

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISCELLANEOUS COMMERCIAL APPLICATION NO. 144 OF 2016**

(Arising from Commercial Case No. 150 of 2014)

**BETWEEN**

**HAREL MALLAC TANZANIA**

**LIMITED.....APPLICANT/DECREE HOLDER**

**Versus**

**JUNACO (T) LIMITED.....1<sup>st</sup> RESPONDENT/JUDGMENT DEBTOR**

**JUSTIN LAMBERT .....2<sup>nd</sup> RESPONDENT/JUDGMENT DEBTOR**

Last Order: 23<sup>rd</sup> July, 2019

Date of Ruling: 02<sup>nd</sup> Sept, 2019

**RULING**

**FIKIRINI, J.**

The applicant/decree holder has filed this application under several different provisions of the law namely: chamber summons supported by an affidavit filed on 04<sup>th</sup> July, 2016 in a tabularized form made under Order XXI Rules 9, 10 (2) (j) (iii), 28, 35 (1) (2) and 36 of the Civil Procedure Code, Cap. 33 R.E. 2002 (the CPC); another was filed on 11<sup>th</sup> July, 2016 under sections 38 (1), 42 (c ), (e ), 44 (1), (c ), Proviso 68 (e ), 95, and

Order XXI Rule 9, 10 (2) (j) (iii), 28, 35 (1), (2), 36 and 39 (2), (b), (d) of the CPC; followed by another one on 07<sup>th</sup> November, 2016 made under sections 38 (1), 42 (c ) (e ), 44 (1) (c), Proviso 68 (e), 95 and Order XXI Rules 9, 10 (2) (i) (iii), 28, 35 (1), (2), 36 and 39 (2) (b) (d) of the CPC; and the amended one filed on 05<sup>th</sup> April, 2019 made under the provision of sections 38 (1), 42 (c ), (e ), 44 (1), ( c ) Proviso, 68 (e ), 95 and Order XXI Rules 9, 10 (2) (j) (iii), 28, 35 (1) (2), 36 and 39 (2), (b), (d) of the CPC; and any other enabling provisions of the law. This Court will consider the amended application filed on 05<sup>th</sup> April, 2019 as to have superseded the other 3 (three) filed previously. So it's on the application filed on 05<sup>th</sup> April, 2019 this Court will make its ruling. The application was seeking for the orders:

1. This Honourable Court be pleased to lift the veil of incorporation of the judgment debtor;
2. This Honourable Court be pleased to order for the arrest and detention of the 02<sup>nd</sup> respondent, the Managing Director of the 1<sup>st</sup> respondent/judgment debtor;

3. In alternative this Honourable Court be pleased to order the 2<sup>nd</sup> respondent to surrender title deeds of properties equals to the amount decreed by this honourable Court in favour of the decree holder;
4. Costs of the application to be provided for, and
5. Any other orders and relief as this Honourable Court shall deem fit to grant.

The application was ordered to be argued by way of written submissions with initial ruling date set for 02<sup>nd</sup> July, 2019 but rescheduled to 23<sup>rd</sup> July, 2019 and finally to 02<sup>nd</sup> September, 2019, due to Mr. Ngalo's passing on of his father.

Arrest and detention of the judgment debtor is one amongst many modes of execution of decrees which the CPC provides in section 42 (c), 44 (1), (2) & (3), Order XXI Rules 10 (2) (j) (iii), 35 (1) and 39 (2), (b) and (d) of the CPC, and specifically under Order XXI Rule 28 of CPC, the CPC provides that arrest and detention of the Judgment debtor can be an option in the modes of execution of a decree.

This is what the provision of Order XXI Rule 28 of the CPC provides:

*“Every decree for the payment of money including a decree for the payment of money as the alternative to some other relief, may be executed by the detention as a civil prisoner of the judgment debtor or by attachment and sale of his property or by both”*

However, in order for this mode of execution to be effected, depending on each case, the Court has to satisfy itself that other modes available have failed. This is due to the fact that infringement of one’s freedom which is jealously guarded by the Constitution of the United Republic of Tanzania should not be taken lightly. This is provided under Article 15 (1), (2) (a) and (b) of the Constitution which provides as follows:

*(1) Every person has the right to freedom and to live as a free person.*

*(2) For the purposes of preserving individual freedom and the right to live as a free person, no person shall be arrested, imprisoned, confined, detained, deported or otherwise be deprived of his freedom save only:*

*(a) under circumstances and in accordance with procedures prescribed by law; or*

*(b) in the execution of a judgment, order or a sentence given or passed by the court following a decision in a legal proceeding or a conviction for a criminal offence”*

In the present application the applicant is seeking for lifting of the corporate of the judgment debtor so that the 2<sup>nd</sup> respondent/judgment debtor can be arrested and detained in order to satisfy the Court decree.

