

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM DISTRICT REGISTRY)

AT DAR-ES-SALAAM

APPLICATION FOR EXECUTION NO. 54 OF 2021

(Originating from Land Case No. 37 of 2017)

CITY MORTGAGE AND FINANCE CORP. LTD APPLICANT

VERSUS

DANIEL MARCO KAHWA RESPONDENT

RULING

Date: 04 & 04/08/2023

NKWABI, J.:

Under form No. F/5 made under the Civil Procedure Code (Approved forms) the applicant moves this court to arrest and detain in prison the judgment debtor unless the decree is settled on its entirety. This application has been pending in this Court since its presentation for filing on 24th August 2021. Understandably, there was a preliminary objection which was overruled by this Court on 10th March 2023.

When the application was tabled before me, and in the presence of the counsel of both parties, I directed the counsel of both parties to address me on the competence of the application since it was not brought by way of a chamber summons supported by an affidavit. I did so while I having in mind

what was stated in **Blay v Polland and Morris**, [1930] 1 KB 311 where it was observed that:

"We are of the considered view that generally a judge is duty bound to decide a case on the issues on record and that if there are other questions to be considered they should be placed on record and the parties be given opportunity to address the court on those questions."

When the matter was called upon for hearing on the question raised by the Court suo motu, Mr. Harry Mwakalasya, learned counsel appeared for the applicant while the respondent enjoyed the services of Mr. Godwin Muganyizi, also learned counsel.

Mr. Muganyizi addressed the Court first. He was of the firm view that the application which was presented by way of a form of execution is defective. He expounded that the application of this nature ought to have been brought by way of chamber summons supported by an affidavit for the reasons that under Order XXI Rule 39(2) of the Civil Procedure Code because there are some specifications or limitations for bringing the application. Facts in

respect of the limitation should be contained in an affidavit. He prayed the application be struck out.

Mr. Mwakalasya was not persuaded by the submission of his learned friend. He argued that there is no any law that provides that the application should be brought by way of chamber summons supported by an affidavit. As the matter had been dealt by the prior judge, who overruled the preliminary objection, the application will be condemned without even the judgment debtor is brought before the Court. He stated that the Court can review its own decision by an application of another party who has not been satisfied. He stated the Court is bound by its decision and is required to respect its decision. He cited **Karori Chogoro v. Waitihache Merengo**, Civil Appeal No. 164 of 2018 CAT (unreported). He pressed that the application should proceed by being heard on merit.

Reiterating his stance in rejoinder submission, Mr. Muganyizi said that imprisonment is not an option but is a final resort. The decree holder ought to have satisfied the Court that the other modes cannot be preferred but civil imprisonment. He stated that ground cannot be in formal form of execution.

He further expounded that there are many provisions for this form of execution which is found under Order XXI Rule 28, 35-35 and section 42 of the Civil Procedure Code. He prayed for this application be struck out.

As to whether this Court can review its own decision or order, Mr. Muganyizi was of the view that an application for review can be made by parties or the Court can raise it suo motu as the Court cannot trade on a defective pleading filed in Court. He beefed up that the Court has to satisfy itself if it is dealing with a competent pleading.

I have given deserving consideration to the submissions of both parties. I am of the firm view that this Court has power to review its own decision or order. I am holding so basing to the decisions of this Court and the decisions of the Court of appeal. That power can be seen in the decision found in the case of **Ursula Massawe and Others v Makiidi village**, Civil Review No. 11/1998 (HC) at Moshi (unreported) E.N. Munuo, J., as she then was. There is also the decision of the Court of Appeal in the case of **Mohamed Enterprises (T) Limited v. Masoud Mohamed Naseer**, Civil Application No. 33 of 2012, CAT (unreported) where it was underscored that:

"But the court in its inherent jurisdiction, may set aside an interlocutory consent order which is not a final order or judgment."

Now, that being the position, I proceed to determine the question whether this application is competent before this Court.

Without much ado, I rule that this application is incompetent before this Court in the nature it was brought which is through an application form. The application ought to have been brought by way of chamber summons supported by an affidavit indicating the grounds on which why the other modes of execution have not been preferred, such mode of execution for example attachment and sale of properties of the respondent.

The provisions for bringing an application of execution in the mode of arrest and detention provide discretion to the Court. Discretion has to be exercised judiciously by giving sufficient reasons else, exercise of discretion without sufficient reasons amounts to arbitrariness. Such reasons, I think, should come from the applicant himself/herself in an affidavit and not otherwise. In that regard the respondent will answer the grounds through a counter-affidavit.

In the premises, I review the order of this Court dated 10 March 2023 and rule and order that the application is incompetent. Since the application is incompetent before this Court. The application for execution is thus, struck out. The applicant has the right to refile the application for execution. I make no orders as to cost as the question that has disposed of the application by being struck out was raised by the Court suo motu.

It is so ordered.

DATED at **DAR-ES-SALAAM** this 4th day of August, 2023.



A handwritten signature in blue ink, appearing to read "J. F. Nkwabi".

J. F. NKWABI

JUDGE