

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

MISC. CIVIL APPLICATION NO.154 OF 2020

MRS GEORGIA CELESTINE MTIKILA.....APPLICANT

VERSUS

PG ASSOCIATES LTD.....1st RESPONDENT

PRADEEP KUMAR LALJI GAJJAR.....2nd RESPONDENT

*(Application to remove corporate veil of the respondents in
Land Case No. 166 of 2005 of High Court, Land Division)*

RULING

MGETTA, J:

This ruling is in respect of the application for removal of corporate veil of the respondents/Judgment debtors. Upon such removal, the applicant/decreed holder pays to be permitted to execute the Decree passed in Land Case No. 166 of 2005. The application was lodged under the provision of **Sections 38(1) and 95 of the Civil Procedure Code, Cap 33** (henceforth the CPC), and supported by an affidavit of the applicant, Mrs. Georgia Celestine Mtikila (henceforth the applicant).

A brief background of this application is that, the applicant herein was the plaintiff in counter claim in Land case No. 166 of 2005 which

was instituted by PG Associates (the 1st defendant) and Federal Bank of the Middle East LTD (the 2nd defendant). The main suit was dismissed for want of prosecution, and the Court proceeded *ex parte* with the counter claim filed by the applicant against 1st Defendant (henceforth the 1st respondent). Judgment was delivered in the applicant's favor, whereas, amongst others, the 1st Defendant was ordered to pay USD 25,000 as general damages suffered by the applicant. The applicant applied for execution in Misc. Application No. 36 of 2015, whereas Mr. Pradeep Kumar Lalji Gajjar (henceforth the second respondent) promised to pay half of the decretal amount although he did not pay for the same. Therefore, decree was not successfully enforced regardless of applicant's effort to locate 1st respondent's assets. The applicant decided to file this application against the respondents so as the liability of the Company may be shifted to its Directors.

During the hearing of this application, Mr. Elisaria J. Mosha, the learned advocate represented the applicant while the 2nd respondent was represented by Mr. Florence Aloyce Tesha, the learned Advocate who were allowed to file written submissions.

In his written submission, Mr. Mosha cited the Ugandan case of **Jimmy Mukasa v Tropical Investments Ltd & 3 others**; Civil Suit No. 232 of 2007 (unreported), where it was held that:

"Directors of such company are not immune from being followed up in execution of decree against their company... The best method of enforcing execution against Directors of such Company is not by instituting a fresh plaint.. but by making the application for lifting corporate veil.... can be lifted within original suit...".

He submitted that the above position was approved by this court in **M.H Company Ltd v Oryx Oil Company**; Commercial Case No. 16 of 2009 (unreported).

Mr. Mosha had two arguments in support of his application. **One**, the act of the 2nd respondent to promise to pay half of the decretal amount intended to mislead the Court and/ or Directors misled the judgment debtor. He submitted that it is on record that the 2nd respondent who was the managing Director of the 1st respondent, lied to this Court that he would pay applicant USD 12,500, which is in the proceeding annexed as G-3 to the affidavit. He then referred this court to annexure G-10 (that was not disputed in the counter affidavit) that

the 1st respondent has two Directors and shareholders who are Mr. Pradeep Lalji Gajjar, the 2nd respondent and Mr. Philip Grissel, with one share each and their names exists in BRELA'S papers.

Two, he submitted that the Directors of the Judgment debtor/1st respondent have concealed judgment Debtor's assets making it impossible for the applicant to execute the decree. He quoted the courts proceeding (annexure G-3) at page 4 where the 2nd respondent promised to pay USD 12,500, in which the Court Order dated 16/3/2016 is still intact. He cited the case of **Yusuph Manji v. Edward Masanja & Another** [2006] TLR 127 where the Court of Appeal hold that concealing of the Company's assets amounted to such special circumstances for lifting the Corporate Veil.

