

TANZANIA / JUDGMENT

EXIM BANK T LTD VS MS HEDICO LTD COMM CASE NO

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (COMMERCIAL COURT DIVISION) AT DAR ES SALAAM COMMERCIAL EXECUTION NO 12434 OF 2024 EXIM BANK (TANZANIA) LIMITED..... DECREE HOLDER versus MS HEDICO LIMITED..... 1st JUDGMENT DEBTOR EPHRAIM SAMWEL MAGULLA..... 2nd JUDGMENT DEBTOR HAPPY KAITIRA MAGULLA..... 3rd JUDGMENT DEBTOR ABDALLAH MZUNGU WANZALA..... 4th JUDGMENT DEBTOR Date of last order: 24/10/2024 Date of ruling: 08/11/2024

RULING

AGATHO, J.: Before me is an application for execution of the decree founded in Commercial Case No 60 of 2015. The applicant has brought it under Order XXI Rule 9, Rule 10 (2) (j) (i) & (v), 33 (1) & Rule 34 of the Civil Procedure Code, R.E. 2019. Through this application the applicant moves the court for orders of execution of a decree emanating from a deed of settlement dated 29th March 2016. The mode of execution sought for is by way of delivery/ entering into possession of Mortgaged property under certificate of title under CT No 113294 Plot 1829/5 Msasani Peninsula Dar es salaam to the decree holder and evicting the judgment debtors as well as whoever 1 derives authority to possess the property from judgment debtors until when the full amount is paid or when the property can be sold. On 22nd August 2024, the respondent filed a notice of preliminary objection centred on two points that: -

1. The applicant is seeking to recover that which is against the decree
2. The application is untenable and illegal as it is in violation of Section 6(2) and (5) of the Government Proceedings Act, Cap 5 R.E. 2019 The judgment debtor therefore moves this court for orders that
 1. This application for execution be declared illegal/incompetent and be dismissed
 2. The applicant be condemned to pay the respondent costs of this application The gist of this ruling is therefore centred on determination of the preliminary objections above mentioned. Learned Counsel Roman S.L. Lamwai stood for the decree holder in this matter while for the

judgment debtors was advocate Barnaba Luguwa. The hearing of preliminary objections was conducted orally. In arguing the preliminary objections, Mr. Luguwa took off by stating that the decree sought to be executed emanated from a deed of settlement 2 entered into on 29th March 2016 which provided that the decree shall be executed according to the terms of the deed of settlement which was executed by parties. But later, on 26th March 2018, parties entered into a deed of variation of the decree in which the figure quoted was TZS 441 million. According to the deed of variation, it was a term that upon failure to realize the said sum, then the property that is under CT 113294 Plot 1829/5 Msasani Peninsula Dar es salaam was supposed to be attached and sold in execution of the decree. It is Mr. Luguwa's submission that the judgment debtor has made several payments to the decree holder whose figure is uncertain and the uncertainty should be resolved by the court. He went on to state that this application for execution is not the first one and that the applicant is seeking to recover what is against the decree. In the first application filed on 24th August 2024 the 1st judgment debtor stated that she had paid TZS 308,400,000 but the outstanding debt was indicated as TZS 558, 897,

