

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

LAND CASE NO. 149 OF 2018

**DAR ES SALAAM DEVELOPMENT
CORPORATION (DDC).....PLAINTIFF**

VERSUS

**THE IGOSI LOUNGE AND
NIGHT LIGHT EXECUTIVE INN1st DEFENDANT**

GODLOVE RAPHAEL DEMBE.....2nd DEFENDANT

JUDGMENT

28/05/21 & 04/08/2021

Masoud, J.

Dar es salaam Development Corporation (DDC), the plaintiff herein, filed a civil suit against "*The Igosi Lounge and Night Light Executive Inn*", and Godlove Raphael Dembe, as the first and second defendants respectively. In the plaint filed by the plaintiff in respect of this suit, the plaintiff alleged that the first defendant who was being sued as "*The Igosi Lounge and Night Light Executive Inn*" is a limited liability company, while the second defendant is the Managing Director of the first defendant.

It is important at the outset to note that the second defendant was joined in the suit in his personal capacity as the plaintiff urged the court to lift the corporate veil of the first defendant. The pleading for the lifting of the corporate veil of the plaintiff was predicated by the involvements of the second defendant in the lease agreements concluded between the first defendant and the plaintiff.

It was alleged that the first defendant acting through the second defendant won a tender of running a business of a bar and a restaurant in the plaintiff's premises, namely, halls A and B situated Msimbazi Street/Mhonda Street, Kariakoo, Dar es Salaam (hereinafter the suit premises) under lease agreements. Consequently, lease agreements were signed between the plaintiff and the first defendant through the second defendant. The defendants were to pay an annual rent of TZS 151,026,000,000/- for Hall "A" and TZS 64,974,000/- for Hall "B" respectively.

Despite leasing the premises under the said agreements and getting extensions of the leases on the promises of paying up the outstanding rent arrears, the first defendant failed to honour her part of the bargain under the agreements. As a result, the second defendant defaulted

payment of rent which failure led to outstanding rent arrears to the tune of TZS 223,400,000/- and interest of 5% as from the date of default.

Because of the alleged breach of the lease agreements, the plaintiff claimed for the following reliefs against the defendants. Firstly, immediate payment of the claimed sum of TZS 223,400,000/-and an interest of 5% from the date of default to the date of judgment. Secondly, interest at the court's rate of 7% from the date of judgment to the date of payment. Thirdly, general damages as to be assessed by the court. Fourthly, costs of the suit and any other reliefs that the court may deem fit to grant.

Disputing the allegations and the reliefs sought by the plaintiff, the second defendant raised issues as to the nature of the plaintiff's case saying, among other things, that it was brought against the first defendant which does not exist as a limited liability company. The first defendant is not as such a legal entity for which the second defendant could have served as a director as alleged. The suit was therefore wrongly presented as it did not properly identify its defendants. The second defendant placed the plaintiff into strictest proof of the allegation as to the incorporation of the first defendant, whilst saying that the issue

of lifting the corporate veil of the plaintiff as an incorporated body cannot hold as the plaintiff is non-existent.

The other line of defence apparent in the second defendant's written statement of defence focused on the legality of the lease agreements which were concluded by the plaintiff with a party who had no capacity to contract and could not be sued in its own name. The alleged agreements were therefore unenforceable as one of the alleged parties to the lease agreements is a non-existent entity.

In the course of hearing of the suit, the plaintiff brought two witnesses, one, Mr Rwandiko Fred Mwanumbu (PW.1), and one, Mr Shabani Rajabu Stambuli (PW.2). The second defendant, on the other hand, was the only defence witness (DW.1). As to the first defendant, namely, "*The Igosi Lounge and Night Light Executive Inn*," the suit proceeded ex parte as there was no written statement of defence filed by the said defendant despite the service.

