

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

EXECUTION APPLICATION NO. 1 OF 2020

(Arising from Civil Case no. 17 of 2019)

MUSHI BROTHERS LIMITED DECREE- HOLDER

VERSUS

SAM CONSTRUCTION CO. LIMITED..... JUDGEMENT-DEBTOR

RULING

7/6/2021 & 6/9/2021

ROBERT, J:-

Before me is an application lodged by the Decree Holder, Mushi Brothers Limited, seeking orders of arrest and detention as a civil prisoner, Mr Samwel Mhina, the Managing Director of Sam Construction Co. Limited, the Judgment Debtor in Civil Case No. 17/2019 for neglecting to pay the decretal sum. The application is brought vide execution form No. F/5 and is being pursued under section 42 (c) and Order XXI, Rules 10 (2) (j) (iii) and (v) and 28 of the **Civil Procedure Code**, Cap. 33 (R.E 2019).

Prior to the hearing of this application, counsel for the judgment debtor raised two points of preliminary objection as follows;

- i. *That the application which seeks to execute a money decree against a third party to the decree is deficient and incompetent. Alternatively:*
- ii. *That the application which seeks to execute a money decree by committing a director of a judgment debtor company to civil prison is incompetent and does not lie.*

At the request of parties, the preliminary objection was disposed of by way of written submissions. Mr. Elvaion E. Maro, learned advocate appeared for Mr. Samwel Mhina, the Managing Director of Sam Construction Co. Limited, against whom an order for arrest is sought whereas Mr. Caessar A. Skayo, learned counsel appeared for the Decree Holder.

Mr. Maro abandoned the second point of preliminary objection and argued the first point of objection only.

Highlighting on the first point of preliminary objection, Mr. Maro submitted that, while Order XXI Rule 28 of the CPC provides for execution of the money decree by detention of the Judgment Debtor as civil prisoner, the execution envisaged in the cited provision is against the judgment debtor not a judgment debtor's director or a third party to the decree. He made reference to section 3 of the CPC which defines the

judgment debtor as a person against whom a decree has been passed or an order capable of execution has been made. He observed that, the application is silent as to why the decree holder wants to commit a third party to prison as a civil prisoner.

Mr. Maro submitted further that, the current application is deficient and incompetent in that, first, it does not disclose by way of affidavit or otherwise why a third party should be committed to prison instead of the Judgment Debtor; secondly, the application has no supporting evidence to prove that Mr. Samwel Mhina is the Director of the Judgment debtor.

He submitted that, assuming the law allows a director to be committed to prison as a civil prisoner in execution of a decree against the company, then, the law requires the decree holder to prove certain facts before the Court can commit a person to prison as a civil prisoner. He made reference to the book titled **Civil Procedure, 6th Edition, Eastern Book Company, Lucknow, 2009 at page 618** where the author, Justice CK. Thakker (Takwani) commented that, where the decree is for payment of money, execution of money by detention in civil prison should not be ordered by the Judgment Debtor's mere failure to pay if he cannot be held to have neglected to pay the amount to the decree holder.

He also made reference to the case of **Jolly George Varghese vs bank of Cochin** (1980) 2SCC 368 (AIR 1980 SC 40) where the Court observed that the simple default to discharge is not enough. There must be some elements of bad faith beyond mere indifference to pay.

He maintained that, the law and conventional practice require the decree holder to prove intentional default on the part of the one to be committed to prison and in turn, afford the judgment debtor or a person against whom an order is sought to show cause why he should not be detained as a civil prisoner. The applicant decree holder must place before the Court material or evidence upon which he/she seek to commit a person to prison as civil prisoner and such person must be heard in answer to those allegations or factual matters laid before the court by the decree holder.

He argued that, in Tanzania the Court has consistently demanded filing of an affidavit disclosing grounds for committing a judgment debtor to prison. To support his argument, he cited the High Court decision in the case of Mr. Terutilio Elifas Kaaya and 5 others vs Mr. Paul Samwel Shayo, Civil Application No. 77/2017.

