

ARREST AND DETENTION IN EXECUTION OF A DECREE IN TANZANIA: SALIENT ISSUES, LAW AND PRACTICE

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ABSTRACT

Arrest and detention as a civil prisoner remain one of the modes through which a judgement of the court may be executed in Tanzania. However, the practices pertaining in different courts and the same registry are inconsistent and uncommon. Detention of a person in prison, takes away that person's liberty which is recognised by the constitution of the United Republic of Tanzania. The insistency in the application of the law present undesirable practice in the administration of justice and poses a danger of abuse in the application. Given its sensitivity the rules of procedure applicable in the process should be strictly complied, the consequences that are associated, a proper and guided application of the law is indispensable.

Learning from experiences in similar jurisdictions, the law in Tanzania seems to be wanting in some crucial aspects. The paper notes use of discretionary powers in the process which are subtle to abuse. Using comparative methods from other jurisdictions, the work recommends that for a proper functioning and transparent civil justice which is in consonant with the rule of law, reforms in both the law and practice related to the arrest and detention in the execution of a decree are indispensable.

Keywords: Civil Procedure and Practice/Execution of a Decree/Arrest and Detention/Civil Prisoner

INTRODUCTION

Conventionally, imprisonment is associated with criminality behaviours. When a person is locked behind bars it connotes being found guilty and convicted of a criminal offense. That is the correct application of the concept in the administration of criminal justice. However, when applied in the administration of civil justice, it presents a different meaning all together. Arrest and detention as a civil prisoner are one of the modes through which a judgement of the court may be enforced in Tanzania.

There are pertinent legal and practical issues related to the execution of a decree by arrest and detention of the Judgement Debtor as a civil prisoner which are adequately discussed in this work. Understandably, arrest and detention takes away one's freedom which is enshrined in the Constitution.ⁱ The court has held that since such freedom is jealously guarded by the Constitution of the United Republic of Tanzania it should not be taken lightly.ⁱⁱ Unlike any other mode of execution, arrest and detention of the Judgement Debtor as a civil prisoner takes away the judgement debtor's freedom, which is exceptional. Although arrest and detention as a civil prisoner is recognised as a mode through which a judgement may be enforced, in this paper, I argue that it should be triggered as a last resort, if all other modes of execution fail. Other modes such as delivery of the property specifically decreed,ⁱⁱⁱ attachment and sale or by sale without attachment of any property,^{iv} by the appointment of a receiver,^v should be tried first.

I further argue that, mere failure to pay the decretal sum is not a justification of imprisonment in the execution of a decree. The law in Tanzania does not recognise poverty as a crime and an insolvent person cannot be punished as such. It is suggested that in order this mode of execution to be put in motion, there must be deliberate actions by the Judgement Debtor to frustrate the execution of a decree. Further, I argue that a director or a shareholder of a company, cannot be arrested and imprisoned as a civil prisoner in execution of a decree against a company, unless it is established that there are specific violations committed and of course, upon the court lifting the corporate veil. Enjoyment of civil liberty being a constitutional right should be deprived only in appropriate circumstances and upon strict adherence to the applicable law.

In order to bridge the gap, bring consistency, and inform the profession on the rules of procedures, a simplified way of handling the application is presented. The paper presents important procedures and principles involved in the enforcement of a judgement in Tanzania by way of arrest and detention of the judgement debtor as a civil prisoner. We argue that both the bench and bar in Tanzania and all over the world will benefit from this work.

MEANING OF ARREST AND DETENTION AS A CIVIL PRISONER

Prison detention is the process where a person is imprisoned in state prison usually applicable in criminal justice as a mode of punishment for a crime alleged to have been committed. A prisoner serves a jail sentence following an order of the court passed in a criminal judgement. Conversely, detention in the execution of a decree has no relation with a punishment passed in a criminal case.^{vi} A judgement debtor is detained as a civil prisoner not as a punishment, for there is no known offense that he has been adjudged to commit, but as a way of enforcing a civil judgement.

Section 44 read together with Order XXI Rule 10(2)(j)(iii) and Rule 35 of the CPC recognise arrest and committal to the prison as one of the modes through which a decree may be enforced. However, when the court is dealing with such an application, it does so in strict observance of the law.^{vii} This means that even the standards and treatment of the matter receive such attention as a criminal matter because it involves possibilities of depriving the Judgement Debtor of his liberty. In *Jane Wangui Gachoka vs Kenya Commercial Bank Limited*,^{viii} the court emphasised the obligation to strictly follow the law. In the case in declining to declare the legislation unconstitutional, it held;

“... however, which has been emphasized in all the cases set out above is that before a person can be committed to civil jail for non-payment of a debt, there must be strict adherence to the procedures laid down...”

SCOPE OF APPLICATION AND LIMITATION OF ARREST

The execution of a decree by arrest and detention of the Judgement Debtor is possible, where the decree subject for execution is for the payment of money. The law provides that a decree for payment of money includes a decree for the payment of money as the alternative to some other reliefs.^{ix} Any other decree, cannot be executed by arrest and detention, but through other modes of execution.

In effecting the arrest, the Judgement Debtor can be arrested between the sunrise and sunset.^x Beyond that time, the arrest should not be effected. In addition, in effecting the arrest, no breaking is authorised, unless the Judgement Debtor is frustrating his arrest.^{xi} The law further provides for respect of the customs and religion of people. If there is a woman in the room, of course, other than the Judgement Debtor, and according to her religion or customs she is not supposed to appear in public, the officer effecting the arrest shall not gain entry, unless that woman has been instructed to withdraw and given a reasonable time to do so.^{xii}

PRESENTING AN APPLICATION FOR ARREST AND DETENTION

The Civil Procedure Code regulates most of the civil matters. Fortunately, the application for execution has been simplified. An application for execution is made by filing in Form No. F/5 that is appended on the Civil Procedure (Approved of Forms) Notice, 2017.^{xiii} The decree holder or his recognised agent of attorney must fill in the said form that indicates, among other things, the amount of the decree and the mode of assistance sought from the court. Like any other application, the same should indicate to be made under Order XXI Rule 10(2)(j) (iii) of the CPC.

