

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISC. COMMERCIAL APPLICATION NO. 105 OF 2022**

(Arising from Commercial Case No. 65 of 2019)

**KCB BANK TANZANIA LIMITED ..... APPLICANT**

**VERSUS**

**DICKSON HYASINT HYERA ..... RESPONDENT**

**RULING**

**A.A. MBAGWA, J.**

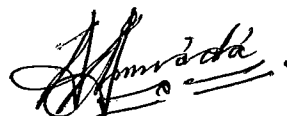
This is an application for execution of a decree by way of arrest and detention of the judgment debtor namely, Dickson Hyasint Hyera. The application originates from a consent decree in Commercial Case No. 65 of 2019 between the applicant and the respondent. The applicant instituted a suit, Commercial Case No. 65 of 2019 which was finally disposed of through amicable settlement. In the deed of settlement dated 28<sup>th</sup> October, 2019, the respondent admitted debt of TZS 201,000,000 hence he was ordered to pay the applicant a sum of TZS 208,000,000/=. However, the applicant did not honour the terms and conditions agreed



in the deed of settlement as such, the applicant decided to bring this application.

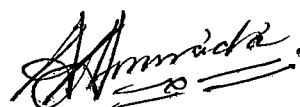
The application has been brought by way of chamber summons made under sections 38(1), (2), 44(1), 46(1)(a)(b) and (ii), and 95 of the Civil Procedure Code. The applicant prays the court the following orders;

1. That this honourable court be pleased to find out that the respondent/judgment debtor is deliberately avoiding to honour the decree of this court delivered on the consent of the parties dated 18<sup>th</sup> September, 2020.
2. Sequel to granting prayer (i) herein, the Hon. Court be pleased to issue orders for the arrest of the respondent/judgment debtor and commit him as civil prisoner unless otherwise he deposits the decretal sum in full as adjudged by this court in the decree dated 4<sup>th</sup> December, 2020 which is now outstanding in the extent of Tshs. 197,000,000/=.
3. That the applicant is able and willing to maintain the respondent /judgement debtor during the entire period he shall be serving custodial sentence by providing all costs /charges prescribed and or any other monthly allowances as shall be prescribed by honorable court.

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4. That costs and incidental to the application be borne by the respondent/judgement debtor.
5. Any other and further reliefs the hon. Court shall deem just and fit to grant.

The application is supported by an affidavit sworn by Damas Gabriel Mwangange, a principal officer of the applicant bank. The deponent states that, the respondent agreed and was therefore ordered by the court to pay the decretal sum in instalments as indicated in the deed of settlement (annexure TMA3). Mr. Mwangange further states that it was agreed that in case of default, the applicant would be entitled to sell the respondent's property comprised in Plot No. 1007, Block 'A' Mbezi Luis, Ubungu under CT 77481 which was in custody of the respondent at the material time. The applicant goes on to state that the respondent only paid Tanzania Shillings Nine Million (Tshs 9,000,000/=) out of the decreed amount and that upon making a follow up, the applicant learnt that the respondent had used the said title namely, CT 77481 to secure another loan from CRDB Bank. The applicant therefore opined that the respondent has no intention to honour the court decree and he is intentionally avoiding execution thereof. Further, the applicant contends that the respondent would not pay the decretal sum unless he is arrested and detained. He



also states that the applicant is able to pay the required subsistence allowances for the entire period which the respondent will be detained as a civil prisoner.

In contrast, the respondent contested the application through a counter affidavit sworn by the respondent, Mr. Dickson Hyasint Hyera. He states that his failure to pay the decretal sum was due to the factors beyond his control. Further, the respondent avers that the said certificate of title No. 77481 is in possession of Letshego Bank where he took another loan, upon being advised by the applicant, in order to service the loan with the applicant.

When the matter was called on for hearing, the applicant was represented by Irene Mchau, learned counsel while the respondent appeared through Walter Shayo, learned counsel.

Submitting in support of application, the applicant counsel prayed the court to find that the applicant is deliberately avoiding to honor decree. She thus implored the court to order arrest of the respondent and consequently commit him as civil prisoner. Besides, the counsel informed the court that the applicant is ready and able to incur costs that would be required to maintain the respondent while in custody.



To bolster the argument, the applicant's counsel referred this court to the cases of **Mohamed H. Nassor vs Commercial Bank of Africa**, Civil Application No. 161 of 2014, CAT at Dar es Salaam at page 8 and **The Grand Alliance Limited vs Mr. Wilfred Lucas Tarimo and 4 Others**, Civil Application No. 229 of 2020, CAT at Dar es Salaam at page 21 and 22. The counsel expounded that in the above cited cases, it was categorically stated that the applicant is free to apply for execution of decree by any mode of execution mentioned under section 42 and Order XXI rule 28 of the Civil Procedure Code. Finally, the counsel prayed the court to grant the application.

In rebuttal, Mr. Walter Shayo strongly opposed the application. He told the court that before invoking arrest and detention mode under Order XXI rule 39(2), there are requirements which must be fulfilled. The respondent's counsel explained that the requirements include the proof that the debtor has bad faith in refusing to pay the amount claimed. He continued that bad faith was interpreted in the case of **The Grand Alliance Limited vs Mr. Wilfred Lucas Tarimo**, Civil Application No. 187/16 of 2019, CAT at Dar es Salaam at page 23. Mr. Shayo elaborated that from the said definition, it is quite clear that the respondent has not attributed any bad faith in repaying the decretal sum.