He submitted that, the present application is deficient in that, it has no material upon which the Court can act and incompetent in that it didn't

follow the procedure. He prayed for it to be struck out with costs to Mr. Samwel Mhina.

Responding to the point of preliminary objection, counsel for the Decree Holder submitted that the objection raised by the counsel for the judgment Debtor bear no point of law which requires an application for execution of a decree by arrest and detention of the judgment debtor to be accompanied with an affidavit. He referred the Court to the case of **Mukisa Biscuit Manufacturing Company Limited versus West end Distributors Limited (1969)1 EA 696** where the Court held that a preliminary objection must be on a pure point of law and cannot be raised if certain facts have to be ascertained or if what is sought is the exercise of judicial discretion.

He argued that, counsel for the Judgment Debtor is trying to mislead the Court by submitting on the merit of the application at this stage instead of submitting on the points of preliminary objection raised.

He submitted that, the cited case of Terutilio Elfasi Kaaya and 5 others vs Paul Samwel Shayo, Civil Application No. 77/2017 is distinguishable from the application at hand since it was filed by chamber summons which was to be supported by an affidavit and it arose out of a

ruling of the taxation cause while the present application comes from a decree arising from a civil suit and therefore governed by the Civil Procedure Code (Approved Forms) Notice G.N. No. 388/2017 which requires the use of approved form No. F/5 and not chamber summons supported by affidavit.

He prayed for the preliminary objection to be dismissed with costs for lack of merit and the application be determined on merit.

In a brief rejoinder, Mr. Maro made it clear that he is not acting for the "judgment debtor" but for Mr. Samwel Mhina whom an order for arrest and detention in execution of the decree is sought. He denied to have argued this matter on merit in his submissions in chief.

He maintained that, submissions made by the learned counsel for the Decree Holder did not address the raised point of objection raised and proceeded to reiterate the arguments made in his submissions in chief.

He insisted that Form Number F/5 used by the Decree Holder is irrelevant and does not apply in an application to commit the judgment debtor to prison. He maintained that the Decree Holder just modified the form by citing the provisions for execution empowering the Court to commit the Judgment Debtor to prison. He clarified that, the said form is applicable for applications made under Order XXI rule 11 of the CPC which

is an application for attachment of movable property and not in the present application.

Having examined closely the submissions made by the learned counsel for both parties, I will now deliberate on the point of objection raised by the counsel for the Judgment Debtor by make a determination on: One, whether the point of objection raised meets the test of being a point of preliminary objection. Two, if the first issue is positively answered, whether the Decree Holder's application is properly lodged before the court.

Starting with the first issue, describing the nature of what qualifies to be raised as a point of preliminary objection the Court in the case of **Mukisa Biscuit Manufacturing Co. Ltd. v West End Distributors Ltd.** (1969) EA 696 at page 700 had this to say:-

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arise by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

And at page 701 Sir Charles Newbold, P. stated that-

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all

the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion". (See also: Civil Application No. 40 of 2000 between Cotwu (T) m Ottu Union & Another and Hon. Iddi Simba & 7 Others (unreported)."

The learned counsel for the judgment debtor maintained that, the current application is deficient and incompetent in that, first, it does not disclose by way of affidavit or otherwise why a third party should be committed to prison instead of the Judgment Debtor; secondly, the application has no supporting evidence to prove that Mr. Samwel Mhina is the Director of the Judgment debtor.

Given that, the first limb of this objection challenges the competence of this application, I am satisfied that the point of objection raised meets the threshold set out in Mukisa's case cited above. However, as the second limb challenges the application on grounds of lack of evidence, this Court finds that it doesn't raise a pure point law and therefore it doesn't qualify as a preliminary objection because it requires evidence to be ascertained. I will therefore make a determination on the first limb of this objection.

Coming to the second issue, whether the application is properly before the court. Counsel for the Judgment Debtor argued that the application ought to have been filed by way of affidavit disclosing why a

third party should be committed to prison instead of the Judgment Debtor.
He faulted this application for being filed through Form No. F/5 only.

