

TANZANIA / JUDGMENT

euro products t ltd vs junaco t ltd

2011 tzhccomd 2023 8 november 2011

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TZHCCOMDDECIDED
8 November 2011

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT PAR ES SALAAM
COMMECIAL CASE No. 103 OF 2005 EURO PRODUCTS TANZANIA LIMITED..... PLAINTIFF
VERSUS 1 JUNACO (T) LIMITED..... st DEFENDANT 2 JUSTINE
LAMBERT..... nd DEFENDANT

RULING

MRUMA, J, Following an order of the Court of Appeal dated 14th July, 2009, a Decree by consent in terms of the deed of settlement between the parties was made. Under that decree, the judgment debtor/respondent was ordered to pay.

- (a) T.shs 162,300,000/=in equal monthly installments of T.shs 20,000,000/= 30th August, 2009 till the whole amount is discharged. By virtue of that deed of settlement and decree, the applicants herein agreed to abandon all other claims related to this suit. The settlement was registered in this Court on Page 1 of 9 14th July, 2009 and a decree to that effect was entered accordingly on 5th August, 2009. Unfortunately, the Judgment debtor/respondent failed to adhere to the said decree and instead of effecting the installments as agreed; only 10,000,000/= were paid in respect of the first installment. Thus, by of 30th Sept, 2009, only T.shs 10,000,000/= out of the whole amount had been paid. It is worthy to note that the deed of settlement on appeal (decree) carried a usual default clause. On 30th September, 2009 the applicant presented before this court an application for execution of the decree by arrest and detention of the judgment debtor an a civil prisoner. This matter has been rather dragged by the parties, particularly the judgment debtor. On several occasions, he made attempts to settle the decreed amount but surprisingly some of the cheques he issued were dishonoured. The processes of negotiations and settlement albeit, in violation of the decree as regards the terms of payments explains largely the keeping in abeyance of this ruling. While this ruling was in pendency, the Judgment debtor/respondent presented an application for extension of Page 2 of 9 time within which he could effect payments by instalments. This was on 4th June, 2010, however to date no single instalment had been paid at least to show that the judgment debtor is willing to settle the decretal sum. On 8th June 2011, this court ordered issuance of a warrant of arrest against the judgment debtor to be brought before the court and show cause why he should not be sent to prison as a civil

prisoner. As intimated, on the 22nd march 2010, the J/debtor appeared in person, flanked by Mr. Msemwa and Buberwa learned advocates, whereas the applicant was represented by Mr. Rutabingwa learned Counsel. Mr. Rutabingwa accordingly indicated that the applicant was ready to pay for prison expenses should this court find it fit to commit the Judgment debtor to civil prison. He prayed to this court to make an order that the judgment debtor be imprisoned as a civil prisoner. That prayer met a stern resistance from Mr. Msemwa learned counsel for the Judgment debtor. He first of all complained that they were not served with the application which was being heard. He said further that according to the information he had there was no such application filed in court. He contended that in absence of such application his Page 3 of 9 client was not in a position to answer the allegations that he has failed to pay. To him, there must be a formal application supported by an affidavit before a court can order a person to be sent to prison as a civil prisoner. He backed up his proposition with the decision of the Court of Appeal in IPTL Ltd Versus VIP Engineering Ltd Civil case no. 54 of 2002. He said that his client was served on the 2nd October, 2009 and in between he has been making some payments up to T.shs 70,000,000/= whereby T.shs 20,000,000/= cheque was paid in March, 2010. In substance the learned counsel argues that in absence of a formal application the Judgment debtor is unable to defend himself and prove that he is paying, willing and able to pay, though he concedes that he was paying contrary to the schedule. For the applicant, it has been submitted that an application in that respect was filed on 30th September, 2009 and necessary fees paid. According to the decree holder's counsel the application was made because Judgment debtor has defaulted. The learned counsel argues that the statement that the Judgment debtor is able and willing to pay is a mere statement from the bar or otherwise there should be an affidavit to that effect. Page 4 of 9 He said that the applicant had waived interests and costs on the understanding that the judgment debtor could pay the decretal sum as agreed. In rejoinder Mr. Buberwa insisted that the application is not properly before the court, referring to O.XLIII (2) of the CPC. He submits that the application filed on 30th September, 2010 was premature because the Judgment debtor had been paying even after that date though not as agreed. He said that if any extension of time was necessary, it should have been after April 2010, and that the default clause was to take effect after 30th April, 2010. He said that it was agreed that the Judgment debtor would be paying more whenever he gets money from his other business since the amount involved is a colossal sum. Finally he prayed that their client be given up to June 2010 to pay the remaining balance. Fortunately Mr. Rutabingwa had no temperature on that request and he readily conceded and said that if at all they were serious, he would leave the matter in the hands of the court to decide. Unfortunately the seriousness anticipated by the learned counsel was not forthcoming, until the date of composing Page 5 of 9 this ruling and my last order which was on 8th June, 2011 almost a year and two months. The Judgment debtor had not complied hence this ruling. I agree that this ruling has been long and overdue but for good reasons; that considering business circumstances, and both the applicants and courts indulgency it was all in favour of the debtor to allow him to effect payment as anticipated. As I have noted, the Judgment debtor had filed an application for extension of time while well aware of the tendency of this ruling for his arrest and