The evidence adduced by both parties is on the record, and has been duly considered in the light of the pleadings and reliefs sought by the plaintiff and the final submissions filed on the record. The majority of the

evidence of the plaintiff in its totality showed when and how the plaintiff entered into the alleged lease agreements with the first defendant, the length of the lease terms and how the defendants failed to meet the requirements of paying up the rents. The evidence showed the agreed monthly rent and the manner in which the rents were being paid by the defendants through the plaintiff's bank account and the outstanding sum of TZS 223,400,000/- that remained unpaid.

The evidence in respect of notices issued by the plaintiff to the first defendant, demanding payment of the outstanding rent arrears, was also adduced as was the reply by the first defendant admitting indebtedness and requesting extension of the lease agreements. The evidence further named individuals through whom some payments were made towards settlement of the outstanding rent arrears. They included Luimuso Enterprises, the second defendant (Godlove R. Dembe (DW.2)), Monica Dembe, and the first defendant

Of significance, the plaintiff evidence also consisted of several documents admitted as Exhibits in evidence. The exhibits included the relevant lease agreements which gave rise to the alleged outstanding sum against the defendants, relevant notices issued to the first

defendant, including the demand notice and bank statements (Exhibits P.15, P.16, P.17, P.18 and, P.19) of the plaintiff's bank account, allegedly showing the amount paid by the first defendant, and a letter dated 18/10/2016 signed by the second defendant notifying the plaintiff that Mr James Levi Mgeni had ceased to be a partner in both *The Igosi Lounge* and *Night Light Executive Inn* as from 24/06/2016 (Exhibit P.7). As to the lease agreements, it transpired in the cross-examination that the same were neither signed by the second defendant on behalf of the first defendant, nor was the second defendant's name reflected in any way in the agreements.

Matters as to the status of the first defendant were also raised in the course of the trial by the witnesses. It was stated by PW.1 that the first defendant was a limited liability company. An affidavit of Godlove Raphael Dembe (second defendant) and James L. Mgeni allegedly produced by the defendants when they applied for the tender of running the leased premises was tendered by PW.1 and admitted in evidence as Exhibit P.1. The court was told by PW.1 during the trial that the affidavit is evident that the first defendant is a limited liability company and that the second defendant is its director. This evidence appeared to be consistent with the contents of the lease agreements, for example

Exhibit P.3, which suggested that the first defendant was a limited liability company.

As to the affidavit (Exhibit P.1), it transpired in the cross-examination that it was about introducing the second defendant and one James Mgeni as owners of *The Igosi Lounge* and *Night Light Executive Inn* registered respectively as such with BRELA. It was admitted by PW.1 that there was nothing from BRELA tendered evidencing incorporation of the first defendant as a limited liability company.

On the part of the second defendant's defence evidence, there was nothing other than the testimony of the second defendant himself which was, by and large, different from the line of defence maintained in the written statement of defence. The exception was the position the second defendant maintained which questioned the allegation in the plaintiff's plaint that the first defendant was a limited liability company having capacity to sue and be sued in its own name.

The issues which this court recorded on 23/11/2020 for determination, as per Hon. Dr Mango J., were as follow: Firstly, whether there is any lease agreement between the plaintiff and the defendants. Secondly,

whether there is any outstanding rent to the amount claimed by the plaintiff. Thirdly, whether the second defendant is personally liable to pay the rent arrears claimed. And fourthly, to what reliefs are parties entitled.

Based on the pleadings, the above issues in my understanding underlined the allegation that the first defendant is a legal entity, separate from its shareholders, can enter into contract, and can sue and be sued in its own name. The issues would only be relevant once it is established that the first defendant is a legal entity separate from its members, and that the suit was properly brought against such an entity that can be sued in its own name.

While the plaintiff admittedly sued the first defendant as "The *Igosi Lounge and Night Light Executive Inrl*" which does not connote the alleged corporate personality of the said defendant, the second defendant disputed that the second defendant is an incorporated body capable of being sued in its own name. Going by the very name with which the first defendant was being sued, it is evident that the plaintiff was not an incorporated body capable of being sued as such. The name as it appears on the record, therefore, does not reflect one of a body

corporate capable of suing and being sued and contracting in its own name.

