IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 250 OF 2023

(Originating from the Civil Cause No. 04 of 2022)

AVINASH RAMESHKUMAR GALAN .....1ST APPLICANT/DECREE HOLDER

KISSHORI MUKESH MAGANLAL .....2ND APPLICANT/DECREE HOLDER

VERSUS

ANAMIKA AGNIHOTRI .....1ST RESPONDENT/ JUDG. DEBTOR

RAHUL GANESHAN MUDALIAR ..... 2ND RESPONDENT/JUDG. DEBTOR

ATVANTIC GROUP (T) LIMITED.....3RD RESPONDENT/ JUDG. DEBTOR

RULING

30th November, 2023 & 16th February, 2024

BWEGOGE J.

The above-named applicants (decree holders in Misc. Cause No. 04 of 2022) instituted an application herein praying, among other things, that this court be pleased to lift the veil of incorporation of the 3rd respondent (judgment debtor); and enter an order for the arrest and detention of the 1st and 2nd respondents herein who are the directors of the 3rd respondent, as civil prisoners, among others. The application herein purports to have been brought under the provisions of Order XXI, rule 9,

10 (2) (j) (iii), 28, 35 (1) (2), 36 and sections 44(1) (c), 68, and 95 of the Civil Procedure Code [Cap. 33 R.E. 2019] and supported by the affidavit of Ms. Magreth Joseph Maggebo, counsel for the applicant.

It is depicted by the affidavit deposed by the applicant's counsel mentioned above in that the applicants herein were the shareholders and directors of the 3rd respondent herein, a limited company, along with the 1st and 2nd respondents herein. Strifes ensued among the parties herein whereas, allegedly, the 1st and 2nd respondents removed the applicants from the management of the company for ulterior intentions. Allegedly, the respondents withdrew an estimated amount of TZS 1, 381, 085, 730/. And, in quest to recover the above-mentioned amount of money, the applicant commenced civil proceedings against the respondents herein in Civil Cause No. 04 of 2022. While the above-mentioned suit was still pending in this court, the parties herein mutually struck an amicable settlement of the case whereas the respondent herein covenanted, among others, to refund the applicants the sum of TZS 700,000,000/= within a specified period in six instalments.

Further, it is deponed that the respondents partly discharged their covenant whereas the same managed to pay TZS. 476,000,000/= only. And, the deponent charged that respondents herein have not only

defaulted to discharge their covenanted promises to pay the decretal sum but also, by virtue of their positions as directors of the 3rd respondent, are acting dishonestly and, or fraudulently by hiding behind the corporate veil of the 3rd respondent in order to defeat their legal obligation. And, it was asserted by the deponent that unless the 1st and 2nd respondents are committed as civil prisoners, the applicant /decree holders will be left without any other means to realize the fruit of decree of this court.

The applicants were represented by Ms. Magreth Joseph Maggebo and Mr. Jerome Msemwa, learned advocate, whereas the respondents were represented by Mr. Chance Luoga, learned advocate. The application herein was argued by written submissions whereas the 1st respondent herein purports to have argued the written submission in reply.

In her written submission in chief, Ms. Maggebo charged that the respondents herein merely paid TZS. 476, 000,000/= out of the decretal sum of TZS 700,000,000/= whereas the amount due being TZS 224, 000,000/. That the applicants were constrained to commence execution proceedings whereas the respondents had bound themselves to pay the remaining balance with two instalments. However, once again the respondents failed to honour their promise whereas they later came up

with an excuse that they have no property to be attached for sale as they are foreigners.

Further, the counsel subscribed to the principle of separate legal entity expounded in the case of **Solomon vs. Solomon** but contended that the court is enjoined with power to lift the corporate veil and find the shareholders/directors thereof liable for the company's debt if it finds that the company is being used for fraudulent or improper purposes. That the law enjoins this court with power to lift the corporate veil and find the directors of the company liable to shoulder the company's debts in exceptional circumstances such as when the directors use the company to conceal assets. The counsel referred the case of **Yusuph Manji vs. Edward Masanja & Abdallah Juma** (Civil Appeal No. 78 of 2002) [2008] TZCA 83 to bring her point home.

