

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

MISC. LAND APPLICATION NO. 505 OF 2021
(Originated from Land Case No. 45 of 2013)

HUSSEIN MOHAMED SHAMS APPLICANT

VERSUS

DAUDI SAKAYARESPONDENT

Date of last Order: 06/07/2022

Date of Ruling: 06/09/2022

RULING

I. ARUFANI, J

This application was filed in this court by the applicant under Order XXI Rule 10 (2) (j) (iii) of the Civil Procedure Code, Cap 33, R.E 2019 (hereinafter referred as the CPC) together with any other enabling provision of the law. The applicant who is a decree holder in Land Case No. 45 of 2013 of this court is urging the court to order the respondent who is a judgment debtor in the mentioned land case to show cause why he should not be arrested and detained as a civil prisoner for failure to pay him the sum of Tshs. 85,756,805/= being a decretal sum plus interest issued against the respondent. The applicant is also urging the court to order the respondent to be arrested and detained as a civil prisoner for

six months after having failed to show cause/pay the above stated decretal amount to satisfy the decree of the court.

The application is supported by an affidavit sworn by the applicant and it is opposed by a counter affidavit affirmed by the respondent. At the hearing of the application, the applicant was represented by Mr. Bernard Shirima, learned advocate and the respondent was represented by Mr. Bernard Ngatunga, learned advocate. The counsel for the respondent prayed the application be argued by way of written submissions and as the prayer was not contested it was granted, hence the application was argued by way of written submissions.

In arguing the application, the counsel for the applicant prayed to adopt all the contents of the affidavit and reply to the counter affidavit as part of his submission. He stated that, the decree in Land Case No.45 of 2013 subject of this application was made way back on 15th December, 2016 whereby the respondent was ordered to pay the applicant the sum of Tshs. 50,000,000/= being general damages plus Tshs. 539,000/= being costs to replace beacons removed from the suit land and interest of 12% on the decretal sum per annum. He submitted that, from when the decree was issued to the date of filing the present application in the court on 20th September, 2021 the claimed amount has raised to Tshs. 85,220,905/= (as per the calculation attached to the affidavit).

He contended that, from when the decree was issued to date the respondent is yet to pay the decretal sum and the reason advanced in the counter affidavit filed in this court by the respondent is that he is appealing to the Court of Appeal. He stated the respondent has attached a copy of the application for leave to appeal to the Court of Appeal and judgment of the court to the counter affidavit but there is no notice of appeal attached thereon. He argued that, under Rule 11 (3) of Court of Appeal Rules, 2009 as amended by GN. No. 362 of 2017 a notice of appeal or even an appeal is not automatic stay of execution. He added that, Rule 11 (4) of the same Rules states that, an application for stay of execution has to be made before the Court of Appeal within 14 days of service of notice of execution or from the date of becoming aware of an application for execution.

He argued that, the respondent was served with notice of the present application on 9th November, 2021 and on 17th November, 2021 he entered appearance before the court. He said on 23rd November, 2021 the respondent filed his counter affidavit in the court but to date which is more than seven months from when he first appeared in the court, he has never filed any application for staying execution of the decree in the court and no order to stay the execution has been issued by the court. He stated it is provided under Rule 11 (3) of the Court of Appeal Rules that, in any

civil proceedings, where a notice of appeal has been lodged in accordance with rule 83, an appeal shall not operate as stay of execution of a decree or an order appealed from nor shall execution of a decree or an order be stayed by reason only of an appeal having been preferred from the decree or order by the court. He argued it is upon good cause being shown is when an order to stay execution of a decree or an order can be issued.

He submitted that committing a judgment debtor to civil prison is one of the modes of execution of a decree available under the law when it is proved that the judgment debtor is not willing without good causes to satisfy the decree of a court. He argued that, it is almost six years from when the decree of this court was issued and to date the respondent has not shown any willingness to satisfy the decree of the court without good cause. He added that, Order XXI Rule 35 of the CPC limits the arrest of the judgment debtor only if he pays the decretal amount. He argued that, in his counter affidavit, the respondent has never stated is willing to satisfy the decree issued by this court.

