IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO 73 OF 2010

AFRICAN BANKING CORPORATION TANZANIA LIMITED.....PLAINTIFF

Versus

MTURE EDUCATIONAL PUBLISHERS LIMITED.....1st DEFENDANT

RIET ELIBARIKI MOSHI.....2nd DEFENDANT

ELIBARIKI ANDREA MOSHI.....3rd DEFENDANT

Last Order: 14th Aug, 2019

Date of Ruling: 17th Sept, 2019

RULING

FIKIRINI, J.

The decree holder, African Banking Corporation Tanzania Limited moved this Court seeking to execute the Court decree in Commercial Case No. 73 of 2010 by way of arrest and detention of the 2nd and 3rd judgment debtors, as civil prisoners. The application has been brought under Order XXI Rule 10 (2) (j) (iii) of the Civil Procedure Code, Cap. 33 R. E. 2002 (the CPC). The 2nd and 3rd judgment debtors namely Riet Elibariki Moshi and

Elibariki Andrea Moshi were summoned to show cause as to why the mode of execution opted against them should not be effected.

The judgment debtors filed an affidavit deponed by Riet Elibariki Moshi the 2nd judgment debtor on behalf of the other judgment debtors. The decree holder through Nyanjala Mutebi, the Principal Officer of the plaintiff, filed a counter affidavit, and the decree holder through its counsel Mr. Peter Lusiu filed skeleton arguments, while none was filed by the judgment debtors. During hearing Mr. Peter Lusiu and Mr. Michael Ngalo for the judgment debtors prayed for their filed documents to be adopted and made part of their submission for or against the application, the request which was agreed by the Court.

On 14th August, 2019 when the matter was called for hearing, the application was orally argued. Mr. Ngalo submitting on behalf of the judgment debtors submitted that the mode of execution chosen by the decree holder was the one seeking to deprive the 2nd and 3rd judgment debtors of their freedom to satisfy a civil debt that has been adjudged against them by this Court. It was his argument that, that mode chosen should have been the last option after all other modes have failed, that being the practice of this Court. He told the Court that there was nothing

The bone of contention seemed to be the mode of execution chosen by the decree holder, submitted Mr. Lusiu. Expounding on how this occurred, he stated that the decree holder filed Commercial Case No. 73 of 2010 claiming for outstanding amount of Tzs. 250, 233, 205.00, arising from a loan agreement. After the decision was in its favour the decree holder, besides knowing the 2 (two) mortgaged properties which the decree holder resorted to sell, he was not aware of any other properties belonging to the judgment debtors. The resort was thus for mode chosen of arrest and detention of the judgment debtors and the Court assistance was sought.

As to the submission that the mode chosen should be the last resort, Mr. Lusiu questioned the position, inquiring on what could have happened if the decree holder was not aware of other properties belonging to the judgment debtors, would that mean the decree would not be executable? His answer to that was this application was filed under Order XXI Rule 10 (2) (j) (iii) of the CPC, which allows the decree of this Court to be executed by way of arrest and detention of any person.

Making a demand in regard to the decretal sum prior to opting to the mode chosen, responding to this Mr. Lusiu's contended that was not a legal requirement that before resorting to the mode chosen the decree holder

must make a demand to the judgment debtors. To the contrary, it was upon the judgment debtors to make an offer to the decree holder on how they plan and intend to satisfy the decree. Dissecting the case of **Harel Mallac** (supra), he argued that the case was distinguishable as in that case the decree holder did not state that they were not aware of any property belonging to the judgment debtors, instead they opted for arrest and detention of the principal officer. Under the circumstances it was proper for the trial judge to remark that other modes be applied first before resorting to arrest and detention. In the present case 2 (two) mortgaged properties were sold in an auction and hence making the two scenarios distinguishable.

In another case cited the order for arrest and detention was made with condition. Fortifying his position, it was his submission that the essence behind executing the decree was to let the decree holder enjoy the fruits of the judgment, so any mode of execution be it an offer from the judgment debtors, commitment to pay and so forth was in the decree holder's case welcomed and nothing else.

In conclusion, he submitted that the judgment debtors had miserably failed to show cause why arrest and detention should not be carried out as prayed.

Mr. Ngalo reiterated his earlier submission and went on rejoining on the knowledge of the properties belonging to the judgment debtors by the decree holder, he refuted the contention that none was known to the decree holder, apart from the 2 (two) mortgaged properties. Moreover, the submission in relation to that aspect was made from the bar, he submitted. Mr. Ngalo contended that it was a well-known legal position that submission from the bar was not to be entertained. Besides, the argument did not feature in the counter affidavit, he added.

Expounding on the mode chosen of arrest and detention, it was Mr. Ngalo's submission that the judgment debtors did not dispute arrest and detention being valid mode of execution, but what the judgment debtors were saying was that it should be the last resort. Mr. Ngalo as well pointed out that Mr. Lusiu has in actual fact conceded that the interest of the decree holder was to be paid; therefore the Court can issue a conditional arrest and detention that upon failure to pay after prescribed time that is when arrest and detention can be ordered.

I have carefully read the affidavits, skeleton arguments filed by the decree holder and finally the oral submissions for and against the application. It is evident from the records, that the judgment debtors secured their loan by mortgaging the 2 (two) properties. After failing to service their debt loan the 2 (two) mortgaged properties were auctioned. Later the decree holder sued the judgment debtors in Commercial Case No. 73 of 2010 for the remaining balance of Tzs. 250, 233, 205.00/=. The Court entered decision in the decree holder's favour and hence this execution application in the mode chosen.