However, the Court has held severally that execution is not intended to humiliate, harass or embarrass the Judgement Debtor. Arresting and detaining the Judgement Debtor in the execution of a decree, should be proceeded with care. This is so because, as the Court observed, “it is a most draconian and repressive way of forcing a debtor to meet his civil liabilities.”^{xiv} Because of its inherent consequences, the court has held that this mode of execution should be the last resort.^{xv} The position of the law in Tanzania, it seems, arrest and detention in execution should be employed if all other means have failed.^{xvi} There should be some efforts to show that any modes of execution have proved futile before embarking on arrest and detention.^{xvii} In the

case of *Harel Mallac Tanzania Limited V Junaco (T) Limited*, for example, the Court went further to observe that since arrest and detention in the execution of a decree goes against the constitutional right to liberty, it should be approached with the care it deserve. The court held,

“However, in order for this mode of execution to be effected, depending on each case, the Court has to satisfy itself that other modes available have failed. This is due to the fact that infringement of one's freedom which is jealously guarded by the Constitution of the United Republic of Tanzania should not be taken lightly.”^{xviii}

In Kenya, Courts have gone even far by requiring the Decree Holder to prove that the Judgement Debtor is taking some positive action to frustrate execution. In *Solomon Muriithi Gitandu & Another vs. Jared Maingi Mburu* the court held

“...It is the duty of the decree holder to satisfy the court that the judgment debtor is not suffering from poverty, or any other sufficient cause and is able to pay the decretal sum”^{xix}

Jurisdiction to Entertain the Application

Execution proceedings are not entertained by any Judicial Officer. Given the peculiarity and intricacies involved, in Tanzania, there are certain Judicial Officers who are allowed to preside over execution proceedings. Execution proceedings in the subordinate courts are presided over by a Magistrate in charge of that particular court. The Chief Justice appoints an Officer who has administrative functions in respect of each and every magistrate's Court.^{xx} It is only that officer; the Magistrate in charge who can execute a decree of the court.

In the High court, execution proceedings are usually handled by the Registrar of the High Court. By extension of the Registrar, it includes the Deputy and any person acting in that capacity. However, unlike any other execution proceedings, in the High Court, the Registrar has no powers to order arrest and detention of a judgement debtor in the execution of the decree.^{xxi} Such powers are left to be exercised by the Judge. The Registrar can exercise such powers and issue orders of arrest and detention, if at the place of the registry there is no Judge.^{xxii} The interpretation of the words “if no Judge at the place of registry” cannot be stretched, by any imagination, to include the situation where a Judge is away for temporal

reasons such as leave, official safari or other engagements. It means, where there is no Judge assigned to the Registry.

The rationale of conferring jurisdiction of arrest in the High Court is far from being realistic. Most Registrars are appointed from amongst Resident Magistrate in charges. With the experience, and indeed having graduated from being Resident Magistrates in charge, it defeats logic stripping off them jurisdiction to perform some functions they had been performing, but allowing their juniors to act in such cases. In any case, with the dwindling of the number of serving Judges and the ever increasing number of case,^{xxiii} unless Judges are let to concentrate on the disposition of cases and Registrars assist them, backlogs will be a nightmare to challenge.

Notice to Show Cause

Before the Court issues an order of arrest, it may issue a notice to show cause why the judgement Debtor should not be arrested and detained in the execution of the decree.^{xxiv} Although the words are used are ‘may’ which means discretionary, however it is undesirable to issue an order of arrest without affording the Judgement debtor an opportunity to be heard. The Court stressing on the importance of affording an opportunity to the Judgement Debtor before being committed as a civil prisoner, observed;

“However, in order to protect a person from being deprived of his freedom unnecessarily or unjustly, as a legal requirement under Order XXI Rule 35 (1) of the CPC, prior to the arrest and detention being effected the judgment is given audience to appear before the Court and show cause why arrest and detention should not be carried out. Though the requirement is discretionary since the term used is "may" but the Court have often preferred for the judgment debtor (s) to appear and show cause... ”^{xxv}

Although the law uses ‘may’, which means the Court has the discretion to issue a notice to show cause to the Judgement Debtor, however a careful consideration and reflection on the consequence that will inevitably follow on the Judgement Debtor, a second thinking is more meaningful. The Judgement Debtor here faces the danger of being detained as a civil prisoner. Deprivation of the right to liberty is the worst thing that should happen to any person. The right

to liberty, is jealously protected by the Constitution.^{xxvi} It cannot, therefore, be taken lightly, as suggested by the use of the word may in the statute.

In any case, the position in Tanzania is that no any Court should determine any person's right, of whatever kind, without affording the affected person a right to be heard. The right to be heard has been held to be fundamental in the administration of justice in Tanzania, violation of which renders the entire process a nullity. There is an unbroken chain of judgements and decisions of the Court of Appeal to that effect.^{xxvii} Although the Civil Procedure Code is basically a procedural law, which does not create rights, however, the fact that it provides for circumstances where prisoner's liberty may be denied, it goes to the fundamental right itself.

