

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO 271 OF 2020

BETWEEN

FUSUN INVESTMENT COMPANY LIMITED.....D/HOLDER

VERSUS

FARB ASSOCIATES LIMITED AND

TRIBUNAL BROKERS.....1ST J/DEBTOR

BASILISA THOMAS.....2ND J/DEBTOR

RULING

Date of last order: 04/05/2021

Date of Ruling: 26/05/2021

MLYAMBINA, J.

Under Order XX1 Rule 35 (1) of the Civil Procedure Code Cap 33 (R. E. 2019), the Decree Holder has applied for execution of the Decree of this Court dated 30th October, 2020 of TZs 120,000,000/= by arrest and detention of BASILISA THOMAS, the 2nd Judgement Debtor as a Civil Prisoner and for Costs. The application is supported with the affidavits of Sylvester Eusebi Shayo, Advocate of the Applicant and Ling Gang Wang, the

Managing Director of the Applicant. The underlining reasons of this application are three: *One*, the 2nd Judgement Debtor has not paid to the Decree Holder any amount she was ordered to pay under the Decree. *Two*, after making diligent search, the Decree Holder has not been able to find any assets of the 2nd Judgement Debtor upon which execution can be levied to satisfy the Decree. *Three*, the Judgement Debtor's conduct is improper and fraudulent.

The Judgemnt Debtor filed an affidavit sworn by her Advocate one Syprianus Silungwe, though it bears also the name of Basilisa Thomas. There is another affidavit of Basilisa Thomas. In both affidavits opposing the application, the Judgement Debtor, without attaching or annexing any proof, sworn that she has already paid TZs 20, 000,000/=

On showing cause as to why the Judgement Debtor should not be committed as a Civil Prisoner, Counsel Syprianus Silungwe had nothing substantive to tell the Court apart from submitting that the Judgement Debtor has filed *Misc. Civil Application No. 341 of 2020* before this Court seeking for lodging Notice of Appeal to the Court of Appeal of Tanzania. For that reason, the Judgement Debtor prayed for stay of execution of the Decree.

On the other hand, the Decree Holder through Counsel Steven Luko insisted on grant of the application for execution as prayed on the reasons stated in the supporting affidavits.

Having considered the supporting affidavits and the affidavits in opposition of the application as well as the submissions of both Counsel, I should observe that the right to commit a Judgement Debtor to a jail as a Civil Prisoner is provided under *Sections 42, 44 (1) and Order XXI Rules 35 (1) (2) and 36 of the Civil Procedure Code Cap 33 (supra)* which provide that:

42 Subject to such conditions and limitations as may be prescribed, the Court may on the application of the decree holder, execution of the decree

a) N/A

b) N/A

c) By arrest and detention in prison.

44 (1) a Judgement Debtor may be arrested in execution of a decree at any hour and on any day and shall, as soon as practicable, be brought before the Court, and the Court may order his detention:

Provided that, for the purposes of making an arrest under this section:

- a) No dwelling house shall be entered after sunset and before sunrise;
- b) No outer door of a dwelling house shall be broken open unless such dwelling- house is in the occupancy of the Judgement Debtor and he refuses or in any way prevents access thereto, but when the officer authorized to make the arrest has duly gained access to any dwelling house, he may break open the door of any room in which he has reason to believe the Judgement Debtor is to be found; or
- c) If the room is in the actual occupancy of a woman who is not the Judgement Debtor and who, according to her religion or local custom, does not appear in public, the officer authorized to make the arrest shall give notice to her that she is at liberty to withdraw and, after allowing a reasonable time for her to withdraw and giving her reasonable facility for withdrawing, may enter the room for the purpose of making the arrest:

Provided further that, where the decree in execution of which a Judgement Debtor is arrested is a decree for the payment of money, and the Judgement Debtor pays the amount n of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him.

- 2) Where a Judgement Debtor is arrested in execution of a decree for the payment of money and brought before the Court, the Court shall inform him that he may apply to be declared an insolvent, and that he will be discharged if has not committed any act of bad faith regarding the subject of the application and if he complies with the provisions of the law of insolvency for the time being in force.
- 3) Where a Judgement Debtor expresses his intention to apply to be declared an insolvent and furnishes security, to the satisfaction of the Court, that he will within one month so apply and that he will appear, when called upon, in any proceeding upon the application or upon the Decree in execution of which he was arrested, the Court shall release him from arrest and, if he fails so to apply and to appear, the Court may either direct the security to be realized or commit him as a civil prisoner in execution of the decree.

