

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS LAND APPLICATION NO 40 OF 2022

(From the Judgment and Decree in Land Case No.118 of 2015)

JOSEPH NESTORY ISAKAAPPLICANT

VERSUS

FLANCONIA INVESTMENT LTD1ST RESPONDENT

HUBERT KRISCHKE 2ND RESPONDENT

Date of last Order: 30/09/2022

Date of Ruling:30/09/2022

RULING

OMARI, J.:

The Applicant (Decree Holder) made this Application under sections 42 (c) and (e), 44 (1), 68 (e) and 95 as well as Order XXI Rules 10 and 35 (1) of the Civil Procedure Code, Cap 33 (R.E 2019) (the CPC). They seek execution of a decree of this court dated 19 May, 2017 in Land Case No. 118 of 2015. To get a better grasp of the sequence of events, I find it necessary to narrate the background as follows.

Through the above-mentioned Land Case No. 118 of 2015 the Decree Holder brought a suit against Flanconia Investment Ltd for rent arrears to the tune

of TZS 65,000,000. The same is a result of the Judgment Debtor's (the then defendant) issuing dishonoured cheques that had been written towards the claimed rent. Upon admission by the Judgement Debtor the court ordered them to pay the Decree Holder TZS 65,000,000/= plus TZS 5,000,000/= in general damages. Costs were also awarded to the Decree Holder. To execute the said judgment and decree the Decree Holder filed Execution No. 4 of 2020. This was eventually struck out by this court for failure to accompany the application with an affidavit which legitimizes the Applicant's (Decree Holder's) claims. The court in its Ruling also noted that the Applicant had not exhausted other remedies which would have moved it to entertain their plea for ordering the arrest and detention of the Judgement Debtor as a civil prisoner. They are now before this court, again praying for three orders which for avoidance of doubt I choose to reproduce hereunder;

1. This honourable court be pleased to order for the arrest and detention as a civil prisoner the 2nd Respondent, the Managing Director of the 1st Respondent/Judgment Debtor for failure to satisfy Decree/Order of the Court dated 19 May, 2017;
2. Costs of the application to be provided for; and

3. Any other orders and reliefs as this honourable court shall deem fit to grant.

Yet again, a brief narration of what transpired since this Application was filed on 4 February, 2022 might also be helpful to appreciate the facts. The record shows that on 15 March, 2022 this court ordered for the Respondents to be served with summons to show cause why they should not be held liable as a civil prisoner. On the next date set for hearing (i.e., 11 May, 2022) the advocate for the Applicant informed the court that they failed to effect service to the Respondent and prayed to serve him by way of publication since the company seemed to have changed their physical address. This court granted the prayer. On the next date scheduled for hearing, the Applicant's advocate informed the court they served the Respondents through Mwananchi Newspaper on 25th of May, 2022 (the same is on record). They prayed that being that the Respondent has not appeared, they should then be heard *ex parte*. Their prayer was granted, thus, this ruling.

The Applicant's advocate at the *ex parte* hearing, one Elia Mwingira commenced his submissions by asking this court to adopt the affidavit of Joseph Isaka (the Applicant herein) to form part of his submissions. He informed the court that the 2nd Judgement Debtor, Hurbert Krischke against

whom the order to be detained as a civil prisoner is sought is the Managing Director of the 1st Judgement Debtor therefore conversant with the assets of the 1st Judgement Debtor. He went on to state that the Judgment Debtors had completely failed to comply with the court's orders. The learned advocate averred, they decided to opt for this mode because the 2nd Respondent has been making countless promises that are not materializing. They (the 2nd Respondent) are avoiding to reveal properties which would have been attached for sale.

He continued to submit that the Judgment Debtors have been concealing properties and or assets making all other modes of execution, including attachment difficult. In his submission and in paragraph 8 of the affidavit he points out being told by the 2nd Judgment Debtor that the 1st Judgment Debtor owned Plot 12 Block A Bunju A in Kinondoni, Dar es Salaam. However, upon follow up of the same they found the said property was owned by another company. He also said they had tried to look for the Judgment Debtors' bank accounts but they refused to divulge any information. In addition, he informed the court that the 2nd Judgment Debtor is a German national so they have no other means to their money back or realize the judgment and decree.

Finalizing his submissions, he pointed out that they cited S. 42(c) and Order XXI Rule 8 of the CPC for arrest and detention as a civil prisoner and they pray that the 2nd Judgement Debtor the Managing Director of the 1st Judgement Debtor be committed as a civil prisoner to satisfy the Decree.

After carefully considering the facts and submission by counsel, the main issue that has to be determined is whether there are reasons to move this court to grant the order to arrest and detain the 2nd Judgment Debtor as a civil prisoner. Before going on to the reasons; let me, even if the said provisions are a common subject in any matter involving arrest and detention of a Judgement Debtor as a civil prisoner reproduce the provisions that provide for this option and ensuing procedure. To start, section 42 of the CPC provides that:

'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 ... (c) by arrest and detention in prison.'