204. The decree holder on his side showed that the judgment debtor had paid TZS 308,400,000 out of an unknown amount but then the deed variation showed that the outstanding debt is TZS 441,000,000 Tshs. Mr. Luguwa concluded that if the amount paid is TZS 308, 400, 000 then the outstanding amount should be around TZS 100 million. 3 It was his added submission that the present application for execution is attached with a statement of account which shows that the judgment debtor had paid TZS 74, 400,000 by 31st March 2023 however the said statement does not indicate which account number did the statement refer to and in whose name it is. Additionally, Mr Luguwa hinted that the parties herein have been to this court in another application before Hon. Judge Mbagwa in Misc Commercial Application No. 216 of 2022 and in that case Mr Edmund Mwasaga stated that the 1st judgment debtor has never paid anything since the date of executing the deed of settlement. In that case, he submitted that it is still unclear how much is the decretal sum. As for the second preliminary objection, advocate Luguwa did contend that there were other proceedings in which the Office of the AG (OAG) was involved but the same ended automatically after the attachment was lifted but the application at hand has been taken without considering the interest of the government. Therefore, it is not proper before this court. Advocate Masumbuko before replying, he told the court that the so- called preliminary objections by the judgment debtors are not purely points of law. In alternative, he replied to the submission by the judgment debtors starting with the first objection that the decretal amount is clear 4 even without the need to go to the deed of variation of decree. He took the court back to the series of events that the 1st deed of settlement was of 29th March 2016. And that is the one which was recorded in court. However, that deed of settlement and its subsequent decree was varied by a deed of variation recorded on 26th March 2018. Clause 5 of that deed of variation stated that all other terms and conditions in the deed of settlement of 2016 remained the same. The only thing that was varied was the amount and interest. Clause 6 of the deed of settlement of 29th March 2016 provided that in

event of default the bank shall have incontestable right including but not limited to auctioning of the mortgaged property under certificate of title No. 113294. Mr Masumbuko submitted further that in the ruling by Hon. Judge Mkeha, the execution was not aborted. He allowed execution but only not by sale and change of ownership of the property. Any other mode of execution was allowed including entering possession. That was why the present application was brought. Regarding the decretal sum, Mr Masumbuko stated that in execution of Commercial case No. 60 of 2015 the judgment debtors after they were served with a notice to show cause, they brought the AG to dispute the 5 attachment but they never disputed the amount stated. But now they are bringing up this issue as part of a PO. Also, Mr Masumbuko was astonished that Mr Luguwa was changing the tone of His Lordship Mbagwa, J in Misc Commercial Application No 216 of

2022. In that case the same issue of amount was raised as the judgement debtor had filed an application under Section 38 of the CPC seeking among other orders for the court to assess and ascertain the amount of money paid by the judgment debtor in satisfaction of the money paid. Consequently, the judge held that the application could not be maintainable while there was no pending application for execution. On the basis of what he submitted, the learned counsel prayed that the first PO be disregarded. As for the second PO, the learned counsel stated that there are neither any government interest nor consolidation of application either by the AG or the judgment debtors. In the former applications all parties were heard and the respective rulings were issued. Since then there has been no appeals against the said decisions by any party. He in addition submitted the fact that the fact that the AG was quoted in the ruling by Hon. Judge Mkeha dated 10th February 2023, does not mean that he had interest. 6 It was Mr. Masumbuko's submission that this is a matter between private parties. Lastly, Mr. Masumbuko submitted that, with regard to this court's previous decisions, it is functus official as held by the CAT in Mohamed Enterprises (T) Limited v Masoyd Mohamed Nasser, Civil Application No. 33 of 2012 at pages 17-18 and therefore he asked the court not to set aside what transpired before Hon. Mkeha J. In the circumstances, the learned counsel prayed that the POs be dismissed with costs. Mr Luguwa while exercising his right to rejoin recapped that the bank statement attached by the applicant is not a deed of variation and that the amount keeps varying from one application to another. He also stressed that in the absence of certainty in amount the decree cannot be executed. He also still insisted that it was proper that in this case, the AG should be involved. Basing on that the learned counsel maintained that the POs are meritorious and should be sustained. All of the parties' submissions have been thoroughly put into consideration and basing on the same, the court is now in a good position to deliberate 7 on the viability or otherwise of the preliminary objections raised by the judgment debtors. I wish to start by referring to the recent decision by the court of appeal arguing borrowers not to be adamant when it comes to repayment of loans. That is the theme which can be extracted from the case of Equity Bank Tanzania Limited and Another vs NAS Hauliers Limited & 10 others, Civil Appeal No. 382 of 2023. The first preliminary objection is based on a complaint that the applicant is seeking to recover what is against

