

**IN TH HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

DAR ES SALAAM

CIVIL REVISION NO: 7 OF 2019

(Originating from Civil Case No: 5 of 2016 Resident Magistrates Court
of Morogoro)

PULKERIA MICHAEL DUMA.....APPLICANT

VERSUS

ATN PETROLEUM CO. LTD1ST RESPONDENT

MPANGO 2005 (T) LTD.....2ND RESPONDENT

RULING

MASABO J.:

In Civil Case No. 5 of 2016 before the Court of the Resident Magistrate for Morogoro at Morogoro ATN Petroleum Co. Ltd, the 1st respondent herein, obtained a decree against the 2nd respondent. After several unfruitful attempts to realise the decretal sum of Tshs 35,518,238/=, it obtained an order for detention of the director of the 2nd respondent, one **Pulkeria Michael Duma** who is the applicant herein.

Discontented, the applicant filed this application praying that this court be pleased to revise the proceedings of the above case. The application was supported by an affidavit of Mluge Karoli Fabian, who is identified as the applicant's counsel which was sternly disputed by the 1st Respondent through a counter affidavit deponed by one Ahmed Bawazir. The counter affidavit was however struck out from the record after the applicant successfully argued a preliminary objection that the counter

affidavit was offensive of the law on affidavit. Hearing was subsequently ordered to proceed ex parte the 1st Defendant and inter parties the 2nd respondent who basically did not content the application.

Hearing proceeded in writing. The Applicant was represented by Mr. Josephat Sayi Mabula learned counsel. The 2nd respondent was not represented, it fended for itself. The parties complied with the schedule to filing of submissions. In total amazement, during the preparation of this ruling I noted that the 1st Respondent whose counter affidavit was struck out, defiantly ignored the *ex parte* order and proceeded to filed a submission in reply to the Applicant's submission in chief. Without saying much on this conduct which I seriously detest for being contemptuous to the court order, I totally disregard the submission and proceed to determine the application ex parte him as per my order dated 22nd July 2020.

Foe the Applicant, Mr. Mabula submitted that in law a company is a legal person independent from its members and directors. This principle, he argued, was founded in **Salmon v Salmon** [1987] AC 22 as cited with approval by the Court of Appeal in **Yusufu Manji v Edward Masanja and Abdallah Juma** [2006] TLR 127. Having cited this principle he submitted briefly that, the order for detention of the applicant in her capacity as director of the company was wrong. On its party, the 2nd respondent while supporting the submission made by the applicant, cited the case of **Hiyari Saidi v Sauda Salum** Civil Appeal No. 37 of 2014,

High Court at Dar es Salaam (unreported) and argued that the judgment of the trial court is erroneous as it does not disclose the reasons from which the decision to detain the applicant was based. This marked the end of the submission.

This being an application for revision it is governed by Section 79 of the Civil Procedure Code [Cap 33 RE 2019] which states that:

The High Court may call for the record of any case which has been decided by any court subordinate to it and in which no appeal lies thereto, and if such subordinate court appears-

- (a) to have exercised jurisdiction not vested in it by law;
- (b) to have failed to exercise jurisdiction so vested
- (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

In view of this, the question for interrogation is whether there is an irregularity in the proceedings of the trial court. The applicant complains that the proceedings of the trial court are tainted with an irregularity, that is the order for detention was issued against the applicant who is not party to the case.

Considering that the complained irregularity is about the personality of a company against the shareholders and directors, I will first address myself to the position of law in this area as it currently stands. It is a well

settled principle of law that a company is legal entity separate from its directors. The principle was articulated in the following terms by Lord Macnaghten in **Salmon Versus Salmon (supra)**:

“The company is at law a different person altogether the subscribers, and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee of them. Nor are subscribers, as members liable, in any shape or form, except to the extent and in the manner provided by the Act”.

In our jurisdiction, the principle above has been cited with approval in numerous cases in such that it has now become part of our law. These cases include **Yusuf Manji Versus Edward Masanja and Abdallah Juma** [2006] TLR 127 CAT; **Mussa Shaibu Msangi Vs Sumry High Class Limited & Sumry Bus Service Ltd** Misc Commercial Cause No 20 of 2012 (HC Commercial Division) and in **Zebedayo Mkodya v Best Microfinance Solutions** Limited Commercial Case No. 95 of 2016 (HC Commercial Division).

All these authorities converge that the principle is binding save where there exist special and exceptional circumstances warranting the lifting of veil. Such circumstances include where after the completion of the liquidation process there is nothing left to cover unsecured creditors or where, as in the instant case, there is a judgment debtor and the

company has no assets. The veil may also be lifted if it is established that it is used to evade legal or contractual obligation or where the companies are formed merely as cloaks, shams, devices, masks or facets of control or to evade payment of taxes or to conceal true facts. (see **Yusuf Manji Versus Edward Masanja and Abdallah Juma** (supra); **Mussa Shaibu Msangi Vs Sumry** (supra)).

It is therefore crucial to determine whether in the instant case there were special and exceptional circumstances warranting the lifting of the veil and if so whether the veil was properly lifted. It should be noted that the veil of incorporation can only be lifted against the members of the company, who include the shareholders and directors. Undisputedly in the instant case, the applicant was the director of the 2nd Respondent Company (judgment debtor). Hence, the veil could justifiably be lifted against her.

As to whether the special circumstances existed, in my painstaking examination of the record I observed the following: the decretal sum pronounced by the court on 29th April 2016 was at a tune of Tshs 64,781,915/= plus interest of Tshs 1,500,000/=. After the decree was pronounced, the decree holder made several attempts to realise the decree. As of 15th November 2018, when the ruling to detain the applicant was pronounced, a sum of 35,518,238/= was still due. It was further observed that on 18th December 2017 the decree debtor promised to release a vehicle with Reg. No. T 647 CSN, T 964 CSN within

two months but as of 11th May 2018 he had not released the same. On the said date the broker appointed by court to execute the decree reported that the judgment debtor deliberately lied to the court that the vehicle sought to be attached was in Dar es Salaam whereas the same was the Democratic Republic of Congo (DRC). It is also on record that the decree holder fruitless attempted to attach the 2nd Respondent's motor vehicles only to be informed by Twiga Bancorp Limited (through a letter dated 30/4/2018) that it has a general debenture against all present and future fixed and floating assets of the 2nd Respondent.

While these facts may be material in lifting of the veil, the procedure applied by the trial court had a serious impairment. From the above cited cases it can be safely discerned that the lifting of veil is done upon proof being rendered by way of affidavit or otherwise to the satisfaction of the court as to the existence of the said circumstances. The court record demonstrate that the trial court acted on an application made orally by one Anthony Kayanda who was appearing decree holder. No application, oral or written, was made to have the veil lifted against the applicant let alone a finding in this respect. The court invoked ordinary procedures for arrest and detention of judgment debtor under section 44& 46(1) (a) and Order XXI rule 9 and 10 of the Civil Procedure Code, Cap 33 RE 2002] and proceeded to order detention in total disregard of the legal need for lifting the veil of incorporation before imputing the company's responsibility on its members/directors as set forth in the authorities above cited.

To that extent, and pursuant to the powers vested in this court by section 44 (1) (b) of the Magistrate Courts Act [Cap 11 RE 2019] I allow the application and nullify the proceedings of the Court of the Resident Magistrate for Morogoro with costs.

DATED at **DAR ES SALAAM** this 24th day of November 2020



J.L. MASABO
JUDGE