

TANZANIA / JUDGMENT

quresh m delaware vs mazrui commission agent com ltd another 2004 tzhccomd 8 21 july 2004

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21 July 2004

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT PAR ES SALAAM
COMMERCIAL CASE NO. 63 OF 2002 QURESH M. DELAWARE.....
PLAINTIFF/ DECREE HOLDER VERSUS

1. MAZRUI COMMISSION AGENT CO. LTD..... Ist DEFENDANT I JUDGMENT
2. SAID MAZRUI..... 2nd DEFENDANT) DEBTORS

RULING

KALEGEYA, J: Following an application for execution by the Decree - holder through the mode of “imprisoning of the judgment debtor as a civil prisoner for failure to pay the decretal amount, and he has no property to attach”, the 2nd Judgment - debtor represented by Mr. Lugaila, Advocate, raised a preliminary objection that “the Application made before this Court is incompetent as it contravenes the law”. The decree holder is represented by Capt. Sanze. The Counsel were ordered to effect arguments by way of written submissions on both the preliminary objection and the main application. Starting with the preliminary objection, briefly, the 2nd Judgment - debtor’s Counsel argued that the application is contrary to law, in that, execution against a Company cannot be issued against its members including its Directors who were not parties to the suit, making reference to Salomon vs Salomon & Co. Ltd, [1897] AC 22 and also that there is no 2 application legally worth the title as O. XLIII Rule 2 of the CPC was not complied with. He also made reference to Sarkar’s Law of Civil Procedure - Part 1 at page 924 urging that the incapability of the judgment

- debtor to pay should be backed up by an affidavit. In response, Capt. Sanze insisted that Salomon case is not applicable as the person against whom arrest and detention is sought was a party to the case; that Sarkar’s observations are merely persuasive as they cannot override the provisions of the CPC, making reference to the proviso to O. XLIII Rule 2 CPC insisting that the relevant rules are O. XXI Rules 9, 10 (1) and (2) of the CPC. Backed up by the law, I should state that the preliminary objection has no merits. The record is very clear - Defendants are Mazrui Commission Agent Co. Ltd and Said Mazrui. The decree is against

both parties. Indeed, as rightly submitted by Capt. Sanze, Salomon's case is not applicable. As to whether the application was improperly filed, I am on all fours with Capt. Sanze that it is the doing the opposite that would have violated the law. An application for execution by arrest and detention has no different format from the format used in other modes which a decree holder may seek to enforce the decree. O. XLIII, Rule (2) CPC upon which the 2nd Judgment debtor's Counsel relies stands against him. The said Rule provides, 3 "Every application to the Court made under this code shall, unless otherwise provided, be made by a chamber summons supported by affidavit: Provided that the Court may where it considers fit to do so, entertain an application made orally..." The said order provides three modes in which, generally, an application to the Court can be made; one, by chamber summons supported by affidavit; two, by a mode otherwise provided for; and three, orally with Court's leave. In our situation, category two is the one applicable. How a decree holder should effect an application for execution is provided for under O. XXI, CPC, under a sub - heading "Application for execution". Rule 10(1) allows a decree holder to orally apply for immediate arrest of a judgment - debtor at the time the decree is passed. This however is not applicable as the decree was passed a long time ago. What is applicable is Rule 10 (2) which provides: "(2) Save as otherwise provided by sub — rule (1) or sub - rule (1A), every application for the execution of a decree shall be in writing, signed and verified by the applicant or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars, namely - 4 The sub - rule then itemizes what should be reflected [(a) - (i)]: (i) is followed by (j) which provides:

- (a) the mode in which the assistance of the court is required, whether —
- (i) by the delivery of any property specifically decreed; (ii) by the attachment and sale, or by the sale without attachment, of any property, (Hi) by the arrest and detention in prison of any person; (iv) by the appointment of a receiver;
- (v) otherwise, as the nature of the relief granted may aquire. " (emphasis mine) What has been applied for falls under (J) (iii). The applicable and general format for execution is as reflected on form No. "Civil Courts 9" entitled "Application for execution of decree (O. 21, Rules 9 and 10)". This is the very format dutifully employed by the present Applicant/Decree - holder and filed on 31/7/2003. What Mr. Lugaiya is fronting is very norval indeed. While the commentary in Sarkar's Law of Civil Procedure may provide as Mr. Lugaiya urges, that grounds for arrest and detention should be provided in an affidavit, I am on all fours with Capt. Sanze that that observation is merely persuasive and not 5 binding. In any case, the same CPC provides safety valves in an application for such mode of execution - under Rule 35 the Court has discretionary powers to permit a judgment - debtor to show cause against detention in prison. In my view, this should be a rule rather than an exception. As a person's liberty would be at stake I think it is only reasonable and proper that before being cast into detention for a debt he should be afforded chance to show cause, if any, why the order should not issue, and this is where, if necessary, evidence and competing affidavits and counter affidavits can be sought. Otherwise, the application before us is legally proper. The