He argued further that, this application is not a unique application as the court in several times has issued an order to commit a judgment debtor to civil prison and one of those cases is the case of **Thomas Rugimbana V. Colman Mushi** Execution No. 78 of 2020, HC DSM District Registry (unreported) where the court quoted with approval the

Decision of the Court of Appeal delivered in **The Grand Alliance Ltd V. Mr. Wilfred Lucas Tarimo & 4 Others** Civil Application No.187/16 of 2019 where it was stated that, imprisonment of a judgment debtor in execution will only be ordered when limitations and condition are satisfied. Those conditions are; one there must be an application for execution of decree for payment of money by arrest and detention in prison of a judgment debtor like the present application. Two is to require the judgment debtor to show cause why he should not be committed to prison as done in the first prayer of this application whereby the respondent has failed to show sufficient cause and is unwilling to pay the decretal sum.

He contended that, Order XXI Rule 39 (1) of the CPC provides for some reasons which may be taken into consideration by the court to disallow the application for execution of a decree by way of arrest and committing a judgment debtor to prison as a civil prisoner. The stated reasons includes where a judgment debtor is unable to pay the decretal sum due to poverty or due to any other sufficient cause or could even offer any property to his possession to be attached.

He added that, Order XXI Rule 39(2) of the CPC provide for some allegations which may be taken into consideration by the court when determining the application. He stated among the allegations were deposed at paragraphs 6 and 7 of the affidavit of the applicant that, the

respondent is avoiding paying the decretal amount and he has also made execution of the decree near to impossible and caused filing of the present applicant in the court as the applicant do not know any property of the respondent which can be attached for execution of the decree.

To support his argument, he referred the court to the case of **Bank of Africa Tanzania Ltd V. Martin Matiku**, HC Com. Div. Commercial Case No.62 of 2013 (unreported) where the court issued an order of arresting and detaining a judgment debtor as a civil prisoner for 3 months for failure to pay the decretal sum after failing to give sufficient reasons as to why the application should not be allowed.

In reply the counsel for the respondent stated that, even if notice of appeal is not attached with the counter affidavit of the respondent but the applicant did not dispute that the respondent has lodged the notice of appeal in the court. He stated the applicant has not disputed that the respondent lodged in the court an application for leave to appeal to the Court of Appeal in accordance with section 47 (1) of the Land Disputes Courts Act, Cal 216 R.E 2019 and the leave was granted in Misc. Land Application No. 1081 of 2016. He submitted that the appeal has not been lodged in the Court of Appeal because the respondent has not been supplied with the copies of the proceedings of the case and the exhibits admitted in the case by the registrar of this court. He submitted that, the

respondent has not failed to apply for stay of execution of the decree but is in the process and submitted further that if this application will be granted it will render the intended appeal nugatory.

As for the argument that the respondent is unwilling to pay the decretal sum and the applicant does not know any of the property of the respondent which can be attached and sold in execution of the decree of this court the counsel for the respondent argued that, the respondent's land is adjacent to the applicant's land so he cannot say that he does not know the respondent property. He stated there is no prove that the respondent has made execution of the decree of the court impossible.

He argued the case of **Bank of Africa Ltd** (supra) cannot apply in the present case. He argued that, the applicant wants the respondent to pay the decretal sum and at the same time the respondent to be detained as a civil prisoner which is a double punishment. He submitted that, the applicant has not shown that the respondent has refused deliberately to pay the decretal sum and all other modes of execution of the decree have failed so as to warrant the respondent to be detained as civil prisoner. At the end he prayed the application be dismissed with costs.

