

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY AT ARUSHA

APPLICATION FOR EXECUTION NO.7 OF 2022

(Based upon the judgment in the Chief Magistrate's Court in Nairobi-Mlimani Commercial Courts in the Republic of Kenya in Civil Suit No.5969 of 2017 dated 21st March 2018 which has been duly registered in the High Court of Tanzania pursuant to Part II of the Reciprocal Enforcement of Foreign Judgment Act Cap 8 R.E 2002)

IAF (EAST AFRICA LIMITED)APPLICANT /JUDGMENT CREDITOR

Vs

SAHARA MEDIA GROUP LIMITED.....RESPONDENT /JUDGMENT DEBTOR.

RULING

Date of last order:21-7-2022

Date of Ruling:19-8-2022

B.K.PHILLIP,J

This is an application for execution of the judgment of the Chief Magistrate's Court in Nairobi-Mlimani Commercial Courts in the Republic of Kenya in Civil Suit No.5969 of 2017 dated 21st March 2018, which was registered by this Court (Hon. Gwae, J) as a decree of this Court on 7th October 2021.

The application has been filed by the applicant's Advocate, the learned Advocate Moses Mahuna and indicates that the mode in which the assistance of the Court is required is by arrest and detention of Director of Judgment debtor , Mr. Anthony M.Diallo, as a civil prisoner.

Upon being served with the application, Mr. Boniphace Sariro, the Advocate for the Judgment Debtor raised a point of preliminary objection couched as follows;

- *That , the Application contravenes the principle of lifting the Corporate Veil.*

The application was heard viva voce. Mr. Sariro's argument was straight forward, that is, the judgment debtor in this case is a Company which has legal personality and distinct from its Directors and shareholders. He cited the famous case of **Salomon Vs Salomon and Company Ltd (1897) AC**, in which it was held that a Company is separate and distinct from its Directors and Shareholders, to cement his argument. He went on submitting that in this application the applicant moves this Court to execute the Court decree against Mr. Anthony Diallo, the Director of the judgment debtor ,who was not a party to the case. He contended that if a person wants to execute a Court decree against a Director/shareholder of a particular Company he/ she has to first apply and obtain a Court order for lifting the Corporate veil and not otherwise. Thus this application is improper and has been made pre - maturely because the applicant prays for an order for arrest and detention of the director of the respondent Company as a civil prisoner without first obtaining a Court order for lifting the Corporate veil of the judgment debtor. To cement his arguments he cited the case of **Sac Profit Emerge Limited Vs Contract International Limited, Commercial Case No. 30 of 2012**, (unreported) and implored this Court to strike out this application with costs.

In rebuttal, Mr. Mahuna argued that the arguments raised by Mr. Sariro are misconceived. This application has been made against the respondent's Company, the judgment debtor, not its director or shareholders. It is in the mode of assistance requested from the Court where the name of the Respondent's director has been mentioned. Mr. Mahuna went on submitting that the respondent's director has not yet been served with the notice to show cause why execution should not proceed as prayed by the applicant. After being served with the notice to show cause, that is when the respondent's director will appear in Court. He will be accorded opportunity to be heard why he should not be arrested and imprisoned as civil prisoner as prayed by the applicant. On the other hand the applicant will have opportunity to submit before the Court on the reasons for moving the Court to lift the judgment debtor's Corporate veil. Mr. Mahuna contended that it is at that moment when the issue concerning the lifting the Corporate veil will be dealt with by the Court.

It was Mr. Mahuna's contention that this point of preliminary objection has been raised prematurely and it is not a pure point of law because its determination requires evidence. He went on arguing that this Court will need to investigate if Mr. Anthony Diallo is the Director of the Respondent Company/ Judgment debtor and whether he is avoiding to pay the decretal sum. He maintained that the above issues cannot be discussed and determined at this preliminary stage. He cited the case of **Soitsambu Village Council Vs Tanzania Breweries Limited and Another**, Civil Appeal No.105 of 2011 (unreported), to bolster his arguments. He distinguished the case of **Sac** (supra) from this application

on the ground that the issue which the Court was called upon to determine in the that case was , whether Mr. Abba Robert Mwakitwange was supposed to be imprisoned as the civil prisoner for failure to pay the debt of his company, Contract International Limited and the same was heard on merit. Mr. Mwakitwange was accorded the right to be heard. In addition, Mr. Mahuna submitted that the case of **Sac** (supra) was decided in 2014. In the case of **Princess Shabaha Company Ltd Vs NIC Bank Tanzania Limited, Commercial Case No.94 of 2015**, (unreported) , which was decided in 2017, this Court made a decision different from the holding it made in the case of **Sac** (supra).It ordered the arrest and detention of the director of NIC Bank Limited. Also, he cited 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**, which has a similar holding to the case of **Princess Shabaha** (supra). Mr. Mahuna contended that according to the decision of this Court in the case cited herein above, the principle established in the case of **Salomon** (supra) that is, a Company is distinct and separate from its Directors is not absolute. In some special circumstances corporate veil can be uplifted and Director of a company can be held liable for the debts of his/her Company. He was of the view that by comparing the decisions of this Court in the case of **Sac** (supra), **Mussa Shaibu Msangi** (supra) and **Princess Shahaba**, (supra) it appears that there are two conflicting positions on the manner this Court can be moved to uplift Company's Corporate veil. He was of the view that under the circumstances, this Court is bound to follow the position in the most recent decision. To cement his

