

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(LABOUR DIVISION)

AT MBEYA

MISC. LABOUR EXECUTION NO. 26 OF 2021

(From Labour Revision No. 03 of 2021 in the High Court of Tanzania at Mbeya.)

ZHANG ZAIGUO.....DECREE HOLDER

VERSUS

EPOCH MINING (T) LTD.....DECREE DEBTOR

RULING

Date of Hearing: 20/05/2022

Date of Ruling : 17/06/2022

**MONGELLA, J.**

The applicant is seeking to execute a decree of this Court rendered in Labour Revision No. 03 of 2021. He is seeking to execute a sum of USD 600,000 against the respondent through arrest and detention as civil prisoners the directors of the respondent company until full realization of the amount awarded in the decree. The application is brought under **Rule 48 (3) of the Labour Court Rules, 2007 and Order XXI Rule 9, 10 (2) and 35 (1) of the Civil Procedure Code, Cap 33 R.E. 2019**. The application was argued orally after the respondent filed an affidavit to show cause on why its directors should not be arrested and detained as civil prisoners.



Mr. Emily Mwamboneke, learned advocate, represented the applicant. In his brief submission, he informed the Court that the application at hand has been preferred following failure of normal procedures. Explaining further, he contended that there was an attempt to execute the court decree by attaching properties of the judgment debtor, but the properties were found not to be in the hands of the judgment debtor. He added that up to the date of hearing of the application in the name of the judgment debtor. He said that even execution through garnishee order failed as the bank account is in another name. In the premises, he said that the applicant is left with no other means than to pray for the Court to issue an arrest warrant. He prayed for the application to be granted.

The respondent was represented by Mr. Isaya Mwanry, learned advocate. He had several grounds to counter the applicant's application. First, referring to paragraph 7 of the applicant's affidavit to show cause, which he adopted as part of the submission, he contended that the applicant/decreed holder has already served them with an application, that is, Misc. Labour Application No. 8 of 2022, which is pending before Hon. Ebrahim, J., in which he prays to execute the same decree. He was of the view that the said application renders this Court with two parallel pending applications for executing the same decree, which is aimed at confusing the Court by the applicant. He added that the application before Hon. Ebrahim, J. is for lifting of corporate veil as well as to arrest and detain.



Referring to the application at hand, he said that the same is for arrest and detention only and not for lifting corporate veil, but the decree is against Epoch Mining (T) Ltd. as a corporate organisation. In the premises he was of the view that this Court cannot go straight to arrest and detain without lifting the corporate veil. He argued further that for the court to lift corporate veil, there has to be reasons which have to be proved in evidence. He challenged the reason advanced by the applicant's counsel to the effect that other modes of execution have been attempted and failed on the ground that this Court has not been told as to when and where the same was done and which executing officer gave which orders. He added that the properties have not been described by the applicant's counsel.

Mr. Mwanry argued further that arrest and detention is a last resort after all other attempts have failed and in the case at hand there is no proof of any previous attempts showing clearly that the decree holder has jumped to this stage without involving other means first.

He added another ground, which is also presented under paragraph 5 of the affidavit to show cause, saying that the decree debtor has filed an appeal in the Court of Appeal and the same has reached the stage of written submissions meaning that the parties are waiting for the Court of Appeal Session for hearing. He was of the stance that if the applicant's application is granted, in the circumstances, the matter filed in the Court of Appeal shall be rendered nugatory.



On the grounds advanced, Mr. Mwanry prayed for the application not to be granted.

In rejoinder, Mr. Mwamboneke first addressed the contention that no efforts engaged have been made. He contended that the efforts were made during execution of the CMA award in the High Court in Dar es Salaam more than once, but proved futile. With respect to corporate veil, he argued that the application pending in this Court, that is, the application at hand, and the one pending before Ebrahim, J. are two different applications. He said that the application before Ebrahim, J. is only for lifting of corporate veil.

He as well challenged Mr. Mwanry's submission that there is a pending appeal in the Court of Appeal. Referring to **Order XXXIX Rule 5 (1) of the Civil Procedure Code, Cap 33 R.E. 2019**, he argued that it is the position of the law that an appeal cannot operate as stay of proceedings or bar to execution unless a party has applied and obtained orders for stay of execution. In support of his argument he referred the case of **CRDB Bank PLC vs. Finn W. Peterson**, Civil Application No. 367/17 of 2017; and that of **Tanzania Bureau of Standards vs. Anitha Kavera Maro**, Civil Application No. 54 of 2017. He added that the notice of appeal to the Court of Appeal has not yet been served to the decree holder.

I have given the arguments by the learned counsels due consideration. As stated earlier, the applicant is seeking to execute a decree of this Court through arrest and detention of the respondent's directors. As much as the decree holder has an option to choose the mode in which to execute

the decree, the right to commit the judgement-debtor as a civil prisoner is coupled with conditions. The executing court has to satisfy itself that the conditions enshrined under the law have been met before issuing the orders. These are provided under **Order XXI Rule 39 (2) of the Civil Procedure Code**, which states:

*"Before making an order under sub rule (1) the court may take into consideration any allegation of the decree holder touching any of the following matters, namely:-*

- (a) A decree being for a sum for which the judgement-debtor was bound in any fiduciary capacity to account;*
- (b) The transfer, concealment or removal by the judgment-debtor of any part of his property after the date of the institution of the suit in which the decree was passed, or **the commission by him after that date of any other act of bad faith in relation to his property, with the object or effect of obstructing or delaying the decree-holder in the execution of the decree;***
- (c) Any due preference given by the judgement-debtor to any of his other creditors;*
- (d) Refusal or neglect on the part of the judgment-debtor to pay the amount of the decree or some part thereof when he has, or since the date of the decree has had, the means of paying it;*
- (e) The likelihood of the judgment-debtor absconding or leaving the jurisdiction of the court with the object or effect of obstructing or delaying the decree-holder in the execution of the decree."*  
[Emphasis added].



