IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 154 OF 2020

BETWEEN

FAH CONSTRUCTION COMPANY LIMITED.....APPLICANT

Versus

ATLAS MARK GROUP (T) LIMITED.....1st RESPONDENT

SYLIVANUS RUGAMBWA PHILBERT.....2nd RESPONDENT

ZANA PHILIP RUGAMBWA.....3rd RESPONDENT

Last Order: 25st Nov, 2020

Date of Ruling: 17th Feb, 2021

RULING

FIKIRINI, J.

The applicant, Fah Construction Company Limited a decree holder in Commercial Case No. 81 of 2018, brought this application under the provisions of section 38 (1), 42 (c) & (e), 44 (1) (c), 68 (e), 95 and Order XXI Rules 9,10 (2) (iii) (j), 28, 35 (1) & (2),36, 39(2) (b), (d) of the Civil Procedure Code, Cap 33 R.E. 2019 (the CPC) and any other enabling provisions of the laws, moving this Court seeking the following orders:

1. That, this honorable court be pleased to lift the veil of incorporation of

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the 1st respondent.

2. That, this honorable court be pleased to order the 2nd and 3rd respondents, the directors and shareholders of the 1st respondent to satisfy Tzs. 303,000,000 issued against the 1st respondent, failure of which be arrested and committed as Civil Prisoners.

3. In the alternatively, but without prejudice to prayers hereinabove, this honorable court be pleased to issue a garnishee order to the CRDB Manager to attach the sum of Tzs. 300,000,000/= from the 3rd respondent **account No. 015 235 853 060 0** in the name of **Zana Philip Rugambwa** and be paid into **account No. 191 504 000 769** maintained with **TPB Bank** in the name of **Fah Construction Company Limited**

4. Costs of the application be provided for

5. Any other reliefs as this honorable Court may deem fit and just to grant

The affidavit of Fabian Daudi Kishome, Managing Director of the applicant supported the application while the counter affidavit of Benedict Archad Mutta, the respondents advocate opposed the application.

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The matter was orally argued whereby Mr. Ashiru Lugwisa learned counsel appeared for the applicant and the respondents enjoyed the legal service of Mr. Mwesigwa Zaidi learned counsel.

Assigning reasons as to why the execution of the decree should be considered positively, Mr. Lugwisa submitted that, the applicant won the suit against the 1st respondent in Commercial Case No. 81 of 2018 and the judgment and decree were issued on 16th August, 2019 as reflected in annexure Fah-1.

Extending his submission, he submitted that, the 1st respondent failed to satisfy the decree. And in the effort to execute the decree, the decree holder could not find any properties or assets belonging to the judgment debtors. The official search conducted at BRELA depicted that, the judgment debtors have no any assets which could be attached in the execution of the decree, as exhibited by Fah-2.

It was Mr. Lugwisa's submission that, the 2nd and 3rd respondents being the directors of the 1st respondent have acted fraudulently and dishonestly in concealing the assets with the motive to frustrate the execution of the decree. Emphasizing his argument, he submitted that, the particulars of fraud and dishonest were enumerated under paragraph 6 (a)-(d) of the affidavit supporting the application.

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On the strength of the submission, he urged the Court to lift the veil o incorporation and grant prayers as indicated in the chamber summons. Pressing that, the decree holder deserved to enjoy the fruits of the decree in her favor.

Mr. Mwesigwa in opposing the application, he submitted that, the applicant prayers of lifting of the veil of incorporation should not be granted on the following reasons. **One**, the directors, have never contracted or promised to pay in person to the applicant nor guaranteed the company to pay on its behalf. The company being a legal person it has never failed to pay its debts.

Two, the respondents have filed a notice of appeal before this Court with the intention to appeal the decision which was the basis of this application, as well as an application for extension of time as per the annexed documents to the counter affidavit. The application has already been registered and served upon the applicant and been received. To strengthen his position, he cited the case of **Serenity on the Lake Ltd v Dorcas Martin Nyanda, Civil Revision No. 1 of 2019, p. 3-4 (unreported**).

Winding up his submission, he submitted that, this Court ceased to have jurisdiction.

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Disputing the authority cited by the respondents' counsel, Mr. Lugwisa in his rejoining submission submitted that, the authority cited was self defeating, as the respondents' counsel did not grasp the reasoning of the Court of Appeal, in their settled principle which all counsels know that, once a notice of appeal has been lodged the High court ceased to have jurisdiction to entertain stay of execution but the Court has jurisdiction to entertain the application for execution. The applicant counsel in supporting his argument he cited the case of **M/S Law Associates Advocate v M/S IPTL, Independent Power (T) Limited, Taxation Case, Civil Case No. 336 of 2002 [2004] T.L.R. 279** which stated that:

> *"The court in the absence of an order of stay of execution from Court of Appeal, this court has jurisdiction to entertain execution proceedings."*

Winding up his submission, he also cited the case of **Tanesco v Dowans & Another, Civil Application No. 142 of 2012,** reiterating that, in the absence of stay of execution order from Court of Appeal this Court still have jurisdiction to entertain application for execution.

Having closely examined the submission by the counsels for the parties, two issues are to be taken into consideration when determining this application.

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One, whether the notice of appeal lodged in the Court of Appeal, ceases the jurisdiction of this Court.

Two, whether this application for execution deserves granting or not.

