IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MMILLA, J.A, MKUYE, J.A., And SEHEL, J.A.)

CIVIL APPLICATION NO. 187/16 OF 2019

THE GRAND ALLIANCE LIMITED ..... APPLICANT

VERSUS

1. **MR. WILFRED LUCAS TARIMO**
2. **MR. FREDRICK WILFRED TARIMO**
3. **DOREEN WILFRED TARIMO**
4. **MRS. IRENE WILFRED TARIMO**
5. **SNOWCREST & WILDLIFE SAFARIS LTD**

..... RESPONDENTS

(Application for revision of the Ruling and Drawn Order of the High Court of Tanzania (Commercial Division) at Dar es Salaam)

(Mruma, J.)

Dated 4th day of October, 2017
in

Commercial Case No. 9 of 2012

RULING OF THE COURT

17th Feb., & 21st April, 2020

SEHEL, J.A:

In this application, the Grand Alliance Limited (the applicant), is seeking an order for revision against the Ruling and drawn order dated 4th October, 2017 issued by the High Court (Commercial Division) at Dar es Salaam (the executing court) in Commercial Case No. 9 of 2012. In that Ruling, the executing court declined the applicant's application for

execution of a decree dated 22nd August, 2014 in Commercial Case No. 9 of 2012 whereby the applicant sought from the executing court an assistance in executing the decree by way of arrest and detention of 1st, 2nd, 3rd, and 4th judgment-debtors (the 1st, 2nd, 3rd, and 4th respondents herein) as civil prisoners. The applicant is also seeking an order from this Court that the decree be executed because the same remains unsatisfied to date.

The application is made under section 4 (3) of the Appellate Jurisdiction Act, Cap. 141 RE 2002 and Rule 65 (1) of the Tanzania Court of Appeal Rules of 2009 and it is supported by the affidavit of the James Barnabas Ndika, the Managing Director of the Applicant.

The grounds canvassed by the applicant in its notice of motion are as follows:-

1. *It is improper for the executing court to decline to execute a decree which is yet to be satisfied by the judgment debtors;*
2. *It is incorrect, illegal and improper for the executing court to direct the decree holder to*

execute another decree in which the decree holder was not a party; and

3. *The impugned decision of the executing court is illegal and improper for blessing fraudulent transfers and conversions by the respondents.*

On the other hand, the application is resisted by the affidavit in reply deponed jointly by Wilfred Lucas Tarimo (the 1st respondent); Derick Wilfred Tarimo (the 2nd respondent); Irene Wilfred Tarimo (the 3rd respondent); and Doreen Wilfred Tarimo (the 4th respondent).

For better perception of the sequence of events leading to this application, we propose to set out briefly the historical background of the matter. The applicant and the 1st, 2nd, 3rd, and 4th respondents entered into a Share Acquisition Agreement for the applicant to purchase and acquire 5,000 shares in SnowCrest and Wildlife Safari Limited (the 5th respondent) owned by the 1st, 2nd, 3rd, and 4th respondents at a consideration of USD 7,000,000. It was a term of the agreement that the applicant paid USD 2,834,457.51 to the 1st, 2nd, 3rd, and 4th respondents and the remaining balance of USD 4,165,542.49 re-serviced a bank loan. The applicant paid USD 1,730,000 to 1st, 2nd, 3rd and 4th respondents and

took over the management of the business of the hotel. However, after some months, the 1st, 2nd, 3rd and 4th respondents repossessed the management of the hotel for a reason that the applicant breached the agreement as it failed to pay the remaining balance. This prompted the applicant to sue the respondents in Commercial Case No. 9 of 2012.