The object of this mode of execution is to ensure that the decree holder realises the money decreed in his favour, especially where the judgment debtor acts in dishonest manner with aim of depriving the decree holder from realising the money decreed in his favour. This was held by the Court of Appeal in the case of **The Grand Alliance Limited vs. Mr. Wilfred Lucas Tarimo & 4 Others**, Civil Application No. 187/16 of 2019 (CAT at DSM, reported at Tanzlii), in which while quoting **Mulla on the Code of Civil Procedure**, 16<sup>th</sup> Edition, Vol. 1 by Solil Paul and Anupam Srivastava, Butterworths reprint of 2002, at page 724 stated:

*"The object of detaining a judgment debtor in a civil prison is not to punish him for any crime but for enabling the decree holder to realise the moneys decreed in his favour, and for the purpose of achieving this alone ... It is some contumacious conduct on the part of the judgment debtor and not mere inability to pay, which renders him liable to be arrested."*

Mr. Mwamboneke argued that the efforts to have the decree executed have proved failure because the judgment-debtor appears to have no property of his own including the bank accounts. He said that even execution through garnishee order failed as the account sought to be attached was not in the judgment-debtor's name. In the premises he was of the stance that the only means left was to arrest and detain the directors of the judgment-debtor.

In consideration of the authorities I have referred to above, a judgment-debtor can only be arrested and detained, among other factors, where it is proved that he is acting in bad faith to deprive the decree-holder his



right to execute the decree in his favour. Like argued by Mr. Mwanry, to which I subscribe, Mr. Mwamboneke in his application and submission, never gave any details on how the applicant tried to enforce the decree, but failed due to the actions of the judgement-debtor. He mentioned nothing regarding the actions of the judgment-debtor, which could be termed or ascertained as acts of bad faith.

Further, it should be taken into consideration that the judgement-debtor is a limited company. In the premises, since the applicant is seeking to have the directors arrested and detained until satisfaction of the decree, the applicant ought to have explained the actions, in bad faith, by the directors warranting issuance of arrest and detention order, such as deliberate efforts to conceal the judgement-debtor's properties. I, in fact, find the applicant's presentations insufficient to warrant the issuance of orders of arrest and detention.

Mr. Mwanry in his submission stated that the applicant has filed in this Court Misc. Labour Application No. 8 of 2022 seeking to lift the corporate veil so as to have the directors responsible in executing the decree. This fact was conceded by Mr. Mwamboneke in his rejoinder. Given the situation, I agree with Mwanry that the applicant is abusing the court process for having two applications to execute the same decree. I as well agree that the application at hand cannot be effected until the corporate veil is lifted by the court. In the premises, the application at hand is also rendered premature, if at all it is necessary that arrest and detention has to be invoked.



The law further requires that invoking arrest and detention as a mode of executing a court decree should be done as a last resort upon concrete proof of failure of other modes. I am in tandem with the holding of my learned brother, Mahimbali, J. in the case of **Simon Mwita Mlagani & Another vs. Kiribo Limited**, Execution Case No. 56 of 2020 (HC at Musoma, reported at Tanzlii) in which he ruled that:

*"... In law, there are various legal means provided for one to enforce courts' award. Nevertheless, resorting to the arrest and detention mode is not the party's choice but, as a matter of legal practice, it is a legal means of last resort. And before invoking that mode, there must be clear attempts done by the decree-holder in enforcing the said award by other means legally provided but in vain. For one to resort to the last mode of enforcement ... there must be proof by affidavit of the relationship between the said director/partner or shareholder and the legal entity; that the decretal sum has not been fully settled; and that there are efforts to conceal the properties of the said company as alleged."*

See also: **Yusufu Manji vs. Edward Masanja and Abdalah Juma**, Civil Appeal No. 789 of 2002 (CAT at DSM, unreported). In the matter at hand, as I have found earlier, the applicant has not proved the efforts made in executing the decree through other modes in vain and has not proved how the directors he seeks to be arrested and detained have concealed the properties of the judgement-debtor. Besides, since he is also seeking for corporate veil to be lifted through Misc. Labour Application No. 8 of 2022, he still has not exhausted the other means, such as going after the director's properties after having the corporate veil lifted.





Having observed as hereinabove, I find the application devoid of merit and dismiss it accordingly. In consideration of the matter being a labour matter, I make no orders as to costs.

Dated at Mbeya on this 17<sup>th</sup> day of June 2022.

  
**L. M. MONGELLA**  
**JUDGE**

**Court:** Ruling delivered in Mbeya in Chambers on this 17<sup>th</sup> day of June 2022 in the presence of Emily Mwamboneke, learned advocate for the decree holder.



  
**L. M. MONGELLA**  
**JUDGE**