

**THE HIGH COURT OF TANZANIA
(DAR ES SALAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

MISC. CIVIL APPLICATION No. 302 OF 2019

(Arising From the Decree of this Court in Civil Case No. 65 of 2015)

**STANBIC BANK TANZANIA LIMITEDAPPLICANT/D.HOLDER
VERSUS**

**MASHAKA JONAS MADALE t/a
MADALE TRANS & SUPPLY OF
AGRICULTURAL PRODUCTS** } **RESPONDENT/J. DEBTOR**

RULING

Date of Last Order: 11 /6/2021

Date of Judgment: 30/6/2021

MASABO, J.:-

The applicant has moved this court to issue a warrant of arrest and detention of one MASHAKA JONAS MADALE, a sole proprietor of Madale Trans & Supply of Agricultural Products, in satisfaction of a decree under Order XXI rule 35(1) and (2) of the Civil Procedure Code [Cap 33 RE 2019]. The application is supported by an affidavit deposed by one Erick Rwelamira, a principal officer of the respondent in which it is stated that, on 25th November 2015, following a settlement deed executed by the parties in Civil Case No. 63 of 2015, this court decreed the respondent herein to pay the applicant a total sum of Tshs 28,680,911.53 comprising of a principal loan and the interests thereof. The sum was to be paid in installments. The first advance payment of Tshs 20,000,000/= was to be paid by the end of March 2016 and the remaining amount was payable in

monthly instalments of Tshs 3,500,000/= until final payment. But, to the contrary, the respondent never deposited the advance sum and as of to date he has not satisfied the decree and efforts for execution by way of attachment has failed as the diligent search conducted by the applicant revealed that the respondent has no property capable of being attached.

Upon the application being filed, the court found it proper to summon the judgment debtor to show cause why he should not be arrested and detained. Efforts to serve him turned futile. He could not be physically served as his whereabouts were unknown and even after publication of the summons in Mwananchi Newspaper of October 22, 2020, he defaulted appearance.

When the application came for hearing Mr. Stanslaus Ishengoma, counsel for the applicant briefly submitted that since the respondent has not satisfied the decree and has failed to show cause why he should not be arrested and detained, the court be pleased to allow the application on conditions that, the applicant will bear the costs of arrest and detention of the respondent.

Section 42 (c) of the Civil Procedure Code, Cap 33 RE 2019, lists arrest and detention of judgment debtor as one of lawful modes of execution of decree and provides that, on an application made by a decree holder, the court may order execution of the decree by arrest and detention of the decree debtor in prison. The order may issue upon satisfaction and subject to the provisions of Order XXI rules 35 to 39 of the Civil Procedure Code. Order XXI rule 35(1) and (2) states as follows:

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 judgment 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 judgment debtor.

These provisions were extensively interpreted by the Court of Appeal of Tanzania in **Grand Alliance Ltd vs Mr. Wilfred Lucas Tarimo & Others** (Civil Appl. No.187 of 2019 (unreported) where it was lucidly stated thus;

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 XXI rule 10 of the Code). After receipt of the application, the executing court has discretion to in 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 XXI 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 XXI 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.
[Emphasis added]

As intimated earlier, in the present case, upon the application being filed, the court found it proper to summon the judgment debtor. However, as it could be seen in the preface to this ruling, he defaulted appearance. Now, since the requirement of Order XXI rule 35 (2) have been fully complied with but the decree debtor has defaulted appearance, I am fortified that, the said **MASHAKA JONAS MADALE**, decree debtor, has become due for arrest.

Accordingly, the application for a warrant of arrest of the decree debtor, MASHAKA JONAS MADALE is allowed. Unless the whole decretal amount of Tshs Tshs 28,680,911.53 is paid within 14 days from the date of this ruling, the said MASHAKA JONAS MADALE, shall be arrested and brought before this court within 48 hours after his arrest for this court to consider if the circumstances provided for under Order 39 of the Civil Procedure Code exists.

This order shall be subject to the decree holder paying and remitting in this court a sum of Tshs 400,000/= being costs for arrest and subsistence allowances of the Judgment Debtor from the time of his arrest until he is brought to the Court. It is so ordered.

DATED at DAR ES SALAAM this 30th day of June 2021.



J.L. MASABO
JUDGE