

TANZANIA / JUDGMENT

GENERAL MANAGER BARICK VS CHACHA KIGUHA OTHERS

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TANZLIIDECIDED
29 October 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (MWANZA SUB-REGISTRY) AT MWANZA MISCELLANEOUS CIVIL APPLICATION NO 19663 OF 2024 (Arising from Civil Case No. 09/2013 and execution No. 18 of 2016) GENERAL MANAGER, AFRICAN BARRICK GOLD MINE LTD..... APPLICANT VERSUS CHACHA KIGUHA..... 1st RESPONDENT NEEMA CHACHA..... 2nd RESPONDENT BHOKE CHACHA (A minor by his next of friend CHACHA KIGUHA)..... 3rd RESPONDENT KIGUA CHACHA (A minor by his next of friend CHACHA KIGUHA)..... 4th RESPONDENT MOTONGORI CHACHA (A minor by his next of friend NEEMA CHACHA)..... 5th RESPONDENT SURATI CHACHA (A minor by his next of friend NEEMA CHACHA)..... 6th RESPONDENT

RULING

28th October 8< 29th October, 2024 A. MATUMA, J. In this application, the Applicant is seeking this Court to order the Respondents to pay a sum of Tshs. 171,612,500/= as a restitution of the money paid by the Applicant to the Respondents in excess of the real amount which they were entitled as determined by the court of appeal in civil appeal No. 99 of 2019. The applicant is further claiming for interests of such amount from the date it was paid till final payments, costs of this application and any other relief which may be just to grant. The brief facts of the matter are that; the Respondents obtained a High Court Decree vide Civil Case No. 9 of 2013 against the Applicant for payment of Tshs. 300,000,000/= as general damages. Following such decree they filed execution proceedings for Tshs.343,225,000/= and this Court ordered execution by attachment and sale of the Applicant's motor vehicles. The Court appointed Court Broker who issued a 14 days notice to the Applicant to settle the decretal sum or else her twenty three motor vehicles would be sold in execution of the decree. To avoid the sale of her vehicles if the money is not paid, the Applicant paid the full amount of Tshs. 343,225,000/= on 17/12/2018 but processed an appeal to the Court of appeal against the High Court Decree. In its judgment the Court of appeal varied the decree of this court to only half of the amount decreed by this court. The applicant is now seeking a refund of the excess paid amount. The Respondents were dully served and engaged Mr. Thomas Ilanga learned advocate to represent them. On 15.10.2024 the said

advocate appeared in Court and sought leave of the Court to file counter affidavit within fourteen days. This Court allowed the prayed and ordered the 2 Counter Affidavit to be filed within 14 days and fixed this case for hearing on 28/10/2024. When the matter came for hearing, Mr. Faustin Malongo and Mr. Iman Mfuru learned advocates appeared for the Applicant while the Respondents were absent without notice serve for the first Respondent Mr. Chacha Kiguha who was present in person. The counter affidavit was not filed as it was previously sought and granted. In the circumstances, I ordered hearing of the matter *ex parte* against the respondents who are absent but allowed the 1st Respondent to respond against this application. Mr. Faustin Malongo learned advocate argued for this application mainly reiterating the contents of the affidavit whose summary is already stated *Supra* on the brief facts of the matter. He then prayed for this application to be allowed by ordering the Respondents;

- i. To refund the Applicant Tshs. 171,612,500/= as a restitution of the excess paid amount to restore the applicant to her original position before payment of such amount was made in execution of the decree which was later varied. ii. To pay interest of the said Tshs. 171,612,500/= at court's rate of 7% from 8/1/2019 when such amount was paid till final payment of the same. Hi. To pay costs of this application and any further orders as this court shall deem just to grant. The 1st Respondent on his part admitted that in fact they were paid Tshs. 343,225,000/= He argued that despite the fact that the Court of appeal varied the High Court Decree, it did not order that the excess amount be refunded to the Applicant. Just to quote him in his own words, the 1st Respondent argued; "Kwa kuwa Mahakama ndiyo Hiamuru tuiipwe, tukaiipwa kihalaii na tumeshatumia heia zote. Hatukuchukua fedha hizo kinguvu, tunaomba isiamuiwe kwamba tuiipe fedha hizo" In his rejoinder Mr. Faustin Malongo argued that the Court of appeal could not order the refund of the money because it was not dealing with an execution matter but an appeal. He further argued that the argument of the 1st Respondent that they have no money to refund is misplaced at this stage. He also argued that the argument that the money was paid to the respondents by a Court order cannot stand because such order has already been varied by the Court of appeal. Having heard the parties for and against this application. I am of a firm view that Mr. Faustin Malongo learned advocate and his fellow advocate Mr. Iman Mfuru are absolutely right in their arguments that the Applicant is entitled to a refund of the amount paid in excess of the amount decreed by the Court of appeal. It was not the duty of the court of appeal to order the refund of such money because it was not dealing with an execution matter but an appeal. In its decision the Court of appeal varied the lower Court decree and as such the decree of this court is only varied to the extent varied by the court of appeal. That being the case the Respondents are not legally entitled to hold the excess amount which was paid to them in execution of the erroneous decree (the decree which was varied by the Court of Appeal). In that respect the arguments of Mr. Chacha Kiguha that the money was paid to the respondents by Court order cannot stand because the said order has already been varied by the superior Court. When the respondents hurried the execution process in disregard to the ongoing appellate process by the applicant, they were doing so at their own risks. They cannot therefore be left to benefit from an erroneous decree which has already

