IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 288 OF 2016

(*Arising from the Judgment and Decree of Kinondoni District Court in Civil Case No. 24 of 2013 dated on 1st November 2016- Hon. Lihamwike,* ***RM****)*

MSHANAWANDU INVESTMENT LIMITED..... APPELLANT

VERSUS

NOLIC COMPANY LIMITED.....1ST RESPONDENT

KILIMANJARO COOPERATIVE BANK.....2ND RESPONDENT

JUDGMENT

Date of last order: 14th December 2021
Date of Judgment: 18th February 2022

E.E. KAKOLAKI J.

The appellant here in has appealed to this Court challenging the Judgment and decree of Kinondoni District Court in Civil Case No 24 of 2013 dated on 01/11/2016 entered in disfavour. It has done so by filing a memorandum of appeal carrying five grounds of appeal. Before proceeding further, I wish to narrate albeit so briefly essential background of the case for an understanding of the context in which this appeal has arisen.

As per the record, appellant is a registered company under Companies Act, [Cap. 202 R.E 2002] dealing with transportation business. On 7/03/2013 at Mikocheni area its motor vehicle with registration No T. 836 AFR make Nissan Pickup was impounded by the 1st Respondent, under directions of 2nd Respondent in satisfaction of the debt which the 2nd respondent owed the appellant after defaulting to repay the loan, which was advanced to one Edward Epimark Lasway (t/a) **J.E Auto spares** claimed to be one of the appellant's directors. As a result, the appellant filed a suit in Civil Case No. 24 of 2013 in District Court of Kinondoni seeking for the following reliefs; immediate release of the motor vehicle with registration Number T. 836 AFR make Nissan Pickup, cost of the suit and any other relief that the Court would deemed fit to grant. After full trial, and considering both parties evidence of PW1, PW2 and DW1 and exhibits; motor vehicle's registration card exh. PE1, a letter from 2nd respondent instructing the 1st respondent to attach appellant's vehicle exh.PE2, motor vehicle hire contract exh.P3, overdraft agreement and guarantee letters between Edward Epimark Laswai (t/a) **J.E Auto spares** and 2nd respondent exh. D1 collectively and sale advertisement in Mtanzania newspaper exh.D2, the trial court adjudged that the Motor vehicle was properly attached as one of the Directors of the Appellant took

loan and failed to return the same. In arriving to that conclusion the trial court invoked the principle of lifting up corporate veil reasoning that, the appellant/plaintiff company was established purposely by the said loan debtor Edward Epimark Laswai (t/a) **J.E Auto spares** and director of the appellant's company as a scape gate to hide the borrower's properties and frustrate 2nd respondent's efforts of realising the unpaid up loan. The said appellant's motor vehicle was properly and lawfully attached as the court is enjoined to protect financial institutions like the 2nd respondent and not to frustrate them by invoking technicalities. It is from that decision as alluded to herein above, the appellant has engaged this court to consider her dissatisfaction as enumerated in her five grounds of appeal namely:

1. That the trial Court erred in law and fact upon finding that the Respondent legally attached the property of the appellant while knowing that the appellant had never ever entered into contract with the second Respondent.
2. That the trial Court erred in law and fact upon finding that the appellant was established in order to evade the obligation of its director without any evidence to substantiate such allegations

3. That the trial Court erred in law and fact upon making its finding on concocted or manufactured story that the properties of Edward Epimark Laswai were transferred from earlier name to the name of the appellant in order to escape liability without any proof whatsoever.
4. That the trial Court erred in law and fact upon lifting the cooperate veil on its own preference volition basing on cooked stories of the Respondents.
5. That the trial Court erred in law and fact upon making its findings in favour of the Respondent basing on the evidence of the Respondent only.

On the strength of the above grounds, Appellant prays this Court to quash the decision of the trial Court with costs and Order the Respondent to return her Motor vehicle with Registration No. T 836 AFR make Nissan Pickup or in alternative payment of money basing on its market value.

At the hearing of the appeal, appellant appeared represented by Mr. Johnson Msangi learned advocate, whereas the Respondent had services of Ms. Fatuma Mwaimu, learned advocate. By consent, both parties agreed to dispose of the appeal by way of written submission and religiously adhered to the filing schedule orders as provided by the court. In his submission the

Appellant's counsel opted to consolidate the 2nd 3rd and 5th ground of appeal while the 1st and 4th grounds of appeal were argued separately.

