

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
ARUSHA SUB-REGISTRY
AT ARUSHA**

CIVIL APPEAL NO. 17 OF 2023

(Originating from Civil Case No. 11 of 2022 before the Resident Magistrate
Court of Arusha at Arusha)

M/S LODHIA STEEL INDUSTRIES LTD APPELLANT

VERSUS

NATIONAL MICROFINANCE BANK PLC 1ST RESPONDENT

FELICIAN EDWARD KUYELA 2ND RESPONDENT

JUDGMENT

14th November & 21st December, 2023

KAMUZORA, J

In this appeal the Appellant M/S Lodhia Steel Industries Ltd is appealing against the Ruling and Drawn Order of the Resident Magistrate Court of Arusha dated 23rd November 2022. According to the records, the genesis of the matter began at Manzese Primary Court, whereas the second Respondent instituted a suit against the Appellant (Civil Case No.203 of 2020) claiming a total amount of 80,000,000/=. The primary Court delivered judgment and decree in favour of the 2nd Respondent herein. In executing

the decree, on 29th April 2021 the court ordered the attachment of the Appellant's two bank accounts at the first Respondent bank NMB and at CRDB Bank PLC. This was followed with issuance of garnishee order which was also complied with on 27th October 2021 by transfer of TZS 80,000,000/= by the first Respondent to second Respondent's account.

On 25th July 2022, the Appellant instituted a suit against the Respondents (Civil Case No.11 of 2022) in the Resident Magistrate Court praying among other things for the court to declare the said transaction illegal. The first Respondent raised a preliminary objection that, the suit was incompetent before the resident magistrate court for contravening section 38(1) of the Civil Procedure Code, Cap 33, [R.E 2019]. The objection was sustained and the suit was struck out. Aggrieved by the said ruling, the Appellant filed an appeal to this Court challenging the decision of Resident Magistrate Court on one ground that the trial court erred in law and in facts in holding that the plaintiff suit contravened the provision of section 38(1) of the Civil Procedure Code, Cap 33, [R.E 2019] hence subject to be stuck out.

When the matter was called for hearing the Appellant was represented by Mr. Abdallah Issa Ally learned counsel whereas Mr. Mosses Mbando represented the first Respondent. Counsel for parties opted to argue the

appeal by way of written submissions and they complied to the scheduling order save for the second Respondent.

Submitting in support of appeal Mr. Abdallah argued that, for the provision of Section 38(1) of the Civil Procedure Code be brought into play, there must co-exists two sets of conditions; *First*, existence of a question arising from the execution, discharge or satisfaction of the Decree and *Second*, the parties involved in the said question must be parties to the suit/their representatives. In cementing on his argument, he referred this court to the Code of Civil Procedure, 19th Edition, Vol.1 By Mulla at page 651 and the cases of **Mornach Investment Ltd Vs. CRDB Bank Plc and Another**, Misc. Land Application No. 33 Of 2022 HCTZ Mwanza, and **Metteus Caesar and Another Vs. Safina Hussein Msuya and Others**, Land Case No. 389 of 2017, HC DSM (unreported) where it was stated that the court may be moved to consider whether there are questions arising between the parties to the suit in which the decree was passed or the representative and relating to the execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and not separate suit.

The counsel for the Appellant further submitted that the issues in question is whether in absence of the first Respondent herein as a party to the proceedings in the said Civil Case No. 203/2020 at Manzese/Sinza Primary Court, the matter fall within the stipulated conditions stated under Section 38(1) of the Civil Procedure Code(supra) and makes Appellant's suit incompetent. He argued that, since the first Respondent herein was not a party to the case in Civil Case No. 203/2020 condition number two was not met as regard to section 38(1) of the Civil Procedure Code thus, Civil Case No.11 of 2022 at the Resident Magistrate Court cannot be said to have preferred in contravention with the said provision. He cited the case of **Millicom (Tanzania) N.V Vs. James Alan Russel Bell and 5 Others**, Civil Revision No.3/2017, C.A.T DSM 2018 from which he argued, the scope of questions to be determined by the executing court is limited to those arising between the parties to the suit in which the decree was passed. He concluded with prayer for this Court to allow the appeal, quash and set aside the Ruling and Drawn Order of the resident magistrate court.

In reply, Mr. Mmbando, counsel for the Respondent supported the trial court's decision and argued that the suit before the trial court emanated from the discharge or satisfaction of the decree. That, the dispute between

parties is against attachment and deduction of the sum of TZS.80,000,000/= from the plaintiff's bank account number 40810054146 which was so done in compliance with garnishee order of the Primary Court of Manzese in Civil Case No.203/2020 as indicated at paragraph 2 of the written statement of defense and paragraph 5 and 6 of the plaint before the trial court. Referring **the Code of Civil Procedure Code**, 16th Edition Vol 1 By Mulla at Page 643, and **section 38(1) of CPC** the counsel for the Respondent submitted since the first Respondent is holding the account and monies of the Appellant herein, it makes the first Respondent a representative of the Appellant who was the judgement debtor in execution proceedings. To him, being a representative, any question arising from execution must be dealt by the execution Court. He added that, according to the book of **Code of Civil Procedure Code, 16th Edition Vol 1 By Mulla at page 675**, a representative does not only mean legal representative but representative in interest. That, since the Appellant is aggrieved and complaining of illegality in the attachment and deduction of money from her account to satisfy the court's decree, the executing court will be in a best position to resolve it and in this case, it has to be Manzese Primary court. He added that, the said

order is still unchallenged and therefore determining the matter in another court will amount into conflicting decisions.

