IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

CIVIL REVISION NO 12 OF 2023

(Originating from Execution No. 62 of 2021 in the Resident Magistrate Court of Dar es Salaam at Kisutu)

SULEIMAN MASOUD SULEIMAN.....1ST APPLICANT

YAHAYA MASOUD SULEIMAN AL HABSI.....2ND APPLICANT

VERSUS

ALMANIAH HEAVY EQUIPMENT ..... RESPONDENT

RULING

14th May & 27th June 2024

MWANGA, J.

The applicants approached this court by way of Chamber summons, filed under section 43 (3) and 44(1) (b) of the Magistrates Courts Act, Cap11 R.E 2019, section 79(1) (b) (c), (2) 7 (3),95, and Order XLIII Rule 2 of the Civil Procedure Code Cap 33 R.E 2019 (2), and any other enabling provisions, seeking for the following orders;

(i) That this honorable court be pleased to call and examine the proceedings, ruling, and orders of the Resident Magistrate Court of Dare es Salaam at Kisutu in Execution No. 62 of 2021 dated 27th April 2023, revise and set aside the ruling and court order.

(ii) Any other reliefs this Honorable Court deems just and equitable to grant.

Supporting the application are the applicants' affidavits deponed by Suleiman Masoud Suleiman and Yahya Masoud Suleiman Al Habsi. The background of the matter is straightforward. As it can be gathered from the Affidavit, the matter premised on the credit purchase agreement executed between the respondent and Junior Construction Company Limited, not party to this application, over the machine described as Dozer CAT D8R Serial No. 7XMO3503 with registration No. T 496 DHM. Following defaults to make a repayment by Junior Construction Limited, the respondent undertook repossession of the trucks and managed to recover the same. Afterward, the respondent initiated the civil proceedings against the other party, Junior Construction Limited, through Civil Case No. 33 of 2020, seeking a court order to pay repossession costs she incurred in transportation of the machine to the tune of Tanzania shilling Fifty-Nine Million and Thirty-Eight Thousand [TZS 59,038,000/-], general damages, costs of the suit and interest at the rate of 24% per month from the date of repossession to the date of

execution of decree. After full trial the judgment was delivered in favor of the respondent to the extent that the Junior Construction Company Limited was ordered to pay the total sum of Tanzania shilling Fifty-Nine Million and Thirty-Eight Thousand [TZS 59,038,000/=] as repossession costs that the respondent incurred during repossession, interest at the rate of 24% per month from repossession to judgment, general damages to the tune of Five Million [TZS 5,000,000/=] and costs of the suit. Respondent preferred execution of the Decree through Execution No. 62 of 2021 by way of arrest and detention of the applicants and commit them as civil prisoners until the amount to the tune of Tanzania shilling Four Hundred Eighty-Seven Million Seven Hundred Seventy-Eight Thousand Four Hundred Thirteen and Twenty-Five Cents [TZS 487,778,413.25] is paid in full in which the same was granted via a ruling delivered on 27/04/202. It is this ruling and Order of the Resident Magistrate's Court of Dar es Salaam at Kisutu in Execution No. 62 of 2021 which triggered the present application for revision based on three main grounds thus;

(i) That the Applicants were not parties to Execution No. 62 of 2021 and have been condemned unheard.

(ii) That the amount sought to be executed does not arise from the decree in Civil Case No. 33 of 2020.

(iii) That the application for execution was between the Respondent and the judgment debtor in Civil Case No. 33 of 2020, which is Junior Construction Company Limited

(iv) Junior Construction Company Limited, the Judgement debtor in Civil Case No. 33 of 2022, is a limited liability company.

Based on the above-mentioned grounds, the applicants implore the court to exercise its revisionary powers by calling for the records of the trial court and determining the correctness, legality, and propriety of the decision.

The respondent vigorously resisted the application, filing the counter affidavit. The application hearing was a written submission, as both parties were represented. Mr. Juventus Katikiro represented the applicants, while the respondent hired the legal services of Mr. Michael Kasungu, both learned advocates.