Submitting in support of the Appeal on the first ground, Mr. Msangi faulted the learned trial Magistrate when found the appellant's motor vehicle was properly attached and fortified his submission with a number of cases including the case of **Miriam E. Maro Vs. Bank of Tanzania**, Civil Appeal No. 22 of 2017, (CAT-unreported) which held parties are bound by their terms of the agreement they freely entered into. He argued, in this matter there was no binding agreement between the parties as the contract which resulted into attachment of appellant's motor vehicle (exh. D1) was between Edward Epimack Lasway (t/a) J.E. Auto Spare and the 2nd respondent and not the appellant with the respondents. He was of the view that under the doctrine of the sanctity of Contract, it was legally wrong for the respondent to attach the properties of the appellant as it was not privy to the contract and therefore, the Court was wrong to interpolate in this matter.

In 2nd, 3rd and 5th ground of appeal, appellant contends the trial court is in error to decide the case in favour of respondents without considering the fact that, appellant adduced sufficient evidence to prove her case. Mr. Msangi contended from the impugned Judgment it is clear that, the

Respondent failed to prove that the Appellant company was established in order to evade the obligations of its directors, and that there is no anywhere the appellant signed as guarantor to the contract (exh. D1) or that his property being mortgaged as security to the loan agreement between 2nd Respondent and one **Edward Epimark Lasway** (t/a) **J.E Auto spares**. To justify his stance, the Court was referred to sections 110 and 111 of the evidence Act, [Cap. 6 R.E 2019] which provides for the standard and burden of proof in civil suits. Mr. Msangi was of the view that, in civil cases, the party seeking the court to pronounce judgment in his favour also bears the burden of evidential proof in which the standard of proof in each case is on balance of probabilities. To buttress his point, he cited to the court the case of **Anthon M. Masanga Vs. Penina (Mama Ngesi) and Another**, Civil Appeal No 118 of 2014 (Unreported). He argued, the assertion that the appellant company was established by one director "Edward Epimack Laswai" in order to evade its contractual obligation was an afterthought, and worse still he added, the court failed to interpret the said contention within the meaning of and confines of the law of Contract, which inter alia stipulate the contractual conditions and remedies to the parties affected by the other party to the contract vide Fraud, misrepresentations or otherwise.

In respect of the fourth ground, it was Mr. Msangi's submission that, in law the Company is a different person from its subscriber's and managers though the same persons might benefit from the profits after its incorporation and the business engagement. He contended, the company is not in law the agent of the subscribers or trustees nor are subscribers as members liable in any shape or form to the companies' liabilities. To stress his point, he cited the case of **Salomon Vs. Salomon** (1987) AC 2. The appellant further submitted that, the concept of lifting up the veil as portrayed by the trial Court was wrongly applied and considered. He added, there are two types of lifting up the veil, statutory and judicial in which none of the conditions set for invoking it featured in this matter. He mentioned four conditions and cited the cases of **Jones Vs. Lipman** (1962) IW. LR 8322 and **Deimla Co. ltd Vs. Continental tyre and rubber co**. (1916) 2 AC 307 to reinforce his stance. In view of the above submissions Mr. Msangi urged the court to find the appeal is meritorious and allow it.

In response Ms. Fatuma, advocate for both Respondents resisted the appeal contending that it is lacking in merit. She submitted on the first ground intimating that, the respondent proved during hearing through DW1 that, the Appellant and 2nd Respondent had a valid loan agreement for a term of

one year and that, appellant had a personal guarantee on the hypothecation of goods on the said loan. He added, DW1 testified to the effects that, even the signature and picture contained in the said personal guarantee bore the appellant's face and hand writing. Ms. Fatuma further argued, when entering into contract with the 2nd Respondent, appellant was informed on the effect of guaranteeing the said loan with her personal belongings hence the 2nd respondent was right to attach the appellant's property and the trial court correctly interpolated on the same.

