

**IN THE HIGH COURT OF TANZANIA**

**IN THE DISTRICT REGISTRY**

**AT MWANZA**

**MISCELLANEOUS LAND APPLICATION No.37 OF 2020**

**(Arising from the order of this Honourable Court in Misc. Land Application No.32 of 2020 by Hon. Ismail, J. dated 17<sup>th</sup> April, 2020)**

**MARY JOSEPH.....APPLICANTS**

**VERSUS**

**RACHEL ZEPHANIA.....RESPONDENT**

**RULING**

*14<sup>th</sup> April, & 22<sup>nd</sup> May, 2020.*

**TIGANGA, J.**

Under the certificate of urgency, the applicant, through the services of Mr. Kyariga- learned counsel, of IMMMA Advocate, filed this application by a chamber summons seeking the following orders; first, that this court be pleased to issue summons to the respondent to appear and show cause as to why she should not be committed as a civil prisoner for not obeying the court order dated 17<sup>th</sup> April, 2020, second, an order requiring the respondent to adhere to the court order issued on 17<sup>th</sup> April, 2020, pending determination of the main application on merit.

The application has been preferred under section 95 and Order XXXVII, Rule 2(2) of the Civil Procedure Code [Cap 33 R.E 2002] and any other

enabling provisions of the law. It is supported by the affidavit deposed by the applicant.

When this application was brought before this court for hearing, the applicant was represented by the learned counsel Mr. Rwazo, also from IMMMA Advocates, whereas the respondent was represented by Miss. Hidaya Haruna, learned counsel.

Arguing in support of the application, the counsel for the applicant prayed to adopt the affidavit of the applicant and prayed to be guided by three issues that; **first** whether there was a court order, **second**, whether the respondent went against that court order, and **third**, what is the punishment for a person who has acted against the court order.

On the first issue, counsel submitted that, there was actually an order by the High Court of Mwanza which was issued on 17<sup>th</sup> April, 2020, ex parte, after the respondent had failed to appear regardless the fact that she was served with a summons to appear. The order required that the execution of the tribunal's order be stayed pending hearing of the parties. He went further stating that as soon as the order was given, they went and found that the broker had started execution, but when they served him with the High Court order he stopped right away and left from the scene. The same order was also given to the respondent while other copies were affixed to the go down door. The properties which were taken out by the broker, were then returned inside.

However, in the evening of that same day, the respondent together with her relatives disregarded the order, broke the godown and started evicting the applicant by taking the properties out. He referred this court to the attached pictures showing that it was not the broker conducting the

eviction but the respondent. A video showing the respondent ordering the eviction was also admitted and shown to the court proving that the respondent acted against the given order.

On the third issue regarding the punishment for a person who has acted in contravention to the given order, Mr. Rwazo submitted that, in all cases of disobedience to the court order, there are two actions that could be taken under Order XXXVII, Rule 2(2) of the CPC [Cap 33 R.E 2002] if the person committing contempt is a party to the suit. But if not, then, they would become liable under section 124 of the Penal Code. However, the applicant has not complained against those who were working with the respondent, she has not done so, because those were working under the instruction and supervision of the respondent.

The counsel cited the case of **Silent in Hotels Ltd versus Interstate Office Service Ltd**, Civil Case No. 464 of 1999 where the term contempt was defined to mean wilfully abstaining to obey a court order. Stating that the prime object is to vindicate the rule of law rather than to punish an individual. He also referred this court to the cases of **Zein Mohamed Bahroon versus Reli Assets Holding Company Ltd RAHCO**, Misc. Land Application No. 307 of 2017 and **Land Masters Combine Co. Ltd versus Kisa Kajeba & Two others**, Misc. Land Application No. 183 of 2015 as the authorities in which courts dealt with the matter of this sort.

He submitted that, since they have proved that the respondent went against the court order, the decisions in the cited cases were to the effect that the courts gave verdicts of fine and that it is after a person has failed to pay fine that he goes to jail. He concluded by praying that, the properties taken out in the unlawful execution be returned in the godown,

and that the applicant be allowed to verify her properties if really are the ones she had locked or have been tampered with. Also the costs of the application be provided for.

In reply to what has been submitted by the applicant's counsel, the counsel for the respondent submitted by first praying to adopt the counter affidavit of the respondent and stated that it is not true that she disobeyed the court order. She claimed that the respondent was not aware of the application for stay of execution, since the house she is residing is different from the one the affixation was done. There was no proof of service that she was served with that summons to appear in that case, and did not see the said affixed summons.

