

**N THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DARES SALAAM**

MISCELLANEOUS COMMERCIAL APPLICATION NO. 99 OF 2021

I & M BANK (T) LIMITED APPLICANT

VERSUS

MUSTAFA'S (2005) LIMITED 1ST RESPONDENT

SALIM M. RATANSI 2ND RESPONDENT

KEVAL SOLANKI 3RD RESPONDENT

RULING OF THE COURT

K. T. R. Mteule, J

26/10/2021 & 11/1/2022

This is an application seeking for the leave of the Court to allow the applicant to sue the Respondents for the recovery of alleged outstanding loan advanced to the 1st Respondent **Mustafa's (2005) Limited**. The applicant's prayers are as follows: -

1. That the Honourable Court may be pleased to grant the Applicant leave to commence legal proceedings/to sue the Respondents herein jointly and severally for the balance of the sum outstanding on the Loan taken by the Respondents.
2. That the Honourable Court may be pleased to give such further orders and directions in these proceedings as it shall deem appropriate.
3. Any further reliefs that the Honourable Court may deem fit, just fair and equitable.

The application was heard by a way of written submissions where the Applicant's submissions were drawn and filed by Sheikh's Chambers of



Advocates while the Respondents submissions were drawn and filed by Nehemiah Geoffrey Nkoko Advocate from RK Rweyongeza and Co. Advocates.

Before embarking to substantive issues in this application, I will give a brief account of the matter. The history behind this application as gathered from the affidavit, counter affidavit and parties' submissions can be explained as hereunder. The aforesaid loan was advanced to the 1st Respondent in various times with some adjustments. Initially, in March 2012, a loan of **TZS 500,000,000.00** was issued, which was later in September 2012, adjusted and TZS 100,000,000.00 was added. The loan was secured by several collaterals including 3rd Party Mortgage by National Supplies Limited, Director's (2nd and 3rd Respondents) personal guarantee agreement through promissory notes dated 13th March 2012, 24th September 2012 and 30th June 2014.

In due course, a dispute arose from borrowers' failure to settle the loan where the Applicant filed **Commercial Case No. 53 of 2016** against the Third-Party Mortgagor, National Supplies Limited. The suit was decided in favour of the Applicant where the mortgaged property of National Supplies Limited was sold and realised TZS. 130 million.

According to the affidavit sworn by one Mwanahamis Mohamed Pazi the Applicant's Recovery Manager, in support of the application, **Commercial Case No. 53 of 2016** was filed under the applicant's belief caused by a misleading valuation report which stated that the Third Party Mortgaged property valued at between TZS. 600,000,000 to TZS 800,000,000.00 which would be sufficient to pay off the Loan, but instead, only TZS 130,000,000 was realised leaving an outstanding balance of TZS 1,273,137,035.41 as unpaid loan. It is further deponed in the affidavit that due to the said misleading valuation report, the applicant sued the professional valuer who



did the valuation vide **High Court Civil Case No. 16 of 2020** which was decided against the said valuer confirming negligence or fraudulent processing of the valuation report.

Being dissatisfied with the amount realised from the sale of the mortgaged property, the Applicant attempted to recover the balance of money by filing **Commercial Case No. 110 of 2019** which was struck out by the Hon. Justice S. M. Magoiga, J on the ground that leave should have been sought by the Plaintiff before filing the suit. This application is therefore seeking the said leave to file a suit against the Respondents for the recovery of the loan balance remaining unpaid on the loan borrowed by the 1st Respondent.

According to the affidavit, the application is premised on the following grounds:

1. To file a suit with the objective of recovering the actual balance left unpaid on the decretal amount (and the Loan) and full interest thereon.
2. Fraud of the Valuer and Respondents: Who had deliberately misled the Applicant Bank to believe that the amount that would be recoverable on the Sale of the 3rd Party Mortgaged Property (around TZS 800 million) would be sufficient for repayment of the borrowed amount.
3. The judgement of the previous recovery case, Commercial Case No. 53 of 2016 that was filed by the Applicant was tainted with the fraud of the Respondents.
4. The principles of fairness, equity and natural justice.

