

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

MISC. CIVIL APPLICATION NO. 230 OF 2020
(Arising from Civil Case No. 4 of 2015)

**AYDIN TANZ CRANE CO. LIMITED...APPLICANT/D. HOLDER
VERSUS
GAGAJA CONTRACTORS LIMITED...RESPONDENT/D.DEBTOR**

RULING

Lat Order: 23/11/2021
Date of Ruling: 8/2/2022

MASABO, J.:-

The applicant has moved this court under section 44(1) and Order XXI rule 28 of the Civil Procedure Code, Cap 33 RE 2019. Her main prayer is for lifting the cooperate veil and order the arrest of Mr. Mohamed J. Kilumbi, who is identified as the managing director of the respondent company in satisfaction of a sum of EURO 453,709 decreed in her favour by this court in Civil Case No. 4 of 2015. In an affidavit deponed by the applicant's counsel John J. Lingopola, it is deponed that upon the decree being extracted in 2018, the applicant successfully applied for its execution but as of todote it has not been fully executed as the assets earmarked for attachment and sale, that is Caterpillar Grader with Registration number T433 BLP and Dynapac Road Roller with registration number T393 CAJ had already been sold out to third parties and the last asset, that is, Dynapac Roller with Registration Number T. 444, is untraceable although the record shows it is

still owned by the decree debtor. The applicant is of the strong feeling that the transfer of the two machines and the disappearance of the third machine is tactically deployed to prevent the execution of the decree as the two machines were sold on the verge of the attaining the order for attachment of the assets.

Hearing proceeded ex parte the respondent defaulted appearance. Submitting in support of the application Mr. Mbilingi, advocate for the applicant reiterated the averments in the counter affidavit and proceeded that there are three reasons why the decree debtor's veil of incorporation should be lifted and her director, one Mohamed J. Kilumbi be arrested and detained as civil prisoner. The three reasons as extracted from the submission are that:

- 1. the judgment debtor has failed to satisfy the decree of this court*
- 2. we could not realise the order for attachment as the assets of the judgment debtor are nowhere to be traced and some have been sold*
- 3. the judgment debtor has always committed fraud as he tempered with the assets of the company".*

In fortification of his point, Mr. Mbilingi cited the ruling of this court in ***Fusuni Investment Co. Ltd v FARB Associates Limited and 2 others***, Civil application No. 221 of 2020, in which an order for arrest and detention of the judgment debtor was issued.

I have carefully considered the application, its supporting affidavit and the submission made by the applicant. It is pertinent at this juncture to point

out that the application is premised on the principle prominently known as **Salmon's principle** which was developed by Lord Macnaghten in **Salmon v Salmon** (1897) A.C.22.. In this case, His Lordship held thus:

"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".

This principle has been cited with approval in numerous decisions of this court and the Court of Appeal such that it has now become a trite law in our jurisdiction. These decisions 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 **Zebedayo Mkodya v Best Microfinance Solutions Limited** Commercial Case No. 95 of 2016 (HC Commercial Division). In **Yusuf Manji Versus Edward Masanja and Abdallah Juma** (supra), having cited the above principle with approval, the Court of Appeal proceeded to hold held that:

In our view, and as correctly held by the learned judge, in certain special and exceptional circumstances, the court may go beyond the purview of this principle by what was described in Salomon (supra) lifting the veil.

The circumstances warranting the exception/or permitting the lifting of veil as elucidated in the decisions above cited, can be summarised as follows:

- (i) where after completion of the liquidation process there of the company, there is nothing left to cover unsecured creditors or were, as in the instant case;
- (ii) where there is a judgment debtor and the company has no assets;
- (iii) where it is established that the veil of incorporation is used to evade legal or contractual obligation or
- (iv) 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.

Therefore, in the instant application, the crucial issue to be considered is whether such circumstances are existent. A similarly crucial point for deliberation and consideration is the relationship between the decree debtor company and the person against whom the order for arrest and detention is sought.

Starting with the second question, as the veil of incorporation can only be lifted against a member or director of the company, the relationship between the decree debtor company and the person against whom the veil of incorporations is sought to be lifted against must be sufficiently established. In the instant case, the prayer in the chamber summons is for lifting of the corporate veil against one Mr. Mohamed J. Kilumbi, who is described as director of the decree debtor company. One would have expected the applicant to provide the court with cogent evidence as regards the relationship between the said Mohamed J. Kilumbi and the decree holder

company but none was rendered. In my perusal of the application and the supporting documents, I have observed that, save for paragraph 7 of the affidavit which reiterates the prayer for arrest and detention of the said Mr. Mohamed J. Kilumbi, there is no concrete evidence for this court to form an opinion let alone to draw a conclusion that, the said Mohamed J. Kilumbi, is indeed the managing director of the decree debtor company.

Such evidence is fundamental and cannot be easily overlooked. Needless to say, such evidence as an official record from respondent's offices or from the Business Registration and Licensing Authority (BRELA) showing the relationship between the said Mohamed J. Kilumbi and the respondent was very crucial. Its absence has a fatal effect to the application. It would certainly be a lucid misdirection for this court to proceed to draw a conclusion based on bare assertions by the applicant's counsel. Under the premise, I hasten to hold that, the applicant has miserably failed to substantiate the existence of a relationship which would make the said Mohamed J. Kilumbi, who was for unknown reason not made a party to these proceedings, responsible for the deeds of the decree debtor thereby justifying the lifting of veil and granting of orders for arrest and detention of Mohamed J. Kilumbi.

Regarding the 2nd question, the applicant has just mentioned that she identified three assets for attachment and sale but found out that, two of these three items were sold before the attachment and the remaining asset was not traceable and the efforts to locate other assets of the company has ended futile. In my strong view, much as this fall under the exception above

stated, the materials on record do not sufficiently justify the lifting of veil as, apart from a letter showing the attempt made to allocate the three assets above mention, there is nothing on record to show that, the decree debtor has no other assets capable of being attached and/sold for execution of the decree. Hence, a rebuttable assumption that there are still other assets which can be attached and sold to realise the decretal sum. I may also add here that, under the circumstances, even if the relationship between the decree debtor and Mohamed J. Kilumbi had been established, the application would still be hesitant to lift the veil and issue the warrant for arrestee and detention of Mohamed J. Kilumbi.

In the foregoing, the application fails in entirety and is dismissed for want of merit. As the application proceeded *ex parte*, there are no orders for costs.

DATED at DAR ES SALAAM this 8th day of February 2022.

X



Signed by: J.L.MASABO

J.L. MASABO

JUDGE