been varied by the superior Court. The learned advocates for the Applicant cited to me the Court of appeal decision in the case of Farid F. Mbaraka & Anofher versus Domina 5. Kagaruki & Another, Civil Appeal No. 293 of 2022 to the effect that when the decree of the lower court is reversed restitution of the victim of such decree to the position he or she was prior to the execution must be done. I have gone through such guiding decision which I am obliged to follow and find out that it was well established, guided and held that;

- i. When the decree is reversed or modified, the law gives obligation to a party who had benefited from that decree, to restore the other party to the position he had been before the erroneous decree. ii. It is not only a right but a duty of the Court to see that a person does not suffer by its wrong decision. Hi. Restitution is a principle of equity and is subject to the Court's discretion in that no party should receive benefit from an erroneous decision. From such guiding decision, the respondents in this application are duty bound to refund the Applicant the excess paid amount following the variation of the decree of the High Court by the Court of Appeal. As a Court, we have the duty to ensure that the Respondents do not 6 I thus agree with Mr. Malongo that the argument of the first Respondent that the money was paid to the respondents by a Court order and were not taken by force cannot justify the denial of restitution to the Applicant of her entitled amount which is a principle of equity. Whether or not the Respondents have money by now to refund the applicant, it is a matter to be discussed during execution process and not at this stage. Having said all these, I now determine whether the Applicant is entitled to a refund of Tshs. 171,612,500/= as claimed. Initially the respondents were decreed general damages to the tune of Tshs. 300,000,000/= as general damages which was Tshs. 50,000,000/= per each respondent. The Court of Appeal reduced such amount to only Tshs. 150,000,000/= which was Tshs. 25,000,000/= per each Respondent. Having gone through the said decision of the Court of Appeal I noted that 7% interest was as well decreed to the amount varied and not that which was decreed by the High Court totalling Tshs. 43,225,000/=. The Applicant is now claiming half of this amount which was paid as interest along with Tshs. 150,000,000/= which was paid in excess. The Applicant is thus entitled to the varied amount of Tshs. 150,000,000/= and accrued interests which was paid to the Respondents. I thus order the Respondents to refund the Applicant Tshs. 150,000,000/= plus itsjaaid interests which is half of Tsh. 43,225,000/=. The total amount to be refunded is thus Tsh. 171,612,500. In respect of interest at the Court's rate of 7%, I don't allow this claimed relief. This is because in the same manner that the respondents should not be let to benefit from the Court's wrong decision, the applicant should also not be allowed to benefit from the same wrong decision of this court. It was this Court which decreed such amount to the respondents. The respondents executed the decree and by the time they received the decretal sum, they were entitled to believe that they received a lawful amount dully ordered by the court. They were thus entitled to spend the money at their own plans. When finally, the decree got reversed by the court of Appeal to the extent herein above stated, the Applicant's right is only to be restored to her original position by a refund of the excess paid amount. Condemning the Respondents to interests would be punishing them for the money which they had legal justification to use prior to the court of appeal

decision. Likewise, costs of this application are not granted because this matter results from an erroneous decision of this court as it was determined by the court of appeal. The erroneous decision resulted from the exercise of discretionary powers of this Court and therefore had this court not erroneously exercised its discretions, all these consequences could not happen. Neither party in this matter should suffer as a result of the erroneous decision of this court. My duty is to restore each party to her or his original position prior to the execution of the erroneous decree to the extent of variation made by the Court of Appeal. In that respect, I find that justice to both parties is for the respondents to refund the applicant only the excess amount paid as herein above ruled. This application is thus allowed to the extent herein above stated. For avoidance of doubts, the Applicant is entitled to only Tshs. 171,612,500/= as a refund of the excess paid amount which was paid in execution of the 9

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