In Respondent's joint Counter Affidavit which was sworn by Salim M. Ratansi it is deponed that the valuer alleged to have been submitted a wrong valuation report was appointed by the Applicant. The Respondents blamed

the Applicant for noncompliance with execution procedure where she directly appointed Yona Auction Mart to sell the property, which was sold below the market value hence depriving the Respondent's guarantors right to obtain 1.5 billion.

The Respondents considered the wrong valuation as Applicant's admission that she misrepresented the value of the property mortgaged and caused the 1st Respondent to sign loan contract. They further treated this undertaking as a conspiracy between the Applicant and the Valuer from which applicant wants to benefit. The Respondents wanted to be relieved by the finding of the **High Court in Civil Case No. 16 of 2020** which confirmed the valuer (Property Consultancy and Services Limited) to be liable with negligence.

The application was disposed of by a way of written submissions. In her written submissions, the applicant's counsel started by alleged that the beneficiary of the fraud is the borrower who is the third Respondent. On the other hand, in the Respondent's view, the valuer's negligence misled the borrower and the guarantors who entered into a loan agreement basing on the misrepresented valuation report. The respondents associated the fraud if any with the applicant's conduct.

In distinguishing the intended suit from the previous suit, the applicant submitted that she is not barred to institute a fresh suit under Order II Rule 2 (2) and (3) of the Civil Procedure Code Cap 33 of R.E. The provision reads:

"(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits,

except with the leave of the court, to sue for all such reliefs, he shall not afterward sue for any relief so omitted"

According to the applicant, neither **Commercial Case No. 53 of 2016** nor the intended suit fall under the above provision because the previous suit was a summary suit on foreclosure of a Third-Party Mortgage against the third party Mortgagor who is not one of the instant Respondents. Citing **Mulla on the Code of Civil Procedure Volume 2 17th Edition at page 156, at page 138**, the Respondents submit that this rule does not produce second suit based on a distinct cause of action. That to make the rule applicable, the defendant must satisfy three conditions, namely

- (1) The previous and second suit must arise out of the same cause of action;
- (2) Both the suits must be between the same parties; and
- (3) The earlier suit must have been decided on merit. Where there is no evidence to show that the cause of action is the same as in the previous suit, the subsequent suit is maintainable"

In a further attempt to distinguish the Cause of action in **Commercial Case No. 53 of 2016** from the cause of action in the intended suit, the applicant cited the definition of cause of action given in **Black's Law Dictionary 6th Edition** as; -

".. the fact or facts which gives a person a right to judicial redress or relief against another. The legal effect of an occurrence in terms of redress to a party to the occurrence. A situation or state of facts which would entitle party to sustain action and give him right to seek a judicial remedy in his behalf"

Basing on the above definition, the applicant argues that the cause of action in the first suit was against the 3rd Party Mortgagor, National supplies Limited who is not a party to this suit and therefore the intended fresh suit against the 3 Respondents is not barred. The Applicant argues further that the Defendant in the earlier suit was not the Borrower, and the suit was founded on the 3rd Party Mortgage while the 1st Respondent herein is the Borrower and the cause of action is the Loan Agreement and the claims against the 2nd and 3rd Respondents herein arise under the Director's Personal Guarantee Agreements.

In the applicant's view, not only is the Cause of Action in the intended suit against the Respondents herein is totally different from that in the first suit, Commercial Case No. 53 of 2016, but also the Defendants will be different.

It is further submissions by the applicant that Rule 2 of Order II does not require that when several causes of action arise from one transaction the Plaintiff should sue for all of them in one suit. The applicant supported this assertion by **Mulla on the Code of Civil Procedure 17th Edition Volume 2 at pages 137-138** where it is stated that

"if the cause of action in the subsequent suit is different from that in the first suit, the subsequent suit is not barred".

The applicant further cited the case of **Muhammad Khalil Khan versus Mahboob Ali Mian, AIR 1949 PC 78** cited by **Mulla at page 128** of his book where according to the applicant, the Privy Council summed up the principles underlying this rule and ruled, inter alia:

- (1) The correct test in cases falling under O 2, r 2, is whether the claim in the new suit is in fact founded upon a cause of action distinct from that which was the foundation for the former suit.

(2) The cause of action means every fact which will be necessary for the Plaintiff to prove if traversed in order to support his right to the Judgment.

(3) If the evidence to support the two claims is different, then the causes of action are also different.

