

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL REVISION NO. 1 OF 2022

(C/F Civil Case No. 42 of 2018)

SIMON JOHN NGALESONI APPLICANT

VERSUS

FATHER VELEMIR TOMIC (Suing as Legal Representative

of the Registered Trustee of

Catholic Archdiocese of Arusha) RESPONDENT

RULING

06.06.2022 & 12.07.2022

N.R. MWASEBA, J.

Simon John Ngalesoni, the applicant herein has preferred this application against the respondent, Father Velemir Tomic (Suing as Legal Representative of the Registered Trustee of Catholic Archdiocese of Arusha), challenging an order of the Resident Magistrate's Court in respect of Civil Case No. 42 of 2018 to arrest and detain the applicant as a Civil Prisoner.

The background story reveals that; the respondent herein sued the applicant at the Resident Magistrate's Court of Arusha claiming for Tshs. 108,258,473/= as a liquidated damage following an accident occurred on 18.06.2016 which was caused by the applicant, leaving the respondent with some permanent disabilities and his car was also damaged. The matter was determined ex parte against the applicant as he never entered appearance before the trial court as he was nowhere to be found so the respondent served him by publication. After an ex parte hearing the court decided in favour of the respondent herein and ordered the applicant to pay him Tshs. 108,258,473/= as a liquidated damage and 10% percent decretal sum from the day of judgment till the payment in full.

Following the non-payment of the said costs, in 2018 the respondent filed an application for execution of decree against the applicant and prayed for him to be arrested and detained as a civil prisoner. The application was determined inter parties and at the end of the trial the court ordered the applicant to be arrested and be detained as a civil prisoner due to his disobedience over a notice to show cause as to why he should not be detained as a civil prisoner. Aggrieved by the decision the applicant preferred the present application.

In his affidavit supporting the application, the applicant deponed that he was not able to file a notice to show cause earlier due to the pending of two applications filed by him before the court which is Misc. Application No. 9 of 2020 (extension of time to set aside ex parte order) and Misc. Application No. 13 of 2020 (Application for stay of execution pending the determination of Application No. 9 of 2020). He deponed that the said applications were struck out for being brought under the wrong provisions of the law and he filed another application No. 36 of 2020 aiming at setting aside ex parte judgment and the same was heard and dismissed with costs. He deponed further that during the pendency of the said applications, they were appearing before the court but there was no need for them to show cause as they were waiting for the determination of the said applications. After the dismissal of their applications then his counsel appeared before the court to show cause as to why the applicant herein should not be detained as civil prisoner. He contended that he never disobeyed the order of the court to show cause so he should not be detained as a civil prisoner.

At the hearing of the application Mr Stephen Mushi, learned counsel represented the applicant while Ms Lulu Monyo, learned counsel appeared

for the respondent. The parties prayed to dispose of the application by way of written submission and the court granted their prayer.

Submitting in support of the application, in addition to what has been deponed in their affidavit, Mr Mushi argued that the court ordered the applicant to be arrested and detained as a civil prisoner without taking into account the compulsory conditions set out under **Order XXI Rule 39 (2) of the Civil Procedure Code**, Cap 33 R.E 2019. He buttressed his point by citing the case of **Grand Alliance Limited Vs Mr Wilfred Luca Tarimo and Others**, Civil Application No. 187/16 of 2019 (Unreported) and **Esther Crescence Mashoko Vs Norbert Furaha Lyimo**, (Misc. Land Application No. 90 of 2016) TZHC Land 2249 (23 September 2020) (Tanzlii) where the court insisted for the procedures under **Order XXI Rule 39 (2) of the CPC** to be adhered to prior to the arrest and detention of a person as a civil prisoner.

Mr Mushi submitted further that the respondent did not file any affidavit stating the grounds and the reasons why he wants the applicant to be detained as a civil prisoner instead the court relied on the submission made by the respondent's counsel which is wrong. **The case of Registered Trustees of the Archdiocese of Dar Es Salaam Vs Bunju Chairman Bunju Village Government and 4 Others**, Civil

Appeal No. 47 of 2006 (Unreported) and **the book of Mula on Civil Procedure Code**, 15th Edition at page 447 to 448 were cited to support his argument. Further to that he averred that, the other modes of execution were not exhausted prior to detain the applicant as a civil prisoner the act which is fatal as it was held in the case of **Joseph Nestory Isaka Vs Flanconia Investment Limited**, Execution No. 4 of 2020 (HC- Unreported) that other modes of execution need to be exhausted prior to detain a person as a Civil prisoner.

It was his further submission that nothing was submitted to prove that the applicant had bad faith which warrant him to be arrested and detained as a Civil Prisoner. He referred this court to the case of **Grand Alliance Limited** (supra) in which the Court of Appeal emphasized that before committing the judgment debtor as a civil prisoner the law requires that there must be evidence on bad faith beyond mere inference to pay. A mere allegation that a judgment debtor has failed to pay is not enough. And lastly as it was already submitted herein the applicant was in court corridors during the hearing of an application for execution that's why he was not able to show cause as to why he should not be detained as a civil prisoner. Hence, they prayed for the application to be granted with costs.

