

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

**MUSOMA SUB REGISTRY**

**AT MUSOMA**

**EXECUTION CASE NO 56 OF 2020**

**SIMON MWITA MLAGANI ..... 1<sup>ST</sup> DECREE HOLDER**

**MANG'ENGI MONATA ..... 2<sup>ND</sup> DECREE HOLDER**

***VERSUS***

**KIRIBO LIMITED .....DECREE DEBTOR**

**RULING**

11<sup>th</sup> and 15<sup>th</sup> March, 2022

**F. H. MAHIMBALI, J.:**

Originally, there was an award by the CMA (Musoma) for the Decree Holders in which they challenged it before this Court by way of revision. In the said revision ruling, the judgment debtor was condemned to pay compensation to the judgment debtors each a twelve month's remuneration subject to statutory deductions and also entitlements to the terminal benefits up to 1<sup>st</sup> May, 2019. In enforcing this award, the decree holders applied to this Court to enforce the Court's award claiming a total sum of TZS: 137,928,162. The mode of execution in which the decree holders sought this Court to assist is arrest and detention of Mr. Kebacho Chacha Monata who is said to be

Managing Director as civil prisoner to compel him settle the decretal sum. This is pursuant to Rule 48(3) of the Labour Court Rules of GN 106 of 2007 read together with Order XXI, Rule 9 and 10 (2) of the CPC.

During the hearing of the application, the decree holders were enjoying the legal services of Mr. Paulo Obwana, learned advocate whereas the Judgment Debtor enjoyed the legal services of Mr. Baraka Makowe, learned advocate.

As to why this mode of execution was preferred by the Decree Holders in lieu of other modes such as attachment and sale of the judgment debtors' assets, Mr. Paulo Obwana, vehemently submitted that:

Firstly, the said Kebacho Chacha Monata is the Director of the Judgment Debtor's company. Secondly, the companies' physical and monetary assets have been concealed by the said Kebacho Chacha Monata. Thirdly, the said decretal sum has not been settled to date and there are no signs or efforts to settle the same. On that basis, he is praying that under section 95 of the Civil Procedure Code, this Court to lift up the corporate veil of the company so that its director (Kebacho Chacha Monata) is put into task.

In support of his application/prayers, Mr. Paulo Obwana learned advocate referred this Court to rely on the Court's issued summons

dated 10<sup>th</sup> December 2021 in which it was addressed to Kebacho Chacha Monata as Managing Director of Kiribo Ltd as proof of the fact that after he had received and signed it, he is the Managing Director of Kiribo Ltd.

He also referred this Court to seek reliance to the case of **Yusufu Manji V. Edward Masanja and Abdalah Juma**, Civil Appeal No. 789 of 2002 (CAT – at DSM unreported) in which it clarified that where there are efforts to conceal the company's properties, the managing director is liable for action on behalf of the company and the shield was thus unveiled.

On that basis, he prayed that this application be granted and order that the said Kebacho Chacha Monata who is the Managing Director be arrested to compel him settle the said decretal sum. In case of further default, the Court to order his detention as civil prisoner and that the judgment debtors guarantee to settle all the costs for his arrest and detention as civil prisoner in prison.

On the other hand, Mr. Makowe who despite not having filed the notice of preliminary objection nor affidavit to show cause yet vehemently opposed the application by using legal points which I think is right in my considered view, being guided by the decisions of the Court of Appeal in **Fransisca Mbakileki v. Tanzania Harbours Corporation**, Civil Application No. 71 of 2002 and **Yokobeti Sanga v.**

**Yohana Sanga**, Civil Application No. 1 of 2011 (both unreported). In the latter case the Court stated:

*"... it is settled that where the respondent does not lodge an affidavit in reply despite being served, it is taken that he does not dispute the contents of the applicant's affidavit.....Therefore, the respondent who appears at the hearing without having lodged an affidavit in reply is precluded from challenging matters of fact, but he can challenge the application on matters of law.."*

In his reply submission but on points of law, he differed with Mr. Paulo Obwana that as per nature of this application as per advocate's submission there ought to be proof by affidavit that the said facts do exist. In the absence of the proof by affidavit, this application is improper. He cited rule 42 (7) of the Labour Court Rules (GN 106 of 2007) which sets the modality how execution is carried out. With this irregularity, he submitted that this application is violative. There are no detailed explanations/facts of what has been done by the Decree Holder prior to the filing of the current application.

