

TANZANIA / JUDGMENT

KIBAIGWA

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IN THE HIGH COURT OF TANZANIA DODOMA SUB REGISTRY AT DODOMA EXECUTION No 13828 OF 2024 (Arising from Judgment and Decree in Land Case No 20 of 2022 before the High Court of Tanzania) KIBAIGWA FLOUR SUPPLIES LTD..... 1st DECREE HOLDER KONGWA FOOD TRADERS LIMITED..... 2nd DECREE HOLDER SEBASTIAN ABDALLA MSOLA.....3rd DECREE HOLDER VERSUS

1. M/S CRDB BANK PLC..... 1st JUDGMENT DEBTOR
2. PASS TRUST..... 2nd JUDGMENT DEBTOR

RULING

Date of the last order: 18/06/2024 Date of the Ruling. 02/07/2024 LONGOPA, J.: The first Judgment debtor and the First decree holder were parties to a term loan agreement which was allegedly the breached by introduction of a guarantor (the second Judgment debtor) thus the decree holder instituted a case against the 1st and 2nd Judgment debtors claiming declaration that the 1st decree holder did not fail to repay the term loan 1 [Page and that decree holders be ordered to pay TZS 1,500,000,000/= as damages. The Court found that the 1st judgment debtor breached the agreement by introducing the 2nd judgment debtor. The Court noted that the parties should be allowed to revisit the restructuring process. This is to say, the 1st Defendant and the 1st Plaintiff should re-negotiate their positions and restructure the loan, but they should also include the 2nd Defendant as one of the guarantors since the Plaintiffs are also interested in having her formally included in the restructured loan. In doing so, both the 1st Plaintiff and the 1st Defendant will be able to benefit as the 1st Plaintiff will continue with her business while repaying or servicing the loan. It is from this decree of this Court that the decree holders are applying to execute by way of committing the Managing Director of the 1st Judgment debtor as a civil prisoner. This is an application for execution of a decree filed on 11th June 2024 under certificate of extreme urgency preferred under Order XXI R. 9, 10(2) (a), (b),(c), (d), (e), (f), (g), (h), (i), (j), (v), Rule 30(1), (2),(5), and Rule 35(1) of the Civil Procedure Code, Cap 33 R.E. 2022 for the following orders, namely:

1. An order granting /eave to detain as civil prisoner one Abduimajid Mussa Nsekeia the Managing Director of the 2 I Page first decree holder (Sic!) for willful failure to obey or implement a decree of this court of 5th February 2024 which ordered the 1st Judgment debtor and 1st Decree ho/der to revisit and revive the restructuring process whi/e engaging the 2nd Judgment debtor.
2. An order for notice to one Abdu/majid Mussa Nseke/a the Managing Director of the first decree holder (Sic!) to show cause as to why he shou/d not be committed to prison for failure to obey or implement a decree of this court of 5th February 2024 which ordered the 1st Judgment debtor and 1st Decree holder to revisit and revive the restructuring process while engaging the 2nd Judgment debtor.
5. An order directing the 1st Judgment debtor to obey and implement a decree of this court of 5th February 2024 which ordered the 1st Judgment debtor and 1st Decree holder to revisit and revive the restructuring process. On 18th June 2024, the parties appeared before me for viva voce submission on the application for execution. The decree holders enjoyed the legal services of Ms. Catherine Wambura, learned advocate, the 1st judgment debtor enjoyed the legal services of Teckla Kimati, learned advocate and the 2nd judgment debtor was represented by Joanitha Paul, learned advocate holding brief for Ms. Nora Marah, learned advocate. 3 | Page The Counsel for applicant stated that the applicants/ decree holders pray for leave to detain one Abdulmajid Nsekela, the Managing Director and Chief Executive Officer of the 1st Judgment Debtor for failure to comply with the decree of the court dated 05th February 2024 that declared that there was a breach of the agreement by the First Judgment Debtor regarding the loan agreement between the Decree Holder and Judgment Debtor. The Court ordered the restructuring process of the loan by involving the second Judgment Debtor. It was reiterated by the applicant that the Judgment Debtors have failed to honour the decree as there is notice of Zanzibar Leo dated 28th May 2024 whereby the 1st Judgment Debtor's agents have advertised the sale of the Mortgaged properties regarding the same loan that is to be restructured. The notice inviting bids of sale for the mortgaged properties was submitted to form part of the submission to this Court. It was concluded that in the circumstances of the matter, the applicants/decrees holders pray for detention of the Managing Director and Chief Executive Officer of the First Judgment Debtor as a Civil Prisoner for failure to honour the decree of this Honourable Court. On the other hand, the counsel for the 1st respondent/judgment debtor objected the application for detaining the Chief Executive Officer (CEO) of the CRBD Bank Plc as a civil prisoner on allegedly failure to 4 | Page honour the decree of this Court dated 5th February 2024. It was reiterated that the decree had ordered the parties to meet and do the restructuring of the loan and in course of so doing to involve the Second Judgment Debtor (PASS TRUST) as Guarantor. The 1st Judgment debtor stated further that after restructuring of the loan, the First Decree Holder would proceed to repay the loan. In ensuring that such decree of the court is fully implemented, the 1st Judgment debtor argued that all these actions were taken and complied by the 1st Judgment Debtor. On 5th March 2024, the parties met in a scheduled meeting to resolve the matter. Five items were set/proposed to guide the discussion between

