

TANZANIA / JUDGMENT

raphael juma kasera vs katibu dayosisi ya mara 2020 tzhc 680 29 april 2020

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29 April 2020

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA LABOUR DEVISION AT
MUSOMA LABOUR EXECUTION NO. 11 OF 2020 (Arising from the Award of the Commission
Decision for Mediation and Arbitration at Musoma in Labour Dispute No. CM A / MUS /248/2017)
RAPHAEL JUMA KASERA.....JUDGEMENT HOLDER VERSUS KATIBU
DAYOSISIYA MARA.....JUDGEMENT DEBTOR

RULING

Date of Last: Order 16/3/2020 Date of Judgement: 29/4/2020 KISANYA, J.: The judgement (award) holder, Raphael Juma Kasera has applied for execution of an award issued by the Commission for Mediation and Arbitration for Mara at Musoma (CMA) in Labour Dispute No. CMA/MUS/248/2017. In the said award, Katibu Dayosisi ya Mara (judgement/award debtor) was ordered to pay the judgement holder, Tsh. 3,832,385, being compensation for unlawful termination of the judgement holder. It is on record that the judgement debtor had attempted debtor to challenge the said award. However, his application for revision (Labour Revision No. 5 of

2019) was dismissed want of prosecution. Therefore, the judgement holder has applied for execution of the said award by way of arrest and detention of the judgement debtor, as a civil prisoner. At the hearing of this matter, the judgement holder appeared in person, unrepresented while Mr. Wambura Kisika, learned advocate, appeared for the judgement debtor. In his brief submission, the judgement holder urged me to grant the application and issue the order to arrest and detain the judgement debtor as a civil prisoner. I asked the judgement holder whether he was ready to cover for subsistence of the judgement debtor and he replied that he had no means of meeting the costs required to enforce the order of arrest and detention. He therefore urged the Court to help him. The Counsel for the judgment debtor submitted that the judgement debtor was ready to settle the matter with the judgement holder. Therefore, I adjourned this application to pave way for the parties to settle. However, the parties informed the Court that they had failed to settle the matter. Therefore, Mr. Kisika opted to submit in opposition of the application. Citing article 15 of the Constitution of the United Republic of Tanzania, 1977 (the Constitution), the learned counsel argued that every person has the right to freedom and that he cannot be detained unless a judgement in criminal or criminal case has been issued against him.

He contended that the judgement holder was employed by the Anglican Church of Tanzania, Diocese of Mara and not Katibu wa Dayosisi ya Mara. For that reason, counsel Kisika was of the view that, it will be unfair to detain Katibu wa Dayosisi ya Mara as a civil prisoner. He argued further that, the award is not executable because it was issued against the wrong party. He cemented his submission by referring to the case of Afisa Tawala Hospital ya Ndala vs Eunice Meshack Shimba, Revision No. 17 of 2015, HCT at Tabora cited with approval by this Court in this Court (I.C. Mugeta, J.) in the case of Kanisa la Anglikana Ujiji vs Abel S/O Samson 2 Heguye, Labour Revision No.5 of 2019, High Court of Tanzania, Kigoma District Registry, Labour Division (Unreported) that: “ ..the respondent sued a wrong party thus the CM A award is not executable in the eyes of law. ” In alternative, Mr. Kisika submitted that the Court should not issue an order to arrest and detain the judgement debtor unless the judgement holder has deposited a sum of money to be decided by this court as required under O. XXI,