After the exchange of pleadings, the suit went to a full hearing. At the end, the High Court rescinded the Share Acquisition Agreement and ordered the 1st, 2nd, 3rd and 4th respondents to refund the applicant the money it paid for acquisition of the shares in the 5th respondent, that is, the 1st, 2nd, 3rd, and 4th respondents were ordered to pay the applicant USD 1,730,000. Aggrieved with that decision, the respondents appealed to this Court but their appeal was dismissed for lacking merit. Following the dismissal of the appeal, the applicant filed an application for execution of the decree by arrest and detention of the 1st, 2nd, 3rd and 4th respondents as civil prisoners.

After receipt of the application for execution, the executing court issued a notice to show cause to the 1st, 2nd, 3rd and 4th respondents. In response to that notice, the 1st respondent filed an affidavit, for himself

and on behalf of the 2nd, 3rd and 4th respondents. According to the proceedings, the hearing of the application for execution was held on 20th July, 2017 whereby Ms. Dorah Malaba and Subira Omari, learned advocates appeared for the applicant. Mr. Boniface Joseph appeared for judgment debtors/respondents. After hearing the parties, the executing court found that there was no act of bad faith committed by the 1st, 2nd, 3rd and 4th respondents for them to be detained as civil prisoners thus it refused the application. The executing court went further, after noting that the 1st, 2nd, 3rd and 4th respondents offered a decree in Commercial Case No. 3 of 2016 in which consent decree was passed for a third party to satisfy the decree in Commercial Case No. 9 of 2012, and said the following:-

> *"Under the provisions of Rule 52(1)(a) of Order XX1 of the Civil Procedure Act, Cap. 33 RE 2002 (hereinafter referred to as the Code) a decree is among the attachable property in execution of another decree. Under sub rule (2) of Rule 52 of the same Order the court can, on the application of the creditor who has attached the decree, make an order for execution of the attached decree and apply the proceeds in*

satisfaction of the decree sought to be attached. Thus, the decree holder is at liberty to apply for attachment of a decree in Commercial Case No. 3 of 2016 proposed for satisfying the decree in Commercial Case No. 9 of 2012."

As mentioned earlier, the applicant is not satisfied with that finding hence it filled the present application for revision.

At the hearing of the application, the applicant had the legal services of Mr. Melchisedeck Lutema, learned advocate assisted by Ms. Dora Mallaba, learned advocate. Mr. Ipanga Kimaay, learned advocate, appeared for all the respondents.

Mr. Lutema prefaced his submission by adopting the notice of motion, affidavit in support of the motion, and the written submission he had earlier on filed, thereafter he recapitulated what is contained in the written submission. For the first ground that it was improper for the executing court to decline the application for execution of a decree, he submitted that the executing court should not have recognized the decree in Commercial Case No. 3 of 2016 because by doing so it is as if the decree in Commercial Case No. 9 of 2012 was varied or adjusted by a

decree in Commercial Case No. 3 of 2016. He argued that for a decree to be properly varied or adjusted it must be in accordance with the provisions of Order XX1 rule 2 (1), (2), and (3) of the Code. In support of his submission, he cited the case of **Ally Juma Mwangomba and 143 Others v. The Attorney General**, Civil Appeal No. 60 of 2009 (unreported) where it was held that unless payments or adjustments or satisfactions of a decree have been certified or recorded to have been certified the same should not be recognized by any court.

Mr. Lutema added that there was enough evidence before the executing court to prove bad faith on part of the respondents. He pointed out that the applicant deposed before the executing court that the respondent clandestinely sold their shares after issuance of the decree and that they concealed the identities of their properties to evade attachment and sale of shares. Nevertheless, he argued, the executing court did not order for arrest and detention of the respondents.

Mr. Lutema added that, it was only the 1st respondent who responded to the notice to show cause as such the executing court ought to have found that the other respondents failed to show cause thus an

order for arrest and detention for the defaulting respondents was inevitable.

For the second ground that it was illegal for the executing court to direct the applicant to execute a decree to which it was not a party, Mr. Lutema submitted that by directing the applicant to execute another decree is like that other decree had set aside the first decree. He was of the view that the subsequent decree cannot set aside a pervious decree unless all parties are involved. He said, since the applicant was not involved then it was condemned unheard.

