

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF DAR ES SALAAM**

AT DAR ES SALAAM

CIVIL REVISION NO. 10 OF 2022

SHAKILA YUSUPH HAMER APPLICANT

VERSUS

MOHAMED RAZA RESPONDENT

***(Arising from the proceedings of the Resident Magistrate's Court of
Dar es Salaam at Kisutu in Civil Application No. 98 of 2018)***

RULING

22nd August & 2nd September, 2022

KISANYA, J.:

This is an application for revision of the proceedings and orders of the Resident Magistrate's Court of Dar es Salaam at Kisutu in Misc. Civil Application No. 98 of 2018 which was instituted by the Court, *suo mottu*, based on a letter addressed to this Court by Mr. Peter Kibatala, learned advocate for the above named applicant.

The background facts leading to this matter can be stated as follows; the applicant and respondent are biological parents of one MN (name withheld to disguise his identity). At the Resident Magistrate's Court of Arusha (henceforth "the trial court"), the respondent successfully petitioned against the applicant for an order of separation. Further to this, MN was

placed under the custody of the respondent. The trial court further ordered that both parties have the rights and access to visit and see the child.

In the course of executing the decree, the respondent moved the trial court to transfer the execution in Dar es Salaam where MN lives with the applicant. Upon granting the said prayer, the trial court issued a certificate for non-satisfaction of decree and an order sending decree for execution to the Resident Magistrate's Court of Dar es Salaam at Kisutu (henceforth "the executing court") for execution.

In the result, the executing court instituted Misc. Civil Application No. 98 of 2018. When served with the summons to show cause, the applicant through the legal services of Counsel Peter Kibatata raised the following four issues: *One*, the application for execution was time barred. *Two*, the date stated in the decree and transfer order were at variance. *Three*, the decree was made *ex-parte* and the applicant was not informed of the date of *ex-parte* judgment. *Four*, there was uncertainty of the age of the child.

In its ruling dated 15th March, 2019, the executing court found the above stated issues not meritorious. It went on to order the execution to proceed. The applicant was then directed to hand over the child (MN) to the respondent, under supervision of the social welfare officer.

It turned out that the executing order was not complied with by the applicant. As a result, when the matter was called on for orders on 18th February, 2022, the executing court ordered that the applicant “be arrested and made to appear” before it to show cause. Following that order, Counsel Peter Kibatala wrote a complaint letter to this Court. The Judge In-charge found it just to institute the instant application for revision. Both parties were summoned and asked to address the Court on whether the order and/or decision of the trial court are tainted with illegality, impropriety or otherwise.

At the hearing, the applicant was represented by Mr. Omari Msemo, learned advocate, whereas Mr. Stephens Madulu, learned counsel represented the respondent.

When invited to submit in support of the application, Mr. Msemo opted to address the Court on one issue namely, whether the executing court exercised its jurisdiction properly to issue a warrant of arresting the applicant. He argued that it was not proper for the executing court to issue the warrant of arrest. His argument was based on the contention that it was not proved that the applicant and/or her advocate were served with summons to appear before issuance of the arrest warrant.

Mr. Msemo went on submitting that an order of arresting the decree debtor is one of the penal sanctions. He was of the further view that, much

as the order curtails the rights of an individual, it cannot be granted without complying with the law. To cement his argument, the learned counsel cited the case of **Yusuph Shaban Luganga vs Happiness John and 3 Others**, Civil Application No. 304/14 of 2022. He therefore, urged this Court to revise the order of the executing court on the account that the arrest warrant was issued without proof of service to the applicant.

In reply, Mr. Madulu submitted that the applicant was duly served. He further contended that the sentencing court was inclined to issue the arrest warrant because the applicant failed to comply with its orders. It was also his contention that the applicant was served through the social welfare officer. In that regard, Mr. Madulu moved the Court to dismiss the application with costs. He was of the view that the warrant of arrest was issued according to the law.

When Mr. Msemu rose to rejoin, he reiterated his submission in chief that there was no proof that the applicant was served. With regard to the issue of costs, he submitted that costs are not awarded in matrimonial proceedings.

I have considered the submissions by the learned counsel for the parties. The issue which this Court is called on to determine is whether the warrant for the applicant's arrest was properly issued by the executing court.

At the very outset, I agree with Mr. Msemo that the warrant of arrest can only be issued if the person to whom it is issued has been served with summons to appear before the court. This requirement is provided for under section 27 (a) of the Civil Procedure, Cap. 33, R.E. 2019.

