

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISCELLANEOUS COMMERCIAL CAUSE NO. 11 OF 2013**

**IN THE MATTER OF THE ARBITRATION ACT (CAP. 15 R.E. 2002)**

**AND**

**IN THE MATTER OF ARBITRATION**

**BETWEEN**

**NAUTILUS LIMITED ..... DECREE HOLDER**

**AND**

**AMETAN CONTRACTORS LIMITED ..... JUDGMENT DEBTOR**

23<sup>rd</sup> June & 17<sup>th</sup> October, 2015

**RULING**

**MWAMBEGELE, J.:**

Nautilus Limited; the decree holder, is armed with a decree of this court dated 05.06.2014. That decree has not been executed. The decree holder has filed an application for execution seeking the assistance of this court in executing the decree. The mode in which the assistance of the court is sought is that:

“the Managing Director, AMETAN CONTRACTORS LIMITED, Mr. JAMES ERIC AIKEN to be summoned to show cause why he should not be committed to civil prison for failing to pay the decretal amount”.

The application for execution was filed in this court on 03.09.2015.

The court summoned the said James Eric Aiken to show cause why he should not be committed to civil prison for failing to satisfy the decree. After several defaults of appearance in person, Mr. James Eric Aiken appeared on 24.05.2016. His advocate, Mr. Tairo, through whom he spoke, was also present. Ms. Libby Ringo, learned counsel appeared for the decree holder.

I must state at the outset that this ruling ought to have been pronounced on 23.06.2016 but because I was out of the station for two consecutive months for a special assignment which ended on 22.09.2016, that could not be possible.

In showing why he should not be committed to prison Mr. Aiken, who, as aforesaid, spoke through Mr. Tairo, learned counsel advanced several reasons why he should not be taken to a civil prison. First, that the decree is disputed because the same is not against his company; Ametan Contractors Company Limited but against Ame-Tan Contractors Limited or Ametan Contractors. He argues that the names bear some resemblance but they are not the same. Failure to sue the right person or use of the correct name of the defendant/respondent renders the proceedings incompetent, he argues. On this proposition, several decisions have been cited. These are ***Dar es Salaam Green Acres International School & another Vs the Registered Trustees of Parents Association of Tanzania***, Civil Case No. 16 of 2013 (HC unreported), ***Registered Trustees of Umoja wa Wazazi Tanzania Vs Regmas Construction co. Ltd & another***, Miscellaneous Commercial Application No. 285 of 2014 (HC unreported), ***National Oil Vs Aloyce Hobokela***, Misc. Labour Application No. 212 of 2013 (HC unreported), ***Christina Mrimi Vs Coca Cola Kwanza Bottlers Ltd***, Civil

Appeal No. 112 of 2008 (CAT unreported) and **NBC Vs Thomas K. Chacha**, Civil Application No. 3 of 2000 (CAT unreported). It is submitted that Ametan Contractors Company Limited was neither a party in the arbitral proceedings nor the present execution proceedings.

The second reason advanced for resisting the application for execution is that the arbitral award that resulted into the decree sought to be executed has never been registered by this court. His argument is that under section 17 of the Arbitration Act, Cap. 15 of the Revised Edition, 2002 an award is enforceable after a specific order to have it registered as a decree is made. He gives an example of **Luxury Apartments Vs Dr. Edward Ngwale**, Miscellaneous Commercial Cause No. 175 of 2014 (HC unreported) in which an order was given to the following effect:

"I accordingly hereby order that the arbitral award forwarded to this court be and is hereby registered as if it was a decree of this court".

The records of this matter, he argues, do not show that the award was ever registered.

The third reason for resisting the execution is that the Managing Director Mr. James Eric Aiken was not a party to the proceedings which led to the decree sought to be executed. He relies on **J. H. Rayner (Mincing Lane) Vs Dept of Trade and Industry** [1989] 3 WLR 969 for the proposition that members of a company are not liable to pay the company's debts and **Salomon Vs Salomon and Co.** [1895 - 99] All ER 33 for the stance that an incorporated company is a distinct entity separate from its shareholders and directors. It is submitted that there is no evidence that the veil of incorporation has been lifted to hold individual shareholders/directors personally liable.

