

THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY)
AT DAR ES SALAAM
EXECUTION NO. 10 OF 2022
(Arising from Land Case No. 132 of 2011))

IRENE LAZARO MOLLEL (As the Administratrix of the estate of
the late PRUCHERIA MEITORIS MOLLEL suing by attorney
LAZARO LOKAJI MOLLEL) **DECREE HOLDER / APPLICANT**

VERSUS

ALPHONCE KIHWELE **JUDGMENT DEBTOR / RESPONDENT**

RULING

Date of Last Order: 19.08.2022

Date of Ruling: 25.08.2022

A.Z.MGEYEKWA ,J

This is an Application for Execution of a Decree brought under Order section 42 (c) and (e) Section 44 (1) and Order XXI Rule 9, 28 and 35 (1) and (2) of the Civil Procedure Code Act, Cap. 33 [R.E 2019]. The applicant applies for execution of the award dated 30th October, 2013 against Alphonse Kihwele. The applicant prays for this court to order the Judgment Debtor to pay the Decree Holder a sum of Tshs. 312,000,000/=

and costs of execution and in default thereof, the Judgment debtor namely Alphonse Kihwele be arrested and detained as a Civil Prisoner.

The application was argued before me on 25th August, 2022 whereby the Decree Holder enjoyed the legal service of Mr. Hurbert Mligo, learned counsel and the Judgment Debtor had the legal service of Mr. Boniphace Erasto, learned counsel.

Mr. Hurbert was brief and focused. He submitted that the Decree Holder has applied for execution of the decree in Land Case No. 132 of 2011 between Purcheria v Alphonse Kihwele. He went on to submit that the matter is before this court because this court in its Judgment in Land Case No. 132 of 2011 issued two orders; eviction and general damages and costs to a tune of Tshs. 2,000,000/=.

He went on to submit that the Decree Holder prays for eviction of the Judgment Debtor from the suit land and payment of a total amount of Tshs. 312,000,000/= and costs of taking out the said execution be realized by arrest and detention of the Judgment Debtor. He went on to submit that they appeared before the Deputy Registrar and they were informed that the Registrar has no power to grant the second prayer.

The learned counsel for the Decree Holder urged this court to issue notice to show cause under Order XXI Rule 35 (1) & (2) of the Civil Procedure Code Cap. 33 as to why the Judgment Debtor should be arrested and

detained as a civil prison until the decree is satisfied in full. He went on to submit that they also pray for this court to issue notice to the Judgment Debtor to show cause, why he should not be evicted from the disputed, landed property located on Plot No. 310 at Jangwani Beach Dar es Salaam.

In reply, Mr. Bonophace submitted that the matter is coming for execution, however, he informed the court that they have filed an application for stay of Execution No. 399 of 2022 which is pending before Hon. Arufani, J. He prayed for this court to stay this application pending the hearing of stay execution. Mr. Boniphace also informed the court that there is another Application No. 38 of 2022 to set aside an *ex parte* Judgment before Hon. Arufuani, J.

Suo mottu I prompted the parties at the very outset to satisfy this court on the competence of the application before me. I raised such a concern because on perusal of the record of application before I convened in composing the judgment, I noted a point of law that the application is omnibus and prematurely filed before this Court. Therefore, I called upon the parties to address me on the said matter.

Mr. Mligo, learned counsel for the applicant submitted that the matter before this court emanates from the decision of this court which issued two prayers; vacant possession and general damages to a tune of Tshs.

2,000,000/=. He went on to submit that in the instant application they have prayed for execution to evict the Judgment Debtor and detain him as a civil prisoner until full payment of Tshs. 312,000,000/=. He submitted that their prayer is not an omnibus application because it originated from the same Judgment and Decree.

On his side, Mr. John submitted that the application is omnibus because the prayer of detention is the last resort to be issued by this court.

Let me, first, address the point of law before proceeding with the application. 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, now I in a position to address the Decree Holder's prayers. The Decree Holder is praying for this court to order the Judgment Debtor to vacate the suit landed property on Plot No. 310 at Jangwani Beach, Dar es Salaam and at the same time the Decree Holder is praying for this court to order the Judgment Debtor to pay Tshs. 312,000,000/= together with interest on the principal sum up to date of payment and cost of taking out the execution be realized by arrest and detention of the Judgment Debtor as a civil prisoner.

In my considered view, I find that the application before this Court is improper because the Decree Holder has combined two prayers instead of exhausting one prayer at a time. The Decree Holder has included the

second or last resort of ordering the Judgment Debtor to be arrested and detained as a civil prisoner which is not correct. I understand that the Decree Holder's prayer is originating from the same Judgment and decree, however, the prayers are different, and worse enough the applicant has not exhausted other remedies for executing the award of this court. Before ordering the detention of the Judgment Debtor as a civil prison, the applicant was required to identify the properties of the Judgment Debtor or bank account to execute the award of this court. Section 42 (a) and (b) of the Civil Procedure Code Cap.33 [R.E 2019] provides that:-

"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."*

Guided by the above provision of law, it is clear that this court is not moved to determine the matter. If the normal procedure for execution fails then the applicant can opt for the last resort of executing the decree of this court by filing an application to detain the Judgment Debtor in civil prison not otherwise.

In the upshot, I find that the application before this Court is prematurely filed. Therefore, I proceed to strike out the application. No order as to the costs.

Order accordingly.

Dated at Dar es Salaam this date 25th August, 2022.




A.Z.MGEYEKWA
JUDGE
25.08.2022

Ruling delivered on 25th August, 2022 in the presence of Mr. Albert Mlingo, learned counsel for the Decree Holder and Mr. John Chogolo, learned counsel holding brief for Mr. Boniphace Erasto, learned counsel for the Judgment Debtor.




A.Z.MGEYEKWA
JUDGE
25.08.2022