- r. 38 of the Civil Procedure Code [Cap. 33, R.E. 2002] (CPC). The judgement holder rejoined by submitting that the issue whether Katibu wa Dayosisi ya Mara is a wrong party was required to be raised during trial when the said Katibu wa Dayosisi ya Mara appeared before CMA. However, the judgement holder reiterated that, he had no means of meeting the costs for enforcing the order sought in the application. Having given due consideration to the submissions by the judgement holder and the learned counsel for the judgement debtor, two issues need to be addressed at this stage. One, whether the issue that the award was issued against the wrong party can be raised during the execution proceedings. Two, whether application for execution for execution of decree by arrest and detention in civil prison of the judgement debtor can be issued if the decree holder is unable to meet the costs for enforcing such order. From the outset, I wish to point out that one of the means of execution of judgement is arrest and detention of the decree debtor as a civil prisoner. This is mode of execution is provided for under section 44 and O. XXI, r. 28 of the CPC. The provision of O. XXI, r. 28 of the CPC provides that: 3 “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. ” I understand that Article 15 (1) of the Constitution guarantees the right to freedom and to live as a free person. Therefore, this right can be curtailed if the award or judgement is executed by detention of the judgement debtor as a civil prisoner. However, this mode of execution of judgement is anticipated and provided for under Article 15(2) of the Constitution which provides: “(2) For the purposes of preserving individual freedom and the right to live as a free person, no person shall be arrested, imprisoned, confined, detained, deported or otherwise be deprived of his freedom save only-
- (a) under circumstances and in accordance with procedures prescribed by law; or
 - (b) in the execution of a judgment, order or a sentence given or passed by the court following a decision in a legal proceeding or a conviction for a criminal offence. ” Now, as to the first, I am of the view that, the issue whether the award is brought against the proper party is

required to be raised and addressed in the trial, appellate or revisional proceedings. Thus, if the judgement holder was a party and appeared during the proceedings giving rise to the award, he cannot raise the issue on parties to the case in the execution proceedings. In my opinion, the proper recourse for him was to file an appeal or revisional proceedings against the said award or judgement. It is on record that the judgement/award debtor in the case at hand appeared before CMA. He entered his defence. Aggrieved by the award, he filed application for revision (Labur Revision No. 5 of 2019) which was dismissed for want of prosecution. There is no application filed by the judgement debtor to re- 4 admit or restore the said revision. Hence, I find that the decree holder is barred from raising that issue at the stage of execution. The case cited by Counsel Kisika is distinguishable in the case at hand because it involved revision proceedings. For that reason, I hold that the objection by the judgement debtor has no merit. The second issue is whether the application for execution for of judgement by arrest and detention of the judgement debtor can be issued if the judgement holder is unable to meet the costs required to enforce the order. O. XXI, r. 38 of the Code specifies the costs to be incurred by decree holder in executing the award by committing the judgement debtor to civil prison. These include the substance allowance for the judgement debtor from the time of arrest to the time he is brought before the Court. The amount to be paid by the judgement holder is set by the Court. Also, where the judgement debtor is committed to prison, the judgement holder is responsible to pay for his substance allowance. Since there are no rules governing the allowance to be paid, the Court is mandated to fix the amount taking into class of the judgement debtor. For easy of reference, rule 38 is quoted hereunder: “38.-(1) No judgment debtor shall be arrested in execution of a decree unless and until the decree-holder pays into court such sum as the judge or magistrate thinks sufficient for the subsistence of the judgment debtor from the time of his arrest until he can be brought before the court.

- (2) Where a judgment debtor is committed to prison in execution of a decree, the court shall fix for his subsistence such monthly allowance as he may be entitled to according to the scales fixed under section 45 or, where no such scales have been fixed, as it considers sufficient with reference to the class to which he belongs.
- (3) The monthly allowance fixed by the court shall be supplied by the party on whose application the judgment debtor has been arrested by monthly payments in advance before the first day of each month.
- (4) The first payment shall be made to the proper officer of the court for such portion of the current month as remains unexpired before the judgment debtor is committed to civil prison, and the subsequent payments (if any) shall be made to the officer in charge of the prison.” In my opinion, the above provision bars an arrest of the judgement debtor if the judgement holder has not paid the required substance allowance. In other words, it does not bar the court from issuing the order of committing of the judgement holder to civil prisoner. It is the enforcement of order of committing the judgement debtor to prison will be effected upon payment of the substance allowance to be specified by the court. To this end, as the

objection raised by counsel for the judgement debtor lacks merit and having considered that this mode of execution involves restraining of personal freedom of Katibu wa Dayosisi ya Mara, I find the need of judgement debtor personally before the issuing the order. Consequently, the notice is hereby issued to the judgement debtor under O. XXI, r. 35(1) of the CPC to appear before this Court on 6thMay, 2020 at 2.30 pm and show cause why he should not be committed to prison. Order accordingly. Dated at MUSOMA this 29th day of April, 2020. E. S. Kisanya JUDGE 29/4/2020 6

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