As regard to the 2nd, 3rd and 5th grounds of appeal, Ms Fatuma resisted appellant's submission on allegation that, respondents did not make out their case. She argued that, according to DW1, the appellant company is solely owned by Edward Epimack Laswai, and the properties were transferred from the former name to the appellant. She added that, the appellant company does not exist among the list of the companies in Tanzania. In view of Ms Fatuma, appellant failed to prove her case as her only strong evidence exh.PE1 was admitted in court but discredited by the trial Magistrate. On last ground of appeal, respondents' counsel submitted that, Edward Epimack Lasway, the sole director of the appellant, took loan from 2nd respondent and his properties were used as collaterals before he established the appellant

company. According to her, since the creation of the appellant was designed to escape liability of paying her debt, the trial court was justified to lift up the cooperate veil to help bringing up a fair and just determination of the case when held the appellant's case had no merit as the attachment of the motor vehicle in dispute was correctly done. She concluded that, respondents proved their case on the required standard, as they were corroborated by the tendered evidence including the loan agreement (exh. D1), letter of hypothecation and personal guarantee (exh.D2). She therefore prayed the court to dismiss the appeal.

In a short rejoinder, appellant had nothing useful to add apart from maintaining that the respondents failed to prove his case instead, it is the appellant who proved its case to the required standard.

I have taken time to exhaustively examine and consider the contending submissions by the parties in light of the raised grounds of appeal with the weight it deserve. In addressing them this Court is intending to address each ground of appeal as submitted by the parties if need be. To start with the first ground of appeal, the crux of the matter is *whether respondents legally attached appellant's motor vehicle*. My scrutiny of the evidence exhibit DE1, loan agreement and the hypothecation letter, has evidenced that, the loan

agreement was signed between 2nd respondent and one Edward Epimack Lasway T/A J.E auto spares, thus appellant was never a party to the said contract. Further to that, the appellant was never surety nor guarantor to the said contract. Additionally, the registration card of the disputed motor vehicle exhibit PE1 shows that, the same belongs to the appellant and not Edward Epimark Lasway. There is no tendered evidence by the respondents to prove that, the title of the said motor vehicle was once in time owned by the loan debtor, and then later on transferred to the appellant in disguising its ownership to frustrate the appellant's efforts of realising her debt from Edward Epimark Lasway (t/a) **J.E Auto spares**. Furthermore, the letter of hypothecation does not indicate anywhere that, the said motor vehicle was among the properties to be seized as can be gathered in clause 10 of the said letter which does not specify the securities to be realised. Despite of observing these deficiencies, the trial court proceeded to lift up the veil of corporate and concluded the appellant's company was formed with ill purpose of evading lawful liability of its director, hence the attachment was properly made. At page 10 of the impugned Judgment, the trial Magistrate had this to say;

> ***In the instant case the plaintiff is different from the Epimack Lasway. Enforcing the agreement straight against the plaintiff was improper as the company was neither a guarantor nor surety to the contract. If this case would merely be based on this aspect of the law, then this case would have been decided on matters of technicalities.*** *Such decision nevertheless would not have gone through to the roots of the case at hand. Conversely, it is this Court's finding that,* ***what the defendant ought to have done is to ask the court to lift the cooperate veil of Mshanawandu Investment Company Limited and make the directors severely accountable where necessary****." (Emphasis supplied)*

From the quoted paragraph, it is noted though the conclusion was different basing on the doctrine of lifting up corporate veil, the issue which will be dealt with in the last ground, the trial Court agreed that it was not proper for the respondent to attach appellant's motor vehicle as the two had no contractual relationship. It is from that finding of the trial court on the fact of lack of contractual relationship between the appellant and 2nd respondent, I find the first ground of appeal has merit as under the circumstances, the motor vehicle in dispute would not have been attached.

Coming to the 2nd 3rd and 5th grounds of appeal, the main issue which requires Court's attention on those grounds is *whether respondent proved the attached motor vehicle was part of the securities guaranteeing the loan secured by* Edward Epimark Lasway (t/a) **J.E Auto spares**. As rightly explained by the appellant in his submission, in civil cases under sections 110 of the Evidence Act, [Cap. 06 R.E 2019], he who alleges has to prove his allegations. Section 110 (1) and (2) of Evidence Act, (Supra) provide that:

> *110(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exists.*
> *110 (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies to that person*.

