

TANZANIA / JUDGMENT

CIVIL APPLICATION NO 15 01 OF 2023 ROSEMARY M HAMILTON VS DR GEORGE OREKU ANOTHER

COURT
TANZLIIDECIDED
1 January 2023

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE COURT OF APPEAL OF TANZANIA AT PAR ES SALAAM CORAM: MWARIJA, J.A. RUMANYIKA J.A And MLACHA. J.A CIVIL APPLICATION NO. 15/01 OF 2023 ROSEMARY M. HAMILTON APPLICANT VERSUS DR GEORGE OREKU .1st RESPONDENT JANETH ISAACK..... 2nd RESPONDENT (Application for Revision of the Ruling of the High Court of Tanzania, at Dar es Salaam) (Mruma, J.) dated the 14th day of November, 2022) in Execution No. 37 of 2021 RULING OF THE COURT 15th & 31st July, 2024 RUMANYIKA. 3.A.: This is an application for revision of the ruling of the High Court of Tanzania at Dar es Salaam (Mruma, J.) in Execution No. 37 of 2021. It has been predicated on rule 65(1), (2), (3), (4), (5) and (7) of the Tanzania Court of Appeal Rules, 2009 ("the Rules") and section 4(3) of the Appellate Jurisdiction Act, Cap. 141 RE 2002 ("the AJA"). The application has been supported by an affidavit sworn by Rosemary M. Hamilton, the applicant herein. The respondents contested the application by filing a joint affidavit in reply. i Briefly, the matter is rooted in Civil Case No. 242 of 2012 which was successfully instituted by the respondents herein who are a husband and wife. They claimed for recovery of loan money which they had given to the applicant's Construction Company, Mufindi Unit Care. In its decision, the High Court ordered the applicant to pay the respondents TZS 330,000,000.00 being the principal sum, TZS 20,000,000.00 as general damages and interest at the rate of 7% per annum from the date of judgment to the date of full payment. However, the applicant did not heed to the decision. Consequently, the respondents successfully filed Execution No. 37 of 2021 in the High Court executing the said decree and it ordered the applicant's arrest and detention as a civil prisoner. Aggrieved by the decision above, the applicant is before us seeking to revise it, on three grounds which are paraphrased as follows: One, that, the High Court improperly construed the provisions of Order XXI Rule 39(1)

- (2) of the Civil Procedure Code, Cap. 33, R.E 2019 ("the CPC"), two, that, the High Court Judge quoting the appellant to say that she is poor and therefore unable to pay is inconsistent with the record, therefore liable to be impeached for not reflecting what actually had transpired in court for and three, that the order for arrest and detention did not consider her affidavit. 2 At the hearing of the application, Dr. Noel Nkombe learned counsel appeared for the applicant whereas the respondents had the services of Ms. Lucy Nambuo, learned Counsel.

Dr. Nkombe began by adopting the affidavit in support of the application. On the 1st ground of the application, he faulted the learned Judge on contention of the alleged improper construction of Order XXI Rule 39(1) (2) of the Civil Procedure Code Cap 33 of the Law. According to the learned counsel, the applicant had not pleaded poverty as the ground for her failure to pay the decreed sum, as misquoted. Therefore, he argued, the order of arrest and detention of the applicant as a civil prisoner was made improperly and prematurely. As regards the 2nd and 3rd grounds which he argued conjointly, he contended that, the findings and order made by the learned Judge is inconsistent with the record of application since, nowhere in the proceedings had the applicant pleaded poverty as the reason for failure to pay the decreed sum. He added that, the High Court Judge did not consider the applicant's averments at paragraphs 5-11 of the affidavit in support of the application. So, the applicant was denied the right of a fair hearing which occasioned injustice on her part. To bolster his stance, he cited our decision in *David Mushi v. Abdallah Msham Kitwang a*, Civil Appeal No. 286 of 2016. He also cited the Court's decision in *The Grand 3 Alliance Ltd v. Mr. Wilfred Lucas Tarimo and 4 Others*, Civil Application No. 187/16 of 2019. In reply, Ms. Nambuo commenced her submission by adopting the respondents' joint affidavit in reply. She contended that, the impugned order was legally justified because the applicant had not said any promising word for the payment. And that the issue of denial of a right to be heard should not have been raised because the applicant's alleged inability to pay meant poverty. Upon hearing the learned counsel's contentions, the issue is whether the High Court Judge erred in allowing the arrest and detention of the applicant as a civil prisoner to warrant the Court exercise its revision powers. Ground one concerns the failure of the High Court Judge to properly construe the provisions of Order XXI Rule 39(1) and (2) of the CPC, which read as follows:

- (1) 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 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) We note from the provision reproduced above that, put simply, the moment the Judgment Debtor had expressed his inability to pay, be it in full or by installments, as it happened, the executing court would remain with one option, which is to order his arrest and detention as a civil prisoner. It is apparent in this application that the applicant had admitted to be unable to pay completely. From the observation above therefore, the follow up question is whether the applicant failed to pay the decreed sum for the reason of being poor as found and held by the learned Judge. We note from the record of the application at page 11 of the supporting affidavit presented before the High Court, that the applicant had no financial means to satisfy the decreed sum. For clarity, it is averred as follows: "... my failure to settle the decreed amount has not been caused by my own negligence or disrespect of court's order

but due to lack of 5 financial sources and predominant bad health condition to my husband whom I have been taking care of since 2010 to date... all the vigor to settle the debt..hasproved fu t ile ...(Emphasis added) Moreover, at page 9 of the High Court proceedings dated 12/11/2022, while explaining why she should not be detained as a civil prisoner, the applicant stated that: 7 am unable to pay the decretal sum because all the time I have been nursing my sick husband. His leg has been amputated...Iam [his] all care taker..." However, the copies appended to the application are merely the medical chits which only showed that the applicant's husband is sick. None of them added value. In other words, the applicant who owned and ran Mufindi Unit Care, a Construction Company, did not seriously show that she had no bad faith or just refused to pay the decreed sum, just as she may not have necessarily meant that she is poor. Therefore, in the absence of evidence that she had paid the decreed sum or undertaking to pay in the nearest future, the High Court Judge cannot be faulted to hold that the applicant was poor and unable to pay it. The more so is the submission of Mr. Msangi, her advocate, at page 9 of the proceedings of the executing court that, she had no property to be attached and sold to satisfy the decree. To allow her arrest and detention as a civil prisoner therefore, was inevitable in the circumstances. We wish to stress that, the object of arrest and detention is not to punish the judgment debtor but rather to assure the decree-holder that his decree is in fact fruitful. The 1st ground is thus, unfounded and dismissed. The applicant's second point of grievance that, she was misquoted as admitting to be poor and unable to pay will not detain us, since our deliberation on the 1st ground is sufficient to dispose the issue. What is discerned from page 9 of the proceedings shows clearly that, the learned Judge rightly construed the applicant's contention that she was poor, even though the learned Judge's observations found at page 2 of the impugned ruling were mistaken for being the applicant's words. What he meant was that, no judgment debtor would be excused, for instance, for saying that he is poor and therefore, unable to pay the decreed sum. Nonetheless, even when the allegedly quoted words are removed from the record, still the applicant's response would mean that her alleged inability to satisfy the decree was not justified in the circumstances. Therefore, the next step would be to order arrest and detention of her as a civil prisoner as the learned Judge rightly did. Therefore, the issue of the impugned order being inconsistent with the evidence on record should not have been raised. The second ground is equally dismissed. 7 On the 3rd ground that, the High Court Judge did not consider the applicant's affidavit which constituted denial of a right to be heard, we agree with Dr. Nkombe's contention. However, the look of the reason given for the applicant's failure to pay, as observed earlier on, not only that it had nothing to do with the respondents, but also it seemed to be more of a refusal than an inability to satisfy the decree. Therefore, an order for the arrest and detention of the applicant as a civil prisoner was a proper recourse. We remark that, in order for an application of this nature to succeed, generally, the bottom line is that every decree holder shall enjoy the fruits of his decree at the earliest possible opportunity unconditionally. Notably, the essence of an order to show cause at hand cannot be overstated. Since, it is intended, from the general perspective of the things that, the judgment debtor shall prove upright that he had already paid or he is ready to pay the decreed sum, as the case may be. It

is very unfortunate in this application that the applicant had taken none of the two options. Nor was it for the applicant simply to state the reasons for her inability to pay the decreed sum, as she did. If the courts would have solely relied on the Judgment Debtor's plain words of being unable to pay to disallow the application and set him free, then, the majority of the decree holders would end up with empty decrees, which is not the intention in any civil litigation. We wish to remark that, the duty of the judgment Debtors to pay or not to pay cannot be optional at their instance. Rather, it is the courts' domain in terms of Order XXI Rule 39(1) of the CPC. The third ground also crumbles. In the upshot, the application is devoid of merits. It is dismissed with costs. DATED at DAR ES SALAAM this 30th July, 2024. A. G. MWARIJA JUSTICE OF APPEAL S. M. RUMANYIKA JUSTICE OF APPEAL L. M. MLACHA JUSTICE OF APPEAL The Ruling delivered this 31st day of July, 2024 in the presence of Dr. Noel Nkombe assisted by Ms. Scholastica Mateso, both learned counsel for the Applicant and Mr. Johnson Msangi, learned counsel for the Respondents; is hereby certified as a true copy of the original. 9

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE	https://media.tanzlii.org/media/judgment/314534/source_file/def5d929f7d69fe8/CIVIL_APPLICATION_NO_15_01_OF_2023_ROSEMARY_M_HAMILTON_VS_DR_GEORGE_OREKU__ANOTHER.pdf
CASE PAGE	https://chat.esheria.ai/case-law/tanzania/rosemary-m-hamilton-ExecutionofDecrees-tanzlii-2023--6a3ea52c3b1caa91298257fe

Prepared on 13 October 2026 · Esheria