

**IN THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION
AT DAR ES SALAAM**

COMMERCIAL CASE NO.16 OF 2009

M.H.NASSORO COMPANY LIMITED.....APPLICANT/J.DEBTOR

VERSUS

ORYX OIL COMPANY.....RESPONDENT/D.HOLDER

Date of hearing: 14/06/2013

Date of last Order: 14/06/2013

Date of ruling: 23/08/213

RULING

MAKARAMBA, J.:

This is a ruling on application to set aside an order of this Court requiring Mr. M.H. Nassoro, the Managing Director of the Applicant's company/Judgment Debtor to show cause why he should not be arrested and committed as a civil prisoner for failing to pay the judgment debt.

The application was filed in this Court on the 16th of May, 2013. It has been brought under sections 68(e) and 95 of the Civil Procedure Code Cap.33 R.E 2002 and is supported by the affidavit of **TOM MAZANDA**, the General Manager of the Applicant's company/Judgment Debtor.

The application was disposed orally by **Mr. JEROME MSEMWA**, Advocate for the Applicant/Judgment Debtor, and **Mr. JUVENILES NGOWI**, Advocate for the Respondent/Decree Holder.

In arguing the application, Mr. Msemwa, learned Counsel advanced a number of preliminary objections, which I propose to dispose of in the course of this ruling together with the substance of the main application. The first preliminary objection is that **the counter affidavit taken out by Mr. Juvenalis Ngowi** on the 24th May, 2013 for the Respondent **violates the mandatory provisions of section 10 of the *Oaths Judicial Proceedings and Statutory Declaration Act, Act No.59 of 1996 R.E. 2002***. Mr. Msemwa argues that the counter affidavit **does not show whether the Commissioner for Oaths who attested the affidavit knew the Applicant personally or whether the Applicant was identified to the Commissioner for Oaths by somebody else whom the Commissioner for Oaths knew personally**. Mr. Msemwa to buttress his argument referred this Court to the decision in the case of **SIMPLICIUS FELIX KIJUU ISAKA VERSUS THE NATIONAL BANK OF COMMERCE, Civil Application No. 24 of 2003 (unreported)**, and the case of **SILVERSTONE PROPERTIES CO. LTD VERSUS DAR ES SALAAM CITY COUNCIL, Land Case No. 47 of 2013, (per Mansour J.) dated 7th June, 2013 (Unreported)**. Mr. Msemwa however, did not avail to this Court a copy of the ruling for the reason that it was still being typed at the High Court Land Division. Mr. Msemwa prayed that, the counter affidavit be struck out for being incompetent.

Responding, Mr. Ngowi for the Decree Holder argued that, the preliminary objection raised by Mr. Msemwa itself has not been properly brought in this Court. Being a matter of law, Mr. Ngowi further submitted,

the preliminary objection was supposed to be filed at the earliest opportune moment.

Mr. Ngowi argues further that the Counter-Affidavit of the Respondent is properly before this Court since it is clear that the Commissioner for Oaths knew Juveniles Ngowi as it has been well stated in the introductory part of the Counter Affidavit. Mr. Ngowi invited this Court not to rely on the decisions cited by Mr. Msemwa since copies were not availed to this Court by Mr. Msemwa for ease of reference. Mr. Ngowi argued further that, **section 10 of the Oaths Judicial Proceedings and Statutory Declaration Act, does not apply in this case, rather it applies to judicial proceedings.**

Mr. Msemwa argues that the counter affidavit of Juvenalis Ngowi is defective for it violates the mandatory provisions of section 10 of the ***Oaths Judicial Proceedings and Statutory Declaration Act, Act No.59 of 1996 R.E 2002*** for not showing whether the Commissioner for Oaths before whom the counter affidavit was sworn knew the deponent personally or whether the deponent was identified to the Commissioner for Oaths by somebody else whom the Commissioner for Oaths knew personally. Mr. Ngowi countered by arguing that section 10 of the ***Oaths Judicial Proceedings and Statutory Declaration Act, Act No.59 of 1996 R.E 2002*** does not apply in the instant case rather it relates to oaths taken in judicial proceedings.

