

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBIA DISTRICT REGISTRY

AT BUKOBIA

MISC. LAND APPLICATION NO. 39 OF 2022

(Arising from Taxation Cause No. 08 of 2022 in the High Court at Bukoba and Originating Misc. Land Case Appeal No. 14 of 2018 in the High Court at Bukoba)

SULEIMAN KALIMBE----- APPLICANT

VERSUS

CHARLES ANTONY-----RESPONDENT

RULING

Date of Last Order: 12/09/2022

Date of Judgment: 30/09/2022

A. E. Mwipopo, J.

The applicant namely Selemani Kalimbe successfully filed Taxation Civil Cause No. 08 of 2020 in the High Court at Bukoba against the respondent namely Charles Antony. The taxation cause filed was to recover cost of suit after the Misc. Land Appeal No. 14 of 2018 in the High Court at Bukoba which was filed by the respondent was dismissed for want of merits with cost. The Taxing Master on 05.05.2021 awarded Tshs. 2,642,000/= to the applicant. The respondent did not appeal or refer the matter for reference against the decision. On 18.08.2021 the applicant proceeded with execution of the award by attaching the house of the

respondent located at Kishenye Bisore Village, Muhutwe Muleba District following the failure of the respondent to pay for the award and the Court appointed Court Broker namely Maje Maje Auction Mart to execute the order. The respondent's wife namely Odilia Mukarugasha filed Misc. Land Application No. 96 of 2021 in the High Court at Bukoba objecting the attachment of the matrimonial house and land on ground that the her survival and survival of family depends on it. The High Court on 18.10.2021 released the attached house and farm at Kishenye Hamlet, Bisore Village, Muhutwe Ward and Muleba District as the properties are matrimonial assets and advised the applicant to identify and attach properties of the respondent in order to recover the taxed amount. The applicant decided to file the present application to commit the respondent as a civil prisoner.

The application is made under Order XXI Rule 35 (1) and (2) and section 95 of the Civil Procedure Code Act, Cap. 33 R.E. 2019. The said application was made by Chamber Summons supported by Affidavit of Mr. Aaron Kabunga, advocate for the applicant. In the chamber summons, the applicant was praying for the following orders:-

- 1. That, the Hon. Court be pleased to issue Notice to the judgment debtor to show cause for payment of the sum of Tshs. 2,642,000/= or why an order to commit the respondent as a civil prisoner should not be issued.*

- 2. That, the Hon. Court be pleased to issue an order committing the judgment debtor as civil prisoner for default to pay the decretal sum of Tshs. 2,642,000/=.*
- 3. That, Hon. Court be pleased to issue other necessary orders as shall be deemed fit and proper for interest of justice.*
- 4. Cost of the application be provided for.*

The respondent opposed the application through his Counter Affidavit. The respondent admitted in the Counter Affidavit to be indebted the decretal amount by the applicant and stated that he is protected by the law due to his inability from poverty. He said that he has not neglected to settle the taxed amount nor he transferred, concealed or removed any part of his property and there is no likelihood to abscond or leave the Court's jurisdiction. That he is willing to pay but he fails due to inability from poverty.

Mr. Frank Karoli, advocate who represented the applicant, submitted that after the Land Appeal No. 14 of 2018 was dismissed by this Court with cost, the respondent filed application for cost in Taxation Cause No. 8 of 2020 where the Tax Master awarded payment of Tshs. 2,642,000/= to the applicant. While process for execution were in progress, somebody by the name of Odira Mugarubasha objected the execution on claims that she is the wife of the respondent. The said application was allowed and the attached properties were released. The respondent was given a long time to pay for the debt but he has not paid intentionally. The applicant has failed to get other properties of the respondent to

attach. The applicant has right to enjoy the order of this court and to be paid the amount awarded. The counsel prayed for the respondent be commit to the prison as Civil Prisoner for failure to pay the debt and the applicant is ready to pay for the cost for keeping the respondent as Civil Prisoner.

In his reply, the respondent agreed that the applicant owe Tshs. 2,642,000/= as the cost of the suit awarded to him by this court. He said that it is not true that he rejected to pay his debt. He failed to pay the debt because his economic situation is not good and he still intend to pay. He said he have no objection to the respondent prayer to take him as Civil Prisoner. He pray for the court to protect him as he is still intending to pay the debt.

