

IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 105 OF 2021

(ARISING FROM COMMERCIAL CASE NO. 64 OF 2017)

EXIM BANK TANZANIA LIMITED.....APPLICANT

VERSUS

RAFIK HALAI.....RESPONDENT

Date of Last Order: 30/09/2021

Date of Ruling: 20/10/2021

RULING

C. P. MKEHA, J

In this ruling, a question regarding the standard of proof required in establishing a civil contempt of court has to be answered. Before venturing into answering the said question, a brief factual background of the present application is necessary.

The applicant in the present matter is the decree holder in Commercial Case Number 64 of 2017. On the otherhand, the respondent is one of the judgment debtors in the said case which is currently pending for execution before this court.

Following filing of the application for execution of the decree referred to hereinabove, the court ordered attachment and sale of the respondent`s

landed property on Plot No. 26 Themí Hill Area, with Title Number 424 situates in Arusha City. Then on 03/02/2021, a Court Broker was appointed for execution of the court`s order. The appointed Court Brokereffected service of a prohibitory order issued in terms of Order XXI Rule 53 (1) of the Civil Procedure Code to the Respondent. As usual, the said prohibitory order prohibited the respondent from transferring or charging the attached property in any way, until further orders of the court.

According to paragraph 7 of the affidavit supporting this application, on 20/07/2021 the applicant received a letter, photographs and an affidavit from the Court Broker which suggested that, the respondent had tampered with the attached property by demolishing two rooms at the compound thereby vandalizing the main house while knowing that the property was under a prohibitory order of the court. That, despite a warning issued by the Court Broker to the respondent, the warned person refused to heed to the same.

It is because of the foregoing, the applicant is moving the court to be pleased to order the respondent`s arrest and that, the respondent be committed to prison as a prisoner for contempt of this court`s order dated the 16th day of October, 2020. The application is made under sections 95 and 68 (e) of the Civil Procedure Code. It is supported by an affidavit of one Edmund Aaron Mwasaga, the Acting Head of the applicant`s Legal Department. Whereas the applicant is being represented by Mr. Zacharia Daudi learned advocate, the respondent who resisted the application by filing his own counter affidavit, is being represented by Mr. Mpaya Kamara and Ms. Esther Msangi learned advocates. Arguments of the learned

counsel for the parties were made by way of filing written submissions in court.

Mr. Zacharia Daudi learned advocate commenced his submissions by adopting contents of the affidavit in support of the application. He then went on to invite the court to hold the obvious that it has jurisdiction to hear and determine the application for contempt of court resulting from disobedience of its own order, which in view of the learned advocate is a civil contempt of court.

The learned advocate invited the court to hold that the standard of proof required in establishing an allegation of civil contempt is not beyond reasonable doubt but on balance of probabilities. Neither a statutory provision, nor a case law was cited to persuade the court to hold in the learned advocate's path.

According to the learned advocate, the issues for determination ought to be whether there was an order of this court for attachment of the property described as Plot No. 26 Themu Hill Area, Arusha Township with Certificate of Title No. 424. And if the first issue is answered in the affirmative, the second issue ought to be whether the respondent disobeyed the said order.

The learned advocate submitted that, an order for attachment of the respondent's property was made by this court on 16/10/2020. He then referred to paragraph 3 of the respondent's counter affidavit in which existence of the prohibitory order is admitted. According to the learned advocate, the prohibitory order prohibited the respondent from

transferring, charging or changing the attached property in any way unless and until the court`s order is lifted or the debt is paid in full.