She claimed further that the case had already been filed to the High Court and was decided in favour of the respondent and that is when she went back to the tribunal and applied for execution. In the application for execution before the District Land and Housing Tribunal, the applicant never appeared, instead, she applied for extension of time at the same time, and she was issued with 14 days' notice which expired on the 17<sup>th</sup> April, 2020. She contended that it was the broker who executed the order of the tribunal and handed the house to the respondent, the exercise which was witnessed by the street chairman.

The counsel furthered her arguments by stating that, it was after the broker had completed evicting the applicant and left, when the applicant arrived with an order from this court, she broke the padlocks and started taking her properties back in. The court broker was called and claimed that since he had already legally evicted the applicant, it was illegal for

her to break into the godown. He then together with the respondent started to take out the applicant's properties again.

Concerning the video, counsel claimed that the properties seen are the ones that were taken out by the court broker. She then concluded her arguments by praying that this application be dismissed with costs.

In his rejoinder, the counsel for the applicant stated that there was no any fight at the scene and that this case does not relate in any way with that in the tribunal. That the picture and video show that, there was a court order affixed at the door which means that, the respondent has to be punished. He concluded by praying that the orders sought for, be granted.

For easy reference, it is important to appreciate what the law upon which this application has been made provides. The said provisions are section 95 and Order XXXVII, Rule 2(2) of the Civil Procedure Code [Cap 33 R.E 2002]. While section 95, provides for the inherent powers of this court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Order XXXVII Rule 2(2) of the same law provide to the effect that in case of disobedience or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained as a civil prisoner for a term not exceeding six months, unless in the meantime the court directs his release.

From the above provisions, it is obvious that the court has such powers as well as the duty to make sure that its orders are respected. These

powers are both, inherent as provided by section 95 and statutory as provided by Order XXXVII Rule 2(2) of the CPC (supra).

As rightly submitted by Mr. Rwazo, learned counsel, in his approach during the hearing, for the respondent to be found liable, there should be a proof that there was an order of the court issued in restraining the respondent to do a certain act pending the determination of the main dispute in court. Also that, the order was directed to the respondent, last, it should be proved that the order was disobeyed or breached by the respondent.

From the submissions by counsel for both parties, there is no dispute that the High Court Mwanza Registry in Misc. Civil Application No. 32 of 2020 on 17<sup>th</sup> April, 2020 granted an interim order against the respondent in this application, staying execution of the decree of the District Land and Housing Tribunal for Mwanza issued on 1<sup>st</sup> April 2020. The said order was directed to the respondent interrimly staying the execution of the decree of the tribunal pending the hearing of the application of extension of time to apply for stay of execution.

The issue remains to be whether the respondent disobeyed or beached the said order?

Now, going by the applicant's affidavit, her main concern is the fact that, despite this court order of maintenance of *status quo* pending determination of the application for stay of execution, and despite the fact that the said order was, on the same day it was given, brought to the attention of the respondent, by personal service and affixation to the walls and doors of the suit premises, the respondent abrogated the same and continued with the eviction of the applicant from the godown.

However, the counsel for the respondent disputed his client to have abrogated the said court order, and contended that, it was the court broker who executed the decree of the District Land and Housing Tribunal, and not the respondent.

The facts in the affidavit and arguments by counsel lead irresistibly that, the order was served to the respondent, while the process of execution had already commenced. While the applicant counsel states that execution was yet to be completed, and upon service of the order, the court broker decided to return the already taken out properties inside the store from which the applicant was evicted, and left place, the counsel for the respondent stated otherwise. She submitted that, the order was served at the time when the broker had already completed the execution process and handed over the suit premises to the respondent. She submitted that the applicant forcefully came with people she called police officers, broke in the godown which was already handed over to the respondent by the broker, and returned in, the properties of the applicant already taken out.

