

IN THE HIGH COURT OF TANZANIA
COMMERCIAL COURT
AT DAR ES SALAAM

MISC COMMERCIAL CAUSE NO 20 OF 2012

BETWEEN

MUSSA SHAIBU MSANGI -----PLAINTIFF/DECREE HOLDER

VERSUS

SUMRY HIGH CLASS LIMITED -----DEFENDANTS/DECREE DEBTOR
SUMRY BUS SERVICE LTD-----DEFENDANT/DECREE DEBTOR

RULING

Date of Hearing: 20/8/2015
Date of Ruling: 30/10/2015

SONGORO, J

Mussa Shaibu Msangi, a Decree holder has a 'court decree of shs 179,379,980/- and interests passed in his favour by this court against Sumry High Class Limited and Sumry Bus Service, Judgment debtors. He wants to execute it, in order to get his monies.

Thus on the 30/10/2014, the Decree holder applied to attach 5 buses which belong to the Judgment Debtors, but his application did not bear any fruit.

Later on the 25th February, 2015, Decree holder filed the instant application under Order XX1 Rules 9 and 10 of the Civil Procedure Code, Cap 33 [R.E 2002] applied to execute his court decree.

On mode of execution, the Decree holder applied for arrest, and detention of Hamoud Mohammed Sumry, who is the Managing Director of the Judgment Debtors Companies as civil prisoner for his failure, and neglects to pay the Decretal sum.

In the light of the Application made by the Decree holder, Hamoud Mohammed Sumry appeared before the court and filed an affidavit to oppose the application. In his affidavit, he explained that, he is the one of the directors of Judgment debtors companies, but denied that, he not a party in Commercial Case No 20 of 2012 and for that, reasons the court decree cannot be executed against him.

He then elaborated in his affidavit that, the Judgment debtors are his companies which under the law are separate legal entity from its directors. For this reasons and other he contested that, he may not be held liable. For that, reasons, he prayed to the court to dismiss the application.

In view of the application for execution of the court decree, and denial made by Hamoud Mohammed Sumry, the application was called for hearing on the 20/8/2015. At the hearing, Ms Phillip, Learned Advocate appeared for Decree holder and pursued the application whereas Mr Aboubakary, Learned Advocate appeared for Hamoud Mohammed Sumry and opposed the Application.

On her part, Ms. Philip relying on the application and paragraphs 4 and 5 of her "counter affidavit" filed on the 18/8/2015, she informed the court that, Mussa Msangi has a court decree of about shs 179,379,980/- which also carries interests. She then explained that, the Decree holder has attempted to execute it against Sumary High Class Limited and Sumry Bus Service, who are Judgment debtors but his attempt to execute has failed. .

She then briefed the Court that, due to the facts Judgment debtors companies operates through its directors, then Hamoud Mohammed Sumry who is the Managing Director and has a legal obligation to comply with the court order and pay the Decretal Sum.

She then clarified to the court that, in essence the Decretal sum was supposed to be paid by Sumry High Class Limited, and Sumry Bus Services or by its Managing director but they have not honoured the court Order and pay the Decretal sum.

It was the argument of the Decree holder that, since , Hamoud is the director of Judgment Debtors companies which they have refused to comply with the court order, and pay Decretal sum, then the court may lift corporate veils of two companies, and held Hamoud Mohammed Sumry, liable, and order his arrest and

detention as a civil prisoner, for a failure and neglected to pay the Decretal sum .

The Counsel then insisted that, under the circumstances where director of the company is not willing to comply with the court order, courts are permitted to lift corporate veils and held directors liable. He then clarified that, this also a right case under which the court may lift the corporate veils and grant the orders sought in application.

To substantiate her point that, the court is permitted to lift the corporate veil and held director of a company liable, Ms. Philip drew the attention of the court to case to the case of Yusuf Manji Versus Edward Masanja and another T.L.R 2006 at page 127 where the Court of Appeal said and emphasized that, in the circumstances a Court Decree has not been paid, and the company is indebted, the law allows in exceptional circumstances, the lifting of veil , and holding of directors of the company accountable.

