

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

AT DAR ES SALAAM

EXECUTION CAUSE NO. 54 OF 2021

CITY MOTRAGAGE AND

FINANCE CORP. LTD.....DECREE HOLDER

VS

DANIEL MARCO KAHWA.....JUDGMENT DEBTOR

Date of Last Order: 26/08/2022

Date of Judgment: 10/03/2023

R U L I N G

MGONYA, J.

Before this Court is an Application for Execution filed by the Decree holder praying for the amount claimed to be realized by the arrest and detention of the Judgement Debtor. In the cause of filing pleadings, the Judgement Debtor raised a **preliminary objection** against the application to the effect that: -

(a) That this application contravenes the provisions of section 42, 47, Order XXI Rules 35 and 39 of the Civil Procedure Code Cap. 33 [R. E. 2019].

The Decree Holder in this matter is being represented by **Mr. Harry Mwakalasya** learned Advocate while the Judgement

Debtor is being represented by **Mr. Muganyizi** learned Advocate. The Court granted a prayer for the matter to be disposed of by way of written submissions of which after the compliance with the scheduling order the objection is now competent for determination.

In accordance to the objection raised, the Judgment Debtor states that the instant application before the Court contravenes the law upon the procedures of execution by arrest and detention. It is until where the conditions set out by the law are fulfilled then an order for arrest and detention can be made.

In the records, the Judgement debtor has based his averments on the procedure to be adhered to by the Court as provided for under **Order XXI Rules 35 (1) and (2) of the Civil Procedure Code Cap. 33 [R. E. 2019]** and cited the case of **GRAND ALLIANCE LTD VS MR. WILFRED LUCAS TARIMO AND OTHERS (CIVIL APPLICATION NO. 187 OF 2019)** to support the objection.

In reply, the Decree holder stated that the allegations stated out in the submissions filed by the Judgement Debtor are hopeless and prematurely raised. The same would have been productively raised in the time of hearing by the Judgement Debtor at the time of showing cause or if the matter could have been brought before this Court for revision following orders

which could have yet been done by the lower Court to that extent.

The Judgment Debtor in the submission has reiterated what has been transpiring in Court proceedings from the time the Application was filed. It is the submission of the Counsel that the procedure has been complied with whereas the Court issued a notice to appear before the Court and the same was received by the latter who did not show cause. However, he instructed his Advocate to appear. The matter was scheduled for hearing and the Counsel for the Judgement Debtor has been appearing though the matter has not taken off on hearing.

Moreover, the Decree Holder states also to have addressed and move the Court under **Order XXI Rule 35 (1) and (2) of the Civil Procedure Code** with a motive of requiring appearance of the Judgement Debtor in Court for necessary Orders and upon refusal issue a warrant of arrest. It was submitted that, the Court did not grant the said prayer waiting for Counsel of the Judgement Debtor to appear.

In the Course of the above occasion an objection was raised by the Judgment Debtor's Counsel hence. The Decree Holder prayed before the Court for issuance of an arrest warrant if the Judgement Debtor still won't appear. It is in this circumstance the latter states the objection to be premature.

Having heard the Decree holder and Judgement Debtor on the preliminary objection in support and against the same, the issue for determination before this court is ***whether the application contravenes the provisions of section 42, 47 Order XXI Rule 35 and 39 of the Civil Procedure Code.***

The above provisions of the Civil Procedure Code are the laid down procedures to be complied to when it comes to an application for execution to be realized by arrest and detention of the Judgement Debtor. The Decree holder in this cause has applied for such manner to execute his decree unless the decree and costs is settled in its entirety.

This Court in its records reveals that when the Judgement Debtor was summoned, his Advocate appeared in Court on his behalf. On the **06/12/2021**, the Judgment Debtor prayed before the Court for another date for them to appear and show cause of which the date that was set. However, the latter did not appear. On the **22/03/2022** the matter was adjourned by the District Registrar in absence of the preceding Judge. Counsel for the Decree Holder addressed the District Registrar that the matter was for hearing, the same was then scheduled for hearing. The Court was waiting for a hearing so as to be informed as to why the Judgement Debtor wasn't appearing before the Court to show cause. It is from there on **18/05/2022** Counsel for the Decree Holder prayed that since

the Judgement Debtor does not appear to show cause then the Court issue a warrant of arrest of the judgement Debtor to come and show cause.

The application for execution filed before the Court has preferred execution to be conducted as per **section 42 (c) of the Civil Procedure Code**. In respect of such manner there are legal procedures to be complied by the Court before grant the order sought.

It is the requirement of the law that upon such demand by a decree holder, first the Court is directed to issue a Notice to the Judgement Debtor to enter appearance before issuing a warrant of arrest and state as to why he/she should not be committed as a Civil Prisoner. This is the first procedure to comply with. The essence is to hear the latter of the reasons as to why he has failed to honour what the Court had ordered in its decision. Failure to enter appearance to show cause will hence result to an arrest warrant for the Judgment Debtor. This procedure is provided for under the provisions of **Order XXI Rule 35 (1) and (2) of the Civil Procedure Code**.

In the circumstance of the instant application, the records shows that Counsel for the Judgment Debtor prayed for entering appearance to show cause of which various dates were scheduled for that, occasion and yet the judgement did not enter appearance to show cause. It was after that the Counsel for the

Decree Holder prayed for an arrest warrant to be issued in that respect so that the Judgment Debtor enters appearance and show cause why he should not be committed to be a Civil Prisoner.

Section 42 of the CPC enumerates different modes of execution that the Decree-Holder can choose for executing his Decree. However, that right is subject to some conditions and limitations. The order may be issued upon satisfaction and subject to the provisions of **Order XXI rules 35 to 39 of the Civil Procedure Code** which states as follows:

"35. -(1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention as a civil prisoner of a judgment debtor who is liable to be arrested in pursuance of the application, the court may, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the court on a day to be specified in the notice and show cause why he should not be committed to prison.

(2) Where appearance is not made in obedience to the notice, the court shall, if the

decree-holder so requires, issue a warrant for the arrest of the Judgment Debtor”.

In this matter before me it was the Counsel for the Judgment Debtor himself who prayed for a date for them to enter appearance and show cause. After that the scheduled dates for appearance the Judgment Debtor did not appear to show cause. The same was occasioned for three consecutive dates. I find the prayer by the Decree Holder to issue an arrest warrant for the Judgement Debtor to show cause to have aligned with the procedures of the above provision of the law since the judgement Debtor has disobeyed the notice to appear and show cause.

Having said all of the above, I am of the firm opinion that the Judgement Debtors disobedience to appear and show cause has no other remedy than issuing an arrest warrant for the latter to show cause as desired by the Decree Holder of which I order accordingly.

Consequently, I therefore find the raised objection that this application is contravening the provisions of **section 42, 47, Order XXI Rules 35 and 39 of the Civil Procedure Code; to be meritless and therefore overruled.**

It is so ordered.

Costs to follow the event.



L. E. MGONYA

JUDGE

10/03/2023

ORIGINAL