It is thus submitted that the application to have Mr. James Eric Aiken committed to civil prison for failing to pay USD 398,223 and Tshs. 25,139,432/04 is without merit and should be dismissed with costs.

On the other hand, Ms. Libby Ringo, learned counsel for the decree holder urges the court to disregard the submissions of the learned counsel for the judgment debtor because they are intended to obstruct justice. She argues that all along the judgment debtor submitted to the jurisdiction of the arbitrator under the name of Ametan Contractors Limited and consequently a decree issued. What was the basis of Mr. James Eric Aiken appearing before the Arbitrator and giving evidence in the matter if the matter did not concern him?, she asked. The learned counsel submitted that Mr. James Eric Aiken gave evidence in the Arbitration Proceedings as appearing at p. 58 of the proceedings and admitted at pp 83 -- 84 that the work done was 70% and the Contract reads Ametan Contractors Limited. The counter-claim was in the very name and was signed by the very James Eric Aiken. The closing submissions, the list of documents to be relied upon, the Petition filed by the judgment debtor after the decree holder filed the award in this court and the judgment debtor's application for extension of time to appeal against the decision of Nyangarika, J. all were in the name of Ametan Contractors Ltd. The learned counsel thus submits that the argument to the effect that the judgment debtor was not a party to the arbitration proceedings is but an afterthought.

Ms. Ringo conceded that a company has a distinct personality from its shareholders and directors but that there are people who had been entrusted in running and conducting the activities for which the company was formed and Order XXI rule 30 (2) of the CPC which states that a decree may be

executed by detention of directors as civil prisoners does not speak of lifting the veil of incorporation. An application to the court suffices, she argues.

The learned counsel thus submits that the court grants an application by allowing the detention of James Eric Aiken as a civil prisoner and that the decree holder undertakes to pay his subsistence allowance as required by the provisions of Order XXI rule 38 of the CPC. She added that other modes of execution have not worked as the judgment debtor has not filed its accounts with BRELA and that with the fiduciary relationship between the judgment debtor and its banker, the latter could not divulge any useful information. She stated that the mode of assistance sought for is a last resort.

Conceding that the name Ametan Contractors Limited has been used in the rubber stamp, counterclaim, list of documents, *et cetera*, Mr. Tairo rejoined that that does not justify the error made. He stressed that the court should be guided by the *Mrimi* case.

He reiterated that the award was not registered as a decree of this court and therefore it remained an award.

He added that despite the fact that it is true that companies are managed by directors, there must be followed a specific procedure to proceed to execute a decree against a personality by lifting the veil of incorporation.

On the argument on Order XXI rule 30 (2) of the CPC, the learned counsel rejoined that the provision is not applicable because the matter here is not for specific performance. Neither is it one for injunction.

I have heard the arguments by both learned counsel. There seem to be three issues which this ruling must answer. The first is whether the

defendant is a stranger to the arbitration proceedings. The second is whether the arbitral award that resulted into the decree sought to be executed has never been registered by this court and the third is whether the Managing Director; Mr. James Eric Aiken was not a party to the proceedings which led to the decree sought to be executed and therefore the veil of incorporation should be lifted to grant the order sought.

Let me state at this juncture that the issues for determination in this ruling have taxed my mind a great deal. I have asked myself a question if it is appropriate for me to entertain the application without any evidence by affidavit from the parties or their counsel. The learned counsel for the decree holder, for instance, has stated from the bar that all other modes of enforcing the decree have failed hence a resort to the mode of assistance sought; detention of the managing director of the judgment debtor as a civil prisoner. The learned counsel for the judgment debtor, as well, has explained from the bar why the alleged director of the judgment debtor's company should not be sent to a civil prison. But I found solace in the provisions of Order XXI rule 10 (2) (j) which enlists the ingredients of the mode in which the assistance of the court is required in execution of a decree and Order XXI rule 10 (2) (j) (iii) thereof is about "by the arrest and detention in prison of any person". Under the sub-rule, there is no requirement of an affidavit. Under the circumstances, I think it is appropriate to proceed with the application for execution, without any evidence by affidavit.

The foregoing said, let me now proceed to the determination of the questions posed above.