Mr. Lutema also submitted that the procedure of indemnifying a third party as provided under Order I rule 14 (1), (2), (3) and (4) of the Code was not adhered to by the respondents whereby a third party notice to the applicant ought to have been issued.

For third ground, it was the submission of Mr. Lutema that the executing court illegally and improperly blessed the fraudulent transfer and conversion of shares made by the judgment-debtors to the third party. He contended that Order XXI rule 39 (2) (b) forbids transfer, concealment or removal of any part of the judgment-debtor properties

after the institution of the suit. It was Mr. Lutema's view that the transfer of shares to the third party was against the law, hence, invalid.

For those reasons, Mr. Lutema urged the Court to allow the application with costs.

In reply, Mr. Kimaay adopted the affidavit in reply and written submission and strongly resisted the application. He argued that the executing court was justified in releasing the respondents from arrest and detention in accordance with Order XX1 rule 39 (3) of the Code because the executing court, after considering the applicant's application, was satisfied that the conditions stipulated under Order XX1 rule 39 (2) were not fulfilled.

Regarding the selling of shares, Mr. Kimaay argued that the respondents were legally justified to sell their shares that reverted back to them after being declared so by the trial court and there was no conditions attached to that order. It was Mr. Kimaay's view that the sale did not contravene any law.

On notice to show cause, Mr. Kimaay contended that after receipt of the notice, the 1st respondent filed an affidavit for and on behalf of the

other respondents. Further, he said, this complaint was never raised at the executing court thus it cannot be raised for the first time to this Court. He said, the Court lacks jurisdiction to determine an issue that was not considered by the lower court.

Regarding bad faith, he argued that there was nothing before the executing court implicating the respondents acting in bad faith. He explained that the respondents lawfully sold their shares to a third party but unfortunately no money was received by them. Hence, a suit was filed against the third party which was Commercial Case No. 3 of 2016 and a compromise agreement was reached. He submitted that the decree in Commercial Case No. 3 of 2016 can therefore be attached and the same was not obtained fraudulently or surreptitiously. To cement his argument, he referred us to the provisions of Order XX1 rule 53 (1), (3), (5) and (6) of the Indian Code of the Civil Procedure which is *in pari materia* with our Order XX1 rule 52 of the Code.

He concluded his submission by arguing that the application lacks merit thus it should be dismissed with costs.

Mr. Lutema briefly rejoined by reiterating his earlier submission and said that the applicant became aware of the decree in Commercial Case No. 3 of 2016 after the filing of the application for execution.

We have carefully considered the rival arguments of counsel for the parties. The main complaint of the applicant is the refusal by the executing court to grant the application and declared the respondents as civil prisoners.

The right to commit a judgment-debtor as a civil prisoner is provided under sections 42 to 47 and rules 28, 35 to 39 of Order XXI of the Code. Section 42 of the Code enumerates different modes of execution that the decree-holder can choose for executing his decree. However, that right is subject to some conditions and limitations.

The import of the words *'subject to such conditions and limitations as may be prescribed'* appearing in section 42 of the Code was well addressed by the Supreme Court of India in the case of **Mahadev Prasad v Ram Lochan** AIR 1981 SC 416 sourced from indiankanoon.org//doc/1624821 when it was interpreting section 51 of

the Indian Code of the Civil Procedure (before its amendment in 1954) which is *in pari materia* with our section 42 of the Code that:

> *"The opening words of section 51* ***'subject to such conditions and limitations as may be prescribed'*** *put it beyond doubt that there is no wide jurisdiction to order execution or to claim execution in every case in all the modes indicated therein....Although ordinarily a decree-holder has option to choose any particular mode for execution of his money decree it may not be correct to say that the Court has absolute no discretion to place any limitation as to the mode in which the decree is to be executed."*