In rejoinder the counsel for the applicant reiterated what he argued in his submission in chief and insisted that, as there is no an order to stay execution of the decree there is nothing to stop the present application to

be granted. As for the issue that the respondent's land is adjacent to the applicant's land the counsel for the applicant submits that, there is no land that is adjacent to the applicant. He stated in relation to the issue of double punishment that, paying of a decretal sum by the judgment debtor is not a punishment rather a liability and committing him as a civil prisoner is just a way to compel him once released to pay the decretal sum and not otherwise.

After going through the applicant's affidavit, respondent's counter affidavit as well as the submissions filed in this court by the counsel for the parties, the court has found the issue to determine in this application is whether the applicant has managed to establish he deserve to be granted the orders is seeking in the chamber summons. The orders sought in the chamber summons as stated earlier in this ruling is an order to show cause why the respondent should not be detained as a civil prisoner and in event of failure to show cause or pay the decretal sum to be detained as a civil prisoner.

The court has found arrest and detention as civil prisoner for a judgment debtor who has failed to satisfy a decree issued by a court is one of the modes of execution of decree recognized by our laws. Rule 28 of Order XXI of the CPC provides as follows: -

"Every decree for the payment of money, including a decree for the payment of money as the alternative to some other relief, may be executed by the detention as a civil prisoner of the judgment debtor or by the attachment and sale of his property, or by both."[Emphasis added].

The court has also found that, Rule 35 (1) and (2) of order XXI of the CPC provides that, where an application is made for arrest and detention of a judgment debtor as civil prisoner the court may instead of issuing a warrant for his arrest, issue a notice calling upon the judgment debtor to appear before the court on a day to be specified in the notice and show cause why he should not be committed to prison in execution of the decree.

The underlying object of issuing notice as stated in the case of **Grand Alliance Limited V. Mr. Wilfred Lucas Tarimo and 4 Others**, Civil Application No. 187/16 of 2019, CAT at DSM (unreported) is to afford protection to the honest judgment debtors incapable of paying dues for reasons beyond their control and satisfy the court if there is any other good cause for not ordering the judgment debtor to be detained as a civil prisoner.

As rightly argued by the counsel for the applicant the respondent in the present application was issued with a notice to show cause why he

should not be detained as a civil prisoner in execution of the decree issued against him and he has done so by filing in the court his counter affidavit which has also been supported by the argument fronted to this court through the submission filed in this court by his counsel. The main reason as to why the respondent should not be detained as a civil prisoner as deposed in his counter affidavit and argued by his learned counsel is that he has not refused to satisfy the decree but he is in the process of appealing to the Court of Appeal to challenge the decree ordered him to pay what the applicant is claiming from him.

The court has carefully considered the cause advanced to the court by the applicant but find that, although the respondent deposed at paragraphs 4 and 5 of his counter affidavit that he has annexed in his counter affidavit the letters requesting for copies of the judgment, decree and proceedings in respect of Land Case No. 45 of 2013 and he has annexed thereon a copy of notice of appeal and Misc. Land Application No. 1081 of 2016 which is an application for leave to appeal to the Court of Appeal as annexure "A" collectively, but it is only the copy of the application for leave to appeal to the Court of Appeal and copy of the judgment delivered in Land Case No. 45 of 2013 which are annexed to the counter affidavit.

The rest of the mentioned documents are not annexed to the counter affidavit as deposed by the respondent. Therefore, the deposition by the respondent and argument by his counsel that he has requested to be supplied with the copy of the proceedings and exhibits of the case he wants to challenge in the court of appeal is unsubstantiated. That shows the counter affidavit of the respondent is not telling the truth and as stated in the case of **Ignazio Messina V. Willow Investment SPRL**, Civil Application No. 21 of 2001 (unreported) an affidavit which is tainted with untruth is not affidavit and cannot be acted upon by the court to resolve any issue pending before a court of law.

The court has found that, even if it will be taken the said documents are available and the respondent has initiated the stated appeal process as deposed in the counter affidavit of the respondent and argued by his counsel but as argued by the counsel for the applicant the law is very clear that, filing of a notice of appeal and filing of appeal in the Court of Appeal is not a bar for execution of a decree to continue. That is as per Rule 11 (3) of the Court of Appeal Rules which states as follows: -

"In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 83, an appeal, shall not operate as a stay of execution of the decree or order appealed from nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree or order; but the Court,

may upon good cause shown, order stay of execution of such decree or order."