the parties. First, request for discount of loan from outstanding of TZS 2.06 billion to TZS 800 million in which was resolved that CRDB should review on the possibilities or otherwise and respond by informing the 1st Decree Holder about the decision of the bank. Second, repayment of the restructured loan to be in a period of five years on semi-annual instalments and term the restructured loan as the investment loan. This was to be subjected to the bank review and inform the 1st Decree holder on the outcome. Third, request on grace period of 6 months for the repayment of the restructured loan whereas the 1st Decree holder would not be required to commence repayment upon conclusion of restructuring. Fourth, request to allow restructured loan to change the Status from Non-Performing loan 5 | Page (NPL). This was subjected to review by the bank while the status would remain as per the regulations. The fifth was a request that CRDB Bank Plc should facilitate and encourage relationship and partnership with other potential investors. This matter was rejected that it is not acceptable since it tends to transfer responsibilities from the Decree Holder Kibaigwa Flour Supplies Limited to CRDB Bank Plc (the Judgment Debtor). The minute of the Meeting between the 1st Decree Holder and 1st Judgment Debtor dated 05/03/2024 was submitted to this Court as part of the submission. The First Judgment debtor reiterated that on 11th March 2024, the First Judgment Debtor (CRDB Bank Plc) responded to the issues raised during the 5th March 2024 which required bank's review and response. The letter is entitled: RE: IMPLEMENTATION OF THE COURT ORDER FOR RESTRUCTURING OF THE OUTSTANDING LOAN IN RESPECT OF KIBAIGWA FLOUR SUPPLIES LIMITED. In this letter, the 1st Judgment Debtor stated that several aspects have been reviewed, namely: First, loan restructure would be reduced to TZS 1.6 billion that was outstanding by April 2022. Second, grace period of six month is granted effectively from 1st April 2024. Third, repayment of the restructured loan to quarterly basis within five years from the effective date upon expiration of the grace period. Fourth, the request for additional financing is not accepted. This latter was also tendered as part of the submission. 6 | Page Further, it was argued that on 30th April 2024, the 1st Judgment Debtor (CRDB Bank Plc) wrote another letter to the 1st Decree Holder relating to signing of the restructured loan documents within seven days of the letter. This was to implement the court order. This followed inaction of the 1st decree holder to act timely thus reminding that there should be compliance to previous letters sent to the 1st Decree holder. This letter was also tendered to form part of the submission. Moreover, it was reiterated that on 14th June 2024, the 1st Judgment Debtor wrote a letter to the 1st decree holder informing the latter that 1st Judgment debtor is halting implementation of recovery measures after the decree holder failed to honour the restructuring of the loan to ensure further discussions on restructuring of the loan. This letter was produced before this Court as part of the submission of the first Respondent/Judgment debtor. Additionally, it was argued that sometimes on 7th May 2024, the 1st Decree holder (Kibaigwa Flour Supplies Limited) wrote a letter to CRDB Bank Plc to have a meeting involving Decree holders, the 1st Judgment Debtor and 2nd Judgment Debtor whereby the decree holder wished that a reduction of loan should be at TZS 800 million. This letter was also supplied as part of the submission by the 1st respondent/Judgment debtor. 7 | Page According to the 1st Judgment debtor, there have been communications between the 1st Judgment Debtors and the 1st