imprisonment. I should start by stating the obvious (with due respect to the learned counsel), that an application for execution filed in court was not orally made. This application was rather filed pursuant to the provisions of Order XXI rule 5(2) of the Civil Procedure Code. Secondly, the submission that the default clause was effective from April 2010 cannot be entertained. Default is immediately after the Judgment debtor had failed to effect instalment as per the court's decree. In that accord, the applicant was entitled to apply for execution for his amount due in full immediately after the Judgment debtor having defaulted to effect the 30th August 2010 and 30th September, 2010 instalments. Page 6 of 9 Counsels for the Judgment debtor have submitted that without formal application, they could not be able to respond as to what extent their client is liable but they concede that payments was not made and even those made was not being made according to the agreement. That to me suffices to bring into operation the normal default clause. In case of default of payment, a decree holder is entitled to apply for execution to recoup his amount in full with recourse to any mode of execution provided by the law including arrest and imprisonment of the Judgment debtor as a civil prisoner Contrary to what Mr. Buberwa stated, there's nowhere in the said deed of settlement where it is indicated that payments were to be made whenever the Judgment debtor got money from his other business. That, in my view would have defeated the requirement of monthly charge of T.shs 20,000,000/= from 30th August, 2009 by which the full amount would have been discharged on or about 30th April, 2010. Considering the fact that the applicant/decreed holder had waived his interest and costs, and as a businessman, it goes without saying that he has been deprived of his substantial Page 7 of 9 amount of moneys which would have otherwise proceeded from investing the money that was supposed to be fully paid In the event therefore, I allow the application for execution by way of arrest and imprisonment of the Judgment debtor as a civil prisoner. I order that unless he sooner pays the decreed amount together with the interest accrued the Judgment debtor be arrested and committed to Keko prison (or any other prison facility) as a civil prisoner for period of six months. The decree holder shall pay T.shs 6000/= per day payable upfront being daily subsistence allowance payable to the Prison officer In-charge of Keko Prison (or any other prison as the case may be) where the Judgment debtor shall be kept. It is accordingly ordered. A.R. MRUMA, JUDGE. Page 8 of 9 8/11/2011 Coram: Hon. A.R.Mruma, Judge. For the D/Holder/Applicant - Mr. Rutabingwa, For the J/Debtor/Respondent - Mr. Nyange H.H.H. for Mr. Buberwa for Respondent. COURT: Ruling delivered this 8th day of November 2011 in presence of Mr. Rutabingwa, Advocate for the Applicant and Mr. Nyange H.H.H holding Mr. Buberwa's brief advocate for the Respondent. A.R. MROMA JUDGE. 8/11/2011 2,815 Words. Page 9 of 9

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