IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 204 OF 2017

BETWEEN

MAXINSURE TANZANIA LTD.....PLAINTIFF/DECREE HOLDER

Versus

PAN OCEANIC INSURANCE

BROKERS LIMITED.....DEFENDANT/JUDGMENT DEBTOR

Last Order: 23rd Apr, 2020

Date of Ruling: 13th May, 2020

RULING

FIKIRINI, J.

The plaintiff/decree holder instituted this suit against the defendant in 2017, seeking for payment of TZS. 198,020,728/= and USD. 35, 551.0, being the outstanding sums arising from unremitted insurance premium.

The decree holder further sought punitive and general damages to be assessed by this Court, interest at 25% per annum from the date of default to the date of judgment, interest at 12% per annum from the date of judgment to the date of full payment; costs of the suit, and any other reliefs deemed fit and just by this Court.

On 21st September, 2018, this Court was informed by the parties that they had agreed to settle the suit out of the Court, and on 25th September, 2018 filed a Deed of Settlement which shows was signed by the Principal officer of the defendant/judgment debtor in the name of Fareed Shaaban Seif.

The plaintiff/decree holder, after almost sixteen (16) months, equivalent to a year and four months had elapsed, on ground that the defendant/judgment debtor was frustrating the agreement, filed this application for execution of the decree which the defendant objected to its granting.

On 23rd April, 2020 when the matter was called for hearing, Mr. Anney Semu learned counsel and Mr. Julius Manjeka learned counsel appeared for their respective clients.

Mr. Manjeka, set the ball rolling showing cause as to why the decree should not be executed, by outlining some defects in the application namely (i) That the amount of Tzs. 55,000,000/=, which is being claimed as outstanding balance, was not realistic as the judgment debtor has already settled part of the decree to the tune of Tzs. 69,600,000/=, which means the remaining balance to be claimed should have been Tzs. 40,400,000/=. The plaintiff/decree holder should have therefore filed another application reflecting the amount due. (ii) That the title in the application refers to Commercial Case No. 51 of 2011 while the present suit was Commercial

Case No. 204 of 2017. (iii) That Fareed Shaaban Seif upon whom the notice to show cause why arrest and detention has been directed to was not the defendant/judgment debtor's Managing Director. (iv) That the decree was in contravention of the dictates of Order 20 Rule 7 & 8 of the Civil Procedure Code, Cap 33 R. E. 2002 (the CPC), for being signed by the Deputy Registrar. (v) That Fareed Shaaban Seif was not a party to the suit; and that there was no any application for lifting of the corporate veil of which the defendant/judgment debtor has been informed.

Considering the pointed out defects incurable, Mr. Manjeka, prayed for the application be struck out.

Reacting to the pointed out defects, Mr. Semu, challenged the procedure which was used to bring up the objections, stating that not to be the rule of practice to take the other party by surprise. The proper practice, as submitted by the counsel was for a notice of preliminary point of objection to be filed. Since none was filed, he prayed for an adjournment so that he can get time to prepare and rebut the submission on the raised defects. A one-hour adjournment was granted and upon reconvening, Mr. Semu, commenced his reply by averring that the amount stated in the application of Tzs. 55, 000,000/= was the correct amount to be paid. And that despite the matter was settled amicably, but for almost a year plus, the decree was

yet to be satisfied. Retorting on the claim that some payments have been made, he informed the Court that the plaintiff/decree holder was not aware of the payments as no notice or a letter was made or even a courtesy call in that regard.

On Fareed Shaaban Seif, that was a responsible person for the defendant/judgment debtor, it was his submission that, besides being the one who attended to the proceedings, he was also the one who signed the Deed of Settlement on behalf of the judgment debtor. Cautioning the Court, he urged it not to allow to be taken for a ride. More into Fareed Shaaban Seif, he contended if he was not the one responsible then the decree holder should name the proper person upon whom the arrest and detention warrant can be served. Assigning reasons as to why, Fareed Shaaban Seif was the one served with the notice, Mr. Semu, made reference to Order 21 Rule 10 (2) (j) (iii) read together with Order 28 Rule 3 of the CPC, which provided for appearance by corporation through a person. He thus maintained that Fareed Shaaban Seif should be arrested and detained to satisfy the Court decree and not allowed to play around. He continued submitting that the issue of corporate veil has been raised but without citing any provision of the law to support the assertion. According to Mr. Semu, the judgment debtor's intention was to defeat the execution of the Court decree, which resulted from the Deed of Settlement, urging the Court not to allow that to happen.