In reply, Mr. Tesha divided his submission in two limbs. The first limb is on the competence of the application. He contended that *the affidavit submitted in support of the application is defective for being improperly dated*. He cited **section 8 of Notaries Public and Commissioner for Oath Act, Cap 12**, which provides that jurat must show when oath was taken. He submitted that the applicant has deposed the said affidavit on 16th March 2020 but in Jurat it shows that the same was sworn on 17th March 2020. He argued that this is very wrong and improper as the same was supposed to contain the

same date. In other word, he insisted, the jurat does not state exactly when the oath was taken. He prayed the same to be struck out as a result, the application would be left with no leg to stand. He therefore prayed the application to be struck out with costs.

On the second limb, he submitted that the application has no merits in the fact that the applicant has failed to bring into attention of this court any criteria which will warrant the court to exercise its discretionary power for grant of the prayers sought. Neither the affidavit nor the submission made by the advocate for the applicant. The allegations found in applicant affidavit that his client used to gamble at New Africa Casino and that the 2nd respondent is concealing the 1st respondent assets are not true and therefore require the applicant to provide proof thereon.

He submitted further that the applicant was required to state the properties which were owned by the 1st respondent and provide proof of ownership of those properties and later on proof of being deprived information of whereabouts of the properties by the 2nd respondent. He submitted that his client never concealed any property of the 1st respondent and names of other director of the 1st respondent. He also questioned the additional list of documents submitted by the applicant, that they were not properly filed, and that they should be filed under

supplementary affidavit. Hence, the same which contained annexure G-1 should be expunged from record.

On the allegation that the 2nd respondent being the former director of the 1st respondent should be charged and his advocate to be considered representing 1st respondent, he submitted that the 2nd respondent had appeared and dispensed his duty under managerial position when he was a Director, but not under his personal capacity. He added Masera Massawe and Mashaka Mfala were the learned advocates representing the 1st respondent.

He further submitted that the 2nd respondent never promised to pay USD 12,500 before this Court. As for now the 2nd respondent has ceased to act as director of the 1st respondent since 1st October 2014 when his health proceeded to deteriorate, thus unable to be part of the operation of the company, as per annexure "B" of the counter affidavit. The case of *Yusuph Manji* (supra) on concealing the identity and asset of the company cannot be relied to the circumstances at hand. He added that the case of **Corporate Insurance Company Limited v Savemax Insurance Brokers Ltd** (2002) 1 E.A 41, applied where the assets and resources of the Company have been dealt by the Directors for their personal benefits to avoid execution of the decree made by the Court. To his it is not proper to deal with the

Director merely because the company has failed to pay its debts, and in the present case the applicant claims against the 1st respondent and not the 2nd respondent. He therefore prayed this application be dismissed with costs.

In rejoinder, Mr. Mosha when replying on the objection, he cited **Order VIII Rule 2 of the CPC** that the objection is against the law that requires it to be raised at the earliest possible opportunity before hearing of the matter. In alternative, he submitted that the verification clause as well as jurat of attestation that has been filed has complied with the law. He therefore prayed for the preliminary objection be dismissed. On the issue of additional list to be relied upon, he submitted that the same document conforms to the requirement of **Order XIII Rule 1(1) and (2) of the CPC**. He further reiterated what he submitted in submission in chief.

Before I proceed further, I have to determine two objections raised by the 2nd respondent. My answer to that is that I am in agreement with Mr. Mosha that the said objection being raised in submission are contrary to **Order VIII, Rule 2 of the CPC**, that it aims to take the applicant by surprise. Therefore I cannot take them on board.

Painstakingly, considering submissions of both advocates, the issue for determination is whether this court may make an order of lifting the corporate veil against the respondent/judgment debtors. I must point out that in law, a Company is the legal entity capable to sue and to be sued. The Directors and shareholders cannot be liable for the debts or liabilities of the company. This principle was established in the famous case of **Salomon v Salomon &Co. Ltd** (1987) A.C 22 that:

"The Company is at law a different person altogether from subscribers...., and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agents of the subscribers or trustee of them. Nor are subscribers, as members liable, in any shape or form, except and in the manner provided by the Act"