Section 44 (1) also provides that:

' A judgment debtor may be arrested in execution of a decree at any hour and on any day and shall, as soon

as practicable, be brought before the court, and the court may order his detention:

The sub-section above is with a *proviso* on the manner in which the arrest should not be made or rather should be made giving specific dos and don'ts when effecting the arrest. There is an additional *proviso* that provides for the immediate release of the Judgement Debtor where after the arrest he or she pays the amount of the decree and the costs of the arresting officer.

Section 44 (2) and (3) further provides that:

(2) Where a judgment debtor is arrested in execution of a decree for the payment of money and brought before the court, the court shall inform him that he may apply to be declared an insolvent, and that he will be discharged if he has not committed any act of bad faith regarding the subject of the application and if he complies with the provisions of the law of insolvency for the time being in force.

(3) Where a judgment debtor expresses his intention to apply to be declared an insolvent and furnishes security, to the satisfaction of the court, that he will within one month so apply and that he will appear, when called upon, in any proceeding upon the application or upon the decree in execution of which he was arrested, the court shall

release him from arrest and, if he fails so to apply and to appear, the court may either direct the security to be realised or commit him as a civil prisoner in execution of the decree.'

The above provisions depict that even if an arrest and detention order were given by a court the Judgment Debtor still has room to redeem themselves.

Order XXI Rule 10 of the CPC provides that:

'Where a decree is for the payment of money the court may, on the oral application of the decree-holder at the time of the passing of the decree, order immediate execution thereof by the arrest of the judgment debtor, prior to the preparation of a warrant if he is within the precincts of the court.'

The above provision read with those previously cited cement the argument that a Decree Holder has a right and can in fact approach a court to seek for the arrest and detention of a Judgement Debtor as a civil prisoner. As held by the Court of Appeal of Tanzania in **Grand Alliance Ltd vs. Mr Wilfred Lucas Tarimo and four others**, Civil Application No. 187/16 of 2010 (Unreported) this right is subject to some conditions and limitations. Some

of these conditions and limitations are provided for in the law which in Order XXI Rule 39 (2) which essentially beseeches the court to consider allegations of the decree holder touching on what is provided for from (a)- (e) of the said Rule 39 (2) of the CPC. It should be noted that Rule 39 is framed to cater for situations where the Judgment Debtor has appeared in court after being served. In the Application before me the Judgement Debtors have been serially absent and it was heard *ex parte*.

While I must emphasise that I understand that ordering the arrest and detention of a Judgment Debtor as a civil prisoner is not something that was envisaged by the law to be used as a scapegoat for Decree Holders to seek

imprisonment of Judgement Debtors at whim. This is why it has always been maintained that arrest and detention should not be the first and to go for means of execution of a decree (see **Grand Alliance Ltd vs. Mr. Wilfred Lucas Tarimo and four others** as cited supra see also, **Eurafrican Bank (Tanzania) Ltd vs. Tina and Company Limited and 2 Others**, Commercial Case No. 80 of 2006, High Court of Tanzania Commercial Division (Unreported)).

This view was also held by this same court when the Applicants first brought their application (see **Joseph Nestory Isaka vs. Flonconia Investment**

Ltd, Execution No. 4 of 2020, High Court of Tanzania Land Division (unreported).

On the other hand, the court in **Eurafrican Bank (Tanzania) Ltd vs. Tina and Company Limited and 2 Others** (*supra*) also observed that section 44 (1) and Rule 28 of Order XXI of the CPC is in the statute book (that is the CPC) and as long as it is there it cannot be "unconstitutional" for a judgement debtor to be committed as a civil prisoner when he fails to pay his debts. They went on to observe as we have elsewhere in this judgement that the CPC provides for a legal regime for arrest and detention as a means of enforcing a decree.

In the circumstances of the present Application, the 2nd Judgment Debtor has failed to appear to defend themselves and or show cause why they should not be arrested and detained as a civil prisoner. Pursuant to the provisions of section 46 (1) (a) of the CPC, I order that, unless the whole decretal amount of TZS 70,000,000/= is paid within 14 days from the date of service of this order, the 2nd Judgment Debtor Hurbert Krischke shall be arrested and detained as a civil prisoner for the period of six (6) months in execution of a decree pronounced in Land Case No. 118 of 2015 before this court. The decree holder shall pay subsistence allowance for the Judgement

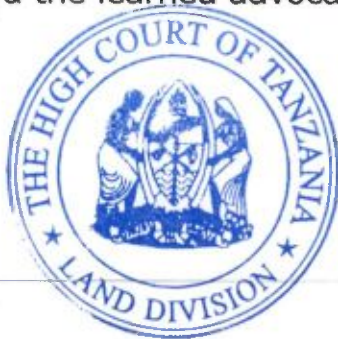
Debtor's upkeep per each month the Judgement Debtor will be in Prison in terms of Order XXI Rule 38 (1) and (2) of the CPC. It is so Ordered.



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A.A. OMARI
JUDGE
30/09/2022

Ruling pronounced on 11th day of October, 2022 in the presence of Armando Swenya the learned advocate for the Decree Holder.



A handwritten signature in blue ink, appearing to read "A.A. Omari".

A.A. OMARI
JUDGE
11/10/2022