To the view of this court the wording of the above quoted provision of the law is crystal clear that execution of a decree shall not be stayed simply because there is an appeal which has been preferred against the decree intended to be executed. If the respondent wanted execution of the decree to await determination of the stated appeal, he was required to apply for stay of execution of the decree pursuant to Rule 11 (4) of the Court of Appeal Rules which states as follows: -

"An application for stay of execution shall be made within fourteen days of service of the notice of execution on the applicant by the executing officer or from the date he is otherwise made aware of the existence of an application for execution."

Since as rightly argued by the counsel for the applicant the respondent is well aware of the present application for execution of a decree passed against him as he was served with notice of the application and he has filed his counter affidavit in the court and is being represented in the application by an advocate and there is no order to stay execution of the decree which has been sought and issued by any court, the court has failed to see any justifiable reason which can make it to desist to grant

the order of detaining the applicant as a civil prisoner for failure to satisfy the decree of the court.

The court has arrived to the above stated view after seeing that, the decision which ordered the respondent to pay the decretal sum was issued on 15th December, 2016 and as rightly argued by the counsel for the applicant, the respondent has not shown any willingness to pay the decretal sum or any serious follow up of the appeal he deposed in his affidavit he has initiated in the Court of Appeal. Under that circumstances the court has failed to see any justifiable reason for not granting the order sought from this court by the applicant as it is more than five years which have passed from when the decree was issued without being satisfied.

The court has considered the argument by the counsel for the respondent that the respondent has a land adjacent to the applicant's land which shows the applicant has not proved execution of the decree by mode of attaching and selling the land of the respondent which is adjacent to the land of the applicant is impossible. The court has found the stated argument has been contested by the applicant who through his counsel has argued in his rejoinder that, the respondent has not stated how he own the stated land.

The counsel for the applicant argued that, the only property known by the applicant is owned by the respondent is a container he put on the

public road which belongs to TARURA and as per the decree sought to be executed in the present application the respondent was declared is a trespasser and he was ordered to remove the container and all structures from the public road. If that is the land the counsel for the respondent is saying is adjacent to the land of the applicant it is crystal clear that it cannot be said is a property which can be attached and sold to satisfy the decree of the court.

Basing on all what I have stated hereinabove the court has found all the steps required to be followed before the order of detaining the respondent as a civil prisoner has been followed in the present application. The court has found the respondent has been given chance to show cause why he should not be detained as a civil prisoner and he has failed to show sufficient cause as to why execution of the decree of the court by way of being detained as a civil prisoner for failure to satisfy the decree of the court should not be allowed.

Consequently, the court has considered the conditions provided under Order XXI Rule 39 (2) of the CPC and basing on the provision of section 46 (1) (a) of the CPC the court is ordering that, unless the decretal amount is paid within three (3) months from the date of this order, the respondent namely Daudi Sakaya shall be detained in civil prison for the

period of six months in execution of the decree issued in Land Case No. 45 of 2013.

In compliance with requirements provided under Order XXI Rule 38 of the CPC the applicant who is a decree holder shall pay Tshs. 100,000/= (say One Hundred Thousand Shillings) only being substances allowance per each month the respondent will be in prison. It is so ordered.

Dated at Dar es Salaam this 06th day of September, 2022



Court:

I. Arufani

JUDGE

06/09/2022

Ruling delivered today 6th day of September, 2022 in the presence of Ms. Mosama Elias, Advocate holding brief for Mr. Bernard Shirima, Advocate for the applicant and in the presence of Mr. Bernard Ngatunga, Advocate for the respondent. Right of Appeal to the Court of Appeal is fully explained.



I. Arufani

JUDGE

06/09/2022