The above position strictly separate company liability from its members or directors. But there are circumstances where the company can not be held liable for its act. In the case of **Bank of India (Tanzania) Limited V. FOMCOM International Ltd and 2 others;**

Commercial Case No. 19 OF 2018 High Court of Tanzania (Commercial Division) where the court had this to say:

"a company becomes separate entity from its shareholder, directors who own and /or act for the company. However, the principle as nonetheless its exceptions, and the court when called upon to act in actual fact intervene by piercing or lifting of corporate veil. And in so doing, the court will consider among other things, where the person/s controlling a company have acted fraudulent, the company is considered as sham or where a company is used to avoid an existing legal duty, before lifting the corporate veil"

Also, the case of Yusuph Manji (supra) it was held that:

"in our view and as correctly held by the learned judge, in certain special and exceptional circumstances, the court can go beyond the purview of this principle by what is described in Salomon (supra) lifting veil"

I have learned from the records that the center of this application is the 2nd respondent statement in the Court proceedings

annexed in the affidavit as annexure G-3. At page 4 and 5 of the Court proceeding the 2nd respondent promised to pay half of the decretal amount worth USD 12,500 if he will be given time. The wording of his statement is as follows and I quote:

"Mr. Pradeep Gajjar: Your Honor, I was the managing Director of PG Associates currently I'm no longer as healthier. I am weak to run such duties and that my financial position is almost zero. I have registered the same from BRELA following my financial liability. I have already applied for bankruptcy proceeding before the High Court and the same on 18th May 2016. I pray to submit that my financial position is weak to discharge the said debt/decretal sum"

He stated further that:

"Mr. Gajjar: With good faith, I humbly submit that this is my ultimate that if I m given a certain period, I will try my level but to collect half of the decretal sum (12,500 USD). That I guarantee."

Mr. Tesha denied the above contention to the fact that the 2nd respondent never promised to pay such amount in his individual capacity. He appeared under managerial or directorate position therefore cannot be held liable for the company liability. He submitted that there are laid down procedures under company law which provides the manner in which the company has to pay its debts. However, he did not mention any of those procedures.

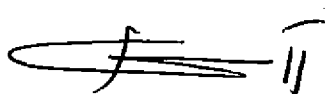
As stated above, the applicant herein has elaborated his effort toward executing his awards, whereby it is evidenced that the 2nd respondent appeared on several occasion but he did not assist the applicant to locate the company assets in order to execute his decretal amount. It was easy for the 2nd respondent being the Director of the judgment debtor to locate assets of the Company so as the applicant could enforce his decree.

Luckily from the quoted part of the proceedings above, 2nd respondent admitted that currently he is not the Director of the 1st respondent, but to my surprise he promised to pay half of the decretal amount, USD 12500 and it is on the court record. This implies that 2nd respondent consented to pay the said amount before this court from his own fund and the remaining liability to be paid by his company or the other Director. Having said that I hold therefore that, apart from

other reasons of lifting corporate veil, the court may also lift the corporate veil to individual where he consented/ promised to pay the amount that was supposed to be paid by the Corporation. I understand that the 2nd respondent defended himself by alleging to have Bankruptcy proceedings before the High court. But the said proceeding was alleged to be filed since 2016 and no any order has been tendered before me. Therefore, the said defense does not carry water before me.

Having said that the corporate veil of Judgment Debtor is lifted to the 2nd defendant to the amount he promised to pay before this court that is of USD 12500 which was the Company's liability. And on 23/03/2016 the court ordered the 2nd respondent herein to honor his promise. But until today he have not honored his promise. I thus proceed to order that 2nd respondent should honor his promise to pay. Hence, the application for lifting corporate veil is accordingly granted with costs.

It is so ordered.



J.S. MGETTA
JUDGE
12/4/2021

COURT: This ruling is delivered today this 12th April, 2021 in the presence of the applicant in person and in the presence of Mr. Tumaini Michael, the learned advocate holding a brief of Mr. Florence Tesha, the learned advocate for the 2nd respondent.

**J.S.MGETTA
JUDGE
12/4/2021**

