

TANZANIA / JUDGMENT

joseph nestory isaka vs franconia investment ltd 2021 tzhclandd 607 15 september 2021

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15 September 2021

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THE HIGH COURT OF TANZANIA (DISTRICT REGISTRY) AT DAR ES SALAAM EXECUTION NO. 4
OF 2020 (From Execution Land Case No.118 of 2015) JOSEPH NESTORY ISAKA.....
DECREE HOLDER / APPLICANT VERSUS FLANCONIA INVESTMENT LTD..... JUDGMENT
DEBTOR / RESPONDENT

RULING

Date of Last Order: 07.09.2021 Date of Ruling: 15.09.2021 A.Z.MGEYEKWA ,J This is an Application for Execution of a Decree brought under Order XXI Rule 10 (2) of the Civil Procedure Code Act, Cap. 33 [R.E 2019], The applicant applies for execution of the award dated 19th May, 2017 against Franconia Investment Limited. The applicant prays for this court to issue an order of arrest of one Hurbert Krischke, the Managing Director of Franconia Investment Limited. 1 The application was argued before me on 01st September, 2021 whereby the Decree Holder enjoyed the legal service of Ms. Kambibi Kamugisha and the Judgment Debtor appeared in person unrepresented. The Judgment Debtor acknowledged the debt and he was given two weeks to settle the debts and ordered to surrender his passport on 02nd September, 2021. When the matter called for hearing on 02nd September, 2021. The Decree Holder and his learned counsel appeared in court, however, the respondent/ Judgment Debtor did not show appearance. This court issued a last adjournment and the Judgment Debtor was once again summoned to appear in court on 07th September, 2021. On the hearing date, the Judgment Debtor did not show appearance. Ms. Kamugisha informed the court that they have traced the Judgment Debtor to no avail. Later they were informed that the Judgment Debtor was outside Dar es Salaam. Ms. Kamugisha valiantly argued that the Judgment Debtor was aware of the mention date but he has opted not to appear in court. She went on to argue that the Judgment Debtor has been lying all the time and now he is nowhere to be found. She strongly contended that the Judgment Debtor is disobeying the court order. She ended up praying for necessary orders. 2 Having heard the submission of the learned counsel for the Decree Holder and after going through the court records I have noted that there was Land Case No.118 of 2015 before this court and this court decided in favour of the Decree Holder. The Decree Holder was awarded a total amount with interest in a tune of Tshs. 70,000,000/

=. The award was issued on 19th May, 2017. I am certain that the Judgment Debtor is aware about the matter pending before this court therefore he has opted not to obey the order of this court. I understand that arrest and detention in prison is one of the modes of execution of a decree prescribed by the law specifically under section 42 (c) of the Civil Procedure Code Cap.33 [R.E 2019] and Order XXI Rule 28 of the Civil Procedure Code Cap.33 [R.E 2019]. Section 42

- (c) of the Civil Procedure Code Cap.33 [R.E 2019] provides that- “42. Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree holder, order execution of the decree-
- (c) by arrest and detention in prison. Order XXI Rule 28 of the Civil Procedure Code Cap.33 [R.E 2019] provides that:- " 28. Every decree for the payment of money, including a decree for the payment of money as the alternative to some other relief, 3 maybe executed by the detention as a civil prisoner of the judgment debtor or by the attachment and sale of his property, or by both.” Applying the above provision of the law and in accordance to the application for execution at hand and the submission made by the learned counsel for the applicant, 1 should state from the outset that the issue for determination is whether this court is moved to entertain the instant application. Reading the records, I have realized that the application is not accompanied by an affidavit that legitimizes the applicant's claims. Additionally, I have noted that the applicant has not exhausted other remedies of executing the award of this court. The applicant was required to state all facts in the affidavit. Before ordering the detention of the Judgment Debtor as a civil prison, the applicant was required to identify the properties of the Judgment Debtor or bank account to execute the award of this court. Section 42 (a) and (b) of the Civil Procedure Code Cap.33 [R.E 2019] provides that:- “42. Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree holder, order execution of the decree-
- a) by delivery of any property specifically decreed; (b) by attachment and sale or by sale without attachment of any property. ” 4 Guided by the above provision of law, it is clear that this court is not moved to determine the matter. If the normal procedure for execution has failed then the applicant can opt the last resort of executing the decree of this court by filing an application to detain the Judgment Debtor in civil prison. In the upshot, I find that the application before me is prematurely filed. Therefore, I proceed to strike out the application. No order as to the costs. Order accordingly. Dated at Dar es Salaam this date 15th September, 2021. JUDGE 15.09.2021 Ruling delivered on 15th September, 2021 in the presence of Ms. Kamugisha, learned counsel for the applicant, the applicant was also present in the absence of the respondent. A.Z.MG JUDGE 15.09.2021 5

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