

TANZANIA / JUDGMENT

hans aingaya macha vs dira newspaper company ltd and another 2022 tzhc 15166 15 december 2022

COURT
TZHCDECIDED
15 December 2022

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IN THE HIGH COURT OF TANZANIA (DAR ES SALAAM SUB DISTRICT REGISTRY) AT DAR ES
SALAAM EXECUTION NO. 59 OF 2022 (Arising from Civil Case No 7 of 2016.) HANS AINGAYA
MACHA.....DECREE HOLDER VERSUS DIRA NEWSPAPER
COMPANY LTD 1ST JUDGMENT DEBTOR MUSA
MSAMA.....2ND JUDGMENT DEBTOR

RULING

Date of last Order: 01/12/2022 Date of Ruling: 15/12/2022 E.E. KAKOLAKI, J. The applicant before this court being a decree holder, preferred this application under Order XXI Rule 35 of the Civil Procedure Code, R.E 2019 (the CPC), seeking for execution of the decree of this Court/consent settlement order dated 22/09/2016 in Civil Case No. 7 of 2016, by committing to prison as civil prisoner the director of the judgment debtor one Alex Msama. For a better understanding of this matter, I find it necessary to narrate albeit briefly the background behind his prayer. The applicant herein filed a Civil Case No. 7 of 2016 before this Court against the Judgment debtors above named, in which later on the court entered Consent 1 settlement order to the effect that, the Judgment debtors were to pay the decree holder/applicant Tshs. 8,000,000 as final and conclusive payment of his claims in the said case and any other application arise from the same. The said money was to be paid in two equal instalments of Tsh. 4,000,000 by 20th October 2016 and 20th November 2016. Facts reveals further that Mr. Alex Msama, the director to the 1st judgment debtor, DIRA NEWSPAPER COMPANY LTD, guaranteed performance of the said settlement failure of which execution proceedings could follow. It appears the judgment debtors did not heed to the agreed settlement order, the fact which triggered this application for execution in which the director for the 1st judgment debtor one Mr. Alex Msama is to show cause as to why he should not be committed to prison as Civil Prisoner for failure to satisfy the courts decree dated 22nd September 2016. On 27/08/2022 the court ordered that Mr. Alex Msama be served through his attorney Mr. Kanonyele, who was present in court. On the next date, when the application came for hearing, Mr. Alex Msama did not appear, but his advocate informed the Court that, Mr. Msama is held at PCCB for another matter in which the decree holder's account

number was requested and availed to him for the 1st Judgment debtor's director to deposit some amount of money. He finally prayed for adjournment of the matter for two weeks to avail his client with ample time to either deposit the money or to show cause before this court the prayer which was cordially granted. On the next date scheduled for hearing which is on 01/12/2022, the Court's orders were not complied with, as neither the director of the 1st judgment debtor Mr. Alex Msama appeared in court nor did he deposit any amount of money to the decree holder's account as pledged before. It appeared that, the Court was informed by his advocate Mr. Kanonyele that, the 1st Judgment debtor's director Mr. Alex Msama is struggling to secure the due amount so a prayer was made for him to settle the due amount in the next date, the prayer which was rejected, instead it was ordered that Mr. Msama should appear before the court at 3:00 Pm in person to show cause as to why he should not be committed to prison for failure to satisfy the decree of the Court. At 3:00 pm Mr. Msama appeared before the Court as ordered while under representation of his advocate Mr. Kanonyele and told the court that, the decree holder's prayer should not be granted as he needed more time to effect the decree, since his business was closed down by the Government in 2018 while his accounts seized. Secondly, he contended at the same time was bereaved by his father, mother and young brother who passed away in the year 2020. It was his further submission that, he has a plot at Kigamboni District in which he is intending to dispose of so as to pay the decreed amount but the buyer on that date had been bereaved and travelled upcountry, he was unable to discharge the amount due. He finally prayed the Court to consider all those factors and refrain from granting the sought prayer by the decree holder and instead extend him time to him until 15/12/2022 for him to make good the debt in the decree. On the other side, Ms. Kulwa for the decree holder attacked that submission by Mr. Msama arguing that, he was unwilling to pay the due amount as per the decree of the court, hence contempt of court since the same was issued in 2016, and the alleged difficulties came in 2018. According to her, the allegations that his business was closed by the Government is unfounded as there is no single evidence to support the same. On that note it was her submission that, the reasons advanced by Mr. Msama are not justifiable thus prayed decree holder's prayer be granted by ordering him to be imprisoned as a civil prisoner as the applicant is ready to bear all the costs as directed by the Court. In his side, Mr. Kanonyele submitted that, his client has given detailed account on why he should not be sentenced to serve imprisonment sentence as civil prisoner, and his further prayer for extension of time to settle the said amount by 15/12/2022. He prayed the Court to grant him time he has prayed before entering any adverse order against him. I have keenly considered both parties' submissions and accorded it with the deserved weight. It is uncontroverted fact that, the power of this Court to commit a Judgment Debtor to jail as a civil prisoner is provided under Order XXI Rules 35 (1) (2) of the CPC which provides 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.

