

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MWANZA

AT MWANZA

MISC. CIVIL APPLICATION NO. 77 OF 2022

(Arising out from Misc. Civil Cause No. 04 of 2021)

RICHARD JOSEPH KWEYAMBA RUGALABAMU..... APPLICANT

VERSUS

CHARLES KAHATANO LWEMPISIRESPONDENT

RULING

1st Sept. & 5th October, 2022

DYANSOBERA, J:

This ruling is on a petition filed by the petitioner against the respondent. According to the chamber summons drawn and filed by Mr. Joseph Masinga, learned Advocate, the applicant is moving this court under Section 124 of the Penal Code [Cap.16 R.E.2019] and Section 95 of the Civil Procedure Code [Cap.33 R.E.2019] for the following orders:-

1. That the respondent one Charles Kahatano Lwempisi be compelled to appear in person in this Honourable court to show cause why he should not be detained as civil prisoner for contempt of this Honourable Court orders dated 20th April, 2022 by Hon. C.M. Tengwa (SRM-EJ) in Misc. Civil Cause No. 4 of 2021
2. That the respondents be ordered to comply to (sic)k this court's orders issued Misc. Civil Cause No. 4 of 2021

3. That costs be provided for
4. Any other relief this Honourable Tribunal (sic) may deem fit and just to grant.

An affidavit sworn by the applicant has been filed in support of the application. The petition has, however, been opposed by the respondent who, apart from filing a counter affidavit, has filed a preliminary objection on the following grounds: -

1. That the application is premature as the Misc. Cause No. 4 of 2021 is before the Court of Appeal for an appeal
2. That the application is misconceived as the Misc. Civil Cause No. 4 of 2021 was not executed before this Honourable Court.
3. That the court is improperly moved.

Before me, the petitioner was represented by Mr. Meswin Joseph Masinga, learned Advocate while the respondent was advocated for by Mr. Abdallah Kessy, learned Counsel.

On 1st September, 2022 when this matter was called on for hearing of the preliminary objection, learned Advocates orally made their submissions in support and in opposition.

Mr. Abdallah Kessy argued that the petition is premature as Misc. Civil Cause No. 4 of 2021 is before the Court of Appeal for an appeal. He

contended that the petitioner has brought this petition which originates from Misc. Civil Cause No. 4 of 2021 whereby there is a notice of appeal and the applicant has been served with it and that there is an application for leave to appeal to the Court of Appeal vide Misc. Civil Application No. 38 of 2022 and that what the petition is doing amounts to an abuse of court process. Reliance was placed on the case of Hector Sequira v. Serengeti Breweries Ltd, Civil Application No. 395/18 of 2019.

Further that the application is misconceived as Mis. Civil Cause No. 4 of 2021 was not executed before this Hon. Court. Counsel draw the attention of this court that section 124 of the Penal Code is on the disobedience of lawful order which is a criminal offence while the case which is sought to be enforced, that is Misc. Civil Cause No. 4 of 2021, is a civil matter. Counsel for the respondent explained that enforcement of civil matters has its procedures set out under the Civil Procedure Code. In his view, this application is misconceived.

Expounding the 3rd point, Counsel for the respondent contended that by citing section 124 of the Penal Code, the court is being properly moved and the petition lacks legal basis.

Responding to the submission by Mr. Kessy Abdallah, Counsel for the petitioner professed that these preliminary objections are not pure

points of law within the meaning ascribed to by the case of Mukisa Biscuits Manufacturing Company Ltd v. West Ends Distributors Ltd [1969] EA 696.

With respect to the argument that the petition has been prematurely filed, Counsel for the petitioner contended that a mere presence of a notice of appeal does not prevent the execution of the decree in view of the clear provisions of O. XXXIX rule 5 (1) of the CPC. He argued that in Misc. Civil Cause No. 4 of 2021 what was contentious was the companies welfare-Lwempisi General Company Ltd in that the business of the company had to proceed and the debts had to be paid. He complained that the respondent is thwarting the execution of the decree and should, therefore, show cause. He refuted the claims that the application is an abuse of court process. He concluded that the cited case of Hector is inapplicable.