Decree holder on this matter via emails. The 1st Judgment Debtor took all necessary actions required to ensure that the court's decree is implemented. Thus, lamentations by the 1st Decree holder are not correct and their prayers are misplaced as the 1st Judgment debtors took all necessary actions to implement the decree of this Court. It was the 1st Judgment debtor prayer that this application be dismissed for lack of merits with costs. The 2nd Judgment Debtor submitted that there are no major issues between the parties. It was reiterated that it is true that this Court ordered the 1st Decree holder and 1st Judgment debtor to involve the 2nd judgment debtor while restructuring of the loan between the 1st decree holder and 1st judgment debtor. It was argued that 2nd Judgment debtors was waiting for an agreement between the two i.e. 1st decree holder and 1st judgment debtor so that we can know the amount that would be guaranteed by the 2nd Judgment debtor. It was further submitted that surprisingly, the 2nd Judgment received a summons to appear before this Court whereas the decree holder have instituted this application for execution by way of committing the 1st Judgment debtor as a civil prisoner. 8 | Page In a brief rejoinder, the applicants/ Decree holders reiterated that this Court should be pleased to grant the application as there is nowhere that the 2nd Judgment Debtor is involved in the process of restructuring the loan. The applicants insisted that decree of the court has not been implemented, thus it was their prayers that the 1st Judgment Debtor Chief Executive Officer (CEO) be detained as a civil prisoner. Having heard the rival submissions by the parties, I am required to determine on whether or not this application has merits. I have dispassionately perused the available record, application for execution of the decree and submission of the parties to underscore the gist of the application before me. There is no dispute that the 1st Decree holder and 1st Judgment debtor had a term loan agreement whereas the 1st decree holder was the borrower who mortgaged among others the properties listed in the Notice of Invitation for bid to Sale of the properties dated 28th May 2024 published in Zanzibar Leo Newspaper. These properties are Plot No 4 Block G Certificate Number 28506 DLR Land Office Number 438602 in O. Kongwa Food Traders Limited located at Kisimani Kibaigwa Urban area; and Plot No 4 Block G Certificate Number 28506 DLR Land Office Number 438603 in O. Kibaigwa Food Supplies Limited located at Kisimani Kibaigwa Urban area. 9 | Page The whole of the decree holders' submission is based on protecting these mortgaged properties from being disposed of in recovery measures of the loan that has not been repaid since 2022. There is nothing more disclosed on what actions the 1st decree holder took to ensure that decree of the Court is obeyed or implement. It is further correct that this Court on its decision dated 5th February 2024 ordered that the parties within 30 days of the decision should meet and have discussion on restructuring of the loan. Simply, this Court found that despite implicit inclusion of the 2nd judgment debtor as a guarantor without properly formalization the only appropriate means to resolve the parties' dispute was restructuring of the loan. The application for execution of decree by way of the committing the 1st Judgment debtor as a civil prisoner is one of the means used to execute decrees. However, it is not applied at the pleasure of the decree holder. There must a well-grounded cause for such serious action to be ordered by the Court given the fact that the decree holder wishes this court to lift the corporate veil of the 1st Judgment debtor and order that its

managing director be committed as a civil prisoner. The High Court (Hon Nangela, J) observed that the parties should be allowed to revisit the restructuring process and pick from where they left off. This is to say, the 1st Defendant and the 1st Plaintiff should re- 10 | P a g e negotiate their positions and restructure the loan, but they should also include the 2nd Defendant as one of the guarantors since the Plaintiffs are also interested in having her formally included in the restructured loan. It was noted lucidly that in doing so, both the 1st Plaintiff and the 1st Defendant will be able to benefit as the 1st Plaintiff will continue with her business while repaying or servicing the loan. On that account, much as there has been a finding that the 1st Defendant breached the agreement when she indirectly introduced the 2nd Defendant into an arrangement that she was not part of, the Court does not find that she is entitled an order for compensation, but in lieu thereof, an order that the parties revisit their positions and restructure the loan would be more justified and will soothe the existing hostility. As a result, this Court decreed that:

1. That, although the 1st Defendant's indirect act of introducing the 2nd Defendant as a guarantor of the loan she had advanced to the 1st Plaintiff was an act in breach of the facility arrangement between herself and the 1st Plaintiff, that act nonetheless was not material enough to affect the performance of their contractual obligations though it did financially affect the 1st Plaintiff's performance of her obligations under the loan agreement. 11 | P a g e A
2. That, although the 1st Plaintiff could be compensated for the breach, the circumstances of the case would call for a more justifiable remedy in lieu thereof, that is a restructuring of the loan.
3. That, considering what is stated in number 1 and 2 above, the 1st Plaintiff and 1st Defendant are, within 30 days from the date of this judgement, ordered to re-visit and revive their restructuring process from where it ended in the year 2022, thereby agreeing on new loan repayment terms.
4. That in line with what is stated in number 3 above, while restructuring the loan, the parties should ensure the full involvement of the 2nd Defendant and the 1st Plaintiff should make available to the 2nd Defendant all necessary information that she had earlier requested, as per the email dated April 25, 2022.
5. That, in the circumstances of this case and considering the position that each of the parties had in this matter, I do not find it prudent to make an order for costs, meaning that each party should bear its own costs. The decree imposed the duty to renegotiate the restructuring of the loan to mainly two parties, the 1st Decree holder and the 1st Judgment debtor. These had a central role towards restructuring of the loan as the 12 | P a g e main parties to the said loan as borrower and lender. The 2nd Judgment debtor was to be involved to guarantee the restructured loan. However, its role would lucidly depend on the willingness of the 1st Decree holder and 1st Judgment debtor to conclude loan restructuring agreement. Law on application for execution through committing a judgment debtor as a

civil prisoner is settled. Order XXI Rule 35 of the Civil Procedure Code, Cap 33 R.E. 2022 provides a guidance on committing a judgment debtor as a civil prisoner. It states 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. The wording of this provision of the Civil Procedure Code, reveals that detention as civil prisoner applied to monetary decree i.e. where the decree had ordered the judgment debtor to pay the decree holder a certain specified amount of money. 13 | Page

In the case of Eliamini Mbeo vs Digital Auction Mart Limited (Misc. Civil Application No. 423 of 2022) [2023] TZHC 16094 (6 March 2023)(TANZLII), at pages 2-3, the High Court reiterated that the detention as civil prisoner applies to circumstances where the Judgment debtor had been afforded opportunity to ensure that he satisfies the decretal sum and called upon to show cause but fails adhere to such order to effect payment of the decretal sum. I have carefully perused the decree of this Court (Hon Nangela, J) dated 5th February 2024, there is nothing to suggest that there is any monetary decree for the applicants/ decree holders to seek the court to uplift the corporate veil of the 1st Judgment debtor and order the detention of the 1st Judgment debtor Managing Director as a civil prisoner. Also, the decree holders have not put any material evidence/submission before this court to demonstrate that decree holders of non-monetary decree have taken any actions on their part to obey and implement the court's decree. Further, the Decree holder never disclosed any information on the efforts taken by the 1st Judgment debtor to resolve the existing hostility. My understanding of the decree in question is that this Court ordered restructure of the loan in question to assist the 1st decree holder to be afforded more opportunity to repay the loan without compelling the 1st Judgment debtor to enforce the existing mortgage. That decree has not 14 | Page