Expounding on the rationale of giving a party the right to be heard before an adverse decision is made and consequence of default, the Court of Appeal in *Abbas Sherally & another v Abdul S.H.M Fazalboy* held,

“The right to be heard before adverse action or decision is taken against such a party has been stated and emphasised by courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice.”^{xxviii}

Conversely, in Kenya and Uganda, the position is different. Although in both Kenya and Uganda, the statutes use the word ‘may’ which means that the Court has the discretion to issue a notice to show cause, however, Courts have held that a notice to the Judgement Debtor to show cause why he should be committed to prison in execution of a decree, is mandatory. It has been held in Kenya that a notice to show cause is mandatory to be issued before the Judgement Debtor can be arrested and failure to issue such notice is fatal.^{xxix} Likewise, in Uganda, the Court has held that a notice to show cause is mandatory failure which, renders the proceedings fatal.^{xxx}

For example, in the case of *Buwembo Sarah Kakumba V Samuel Kiwanuka & Another*,^{xxxi} the Assistant Registrar had held that a notice before the arrest of the Judgement Debtor was discretionary and that it was not mandatory for the Judgement Debtor to show cause before his arrest. A reference was made to the Judge. The Court then held that although the word used is may, however it was not correct for Assistant Registrar to hold that it was discretionary. It was

held that it is mandatory a notice to be issued before the Judgement Debtor is arrested. Giving the rationale of the notice, it was held;

“...Use of the instructive word 'may' in the Rule as a mandatory requirement. This is clearly informed by the fundamental rule of natural justice that no one should be condemned unheard. To arrest a judgment debtor, before affording such person the opportunity to state his or her case, would gravely offend that principle of natural law”^{xxxii}

Given the position of the law in Tanzania regarding the right to be heard, and the practices and positions pertaining to the same procedures in other East African jurisdiction, it is submitted that, even if the law uses ‘may,’ however it is mandatory of the executing Court in Tanzania to issue a notice to the Judgement Debtor to show cause why he should not be detained as a civil prisoner. A warrant of arrest should always be preceded by a notice to a person to show cause why a warrant of arrest should not issue against such person. The proceedings should indicate that the executing Court made that order. Then, the responsible officer issues such an order as contained in the law.^{xxxiii} The notice to show cause invites the Judgement Debtor to appear before the Court and show cause why he should not be committed to prison in execution of a decree.

Where the Judgement Debtor defaults to enter appearance and once the Court satisfies itself that the Judgement Debtor was duly served with a notice, a warrant of arrest may be issued.^{xxxiv} Further, if the Judgement Debtor appears, but shows no cause to the satisfaction of the Court, he will be arrested. The order of arresting the Judgement Debtor, once entered on record, the officer responsible issues an arrest warrant contained in Form No. F/10.^{xxxv} This order instructs the arresting officer to arrest and procure the Judgement before the Court. It goes further to instruct that should the Judgement Debtor pay the decreed amount; he should be released forthwith. The amount subject of arrest is shown in the warrant of arrest.

Showing Cause

Once the judgement debtor is issued with a notice to show cause why he should not be arrested or has been brought before the court following an arrest warrant it is an opportunity given to him to raise grounds sufficient to convince the court not to detain him. The Judgement Debtor,

has two grounds that can be advanced so that the court does not detain him; poverty or any other cause.^{xxxvi} The court has held that poverty, is the inability of a person to satisfy his basic needs due to lack of money or skill.^{xxxvii} The second ground of "any sufficient cause,"^{xxxviii} is wide, it gives discretion to the executing court to consider any other matters relevant in each case. However, the mere fact that the Judgement Debtor has other debts to pay is not good a cause.^{xxxix}

The judgement debtor must show cause by way of an affidavit. The Judgement debtor is not to be detained in prison for inability to pay the debt, but for some fraudulent means designed to frustrate the execution. In Kenya, the court in *Solomon Muriithi Gitandu & Another vs. Jared Maingi Mburu*,^{xl} held,

"A person is not liable to be committed to civil jail for inability to pay a debt but a dishonest and fraudulent debtor is liable to be punished by way of arrest and committal."

However, the Judgement Debtor has to show by evidence that he is unable to pay the decreed amount or any other good cause. In such circumstances, an affidavit to show cause must contain sufficient evidence to move the court. Mere allegations will not help the judgement debtor. If for example the judgement debtor is ill, he must show the evidence in the affidavit such as a medical report. In *African Banking Corporation Tanzania Limited v Mture Educational Publishers Limited and Others* the court explained how to go about in such cases. The High Court of Tanzania while dismissing the Judgement Debtors' assertion that they were unable to pay because of age and illness, found out that such allegations had not been proved. In the said case, the Judgment Debtors had sworn in their affidavit that they were aged over 75 years and their health would deteriorate day after day and therefore keeping them in detention as a civil prisoner will not only accelerate their aging and attacks from diseases but they might end up losing their lives in prison. The court made the following observations;

"Although this averment seems sensible but is not supported by any evidence. No information on age of each of the judgment debtors or medical records detailing their claimed ill-health was furnished to this Court. To generally assume that at 75 one is in ill-health is not necessarily always the case. So supporting evidence was a must."^{xli}

The *obiter dicta* that can be drawn from the above case are first old age may not necessarily qualify as good cause envisaged in the law. This is correct, because, for all purposes and intents, being a senior citizen has no direct relationship with wanting in financial ability. However, if old age has a relationship with the inability to pay, it seems, can be a good cause envisaged by the law. The second *obiter dictum* suggests that illness if proved, maybe “a good cause” envisaged in Rule 39 (1) of Order XXI of the CPC.

On the contrary, mere allegations of inability to pay in the affidavit may not exonerate the Judgement Debtor from being arrested and detained in the execution of a decree in a civil suit. It has been held in Tanzania that poverty or inability to pay the decretal sum can only be established by filing an application to be declared insolvent or bankrupt, as the case may be.^{xlii} Mere allegations of poverty, not even in the affidavit, will not amount to proof of inability to pay due to poverty.

