

THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY)
AT DAR ES SALAAM
EXECUTION NO. 78 OF 2020
(Arising from Bill of Costs No. 139 of 2017)

THOMAS RUGIMBANA DECREE HOLDER / APPLICANT

VERSUS

COLMAN MUSHI JUDGMENT DEBTOR / RESPONDENT

RULING

Date of Last Order: 22.03.2022

Date of Ruling: 28.03.2022

A.Z.MGEYEKWA ,J

This is an Application for Execution of a Decree brought under Order XXI Rule 35 (1) and (2) of the Civil Procedure Code Act, Cap. 33 [R.E 2019]. The applicant applies for the execution of this court award dated 29th January, 2019 against Colman Mushi. The applicant prays for this court to order the Judgment Debtor to pay the Decree Holder a sum of Tshs. 5,173,000/= and costs of execution and in default thereof, the

Judgment debtor namely Colman Moshi be arrested and detained as a Civil Prisoner.

The application was argued before me on 22nd March, 2020 whereby the Decree Holder afforded the legal service of Ms. Eda Rugakingira, learned counsel Mr. Linus learned counsel. The matter proceeded *ex parte* against the Judgment Debtor. There is no dispute that the respondent, by way of publication in Kiswahili tabloid – Mwananchi Newspaper of, respectively dated 10th November, 2021 was served. I am alive to the fact that the respondent was notified through the said publication to appear on 22nd November, 2021 when this case was fixed for hearing and the respondent was so informed through the said publication. However, the respondent did not appear on the slated date and the case was adjourned several times; on 24th November, 2021, 15th December, 2021, 17th February, 2022 and 22nd March, 2022 during which, again, the respondent did not appear. Having regard to the entire circumstances of this case, I am of the considered view that the respondent was duly being served therefore, I grant the Decree Holder' Advocate prayer to proceed *ex parte* against the Judgment Debtor.

In her submission, Ms. Lugakingira was brief and focused. She submitted that the matter was before Hon Deputy Registrar, however, due to the nature of the application the same was transferred to a Judge. The learned counsel submitted that the application is brought under Order XXI Rule 25 (1) and (2) of the Civil Procedure Code Cap. 33. She prayed for this court to issue an order as presented in the applicant's Bill of Costs; they are praying for this court to order the Judgment Debtor to pay Tshs. 5, 173,000/= and in default to detain the Judgment Debtor as a civil prisoner.

Having considered the supporting affidavits and the affidavits in opposition to the application as well as the submissions of the learned counsel for the applicant, I should observe that the right to commit a Judgment Debtor to jail as a Civil Prisoner is provided under Order XXI Rules 35 (1) (2) and 36 of the Civil Procedure Code Cap 33 (supra) which provide that:-

35. (1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention as a civil prisoner of a Judgment Debtor who is liable to be arrested in pursuance of the application, the Court may, instead of issuing a warrant for his arrest, issue a notice calling upon him 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.

(2) Where appearance is not made in obedience to the notice, the Court shall, if the Decree Holder so requires, issue a warrant for the arrest of the Judgement Debtor.

36. Every warrant for the arrest of a Judgement Debtor shall direct the officer entrusted with its execution to bring him before the Court with a convenient speed, unless the amount which he has been ordered to pay, together with the interest thereon and the costs (if any) to which he is liable, be sooner paid.

The Order XXI Rule 35 limits the arrest of the Judgement Debtor only if he pays the amount of the Decree and costs of the arrest. It is the finding of this Court that the Judgement Debtor's failure to execute the award and his failure to appear in court represents a dishonest and fraudulent character which compels this Court to issue an order of arresting and detaining her as a civil prisoner.

I understand that there may be other ways of enforcing a civil debt such as attachment of property. However, as intimated by the Decree Holder, normal execution of the Decree has failed because the Judgment Debtor does not want to execute the award of this court. It is hard to trace the property of the Judgment Debtor since the whereabouts of the Judgment

Debtor is unknown. Therefore the only solution is to arrest him and order him to pay the said money failure that he will be detained as a civil prisoner. The Court of Appeal of Tanzania in the case of **the Grand Alliance Ltd v Mr. Wilfred Lucas Tarimo and 4 Others**, Civil Application No. 187/16 of 2019 made the following findings:-

“ It follows then that the imprisonment of a Judgement Debtor in execution cannot be ordered unless the conditions and limitations are satisfied. One of those conditions is that there must be an application for execution of a decree for payment of money by arrest and detention in prison of a Judgement Debtor (see Sections 42 and 44 and Order XXI Rule 10 of the code) after receipt of the application the executing Court has the discretion to issue a notice to show cause to the person against whom execution is sought on a date to be specified in the notice, why should not be committed to prison or to issue a warrant of his arrest (See order XXI Rule 35 (1) of the Code) the purpose of this warrant is to bring the Judgement Debtor before the executing Court and it is not an automatic order for committal as Civil Prisoner because the executing Court is required to be satisfied with the conditions stated under Order XXI Rule 39 (2) of the Code before committing a person to prison. Likewise, where the Judgement Debtor defaults appearance on notice to show cause, the executing Court

shall, if the Decree Holder so requires, issue a warrant of his arrest.

See Order XXI Rule 35 (2) of the code).

In the circumstances of the above, it is presumed that the Judgement Debtor has failed to defend his case and show cause as to why he should not be committed to prison as a Civil Prisoner.

Pursuant to the provisions of Order XII Rule 35 of the Civil Procedure Code Cap 33 (R.E. 2019), I order that, unless the whole decretal amount of Tshs. 5,173,000/= plus Court interest rate of 7% from the date of judgment to the date of payment which is 14 days from the date of service of this order. Failure to that Colman Moshi, the Judgement Debtor should be arrested and detained as a civil prisoner in Civil Prison in Tanzania for the period of three (3) months in the execution of a Decree pronounced in Misc. Land Appeal No. 335 of 2015 before this Court. The Decree Holder to pay Tshs. 100,000/= only being subsistence allowance per each month the Judgement Debtor will be in prison.

Order accordingly.

Dated at Dar es Salaam this date 28th March, 2022.



A.Z.
A.Z.MGEYEKWA

JUDGE

28.03.2022

Ruling delivered on 28th March, 2022 in the presence of Ms. Eda Rugakingira, learned counsel for the Decree Holder/ applicant.




A.Z.MGEYEKWA
JUDGE
28.03.2022