

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

EXECUTION NO. 47 OF 2021

(Original Civil Case No. 45 Of 2007)

ELIZABETH JEREMIAH DECREE HOLDER

VERSUS

MOHAMED SALUM NAHDI JUDGMENT DEBTOR

RULING

Date of Ruling: 20th September, 2021.

MRUMA. J;

This is an application for execution of a decree by arresting and sending to prison of the judgment debtor Mr. Mohamed Salum Nahd.

The Applicant Elizabeth Jeremiah is a decree holder in connection with Civil Case No. 45 of 2007. That case was heard ex-parte by this Court (Kibela J,) as we the was). An exparte judgment against the judgment debtor was passed on 28th October, 2014.

This application was presented for filing on 26th July 2021 and it was called for first time before Judge (myself) on 10/8/2021. Summons to show

cause under Rule 35(1) of Order XXI was issued against the judgment debtor. On the same day, on 19/8/2021 he entered appearance accompanied by his advocate Mr. Ngudingi. Mr. Ngudingi applied for leave to file an affidavit of the judgment debtor to show cause as to way he should not be sent to prison as a civil prisoner.

Affidavit to show cause has been filed. The main contention in that affidavit is that the judgment debtor has filed application No. 373 of 2001 of 2021 in the Court of Appeal praying for stay of execution. It has been submitted by Mr. Ngudungi that once a notice of appeal has been duly filed, the High Court ceases to have jurisdiction over the matter.

The Respondent Elizabeth Jeremiah was not represented and she did not file any counter affidavit and when she was invited to reply to the counsel's submission she simply stated that this is the 4th year since, she obtained a decree but the judgment debtor has not satisfied it.

While it is now a settled principle in our jurisprudence that once a notice of appeal has been duly lodged to the Court of Appeal the High Court ceases to have jurisdiction over the matter [see Civil Revision No. 1 of 2019 between **Serenity on the Lake Ltd vs. Dorcus Martin Nyanda Civil Application No. 142 of 2012 between Tanzania Electric Supply Co.**

**Ltd vs. Dowans Holdings S.A (Costa Rica) and Another and also
AERO Helicopters (T) Ltd vs. F. N. Jansen (1990) TLR [142].**

However, Rule 5(1) of Order XXXIX of the Court Procedure Code [Cap. 33 R.E 2019], provides that:

“An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree but the court may, for sufficient cause, order the stay of execution of such decree.”

In a quick look at the provisions quoted above, one may think that the decisions of the Court of Appeal are at variance with the above provisions, however that is not the position. In all decisions of the Court of Appeal quoted, the Court stated clearly that once a notice of appeal has been duly lodged, the High Court ceases to have jurisdiction over the “matter”. The Court of Appeal did not say that the jurisdiction of the High Court over the proceedings ceases. In my view the term “matter” refers a specific to subject or issue under consideration while “proceedings” refers to the entire suit or case.

It follows therefore that the High Court may exercise jurisdiction over other matters in the same proceedings. Take for instance an appeal on interlocutory matters, staying proceedings in the lower court may unnecessarily create backlog in the registry. My view is that in such a situation unless the case file or record of the lower court is called by the appellate of Court, the lower court is entitled to proceed with the trial to a stage which may not interfere with the would be direction of the Court of Appeal on the matter or specific issue before it. In other words, I am of the view that the jurisdiction of the lower court ceases only in respect of a matter/or issue which is under consideration by the Court of Appeal.

In the case of hand the 'matter' or 'issue' under consideration by the Court of Appeal is stay of execution. That Court is being requested to older stay of execution of the decree of this Court. On the other hand the Applicant is before me seeking for execution of the same decree. In any event, if this court will go ahead and grant the application it will prejudice and interfere with the matter which is pending before the Court of Appeal and particularly so because the mode of execution chosen is arrest and detaining as a "civil prisoner" of the judgment debtor. Execution of Decree by arrest and detention of a judgment debtor is direct and instant. Procedures to be

followed for arrest and detention are provided under rules 36 to 40 of Order XXI of the CPC.

The judgment debtor has appeared and I have heard him through his affidavit and submissions of his Advocate. The only reason given by him for his inability to pay the decree amount is that he has all along been struggling to appeal against that decree. I find that to be not a reasonable cause. However, as there is an application for stay pending in the Court of Appeal I will not make an order for his detention as a civil prisoner. I will wait for result of his application for stay. If the Court of Appeal will grant it, then detention order will await the result of further proceedings which will be conducted in that Court. If the stay will not be granted, because the judgment has already been heard, detention order may issue without much ado. That said, it is hereby ordered the final order with respect to execution by arrest and detention is put in abeyance.

Order accordingly.



A. R. Mruma

JUDGE

20/9/2021

COURT:

- Delivered in presence of the parties this **20th** day of **September 2021.**
- Right of Appeal Explained.



A. R. Mruma

JUDGE

20/9/2021.