The Judgement Debtor has some rights, which the Court is obliged to lay at his disposal. The court is obliged, before ordering the detention of the Judgement Debtor, to inform him that he may apply to be declared an insolvent.^{xliii} If the Judgement Debtor shows interest to apply for insolvency, the court must discharge him unless the Judgement Debtor has committed any act of bad faith regarding the subject of the application. Upon production of security to the satisfaction of the court, the proceedings shall be adjourned for a period not exceeding one month to allow the Judgement Debtor to file for insolvency proceedings.^{xliv}

Factors to Consider before Ordering Detention

An order detaining a Judgement Debtor in the execution of a decree is discretionary. The Court, is at liberty to decline to make such an order, of course in deserving circumstances. The use of the word may in the law, makes serious sense when arresting and detaining of a Judgement Debtor reflected in terms of the right to liberty protected under the Constitution of the United Republic of Tanzania.

The executing court, has five factors that should be considered before making an order for detention of the Judgement Debtor. The Court should consider allegations by the Decree Holder that the decree subject of enforcement is for a sum for which the judgment debtor was bound in any fiduciary capacity to account;^{xlv} 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;^{xlvi} any undue preference given by the judgment debtor to any of his other creditors;^{xlvii} 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;^{xlviii} and 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.^{xlix}

ARREST AND DETENTION OF DIRECTORS AND SHARE HOLDERS OF A CORPORATION

It has been, for decades, the correct legal position that the company is at law a different person from the subscribers. The liabilities of a company are far beyond its shareholders and directors. The shareholder or a director should not be held liable to the debts of a company, and vice versa.¹ In the premises, proceedings for execution of a decree can be commenced against only a Judgement Debtor. Any person who was not a party to the proceedings cannot be brought into action at the execution stage.ⁱⁱ Generally, a director or shareholder of the Company is a distinct person from the company. It is an old principle of company law that a director or a shareholder cannot be held responsible to the debts of a company unless of course, he is also a party to such proceedings. Understandably, a company exists independent of its directors and shareholders.ⁱⁱⁱ

In Tanzania, it settled now that a director or a shareholder of a company may be detained as a civil prisoner in the execution of a decree against the company. For the director or a shareholder to be detained as a civil prisoner for liabilities of the company, the decree holder must file an application to lift the corporate veil.^{liii} Once the application is allowed, the veil of incorporation is lifted, so that the court can go behind the veil to execute a decree against a director or shareholder.^{liv} The challenging procedures however, for a practitioner, is how to move the court.

Like any other application, lifting the corporate veil is by way of chamber summons supported by an affidavit.^{lv} In the affidavit in support of the application, the decree holder should show that the director or shareholder is fraudulent or is involved in hiding properties belonging to the company or that he is doing some deliberate efforts to frustrate execution of a decree.^{lvi} There should be sufficient reasons explained in the affidavit. It has been held that efforts to conceal the assets and identity of the company can be ground of lifting corporate veil.^{lvii} We noted that, arrest and detention a remedy that should be available as a last resort. Moreso, when execution is against a corporation, it has to be shown that although the execution is against the corporation, however it cannot be successfully completed for some positive interferences by its directors or shareholders.^{lviii}

DETERMINATION OF SUBSISTENCE ALLOWANCE

A civil prisoner detained in the execution of the decree of the court is not a state prisoner. The state has no obligation to feed or pay his medical bills. The Decree Holder must pay for the upkeep of the Judgement Debtor in Prison. Indeed, the law prohibits the issuance of warrants of arrest unless the person making such an application pays in court such amount as the Court determines as sufficient subsistence allowance for the Judgement Debtor from the date of arrest to the date of procurement in court.^{lix} The law imposes an obligation on executing officer, not to issue the warrant for the arrest of the Judgement Debtor unless the substance allowance is made into court.^{lx}

Once an application is granted, the Judgement Debtor may not be sent to prison unless the Decree Holder pays in Court subsistence allowance for the up keep of the Judgement Debtor in prison. This is, perhaps the most challenging stage for the executing officer. Subsistence allowance is paid according to the scales prescribed by the Chief Justice under section 45 of the CPC. However, the Chief Justice has not made the contemplated rules that prescribe scales of the said allowance. The executing officer, thus must fix the rate of allowance, in the absence of the prescribed rules by the Chief Justice.^{lxi} Judicial Officers, are challenged, as always, as how to fix the sufficient allowance. In the absence of the prescribed scales, the Judicial Officer must set the allowance according to the style and position of the Judgement Debtor in the society,^{lxii} and must be payable in monthly instalments due on the first day of each month.

The Judgement Debtor however, has nothing to be happy of in case the Court sets high scales. Allowances payable by the Decree Holder for the upkeep of the Judgement Debtor form part of the costs.^{lxiii} In other words, the Judgement Debtor pays for his prison upkeep because, the Decree Holder will claim such costs from the Judgement Debtor. The difference is that an order in such costs cannot be enforced by further arresting and imprisoning the Judgement Debtor as a Civil Prisoner.^{lxiv}

PERIOD OF DETENTION

The Judgement Debtor may be held in prison for the period not exceeding six months depending on the decretal sum. Such a period, may be ordered in instalments or at once. If the sentence is ordered in instalments, the cumulative number of days should not exceed six months. The High Court in Tanzania has held that the execution court can, or may only continue the detention of the judgment debtor, for only a maximum period of six months and no more.^{lxv} In addition, where the Judgement Debtor has been detained and released, the maximum number of days of detention shall not exceed the aggregate of such a period that exceeds six months.^{lxvi}