- (2) Where appearance is not made in obedience to the notice, the Court shall, if the Decree Holder so requires, issue a warrant for the arrest of the Judgment Debtor. The Order XXI Rule 35 limits the arrest of the Judgment Debtor only if he pays the decreed amount and costs of the arrest. However, prior to ordering of the judgment debtor to be arrested, there are conditions to be followed. The said conditions are explained in the case of Grand Alliance Limited 5 vs Mr. Wilfred Luka Tarimo & Others, Civil Application No. 187/16 of 2019 (CAT- Unreported) where the court had this to say: It follows then that the imprisonment of a judgment debtor in execution cannot be ordered unless the conditions and 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 rule 39 (2) of the Code before committing a person to prison. In this matter however, the director to the 1st judgment debtor who guaranteed performance of the decree of the Court did not default appearance when called to show cause but rather gave empty pledges for execution of the same including his intention to sale his plot at Kigamboni 6 which promise did not work. As rightly submitted by Ms. Kulwa, the submission which I embrace, the reasons advanced by Mr. Alex Msama were not justified at all as the decree was issued since 2016 but failed to honour the same as his business allegedly was closed in 2018, two years later. It is no doubt that, Mr. Msama has been making countless promises that are not materializing. Since the decree holder wants to enjoy the fruits of the judgment given in his favour, it is the finding of this Court that the Judgment Debtors' failure to execute the award represents a dishonest and fraudulent character which denies him such right. In the premises this Court remains with no option than to issue an order of arresting and detaining the 1st judgment debtor's director Ms. Msama as a civil prisoner. In view of the above findings and pursuant to the provisions of Order XII Rule 35 of the Civil Procedure Code Cap 33 (R.E. 2019), I hereby order that, unless the whole decretal amount of Tshs 8,000,000/= is paid within 14 days from the date of this ruling the director of the 1st Judgment Debtor Mr. Alex Msama, shall be arrested and detained as a civil prisoner in Civil Prison in Tanzania for the period of six (6) months in the execution of a decree of this Court pronounced in Civil Case No.7 of 2016. The 14 days given expires on 29th December, 2022, in which in the event the judgment debtor fails to 7 satisfy the court decree, the arrest and detention be effected from 30th December, 2022. The Applicant/Decree Holder shall to pay Tshs. 300,000/= (say Three Hundred Thousand) only to the Prison Officer of Ukonga Prison being subsistence allowance per each month the Judgment Debtor will be in prison. Should the decree holder fail to pay that amount Mr. Msama shall not be detained. In terms of sub-section (2) of section 46 of the Civil Procedure Code, [Cap. 33 R.E 2019] a release from prison after serving the ordered six

(6) months is not a discharge form the debt. No order as to costs. It is so ordered. Dated at Dar es Salaam this 15th day of December, 2022. E. E. KAKOLAKI JUDGE 15/12/2022. The Ruling has been delivered at Dar es Salaam today 15th day of December, 2022 in the presence of the Ms. Jacqueline Kulwaand Ms. 8 Benadetha Fabian, advocates for the Decree holder, Mr. Adrew Kanonyele, advocate for the judgment debtors and Ms. Asha Livanga, Court clerk. Right of Appeal explained. E. E. KAKOLAKI JUDGE 15/12/2022. 9

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