The application is also premised on the principle of overriding objective where the applicant contends that from the contents of the counter affidavit, there is a serious dispute which needs to be determined by the court and therefore it is for interest of justice and the principle of overriding objective that leave should be granted to file a suit against the 3 Respondents herein.

In responding to the applicants' submissions, the Respondent argued that the applicant's intended suit is already adjudicated, determined and judgment thereof issued through **Commercial Case No 53 of 2016** and it is so revealed in **Commercial case No. 110 of 2019**. The Respondents maintained that the sale of the mortgaged property was negligently handled by the applicant by undervaluing the price of the property situated around Posta areas which cannot depreciate from TZS 800 million to TZS 130 million. The respondents argued further that the applicant could have waited for the property to appreciate higher value if she found it to have lesser value at the time of sale.

The Respondent's rejected to be linked with any fraud or negligence made by the valuer who was hired by the Applicant. They submitted that they cannot be held accountable for the Applicant's actions of engaging negligent professionals who caused loss, rather they have a claim against the Applicant for misrepresentations.



In Respondents' view, since the Valuer (Property Consultancy and Services Limited) was hired by the Applicant, the Applicant has at all times knew the situation and was defrauding the Respondents since upon that valuation, the Respondents' entered into a loan agreement believing the property mortgaged will secure the loaned money upon default. They submitted that they cannot be held responsible for the shortcomings found in such negligence.

On another line of argument, the Respondents submitted that the loan had a full insurance cover hence the Applicant needed to claim any loss from the insurance company for the Respondents had been paying the insurance fees.

It is the Respondent's plea that the application be dismissed to avoid endless *infinintum* litigation since the applicant already has two suits in respect of the same matter. According to the Respondents if the applicant is allowed to file the suit, the Court will not have a jurisdiction to entertain it because it will be *res judicata*.

By a way of rejoinder, the applicant contended that the Respondents are misleading the court by claiming that the suit is already determined. According to the Applicant, there has never been conclusive determination of Applicant's rights because **Commercial Case No 53 of 2016** was between the Applicant against the National Supplies Limited and none of the instant Respondents were a party. It is the Applicants further submissions that even **Commercial Case No 110 of 2019** did not involve National Supplies Limited who was the Defendant in the previous suit, and it was just struck out whereby the Court ruled that the plaintiff/Applicant should seek leave of the Court before filing the suit. The applicant reiterated that even the cause of action was not the same between **Commercial Case No 53 of 2016** and the intended suit since the suit intended to be filed against the Respondents

will be founded on the Loans and Personal Guarantees of the Respondents herein. According to the Applicant **Order II Rule 2 (3) of the Civil Procedure Code** allow a person in the position of this Applicant, with the leave of the Court to sue afterwards for any reliefs omitted in a previous suit.

The applicant argues that the Respondents benefited from the negligence of the professional valuer. It was questioned by the applicant as to why would she temper with the valuation of a property meant to security for such a huge loan which would have been working against her interest.

In applicant's view, since the valuation of the 3rd party mortgaged property on which **Commercial Case No. 53 of 2016** was tainted with fraud leave should be granted to the Applicant to sue the Respondents with the overall objective of recovering the balance of the monies owed by the 1st Respondent to the Applicant Bank since Part Payment of a Debt is not Satisfaction for the full as per the **Law of Contracts Act, (Cap 345 R.E 2019)** as well as **The Sale of Goods Act (Cap 214)**, Section 40 (1) a) and Section 40 (2) as well as the Rules of Natural Justice.

On the Respondent's arguments requiring the Applicant to claim insurance indemnity, the applicant re-joined that insurance indemnity is not charity because indemnity is made only when the conditions are met and permit and it is not paid by insurers to the Banks to assist the Borrowers from fulfilling their fundamental obligations to fully repay the full amount of the Loan Borrowed and the interest thereon.

In the rejoinder the applicants challenged the Respondents argument that the Applicant should have waited and not sold the mortgaged property until the depressed real estate industry and Land Market prices had improved. According to the Applicant, neither the Banking business nor the Banking and



Financial Institutions Laws nor Bank of Tanzania regulations would allow such a practice.

