

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

EXECUTION NO. 50 OF 2022

RICHARD SIMON1ST APPLICANT
KOE SIMON2ND APPLICANT
VERONICA SIMON.....3RD APPLICANT
FRELINI CHARLES.....4TH APPLICANT

VERSUS

YASSIN I. MASWALIRESPONDENT

R U L I N G

Date of last Order:21/09/2022
Date of Ruling:23/09/2022

K. D. MHINA, J.

This is an application for the execution of a decree made under Order XXI, Rule 10 (2) (d) (iii) and (v) of the Civil Procedure Code, Cap. 33 R. E. 2019 (The CPC) filed by Richard Simon, Koe Simon, Veronica Simon, and Frelini Charles ("Decree Holders") against Yassin I. Maswali ("Judgment Debtor").

On 10 June 2022, the decree holders lodged this application to realize the "fruits" of their decree. They prayed for the payment of TZS. 3,480,000/=, and if the Judgment debtor defaults, the mode of execution in which this

Court's assistance is sought is for arrest and detaining the Judgment debtor as a civil prisoner.

I will briefly narrate the historical background to understand better the fact and sequence of events leading to this execution application.

The Judgment debtor sued the Decree Holders in two separate matters in this Court, i.e., Land Appeal No. 408 of 2017 and Misc. Land Application No. 1003 of 2017. In both cases, the Judgment debtor lost and was ordered to pay costs. Land Case No. 408 of 2017 was struck out with costs, while the Misc. Land Application No. 1003 of 2017 was dismissed with costs.

In pursuit of the ordered costs, the Decree Holders lodged an application for Bill of Costs (No. 113 of 2019), and as usual, it was heard by the Deputy Registrar as a Taxing Officer. The total claim on that Bill of Costs was TZS 9,280,000/=. After a full hearing, the Taxing Officer taxed and awarded TZS. 4,480,000/=.

At the hearing, the Decree Holder had the Legal Service of Mr. Idd Mrema, learned counsel, while the Judgment Debtor was absent despite dully served.

In his submission, Mr. Mrema argued that the Decree Holders prayed for the execution of TZS. 3,480,000 being the costs taxed in taxation proceedings. Initially, the bill was taxed at Tshs. 4,480,000/=, but the Judgment debtor succeeded in paying only TZS. 1,000,000/= as a result, the Decree holders, decided to file this application for execution.

He further submitted that, in the event of the failure to satisfy the decree, the Judgment Debtor be arrested and detained as a Civil Prisoner until he fully pays the remaining amount.

In the efforts to claim the remaining amount from the Judgment Debtor was reminded by reminder notes. Still, the efforts proved futile, though initially, the Judgment Debtor promised to pay by installment, i.e., TZS. 500,000/= every month.

He concluded his submission by informing this Court he opted for arrest and detention because the Judgment Debtor had the ability to pay, but for the reasons known to him, he opted not to pay.

I have carefully considered the arguments of the counsel for the Decree Holders. The main issue is whether there are reasons to warrant the arrest and detention of the Judgment Debtor as a Civil Prisoner.

In **Grand Alliance Ltd vs. Mr. Wilfred Lucas Tarimo and four others**, Civil Application No. 187/16 of 2019 (Tanzlii), the Court of Appeal held that:-

*"The right to commit a Judgment Debtor as a Civil Prisoner is provided under Sections 42 – 47 and Rule 28, 35 to 49 and Order XII of the Code. Section 42 of the Code enumerates different modes of execution that the decree-holder can choose for executing his decree. However, that right is subject to some **conditions and limitations**". [Emphasis provided]*

Order 21 Rule 39(2) of the CPC highlighted conditions and limitations to consider before committing a Judgment Debtor as a Civil Prisoner.