As for the clerical error on case title, he pressed the Court to resort to section 97 of the CPC, and make correction to avoid further delay, the matter being on since 2017. Picking on who signed the decree, Mr. Semu, referred this Court to Order 43 Rule 1 (d) read together with Order 20 Rule 7 of the CPC and prayed that the Court to proceed with the execution to maintain sanctity of this Court's order which must be obeyed.

Rejoining the submission, it was Mr. Manjeka's submission that since the notice for the payment made were served on the counsel, he then had a duty of sharing it with his client. Countering on Fareed Shaaban Seif signing the documents, it was his position that it nonetheless did not make him the Managing Director. The assertion that the Court can call any person, was answered by stressing that the Court called the Managing Director and the plaintiff/decree holder was well aware who was the Managing Director and of course not Fareed Shaaban Seif. Furthering his submission, he pointed out that the plaintiff/decree holder annexed Max-1 which was a letter wrote to the defendant's Managing Director one Bashir PirMohamed, yet they served Fareed Shaaban Seif instead of the Managing Director.

On the provision cited, that of Order 21 Rule 10 (2) (j) (iii) of the CPC, Mr. Manjeka, maintained that the application was not properly before the Court for

failure to cite enabling provision as the one cited was not the correct one. Addressing the error on citing the title, he wondered as to why the plaintiff/decree holder's counsel was insisting on maintaining the application instead of withdrawing it and filing a new and proper application with the correct amount. If the Tzs. 55,000,000/= claimed is not changed, it would be condemning the defendant/judgment debtor twice, while he has already made some payments before this application was filed. After all, the Plaintiff/decree holder's management did not dispute receipt of Tzs. 55,000,000/=, even though it was not shown anywhere.

Defending his submission, Mr. Manjeka, contended that his oral application was made under Order 43 Rule 2 of the CPC. Reiterating his earlier submission, he urged the Court to struck out the application for being defective.

Let me start by acknowledging Mr. Semu's concern that any preliminary point of objection should be by way of notice. Although he did not cite any provision or case law, but indeed that has been a practice. In the case of **M/S Majembe Auction Mart v Charles Kaberuka, Civil Appeal No. 110 of 2005 (unreported),** finding itself in such predicament, the Court had this to say:

> *".....reasonable notice of the preliminary objection is to be given to the other parties including the appellant as in this*

case. The logic behind this provision hardly needs to be overemphasized. ***With the notice given within reasonable time, the other parties.....would not be taken by surprise. In that situation the parties would be in a position to respond in advance to the issues raised in the preliminary objection. It is to be emphasized that in fairness to the parties and in the interest of justice, counsel intending to raise preliminary objection are enjoined as far as possible to serve the notice of preliminary objection within reasonable time.***"

[Emphasis mine]

Mr. Manjeka, ought to have known that and instead of waiting for the hearing date to raise any point of objection, a notice in that respect would have been the appropriate approach.

Another point, I would like to take up, is the necessity of filing an affidavit showing cause why the applied order should not be granted. In the present case arrest and detention of Fareed Shaaban Seif to satisfy the Court decree on behalf of the defendant/judgment debtor, was the intended order. To counter the order and advance reasons why the order should not be granted, would have been well taken care by way of an affidavit.

An affidavit being a substitute of oral evidence on oath reduced into writing setting out the facts and circumstances of what has taken place, ought to have been filed. Underscoring the importance of an affidavit, the Court in the case of **Unyangala Enterprises Ltd & 5 Others v Stanbic Bank (T) Ltd, Civil Application No. 54 of 2004 (unreported),** had this to say:

> *"It is of paramount importance that affidavit has to be attached to the application to substantiate the assertion."*

Though this is not an application like the one envisioned in the decision, whereby an affidavit or counter affidavit in support or against is a must, but the fact that the one served with notice to show cause had something to say, the best approach would have been deponing an affidavit. In the present application, the notice to show cause was issued to Fareed Shaaban Seif, who contested its issuance, though he entered appearance on the date fixed.