From the outset in his submission in support of the application, Mr. Katikiro informed this court that he wishes to consolidate ground (a) (b) and (c) of revision and argue them conjunctively while arguing ground (b) separately. He contended that the applicants were not parties to Execution No. 62 of 2021 and have been condemned unheard as the application for execution was between the respondent and the judgment debtor in Civil Case No. 33 of 2020, which is Junior Construction Company Limited, and

that the latter (judgment debtor in Civil Case No. 33 of 2020) is a limited liability company.

Mr. Katikiro referred the court to paragraph 9(a) of the applicants' affidavits, which states that the applicants were neither a party to any execution of the Contract nor proceedings initiated by the Respondent through Civil Case No. 33 of 2020. Still, it was surprising that the court issued an order for arresting and detaining the applicants through execution No. 62 of 2021 without following the proper procedure of lifting the veil of incorporation following the acts of directors to obstruct the execution process.

He contended that applicants were condemned unheard of contrary to the cardinal principle of the Constitution enumerated under Article 13(6) of the Constitution of the United Republic of Tanzania, 1977. He argued that there is no record that the respondent initiated any proceedings to lift the veil of incorporation through which the applicants could have been accorded a right to be heard before the order for arresting them could have been issued. To bolster his position, he cited the Court of Appeal of Tanzania decision in Civil Appeal No. 110 of 2018, between **Hai District Council &Another Vs. Kilempu Kinoka Laizer & 15 Others,** [Unreported] on page 8, where the Court insisted on the importance of the right to be heard.

Based on the above decision, he submitted that the conduct of execution No. 62 of 2021 and the order to arrest the applicants as civil prisoners until the total amount to the tune of Tanzania shilling Four Hundred Eighty-Seven Million Seven Hundred Seventy-Eight Thousand Four Hundred Thirteen. Twenty-five Cents [TZS 487,778,413.25] is paid in full and realized in full was reached in violation of natural justice, as the applicants were not accorded the right to be heard since they were neither parties to the proceedings in Civil Case No. 33 of 2020 nor parties to the executed agreement between Junior Construction Limited and the respondent herein. It was his prayer that the order of the Resident Magistrate Court for Dar es Salaam at Kisutu in Execution No. 62 of 2021 delivered on 27th April 2023 be revised and set aside with costs in favor of the applicants for the same has been reached with material irregularity.

The second ground of revision applicants' allegations is that the amount sought to be executed does not arise from the decree in Civil Case No. 33 of 2020. In this, Mr. Katikiro submitted that, in the trial court judgment and decree in civil case No. 33 of 2020, the respondent was awarded repossession costs to the tune of TZS 59,038,000/=, general

damages equal to the tune of TZS 5,000,000/= and interest at the rate of 24% per month from the date of repossession to the date judgment. Still, through Execution No. 62 of 2021, the respondent sought an order to recover the amount equal to the tune of Tanzania shilling Four Hundred Eighty-Seven Million Seven Hundred Seventy-Eight Thousand Four Hundred Thirteen and Twenty-Five Cents [TZS 487,778,413.25]. He went on to submit that the amount claimed in the execution altered the Decree in Civil Case No. 33 of 2020 as the amount was more than the amount ordered by the Court in Civil Case No. 33 of 2020 and included the instruction fees worth Tanzania shilling Fourteen Million Two Hundred and Seven Thousand One Hundred Thirty-Eight and Twenty-Five Cents [14,207,138.25] which was not ordered by the Court in Civil Cases No. 33 of 2020. He argued that, as per the law, an executing Court is empowered to execute a decree as it is without any alteration of the Decree. To support his position, he cited the NCL International Limited Vs case**. Alliance Finance Corporation Limited,** Civil Reference No. 6 of 2021 High Court of Tanzania [Unreported] at page 14. He went on to submit that the reliefs granted in execution, including the interest at the rate of 24% per month from the date of repossession to the judgment, was unlawful and bad in law as it contradicts the principles governing the charging of interest. According to him, the amount charged

as interest is at the rate of 24% charged per month from the date of repossession to the date of judgment is to the tune of Tanzania shilling Four Hundred and Nine Million Five Hundred Thirty-Three Thousand Two Hundred Seventy-Five [409,533,275/=] only. He argued that interest is awarded within the ambit of the law without ignoring the procedures already laid out by the law. He cited the provisions of order XX Rule 21(1) & (2) of the Civil Procedure Code, Chapter 33 R.E 2019, and the case of Anthony **Ngoo & Another Vs. Kitinda Kimaro,** Civil Appeal No. 25 of 2014 [Unreported] at page 28, where the Court stated that charging of interest is at the rate of 7% to 12% per annum and the same must be reasonable and indicated in compliance with the prescribed rules made by the Chief Justice.

