

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

AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 90 OF 2016

(Arising from Land Case No. 62 of 2014)

ESTHER CRESCENCE MASHOKOPLAINTIFF/DECREE HOLDER

VERSUS

NORBERT FURAHA LYIMODEFENDANT/JUDGEMENT DEBTOR

RULING

S.M. KALUNDE, J.:

This ruling relates to an application for execution made under order 21 rule 10(2) (j) (iii) of **the Civil Procedure Code, Cap. 33 R.E 2019**, where the Decree Holder is seeking for arrest and detention of Norbert Furaha Lyimo, the Judgement Debtor as a civil prisoner until he satisfies the decree dated 13th August, 2014. In that respect he is seeking the assistance of the Court.

The facts leading up to the present application are that, on 13th May, 2014, this Court (**Hon. Mgaya, J**) entered judgement for the plaintiff as prayed under order XXXV rule 2 (2) (b) of Cap. 33. In accordance with the decree the decree holder was awarded the total amount of Tshs. 934,505,000.00 and the attached property could

only satisfy Tshs. 50,000,000.00. The decree holder filed the present application with a view to secure the arrest and detention of Norbert the judgement debtor as a civil prisoner.

Subsequent to the filing of the application, on 22nd March 2017 the Court issued a notice for the judgement debtor to show cause. In compliance with the orders 04th April, 2017 the judgement debtor filed a seven page paragraph. In the affidavit the counsel for the judgement debtor alleged they had filed Misc. Land Application No. 219 of 2017 which sought for extension of time within which to file a review of the judgement in Land Case No. 62 of 2014. He also alleged that they had filed an application for stay of execution pending determination of Misc. Land Application No. 219 of 2017. The counsel prayed that hearing of the application for execution be stayed pending hearing of the two application which were pending before the Court.

On 14th May, 2018 the Court gave orders that hearing of the application be stayed pending hearing of the application for extension of time to file a review; and an application for stay of execution which was filed. The two applications, Misc. Land Application No. 219 of 2017 and Misc. Land Application No. 269 of 2017 terminated to

the disadvantage of the judgement debtor. This application was, thus, given green light to proceed.

Records of the Court show that since 14th May, when orders to stay hearing of the application pending for extension of time to file a review; and an application for stay of execution were given, the judgement debtor never appeared to Court. On 11th November, 2019 the Court gave orders that the judgement debtor be served through publication in one of the widely circulating newspaper. The order was compiled and on Mwananchi Newspaper dated 14th January, 2020.

Even after publication the judgement debtor did not appear before the Court. On 23rd June, 2020 I ordered hearing to proceed exparte against the judgement debtor. In view thereof I ordered the decree holder to present his submissions in writing which he did.

In support of the prayer Mr. Aretas Stephen Kyara, learned advocate submitted that the judgement debtor failed to satisfy the decree and did not file an affidavit to show cause as to why the execution should not proceed. He argued that the judgement debtor was summoned through Mwananchi Newspaper dated 14th January, 2020 but failed to file his affidavit. He cited the case of **African Banking Corporation T. Ltd vs. Mture Educational Publishers**

Ltd & Others (Commercial Case No.73 of 2010) [2019] TZHCComD 155; [17 September 2019 TANZLII]. In his view the respondent failed to show cause thus an order for arrest and detention for the defaulting respondent was unavoidable.

I have gone through the application; the affidavit of the judgement debtor and the submissions made by Mr. Kyara, in my view the issue for determination is whether this case befits for the issuance of an order for arrest and detention of the defaulting respondent as a civil prisoner. The position of the law relating to arrest of judgement debtor as a civil prisoner is provided for under sections 42 to 47 and rules 28, 35 to 39 of Order XXI of the Cap. 33.

The different modes of carrying out execution are set out under section 42 of Cap. 33. The section reads:

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 the present application, the decree holder filed for an application for execution or in the alternative, arrest and detention of the judgment debtor. The amount involved is Tshs. 934,505,000.00. A notice to show cause was issued to the judgment-debtor. Subsequent to the notice, the judgment-debtor filed an affidavit. However, instead of showing cause why the judgment-debtor should not be arrested and detained, the affidavit alleged that the judgment-debtor had filed two applications; **Misc. Land Application No. 219 of 2017** sought for extension of time to file a review of the Judgment in Land Case No. 62 of 2014. Also **Misc. Land Application No. 269 of 2017** was filed seeking for stay of execution pending determination of Misc. Land Application No. 219 of 2017. Hearing of this application was indeed stayed. However, as hinted above, the two applications terminated to the disadvantage of the Judgment debtor.