It follows then that the imprisonment of a judgment-debtor in execution cannot be ordered unless the conditions and limitations are satisfied. One of those conditions is that there must be an application for execution of a decree for payment of money by arrest and detention in prison of a judgment-debtor (See sections 42 and 44 and Order XX1 rule 10 of the Code). After receipt of the application, the executing court has discretion to issue a notice to show cause to the person against whom execution is sought, on a date to be specified in the notice, why he

should not be committed to prison or to issue a warrant of his arrest (see Order XX1 rule 35 (1) of the Code). The purpose of this warrant is to bring the judgment-debtor before the executing court and it is not an automatic order for committal as civil prisoner because the executing court is required to be satisfied with the conditions stated under Order XX1 rule 39 (2) of the Code before committing a person to prison. Likewise, where the judgment-debtor defaults appearance on a notice to show cause, the executing court shall, if the decree-holder so requires, issue a warrant of his arrest (see Order XX1 rule 35 (2) of the Code).

Thereafter, the executing court has to satisfy itself as to whether the conditions mentioned under Order XX1 rule 39 (2) exist or not. Order XXI rule 39 (2) provides:

> *"Before making an order under sub rule (1), the court may take into consideration any allegation of the decree holder touching any of the following matters, namely:-*
>
> *(a) A decree being for a sum for which the judgment-debtor was bound in any fiduciary capacity to account;*

(b) *The transfer, concealment or removal by the judgment debtor of any part of his property after the date of the institution of the suit in which the decree was passed, or the commission by him after that date of any* ***other act of bad faith in relation to his property, with the object or effect of obstructing or delaying the decree-holder in the execution of the decree****;*

(c) *Any undue preference given by the judgment-debtor to any of his other creditors;*

(d) *Refusal or neglect on the part of the judgment-debtor to pay the amount of the decree or some part thereof when he has, or since the date of the decree has had, the means of paying it;*

(e) *The likelihood of the judgment-debtor absconding or leaving the jurisdiction of the court with the object or effect of obstructing or delaying the decree-holder in the execution of the decree."*

[Emphasis is added]

After the executing court may have considered the factors, it has a discretion to make an order disallowing an application for the arrest and

detention of a judgment-debtor or directing his or her release where it is satisfied that the judgment-debtor is unable, from poverty or other sufficient cause to pay the amount of the decree, or the decreed amount may be payable by installment (See Order XXI rule 39 (1) of the Code). But if no order is made to that effect, then the executing court shall cause the judgment- debtor to be arrested, if he has not been arrested, and subject to the compliance with Order XXI rule 38 by the decree-holder, commit the judgment-debtor to prison for a period of six months where the decree is for payment of a sum of money exceeding one hundred shillings but in all other cases for a period of six weeks.

In the instant application, the decree sought to be executed was a money decree and the assistance sought was by arrest and detention of the 1st, 2nd, 3rd, and 4th respondents in the civil prison. The applicant filed an application for execution as required by the law and a notice to show cause was issued to the respondents. It is on record that a single affidavit sworn by Wifred Lucas Tarimo was filed for and behalf of all respondents to resist that application. At the hearing of the application for execution, Ms. Malaba, learned advocate who appeared for the applicant

raised a concern on the affidavit filed by the respondents. She argued that since the application for execution was not a representative suit then the executing court should have taken that the respondents, save for the 1st respondent, have not entered appearance. She therefore impressed upon the executing court that the 2nd, 3rd, and 4th respondents breached Order XXI rule 39 (2) of the Code as such they should have been sent to prison as civil prisoners. The same prayer was advanced by Mr. Lutema in these revisional proceedings.

