

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

MISC. CIVIL APPLICATION NO. 16 OF 2023

(Originating from Execution Proceedings in Taxation Cause No. 30 of 2021 Before Hon. A.O. Amworo DR)

INNOCENT THADEO.....APPLICANT/DECREE HOLDER

VERSUS

JAFFARI MWANGI KAMUKULU..... RESPONDENT/JUDGMENT DEBTOR

RULING

12th and 26th June, 2023

BANZI, J.:

The applicant has successfully filed Taxation Cause No. 30 of 2021 before the High Court Bukoba Registry against the respondent in order to recover costs awarded in Land Revision No. 3 of 2020 that was decided in favour of the applicant. The amount awarded by the taxing master on 25th May, 2022 was Tshs.3,878,900/= . The applicant has made search for purpose of attaching the property of the respondent but his efforts proved futile. As a result, he filed this application with a prayer to commit the respondent to prison unless or until he pays the taxed amount. The application is brought under sections 42, 44, (1) and Order XXI Rule 28 of the Civil Procedure Code [Cap. 33 R.E. 2019] ("the CPC") and it is supported

by affidavit of the applicant. The respondent did not file the counter affidavit despite given opportunity to file the same.

At the hearing, the applicant was represented by Mr. Dickson Ngowi, learned counsel while the respondent appeared in person unrepresented. Mr. Ngowi apart from adopting the affidavit of the applicant, he submitted that, the respondent has failed to pay the amount ordered by the taxing master. Also, the applicant made efforts to trace any property for attachment but his efforts proved futile. Since this court is allowed to issue arrest order and detain the respondent as civil prisoner pursuant to section 42 (c) of the CPC, and since the respondent has failed to explain why the order should not be issued, Mr. Ngowi prayed for this application to be granted by detaining the respondent in prison as civil prisoner for a period of six months until he pays the said amount. He added that, the applicant is ready to pay Tshs.200,000/= per month as costs of maintaining the respondent in prison according to the standard of Bukoba Prison.

In reply, the respondent admitted that, he has no property for attachment apart from his matrimonial home. He further prayed to pay in instalment by starting with Tshs.500,000/= by 4th August, 2023 and rest of the amount to be paid by Tshs.500,000/= after every three months. He

urged this court not to detain him in prison because by doing so he will not be able to get money to fulfil the debt.

In his short rejoinder, Mr. Ngowi stated that, if the respondent had intention to pay, he could have paid it since last year but he didn't do so. He further insisted that, they are not accepting for the debt to be paid in instalment but rather, the whole amount should be paid at once by 4th August, 2023 and failure to do so, the appellant should be sent to prison as per their prayer.

I have carefully considered the submissions of both sides. It is common knowledge that, arrest and detention in prison is among the modes of execution of decree as articulated under section 42 (c) of the CPC. However, before the judgment debtor is sent to prison, there are procedures to be followed. First and foremost, there must be an application for execution by arrest and detention in prison of the judgment debtor according to sections 42 and 44 and Order XXI rule 10 of the CPC. Second, upon such application, the executing court is required to issue summons to judgment debtor to show cause why he should not be committed to prison pursuant to Order XXI rule 35 (1) of the CPC. Third, as directed under Order XXI rule 39 (1), after the judgment debtor appears in obedience of summons, and it appears to the court that he is unable from poverty or other sufficient cause to pay

the amount of the decree or, if that amount is payable by instalment, the court may, upon such terms as it thinks fit, make an order disallowing the application for his arrest and detention. Otherwise, before committing him to prison, if the application is allowed, the court is required to be satisfied with the conditions stated under Order XXI rule 39 (2) of the CPC. These conditions were also underscored in the case of **The Grand Alliance Limited v. Mr. Wilfred Lucas Tarimo and Four Others** (Civil Application No. 187 of 2019) [2020] TZCA 191 TanzLII.

Reverting to the matter at hand, it is undisputed that, the respondent is indebted Tshs.3,878,900/=. After an attempt to attach the property of the respondent proved futile, the applicant filed this application praying for the order of arrest and detention of the respondent in prison. It is also undisputed that, the respondent in response of summons, he appeared before this court and admitted on the obligation to pay the amount in question. The respondent himself admitted to own nothing for attachment other than his matrimonial house which he lives with his family. He urged to be allowed to pay the debt in question in instalment starting with Tshs.500,000/= to be paid by 4th August, 2023 after selling his coffee and for the rest of the amount, he should be allowed to pay Tshs.500,000/= after every three months. From the affidavit of the applicant and submissions of

both sides, although it is undisputed that, the respondent has no immovable property other than his matrimonial house, but there is no proof that, he is unable to pay due to poverty which could be a reason for disallowing the application. Besides, the respondent has committed himself to pay by instalment starting with Tshs.500,000/= on 4th August, 2023 after selling his coffee. This in itself is a clear proof that, the respondent is not poor.

I am very much aware of the conditions set under Order XXI rule 35 (1) of the CPC in order to protect a person from being deprived of his freedom unnecessarily or unjustly. Equally, the path chosen by the applicant is one amongst the modes of execution provided under our laws and mostly applicable as the last resort for the decree holder to make the judgment debtor pay for the indebted amount so as to allow the decree holder to enjoy the fruits of the judgment in his favour. As stated herein above, the respondent is not poor. Although he prayed to be given time to pay but he did not explain why he failed to pay for more than one year from 25th May, 2022 when the order in question was made to date.

For those reasons, it is hereby ordered that, unless Tshs.3,878,900/= is paid to the applicant within six (6) months from the date of this ruling, the respondent, Jaffari Mwangi Kamukulu shall be detained in Bukoba Prison as civil prisoner for the period of six (6) months in execution of decree in Land

Revision No. 3 of 2020 and Taxation Cause No. 30 of 2021. The six months given expire on 26th December, 2023 and in the event the respondent fails to pay within such period, the arrest and detention shall be effective from 27th December, 2023. In addition, the applicant shall pay the officer in-charge of Bukoba prison Tshs.200,000/= per each month being subsistence allowance for the whole period when the respondent will be detained in prison. Thus, the application is partly allowed on the extent shown above.



I. K. BANZI
JUDGE
26/06/2023

Delivered this 26th day of June, 2023 in the absence of the applicant and in the presence of the respondent in person.



I. K. BANZI
JUDGE
26/06/2023