

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 569 of 2021

(Originating from Civil Case No. 4 OF 2014)

COSMAS MWAIFWANI.....DECREE HOLDER

Versus

**THE EDITOR OF DIRA YA MTANZANIA
NEWSPAPER..... 1ST RESPONDENT**

**DIRA NEWSPAPER
COMPANY LTD.....2ND RESPONDENT**

Date of Last Order: 29th July, 2022

Date of Ruling: 07th October, 2022

RULING

MGONYA, J.

The Decree Holder, Cosmas Mwaifwani moved this Court seeking to execute the Court Decree in **Civil Case No. 44 of 2014** by way of arrest and detention of Mr. Jimmy Charles (Editor and Manager of Dira ya Mtanzania Newspaper) and Mr. Alex Msama Mwita (Director and Chief Executive Officer of Dira Newspaper Company Limited) as civil prisoners until when the court Decree is fully satisfied by Judgment Debtors. The application has been brought under **Sections 42(c) and Section 44(1)** together with **Rules 28, 35(1), 35(2) and 36 of Order XXI of the Civil Procedure Code, Cap. 33 [R. E.**

2019] herein to be referred as the Code. The same has been supported by an affidavit sworn by the applicant himself; whilst the judgment debtors filed a joint counter affidavit sworn by one Jimmy Charles, principle officer of the 1st Respondent resisting the application.

Hearing of this application proceeded by way of filing written submissions. It was Mohamed Tibanyendera, Advocate who prepared and filed a written submission in support of the application on behalf of the Applicant while the submission in reply was drawn and filed by Mr. Andrew Job Kannonyele, Advocate for the Respondents.

Mr. Tibanyendera submitting on behalf of the Decree Holder/Applicant submitted that, the Application originates from the Settlement Deed entered between the parties herein. The same was filed in court on 9th August, 2019 in respect of **Civil Case No. 44 of 2014**. However, the Respondents / Judgment Debtors never executed any of their obligations as agreed in the Deed of Settlement and the Court Decree since August, 2019 to date. Applicant's counsel further submitted that, there is no hope that the Respondents are willing to honour the Court Decree extracted from the Settlement Deed, since the Respondents have hidden all the movable and immovable assets belonging to them to the extent that there is nothing to attach. It has been further submitted that, due to the Respondents'

conduct, normal execution application could not be enforced by this court, as Respondents filed an execution which later they withdrew it. In advocate's view, there is no way the Applicant can be compelled to execute the decree in the absence of any force. It was his argument that the chosen mode is the only solution to compel the Respondents to show respect to court Decree and Orders. The case of ***FUSUN INVESTMENT CO. LTD VS. FARB ASSOCIATE LTD AND TRIBUNAL BROKERS AND ANOTHER***, Miscellaneous Civil Application No. 271 of 2020, High Court at Dar es Salaam (Unreported), ***EURAFRICAN BANK (TANZANIA) LTD VERSUS TINA AND COMPANY LIMITED, WOLFGANG A. SPENGLER AND MRS. CHRISTINE S. SPENGER, COMMERCIAL CASE NO. 80 OF 2006, HIGH COURT, COMMERCIAL DIVISION, AT DAR ES SALAAM AND RAPHAEL JUMA KASERA VERSUS KATIBU DAYOSISI YA MARA, LABOUR EXECUTION NO. 11 OF 2020*** were referred to support the Application.

In reply Mr. Kannonyele submitted that the Decree Holder has never ever attempted to execute the Decree he was awarded. The allegations that the Respondents have hidden all the movable and immovable assets are unfounded since there is no court order that has ever been issued for execution. He contended further that, no court broker who has been appointed to execute the said Decree by attaching any of the assets of the

Respondents. Mr. Kannonyele went on to state that the Decree Holder at first filed an Application for execution before this court vide Execution No. 01/2020 which without probable cause decided to withdraw for no apparent reasons. In his view, the withdraw of Execution No. 01 /2020 before appointment of court broker who could file an affidavit or report on failure to obtain the Respondents assets for any reason, makes this Application incompetent for being prematurely preferred out of presumptions which have never been proved. Mr. Kannonyele distinguished the case cited by the applicant by submitting that in this case the Respondents were supposed to be summoned to show cause in order to be heard before executing this Application.

I have carefully considered the rival arguments of Parties' counsel. Essentially both counsel agree that mode of execution chosen exist. Their point of departure is, while Mr. Tibanyendera submitted that the Respondents have hidden all their movable and immovable assets to the extent that there is nothing to attach hence arrest and detention is the last resort. Mr. Kannonyele resisted the allegations and through the counter affidavit subjected the Applicant into strictly proof. He contended further that, the act of the applicant to withdraw the **Execution Cause No. 01 of 2020** before the court order and appointment of a court broker, who could file an affidavit to prove that the

execution was not possible due to the deponed reason, this application is incompetent as prematurely filed based on assumed facts.

The right to commit a Judgement Debtor as civil prisoner is provided under **Section 42 to 47** and **rule 28, 35 to 39 of Order XXI of the Code Section 42** of the Code stipulates different modes of Execution; a decree holder can choose for executing his Decree. However, the right to commit a Judgement Debtor as civil prisoner is subject to some conditions and limitations. One of those conditions is, there must be an Application for Execution of 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 to satisfy itself as to whether the conditions mentioned under **Order XXI Rule 39 (2) of the Code**, exist or not. After satisfy itself as to the conditions mentioned by the law, the executing court has discretion to make an order allowing or disallowing the application. For a better discussion to be followed soon, I find it imperious to reproduce the provision of the law as hereunder:

39 (2) 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) the decree being for a sum for which the judgment 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 undue preference given by the judgment 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 is added]

In the Application at hand, the Decree Holder prayed for an order of arrest and detention of the Judgment Debtors on the reason that, they did not pay him as they agreed in a Settlement Deed and they have hidden their movable and immovable assets. On the Respondents' side they did not object that they were supposed to pay the Applicant but they resisted that they have hidden their assets as there was no Execution Application which appointed the Court Broker to execute the order but he failed due to the Respondent's bad faith to hide their properties. I do agree with the Respondents' counsel that, the reason stated by the Applicant is not proved to the standard required in civil cases. In his affidavit apart from stating that the Respondent's have hidden their assets, no clause which he at least mention some of those assets which he knew and now they have been hidden by either transferred or sold. Also, since there was no any court broker appointed to attach the properties which were formerly known by the Applicant and he failed to trace them, it suffices to state that, assertion stands to be mere speculation which a court cannot act upon. The court of appeal when deciding the case of The **GRAND ALLIANCE LIMITED VS. MR. WILFRED LUCAS TARIMO & OTHERS, CIVIL APPLICATION NO.187/16 OF 2019 (Unreported)** after referring to what were articulated by the Supreme Court of India in the case of **JOLLY GEORGE VEGHESSE & ANOTHER V. THE BANK OF**

TANZANIA OF COCHIN AIR 1980 SC 470, on what constitutes bad faith, insisted that, the law requires that there must be evidence on bad faith beyond mere indifference to pay.

Going through the records, at this juncture, I find that there was no evidence establishing bad faith on part of the Respondents to warrant their arrest and detention as civil prisoners.

In the circumstances the Application is devoid of merit and should be dismissed with costs, as I hereby do.

It is so ordered.



A handwritten signature in blue ink, appearing to read "L. E. Mgonya".

L. E. MGONYA

JUDGE

07/10/2022