The Judgement Debtor cannot be detained more than once, for an aggregate period exceeding six months, in the execution of the decree of the court.^{lxvii} The High Court, in the case of *Maureen George M. Jilawe versus Nondo Kaombol* faced a similar situation. The Judgement Debtor was imprisoned as a civil prisoner in the execution of a decree of the court. Few days before the expiration of six months, the Decree Holder made a fresh application for enhancement of the detention period. The High Court declined the application and made interesting observations. It was held that the execution of a decree does not intend to harass or embarrass the Judgement Debtor. According to the court, extending the time for a further period of six months, was harassment on the part of the Judgement Debtor which is not the intention of executing court

The Tanzania position, it seems is shared by Kenya as well. The maximum period of time that a person may remain detained as a civil prisoner is a period or an aggregate number of days not exceeding six months. Such a period, maybe ordered once, or at interval provided that the aggregate period does not exceed six months. The Court, in Kenya held;

“...The Respondent’s argument that once the Court had exercised its discretion to sentence him to thirty days’ civil jail, the Court had no further discretion to extend time, is untenable in law. That simply sets the maximum limit of detention to six months, whether it is done by way of one sentence, or several sentences, aggregating to a maximum of six months. What is important, however, is that due process must be followed.”^{lxviii}

GROUNDS OF LIFTING DETENTION

Once the Judgement Debtor is detained in the execution of a decree, he may be released by the court on certain grounds. The first ground is when, of course, the period of detention expires. As shown, the period of detention should be not more than six months where the sum of money subject of execution exceeds one hundred shillings. In any other circumstances, the maximum period should be six weeks. The Judgement Debtor may be released before the expiration of the period of detention if the amount mentioned in the warrant for his detention is paid to the officer in charge of the prison;^{lxix} or the decree against him being otherwise fully satisfied;^{lxx} on the request of the person on whose application he has been so detained;^{lxxi} and on the omission by the person on whose application he has been so detained to pay subsistence allowance.^{lxxii} However, the Judgement Debtor cannot be released on the application of the person whose detention was made or on allegation of satisfying the decretal sum, unless there is an order of the court to that effect.^{lxxiii}

Arrest and detention of the Judgement Debtor in the execution of a decree is different from a criminal prisoner. While a criminal prisoner remains serving his sentence even if he falls ill, however a civil prisoner has to be released from detention if he falls sick. Indeed, before commitment to prisons, the court may cancel the warrant on the ground of Judgement Debtor’s serious illness,^{lxxiv} or if in the opinion of the Court he is not in a fit state of health to be detained as a civil prisoner.^{lxxv}

The Judgement Debtor may be released even if he has been committed to prison on the ground of his suffering from any serious illness. Such a release order may be made by a committing court or any other court that is subordinate to the committing court.^{lxxvi} Equally, the Officer in Charge of the prisons where the Judgement Debtor is detained may release him on the ground

of the existence of any infectious or contagious disease.^{lxxvii} However, when exercising such powers, in practice, the Officer in Charge must communicate with the committing court, and wherever necessary, should procure the Judgement Debtor in court for appropriate orders to be made. Unless such an infectious disease is pandemic,^{lxxviii} known generally in public knowledge, an officer must swear an affidavit to that regard. Moreso, the executing Court, must give another side an equal opportunity to address the court on the grounds of release. Unless such valves are put in place, there is a likely danger of unscrupulous litigants to abuse the process.

LIABILITY AFTER DETENTION

Serving a civil sentence, so to speak does not take away the liability imposed by the decree. Strictly speaking, the liability increases as costs of upkeeping the Judgement Debtor become the costs of the case.^{lxxix} Therefore, a judgment debtor who is released from detention as a civil prisoner is not discharged from his debt.^{lxxx} Upon being released from prison, the Decree Holder may file a fresh application for execution, this time seeking the assistance of the court in a different mode. As shown, a Judgment Debtor cannot be detained for more than six months in the execution of a decree of the court. In such circumstances, the Decree Holder may apply for attachment and sale of the Judgement Debtor's properties or any other means.

However, this is not general knowledge for all. One example suffices to explain. In *Maureen George M. Jilawe versus Nondo Kaombola*^{lxxxi}, the Decree Holder applied for arrest and detention of the Judgement Debtor as a civil prisoner in the execution of the decree of the Court. The application was allowed and consequently, the Judgement Debtor was detained for six months. On the expiry of six months, the Decree Holder made a fresh application this time for attachment and sale of the Judgement Debtor's property. When the processes were issued, the counsel for the Judgement Debtor wrote a complaint letter to the Deputy Registrar complaining that his client had discharged the liabilities on serving six months detention period. He prayed for the court to vacate the processes it had issued. In response, the Deputy Registrar advised the Counsel on the correct legal position and required the counsel to properly advise his client.

CHALLENGING AN ORDER OF COMMITMENT TO PRISON

Generally, every court order is subject to appeal, review or revision depending on the nature and facts of each individual case. Like any other court order, an order for commitment to prison can be challenged. Challenging the said order, depends on the Court that detained the Judgement Debtor. Since both the High Court and Subordinate Courts have the powers of arrest and detention in the execution of a decree, such order can be challenged in the Court higher than the one executing the decree.

Order XXXIX of the CPC provides that an appeal to the High Court can be on a decree of the subordinate court in its original jurisdiction. An order arresting and detaining the Judgement Debtor in the execution of a decree is not a decree. Therefore, an appeal that is contemplated under the said order cannot be entertained. Moreover, Order XL of the CPC provides for orders from which an appeal can be entertained by the High Court. Orders listed under the said Order, do not include an order for arresting and detaining a Judgement Debtor. Also, no appeal can be allowed under that provision.

It is now settled that any person who is aggrieved by any decision or order that is not subject to appeal, can challenge the said decision or order by way of revision.^{lxxxii} Since the order of execution by way of arrest and detention as a civil prisoner is not capable of being challenged by way of an appeal, it follows therefore that it can be challenged by way of revisions. An application for revision shall be made in the form of a chamber summons supported by an affidavit. The affidavit must state the grounds upon which the application is made. The revision shall be filed in the High Court.