After the respondent has rejoined, the Court decided to get explanation from the respondent that if he admit the presence of the debt and he is willing to pay it, he has to tell the Court as to when and how he is going to pay the respective debt. The respondent replied that his economic situation is not good and he could not say how he is going to pay it. That, he is not in position to promise anything on the payment. He don't know as to when he will pay the applicant or on what terms. He added that sending him to jail will affect his health and prejudice his rights.

The Court is aware that arrest and detention in Civil Prison of the Judgment debtor is one of the modes of execution of decree in our jurisdiction. The same is

provided under section 42 and 44 of the Civil Procedure Code Act, Cap. 33 R.E. 2019, and rules 28, 35 to 39 of Order XXI of the same Act. Right for arrest and detaining judgment debtor as civil prisoner, like all other mode of execution, is subject to some conditions and limitations. These conditions includes that the execution Court has to summon the judgment debtor to show cause in accordance with rule 35 (1) Order XX1 of the Civil Procedure Code Act and to see if there is a refusal or neglect on the part of the judgment debtor to pay the amount of the decree or some part thereof when he has the means of paying it. This is according to rule 39 (2) Order XXI of the Civil Procedure Code Act.

The Court of Appeal was of the same position in the case of **Grand Alliance Limited vs. Mr. Wilfred Lucas Tarimo and 4 Others**, Civil Application No. 187/16 of 2019, Court of Appeal of Tanzania at Dar Es Salaam, (unreported), where it held at page 14 of the judgment that:-

"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."

In the present application, there is no dispute at all that the respondent is indebted Tshs. 2,642,000/= by the applicant which was awarded by Taxing Master in Taxation Cause No. 08 of 2020 before this Court. After an attempt to attach respondent house and farm located at Kishenye Hamlet, Bisore Village, Muhutwe Ward within Muleba District in Kagera Region in execution of the decree failed and the said properties were released by this Court in Misc. Land Application No. 96 of 2021 for being matrimonial properties, the applicant has applied for execution of money decree by arrest and detention of the respondent in the civil prison. The application for execution was filed as required by the law and a notice to show cause was issued to the respondent. The respondent filed Counter Affidavit and he addressed the Court as to why he should not be detained in prison as civil prisoner. The respondent said that he has an interest to pay the debt, but he is not able to pay the same for the reason of poverty. He said that he has no property which he is concealing and that he has not transferred any property to anybody.

The Court asked the respondent that if he is willing to pay the debt, how and when he is going to pay the respective debt. The respondent answer was that

his economic situation is not good and he could not say how, when or on what terms he is going to pay the debt. That, he is not in position to promise anything on the payment. He added that sending him to jail will affect his health and prejudice his rights.

Under section Rule 39 (1) Order XX1 of the Civil Procedure Code Act, poverty is a good ground for disallowing an application for arrest and detention in Civil Prison. The said Rule provides as follows:-

"39.-(1) Where a judgment debtor appears before the court in obedience to a notice issued under rule 35, or is brought before the court after being arrested in execution of a decree for the payment of money and it appears to the court that the judgment debtor is unable from poverty or other sufficient cause to pay the amount of the decree or, if that amount is payable by installment, the amount of any installment thereof, the court may, upon such terms (if any) as it thinks fit, make an order disallowing the application for his arrest and detention, or directing his release, as the case may be."

From above cited law, the Court will disallow the application where it appear to the Court that the judgment debtor is not able to pay the amount of decree because of poverty. The interpretation of the above cited rule is that the judgment debtor has to satisfy the Court that he was unable to pay the debt because of poverty. The judgment debtor has to prove that he is unable to pay the debt for the reason of poverty.

This Court was of the same opinion in the case of **EURAFRICAN Bank (Tanzania) Limited vs. ST. Tina and Company Limited**, Commercial Case No. 80 of 2006, High Court Commercial Division at Dar Es Salaam, (unreported) at page 4 it held that:-

"While poverty is a good ground for disallowing an application for arrest and detention in Civil Prison (see Rule 39 (1) of Order XXI of the CPC), it has to be proved. In terms of Section 44(2) of the Civil Procedure Code, a person is deemed to be poor if he has been declared insolvent or bankrupt pursuant to the laws relating to insolvency and bankruptcy."