Then relying on the fact that, Hamoud Mohammed Sumry, is the Managing Director of Judgment debtors companies and the fact that, is the one who conducted the business transactions which lead to companies court liabilities, and did not offer any defence in his affidavit, then he must be held liable to pay his companies court

liabilities. Finally, Ms Phillip and prayed to the Court to grant the application and order arrest and detention of Mr. Hamud.

Responding to the Application, Mr. Aboubakari Learned Advocate relying on the Affidavit filed by Hamud Mohammed Sumry, opposed the application and advanced several reasons.

First he informs the court that, his client was not a party to the suit. Secondly he is not a decree debtor. Thirdly, he is not the Managing Director of the Judgment Debtors Companies.

Fourthly, he contested that, Judgment debtors are companies which are separate legal entity from its directors, and from the legal point of view he may not be liable. To support his argument that, Hamoud Mohammed Sumry not be liable for the wrongs committed by his company, the Counsel drew the attention of the court to the decision in the case of Salmon Versus Salmon & CO [1897] AC 22 which laid down a legally principle that, a company is a separate legal entity from its directors. So, Hamoud Mohammed Sumry being a director may not be compelled to pay Decretal sum which is due and payable by Judgment debtors.

Responding to the argument and request from Judgment Creditor of lifting, a corporate veil, Mr. Aboubakari submitted that, may be done, only if there is evidence of fraud on the part of directors, or

where there is evidence that, directors are maneuvering, or blocking the company from performing its statutory obligations.

The Counsel then pointed out that, the Judgment creditor was allowed by the court to execute the court decree by attaching company's properties, and was in the process of doing so. But so far there is no explanation as to why he did not complete the execution process, and resorted to filing instant application.

Counsel then argued that, since Mr. Mahmoud is not the managing director of any of the Judgment debtors' company, then it will not be proper to order his arrest and detention, while compelling him to pay Decretal sum. On the basis what he submitted, Mr. Aboubakari prayed for dismissal of the application for lack of merit.

In his brief rejoinder, Ms Philip responded that, the argument presented by Mr. Aboubakari, that, Hamoud Mohammed Sumry is not the managing director of Judgment debtors companies has no basis at because it was not pleaded in his affidavit. For that, reasons, she prayed the application be granted.

The court has carefully considered the application, and response made by the Counsel of Hamoud Mohammed Sumry , and find there matters which the court need to put them into proper legal

perspective, before it consider to grant or not to grant the application.

The first point is that, going by Order XXI Rule 9 of the Civil Procedure Code, [Cap 33 R.E 2002] if a holder of the decree wants to execute it, all what is supposed to do is to apply to the court as the applicant did for execution and indicate the mode of execution he prefers.

Also, it is important to note that, where the Decree is for payment of monies, then under Order XXI Rule 10 of the Civil Procedure Code, Cap 33 [R.E 2002] the court has facilitate its execution against Judgment debtors who are Sumry High Class Limited, and Sumry Bus Services.

Regarding liabilities of director's of the companies vis a vis the company itself, court partly agrees with the argument of Mr. Aboubakari, that, in the case of Salomon versus Salmon [1987] AC 22, it was held that, a company like Sumry High Class Limited, and Sumry Bus Services is separate legal entity from its director. It means a company has to be treated different with its directors. That, Principle is even reproduced in Section 15 (1) and (2) of the Companies Act No 2 of 2002 where it said that, after incorporation, the company becomes a legal entity, separate from its shareholders

But it is important to note that, there are court decisions which states exception to the principle stated in the case of SALMON. Such court decisions are like the case of Tanzindia Assurance Company Ltd Commercial case No 37 of 2006, Vitafoam (T) Ltd Versus Lumumba Street Godoro Store Commercial Case No 34 of 2002 (Unreported) and the case of Yusuf Manji Versus Edward Masanja and another T.L.R 2006 at page 127

In the cited decisions, courts in exceptional circumstance is allowed to use their inherent powers, and lift the veil of incorporation and held directors of the company personally liable on the debts of their companies.

