

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM SUB - REGISTRY
AT DAR ES SALAAM
MISC. CIVIL APPLICATION NO. 503 OF 2023

LASCO MICHAEL MBOWEAPPLICANT

VERSUS

JONAS STOMIH NKYARESPONDENT

RULING

Date of last Order: 07/06/2024

Date of Ruling: 14/06/2024

G.N. ISAYA, J:

This Court has been moved by the applicant under Order XXI Rule 10(2), (j), (iii), 35 (1), (2), and section 95 of the Civil Procedure [Cap. 33 R. E. 2019] section 14 (1) of the Law Limitation Act [Cap. 89 R. E. 2019] (Henceforth referred to the Code) seeking for orders that this Court: -

- 1. That this Honourable Court be pleased to issue an order for an arrest and detention in prison of the judgment Debtor for failure to satisfy the Courts decree.*
- 2. That any other relief(s) this Honourable Court may deem fit and equitable to be granted.*

The application is well supported by the affidavit of Lasco Estomih Mbowe, the applicant in this matter. The Respondent resisted the application through

the filed counter affidavit of Tumaini Mfinanga, an advocate of the respondent.

When this matter came for hearing on 7th June 2024, the matter was agreed upon and ordered to be disposed of by way of written submissions. Both parties complied with the order of the court. The applicant herein was represented by Mr. Tumaini Mgonja, learned Advocate while the Respondent was represented by Mr. Tumaini Mfinanga learned Advocate also. Nevertheless, the applicant prayed to adopt the Affidavit sworn by Lasco Michael Mbowe, to form part of their submission.

A brief history of this application albeit briefly, is that in 2023 the applicant applied for execution vide Execution No. 4 of 2023 between the same parties as appears in this current application. The applicant prayed for the arrest and detention of the judgment debtor as a civil prisoner through a tabular form whereby the matter was assigned to Hon. Fimbo Deputy Registrar. Before the same was determined, it was struck out with instruction that it should be filed through chamber summons supported by affidavit since there was a prayer for arrest and detention, hence this application before this Court.

Submitting in support of the application the applicant asked the court be pleased to issue an order for arrest and detention in prison of the judgment debtor for failure to satisfy the court's decree. He contended that the law requires that where an application for execution is preferred it should show the mode in which the assistance of the court is required. Rule 35 of Order XXI of the Code gives discretionary power to the court to permit the judgment debtor to show cause against detention in prison. He reproduced the provision 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.

He further averred that the Decree Holder on the 1st day of June 2021 got a judgment and decree in his favor against the Judgment debtor

vide Land case No. 122 of 2011 between **Lasco Michael Mbowe versus Theresia Estomih Nkya & 2 others**, the 3rd Defendant being the Judgment debtor in this current application. The Judgment and decree condemned the Judgment debtor to pay the Decree holder a sum of TZS 87,000,000/= (say Eighty-seven Million shillings) in total. Ever since the decree was issued against the Judgment debtor, it has never been satisfied anyhow to date voluntarily. To buttress his point, he cited the case of **City Mortgage and Finance Corp. Ltd versus Daniel Marco Kahwa, Application for Execution No. 54 of 2021** in which Nkwabi, J stated as follows:-

"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. [Emphasis is mine]."

After that, he submitted that the provision for bringing an application of execution in the mode of arrest and detention provides discretion to the

court which should be exercised judiciously by giving sufficient reasons else. He was of the view that in paragraph 5 the applicant gave an account that on diverse dates from the date of judgment and decree, the applicant had made various efforts by requesting the judgment debtor to make good the decretal sum, but all in vain.

He further submitted that the Judgment debtor failed even to appear before this honorable court from the day this application was scheduled in court despite several orders for him to enter an appearance in person.

In reply to the application, the respondent's Counsel stated the conditions set out under Order XX1 Rule 39 (2) of the Code have not been complied with for this Court to grant the application. There is no any paragraph in the applicant's affidavit showing that the respondent had means of satisfying the decree but he willfully neglected and or refused. He referred this court to the case of **Esther Cresence Mashoko vs Norbert Furaha Lyimo, Misc. Land Case No. 90 of 2016**, High Court, Land Division at Dar es Salaam (unreported) where it was stated as follows: -

"Thirdly, there is no proof that since the date of the decree, the judgment debtor has had the means of paying the amount of the decree or some part thereof but refused or neglected to do so".