The relevant law that Mr. Msemwa says that the Respondent's counter affidavit violated has also been wrongly cited. In terms of section 1 of Act No.59 of 1966 R.E. 2002, the Act is supposed to be cited as the

"Oaths and Statutory Declarations Act" and therefore no longer cited as the **"Oath Judicial Proceedings and Statutory Declaration Act"** as Mr. Msemwa did. Section 10 of the **Oaths and Statutory Declarations Act** (Act No. 59 of 1966) which Mr. Msemwa contends that the Respondent's counter affidavit violated provides as follows:

"Where under any law for the time being in force any person is required or is entitled to make a statutory declaration, the declaration shall be in the form prescribed in the Schedule to this Act:

Provided that where under any written law a form of statutory declaration is prescribed for use for the purposes of that law such form may be used for that purpose. (the emphasis is of this Court).

Clearly, as it can be garnered from the provisions of section 10 of the **Oaths and Statutory Declarations Act, Act No.59 of 1966** as cited above, has nothing to do with the defectiveness of an affidavit or counter affidavit for that matter. Section 10 of the Act only provides generally that a statutory declaration has to be in the prescribed form in the Schedule to the Act. The provisions of section 10 of the Act also recognize any other form of statutory declaration under any other written law. As Mr. Ngowi rightly submitted, Act No.59 of 1966 R.E 2002 has nothing to do with oaths administered by an advocate as a Commissioner for Oaths, but deals with matters of **administration of oaths and affirmations in judicial proceedings**. Any attempt therefore as Mr. Msemwa has tried to do, of

bringing a counter affidavit sworn before an Advocate as a Commissioner for Oaths within the ambit of the provisions of the Act would be fortuitous. Oaths administered by advocates as Commissioners for Oaths fall squarely under the ***Notaries Public and Commissioners for Oaths Act, Cap.12 R.E 2002***. Under section 8 of Cap.12, it is mandatory to state at the jurat of attestation "***at what place and on what date the oath or affidavit is taken or made.***" The two cases cited by Mr. Msemwa in his submissions, namely, **SIMPLISIUS FELIX KIJUU ISAKA VERSUS THE NATIONAL BANK OF COMMERCE**, Civil Application No. 24 of 2003 (unreported), and **SILVERSTONE PROPERTIES CO. LTD VERSUS DAR ES SALAAM CITY Council**, Land Case No. 47 of 2013 (per Mansour J. on 7th June, 2013 (Unreported)), copies of which he did not avail to this Court, are therefore not relevant in the circumstances of this case.

It is for the above reasons that the preliminary objection that the counter affidavit of the Respondent is defective lacks any merits. It is accordingly dismissed.

The other preliminary objection raised by Mr. Msemwa is that **the application for execution has been brought without citing the specific provisions of the law**. Mr. Msemwa reasoned that since application for execution is governed by Order XXI of the Civil Procedure Code Cap.33 R.E 2002, which has so many rules, **failure to cite the specific provision of the law under which the application has been brought renders the application incompetent for non citation of the law and thus should be struck out.**

Mr. Ngowi responded that, the issue of enabling provision of the law in any event would be determined at the time of the hearing of the application for execution but not at this stage of dealing with the objection to summons to show cause. Mr. Ngowi submitted further that it is true that execution is governed by Order XXI of the Civil Procedure Code, Cap.33 R.E. 2002, which has several rules under it, thus making it practically impossible to cite all of them. In any case, Mr. Ngowi added, there is no any requirement to make a citation of the provision of the law in an application for execution.

The gist of the argument by Mr. Msemwa is that, the application for execution does not cite the specific of Order XXI of the Civil Procedure Code, thus it is incompetent for non citation of the law and therefore it should be struck out. According to Mr. Ngowi there is no any requirement to cite the provision of law in the application for execution and that, the issue of the enabling provision will be determined at the time of the hearing of the application for execution.

