

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM MISC. CIVIL APPLICATION NO. 446 OF 2023 (Arising from Land Case No. 166 OF 2005) MRS. GEORGIA CELESTINE MTIKILA..... APPLICANT/DECREE HOLDER VERSUS PG ASSOCIATE LTD.....RESPONDENT/ JUDGEMENT DEBTOR PRADEEP KUMAR LALJI GAJJAR..... RESPONDENT/ JUDGEMENT DEBTOR

RULING

5th December, 2023 & 2nd March, 2024 L. HEMED, J. The instantaneous application is rooted from Land Case No. 166 of

2005. In the said suit, GEORGIA CELESTINE MTIKILA, the Applicant herein, emerged the victor against P.G. ASSOCIATES LTD and FEDERAL BANK OF THE MIDDLE EAST LTD. This Court delivered its Judgment on 16th July 2015, ordering FEDERAL BANK OF THE MIDDLE EAST LTD to return to the Applicant herein her Certificate of Title No.29249 and for payment of general damages of USD 25,000. The 1st Respondent herein PG ASSOCIATE LTD was also ordered to pay the Applicant the general damages of USD 25,000. The Court further ordered both judgment debtors to pay interest of 12% per annum from the date of the judgment to the final satisfaction of the decree. On 4th May 2017, the Applicant commenced Execution No.32 of 2017 against the 1st Respondent herein for payment of the decretal sum but could not be fruitful. The Applicant who is the decree holder instituted Misc. Civil Application No. 154 of 2020 for removal of corporate veil of the 1st Respondent with the view to be able to execute the Decree passed in Land Case No. 166 of 2005. On 12th April 2021, this Court, by the ruling delivered by Hon. Mgetta, J lifted the corporate veil of the 1st Respondent to the managing Director, Mr. Pradeep Kumar Lalji Gajjar, the 2nd Respondent herein. The 2nd Respondent was ordered to pay USD 12,500 but has not paid to date hence the instant application made under Sections 44 (1-3), 46 (1) (a) (b), 95 and Order XXI Rule 28, 35 (1) and (2), 36 and 37 of the Civil Procedure Code, [Cap. 33 RE 2019]. The Applicant herein, seeks for the following orders:- "(i) That, Mr Pradeep Kumar Lalji Gajjar, the managing Director/Shareholder of the Judgment -I Debtor/Respondent be arrested and detained as civil prisoner in execution of a decree of this court dated 16/07/2015 and in noncompliance to this with mk; >. this Court's order 12/04/2021 in Misc. Civil Application No. 154/2020. (ii) Costs of this application be provided for." The

Application is supported by the affidavit of the Applicant. The respondents through the counter affidavit of PRADEEP KUMAR LALJI GAJJAR have opposed it. The matter was argued by way of written submissions. Mr. Elisaria J Mosha learned advocate duly represented the Applicant, while the respondents enjoyed the legal service of Mr. Florence Aloyce Tesha, learned advocate. It was submitted by Mr Mosha that the instant application has met the conditions stipulated under Order XXI Rule 39 (2) of the Civil Procedure Code for arrest and detention of the 2nd Respondent. He cemented his argument by citing the decision of the Court of Appeal of Tanzania in *Grand Alliance Limited vs Mr Wilfred Lucas Tarimo and 4 others*, Civil Application No. 187/ 16 of 2019, where it was insisted that the conditions stated under Order XXI rule 39 (2) of the Code must be met before imprisoning a person. The learned counsel was of the view that, the 2nd Respondent acted in bad faith as he failed to prove the alleged sickness that led to his failure to perform directorship duties. Mr Mosha also pointed out that the 2nd Respondent failed to prove the alleged bankruptcy that led to his failure to honour his promise to pay USD 12,500. He glued his argument with the decision of this Court in *Esther Crescence Mashoko vs Norber Furaha Lyimo*, Misc Land Case Application No 90 of 2016. In reply, Mr. Tesha asserted that the Applicant was declared bankrupt vide Miscellaneous Civil Application No. 238 of 2023 whose ruling was delivered by Hon Judge Mwanga, J on 19th September 2023 that he cannot be arrested and detained as civil prisoner. In his view, this Court cannot go against its order that declared the 2nd Respondent bankrupt. Mr. Tesha submitted that the conditions under Order XXI rule 39