While the counsel for the Respondent agreed that, the first Respondent's name was not in the execution proceedings, he argued that the 1st Respondent was bound by the attachment order issued by the Court as a representative of interest and therefore was involved in the discharging and or satisfaction of the decree in execution as ordered by the executing Court. The Respondent's counsel concluded that since the Appellant is seeking to be refunded transferred from his account, proper court to determine that issue is the executing court which could lift the garnishee order against and not file a separate suit in the Resident Magistrate Court. He therefore prayed for the appeal be dismissed for lack of merit.

I have dispassionately considered the lower court records, ground of appeal and submissions by the counsel for the parties. For the purpose of clarity, **section 38(1) of the Civil Procedure Code** (supra) reads;

"All questions arising between the parties to the suit in which the decree was passed, or their representative, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit".
[Emphasis is mine]

The above cited provision is that matters relating to the execution, discharge of satisfaction of the decree has to be dealt with by the executing court and not by a separate suit. While the Respondent herein claim that the dispute arose out of execution of the court decree hence need to be dealt with by the executing court, the Appellant herein claim that the condition set under section 38 above does not fit in the matter at hand for it to be determined by executing court hence, a separate suit could be filed in court. The trial court was satisfied that the dispute was related to execution of the court decree hence, the executing court was in a good position to determine the matter. The issue in controversy is whether the trial court was correct in concluding that the dispute could not be brought by way of a separate suit.

It is clear, and I agree with the Counsel for Appellant that for section 38(1) of CPC to be brought into action two conditions must be met; **one**, questions must be arising between the parties to the suit in which the decree was passed, or their representative and **two**, a question must be relating to the execution, discharge or satisfaction of the decree.

The law clearly requires any matter falling under the above two conditions to be dealt with by the execution court. The rationale of section 38 (1) of the CPC was well elaborated by **Sir Dinshaw Fardunji Mulla** in

his book **The Code of Civil Procedure Nineteenth Edition, Volume 1, page 651** that, is to provide a cheap and expeditious procedure for the trial of such a question without recourse to a separate suit and to check litigation.

Now the question is whether the dispute in the matter at hand fall under the provision of section 38 (1). To determine that issue, I will assess whether the two conditions have been met, that is to say, whether there are questions arising between the parties to the suit in which the decree was passed, or their representative and whether the questions are relating to execution, discharge or satisfaction of the decree passed in Civil Case No.203 of 2020 at Manzese Primary Court.

It is clear that parties in Civil Case No. 203 of 2020 before the primary court were also the plaintiff and the 2nd defendant before the resident magistrates' court in Civil Case No. 11 of 2022. Only the 1st defendant (the 1st Respondent herein) was not a party to the primary court proceedings. I agree with the Respondent's reasoning that the 1st Respondent acted as representative of the Appellant hence, was covered under the provision of section 38 (1). I say so because the representation referred into the above provision does not limit itself to the legal representatives but any representatives to interest of the party to the case. The 1st Respondent being

a bank where the Appellant maintained his bank account, he was a representative of the bank interest of the Appellant thus, if anyone was complaining of any issue done by the bank as representative of the client in execution of the court decree, he could have properly raised that issue before the executing court and not to file a separate suit.

On the second condition, it is apparent from the records that, the dispute arose from the execution of the court decree in Civil Case No.203 of 2020 at Manzese Primary Court. Paragraph 4, 5 and 6 of the plaint read;

- 4. That, the Plaintiff claim against the defendant jointly and severally is for the payment of Tanzania shillings eighty million (80,000,000/=) being an amount illegally transferred from the plaintiff account no. 40810054146 and paid into the second defendant Attorney one Bahati Mkeha Rukiko bank account number account no. 24710008054 both accounts are held by the first defendant at Clock Tower Branch and general damages arising out of illegal transfer of the Plaintiff monies.*
- 5. That, on 29 day of June 2020 the second defendant obtained an ex parte judgement and decree from Manese/ Sinza Primary Court against the plaintiff ordering the Plaintiff to pay the amount of eight Million (80,000,000/=) to the second defendant.*
- 6. That, following the ex parte Judgement and Decree as against the Plaintiff, 2nd Defendant further obtained an execution order by way of attachment of the Plaintiff's bank account dated 11/02/2021 as a*

means to satisfying the judgement and decree emanating from the Civil Case no. 203 of 2020 vide order dated 11 February 2021.

From the above excerpt, it is clear that the cause of action in Civil Case No 11 of 2022 before Resident Magistrate Court emanates from execution of the court decree by Manzese/Sinza Primary Court in Civil Case No 203 of 2020. The reliefs sought by the Appellant in my considered view are also against the execution and satisfaction of the court decree. In that regard, the trial court was correct to find that the executing court was in better position to determine any inconsistency complained of as arising out of execution of court's decree.

It must also be noted that what is complained of by the Appellant is the execution process which took place at Manzese/Sinza primary court. The bank acted on the order of the court and not on its own motion. If any party was aggrieved by the order and the whole execution process which resulted to the claimed illegal transfer of the money, the remedy was to file revision to the district court which could have assessed the legality of the order and legality of the transfer effected by the bank. The resident court of Arusha could not be in a position to peruse the primary court record and see if any of the procedure was not followed for it to find that there was illegal transfer

since the Appellant was complaining of propriety of execution carried out at Manzese/Sinza Primary Court is Dar es salaam, the court at Dar es salaam could be in better position to evaluate the validity and legality of the money transfer for the law and prudence requires so.

In summary, it is my settled view that the applicant's claim purely relates to the discharge and satisfaction of the decree and as such, the proper Court to deal with the matter is the executing court. Consequently, I find the appeal devoid of merit and I hereby dismiss the appeal with costs.

DATED at **ARUSHA** this 21th day of December, 2023




D.C KAMUZORA
JUDGE

