

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**LABOUR DIVISION AT ARUSHA**

**LABOUR EXECUTION CASE NO. 91 OF 2021**

***(C/f Labour Dispute No.CMA/ARS/ARB/09/2015)***

**WILIBALD NGAMBEKI.....DECREE HOLDER**

**Vs**

**NEW NORTHERN CREAMERIES LTD .....JUDGMENT DEBTOR**

**RULING**

*Date of last Order: 24-8-2022*

*Date of Ruling: 21-10-2022*

**B.K.PHILLIP,J**

This Ruling is in respect of a point of preliminary objection raised by the learned Advocate Emmanuel Anthony who appears for the judgment debtor. The same is couched as follows;

- *That this application is bad in laws as it violates the principles that were established in the case of **Yusuph Manji Vs Edward Masanja and Another , Civil Appeal No.78 of 2002 (unreported)**.*

In order to appreciate the coming discussion, let me give a brief background to this matter, albeit briefly; In the year 2015, the decree holder herein lodged complaints for unfair termination from employment at the Commission for Mediation and Arbitration at Arusha ( "CMA") against the judgment debtor herein vide Labour Dispute No.CMA/ARS/

ARB/09/2015. Upon receiving evidence from both sides, the Arbitrator awarded the decree holder a sum of Tshs 8,220,000/= which includes twelve months salary as compensation for unfair termination among other things.

Back to the case in hand, on 13<sup>th</sup> August 2021 the decree holder, lodged the application in hand for execution of the CMA award aforesaid. The mode in which the assistance of the Court is required indicated in the application is arrest and detention of Managing Director of the Judgment Debtor, Mr. John Kyenkungu. Upon being served with the application for execution the learned Advocate Emmanuel Anthony who appears for the judgment debtor raised the aforementioned point of preliminary objection. The decree holder is represented by the learned Advocate Mohamed Mhinda. The point of preliminary objection was argued by way of written submission.

Submitting in support of the point of preliminary objection, Mr. Anthony argued that Mr. Kyenkungu was not part to the dispute between the judgment debtor and the decree holder. Thus, his name has been wrongly indicated in the application for execution of CMA award filed in Court by the decree holder. Relying on the case of **Salomon Vs Salomon & Co Ltd ( 1897) A.C.22**, Mr. Anthony submitted that at law the Company is different from the subscribers and are not personally liable for matters involving the Company's business .

Furthermore, Mr. Anthony argued that it is unprocedural for the decree holder to move this Court issue an order for arrest and detention of

Mr. John Kyenkungu as a civil prisoner without prior proof that Mr. John Kyenkungu has a connection with the judgment debtor and had been acting in bad faith to conceal identities of the judgment debtor's assets in order to escape the execution of the award. Mr. Anthony went on submitting that the aforesaid proof is normally done by filing an affidavit. Thereafter the decree holder is supposed to make an application for lifting of the judgment debtor's Corporate veil to pave for moving the Court to issue an order for arrest and detention of the judgment debtor as a civil prisoner. To cement his argument he cited the case of **Yusuf Manji Vs Edward Masanja and Abdallah Juma ( 2006) TLR 127** , in which the Court of Appeal said the following;

*".. Here the appellate was the managing director of the Company. The appellant was also alleged to be involved in concealing the identity and assets of the Company. In that capacity , and as held by the learned judge, we agree that the appellant was in a better position to know the trend of the affairs regarding the alleged concealment of the Company's assets"*

Other cases cited by Mr. Anthony to support his stance are ; **GM. Dewji & Company Limited Vs Ayan Abdullah and Another, Civil Revision No.6 of 2021 , Simon Mwita Mlagani and Mang'engi Monata Vs Kiribio Limited , Execution Case No. 56 of 2020 and Grand Alliance Limited Vs Mr. Wilfred Lucas Tarimo and 4 others, Civil Application No.187/16 of 2019** (all unreported).

Mr. Anthony concluded his submission by insisting that the name of John Kyenkungu has been wrongly indicated in the execution form filed in Court by the decree holder , thus the same has to be struck out. He beseeched

this Court of make a finding that this application is incompetent and it is good as nothing has been filed in Court, and strike it out.