He submitted further that this case is against Kiribo Ltd. The summons being addressed to Mr. Kebacho Chacha Monata was not erroneous. According to rule 9 of Labour Court rules (GN 106 of 2007), it is clear as who should receive court summons. He thus submitted that as per law, this application is incompetent as it is legally violative.

Regarding the company's assets being not used or established that the company is short of fund to effect the said decretal sum alleged, he submitted that, this application is a pre – mature one. Citing rule 42 (7) of Labour Court Rules (GN 106 of 2007), he submitted that this court has not yet made a finding that the said Kebacho Chacha Monata is connected with Kiribo Ltd. As per order XXI, rule 35, there must be full compliance prior to skipping to rule 36. What is before the court, is an application for execution. There has been no notice to show cause against the said Kebacho. It was his submission that this application is premature, the same be dismissed.

In his brief rejoinder submission, Mr. Paulo Obwana submitted that from what Mr. Makowe has submitted, he considers the application as not disputed. This is because

- the legal objection/point of law are only raised by notice.
- The said Kebacho is dully served as per court's summons.
- It is not objected that Mr. Kebacho has concealed the company's properties.
- The said Kebacho dully received the said summons and that is why his learned counsel is representing him.

On that, he prayed this Court to grant the application as prayed.

Having heard the rival submissions from both sides, it is now the Court's turn to determine this application as per law.

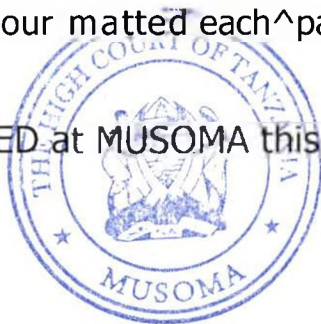
In a nutshell, I agree with Mr. Makowe that this application is misplaced. The facts deposed by Mr. Paulo Obwana in his submission are so vindicative that can not be considered with equal legal value in the absence of proof. The necessary material facts which needed proof are: One, whether the said Kebacho Chacha Monata is connected with Kiribo Ltd as alleged. Two, whether the said Kebacho Chacha Monata being the director of the said Kiribo Ltd is concealing the Company's assets. Three, has the said Kiribo Ltd failed to discharge the said decretal sum as alleged?

In my considered view, it is always the pleasure of the Court that Decree Holders enjoy the Court's award and that Courts must be jealousy of it. In law, there are various legal means provided for one to enforce Court's award. Nevertheless, resorting to the arrest and detention mode is not the party's choice but as a matter of legal practice, it is a legal means of last resort. And before invoking to that mode, there must be clear attempts done by the Decree Holders in enforcing the said award by other means legally provided but in vain.

For one to resort to the last mode of enforcement, as provided in the case of **Yusufu Manji V. Edward Masanja and Abdalah Juma**, (supra), there must be proof by affidavit that the relationship between the said Director/Partner or shareholder and the legal entity, that the decretal sum has not been fully settled, that there are efforts to conceal the properties of the said company as alleged. In the present case, none has been established.

That said, the application is not merited as being filed in contravention of the law. The same is hereby struck out. This being a labour matted each party shall bear its own costs.

DATED at MUSOMA this 15<sup>th</sup> day of March, 2022.



  
F.H. Mahimbali

Judge

**Court:** Ruling delivered this 15<sup>th</sup> day of March, 2022 in the presence of the Mr. Paul Obwana, advocate for the Decree Holders, Mr. Makowe, advocate for Judgment Debtor and Mr. Gidion Mugo – RMA.

  
F. H. Mahimbali

Judge

15/03/2021