

TANZANIA / JUDGMENT

# mussa shaibu msangi vs sumry high class ltd one 1 another 2022 tzhccomd 303 23 september 2022

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TZHCCOMDDECIDED  
23 September 2022

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT DAR ES SALAAM ARISING FROM EXECUTION PROCEEDINGS IN RESPECT OF COMMERCIAL CASE NO. 20 OF 2012 MUSSA SHAIKU MSANGI.....PLAINTIFF/DECREE HOLDER VERSUS SUMRY HIGH CLASS LTD..... 1st DEFENDANT/JUDGMENT DEBTOR SUMRY BUS SERVICES LTD .....2nd DEFENDANT/ JUDGMENT DEBTOR Date of Last order: 21/09/2022 Date of Ruling: 23/09/2022

## RULING

MKEHA, J: Following filing of an application for execution of a decree in respect of Commercial Case No. 20 of 2012, through arrest and detention of the Judgment Debtor's Directors, the latter filed affidavits in view of showing cause why execution orders ought not be granted. The Judgment Debtors i did so through Mr. Didace Respicius learned advocate. Affidavits of Mr. Amour Mohamed Sumry and that of Salum Mohamed Sumry were filed for that purpose. The decree holder filed a counter affidavit. The decree holder was being represented by Mr. Deogratius Ogunde learned advocate. When the matter was called for hearing, Mr. Didace learned advocate submitted that, the whole of the decretal sum, which included the awarded interest as per the application for execution made on 25/02/2015 had been fully paid by the judgment debtor. In his view, the decree was fully satisfied. As to the mode of execution sought, the learned advocate submitted that, the conditions for making of an order of arrest and detention had not been fulfilled by the decree holder. The case of the Grand Alliance was cited. According to the learned advocate, the application did not indicate that the conditions had been satisfied. The learned advocate did not contest execution of the costs after taxation, which had not been executed in the former application. 2 Mr. Deogratius Ogunde learned advocate commenced his reply submissions by submitting that, there was no denial that TZS. 43,319,000 being the amount of costs after taxation had not been executed. He also admitted that, the principal debt had been paid by the judgment debtor. He also submitted that, the awarded interest had been paid up to 01/04/2016. He however submitted that, the decree holder had not been paid interest on the decretal sum from 02/04/2016 to the date when the principal decretal

sum was fully paid. According to the learned advocate, up to when the principal decretal sum was fully paid, the accrued interest stood at TZS. 113,842,766. He pressed for payment of the said sum of money. As to the mode of execution preferred, the learned advocate submitted that, the persons sought to be arrested were Directors of the Judgment Debtor company. That, there was outstanding claim unsatisfied. That, efforts to get properties of the Judgment Debtor were unsuccessful. That, the Judgment Debtor had neglected paying the decretal amount. The learned advocate added that, paragraph 21 of the counter affidavit demonstrated bad faith on part of the Judgment Debtor. He therefore 3 prayed that, the veil of incorporation be lifted to enable arrest and detention of the two Directors as civil prisoners. When Mr. Didace learned advocate rose to rejoin, he insisted that there was no evidence of bad faith in paragraph 21 of the counter affidavit. He then rested his case. The only determinative issue is whether the executing court can reopen execution proceedings after recording satisfaction of decree. The decree holder does not deny that his application for execution which was filed in court on 25/02/2015 was granted by the executing court. The application consisted of the principal award and interest awarded. Only costs remained unexecuted as they had not been taxed when the application for execution was determined. In this regard, the decree holder admits to have been paid TZS. 216,067,500 being the principal claim and interest as per the decree holder's application for execution dated 25/02/2015. However, the decree holder maintains that, as far as interest is concerned, the judgment debtor paid up to 01/04/2016 and not up to the date the principal decretal sum was fully paid. On the other hand, the judgment debtor maintains that the whole debt stands paid. 4 The executing court's record indicates that on 05/10/2022 the judgment debtor deposited what was considered to be the whole of the decretal sum due i.e TZS. 216,072,500 as ordered by the executing court. Then the advocate for the judgment debtor wrote to the court asking for clearance of Mr. Hamoud Mohamed Sumry who had been earlier ordered to be arrested for failure to satisfy the decree. Upon receipt of the said letter, the executing court made an order for issuance of a clearance letter to the said Judgment Debtor's Director. That was on 06/10/2020. The said order was followed by another order by the executing court recording satisfaction of the decree holder's decree. The latter order is dated: 16/10/2020. At this stage, the case file relating to these execution proceedings was expected to be consigned to the archivist for record purposes, in as far as execution in respect of the principal decretal sum and interest is concerned. That was not the case. Whereas satisfaction of decree was recorded on 16/10/2020, the present application for execution seeks to revive proceedings which essentially ended when satisfaction of the decree was recorded. In my considered view, the executing court after recording that the decree is satisfied, it becomes functus officio and it ceases to be the executing court unless for 5 exceptional reasons, the order marking satisfaction of the decree is vacated. Circumstances which may attract vacation of orders marking full satisfaction of decree may include cases in which decree holders who are not negligent on their part, discover later on that, part of the decree stood unsatisfied when the court marked satisfaction of the decree or, judgment debtors who without undue delays, may move the court to determine questions relating to excess of payments made in the course of satisfying the decree. Therefore, while an order of the court marking satisfaction of the decree still subsists, I am unable to entertain execution proceedings relating to the principal decretal sum and the interest thereon that was marked satisfied on

16/10/2020. I however hold that, the judgment debtor is bound to satisfy the remaining part of the decree relating to costs after taxation to the extent of TZS. 43,319,000. Upon carefully reading paragraph 21 of the counter affidavit, I see no evidence of bad faith on part of the Judgment Debtor or its Directors which may attract arrest and detention of the Directors for failure to pay TZS. 43,319,000 which I have determined to be payable in the 6 circumstances of the case. See: THE GRAND ALLIANCE LTD VS. MR. WILFRED LUCAS TARIMO & 4 OTHERS, CIVIL APPLICATION NO. 187/16 OF 2019, CAT AT DAR ES SALAAM. Unless the said evidence is provided by the decree holder, he will have to seek an alternative mode of executing the remaining part of his decree. It is so ordered. Dated at DAR ES SALAAM this 23rd day of SEPTEMBER, 2022. JUDGE 23/09/2022 Court: Ruling is delivered in the presence of the decree holder, Mr. Deogratus Ogunde learned advocate for the decree holder and Mr. Didace Respicius learned advocate for the judgment debtor. JUDGE 23/09/2022 7

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