arguments he cited the case of **Arcopar (O.M) S.A Vs Harbert Marwa and Family and three others, Civil Application No.94 of 2013.** (unreported) and **Yusufu Manji Vs Edward Masanja and another, Civil appeal No. 78 of 2002 , (2006) T.L.R 127.**

Mr. Mahuna maintained that this application is proper before this Court .Mr. Sariro's contention is not supported by the case law he has cited because in the case of **Sac** (supra) issue concerning lifting of the Corporate veil was not decided in the preliminary stage. He added that under normal circumstances, a decree holder cannot file an application to lift the Corporate veil because the same will be improper and baseless since there will be no any decision of the Court to rely on. He prayed for the dismissal of the point of preliminary objection with costs.

In rejoinder, Mr. Sariro reiterated his submission in chief and submitted that Mr. Mahuna has not disputed the principle pertaining to lifting of the Corporate veil. Relying on the decision in the case of **Sac** (supra), Mr. Sariro insisted that a Court decree has to be executed against the parties to a case. In this case Mr. Anthony Diallo was not a party to the case whose decree is sought to be executed .He insisted that the decision of this Court in the case of **Sac** (supra) is a good law and persuasive to this Court since it has not been overturned by the Court of Appeal.

With regard to the cases cited by Mr. Mahuna, Mr. Sairo alleged that they are distinguishable from the facts of this case. Starting with the case of **Soitsambu Village Council** (supra), he contended that the same is distinguishable because the point of preliminary objection on procedure

on uplifting the Corporate veil is a pure point of law. It does not require evidence to be proved. He went on submitting that the case of **Arcopar (O.M)** is not applicable in this case because Mr. Mahuna failed to point out which case is in conflict with the decision of this Court in the case of **Sac** (supra). With regard to the case of **Princess Shabaha**, (supra) he argued that the same is not applicable in this application since it was for extension of time and the Court did not make any holding that one can apply for arrest of the director of a Company before seeking for leave to uplift the corporate veil.

Having dispassionately analyzed the competing arguments made by the learned advocates, I have noted that the main issue on controversy, is how should a party move the Court to uplift the corporate veil when applying for execution of decree against a Company and wishes the Director of the Company to be held responsible to settle the decretal sum. Now, in resolving the above mentioned controversy, I think a good starting point is determination of the contention made by Mr. Mahuna that so far there are two conflicting positions on the way of moving the Court to uplift the Corporate veil and relying on the case of **Arcopar (O.M)** supra, he urged this Court to rely on the most recent decisions of this Court, that is, the case of **Mussa Shaibu Msangi** (supra) and **Princess Shabaha** (supra), which were made after the decision of this Court in the case of **Sac** (Supra) made in 2014.

Upon reading all the cases referred to me by the learned advocates, I have noted that there are no conflicting or different positions on the manner of

moving the Court to uplift the Corporate veil as contended by Mr. Mahuna as I will elaborate soon hereunder.

In the case of **Sac** (supra) which appears to be the oldest among the cases cited before me, this Court (Hon, Makaramba, J as he then was) made a determination of an application for execution which is similar to the application in hand. The Decree holder, filed an application for execution of a decree against the judgment debtor, Contract International Limited, in which it indicated that a Court order be issued against Mr. Abba Robert Mwakitwange, the director of the Judgment debtor. Summons to show cause why he should not be arrested and imprisoned as a civil prisoner for failing to settle the decretal sum was issued. In response to the application Mr. Mwakitwange filed an affidavit in which he deposed that he was not a party to that case, he was a mere director of the judgment debtor. Thus he claimed that he was not liable to pay the decretal sum because the judgment was a legal entity separate and distinct from him as the director. Let me pause here. What is relevant and important in the ruling of the Court in that case in relation to the application in hand is that this Court acknowledged the fact that it has powers to issue an order for uplifting the Corporate veil, but it pointed out that the advocate for the decree holder did not file any pleading in Court to establish the justification for the uplifting the judgment debtor's Corporate veil. He just made his arguments in his written submission which in law does not constitute evidence and is not part of pleadings. It is noteworthy that in that case the advocate for the decree holder did not

file any Counter affidavit. For clarity and ease of reference let me reproduce the relevant part of the Ruling of the Court hereunder;

" In any event , the Company in which Mr. Mwakitwange is its Director , in order for this Court to pierce or lift its veil and hold its Director personally liable for its debt, the applicant has the burden of establishing the basis for disregarding the fictional corporate veil by adducing such facts as would bring the case within the judicially accepted circumstances.

