar circumstances of this case, right from the failure to file a Response within the Statutory period through to the court-extended time and the subsequent consent settlement which then culminated into the instant Application, we are convinced that this is an appropriate and justifiable case for this Court to invoke its inherent mandate to ensure the ends of justice and to avert any possibility of abuse of the Court's processes and so we validate representation of the Applicant by the law firm of Macharia –Mwangi & Njeru Advocates.

43. We grant leave for the law firm of Macharia–Mwangi & Njeru Advocates to go on record as the duly instructed Advocates for the Applicant and do order that the law firm is entered on the Court record as such.

44. We shall now proceed to determine whether the Consent Decree was properly and lawfully derived and construed or not. This is a matter of mixed law and fact. At this stage however, we will focus on the aspects of law.

(iv) Whether the Consent Decree was Lawfully Derived and Construed

45. It is the Applicant's case that even if the judgment was entered by consent, the Court did not satisfy itself that the agreement was reached lawfully. They further submit that Mr Biong had no mandate to consent on behalf of the Respondent Government.

46. On its part, the Respondent sought to rely on Sections 15, 18, 24 and 25 of **the Ministry of Legal Affairs and Constitutional Developmental Act** which designates the Minister and Legal Counsel as the legal advisors to the Government of South Sudan with the mandate to render advice on civil disputes, among other things, to contend that the consent agreement was lawfully entered.

47. Noteworthy, Counsel for the Respondent elaborately submitted on the mandate of this Court to enter *Default Judgment* where there is failure to file a Response and *Judgment on Admission* of facts. They cited decisions from other jurisdictions to validate their arguments. These submissions, in our opinion, were misconceived given the fact that the instant Application is about a *Consent Judgment* and not a *Default*

Judgment nor a *Judgment on Admission* which is what is alluded to in the said elaborate submissions.

48. However, at page 12 of their submissions, Counsel for the Respondent states that in the instant case, it had been proved to the satisfaction of Court that the Reference had been adjusted wholly or in part by a lawful agreement. They further state that:

> ***"In this case since this matter appeared before a full bench on the 31st August 2020 and a Consent Judgment was entered on the 26th November 2020 and endorsed by the Principal Judge, the Applicant ought to have applied to vary, discharge or reverse the decision before a full bench by the 3rd December 2020. The Applicant has filed an application for review on 5th February 2020."***

49. The import of this submission is that Court had, at its sitting on the 31st August 2020, satisfied itself that the agreement by which the parties settled the dispute was lawful.

50. In an effort to verify this, we have carefully perused the Record of this Court's proceedings dated the 31st August 2020. On that occasion, the Court was set to hear Application No. 15 arising out of Reference 21 of 2019. Counsel for the Applicant in the Reference raised a preliminary objection to the effect that the Respondent in the Reference had no *locus standi* to be heard because they had not filed a Response. Court granted the Respondent leave to file a reply to the Reference out of time. Based on our perusal of the record of proceedings, that would appear to have been the only business that was handled on that occasion.

51. From the Court's Case file and record, when this Court sat on the 31st August 2020, there was no consideration of any form of agreement between the parties.

52. On the 26/11/2020, a Consent Decree and Order extracted and signed by Mr Biong and the Respondent's Advocates were filed and were endorsed and recorded by the Court.

53. Rule 62 of the Rules provides that:

> ***"Where it is proved to the satisfaction of the Court that a dispute or Reference has been adjusted wholly or in part by any lawful agreement or compromise, the Court shall on the Application of any party, direct that such agreement, compromise or satisfaction be Recorded and shall enter judgment accordingly."***

54. The provisions of this Rule impose two principal obligations on the Court. Firstly, to satisfy itself about the legality of the agreement or compromise and secondly to record and enter judgment as will have been agreed upon or compromised by the parties. The mandate is not to interrogate the merits of the agreement but to convince itself that the agreement passes the test of legality. The Court does not therefore question the entitlements or exactitude of the agreement but rather poses the question such as would establish whether the parties had the mandate, the legal capacity to agree and whether the agreement is at harmony with public policy or law. The record must then show that the court addressed its mind to these issues before it endorsed and entered the agreement on its record as a judgment or decree.

55. The question that begs an answer therefore is whether this Court, when considering the Consent, satisfied itself that the Agreement or

the procedures leading to its procurement in no way infract any law or public policy. If the answer to the forgoing question is in the affirmative, then no challenge to a Consent Judgment entered under Rule 62 would be sustainable. However, if the answer is in the negative, then the Court will have offended Rule 62 and a Consent Judgment so recorded would be a nullity.

56. At page 12 of its submissions, the Respondent sought to rely on the Record of proceedings of 31st August 2020 to establish to this Court that it had indeed satisfied itself that the Agreement was lawful. We have however carefully reviewed the proceedings of the day and we do find that the proceedings do not disclose any evidence that the Court satisfied itself about the lawfulness of any agreement, let alone the impugned Consent Agreement. In any event, the Consent Agreement was lodged on the 26th November 2020 and yet the proceedings sought to be relied upon by the Respondent took place on the 31st August 2020.