The principle under the above section is articulated in the case of **Berelia Karangirangi Vs. Asteria Nyalwambwa,** Civil Appeal No 237 of 2017 (CAT-unreported) where the Court of appeal had this to say:

> *We think it is pertinent to state the principle governing proof of cases in civil suits. The general rule is that, he who alleges must prove….it is similar that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on the balance of probabilities.*

The burden of proof never shifts to the adverse party until the party on whom the onus of proof lies discharges his, and the same is not diluted on

amount of weakness of the opposite party. See the case of **Pauline Samson Ndawaya Vs. Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017 (CAT-unreported).

In the present matter, the respondents alleged that, appellant was created to avoid liability of paying the loan and that, the properties of one Edward Epimack Lasway were changed to appellants name to escape liabilities, the facts that he never proved as there was no documentary exhibit tendered by them to so prove. Guided by the principle in **Berelia Karangirangi** (supra), this court is satisfied that Respondents failed to discharge their duty, hence no proof that the motor vehicle in dispute was subject of attachment as security for the loan secured by Edward Epimark Lasway (t/a) **J.E Auto spares** since the appellant was not privy to the contract exh.D1 as already found when determining the first ground. Thus, the 2nd,3rd and 5th grounds of appeal also have merit.

Next for determination is the fourth ground of appeal which I think need not detain much this Court. I hold as under the principle established in the case of **Salomon v Salomon and Co. Ltd,** (1987) AC 22, the company is a separate legal entity, capable of suing and being sued, then it has capacity to own properties and enter into binding contracts. It follows therefore that

Company's liabilities are separate from its members or directors. The directors and shareholders cannot be liable for the debts or liabilities of the Company unless the corporate veil is lifted. Further to that and as properly addressed by the appellant, judicial lifting up of cooperate veil is invoked *Where a cooperate personality is used to evade taxes/legal obligations, where a cooperate veil is used as a mere cover/bubble/a sham/ a dummy, where a company acquires an enemy character, for instance when there is a war, where court orders are disobeyed by a company, the public interest requires that the veil should be lifted to find the official who has disobeyed the orders.* See the case of cases of **Jones Vs. Lipman** (1962) IW. LR 8322 and **Deimla Co. ltd Vs. Continental tyre and rubber co**. (1916) 2 AC 307.

In the present appeal, I am satisfied and therefore of the profound view that, it was improper for the Court to lift up the veil of the appellant and hold it was responsible for the loan of its director one Edward Epimark Lasway (t/a) **J.E Auto spares**. My finding is grounded on two relevant facts. One, the motor vehicle registration card bears appellant's name. Secondly, there is neither binding agreement between the appellant and respondents nor any guarantor's commitment by the appellant, subjecting his properties to

realisation by the respondents in particular the 2nd respondent who alleges to have lawfully attached it. Thirdly, the allegations by the respondents that the appellant was created to evade loan payment liability and that, the car was transferred from Edward Epimack Lasway to appellant name were relevant fact if at all proved, in justifying application of the principle of lifting of corporate veil particularly *where a corporate personality is used to evade taxes/**legal obligations*** hence lawful attachment of the motor vehicle in dispute. Nevertheless, the same were never proved at all hence, a finding of this court that, the said doctrine was misconceived and improperly applied by the trial court. The four ground of appeal also has merit and is hereby upheld.

All said and done, this court is satisfied that the appeal has merit therefore the same is allowed. In the result, the Judgment and decree of the District Court Kinondoni in Civil Case No. 24 of 2013 is set aside. The respondents are hereby ordered to return the motor vehicle with Registration No T 836 AFR make Nissan Pickup to the Appellant or pay her the equivalent money basing on the market value at the time of its attachment.

Costs of the appeal be borne by Respondents.

It is so ordered.

DATED at DAR ES SALAAM this 18th day of February, 2022.

E. E. KAKOLAKI
JUDGE
18/02/2022

Judgment has been delivered today this 18th February in the presence of Mr. Edward Mshanawandu, Director for the Appellant and Ms. Asha Livanga, Court clerk and in the absence of the Respondents.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
18/02/2022