He believed that the award of interest at the rate of 24% per month was unlawful and that executing an illegal order was unenforceable. In conclusion, it was his submission that it is from that position of the law that the applicants pray for the court intervention by revising and setting aside the whole order of the Resident Magistrates' Court of Dar es Salaam at Kisutu in Execution No. 62 of 2021 for the same being tighten with material irregularities.

In rebuttal, Mr. Kasungu admitted that the applicants herein and the judgment debtor in Execution Case No. 62 of 2021 are two different persons. However, he denied that the applicants were condemned unheard and that they are not to be held accountable for the acts or omissions of the Judgment debtor (Junior Construction Company Limited) in Execution case No. 62 of 2021. He submitted that it is not true that the applicants were condemned unheard as the respondent had prayed for an order to amend the application for execution, the prayer which was unopposed, and the court proceeded to grant the prayer sought; thus, the respondent filed an amended application for execution seeking assistance from the court in execution by the arrest and detention as civil prisoners of both applicants as deponed at paragraph 5 of the respondent's counter-affidavit and evidenced by annexure AHE-1 in the counter affidavit. He went on to submit that the said affidavit was in support of the application for execution in execution case No. 62 of 2021, and the same was not disputed in any way by the judgment debtor and, therefore principally, what was alleged therein was considered to be accurate, in as far as the court was concerned. Mr. Kasungu contended that if the applicants were as eager then as they are now, they would have filed affidavits opposing the application for execution. Still, their failure to do so

was negligent and only goes further to prove that this application is a calculated move aimed at frustrating the executing process.

Mr. Kasungu argued further that it is also ironic how the applicants herein allege to be condemned unheard while paragraphs 7 and 8 of their affidavits supporting the application for revision acknowledge that an application for execution was in existence seeking their arrest. He contended that, throughout the proceedings in execution case No. 62 of 2021, the judgment debtor (Junior Construction Company Limited) was represented and enjoyed the services of Advocates whose responsibilities were to describe the Judgment debtor factually and legally in court; he succumbed.

On the allegations that the applicants herein are not to be held accountable for the acts or omissions of the Judgment debtor (Junior Construction Company Limited) in execution case No. 62 of 2021, he contended that the applicants are directors of Junior Construction Company Limited. Still, they opted not to respond to the affidavit filed in execution case 62 of 2021 and chose silence over their legal requirement to file counter affidavits opposing the application.

He argued further that, in the course of the proceedings and during the hearing of the application for execution, the respondent herein prayed

to the court to lift the judgment debtor's veil of incorporation and hold the directors accountable, the prayer which the court cordially granted since the respondent satisfied the court that there was an affidavit supporting the application filed in court and was unopposed by the judgment debtor and that under order XXI Rule 10(2) (j) (iii) and (v) of the Civil Procedure Code, Chapter 33 R.E. 2019 which provides for the modes of arrest of any person as one of the modes of execution as the relief may require. In his view, since the respondent sought assistance from the court in lifting the corporate veil to summon the directors and show cause why they should not be detained as civil prisoners, it was a recognized mode of execution under the law. To cement this point, he cited the case of **Hamoud Mohamed Sumry versus Mussa Shaibu Msangi and two others,** Civil Application No. 257 of 2015, Court of Appeal of Tanzania at Dar es Salaam (Unreported),

He argued further that, there is no hard and fast rule that presupposes the existence of a written application in a way of a chamber summons and affidavit for the court to lift the corporate veil in execution proceedings. He submitted that the respondent in execution case No. 62 of 2021 had filed an affidavit supporting the execution, explaining that the Respondent tried to find other means of executing the decree but failed as there was no property

that could be found to attach and sell in Satisfaction of the court's decree. To bolster his position, he cited the case of IAF (East Africa Limited) vs. Sahara Media Group Limited, Execution No. 7 of 2022, unreported on page 10, where it was stated that no law 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. This citation serves to inform the audience of the legal context and the absence of a specific requirement for such an application.