The crux of the matter is whether the applicant was served by the executing court. Since Mr. Msemo contends that the applicant was not served, I was inclined to go through the proceedings of the execution court. Having done so, I have detected the following:

One, the applicant was served to appear before the executing court to show cause. As hinted earlier, her Counsel appeared before the executing court to show cause. However, the executing court was not convinced with the grounds or issues fronted by the applicant's counsel when it held as follows: -

"In the final analysis from the observation above in my opinion the judgment debtor fails to show cause and I order execution to proceed the judgment debtor to hand over the child named ... to the Decree Holder."

For smooth implementation of "exchange of hands" for the child from the Judgment Debtor to the Decree Holder the Social Welfare officer shall supervise the process"

Two, the record bears it out that neither the applicant nor the respondent was in attendance when the ruling on the above order was delivered on 15th March, 2019. They also failed to appear when the matter was called on for orders on subsequent dates. It was on 9th July, 2020, when one, Sylvanus Chingota, learned advocate holding brief for Counsel Kibatala appeared for the applicant. He was duly notified of the court's order which required the applicant to hand over the child to the respondent under supervision of social welfare officer who was also in court.

Three, the applicant was also represented when the matter was called on for orders on 3rd August, 2020 and 5th October, 2020. On the latter date, the executing court ordered the applicant to appear in court on 2nd November, 2020.

Four, the applicant was not in attendance on 2nd November, 2020 as ordered by the executing court. Her counsel admitted that the applicant was duly served. He also conceded that he is the one who advised her not to attend. Let what transpired on that date paints the picture:

"Mr. Madulu

For receiving report from SWO but judgment debtor rejected to attend blatantly when social welfare summoned her.

Mr. Alphonse

*Your honour what the Advocate has submitted is not true. **It is true my client received a summons from the social welfare. We advised our client not to attend because we filed an objection.***

Court: *Let the judgment debtor appear in court on the date to be fixed."*

Sgd

SRM

02/11/2020"

(Emphasize supplied)

Five, upon failing or neglecting to comply with the execution order, the respondent moved the executing court to issue the warrant of her arrest. That is when the executing court issued the following order dated on 18th February, 2022:-

"COURT: As rightly submitted and prayed by advocate Madulu, the circumstances of this matter may dictate for the Respondent herself to appear and show cause as to why she does cooperate in the execution process or does not comply to the order of the court decreed. Let the judgment debtor be arrested and made to appear before this court to show cause"

In the light of the foregoing, I find no merit in Mr. Msemo's ground that the applicant she was not served. To the contrary, I am satisfied that

the applicant was duly served to appear before the executing court and that she was duly represented.

Considering further that the applicant did not challenge the execution order or decree subject to execution and that he was duly served to appear voluntarily, I hold the view that the executing court was justified to compel obedience of its orders in order to maintain public trust of the rule of law. I am fortified by the case of **Yusuph Shaban Luganga vs Happiness John and 3 Others** (supra) in which the Court of Appeal held that:-

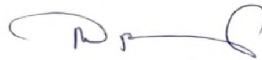
"... courts of law have inherent powers to ensure obedience of their lawful orders. In exercise of such powers therefore, courts of law are mandated, where necessary, to impose penal sanctions to compel obedience of its orders, including, as rightly observed by the trial Judge, court summons. The rationale behind the law is not only to protect the orderly administration of justice from being abused but to maintain public trust of the supremacy of the rule of law as well."

The law is also settled that, a court is duty bound to ensure that its orders are respected. Where a party fails to comply with any of the court's orders or directions, Order VIII, Rule 21 of the CPC empowers the court to make an order that it deemed just. In the circumstances, the executing court was justified to cause attendance of the applicant before it by issuing the

warrant of her arrest to show cause. Upon appearing, the applicant is expected to state the reasons of her failure to comply with the orders of the executing court. In the light of the foregoing, the ground for revision which was fronted by the applicant's counsel lacks merit.

In view thereof, this application is dismissed for want of merit. Given the nature of this matter, I make no order as to costs.

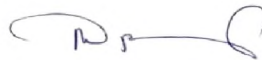
DATED at DAR ES SALAAM this 2nd September, 2022.



S.E. Kisanya
JUDGE

Court: Ruling delivered this 2nd day of September, 2022, in the presence of Mr. Omary Msemo, learned advocate for the applicant and Mr. Stephens Madulu, learned advocate for the respondent.

Right of appeal explained.



S.E. Kisanya
JUDGE
2/09/2022