On the other hand, if any order arresting and detaining a Judgement Debtor was issued by the High Court, a different procedure exists. The law provides that any person aggrieved by an original decree of the High Court may appeal to the Court of Appeal.^{lxxxiii} Further, the law provides for orders of the High Court appealable to the Court of Appeal.^{lxxxiv} While the law allows an aggrieved person to appeal against any civil order of arrest, it prohibits appeal from orders issued in execution of a decree by arrest and detention.^{lxxxv} An order of arresting and detaining a Judgement Debtor follows within the categories of High Court orders that are appealable subject to the leave of the High Court. Any person aggrieved by an order of the

High Court arresting and committing him to prison may appeal to the Court of Appeal, but subject to seeking and successfully obtaining leave of the High Court.^{lxxxvi}

An order issuing an arrest warrant cannot be challenged by way of revision or appeal. Being interlocutory in nature, no appeal arising therefrom is allowed. The High Court has held that, in such cases, the Judgment Debtor has to wait for final determination of the matter so that he takes necessary steps. In *Salma Issa v Dr. Yahaya Mohamed*,^{lxxxvii} the court had issued a warrant of arrest against the applicant who challenged the same by filing revision. In dismissing the said application, the Court held;

“The order is therefore clearly a "preliminary or interlocutory order" within the meaning of section 43(2) of the Magistrate's Courts Act 1984. An application for revision of the said order made on 13/2/03, which is a "preliminary or interlocutory order", is barred by the provisions of section 43(2) of the Magistrates' Courts Act.”^{lxxxviii}

ARREST AND DETENTION BY PRIMARY COURTS

The Court system in Tanzania starts from the Primary Court, the lowest Court to the Court of Appeal; the highest Court. Execution of decree in the Primary is governed by both law and practice. Although this paper makes no attempt to deal with the execution of the decree in the Primary Court, it suffices to note that a Primary Court has no jurisdiction to enforce a civil decree by means of arrest and detention of the Judgment Debtor as a Civil Prisoner.^{lxxxix}

Paragraph 4 of the Fourth Schedule to the Magistrate's Court Act,^{xc} recognises arrest and detention of a Judgment Debtor as one of the modes of execution in the Primary Court. However, the law provides that once the Decree Holder applies for execution by way of arrest and detention, the Primary Court responsible should forward the record to the District Court within its establishment for the same to be dealt with. The law provides that once the District Court concerned receives the said record, it shall deal with it according to the procedures established under the CPC.

The issue that challenges Judicial Officers however, is how to go about it on the reception of the said record. Should the District Court proceed to record proceedings in the record forwarded by the Primary Court? Indeed, the law is silent. However, the logical thing is for the District

Court, to file an application in its relevant civil application register, and open a file for that purpose. Then, the provisions of the CPC regarding the execution of a decree by arrest and detention as a civil prisoner shall apply *mutatis mutandis*.^{xci}

A word of caution though, in passing. The District Court, when exercising powers on the reception of the record from the Primary Court, is still a civil court and the Judgement Debtor should not be considered as a criminal. This is what was held in *Issa Halfani Ndomeho Vs Karimu Hassan and Another*.^{xcii} In the said case, the Primary Court had forwarded to the District Court an application for execution of a decree by arrest and detention as a civil prisoner. On receiving the same, the District Court of Masasi, opened a Civil Revision Cause, and went further to imposed bail conditions on the Judgement Debtor. As it would appear, the matter was heard, in a procedure far different from what the law provides, and the Judgement Debtor was sentenced to two years jail term. On revision, the High Court nullified the order on the ground on procedural illegalities and jurisdictional issue. It was observed that the maximum period of time the Judgement Debtor could be detained six months only.

CONCLUSION

Draconic as it might be, arrest and detention of the Judgement Debtor remains one of the methods through which a civil judgement may be enforced in Tanzania. However, as noted, this mode of the execution, is not as easy as it looks. There are many procedures that are involved, and the position of the law, as noted, must be strictly complied with. Failure to strictly follow such procedures, renders the entire process a nullity. To avoid being embarrassed, or to embarrass the Court it is submitted that all Judicial Officers responsible for the execution and the practising Attorneys alike, should know the applicable legal procedures.

As shown certain cases courts may issue orders of arrest without strictly observing the applicable procedures. That is undesirable because it amounts to wastage of time and resources of both litigants and courts. Further, such default, encroaches on the right to liberty by the Judgement Debtor which is jealously guarded by the Constitution of the United Republic of Tanzania. However, as the position in other East African jurisdictions seems to be more transparent and adequate, it is submitted that even the jurisprudence in Tanzania should move towards that direction.

WAY FORWARD

This paper cannot in anyway pretend to present all the solutions in as far as arrest and detention in the execution of a civil decree is concerned. Given the complexity of the matter, and sensitivity involved, it would be self-defeating to pretend that the suggestions are exhaustive. However, for a transparent and effective system of arrest and detention in the execution of a civil judgement, that respects the right to a fair trial, the following suggestions are inevitable;

It is without dispute that the executing courts in Tanzania remain with discretion to issue a notice to show cause before arresting the Judgement Debtor in execution of a civil decree. However, because arresting a person is such sensitive that unless carried in a manner that respects human dignity is likely to compromise the entire process. We recommend that Rule 39(1) of Order XXI of the CPC be amended to impose an obligation to the executing Court not to issue an arrest warrant to the Judgement Debtor unless a notice to show cause has been issued.

Section 44(1) of the CPC mandates the Chief Justice to make Rules prescribing the scale of the allowance payable for the upkeep of the civil prisoner. The rules have not been made, as a result, this leaves much discretion to the executing court. The effects are such that the executing Court may order much or less in terms of allowance for upkeep of the civil prisoner. It is high time Rules have been made. Having rules in place will not only increase transparency in the process, but enhance public trust and confidence because of the predictability of the process.