He also relied on the case of **Zenifhsys Space Company Limited vs. Decortech Tanzania Limited,** Misc. Commercial cause No. 328 of 2017, unreported (on page 4), where the Judgment debtor, in this case, had a view that the execution proceedings were prematurely brought before initially applying lifting of the corporate veil; however, the court disagreed with this assertion and observed that the application was competent in as far as the decree-holder had filed an affidavit giving reasons why the veil should be lifted. He was insistent that this was exactly what the respondent herein did in execution case No. 62 of 2021. He submitted further that it was approximately two years from when the decree of the court was issued, but

the Judgment debtor in Execution case No. 62 of 2021, of which the applicants herein are directors, never showed or assisted the respondent herein in realizing the decree to him, this omission by the judgment debtor was not warranted for and proved the existence of fraud and negligence on the part of the applicants herein as directors. To cement his position, he cited the case of **Mussa Shaibu Msangi vs. Sumry High-Class Ltd and another**, Misc. Commercial Cause No. 20 of 2012 (unreported) on page 10, where in a similar circumstance, a company negligently not adhering to the court's decree for payment for more than one year was held to be a good reason warranting the court to lift the Company's veil of incorporation. Mr. Kasungu argued that the respondent took all the needed legal steps in obtaining an order accountable and condemned them to be arrested in satisfaction of the court's decree. He believed that the allegations that the applicants were condemned unheard were hypocritical and untrue. He added that the respondent correctly moved the Court to lift the company's veil, and the Court was correct in rendering its decision ordering the applicants' arrest.

In concluding this point, Mr. Kasungu contended that, as per the court's order in Execution Case No. 62 of 2021, the Honorable Magistrate clearly ordered that a notice be issued to the applicants prior to the issuing

of the warrant of arrest so that they could disclose to the court why they should not be detained as civil prisoners.

On the ground (b), it was the respondent's submission that the record is clear that the decree delivered in civil case No.33 of 2020 awarded the respondent TZS 59,038,000/= as repossession costs, the interest of 24% per month from repossession to judgment, TZS 5 Million as general damages and expenses of the suit.

He argued that the amount stipulated in execution case No. 62 of 2021, which is subject to this revision, emanated from the decree of the Court. He clarified that the same was calculated from items (a)-(c), thus reaching a total of TZS 473,571,275, adding TZS 14,207,138.25, which was the amount of costs subsequently incurred as a result of the execution proceedings, leads to a total of TZS 487,778,413.25 claimed in the execution proceedings.

On the allegations that the interest granted was high and illegal, it was his submission that neither this court nor the executing court have the mandate of determining this issue at this stage, as Civil Case No. 33 of 2020 was conclusively resolved on the 07th of June, 2021 and Judgment and decree was delivered accordingly. According to him, if the Judgment debtor in Execution Case No. 62 of 2021, of which the applicants herein are

directors, was dissatisfied with the decision rendered, they could remedy the situation through an appeal. Still, no appeal was filed, and the respondent initially filed Execution Case No. 62 of 2021. In his view, since there is no order of the court that has altered what was decided in Civil Case No. 33 of 2020, then, in execution proceedings, the executing court is bound to what is stipulated in the court's decree and execution of court decrees is made as it is and not as it ought to be however erroneous that decision might be. This legal basis for the decision should instill confidence in the audience about the fairness of the process.

With the above submission, it was his prayer that this application be dismissed for being non-meritorious, the decision of the executing court be sustained, and the costs of this revision be provided for in favor of the respondent herein.