the decree. I will be in a better position to decide on this point by referring to the contents of the said decree which was reached after an amicable settlement out of court. According to the record of the case i.e Commercial Case No 60 of 2015,, as a result of out of court negotiations, parties reached into a compromise. The deed of settlement was drawn, signed and then filed in court and as is the law and the practice, a consent decree was extracted therefrom. That was on 29th March 2016. According to the order on the deed of settlement, the decree was to be executed according to the terms of the deed of settlement which was agreed by parties. However, the payable amount was not disclosed. Logically it is for this reason that later on 26th March 2018 parties entered 8 into a deed of variation of the decree in which the payable figure was noted as TZS 441 million (See term 1 & 2 of the deed of variation). All other terms were agreed to remain the same as they were in the original deed of settlement. Record further represents that the judgment debtors did indeed default repayment of the loan. The decree holder first sought execution by way of attachment and sale of the mortgaged property aforementioned property which proved futile on 10th February 2023 in this court. In the present application the judgment debtor is applying for entering into possession of the mortgaged property. Undoubtedly it was a term in the deed of settlement entered into by parties herein that upon failure to realize the said sum then the property that is under CT 113294 Plot 1829/5 Msasani Peninsula Dar es salaam was supposed to be used in execution of the decree. To quote the term as it is, the settlement provided under Clause 6 of the deed of settlement of 29th March 2016 that in event of default the bank shall have incontestable right including but not limited to auctioning of the mortgaged property under certificate of title No. 113294 In that case the judgment debtor cannot appear now to state that the applicant is seeking to recover that which is against the decree. The bank is not limited on the mode of dealing with the security in order to realise 9 its loan advanced to the judgment debtor. In that matter, the first preliminary objection fails. The second preliminary objection centres on the complaint that the present application is in violation of Section 6(2) and (5) of the Government Proceedings Act. The provision provides that:-

- (2) No suit against the Government shall be instituted, and heard unless the claimant previously submit to the Government Minister, Department or officer concerned a notice of not less than ninety days of his intention to sue the Government, specifying the basis of his claim against the Government, and he shall send a copy of his claim to the Attorney-General and the Solicitor General.
- (5) Notwithstanding the provisions of subsection (3), the Attorney General may, unless another person ought to be sued, be sued or be joined as a co-defendant, in proceedings against the Government. Just on the face of it, this objection cannot stand a chance to be sustained in this application a mere observation of the parties involved in this case portrays that there is no any government institution involved so that the provisions of the Government Proceedings Act may be applied. Besides should the government have interest there is a proper procedure for it to 10 join in the matter. Moreover, looking at the

record of proceedings in the original case which ended in a decree sought to be executed, it is loud that the government was involved. This court cannot reopen that case. The preliminary objection is therefore severely misconceived. The judgment debtor's counsel also in a style, tabled before this court an argument that the decretal sum is not ascertained in this case. I hasten to state that determination of this point requires going into the evidence and records of the case in depth and so this does not qualify to be under the armpits of what a preliminary objection is. The guidance is provided in the celebrated case of Mukisa Biscuit Manufacturing Co, Ltd. v. West End Distributors Ltd [1969] E.A. 696, at page 100 where it was stated that:- "...The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of 11 preliminary objection does nothing but unnecessarily increase costs and on occasion confuse issues. This improper practice should stop." Suffice it to say that the preliminary objections raised by the judgment debtor lack merit entirely and they are hereby overruled with costs. Order accordingly. DATED at DAR ES SALAAM this 8th Day of November 2024. U. J. AGATHO JUDGE 08/11/2024 Court: Ruling delivered by Hon. Joyce Minde, Deputy Registrar, today this 8th November 2024 in the presence of the parties 12 U. J. AGATHO JUDGE 08/11/2024 13

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