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Further, the respondent's counsel told the court that the reasons for the respondent's failure to pay the decreed money are disclosed in the respondent's counter affidavit. It was the counsel's submission that the respondent was honouring the decree until when he was served with the court summons in respect of this application. The counsel insisted that the respondent had not shown any bad faith in honoring the decree. He thus implored the court to dismiss the application for want of merits.

In rejoinder, Ms. Irene Mchau reiterated that the respondent has demonstrated bad faith by failure to honour the court order. She recapitulated that the respondent was indebted to the applicant a sum of Tshs. 194,879,483.63 but he paid only Tanzania Shillings Nine Million (Tshs. 9,000,000/=). In her view, the small amount paid by the respondent in execution of the court decree constituted bad faith. In addition, Ms. Mchau submitted that the respondent's act of mortgaging the certificate of right of occupancy to wit CT 77481 to another bank as admitted under paragraph 5 of the respondent's counter affidavit while aware that the same was agreed to be disposed of in case of default, clearly exhibits the respondent's bad intention. She reiterated that arrest and detention are the deserving modes of execution, in the circumstances of the case.

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I have paid the deserving attention to the counsel's rival submissions, depositions along with their respective annexures. The relevant issue for consideration is whether the applicant has satisfied this court to order arrest and detention of the respondent as a civil prisoner.

At the outset, it is apposite to note that arrest and detention is one of modes of executing court decree recognized under our law. Section 44 of the Civil Procedure Code provides;

*42. Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree holder, order execution of the decree-*

*(a) by delivery of any property specifically decreed;*

*(b) by attachment and sale or by sale without attachment of any property;*

*(c) by arrest and detention in prison;*

*(d) by appointing a receiver; or*

*(e) in such other manner as the nature of the relief granted may require.*

In light of the provision above, it goes without saying that this court, subject to conditions as may be prescribed, is enjoined to arrest and detain a judgment debtor in the course of executing its decree. Order XX1 rule 39 (2) stipulates conditions which the court may take into



consideration before detaining the judgment debtor. The rule provides;

(2) 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) 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 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 the execution of the decree.*

In this application, the applicant has raised allegations of bad faith on the respondent's part. The applicant predicates bad faith on the respondent's act of mortgaging the property which he pledged, in the deed of

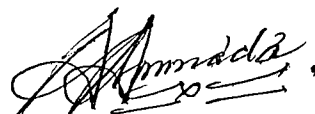
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settlement, that it would be available to satisfy the decree in case of default. On the contrary, the respondent disputed the allegations of bad faith and maintained that he was honouring the decree until when he received summons in respect of this application. Nonetheless, the respondent does deny mortgaging the property namely, CT 77481 to another bank, Letshego.

I have scanned the terms of the deed of settlement (annexure TMA-3) which was signed by the parties and filed in court to adjust the suit. Clause 4 of the settlement deed is very clear that the respondent consented to the sale of his house under Certificate of Title No. 77481 in respect of Plot No. 1007 Block 'A' Mbezi Luis in case he defaulted repayment of the agreed instalments. Despite this clear term of the settlement deed, the respondent went astray and mortgaged the said property to Letshego Bank.

According to Order XX1 rule 39(2)(b) cited above, an act of bad faith in relation to property, with the object or effect of obstructing or delaying the decree holder in the execution of the decree is one of the grounds for grant of arrest and detention. While interpreting as to what constitutes bad faith, the Court of Appeal in the case of **The Grand Alliance Limited vs Mr. Wilfred Lucas Tarimo and 4 Others** (supra), quoted with

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approval the definition provided by the Supreme Court of India in the case of **Jolly George Veghese & Another v. The Bank of Tanzania of Cochin** AIR 1980 SC 470 which is to the following effect:

*"The simple default to discharge is not enough. There must be some element of bad faith beyond mere indifference to pay, some deliberate or recusant disposition in the past or, alternatively, current means to pay the decree, some or a substantial part of it. The provision emphasizes the need to establish not mere omission to pay but an attitude of refusal on demand verging on dishonest disowning of the obligation under the decree. Here considerations of the debtor's other pressing needs and strained circumstances will play prominently.*

Applying the above interpretation of bad faith as provided in the foregoing excerpt, I am at one with the applicant that the respondent has maliciously and deliberately mortgaged the property namely, Certificate of Title No. 77481 with the intention to obstruct or delay the judgment debtor in executing his decree.

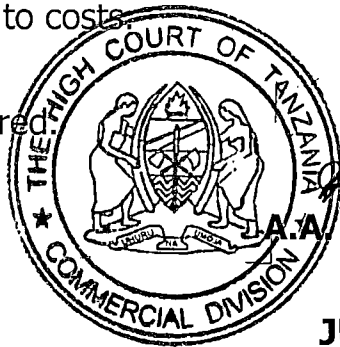
On all this account, it is my findings that the respondent has failed to show cause why he should not be detained in prison. I therefore hold that this application is meritorious and consequently I allow it.

Thus, pursuant to section 46 (1)(a) of the Civil Procedure Code, I hereby order the judgment debtor/respondent one DICKSON HYASINT HYERA to be detained in prison for six (6) months in execution of decree in

Commercial Case No. 65 of 2019, unless the respondent/judgment debtor pays the decretal amount to wit, Tshs. 197,000,000/= say Tanzania Shillings One Hundred Ninety-Seven Million within fourteen (14) days from the date of this ruling. The decree holder/ applicant shall pay Tanzania Shillings Three Hundred Thousand (Tshs. 300,000/=) only being the monthly subsistence allowance of the judgment debtor for the period that he shall be in prison.

No order as to costs.

It is so ordered



*A.A. Mbagwa*  
**A.A. Mbagwa**

**JUDGE**

**20/04/2023**