

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

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 467 OF 2022

BETWEEN

SHEIKH HASHIMU MBONDE.....APPLICANT

AND

TIP TOP CONNECTION COMPANY LIMITED.....1ST RESPONDENT

HAMIS SHABANI TALE TALE.....2ND RESPONDENT

**[Originating from the judgment and decree in Civil Case No. 185 of 2013
delivered on 16th February, 2016 before Shangwa, J.]**

RULING

6th & 21st November, 2023

CHUMA, J:

The genesis of this application is the execution of the decree in Civil Case No. 185 of 2013 in which this Court ordered the 1st respondent to pay the applicant TZS 200,000,000.00 and 50,000,000.000 being compensation for the loss arising from copyright infringement and general damages respectively.

After successfully suing the 1st respondent, the applicant was not paid the decreed amount and his efforts to search the whereabouts of the 1st respondent's properties for the purposes to satisfy the decree were not successfully. Subsequently, the applicant filed an application seeking to lift the corporate veil of the 1st respondent with intent to hold 2nd respondent

personally liable or otherwise arrest and detain him as civil prisoner. The application was placed for hearing before the Deputy Registrar to whom upon examination of the submissions granted it by directing the directors to disclose the 1st respondent's properties, failure of which they were ordered to pay TZS 250,000,000.00 or sell their properties.

With that outcome of the decision, the 2nd respondent as the Managing director of the 1st respondent was arrested and detained. However, a moment later after the arrest, the 2nd respondent paid TZS 35,000,000.00 being part of the ordered amount. Subsequent to that, it is apparent that the 2nd respondent was released on the ground that the order of the Deputy Registrar for arrest and detention was a nullity for want of jurisdiction. As a result, the applicant has preferred the instant application taken out under section 38(1), 42(c) (e), 44 (1) (c), 68 (e), 95 and Order XXI rules 9, 10 (2) (j) (iii), 28, 35 (1) (2), 36 and 39 (2), (b) (d) of the Civil Procedure Code, Cap. 33 R.E 2019. The applicant seeks the Court for the following orders:

- (i) This honorable Court be pleased to lift the corporate veil of incorporation of the judgment debtor and hold the 2nd respondent personally liable.
- (ii) This honorable Court be pleased to order for the arrest and detention of the 2nd respondent, the Director of the 1st respondent/judgment debtor.
- (iii) Costs of the application to be provided for.
- (iv) Any other order and relief as this honorable Court shall deem fit to grant.

The affidavit affirmed by the applicant in support of the application gives a recap account of facts which triggered the applicant to file this application. Central to the application is averred in paragraph 9 of the affidavit that the 2nd respondent being the director of the 1st respondent started to pay part of the decreed sum but with ill motive decided to turn around and refuse to satisfy the decree. That left the applicant with no other option other than filing the present application as there is no any trace of the 1st respondent's properties.

Resisting the application, the respondents filed a joint amended counter affidavit affirmed by Iddi Shabani Tale Tale, Principal officer of the 1st respondent. They contended that there was an agreement during the arrest of the 2nd respondent that the 1st respondent would pay TZS 50,000,000.00 in lieu of the decreed amount in the judgment. It was further replied that the payment of TZS 35,000,000.00 was aimed at settling TZS 50,000,000.00 not TZS 250,000,000.

When the application came for hearing on 6th November, 2023, Ms. Loveness Ngowi, learned counsel appeared for the applicant whereas Mr. Twarah Yusuph, learned counsel represented the respondents.

Ms. Loveness in her submission in chief she first prayed to adopt the affidavit to form part of her submission. After reiterating the prayers raised in the chamber summons, Ms. Loveness asked the Court to lift the corporate veil of the 1st respondent and hold the 2nd respondent personally liable on the basis that the efforts to trace the properties of the 1st respondent proved futile. Strengthening the point, the learned counsel cited the case of **Yusuph**

Manji v. Edward Masanja & another [2006] T.L.R 127 in which the Court of Appeal held that in the circumstances a court decree has not been paid and the company is indebted, the law allows, in exceptional circumstances, to lift the corporate veil and hold the director of a company liable.

Ms. Loveness submitted further that after lifting the corporate veil, the 2nd respondent being the director of the 1st respondent should be held liable to pay the outstanding debt failure of which he should be arrested and detained as civil prisoner.