It was the applicant's averment through the affidavit deponed by Marie Pierre Michael Frantz Boribon, that the 1<sup>st</sup> respondent has only paid Tshs. 300,000,000/= in two installments out of Tshs. 2,476,406,485/= which was agreed to be paid. The Deed of Settlement was signed by the 2<sup>nd</sup> respondent who is a shareholder as well as a Managing Director of the 1<sup>st</sup> respondent. The 2<sup>nd</sup> judgment debtor, in his capacity has acted dishonestly and fraudulently in effecting the Deed of Settlement by hiding under the corporate veil. The applicant further averred that for almost a year no property of the judgment debtor has been identified. Under the

circumstances the applicant prays for the Court to lift the corporate veil so that the 2<sup>nd</sup> respondent can be arrested and detained in satisfaction of a Court decree. In support the cases of **Solomon v Solomon & Co. Ltd [1897]AC 22 HL; Multichoice Kenya Ltd v Mainkam Ltd & Ano, Civil Case No. 492 of 2012; Yusuf Manji v Edward Masanja & Ano, Civil Appeal No. 78 of 2002; Plasco Ltd v EFAM Ltd & Fatma M. Rweyemamu, Commercial Case No. 60 of 2012; Jones v Lipman [1962] 1 WLR 832; and Tanzania Cigarette Co. Ltd v P.G. Associates Ltd & Philip Griessel, Commercial Case No. 81 of 2005.**

The 2<sup>nd</sup> respondent as a shareholder and Managing Director of the 1<sup>st</sup> respondent signed in the Deed of Settlement upon being authorized by the 1<sup>st</sup> respondent's Board, but was not a party to the suit. He as well declined to be the overseer of the 1<sup>st</sup> respondent/judgment debtor or being the only one.

Through the counter affidavit the 2<sup>nd</sup> respondent refuted the allegation that he acted dishonestly and fraudulently to frustrate the decree holder or make mockery of justice. Further to that, he as well refuted the assertion

that the 1<sup>st</sup> respondent had no properties as there were no efforts which has been indicated by the applicant in that regard.

In **Solomon v Solomon** cited (supra) the Court clearly stated that, upon incorporation, a company becomes a separate entity from its shareholders, directors and officers who own and/or act for the company. The principle has its exceptions and the Court when called upon to act can in actual fact intervene by piercing or lifting of a corporate veil. And in so doing, the Court will consider among other things, where the person/s controlling a company have acted fraudulently, the company is considered as "sham" or where a company is used to avoid an existing legal duty, before lifting the corporate veil.

The exceptions have been dealt with in the cases such as **Multichoice Kenya** (supra) where the Court had this to say:

*".....Other instances include when a fraudulent and improper design by scheming directors or shareholders is imputed. In such exceptional cases, the law either goes behind the corporate personality to the individual*

*members or regards the subsidiary and its holding company as one entity"*

Bringing the experience close to home is the decision in **Yusuf Manji** (supra), where the Court of Appeal had this to say:

*".....In the circumstances, it is our view that the Respondent would be left with an empty decree as it were, against the company.....Here, as just shown such circumstance is premised upon the fact that the appellant was the managing director of the company. The appellant was also alleged to be involved in concealing the identity and assets of the company"*

The rationale behind lifting of the corporation veil was to make sure the decree holder is not left with an empty judgment due to the unscrupulous behavior of the company through its directors who run day to day activities of the company who are likely to act dishonestly and commit frauds or avoid legal obligations.

Coming to the application at hand, it is undisputed fact that the Deed of Settlement signed almost five (5) years back has not been satisfied.