Essentially both counsels agree that mode of execution chosen exist legally and can be effected. Their point of departure is while Mr. Ngalo considers the chosen mode should be the last resort after all other modes have failed Mr. Lusiu had a different outlook. He was of the position that after the sale in an auction of the 2 (two) mortgaged properties of the judgment debtors no any other properties of the judgment debtors was known to the decree holder, thence a resort to the present mode of execution chosen.

This assertion though refuted by Mr. Ngalo yet he could not point out which other properties belonging to the judgment debtors were known to the decree holder such that the latter could have opted for that first,

before proceeding to arrest and detention mode of execution. His assertion is thus taken as mere words. The decree holder in the case of **Harel Mallac** (supra) openly stated not to know any of the judgment debtors' properties and that was what made the decree holder then to apply for arrest and detention of the judgment debtors. In that instance the Court was thus correct in ordering the decree holder to first exhaust other modes of execution before resorting to arrest and detention.

The decree holder had already sold by way of an auction of the judgment debtors' 2 (two) properties which he knew. The scenarios are thus different and therefore distinguished. The Court affirmed arrest and detention conditionally in the case of **Euro Africa (BOA).** This position is in my view what the judgment debtors in the present application are proposing, reading from Mr. Ngalo's submission. I find no problem with the proposition considering the essence behind executing a decree is to let the decree holder enjoy the fruits of the judgment without much hustle, the position not contested by Mr. Lusiu, so long as the decretal sum will be satisfied as ordered by the Court.

Mr. Ngalo's submission that the decree holder should have demanded for settlement of the decretal sum from the judgment debtors before

proceeding to apply for their arrest and detention, as argued by Mr. Lusiu, the argument I support, that it is not a legal requirement. In actual fact the judgment debtors should have been the ones to approach the decree holder with a plan on how the decretal amount should be dealt with to satisfy the Court decree and let the decree holder enjoy the fruits of the judgment in its favour and not *vice versa*.

The submission by Mr. Ngalo that the mode chosen was the one which seeks to deprive the 2nd and 3rd judgment debtors of their freedom, whilst admitting that the outcome would be depriving the judgment debtors of their freedom, but this does not stop the decree holder from opting for it if that is the only means available. Moreso, Mr. Ngalo's assertion is not supported by any evidence.

However, in order to protect a person from being deprived of his freedom unnecessarily or unjustly, as a legal requirement under Order XXI Rule 35 (1) of the CPC, prior to the arrest and detention being effected the judgment is give audience to appear before the Court and show cause why arrest and detention should not be carried out. Though the requirement is discretionary since the term used is "may" but the Court have often preferred for the judgment debtor (s) to appear and show cause why the

mode chosen should not be applied. Likewise, in the present case the judgment debtors were given that opportunity, of which they used by filing an affidavit to show cause why execution in the mode chosen should not be effected. Also on the date set for hearing Mr. Ngalo appeared and orally argued the application opposing the mode chosen that it should be the last resort after all other modes have failed.

In addition, in paragraph 15 of the 2nd judgment debtor's affidavit, the deponent insinuated that the mode chosen by the decree holder was in order to embarrass and torture the judgment debtors. This averment has not been explained further and no support in that regard was availed to this Court and thence making the averment a mere speculation.

From the submissions, the judgment debtors have not been able to show cause why the mode of execution chosen should not be applied. In paragraph 14 the judgment debtors have claimed they are senior citizens aged over 75 years and their health deteriorating day after day and therefore keeping them in detention as civil prisoner will not only accelerate their aging and attacks from diseases but they might end up losing their lives in prison. Although this averment seem sensible but is not supported by any evidence. No information on age of each of the judgment

debtors or medical records detailing their claimed ill-health was furnished to this Court. To generally assume that at 75 one is in ill-health is not necessarily always the case. So supporting evidence was a must. This is also said as I had no opportunity of seeing the judgment debtors to make my own assessment, which is of course not purely binding as I am not a doctor or a person with expertise to tell on one's age and ill-health.

Having said that but going by Mr. Ngalo's submission it seems the judgment debtors have properties belonging to them, the properties which were not known to the decree holder as submitted by Mr. Lusiu, and regardless of the mode, all what the decree holder wants was to enjoy the fruits of the judgment in its favour. Therefore any mode applied which would see the Court's decree is satisfied is welcomed.

With that spirit, I thus proceed and grant the application for execution in the mode chosen that of arrest and detention of the 2nd and 3rd judgment debtors as civil prisoner, on two conditions. **One,** that the judgment debtors within 3 (three) months to satisfy the Court decree as reflected in the application for execution, failure of which arrest and detention should take effect right away. The 3 (three) months will start counting from the date of this ruling and to be specific end by 17th December, 2019. **Two,** in

the event the judgment debtors fails to satisfy the Court decree, the arrest and detention be effective from the 18th December, 2018, and the decree holder should provide for the 2nd and 3rd judgment debtors up keep as provided under Order XXI Rule 38 (2) (3) (4) and (5) of the CPC.

For the foregoing, I find the 2nd and 3rd judgment debtors have failed to show cause as to why arrest and detention should not be effected against them and proceed to grant the execution application for arrest and detention albeit conditionally as stated above.

The application granted with costs. It is so ordered.

P. S. FIKIRINI

JUDGE

17th SEPTEMBER, 2019