As for Mr. Twarah, he began to respond by adopting the counter affidavit to be part of his submission. The learned counsel, while referring to paragraphs 8 and 9 of the affidavit, was adamant that the application is wrongly premised for the 1st respondent is defunct company and the 2nd respondent is neither the director nor shareholder of the 1st respondent. Regarding TZS 35,000,000.00, Mr. Twarah submitted that such amount was paid to the applicant on behalf of one Abdul Shaban Tale Tale the owner of the 1st respondent to set off the agreed amount of TZS 50,000,000.00 instead of TZS 250,000,000.00. He replied further that there was no evidence to justify the efforts taken to trace the whereabouts of the 1st respondent properties.

Alternatively, Mr. Twarah argued that even if the 2nd respondent is the director of the 1st respondent, the resultant order in respect of this application will affect or prejudice the respondents. He reinforced his proposition with the decision of the Court in **Princes Shabaha Co. Ltd v. NIC Bank TZ Limited**, Commercial Case No. 94 of 2015 in which the

application was granted upon failure of the judgment debtor to show cause as to why the execution should not proceed.

In brief rejoinder, Ms. Loveness was firm that by virtue of the Memorandum and Articles of Association the 2nd respondent is still the director of the 1st respondent and there is no proof that the 1st respondent is defunct. Regarding the agreement on the payment of TZS 50,000,000.00 between the applicant and 1st respondent, Ms. Loveness urged this Court to find it baseless.

The rival arguments by both parties and the affidavits in support of and in opposition to the application in the light of the prayers sought in the chamber summons bring three main issues for determination. Which are: (a) whether the 2nd respondent was a director of the 1st respondent, (b) whether the 1st respondent is defunct juristic person, (c) whether this Court has been properly moved to lift the veil of incorporation of the 1st respondent and, (d) whether the case is made out sufficient to arrest and detain the 2nd respondent as a civil prisoner.

Before embarking on resolving those issues I am inclined to start with the obvious requirement of the law under section 110 of the Evidence Act, Cap. 6 R.E 2019, that the burden of proving a fact rest on the shoulders of the person who asserts a claim and the standard is on a balance of probabilities. The law is also settled that such burden of proof never shifts to the adverse party until the party on whom the onus lies discharges his. This law has been held by the courts in this jurisdiction since time immemorial, see: **Tatu Mohamed v. Maua Mohamed**, Civil Appeal No. 31

of 2000 and **Paulina Samson Ndawavya v. Theresia Thomasi Madaha**, Civil Appeal 45 of 2017 [2019 TanzLII] TZCA 453 (11 December 2019) just to mention a few. This Court therefore is enjoined to examine whether the applicant to whom the burden of proof lies discharged the duty.

Starting with the the 2nd respondent directorship, the evidence in paragraph 8 which was supported by the Memorandum of Association (annexture MM-5) establish the fact that the 2nd respondent is one of the directors of the 1st respondent. The assertion raised by Mr. Twarah that the 2nd respondent is neither a director nor shareholder appears not only to be a blanket statement but words from the bar for being raised in the course of the reply submissions. As held in **Republic v. Sumni Ama Aweda**, Criminal Application 65 of 2020 [2022] TZCA 832 (8 December 2022 TanzLII) and many other decisions, the law is settled that a court of law cannot act upon statement not raised in affidavit as it is mere statement from the bar.

Even if the issue of the 2nd respondent's directorship could have featured in the joint counter affidavit, in order to prove that the 2nd respondent is no longer the director of the 1st respondent, there had to be evidence on his removal in the office pursuant to the provisions of the Companies Act, Cap 212 R.E 2002. Again, the argument raised by Mr. Twarah that the 2nd respondent paid TZS 35,000,000.00 to the applicant on behalf of one Abdul Shaban Tale Tale, was indeed unsubstantiated assertion. Since it is proved that the 2nd respondent is the director of the 1st respondent, undeniably he made that payment on behalf of the company.

As to whether or not the 1st respondent is a going concern entity, this should not detain much time. This again is an argument from the bar as it was not raised in the joint counter affidavit but it surfaced in the reply submission. Be it as it may, the affidavital evidence supported by annexure MM5 affirms the fact that the 1st respondent is a validly registered company. The argument that the 1st respondent is defunct and therefore it is unable to conduct its business appears to be unsupported. The burden to produce current evidence regarding official search on whether or not the 1st respondent is going concern lied on the respondents who asserted that fact. Put differently, the burden was upon the respondents to demonstrate that the 1st respondent is in difficult situation in running its business hence it is under administration or is about to be wound up.