I have taken considerable time to review the pleadings and consider the fighting arguments advanced by both parties. In considering the merit or otherwise of the present application, I will deal with each point raised by the applicants and answered by the respondent as can be portrayed from their pleadings and submissions to it. I wish to start with the second ground covering the allegations that the amount sought to be executed does not

arise from the decree in civil case No. 33 of 2020 and that the interest granted was high. I profoundly believe these allegations have no basis, and the same need not delay this court. The reasons I am so holding are not farfetched. Firstly, looking at the decree granted in civil case No.33 of 2020, it is clear that the respondent was awarded the following reliefs: (a)Payment of TZS 59,038,000/= as repossession costs(b) interest of 24% per month from repossession to judgment (c) TZS 5,000,000/= Million as general damages; and costs of the suit. As rightly submitted by Mr. Kasungu, calculating the awarded amounts plus cost and costs subsequently incurred due to the execution proceedings leads to a total of TZS 487,778,413.25 claimed in the execution proceedings; thus, the applicant's allegation is baseless. Similarly, the contention that the interest was on the higher side is misconceived as the court granted the same in Civil Case No. 33 of 2020. If all the applicants were dissatisfied with the said award, they had room to appeal against the said decision and not raise the same at this stage. Since there was a right to appeal but was never exercised by the applicant as provided under section 79 (1) of the CPC, the applicants have no right to raise it now as the executing court has to implement the decree as it is and not otherwise. Thus, the second round of revision has no merit, and the same is dismissed immediately.

Reverting to the first ground, which combined three points, the applicant alleges that they were condemned unheard since they were neither party to Civil Case No. 33 of 2020 nor Execution No. 62 of 2021 and that the judgment debtor is a company limited, but the cooperate veil was not lifted. On his part, the respondent insisted that lifting the veil is one of the execution modes and that he correctly applied for it. Since the applicants are directors of the judgment debtor. The judgment debtor was represented in court during the execution application, so the applicants cannot lament that they were condemned unheard. While I agree with Mr. Kasungu that lifting a veil is among the modes of the decree-holder realizing the amount of the decree, I distance myself from the assertion that the applicants were not condemned unheard as the proper procedure for lifting the veil was followed. Undoubtedly, applicants were never parties in both civil case No.33 of 2020 and Execution Application No. 62 of 2021 as the judgment debtor was Junior Construction Company which was a limited company. It should be underscored that a company is separate and distinct from its directors and shareholders as per the case of **Salomon vs Salomon and Company Ltd** (1897) AC. Now that being the position, Mr. Kasungu's allegation that since the execution case, the judgment debtor was represented thus, the applicants were accorded the right to be heard is unfounded. In my view,

since applicants were not parties to Civil Case No. 33 of 2020, the respondent had to make them aware of the execution application to make them responsible for realizing the decree awarded. Now, the issue is whether the procedure for lifting the veil was adequately followed to warrant the execution court's order to arrest the applicants until full payment of the awarded amount. In my view, it was not observed; I view that the respondents made no formal application for lifting the corporate veil to make the applicants responsible. My stance is backed by the recent High Court decision in the case of **T-Better Holding Corporation (T) Ltd vs. African Banking Corporation (T) Limited**, Execution No. 3 of 2015, (TANZLII), where my brother Mkeha J had this to say;

> *"Arresting and detaining a company's director is one way of executing a decree against the personal capacity of such a director. To be able to do so, such a director* ***should have been a party to the civil case****, which resulted in the decree under execution*. ***Short of that, the decree-holder has to explain, under oath, the reasons for preferring execution proceedings against a stranger to the suit. I am, therefore, in agreement with the learned advocate for the judgment debtor that a formal application is necessary for lifting the corporate veil for one to execute a decree against the personal capacity of a***

company's director if the latter was not made as one of the parties to the suit which resulted into the decree under execution".

I subscribe to the above stance that, for the company's directors to be made responsible for executing a decree against a legal company, a formal application is necessary for lifting the corporate veil. I have scrutinized the execution pleadings, including the affidavit in which Mr. Kasungu tries to convince the Court that the respondent explained why the cooperate veil should be lifted. It was my finding that the said affidavit supported the execution. There were no pleadings concerning lifting the cooperate veil as correctly directed by the authority referred to above. The issue of lifting the veil came as an afterthought during the execution hearing, that is, during submissions, which in law is not part of the evidence.

