

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
DODOMA DISTRICT REGISTRY
AT DODOMA**

LABOUR EXECUTION NO. 16 OF 2022
(Arising from Labour Dispute No. CMA/DOM/63/2020)

**ATTILIO MBWILO.....APPLICANT
VERSUS
LIVELIHOOD BASIX TANZANIA.....RESPONDENT**

RULING

Last Order: 03rd June 2023.
Date of Ruling: 21st July 2023.

MASABO, J:-

The applicant one Attilio Mbwilo, was a judgment debtor in Labour Dispute No. CMA/DOM/63/2020 under which he was awarded by the arbitrator a sum of Tshs 59,610,000/ comprising his terminal benefits and other employment entitlements. Having obtained the award, he instituted Labour Execution No. 30 of 2020 before this court. Unable to realise his decree, he successfully moved this court to lift the veil of incorporation against the Respondent's Managing Director, one Mathew A. Ngwahi. By this application, he has moved this court under, among other provisions, Order XXI rule 35 and 36 of the Civil Procedure Code, Cap 33 RE 2019, praying that the court be pleased to issue an order of arrest and detention as civil prisoner the said Mathew A. Ngwahi.

Bracing the application is an affidavit by the applicant vide which he has deponed that, his several attempts to execute the decree have all ended fruitless. Even the Garnishee Order issued by this court on 25/2/2021 did

not bear fruits as a result, he successfully petitioned to have the veil of incorporation lifted against the respondent's managing director, the said Mathew A. Ngwahi whom he now prays that he be arrested and detained as civil prisoner.

Hearing of the application proceeded *ex parte* against the judgment Debtor as effort to procure his attendance was fruitless. Given a room to address the court, Mr. Charles Makoko, the representative of the applicant, stated that they have tried all means to realise the applicant's right in vain such that, even the garnishee order, ended fruitless. Thus, the remaining viable option, is arrest and detention of the said Mathew Ngwahi, Managing Director of the judgment debtor against whom the veil of incorporation has been lifted.

Having heard the Applicant's representative, the sole issue for determination before this court is whether the respondent's managing director, Mathew A. Ngwahi, is due for arrest and detention as civil prisoner.

Section 42 of the Civil Procedure Code enumerates different modes of execution that a decree holder may employ in executing his decree. One of such mode is the arrest and detention of the decree holder as civil prisoner, a mode which the applicant herein seeks to employ. It is relevant at this stage, to set out that, this mode of execution while available to decree holders, it is subject to certain conditions and limitations. It may only be issued upon satisfaction of the conditions set under Order XXI,

rules 35(1) (2) and rule 36 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 warrant of 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.

36. Every warrant for the arrest of a judgment Debtor shall direct the officer entrusted with its execution to bring him before the court with a convenient speed, unless the amount which he has been ordered to pay, together with the interest hereon and the costs (if any) to which he is liable, be sooner paid.

These provisions were expounded by the Court of Appeal in the case of **Grand Alliance Ltd vs. Wilfred Lucas Tarimo and Others**, Civil Application No. 187 of 2019 (unreported) where it was held that;

The right to commit a judgment-debtor as a civil prisoner is provided under sections 42 to 47 and rules 28, 35 to 39 of Order XXI of the Code. Section 42 of the Code 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 import of the words 'subject to such conditions and limitations as may be prescribed'

appearing in section 42 of the Code was well addressed by the Supreme Court of India in the case of **Mahadev Prasad v Ram Lochan** AIR 1981 SC 416 sourced from indiankanoon.org/doc/1624821 when it was interpreting section 51 of the Indian Code of the Civil Procedure (before its amendment in 1954) which is in *pari materia* with our section 42 of the Code that:

'The opening words of section 51 'subject to such conditions and limitations as may be prescribed' put it beyond doubt that there is no wide jurisdiction to order execution or to claim execution in every case in all the modes indicated therein....Although ordinarily a decree-holder has option to choose any particular mode for execution of his money decree it may not be correct to say that the Court has absolute no discretion to place any limitation as to the mode in which the decree is to be executed."

It follows then that the imprisonment of a judgment-debtor in execution cannot be ordered unless the conditions and limitations are satisfied. One of those conditions is that there must be an application for execution of a decree for payment of money by arrest and detention in prison of a judgment-debtor (See sections 42 and 44 and Order XXI rule 10 of the Code). After receipt of the application, the executing court has discretion to in issue a notice to show cause to the person against whom execution is sought, on a date to be specified in the notice, why he should not be committed to prison or to issue a warrant of his arrest (see Order XXI rule 35 (1) of the Code). The purpose of this warrant is to bring the judgment-debtor before the executing court and it is not an automatic order for

committal as civil prisoner because the executing court is required to be satisfied with the conditions stated under Order XXI rule 39 (2) of the Code before committing a person to prison. Likewise, where the judgment-debtor defaults appearance on a notice to show cause, the executing court shall, if the decree-holder so requires, issue a warrant of his arrest. [Emphasis added]

After perusing the record, I have observed that, upon the application being filed, the court did not issue a summon to the said Mathew A. Ngwahi to show cause why he should not be committed to prison. Instead, it issued an ordinary summons calling upon the said Mathew A. Ngwahi to appear in court for mention. Hence forth, it did not abide by the law. To correct the anomaly, it is incumbent that a proper notice requiring the said Mathew A. Ngwahi to appear before the court and show course why he should not be arrested, be issued. Consequently, the notice is hereby issued to the judgment debtor under Order XX1, Rule 35(1) of the Civil Procedure Code to appear before this Court on 21st August, 2023 at 9.00 am and show cause why he should not be committed to prison.

It is so ordered.

DATED at DODOMA this 21st day of July, 2023.



A handwritten signature in blue ink, appearing to read "L.J. MASABO", is written over a horizontal line.

L.J. MASABO

JUDGE