There was no evidence shown to the court that the said plaintiff had been exempted from using its corporate identity. Thus, while the plaintiff alleged that the first defendant is an incorporated person which allegation was evidently disputed by the second defendant, there was no proof that such plaintiff was indeed an incorporated entity which could properly be sued in such name and style.

The only evidence on the record relied upon in showing that the first defendant is a body corporate was the affidavit referred to herein above (Exhibit P.1). The affidavit was allegedly produced when the first defendant submitted a tender to the plaintiff for managing the demised premises.

My scrutiny of the affidavit (Exhibit P.1) left me in no doubt that there were no averments evidencing sufficiently that the first defendant was indeed incorporated as alleged, and the second defendant was one of its director and shareholder. Rather, the averments therein are to the effect that there were registrations of *The Igosi Lounge*, and *Night Light*

Executive Inn, respectively as two separate companies. Notably, my finding as a result of the scrutiny of Exhibit P.1 have had regard also to Exhibit P.7 which is a letter notifying the plaintiff about removal of one James Levi Mgeni from being a partner in both *The Igesi Lounge*, and *Night Light Executive Inn*. I have had a further regard to the fact that Exhibit P.7 implied that Godlove Raphael Dembe (the second defendant) and James Levi Mgeni were partners (not shareholders) in both *The Igesi Lounge*, and *Night Light Executive Inn*.

The position reflected in the lease agreements to the effect that the first defendant is an incorporated body is in any case not supported by any evidence. Even if the said agreements were taken as a proof of the disputed corporate personality of the first defendant, one would wonder as to why the plaintiff ended up suing the first defendant in the name and style of "*The Igesi Lounge and Night Light Executive Inn*" which does not connote incorporation of the first defendant in any way, and which by itself would render the suit unmaintainable. This is because "*The Igesi Lounge and Night Light Executive Inn*" (the first defendant herein) on the face of the record does not enjoy the capacity of suing and being sued in its own name.

Of interest also to note and reflect on is that the affidavit relied on by the plaintiff suggests that the first defendant named and styled as "*The Igosi Lounge and Night Light Executive Inn*" consisted of two separate companies, firstly, "*Night Light Executive Inn*", and secondly, "*The Igosi Lounge*", and not just one, as intimated by the plaintiff in this suit. Copies of extracts from the register and resolved agreements which accompanied Exhibit P.7 were not tendered and admitted in evidence.

It is my view that if the defendant is an incorporated body, it should have been sued in its own name as the law requires. The second defendant in this suit was undoubtedly linked to the suit through the first defendant, and hence, the claim for piercing of the corporate veil. Very unfortunately, the plaintiff did not properly sue the first defendant through whom the second defendant was linked to the suit.

As the thrust of the allegations in the pleading was on the existence of an incorporated body (the first defendant) in respect of which the second defendant was allegedly acting, and hence, the pleading for piercing the veil of the first defendant, there is no cause of action against the second defendant in the very pleading which would remain maintainable against the second defendant.

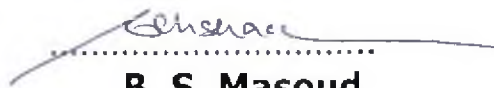
In my deliberations, I have had regard to, and inspirations from, various authorities relating suing a corporate person and lifting of the veil of incorporation. The mainly included **Salomon v. Salomon & Co. Ltd.** (1897) A.C.22; and **Yusufu Manji vs Edward Masanja and Another**, Civil Appeal No. 78 of 2002.

In view of the foregoing and given the manner in which the suit was brought, I would find that the suit is incompetent and unmaintainable against the defendants.

In the end, the suit is, for reasons stated herein above, struck out with costs.

It is so ordered.

Dated and Delivered at Dar es Salaam this 4th day of August 2021.



B. S. Masoud
Judge