Secondly, in my further perusal of the pleadings and trial court record, I am satisfied that the applicants were not personally served with the summons to show cause during execution proceedings. The law governing the issue of an order of arrest warrant, as provided under Order XXI Rule 35 of the CPC, requires that an arrest warrant be issued upon disobedience of the judgment debtor to the notice issued to them. The said Order XXI Rule 35 of the CPC provides that:

(2) *Where appearance is not made in obedience to the notice, the court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment debtor.*

Applying the above provision of the law to the facts of this matter as alluded to above, where the applicant was never notified of the execution process, it is obvious to me, and I so hold, that the trial court acted outside the purview of the law. Given the above, I distance myself from Mr.Msungu's contention that the applicant's arrest warrant issued by the executing court was granted free from any procedural irregularities and proceed to hold that the same is an irregularity on the face of records, which calls for intervention by this Court to make it good.

About the allegations that applicants had to file an affidavit opposing the application for execution, the same is baseless since the applicant was neither part of the execution application nor served with the summons to show cause and, thus, unaware of the proceedings hence, had no room to oppose the same. Similarly, the contention that in his ruling, the trial magistrate clearly ordered that a notice to show cause has to be issued to the applicants before the issuing of the warrant of arrest so that they could disclose to the court why they should not be detained as civil prisoners is unfounded and un-procedural as the same was ordered in the ruling granting

execution which literary means the order for lifting the veil and arrest the applicants was already granted. For clarity, I wish to quote the passage from the impugned ruling found on page 5

> *..I hereby lift the corporate veil of the judgment debtor company and hold the directors liable on behalf of the company. However, in law, before issuing the warrant of arrest of the directors, the executing court has to issue notice to show cause why they should not be committed in prison as civil prisoners. Eventually, I find and hold that the application for execution has merits. I hereby granted and execution process is issued.*

The excerpt above speaks loud and clear that the applicants were not issued with notice to show cause, and the court did mention the need to do so, but it did not order for the same to be issued. Further, even if the applicants were to be issued a notice to show cause, the ruling was already delivered; hence, they had no room to defend themselves, thus denying their right to be heard. Right to be heard has been emphasized in different decisions; for instance, in the case of **Abbas Sherally & Another v Abdul Fazalboy**, Civil Application No 33 of 2002, it was held that:

> *" The right of the party to be heard before adverse action or decision is taken against such party has been stated and*

emphasized by the court in numerous decisions. That the right is so basic that a decision arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard because the violation is considered ***a breach of natural justice****." [Emphasized mine]*

That aside, the Court of Appeal of Tanzania in the case of **The Grand Alliance Ltd v. Mr. Wilfred Lucas Tarimo and 4 Others (supra)**, after revisiting the Indian decision in the case of **Mahadev Prasad v. Ram Lochan Air** 1981 SC 416, at page 12-13 had this to say on execution by arrest warrant and detaining the judgment debtor as a civil prisoner:

"It follows then that the imprisonment of a Judgement-Debtor in execution cannot be ordered unless the conditions and limitations are satisfied. One of those conditions is that there must be an application for execution of a decree for payment of money by arrest and detention in prison of a Judgement Debtor (see Sections 42 and 44 and Order XXI Rule 10 of the code). After receipt of the application, the executing Court has the discretion to issue a notice to show cause to the person against whom execution is sought, on a date to be specified in the notice, why he should not be committed to prison or to issue a warrant of his arrest (see order XXI Rule 35 (1) of the Code). The purpose of this warrant is to bring the Judgement-Debtor before the executing court, and it is not an automatic order for committal as a civil prisoner because the executing

Court is required to be satisfied with the conditions stated under Order XXI Rule 39 (2) of the Code before committing a person to prison. Likewise, where the Judgement Debtor defaults appearance on a notice to show cause, the executing Court shall, if the decree-holder so requires, issue a warrant of his arrest (See Order XXI Rule 35 (2) of the code).”

Applying the above principle to the fact of the present application, it is clear to me, and it can safely be concluded that the applicants were condemned unheard. In view, therefore, I allow the application by invoking the revisionary powers bestowed to this court under the provisions of section 44 (1) (b) of the Magistrates Courts Act [Cap 11 R.E 2019] and proceed to quash the proceedings of the Resident Magistrates Court of Dar es salaam in Execution No. 62 of 2021 and set aside the ruling and subsequent orders to it. I order each party to bear its costs.

Order accordingly.

H. R. MWANGA

JUDGE

27/06/2024