However, the allegation that the 2<sup>nd</sup> respondent who is a shareholder, managing director and the one who signed the Deed of Settlement acted dishonestly and/or fraudulently in effecting the Deed of Settlement, has not been established and proved. The claim contained in the affidavit as deponed in support of the application is nothing but mere assertion. Since it is a well-known Court's position that mere assertion cannot be acted upon unless the contrary is shown, which in this case it has not, the claim therefore remain an unsupported assertion.

Furthermore, applicant has alleged that the 1<sup>st</sup> respondent/judgment debtor had no properties and for almost one year the applicant has failed to point out the properties belonging to the judgment debtor. This has as well not been proved apart from general allegation. Otherwise no efforts have been disclosed made by the applicant to locate the properties belonging to the 1<sup>st</sup> respondent/judgment debtor. Also the applicant/decreed holder has failed to show how was the effort made and which properties were located only to be found not belonging to the 1<sup>st</sup> respondent/judgment debtor. Since it is upon the decreed holder to point out the properties, before the Court is invited to provide assistance, failure

by the decree holder to fulfill that obligation, cannot therefore shift blame but blame it upon himself for failure to fulfill his obligation and not as alleged in the affidavit and in the submissions in support. In this, I concur to Mr. Ngalo's submission that the applicant/decreed holder has failed to show the 2<sup>nd</sup> respondent/judgment debtor dishonesty and fraudulent activities geared towards impeding the execution of the decree in question.

The application for lifting of a corporate veil has in my view been brought prematurely. Consequently this Court cannot order the arrest and detention of the 2<sup>nd</sup> respondent/judgment debtor in satisfying the Court decree emanating for the Deed of Settlement.

While it cannot be concluded with certainty that the 1<sup>st</sup> respondent/judgment debtor has not been able to satisfy the Court decree emanating from the Deed of Settlement signed by the 2<sup>nd</sup> respondent/judgment debtor on behalf of the 1<sup>st</sup> respondent/judgment debtor, but the fact that the decree has not been fully satisfied leaves a lot to be desired. In this instance, I place blame on both the decree holder and the 2<sup>nd</sup> judgment debtor. With the judgment debtors and in particular the 2<sup>nd</sup> judgment debtor who is the managing director and the one who

signed the Deed of Settlement, should in all fairness have made sure that what was agreed in the Deed of Settlement comes to fruition. On the contrary the decree holder had equally a duty of seeing that the decree awarded to him is satisfied by effortlessly pointing out the 1<sup>st</sup> judgment properties liable to attachment to satisfy the Court decree in his favour. From the narratives both in the affidavit and written submissions what is gathered is that no efforts were made, as no information was provided in that regard.

The 2<sup>nd</sup> respondent besides being a shareholder is also a managing director of the 1<sup>st</sup> respondent/judgment debtor and the one overseeing the 1<sup>st</sup> respondent's day to day operations. He might not be the only one, but the one leading the others, the position which comes with extra responsibility compared to other directors. And since the existence of the decree is not disputed and has to be fulfilled, I find it reasonable at this stage to remind the 2<sup>nd</sup> respondent/judgment debtor that compliance to Court order should not be underrated. On the same note I urge the decree holder to seriously look and point out to this Court the 1<sup>st</sup> respondent's properties so that the assistance of this Court can be applied, instead of asking this Court to ask

the 2<sup>nd</sup> respondent to surrender title deeds of properties with a value which equals to the amount decreed by this honourable Court in favour of the decree holder. By so doing this Court will find itself being used to do what the applicant/decreed holder was obliged to do, which I find no credible reason warranting for such intervention. Once all efforts have been applied and proved to have failed and there is suspected properties belonging to the 1<sup>st</sup> respondent/judgment debtor but not within the decree holder's reach, that is when this Court can be called to act and not at this point.

In light of the above, I find this application for execution praying lifting of the corporate veil leading to arrest and detention of the 2<sup>nd</sup> respondent/judgment debtor as a civil prisoner or seeking for an order requiring the 2<sup>nd</sup> respondent/judgment debtor to surrender title deeds of properties with the worthiness equal to the decretal amount were premature. The application is thus dismissed with costs. It is so ordered.



**P.S.FIKIRINI**

**JUDGE**

**02<sup>nd</sup> SEPTEMBER, 2019**