Starting with the first issue it is settled legal position that, the Court can stop to order execution on the two main grounds: **first**, once the decree has been satisfied and **second**, if there is stay of execution order from the Court with competent jurisdiction, which in this present case is an order either from this Court or the Court of Appeal. Otherwise lodging of a notice of appeal cannot operate as a bar to execution proceedings before the trial court. Sub-rule (1) of Rule 5 of Order XXXIX of the Civil Procedure Code provides that:

> "*An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the court may order nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree but the court may for sufficient cause shown order the stay of execution of such decree'*

On the contrary where there is application for stay of execution before the Court of Appeal, the High Court ceases to have jurisdiction over the matter. In this case the respondents have neither filed an application of

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stay of execution nor satisfied the Court decree. Instead the respondents' have only filed a notice of appeal which in itself cannot not prevent the execution, considering that, an appeal should not operate as stay of execution of the decree. **See: Aero Helicopter (T) Ltd v F. N. Jansen [1990] T. L. R. 142**.

The respondents have filed an application for extension of time to file an appeal to the Court of Appeal whilst that is not disputed, but this has nothing to do with this application since an application of extension of time to the Court of Appeal cannot make this Court to cease its jurisdiction. In actual fact that is farfetched process to interfere with this application for execution.

Therefore, there is no any legal ground to prevent this Court from issuing the execution order, as the judgment debtor has neither satisfied the Court decree nor armed with a valid stay of execution order. This Court is thus competent to deal with an application for execution despite of notice of appeal filed.

The second issue is **whether this application for execution deserves granting or not.** Execution of the decree is mandatory proceeding which should not be ignored as without it being finalized, the matter will still be being lingering. Additionally, the essence of executing

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a decree is to let the decree holder enjoy the fruits of the judgment in her favour without much hustle.

Relying on the principle of corporate personality established in the now classic case of **Solomon v Solomon & Co. Ltd [1987] A.C 22,** reasoned logically that since a registered company is a legal person separate from its members it can be held liable in its capacity as a juristic person. However, for obvious reasons it can only act through human agents or employees. Therefore, in order to bring its human agents or employees such as directors or shareholders liable, lifting of veil of incorporation is inevitable.

The applicant in her application has moved this Court to lift the veil of incorporation and allow the 2nd and 3rd respondents to be arrested and detained as civil prisoners for acting dishonestly and fraudulently. I have candidly perused the affidavit in support of the application and submissions thereto. The applicant has under paragraph 6 (a) – (d), enumerated a number of things, but I have failed to gather and/or conclude that there were dishonest and fraudulent acts. The applicant has not furnished this Court with any proof of the transfer of the 1st respondent's assets to another or other persons or entities after the pronouncement of the judgment or immediately before, warranting such assumption. The fact that the applicant could not locate or point out the

1st judgment debtor's assets in her name though a reasonable ground to assume she has no assets but that is not the same as concluding that there were fraudulent and/ or dishonest acts. With the claim of dishonesty and/or fraudulent acts, the applicant was expected to prove her assertion and not mere unproven allegation.

Whereas, I agree that it is strange for the 1st respondent not having the landed property of her own, but I also agree and reason with the respondents' counsel that, it is not a legal requirement, for a company to possess landed property before or after incorporation. Similarly, it is expected that schools such as the 1st respondent who are legal entities of having their own accounts. However, without cogent proof this Court cannot conclude that the 1st respondent had no account of its own and that all its transaction were wholly being channeled through other accounts.

All that said and from the affidavit and submission it is not disputed that the 2nd and 3rd respondents are proprietors of Atlas schools and Atlas secondary school. The 3rd respondent as the company secretary of the entities incorporated on 24th May, 2010 and the 2nd and 3rd respondents jointly are the shareholders as well as directors. Meaning they are the ones running the affairs of the 1st respondent, the fact which they have

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not controverted. Against that position I find it proper for the 2nd and 3rd respondents to be held liable on behalf of the 1st respondent.

Borrowing a leaf from the case of **Yusuf Manji v Edward Masanja & Ano, Civil Appeal No. 87 of 2002, p.7,** where the Court of Appeal when faced with the same scenario had this to say:

> "... *that in the circumstances,* ***it is our view that the respondents will be left with an empty decree it won against the company, Metro Investment Ltd. Furthermore, it is apparent that the Managing Director of the company at the time was the appellant,*** *who was said before was alleged to be involved in concealing assets of the company.* ***For this reasons we think it will not serve the interest of justice in this case to shield the appellant behind the veil of incorporation.***"
>
> [Emphasis mine]

As pointed out earlier on that even though acts of dishonest and fraudulent have not been proved but the fact that the 2nd and 3rd respondents are shareholders and directors of the company and the 3rd

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respondent particularly its company secretary, who by and large are the ones running it, cannot be exonerated from liability.

Once the decree has been issued in favour of the decree holder, the judgment debtor is obligated and legally required to comply with the Court order by satisfying the Court decree unless there is a reasonable ground to prevent such execution. Notice of appeal alone is not reasonable ground to prevent the execution to be granted. Under the circumstances this Court proceeds to lift the veil of incorporation and the 2nd and 3rd respondents are pronounced personally liable.

In the light of the above, I proceed to grant the application for execution and lift the veil of incorporation of the 1st respondent to get hold of the 2nd and 3rd respondents who are now held personally liable to satisfy the Court decree, failure of which are ordered to be arrested and committed to prison as a civil prisoner.

It is so ordered.

P.S FIKIRINI

JUDGE

17th FEBRUARY, 2021