We shall thus first deal with it. It is quite clear from the provision of Order XXI rule 35 (2) of the Code that where the executing court issues a notice to the judgment-debtor and no "obedience to the notice" is made by the judgment debtor, the executing court is required to issue a warrant of arrest if the decree-holder so desires. The words used in that Rule are *"where appearance is not made in obedience to the notice."* This means that before the executing court can secure the attendance of the judgment-debtor by issuance for a warrant of arrest, it must be satisfied that the judgment-debtor was dully served with the notice to

show cause and there was disobedience to the notice. Further, a warrant of arrest can only be issued if the decree-holder so desired.

In this application, we have gone through the record and we failed to find any concrete evidence suggesting that the counsel for the applicant informed the executing that she required the attendance of the 2nd, 3rd, and 4th respondents. The learned advocate for the applicant did not to pray before the executing court for the issuance of a warrant of arrest in order to secure the attendance in court of the 2nd, 3rd and 4th respondents. The only payer that she advanced before the executing court was for an order of arrest and detention of the 2nd, 3rd, and 4th respondents. We understand that the counsel for the applicant thought, since the 2nd, 3rd, and 4th respondents were absent then there ought to be an automatic order for committal to civil prisoner. With respect, the law requires the executing court to be satisfied with the conditions under Order XXI rule 39 (2) of the Code before making any order of arrest and detention. Further, as alluded to herein, the purpose of the warrant of arrest under Order XXI rule 35 (2) is to bring the judgment-debtor before

the executing court and it is not an automatic order for committal as civil prisoner.

It is, thus, surprising to us to hear, for the first time, a complaint at the revisional proceedings that the executing court illegally refused to issue warrant of arrest of the 2nd, 3rd, and 4th respondents. The position of this Court has consistently been that the Court will not entertain an issue that was not decided by the lower court. (See:- **Melita Naikiminjal Loishilaan Nakiminjal v. Sailevo Loibanjuti** [1998] TLR 120; and **Elisa Mosses Msaki v. Yesaya Ngateu Natee** [1990] TLR 90).

Since the learned advocate for the applicant did not pray before the executing court that she required the attendance of the 2nd, 3rd, and 4th respondents, the only deductible justification we find is that the applicant did not want to secure the attendance of the 2nd, 3rd, and 4th respondents by warrant of arrest. We thus see nothing illegal or incorrect calling for us to invoke our revisional power on this complaint.

Now coming back to the grounds for revision, we shall start with the first and third grounds that the executing court illegally and

improperly declined to issue an order for arrest and detention of judgment-debtors as civil prisoners and blessed fraudulent transfer and conversion. Here we wish to revisit the record in order to satisfy ourselves as to the grounds advanced by the applicant in the executing court. The applicant in its Counter-Affidavit deposed the allegation of bad faith on part of the respondents and refusal to pay as follows:

> *"11. That knowing that the judgment-debtors have fraudulently transferred their shares to third parties to defeat the decree passed against them in this suit we tried to search for properties of the judgment-debtors that could be attached and sold to satisfy the decree passed against them.*
>
> *12. That we came to know that the judgment-debtors built a grandiose house on Plot Number 108, Block KK, Oloirien area, Arusha Municipality, comprised in Certificate of Title Number 12146; which was finished and opened with a lot of pomposity and fanfare in early 2015...but after doing an official search through our attorney we realized that the landed property is still in the names of Hassan Fazel and Masuma Hassan Fazel who sold the piece of land to the judgemnt-debtors. A true*

and correct copy of the official search is attached hereto and marked Annexure JBNI to be read as part of this Counter-Affidavit.

13. That we fell upon another property of the first judgment-debtor which is Plot Number 38, Block BB, Kwangulelo Area, Arusha Municipality, comprised in Certificate of Title Number 13552; but we noted that the same is irrevocably mortgaged and encumbered to Stanbic Bank in respect of a loan of more than Tanzania shillings one billion five hundred eighty five million thus the same could not be attached and sold at our instance to satisfy the decree. A true and correct copy of the official search is attached hereto and marked Annexure JBN2 to be read as part of this Counter-Affidavit.