In the same vein, in establishing that there are special circumstances to move this court to grant the prayers made herein, the counsel contended that the respondents neglected to discharge their covenanted agreement to pay the decretal sum, now alleging the mutual agreement was executed under duress; hence, tainted by illegality whereas they have illegally removed the applicants from their positions in the company.

And, the counsel opined that it is the law of this land that order prayed for herein may issue where it is ascertained that the judgment debtors have the means to pay decretal sum but refuse or neglect so to do. The case of **ABS Tanzania t/a Hyatt Regency DSM vs. Wicliff Shilaho & Martin,** Commercial Case No. 82 of 2017 HC (unreported) was cited to validate the argument. On the above account, the counsel prayed this court to grant the application herein with costs.

The 1st respondent who purported to have argued the submission in reply, given a lengthy account of the differences arose between the parties herein and defence she relies upon to defeat the application herein. In the interest of brevity, it suffices to restate that allegedly, the 1st applicant had instigated a move to take control of the company (3rd respondent) by preempting the respondents from their management positions in the company. The disputes had escalated to irreconcilable conflicts involving unsubstantiated criminal charges and a litany of court litigations, the execution proceedings herein inclusive. Likewise, the 1st respondent denied the allegation of removing the applicants from their management positions of the company.

Otherwise, the 1st applicant vehemently contested the application herein maintaining that the purported mutual consent decree which is the

mainstay of the application herein lacks legal force. The following reasons were advanced to support the argument: **First**, the proceedings in Civil Cause No. 04 of 2022 was never determined to its finality since the claim of TZS 1, 381, 085, 730 was never proved beyond reasonable doubt by court of competent jurisdiction. **Secondly,** the institution of the suit (Civil Cause No. 04 of 2022) was tainted with illegality for wanting board resolution authorizing commencement of the same in court. **Thirdly**, the suit mentioned above was instituted in court before exhausting the arbitration remedy as articulated in the memorandum of articles of association. **Fourthly**, the respondents herein didn't mutually agree to an amicable settlement of the case. That the respondent didn't willingly covenant to refund the decree holders TZS 700,000,000/= as the purported agreement was executed by the respondents under influence from the applicants. Thus, on account of the above, the 1st respondent enlightened this court that they intend to seek extension of time to file a review of the decree entered by this court in the impugned proceedings commenced by the applicants herein.

Apart from the above, the 1st respondent contended that the application herein is bound to fail. That there is no proof furnished by the applicant that the respondents acted dishonestly or in bad faith as required by law.

The counsel referred the case of **Grand Alliance Limited vs. Mr. Wilfred Lucas Tarimo, & Others** (Civil Application 187 of 2019) [2020] TZCA 191 to fortify her point.

In the same vein, the 1st respondent argued that the conditions imposed under the provisions of Order XXI, rule 39 (2) of the CPC were not satisfied to warrant grant of the order sought herein. That the relevant provision requires that the applicant must establish that the judgment debtor transferred, concealed or removed his property after the date of institution of the suit in which the decree was passed; or commission of other acts of bad faith in relation to his property intended to obstruct or delay the decree holder in the execution of the decree; refusal or neglect on part of the judgment debtor to pay the decretal amount, or some part thereof when he has some means of paying, among others.

In tandem to the above, the 1st respondent directed the mind of this court to the decision in the case of **Exim Bank (T) Ltd vs. National Furnishers Limited & Kawe Apartment Limited** (Execution 80 of 2022) [2023] TZHCLandD98 whereas the court expounded:

> *"Before ordering the detention of the Judgment Debtor as a civil prison, the applicant was required to enforce the award vide other modes of execution. Resorting to the arrest and detention mode is not the party's choice but a matter of legal practice. Before*

invoking that mode, there must be clear attempts done by the Decree Holder in enforcing the said award by other means legally provided but in vain."