As Mr. Msemwa rightly submitted, the application for execution dated 18th August 2010 was filed without citing any enabling provision of law. Essentially, as per the line of authorities from the Court of Appeal of Tanzania on non citation or wrong citation of the provision of the law, the application would have been rendered incompetent and therefore liable to be struck out. It would seem imperative for the specific provision of the law under which the court is being moved for the orders sought to be cited in the application for execution. However, as it could be gathered from the Court record, since the time of the filing of the application for execution in

this Court on the 18th of August, 2010, the Judgment Debtor has not taken any action in settling the judgment debt. What seems to have taken place between the parties was a series of negotiations, proposals and counter proposals all in an attempt to settle the matter amicably. As the court record would reveal, on the 9th of May 2013, this Court issued another summons against Mr. M. H. Nassor, the Managing Director of the Judgment Debtor's company, to show cause why he should not be arrested and committed as a civil prisoner for failing to settle the judgment debt. This, in my considered view, would make the preliminary objection raised by Mr. Msemwa that the application dated 18th of August, 2010 was filed without citing any provision of the law overtaken by events. The Judgment Debtor could have raised such objection at the earliest possible opportune moment before this Court reissued the summons to show cause on the 9th of May, 2013, the subject of the present objection. The court record shows that on that date, the learned Counsel for the Decree Holder applied orally in the presence of **Mr. Abdul Aziz**, Advocate, who appeared for the Judgment Debtor, for notice to show cause to reissue. The said Mr. Abdul Aziz did not raise any objection on that date as to non-citation of the proper provision of the law in the application for execution. In my considered view therefore, for the Applicant/Judgment Debtor to raise such objection at this stage, and on matters which the judgment debtor previously had conceded to, is to say the least, rather awkward and unfounded. The judgment debtor having previously conceded to such matters, he now is effectively estopped from denying the truth of such facts.

It is for the above reasons that the preliminary objection that the application for execution has been brought without citing the specific provision of law lacks merits. It is accordingly dismissed.

Mr. Msemwa also raised another objection that, the applicant in the application for execution is not the Decree Holder but by one **Shadrack Kombe**, a stranger to these proceedings. Mr. Msemwa also argues that, it is not clearly stated as to what the status of Mr. Shadrack Kombe in the Decree Holder's company was, which irregularity according to Mr. Msemwa renders the whole application incompetent and therefore liable to be struck out.

Mr. Ngowi responding conceded that, indeed the application for execution was signed by one **Shadrack Kombe**. Mr. Ngowi offered an explanation that this was due to the fact that a corporation by itself cannot sign documents and as such those documents have to be signed by officers of the Company duly mandated to do so. According to Mr. Ngowi there is no any requirement that an officer of the company who is signing an application for execution must also state his or her position or status in that company. So long as there is no proof that Mr. Shadrack Kombe was not an officer of the Company, the Decree Holder, then he was authorized and empowered to do so, Mr. Ngowi surmised.

The gist of the argument by Mr. Msemwa is that, the application for execution has been filed by one **Shadrack Kombe**, who is not the Decree Holder and therefore a stranger to the proceedings. The counter argument by Mr. Ngowi is that a corporation by itself cannot sign documents, but its officers mandated to do so.

The argument as to who is competent to sign documents on behalf of a corporate body need not detain us any longer than is necessary. It is now fairly established, and this since the famous English case of ***Salomon vs. Salomon*** (1897) that a company is an artificial person, a legal person normally created by statute and as such it cannot act or operate on its own but through its duly appointed officers. I am alive to the wise words of Lord Denning in the English case of **HL BOLTON CO V TJ GRAHAM AND SONS [1956] 3 All E.R 624** at page 630 thus:

*"A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. **Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such.** So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company..." (the emphasis is of this Court).*