This court has power to punish for contempt or disobedience of its orders, to ensure that orders of the court are not easily slighted, and the culprits get away with it. In the case of **Asulwike Kamwela v. Semu Mwanzyunga**: DC HC Civil Appeal No. 13 of 1997 (Unreported), whereby Hon. Mackanja, J. (as he then was) sitting at Mbeya observed:

"It has always been my view that when courts make orders by which their business is to be regulated, parties will be bound to obey them.

For it will be sheer anarchy and courts will be brought into disrepute if parties were allowed to choose which court orders are to be obeyed and which are to be ignored. That will not be allowed to happen."

Likewise, Mapigano J (as he then was) put it in **Tanzania Bundu Safaris Ltd vs Director of Wildlife & Another** [1996] TLR. 246 that:-

"The prime object of contempt proceedings is to vindicate the rule of law, rather than to punish an individual. The punitive jurisdiction of the court to punish for contempt is based upon the fundamental principle that it is for the good of the public and the parties that such orders should not be despised or slighted."

However, according to **HALSBURY'S LAWS OF ENGLAND**, 4th ed. Vol. 9 (1) paragraph 469 at p. 287: -

"The power to order committal for civil contempt is a power to be exercised with great care. The court will only punish disobedience to an order of the court or non-compliance with an undertaking if satisfied that the terms of the order or undertaking are clear and unambiguous, that the Defendant has proper notice of the terms and that a breach of the order or undertaking has been proved beyond reasonable doubt."

It is further noted by the learned authors of **HALSBURY'S LAWS OF ENGLAND** (supra) at p. 312) that: -

"The burden of proof is on the party seeking to establish that contempt has been committed."

This application has also been filed under, among others, Section 124 of the Penal Code which stipulates as hereunder:

"124.

A person who disobeys any order, warrant or command duly made, issued or given by a court, an officer or person acting in any public capacity and duly authorized in that behalf, is guilty of an offence and is liable, unless any other penalty or mode or proceeding is expressly prescribed in respect of that disobedience, to imprisonment for two years."

As rightly submitted by the learned Advocate for the respondent, section 124 deals with commission of a criminal offence. The court clothed with the jurisdiction to enforce it is a criminal court.

The basis of this petition is Misc. Civil Cause No. 4 of 2021 in which it is alleged that the respondent has disobeyed was on an execution order. Clearly, this is a civil wrong and not a criminal offence. The enforcement of an order of the court and the jurisdiction of the forum depends on the

nature of the complained act. In criminal law, it the criminal court empowered to enforce the commission of a criminal offence while in civil law, it is the civil court vested with jurisdiction to enforce the decree or any order. While in the latter case, the Civil: Procedure Code is brought into play, in the former, the Penal Code is the right legislation to be applied. It is, in my view, improper to combine two different legislations in order to enforce a civil wrong. After all this was a civil contempt and the Penal Code is not the right law to deal with civil contempt. In that respect, this petition is misconceived.

I now come to section 95 of the Civil Procedure Code. The position of the law is that section 95 of the CPC cannot be used where there is a specific remedy provided by law. It is a residual jurisdiction which should be used in special circumstances in order to put right that which would otherwise be a clear injustice as such no party has a right to insist on the court's exercising the inherent jurisdiction of the court.

All in all, I find this application misconceived, the court has not been properly moved and the application is incompetent.

I, thus, uphold the preliminary objections raised by the respondent and strike out the application with costs.


W.P. Dyansobera

Judge

5.10.2022

This ruling is delivered at Mwanza under my hand and the seal of this Court on this 5th day of October, 2022 in the presence of Mr. Patrick Suluba, learned Counsel holding brief for Mr. Masinga learned Advocate for the petitioner and learned Advocate Mr. Mwanaupanga holding brief for Mr. Lugaila, learned Counsel for the defendant.




W.P. Dyansobera
Judge