Likewise, the mind of this court was drawn to the decision of this court (Makaramba J.) in the case of **Sac Profit Emerge Limited vs. Contract International Limited,** Commercial Case No. 30 of 2012 (unreported) whereas the court opined:

".....in order for the for the court to pierce or lift its veil and hold its directors personally for its debts, the applicant has the burden of establishing the basis for disregarding the fictional corporate veil by adducing such facts as would bring the case within the judicially accepted circumstances."

The 1st respondent concluded that the applicants herein have failed to meet the scales of justice revisited above to warrant grant of the application herein. Hence, the 1st respondent prayed this court to dismiss the application with costs.

In rejoinder, the applicant's counsel contended that the defence put forth by the respondents to defeat the application herein is patently afterthought. Likewise, the counsel contended that the respondents having entered amicable mutual settlement with the applicants and eventually paid a substantial part of the agreed decretal amount, cannot now be heard lamenting that the agreement is tainted by illegality and

seek to undo what they bound themselves to discharge. The case of **Farida Omar & Others vs. Farouk Islam Abeid (as an Administrator of the Estate of the Nuru Saad)** (151 of 2020) [2021] TZHCLandD 6920 was cited to bolster her point.

And, in respect of the argument fronted by the respondents in that the memorandum of articles of association of the company (3rd respondent) provided for arbitration in case of dispute arising amongst the shareholders, which the applicant didn't exhaust, the counsel contended that the respondents having filed defence to the plaint instituted by the applicants in court they waived their right to refer the matter to an arbitrator as it signified their clear intention to subject themselves to the jurisdiction of this court. The Case of **Union Congress of Tanzania (TUCTA) vs. Engineering Systems Consultants Ltd** (Civil Appeal 51 of 2016) (*Civil Appeal 51 of 2016*) [2020] TZCA 251 was referred to buttress the point.

Lastly, in countering the charge that the application herein is prematurely brought before this court for reasons that the applicants have not exhausted the available remedy, the counsel submitted that there is no law imposing condition that the applicant should consider other available modes of execution before resorting to the mode preferred herein. The

counsel referred the case of **Mohamed H. Nassoro vs. Commercial Bank of Africa (T) Limited,** Civil Application No. 161 of 2014, CA (unreported) cited in the **ABS Tanzania Limited t/a Hyatt Regency Dar es Salaam case (supra)** to reinforce the argument. This is all about the submissions made by parties in this case.

The question to be resolved herein is whether this application is tenable in law.

At the outset, I find constrained to address the contentions made by the respondents herein seeking to defeat the execution proceedings herein in that the purported mutual consent decree which is the mainstay of the application herein lacks legal force for reasons namely: **One**, the proceedings in Civil Cause No. 04 of 2022 was never determined to its finality since the claim of TZS 1, 381, 085, 730 was never proved beyond reasonable doubt; **two,** the institution of the suit (Civil Cause No. 04 of 2022) was tainted with illegality for wanting board resolution authorizing commencement of the same in court; **three**, the suit mentioned above was instituted in court before exhausting the arbitration remedy articulated in the memorandum of articles of association; and **four,** the respondents herein didn't mutually agree to amicable settlement of the case.

As rightly contended by the applicants' counsel, the fact that the respondents herein had filed a defence to contest the claim in Civil Cause No 04 of 2022 and duly appeared in court to defend themselves against the claim made by the applicants herein, the same waived their right to refer the matter to an arbitrator purported to have been prescribed in the memorandum of association of the 3rd respondent herein as it signified the respondent's willingness to subject themselves to the jurisdiction of this court. See the cases: **Leo Developers Ltd. vs. B.H. Ladwa** (*Civil Case 205 of 2022*) [2023] TZHC 20488 and **Union Congress of Tanzania (TUCTA) vs. Engineering Systems Consultants Ltd** (supra) among others.