14. That we also learnt that the first judgment-debtor has a property known as Farm Number 1031, situate in Sango Village, Moshi District, comprised in Certificate of Title Number 13552; but we noted that the same is encumbered through a Notice of Deposit by Engen Petroleum Tanzania Limited. A true and correct copy of the official search is attached hereto and marked Annexure JBN3 to be read as part of this Counter-Affidavit.

15. That the judgment-debtors are very affluent individuals who have used the decree-holder's monies to fraudulently enrich themselves and fraudulently conceal the identities of their properties to evade attachment and sale of those properties in execution of the decree in Commercial Case Number 9 of 2012.

16. That in mid last week we learnt that the first judgment-debtor for instance drives a brand new Toyota Land Cruiser V8 vehicle with registration number T202 DHF, but the same is not registered in his name but in the name of Edna Lucas Tarimo, a sister of the first judgment-debtor, showing that the judgment-debtors have realigned and organized themselves in such a way that no court order can fall upon any property that bears their names or the name of any of them."

As stated earlier on, the executing court found no act of bad faith committed by the respondents as such not liable for detention as civil prisoners.

In the present application, Mr. Lutema impressed upon us to find that there was enough evidence at the executing court to impute bad

faith on part of the respondents. We, on our part, are at one with the executing court that there was no act of bad faith committed by the respondents that would warrant for their detention and committal as civil prisoners. The Counter-Affidavit which was considered by the executing court had nothing more than list of properties that neither belong nor in possession to the respondents. The evidence laid before the executing court was that neither the house in Oloirien in Arusha Municipality nor the motor vehicle belongs to the judgment-debtors. Further, the Farm in Moshi and the house in Kwangulelo in Arusha that belong to the 1st respondent are not in his possession.

It suffices to state here that mere ownership of the properties is not enough. There must be evidence that the judgment-debtor was able to realise cash either by sale or mortgage of the property so as to satisfy the decretal amount. On this, we wish to associate ourselves with **Mulla on the Code of Civil Procedure**, 16th Edition, Vol. 1 by Solil Paul and Anupam Srivastava, Butterworths reprint of 2002 at page 727 when it discussed clause (a) (ii) of section 51 of the Indian Code of the Civil

Procedure which is similar to condition (b) to rule 39 (2) of Order XXI of the Code that:

> *"Where the judgment debtor is in possession of a house which he owns, the normal presumption is that he is able to pay by sale or mortgage of that house. But there must be evidence to show that apart from his owning the house, he is in possession of it and in a position to realise substantial cash by its sale, mortgage or other encumbrance.* ***"Refusal"*** *or* ***"neglect"*** *envisages capacity to pay, coupled with deliberate non-payment. Merely because judgment debtor possesses immovable property, an order of detention in civil prison cannot be made for his failure to pay."*

On what constitutes bad faith has been well articulated by the Supreme Court of India in the case of **Jolly George Veghese & Another v. The Bank of Tanzania of Cochin** AIR 1980 SC 470 which we find it highly persuasive that:

> *"The simple default to discharge is not enough. There must be some element of bad faith beyond mere indifference to pay, some deliberate or*

recusant disposition in the past or, alternatively, current means to pay the decree, some or a substantial part of it. The provision emphasizes the need to establish not mere omission to pay but an attitude of refusal on demand verging on dishonest disowning of the obligation under the decree. Here considerations of the debtor's other pressing needs and strained circumstances will play prominently."

Therefore, the law requires that there must be evidence on bad faith beyond mere indifference to pay.