On the fixed day, Mr. Manjeka, while addressing the Court shared a number of facts which he learnt from Fareed Shaaban Seif. An example is the fact that the defendant/judgment debtor had already made some payments and there was even receipt to that effect. By so doing two things occurred: *one,* the plaintiff/decree holder was presumably being bombarded with the facts or evidence which had there been an affidavit deponed, would have been in a position to counter or

acknowledge the assertion. The plaintiff/decree holder was essentially denied that opportunity despite the hearing which went on. *Two,* the information Mr. Manjeka, shared was not different from him testifying from the bar, the practice highly abhorred. **See: Registered Trustees of the Archdiocese of DSM v The Chairman Bunju Village Government & Others, Civil Appeal No. 147 of 2006, CAT-DSM (unreported) p. 7.**

Having stated so, I am however of the strong view that this Court has not been properly moved. Order XXI Rule 10 (2) (j) (iii) of the CPC is a prescribing provision and not enabling provision. Even though Mr. Manjeka, has not cited the enabling provision, but undoubtedly there is a difference between the two. With prescribing provision, a party is instructed what to do or procedure to be followed while enabling provision, is the provision clothing the Court with authority to grant the relief or order sought. **See: Hassan Sunzu v Ahmad Uledi, Civil Reference No. 8 of 2013 CAT, at Tabora (unreported) p. 3.** and **Awiniel Mtui & Others v Stanley Ephata Kimambo, Civil Application No. 19 of 2014, CAT at Arusha (unreported) p. 5-6.**

Arrest and detention have been covered extensively under Order XXI Rules 35 to 39 of the CPC. The Court therefore derives its authority or mandate of dealing with order of arrest and detention sought, therefrom. Besides, the Court not being

properly moved, the application was as well wrongly titled. Instead of Commercial Case No. 204 of 2017, it reads Commercial Case No. 55 of 2011. Mr. Semu, invited the Court not to pay attention to the anomaly and instead focus of justice considering this suit has been on since 2017. And that despite being amicably resolved by signing and filing of a Deed of Settlement, yet there was no a decree fully satisfied.

Whilst I, find Mr. Semu's submission is not completely extraneous, but the defect does go to the root. In the case of **Lukelo Uhalula v R, Criminal Appeal No. 402 of 2013, CAT at Mbeya (unreported),** the Court struck out the appeal when dealing with it after it realized it cited a different number from the original case number in its notice of appeal. The Court considered that there was no appeal before it. Again, in the case of **Alen Alex Zanda Mwakyusa v R, Criminal Appeal No. 599 of 2015 CAT-Mbeya (unreported),** the Court *suo moto* inquired on the propriety of the notice of appeal before it, filed by the appellant and noted that the notice was fatally defective as it referred to different number which was Criminal Appeal No. 4 of 2014 instead of (DC) Criminal Appeal No. 34 of 2014. Though the decisions emanated from criminal proceedings, the effect is, in my opinion, the same even when the scenario prevailed in a civil including commercial case.

Bringing the applicability of the decision to the present situation, the Commercial Case No. 204 of 2017 and Commercial Case No. 55 of 2011, are completely two different cases from two different years, the provision can therefore not be easily brought into play, even though the cases could be between the same parties.

The account by Mr. Semu, that Fareed Shaaban Seif, took part in the proceedings and signed in the Deed of Settlement on behalf of the defendant/judgment debtor, but it is evident that he was neither a party to the suit nor the Managing Director to whom the notice to show cause was directed. In order to bring Fareed Shabaan Seif on board, presumably under Order 21 Rule 10 (2) (j) (iii) read together with Order 28 Rule 3 of the CPC, though the intentions could be valid but the correct procedure has to be followed. This point, although incorrectly was brought up by Mr. Manjeka, as pointed out above, still cannot be ignored.

The arrest and detention of the Managing Director or directors in fulfilling the Court order in course of the execution proceedings, have to be preceded by an application of lifting of a corporate veil. The rationale behind is to show that the Managing Director or directors of the company who were overseeing day to day running of the company, and to whom the order was directed were not involved in concealing assets of the company or evading justice to take its course. **See: Yusuf Manji v Edward Masanja & Another, Civil Appeal No. 87 of 2002.**

Considering all the defects pointed out by Mr. Manjeka, in my opinion, they outweigh Mr. Semu's submission that the Court can resort to section 97 of the CPC, the submission which in other circumstances could not have been completely ignored. Likewise, his assertion that the matter has been on since 2017, therefore any other action different from the one suggested will further delay its conclusion and should not be allowed insinuating the defendant/judgment debtor taking Court for a ride, is not wholly controverted, considering the matter was amicably settled. Ordinarily, the defendant/judgment debtor would have been expected to satisfy the Court decree fully, unfortunately that is not the case, nonetheless, as intimated earlier in this ruling, the existing defects prevailed over the fear for further delay and defendant/judgment debtor's likelihood of taking this Court for a ride and/or playing around and consequently failing to comply to the Court orders.

In light of the above, I find the raised defects going to the root of the application and thence proceed striking out the application. It is so ordered.

P. S. FIKIRINI

JUDGE

13th MAY, 2020