

TANZANIA / JUDGMENT

EXECUTION NO

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TANZLIIDECIDED
1 January 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES
SALAAM EXECUTION NO.61 OF 2023 (Originating from Bill of Cost No. 148 of 2019, before Hon.
IN. A. Hamza, Taxing Master) PETA MHOMA {Administratrix of the Estate of the late JUMANNE
MHOMA..... DECREE HOLDER VERSUS CHARLES HANS
KIRENGA..... JUDGMENT DEBTOR

RULING

18th February& 25th March 2024 GWAE, J. The applicant herein preferred this application under section 42 (c), 44 (1), Order XXI Rule 9, 10 (2), 31 (1) and (2) of the Civil Procedure Code, Cap 33, (R.E 2019) for an order of arrest and detention of the respondent as a civil prisoner. The records and the application reveal that, in the Bill of Costs No. 148 of 2019 before this court, the Judgment debtor was ordered to pay a sum of Tshs. 13,526,000/=, which he failed to pay. The Decree Holder then filed Execution No. 76 of 2020 praying for this court to order the Judgment Debtor to pay Tshs. 13,526,000/= and costs of execution and in default thereof, the Judgment Debtor be arrested and detained as a i Civil Prisoner. This court found the application was prematurely filed and strike it out on the reason that, it combined two prayers instead of exhausting one prayer at a time. The court referred to section 42 (a) of the Civil Procedure Code Cap 33, (R.E 2019), which requires the Decree Holder to identify the properties of the Judgment Debtor or bank account to execute the award of the court, before ordering the detention of the Judgment Debtor as a Civil Prisoner. The applicant again filed Execution No. 2 of 2023. In determining the said matter, the J/ Debtor was ordered to pay Tshs. 13,526,000/= to the Decree Holder until 30.06.2023 and in case the Judgment Debtor defaults to pay, the Decree Holder was allowed to lodge and apply other mode of execution to secure her claims, hence this application. Hearing proceeded orally. The Decree Holder was represented by Mr. Frank Chungu, learned advocate, whereas the Judgment Debtor was represented by Mr. Armando Sweya, learned advocate. During hearing, the judgment debtor expressed to pay a total of 3,500,000/= as a final settlement whereas the decree holder submitted that she was not prepared to be paid the proposed some of money unless her decretal sum is paid. 2 Having examined the arguments of both parties, the issue for determination is whether this application has merits. Before granting this application, the court has to satisfy itself whether the conditions set forth under Order XXI Rule 39 (2) has been adhered to. Order XXI Rule 39(2) provides thus:- "(2) Before making an order under sub-rule (1), the court may take into consideration any allegation of the decree holder touching any of the following matters,

namely:-

- (a) The decree being for a sum for which the judgment debtor was bound in any fiduciary capacity to account;
- (b) The transfer, concealment or removal by the judgment debtor of any part of his property after the date of the institution of the suit in which the decree was passed, or the commission by him after that date of any other act of bad faith in relation to his property, with the object or effect of obstructing or delaying the decree holder in the execution of the decree;
- (c) Any undue preference given by the judgment debtor to any of his other creditors;
- (d) refusal or neglect on the part of the judgment debtor to pay the amount of the decree or some part thereof when he has, or since the date of the decree has had, the means of paying it; 3
- (e) The likelihood of the judgment debtor absconding or leaving the jurisdiction of the court with the object or effect of obstructing or delaying the decree-holder in the execution of the decree". The above position of the law was interpreted in *Grand Alliance Limited vs. Mr. Wilfred Luca Tarimo and Others*, Civil Application No. 187/16 of 2019 (Unreported) provides the procedures to be adhered to before an order for arrest and detention of a person as a Civil Prisoner thus:- 'It follows then that the imprisonment of a judgment debtor in execution cannot be ordered unless the conditions and the 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 judgment debtor (See sections 42 and 44 and Order XXI rule 10 of the code). After receipt of the application, the executing court has 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 he 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 judgment - 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 4 rule 39(2) of the Code before committing a person to prison." Starting with the first conditions set forth in *Grand Alliance Limited (Supra)* that, there must be an application for execution of a decree for payment of money by arrest and detention in prison of a Judgment Debtor as provided for under Order XXI Rule 10 and section 42 (c) of the CPC. The Decree Holder has complied with the statutory requirement by filing this application. Regarding the condition for the court to issue a notice to show cause to the person to whom the execution is sought. The record reveals that, on 20th day of July 2023, this court issued notice to show cause to the respondent as to why he should not be arrested and detained as a civil prisoner. On 05th May 2024, the respondent appeared before the court and was serviced by Mr. Armando Swenya, learned advocate. In the instant application, I have considered the allegations of the Decree Holder in his application that the court ordered the Judgment Debtor was ordered to pay Tshs. 13,526,000/= since 30th

June, 2023 by the order in Execution No.02 of 2023 dated 05th day of May 2023 but he has failed to do so. 5 I have also considered the submissions made by the parties on the 14th day of February 2024, where, the Judgment Debtor expressed his intention or readiness to pay Tshs. 3,000,000/= as a final settlement and the Decree Holder committed herself to pay for the prison service unless her decretal sum is paid. Having deliberated the conditions set forth under Order XXI Rule 39 (2) of the CPC and basing on the provision of section 46 (1) of the CPC, it is hereby ordered that, unless the Judgment Debtor pays the decretal sum of Tshs. 13,526,000/= within 30 days from the date of this order, the Judgment Debtor shall be detained in civil prison for the period of six (6) months in execution of the decree issued by the court in Bill of Cost No. 148 of 2019. The Decree Holder is ordered to pay Tshs.300,000/= as a subsistence allowance for each month for the period the Judgment Debtor will be in prison in terms of Order XXI Rule 38 of the CPC. It is so ordered. DATED at DAR ES SALAAM this 25th day of March 2024. ' JUDGE 6

Orders:

Mention 25/04/2024 at 12:00 hrs to ascertain compliance or cause the judgment debtor to be arrested and detained 7

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