Much as the above observation were aimed at finding where the personal fault of the company would lie for purposes of liability in tort, the

rendering is also relevant in so far as the “*hands to do the work and cannot be said to represent the mind or will*” of the company are concerned.” The duly appointed principal officers of the company are the hands which do the day to day work of the company although they do not represent its mind or will in so far as personal liability of the company is concerned. In my considered view, there is therefore nothing fatal for a duly appointed principal officer of a company in signing documents or applications on behalf of the company. Furthermore, it is a long and well established and common practice in civil litigation for principal officers of corporate bodies to sign court documents including pleadings as is the case presently. For example, in the present matter the written statement of defence was signed and filed by one **Mr. Mohamed Hussen Nassoro** for and on behalf of the Defendant’s company, the Judgment Debtor. In any event and as Mr. Ngowi rightly submitted, it has not been established in the present matter that **Mr. Shadrack Kombe** who signed the application on behalf of the Respondent’s/Decree holder’s company was not its duly appointed officer, which matter in any case would call for evidence and thus technically taking it out of the garb of pure point of law test for a preliminary objection as enunciated in the famous ***Mukisa Biscuit’s Case***.

It is for the above reasons that the preliminary objection that the application for execution was signed by a stranger and not the decree holder lacks merits. It is accordingly dismissed.

Mr. Msemwa also raised another preliminary objection that **the application for execution has been brought prematurely and in bad faith** for the reason that the Judgment Debtor was obliged by the

Decree Holder to surrender the registration cards and the suit motor vehicles in event of any default, which option the Decree Holder has never exercised as indicated in paragraphs 4, 5 and 6 of the Decree.

Mr. Ngowi responded by submitting that, the affidavit by **TOM MAZANDA** does not say if the Judgment Debtor has ever deposited with the Decree Holder the registration cards. Further, that there is no proof that the motor vehicles registration cards were deposited in this Court. Mr. Ngowi argued further that since the application for execution was filed in this Court on 18th of August 2010, if at all the Judgment Debtor had already deposited the registration cards or other securities, definitely the Judgment Debtor would have shown it either in the affidavit or much earlier before the filing of the application. Mr. Ngowi added that the only way the Decree Holder could have enforced the Decree was by bringing an application for execution against the Judgment Debtor.

In rejoinder Mr. Msemwa submitted that, the issue of the motor vehicles, which was mentioned in the Decree was upon the Decree Holder to go through the Court Decree and if those rights in the Decree were not capable of being executed it meant therefore that the Decree was incompetent to be executed.

Mr. Msemwa also came up with the argument that the approach taken by the Decree Holder of filing the application for execution against Mr. Mohamed Hussein Nassoro amounted to **lifting the corporate veil**. It is the contention of Mr. Msemwa that this Court was never moved to lift the corporate veil and accordingly it will amount to injustice and it is illegal to attempt to arrest one of the Company's director or managing director

while leaving the other directors of the Company untouched. Mr. Ngowi replied by submitting that, failure by the Judgment Debtor to honour the Decree of the Court would automatically invite this Court to lift the corporate veil to those who are behind the company upon whom liability could lie.

Amplifying on the issue of lifting the corporate veil, Mr. Msemwa, submitted that, since the Company, the Judgment Debtor, has many directors and shareholders, it will be injustice and illegal to arrest one of the directors or the managing director for that matter, leaving untouched the other directors of the company. Mr. Msemwa insisted that the approach the Respondent/Decree Holder has taken of pursuing the Managing Director of the Company amounts to lifting the corporate veil. Mr. Msemwa referred this Court to the celebrated English decision of **ARON SALOMON VERSUS SALOMON & CO. LTD (1897) A.C p. 22**, that a company is a separate legal entity, different from its directors and shareholders. According to Mr. Msemwa therefore, any liability against the Judgment Debtor should not be visited on the Directors of the Company.

