

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 183 OF 2020

(ARISING FROM COMMERCIAL CASE NO. 38 OF 2007)

PETROMARK AFRICA LIMITED 1ST APPLICANT

FREDDIE ALLY RASHIDI MBONDE 2ND APPLICANT

VERSUS

EXIM BANK (TANZANIA) LIMITED RESPONDENT

Date of Last Order: 06.10.2021

Date of Ruling: 05.11.2021

RULING

MAGOIGA, J.

This ruling is in respect of the preliminary objection on points of law raised and filed by the learned advocates for the respondent against the maintainability of the instant application to the effect that:-

- a. That the application is misconceived and bad in law for contravening the provisions of section 89(1) of the Civil Procedure Code, [Cap 33 R. E. 2019] on ground that it does not seek restitution but refund of the proceeds of the same decree;
- b. That the application is misconceived and bad in law for contravening the provisions of section 89(2) of the Civil Procedure Code, [Cap 33.

R.E. 2019] on the ground that it is an alternative to the suit which should have been filed to seek restitution;

c. This Honourable court has been improperly moved as the application has cited both provisions which are contradictory;

d. The first applicant does not have a *locus standi* in the matter for failure to appeal against the decree of this honourable court in Commercial case No.38 of 2007 dated 31st May, 2012.

Based on the above grounds of objections, the learned counsel for the respondent urged this court to dismiss the instant application with costs.

For better understanding the essence of these preliminary points of objection on points of law, the facts, albeit in brief, pertaining to this application are imperative to be stated. In 2007 the respondent instituted Commercial Case No. 38 of 2007 against the respondents (and other three not in this application) claiming several reliefs, based on loan agreement in which after hearing parties', this court eventually decided in favour of the respondent and applicant were ordered to pay a total of TZS.469,767,017.36 plus accruing interest at the rate of 25% from 1.5.2007 up to the date of judgement, interest on the decretal sum at the court rate



of 7% from the date of judgement up to full and final payment and costs of the suit.

The respondent successfully executed the High Court decree against the applicants by attachment and sale of immovable properties known as Farm No.596 Mahenge village, Iringa district with Title No. 6358 MBYLR and plot No.1 Block 'E' Sinza area, Dar es Salaam with Title No. 37705.

Further facts went on that, aggrieved by the High Court judgement, the applicants successfully appealed to the Court of Appeal and the decree of the High Court was reversed.

It was against the above background, the applicants preferred this application praying, among others, for restitution of the proceeds that were realized after sale of the said immovable properties, interest, general damages and costs of this application, hence, this ruling on preliminary objection on points of law that the instant application is bad in law as itemized in the ground of objection filed and argued.

The applicants in this application are represented by Mr. Audax Kahendaguza Vedasto, learned advocate. On the hand, the respondent had



the legal services of Messrs. Gabriel Simon Mnyele and Roma Masumbuko, learned advocates.

On 07.05.2021 when this application was called on for hearing, Mr. Masumbuko, learned advocate for the respondent informed the court that, they are abandoning grounds number 3 and 4 of the points of objection raised and will only argue the remaining two. The prayer was without much ado granted and ground numbers 3 and 4 were marked so abandoned. The matter was adjourned to another date for hearing.

At the hearing of the preliminary objection both learned counsel for the applicant and respondent respectively had complied with the provisions of Rule 64 of the High Court (Commercial Division) Procedure Rules, 2012 as amended from time to time by filing skeleton written arguments in support of their respective stances on the objection raised and argued. Mr. Masumbuko during oral hearing prayed to adopt the skeleton written arguments in respect of the two remained point of objections. In the skeleton written arguments, Mr. Masumbuko in support of the first limb of objection started by differentiating the words 'refund' and 'restitution' to mean return of money overpaid, overestimated or withheld from the earning and restoration to successful appellant what has been lost by

reason of lower court's erroneous judgement respectively. According to Mr. Masubmuko, the instant application is for refund of the proceeds of the sale of the nullified decree, as such is wrong to seek refund because will amount to benefiting from the nullified decree.

Mr. Masumbuko equally cited the famous author Mulla on Civil Procedure Code, 14th edition who discussed section 144 of the India CPC which is *pari materia* with section 89 and concluded that the provisions of section 89 were meant to restore the successful appellant to what had been lost in the execution of the reversed decree. In this application, the applicants' lost their landed properties and not proceeds of sale of the landed properties in execution of the decree. And according to him, the applicants were to file a suit to claim the sold landed properties and not seeking a refund as they did here and urged the court to dismiss this application.

In support of their position cited the case of TUCTA vs. ENGINEERING SYSTEM CONSULTANT LTD, CIVIL APPEAL NO. 51 OF 2016 CAT (DSM) (UNREPORTED) in which interpreting the word 'otherwise' should have similar meaning to restitution and not in other ways. Another case cited was the case of PAN AFRICAN ENERGY LTD vs. COMMISSIONER GENERAL OF TRA, CIVIL APPEAL NO 172 OF 2020 CAT (DSM) (UNREPORTED) in which it

was held that, under the rule of *ejusdem generis* where in a statute there are general words following particular specific words, the general words must be confined to things of the same kind as those specifically mentioned.

Mr. Vedasto arguing in rebuttal to the 1st limb of objection at the outset prayed to adopt the skeleton written arguments. According to Mr. Vedasto section 89 (1) of the CPC is not limited to restitution alone because the provisions are quite clear that, it can be restitution or otherwise. According to him, the provision is self explanatory that apart from restitution, the court can order other orders which includes interest, damages, compensation and mesne profits which were consequential on such varied or reversed decree. On that note, Mr. Vedasto invited this court to overrule the 1st limb of objection for being unmerited in the circumstances we have.