As Mr. Mwakitwange , rightly submitted the applicant /Decree holder did not plead the issue of uplifting of the Corporate veil of the Company. Mr. Kitare merely raised it in his written submissions, this pass for mere statements from the bar, submissions not being evidence .As such circumstances, this Court has not been moved so as to be able to exercise its powers to pierce the corporate veil of the Company and hold its Director , Mr.Abba Robert Mwakitwange Personally liable for the acts of the Company

(Emphasis is added)

From the above quoted part of the ruling of the Court, to my understanding , what made the Court declining from considering the issue on lifting the Corporate veil is that the advocate for the decree holder did not present any pleadings before the Court to move it to determine whether or not there was a need/justification to uplift the Corporate veil. As I have alluded herein above the Advocate for the decree holder did not file a Counter affidavit. But, most importantly, what is relevant in relation to the application in hand is that the Court did not make any holding to the effect that the decree holder was required to make an application for lifting the Corporate veil before filing the application for execution as contended by Mr. Sariro.If that was the right procedure , I believe the

court would have said it clearly. The Court's concern was that the advocate for the decree holder made his arguments in his submission which is not part of evidence. In other words, he was required to file documents in Court on which he would rely on in his submission. The pertinent question here is; how?. The evidence that was required by the Court could be brought in Court by filing a counter affidavit since Mr. Mwakitwange filed an affidavit to challenge the application and he relied on the contents of that affidavit to move the Court to dismiss the application.

In the case of **Mussa Shaibu Msangi**, (supra) the applicant filed an application for execution of the Court decree against Summry High Class and another, (legal entities) and prayed for an order for arrest and detention of director of the judgment debtor, Mr. Hamoud Mohammed Sumry as a Civil Prisoner for failure to pay the decretal sum, in a similar manner as it was done in the case of **Sac** (supra). Upon issuance of summons to show cause, the advocate for Mr. Hamoud Summry, filed an affidavit to contest the application on the reason that Mr. Hamoud Summry was not a party to the case but a mere Director of the Judgment Debtor. The advocate for the decree holder filed a Counter Affidavit in which the deponent, (decree holder) stated the reasons for moving the Court to uplift the Corporate veil.

Similarly, in the case of **Princess of Shabaha Company** (supra), the decree holder filed the application for execution in a similar way as it was done in the case of **Mussa shaibu Msangi** (supra). What I am trying to demonstrate here is that the manner of applying for execution of Court Decree in which the Court is moved to issue an order for arrest and

detention of a judgment debtor's director, in case the judgment debtor is legal entity is by filing the application form for execution of the Court decree as provided in Order XXI Rule 11 of the Civil Procedure Code ("CPC") and indicate in the form the mode in which the assistance of the Court is required, that is, arrest and detention of the Director of the judgment debtor as a civil prisoner. Thereafter, summons to show cause is issued where by pleadings for and against the application will be filed in which each party will state his /her position.

I believe my findings herein above has answered the arguments raised by the advocates. However, I wish to add that, there is no law which requires that before filing an application for execution which involves requesting the Court to uplift the corporate veil, the applicant has to first make a specific application moving the Court to uplift the corporate veil as argued by Mr, Sariro. And Mr. Sariro did not supply this Court with any case law to support his contention. As I have alluded earlier in this Ruling the case of **Sac** (supra) does not support his contention. The most I can say is that Mr. Sariro misconstrued the Ruling in the case of **Sac** (supra)

Moreover, I am in agreement with Mr. Mahuna that the procedure proposed by Mr. Sariro, legally, it 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.

As correctly submitted by Mr.Mahuna, the point of preliminary objection is misconceived. The arguments raised by Mr. Sariro are supposed to be dealt with during the hearing of this application on merit. During the hearing of the application, Mr. Sariro will have opportunity to address the Court on why it should not lift the Corporate veil whereas Mr. Mahuna will also address the Court in support of his application which basically calls upon this Court to lift the Corporate veil since he has requested for an order for arrest and detention of the director of the judgment debtor. Thus, the case **Soitsambu Village Council** (supra) is relevant because establishing the justification for lifting the Corporate veil or otherwise needs evidence. In the upshot, the point of preliminary objection is hereby dismissed for lack of merit. Costs will be in course. It is so ordered.

Dated this 19th day of August 2022



A handwritten signature in blue ink, appearing to be 'B.K. Phillip', written over a circular stamp.

B.K.PHILLIP

JUDGE.