Mr. Msemwa premised his arguments on the corporate personality principle as stated in **Salomon's case (1897) (supra)** to elaborate on the various factors which the Court has to take into consideration when minded to lift the corporate veil. First, that the corporate veil can be "pierced" by statute, as for example, when members of the company are below the statutory requirements. Mr. Msemwa further submitted that, the corporate veil can also be lifted in the process of winding up of the

company and sometimes where the company has been misdirected by its officers.

Mr. Msemwa submitted further that the corporate veil can also be pierced by courts, where in the interest of justice, the Court may depart from the corporate personality principle in *Salomon's case*. This, according to Mr. Msemwa, has not been done in the present case. In support of his argument, Mr. Msemwa referred this Court to the decision in the case of **JARVIS MOTORS (HARROW) LTD V CARABOTT [1964] 1 WLR 1101**.

Mr. Msemwa submitted further that, another area in which a Court may lift the corporate veil is on a matter of paramount of public interest. In support of his argument, Mr. Msemwa cited to this Court to the decision in the case of **DAIMLER CO. LTD VERSUS CONTINENTAL TYRE AND RUBBER CO. (GREAT BRITAIN LTD) [1915]2 A.C p.307**. Lastly, Mr. Msemwa further submitted that, the corporate veil can also be lifted in case of fraudulent trading by the company.

Aside from the factors for lifting the corporate veil, Mr. Msemwa also submitted that since the application for execution was supposed to be filed under Order XXI Rule 35(1) & 36 of the Civil Procedure Code, the issue of arresting the Managing Director of the Judgment Debtor's Company does not arise, and as such the present application is not made against the Judgment Debtor. Mr. Ngowi responded to this argument by submitting that, the application for execution by the Decree Holder is not specifically saying that M. H. Nassoro be arrested but that the Managing Director of M. H. Nassoro Company Limited be arrested. The application is not therefore

directed at the directorship but the managing capacity of Mr. M.H. Nassoro, Mr. Ngowi further argued. Mr. Ngowi reasoned that, it is clearly stated by the Applicant's Counsel that paragraph 4 and 5 of the Decree obliged the Judgment Debtor to fulfill its obligation but it has failed, and therefore the Managing Director of the Judgment Debtor Company is liable for the acts or omission of the Defendant's Company, which is the Judgment Debtor for not complying with the Court Order.

According to Mr. Ngowi, *Salomon's case* is against the Judgment Debtor's application. Mr. Ngowi submitted further that the Decree has clearly instructed the Judgment Debtor to surrender the suit Motor Vehicles, Registration Cards and to give other securities for the outstanding amount. A failure by the Judgment Debtor's company to do so, invited this Court to look who is behind the company and compel that person to do the needful, Mr. Ngowi further submitted. Failure by the Judgment Debtor to honour the Decree of the Court therefore automatically invited this Court to lift the veil and see those who are behind the company, Mr. Ngowi surmised.

Mr. Ngowi also countered by submitting that, the whole application before this Court is premature since the Order of the Court was to compel the Managing Director of the Judgment Debtor to appear in this Court and to show cause, and as such there was no any other order. What the learned Counsel for the Judgment Debtor has stated could have been stated by the Judgment Debtor after appearing before this Court and then the Court could have granted him audience and therefore have the platform for stating whatever it had to state. But the Managing Director of

the Judgment Debtor's company has, without even swearing an affidavit, came to this Court to object to summons to appear to show cause.

Mr. Ngowi amplified by submitting that in **Civil Appeal No. 78 of 2002 between YUSUPH MANJI AND EDWARD MASANJA & ABDALAH JUMA**, the Court of Appeal of Tanzania stated at page 8 that:

"...when the Managing Director of the company conceal(s) the identity of the assets of the company, then the corporate veil can be uplifted.

According to Mr. Ngowi, the above scenario in the cited case, is what has happened in the present case. Mr. Ngowi added that the application for lifting the corporate veil is simultaneous with the application for execution.

Considering that the issue of the Managing Director of the Company concealing the assets of the Company was not amply covered in the submissions in chief of Mr. Msemwa in support of the application, this Court accordingly granted leave to Mr. Msemwa to rejoin on the submissions of Mr. Ngowi on that point.

