

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 14 OF 2021

(Originated from Commercial Case No. 170 of 2017)

BETWEEN

EAST YORKSHIRE COMMERCIAL LIMITED.....APPLICANT

Versus

BOCCO GENERAL COMMERCIAL LIMITED.....RESPONDENT

Last Order: 1st April, 2021

Date of Ruling: 15th April, 2021

RULING

FIKIRINI, J.

This application was filed under certificate of urgency by way of chamber summons supported by an affidavit of Simon Singleton, the applicant's Managing Director, under Rule 2 of the High Court (Commercial Division) Procedure -(Amendments) Rules 2019 (the Rules), section 42 (c) and Order XX1 Rule 28 & 35 of the Civil Procedure Code, Cap 33 R.E 2019 (the CPC). From the chamber summons, the applicant is praying for the following orders: that the respondent's Managing Director one Mr. Emil Roggate Bocco, be summoned and required to show cause why he should not be arrested, detained or committed to prison for contempt of

Court for failure, to honour decree in Commercial Case No. 170 of 2017, dated 9th July, 2018, and later to also honour orders issued by the Deputy Registrar on 19th December, 2019; and that costs of the application be reimbursed to the applicant, and any other orders deemed just and equitable to be granted by this Court.

This is ruling is thus in respect of the notice to show cause issued against the respondent.

During the hearing, Mr. Edward Mwakigwe learned counsel argued the application orally on behalf of the applicant, whereas the respondent did not enter appearance.

Mr. Mwakingwe begun by telling the Court that this application had to be lodged under the certificate of urgency in order to timely hold back the respondent who is busy concealing and unlawfully transferring most of the properties that were liable for attachment.

The background to this application is the decree which is subject of the execution proceedings emanated from the judgment of the Commercial Case No. 170 of 2017. Following the delivering of the said judgment, the applicant filed the 1st application for execution on 6th December, 2019, which was heard *ex-parte* due to failure of the respondent to enter appearance.

The attachment and prohibitory order were issued on 19th December, 2019 and Mr. Abdallah Hamza Abeid trading as Tambaza Auction Mart and Court Broker was appointed to execute the order. Per his reports dated 14th January and 5th March, 2020 the appointed Court Broker revealed that he failed to attach any property belonging to the respondent as ordered by the Court. The failure by Mr. Abdallah Hamza Abeid, led the applicant to seek for change of the Court Broker. On 15th May, 2020 this Court proceeded to appoint Mr. Abdallah Mkata - Trading as Sensitive Auction Mart and Brokers to execute the same decree against the same judgment debtor. As per Mr. Abdallah's report among all to be attached properties listed in the order, he managed to attach 1 truck and 7 trailers, which were nevertheless not in merchantable quality as reflected in annexure EYS-4.

Submitting on the Court Broker's report, he submitted that, the respondent has concealed most of the properties after being aware of the orders of this Court. For those properties already attached, he submitted that, the Court Broker was in the process of selling them. And that those properties were attached on 1st December 2020, and the valuation report was obtained on 5th March 2021, so the auction was soon to take place.

On the strength of his submission, he submitted that, the amount which has been decreed of £ 431, 096. 71 and Tzs. 28, 570,000/= compared to the value of the already attached properties which was Tzs, 21, 437.500/= was not enough to satisfy the decree of this Court. On top of that, it was Mr. Mwakigwe's submission that, since the respondent has not shown any intention to settle the whole amount as ordered by this Court and as time goes his yard was kept on being emptied, it was thus the applicant's prayer that for the interest of justice and ensuring that it was the applicant's time to enjoy the fruits of the decree of this Court in her favour, then the only means to do so was for the Managing Director of the respondent's Company be arrested and brought before this honorable Court to show cause why he should not be detained or committed to prison for being in contempt to Court.

Winding up his submission, it was Mr. Mwakigwe's submission that, the respondent's Managing Director was available and has been showing up at the yard on every attempt to execute the decree, trying to halt the exercise by the Court Broker. Surprisingly he has never shown up before this honorable Court since the inception of the suit to date, the fact which showed his unlawful conduct and dodging lawful Court orders. To strengthen his position, he cited the case of **Princess Shabaha**

**Company Limited v NIC Bank Tanzania Limited, Commercial
Case No. 94 of 2015**

It was thus his prayer that the order sought be granted so as to allow the applicant enjoys the fruits of the decree of this Court.