In rejoinder, the learned advocate for the respondent maintained his earlier stance and simply stated that, the case of PETER ADAM MBOWETO vs. ABDALLAH [1981] TLR 335 is irrelevant at this stage without going into details of the irrelevancy.



Having carefully followed and considered the rivaling arguments by both counsel for parties', I noted that, the bone of contention triggering the instant objection is whether under the provisions of section 89 (1) of the CPC, a party who successfully appealed and have the decree of the first instance court reversed or varied, can claim refund or is it limited to restitution alone? The answer to the above question will make my day easy in this ruling. And to be fair to the parties, let me allow the provisions of section 89(1) speaks by itself. The said provisions for easy of reference provides:

Section 89. Application for restitution

*(1) Where and in so far as a decree is varied or reversed, the court of first instance shall, on the application of any party entitled to **any benefit** by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed; and, for this purpose, the court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal. (emphasis mine).*

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under subsection (1).

Going by the provisions of the above cited provisions, in particular, the underlined and bolded words is very clear that for this application to apply the following must co exists:

- i. There must be a decree that has been varied or reversed;
- ii. The application for restitution or otherwise must be made to the court of first instance which passed the decree (emphasis mine)
- iii. An application can be made by **any party entitled to any benefit** by way of restitution or otherwise (emphasis mine).
- iv. The aim is to restore parties to the original position before the passing of the decree.
- v. And the court of first instance can make orders, including orders for the refund of costs, and for the payment of interest, damages, compensation and mesne profits which are properly consequential on such variation. (emphasis mine)



The word 'restitution or otherwise' according to Black Law Dictionary is defined to mean compensation or recompense for injury or loss. Therefore from the above definition, in my considered opinion; **one**, the word 'otherwise' by using esjudem generis principle of interpretation as used in the provision can cover compensation of the value without necessarily returning to its original position. **Two**, the applicant need not be an appellant to make an application but the gauge here is any party entitled to any benefit by way of restitution such as administrator/administratrix, or assignee, beneficiary or any person with a recognized interest. **Three**, putting parties to its original position will depend on each particular circumstances of the case without necessarily inviting further litigations, and restoration, if any, must be desirable in the circumstances of each case in dispute and none of the parties should be allowed to enrich himself/herself from the reversed decree. **Four**, the orders that the court of 1st instance is to give must be orders properly inconsequential to the varied decree and not otherwise. **Five**, subsection (2) of section 89 of the CPC, was meant, in my opinion to bring to an end, endless litigation on restitution or other reliefs-which can include compensation, refund and other consequential orders.



From the foregoing, the arguments by the learned advocates for the respondent that, claiming refund is bad in law are devoid of any useful merits and cannot carry the order of the day. Further arguments by the learned advocate for the respondent that, the applicant need to open a suit to claim for refund and other orders is misconceived and as such are as well of no merits and do not befit to be point of law in this application

That said and done, I find and hold that the 1st limb of objection is without any useful merits and same must be and is hereby overruled.

This takes me to the second limb of objection which was couched that the application is misconceived and bad in law for contravening the provisions of section 89(2) of the CPC on ground that it is an alternative to the suit which should have been filed to seek restitution. Mr. Masumbuko argued in support of this limb that section 89 provides for two way of restitution; one by way of restitution by application and two by way of a suit. The reason which he raised this point of objection is that the property in dispute were sold to third parties and by way of a suit will include them in the suit and the respondent for better determination of the interest of the parties. Claim of refund and other reliefs as prayed in the application, according to Mr. Masumbuko, are only available to the applicants if a suit is filed and proved

by evidence by way of compensation and not restitution. The learned advocate for the respondent cited the case of ARJUN SINGH vs. MUSSAMMAT PARBATI, [1922] AIR 465 in which it was held that:

"We understand this subsection to mean that where restitution cannot be obtained by application under subsection(1) as is the case here, there is no bar to the institution of a suit."

It was, thus, submission of Mr. Masumbuko that, since the applicants are seeking compensation, interest, and general damages resulting from the sale of the immovable properties in execution of decree which was varied or reversed, then, the applicant should have come through a suit under subsection (2).

On that note the learned advocate concluded that the instant application was wrongly filed and should be dismissed with costs.

On the other adversary part, Mr. Vedasto brief to the point argues that, the whole arguments by Mr. Masumbuko are misconceived and narrowly pegged on restitution alone and without explanation of the word 'otherwise' which according to him, mean and includes compensation for that matter and other consequential orders.



On that note prayed that the instant objection equally be overruled with costs.

Nothing of essence was rejoined by the counsel for respondent.

Having gone and dutifully considered the rivaling arguments on the 2nd limb of objection, I must say at the outset that, with due respect to Mr. Masumbuko, his wholly arguments, as correctly argued in rebuttal by Mr. Vedasto, and rightly so in my own opinion, are misconceived in the circumstances of this application. Guided by what I found and held in the first limb of objection, this limb as well has to fail. The reasons are not far-fetched. **One**, Mr. Masumbuko is misleading this court to determine whether the application is merited or not to all of the prayers sought. I am not prepared to take that route now, but will take that route at the right time when considering the merits of the application. **Two**, filing of a suit is an option and not restrictive route provided one can get the remedies by application and consequential orders to the reversed or varied decree is not mandatorily required to file a suit.

That said and done this limb of objection has to fail and same must be and is hereby overruled.



On the totality of the above reasons, I find the two set of points of objection wanting of merits and same are hereby overruled with costs.

It is so ordered.

Dated at Dar es Salaam this 05th day of November, 2021.



A handwritten signature in blue ink, consisting of a series of vertical lines followed by a horizontal line and a flourish.

S. M. MAGOIGA
JUDGE
05/11/2021