- (2) of the Civil Procedure Code {supra} where lacking as the 2nd Respondent does not have bad faith in relation to the execution of decree. According to the learned counsel, the 2nd respondent failed to pay the decretal amount due to sickness. He fortified his argument by the case of *Grand Alliance limited vs Mr Wilfred Lucas Tarimo and 4 others* (supra) where the court held that the executing court must be satisfied with the condition set out under XXI rule 39 (2) of the Code before making any order to arrest and detain a person. He also contended that a mere default in payment is not enough s n x ' Ct Z' r- to order for arrest and detention of a person unless proved that the failure to pay is due to bad faith. Mr. Tesha insisted that the 2nd Respondent is sick that he cannot be arrested and detained. He ended praying the application to be dismissed. Having gone through the rival affidavits and submissions, it is now apt to determine whether the application is meritorious and worth to be granted. As aforesaid, in the instant application, the Applicant seeks to execute her decree by arrest and detention. Order XXI Rule 35(1) of the Civil Procedure Code, [Cap.33 R.E 2019] requires the Court prior to issuance of warrant of arrest to issue a notice calling upon the judgment debtor to appear before the court on a day specified in the notice to show cause why he should not be committed to prison. Order XXI Rule 35(1) of the Code provides thus:- "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." (Emphasis added) In the instant matter, the 2nd Respondent who is the Managing Director of the 1st Respondent was issued with the notice to appear to show cause as to why he should not be committed to prison. He obeyed and appeared through his advocate Mr. Tesha and tried to show cause by way of written submissions as summarised herein above. The 2nd Respondent advanced two (2) reasons as to why he should not be committed to prison. The said reasons are (i) serious sickness on the part of the 2nd Respondent; and (ii) being declared bankrupt by this court. The question is whether the two reasons advanced by the 2nd Respondent sufficient to disallow the application for detention. Order XXI Rule 39(1) provides thus:- (rz >., "Where a judgment debtor appears before the court in obedience to a notice issued under rule 35, or is brought before the court after being arrested in execution of a decree for the payment of money and it appears to the court that the judgment debtor is unable from poverty or other 6 sufficient cause to pay the amount of the decree or, if that amount is a payable by installment, the amount of any installment thereof, the court may, upon such terms (if any) as it thinks fit, make an order disallowing the application for his arrest and detention, or directing his release, as the case may be. (Emphasis added) From the above provision the Court is permitted to disallow the application for detention of the judgment debtor under the following circumstance; One, if he proves to be unable to pay the debt due to poverty; Two, other sufficient cause to pay the amount of the decree; and Three, if that amount is a payable by installment. Nevertheless, the Court of Appeal of Tanzania in Grand Alliance Limited vs. Mr. Wilfred Lucas Tarimo & Others (supra) insisted that before making an order to disallow the application for detention, the executing court should consider the conditions provided under Order XXI Rule 39(2) of the Code. It 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;

- (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.[Emphasize is addj I have considered the conditions stated in the provision herein above. In Grand Alliance Limited Case (supra) the Court of Appeal of Tanzania insisted that there must be evidence of bad faith to pay the debt beyond mere indifference to pay. However, in the circumstance of this matter, the 2nd Respondent has never refused to pay the amount of the decree with bad intention or concealed to hide the property to avoid 8 to pay the debt. Evidence on record proves that the judgment debtor was sick and the medical report dated 11th May 2023 supported the ' - - - averment of sickness. The assertion is found in paragraph 18 of the counter Affidavit of 2nd Respondent where it has been stated thus:-
- ”18. That further to the contents of paragraphs 16 and 17 above the 2nd Respondent stated that being an old and attending medical treatment is the inability to work lost vision for 100% / o one eye, inability to walk properly, I have no means of affecting any payment to the applicant herein. Moreover, when I appeared previously in court after being summoned under my persona! capacity I • ■■■■■■' informed the court my financial insolvency proceeding before the High Court of the United Republic of Tanzania at Dar es salaam District Registry in Miscellaneous Civil Application NO. 238 of 2023 Before Honourable Mwanga Judge. Copies of the medical ..< records are hereby annexed marked "B" forming part of this Counter Affidavit." [Emphasize is added] I have also noted that this Court, vide its order made on 19th September, 2023, Hon. Mwanga,J, in Misc. Civil Application No.238 of 2023, declared the 2nd Respondent bankrupt. The effect of such order is that the 2nd Respondent is considered destitute who cannot be able to pay the decretal amount. In the final analysis, I find that this court cannot commit to prison a person declared bankrupt and who is serious sick. In view of Order XXI Rule 39(1) of the Civil Procedure Code [Cap.33 R.E 2019. The application for detention of the 2nd Respondent as civil prisoner is thus JUDGE io

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