

TANZANIA / JUDGMENT

SHABAN IDDI JUDGMENT

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IN THE HIGH COURT (MWANZA SUB-REGISTRY) AT MWANZA CIVIL REVISION NO.14511 OF
2024 (Arising from the Execution Cause No. 7 of 2023 in the Nyamagana District Court at
Nyamagana) SHABAN IDDI.....APPLICANT VERSUS
CHRISTIANA SIMON MASANJA.....RESPONDENT

RULING

11th & 18th November, 2024 KAMANA, J. Shaban Iddi, the applicant, seeks revision of the decision of the Nyamagana District Court in Execution Cause No. 7 of 2023 which was preferred by Christiana Simon Masanja, the respondent. According to the said decision, the applicant was ordered to pay the respondent TZS 18,395,000/- within thirty days from when the order was served to him. It was also decided that, in case of default, the applicant would be detained as a civil prisoner for six months. Briefly, the parties were business partners whereby in the course of their business the applicant found himself owing the respondent TZS 19,814,600/-. The claims led to the institution of a civil case which was registered in the Mkuyuni Primary Court as Civil Case No. 454 of 2019. 1 The applicant admitted the claims and was ordered to pay the respondent such sum. Due to financial constraints, the applicant was unable to pay the said sum as ordered. Aggrieved, the respondent initiated the execution process whereby the applicant's motor vehicle and farm were attached and ultimately auctioned. The applicant was not satisfied with the attachment and selling of his property, so he filed Miscellaneous Application Case No. 82 of 2020 in the Nyamagana District Court challenging the legality of the process. On 16 July 2021, after hearing the parties, including Kassanga H. Kassanga, the auctioneer, the district court found no merit in the application and dismissed it with costs. The appellant did not challenge the decision. Since the sale did not satisfy the decretal sum, the respondent filed Execution Cause No. 7 of 2023 in the Nyamagana District Court where she asked the court to order the respondent to settle the remaining balance of TZS 18,395,000/- failure of which the applicant should be committed to prison as a civil prisoner. The district court granted the prayed orders which aggrieved the applicant, hence this application which is supported by his affidavit. Submitting in support of the application, Ms. Zena Hassan, learned Counsel for the applicant, contended that the order issued in Execution 2 Cause No. 7 of 2023 was not correct as the sale of the applicant's properties did not adhere to the required procedures. She amplified that the respondent failed to discharge her duty to notify the applicant about the sale of his properties and what was accrued from that sale. She added that the lower court erred in issuing the order as the applicant was unaware that the sale of

his properties did not satisfy the decretal sum. The learned Counsel summed her arguments by asking this court to correct the anomaly. She strengthened her arguments by relying on the case of *Adelina Koku and Another v. Byarugaba Alex*, Civil Appeal No. 46 of 2019-CAT (Unreported). Responding, Mr. Joseph Kinango, learned Counsel for the respondent contended that it is not true that the procedures for selling the properties were not followed. Amplifying, Mr. Kinango contended that the applicant complained about the sale through Miscellaneous Application No. 82 of 2020 in the Nyamagana District Court whereby the court concluded that the properties were sold according to the law. He held the view that the only recourse which the applicant had was to appeal against such a decision. Concerning the order issued in Execution No. 7 of 2023, Mr. Kinango contended that the applicant was served with a summons and filed his affidavit on 14th April, 2024. He added that the executing court 3 did not make any mistake as there was a decree and there was no appeal or order for a stay of execution and the debt was not fully satisfied. Rejoining, Ms. Hassan contended that the applicant did not appeal against the decision on Miscellaneous Application No. 82 of 2020 as the court had already issued an order for his arrest under Execution No. 7 of 2023 which was instituted by the respondent. Having heard the rival arguments, I asked the learned Counsel to address the court as to who bears the burden of proof that the judgment debtor has failed to pay the debt whilst having the means to do that and whether that burden was discharged in Execution No. 7 of 2023. Mr. Kinango was brief as he stated that the issue that the applicant was able to pay the debt and refused was not addressed in Execution No. 7 of 2023. Ms. Hassan also was brief as she stated that the court only issued the order and there was no proof that the applicant refused to pay while he had the means. I have ardently considered the rival submissions of the parties. First and foremost, I do not agree with Ms. Hassan that this court has the power to correct the alleged anomalies so far as the attachment and sale of the applicant's properties are concerned. This is because this 4 application emanates from Execution No. 7 of 2023 and has nothing to do with the attachment and sale of the applicant's properties which was challenged by him in Miscellaneous Application Case No. 82 of 2020. Though related to what was complained of by the applicant in Miscellaneous Application No. 82 of 2020, this application aims to challenge the orders issued in Execution No. 7 of 2023 which I have already mentioned at the outset. Further, the case of *Adelina Koku and Another* (Supra) had different circumstances from this matter as in the cited case the Court of Appeal dealt with jurisdictional issues while in this case the controversy centered on the procedure for selling the judgment debtor's property. As rightly argued by Mr. Kinango, the applicant had the option of appealing against the decision in Miscellaneous Application No. 82 of 2020. Ms. Hassan's arguments that the applicant failed to appeal against such a decision as there was an order for committing the applicant to prison as a civil prisoner is a lame one. This is because the order to commit the applicant to prison in case he fails to settle the outstanding debt was issued almost three years after the decision made in Miscellaneous Application Case No. 82 of 2020. Further, even if the order in Execution No. 7 of 2023 would have been issued before the decision in Miscellaneous Application Case No. 82 of 2020, still the existence of 5 such an order would not have barred the applicant from filing his appeal against the decision in Miscellaneous Application Case No. 82 of 2020. I painstakingly went