stopped the 1st Judgment debtor to exercise its rights under the mortgage agreement in cases where restructuring of the loan is not successful. I concur with the 1st Judgment debtor submission that this application for execution is devoid of merits. The reasons are lucid. First, the parties complied with the order to meet within 30 days of the decision of the court. This was demonstrated by Attendance and Minute Sheet for a Meeting between the 1st Decree holder and the 1st Judgment debtor dated 5th March 2024. At that meeting, the 1st Judgment debtor undertook to review all the requests made by borrower in respect of four items on discount of the loan amount, five years repayment plan on semi-annual basis, 6 months grace period, and changing of status from non-performing loan status. It is also clear that on 11th March 2024, the 1st Judgment debtor wrote to the 1st Decree holder responding to all requests by the Decree holder. The letter explicitly stated that 1st Judgment debtor had reviewed all the requests and agreed to restructure the repayment of the loan on the terms contained in that letter. The amount of the loan was discounted to TZS 1.6 billion that was outstanding in April 2022 before the dispute arose, grace period of 6 months from April 2024, five years repayment of the restructured loan in quarterly basis from the date of expiry of 6 months grace period. However, 1st Judgment debtor declined on additional

financing request as that was not part of the decree of the High Court. The 15 | Page bank reiterated its readiness to hand over the loan restructure documents to the 1st decree holder for signing. Moreover, on 30th April 2024 the 1st Judgment debtor by a letter informed the 1st Decree holder on the reminder of seven (7) days to signing the loan restructure documentation as per terms communicated earlier in letter dated 11th March 2024 in resolving the matter before the parties as per Court's decree. It was the respondent's/1st Judgment debtor's submission that 1st Decree holder did not heed to this call to finalise the matter. The efforts of the 1st Judgment debtor did not end up there but on 14th June 2024 wrote to the 1st Decree holder explicitly informing that recovery measures that were revitalized in May 2024 on the outstanding loan by selling the mortgaged properties would be halted to allow the parties to further negotiations on restructuring of the loan. Prevailing circumstances on the matter reveal that 1st Judgment debtor has taken all possible means to implement the decree of this Court. It is the 1st Decree holder who seems to be uncooperative in obeying or implementing the Court order. The submissions on record explicitly show that as the Decree holders did not bother to lead any material submission on any efforts done by either the 1st Decree holder or 1st Judgment debtor to implement the decree. Such concealment especially of the efforts made 16 | Page by the 1st Judgment debtor is a clear indicate of abuse of the court process by the 1st Decree holder. It is a settled law of this jurisdiction that he who alleged must prove. That is section 110 of the Evidence Act. In *Amos Njile Lili vs Nyanza Cooperative Union (1994) Ltd & Others (Civil Appeal No. 126 of 2020)*

[2024] TZCA 13 (31 January 2024), pages 15-16, where the Court observed that: In our determination of the complaints before us, we shall be guided by the following principles of law. One, is that in civil cases, the burden of proof lies on the person who alleges anything in his favour founded on section 110 of the Evidence Act. Two, is that the burden of proof envisaged above is on the balance of probabilities. It was the duty of the decree holders to prove that the 1st judgment debtor did not avail itself to the negotiation towards ensuring restructuring of the loan. However, the facts available are overwhelming that the 1st Judgment debtor took all reasonable actions to ensure that the decree of this Court dated 5th February 2024 is implemented to no avail. Upon serious consideration of the application, I have found that there is no justification at all for this court to exercise its discretion to grant leave 17 | Page to order detention of the 1st Judgment debtor's Managing Director as a civil prisoner for failure to obey the decree of the court. There is no proof at all that the 1st Judgment debtor has at any point in time refused to implement the decision of the Court. As it is for other aspects of exercise of judicial discretion, determination of this matter of execution of decree by committing a person to civil prison must ensure the same is done judiciously. In the case of *Sabena Technics Dar es Salaam Ltd vs Alfred Kirchsten (Civil Application No. 91/81 of 2022)* [2024] TZCA 9 (31 January