Mr. Msemwa insisted that, the issue of lifting the corporate veil is governed by the Companies Act, so any application to lift it should be brought under the Companies Act, and its rules and regulations. Mr. Msemwa submitted further that in the present case there is no issue of concealing properties since that amounts to fraud and as such there is no any issue of fraud in the present case and therefore the facts in **Yusuph Manji's case** (above) are distinguishable from the facts in the instance

case. Mr. Msemwa submitted further that, without stating the name of the Managing Director in the application for execution, this amounted to taking a party by surprise and condemning him unheard.

I have carefully considered the submissions of learned Counsel in support and rival. I should state here that it is now a fairly settled principle of law as enunciated in the celebrated English case of ***Salomon versus Salomon (1897)*** (above) that, a corporation being a legal person is a separate legal entity, distinct from its members, and as such its directors or shareholders cannot therefore be personally held liable for the acts of the company without lifting its corporate veil. However, as fate would have it, and as time went by, company members started using the corporate veil personality blatantly as a "*crack for fraud or improper conduct.*" This made it necessary therefore for courts of law to break through or as it is commonly known "***to lift the corporate veil***", to look at the persons behind the company, the real beneficiaries of the corporate legal fiction, so that liability for the acts or omissions of the company could be visited on its directors and/or shareholders. The legal consequence of lifting the corporate veil is to enable the Court to regard the corporation "*as an association of persons.*" This legal position was succinctly stated by one American court in the case of **UNITED STATES V. MILWAUKEE REFRIGERATOR CO. (1905) 142 Fed 247**, thus:

"A corporation will be looked upon as a legal entity as a general rule... but when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud or

defend crime, the law will regard the corporation as an association of persons”.

Likewise Lord Denning in the case of **LITTLEWOODS MAIL ORDER STORES LTD. V. INLAND REVENUE (1969) WLR 1241** stated that:

“The doctrine laid down in Salomon v. Salomon & Co. Ltd. has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can and often do draw aside the veil. They can, and often do, pull off the mask. They look to see what really lies behind.”

Other cases in which the corporate veil can be lifted is where the company is used for tax evasion; where the company is determined as an enemy; where the company is formed to avoid legal obligation; where the court deems fit to lift the veil to protect policy and as Mr. Msemwa rightly submitted by statutory lifting especially where the number of members is reduced below the statutory minimum.

The procedure on how to move the Court to lift the corporate veil has been succinctly explained by **Christopher Madrama, J.** in the Ugandan case of **Jimmy Mukasa versus Tropical Investment Ltd & 3 Others, Civil Suit No. 232 of 2007**, (High Court Commercial Division of Uganda at Kampala) at page 9 thus:

*"The issue before me is whether an independent suit should be filed. In practice the veil of incorporation can be lifted within the original suit.....In East Africa the veil of incorporation has been lifted in the main suit against the company. **In Civil Appeal No. 78 of 2002, Yusuf Manji versus Edward Masanja and Abdallah Juma [2005] TZCA 83** the Court of Appeal of Tanzania in Dar es Salaam agreed that the corporate veil had been properly lifted and execution proceedings directed at the directors of a company in a case brought against the company."*

The burden of establishing the basis for disregarding the corporate fiction rests on the party asserting as such. Rather unfortunately, in the present matter, as Mr. Msemwa rightly submitted, there has been no application and/or prayer by the Respondent to lift the corporate veil. It is the Applicant who told this Court that for the Managing Director to be committed as civil prisoner, the Respondent ought to lift the corporate veil. Not only that, even if we were to assume that that was possible, there are no grounds which have successfully been established by the Respondent for this Court to exercise its discretion to lift the corporate veil.

