

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
COMMERCIAL CASE NO. 80 OF 2006

EURAFRICAN BANK (TANZANIA) LTD PLAINTIFF

VERSUS

TINA AND COMPANY LIMITED 1ST DEFENDANT

WOLFGANG A. SPENGLER 2ND DEFENDANT

MRS. CHRISTINE S. SPENGLER 3RD DEFENDANT

RULING:

MRUMA, J.

This is a ruling on an application for execution of a decree by arrest and sending to prison as Civil Prisoners Mr. Wolfgang A. Spengler and Mrs. Christine S. Spengler (2nd and 3rd Judgment Debtors)

Arrest and detention in Civil Prison of the Judgment debtor is one of the modes of execution of decree.

Rule 28 of Order XXI of the Civil Procedure Code (Cap 33 RE 2002) provides as follows:-

"Every decree for the payment of money including a decree for the payment of money as the alternative to some other relief, may be executed by the detention as a

*Civil Prisoner of the judgment debtor or by attachment
and sale of his property or by both"*

Under Rule 35 (1) of the same Order, where an application is made for arrest and detention of the judgment debtor, the Court may instead of issuing a warrant for arrest, issue a notice calling upon the judgment debtor to appear and show cause why he should not be committed to Civil Prison in execution of the decree. The underlying object of issuing notice is to afford protection to honest debtors incapable of paying dues for reasons beyond their control.

In the present application, the decree holders have applied for execution of a decree of Tshs 86,030,507.26 and USD 13,451.00. The said decree was passed by this court (Werema, J) on 24th April, 2009. The mode in which the assistance of the court has been required is an order for arrest and detention of the two judgment debtors.

The 3rd Judgment debtor Mrs. Christine S. Spengler was afforded an opportunity to show cause. In her affidavit and viva voce statement to the court, she denied to have transferred her properties liable for attachment. She said that she sold her properties to one Ridhiwani Mringo after he showed interest in the properties.

I have considered the application, the records, in Commercial Case No. 80 of 2006 from which the decree in question originates and cases of the parties as adumbrated in the affidavits and the submissions. What comes out clearly from the foregoing and the law applicable is that a person who fails to satisfy a monetary decree

may, if the conditions stipulated in Section 44 of the Civil Procedure Code (Cap 33 RE 2002) are satisfied be committed to jail.

Committal to jail in such circumstances in my view is exceptional in the sense that a person's liberty is curtailed not at the instance of a private individual, the person detained is placed in the custody of the state. Right to freedom and to live as a free person is enshrined in Article 15 (1) of the constitution and that right is not one of the non-derogable rights. Under Article 15(2) (a) and (b) of the constitution that right can be limited on the following grounds:-

- (a) under circumstances and in accordance with the procedures prescribed by law or;*
- (b) in the execution of a judgment, order or a sentence given or passed by the court following a decision in a legal proceeding or a conviction for criminal offence.*

Thus, as long as Section 44(1) and Rule 28 of Order XXI of the Civil Procedure Code remains in the statute book, it is not unconstitutional for a judgment debtor to be committed to a civil prison upon his failure to pay his debts. The Civil Procedure Code provides a legal regime for arrest and committal as a means of enforcement of a decree.

Since the provisions for arrest and detention co-exist with the provisions for attachment and sale of the judgment debtors property and neither of them, the law as it is today gives the Decree Holder an option to choose any of the two.

What comes out from the foregoing is that committal to civil prison is not objectionable subject to the due process being adhered to.

Now applying the law to the facts in the present case, Mrs. Christine S. Spengler has said that they are unable to pay the decree because of illness of the second judgment debtor Mr. Wolfgang A. Spengler. She also raised the issue of poverty. She said that the 1st Judgment debtor is no longer transacting its business through it has not been wound up. She said that they are in financial doldrum and they cannot even pay their school fees.

While poverty is a good ground for disallowing an application for arrest and detention in Civil Prison (see Rule 39 (1) of Order XXI of the CPC), it has to be proved. In terms of Section 44(2) of the Civil Procedure Code, a person is deemed to be poor if he has been declared insolvent or bankrupt pursuant to the laws relating to insolvency and bankruptcy.

In the present case that has not been proved. Accordingly I find that the 3rd Judgment Debtor Ms. Christine S. Spengler has failed to show cause as to why she should not be committed to prison as civil prison.

Pursuant to the provisions of Section 46 (1) (a) of the Civil Procedure Code, I order that unless the decretal amount is paid within three (3) months from the date of this order, 3rd Judgment Debtor Ms. Christine S. Spengler shall be detained in Civil Prison for the period of six (6) months in execution of a decree in Commercial Case No. 80 of 2006.

The Decree Holder shall Tshs. 300,000/= (say Three Hundred Thousand) only being subsistence allowance per each month the judgment debtor will be in prison.

Order accordingly




A. R. Mruma,

Judge

18th July, 2018