

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MBEYA)
AT MBEYA**

MISCELLANEOUS CIVIL APPLICATION NO. 08 OF 2019

(Originating from Civil Case No. 55 of 2016 at Mbeya Resident Magistrates'
Court.)

MBEYA CITY COUNCIL.....APPLICANT

VERSUS

JANETH M. MASSABURI & 10 OTHERS.....RESPONDENTS

RULING

Date of Last Order: 02/07/2020

Date of Ruling : 12/08/2020

MONGELLA, J.

In this application, the applicant is seeking for orders from this Court to lift the veil of incorporation against the respondent's assets. The application is made under section 95 of the Civil Procedure Code, Cap 33 R.E. 2002 and section 2(1) of the Judicature and Application of Laws Act, Cap 358 R.E. 2002. The application was argued by written submissions.

Representing the applicant, Ms. Triphonia Kisiga, learned City Solicitor started by providing the series of events that led to the application at hand. She stated that the applicant instituted Civil Case No. 55 of 2016 in the RMs court at Mbeya against the 11th respondent, Didas Agency Tanzania Ltd. The said case resulted from breach of contractual

agreement between the applicant and the 11th respondent for collection of billboards and advertisement fees for financial year 2010/2011. In the said case the judgment and decree was delivered in favour of the applicant.

Following the decision of the RMs court, the applicant made an application to execute the court decree whereby he obtained an order for attachment and sale, thereafter warrant of attachment of Plot No. 49 Block T Migombani street in Ilala, Dar es Salaam City. However, the 1st respondent objected the attachment and sale of the property on the ground that the same was a matrimonial property of Didas John Massaburi and Janeth Maurice Massaburi. Then the applicant conducted an official search at the Business Registrations and Licensing Agency (BRELA) regarding the assets which the company owns and realised that the company owns nothing. Thus the efforts to locate the company's assets proved futile.

Ms. Kisiga was thus of the view that the respondents are intentionally hiding and concealing the assets of the company rendering the applicant to remain with an empty decree to date. She said that this situation has led the applicant to file this application in this Court so as the veil of incorporation of the 11th respondent can be lifted in order to hold the other respondents personally liable to enable the applicant to execute her decree. She contended further that the respondents are not cooperating with the applicant to show which assets are owned by the company to enable the applicant execute his decree. She was of the view that under normal circumstances the company cannot own nothing,

but it is only that the respondents are hiding and concealing the assets of the company. She referred the court to the case of **Yusufu Manji v. Edward Masanja & Abdallah Juma** [2006] TLR 128 in which the Court of Appeal held:

*“While a company is at law a different person altogether from the subscribers, in certain special and exceptional circumstances, the court may go beyond the purview of this principle by what was described in **Solomon v. Solomon** as lifting the veil...*

Having regard to the relationship of the company, at the time, with the appellant as the Managing director, the alleged concealment of the assets of the company by the appellant, which was not denied by way of counter affidavit, this was a proper case in which to apply the principle of lifting the veil of incorporation.”

She concluded that, in line with the above cited case and for interest of justice, the veil of incorporation of the 11th respondent be lifted so that the rest of the respondents could be held personally liable for satisfying the decree passed against the company.

On his part, Mr. Deogratius Mwarabu, learned advocate for the respondents opposed the application. He contended that the house at plot no. 49 Block T Migombani Ilala Dar es Salaam which the applicant sought to attach and sale for execution of the decree has never been a company property in any way. He distinguished the case of **Yusufu Manji** (supra) referred to by Ms. Kisiga on the argument that in this case the Managing director of the company was held personally responsible for using efforts expressly alleged to hide the company assets, the allegations



which were not denied by the respondent. He quoted part of the decision of the Court in this case whereby it was stated:

"It was expressly alleged in the affidavit sworn by the 1st respondent, Edward Masanja, in support of the Employment Cause No. 126 of 1999 that the appellant Yusufu Manji was to be held liable because there was effort to conceal the assets and identity of the company. This allegation was not specifically denied by the appellant by way of a counter-affidavit."

He argued that the scenario in the case of **Yusufu Manji** (supra) is totally different from the one in the case at hand. He explained the rationale behind lifting of corporate veil to the effect that the same was aimed at making sure that the decree holder is not left with an empty judgment due to unscrupulous behaviors of the company through its directors who run the day to day activities of the company and who are likely to act dishonestly and commit frauds or avoid legal obligations. He was however, of the view that the deponent has to expressly allege these facts and prove them.

Mr. Mwarabu also challenged the applicant's reliance on the case of **Solomon v. Solomon & Co. Ltd.** (1897) A.C. 22 arguing that it was not in favour of the applicant's application. He contended that in the said case, the appellant was alleged to be involved in concealing the identity and assets of the company. The House of Lords thus reversed the decision holding that the company being a legal person, its members including Solomon were not liable for its debts. He specifically quoted part of the decision which states:



"The company is at law a different person altogether from 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."

Mr. Mwarabu argued further that the principle set out in **Solomon v. Solomon** above has its exceptions under which the court may be invited to lift the corporate veil. He said that the exceptions as provided in that case are:

"Where the person/s controlling a company have acted fraudulently, the company is considered as "sham" or where a company is used to avoid an existing legal duty, before lifting the corporate veil."

From the above decision, he argued that before lifting the corporate veil, the court has to satisfy itself on the fraudulent acts by the respondents. He was of the view that the respondents can only be liable to the extent and manner precisely expressed and provided by the Act and upon proof by the applicant on the manner in which the respondent's acts can be considered fraudulent or considered as sham purposely aimed at concealing either the identity or assets of the company thereat. He added that it is the applicant's obligation to prove the claims contained in the affidavit as deponed in the affidavit in support of the application. To buttress his point, he referred to a decision of this Court in **Harel Mallac Tanzania Limited v. Junaco (T) Limited & Justine Lambert**, Misc.



