

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM**

COMMERCIAL CASE NO. 37 OF 2006

**TANZINDIA ASSURANCE COMPANY LTD.....PLAINTIFF
VERSUS
RABCO TANZANIA LIMITED.....DEFENDANT
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R U L I N G

Date of filing submission – 6/11/2007

Date of Ruling 13/11/2007

MASSATI, J

On 29/6/2007 I entered judgment for the Plaintiff/Decree Holder in the sum of shs.144,524,000/= interest at 20% p.a. thereon, 7% p.a. interest on the decretal sum and costs.

On 6/8/2007 the Decree Holder, through her Counsel, MS. Hamida Sheikh, filed an application for execution, in order to realize the fruits of her decree. The mode of execution for which the court's assistance is sought is: -

"Arrest and detention of BARAKA ABDU, the Defendant's Managing Director, as a civil prisoner."

The application is supported by the affidavit of JOHN P. PULINTHANAM. According to paragraph 5 of the affidavit, execution

by attachment of the judgment debtor's properties has failed because the Company has disposed of all its properties in order to obstruct the execution of the decree. Further according to paragraph 6, the judgment debtor has now closed its business in Dar es Salaam.

On the other hand, BARAKA ABDU has filed a counter affidavit in which the contents of paragraphs 3,4,5, and 6 of the affidavit are "*vehemently denied*". Further more, he depones that there is a notice of appeal now pending in the Court of Appeal, and so prays that the application be dismissed with costs.

In support of the application MS. Sheikh, who submitted in writing, said that the circumstances of the case militate in favour of an order for civil imprisonment of BARAKA ABDU, because the money was not lent, but actually technically "*stolen by agent*". All proposed payment by instalments made by BARAKA ABDU as the judgment debtor's Managing Director were fruitless, thus ignoring and disobeying court orders. Mr. Semu, learned Counsel for the Judgment debtor/Respondent, had first filed a notice of preliminary objection on this court's jurisdiction to entertain the application but somehow never rose up to argue the preliminary objection.

Be that as it may, since the issue of jurisdiction is sacrosanct and always in issue, the court will examine and decide on it to satisfy

itself if it indeed has such jurisdiction, even if the parties have abandoned it midway.

The objection is this:

"The honourable court "had" no jurisdiction to entertain this application as the same is functus officio in "pertaining" (sic) to this case, and the same shall pray for the application to be dismissed with costs."

Even without the benefit of argument by any of the learned Counsel, I have no doubt in my mind that the objection is totally misconceived. The principle of *"functus officio"* no doubt, can only be invoked where a court has heard and finally decided a matter. In the present case, although the court has heard and pronounced a decree, it is not yet functus officio as far as execution is concerned. This is because under s. 38 (1) of the Civil Procedure Code 1966:

"38. (1) All questions arising between the parties to the suit in which the decree was passed...relating to execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree..."

Furthermore O. XX1 rule 9 of the Civil Procedure Code, 1966 directs that:

"When the holder of a decree desires to execute it he shall apply to the court which passed the decree."

It is therefore plain that as "the court which passed the decree", this court has jurisdiction to entertain, not only an application but also all matters relating to execution, even where there is a notice of appeal, because in law, the notice of appeal does not operate as a stay of execution. So I will dismiss the preliminary objection, with the attendant costs in any case.

Counsel have engaged on the question whether the court can properly issue process against the Managing Director of a corporation. According to Ms. Sheikh in the circumstances of this case, process could properly issue. According to Mr. Semu, this was not legally tenable in view of the concept of corporate veil. He cited **SALOMON VS SALOMON & CO. LTD** [1897] AC. 22 and s. 15 of the Companies Act. Mr. Semu also submitted that ss. 28, 35 and 40 of Order 21 of the Civil Procedure Code 1966 did not contemplate a corporate judgment debtor, and so were inapplicable in the present case. He thus prayed for the dismissal of the application with costs.

I accept the principle that a limited liability company is an entity separate from its members. However, in **VITAFOAM (T) LTD VS LUMUMBA STREET GODORO STORE** (Commercial Case No. 34 2002 (unreported) I opined, that courts have inherent power to lift the veil of incorporation in certain circumstances, and that such power, must however, be exercised with circumspection and only if the interests of justice so demand. I am supported on this view by the decision of the Court of Appeal of Tanzania in **YUSUF MANJI VS EDWARD MASANJA, ABDALLAH JUMA** Civil Appeal No. 78/2002 (unreported) where on p. 6 of the judgment, the Court observed:-

*"... in certain special and exceptional circumstance the court may go beyond the purview of this principle by what was described in **SALMON** (supra) lifting the veil."*

The issue in the present case, is whether the circumstances justify the lifting of the corporate veil.

The circumstances in which courts in other jurisdictions have thought it fit to lift the veil corporation, are varied. They include where the veil is used to evade legal or contractual obligations, or where the companies are formed merely as cloaks, shams, devices, masks or facets of control or to evade payment of taxes, or to conceal the true facts.

In the present case, it is not disputed that the judgment debtor was an insurance agent of the Plaintiff Company. In the course of the agency, it collected monies from insureds, but failed to remit the collections to the Plaintiff. In the course of hearing, BARAKA ABDU the Defendant's Managing Director, admitted that the money was "*stolen*" by his staff. I do not think, that in its memorandum of association, one of the objects of the judgment debtor Company was to "*steal*" the money that came in by virtue of such insurance agency. It is only its officers who could steal. It is therefore a clear case where the corporate identity is about to be abused, to evade, legal or contractual obligations. The court cannot sit by and loose sight of the realities on the ground.

It is in the light of the circumstances of the case, that I have come to the firm view that this is one fit case, where the court ought to lift the veil of incorporation, and get the directors of the Company to account. As Managing Director of the judgment debtor Company, I think BARAKA ABDU cannot hide behind the veil of incorporation.

In fine I find no merit in Mr. Semu's but attractive argument and I proceed to reject it. I will allow the application, and order the arrest of Mr. BARAKA ABDU, for him to appear before me on 16/11/2007 to show cause, why he should not be committed to civil prison.

It is so ordered.

S.A. MASSATI

JUDGE

13/11/2007

1,218 words

I Certify that this is a true and correct
of the original ~~order~~ Judgement Ruling

Sign

Registrar Commercial Court Dsm.

Date

82/11/07