The Registrar and Deputy Registrar are empowered to execute the decree in the High Court of Tanzania. However, when it comes to the execution by arrest and detention, such powers cease. On the other hand, their subordinates are allowed to issue orders of arrest and detention in execution of a civil judgement. It is interesting to note that the Registrar is not allowed to perform some functions which he was best at before his promotion. Given the limited number of Judges available in Tanzania, and the practice in other East African jurisdictions we recommend that Order XLII Rule 1(j) of the CPC be amended, spare Judges with execution so that Judges can be reserved for matters deserving their serious attention.

REFERENCES

- ⁱ See Article 15 (1), (2) (a) and (b) of the Constitution of the United Republic of Tanzania, 1977.
- ⁱⁱ Harel Mallac Tanzania Limited V Junaco (T) Limited and Another, Miscellaneous Commercial Application No. 144 Of 2016, High Court (Commercial Division), (Unreported)
- ⁱⁱⁱ The civil Procedure Code, [Cap. 33 R.E 2002], Order XXI Rule 2(i)
- ^{iv} *Ibid.*, Order XXI Rule 2(ii)
- ^v *Ibid.*, Order XXI Rule 2(iv)
- ^{vi} See Section 3 of the Prisons Act, [Cap 58 R.E 2002]
- ^{vii} See the Kenyan case of Jedida Chepkoech Mutai (Suing as The Legal Representative of the Estate of Julius Kipkorir Mutai (Deceased) v Cheronon Beatrice [2018] eKLR
- ^{viii} [2013] eKLR
- ^{ix} Order XXI Rule 28 of the CPC. Also see Eurafrican Bank (Tanzania) Ltd V Tina and Company Limited and Others, Commercial Case No. 80 of 2006, High Court Commercial Division, (unreported)
- ^x Section 44(1)(a) of the CPC
- ^{xi} Section 44(1)(b) of the CPC
- ^{xii} Section 44(1)(c) of the CPC
- ^{xiii} The Rules were gazetted on 29/09/2017 vide GN. No. 388 of 2017
- ^{xiv} Omari Mzee Mtumwani v Said Issa Magenza, Civil Case No. 88 of 1987 , High Court Dar Es Salaam, (Unreported)
- ^{xv} Omari Mzee Mtumwani v Said Issa Magenza, *Ibid*
- ^{xvi} *Ibid.*
- ^{xvii} Harel Mallac Tanzania Limited V Junaco (T) Limited, Miscellaneous Commercial Application No. 144 of 2016, High Court (Commercial Division), (Unreported). The same remarks were made in the case of *Omari Mzee Mtumwani v Said Issa Magenza* where the High Court observed that it should be employed if all other means have failed.
- ^{xviii} Harel Mallac Tanzania Limited V Junaco (T) Limited, *Ibid.* Page 4
- ^{xix} [2017] eKLR
- ^{xx} See Section 15 of the Magistrates Court Act, [Cap 11 R.E 2002]
- ^{xxi} See Order XLIII(j) of the CPC
- ^{xxii} Order XLIII(j), *Ibid*
- ^{xxiii} See Juma, I.H., Speech of the Chief Justice of Tanzania at Law Day Celebrations in 2020. At February 2020, the average caseload for each Judge of the High Court, was 513 cases per judge compared to the average disposal of 220 cases per Judge per year. Accessed on <https://tanzlii.org/blog/hotuba-ya-jaji-mkuu-mhe-prof-ibrahim-hamis-juma-kwenye-kilele-cha-wiki-ya-elimu-na-siku-ya>, accessed on March 31, 2020
- ^{xxiv} See Order XXI Rule 35 (1) of the CPC
- ^{xxv} African Banking Corporation Tanzania Limited V Mtire Educational Publishers Limited and Others, Commercial Case NO 73 OF 2010, High Court (Commercial Division), (unreported)
- ^{xxvi} Article 15 of the Constitution of the United Republic of Tanzania
- ^{xxvii} Scan Tan Tours Limited v The Registered Trustee of the Catholic Diocese of Mbulu, Civil Appeal No. 78 of 2012, (unreported), Peter Ng'homango v. the Attorney General, Civil Appeal No. 114 of 2011 (Unreported), Yazidi Khassim Mbakileki v CRDB 1996 Ltd & Another, Civil Reference No.14 of 2018, (Unreported), National Housing Corporation V Tanzania Shoes And Others [1995] TLR 251; Abbas Sherally & another v Abdul S.H.M Fazalboy, Civil Application No. 33 of 2002 (Unreported)

xxviii This is Civil Application No. 33 of 2002 (Unreported).

xxix See the case of Braeburn Limited -V- Gachoka and another (2007)

xxx Kemigisha Mbabazi v Jing Cheng International Trading Ltd (HCT - 00 - CC - MA - 344 - 2012) [2012] UGCOMM 128, Federico Sebirumbi V Josph Konde (1994), IV KALR 44, Hajji Hassan Bin Abudul Azizi V Ramazani Bin Razabo [1977] HCB 39 and Buwembo Sarah Kakumba V Samuel Kiwanuka & Another (Civil Appeal No, 1670 of 2013) [2014] UGHCEBD 6

xxxi (Civil Appeal No, 1670 of 2013) [2014] UGHCEBD 6

xxxii *Ibid*

xxxiii See Form No. F/10 provided under the Civil Procedure (Approved of Forms) Notice, 2017, G. N. No. 388 published on 29/09/2017

xxxiv Fr. James Mweyunge v Charles Mokiwa, Misc. Civil Application No. 128 of 2019, High Court, Dar Es Salaam, (Unreported)

xxxv The Form is provided under the Civil Procedure (Approved of Forms) Notice, 2017, *Ibid*.