In the same vein, I purchase wholesale the argument made by Ms. Magebbo in that the respondents herein having entered amicable mutual settlement with the applicants and eventually paid a substantial part of the agreed decretal amount, cannot now be heard complaining that the agreement is tainted with illegality and seek to undo what they bound themselves to discharge. I find the argument made by the respondent in that the claim of TZS 1, 381, 085, 730 was never proved beyond reasonable doubt strange in the strict legal sense. I fail to comprehend how the applicants would have been obliged to prove the claim while the

respondents had amicably settled the claim for payment of a lesser sum. Even if the applicants were obliged to prove the claim, their burden of proof was not to transcend to proof beyond reasonable doubt but on preponderous of evidence. See section 3(2) (b) of the Evidence Act [Cap. 6 R.E. 2022] and the decisions in the cases of **Charles Richard Kombe t/a Building vs. Evarani Mtungi & Others** (Civil Appeal 38 of 2012) [2017] TZCA 153; **Anthony M. Masanja vs. Penina (Mama Mgesi) & Another**, Civil Appeal No. 118 of 2014, CA (unreported) and **Hamed said vs. Mohamed Mbilu** [1984] TLR 113. And, I need not mention that the purported objection in that the institution of the suit (Civil Cause No. 04 of 2022) was tainted with illegality for want of board resolution authorizing commencement of the same in court is misplaced herein.

That said, I now revert to scrutinize the tenability of the application herein before this court. The applicants herein moved this court to lift the veil of incorporation of the respondents' company and cause the same to be arrested and detained as civil prisoners for deliberate nonpayment of the decretal sum. It is the law of this land ostensibly manifesting under the provision of section 15(2) of the Company Act [Cap. 212] that upon inception, the company becomes a separate legal entity from its members whereas the same acquires legal personality with the capacity to sue and

be sued in its name, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up. It is from this principle that the director of the company cannot be held liable for the liability of the company or actions executed on behalf of the company. However, as rightly submitted by the applicants' counsel, there are circumstances in which the protective corporate veil shielding the directors or shareholders of the company from being held liable for the indebtedness of the company is removed. The principle is well restated in the decision of the Apex Court in the case of **Yusuph Manji vs. Edward Masanja** (supra) thus:

> *"In our view, and as correctly held by the learned judge, in certain special and exceptional circumstances, the court may go beyond the purview of this principle by what was described in Solomon (supra) lifting the veil. Were there such circumstances in this case, we pose to ask. With respect, we do not agree that there were no such circumstances..... In the circumstances, it is our view that the respondents would be left with an empty decree as it were, against the company, Metro Investment Limited. Furthermore, it is apparent that the company's managing director was at that time the appellant, who are as said before was alleged to be involved in concealing the assets of the company. For this reason, we think it would not serve the interest of justice in this case to shield the appellant behind the veil of incorporation."*

However, before the court may pierce or lift the 3rd respondent's veil and hold its directors personally responsible for her debts, the applicants have the burden of persuading this court to discount the fictional corporate veil by adducing such facts as would bring the case *"within the judicially accepted circumstances"*[**SAC Profit Emerge Limited vs. Contract International Limited (supra)**]. The provisions of Order XXI, rule 39 (2) of the CPC imposes obligation to the applicants to establish that;

1. the judgment debtor transferred, concealed or removed his property after the date of institution of the suit in which the decree was passed; or
2. commission of other acts of bad faith in relation to his property with the object or effecting of obstructions or delaying the decree holder in the execution of the decree, among others.