I have carefully examined the affidavit in support of the application and the submission made by Mr. Mwakigwe, and the only issue to be taken into consideration is **whether this application for execution by way of issuance of warrant of arrest to the judgment debtor's Chief Executive Officer – Mr. Emil Roggate Bocco, should be granted or not.**

In carrying out its duties and tasks the Court has to make sure parties are fairly and justly treated. All things be sensibly approached, the judgment debtor is actually expected to fulfill her obligation by satisfying the Court decree, unless there is an appeal preferred or a stay of execution from the Court which issued a decree or Superior Court. **See: Jawinga Co. Ltd v Aristepro Investment Co. Ltd, Commercial Case No. 103 of 2012.**

Failure by the judgment debtor to be candid and do what is required, in most cases than not, propel institution of an application for execution.

Without satisfaction of the decree which finalizes the matter, the matter

would be a lingering on indefinitely. In addition, the essence of executing a decree is to let the decree holder enjoy the fruits of the judgment without much hustle.

Once the decree has not been satisfied and there is no appeal preferred or stay of execution granted the Court is bound to invite the judgment debtor who is a party to the suit to appear in Court and show cause, as required under Order XXI Rule 20 (1) of the CPC, the requirement which is a mandatory obligation.

In the present situation considering the decree was obtained in 2018 and the fact no appeal has been preferred, it was thus necessary to afford parties audience and in particular the judgment debtor who had decree to satisfy, lest she be condemned unheard. In the case of **Abbas Sherally & Another v Abdul Fazalboy, Civil Application No 33 of 2002**, the Court of Appeal in stressing on the right to be heard had this to say:

“The right of the party to be heard before adverse action or decision is taken against such party has been stated and emphasized by the court in numerous decisions. That the right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been

reached had the party been heard, because the violation is considered to be a breach of natural justice." [Emphasized mine]

Despite being given the right to be heard, the judgment debtor never bothered to make any appearance. After ordinary proof of service that service has failed, substituted service by way of publication was opted, and the publication was carried in the Citizen and Mwananchi newspapers of 25th February, 2021, yet the judgment debtor did not enter appearance.

The affidavit and annexures EYS-1, EYS-2, EYS-3 and EYS-5 and the submissions in support of the application advanced by the applicant through Mr. Mwakigwe, has undoubtedly shown the efforts made by the applicant in execution of the decree. However, the applicant has not attached the valuation report and therefore the assertion that the value of the attached property as per valuation report is Tzs. 21,437,500/= below the decreed amount is simply a statement from the bar which aside from being discouraged by the Court cannot be afforded any weight.

Since the respondent has failed to enter any appearance despite proof of service as well as averment in 11 of the affidavit deponed by Simon

Singleton, applicant's Managing Director, that he personally met the respondent's Managing Director Emil Roggate Bocco, it is a proof that the respondent's Managing Director is aware of the Court decision and has deliberately chosen to disrespect its orders. For ease of reference and in order to appreciate the account, the paragraph is reproduced herein below:

"I personally met the Respondents Managing Director-Mr. Emil Roggate Bocco while overseeing the execution done by Mr. Abdallah Makatta t/a Sensitive Auction Mart & Court Brokers when he showed up with his lawyer in trying to halt the exercise alleging that there were some court proceedings against the attached properties but he failed for lack of no any satisfactory proof for the same."

With this piece of evidence and the fact that there is no appeal preferred or stay of execution order in place, all put together this Court finds there is nothing which hinders this Court from granting the application.

In light of the above, I proceed to grant the application and accordingly order the arrest of Emil Roggate Bocco – Managing Director of the respondent's Company and be brought before the Court under Order XXI Rule 35 (2) of the Civil Procedure Code, Cap. 33 R.E. 2019, to show

cause why he should not be detained or committed as a civil prisoner for failure to satisfy the Court decree. It is so ordered.



A handwritten signature in blue ink, appearing to read "P. S. FIKIRINI".

P. S. FIKIRINI

JUDGE

15th APRIL 2021