57. From the Court Record, there is no indication that the legitimacy of the agreement was ever subjected to a test of its veracity by this Court. This Court did not therefore, as required by Rule 62 of the Rules, satisfy itself that the agreement was lawful. The omission by this Court to satisfy itself as to whether the Consent Agreement which was filed in Court was lawful, before having it endorsed and recorded by the Court offended Rule 62 of the Rules.

58. In the instance, the Court, by omission, committed an error.

59. Article 35 of the Treaty mandates this Court to review its judgment on account of some mistake, fraud or error on the face of the Record or upon discovery of some fact which by its nature could have a decisive influence on the judgment if it had been known to the Court at the time

the judgment was given but which fact at the time was unknown to both the Court and the party making the Application and which could not with reasonable diligence have been discovered by that party before the judgment was made. Rule 83 of the Rules gives life to this provision of the Treaty.

60. The provisions of Article 35 of the Treaty and of Rule 83 of the Rules were enunciated in the cases of **Christopher Mutikila vs Attorney General of Tanzania and Another, Appeal No. 8 of 2007** and in **FX Mubuuke vs Uganda Electricity Board, HCMA No. 98 of 2005**, both of which were rightly cited by the Respondent to establish the grounds upon which an Application for review can be brought and upheld.

61. In the case of **Edison Kanyabwera vs Pastori Tumwebaze, Supreme Court Civil Appeal No 6 of 2004**, a persuasive decision of the Supreme Court of Uganda, it was held that:

> ***"In order for an error to be a ground for review, it must be an evident error which does not require any extraneous matter to show its correctness. It must be an error so manifest and clear that no Court would permit such an error to remain on record. The error may be one of fact but it is not limited to matters of fact and also includes an error of law."***

62. The provisions of Article 35 of the Treaty, Rules 62 and 83 as echoed by the holdings of Court in the afore-stated cases are very instructive on the options of available remedial recourse under such circumstances as pertain in the instant case; to wit, that such a judgment would be eligible for review.

63. Having established that the Court, by omission, manifestly committed a mistake, this error should not be permitted to remain on record. The

Consent Order and Decree entered by the parties and recorded and endorsed by this Court on the 26th November 2020 is accordingly set aside and the Reference shall be heard and disposed of on the merits.

64. It follows therefore, that all orders and subsequent execution actions deriving from the impugned Consent Order and Decree have no legal basis and are void *ab initio*.

H. CONCLUSIONS AND ORDERS

65. On the premises, it is the decision of this Court that the Application by the Applicant has merits. We therefore direct and Order as follows:

a) This matter is not res judicata;

b) The Court is not functus officio;

c) The Applicant has *locus standi* in this matter;

d) Representation of the Applicant by the law firm of Macharia–Mwangi & Njeru Advocates is hereby validated;

e) The law firm of Macharia–Mwangi & Njeru Advocates be entered on record as the duly instructed Advocates for the Applicant;

f) The Court's omission to satisfy itself that the Consent Agreement was lawful is a manifest mistake and error on the face of record;

g) The Consent Order and Decree issued by this court on 26th November 2020 be and is hereby set aside in its entirety;

h) The time for filing a Response in Reference No. 21 of 2019 be and is hereby extended;

i) The Respondent therein is granted unconditional leave to file its Response within 30 days from the date hereof; and

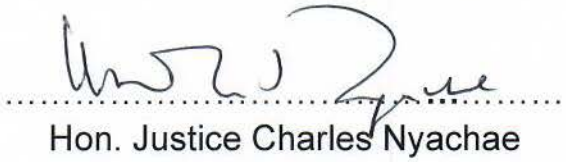
j) **Costs of the Application shall abide the outcome of the Reference.**

66. It is so ordered.

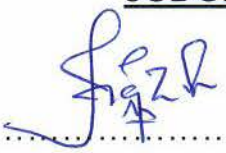
Dated, signed and delivered at Arusha this 26th Day of September, 2022.

Hon. Justice Yohane B. Masara
PRINCIPAL JUDGE

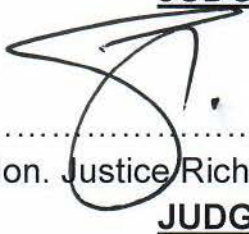
*Hon. Justice Audace Ngiye
DEPUTY PRINCIPAL JUDGE



Hon. Justice Charles Nyachae
JUDGE



Hon. Justice Richard Muhumuza
JUDGE



Hon. Justice Richard W. Wejuli
JUDGE

***[Hon. Justice Audace Ngiye's term of office at the EACJ came to an end on 30th June, 2022, but he signed this Judgment in terms of Article 25(3) of the Treaty]**