xxxvi See Rule 39 (1) of Order XXI of the CPC

xxxvii Gosbert Stanslaus Mutagaywa v Hamis Shabani Kamba, Commercial Case No. 46 of 2017, High Court (Commercial Division), (Unreported)

xxxviii See Rule 39 (1) of Order XXI of the CPC

xxxix Gosbert Stanslaus Mutagaywa v Hamis Shabani Kamba, *Ibid*.

xl [2017] eKLR

xli African Banking Corporation Tanzania Limited V Mtire Educational Publishers Limited and Others, Commercial Case NO 73 OF 2010, High Court (Commercial Division), (unreported)

xlii Gosbert Stanslaus Mutagaywa v Hamis Shabani Kamba, *Ibid*

xliii Section 44(2) of the CPC

xliv Section 44(3) of the CPC

xlvi Order XXI Rule 39(2)(a) of the CPC

xlvi Order XXI Rule 39(2)(b) of the CPC

xlvi Order XXI Rule 39(2)(c) of the CPC. See also Gosbert Stanslaus Mutagaywa v Hamis Shabani Kamba, Commercial Case No. 46 of 2017, High Court (Commercial Division), (Unreported)

xlvi Order XXI Rule 39(2)(d) of the CPC

xlvi Order XXI Rule 39(2)(e) of the CPC

¹ Salomon v. Salomon & Co. Ltd. (1897) A.C.22.

^{li} Swedish Motor Corporation v. Suchack & Sons Company Ltd, Commercial Case No.40 of 2000, High Court Commercial Division (Unreported)

^{lii} See Section 15 of the Companies Act. Also see the case of Frank Werairuka Musari v Gapoil (T) Ltd and Munza Trading Enterprises Ltd, Civil Application No.60 of 2003, Court of Appeal (Unreported).

^{liii} See the holding of the Court of Appeal of Tanzania in *Yusufu Manji v Edward Masanja and another*. In the said case it was held that in certain special and exceptional circumstances, the court may go beyond the purview of this principle by what was described in Salomon (supra) lifting the veil.

^{liv} See the cases of *Salomon* and *Yusufu Manji* above

^{lv} See Order XLIII Rule 2 of the CPC

^{lvi} *Yusufu Manji v Edward Masanja*

^{lvii} *Yusufu Manji v Edward Masanja, Ibid*.

^{lviii} *Yusufu Manji v Edward Masanja, Ibid*

^{lix} See Order XXI Rule 38(1) of the CPC

^{lx} See Order XXI Rule 38 of the CPC

^{lxi} See Order XXI Rule 38(2) of the CPC

^{lxii} See *Ecobank Tanzania Limited V Nararisa Enterprises Company Limited*, Commercial Case No. 81 of 2014, High Court, Commercial Division, (Unreported)

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- lxiii See Order XXI Rule 38(5) of the CPC
- lxiv See the Proviso to Rule 38 of Order XXI of the CPC
- lxv *Tata Holding (T) Ltd v Monani Trading as Anchor Enterprises*. HC at Dar, Civil case No 282 of 1998, High Court, Dar Es Salaam (Unreported)
- lxvi *Ibid*
- lxvii *Issa Halfani Ndomeho Vs Karimu Hassan and Another*, Civil Revision No. 2 of 2029, High Court, Mtwara, (Unreported)
- lxviii See the Kenyan case of *Munyui Kahuha v Ng'ang'a Kahuha* [2007] eKLR,
- lxix See Section 46(1)(b)(i) of the CPC
- lxx See Section 46(1)(b)(ii) of the CPC
- lxxi See Section 46(1)(b)(iii) of the CPC
- lxxii See Section 46(1)(b)(iv) of the CPC
- lxxiii See the proviso to See Section 46(1)(b) of the CPC
- lxxiv See section 47(1) of the CPC
- lxxv See section 47(2) of the CPC
- lxxvi See Section 47(3)(b) of the CPC
- lxxvii See Section 47(3)(a) of the CPC
- lxxviii A disease such as COVID-19, is so pandemic that
- lxxix See Order XXI Rule 38(5) of the CPC
- lxxx See Section 46(2) of the CPC
- lxxxi Commercial Case No. 60 of 2017, High Court (Commercial Division), (Unreported)
- lxxxii *CRDB Bank Limited v Mathew Kilindu and Another*, Civil Application No. 74 of 2010, Court of Appeal, (Unreported), *Bank of Tanzania v Devram P. Valambhia*, Civil Reference No. 4 of 2002, Court of Appeal, (Unreported) and *Mohamed Enterprises (T) Ltd v Tanzania Investment Bank and others* [2012] EA 173
- lxxxiii Section 5(1)(a) of the Appellate Jurisdiction Act, [Cap 141 R.E 2002]
- lxxxiv The Appellate Jurisdiction Act, *Ibid.*, Section 5(1)(b)
- lxxxv The Appellate Jurisdiction Act, *Ibid.*, Section 5(1)(b)(viii)
- lxxxvi The Appellate Jurisdiction Act, *Ibid.*, Section 5(1)(c)
- lxxxvii Civil Revision No. 32 of 2003, High Court Dar Es Salaam, (Unreported)
- lxxxviii *Salma Issa v Dr. Yahaya Mohamed*, *Ibid*
- lxxxix See Para 4 of Fourth Schedule to the Magistrate's Court Act, [Cap 11 R.E 2002]
- xc Cap 11 R.E 2002
- lxxci Para 4 of the Fourth Schedule of the Magistrate's Court Act, *Ibid*
- lxxcii Civil Revision No. 2 of 2019, High Court, Mtwara (Unreported).