The above requirements were amplified in the in the case of **Grand Alliance Limited vs. Mr. Wilfred Lucas Tarimo, & Others** (supra) whereas the Apex court expounded: -

> *"Therefore, the law requires that there must be evidence on bad faith beyond mere indifference to pay, our close reading of the applicant's counter affidavit, we find that the applicant miserably failed to establish that there*

was deliberate disposition of the property by the judgment debtor...."

In the same vein, the Court being persuaded by the foreign decision in the case of **Jolly George Veghes & Another vs. The Bank of Tanzania of Cochin** AIR 1980 SC 470, replicated the following excerpt:

> *"The simple default to discharge is not enough. There must be some element of bad faith beyond mere indifference to pay, some deliberate or recusant disposition in the past or, alternative. Current means to pay the decree, some or a substantial part of it. The provision emphasizes the need to establish not mere omission to pay but an attitude of refusal on demand verging on dishonest disowning of the obligation under the decree. Here consideration of the debtor's other pressing needs and strained circumstances will play prominently."*

Arguably, the previous disposition of this court was that the applicant who crave for order of arrest and detention of the judgment debtor was supposed to exhaust other available modes of execution of decree enlisted under section 42 of the CPC. See the case; **Exim Bank (T) Ltd vs. National Furnishers Limited and Kawe Apartment Limited (supra),** and **Mallac Tanzania Limited vs. Junaco (T) Limited,** Commercial Case No. 159 of 2014 (unreported), among others. As rightly submitted by the counsel for the applicant, this supposed condition has been whittled down. Specifically, in the case of **Mohamed**

H. Nassoro vs. Commercial Bank of Africa (T) Limited (supra) the Apex Court had this to say:

> *"According to section 42 of the Civil procedure Code, Cap. 33 R.E. 2002, one of the modes of executing a decree is by way of arrest and detention in prison of a judgment debtor. There are no conditions attached such that before the process is put in motion the judge should first consider attaching and selling the properties of the judgment debtor...."* See also the same view in the case of **ABS Tanzania t/a Hyatt Regency DSM vs. Wicliff Shilaho & Martin (supra).**

Now, the question arising herein is whether the applicants herein have met the conditions imposed under Order XXI, rule 39 (2) of the CPC to warrant grant of the order sought. To answer this question, I have the following observations: **First**, the particulars deponed in the counter affidavit, apart from allegations made in respect of the respondents reluctance to pay the decretal sum notwithstanding efforts taken to procure court orders to that effect, are to the effect that the respondents, by virtue of their positions as directors of the 3rd respondent, are acting dishonestly and, or fraudulently in effecting the settlement deed by hiding behind the corporate veil of the 3rd respondent. No further particulars were given. Thus, there is no way that I can cogently arrive to the conclusion that the judgment debtors transferred, concealed or removed his property after the date of institution of the suit in which the decree

was passed; or commission of other acts of bad faith in relation to his property with the object of obstructing or delay the decree holder in the execution of the decree, among others.

Secondly, the applicants herein commenced the execution proceedings in this court in Execution Case No. 41 of 2022 for garnishee order of which the same had withdrawn for reasons not related to any act done by the respondents in defeating the execution of the decree. In fact, it was the respondents' counsel who objected the prayer for withdrawal on ground that there was no reason to infer that the mode of execution preferred was not practicable. The applicant's counsel had responded that the objection was prematurely fronted. Thus, I expected the applicants to enlighten this court why the application for garnishee order was aborted. Nothing was deponed or submitted in this respect

Therefore, in view of the foregoing, I am constrained to agree with the respondents in that there are no convincing grounds advanced to warrant this court grant the prayer for issue of the order for arrest and detention of judgment debtors in this case. The mere allegation of omission to pay cannot be ground for issue of the order for arrest and detention of the judgment debtors.

In fine, I find the application herein bereft of substance. I hereby dismiss the same. Based on the circumstances of this case, I make no order as for costs.

So ordered.

DATED at **DAR ES SALAAM** this 16th February, 2024.

O. F. BWEGOGE

JUDGE