On our close reading of the applicant's Counter-Affidavit, we find that the applicant miserably failed to establish that there was deliberate disposition of the properties by the judgment-debtors. Nor were there any evidence to establish that the house at Oloirien in Arusha Municipality and a motor vehicle belong to the judgment-debtors. Mr. Lutema argued that the executing court illegally and improperly blessed fraudulent transfer and conversion occasioned by the judgment-debtors. The fraudulent transaction according to Mr. Lutema was the sale of 5000 shares. It be

noted that the history of the subject matter of the suit in Commercial Case No. 9 of 2012 was the sale of 5000 shares to the applicant which was declared null and void and the shares reverted back to the respondents. As correctly submitted by Mr. Kimaay, the shares having reverted back to the respondents they were free from any encumbrances as such their sale was not in contravention of Order XXI rule 39 (2) of the Code. In that regard, the subsequent sale of shares to the third party was not an act of bad faith or dishonest disowning of the obligation. At any rate, as we shall discuss on ground number two, the respondents willingly offered a decree in Commercial Case No. 3 of 2016 for the decree-holder to realise the decretal sum.

It is worth noting here that the applicant deposed in its Counter-Affidavit that the properties owned by the 1st respondent cannot be realised to satisfy the decree. In view of what was deposed by the applicant we are satisfied that the default to pay was not due to refusal or neglect by the respondents to honour the obligation under the decree. So, we are settled that the first and third grounds have no merit. We find that the executing court properly declined to execute a decree by arrest

and detention of the judgment-debtors and there is nothing warranting this Court to invoke revisional powers.

We now turn to the second ground that the executing court incorrectly, illegally and improperly directed the decree-holder to execute another decree in which it was not a party. On this we shall be very brief that the executing court rightly invoked Order XXI rule 52 of the Code. The respondents, as correctly observed by the executing court, had with them a decree in Commercial Case No. 3 of 2016 which they offered to satisfy the decree in Commercial Case No. 9 of 2012. The provision of Order XXI rule 52 of the Code is crystal clear that a decree is among the properties subject to attachment and realization of another decree. We hasten to add here that decrees are not expressly mentioned in section 48 of the Code as property not liable to attachment and sale. Hence, the decree in Commercial Case No. 3 of 2016 can be attached and realized in accordance with the provision of Order XXI rule 52 of the Code. We, thus, find that the executing court correctly, legally and properly directed the applicant to make an application under Order XXI rule 52 of the Code to attach the decree. This ground also fails.

At the end we wish to insist that since no proof was produced on the respondents' dishonest conduct then the executing court was legally justified to refuse the application. The object of arrest and detention is to ensure the decree-holder realises the money decreed in his favour and to protect honest judgment-debtors but dishonest ones becomes liable to arrest and imprisonment. Mulla on the Code of Civil Procedure (*supra*) at page 724 has rightly put that:-

> *"The object of detaining a judgment debtor in a civil prison is not to punish him for any crime but for enabling the decree holder to realise the moneys decreed in his favour, and for the purpose of achieving this alone, the conditions in the proviso have been formulated. It is some contumacious conduct on the part of the judgment debtor and not mere inability to pay, which renders him liable to be arrested."*

Going by the record before us, we are settled that there was no evidence establishing bad faith on part of the respondents that would warrant for their arrest and detention as civil prisoners. We are, therefore, of the considered view that the executing court properly

released them and the direction issued on 4th October, 2017 was in accordance with Order XXI rule 52 of the Code. In the circumstances, the application is without merit. It is hereby dismissed with costs.

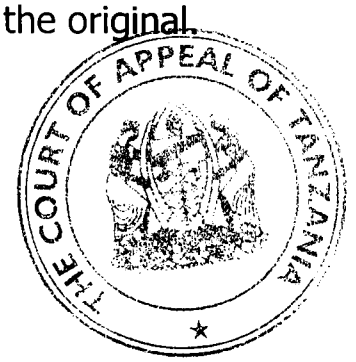
DATED at **DAR ES SALAAM** this 20th day of April, 2020.

B. M. MMILLA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Ruling delivered this 21st day of April, 2020 in the presence of Ms. Subira Omari counsel for the applicant whereas counsel for the respondent was absent duly served, is hereby certified as a true copy of the original.



B. A. Mpepo
DEPUTY REGISTRAR
COURT OF APPEAL