In the final point, this Court has a duty to weigh in whether the conditions under Order XXI rule 39 (2) of the Code have been satisfied before making any order of arrest and detention. The respective provision provides that:

The wording of section 42 above, presupposes that the decree holder is at liberty to choose the mode of execution appropriate in the circumstances of his case. That prerogative is subject to "*such conditions and limitations as may be prescribed by the court*". In **the Grand Alliance Limited vs. Mr. Wilfred Lucas Tarimo & Others** (Civil Appl. No. 187 of 2019) [2020] TZCA 191; [21 April 2020 TANZLII] the Court of Appeal (**Sehel, J.A**) highlighted the preconditions to be taken into account before ordering imprisonment of a judgment-debtor:

- (a) there must be an application for execution of a decree for payment of money by arrest and detention in prison of a judgment-debtor;
- (b) executing court has to issue a notice to show cause to the person against whom execution is sought;
- (c) the executing court has to satisfy itself as to whether the conditions mentioned under Order XXI rule 39 (2) exist or not.

Upon consideration of the above factors the executing court may exercise its discretion to make orders allowing or disallowing an application for arrest and detention of a judgment-debtor.

"(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." [Emphasis mine]*

In the instant case, it is not disputed that the decree sought to be executed included payment of Tshs. 934,505,000.00. It is also on record that upon attaching the house of the judgment-debtor, the decree holder could only recover Tshs. 50,000,000.00. In his submissions, Mr. Kyara, maintained a view that the Judgment debtor did not file an affidavit to show cause as to why he should not be arrested and committed to prison. In his view, this was sufficient to commit him to prison. It is on record that when this matter was filed, the judgment debtor was given notice in accordance with Order XXI rule 35 (1); and that in obedience to the order he entered appearance and filed his affidavit. On his part, the decree holder did not file their counter affidavit to contradict the judgment debtors' affidavit.

At this juncture, I wish to pose and note that, the failure to file a counter affidavit left the decree holder with no material upon which to base his claims for arrest and detention. I say so because, Mr. Kyara wishes this Court to grant the orders sought on the basis of his written submissions. I am aware that submissions are not evidence, so I will approach them with caution.

Even assuming the submissions were supported in the counter affidavit, which I hold they were not, there is no material whatsoever in the chamber application and submissions to persuade this Court that the conditions under Order XXI rule 39 (2) of the Code have been satisfied. I will explain why.

First, there no proof or evidence the judgment debtor attempted to transfer, conceal, removal or carryout any other act of bad faith in relation to his property. Secondly, there no material to support claims of undue preference to other creditors by the judgment-debtor. Thirdly, there is no proof that since the date of the decree, judgment-debtor has had, the means of paying the amount of the decree or some part thereof but refused or neglected to do so. Finally there were no claims that there is a 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 fact, he allowed the attached house to be sold in realization of the decree, only that the sale proceeds could not meet the realization of the award.

For this Court to issue the orders sought, there must be evidence or materials to that the judgment-debtor was able to realize

cash either by sale or mortgage of the property so as to satisfy the decretal amount and that, actuated by bad faith, he neglected or refused to do so. I will associate myself with the Court of Appeal decision in **the Grand Alliance Limited Case (supra)** where it was held that:

"Therefore, the law requires that there must be evidence on bad faith beyond mere indifference to pay."

In arriving at its decision the Court of Appeal was persuaded by the decision of 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 articulated that:

"The simple default to discharge is not enough. There must be some element of bad faith beyond mere indifference to pay, some deliberate or reculant 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."

In light of the above analysis, I find no evidence establishing that the conditions under Order XXI rule 39 (2) of the Code have been satisfied for me to exercise the discretion to grant the orders sought. Consequently, I will dismiss the application and make no orders as to costs.

It is so ordered.

DATED at DAR ES SALAAM this 25th day of SEPTEMBER, 2020.


S. M. KALUNDE
JUDGE