So going by the above mentioned courts decisions, it is certain that, the principle stated in the case Salmon Versus Salmon has an exception in the sense the director and the company may be treated as one and the same once, it comes to payment of certain companies liabilities.

The circumstances under which such treatment of lifting the veil may be done are many. The point for consideration in this application is if those exception circumstances of lifting the veil also exist in the present application. I will pause here and return to this point.

Now moving on another argument, of Mr. Aboubakari, the court, he told the court that, Judgment debtors have instituted an appeal to the Court of Appeal and the said appeal is pending. It was the direct argument of the Learned Advocate that, since there is an appeal which is pending it is not ideal to enforce a court decree against the Judgment debtors or Hamoud Mohammed Sumry.

The court has carefully weighed, and considered the above mentioned argument and find that, it does not dispute if there is a pending appeal. However, the court would like emphasis that, an appeal is not a bar for execution of a court decree. It is only an order for stay of execution, which stays execution of the court decree. So unless there is an order of stay of execution, that, is where the Decree holder may be temporary restrained from executing the court decree. Since there is no order for stay, I find the application is quite proper.

Now reverting back to the question, if there are circumstances which may warrant the lifting of corporate veils and held Hamoud Mohammed Sumry liable to pay the decretal sum, I find in paragraph 1 of his affidavit filed to this court on the 7th August, 2015, he has admitted that, is one of the directors of Judgment debtors companies.

Next the court finds, Hamoud Mohammed Sumry, even if he is not the managing director of the companies, being a director in the two companies still has a legal obligation of complying with the court orders on behalf of his companies. I find that obligation even extend to payment of Decretal sum by virtue of his position as a director. That, court finding takes into account that, companies acts, and transaction their business through their directors.

Now bearing in mind the Court Decree was issued on 13/8/2014 which is about "one solid year " from today and it has not been honoured even by "a single cent" by the Judgment debtors companies and even by its director including Hamud Mohammed Sumry, the court highly is persuaded, that, the Sumry High Class Limited and Sumry Bus Services Limited and its directors are neglecting to pay the Decretal sum.

In view of such neglect which has been demonstrated by Judgment debtors companies, their directors including Hamoud Mohammed Sumry, the court applies and uses its inherent powers, vested to it under Section 95 of the Civil Procedure Code Cap 33 [R.E.2002] and lift the two veils of Sumry High Class Limited and Sumry Bus Services Limited which covers the directors, and hold Hamud Mohammed Sumry who is director of the two companies accountable and liable to pay the Decretal sum.

The court action of lifting veils and holding of Mr. Hamoud liable to pay decretal sum takes into account the fact that, companies acts and conducts their business transactions including that, of paying court decree through its directors, Mr Hamud being one of them.

Secondly, the lifting of veils had been done to ensure that, Hamud Mohammed Sumry as a director of two Judgment Debtors companies, do not use two veils, to evade his legal obligation as a director to pay the Decretal sum.

After lifting the veil of incorporation of two companies , and the court find and decides that Hamoud Mohammed Sumry is accountable and liable to pay the Decretal sum as a director of Judgment debtors company. That being the case, I find it is fair that he should be given time to pay the decretal sum instead of ordering his immediate arrest, and imprisonment

In view of the above, I Order , Hamoud Mohammed Sumry to pay the Decretal Sum within 30 days from today, and report to the court on such payments.

In the event of Hamoud Mohammed Sumry default to pay the decretal sum, the Applicant is at liberty to file a fresh application. The application partly succeeded. Since the case is at the execution stage, I make no order as to costs.

Dated at Dar es Salaam this 30th day of October, 2015

H.T.SONGORO
JUDGE

Delivered at Dar es Salaam this 30th October, 2015

H.T.SONGORO
JUDGE

The Ruling was delivered in the presence of Ms Philip Learned Advocate of Decree holder, Presence of Decree holder himself and Mr. Aboubakari Learned Advocate of Mr. Hamoud Mohammed Sumry and Judgment Debtors