preliminary objection stands dismissed. That disposed of let us turn to the merits of the application. The Applicants' Counsel charges that the 2nd Judgment - debtor has the ability to pay but that he is playing delaying tactics "verging on disowning of the obligation under the decree" as portrayed by his various fruitless promises to pay. On the other hand, the 2nd Judgment - debtor's Counsel insists that it is not correct to say that his client has refused to pay as "he has approached the decree - holder several time with view to settle part of the decretal amount but the decree holder refused to accept the money and insists to proceed with execution by detaining of the 2nd judgment - debtor", that the allegation that "the judgment - debtor has no property to be attached and the said debtor is not ready to pay the decretal amount is a serious allegation which need to be proved beyond reasonable doubt as the allegation takes away a constitutional right to be free..." He again makes 6 reference to Sarkar's Law of Civil Procedure, 8th Ed., 1992, at page 981, wherein it is observed, "...The decree holder has to demonstrate that the judgment — debtor has willfully with the malafide intention, to deprive the benefit of the decree, is refusing to pay the decretal amount in spite of having sufficient means to pay". With respect to Mr. Lugaiya, his client has demonstrated the contrary of what he is fronting. The record paints him gravely as follows. The suit was filed in February, 2002. The usual preliminaries including completion of pleadings and failure of mediation proceeded before Hon. Nsekela, J. (as he then was). Subsequently, the matter was re - assigned to me. Issues were framed on 24/10/2002. Hearing commenced and the Plaintiff closed their case on 12/12/2002 after three witnesses had testified. The matter was adjourned for defence hearing on 13/1/2003. On that date the case did not proceed as Defendant's Counsel was absent. The matter was adjourned to 25/2/2003 with Defendants' condemnation in costs. On 25/2/2003 again the Defendants' Counsel was absent but the 2nd Defendant/Judgment - debtor/Respondent in person represented both Defendants. What transpired in Court on that date is as follows:- "Mr. Mazrui: On 2nd reflection, I admit the claims. I am ready to pay the Plaintiff a round figure of shs.10 million and this will include 7 fees, costs and the principal sum. If accepted, I will pay the said sum by 30th April, 2003. Mr. Mnyele: We agree, let judgment be entered in terms proposed and accepted. Sgd: L.B. Kalegeya Judge Order: Judgment by admission is hereby entered in favour of the Plaintiff in the following terms - the Defendants shall pay to the Plaintiff a sum of shs.10 million which shall be inclusive of the Principal sum, fees and costs. The said sum shall be paid by 30th April, 2003. Sgd: L.B. Kalegeya Judge 25/2/2003 " The 2nd Judgment - debtor however never kept his promise. Upon filing the present application by the Decree - holder, on 22/9/2003 a notice to show cause in terms of O. XXI, Rule 30 CPC was ordered. After futile various attempts to serve him he was finally traced. On 8 27/1/2004 the 2nd Judgment - debtor/Respondent made appearance and informed the Court: "I had problems with finances. I will have settled the debt by the end of April". To give him an allowance, hearing of the application was adjourned to 12/5/2004 and then 17/5/2004. On the said 1-7th, the Respondent surfaced not with the decretal sum or part thereof but with Mr. Lugeiya, Advocate, challenging the application and here we are. A party to a case, who fails to settle the matter amicably under mediation; who duly puts up a fight, challenging the claim, necessitating the calling of three witnesses by the other party; who

subsequently makes a total u - turn, and does what he should have done over a year before, admit the claims; who sets a date for settling the claim but does not abide by his promise for a future date and who finally engages an advocate to challenge execution cannot in the least be said to be bent at settling the liability. And, the only reasonable inference that can be drawn, from his all round conduct is that he is intentionally refusing to pay or else he would not be giving promises with set dates. At the most he would have implored the decree - holder for his consent for an application for Court's leave to pay in instalments in terms of O. XX, Rule 11(2) CPC. I am satisfied that the application is meritorious. The 2nd Judgment - debtor/ Respondent should be arrested and detained as a civil prisoner for a 9 period of 6 months from the date of delivery of this ruling. Application allowed with costs. L.B. KALEGEYA JUDGE Delivered in the presence of Capt. Sanze for the Applicant/Decree - holder and absence of 2nd Respondent/2nd Judgment - debtor. The latter were duly notified. JUDGE 21/7/2004 1,796 words

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