In fact, Mr. Twarah's claim that the 1st respondent is defunct entity contradicted the evidence in paragraph 4 of the joint amended counter affidavit where it is stated that there was an agreement between the 1st respondent and applicant during the arrest of the 2nd respondent as to the payment of the outstanding amount. A defunct company would not have entered in such arrangement. The very argument is then out of context.

I will now proceed to examine the remaining two issues. Whether this is a fit case to pierce the corporate veil of the 1st respondent and if answered in the affirmative, next will be, whether the applicant has advanced sufficient cause moving this Court to hold the 2nd respondent personally liable or otherwise be committed as a civil prisoner. Ms. Loveness urged this Court to lift the corporate veil and hold the 2nd respondent personally liable because the efforts to trace the properties of the 1st respondent were barren of fruits.

I wish to reiterate the words of **Lord Macnaghten** in **Salomon v. Salomon & Co** (1897) AC 22 that a company is a legal person distinct from its members therefore the subscribers, as members cannot held liable on behalf of the company in any shape or form. That being a general rule, there is always an exception to it. There are situations where the Court may disregard the separate personality of the company and allow lifting the corporate veil with a view of attaching responsibility to the individual shareholders or directors in favour of creditors or decree holders.

In the case of **Yusuph Manji v. Edward Masanja**, it was held that the principle of lifting corporate veil apply once special and exceptional circumstance is shown. The Court of Appeal upheld the findings of this Court lifting the veil of incorporation upon satisfaction the Managing Director (appellant) involved in concealing the assets of the company. It also reached to that decision in order to serve the interest of justice to avoid shielding the Managing Director behind the veil of incorporation and leaving the decree holder (the respondents) with an empty decree. In another case of **Millicom Tanzania Nv v. James Alan Russels Bell & Others**, Civil Revision 3 of 2017 [2018] TZCA 355 (26 July 2018 TanzLII)

"We are aware that, piercing the veil entails looking behind the person in control of the company not to take shelter behind legal personality where fraudulent and dishonest use is made of the legal entity. This is so because the legal entity should not be used to defeat public convenience, justify wrong, and defend crime and the law will regard the corporation as an association of

persons whereby the courts can draw aside the veil to see what lies behind”.

See also: **Jackson Sifael Mtares & Others v. The Director of Public Prosecutions** (Criminal Appeal 180 of 2019) [2021] TZCA 612 (28 October 2021,

I also had the opportunity of seeking inspiration from Kenya in the case of **Ukwala Supermarket v. Jaideep Shah & another**, Civil Suit No. 7 of 2016 where the High Court sitting at Eldoret held that courts will only allow for the piercing of the corporate veil when two requirements are met: **First**, the company is a mere instrumentality or alter ego of the shareholder or director in question such that there is such unity of interest and ownership that one is inseparable from the other; and; **Second**, the facts must be such that adherence to the fiction of separate entity would, under the circumstances, sanction a fraud or promote injustice.

Equating the above pronouncements to the present facts, it is evident that the applicant has failed to advance exceptional circumstances that would have warranted the Court to lift the corporate veil. Despite the fact that there is no evidence from the applicant on how the properties of the 1st respondent were searched but still failure to trace the whereabouts of the 1st respondent's properties, by any stretch of imagination, cannot constitute exceptional circumstance. Besides, there is no tangible evidence to prove that the 2nd respondent or any of the other directors involved in concealing the identity or location of the assets of the 1st respondent. Similarly, there is no evidence to prove that the 1st respondent is used as alter ego and

performs her duties as an agent of the 2nd respondent and thus one is inseparable from the other.

For the foregoing circumstances, it seems clear that lifting the corporate veil is inappropriate. Correspondingly, quite apart from the applicant's prayers, I find no good cause to have been established to warrant this Court to order arrest and commit the 2nd respondent as civil prisoner.

In the upshot, the application is dismissed with costs.



A handwritten signature in black ink, appearing to read "W.M. Chuma", is written over a horizontal line.

W.M. CHUMA

JUDGE

21st November, 2023