Commercial Application No. 144 of 2016 (unreported) in which it was held:

"The claim contained in the affidavit as deponed in support of the application is nothing but mere assertion. Since it is a well-known court's position that mere assertion cannot be acted upon unless the contrary is shown, which in this case it has not, the claim therefore remain an unsupported assertion."

Basing on the authorities he cited as seen above he contended that the applicant's application lacks merit for failure to prove any imputed fraud on the part of the directors or shareholders to warrant this Court to lift the corporate veil. He prayed for the application to be dismissed with costs.

In rejoinder, Ms. Kisiga contended that the respondents are only lamenting that the property that the applicant wanted to attach and sale is a matrimonial property, but still do not disclose which are the assets of the company. She challenged Mr. Mwarabu's argument that the applicant had not proved any fraud or improper design on the part of the respondents. On this, she contended that this is a new issue not brought up by the applicant in her submission. She was of the view that the case of **Harel Mallac Tanzania Limited** (supra) referred to by Mr. Mwarabu is irrelevant to the application at hand because the applicant's argument is not based on fraud on the part of the respondents, but rather on the argument that the respondents are hiding and concealing the company's assets. She reiterated the applicant's prayer in this application for the 11th respondent's corporate veil to be lifted so that the rest of the respondents can be held personally liable in satisfying the decree passed in favour of the applicant.



After considering both counsels' arguments, I find the issue calling for determination is whether the veil of incorporation for 11th respondent can be lifted. I agree with both counsels that the rationale of lifting the corporate veil is to ensure that the decree holder is not left with an empty judgment due to unscrupulous behavior of the company directors who run the day to day activities of the company who are likely to act dishonestly and fraudulently or to avoid legal obligations. However, for a court to lift the corporate veil, certain conditions have to be considered. In the case of **Bank of India (Tanzania) Limited v. FomCom International Limited & 2 Others**, Commercial Case No. 19 of 2018 the court listed the considerations when it held:

"In lifting corporate veil, the court will consider among other things, where the person(s) controlling a company have acted fraudulently, the company is considered as "sham" or where a company is used to avoid an existing legal duty."

In **Multichoice Kenya Ltd. v. Maikam Ltd & Another**, Civil Case No. 492 of 2012 it was further held:

"...other instances include when a fraudulent and improper design by scheming directors or shareholders is imputed. In such exceptional cases, the law either goes behind the corporate personality to the individual members or regards the subsidiary and its holding company as one entity."

Considering the above position of the law, it follows thus that elements of fraud or improper design must be attributed to the directors of the company. This was also the line of argument of the respondents' counsel. In her rejoinder, Ms. Kisiga argued that this line of argument is



misconceived as what she argued is that the respondents are concealing the properties of the 11th respondent and not that there was fraud or improper design. With all due respect, I do not agree with her position. In my settled view, intentional concealment as claimed by the applicant amounts to fraud and therefore the applicant ought to have explained and prove the nature of such concealment. Unfortunately, this was not done and thus the claims by the applicant stand to be mere assertions.

The applicant was supposed to show the manner in which the respondents are concealing the assets of the company and to point out the properties belonging to the judgment debtor which are claimed to be concealed. In **Yusuf Manji** (supra) the Court of Appeal lifted the corporate veil following allegations of concealment of company assets by the director which was not denied in counter affidavit. I agree with Mr. Mwarabu that such admission necessitated no further proof of the acts of concealment, unlike in the case at hand.

Ms. Kisiga argued that the applicant searched at BRELA and found no assets of the 11th respondent being listed and that the respondents have not revealed the properties belonging to the 11th respondent to enable the applicant effect the execution. In my opinion, I find her argument misconceived as well. First, the assets of the company are not among the items that are required to be listed with BRELA, thus it was a futile exercise for the applicant to conduct the said search at BRELA. Second, Ms. Kisiga is endeavoring to charge the respondents with an obligation that is not theirs under the law. In her submission in chief as well as in rejoinder, she insisted that the respondents have not disclosed which assets belong to

the company. The judgement debtor has no obligation of disclosing his/her assets to be attached and sold in execution of a decree. It is the duty of the decree holder to identify the properties to be attached and sold for purposes of fulfilling the decree. (See: **Harel Mallac** (supra)).

From both counsels' submissions I gather that the applicant attached a house at Plot No. 49 Block T Migombani Street in Ilala, Dar es Salaam City. The 1st respondent successfully objected the attachment and sale of the property on the ground that the same was a matrimonial property of Didas John Massaburi and Janeth Maurice Massaburi. To this point, it appears that this is the only property identified by the applicant for execution of the decree. In my view, since the same was proved to be a matrimonial home in the objection proceedings, the same cannot be subject of attachment even if the corporate veil is lifted. Section 48 (e) of the Civil Procedure Code, Cap 33 R.E. 2019 categorically protects matrimonial homes from being attached and sold in execution of decrees. See also: **Ms. Sykes Insurance Consultants Co. Ltd. v. Sam Construction Co. Ltd.**, Civil Revision No. 08 of 2010 (CAT, unreported).

Having observed as above, it is my finding that the applicant has not substantiated his claim that the respondents are intentionally concealing the company assets in their own names. Consequently, the application lacks merit and is hereby dismissed.

Dated at Mbeya on this 12th day of August 2020




L. M. MONGELLA

JUDGE

Court: Ruling delivered in Mbeya in Chambers on this 12th day of August 2020 in the presence of Mr. Jibu, learned City Solicitor for the applicant and Mr. Timotheo Nichombe, learned counsel, holding brief for Mr. Deogratius Mwarabu, for the respondents.


L. M. MONGELLA
JUDGE