IN THE HIGH COURT OF TANZANIA

AT TANGA

CIVIL REVISION NO.5 OF 2011

[Arising from (DC) Misc. Civil Application No.4 of 2011 and Original (DC) W/M Civil Case No.23 of 2003 in Tanga District Court]

FRANCIS OKUMU.....APPLICANT

VERSUS

SISI CONSTRUCTION COMPANY LTD.....RESPONDENT

Date of last order: 17/5/2012
Date of Ruling: 10/8/2012

RULING

Teemba, J;

The applicant, Francis Okumu filed this application against the respondent seeking for the following releifs:-

1. *The court be pleased to call for the record and proceedings or the Ruling dated 19/8/2011 in Misc. Civil Application No.4 of 2011 of the District Court of Tanga and to examine, correct and revise the irregularities therein causing injustice to the Applicant.*
2. *Any other order the court may deem fit to grant.*
3. *Costs of this application.*

This application is made under section 44(1) of the Magistrate's Court Act [Cap.11 R.E. 2002] and it is supported by the Affidavit of the applicant, Francis Okumu. The respondent filed the counter – Affidavit in opposing the application. Briefly, the contents of both the Affidavit and counter affidavit together with the subordinate court's record reveal the following facts: In the District Court of

Tanga at Tanga, the applicant through Civil Cause No.23 of 2003 successfully sued his employer – MWANANCHI ENGINEERING AND CONSTRUCTING CO. LTD [MECCO] for recovery of his salaries and other incidental claims. The trial court granted the applicant Tshs.343,288,147/= as a decretal sums. The applicant filed an application for execution of decree by way of attachment and sale of his employer's property. On 14/3/2011, the trial court granted the order of attachment and sale of the Godown situated on plot No.1 Block KB 9 Gofu area, Tanga – the property of his employer -- MECCO.

On 8th April 2011, the respondent, Sisi Construction Company Ltd filed Misc. Civil Application No.4 of 2011 seeking for an order that the order for attachment and sale be raised/vacated because it owns 75% of total shares of MECCO. The trial court considered this reason positively and granted the application. The applicant/decree holder was dissatisfied and lodged this application. In the main, the applicant complains that the respondent who is a mere shareholder of MECCO has no mandate whatsoever to legally bring an action seeking for a redress for a wrong done to a company or its properties and yet stand to defend the same on its behalf.

The parties were allowed to argue the application by way of written submissions.

In his submissions, Mr. Mlawa, learned counsel for the applicant contended that it is not in dispute that the respondent owns 75% of MECCO's shares. In that regard, the learned counsel submitted that, the mere fact that

the respondent owns majority shares in MECCO can not entitle the respondent to come forward as a shareholder to defend or protect the interest of the company in any form. The learned counsel cited the case of **Heyting V. Dupont and another [1963] 3 ALL E.R. 97, page 100** to the effect that in order to redress a wrong done to the company or to recover money or damages alleged to be done to the company, the action should *prima facie* be brought by the company itself and not the respondent. Mr. Mlawa also cited the case of **SALOMON and Co. V. SALOMON [1897] AC 22** to the effect that since MECCO is a separate entity which holds property in its own name and its identity is distinct from that of its members or shareholders, then the respondent who is a shareholder had no locus standi to defend the interest of the judgment debtor [MECCO]. In conclusion, Mr. Mlawa urged the court to allow the application.

In rebuttal, Mr. Akaro the learned counsel for the respondent submitted that in view of the provisions of **Order XXI Rules 57(1), 58 , 59 and section 68(e) of the Civil Procedure Code [Cap.33 R.E. 2002]** the respondent who was adversely affected by attachment order and with interest in the attached property, had the locus standi to object such attachment. He added that, as the respondent has majority shares in MECCO then, it has a locus standi to object the attachment of the property in question. The learned counsel supported his argument by citing the case of **Musa Misango V. Eria Musigire and others, [1966] E.A. 390** to the effect that, the respondent was entitled to bring objection proceedings in the trial court. He also contended that the facts of this

case call for treatment as "exceptional circumstances" where the court can hear a shareholder whose interests are at stake of been unfairly injured. Moreover, the learned counsel insisted that, on the basis of the systematic change of MECCO, the applicant is not entitled to anything from the newly MECCO since the latter was not an employer of the applicant. In conclusion, he urged the court to dismiss the application with costs.

In rejoinder Mr. Miawa insisted that it is true that the former MECCO had systematically transferred to the new MECCO which also inherited the debts of the former MECCO and therefore, the issue that the new MECCO did not employ the applicant has no basis. He also insisted that the cited cases by Mr. Akaro are distinguishable in the present case. He concluded that on the basis of the principle of separate entity which was laid down in the case of **Solomon vs Solomon [supra]**, the executing Resident magistrate should not have raised the attachment order.

I have examined the contents of the affidavit and counter-affidavit. I have also considered the record and the arguments made by both learned counsel. Whether the applicant was employed by the former MECCO and whether the present new MECCO is the currently employer of the applicant, should not derail the proceedings at this stage. This is not an issue before the court now. The issue here is whether there are material errors causing injustice to parties and therefore to invite this court to correct and revise the order by the lower court.

. There is no dispute that the respondent was not a party in civil cause No.23 of 2003. It is only parties who have power to challenge the outcome of their case. In this case, MECCO is the judgment debtor and it owns property including the godown in dispute which is located on plot No.1 Block KB 9 Gofu area, within the city of Tanga. The question to pose here is whether the respondent, the majority share holder in MECCO company, has power to object the attachment and sale of the property of the company. As correctly submitted by Mr. Mlawa, the answer to the above question is, in my view, NO. The property of the company is not property of its members or shareholders. This position was stated in the case of **MACAURA VS NORTHERN INSURANCE CO. LTD. [1975] AC 611** where it was stated *inter alia* that a company's property does not belong to the shareholders, either individually or collectively. The decision in this case falls squarely to the present matter. With this in mind, I am of considered view that, the provisions of **Order XXI Rule 57(1) 58 and 59** together with **section 68(e) of the CPC** were wrongly invoked. I do agree that a person who has an interest in the attached property has a right to bring objection proceedings but if shareholders are to be allowed to use this shield, then no decree holder will be able to execute any decree by way of attaching property of the judgment debtor. The respondent would be entitled to use/invoke the provisions of **Order XXI** to bring objection proceedings if there is evidence that it has specific interest to the attached property. In the present

matter, the situation is different. The respondent's interest is not the godown but only its shares in MECCO.

In the upshot and in view of the provisions of section 44 of the Magistrate Courts Act [Cap.11 R.E. 2002], I hereby reverse the order which raised the attachment and instead I direct that the attachment and sale of the property may proceed. Costs to follow event.

It is so ordered.

R.A. TEEMBA, J.
10/8/2012

10/8/2012

Coram – R.A. TEEMBA, J;

Applicant – Present

Respondent – Absent

C/C Nakijwa

Court: The Ruling is delivered today in the absence of the Respondent.

R.A. TEEMBA, J.
10/8/2012