

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM**

COMMERCIAL CASE NO. 8 OF 2006

EURAFRICAN BANK (T) LTD.....PLAINTIFF

VERSUS

**1. AMI TRAVEL BUREAU LTD }
2. ERNEST MWENEWANDA }.....DEFENDANTS**

R U L I N G

MASSATI, J.

Following a successful mediation the Plaintiff/Decree Holder herein obtained a decree for the sum of USD 38962 on 9/5/2006. It was agreed that the Defendant/Judgment debtors liquidate the entire decretal sum commencing from 30th June 2006; at USD 3000 per month for the first three months and USD 5000 per month from September 2006 until payment in full. It was also expressly agreed that the settlement would be subject to the usual default clause. The Judgment debtor paid only part of the 1st installment of USD 2611 for June 2006. On 15/9/2006, the decree Holder filed an application for execution for the total sum of shs 50,287,695/=. The mode of execution in which this court's assistance is sought is:-

“

... the arrest and detention of the second defendant as civil prisoner pursuant to section 44(1) and Order XXI r.35(1) of the Civil Procedure Code 1966.”

On 18/9/2006 I ordered that the 2nd Judgment debtor be summoned to show cause. On 25/9/2006 the second Judgment debtor appeared in person and prayed for more time to clear the decretal sum up to 15.10.2006. As a positive measure he drew a post dated cheque for the said sum payable on 15/10/2006. Mr. Byamungu, learned counsel who appeared for the decree Holder on that day accepted the proposed on condition that execution be only suspended until such time as the cheque was cleared. So we fixed the matter for mention on 18.10.2006.

Come 18/10/2006 the parties appeared again as on the previous date. Mr. Byamungu reported that the cheque drawn by the second Judgment debtor was referred to drawer for insufficiency of funds. He therefore prayed for the issue of the process. Mr. Mwenewanda pleaded with the court for leniency as he had a large family to take care of and the business to run. He also showed the court several LPOs and Invoices, to show that he was owed substantial sums of money by TANESCO and Moshi Urban Water and Sewerage Authority. So he ended up praying for yet more time within which to pay

the decretal sum. He said 30 days extension of time would be reasonable.

In rebuttal Mr. Byamungu, strenuously opposed any further indulgence, and submitted that this would be bad precedent if the 2nd Judgment debtor's family problems were to be considered inspite of the natural consequences of his having floated his undertaking by issuing a bouncing cheque. He said as to the invoices he wielded before the court. Mr. Byamungu, submitted, I think rightly, that they were all in the name of PAN AFRIAN TRADING CO.LTD, which is a different person in law. Besides, he went on, there is no evidence that he had not been paid, or as to the reasons why it has been withheld. So he submitted that it was dangerous to rely on these documents. He thus reiterated his prayers.

As intimated above, this application is sought under s.44 (1) and O XXI r.35 (1) of the Civil Procedure Code 1966. Section 44(1) empowers the court to order detention as a civil prisoner subject to certain conditions spelt out in the said section. O XXI r.35 (1) prescribes the procedure to be followed by the court in either issuing a warrant of arrest or a notice to show cause.

Section 44(1) of the Civil Procedure Code 1966, in my view only applies where the court has issued a warrant of

arrest. O. XXI r.35 applies for both arrest and notice to show cause. Arrest would only be issued if a judgment debtor does not appear in obedience to a notice to show cause. Where a judgment debtor appears in obedience to a notice to show cause the applicable rule would be r. 39 of O 21 of the Civil Procedure Code.

Rule 39 (1) of O XXI of the civil Procedure Code 1966 reads as follows:

*“ 39 (1) Where the judgment debtor appears before the court in obedience to a notice issued under O 35 r 15 brought before the court after being arrested in execution of a decree for payment of money **and it appears to the court that the judgment debtor is unable from poverty or other sufficient cause to pay the amount of the decree,** or if that amount is payable by installments, the amount of any installment, thereof the court may upon such terms (if any) as it thinks fit make an order disallowing the application for his arrest and detention or directing his release as the case may be.”*

(2) Before making an order under sub rule (1), the court may take into consideration allegations of the decree holder touching on any of the following matters namely:

- (a) *the decree being for a sum for which the judgment debtor was bound in any 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 or 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 debtors 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 absconding or delaying the decree holder in the execution of the decree.”*

From the wording of this rule it appears to me that the position of the law is that a judgment debtor cannot be sent to prison as a matter of course merely because the decree remains unsatisfied or at the option of a decree holder. According to **SARKAR ON CODE OF CIVIL PROCEDURE** 10th edition Vol.2: p. 1467 while commenting on O 21(r.40) of the Indian code, which although not in pari material with our code, is similar in its import with our rule 39;

“

the object is to afford protection to honest debtors who are in capable of paying their debts by reason of poverty; and who have not committed any act of bad faith. The test is whether a debtor is unwilling to pay in spite of his present ability to pay.”

SARKAR (op cit) goes on at p.1468:

“ The court...has no power to order detention in prison unless it is satisfied by evidence that the judgment debtor has present ability to pay debts or substantial portion of it but would not pay with a view to depriving the judgment creditor of his just dues. And the burden of proving the existence of the necessary circumstances (i.e ability to pay) lies on the creditor....The import is that at the time the

execution petition is filed the judgment debtor has the means to pay and fails or neglects to pay or refused to pay.”

And on p.1469:-

The protection afforded is forfeited only on proof of the circumstances stated in provisos.....”

Having set out the law, I now come to the facts in the present case. According to the application for execution presented by the decree Holder:

..... The Defendants have defaulted in paying the July and August 2006 installments and have only partly paid USD 2611, the June 2006 installment. Consequently under the default clause the whole of the decretal sum has now become payable.”

So, there is no averment at all or evidence that the 2nd Judgment debtor had the means but failed or refused to pay. And from the application and the submission of Mr. Byamungu in court, none, in my view of the conditions set out in sub rule 2 (a) (c) (d, or (2) of Rule 39(4) of Order XXI of the Civil Procedure Code 1966, have been alleged and proved. Perhaps paragraph (b) as shown above, partly exposes the

judgment debtor to such sanction if he committed (after the date of the institution of the suit in which the decree was passed).

“

... any 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.”

It could be argued that by issuing the bounced cheque, the judgment debtor intended to obstruct or delay the execution of the decree. However in my view, this must be founded upon proof, primarily, that at the time of execution the Judgment debtor had the means to satisfy the decree. In the present case I can find no such proof.

So in short an order for committal to civil prison is not issued as a matter of course. The Decree Holder has to show that the judgment debtor had the means but failed or refused to pay or did any act with the object of defeating the execution of a decree. If the Decree Holder fails to discharge that burden the court has no power to issue that process.

In the present case I am not satisfied that the decree Holder has discharged that burden. For this reason and without prejudice to the Decree Holder bringing another similar application (upon obtaining proof required by the law)

or other mode of execution, I will disallow the present application, but this does not mean that the judgment debtors are now discharged from their obligation. So, since they have necessitated the Decree Holder to institute execution proceedings the Judgment Debtors are condemned to pay the costs of this application.

It is so ordered.

S.A.MASSATI

JUDGE

20.10.2006

1,971 – words

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I Certify that this is a true and correct
of the original order Judgement Rulling
Sign Bubise
Registrar Commercial Court Dsm.
Date 11/11/2006