Mr. Zacharia Daudi learned advocate submitted further that, it was evident as per paragraph 7 of the applicant`s affidavit that, the respondent had tampered with the property by demolishing part of it while knowing existence of this court`s order attaching the same property. The learned advocate attempted to challenge paragraphs 4 and 5 of the respondent`s counter affidavit by way of written submissions. The learned advocate did not file an affidavit in reply to the respondent`s counter affidavit. Neither did he consider it necessary to seek leave of the court so as to cross examine the respondent. In the respondent`s counter affidavit, the respondent had deponed in paragraph 4 that, at the end of May 2021, heavy branches of one big tree which was nearby the alleged demolished two rooms at his compound, broke down and fell on the roof of the two old rooms. That, the tree had grown weak due to old age. And, in that way, the two rooms got completely destroyed. The respondent had also deponed in paragraph 5 of his counter affidavit that, after the said incident, he responsibly caused the compound to be cleared by removing the said tree branches, the roof which had collapsed as well as the debris of the destroyed two rooms.

The learned advocate for the applicant submitted that, the respondent`s story regarding the big tree had not been substantiated since the photographs annexed to the respondent`s counter affidavit do not show existence of old tree or heavy branches of the alleged big tree which fell over the attached house to cause the demolition. The learned advocate

invited the court to hold that, the two rooms were not demolished by the alleged heavy branches of one big tree but through the respondent's willful actions. And that, in demolishing part of the attached property, the respondent disobeyed this court's order. In view of the learned advocate, the actions of the respondent constituted a civil contempt of court. And, for the said civil contempt, the learned advocate invited the court to commit the respondent to prison as a prisoner.

It was submitted on behalf of the respondent that, he did not commit an act of contempt by disobeying this court's order and by tampering with the property under attachment in the manner alleged by the applicant. Ms. Msangi learned advocate insisted that, the said two rooms got destroyed as a result of what is deponed in paragraphs 4 and 5 of the respondent's counter affidavit as demonstrated in the preceding paragraphs of this ruling.

According to the learned advocate for the respondent, the applicant's invitation to the court to hold that the standard of proof in establishing civil contempt is on balance of probabilities, is intriguing. It was the learned advocate's stance that, no person ought to be punished for contempt of court for disobeying an order of court except when the disobedience is established beyond reasonable doubt. In view of the learned advocate, the allegations against the respondent had not been sufficiently proved.

I am at one with the learned advocate for the applicant that, it is a civil contempt of court to refuse or neglect to do an act required by a judgment or order of the court within the time specified in the judgment or order, or

to disobey a judgment or order requiring a person to abstain from doing a specified act. **See:** *Halsbury's Laws of England, (Fourth Edition) Volume 9 (1), Paragraph 458.* However, in cases of this kind the respondent must be shown to have had proper notice of the terms of the order. This is because, a person cannot be held guilty of contempt in infringing an order of which he knows nothing. Reasonably, for a court order of this kind to be enforced, it is necessary that a copy of the order be served upon the person required to do or refrain from doing a specified act. That being the rationale, Form No. 18 of the Approved Forms, GN No. 388 of 2017 which is made under Order XXI Rule 53 (1) of the Civil Procedure Code, was drafted reflecting the said position. The said notice is to be directed to the judgment debtor. The following words or other words to similar effect are used: *It is ordered that you, the said.....be, and you are hereby, prohibited and restrained, until the further order of this Court, from transferring or charging the same in any way.*

The respondent attempted but unsuccessfully, to challenge existence of an attachment order against his landed property. The said order is contained in this court's ruling dated the 16th day of October 2020 which is not disputed by the respondent. The same was followed by a prohibitory order issued by this court on 03/02/2021 pursuant to Order XXI Rule 53 (1) of the Civil Procedure Code. The said prohibitory order was served upon the respondent. The court was notified of this fact through a letter from the assigned Court Broker dated 05/07/2021. On 20/07/2021, an affidavit was filed in court by the Court Broker, proving the said fact. I hold the respondent's attempt to deny these facts, unsuccessful. Having held that

there was a prohibitory order served upon the respondent, for him not to transfer or charge the attached property, the next question is whether disobedience of the said order was proved to the required standard.**What is the standard of proof required to establish an allegation of civil contempt of court?**

The learned advocate for the applicant referred to the court broker`s affidavit in his bid to prove the allegation that, demolition of the two rooms of the attached landed property was a result of the respondent`s actions which constituted civil contempt for which the court has been invited to punish the alleged contemnor. However, from the Court Broker`s affidavit there is no specific averment indicating that, the Court Broker saw the respondent demolishing the two rooms. The Court Broker deponed in paragraph 3 of his affidavit that, when he visited the attached property on 30/06/2021, he found that the second judgment debtor/ respondent had tampered with the property by demolishing two rooms thereby vandalizing the main house while knowing the property was under a prohibitory order. This averment is far from suggesting that the Court Broker witnessed the act of demolishing the said two rooms.