I should point out here that the summons of this Court was issued against the Managing Director of M. H. Nassoro Co. Ltd. and not against Mr. M. H. Nassoro personally. If coincidentally Mr. M. H. Nassoro happens to be the Managing Director of M. H. Nassoro Co. Ltd, then the summons issued against the Judgment Debtor's Company would be naturally have to be answered by Mr. M.H. Nassoro in his capacity as one of the directors of

the Company. The argument by Mr. Msemwa that there could be other Directors of the Company and therefore it would be an injustice to pursue only one Director is of no consequence since this is a fact known only to Mr. Msemwa but it is not on record. In any event the issue whether Mr. M.H. Nassoro as the Managing Director of M.H. Nassoro Co. Ltd. is personally liable for the acts done and/or committed by M.H. Nassoro Co. Ltd would have to be answered by the M.H. Nassoro Co. Ltd. the Judgment Debtor itself, upon entering appearance on the summons to show cause following the application for execution.

Furthermore, the issue whether the Decree conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit as per the case of **OYSTERBAY PROPERTIES LTD AND KAHAMA MINING CORPORATION LTD VERSUS KINONDONI MUNICIPAL COUNCIL AND 5 OTHERS**, Civil Revision No. 4 of 2011, the Court of Appeal of Tanzania at Dar es Salaam (Unreported), would have to be answered in the hearing of the application for execution.

It is my considered view however, that, the Decree is fairly clear as to the outstanding amount of the Judgment Debt, which was together with interest to be charged over and also the costs to be paid by the Judgment Debtor. I should state here that for an application for execution by issuance of a notice to show cause to be answered by another application is rather uncommon if not unheard of, to say the least. I am of the firm view that the Applicant/Objector could have simply entered appearance and raised this objection to the application for execution, but not by filing

an application to contest the mode of execution by showing cause why the judgment debtor should not be arrested and detained as a civil prisoner for failing to honour the decree.

In the affidavit of **Tom Mazanda** in support of the application, there are certain facts which in my considered view do not state the truth or depict reality. For instance at paragraph 4 of that affidavit the deponent avers that, "***the Respondent did not show the mode of execution of the decree in the application dated 18th August 2010.***" I have carefully perused the application for execution dated 18th of August 2010. It stipulates in very clear terms that the mode in which the assistance of Court is required is by "***an order of the Court to arrest and commit to prison the Managing Director of M.H. Nassor Company Limited.***" I am therefore of the firm view and satisfied that the mode of execution was clearly shown in the application contrary to what is deponed by Mr. Tom Mazanda ay paragraph 4 of his affidavit.

In the course of his submissions Mr. Msemwa contended that, the application for execution requiring the Applicant/Judgment Debtor to be committed as civil prisoner was made prematurely. Mr. Ngowi replied that the application is not premature since the Defendant failed to fulfill the conditions stipulated in the Decree. These arguments have prompted me to have a look at the contents of the Decree. Paragraph four (4) thereof requires the Judgment Debtor to present the said securities before the payment of the first installment. Rather unfortunately however, at paragraph 5 of the Respondent's Counter-Affidavit it is deponed that, "*there is no any security issued to guarantee repayment of the decretal*

sum." I have also examined the court proceedings, which reveal that on the 16th of April 2013, Mr. Ngowi told this Court that the Decree Holder had hoped that, the Judgment Debtor would surrender the said securities but in vein, thus compelling the Respondent to apply orally before this Court for notice to issue to the Applicant's/Judgment Debtor's Managing Director to show cause why he should not be arrested and committed as civil prisoner for failing to honour the decree of this Court. I am of the firm view that the application for issuance of notice to show cause by oral application was not premature.

In the whole and for the above reasons the application fails. It is accordingly dismissed with costs.

A handwritten signature in black ink, appearing to read 'R.V. Makaramba', written over a horizontal dotted line.

R.V. MAKARAMBA

JUDGE

23/08/2013

Ruling delivered this 23rd day of August, 2013 in the presence of Mr. Msemwa, Advocate for the Applicant/J. Debtor and in the absence of the Respondent/J. Debtor.



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R.V. MAKARAMBA

JUDGE

23/08/2013

Word count: 5,552