- 2024) (TANZLII), at page 8, the Court of Appeal stated that: It is thus important to state at the outset that extension of time in terms Ru/e 10 of the Ruies under which this app/ication is brought, is in the discretion of the Court upon good cause being shown by the app/icant. The said discretion isjudicial and so it must be exercised judicially. In the circumstances, given scanty material adduced by the applicants/ decree holders in this application for execution of decree through detention as a civil prisoner, it is my finding that there are no reasons whatsoever to determine the application in favour of the decree holders. I have nothing to substantiate such decision. It is my firm view 18 | P a g e that I am bound by the decision of the Court of Appeal in the case of Francis Mtawa vs Christina Raja Lipanduka (Civil Appeal 15 of 2020)
- [2022] TZCA 719 (15 November 2022) (TANZLII), at pages 12-13, where it was stated that: It bears reaffirming that, the duty of Judicial officers and any other adjudicator to assign reasons for the decision given, needs no emphasis. This is a mandatory requirement and a judgment which fails to comply with that requirement is null and void. I shall therefore proceed to find against the applicants/decreed holders as they have miserably failed to demonstrate on balance of probability that this court's intervention is necessary to ordering detention of the 1st judgment debtor's Managing Director as a civil prisoner. Granting such leave shall be countenance of material concealment of the truth of the matter. The Court should not be used to countenance frivolous applications which materially intends to benefit a party that does not discharge its obligations under the law. The 1st decree holder has a duty to repay the loan despite all the time spent in engaging with frivolous applications against the lender. 19 | P a g e In the case of Grace Olotu Martin vs Ami Ramadhani Mpungwe (Civil Appeal 91 of 2020) [2023] TZCA 193 (20 April 2023) (TANZLII), at pages 12 -13, the Court of Appeal reminded that: In our view, that will amount to being unduly moved by sympathy to the appellant leading to a total disregard of the settled legal position. For equity to apply one must approach it with clean hands which is not the case herein as we shall endeavour to show latter herein. Equity holds true where fairness to both sides is observed, too. I have reiterated that 1st decree holder had not in circumstances of the application proved to have done anything tangible to ensure implementation of the decree of this court neither having taken sufficient steps to respond to lucid communication on terms and conditions of loan restructuring proposals by the 1st Judgment debtor. Indeed, it is on record that 1st Judgment debtor acted promptly to review the proposed items by the 1st decree holder and responded within seven (7) days of the parties' meeting. 1st judgment debtor terms were clear without any ambiguities. The availed record reveals that the 1st judgment debtor acted honestly and with dedication to ensure that decree of this court dated 5th February 2024 is implemented. The 1st judgment debtor had indicated its willingness to discount the amount of loan to be restructured by cancelling 20 | Page all accrued interests and penalties from April 2022 to March 2024 when the loan stood unpaid and allowing repayment of the restructured loan in five years period with a grace period of six months from the date of signing of the restructured loan documents. All these efforts lucid on the

party of the 1st judgment debtor are not reciprocated by the 1st decree holder who for all purposes and intent is the one obliged to repay the outstanding loan amount. It is settled view of this court that it would be improper to grant the applicant/ 1st decree holder's prayers in this execution of ordering committal as a civil prison prisoner, the 1st judgment debtor Managing Director or ordering the 1st judgment debtor's Managing director to show cause why he should not be committed to prison as a civil prisoner in circumstances where the applicant/1st decree holder has concealed all the efforts done by the 1st judgment debtor to have the decree of the court successfully implemented. In totality, the application for execution of decree through order of detention of one Abdulmajid Mussa Nsekela, Managing Director of the 1st Judgment debtor as civil prisoner; or order for the 1st judgment debtors' Managing Director to show cause why he should not be detained as a civil prisoner; or an order directing the 1st judgment debtor to obey and implement the decree of this Court dated 5th February 2024 is destitute of merits. The same deserve to be dismissed for lack of merits. 21 | P a g e I proceed to dismiss all the three prayers against the 1st judgment debtor as the same have nothing cogent warranting grant by this Court. They stand dismissed in their entirety. The applicants/ decree holders are condemned to costs. It is so ordered. DATED at DODOMA this 2nd day of July 2024. E.E. LONGOPA JUDGE 02/07/2024 22 | P a g e

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