Order XXI rule 35 (1) (2) and Rule 36 provides:

35. (1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention as a civil prisoner of a Judgement Debtor who is liable to be arrested in pursuance of the application, the Court may, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to prison.

2) Where appearance is not made in obedience to the notice, the Court shall, if the Decree Holder so requires, issue a warrant for the arrest of the Judgement Debtor.

36) Every warrant for the arrest of a Judgement Debtor shall direct the officer entrusted with its execution to bring him before the Court with a convenient speed, unless the amount which he has been ordered to pay, together with the interest hereon and the costs (if any) to which he is liable, be sooner paid.

The proviso of *Section 44 (1) (c) and Order XXI Rule 36* limits arrest of the Judgement Debtor only if he pays the amount of the Decree and costs of the arrest. In this case, the Judgement Debtor has

failed to prove that the Decree has been executed fully. She merely alleged to have paid TZs 20,000,000/= only.

It is the finding of this Court that the Judgement Debtor's previous conduct represents a dishonest and fraudulent character which compels this Court to issue an order of arresting and detaining her as a Civil Prisoner. It is a further finding of this Court that the Judgement Debtor has been using unreasonable delay tactic. As observed in the Judgement subject of this execution, the Judgement Debtor admitted to the claim of TZs 120,000,000/= being the principle sum owed to the Decree Holder. The delay tactic is further evidenced by her act of seeking notice to appeal against a Judgement on admission of which is contrary to *Order XL Rule 1 and 2 of the Civil Procedure Code, Cap 33 (R.E. 2019)*.

It is further not in dispute that the sum of TZs 120 million has been in the hands of the defendant illegally ever since the auction was nullified by the High Court on 04/11/2014.

I understand that there may be other way of enforcing a civil debt such as attachment of property. However, as intimated by the Decree Holder, normal execution of the Decree has failed because diligent search revealed that no assets of the Judgement Debtor could be traced to satisfy the decree.

The Court is also aware that, an order of imprisonment in Civil Cases curtails a person with freedom of movement. However, there are no rights without duties. This Court in the case of **Eurafrican Bank (Tanzania) Ltd v. Tina and Company Ltd and 2 Others**, *Commercial Case No. 80 of 2006, High Court of Tanzania Commercial Division* had these to observe at page 3 of its ruling:

Thus, as long as *Section 44 (i) and Rule 28 of Order XXI of the Civil Procedure Code* remains in the statute book, it is not un-constitutional for a Judgement Debtor to be committed to a civil prison upon his failure to pay his debts. The *Civil Procedure Code* provides a legal regime for arrest and committal as a means of enforcement of a decree.

The Court of Appeal of Tanzania in the case of **The Grand Alliance Ltd v. Mr. Wilfred Lucas Tarimo and 4 Others**, Civil Application No. 187/16 of 2019, after revisiting the Indian decision in the case of **Mahadev Prasad v. Ram Lochan Air** 1981 SC 416, made the following findings at page 12-13 of its decision:

It follows then that the imprisonment of a Judgement 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 Judgement 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 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 Judgement 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 Judgement 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*).

In the circumstances of the above, I find the 2nd Judgement Debtor has failed to show cause as to why she should not be committed to prison as a Civil Prisoner. Pursuant to the provisions of *Section 46 (1) (a) of the Civil Procedure Code Cap 33 (R.E. 2019)*, I order that, unless the whole decretal amount of TZs 120,000.00 plus

Court interest rate of 7% from the date of judgment to the date of payment is paid within 14 days from the date of service of this order, the Judgement Debtor Basilisa Thomas shall be detained in civil prison in Tanzania for the period of six (6) months in execution of a Decree pronounced in Civil Case No. 1 of 2015 before this Court. The Decree Holder shall pay TZs 300,000/= (say Three Hundred Thousand) only being subsistence allowance per each month the Judgement Debtor will be in prison. It is so ordered.



Y. J. MLYAMBINA

JUDGE

26/05/2019

Ruling pronounced and dated 26th day of May, 2021 in the presence of Counsel Cyprrianus Silungwe holding brief of Steven Luko for the Decree Holder and Counsel Cyprrianus Silungwe for the Judgement Debtor.



Y. J. MLYAMBINA

JUDGE

26/05/2021