IN HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CIVIL REVISION NO. 6 OF 2021
(Arising From the order of the Court of the Resident Magistrate fir Dar es Salaam at Kisutu in Execution No. 99 of 2020)

G.M. DEWJI & COMPANY LIMITED.....APPLICANT
VERSUS
AYAN ABDULLAH AHMED.....1ST RESPONDENT
PAUL BEDA MUTAGAHYWA.....2ND RESPONDENT

RULING

Date Of Last Order: 18/10/2021
Date of Ruling: 30/11/2021

MASABO, J.:-

By a chamber summons filed under section 79(1) of the Civil Procedure Code Cap 33 RE 2019, the applicant has moved this court to call and revise the order of the Court of the Resident Magistrate for Dar es Salaam at Kisutu dated 21st January 2021 on two grounds: **First**, the order for arrest and detention of the applicant's directors namely Shabuir Abker Dewji and Murtaza Akber Dewji was fraudulently obtained by the 1st respondent out of misrepresentation and false statements and in total disregard of the decisions of the same court and procedures applicable in

applications for detention of judgment debtor. And, **second**, the court ignored the fact that a larger [art of the decretal sum has been paid to the decree holder.

The application is supported by an affidavit deponed by Charles Tibetebuka, who is identified as the principal officer of the applicant. The abbreviated facts gathered from this affidavit and its supporting documents are that, sometimes in 2016, the 1st respondent instituted a suit against the applicant and the 2nd respondent suing them for breach of a loan agreement and demanding from them payment of Tshs 83,486,324/= and general damages at a tune of Tshs 50,000,000/= among others. The suit was disposed of amicably following the filing of a deed of settlement from which it was decreed that the applicant pay the 1st respondent a sum of Tshs 83,486,324/= as outstanding loan balance and Tshs 1,000,000/= as costs of the suit. The settlement decree was to be realized through instalments. Admittedly, having

paid the initial installments the applicant defaulted the subsequent installments. This prompted the applicant to move the execution court to issue a warrant of arrest and detention of the directors of the company who are Shabir Akber Dewji and Murtaza Akber Dewji. The application ended futile in 5th February 2019.

Similarly undisputed is the fact that as of 12th October 2020, the 1st responded had not fully realised the fruits of his decree. He went back to the court through Execution No. 99 of 2020 with similar prayers for arrest and detention of Shabir Akber Dewji and Murtaza Akber Dewji. This time, things worked perfectly in his favour. The applicant defaulted appearance and matter proceeded ex parte against him. And, at the end, the prayers were granted. On 14/1/2021, Shabir Akber Dewji was arrested and brough before court to show cause why he should not be detained. Having paid a certain sum of money, he was released and ordered to settle the

decretal sum in 3 months. The application, is therefore, brought to challenge the order for arrest.

Submitting in support of the application, the applicant narrated the factual background of the application and proceeded to submit that, the proceedings of Execution No. 99 of 2020 was invalid as it was preceded by a similar application in which the 1st Respondent was ordered to look for an alternative mode of execution. Thus, it was not open for him to file a fresh application with similar prayers. In the alternative, he argued that, the applicant has a lot of properties thus there is no reason to resort to the detention of the directors.

Moreover, it was argued that the order for arrest was fault as it was made prior to lifting the veil of incorporation which is a mandatory procedure where the arrest and detention involves directors of the judgment debtor. The case of **Transport**

Equipment Limited and Another v Devram Valambhia Civil Appeal No, 44 of 1994, CAT (unreported) and **Mukasa v Tropical Investment Ltd & Others** (2011) EA 313 were cited in support of this point.

In reply, Mr. Boniphace Byamungu, learned counsel for the 1st Respondent submitted that there is nothing to fault the lower court as the procedure used was correct. Upon the application being filed the applicant was served both physically and through a process server but he defaulted appearance hence relinquished his right to be heard. He then proceeded that, the order for arrest of Shabir Akber Dewji and Murtaza Akber Dewji are well grounded as the two are directors of the company. He argued further that, the cited cases are distinguishable as the law does not prohibit the arrest of directors. The directors may be arrested and detained in the execution of the decree if it alleged that they concealed or misappropriated the company's assets.

In rejoinder, the applicant complained that he was not served with the notice. Hence, not accorded the right to be heard. He also argued that the procedure provided for under arrest and detention of judgment debtors as provided for under the Civil Procedure Code, Cap 33 RE 2019 were offended.

Section 79 of the Civil Procedure Code under which the present application is filed states thus:

> 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; or
> (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit.