Responding to what was submitted by the counsel for the applicant, the respondent's counsel asserted that the 1st, 2nd and 3rd grounds discussed by the applicant in his submission were new to the respondent as they are not featured anywhere in his pleadings hence, they prayed for the same to be expunged from the record as per **Order VIII Rule 2 of the CPC**. As for the remaining three issues, he submitted that there is no condition directing the respondent to exhaust all other modes of execution prior to arrest and detain of the applicant as a civil prisoner, See **Section 42 and Order XXI Rule 28 of the CPC**. The respondent opted this mode due to the fact that the applicant was nowhere to be seen that's why it was hard even to trace his properties and the conditions stipulated under **Order XXI Rule 39 (2) of the CPC** are not absolute but they will depend with the nature of the case. Since the applicant failed to prove that he is extremely poor and provide sufficient cause as to why he should not be detained as per **Order XXI Rule 39 (1) of the CPC**, the trial court was right to commit him as a civil prisoner.

It was his further submission that the act of the applicant to remain silent for two years since 2016 and not to disclose a third party who is an insurer proved that the applicant had bad faith of not wanting to honour his legal obligation. Further to that the applicant alleged that there was material

illegality on the trial court decision but the same is not apparent on the face of the record as it was decided in the case of **Lyamuya Construction Limited Vs Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (Unreported).

Moreover, when the applicant was called to show cause why he should not be arrested and detained as a civil prisoner on 20.05.2020, he showed up with his advocate and served the respondent with their two applications; for extension of time and application for stay of execution. He said that was a total violation of the court orders which compelled him to show cause why he should not be arrested and detained. Further, the court gave the applicant a chance to show cause and he failed to demonstrate sufficient cause as to why he should not be arrested and detained as a civil prisoner. It was the opinion of the respondent's counsel that in case the court finds any technicalities the same has to be cured by the principle of overriding objectives which require the court to deal with cases justly and to have regard to substantive justice without being barred by technicalities. He cited **Article 107A (2) (e) of the Constitutional of the United Republic of Tanzania of 1977** (as mended from time to time) and the case of **Yakob Magoiga Gichere Vs Peninah Yusuph**,

Civil Appeal No. 55 of 2017 (Unreported) to cement his averment and prayed for the revision to be dismissed with costs.

In his brief rejoinder, the counsel for the applicant reiterated what was submitted in chief. He clarified on his point that, the issue of failure to take into account conditions specified under **Order XXI Rule 39 (2) of the CPC** was not featured in their affidavit because it is a pure matter of law and not facts which could turn their affidavit into being defective for containing matters of law. And since this kind of application invite the court to look into incorrectness, illegality and impropriety of the decision of the court then the issue of whether the conditions were complied with are covered. They maintained their prayer for the application to be granted.

Having carefully examined and evaluated the parties' arguments in light of the revision, I will now proceed to determine the merit of the application. In order to do so the issue for determination is whether the trial court followed all the procedures before ordering the applicant to be arrested and detained as a Civil Prisoner.

The procedure to be followed before ordering a judgment debtor to be arrested and detained as a Civil Prisoner was well explained in the case of

Grand Alliance Limited (supra) where the Court of Appeal sitting at Dar es Salaam had this to say:

"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 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."

Being guided by the above case law, it is clear that the executing court prior to ordering the judgment debtor to be arrested and detained as a civil prisoner there are three conditions which must be met.

The first condition 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. The same is provided for under **Order XXI Rule 10 of the CPC, Section 42 (c) of the CPC**. This condition was complied with by the respondent who filed an application at the Resident Magistrate's Court for the applicant to be arrested and detained as a civil prisoner due to his failure to pay the liquidated damages as ordered by the court on 14.02.2019.

The second condition was for the court to issue notice to show cause to the person whom execution is sought. The same is provided for under **Order XXI Rule 35 (1) of the CPC** that:

"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."

In our present application the record shows that on 10th day of November, 2020 the applicant was given a notice to show cause why warrant of arrest should not be issued against him. However, he defaulted the notice to show cause that's why the court ordered the judgment debtor to be

arrested and detained as civil prisoner. So, this condition was complied with by the trial court as well.

As for the last condition where the decree holder is required to pay into account such sum as an executing Judge/Magistrate think sufficient for the substance of the judgment debtor from the time of his arrest until he can be brought before the court to show cause. 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. This is well provided under **Order XXI Rule 38 (1) of the CPC** and the case of **Juma Raphael Kasera Vs Katibu Dayosisi ya Mara**, Labour Execution No. 11 of 2020 (HC- Musoma) (Reported at Tanzlii).

The said procedures were also followed by the court where by after the Order of arrest and detention has been issued on 01.03.2022 the court gave an order for the judgment debtor to appear before the court to show cause as to why he should not be detained as civil prisoner. Thereafter on

16.03.2022 when both parties were present before the court, they were given a chance to be heard. The counsel for the judgment debtor prayed for the stay of execution pending determination of Civil Revision No 1 of 2022 (the application herein). Although the decree holder's counsel objected to the prayer the court allowed the stay of execution and ordered the decree holder to proceed with the payment of substance allowance so that the order may be effected immediately after the High Court gives its decision.

Thus, for the said reasons this court is of the considered view that all the procedures were followed by the trial court as required by the law. Further to that the act of the judgment debtor to remain silence for two years while he is nowhere to be found even during the main trial proved that he was having no intention to pay the decree holder which constitutes bad faith on his side.

For the foregone reasons, this court is satisfied that the trial court did follow all the procedures required by the law before and after the order of arrested and detention of a person as a civil prisoner has been made.

Therefore, I find no merit in this application and the same is hereby dismissed with no order as to costs.

It is so ordered.

DATED at **ARUSHA** this 12th day of July, 2022.



N.R. Mwaseba

N.R. MWASEBA

JUDGE

12.07.2022