

IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
MISC CIVIL APPLICATION No. 131 of 2020
(Originating from Civil Case No. 49 of 2011)

UMOJA WA WAKULIMA WADOGO

BONDE LA KISERE(UWABOKI).....DECREE HOLDER/APPLICANT

VERSUS

NOBLE MOTORS LTD.....JUDGEMENT DEBTOR/RESPONDENT

RULING

1st October & 30th November 2020

ACK. Rwizile, J

By chamber application supported by an affidavit of ALLY SALUM KAPECHA, this application was filed. It is filed under Order XXI Rule 10(2)(j) (iii) and Rule 35(1) of the Civil Procedure Code [Cap 33 R.E 2019]. The applicant is praying for;

1. That, this honorable court be pleased to order an arrest and imprisonment of one JAYANTKUMAR CHANDUBHAI PATEL as a civil prisoner.

2. Other relief(s) this court deems fit to grant.

At the hearing Decree holder/applicant was represented by Mr. Joachim learned advocate while the Judgement debtor/respondent was represented by Mr. Mgongolwa senior counsel and Ms. Constanca learned advocates.

In support of the application learned advocate submitted that, judgement debtor tries to frustrate the execution, since he mortgaged the property (Plot No. 9) which is the subject of attachment. He added that, two executions by attaching the said property failed due to encumbrances. According to him this application is the only way to execute his decree.

It was his submission further that, no any matter pending in any court which stays this application from being granted as per O. XXXIX R. 5 of CPC. Since, he added, no order for stay of execution is in his knowledge. To support the same, he cited the case of **Princess Co. Ltd vs NIC Bank Tanzania Ltd**, Commercial Case No. 94 of 2015. Mr. Joachim asserted that, the applicant prays for the corporate veil to be lifted to shareholder, since they are resisting the execution of a decree. He said the same is proved at para 12 of the counter affidavit. The cases of **Mussa Shaibu Msangi vs Sumry High Class Ltd**, Misc Commercial Cause No. 20 of 2012 and **Yusuph Manji vs Edward Masanja and another**, Civil Appeal No. 78 of 2002 was cited to support his argument. It was his argument that this is the 9th year since the decree was granted and the same had not been executed because two previous executions failed. He therefore prayed for this application to be granted.

Resisting the application, Mr. Alex learned advocate argued that, the decree was supposed to be executed against the company (Noble Motors Ltd) which is the judgment debtor. He added, that in law companies are different from shareholders. It was therefore wrong, according to him, to apply for the arrest of Mr. Patel. The applicant did not establish, it was submitted, the relationship between Mr. Patel and Noble Motors Ltd (judgement debtor). He then said, it will be safe to hold that Mr. Patel has no relationship with the judgement debtor.

It was his submission that, since the company was incorporated, the same acquired legal personality, as far as rights and liabilities of the company are concerned. To support his assertion, he cited the famous old case of **Solomon vs Solomon** [1897] AC 22. Elaborating on this point, the learned counsel was of the view that, Mr. Patel is not a party to this case. Further it was submitted that, company law requires a private company to have a minimum of 3 directors and maximum of 50. So, he said, applicant did not establish the capacity of Mr. Patel as a director of the company as against other directors of the said company.

Mr. Mgongolwa argued that, this application cannot be granted to indigent person. He said, since the applicant is offered legal aid it proves that he is indigent. He added that how can an indigent person apply to imprison a person as a civil prisoner and pay for him. An indigent, he added, cannot afford paying legal fees. He referred Section 21-25 of the Legal Aid Act, [Cap 21 R.E 2019]. He submitted that, this application is against a judgement debtor and not the directors.

He therefore prayed for this application to be dismissed for lack of merit.

When rejoining, Mr. Joachim argued that as for lifting of the corporate veil he maintained his submission in chief that, when the directors of the company conceal properties of the company the only option is to lift the veil as per the Solomon's case (supra). He submitted further that; legal Aid applies to this application; however, the law is silent as to how the same should be done. He added that, the applicant is allowed to choose a person with a deeper pocket. The learned counsel asked this court to apply the principle of deeper pocket to execution this decree.

He stated as well that, he did not say Mr. Patel is a director, but he said, he cited cases to prove how the same is done, that if a person is resisting execution this application becomes appropriate to rescue the situation. He therefore said this application is competent and the only way for execution of a decree.

Having heard the submissions of the learned counsels for the parties I have to determine whether this application can be granted. Before going to the merits of the application. I have to perhaps note that it is not in dispute that the applicant has a decree from Civil Case No. 49 of 2011. Before the Deputy Registrar of this (Tiganga DR. as he then was). An application for execution was granted. In the process the court broker was appointed to execute the decree. The same was in vein since the decree holder failed to attach the property of the judgement debtor for the reason that, the said property was mortgaged.

Desperate of the same, the decree holder filed this application against JAYANTKUMAR CHANDUBHAI PATEL who is believed to be the director of the company and the one broking the execution.

It is apparent that, the Judgement debtor is Noble Motors Ltd, a company and not JAYANTKUMAR CHANDUBHAI PATEL. It is elementary that an incorporated company is a legal person with rights and liabilities. The same can sue and be sued and it is separate from its members, as per the case of **Solomon vs Solomon (supra)**. I agree with Mr Mgongolwa learned counsel for the Judgement debtor that, the applicant did not establish who is Mr. Patel. and his relationship with the respondent herein.

The applicant argued that Mr. Patel has to be arrested and imprisoned as a civil prisoner since he is a shareholder/director of the respondent who has been resisting the execution. The applicant not only required to prove that Mr. Patel is the director but also how is resisting the execution of the decree. The Law of Evidence [Cap 6 R.E 2019] provides that whoever wants the court to be give judgement in his favour has to prove every fact in court. Execution of decree by arrest and detention is perhaps the last form of execution to be applied by courts. There must be efforts clearly showing that all other means have failed for instance that no properties available or there has been an effort by the judgement debtor to have some element of bad faith beyond mere indifference to pay. There must be some deliberate move to evade payment not mere omission. It has not been prove that the property found mortgaged was the only property of the judgement debtor ,or that the same was mortgaged by the respondent in evading this execution.

The applicant had a burden to prove why should Mr. Patel be arrested and imprisoned as a civil prisoner. The applicant submitted about lifting the corporate veil, I think the learned counsel misconceived himself on this rule, since the same is done by the court when it is proved and the court is satisfied that, members of the company use the company as a shield for their illegal activities. The rationale behind lifting of the corporation veil is to make sure the decree holder is not left with an empty judgment due to the unscrupulous behavior of the company through its directors running day to day activities of the company. The directors must be shown to have acted dishonestly and commit frauds or are avoiding legal obligations. These therefore is among the exceptions and have been dealt with in the cases of Multichoice **Kenya Ltd v Mainkam Ltd & Ano**, Civil Case No. 492 of 2012; 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 or members or regards the subsidiary and its holding company as one entity..."

In **Yusuf Manji** (supra), 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..."

It is my considered view, the application has no merit, because the relationship between Mr. Patel and the respondent has not been clearly established. As well, how he has been sidestepping execution of the decree. This application is hereby dismissed. Since it is a legal aid case, I make no order as to costs.

 Recoverable Signature

X 

Signed by: A.K.RWIZILE