On the first question, it is the judgment debtor's argument that **Ametan Contractors Company Limited** against which the decree is sought to be

executed was not a party to the arbitration proceedings and its ultimate decree. It is argued that the company against which the decree is sought to be executed is **Ametan Contractors Company Limited** while arbitration proceedings and the ultimate decree thereof were against **Ametan Contractors Limited**. The learned counsel for the judgment debtor has cited several authorities to buttress the point that the name of a party to a suit should be clear, short of which the suit or proceedings will be struck out.

Ms. Ringo, learned counsel for the decree holder, does not seem to dispute that the name of the company against which the decree is sought to be executed is **Ametan Contractors Company Limited** and the name in the arbitration proceedings and in the two applications filed in this court by the decree holder is **Ametan Contractors Limited**. The word "Company" is missing in the latter. However, she submits that the judgment debtor submitted itself to the arbitrator and jurisdiction of this court under the name of **Ametan Contractors Limited**. All documents filed in this court including the counterclaim were in this name. It is her view that the decree holder should not be heard at the execution stage to dispute the name under which he defended the arbitration proceedings and filed the relevant documents thereof in this court. I have subjected the arguments by both learned counsel on this point to a proper sieve. I have also read the authorities cited by the learned counsel for the judgment debtor. I think the law on the point is fairly settled and is as stated by Mr. Tairo, learned counsel for the judgment debtor.

The position of the law on this point has been lucidly stated by my brothers at the Bench in the three cases – ***Dar es Salaam Green Acres International School, Registered Trustees of Umoja wa Wazazi Tanzania*** and ***Aloyce Hobokela*** – cited by Mr. Tairo whose reasoning and conclusion I find

myself highly persuaded with and in ***Christina Mrimi*** also cited by the learned counsel which binds me. The hallmark of these decisions is that correct names are of paramount importance in judicial proceedings. In ***Christina Mrimi*** the court of appeal stressed:

"Companies, like human beings, have to have their names. They are known and differentiated by their registered names. In the instant case, it is apparent that 'Coca Cola Kwanza Bottles'; Coca Cola Kwanza Bottlers Ltd' or Coca 'Cola Bottles Ltd' have been used interchangeably. Although the appellant wants this court to hold that they mean one and the same Company, strictly, this view cannot be accepted without some risk of inexactitude".

For the removal of doubts, the Court of Appeal went further to state that it was alive to the provisions of article 107A of the Constitution of the United Republic of Tanzania, 1977 which require courts to give purposive interpretation to laws and not encourage provisions of the law on mere technicalities which impede justice and concluded that this kind of irregularity does not fall within the purview of the article.

Flowing from the above, the discrepancy of names of the judgment debtor in the arbitration proceedings and other documents filed in this court and the name of the company against which the decree is sought to be executed is not trivial as Ms. Ringo would like this court to believe. The names **Ametan Contractors Company Limited** and **Ametan Contractors Limited**, as per authorities cited above, are not one and the same. I therefore am in



agreement with Mr. Tairo, learned counsel that **Ametan Contractors Company Limited** against which the decree is sought to be executed is a stranger to the arbitration proceedings from which the decree stems. It is elementary law that a decree cannot be executed against a stranger to legal proceedings.

The foregoing disposes this matter. I am aware, as alluded to above that Mr. Tairo also-challenges the decree that the arbitral award was not registered as a decree of this court. I think this is not a proper forum to challenge the decree of this court. As for lifting the veil of incorporation before proceeding against a director of a company, I do not wish to address it as will not have any value addition to the outcome of the application. That may be done at another opportune moment.

Having so found and held, I state that the decree against **Ametan Contractors Limited** cannot be executed against **Ametan Contractors Company Limited**. Thus the mode of assistance sought by the decree holder; that is, to commit Mr. James Eric Aiken; managing director of **Ametan Contractors Company Limited** to civil prison is refused. The circumstances of the present matter are such that there should be made no order as to costs. No order is made as to costs in the present application.

Order accordingly.

DATED at DAR ES SALAAM this 17<sup>th</sup> day of October, 2016.

**J. C. M. MWAMBEGELE**  
**JUDGE**