The applicant's contention as depicted in the affidavit and the submission which I have keenly considered, falls under section 79(c). His major grievance is that the court acted with material irregularity by ordering the arrest and detention of the applicant in satisfaction of the decree against the company. The alleged irregularity is premised on three limbs: **One**, the procedure for arrest and detention of judgment debtors was not followed**; two,** the applicant was adjudged unheard and **three,** the veil of incorporation was not lifted prior to ordering the arrest. The applicant has also indirectly lamented that that the court erred to entertain the matter as it had already been entertained by the same court.

I outright reject this argument. Much as it is true that prior to the impugned application, the applicant filed a similar application which ended futile, the previous application, ie Execution Application No. 251 of 2016 was not a bar to subsequent similar application. The ruling by Mhina SRM, shows that clearly that the prayer for arrest and detention of the two directors in Execution Application No. 251 of 2016 was disallowed as the as it did not meet the requisite criteria. And, subsequently, the decree holder was granted leave to refile the same. The complaint is therefore with no merit.

Besides, even if the court did not expressly grant leave for the applicant to refile the application, he could still have refiled the same. As the fruits of his decree had not been realized, it was certainly open for the decree holder to file a fresh application for execution be it by way of arrest and detention of the directors of the decree debtor company or any other mode of execution which in his view appeared appropriate and tenable. I may also add here

that, since the main reason for rejection of the prayers for arrest and detention in Execution Application No. 251 of 2016 was that it did not satisfy the conditions for lifting of the veil of incorporation which is prerequisite condition for enforcement of court decree gainst directors of the judgment debtor company be it by arrest and detention or any other mode of execution, the room was open for the decree holder to mend things and come to the court for the same order.

Reverting to the merits of the application, since Execution Application No. 251 of 2016 failed because the decree holder had not satisfied the prerequisite conditions for lifting of veil of incorporation, I will take the liberty to start with the second complaint. In this complaint, the applicant has lamented that, the veil of incorporation was not lifted prior to ordering the arrest.

The law regulating enforcement of court decrees against companies and company directors is well settled. As correctly held by Mhina SRM in Execution Application No. 251 of 2016, it is a settled law in our jurisdiction and other jurisdiction that, a registered company has a legal personality distinct from that of its subscribers and directors. Drawn from the landmark Salmond's case (**Salmon v Salmon** [1987] AC 22) which has been cited with approval in many decisions of the apex court of our land and in particular, the case of **Yusufu Manji v Edward Masanja and Abdallah Juma** [2006] TLR 127 and **Transport Equipment Limited and Another v Devram Valambhia** Civil Appeal No, 44 of 1994, CAT (unreported), the *Salmon's principle* has become part of our law. A decree against a company would not be executed against the directors or its subscribers save on special and exceptional circumstances and one of such circumstances is where the company has no attachable assets or sufficient funds in its bank account to satisfy the decree.

The record demonstrates that, just as in Execution Application No. 251 of 2016, in Execution No. 99 of 2020, the decree holder merely asserted that he could not trace the assets of the company without rendering any proof as to how he unfruitfully traced the assets of the company. He similarly rendered no materials as how he established that the two were directors of the judgment debtor. Needless to say, that, it was expected that in the subsequent application, the 1st Respondent would have, at the very least, rendered proof of these two items. To the contrary, he miserably failed as he made no attempt to satisfy any of these two crucial requirements. His affidavit filed in court on 3rd December 2020 in support of the application is self-explanatory. In paragraph 6 of this affidavit, the 1st respondent casually stated that, the "*.....the judgment debtors has hidden all his belongings including movable properties and hence it is difficult to trace them in order to attach and sell*". Even when his counsel, Mr. Dismass Raphael, appeared

in court on 16/12/2020 he made no attempt whatsoever to show that the conditions for lifting of veil of existed. All he submitted was that the judgment debtor has been notified of the application through substituted service by way of publication in Mwananchi Newspaper and that they have defaulted appearance. He thereafter proceeded to pray that the order of arrest be issued and based on this, the court proceeded to grant the prayer and order the arrest of Shabir Akber Dewji and Murtaza Akber Dewji.

This was certainly a lucid misdirection because not only was the veil not lifted but nowhere in the proceedings did the 1st respondent prove that the two are directors of the decree debtor. The applicant's complaint is meritorious. As this irregularity is fatal and sufficiently warrants the exercise of the revisional powers of this court to correct the irregularity, I see no need to proceed to the first complaint.

The upshot is, the application is allowed. The proceedings of Execution No. 99 of 2020 are quashed and set aside.

DATED at DAR ES SALAAM this 30th November 2021

X _____

Signed by: J.L.MASABO

J.L. MASABO

JUDGE