In rebuttal, Mr.Mhinda submitted that the preliminary objection raised by Mr. Anthony is not a pure point of law because it is annexed to an affidavit which states and gives elaboration on factual issues that attempts to prove factual issues prematurely .He went on submitting that the position of the law is well known that a point of preliminary objection has to be concern with matters of law only and should not be mixed up with factual issues. He cited the case of **The Soitsambu Village Council Vs Tanzania Breweries Limited and Another ( CA) , Civil Appeal No. 105 of 2011** ( unreported) in which the Court of Appeal held as follows;

*" A preliminary Objection should be free from facts calling for proof or requiring evidence to be adduced for its verification . Where a Court needs to investigate facts, such an issue cannot be raised a preliminary objection on point of law"*

Furthermore Mr. Mhinda submitted that the application for execution has been filed against New Northern Creameries Ltd not Mr. John Kyekungu. The case of **Salomon** ( Supra) has been wrongly relied upon by Mr. Anthony in his arguments because the principle of the law established in that case has nothing to do with lifting of the Company's veil of incorporation. Explaining on why Mr. John Kyekungu's name appears in this application, Mr. Mahinda argued that a Company operates through its director(s), therefore , when the chosen mode of execution of a Court decree involves a process for arrest and detention of the judgment debtor , as it is in the case in hand , the name of the Managing Director

of the Company has to appear in the application for execution since he/she is the one capable of being arrested and detained as a Civil prisoner.

Furthermore, Mr. Mahinda argued that the point of preliminary objection has been raised prematurely because this Court has not issued any order for arrest and detention of Mr. John Kyekungu as a Civil prisoner. So far the Court has just issue a notice to show cause to Mr. John Kyekungu as the Director of the Company ( Judgment Debtor).Relying on the provisions of Order XXI Rules 10 (2) (j) (iii) and 28 of the Civil Procedure Code ( " CPC" ) , Mr. Mahinda contended that arrest and detention of the judgment debtor is one of the ways applicable in execution of a Court decree . If the decree holder opts to use that way, then he has to indicate in the application for execution the name of the person to be arrested and detained as civil prisoner, and in case the judgment debtor is a legal entity ( Company) the director of the Company in question is the one required to show cause in execution of the Court decree. So, it is obvious that his/her name has to appear in the execution form filed in Court, argued Mr.Mahinda.

Moreover. Mr. Mahinda argued that in his testimony at the CMA ,Mr. John Kyenkungu testified that he was the Managing Director of the judgment debtor . In conclusion of his submission , Mr. Mahinda prayed for the dismissal of this application.

In rejoinder, Mr. Anthony reiterated his submission in chief. He insisted that the point of preliminary objection is not based on factual issue but it is based on what is indicated in the execution form and the principle set out

in the case of **Yusufu Manji** ( supra).Mr. Anthony conceded that arrest and detention of the judgment debtor is one ways applicable in execution of Court decrees as provided in the provisions of the laws cited by Mr. Mahinda. However, he was emphatic that it is the judgment debtor only who is liable for orders for arrest and detention in execution of a Court decree not otherwise.

It was Mr. Anthony's argument that the point of preliminary objection has been raised timely to serve the precious time of this Court. He urged this Court to abide by the case laws he cited and uphold the point of preliminary objection.

Having analyzed the submissions made by the learned advocates as well as perused the Court's records, let me proceed with the determination of the merit of the point of preliminary objection. Mr. Anthony's major argument is that the decree holder was required to first prove that Mr. John Kyekungu was the Director of Judgment debtor and thereafter make an application for lifting the veil of incorporation of the judgment debtor before moving this Court to issue an order for arrest and detention of Mr. John Kyenkungu. What I have gathered from the subimissions made by both learned advocates is that this Court is required to decide the propriety of the application for execution filed by the decree holder, that is, whether or not the procedure adopted by the decree holder is proper under the law. Basically , Mr. Anthony does not dispute that there are exceptions to the principle established in the case of **Salomon** ( supra) that the directors of a company are separate and distinct from the



Company. This is proved by the fact that Mr. Anthony cited the case of **Yusuf Manji** ( supra) in which the Court of appeal stated as follows;

*"Therefore , having regard to the fact that the appellant was the managing director of the Company, we do not accept Mr. kamara's contention that evidence was required to prove the appellant's relationship with the Company or that he had shares in the Company. The Principle enunciated in Salomon ( supra) would apply to the contrary once special and exceptional circumstances is shown."*

Therefore, according to the observations of the Court of Appeal in the case of **Yusufu Manji** ( supra) , Mr. Anthony's contention that since Mr. John Kyenkungu was not a party to the case between the decree holder and the Judgment debtor ( Company ) is not supposed to be involved in the application for execution of the decree against the Company and his name is wrongly indicated in the execution form is misconceived.