As to this litigation going on *infinintum*, the Applicant reiterated that this application is for leave to file a suit against the Respondents in the High Court in its original jurisdiction while the earlier suits **Commercial Case No. 53 of 2016** was against National Supplies Limited and was based on a 3rd party mortgage and **Commercial Case No. 110 of 2019** filed against the Respondents was not determined by the Honourable Court as it was struck out on reason that the Plaintiff (Applicant herein) should have obtained prior leave of the Court before filing the suit.

The Respondent disputed the argument that the intended suit will be *res judicata*. She argued that the cause of action, issues and the parties in the earlier **Commercial Case No. 53 of 2016** are different from the intended suit, therefore cannot in any way be said to be *res judicata* since the claim and the issues in the intended suit have never heard or finally determined by the court.

From the Affidavit, counter affidavit and parties' submissions, there is one issue for determination which is **whether the Applicant has established sufficient cause to warrant leave to sue the Respondents.**

In addressing the above issue, it is appropriate at this point to expound the provision of law guiding this application. The application is brought under **Rule 2 (2) of the High Court (Commercial Division Procedure) Rules, 2012** and **Rule 4 of the High Court (Commercial Division) Procedure Rules 2012 (GN 250 Of 2012)** as amended by the **High Court (Commercial Division) Procedure (Amendment) Rules, 2019 (GN 107 of 2019)** and **Order II Rule 2 (3) and Section 95 of the Civil Procedure Code Cap. 33 (R. E. 2019) (CPC).** **Rule 2 (2) of GN 250 of**

2012 provides for the use of the CPC in case of lacuna while Rule 4 requires due regard to the need to achieve substantive justice in litigation. The procedure which allows bringing of the application like the one at hand is found under **Order II Rule 2 (2) and (3) of the CPC**. It provides:

2.- (1) NA

(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for all such reliefs, he shall not afterward sue for any relief so omitted.

From the above provision, a relinquished claim in a certain cause of action cannot be further sought by a subsequent legal action except by a leave of the Court. This application is seeking for such a leave to allow the applicant to exercise the exception provided in the provision to sue for a relinquished claim. The question to be asked at the moment is which factors should be considered for the court to grant or not to grant the leave. Since **Order II Rule 2 (3)** has not set out such criteria, it will remain to be a discretion of the court to assess the circumstances of the case. It is noted that court discretion needs to be exercised judiciously. (See **Lyamuya Construction Company LTD V Board of Registered Trustees of Young Women Christian Association of Tanzania, Civil Application No. 2 of 2010 (Unreported)** and **Saidi Kibwana & General Tyre E.A. Ltd vs Rose Jumbe 1993 TLR 175 (TZCA)**). From these authorities, sufficient reasons to support the application must be assigned to guide the court in exercising its discretion.



The grounds advanced by the applicant to persuade the Court to allow leave to institute legal action against the Respondents are:

1. Recovery of the balance left unpaid loan and full interest thereon.
2. Fraud of the Valuer and Respondents: Who had deliberately misled the Applicant Bank to believe that the amount that would be recoverable on the Sale of the 3rd Party Mortgaged Property (around TZS 800 million) would be sufficient for repayment of the borrowed amount.
3. The judgement of the previous recovery case, Commercial Case No. 53 of 2016 that was filed by the Applicant was tainted with the fraud of the Respondents.
4. The principles of fairness, equity and natural justice.

The above first and second items can be explained in summary thus the applicant failed to recover full amount of loan advanced to the 3rd Respondent because she was misled by an evaluation report conducted by the professional valuer which overstated the value of the 3rd Party mortgaged property. Guided by such a report, according to the applicant, the 3rd party mortgagor was sued believing that the property will be sufficient to recover the loan, but the market price became lesser than the valued price which could not satisfy the debt. It is not disputed that vide **High Court Civil Case No. 16 of 2020**, the said valuer was found to be negligent in valuing the property at an exaggerated amount excessively bigger the actual market value.

Before concluding as to whether the valuer's misrepresentation in this matter constitute sufficient cause or not, I will iron out some debated points at this juncture.



Firstly, there was a strong debate in the parties' submissions on who benefitted from the valuer's misrepresentation. In my view, I don't have to be laboured by this point. Whether the misrepresentation will benefit the applicant, or the Respondent does not change its relevance in considering as to whether it is a sufficient cause to warrant leave to sue or not. If the leave is obtained, in my view, this debate can be resolved in a suite between the parties where evidence and other particulars can be given.