In terms of the respondent`s counter affidavit, the two rooms were completely destroyed when heavy branches of a big old tree, fell on the roof of the destructed part of the landed property. The applicant did not challenge this averment through the use of an affidavit, but through written submissions. Submissions by an advocate are not evidence. They are arguments based on the available evidence and the governing law.
See: DR. A NKINI & ASSOCIATES LIMITED VS. NATIONAL

HOUSING CORPORATION, CIVIL APPEAL No. 72 OF 2015, CAT, AT DAR ES SALAAM. Neither was the respondent cross examined regarding the actual cause of destruction of the said landed property. The learned advocate for the applicant was of the view that the standard of proof required is that of balance of probabilities. On the other hand, the learned advocate for the respondent was of the contrary view that, proof ought to be beyond reasonable doubt. Counsel for the parties cited no authorities to back up their respective positions.

In striving to resolve the controversy, I was unable to obtain a case law here at home, addressing a similar issue. I was however fortunate that, some persuasive English case laws came to my aid.

According to the said decisions, a person can only be held guilty of civil contempt, for breaking the terms of a court`s order only if it can be proved that a breach has been committed by the respondent and that, the standard of proof is that applicable in criminal cases, that is, the breach must be proved beyond reasonable doubt. Two of the decisions are cited hereunder:

In **Re Bramblevale Ltd (1969) 3 ALL ER 1062** the defendant, a managing director of a company which was being wound up, had been brought before the court on a summons by the liquidator, for his alleged contempt in not complying with an order made by the Registrar to produce certain books belonging to the company. The defendant claimed that at the time of the order the books no longer existed, because as a result of a car accident a year earlier, the books had become soaked in petrol and

inadvertently thrown away. The court did not believe this story and committed the defendant indefinitely for contempt. The following month, the defendant applied for release before the same court. The application was unsuccessful. The court held that,there are only two possibilities '....either he still has them or else he no longer has them, whether by reason of loss, destruction, transfer to someone else or otherwise....that he has himself to blame.' An appeal was successfully made to the appellate court. **Lord Denning MR** said: *A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond all reasonable doubt. It is not proved by showing that, when the man was asked about it, he told lies. There must be further evidence to incriminate him. Once some evidence is given, then his lies can be thrown into the scale against him. But there must be some other evidence.....Where there are two equally consistent possibilities open to the court, it is not right to hold that the offence is proved beyond reasonable doubt.*

The above cited decision was followed by another Court of Appeal decision, in **Knight vs. Clifton, (1971) 2 ALL ER 378** where the Court said: Contempt of court of the type that consists in breach of an injunction or undertaking, is something that may carry penal consequences, even loss of liberty, and the evidence required to establish it must be appropriately cogent. I am highly persuaded by the above cited authorities. I also hold that, the standard of proof required to establish a civil contempt, is that obtaining in criminal cases, that is, beyond reasonable doubt.

In the application before me, the applicant brought no further evidence to controvert the respondent's defence that, destruction of the attached property did not result from his actions. That doubt remained unresolved on part of the applicant. It is for that reason I hold the allegations unproved. The application stands dismissed. No order is made as to costs.

DATED at **DAR ES SALAAM** this 20th day of October, 2021.




C. P. MKEHA

JUDGE

20/10/2021

Court: Ruling is delivered in the presence of Mr.ZachariaDaudi learned advocate for the applicant and Mr. MpayaKamara learned advocate for the respondent, this 20th day of October, 2021.




C. P. MKEHA

JUDGE

20/10/2021