Back to the issue on the procedure applicable when a decree holder against a Company requests the Court to issue an order for arrest and detention of the Company's director. First and foremost, it is imperative to acknowledge that the provisions of Order XXI Rule 10 of the CPC provides that a decree holder has to fill in an execution form in which he /she has to indicate the mode of assistance required from the Court. In other words, the law does not envisage that if the mode of execution of a Court decree involves lifting of the Company's corporate veil the decree holder has to file a separate application seeking to lift the Corporate veil before moving the Court to issue the order for arrest and detention of the directors of the judgment debtor. At this juncture I wish to point out that the cases cited by Mr. Anthony to support his position are all persuasive

not binding to me with exception of the case of **Yusufu Manji** ( supra) which is the decision of the Court of Appeal. So, in this ruling I shall rely on the case of **Yusufu Manji** (supra) which is relevant to the point of preliminary objection raised by Mr. Anthony and also binding to me. In the case of **Yusufu Manji** ( supra) the respondents ( decree holder) did not file a separate application for lifting the Corporate veil of the Company ( Metro Investment Limited) as suggested by Mr. Anthony. They just indicated before the Court that they needed assistance of the Court for arrest and detention of Mr. Yusufu Manji, the Managing Director of the Judgment debtor ( Metro Investment Limited).On appeal the Court of Appeal did not fault the procedure that was adopted by the decree holder and it upheld the decision of the lower Court. Likewise, in the case of **Mussa Shaibu Msangi Vs Sumry High Class Limited and another , Misc. Commercial Cause N. 20 of 2012 ( 2016) T.L.S-LR 430** the decree holder did file a separate application for lifting the corporate veil of Sumry High Class Limited and on appeal the Court of Appeal did not fault the procedure adopted by the decree holder.I wish to reiterate my observations I made in the case of **IAF ( East Africa Limited Vs Sahara Group Limited , Application for Execution No.7 of 2022.** ( unreported) in which I made a determination of a point of preliminary objection similar to the one in hand , that , legally, filing a separate application for lifting the corporate veil when the case has reached at execution stage is not practical because execution of a Court decree is a last stage in a case which aims at closing the matter. In execution of a Court decree the main issue is payment of the decretal sum. The decree



holder has no claim against the director of the judgment debtor. The director of the Judgment debtor is just required to satisfy the Court decree for his Company and in case he is objecting to the mode of execution of the Court decree indicated by the decree holder, the same has to be sorted out during the hearing of the application for execution on merit.

In addition to the above, I am inclined to agree with Mr. Mahinda that the point of preliminary objection has been raised pre-maturely since this Court has just issued a notice to show cause. No order for arrest and detention of Mr. John Kyenkungu has been issued. It has to be noted that when a summons to show cause is issued the person to whom the same is issued has an opportunity to file an affidavit to challenge the application for execution leveled against him and provide evidence to prove why he /she should not be arrested and detained. Likewise, the respondent has an opportunity to file a counter affidavit and present his /her evidence to justify the mode of execution he has chosen. In short, before issuing any further order the Court will have opportunity to hear from the judgment debtor's director served with the summons to show cause. In my considered opinion the concerns/issues raised by Mr. Anthony in the point of preliminary objection cannot be determined in a preliminary stage. Also, it is noteworthy that in this application Mr. Anthony has already filed an affidavit deponed by Mr. John Kyenkungu, in which he is challenging the mode of execution chosen by the judgment debtor. However, surprisingly Mr. Anthony filed the point of preliminary objection the subject of this ruling.

In addition to the above, with due respect to Mr. Anthony the assertions he made in his submission were not in line with the principle that was laid down in the case of **Yusufu Manji** ( Supra). I do not need to be repetitive, suffice it to say, the procedure for moving the Court to lift the Corporate veil asserted by Mr. Anthony is not supported by the principle laid down in the case of **Yusufu Manji** (supra).

In the upshot, it is the finding of this Court that the point of preliminary objection lacks merit. The same is hereby dismissed. Costs will be in course.

Dated this 21<sup>st</sup> day of October 2022



A handwritten signature in blue ink, appearing to be "B.K. Phillip", written over a horizontal line.

**B.K.PHILLIP**

**JUDGE.**