

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

**AT DAR ES SALAAM**

**MISC. COMMERCIAL APPLICATION NO. 216 OF 2022**

**M/S HEDICO LIMITED .....1<sup>ST</sup> APPLICANT**

**HAPPY KAITIRA MAGULLA .....2<sup>ND</sup> APPLICANT**

**VERSUS**

**EXIM BANK (TANZANIA) LIMITED.....1<sup>ST</sup> RESPONDENT**

**EPHRAIM SAMWEL MANGULLA.....2<sup>ND</sup> RESPONDENT**

**RULING**

**A.A. MBAGWA, J.**

This ruling is in respect of the preliminary objections on point of law raised by the respondent's counsel against this application. The applicants brought this application by way of chamber summons made under section 3A, 38 and 95 of the Civil Procedure Code praying for orders which, for sake of clarity, I deem it appropriate to reproduce them as follows;

1. This Court be pleased to take an account of the payments made by the applicants to the respondent, assess and ascertain an amount of the money paid by the applicant in satisfaction of the debt in respect of loan agreement between HEDICO LTD and EXIM BANK



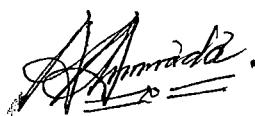
(T) LTD between November, 2013 up to July, 2018 that is payment in HEDICO LTD account No. 0190007807, subsequently when HEDICO LTD account was frozen by the 1<sup>st</sup> respondent then sums paid in IBT Account No. 184000110 and suspense Account No. 199000100 to establish the exact current decretal sums.

2. This Court be pleased to determine questions relating to the execution, discharge and satisfaction of the decree between the parties above named especially the question of whether penalty proceeds when the loan account is frozen and foreclosure proceedings are in force.
3. That costs of this application be in the cause.

The application is supported by an affidavit of Happy Kaitira Magula. Upon service, the 1<sup>st</sup> respondent filed a counter affidavit of Edmund Aaron Mwasaga along with a notice of preliminary objection on point of law to effect that; -

*'The present application is misconceived and bad in law as there is no pending execution application in terms of section 38(1) of the Civil Procedure Code (Cap. 33 R: E 2019).'*

The preliminary objection was disposed of by way of written submissions. However, before I delve into analysing the rival submissions of the parties on the preliminary objection, it is worthy sketching the background of this



application albeit briefly. It is alleged that vide facility letter dated 1<sup>st</sup> November, 2013 the respondent availed the 1<sup>st</sup> applicant an overdraft facility to the tune of TZS 400,000,000.00 which later on was converted to a loan term. It was agreed among other things that, the said facility was repayable within 12 equal monthly instalments at the interest rate of 21% per annum. Unfortunately, the applicant failed to fulfil its obligation as agreed. Consequently, Exim Bank (Tanzania) Limited instituted a suit against the applicants and others vide Commercial Case No. 60 of 2015.

Parties' efforts to settle the debt culminated into settlement deed which was adopted and made part of the judgment and decree of the Court. Notwithstanding the said settlement deed, the applicant failed, neglected and ignored to pay the decretal amount as such, the respondent filed the application for execution. The applicants contend that the whole decretal amount was paid but the respondent is still demanding for payments of decreed amount. In the result, the applicant has resolved through this application to ask the Court to ascertain and establish the amount which the applicant has paid.

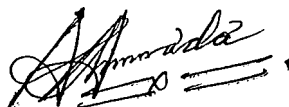
As hinted above, it was by parties' consensus that the preliminary objection be disposed of by way of written submissions. The Court drew the submissions schedule and the parties complied with it. The applicants



were under legal representation of Mr. Barnaba Lugua, learned advocate whilst the 1<sup>st</sup> respondent had the legal services of Mr. Roman Masumbuko, learned advocate.

Mr. Masumbuko, the learned counsel for 1<sup>st</sup> respondent, had it that this Court has no power to entertain the claim because it is not an executing court. It was Mr Masumbuko submission that the power to determine the amount payable rests with executing officer. He insisted that since there is no execution proceedings before this Court, applicant cannot question the amount payable before this Court. Mr Masumbuko, submitted that according to section 38(1) of the Civil Procedure Code, all the issues concerning execution of the decree must be determined by the court executing the decree.

Mr. Masumbuko further submitted that section 38 of CPC gives an exclusives jurisdiction to the executing court and parties are prohibited to bring separate suit or application like the present one. To cement his stand, he referred this Court to the case of **Hassan Ngonyani vs Tanzania Pipe Line Limited**, Civil Appeal No. 201 of 2018, CAT at Dar es Salaam where the Court held that, the executing court enjoys exclusive jurisdiction to deal with any questions relating to execution, discharge and satisfaction of the decree. Mr. Masumbuko reasoned that, the instant



applicant is misconceived because there is no execution proceedings before this Court. On that note, he urged this Court to dismiss the application.

In contrast, Mr. Lugua strongly assailed the submission made by the learned counsel for respondent on the interpretation of section 38(1) of the Civil Procedure Code. According to Mr. Lugua, the provision of section 38 CPC does not require execution proceedings in place for it to apply. He said that the law is very clear that when there is a decree which is passed by the court and the question which arises relate to either execution of the said decree or the discharge of the said decree or the satisfaction of the said decree, then section 38 comes into play. He reasoned that since the word used is "or" then this section can be applicable in issues of satisfaction or discharge from liability.

From the rival submissions and the depositions filed in court, it is not disputed that the instant application is on discharge and satisfaction of the decree. The applicant, under the provision of Section 38(1) of the Civil Procedure Code, is asking this Court to ascertain and establish the amount which applicant has paid. The question which this Court asked is whether section 38(1) of the Civil Procedure Code is applicable in the circumstances of this matter. Without much ado, I agree with the leaned

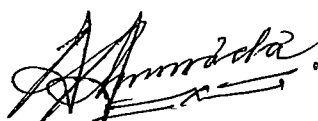


counsel for respondent that, the said provision is applicable where there is pending execution proceedings and that is why section 38(1) bars any claim related to execution proceeding to be opened separately from execution proceedings.

In my view, the applicant's claim purely relates to discharge and satisfaction of the decree as such, the proper Court to deal with the matter is the executing Court. See the case of **Karata Ernest and Others vs The Attorney General, Civil Revision No. 10 of 2010 (unreported)** where the court held that,

*'Although ordinarily the trial court has duty to determine the quantum which the judgement debtor is bound to pay under the decree, where it has left out the question open for consideration subsequently, the executing court has jurisdiction to determine the quantum under this section on the issue'.*

Guided by the above authority and taking into consideration the reliefs sought by the applicant, it is my considered view that, this application ought to have been placed before the executing court in that establishment of the quantum of the money paid in satisfaction of the decree is bestowed on the executing court. In addition, the executing court has powers under section 38 (2) of the Civil Procedure Code to convert execution proceedings to a suit. Thus, anything which relates to



execution, discharge or satisfaction is vested in the exclusive jurisdiction of the executing court. In terms of the provisions of section 38 (1) of the Civil Procedure Code, the executing court is at best place to determine the matter because it is acquainted with the facts of the execution and this would prevent multiplicity of suits.

Having gone through the chamber summons, it is clear that the reliefs sought fall under discharge and satisfaction of the decree. As such, this Court has no jurisdiction. For the foregoing reasons, the preliminary objection is sustained. Consequently, I strike out the application. However, I make no order as to costs in order to bring the matter to an end.

It is so ordered.

The right to appeal is explained.



  
A.A. Mbagwa

**JUDGE**

**11/09/2023**