

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL REVISION NO. 2 OF 2022

(Application for Execution No. 12 of 2020 Arusha Resident Magistrate Court, Originating from Civil Case No. 12 of 2020 Arusha Resident Magistrate Court)

MONICA JOHN AKONAAY..... APPLICANT

VERSUS

ELIAKIM NG'EREU OLE WAVII.....RESPONDENT

RULING

16.06.2022 & 27.06.2022

N.R. MWASEBA, J.

Before me are the records of Application for Execution No. 12 of 2020 from the Resident Magistrate's Court of Arusha brought by the applicant under certificate of most extreme urgency in order for this Court to consider whether or not it can exercise its revisional powers.

The application was brought under Section 79 (1) (a) (b), (c) and 3 of the Civil Procedure Code, Cap 33 R.E 2019. It was supported by an affidavit sworn by the applicant herself.

Brief facts giving rise to the application can be summarized as follows:

The applicant was the defendant in Civil Case No. 12 of 2020 where the

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respondent claimed against her the total amount of Tshs. 73,236,000/= being the amount deposited to the applicant's account for purchase of sunflower seed cake and sorghum upon their agreement, the agreement which was never met by the applicant. After a full trial the applicant was ordered to pay the respondent Tshs. 50,236,000/= being the outstanding balance, general damages of Tshs. 5,000,000/= interest at the rate of 25 % from the date of default to the date of judgment and 7 % from the date of filling the suit to the date of full payment.

The records reveal further that due to the applicant's action of not honouring the order given by the court, the respondent decided to file an application for execution No. 12 of 2020 where the respondent prayed for the applicant to be arrested and detained as a civil prisoner and his application was granted on 30.05.2022. Thus, being aggrieved the applicant preferred the present application.

At the hearing of the application which was done orally the applicant was represented by Mr. Richard Manyota, learned advocate and the respondent had the services of Mr. Ngoseki learned advocate.

In his submission Mr. Manyota learned counsel prayed to adopt their affidavit supporting the application to be part of his submission. He added

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that the applicant has been detained illegally since 30.05.2022 up to date due to the following reasons:

- i. That there was no notice to show cause as to why the judgment debtor should not be arrested and detained in execution of the decree.
- ii. There was no proof from the decree holder that was satisfactory to the court that the judgment debtor who is the applicant is not suffering from poverty or any other sufficient cause, and that she is able to pay the decretal sum.
- iii. Is that the arrest and detention as a Civil prisoner is a last resort in execution of decree after the proof that other procedures have proved futile.

It was his further submission that the order was given with ill motive since the other procedures were not considered at all. He cited the case of **Joseph Nestory Isaka Vs Flanconia Investment Ltd**, Execution No. 4 of 2020 (Unreported) and **The Grand Alliance Limited Vs Mr. Wilfred Lucas Tarimo**, Civil Revision No. 187/16 of 2019 (CAT-Unreported). He submitted further that, the court failed to adhered to **Section 42 (a) and (b) of the CPC** which stipulates conditions to be followed before detaining a person as a civil prisoner. He avers that the

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respondent/decreed holder's application lacks his affidavit to show that he failed to get any property of the applicant in order to be sold to realise a debt as it was held at page 4 of **Joseph Nestory's case** (supra).

He added that apart from the raised illegality, there is a pending application for extension of time in order for the respondent to challenge Civil case no. 12 of 2020 which is Misc. Civil Application No. 113 of 2021 which is pending before this court since 21.12.2021. He alleged that the failure of the decreed holder to identify the properties of the applicant as alleged in their counter affidavit cannot allow the applicant to be detained as civil prisoner without following the proper procedures. More to that as the applicant is a mother with a family and business depended on her, he prays for her released from custody as she has already been there for a month now.

Objecting the application, Mr. Ngoseki prayed to adopt their counter affidavit to form part of his submission. He told the court that, **Section 79 (1) (a), (b) and (c) of the CPC** provides three circumstances within which the court can exercise its revisional power. **First**, where the court has failed to exercised its jurisdiction, **second**, where the court exercise the jurisdiction not vested in it by law and **third**, that in the exercise of its jurisdiction it acted illegally. The applicant failed to prove any of the

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raised circumstances that was infringed by the trial court. He supported his arguments by citing the case of **Blass Michael Vs Said Seleman**, (TLR) 2000 at page 206 and **Matemba Vs Yamulinga** (1968) E.A at page 642.

He further told the court that at the trial court the applicant was given a notice to show cause why execution should not proceed as per **Rule XXI Rule 20 (1) of the CPC**. More so a detain and arrest is one of the modes of execution not a last resort as alleged by the counsel for the applicant as per Order **XXI Rule 28 of the CPC**. He added that the respondent is not aware of Misc. Civil Application No. 113 of 2021 and even if he was aware the same is not a bar to application as the applicant was supposed to file an application for stay of execution as per **Order XXXIX Rule 5 (1) of the CPC**. Moreover, the application for execution was filed on 9.11.2021 while their application for extension of time was filed on 21.12.2021.