It was also the submission of the counsel for the respondent that, when the applicant broke in and returned the properties inside the godown, the respondent called the court broker who did break again the godown and took out the properties of the applicant on the argument that, the applicant had no right to break and re-occupy the disputed premises. The counsel for the respondent does not say that she doubted the order to be of the High Court, nor does she say that she believed that what she did had a support of any law, or that, at that particular time she had the right to disobey the said order. Whatever assertion you take and believe, as between the applicant's and the respondent's, it remains the fact that,

there was a court order which was ordering the respondent to temporarily stay the execution of the decree of the tribunal. That was to be respected and obeyed. That said order was general and its valid period was up to the determination of the application under which it was issued or subject to the provision Order XXXVII Rule 3 of the CPC (Cap 33 RE 2002) as interpreted in the case of **John Joseph Magazeti and 3 Others Versus Gabriel Mushi @ Gabriel Stephen Masha and 2 Others Misc. Civil Application No. 43 Of 2019 HC-Mwanza**. It had no condition that if the same will be served after the execution has already been carried out, it may be disobeyed.

Even if for the sake of argument, we take the assertion by the respondent to be true, which facts have not been proved any way, after the applicant had broken into and returned the properties, it was not proper for the respondent to supervise the re-breaking and re-evicting the applicant whether by using the court broker or other persons. This is because, there was an order of the High Court, which to her understanding is superior to the order of the District Land and Housing Tribunal which ordered execution in the first place.

As rightly held by my sister Hon. Mgonya, J, in the case of **Zein Mohamed Bahroon vs Reli Assets Holdings Company Ltd RAHCO**, Misc. Land Application No. 307 of 2017 in which he quoted with approval the decision of this Court Hon. Luanda J, as he then was, that; Court orders should be respected and complied with, court should not condone such failure, to do so is to set a bad precedent and chaos, this should not be allowed to occur, and that always courts should exercise firm control over proceedings.

I however find it hard believing what counsel for the respondent is alleging, especially regarding who took out the properties of the applicant. This is simply because in her own submission, she stated that the respondent together with the court broker took out the applicant's properties for the second time, and that was after they were made aware of the High Court order requiring the execution of the DLHT to be stayed pending the hearing of the application for extension of time in order to conserve the rights of the parties. That, to me amounted to disobeying the order of the High Court.

It would have been different if the respondent had no knowledge of the order of the High Court staying the execution which they were carrying out. The attached pictures and the video which was tendered and admitted without objection do not show the presence and participation of the court broker, it was only the respondent who was conspicuously seen evicting with the order affixed to the doors of the godown.

I would not be wrong to conclude that the act of the respondent is not only disobedience but also an act of disrespect to the court which made the order the consequences of which are provided for under Order XXXVII, Rule 2(2) of the Civil Procedure Code (supra) and interpreted in the case of **Silent in Hotels Ltd** (supra), that; in case of disobedience or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained as a civil prisoner for a term not exceeding six months, unless in the meantime the court directs his release.

Having found that the respondent disobeyed the court order, her duty was to show cause as to why she should not be committed as a civil prisoner for not obeying the court order.

From what transpired, she actually failed to show such cause, having so found, and considering the legal stance as interpreted in the case of **Land Masters Combine Co. Ltd vs Kisa Kajeba Jacob Philip Manyanga and Yono Auction Mart**, (supra) by my brother Hon. Mzuna, J, in which he quoted the authority in the case of **Tanzania Bandu Safaris LTD vs Director of Wildlife & Another** [1996] T.L.R 246 in which it was held that; the prime object of contempt of court proceedings is to vindicate the rule of law, rather than to punish an individual.

The punitive jurisdiction of the court to punish for contempt is based upon the fundamental principle that it is for the good of the public and the parties that, such orders should not be despised or slighted. Civil contempt does not require immediate imprisonment, for it is also punishable by the imposition of a fine. The custodial penalty, comes in when the person found to have failed to show cause has failed to pay fine.

Having so found, and upon assessing contempt committed in this case, I hereby order the respondent to pay fine of Tanzania shillings 400,000/= which should be paid within seven days from the date of this order. In the event of failure to pay the said fine as ordered, she be detained in prison as a civil prisoner for two months.

It is so ordered

**DATED** at **MWANZA** this 22<sup>nd</sup> day of May, 2020.

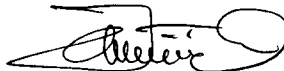


**J.C.Tiganga**

**Judge**

**22/05/2020**

Ruling delivered in chambers in the presence of Mr. Kyariga N. Kyariga leaned counsel for the applicant and Miss Hidaya Haruna learned counsel for the respondent.



**J.C.Tiganga**

**Judge**

**22/05/2020**