Back to the present case, despite the position that poverty is good ground for not allowing the application for arrest and detention of judgment debtor in civil prison according to the law, the respondent has failed to prove it. It is just a mere claim deposed in the respondent's counter affidavit and in his submission without any other evidence to substantiate it. The Civil Procedure Code Act provides under Section 44(2) that a person is deemed to be poor if he has been declared insolvent or bankrupt pursuant to the laws relating to insolvency and bankruptcy. There is no such evidence from the respondent in this case. It is principle of law envisaged in section 110 (1), (2) and 111 of the Evidence Act, Cap. 06 R.E. 2022 that whoever desires the court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

On the respondent's claims that allowing the application will affect his health and prejudice his rights, it is correct that the mode chosen by the applicant seeks to deprive the respondent (judgment debtor) of his freedom. The Court admits that the outcome of granting the application would be depriving respondent his freedom, but this mode of execution is provided by our law especially when it is the only means available for the applicant to make the judgment debtor to pay the decretal amount. It is lawful for a judgment debtor to be committed to a civil prison upon his failure to pay his debts. The law has provided safeguard to protect a person from being deprived of his freedom unnecessarily or unjustly under Rule 35 (1) Order XX1 of the Civil Procedure Code Act. The same was stated by this Court in the case of **African Banking Corporation Tanzania Limited vs. Mture Educational Publishers Limited**, Commercial Case No. 73 of 2010, High Court Commercial Division at Dar Es Salaam, (unreported). The Court held at page 9 of the ruling that:-

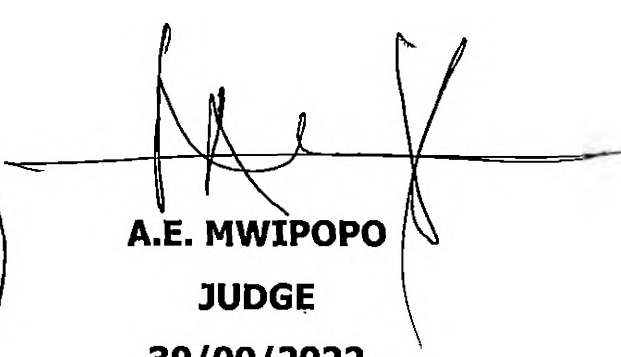
"However, in order to protect a person from being deprived of his freedom unnecessarily or unjustly, as a legal requirement under Order XXI Rule 35 (1) of the CPC, prior to the arrest and detention being effected, the judgment debtor is given audience to appear before the Court and show cause why arrest and detention should not be carried out."

In this case, the applicant has chosen the arrest and detention mode of executing his decree as in order to satisfy Court's decree according to the law. The

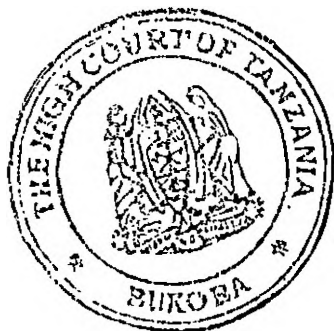
respondent was given audience by the court to show cause why he should not be arrested and detained in civil prison. The decree holder wants to enjoy the fruits of the judgment in his favour. Thus, the application is properly made in accordance with the existing laws.

For the foregoing, the respondent (judgment debtor) have failed to show cause as to why arrest and detention should not be effected against him. It is ordered that, unless shillings 2,642,000/= which is the decretal amount is paid to the applicant within three (3) months from the date of this order, Charles Antony shall be detained in Civil Prison for the period of six (6) months in execution of a decree in Misc. Land Case Appeal No. 14 of 2018 and Taxation Cause No. 08 of 2020. The three months given expire on 30.12.2022. In the event the judgment debtors fails to satisfy the Court decree, the arrest and detention be effective from the 31.12.2022 and the applicant (Decree Holder) shall pay Tshs. 300,000/= (shillings three hundred thousand only) being subsistence allowance per each month the judgment debtor will be in prison. No order as to the cost of this suit. It is so ordered accordingly.




A.E. MWIPOPO
JUDGE
30/09/2022

Court: The ruling was delivered today in the presence of the applicant and the respondent.



A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke at the end.

A.E. MWIPOPO

JUDGE

30/09/2022