Secondly, although the applicant spent a considerable time trying to establish the cause of action in the intended suit being different from the cause of action in the **previous Commercial Case No 53 of 2021**, I don't see the relevance of doing so. It is already a finding of the Court (Hon Magoiga J) in **Commercial Case No. 110 of 2019** that the cause of action in this suit is the same as the cause of action in the previous suit **Commercial Case No 53 of 2016** which the plaintiff cannot split into parts so as to bring separate suits without a leave of the court. What is relevant here is a consideration to find out whether there is sufficient cause to grant the leave to sue.

Thirdly, The Respondents are of the view that the matter in the intended suit is already settled vide **Commercial Case No. 53 of 2016**. However, it is not disputed that there has not been a full recovery of the loan advanced by the Applicant to the 1st Respondent. Further it is not disputed that this application is prompted by the Ruling of Hon. Magoiga, J in Commercial Case No. 110 of 2019 which was struck out for being filed without the leave of the court as required by **Order II Rule 2 (2) and (3) of the CPC** and that this application is seeking for such a leave. I don't subscribe to the Respondent's argument that the matter is finally determined to the extent of being **res judicata** since **Order II Rule 2 (2) and (3) of the CPC** gives a room for

the applicant to sue for a portion of the claim left out in the previous suit upon obtaining the leave of the Court.

As well, I don't agree with the respondent that waiting for the property to appreciate more value before sale is a good option to go because as submitted by the Applicant, this might not be healthy for banking industry. When it is the time to recover the loan, the same should be done as per the terms of the facility. I don't agree that it is right to postpone recovery to allow appreciation of the security to acquire the value of the loan if the terms of the facility mortgage agreement do not provide for that.

The argument that the applicant should recover the loan by a way of insurance again cannot stand. I agree with the applicant that Insurance is not intended to protect borrowers from repaying a loan taken from a creditor. Insurance comes in where there is a total impossibility of the parties to normally recover according to their primary contractual obligations.

At this juncture I come back to the most relevant point that there was a misrepresentation by the valuer. Whether either of the parties may have suffered loss or gained benefit out of that misrepresentation is not relevant at the moment. At least valuer's misrepresentation is confirmed vide **High Court Civil Case No. 16 of 2020**. My task now is to determine whether this valuers' misrepresentation which caused mistaken belief to the Applicant constitutes sufficient ground to allow institution of a suit against the Respondents. In my view, the valuer's misrepresentation which caused a belief to the Respondent that the 3rd Party mortgaged property was sufficient to recover the loan, should be taken as a good cause because the applicant based his decision on a professional advice and any reasonable person could have done the same. The nature of the debate in this application on the appropriateness of the sale indicates that there is a serious issue which

remains unresolved which the exception given in the provision of **Order II Rule 2 (2) and (3)** can address. Whether the sale was appropriately done can be raised before the court upon determination of the intended suit and not in this matter.

The Applicant invited the Court to invoke the principle of overriding objective and Principles of Natural Justice which entails attainment of substantive justice in litigation. I agree with the applicant, this is an appropriate case where overriding objective need to apply because it is not disputed that the Applicant Bank has not fully realised the loan advanced to the 1st Respondents and secured by personal guarantee of the 2nd and 3rd Respondents. The continuing debate is an indication of existence of unresolved substantive issues which need determination.

Therefore, since the applicant was misled by a professional valuation report which made her to belief that the claim in Commercial Suite No 53 of 2016 was sufficient to recover the full loan upon sale of the 3rd Party Mortgaged property, and since there is a debate which indicates that there are unresolved substantive issues, the applicant has established sufficient cause to warrant grant of leave to institute legal action against the instant respondents. Consequently, the application is allowed. Due to the nature of the matter, each party shall bear its own costs.

It is so ordered.

DATED AT DAR ES SALAAM THIS 11TH DAY OF JANUARY 2022



KATARINA T. REVOCATI MTEULE
JUDGE

11/1/2022



Court; -

The Ruling is delivered in Court this 11th Day of January 2022 in the Presence of Yusuph Sheikh Advocate holding brief for Hamida Shekh Advocate for the Applicant and Yusuph Shekh holding brief for Nehemia Nkonko Advocate for the Respondents

K. T. R Mteule, J
Sgd
11/1/2022