The order read as follows:-

- "2. Before making an order.....the Court may take consideration allegations of the **decree-holder** touching any of the following: -*
- a. The decree being a sum for which the Judgment Debtor was bound in any producing capacity to account;*
 - b. The transfer, concealment, or removal by the Judgment Debtor of any part of his property after the date of the suit in which the decree was passed or commission by him after that date or any other act of bad fault in relation to his property with the object or effect of obstructing or delaying the Decree Holder in the execution of eth decree;*

- c. Any undue preference is 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 absconding or delaying the decree-holder in the execution of the decree”.*

In his submission, Mr. Mrema advanced only one allegation (reason), that Judgment Debtor had the ability but refused to pay. That, despite several reminders, the Judgment debtor failed to pay the remaining balance of TZS 3,480,000/=. He initially paid TZS 1,000,000/= and promised to pay TZS 500,000 every month until the finalization of payments.

I have gone through the application and submissions, but I failed to find concrete evidence that any of the above terms and conditions under Order 21 Rule 39(2) of the CPC have been successfully proved.

For me, there is a mere allegation from the counsel without any proof. No proof was produced that the Judgment Debtor has the means but has refused to pay. In proving the issue of refusal to pay, there must be a piece of clear evidence on two conditions;

One, the Judgment Debtor must have the means and ability to pay.

Two, there must be a refusal to pay on the part of the judgment debtor.

As I said earlier, the Decree Holder failed to prove any of the two conditions in this application. The reminder letters sent to the Judgment Debtor were not proof of the two conditions above.

Therefore, from the above findings, the Decree Holders had failed to discharge their duty in proving before the Court that the Judgment Debtor deliberately refused to pay. This is because failure to pay does not mean refusal to pay.

Furthermore, in our laws, arrest and detention is not executed as a matter of course. This is a position in **Eurafrican Bank (T) Ltd vs. Ami Travel Bureau Ltd and Another**, Commercial Case No. 8 of 2006, High Court Commercial Division, on page 8, where it was held that:-

"So, in short, an order for committal to Civil Prison is not issued as a matter of course. The Decree Holder has to show that the Judgment Debtor has means but failed or refused to pay or did any act with the object of defeating the execution of the decree. If the Decree Holder fails to discharge that burden, the Court has no power to issue that process".

Therefore, as indicated earlier, there is no solid substantiated allegation or proof that the Judgment Debtor has refused to pay because the burden of proving that the Judgment has the means to pay but refused is on the Decree Holder. The responsibility which they failed to discharge at a required standard. See **Barclays Bank (T) Ltd vs. P.G Associates and 2 Others**, Commercial Case No. 6 of 2006, High Court Commercial Division (unreported)

In conclusion, I wish to add one issue, which is quite briefly, i.e., on the mode of execution sought by decree holders. The Decree Holders, in this application, applied arrest and detention "straight away" without attempting other methods of execution.

Though the law does not prohibit the Decree holders from opting for arrest and detention before exhaustion of other modes, but as a matter of practice, at least the Decree Holders have to show that other "first instances" modes such as attachment and sale have failed. This is because arrest and detention are treated as a "last resort" mode.

In **Simon Mwita Mlagani and another vs. Kiribo Ltd, Execution case No. 56 of 2020** (High Court, Musoma – Tanzania), it was held that:-

"In Law, there are various Legal means provided for one to enforce the court's award. Nevertheless, resorting to the arrest and detention mode

is not the party's choice but, as a matter of Legal Practice, it is a legal means of last resort".

The exact position was pronounced in **Joseph Nestory Isaka vs. Flanconia Investment Ltd**, Execution No. 4 of 2020, High Court, Land Registry (Tanzlii) that: -

"If the normal procedure for execution has failed, then the applicant can opt the last resort of executing decree of this court by filing an application to detain the Judgment Debtor in Civil Prison."

In the upshot, I find the Decree Holders have failed to discharge their duty as required by the law before committing a Judgment Debtor to prison as a Civil prisoner.

In conclusion, this application is struck out, and since the matter proceeded in the absence of the Judgment debtor, no order as to cost.

It is so ordered.




K. D. MHINA
JUDGE
23/09/2022