The allegation that the applicant was able to pay the debt is just an afterthought since she did not pay the respondent within the time. He distinguished the cited cases of **Joseph Nestory Isaka** (supra) and **The Grand Alliance** (supra) since in those cases the property of the judgment debtor was attached. More so, on the arrested day the applicant herein



was given an option to pay the respondent but she alleged that her business was not good thus, the allegation that she was not given an option to pay before being detained is just an afterthought. In the end, he prayed for the revision to be dismissed with costs for failure to meet the required standard stipulated under **Section 79 (1) (a), (b), (c) of the CPC.**

In his brief rejoinder the counsel for the applicant reiterated what was already submitted in his submission in chief. He added that the cited cases of the respondent need to be disregarded since no hard copies were submitted before the court. Moreover, no notice to show cause was issued to the applicant and that the application for stay of execution as suggested by the counsel for respondent has already been overtaken by event since the applicant is already in prison. He further says the respondent is aware of Misc. Civil Application No. 113 of 2021 which is pending before this hon court.

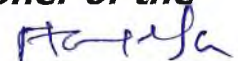
Having gone through the submissions made by both parties and going through the entire record the issue is whether this application has merit. This court will now determine the merit of the application based on the grounds raised by the applicant in his affidavit as follows:



1. *That, the trial court erred in law and in fact when entertaining an application for execution to detain the applicant as a civil prisoner while there was no any proof that other mode of execution has proved failure hence a bad decision was pronounced.*
2. *That, the trial court erred in law and in fact when ordered the applicant be detained as civil prisoner while there were no sufficient proofs by the respondent that he is financially stable to maintain the applicant throughout the time when she is in jail.*
3. *That, the trial court erred in law and in fact for allowing the applicant to be detained as a civil prisoner while there is a pending suit before the high court determining the rights of the parties herein and thus the order made was prematurely procured.*

Starting with the first ground, Mr Manyota complained that other modes of execution were not exhausted prior to detain the applicant as a civil prisoner. In response Mr Ngoseki submitted that there is no rule that other modes of execution come first before the other that's why the respondent opted the mode of detain and arrest. I agree with Mr Ngoseki due to the position of law under **Order XXI Rule 28 of the CPC** which provides that:

*"Every decree for the payment of money, including a decree for the payment of money as the alternative to some other relief, may be executed by **the detention as a civil prisoner of the***



judgment debtor or by the attachment and sale of his property, or by both." (Emphasis is mine)

Being guided by the cited authority it goes without saying that the decree holder may opt either to arrest the judgment debtor as a civil prisoner or to attach his property and sale the same. So, there is no requirement that in the decree of payment of money other modes of execution are supposed to be exhausted first prior to the arrest of the applicant as a civil prisoner.

On the second ground the applicant complains that there was no proof that the respondent will be able to maintain the applicant throughout the time she will be in jail. Although the respondent's counsel did not respond regarding this issue, this court did revisit the records of the trial court and noted that on 30.05.2022 the respondent's counsel submitted estimated costs from the prison and committed himself that he will be able to maintain her for two months in prison. The court ordered the decree holder to pay just a month subsistence allowance. The amount of Tshs. 600,000/= was paid on the same day before the applicant being taken to prison. Thus, this ground has no merit as well.

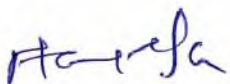
On the last ground, Mr. Manyota complained that since there is a pending application before this court (Misc. Civil Application No. 113 of 2021)

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where the applicant beseeches the court to extend the time so that she may file her appeal against the decision given in Civil case No. 12 of 2020, the execution application was prematurely filed. His argument was strongly objected by Mr. Ngoseki who submitted that apart from not being aware with the said application, the same cannot bar the execution application unless the applicant filed a stay of execution.

It is a trite law that an appeal or application shall not operate as a stay of execution of the decree. The same is provided for under **Order XXXIX Rule 5 (1) of the CPC** 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."

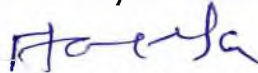
In our present case no application for stay of execution was preferred by the applicant, thus, I concur with the counsel for the respondent that the only act of filing Misc. Application No. 113 of 2021 cannot by itself stay the execution. Therefore, this ground lacks merit too. 

Based on the foregoing reasons, this court is satisfied that the trial court exercised its jurisdiction fairly when it arrested and detained the applicant as a civil prisoner.

In the circumstances, the decision made by the trial court in Execution No. 12 of 2022 is hereby left undisturbed. Accordingly, this application is dismissed with costs for want of merit.

It is so ordered.

DATED at **ARUSHA** this 27th day of June 2022.



N.R. MWASEBA



JUDGE

27.06.2022