

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**EXECUTION NO. 28 OF 2022**

(Arising from Civil Case No. 36 of 2019)

**RACHEL NANKWARE MGENI** (As the lawful Attorney

of Sangiwa Amani Mgeni) .....**APPLICANT/DECREE HOLDER**

**VERSUS**

**JOSEPHINE JOSEPH MAGELANGA**

**T/A APEX CAR CARE.....RESPONDENT/JUDGMENT DEBTOR**

**RULING**

14/11/2022 & 13/12/2022

**MWASEBA, J.**

Before me is an execution case lodged by the Decree Holder seeking for orders of arrest and detention as a civil prisoner of the respondent, **Ms Josephine Joseph Magelanga**, who was the Judgment Debtor in Civil Case No. 36 of 2019 for neglecting to to return the machines to the decree holder as ordered by the court. The application is brought under Order XXI, Rule 11 of the **Civil Procedure Code**, Cap. 33 (R.E 2019).

*Haraga*

At the hearing of the application, Mr Moses Mahuna and Jeff George Sospeter, both learned Counsels appeared for the decree holder and Judgment Debtor respectively. At the request of parties, the application was disposed of orally.

Supporting the application, Mr Mahuna argued that in Civil Case No. 36 of 2019 the decree holder partly won the case and the court ordered the judgment debtor to return the machines following the proof submitted that she has the machines of the decree holder. The court ordered further that in case of any dispute a new case will be filed to prove the ownership of those machines. He added that they have attached a list of those machines and the dispute of those machines had already been solved at Page 12 of the Judgment. It was his further submission that, if the judgment debtor was dissatisfied with the said judgment, she could have filed an appeal. So, since she failed to give reasons as to why she should not be detained, he prayed for the application to be granted.

Responding to what was submitted, Mr Jeffu, the learned counsel for the judgment Debtor prayed to adopt an affidavit to show cause to form part of his submission. He added that in Civil Case No. 36 of 2019 the appellant partly won the case and the issue of machines was negatively answered. The list of machines submitted by the decree holder was never listed in

*Handwritten signature*

the decree of the court. He submitted further that; the decree holder brought new things which is not allowed in execution cases. In Civil Case No. 36 of 2019 the court allowed him to file a new case to establish ownership of the machines and not to file execution application. His arguments were supported with the cases of **NCL International Ltd vs Alliance Finance Corporation Ltd**, Civil reference No. 6 of 2021 (Reported at Tanzlii) and **Mihayo Maziku Missana (Administrator of the estate of late Maziku Missana) vs Abdallah Mashimba Nzingula**, Land Revision No. 3 of 2021 (HC-Reported at Tanzlii). Due to the forestated reasons, they prayed for the application to be dismissed.

In brief rejoinder, Mr Mahuna stated that all those machines were listed during trial and it was proved that they were bought by the decree holder and the court can call the trial court record to prove it. Since the court already determined the machines are there, the act of denying to return them, the judgment debtor is disobeying the order of the court. He maintained his prayer for the application to be granted.

Having examined closely the submissions made by the learned counsels for both parties, the issue for determination is whether the application has merit.



On his side, the Decree Holder wanted the court to arrest and detained the judgment debtor for her failure to return the listed machines alleged it was the order and decree of the court in Civil Case No. 36 of 2019. On the other hand, the judgment debtor is of the view that the issue of machines was answered in negative and the decree holder was advised to file a new case to prove ownership of the alleged machines.

Having heard the parties, this court revisited the decree issued by the court on 14/09/2021 and noted that the court decreed as hereunder:

1. That, the plaintiff/ defendant's suit partly succeeds to the extent that, **he is entitled to be handed over his available machines, if any**, in the possession of the defendant/plaintiff as said machines were vividly supplied and used to be sold, leased and no stock taking that was conducted. In the event of controversy, there will be a fresh case to establish ownership of such machine (s). (Emphasis is mine).

Going through the quoted paragraph it was clear that the court was not sure if there were any machines left to be returned to the decree holder as it used the words "if any". Further the court ordered that in case of any controversy like the current one they will be supposed to file a new case



to establish ownership of the alleged machines which was never mentioned.

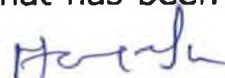
Thus, this court do concur with the counsel for the judgment debtor that to allow this application is like allowing new thing to be submitted during the execution process. More to that what is being executed is a decree and not a judgment itself. As it was held in the Indian case of **V. Ramswami vs T.N.V.Kailash Theyar** reported in AIR 1951 S.C,189 (192), where the court observed that:

*"The duty of an executing Court is to give effect to the terms of the decree. It has no power to go beyond its terms. Though, it has power to interpret the decree, it cannot make a new decree for the parties under the guise of interpretation ".*

The same was held in the case of **Fortunata Edga Kaungua vs George Hassan Kumburu**, Misc. Civil Application No. 71 of 2019 (HC-Reported at Tanzlii) that:

*"It can safely be concluded that the role of the execution court is to finalize the case, that is, to deal with the orders and decrees as decided by the trial court."*

Thus, being persuaded by the cited authorities this court is of the firm view that the duty of this court is to execute what has been decided by



the trial court and not to go beyond what has been decreed for. Since the trial court was not sure if there are machines left for the decree holder to be given, it is safe for the decree holder to go for a second option given by the trial court which is to file a fresh suit to prove the ownership of the alleged mentioned machines. In a new suit to be filed if parties wish so, the court will be in a position to determine whether the listed machines belong to the decree holder and they are under the possession of the judgment debtor. Otherwise, this being an executing court, can not execute something which was not decreed.

For the reasons stated herein above, this application lacks merit and is hereby dismissed with costs.

Ordered accordingly.

**DATED at ARUSHA** this 13<sup>th</sup> day of December 2022.



  
**N.R. MWASEBA**

**JUDGE**

**13/12/2022**