through the records of the lower court in Execution No. 7 of 2023. According to them, the respondent filed an application for the arrest and detention of the applicant as a civil prisoner until the decree in Civil Case No. 454 of 2019 is fully satisfied. In building her case, the respondent stated that she had done a diligent search and found that the applicant had no properties that could be attached to satisfy the outstanding decretal amount. It is on the records that the applicant stated that he had already paid the decretal sum as his motor vehicle valued at TZS 15,000,000/- and farm valued at TZS 40,000,000/- were attached and sold. This assertion was denied by the respondent who stated that the motor vehicle and the farm were sold for TZS 7,900,000/- and she was paid TZS 2,634,000/- which means that TZS 18,395,000/- was still outstanding. From the submissions of the parties, the lower court ordered that unless the applicant pays the stated outstanding debt within 30 days, he would be committed to prison as a civil prisoner for six months. My understanding of the law relating to committing judgment debtors to prison as civil prisoners on matters decided by the primary 6 courts is that an applicant for an order for execution must file an application to the primary court that heard the matter that led to the judgment that is sought to be executed. When the primary court is satisfied that there is no way of executing its order other than committing the judgment debtor to prison, it requests the district court to order the arrest and detention of the judgment debtor. In the exercise of such powers, the district court ought to adhere to the conditions and limitations stated in the Civil Procedure Code, Cap. 33 [RE.2019]. This is well stated in paragraph 4 of the Fourth Schedule to the Magistrates' Courts Act, Cap. 11 [RE.2019] as follows: '4. A primary court may, on the application of the party entitled to the benefit of such order in any civil proceedings, request a district court to take steps for the arrest and detention of any person who has failed to comply with an order for the payment of any amount, including compensation or costs, made by such primary court, and, upon receiving any such request, the district court shall have such jurisdiction and powers to order the arrest and detention of such order as if an application were made for the arrest and detention in the civil Prison 7 of a judgment debtor in accordance with the provisions of the Civil Procedure Code.' That being the position, an application for execution by arrest and detention concerning the judgment of the primary courts is not directly to be filed to the district court. The rationale behind this principle is the fact that the arrest and detention of the judgment debtor is a last resort in ensuring that the court order is fully executed. Given that, the court that has decided the case must be aware of the matters relating to the execution of its orders to the finality. I have perused the records and found nothing suggesting that the Nyamagana District Court ordered the detention of the applicant, in case he fails to settle the outstanding decretal amount, after being requested by Mkuyuni Primary Court. In the absence of such records, the district court acted without jurisdiction as the district courts are not mandated to order the arrest and detention of judgment debtors on matters arising from primary courts unless requested. Assuming that is not a correct position of the law, the purported application that was filed in the Nyamagana District Court, in my view, was supposed to be supported by an affidavit deposed by the respondent. Likewise, the applicant had the right to file a counter affidavit. 8 However, from the records, the lower court ordered the

applicant to file an affidavit and the respondent to file a counter affidavit. Instructively, that is not the procedure. In my view, the decree-holder who wants the court to order the detention of the judgment debtor in prison as a civil prisoner must file an affidavit stating the reasons why he seeks the order. The judgment debtor may file a counter affidavit stating the reasons why he should not be committed to prison. It is worth noting that, it is upon the decree-holder to prove to the satisfaction of the court that the judgment debtor should be committed to prison. For the court to issue an order for the arrest and detention of a judgment debtor as a civil prisoner, the decree-holder bears the burden to prove that the conditions and limitations set under Order XXI Rule 39 (2) of the Code have been met. For ease of reference, I reproduce it as follows: '(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 9 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.' In the circumstances of this matter, it was incumbent on the respondent to prove that despite having the means to pay the debt, the applicant has refused or deliberately shirked to pay the same. I take that position while persuaded by the position taken by the Rajasthan High Court in the case of Mukh Ram and Anr. v. Hardeep Singh, AIR1987RAJ1, 1986 (1) WLN37 where it was stated: 10 'It may be useful to point out that the law casts a duty on the executing Court to be very careful and circumspect in directing detention of judgment-debtors in civil prison.....before directing the detention of the judgment- debtor to be detained in civil prison, the Court must be satisfied that the judgment-debtors have means to pay the amount of the decree or some substantial part thereof and refused or neglected to pay the same.' Deducing from the records, there is no evidence that the applicant had the means to pay the debt and wilfully refused to pay. Given that, the lower court was not justified in issuing the order to commit the applicant to prison. I therefore accept the revision and set aside the lower court's decision in Execution No. 7 of 2023 with costs. For the avoidance of doubt, this ruling does not reverse the execution done and

challenged in Miscellaneous Application No. 82 of 2020. In other words, this ruling does not discharge the applicant from liability to pay his outstanding debt unless otherwise discharged by the competent court. Order accordingly. Right To Appeal Explained. DATED at MWANZA this 18th November, 2024. 11 KS KAMANA JUDGE 12

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