Order XXI Rule (10) (2) of the Code provides that:-

"(2) Save as otherwise provided by sub-rule (1) or subrule (1A), every application for the execution of a decree shall be in writing, signed and verified by the applicant or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars, namely-

- (a) the number of the suit;*
- (b) the names of the parties;*
- (c) the date of the decree;*
- (d) whether any appeal has been preferred from the decree;*
- (e) whether any, and (if any) what, payment or other adjustment of the matter in controversy has been made between the parties subsequently to the decree;*
- (f) whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such applications and their results;*
- (g) the amount with interest (if any) due upon the decree or other relief granted thereby, together with particulars of any cross-decree, whether passed before or after the date of the decree sought to be executed;*

(h) the amount of the costs (if any) awarded;

(i) the name of the person against whom execution of the decree is sought; and

(j) the mode in which the assistance of the court is required, whether- (i) by the delivery of any property specifically decreed;

(ii) by the attachment and sale, or by the sale without attachment, of any property;

(iii) by the arrest and detention in prison of any person;

(iv) by the appointment of a receiver; or

(v) otherwise, as the nature of the relief granted may require

Guided by the quoted provision, it is apparent that, there is no requirement for the Decree Holder to file this application by way of affidavit as alleged by the learned counsel for Mr. Samwel Mhina. Section 101 of the Civil procedure Code requires parties to use prescribed forms approved by the Chief Justice with such variations as circumstances of the case require where any form is prescribed for use by the Chief Justice.

The Civil Procedure Code (Approved Forms) Notice, 2017, G.N.No. 388 of 2017 prescribe forms approved for use in applications connected with proceedings under the Code. In the present application the applicant used Form No. F/5 which is titled "Application for Execution of Decree". Council for Mr. Mhina argued that Form No. F/5 is made under Order XXI rule 11 of the CPC which provides for attachment of movable property not

in judgment debtor's possession whereas the current application is for execution of money decree hence, it is not applicable.

Having examined the application lodged by the Decree Holder, it is obvious, as stated by the learned counsel for Mr. Mhina, that the applicant filed this application by using Form No. F/5. However, the Decree Holder used the said form with variations. Instead of using Order XXI rule 11 of the CPC, he cited the right provision used to move the Court in this application. Item 3 of the G.N. No. 388 of 2017 provides that:

"the forms contained in the schedule may be modified or altered in expression to suit the circumstances of each case and variation from such form not being a matter of substance shall not affect the validity or regularity of the form"

This Court is of the firm view that, although Form No. F/5 may not have been specific for execution by arrest and detention of the Judgment Debtor, the Decree Holder's use of form F/5 with the requisite variations citing the relevant provisions can be accommodated within the provisions of the quoted provision.

Lastly, Mr. Maro submitted that the application is incompetent as it doesn't disclose by way of affidavit or otherwise why a third party should be committed to prison instead of the Judgment Debtor. As noted above, there is no requirement of an affidavit in filing of this application as the

law requires the application to be filed by a prescribed form. Hence, the Decree Holder used Form No. F/5 which contains all the requirements under Order XXI Rule 10 (2) of the Code.

Arrest and detention in prison is one of the modes of execution of decree prescribed by the law under section 42 (c) and Rule 28 of Order XXI of the **Civil procedure Code**. 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 order, under Order XXI Rule 35 of the CPC that, 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.

This Court is of the firm view that, the question whether it is appropriate for the Director of the Judgment Debtor's company to be arrested and detained as a civil prisoner touches on the merit of this application and therefore can be raised and determined at the hearing of the main application.

On the foregoing reasons, this Court finds no merit on the point of objection raised by the learned counsel for Mr. Mhina. Consequently, the

preliminary objection is hereby overruled. The court will proceed to determine the application on merit.

It is so ordered.


K.N. ROBERT
JUDGE
6/9/2021



The seal of the High Court of Tanzania is circular. It features the text 'THE HIGH COURT OF TANZANIA' around the top inner edge and a small 'O' at the bottom. In the center is a coat of arms depicting two figures holding a shield, with a sun or star above them.