Regarding the competence of the application, he submitted that the application violates provisions of Order XXI Rule 10 (2)(f) of the Code. From the provision, the applicant is required to state the previous application for execution and its outcome. The applicant has concealed his previous application for Execution No. 4 of 2023 which was withdrawn hence this application. The legal consequence for non-disclosure of the previous application and its outcomes are to refuse the current application as per Order XXI Rule 15(1) of the Code. He lastly prayed for this application be dismissed.

Having carefully gone through the application and rival submissions of the parties, I should observe and find that the arrest and detention of a judgment debtor as one of the mode of execution is a very serious legal mechanism in enforcement of the decree of the court. The mode of execution deprives a person of his constitutional right to movement and general liberty. A judgment debtor can be arrested and detained in cases where he has failed to satisfy the decree, but I think this should be a last resort and subject to the discretion of the court exercised judiciously. In this instant application, the applicant is seeking for an execution by the mode of arrest and detention of the judgment debtor to Civil Imprisonment. The applicant claims that this

application is a result of the judgment debtor failure to honor the decision of the Court ever since the Court decided in favor of the plaintiff in Land Case No. 122 of 2011 delivered by Hon. Rwizile J.

The respondent on the other hand, opposes this application under the ground that this application is misconceived for not showing whether there was an attempt in making an application for execution by other modes of execution that failed before he could come up with this mode of application.

The right to commit a judgment debtor as a civil prisoner is provided for under **sections 42 to 47 and Rules 28, 35 to 39 of Order XXI of the Code**. The mode on arrest and committing the respondent to civil imprisonment is guided by conditions laid down by the law. The Court of Appeal in the case of **The Grand Alliance Limited vs Mr. Wilfred Lucas Tarimo & 4 Others, Civil Application No. 187/16 of 2019**, TZCA [2020], has enumerated the conditions that an applicant has to fulfill before granting the mode applied herein for execution. It was held that the executing Court has to satisfy itself as to whether the conditions mentioned under Order XXI Rule 39 (2) exist or not. Order XXI Rule 39 (2) provides: -

"Before making an order under sub rule (1) the Court may take into consideration any allegation of the decree-holder touching any of the following matters, namely: -

- (a) A decree is for a sum for which the judgment debtor was bound in a fiduciary capacity to account*
- (b) The transfer, concealment or removal by the judgment debtor of any part of his property after the date of the institution of the suit in which the decree was passed, or the commission by him after that date of any other act of bad faith in relation to his property, with the object or effect of obstructing or delaying the decree-holder in the execution of the decree;*
- (c) Any undue preference given by the judgment debtor to any of his other creditors.*
- (d) Refusal or neglect on the part of the judgment debtor to pay the amount of the decree or some part thereof when he has, or since the date of the decree has had, the means of paying it;*
- (e) The likelihood of the judgment debtor absconding or leaving the jurisdiction of the court with the object or effect of obstructing or delaying the decree-holder in execution of the decree."*

Having considered the factors above then it either has to allow or disallow the application. Going through the records before me I find that the affidavit of the applicant would have been the best place for the applicant to have elaborated on how he met the above conditions before reverting to this application at hand but the affidavit of the applicant is silent. I am of the firm view that from its silence the same would not suffice for this Court to exercise its powers under the prayers of this application.

Moreover, the Court has also addressed applications of this nature on

the basis that, the applicant has to show an effort administered in first making an application for execution and its outcome through other modes as enshrined under section 42 of the Code, before choosing the mode of execution by arrest and detention to Civil prisoner as it has been in this circumstance. The applicant must first exhaust other modes of execution before the one at hand. In the case of **Exim bank vs National Furnishers Limited and another, Execution No. 80 of 2022**, High Court Land division, My Sister Hon. Mgeyekwa, J held that: -

"I hold that the instant application is improper before this Court because the Decree Holder has not exhausted other modes of execution. Instead, he wants this Court to order the Judgement debtor be detained and arrested as a civil prisoner".

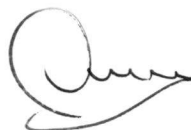
Going through the records before me, I find no the records showing that the applicant had once applied for execution through other modes of execution before this instant application. It is so to say that the applicant has not exhausted other modes before resorting to apply for arrest and detention of the judgment debtor as a civil prisoner which should be a last resort. Having said the above, I find this application lacks merits, let the applicant exhaust other mode(s) of execution first. The application is hereby struck out. No order as to costs.

It is so ordered.


G. N. ISAYA
JUDGE
14.06.2024

Court: Ruling delivered this 14th June 2024 in the presence of Advocate Tumaini Mgonja for Applicant and Advocate Tumaini Mfinanga for the respondent, Ms. Veronica B/C and Hon. Kisaka (JLA).




G. N. ISAYA
JUDGE
14.06.2024